Take Your Time and Do It Right
Delgamuukw, Self-Government Rights and the Pragmatics of Advocacy

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Delgamuukw and Inherent Self-Government Rights

The failure of the Charlottetown proposals[1] in 1992 brought to an end a decade of sustained political effort to make specific provision in our constitution for aboriginal rights of self-government,[2] and likely postponed indefinitely any prospect of protecting such rights through explicit constitutional amendment.[3] It did not, however, diminish aboriginal peoples' own conviction that they have, and always have had, inherent self-government rights.[4] In the years that followed, attention turned with new intensity to the task of determining whether, as a matter of law, Canada's constitution might *already* protect inherent self-government rights: to whether, that is, such rights might qualify as "existing aboriginal rights" recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.[5]

The notion that the constitution does indeed already protect the exercise, as Canadian law, of at least some inherent aboriginal rights of self-government has, of course, both proponents and opponents. Its

Notes will be found on pages 245–263.

proponents include the Royal Commission on Aboriginal Peoples ("RCAP"),[6] a substantial majority of the legal scholars, aboriginal and non-aboriginal, who have written about the issue,[7] and, most recently, the government of Canada, for which the inherent right's existence as a feature of mainstream law is now official policy.[8] The journals and RCAP's reports and studies are replete with legal and moral arguments that promote and facilitate judicial accreditation of such rights. Opposition to the notion (again, both aboriginal and non-aboriginal) has, for its part, appeared most often in the popular media, in considered critiques from outside the legal academy[9] and in the decisions of Canadian and commonwealth courts, which, so far, have rarely, if ever, upheld aboriginal peoples' claims to have free-standing, enforceable self-government rights.[10]

Several things about these patterns are interesting and surprising. It is, for one thing, unusual to see so much agreement among interested legal academics about an issue that is, by any standard, so controversial. It is rare, as well, to see both the federal government and a royal commission two of whose members were current or former judges accepting or asserting as law a position that courts, when asked in actual cases, have continued to resist. It is striking that the judicial and the academic opinion about the inherent right have diverged so conspicuously, and that these streams of opinion have seemed, on this issue, to give one another so little weight. And it is remarkable how little communication and interaction there seems to have been between those who support aboriginal peoples' inherent self-government rights and those who are apprehensive about them.

Small wonder, then, that everyone concerned with self-government issues anticipated so eagerly the Supreme Court's decision in *Delgamuukw*.[11] *Delgamuukw* was not, of course, the first case in which the court had occasion to shape the law on self-government; at least three earlier decisions had given preliminary, if indirect and uncoordinated, indications about the issue.[12] It was, however, the first Supreme Court case in which a claim to a constitutional right of self-government, anchored in traditional practice and forms of social organization and based on a thorough factual record, was at the heart of the business before the court. The two strong dissents supporting self-government in the B.C. Court of Appeal had only increased the sense of anticipation.[13] Few believed the Supreme Court could decide the *Delgamuukw* appeal without indicating clearly whether our constitution leaves room for aboriginal rights of self-government.

We all know what happened. The Supreme Court, having decided already to send the case back to trial, declined not only to determine the claim of self-government on its merits but even to offer substantive

guidance for future litigation.[14] In one important sense, it decided nothing. And because the court *decided* nothing about the law on self-government, it is tempting and natural to suppose that it *told* us nothing of interest about that law.

Part of my purpose here is to dispute that supposition. My personal view is that the Supreme Court's decision *not* to decide the fate of self-government rights in *Delgamuukw* was the best possible contribution to the self-government conversation that it could have made in the circumstances, and that it told us some very important things about the orientation of self-government law. By deferring the issue as it did, and in the manner it did, the court, in my judgment, defined and shifted the ground on which the destiny of the inherent right, considered as a feature of existing Canadian law, is to be determined.

To begin with, I think the court made it clear that it is not eager to close the discussion, or the door, on inherent self-government rights. It would have been as easy as pie for the court to expunge such rights altogether from the universe of Canadian legal and constitutional discourse. All it had to do was express its agreement with the courts below that any self-government rights that the Gitksan and Wet'suwet'en may ever have had were extinguished, at the latest, when British Columbia joined Confederation in 1871.[15] After more than 10 years of litigation, that conclusion, well supported by existing authority,[16] would have been the line of least resistance. Instead, the Supreme Court elected, for the time being, to keep the ball in play. To me, that decision is highly significant. It means that the court is open to persuasion, in a proper case, that such rights survive and that they qualify for constitutional protection as existing aboriginal rights; it is prepared, in principle, to accept that inherent right claims may well have a credible basis in mainstream law. From now on, it will be more difficult for the inherent right's opponents to rely exclusively on blanket extinguishment arguments to dispatch such claims.

For someone of my persuasion, this is extremely good news. I am, for the record, someone whose Canada leaves room for constitutionally protected rights of aboriginal self-government. I believe, as well, that a responsible mainstream court could conclude today, on the basis of credible and attractive legal arguments, that many, if not all, traditional aboriginal collectivities have self-government rights entitled to protection under Canada's current constitution, even without the benefit of a constitutional amendment.[17] I find it encouraging, therefore, that the Supreme Court of Canada has indicated publicly its willingness to continue entertaining such arguments. So too, no doubt, do the lawyers, legal scholars, researchers and bureaucrats who have devoted themselves to the development of such arguments.

It would, however, be a mistake, in my view, for proponents of inherent self-government rights to assume that credible legal or even moral arguments will be enough, on their own, to convince the courts to take responsibility for including such rights within the constitution's protection. Attractive as I find the best such arguments on their legal merits, they are not, by any measure, so compelling, legally, that no responsible court could decide the question otherwise. Most judicial authority, as I have said, still opposes acknowledgement of existing self-government rights.[18] And there is, as some have already noted, a certain rhetorical awkwardness about arguing now, after five unsuccessful efforts in fifteen years to amend the constitution to provide for self-government rights, that such rights, in fact, have been there all along.[19]

In these circumstances, a worthy legal argument equipping courts to embrace inherent self-government rights is little more than an instrument available for their use; it almost certainly will not itself give them reason enough to embrace such rights, unless, on other grounds, they already find mainstream accreditation of the inherent right attractive and appropriate.

The Supreme Court's decision in *Delgamuukw* to defer the self-government issue is a signal that it is open, for now, to persuasion on this ground, as well. It is, however, also a sign—to me, an unmistakable one—that the court is going to *need* such persuasion: that it is deeply troubled by the magnitude, and the consequences, of the decision it is being asked to make about self-government rights. Consider, in this context, the following passage from the majority judgment:

> The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to that issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach.[20]

This observation came, remember, at the culmination of legal proceedings whose trial record included 318 days of evidence, 56 days of legal argument, roughly 35,000 pages of transcript evidence and over 50,000 pages of exhibit evidence.[21] It is difficult to imagine a clearer indication

of the court's own sense that something pretty crucial has been missing from the discussion, or of its sense of unreadiness for the huge—and, once undertaken, inescapable—task of integrating such rights somehow into the mainstream constitutional order.

I must say I find the court's reticence here to be well founded. The fact is that we don't yet have a shared and trustworthy understanding, even in outline, of how self-government rights would work within our mainstream legal arrangements, or of the impact they would have on them. This being so, it is hardly surprising that there has been some public apprehension. In these circumstances, and in the absence of clearer intuitions about these basic legal practicalities, it is hardly grounds for complaint that the courts are wary of being the ones to accord such rights full institutional credibility. It is reasonable for them first to insist on substantive assistance with these issues.

For those of us whose project it is to open the constitution to inherent self-government rights, therefore, the most compelling current task is, almost certainly, to address constructively and candidly that legitimate sense of judicial unreadiness. The mainstream courts' receptiveness to the merits of the legal and moral arguments that could anchor such rights seems sure to depend, in significant part, on our success or failure in this endeavour.

Any realistic effort to carry out this task, however, must begin from an appreciation of the nature and the weight of the public apprehension that, for better or worse, already exists about inherent self-government rights. In practical terms, that apprehension represents and expresses the case that advocates of self-government rights have to meet. What makes this enterprise still more challenging is that it must proceed throughout in a way that continues to honour the integrity of the collective aboriginal experience that inherent self-government rights exist, if they make any difference at all, to preserve and to promote.

I want in the rest of this article to explore what such an enterprise entails. The first step is to grasp more concretely why inherent rights of self-government matter, and why they give pause.

Why the Inherent Right Matters

For aboriginal communities, their members and supporters, acknowledgement that they have enforceable rights to govern themselves—to resume responsibility for their own collective destinies[22]—may well now be the minimum price that the mainstream legal system must pay to earn from them a modicum of respect.[23] For centuries now, such communities have done everything humanly possible to maintain the integrity and vitality of their own traditions, languages, ceremonies and other authoritative internal arrangements, and to continue fulfilling

their ancestral obligations to one another and to the rest of creation,[24] despite catastrophic changes to their physical and economic circumstances, inexorable pressures from non-aboriginal settlement and often concerted efforts by settler peoples to undermine and marginalize their most sensitive and deeply grounded relationships.[25] To qualify as a meaningful departure from this history of interference and exploitation, mainstream acknowledgement of such rights must begin from a respect for both the fact and the legitimacy of aboriginal difference:[26] must dedicate sufficient "constitutional space for aboriginal peoples to be aboriginal," to borrow Donna Greschner's wonderful phrase.[27] This entails respecting and protecting communities' power, and indeed duty, to defend such individuals, lands and resources as may remain to them against mainstream "laws and policies which are demonstrably threatening to their culture," [28] and generally to address their own needs and imperatives in ways that they themselves consider effective and appropriate, even when those aims and ways differ substantially from what we in the mainstream culture might have done or preferred.[29] This, in turn, necessarily involves "the significant letting go of Canadian government power over the lives of Aboriginal citizens" [30] and accepting that self-governing aboriginal communities are bound sometimes to make mistakes (even by their own reckoning) that it cannot be our business, uninvited, to correct.

Respect for the integrity of aboriginal difference is, therefore, the first imperative that defines inherent right advocacy. It requires that we oppose all unnecessary restrictions on fundamental aboriginal values and on the governance arrangements integral to the enduring aboriginal legal traditions. Below this threshold, any mainstream arrangement to preserve or acknowledge self-government rights ceases to offer them meaningful legal protection, and forfeits its authenticity.

Public Apprehensions about Self-Government

What the Apprehensions Are

For those in the non-indigenous mainstream, on the other hand, the prospect of giving enforceable legal effect to inherent self-government rights may be troubling for any of several complex and layered reasons. For some, especially those in positions of real power or legal authority, judicial confirmation now of inherent self-government rights would most probably register, apart from everything else, as a strong rebuke: a rebuke to decades, perhaps centuries, of careful, considered practice informed by accepted conceptions of permissible conduct and of the public interest. For if aboriginal peoples today possess inherent self-government rights, it follows necessarily that they have always had

such rights, at common law, in Anglo-Canadian jurisprudence,[31] and that a very great deal that has happened to aboriginal peoples and communities since the Crown asserted sovereignty in North America has been, by domestic Canadian standards, in breach of those rights. To be judged and found wanting, according to enforceable standards one has no choice but to accept, for having failed to respect legal rights that one's predecessors considered too insubstantial to bother extinguishing is, undoubtedly, not a welcome experience.

Other widely shared apprehensions, which reinforce but do not depend upon such discomfiture,[32] concern the practical consequences of constitutional protection for self-government rights. Most such apprehensions fit within at least one of three general kinds.

Concerns about Capacity and Readiness

Transitions from colonial to indigenous forms of governance require patience and particular care, some commentators suggest, especially given the impatience and the unrealistically high expectations that such transitions often prompt in community members themselves. Even at the best of times, there are real risks of failure and frustration: outcomes that can undermine communities' social vitality and the legitimacy, in the eyes of their members, of their self-government efforts.[33] These risks seem to some to be acute in many of Canada's aboriginal communities, for two reasons: because of the truly staggering scale of deprivation, despair, abuse and dysfunction that one too often finds in such communities, problems of a kind and scale beyond the contemplation of the collective coping mechanisms traditional to aboriginal societies;[34] and because of the fear (of some) that many such communities have too few members with sufficient leadership skills, technical expertise or practical experience to meet the collective's needs in these highly complex and difficult circumstances.[35] Indications that leaders in some aboriginal communities have not used effectively even the very limited powers now available to them makes many outsiders, especially, still more cautious about the prospect of their having more power.[36]

Concerns about Vulnerable Individuals

According to several commentators, individuals living in aboriginal communities[37] are especially vulnerable to the power of their aboriginal governments: not so much because those governments happen to be aboriginal, but because such communities share a number of features each of which they say contributes independently to the risk of excessive centralization of official power. In the first place, transitions from colonial to local rule are, on this view, themselves occasions and incentives for

those in power at the time to consolidate their authority by trading on their prestige.[38] Second, when communities have no tradition of selecting their leaders regularly and democratically,[39] and their governments obtain the vast majority of their wealth through fiscal transfers from sources outside the community,[40] those governments have much less incentive to account to community members for their conduct or to make a point of addressing community members' needs or concerns, because they are effectively insulated from the consequences of residents' disapproval. Finally, individual rights and freedoms, generally speaking, are, in the view of these commentators, more vulnerable in small, homogeneous communities, because such arrangements encourage highly personal styles of community management and discourage both the diversity of overlapping minorities that tend to foster respect for such rights, and the articulation of separate roles and powers within government that tend to be required to protect them.[41]

Published reports of favoritism,[42] personal harassment,[43] misuses of funds,[44] unaccountable leadership[45] and other alleged abuses of political authority by chiefs or other band officials in some communities[46] only lend credibility to these apprehensions.[47] The Royal Commission on Aboriginal Peoples, for example, received more than 200 submissions expressing concerns about ethics and conflicts of interest in aboriginal governments.[48] Such reports and experiences, it seems safe to suppose, contributed significantly to the reluctance of aboriginal voters to support the explicit constitutional entrenchment of their inherent self-government rights pursuant to the Charlottetown Accord.

No issue better illustrates this kind of apprehension, among both aboriginal and non-aboriginal people, than the concern about the fate of aboriginal women if today's band governments were constitutionally empowered. Although it seems widely accepted that neither sexual nor domestic abuse, nor any of the other usual incidents of patriarchy or sexism, was characteristic of North American native societies before they began to have regular contact with the Europeans,[49] it seems equally clear, at least to several commentators, that substantial numbers of aboriginal men today, including many in positions of community leadership, have engaged in such practices and acted upon such attitudes to the disadvantage of the women in their communities.[50] During negotiations that led to the Charlottetown Accord, for example, it became clear that many aboriginal women simply did not believe that male aboriginal leaders, armed with constitutionally protected rights of self-government, could be trusted, left to their own devices, to respond fairly and respectfully to the women's interests or to give sufficient priority to their need for protection from abuse.[51] The Native Women's Association of Canada ("NWAC") has insisted that mainstream human rights

standards, and mainstream courts, remain available for the protection of aboriginal women in communities acting pursuant to rights of self-government.[52] It considered these protections so crucial to the safety and well-being of Canada's aboriginal women, and so different from the positions being taken by the four aboriginal organizations participating officially in the Charlottetown negotiations, that it brought legal proceedings seeking independent representation at those negotiations.[53]

Concerns about Mainstream Society and Its Institutions

To some commentators, apprehensions such as these matter not just for their own sake as signs of an altruistic regard for disadvantaged peoples, but also because the aboriginal peoples of Canada are entitled, as Canadian citizens, to the ongoing assurance that the law will protect their rights as individuals no less fully than it protects the rights of the other citizens of Canada.[54] To them, it would be awkward, at best, for Canada's federal and provincial governments, each of which is subject to enforceable obligations to respect and protect the constitutional rights of individuals, to have to provide ongoing financial support to aboriginal governments that recognized, and were subject to, no such constraints.[55]

These and other commentators, including the Royal Commission on the Economic Union,[56] have expressed public worry about what could happen to the institutions and arrangements on which Canadians and their governments now routinely depend if Canada were suddenly to accredit as many as 600 truly self-governing aboriginal communities,[57] especially given the breadth and strength of the powers and the immunities that such communities are sometimes said to expect.[58] For some critics, the mere existence of so many additional governments, each with its own internal structures, conventions and priorities, poses serious risks of fragmentation in a country whose national institutions already sometimes seem dangerously weak,[59] and whose need for economic integration can only continue to grow.[60] Others have emphasized the risks that such potentially different approaches and outlooks pose to the country's defining and fundamental values.[61] Still others doubt the possibility of creating workable intergovernmental arrangements that could possibly accommodate so many distinct aboriginal polities that are at once so small and so poorly resourced, and insist that self-government cannot work unless there is significant consolidation of aboriginal communities into larger governance units that have the power to bind all their members.[62]

Why the Apprehensions Matter

For these—and occasionally as well for other, less credible[63]—reasons, many non-native individuals and institutions, and some aboriginal

people themselves, continue in some measure to fear, and even sometimes to oppose, the notion of aboriginal governments having constitutional protection.[64] According to published reports, the Chretien government, having recognized the potential for public opposition to this notion, gave serious thought in 1995 to backing away from its earlier promise to treat the inherent right of self-government as an existing aboriginal right.[65]

Considered as reasons to withhold the constitution's protection from inherent self-government rights,[66] these various apprehensions are open to criticism on several grounds. Members of surviving aboriginal communities, whose cultures and institutional arrangements have already endured much worse, and whose ancestors were not given the option of weighing the merits and implications of settler peoples' self-government claims, will be forgiven for finding many of them ironic, if not precious, and for observing how little faith those who express them seem to have in the staying power of the mainstream system.[67] No less ironic, or unfair, from their standpoint is the inference that aboriginal peoples are now disqualified from governing themselves precisely because of all the disruption and deprivation suffered in their communities at the hands of the settler peoples.[68] Others are bound to find convenient, if not colourable, some non-native critics' sudden expressions of tender concern for the welfare of native women and other vulnerable individuals engaged with aboriginal communities.[69] Still others, who have documented our courts' propensity, when adjudicating the claims of aboriginal peoples, to rely on unacknowledged and unacceptable assumptions about the superiority of mainstream traditions and arrangements, are apt to conclude, with some justification, that most of the apprehensions being expressed by self-government's critics are further examples of this pattern, and of such assumptions.[70] Still others, asked to imagine settler society's powerlessness to deal with rogue inherent right communities, may insist on recalling the "very large club" that mainstream governments will continue to hold over aboriginal peoples dependent on their fiscal transfers.[71]

Personally, I share these reservations about the critique of self-government rights. For these and similar reasons, I do not believe it justifies rejection or abandonment of the project of earning such rights mainstream judicial acceptance. I do believe firmly, however, that one cannot pursue that project responsibly without acknowledging the currency and appeal of that critique and without engaging it on its merits. This is so, in my view, for at least three reasons.

First, whatever else one may say about the critique or about its proponents, it does identify some real problems that need attention, like it or not, if effective self-government arrangements are to endure

and flourish, even under the special protection of the constitution.[72] Practically speaking, it is going to take patience, care, and special effort to situate such arrangements, and such rights, in relation to the rest of the mainstream order. Underestimating the difficulty of these challenges will not make them easier to address.

Second, whatever the law may say, the success or failure, in Canada, of self-government initiatives is going to depend, indefinitely, on how much support and co-operation they receive from non-aboriginal Canadians.[73] Mainstream Canadians, generally speaking, are likely to be less supportive of the self-government rights and arrangements of aboriginal peoples if they are apprehensive about the impact such arrangements may have on the individuals living in self-governing communities,[74] on themselves, or on Canadian society generally. Hostility or resistance from the non-native public may very well make prohibitively time-consuming, expensive and difficult the already daunting tasks of restoring, realizing and protecting indigenous forms of government for contemporary use.[75]

Finally—and most important, for here we come full-circle—the very existence of this critique, and of the concerns it expresses, cannot help but affect the perceptions and the intuitions of the courts that, sooner or later, will have to determine the destiny, within our law, of inherent self-government rights. It seems to me all but inconceivable that Canadian courts will treat such rights as constitutional rights unless they are confident that the existing law equips them to address, in practical ways and case by case, the kinds of concerns that self-government's critics have identified. It is extremely important to appreciate why this is so.

As I suggested earlier, the task of integrating into our mainstream legal order inherent rights of self-government, and with them the substantially different cultural orientations that such rights presuppose and exist to protect, would be a major conceptual challenge for our courts in the best of circumstances, precisely because it would propel them against the current, and into uncharted waters.[76] I am among those who believe that it is just and appropriate—and, from a legal standpoint, more than defensible—for courts, despite these disincentives, to make this task their own. Even so, one is bound to acknowledge the effort, and the professional courage, it will require of them to do so, especially in the absence of explicit constitutional text that compels, or even encourages, them to embrace it. If self-government's proponents are going to expect Canadian judges to undertake so pervasive a project, they are going to have to establish, at a minimum, not only that it deserves their support and interest, but that they can recognize and engage in it, as judges, in full conscience.[77] In the current

vernacular, that means demonstrating that rights of self-government can be "reconciled with the sovereignty of the Crown." [78]

It is this additional task that the public apprehensions about self-government complicate. Many of them, taken full strength, suggest that self-government rights and powers, unchecked, could pose significant risks to values, institutions and arrangements considered fundamental to, and constitutive of, the Canadian legal and constitutional order. The character of those apprehensions, the basis they often appear to have in observable fact and the hold they seem, from the coverage, to have on the public imagination make them especially difficult for mainstream courts to ignore.[79] Our courts would almost certainly consider it irresponsible to recognize and enforce such rights within Canadian law without first satisfying themselves that our legal system, as a whole, can absorb and manage such risks.

The paramount concern is that section 35(1) of the *Constitution Act, 1982*, if it protected inherent rights of self-government at all, would protect them so well as to deprive the mainstream orders and branches of Canadian government of the effective capacity to prevent or contain such potential risks to the mainstream constitutional order.

It was Ian Binnie who first articulated this concern (several years before his own appointment to the bench), almost immediately after the Supreme Court of Canada first prescribed, in *Sparrow*,[80] the kind and degree of protection that section 35(1) was to give aboriginal rights:

> … the *Sparrow* doctrine makes it improbable that the judicial concept of Aboriginal rights will extend to such key objectives as Aboriginal self government. The application of the Supreme Court's interpretations of section 35 in *Sparrow* would afford too much immunity from other levels of government to Aboriginal communities, many of which lie cheek by jowl with non-Aboriginal communities in densely populated areas of southern Canada. "Constitutionalizing" a right to Aboriginal self-government would, in light of *Sparrow*, leave the courts with inadequate mechanisms to regulate the overlapping interests of communities occupying contiguous territory.[81]

If one accepts Binnie's premises, it seems almost impossible to quarrel with his conclusion. In the absence of clear constitutional text instructing them to do so, Canadian judges are most unlikely to take responsibility for extending *Sparrow*'s protection to rights of self-government if they are frightened, as judges, by the consequences of doing so, no matter how many scholars and royal commissions tell them—correctly, in my view—that it would be the right thing for them to do. And accred-

iting constitutional rights that pose uncontainable threats to basic mainstream institutions or fundamental mainstream values would certainly frighten them.[82]

How to Address Them

If all this is so, then the second imperative shaping inherent right advocacy must surely be to show that, and how, it is possible to integrate such rights harmoniously into the larger legal framework for which the mainstream courts are responsible. Success at this undertaking depends on perseverance in two related tasks: reducing to a minimum the *avoidable* tensions and apprehensions that now attend the notion of aboriginal self-government, and demonstrating, in response to the challenge Binnie posed years ago, that Canada's legal system already provides sufficient means to ensure that self-government rights could not be exercised, even with the constitution's protection, in ways or for purposes that would do violence to the principles and arrangements on which our legal order depends. I want to consider each of these tasks briefly, and in turn.

Minimizing Avoidable Apprehensions

Meeting the first of these expectations means increasing mainstream public confidence in the enterprise of aboriginal self-government by improving the public understanding of what self-government is, why it matters, and how it is intended that it will operate.[83] Efforts to do so might usefully call greater attention to the complementarity that already exists, especially at the higher levels of generality, between aboriginal peoples' various defining traditions and values and those of the mainstream culture,[84] and to the extent to which aboriginal practice and precedent has already informed and improved the development of mainstream political institutions in North America.[85] Success at this part of the larger task, however, will be difficult, it seems to me, unless there is real progress, soon, at two others.

The first is for aboriginal peoples themselves, especially, to begin addressing the reasons for the apparent loss, within significant numbers of aboriginal communities, of trust and confidence in those communities' leadership and governance arrangements.[86] It is, to begin with, essential that mainstream Canadians not be further tempted to regard aboriginal peoples' legal traditions and governance forms as anthropological ephemera: as talismans suitable only for the purposes of nostalgia. We (in the mainstream) need instead to be encouraged in every way to perceive and experience, even if only from a distance, the living presence of those laws and arrangements and their power, even today, to organize, shape and constrain the activity that takes place

within aboriginal collectivities.[87] It is, from this standpoint, vital that the members of communities seeking mainstream affirmation of their self-government rights communicate, by practice and example, their own ongoing conviction in the resonance and the authority of those forms and traditions.[88] It is equally important to seek to dispel mainstream perceptions (and predisposition to believe) that power in aboriginal communities is being used arbitrarily and irresponsibly. As long as those who live in such communities are widely perceived to be suffering under unresponsive and sometimes untrustworthy leadership, and as long as aboriginal women are perceived to face aggravated risks of abuse and marginalization in their own communities, Canada's non-native governments are going to be reluctant to relax the supervisory powers they now exert over such communities, and mainstream courts, in all likelihood, reluctant to be the ones to set aside protected constitutional space for community laws and governance. This is so regardless of where responsibility ultimately lies for the deterioration of conditions in those communities.[89]

The other is for those who would find self-government rights in the constitution to start being much more specific about the parameters—legal, political and operational—of the rights being claimed. The greater the public uncertainty about what such rights might possibly mean, about the size and composition of the self-governing aboriginal collectivities and about the interface between such units and existing mainstream governments, the less eager the courts are going to be—as *Delgamuukw* itself illustrates—to assume the responsibility for locating such rights within the existing constitution.[90] Fortunately, the self-government options proposed for consideration in the RCAP Final Report,[91] the recent developments in the Canadian law of aboriginal rights,[92] and the federal government's recent willingness to proceed on the basis that the inherent right is already in the constitution[93] should make it much easier than it would have been even five years ago to begin thinking more concretely about self-government issues.

Protecting Fundamental Mainstream Values

Progress toward minimizing the avoidable apprehensions about the potential impact of aboriginal rights of self-government will encourage, and free, the courts to be more receptive to the legal arguments already available in support of such rights. Even complete success at that task, however, seems most unlikely to eliminate altogether the kinds of risks to which Binnie alluded: the risk that the exercise of such rights would threaten values and institutions fundamental to the Canadian constitutional order and that section 35(1) of the *Constitution Act, 1982* would protect such rights so well that mainstream courts and governments

could not contain such threats as they arose.[94] This second challenge, therefore, deserves and requires independent attention.

A full and proper answer to it is, of course, far beyond the scope of this article. It is my view, however, that our courts already have all the power they need to constrain, as necessary, the exercise of existing aboriginal rights of self-government in the interest of preserving truly fundamental Canadian values and institutions.[95] This is so, in brief, because our courts, in giving effect to *any* rights enforceable within mainstream law, have both the power and the duty to define the scope of such rights in a way that ensures their ongoing harmony with the arrangements and values essential to the legal system on which the protection of those rights depends.[96] Properly understood, the task of protecting our legal system's integrity—what the court in *Mabo* called its "skeleton of principle"[97]—from the harms that could result from misuse of self-government rights requires not a one-time-only assessment, winner take all, of the havoc such rights could conceivably cause but continuing alertness to the need for systemic harmony in the ongoing work of articulating, case by case, what such rights mean (and protect) and what they do not.

The more serious danger may be that the courts will find it too easy, and too tempting, to constrict the protected scope of self-government rights in the course of applying them. The purpose of the harmonization exercise is not to find ways of domesticating, to the point of impotence or uniformity, what are, after all, supposed to be *inherent* rights. The virtue of including self-government rights within the constitution's protection—at least for those of us who believe that doing so *has* some virtue—just is, again, to secure constitutional space within which aboriginal difference, its sources and foundations, are authoritative, not just inconveniences in need of ongoing management, and within which respect for aboriginal difference is enforceable. Constraining more than necessary authoritative expressions or examples of aboriginal difference would, I suggested earlier, compromise the integrity of any undertaking from the courts, and from our constitutional order, to protect self-government rights.[98] Where fundamental values or institutions are not at risk, therefore, it will be extremely important that courts approach such rights with restraint and respect, in order to maximize the protected space available to inherent right communities for self-direction and -realization.

Conclusion

The Supreme Court's recent predilection, in cases about aboriginal rights, has been to deliver broad, sometimes exploratory judgments that organize the law for application in lower courts, sometimes even

when the case before them has not required that they do so. *Delgamuukw* itself is one recent example, as regards aboriginal title. Despite that predilection, however, the court took pains in *Delgamuukw*, as it had once before in *Pamajewon*, to avoid deciding the fate of claims to inherent self-government rights. By doing so, in the way it did so, it signalled both its openness to further legal argument designed to establish a place for such rights within mainstream legal doctrine and its profound discomfort with the uncertainty and the apprehension that could result from acceptance of such rights as constitutional rights.

Taken together, these indications amount to an invitation to proponents of self-government rights to demonstrate that, and how, such rights might integrate into the larger legal and constitutional framework for which the courts themselves are responsible. It will be a prudent invitation for us to accept, before the next self-government case appears before the courts. For if it is forced to decide the issue without being shown a cogent way of addressing the risks that self-government rights, at their worst, could pose to aboriginal peoples and to the rest of society, the Supreme Court will, I am almost certain, close the door on such rights. It will not expose the rest of the legal order to risks that it does not believe it can contain.

Successful mainstream advocacy for inherent self-government rights, therefore, is going to take more than defensible legal (or even moral) arguments supportive of the existence of such rights. It will also require concerted ongoing efforts to satisfy two other, sometimes contrary, imperatives: on the one hand, demonstration that our courts will continue to be able, even after giving constitutional effect to such rights, to protect the coherence and the integrity of the mainstream order and the arrangements and values that define it, and, on the other, vigilant and ongoing opposition to all unnecessary restrictions on the scope and exercise of such rights. Achieving that aim means finding and maintaining equipoise between these imperatives: a hard and delicate task, to be sure, but one that is, in my view, both essential and achievable.

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Notes

1 See Canada, *Consensus Report on the Constitution: Charlottetown* (Final Text, 28 August 1992) (Ottawa: Minister of Supply and Services, 1992) ("Charlottetown Accord") and *Draft Legal Text* (9 October 1992).

2 In 1983, a special committee of the House of Commons had recommended federal legislative recognition, and constitutional entrenchment, of a form of aboriginal self-government: see Canada, H.C., Special Committee on Indian Self-government, *Indian Self-Government in Canada* (Ottawa: Minister of Supply and Services, 20 October 1983) esp. at 43-46. Sections 37-37.1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 ("*Constitution Act, 1982*"), repealed in 1983 and 1987, respectively, by ss. 54 and 54.1, had made provision for four constitutional conferences to be devoted specifically to aboriginal issues. Self-government dominated agendas at those conferences. For commentary on them, see, e.g., Brian Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research and Public Policy, 1986) ("Schwartz, Second Thoughts"); Douglas Sanders, "The Constitution, the Provinces, and Aboriginal Peoples" in J. Anthony Long & Menno Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 151 at 165-169; Kathy L. Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox" (1991) 34 Can. Pub. Admin. 272.

3 See, e.g., Jeffrey Simpson, "The Grand Talk of Constitutional Reform for Aboriginals Is a Mirage" *[Toronto] Globe & Mail* (15 August 1995) A16.

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

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

6 See 2 RCAP Final Report, note 4 above, at 166-169, 186-213. The Royal Commission had announced its support for the inherent right in at least two earlier reports: *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996) ("RCAP, *Bridging*") esp. at 219-224, and *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa, Minister of Supply and Services, 1993) ("RCAP, *Partners*") at 29-45.

7 See, e.g., Shaun Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985) 43 U. T. Fac. L. Rev. 72; Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T. Fac.L.Rev. 1; Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990); Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L. Rev. 498; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 ("Macklem, 'Borders' "); Patrick Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in Michael D. Levin, ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 ("Macklem, 'Ethnonationalism' "); Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311 ("Macklem, 'Distributing Sovereignty' "); Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 101; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 ("Slattery, 'Question of Trust' "); Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1992) 21 Man. L.J. 343; Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 338; Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 ("Walters, 'Comment on *Delgamuukw*' "); Mark D. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 ("Walters, '*Mohegan Indians*' "); Mark D.Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711; John Borrows, "Constitutional Law from a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; McNeil, "Constitutional Space," note 5 above; Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sover-

eignty" (1998) 5 Tulsa J. Comp. & Int'l. L. 253 ("McNeil, 'Aboriginal Rights' "); Delia Opekokew, "The Inherent Right of Self-Government As an Aboriginal and Treaty Right" in *The Inherent Right of Aboriginal Self-Government*, papers presented to Canadian Bar Association, Continuing Legal Education Program, Annual Meeting, 1994 ("CBA, *The Inherent Right*"), vol. 2; Mei Lin Ng, *Convenient Illusions: A Consideration of Sovereignty and the Aboriginal Right of Self-Government* (LL.M., Osgoode Hall Law School, York University, 1994) [unpublished]; Peter W. Hutchins, Carol Hilling & David Schulze, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C. L. Rev. 251 (" 'Ghost in the Machine' "); Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., abridged (Toronto: Carswell, 1997) at 573, 589.

For commentaries that express doubt—some regretfully, some not—about the sufficiency of the legal basis in the existing constitution for meaningful rights of aboriginal self-government, see Schwartz, *Second Thoughts*, note 2 above, at 385-390; W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Harry S. LaForme, "Indian Sovereignty: What Does It Mean?" (1991) 11 Can. J. Native Studies 253; Sylvain Lussier, "Réflexions sur 'Partenaires au Sein de la Confédération' et le Droit 'Inherent' à l'Autonomie Gouvernementale" in CBA, *The Inherent Right*, vol. 1; Kenneth J. Tyler, "Another Opinion: A Critique of the Paper Presented by the Royal Commission on Aboriginal Peoples Entitled: *Partners in Confederation*" in CBA, The Inherent Right, vol. 1; Bob Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*" (1994) 28 U.B.C. L.Rev. 49; Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011 ("Morse, 'Permafrost Rights' "). See also, in the popular press, William Johnson, "Modern Myths: Elements of Self-government Haven't Been Perpetuated" *The [Montreal] Gazette* (7 July 1992) B3.

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

Between 1990 and 1995, Ontario government policy also recognized that First Nations have inherent rights of self-government "under the Constitution of Canada." See Bob Rae, "The Road to Self-determination," in Frank Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1991) ("*Aboriginal Self-Determination*") 150 at 152, and *Statement of Political Relationship* between Ontario and the First Nations in Ontario, 6 September 1991.

9 See notes 32-65 below and the text accompanying them. According to a 1995 Insight Canada research survey commissioned by the federal Department of Indian Affairs, 53% of Canadians believed that aboriginal peoples weren't ready to assume self-government powers, and only 46% believed

that aboriginal peoples should be given more autonomy. By comparison, about 70% of Canadians polled in 1993 had supported ratifying the Charlottetown proposals that would have entrenched the inherent self-government rights. See Jack Aubry, "Canadians Wary of Native Autonomy" *Calgary Herald* (1 June 1995) A7.

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

10 For Canadian and commonwealth cases rejecting assertions of free-standing rights or powers of aboriginal governance, see, e.g., *Doe d. Sheldon v. Ramsay* (1852), 9 U.C.Q.B. 105, Burns J.; *R. v. Beboning* (1908), 17 O.L.R. 23 (C.A.); *Sero v. Gault* (1921), 50 O.L.R. 27 (S.C.); *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.); *Isaac v. Davey* (1974), 5 O.R. (2d) 610 (C.A.), aff'd. on other grounds (*sub nom. Davey v. Isaac*), [1977] 2 S.C.R. 897; *Coe v. Commonwealth of Australia* (No. 1) (1979), 24 A.L.R. 118 (H.C.A.); *Re Stacey and Montour and The Queen* (1981), 63 C.C.C. (2d) 61 (Que. C.A.); *A.G. Ontario v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.) at 407, aff'd. on other grounds (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), aff'd. without reference to the point [1991] 2 S.C.R. 570; *Delgamuukw v. The Queen in right of B.C.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) ("*Delgamuukw* (S.C.)"), aff'd. on this point [1993] 5 W.W.R. 97 (B.C.C.A.) ("*Delgamuukw* (C.A.)"), rev'd. on other grounds [1997] 3 S.C.R. 1010 ("*Delgamuukw*"); *Coe v. Commonwealth of Australia (No. 2)* (1993), 118 A.L.R. 193 (H.C.A.); *Walker v. New South Wales* (1994), 182 C.L.R. 45 (H.C.A.); *R. v. Pamajewon*, [1993] 3 C.N.L.R. 209 (Ont. (Prov. D.)), aff'd. on other grounds (1994), 95 C.C.C. (3d) 97 (Ont. C.A.) ("*Pamajewon* (C.A.)"), aff'd. [1996] 2 S.C.R. 821 ("*Pamajewon*"); *R. v. Williams*, [1995] 2 C.N.L.R. 229 (B.C.C.A.). For Canadian and commonwealth judgments that suggest at least some basis for argument in support of existing aboriginal rights of self-government, see *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (S.C.) at 83-84, 138, 1 C.N.L.C. 70 at 78-79, 132, aff'd. *sub. nom. Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Q.B.); *Arani v. Public Trustee of New Zealand*, [1920] A.C. 198 (P.C.); *Delgamuukw* (C.A.), Lambert J.A. (dissenting in part), Hutcheon J.A. (dissenting in part); *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (C.A.); *R. v. Bear Claw Casino Ltd.*, [1994] 4 C.N.L.R. 81 (Sask. Prov. Ct.), and *Mushkegowuk Council v. The Queen in right of Ontario* (1999), 178 D.L.R. (4th) 283 (Ont.

S.C.J.), set aside without reference to the point (2000), 184 D.L.R. (4th) 532 (Ont. C.A.). *Pamajewon* (C.A.), *ibid*., gives both sides some comfort.

For Supreme Court of Canada consideration of aboriginal self-government, see note 12 below.

11 Ibid.

12 In *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), the court made it clear (at 1103) that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [aboriginal] lands vested in the Crown." In *Matsqui Indian Band v. Canadian Pacific Ltd*., [1995] 1 S.C.R. 3, it allowed its approach to a question of statutory procedure to be shaped in part by a federal policy supportive of aboriginal self-government. And in *Pamajewon*, note 10 above, a case whose facts, for this purpose, were about as unsympathetic as one could easily imagine, the court showed considerable restraint in dismissing the suggestion that self-government rights protected from mainstream regulation a large-scale commercial gaming operation that a band council had organized on its reserve. See also, most recently, *Corbière v. The Queen in right of Canada*, [1999] 2 S.C.R. 203 at 248-249 (¶¶52-53), where the minority judgment, with the concurrence of the majority (*ibid*. at 224 (¶20)), again gently deferred an argument based on self-government rights, this time in response to a claim that statutory residency requirements for *Indian Act* band council elections violate the equality rights guaranteed in s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* ("*Charter*" or "*Charter of Rights*").

13 See *Delgamuukw* (C.A.), note 10 above, at 305 (¶¶783-785), 348-353 (¶¶963-984), 359-364 (¶¶1011-1030), Lambert J.A.; at 394-396 (¶¶1163-1173), Hutcheon J.A.

14 See *Delgamuukw*, note 10 above, at 1114-1115 (¶¶170-171), Lamer C.J.C.; at 1134 (¶205), La Forest J.

15 See *Delgamuukw* (S.C.), note 10 above, at 437-455, 473; *Delgamuukw* (C.A.), note 10 above, at 148-153 (¶¶151-175), Macfarlane J.A.; at 222-226 (¶¶470-485), Wallace J.A.

16 See note 10 above.

17 Tempting though it is, I cannot pause here to substantiate this conclusion in any detail. I am satisfied, though: (1) that social organization with some recognizable form of governance and laws is a precondition to the kinds of aboriginal rights that the Supreme Court of Canada has already recognized (see, e.g., *Delgamuukw*, note 10 above, 1099-1100 (¶¶147-148), quoting *Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development*, [1980] 1 F.C. 518 (T.D.) at 559; *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 (H.C.A.) ("*Mabo*"), at 59-62); McNeil, "Aboriginal Rights," note 7 above, at 285-289; (2) that jurisdiction and governance arrangements were, as a matter of anthropological fact, characteristic generally of North American aboriginal societies identifiable as such (see Catherine Bell & Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press,

1997) (*"Aboriginal and Treaty Rights"*) 38 esp. at 64-71); (3) that colonial law provided for pre-existing indigenous legal arrangements to survive and continue to operate in British colonies, subject only to the power of duly authorized colonial legislatures to extinguish them (see, e.g., Walters, "Comment on *Delgamuukw,"* note 7 above; Walters, "*Mohegan Indians*," note 7 above), and (4) that nothing that any duly authorized Imperial, colonial or Canadian legislature is known to have done exhibited a sufficiently clear and plain intention to extinguish aboriginal communities' pre-existing rights and powers of self-government (see, e.g., 2 RCAP Final Report, note 4 above, at 206-213).

18 See note 10 above and the text accompanying it.

19 Ken Tyler, not one of the inherent right's most ardent supporters, has framed the situation with characteristic flair:

> Were the Aboriginal governments secretly inducted into the Confederation partnership on the 17th of April, 1982? There is no evidence that any of the participants in the patriation of the Canadian constitution thought they were doing any such thing. Neither the Queen, nor the Prime Minister, nor any of the Provincial Premiers, nor any member of the Canadian or United Kingdom Parliaments made any mention of such a momentous event. Representatives of the First Nations themselves, far from greeting their long-awaited acceptance into the Canadian family, rushed to the English Courts in a desperate and unsuccessful attempt to block an initiative which there were convinced placed their Aboriginal and Treaty rights in mortal danger. Since 1982 we have had four First Minister's [sic] Conferences devoted exclusively to Aboriginal Constitutional Reform plus the Charlottetown process, in each of which the major priority for the Aboriginal participants was to have the 'right of self-government' entrenched in the Constitution. Surely it would require some very startling new evidence, and some very convincing arguments, to persuade Canadians that all of these efforts were unnecessary, and all of the earnest concerns of the Aboriginal people were unwarranted, because the framers of the *Constitution Act, 1982* had unwittingly accomplished all that they desired:

Tyler, note 7 above, at 25. See also Brian Schwartz, "The General Sense of Things: *Delgamuukw* and the Courts" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 161 (Schwartz, "General Sense") at 174 ("The 1982 Constitution recognizes the 'existing' rights of aboriginal peoples. Can the courts, in good intellectual conscience, suddenly 'discover' that these rights all along contained rights for self-government that would require a massive set of negotiations, leading to a certain kind of outcome?")

20 *Delgamuukw,* note 10 above, at 1115 (¶171).

21 See *Delgamuukw, ibid*. at 1070 (¶89); *Delgamuukw* (S.C.), note 10 above, at 199.

22 See 2 RCAP Final Report, note 4 above, at 139-141.

23 As a non-aboriginal person, mindful of the differences of view among aboriginal peoples and communities themselves, I say this with some trepida-

tion; please discount and cross-check this observation accordingly. But see first Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 ("Turpel, 'Interpretive Monopolies' ") esp. at 25-26, 33-34, 45; P.A. Monture-OKanee & M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 239 ("Rethinking Justice") at 262-263; Asch & Macklem, note 7 above, esp. at 517, and the other sources cited in this paragraph in the text. Compare Audrey D. Doerr, "Building New Orders of Government: The Future of Aboriginal Self-Government" (1997) 40 Can. Pub. Admin. 274 at 275.

24 For accounts of such efforts in two unrelated aboriginal communities, see Johnston, note 7 above (Iroquois) and John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 (Anishnabek). Compare James (Sakej) Youngblood Henderson, "First Nation Legal Inheritances in Canada: The M'ikmaq Model" (1996) 23 Man. L.J. 1 ("Henderson, 'Legal Inheritances' "); J. Edward Chamberlin, "Culture and Anarchy in Indian Country" in *Aboriginal and Treaty Rights*, note 17 above, 3.

25 There are, of course, too many useful accounts of colonial oppression of aboriginal peoples in Canada to list in a single footnote. For a representative sampling of good brief accounts, however, see James R. Miller, "The Historical Context of the Drive for Self-Government" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) ("*Poundmaker*") 41 esp. at 42; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174 ("Turpel, 'Patriarchy' ") at 181-182; Mary Ellen Turpel-Lafond, "Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance," research study prepared for the Royal Commission on Aboriginal Peoples, 1995 ("Turpel-Lafond, 'Enhancing Integrity' ") at 9-15; James Youngblood Henderson, "All Is Never Said" in *Poundmaker, ibid*. 423 esp. at 428, and the sources cited in these publications. See also Sidney L. Harring, *White Men's Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: Osgoode Society, University of Toronto Press, 1998).

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

Turpel, "Patriarchy" *ibid*. at 185. See also Turpel, "Interpretive Monopolies," note 23 above, at 33.

27 See Greschner, note 7 above, at 342.

28 LaForme, note 7 above, at 263. See also "Rethinking Justice," note 23 above, at 263.

29 See LaForme, *ibid*. at 263-264 ("It is this capacity to deal with threats to cultural survival, in a manner that may be drastically different from that re-

quired by other elements of Canadian society, which is needed to ensure the survival of Aboriginal cultures"); Macklem, "Distributing Sovereignty," note 7 above, at 1354 ("Indian government involves more than the conferral of special rights to engage in particular activities: It also involves rights to determine how, when, where and by whom such activity can occur, and the possibility that such decisions will be made in ways that conflict with nonindigenous political values ..."); RCAP, *Bridging*, note 6 above, at 277.

30 Patricia Monture-OKanee, "Thinking About Aboriginal Justice: Myths and Revolution" in *Poundmaker*, note 25 above, 222 at 230. See also Tyler, note 7 above, at 7-8.

31 This is so, of course, whether or not such rights, as a matter, of history, had ever received "the legal recognition and approval of European colonizers": see *Delgamuukw*, note 10 above, at 1092-1093 (¶¶134-136), quoting (at ¶136) *Côté v. The Queen*, [1996] 3 S.C.R. 139 ("Côté") at 174 (¶52).

32 See, e.g., Richard Gosse, "Charting the Course for Aboriginal Justice Reform Through Aboriginal Self-Government" in *Poundmaker*, note 25 above, 1 at 16.

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

34 See Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in *Poundmaker*, note 25 above, 206 at 209 ("Problems of alcohol and solvent abuse, family violence and sexual abuse, and youth crime—these are indications of a fundamental breakdown in the social order in Aboriginal communities of a magnitude never known before"); Monture-OKanee, note 30 above, at 227 ("We cannot look to the past to find the mechanisms to address concerns such as abuse, because many of the mechanisms did not exist. The mechanisms did not exist because they were not needed").

35 Gibbins & Ponting, note 33 above, at 191; David C. Hawkes & Allen M. Maslove, "Fiscal Arrangements for Aboriginal Self-Government" in David C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 93 at 123; Jeffrey Simpson, "Just What Is a 'Nation' and How Can It Work Like A Province?" *[Toronto] Globe & Mail* (27 February 1997) A18; Barry Cooper & David Bercuson, "An Abdication of Responsibility: Ottawa Must See Through the Job of Transferring Lands to Natives" *The [London] Free Press* (23 January 1999) F6. See also *To the Source*, note 4 above, at vi ("While all the people spoke of the need for change, many also said, almost in the same breath, that they are not ready for it. They are afraid, and their fears need to be addressed").

36 See, e.g., Gerald Flood, "Native Woman, Elder Fear Self-government" *Winnipeg Free Press* (8 October 1992) B5 (quoting a native elder in Manitoba as

saying "aboriginal leaders have failed in their efforts to improve conditions, and now expect to be trusted with more power"); Tom Oleson, "Native Self-rule: Is It a Dead End? Know Sovereignty Before Building It" *Winnipeg Free Press* (14 July 1996) B2 ("[Self-government] might receive more public sympathy . . . if there could be a clearer perception that the bands could run well the business they already have authority over"); Gordon Gibson, "It's a Matter of Principles" *National Post* (30 October 1999) B7 ("Gibson, 'Principles'").

37 Even, perhaps especially, the non-aboriginal people, according to some accounts. See, e.g., Cooper & Bercuson, note 35 above.

38 See Gibbins & Ponting, note 33 above, at 190; Schwartz, *Second Thoughts*, note 2 above, at 396.

39 See William Johnson, "Not All Are Leaping on Native Self-government Bandwagon" *The [Montreal] Gazette* (5 May 1992) B3 ("Johnson, 'Bandwagon' "); William Johnson, "Native Self-government: Let's Pay Attention" *The [Montreal] Gazette* (12 May 1992) B3 ("Johnson, 'Let's Pay Attention' "); "Band Councils Must Be Accountable" [editorial] *The [Brantford] Expositor* (24 March 1999) A6 ("Must Be Accountable").

40 "If a high proportion of total revenues are provided by an external authority, can the accountability link between the aboriginal government and its citizens be as strong and effective as in situations in which the community itself is the major source of government revenues?": Hawkes & Maslove, note 35 above, at 113. See also *ibid*. at 123; 2 RCAP Final Report, note 4 above, at 345-346; Richard Simeon, "Sharing Power: How Can First Nations Government Work?" in *Aboriginal Self-Determination*, note 8 above, 99 at 105; Schwartz, *Second Thoughts*, note 2 above, at 396; William Johnson, "What Would Indian Self-government Look Like? Big, Very Big" *The [Montreal] Gazette* (20 May 1992) B3 ("Johnson, 'Big, Very Big' "); William Johnson, "Why Native Leaders Don't Want Charter of Rights in Their Government" *The [Montreal] Gazette* (10 October 1992) B5 ("Johnson, 'Don't Want Charter' "); Tom Flanagan, "An Unworkable Vision of Self-Government" (March 1997) 18 Policy Options 19 at 20.

41 See generally Schwartz, *Second Thoughts, ibid*. at 394-396; Bryan Schwartz, "Bryan Schwartz Takes a Close Look at Aboriginal Self-government" *[Toronto] Globe & Mail* (4 August 1992) A12 ("Schwartz, 'Close Look' "); Gibbins & Ponting, note 33 above, at 216-219; Roger Gibbins, "Citizenship, Political, and Intergovernmental Problems with Indian Self-Government" in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 369 ("Gibbins, 'Problems' ") at 374-376; Johnson, "Bandwagon," note 39 above; Johnson, "Big, Very Big," *ibid*.; Flanagan, *ibid*. at 20-21; Jodi Cockerill & Roger Gibbins, "Reluctant Citizens? First Nations in the Canadian Federal State" in J. Rick Ponting, ed., *First Nations in Canada: Perspectives on Opportunity, Empowerment, and Self-Determination* (Toronto: McGraw-Hill Ryerson, 1997) 383 at 393-394; Gibson, "Principles," note 36 above.

42 See, e.g., Iris Yudal, "Chiefs Abuse Power, Funds, Group Charges" *Winnipeg Free Press* (21 February 1992) B23; Ruth Teichroeb, "Democracy on the Reserve: Limits Sought on Powers of Chiefs" *Winnipeg Free Press* (6 April 1992)

B13 ("Teichroeb, 'Limits' "); Wendy Dudley, "MP Sees Pitfalls in Self-rule" *Calgary Herald* (12 September 1994) B1; Rudy Platiel, "Native Councils Facing Challenges from Within" *[Toronto] Globe & Mail* (15 May 1996) A8; "Must Be Accountable," note 39 above; Nahlah Ayed, "Self-government a Mess, Native Coalition Testifies" *Toronto Star* (3 March 1999) A6; Andrew Duffy, "First Nation Women Want Ombudsman to Fight Corruption" *Sault Star* (3 March 1999) B9.

43 See, e.g., Heidi Graham, "Natives 'Rebels' Meet in Bid to 'Get Self-government Stalled' " *Winnipeg Free Press* (29 March 1992) B14; Patrick Nagle, "Male Domination Heightens Fear of Self-rule" *Calgary Herald* (1 April 1992) B8; Teichroeb, "Limits," *ibid.*; Ruth Teichroeb, "Democracy on the Reserve: Mother Who Reported Abuse Ostracized" *Winnipeg Free Press* (8 April 1992) B18 ("Teichroeb, "Mother Ostracized' "); Ruth Teichroeb, "Democracy on the Reserve: Family Pays Heavy Price for Reporting Sex Abuse" *Winnipeg Free Press* (8 April 1992) B18 ("Teichroeb, 'Heavy Price' "); Flood, note 36 above; Platiel, *ibid.*; Cockerill & Gibbins, note 41 above, at 393-394; Ayed, *ibid.*

44 See, e.g., "Native Group Fears Dictatorial Ways" *Calgary Herald* (21 February 1992) A9; Yudal, note 42 above; Teichroeb, "Limits," note 42 above; Platiel, note 42 above; "Must Be Accountable," note 39 above; Ayed, *ibid.*; Duffy, note 42 above; Rick Mofina, "Allegations of Native Fraud Soaring" *Vancouver Sun* (10 November 1999) A6.

45 See generally Turpel-Lafond, "Enhancing Integrity," note 25 above, at 1-23.

46 Some communities, of course, have no such problems: see, e.g., Teichroeb, "Model of Democracy," note 9 above. For a somewhat more favorable account of the internal accountability practices and attitudes among leaders of aboriginal communities generally, see Simon McInnes & Perry Billingsley, "Canada's Indians: Norms of Responsible Government Under Federalism" (1992) 35 Can. Pub. Admin. 215.

47 See 2 RCAP Final Report, note 4 above, at 345 ("There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent"); Turpel-Lafond, "Enhancing Integrity," note 25 above, at 19 ("Without the existence of [internal conflict of interest guidelines], the trust and confidence in the integrity of a band council to act in the interest of all members is significantly lessened due to the inability to require individuals to account for their conduct"). See also "Inherent But Unclear" [editorial] *Winnipeg Free Press* (11 April 1992) A6; Johnson, "Big, Very Big," note 40 above; Peter O'Neil, "Self-rule for Natives Arouses Hopes, Doubts" *Vancouver Sun* (7 October 1992) A4 ("O'Neil, 'Hopes, Doubts' "); Johnson, "Don't Want Charter," note 40 above; "Must Be Accountable," note 39 above.

48 Turpel-Lafond, "Enhancing Integrity," *ibid.* at 1. See also *To the Source*, note 4 above, at 21 ("many of our witnesses ... worried that additional power could be abused by some of the leaders").

49 See, e.g., *To the Source*, *ibid.* at 59; Thomas Isaac & Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 Man. L.J. 453 at 454-457; Greschner, note 7 above, at 339-340; Joyce Green, "Constitu-

tionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum 110 at 112; Turpel, "Patriarchy," note 25 above, at 180; Monture-OKanee, "Myths and Revolution," note 30 above, at 227. But see also Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in *Aboriginal and Treaty Rights*, note 17 above, 75 at 83-84.

50 See, e.g., *To the Source, ibid*. at 59-61; Isaac & Maloughney, *ibid*.; Nagle, note 43 above; Teichroeb, "Limits," note 42 above; Teichroeb, "Mother Ostracized," note 43 above; Teichroeb, "Heavy Price," note 43 above; Ruth Teichroeb, "Democracy on the Reserve: Professor Says Indian Women Have Reason to Fear Autonomy" *Winnipeg Free Press* (8 April 1992) B18 ("Teichroeb, 'Professor Says' "); Turpel, "Patriarchy," note 25 above, at 181-182; Green, *ibid*. esp. at 112; John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics" (1994) 43 U.N.B.L.J. 19 ("Borrows, 'Equality' ") esp. at 46; Karina Byrne, "Indian Women Want Protection" *Winnipeg Free Press* (27 March 1994) A3; Patricia Robertson, "Native Women Demand Role" *Winnipeg Free Press* (18 May 1996) A11; LaRocque, *ibid*.

51 In the words of Sharon McIvor, at the time a spokesperson for the Native Women's Association of Canada ("NWAC"), "It's really scary to know that these guys are going to be in complete control, they are going to be able to do whatever they want. ... We are lost; if you non-Indian Canadians don't put pressure on your people to help look after our rights, then we are dead in the water": "Native Women Fear Autonomy Will Hide Sex Abuse" *Calgary Herald* (29 July 1992) A9. See also, e.g., *To the Source, ibid*. at 61 ("Women who have been raped, beaten, sexually harassed, overlooked, excluded, ignored, or otherwise oppressed by Aboriginal men are hardly eager to trust the men to look after their interests"); Susan Delacourt, "Natives Divided Over Charter" *[Toronto] Globe & Mail* (14 March 1992) A4 ("Delacourt, 'Natives Divided' "); Peter O'Neil, "Native Women Push for Human Rights" *Vancouver Sun* (14 March 1992) A3 ("O'Neil, 'Native Women Push' "); Sarah Scott, "The Native Rights Stuff: Many Women Fear Self-government Without Charter Guarantees" *The [Montreal] Gazette* (28 March 1992) B5 ("Scott, 'Native Rights Stuff' "); Nagle, note 43 above; Teichroeb, "Limits," *ibid*.; Teichroeb, "Professor Says," *ibid*.; "Native Fights for Charter" *Calgary Herald* (23 April 1992) A12 ("Native Fights for Charter"); Flood, note 36 above; Green, *ibid*.; Byrne, *ibid*.; Borrows, "Equality," *ibid*. at 41-46; LaRocque, *ibid*. esp. at 93-95. Compare Ayed, note 42 above.

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

NWAC, "Statement on the Canada Package" (Ottawa: NWAC, 1992) at 7, quoted in Borrows, "Equality," *ibid.*, at 41. See also Michele Rouleau, "Pro-

posal for Native Self-government Could Deny Fundamental Human Rights to Women" *The [Montreal] Gazette* (23 October 1992) B3; Green, *ibid*.; LaRocque, *ibid*. esp. at 93-95.

There is, of course, controversy, especially among aboriginal peoples, about the extent to which these views of the current male aboriginal leadership are fair and, assuming that they are fair, about whether recourse to external tribunals and standards is, as NWAC maintains, the most appropriate way of addressing that reality in self-governing aboriginal communities. These issues, unfortunately, lie beyond the scope of the present work. The academic sources cited here and in notes 49-51 above provide a useful range of views about them. For additional contributions and viewpoints, see, e.g., Turpel, "Interpretive Monopolies," note 23 above; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) 10 Can. Woman Studies (Nos. 2 & 3) 149; Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's L.J. 279; Ruth Teichroeb, "Democracy on the Reserve: Solidarity Vital, Province's Native Leaders Say" *Winnipeg Free Press* (10 April 1992) B1; "Native Women Urged to Ignore 'White Feminists'" *Calgary Herald* (31 July 1992) A10; Margaret A. Jackson, "Aboriginal Women and Self-Government" in John H. Hylton, ed., *Aboriginal Self-Government in Canada* (Saskatoon, Purich Publishing, 1994) 180.

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

54 See. e.g., Canada, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Minister of Supply and Services, 1985) ("3 Macdonald Report") at 371; Gibbins & Ponting, note 33 above, at 205, 218-219; Schwartz, "General Sense," note 19 above, at 172; "Inherent But Unclear," note 47 above; Cockerill & Gibbins, note 41 above, at 383-384, 388, 390-391, 398-399.

55 Schwartz, *Second Thoughts*, note 2 above, at 394; Gibbins, "Problems," note 41 above, at 376.

56 3 Macdonald Report, note 54 above, at 368-371.

57 "At this point we cannot assume that self-government can be implemented without inflicting serious damage to democratic principles, to the intergovernmental structures of the Canadian federal state, and to the citizenship rights of Canadian Indians": Gibbins, "Problems," note 41 above, at 376. See also Binnie, note 7 above, esp. at 218, 225; William Johnson, "Mercredi Has No Mandate, But That Doesn't Stop Him" *The [Montreal] Gazette* (26 June 1992) B3; Philip Authier, "Quebec Lawyers Slam Native Self-government: It Poses 'Unprecedented Threat to Province's Powers,' Legal Paper Says" *The [Montreal] Gazette* (22 July 1992) B1; Schwartz, "Close Look," note 41 above; Bob Cox, "Self-rule Scenario Packs Potential for Future Conflict, Author Says" *Vancouver Sun* (29 September 1992) A8; "Reformer Inflaming Issues, Says Minister" *Calgary Herald* (8 February 1994) A9; Cockerill & Gibbins, note 41 above, esp. at 385-387.

58 See, e.g., Johnson, "Big, Very Big," note 40 above; Ted Byfield, "Native Self-government Goes Beyond What Canadians Think" *Financial Post* (21-23 March 1992) S3; Tyler, note 7 above, at 7-10.

59 See, e.g., Johnson, "Bandwagon," note 39 above; Authier, note 57 above; Schwartz, "Close Look," note 41 above; Milo Cernetig, "Reform Attacks Native Self-rule" [*Toronto] Globe & Mail* (5 October 1992) A1 at A1, A4.

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

61 See "Aboriginal Gamble" [editorial] *Winnipeg Free Press* (2 June 1992) A6; Authier, note 57 above; Gordon Gibson, "Where the Aboriginal Report Takes a Wrong Turn" *[Toronto] Globe & Mail* (26 November 1996) A19 ("Gibson, 'Wrong Turn' "); Cockerill & Gibbins, note 41 above, at 383-384, 387-388.

62 See 3 Macdonald Report, note 54 above, at 370-371; Gibbins & Ponting, note 33 above, at 209-213; Cockerill & Gibbins, *ibid*. at 385-387.

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

64 See, e.g., Byfield, note 58 above; Susan Delacourt, "Native Self-government Difficult Sell, Clark Says" *[Toronto] Globe & Mail* (2 June 1992) A1, at A1-A2; Peter O'Neil, "B.C. Tories Voice Fears Over Native Government" *Vancouver Sun* (4 June 1992) A4; Sandro Contenta, "Native Deal Stirs Deep Fears in Quebec" *Toronto Star* (19 July 1992) A10; "Go Slowly on Self-government: Canadians Deserve More Than Vague Concepts" [editorial] *The [Montreal] Gazette* (24 January 1994) B2; Oleson, note 36 above; Gibson, "Wrong Turn," note 61 above; "Must Be Accountable," note 39 above.

From this standpoint, it hasn't helped, either, that aboriginal communities have gone to court in recent years asserting constitutionally protected rights: to abduct community members and subject them, without consent, to tribal rituals involving physical punishment (*Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.)); to hear on reserve, exclusively before a jury composed of community members, sexual assault charges brought against a community elder, despite objections from the complainant (also a community member) that she could not be safe, or be fairly heard, in such circumstances (*R. v. A.F.* (1994), 30 C.R. (4th) 333 (Ont. (G.D.)), aff'd. (1997), 101 O.A.C. 146 (C.A.)); to withhold band membership and related entitlements from women born and raised in the community merely because they had "married out" (*Sawridge Band v. The Queen*, [1996] 1 F.C. 3 (T.D.), rev'd. [1997] 3 F.C. 580 (C.A.)), and to promote and engage in high-stakes gaming completely free of any provincial or federal supervision (*Pamajewon*, note 10 above).

65 Jim Bronskill, "Liberals Wavered on Promise: Native Self-government Memorandum" *Calgary Herald* (6 May 1996) A8. In the end, the federal government confirmed its original intention to proceed on the basis that the constitution already protects the inherent right: *ibid*.; *Federal Policy Guide*, note 8 above.

66 There are, of course, other reasons for identifying such concerns and taking them seriously. Several of those cited above with concerns about self-government made it clear that their intention was not to discourage its eventual constitutional entrenchment or accreditation, but only to identify pitfalls that would have to be addressed in the course of design or implementation. See, e.g., Gibbins & Ponting, note 33 above, at 174, 193, 235; Schwartz, *Second Thoughts*, note 2 above, at 396; Green, note 49 above, at 119; Cockerill & Gibbins, note 41 above, at 384. The final report of the Royal Commission on Aboriginal Peoples itself acknowledges that there are grounds for many of these concerns and suggests concrete proposals for dealing with them in the course of giving effect to inherent self-government rights: see 2 RCAP Final Report, note 4 above, at 326-353. See also notes 72-82 below and the text accompanying them.

67 "[H]ave faith that your own system of laws is flexible enough and will not crumble if you accept that First Nations have a right to administer their own justice": Blaine Favel, "First Nations Perspective of the Split in Jurisdiction" in *Poundmaker*, note 25 above, 136 at 139. See also Monture-OKanee, note 30 above, at 224-225. Compare Asch & Macklem, note 7 above, at 517.

68 See, e.g., Macklem, "Distributing Sovereignty," note 7 above, at 1360; Teichroeb, "Victims Are Trying," note 9 above. Compare J. Anthony Long & Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 18 Am. Ind. Culture & Rsch. J. 91 at 103-111.

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

Greschner, note 7 above, at 339. See also, Borrows, "Equality," note 50 above, at 46-47. Compare Turpel-Lafond, "Enhancing Integrity," note 25 above, at 2, 5.

70 Patrick Macklem has explored these issues most thoroughly and consistently. See, e.g., Asch & Macklem, note 7 above; Macklem, "Borders," note 7 above; Macklem, "Ethnonationalism," note 7 above; Patrick Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125. See also Colin H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck & J.B. Waldram, eds., *Anthropology, Public Policy, and Native Peoples in Canada* (Montreal: McGill-Queen's University Press, 1993) 311 esp. at 327, and Turpel, "Interpretive Monopolies," note 23 above, at 33-35.

71 "The point to stress here is that any continued dependency on fiscal transfers from the broader Canadian community gives the federal and provincial governments a very large club that can be used to force Indian compliance with conventional norms of taxation": Gibbins, "Problems," note 41 above,

at 370. See also Gibbins & Ponting, note 33 above, at 233; Hawkes & Maslove, note 35 above, at 123; O'Neil, "Hopes, Doubts," note 47 above ("One government official pointed out that few if any aboriginal governments will be self-sufficient. Any that abuse individual rights will have trouble getting government co-operation.")

72 See, e.g., 2 RCAP Final Report, note 4 above at 326-353.

73 "In reconstructing our world we cannot just do what we want. We require a measure of our oppressors' co-operation to disentangle ourselves from the web of enslavement they created": Borrows, "Equality," note 50 above, at 23. Compare Bradford W. Morse, "Indigenous Laws and State Legal Systems: Conflict and Compatibility" in Bradford W. Morse & Gordon R. Woodman, eds., *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) ("*Indigenous Law*") 101 at 114 ("The challenge today is to find a mix of solutions which can respond to the different needs and circumstances of indigenous peoples. To do so will require the support of the general community, which means that some minimum standards must be adhered to in order to gain that approval and tolerance").

74 See Turpel-Lafond, "Enhancing Integrity," note 25 above, at 2, 5, quoted below at note 89. See also *ibid*. at 39-40.

75 For tangible evidence that this is so, one need only recall the unprecedented hostility directed toward aboriginal fishers in Atlantic Canada, especially by the non-aboriginal fishers there, in the days and weeks following the Supreme Court's confirmation, in *Marshall v. The Queen*, [1999] 3 S.C.R. 456 ("*Marshall*"), that Mi'kmaq peoples have treaty rights to earn a moderate livelihood from trade in fish and game. See, e.g., Jeffrey Simpson, "The Cost of Expectations" *[Toronto] Globe & Mail* (29 October 1999) A19; Rick Mofina, "Police Were Braced for Violence After Native Fishing Ruling, Report Says" *National Post* (21 February 2000) A10. See also note 79 below and the text accompanying it.

76 See notes 19-22 above and the text accompanying them.

77 Compare *Mabo*, note 17 above, per Brennan J. (for the plurality) at 29-30:

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

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

78 *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507 ("*Van der Peet*") at 539 (¶31); *Delgamuukw*, note 10 above, at 1096 (¶141).

79 The large number of intervenors and the significant economic dimensions of the 1996 [Supreme Court] decisions [on Aboriginal rights] are

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

Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 65-66. Compare Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R. v. Sparrow, R. v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 J. L. & Social Pol'y. 67 at 68 ("In the area of Aboriginal rights, the Court cannot provide much support in the face of significant political opposition to the expansion of such rights"). As Rudin observes, the courts cannot afford to ignore the political climate in which they proceed, because they must depend on other branches of government, and on public co-operation, to give effect to their decisions: *ibid*. at 79-89.

Events in the fall of 1999 provided a clear real life example. In November of that year, the Supreme Court of Canada, having endured two months of unremitting public concern and controversy over its treaty rights decision in *Marshall*, note 75 above, took the unprecedented step of issuing written reasons clarifying, and emphasizing the narrow dimensions of, that decision in response to an intervener's [!] motion requesting rehearing of the matter. See *Marshall v. The Queen*, [1999] 3 S.C.R. 533. It is worth recalling, too, that both the United States government and the Georgia state courts refused to enforce the U.S. Supreme Court's landmark decision on aboriginal sovereignty in *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832): see, e.g., Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) at 111-114 and the sources cited there.

80 *Sparrow*, note 12 above.

81 Binnie, note 7 above, at 218. See also *ibid*. at 225, 234.

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

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

suggest that if people knew more about the meaning of Aboriginal self-government they would hold more positive attitudes towards it" (*ibid.*).

84 See, e.g., James W. Zion, "Searching for Indian Common Law" in *Indigenous Law*, note 73 above, 121 at 123-125. But see Turpel, "Interpretive Monopolies," note 23 above, at 30 for a pointed warning about the risks, built into such efforts, of overlooking important differences among distinct aboriginal cultural systems.

85 See, e.g., Henderson, "Legal Inheritances," note 24 above, esp. at 9; Bruce Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution* (Ipswich, Mass.: Gambit Inc., 1982); RCAP, *Partners*, note 6 above, at 40; Menno Boldt & J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt & J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165 at 170; Greschner, note 7 above, at 345-347, and the sources cited in these works.

86 We must also establish trust and communication between our leaders and the people. The Elders said: listen to your grassroots. The youth said: walk your talk. Leaders must assure the people that the grassroots will be involved in rebuilding and reimplementing self-government. The grassroots feel that their leaders have left them behind. The leaders must also be consistent: if they talk about self-government, they should act according to their own traditions and values, not the Indian Act. Again, education and communication are essential:

To the Source, note 4 above, at vi.

87 For one very helpful such account, see Henderson, "Legal Inheritances," note 24 above.

88 "In fact, the chance of Canadian law accepting First Nations legal principles would be substantially weakened if the First Nations did not continue to practice their own laws within their own systems": John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 at 663. See generally *ibid*. at 657-664. The project that Borrows, Trish Monture, Sakej Henderson and others have undertaken to make indigenous laws and legal traditions accessible, to their own people and to others, as objects of reflection and study (see *ibid*. at 661 n. 166) seems to me to have some real potential to add substance to mainstream perceptions of those traditions.

89 As Mary Ellen Turpel-Lafond observed in her report about these issues to RCAP:

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

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

Turpel-Lafond, "Enhancing Integrity," note 25 above, at 2, 5. See also *ibid.* at 39-40; RCAP, *Bridging*, note 6 above, at 275-277. For some confirmation of Turpel's observations about the impact of such concerns on public attitudes, see notes 42-53 above and the text accompanying them.

90 See, e.g., note 20 above and the text accompanying it; compare *Pamajewon*, note 10 above, esp. at 834 (¶27), where the court expressed its displeasure at the "excessively general terms" in which communities were framing their claims to have constitutional rights of self-government. And even before these two cases, the court had emphasized, as a general matter, the importance of "identify[ing] precisely the nature of the claim being made" in aboriginal rights litigation: see, e.g., *Van der Peet*, note 78 above, at 551-553 (¶¶51-54).

91 See 2 RCAP Final Report, note 4 above.

92 See especially *Nikal v. The Queen*, [1996] 1 S.C.R. 1013; *Van der Peet*, note 78 above; *Gladstone*, note 82 above; *Adams v. The Queen*, [1996] 3 S.C.R. 101; *Côté*, note 31 above; *Delgamuukw*, note 10 above.

93 See note 8 above and the text accompanying it.

94 See notes 79-82 above and the text accompanying them.

95 I say this, just to be clear, without assuming that inherent right communities and governments would, as such, be subject to the *Charter of Rights*. My own view is that the *Charter* most probably would not, and should not, apply, as such, to communities exercising aboriginal rights of self-government. For that discussion, see Kerry Wilkins, "... But We Need the Eggs: The Royal Commission, the Charter of Rights, and the Inherent Right of Aboriginal Self-Government" (1999) 49 U.T.L.J. 53.

96 For earlier adumbrations of this general approach, see Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 2, 24-29, 50-52 and "Ghost in the Machine," note 7 above, at 293-298. See also Dan Russell & Jonathan Rudin, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1992?) at 154-155. For my own elaboration and defence of this conclusion, see my LL.M. thesis *Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government* (University of Toronto, 1999), esp. chapters 2 and 4.

97 See *Mabo*, note 17 above, at 29-30, Brennan J. (for the plurality), quoted above at note 77.

98 See notes 22-31 above and the text accompanying them. Concern about this kind of risk has given rise to doubts about the "cultural authority" of main-

stream courts to interpret, apply and enforce aboriginal peoples' self-government rights. See, e.g., Gibbins & Ponting, note 33 above, at 229-230; Turpel, "Interpretive Monopolies," note 23 above, esp. at 4-6, 23-26, 45; RCAP, *Bridging*, note 6 above, at 277-279; Kelly Gallagher-Mackay, "Interpreting Self-Government: Approaches to Building Cultural Authority," [1997] 4 C.N.L.R. 1.

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