

THE CONCEPT OF THE CROWN AND ABORIGINAL SELF-GOVERNMENT

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Abstract/Resume

This paper discusses the concept of the Crown and its importance in the Canadian polity. The concept is seen as useful in assisting Aboriginal groups to achieve self-government, that is autonomy, within Canada. This is especially true since the 1992 Charlottetown Accord through which government and Aboriginal leaders agreed to a third order of government in Canada.

Cet article discute le concept de la couronne et son importance au système politique canadien. On trouve le concept utile pour aider les groupes autochtones à achever l'autonomie au Canada. C'est particulièrement vrai depuis l'Accord de Charlottetown par lequel les leaders du gouvernement et ceux des Autochtones se sont accordés pour établir un troisième ordre de gouvernement au Canada.

Introduction

Aboriginal¹ self-government has been, and will continue to be, a significant constitutional and political issue for Canada in the coming decades. Indeed, the concept encompasses the hopes and aspirations of many Aboriginal peoples. Although difficult to define in a generic or legal manner, the constitutionalization of an inherent right of self-government for Aboriginal peoples was agreed upon by the First Ministers and four of the national Aboriginal organizations² in 1992; culminating with the *Charlottetown Accord*. Ultimately rejected by the Canadian electorate, the *Accord* nevertheless represents a watershed in thinking about Aboriginal governments and their place in the Canadian polity.

This paper examines the 1992 *Charlottetown Accord* in light of the concept of the Crown in Canadian constitutional law and politics. There has not been any serious discussion of the usefulness of the concept of the Crown and the quest of Aboriginal peoples for the implementation of self-government. Although the 1992 *Charlottetown Accord* made significant progress in recommending that Aboriginal governments be seen as comprising one of three orders of government in Canada, only a few substantive provisions were provided to indicate the precise nature and relationship that Aboriginal governments would have with the other orders of government in Canada (federal and provincial) and within the Canadian notion of "the state"; particularly the Crown.

This paper examines the concept of the Crown in Canada from a brief historical and legal perspective. A discussion of the *Charlottetown Accord* and its pertinent provisions to Aboriginal self-government follows. Finally, an analysis of the concept of the Crown and the *Charlottetown Accord* is provided. The paper illustrates the important role that the concept of the Crown can play in assisting Aboriginal governments to achieve their goal of autonomy within Canada. Self-government can be better understood in its development and implementation, under the present system, if the concept of the Crown and its vital role in the Canadian polity is fully appreciated and understood.

The Concept of the Crown and Canadian Law

The role of the Crown in modern Canadian government finds its roots in the 1839 report of Lord Durham, a report which is generally regarded as the great defence of responsible government (Durham, 1922). The problems that Durham encountered had their source in a lack of responsible government in the colonies. Durham believed that the desires of the people of the colonies had to be represented in the policies of their local governments. The colonial governmental structure placed executive

authority in the appointed members of the Executive Council with few checks or balances on their exercise of power. The Executive Council was accountable only to the Governor and often acted without the approval of the elected Assembly. In addition, even though the elected Assembly might consider legislation, the Governor could refuse assent to it, thus leaving the elected representatives of the people with little or no substantive powers. Durham summarized the situation accurately when he wrote that the

...quarrel, ...had been a quarrel between the executive government and the popular branch of the legislature (*Ibid.*:7).

He continued by stating that he

...looked at it as a dispute analogous to, ...a dispute between a people demanding an extension of popular privileges, on the one hand, and an executive, on the other, defending the powers which it conceived necessary for the maintenance of order (*Ibid.*).

Durham recommended the introduction of the concept of responsible government to Canada. He recommended that the Executive Council of a colony should command the support of the popularly-elected legislative chamber. The Governor should choose his advisors (to sit on the Executive Council) from the elected Assembly. Thus, the Governor would listen to those who were responsible to the Assembly and those persons would give advice only if they thought they had the support of the majority of the elected Assembly. Hence, government would not only be representative, but also responsible.

The development of responsible government illustrates the political role of the Crown. The Crown serves as a conduit for responsible and representative government ensuring that those in power have the support of the majority of the representatives of the people. It is upon this basis that the concept of the Crown must be understood.

In addition to the legislative and judicial branches of the government of Canada, there is the formal and political executive branch of government. The formal executive embodies the proposition that the " ...government of Canada is carried on in the Queen's name" (Mallory, 1984:33). While the office of the Governor General carries out the duties and powers of the Queen, these powers do not affect the decision-making ability of Cabinet and Parliament. Walter Bagehot wrote that the Sovereign:

...has...three rights-the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others.³

It is recognized that the role of the Crown has diminished in Canada in recent decades. However, the formal role of the Crown as a check on the legislative branch of government continues, albeit in a limited manner.

The office of the Prime Minister and the Cabinet are not legal entities finding their creation in the Constitution, *per se*. Rather, they are empowered by conventions of government and the Constitution. In real terms, the modern Cabinet's role is to advise the Crown on governing the country.⁴

For example, section 11 of the Constitution Act, 1867⁵ provides that the Governor General shall appoint members to the Queen's Privy Council.⁶ However, the Governor General appoints only those persons whom the Prime Minister recommends, thereby ensuring responsible government. When Cabinet acts, it acts as a body comprising members of the Privy Council who, in turn, sign orders in council to be approved by the Governor General. This powerful tool and mechanism of executive government in Canada is known as "Governor-in-Council."

The formal head of state (executive power) of Canada resides in the Queen of Canada, currently Elizabeth II, otherwise known as the Crown. The Crown is the legal embodiment of the executive branch of government and therefore, represents the state in its most abstract form. Although only one person at a time can be the reigning Monarch, the notion of the Crown, nevertheless, is divisible. For example, the divisibility of the Crown was discussed in the 1982 British appeal court decision of *R. v. Secretary of State for Foreign and Commonwealth Affairs Ex parte Indian Association of Alberta*.⁷ In this case, the Indian Association of Alberta, along with other Aboriginal groups, petitioned the British appeal court to declare that the treaty obligations entered into by the British Crown are still owed to Indian peoples instead of being owed by the federal Crown.⁸ The petitioners were attempting to use the treaty obligations as a means of preventing the enactment of the *Canada Act, 1982*, which included the *Constitution Act, 1982*. The petition was refused, primarily on the basis of the divisibility of the Crown. Lord Denning wrote:

...I have said that in constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century-not by statute-but by constitutional usage and practice. The Crown became separable and divisible-according to the particular territory in which it was sovereign. ...the Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion or province or territory.

...Thus, the obligations to which the Crown bound itself in the Royal Proclamation of 1763 are now to be confined to the territories to which they related and binding on the Crown only in respect of those territories. None of them is any longer binding on the Crown in respect of the United Kingdom.⁹

Thus, in Canada there are eleven Crowns; one for the federal government and one for each of the ten provinces. Originally, Sir John A. Macdonald envisioned the federally appointed provincial lieutenant-governors as being "...representatives of the Crown but taking instructions from Ottawa" (Smith, 1991:460). As noted above, the Supreme Court of Canada held otherwise.¹⁰

The Governor General represents the Crown at the federal level while the lieutenant-governors represent the Crown at the provincial level. The office of the Governor General is outlined in the *Letters Patent of 1947*¹¹ and the office of the lieutenant-governors is set out in ss.9 to 16 and 58 to 68 of the *Constitution Act, 1867*. The Governor General is assigned the power to appoint judges and commissioners and to suspend or remove from office any person assigned to such office by the Crown. The Governor General is empowered to summon and dissolve the Parliament of Canada. All officers, ministers, civil servants, the military and all inhabitants of Canada are required and commanded by the *Letters Patent* to be obedient, to aid and to assist the Governor General in carrying out the duties of the Crown. The power to revoke, amend or alter the *Letters Patent* rests solely with His/Her Majesty, as the case may be.

The authority of the Crown is governed, to some extent, by certain rules which belong to conventions of the Constitution. Dicey noted that such rules include:

The King must assent to, or (as it is accurately expressed) cannot 'veto' any bill passed by the two Houses of Parliament; ...Ministers resign office when they have ceased to command the confidence of the House of Commons (Dicey, 1982:cxlii).

The Parliament of Canada consists of the Crown, House of Commons and the Senate acting together in the exercise of their respective powers. Key to the Parliamentary system is the power which is ultimately exercised by the Cabinet as an instrument of the executive government. As Dicey stated:

...the far more important matter is to notice the way in which the survival of the prerogative affects the position of the Cabinet. It leaves in the hands of the Premier and his colleagues, large powers which can be exercised, and constantly are exercised, free from Parliamentary control. ...a treaty made by the Crown, or in fact by the cabinet, is valid without the authority or sanction of Parliament. ...The survival of the pre-

rogative, conferring as it does wide discretionary authority upon the Cabinet, involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the state (Dicey, 1982:310-311).

Section 9 of the *Constitution Act, 1867* vests the executive government and authority over Canada in the Queen (or the Crown).¹² The Crown retains at common law certain powers and authority known as the "royal prerogative" or the prerogative powers. These powers are not conveyed by statute, but rather vest inherently in the Crown and refer to the powers that are particular to the Crown and that are not enjoyed by private citizens. The exercise of the prerogative powers has caused considerable debate about the extent and degree of power vested in unelected officials. However, Professor Hogg summarized succinctly the role of the prerogative powers for the exercise of responsible government in Canada. He wrote:

...so long as the cabinet enjoys the confidence of a majority of the House of Commons, the Governor General is always obliged to follow lawful and constitutional advice which is tendered by the cabinet. But there are occasions, ...when a government continues in office after it has lost the confidence of the House of Commons, or after the House of Commons has been dissolved. There are also occasions, for example, after a very close election, or after a schism in a political party, where for a period it is difficult to determine whether or not the government does enjoy the confidence of a majority in the House of Commons. In all these situations it is submitted that the Governor General has a discretion to refuse to follow advice which is tendered by the ministry in office (Hogg, 1992:247).

The Crown, during colonial times, possessed the prerogative powers to appoint Governors, and establish executive councils, legislatures and courts for colonies, without the approval of Parliament. Professor Hogg noted that in the case of conquered colonies, the Crown could legislate until the colony was granted its own legislature. The constitutions of Nova Scotia, New Brunswick and Prince Edward Island remain prerogative instruments.¹³

Today, the most apparent of the Crown's prerogative powers are (1) the appointment of the Prime Minister, (2) the dismissal of the Prime Minister,¹⁴ (3) the dissolution of Parliament¹⁵ and (4) appointments to the Senate of Canada and judges.¹⁶

The role of the courts and the prerogative power is limited to whether the claimed prerogative power does, in fact, exist and the extent to which the prerogative power may be exercised (ie. its limitations, if any).¹⁷ The 1985 Supreme Court of Canada decision of *Operation Dismantle v. The Queen*¹⁸ held that the prerogative powers are subject to judicial review and to the *Canadian Charter of Rights and Freedoms*.¹⁹

Professor Hogg stated the following regarding responsible government and the Crown's prerogative powers:

A system of responsible government cannot work without a formal head of state who is possessed of certain reserve powers. While the occasions for the exercise of these powers arise very rarely, the powers are of supreme importance, for they insure against a hiatus in the government of the country or an illegitimate extension of power by a government which has lost its political support. ...it should not be overlooked that (the formal head of state) also performs many formal, ceremonial and social functions which are important in the life of the nation.

Thus, the Crown represents a safeguard on the democratic institutions of governments and acts as a check and balance on the exercise of the federal and provincial governments' power.

The Crown's Fiduciary Relationship to Aboriginal Peoples²⁰

The Crown's fiduciary obligation to Aboriginal peoples represents a burden on the ability of the Crown to conduct its business without subjecting itself to duties or obligations. The constitutionalization of section 35 into the *Constitution Act, 1982*, whereby Aboriginal and treaty rights are recognized and affirmed, makes this particularly true. Brian Slattery noted:

The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands (Slattery, 1987:753).

This general fiduciary duty²¹ supports the specific fiduciary duty of the Crown in the handling of surrendered (and possibly unsurrendered) Indian lands. The leading decision in this regard is *R. v. Guerin*.²² The facts of *Guerin* are straightforward. In 1957, the Musqueam Indian Band of British Columbia surrendered 162 acres of Reserve land situated in the City of Vancouver to the federal Crown pursuant to sections 37 to 41 of the *Indian Act*.²³ The surrender enabled the Band to secure a lease with a golf club.

The terms and conditions of the lease were not part of the surrender but rather, were discussed between federal officials and the Band at Band meetings. The Crown executed the lease on terms that were not as favourable as the terms originally agreed upon orally. The Crown did not receive the Band's permission to change the terms of the lease nor did it provide a copy of the lease to the Band until 1970. The Band instituted a suit against the Crown for breach of trust.

The Supreme Court of Canada's judgement consists of three opinions between eight judges taking part. Seven of the eight judges held that the Crown has a fiduciary duty respecting Indians lands. Dickson J. wrote, for the majority:

...the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty.

If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.²⁴

The *Constitution Act, 1982*²⁵ entrenched a number of key provisions regarding Aboriginal peoples into the Constitution.²⁶ Most notable is section 35. It reads:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The only substantive decision to date from the Supreme Court of Canada on section 35 is *R. v. Sparrow*.²⁷ The facts of the case are as follows. Ronald Sparrow, a member of the Musqueam Indian Band of British Columbia, was charged and convicted at trial under section 61(1) of the *Fisheries Act*²⁸ for fishing with a drift-net that was longer than that permitted under the Band's food fishing licence. Sparrow admitted that the facts constituted an offence but defended his action on the basis that he was exercising an existing Aboriginal right to fish and that the drift-net

length restriction was inconsistent with section 35(1) of the *Constitution Act, 1982* and therefore, invalid.

The Supreme Court discussed section 35(1) in a segmented manner. It held that "existing" means the rights which were in existence when the *Constitution Act, 1982* came into effect. The court stated that existing means unextinguished²⁹ and that "existing aboriginal rights" require an interpretation that is flexible so as "...to permit their [aboriginal rights] evolution over time."³⁰ The court adopted the language of Professor Slattery in noting that "existing" means that rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."³¹

The court's discussion of "recognized and affirmed" is the most substantive portion of the decision. On the issue of Crown sovereignty and Aboriginal lands, the court held

...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."³²

The court noted that the interpretation of "recognized and affirmed" is derived from "...general principles of constitutional interpretation"³³ and that section 35 shall be interpreted in a "purposive way." That is, it shall be given a "generous, liberal interpretation."³⁴ The court then cited its earlier decision of *R. v. Nowegijick*³⁵ wherein it stated:

...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."³⁶

The decision continued by outlining a justificatory analysis that would allow federal or provincial legislation to override an existing Aboriginal or treaty right. For the purposes of this paper, this analysis does not need to be discussed.

Sparrow contains a number of principles which could be read to support the claim that Aboriginal title and rights are to be given a broad interpretation. For example, the court speaks of a "flexible interpretation" of Aboriginal rights so as to permit their "evolution." This is supported by the purposive approach adopted by the court which calls for a liberal and generous interpretation of Aboriginal rights. The principles in *Nowegijick* state that treaties and statutes relating to Indians be construed in favour of Indians.

The court noted, however, that sovereignty and underlying title to the land vests in the Crown. This, of course, is problematic for Aboriginal peoples considering the immense importance they place on the land. However, this may not necessarily rule out a favourable interpretation in the future from the Supreme Court. In *R. v. Sioui*³⁷ the Supreme Court

stated:

The British Crown recognized that the Indians had certain ownership rights over their land...It also allowed them autonomy in their internal affairs, intervening as little as possible."³⁸

The preceding discussion outlined briefly the historical and legal significance and concepts regarding the Crown in the Canadian polity. As well, this examination included a brief discussion of Aboriginal rights. Although Aboriginal rights are recognized and affirmed in section 35, the meaning of section 35, especially as it applies to a right of self-government is uncertain. Thus, the *Charlottetown Accord* was timely by attempting to bring certainty to the Aboriginal self-government debate.

The 1992 *Charlottetown Accord* and Aboriginal Peoples

Introduction

Like the 1987 *Meech Lake Accord*, the 1992 *Charlottetown Accord* attempted to reconcile the problems that the province of Quebec had with the *Constitution Act, 1982*. However, unlike the *Meech Lake Accord*, the *Charlottetown Accord* dealt with the issue of Aboriginal self-government and proposed the constitutional entrenchment of the inherent right to self-government. Before discussing the *Charlottetown Accord*, a brief introduction to the constitutional discussions following the *Constitution Act, 1982* is necessary because it provides an historical perspective to the development of the concept of Aboriginal self-government in the constitutional forum.

The constitutional discussions of the early 1980s produced the *Constitution Act, 1982* which included section 25³⁹ of the *Canadian Charter of Rights and Freedoms* and section 35 (discussed above). Section 37 required the Prime Minister to convene a constitutional conference on matters affecting Aboriginal peoples. On March 15-16, 1983, a conference was held and produced the *1983 Constitutional Accord on Aboriginal Rights*, ultimately proclaimed as the *Constitution Amendment Proclamation, 1983*.⁴⁰ The amendment was agreed upon by the federal government, nine provincial governments (excepting Quebec), the two territorial governments and the four national Aboriginal organizations. The amendment provided for future constitutional conferences⁴¹ on Aboriginal matters, made mandatory a second constitutional conference to be held within one year and made amendments to section 25 of the *Charter* and section 35 of the *Constitution Act, 1982*.⁴²

The 1984, 1985 and 1987 Aboriginal constitutional conferences

resulted in no constitutional amendments. The negotiations at the 1987 conference broke down when British Columbia, Alberta, Saskatchewan and Newfoundland rejected Prime Minister Mulroney's proposal to entrench an Aboriginal right of self-government. The national Aboriginal organizations also had difficulty with the Prime Minister's proposal since it was based upon a contingent right as opposed to an inherent right.⁴³

The Accord and Aboriginal Peoples

The 1992 *Charlottetown Accord* proposed amending section 35.1 of the *Constitution Act, 1982* to include the following:

The Aboriginal peoples of Canada have the inherent right of self-government within Canada.⁴⁴

This subsection would constitutionalize the inherent right of self-government and by itself, it represents an historic step forward. The real issue, concerning the inherent right, however, is simple: what does it mean and in terms of this paper, what is the effect of the inherent right in terms of Aboriginal governments and the existing Canadian state? This discussion is important because it appears likely that any constitutional amendment affecting Aboriginal peoples in the future will have to deal with the inherent right of self-government.

The *Charlottetown Accord* contained a contextual statement in section 35.1(3) that defined, to some degree, the scope of the inherent right. The contextual statement reads:

The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
- (b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

The language of the contextual statement is new in terms of its use in other constitutional documents. For example, the terms "safeguard and develop" and "develop, maintain and strengthen" may represent progress in constitutional language and politics, but these terms do not have any precedent in constitutional jurisprudence. Therefore, it is difficult to know what they mean. This is especially true with regard to their effect, or lack thereof, on the language used in sections 91 and 92 of the *Constitution Act, 1867* where "exclusive legislative authority" is utilized to express the scope of power held by the federal and provincial governments.

More troublesome is the extent of legislative authority granted under clause (b) of the contextual statement. At first glance, "lands, waters and environment" appears to include natural resources. However, upon examination, this is most likely not the case. There are two reasons for this conclusion.

First, section 109 of the *Constitution Act, 1867* and section 1 of the *Constitution Act, 1930*⁴⁵ use the terminology "lands, mines, minerals and royalties." The implication is that "lands" alone does not comprise the minerals, mines and royalties thereto. This is also supported by the common law referred to earlier in this paper.

Second, earlier drafts of the legal text included the terms "seas" and "resources" under clause (b).⁴⁶ The obvious implication of this is that resources were not meant to be included in the term "lands." Also, the clause which details the negotiating framework for self-government agreements under the *Accord* states that issues such as "lands and resources" shall be part of the negotiations.⁴⁷

This represents a serious shortcoming in the *Accord* considering the immense role that resource development and exploitation plays for the other governments of Canada in financing the activities of the state. This is especially true for Aboriginal governments since, for many Aboriginal people, their way of life, their beliefs and traditions are based strongly on the land. Control over the land, including natural resources, represents an essential feature of autonomy for Aboriginal peoples.

Section 35.1(2) states that the inherent right shall be interpreted

...in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

This is perhaps one of the most important clauses in the *Accord* in that it deals directly with the jurisdictional relationship between the federal and provincial governments and Aboriginal governments. This clause could be interpreted to suggest the creation of a third type of Crown in Canada (federal, provincial and Aboriginal). However, this seems unlikely due to the fact that the creation of a third Crown is not stated specifically and that the clause is an interpretive clause. It does not actually create a third order of government for Aboriginal governments. Rather, it states that section 35.1(1), the inherent right, should be "interpreted" in a manner consistent with Aboriginal governments comprising one of three orders of government within Canada. If there is any element of the recognition of Aboriginal governmental authority akin to a Crown in this clause, it is more organic than legislated.

Also missing from the third order of government clause is fiscal responsibility, fiscal rights and transfer agreements. This is dealt with by the draft political accord on Aboriginal peoples which was released in

October 1992. The third order of government clause and the entire *Accord* do not deal with the fiscal relationship between Aboriginal governments and the other governments of Canada and this represents a major weakness in the *Accord*.

Conclusion

The 1992 *Charlottetown Accord* made significant progress in terms of recognizing Aboriginal rights and the inherent right of self-government. Notwithstanding this progress, the *Accord* did not secure for Aboriginal governments a right to the resources on the lands under their control and to which many First Nations claim ownership. As well, it did not explicitly create a third order of government nor new Aboriginal Crowns in the constitutional sense. If it had, the argument could be made that Aboriginal governments, through the existence of their own Crown, are entitled to have legislative and prerogative authority in the exercise of their inherent right of self-government similar to the authority now enjoyed by the other Crowns of Canada.

The Crown and Aboriginal Governments as One of Three Orders of Government Within Canada

Introduction

This analysis presupposes the existence of the existing governing system in Canada, namely one that is federal, parliamentary, and using the monarchy as head of state. This may be presumptuous considering the failure of the *Charlottetown Accord* in that Quebec remains politically alienated within the existing system and that the existing "system" of government has been unable, to date, to meet the needs of various groups across Canada, including Quebec and Aboriginal peoples.

This paper seeks to demonstrate that the concept of the Crown plays a relatively silent, but decisive role in Canadian democracy and federalism. The Crown acts as a conduit of state authority for the government in power. It ensures that the actions of the government are supported by the majority of the members of the House of Commons. It acts as a check on the government system. In addition, the Crown plays a central role in the federal structure of the country by being divisible. This allows the constituent components of the Canadian state, the provinces, to retain a degree of sovereignty within Canada and ensures that the central government cannot exercise absolute authority.

Canada's Aboriginal peoples demand that their right of self-government be recognized by the other orders of government in Canada and that this right be implemented according to the terms of each respective Aboriginal nation.⁴⁸ The issue of the "source" of the Aboriginal right of self-government has been a topic of intense debate. The question of how Aboriginal governments will "exercise" the right of self-government remains elusive and one which is extremely complicated. This is especially true considering the hundreds of Aboriginal governments presently existing in Canada and considering that, in most cases, each is claiming a unique modus of self-government.

This paper submits that in order to understand fully the relationship between the inherent right of Aboriginal self-government and the Canadian polity, an examination and understanding of the role of the Crown is necessary. It is further submitted that the concept of the Crown, as illustrated in the first part of this paper, is a central feature of the division of powers, executive government, responsible government, and generally the nature, of the Canadian government system. Therefore, the pertinent issue concerns the degree to which the concept of the Crown can be understood, adopted and modified to meet the needs of Aboriginal peoples and the quest for the recognition of their right to self-government.

The *Charlottetown Accord* addressed many of the substantial concerns of Aboriginal peoples relating to self-government. However, as the preceding section noted, there were significant problems with the Accord's interpretation on central issues. The *Accord* in general, and its problems, will be the focus of the following discussion, using the concept of the Crown as the analytical tool for a critique.

Divisibility of the Crown

As discussed earlier, the divisibility of the Crown is conducive to Canada's federal structure. It permits each province, and the federal government, to exercise their respective powers without being encumbered by another government. Although not without its problems over the past 130 years, the system has worked relatively well. The Canadian federal structure is well-established and the sovereignty of each government well-recognized and acknowledged by other governments, externally and internally. One Crown in Canada cannot bind another Crown, thereby ensuring sovereignty based upon the divisibility of the Crown.

For Aboriginal governments, the divisibility of the Crown may be particularly appealing in that there is no second guessing about what it "means." A Crown in Canada is a sovereign entity with well-established and recognized rights and privileges. With respect to sovereignty, the internal sovereignty exercised by Canada's Crowns is akin to many

Aboriginal governments' desire for autonomous government within Canada.

In terms of the Accord, the divisibility of the Crown, and the concept of the Crown generally, leave much doubt about the nature of the new "order" of government held by Aboriginal governments. As the earlier discussion noted, the meaning of the "one of three orders of government" clause is unclear in its precise meaning, especially in terms of the Canadian federal structure. The concept of Crown would greatly assist in solving these critical problems.

As well, the divisibility of the Crown ensures that each Aboriginal government, however it may be composed, can define its government in a manner unique and individual to the needs of the particular people concerned. The concept of the Crown does not restrict Aboriginal governments in the form that their governments take and the institutions they wish to adopt, with the two exceptions being democratic norms in general and representative government applying to Aboriginal governments."⁴⁹

The Inherent Right and the Crown

Notwithstanding that the term "Crown" may be presumed to be repugnant to the notion of many Aboriginal people of their inherent sovereignty within Canada, the concept of Crown and its application to Aboriginal governments does not necessarily harm the nature of the "inherency" of the right of self-government. The "inherent" nature of the right recognizes the source of the right. The concept of the Crown, and its usefulness as proposed in this paper, concerns the rights' implementation, not its source. Like the other orders of government in Canada, the source of the right of self-government would be found, at law, in the Canadian Constitution, which would recognize the "inherent" nature of the right of self-government.

Indeed, it can also be argued that the concept of the Crown coincides with the concept of the inherent right of self-government. John Thornton wrote:

Aboriginal government could arguably exercise Crown power in fulfilment of the inherent Aboriginal right to exercise the power necessary to produce and reproduce Aboriginal society. It is of some interest in this respect to note the common origins assumed for both Crown power as the continuation of the divine right of kings, and for inherent Aboriginal right to self-government...as an inalienable right given them by the Creator (Thornton, 1991:59-60).

Thus, the concept of the Crown could also be utilized by Aboriginal peoples to secure sovereignty within Canada much along the lines that the inherent right to self-government debate has been following. The use of the Crown conceptually within the parameters of the inherent right makes the inherent right and self-government a more tangible issue to be discussed. Once Aboriginal governments are established and their sovereign nature (to varying degrees) recognized and secured by the use of the Crown conceptually, then the practical matters of federalism come into play. As I have stated a number of times in this paper, I am not suggesting that Aboriginal peoples adopt the concept of the Crown *per se*. I am suggesting that the conceptual underpinnings of the Crown may be very useful in making clearer an immensely complex subject.

In representing a separation between the executive and legislative branches of government, the Crown could assist Aboriginal governments in providing checks and balances within their governance structures. In essence, the concept of the Crown, as the embodiment of the executive branch of government in Canada, could be utilized by Aboriginal governments to blend their traditional ways of providing checks on the potential abuse or misuse of power. This use of the concept of the Crown has become increasingly important in light of the numerous political problems surrounding the current *Indian Act* Band government system. The *Indian Act* system represents a foreign means of governance to many First Nations peoples and provides no community-based check or balance on the system, thus leaving it open to abuse.

The need for such checks and balances in Aboriginal governments, like any other governments, is expressed by Menno Boldt in the following:

The Indian ruling elite class consider self-government as the avenue to freedom from political and fiscal subordination and accountability to the DIAND. ...But if their aspirations for self-government are realized within the framework of colonial political and bureaucratic structures, then the emerging power arrangements on Indian reserves raise serious concerns about leadership accountability. ...In the absence of traditional or contemporary controls over their leaders, the Indian lower class will be even more vulnerable to manipulation under the rule of their own elites than they were under the rule of DIA officials (Boldt, 1993:130-131).

Boldt's observations are most relevant to this discussion in that they underscore the necessity for Aboriginal governments to examine seriously what types of government they want and to establish governments that represent best the needs of the community. A fundamental aspect of community-based governance and responsible government is a system of checks and balances. Although not new to many traditional Aboriginal governance systems, the challenge is to construct responsible and

accountable governance systems that are relevant to modern society and yet continue to meet the needs of a modern Aboriginal community. The concept of the Crown may assist in this task.

The 'Natural Person' Dilemma

The concept of Crown also solves a fundamental problem with the two examples of Aboriginal government currently outside of the *Indian Act*. First, the *Cree-Naskapi Act*⁵⁰ resulted from the 1975 *James Bay and Northern Quebec Agreement*⁵¹, which permitted the Quebec government to proceed with the James Bay hydro electric project. In return for ceding most of their land, the Cree, Inuit and subsequently the Naskapi received certain environmental, land use and government rights. Section 9.0.1 of the *James Bay and Northern Quebec Agreement* imposed an obligation on the federal Parliament to enact legislation affecting local government for the Cree, and subsequently the Naskapi. In 1984, the federal Parliament enacted the *Cree-Naskapi Act* pursuant to its obligation under the *James Bay and Northern Quebec Agreement*. The *Act* provides the Cree and Naskapi Bands with by-law making authority similar to that held by most municipalities.

Second, the *Sechelt Indian Band Self-Government Act*⁵⁴ came into force in October 1986 and provides a form of Aboriginal government for the Sechelt Band of British Columbia. It establishes a municipal form of government and grants delegated legislative authority to the Band council in areas similar to those provided to the Cree and Naskapi bands. While the Band is no longer under the auspices of the *Indian Act*, except where a void in legislation has not yet been filled by the Sechelt Band Council, it still possesses only delegated authority. The *Act* can be amended or repealed by Parliament as it remains federal legislation.

For the purposes of this paper, section 6 of the *Sechelt Act* is noteworthy in that it provides for the capacity and rights of the Sechelt Band. It denotes the legal character of the Band as a government within Canada. Section 6 states:

The Band is a legal entity and has, subject to this Act, the capacity, rights, powers and privileges of a natural person and, without restricting the generality of the foregoing, may

- (a) enter into contracts or agreements;
- (b) acquire and hold property or any interest therein, and sell or otherwise dispose of that property or interest;
- (c) expend or invest moneys;
- (d) borrow money;

- (e) sue and be sued; and
- (f) do such other things as are conducive to the exercise of its rights, powers and privileges.

The notion that the Band is a natural person is important. The *Cree-Naskapi Act* also provides that its respective Bands be constituted as corporations. Section 6 of the *Sechelt Act* (sections 12 and 14 of the *Cree-Naskapi Act*) basically equates the Band to a corporation. A nation-state or other sovereign entity, like a province or another "order" of government in Canada, are natural persons with additional authority and powers. It is inherent in sovereignty (exercised within or without the state).

Thus, while Canada, through the Crown, is recognized as a natural person, it is not necessarily restricted by the definition provided for in section 6. This is a critical distinction between the Cree, Naskapi and Sechelt Bands and the other two orders of government. While they are legal natural persons, the federal and provincial governments possess sovereignty and are, therefore, deemed capable of exercising sovereign powers which necessarily exceed those of a natural person. The case law on the status and capacity of Indian Act Bands is mixed. However, it is clear that in addition to not being corporations or natural persons per se, they also are not sovereign beings in the same manner as the federal and provincial governments.⁵⁵

Therefore, within the existing Aboriginal governments in Canada there remains a fundamental weakness in their ability to exercise autonomous powers akin to internal sovereignty. The concept of the Crown entails an acceptance of the natural persons doctrine plus the additional powers and authorities held by sovereign entities. In this way, the concept of the Crown neatly solves an outstanding issue with Aboriginal governments and provides a substantive base upon which Aboriginal governments, as one of three orders of government, can function.

The prerogative powers assist in maintaining responsible government in Canada and provide, usually in extreme cases, a check on the potential abuse of power by elected government. By possessing prerogative powers, the ability of the other two orders of government to wield power against the best interests of Aboriginal peoples, in favour of other interests, is undermined significantly. The immunity from applicability to legislation will be useful to Aboriginal governments in asserting their inherent sovereignty, within their defined scope of authority.

An Aboriginal Province and the Concept of the Crown

The suggestion of an Aboriginal or First Nations province has been made by a number of commentators in this area.⁵⁶ However, most deal with the "institutions" of the province and do not deal with the theoretical

underpinnings of a province and Canadian federalism in general. A fundamental underpinning of Canadian federalism is the notion of the Crown. Therefore, if a discussion of an Aboriginal province is to be understood and appreciated fully, it must be examined from the point of view of the Crown and not merely the institutions of a province (such as transfer payments and legislative structure). The provincial aspects of the concept of the Crown, however, prove to be very effective in clearing up the problem of the Accord in dealing with fiscal stability and Aboriginal governments. Aboriginal governments, with powers akin to that possessed by the Crowns, would presumably be entitled to a similar transfer and equalization payment scheme now in place for the provinces.

The convenience of the Crown to the dilemma of Aboriginal self-government is apparent. The Crown has a lengthy history in the Commonwealth and, more importantly, in Canada and as such provides almost an instant framework within which to discuss the fundamental aspects of self-government. This is especially true for discussing the concept that Aboriginal governments comprise one of three orders of government in Canada. Within the framework already established by the concept of the Crown, the meaning of "one of three orders" makes itself much clearer.

Outstanding Issues

There are four basic issues to be resolved before the concept of the Crown can be used in a meaningful manner in the self-government debate. First, there must be a general acceptance of the relevance of the Crown by the existing governmental system. The Quebec sovereignty issue and its critique of the existing Canadian state raises serious concerns about the relevance of the Crown in Canada. However, even so, the "concept" of the Crown, that is as a check on the legislative branch of government, will be useful so long as there is a division of the branches of government.

Second, the semantics and language of the "Crown" is repugnant to Aboriginal governments seeking to assert their "inherent" right of self-government. Any tie to a pre-existing order of government may be seen as making the right contingent or somehow "non-inherent." To address this need, the language of the Crown can be easily changed. When speaking of Aboriginal governments, one need not necessarily describe them as "Crowns," but rather something else which embodies the essence of a "head of state" or formal check on legislative power. In this way, many traditional Aboriginal forms of governments, with their own checks and balances, could be meshed with the apparatus of the modern nationstate. The result could be that Aboriginal peoples take the best from the traditional forms of government and the best from the existing forms of government and develop unique and community-based models of

government that reflect their needs. The concept of the Crown could assist in the development and implementation of such forms of modern Aboriginal governments.

Third, there must be a willingness on the part of the other governments in Canada to want to change the existing order of government and replace it with a system that recognizes and supports the inherent nature of the Aboriginal right of self-government. While the *Charlottetown Accord* was a major step forward, from an historical perspective, it left many questions unanswered. In particular, what would be the precise role and nature of Aboriginal governments comprising one of three orders of government within Canada? Indeed, the concept of the "Crown" would place such a discussion within an already established conceptual framework. In this way, "sovereignty" does not become such a radical term (as seen by some) but rather a term that effectively describes the nature of federalism in Canada.

Clearly, the *Charlottetown Accord* has shortcomings regarding the potential impact of a new order of government being recognized for Aboriginal governments. An example of the overwhelming authority retained by the federal and provincial orders of government in the Accord is evidenced by section 35.4(2) which provides that federal and provincial laws (not territorial laws) may supersede Aboriginal laws where the Aboriginal laws are inconsistent with the preservation of peace, order and good government (p.o.g.g. clause). This subsection is limited by section 35.4(3) which states that nothing in section 35.4 extends the legislative authority of the federal or provincial governments.

35.4(2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.

35.4(3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

Beyond the particulars of the peace, order and good government clause is a matter of principle that relates directly to the issue of Aboriginal governments constituting one of three orders of government within Canada. If Aboriginal governments constitute one of three orders of government, as opposed to a "third" order of government, and if Aboriginal governments are to be treated as equals to the other two levels of government, why then does the p.o.g.g. clause only grant authority to the federal and provincial governments and not to Aboriginal governments? This query questions the reality underlying the "one of three orders of government" clause. Clearly, the p.o.g.g. clause places the federal and provincial governments into a different "order" of government than that held by Aboriginal governments.

Finally, there is the issue of the Crown's fiduciary relationship to Aboriginal peoples. This issue is complicated and can only be discussed here at its most basic levels. However, it is clear that with increased sovereignty, especially at the level of Aboriginal Crowns, the federal Crown's fiduciary obligation would subside. The issue is to what extent does the fiduciary responsibility subside? The fiduciary relationship may be altered for each Aboriginal government according to its needs. For example, an Aboriginal government seeking full crown status would retain a fiduciary relationship to the federal Crown only to the extent required to fulfil the terms of the new order of government (i.e., access to transfer payments, exclusive jurisdiction, and so on). Other Aboriginal governments may opt for a closer relationship to the federal Crown and federal government whereby they exercise authority but only to a degree that still permits the federal Crown to assume responsibility for failures in the self-government process. This, of course, would not be full Crown status, but the main point is that such status shall be decided by the Aboriginal peoples concerned.

The fiduciary relationship issue is intricate because of the potential for double enrichment on the part of Aboriginal government. In an extreme case, an Aboriginal government could be recognized as a full Crown in Canada and could also rely on the federal Crown to assist it beyond the obligations it has to the other Crowns of Canada. It is submitted that such a situation would not be acceptable to the existing government framework because it would give some Aboriginal governments a privileged position in the Canadian federation without assuming the corresponding responsibilities and risks of government. Needless to say, this topic requires, and shall be the attention of, future consideration.

From the earlier discussion of *Sparrow* it was shown how the Supreme Court left the door open to a wide array of interpretations of section 35(1) of the *Constitution Act, 1982*. On its face, this broader interpretive position that *Sparrow* has placed on section 35(1) could provide the basis for a more liberal interpretation of the fiduciary duty of the federal Crown *vis-à-vis* its relationship to the formal recognition of the inherent right of self-government as an existing right within the meaning of section 35(1). Fundamentally, section 35(1) is still broad enough, at this point in time, to recognize the potential of something akin to an Aboriginal "Crown" within Canada and section 35(1) is broad enough to interpret the fiduciary responsibility of the federal Crown in light of such recognition. Of course, recognition of an Aboriginal Crown would probably not be done explicitly. Rather, it would take the form of recognizing the inherent right of self-government which, in many respects, would be akin to what the provinces and Canada now enjoy in terms of their own respective sovereignty.

Conclusion

This paper has outlined the nature of the concept of the Crown in Canada and has applied this concept to the recent *Charlottetown Accord* principles as they relate to Aboriginal governments comprising one of three orders of government within Canada. Clearly, the notion of Aboriginal governments comprising one of three orders of government in Canada satisfies, in broad terms, many of the crucial concerns of Aboriginal peoples in the recognition and exercise of their inherent right of self-government.

However, the *Accord* is not perfect. The "one of three orders of government" clause is weak in its meaning and intent. It is unclear as to what the precise relationship between Aboriginal governments and the other governments of Canada would be.

It is submitted that the concept of the Crown assists in understanding the position which Aboriginal governments want to occupy in the Canadian polity. The concept also assists in understanding the weaknesses of the *Accord*, as they relate to self-government, and to offer a more lucid view of the meaning of its contents.

This paper does not necessarily mean to imply that the creation of a 12th Crown in Canada, composed of Aboriginal governments, is the best or preferred modus to follow in implementing Aboriginal self-government. Indeed, it is highly unlikely that Aboriginal peoples would agree to use a concept such as the Crown to describe or establish their place in the Canadian polity. However, notwithstanding this, the concept of the Crown may be useful in scoping out the areas of Aboriginal jurisdiction and responsibility within the existing system. This, it appears, would be useful given the difficulties that have been presented in articulating the realization of Aboriginal self-government.

The concept of the Crown outlines some basic parameters within which governments can continue to retain a degree of sovereignty and yet, co-exist with other governments. This appears to be the real dilemma in the exercise of the inherent right of self-government.

The future of the Aboriginal quest for the explicit recognition of the inherent right of self-government in the Canadian Constitution is unclear. Indeed, the constitutional future of Canada is unclear. This paper has illustrated that by examining the well-recognized and accepted concept of the Crown in Canadian constitutional law and politics, and by applying it to the Aboriginal right of self-government and the principles contained in the *Charlottetown Accord*, a better understanding of the self-government demands of Aboriginal peoples will be realized.

Notes

1. Although "Aboriginal" is seen by some as a derogatory term to describe the First Nations peoples of Canada, it is, nevertheless, used throughout this paper. Its use stems from the fact that the term is constitutionalized by section 35 of the *Constitution Act, 1982* and, by definition, includes the Indian, Métis and Inuit peoples of Canada. "Aboriginal" is used within this legal framework. "Indian" is used to refer to those persons who come within the application of the federal *Indian Act*, R. S. C. 1985, 1985, C. I-5. See also Isaac, 1992a.
2. The four national Aboriginal organizations are the Assembly of First Nations, the Métis National Council, the Native Council of Canada (now the Congress of Aboriginal Peoples) and the Inuit Tapirisat of Canada. Noticeably missing was the Native Women's Association of Canada which was not permitted to sit at the negotiation table.
3. Bagehot, 1928:67. For example, Sir Robert Borden wrote, "It would be an absolute mistake to regard the Governor-General...as a mere figure-head, a mere rubber stamp. During nine years of Premiership, I had the opportunity of realizing how helpful may be the advice and counsel of a Governor-General in matters ever withheld; and in many instances I obtained no little advantage or assistance therefrom" (Borden, 1927:204).
4. The Privy Council is charged with providing advice to the Governor-General. This office, while still existing, has been replaced in providing "advice" to the Governor-General by the Cabinet. Dawson writes: "...the Privy Council would..., if active, be a large and politically cumbersome body with members continually at cross-purposes with one another; but it has saved itself from this embarrassment by the simple device of holding no meetings....The Cabinet, lacking any legal status of its own, masquerades as the Privy Council when it desires to assume formal powers" (1963:184-185).
5. *Constitution Act, 1867*, 30 & 31 Vict., c.3 (R.S.C. 1985, App.II, No.5).
6. Section 11 of the *Constitution Act, 1867* reads: "There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and Summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General."
7. *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta*, [1982] Q.B. 892 (C.A.).
8. *Ibid.*, 909.
9. *Ibid.*, 916-917.
10. See note 7.

11. *Letters Patent Constituting the Office of Governor General of Canada*, October 1, 1947, R.S.C. 1985, App.II, No.31.
12. Section 9 of the *Constitution Act, 1867* reads: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."
13. Read, 1948:621. The Nova Scotia constitution finds its origins in the Commission and Instructions to Edward Cornwallis by Letters Patent (May 6, 1749). The New Brunswick constitution finds its origins in the Commission and Instructions to Governor Thomas Carleton (August 16, 1784). The Prince Edward Island constitution originates in the Commission and Instructions to Governor Patterson (August 4, 1769 and July 27, 1769, respectively). See Read, *supra*, 626 and 630.
14. Professor Hogg notes that the dismissal or resignation of a Prime Minister is also the dismissal or resignation of the entire cabinet. "Thus what is formally a dismissal of a Prime Minister is in substance the dismissal of the ministry or government" (Hogg, 1992:249).
15. Section 50 of the *Constitution Act, 1867* states: "Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer." The best known Canadian example of this situation is the so-called "King-Byng affair" for which see Forsey, 1968, Chapters 5 and 6.
16. Section 24 of the *Constitution Act, 1867* states "The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate;..." Section 96 of the *Constitution Act, 1867* states: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province,..."
17. See *Case of Proclamations* (1611), 12 Co. Rep. 74, 74 E.R. 1352 (K.B.) ; *Bowles v. Bank of England*, [1913] 1 Ch. 57; *Auckland Barbour Bd. v. The King*, [1924] A.C. 318 (P.C.,N.Z.); *Prohibition del Roy* (1607), 12 Co. Rep. 63, 77 E.R. 1342; *Entick v. Carrington* (1765), 19 St. Tr. 1030, 95 E.R. 807 (K.B.) ; *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L.).
18. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, (1985) 18 D.L.R. (4th) 481; The Supreme Court of Canada held that decisions of Cabinet, based either upon statute or the royal prerogative, come within the meaning of section 32(1) of the *Charter* (application clause) and are subject to judicial review. Thus, the executive branch of government must observe the provisions of the *Charter*. See also Rankin and Roman (1987).
19. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (enacted by the *Canada Act 1982* (U.K.), 1982, c.11, Schedule B). See also Neudorfer (1985).

20. "Aboriginal peoples" is used here to mean that there may be a general fiduciary duty to all such people and is not restricted to Indian people.
21. In *R. v. Kruger*, [1986] 1 F.C. 3, 17 D.L.R. (4th) 591 at 623, [1985] 3 C.N.L.R. 15, 32 L.C.R. 65; affirming [1982] 1 C.N.L.R. 50, 23 L.C.R. 108, 125 D.L.R. (3d) 513; leave to appeal to S.C.C. refused 62 N.R. 102n, Heald, J. stated: "...the Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations."
22. *R. v. Guerin*, [1984] 2 S.C.R. 335, (1984) 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120, 55 N.R. 161, reversing [1983] 2 F.C. 656, [1983] 2 W.W.R. 686, 13 E.T.R. 245, 143 D.L.R. (3d) 416, (1983) 1 C.N.L.R. 20, 45 N.R. 181. (References herein are to [1984] 2 S.C.R. 335). For commentary see Hurley (1985).
23. *Indian Act*, R.S.C. 1952, c.149; now R.S.C. 1985, c.I-5.
24. *Guerin*, *supra*, note 22 at 376.
25. *Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11, as amended by the *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App.II, No.46.
26. In addition to section 35, the Constitution also contains sections 25 and 35.1. Section 25 is a clause in the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*) which states that Charter rights cannot abrogate or derogate Aboriginal and treaty rights. Section 35.1 ensures that Aboriginal representatives will be invited to constitutional conferences regarding section 91(24) of the *Constitution Act, 1867*.
27. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, affirming 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300 (B.C.C.A.), reversing [1986] B.C.W.L.D. 599. [References herein are to 70 D.L.R. (4th) 385, (S.C.C.)]. For commentary see Binnie (1991); Isaac (1991c); Asch and Macklem (1991); and Elliot (1991).
28. *Fisheries Act*, R.S.C. 1970, c.F-14, ss.34, 61(1), now R.S.C. 1985, c.F-14, ss.43, 79.
29. *Sparrow*, *supra*, note 27 at 396 and 397.
30. *Ibid.*, 397.
31. Slattery (1988) 782 as cited in *Sparrow*, *supra*, note 27 at 397.
32. *Sparrow*, *supra*, note 27 at 404.
33. *Ibid.*, 407.
34. *Ibid.*
35. *R. v. Nowegijick*, [1983] 1 S.C.R. 29, [1983] C.T.C. 20, (1983), 144 D.L.R. (3d) 193. [References are to 144 D.L.R. (3d) 193.]

36. *Ibid.*, 198.
37. *R. v. Sioui*, [1990] 1 S.C.R. 1025, (1990), 70 D.L.R. (4th) 427, (1990), 56 C.C.C. (3d) 1. [References herein are to 70 D.L.R. (4th) 427].
38. *Ibid.*, 450.
39. Section 25 of the *Charter* is an interpretive provision that provides that *Charter* rights cannot abrogate or derogate from any Aboriginal, Treaty or other rights of the Aboriginal peoples of Canada. For commentary see Pentney (1988).
40. *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App.II, No.46.
41. See section 37.1 of the *Constitution Act, 1982*.
42. The amendment to section 25 dealt primarily with terminology. Section 35 was expanded to include subsections (3) (land claims agreements as treaty rights) and (4) (equality guarantee to Aboriginal men and women). For discussion see "A Record of Aboriginal Constitutional Reform", *Information*, (Ottawa: I.N.A.C., 1983); A.E. Gaffney, G.P. Gould, and A.J. Semple (1984); and Schwartz (1986).
43. The issue of contingent versus inherent is a debate that focuses on the "source" of a right to self-government. A right that is contingent is based upon some form of external acceptance, recognition and limitations. A right that is inherent requires no justification for its existence. For discussion see Isaac (1992b).
44. *Charlottetown Accord; Draft Legal Text*, (October 9, 1992); section 35.1(1).
45. *Constitution Act, 1930*, R.S.C. 1985, App.II, No.26.
46. Continuing Committee on the Constitution: Group III, *Rolling Draft*, (Toronto: April 9, 1992); Doc: 840-653/017, p.2.
47. *Accord, supra*, section 35.2(l)(b) at p.39.
48. Aboriginal "nation" is used loosely. It is recognized that across Canada Aboriginal peoples have grouped themselves, by choice and by force, in many ways. Many retain the *Indian Act* language of a "band," while others are connected by means of Tribal Councils and regional organizations.
49. This would be to conform to the *Charter*, pursuant to the proposed section 32(c) of the *Charter* in the *Charlottetown Accord*. The *Accord* would also modify section 2 of the *Constitution Act, 1867* to include the following "(a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;..."
50. *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c.46. For discussion see Isaac (1991a; 1991b).
51. *James Bay and Northern Quebec Agreement* (1976).

52. Section 9.0.1 of the *James Bay and Northern Quebec Agreement* provides: "Subject to all other provisions of the Agreement, there shall be recommended to Parliament special legislation concerning local government for the James Bay Crees on Category IA lands allocated to them." The corresponding text and section for the Naskapi Band is Section 7.1 of the *Northeastern Quebec Agreement*, (Ottawa: DIAND, 1984).
53. *Sechelt Indian Band Self-Government Act*, S.C. 1986, c.27.
54. *Cree-Naskapi Act*, *supra*, note 76, ss.12 and 14.
55. *R. v. Cochrans*, [1977] 3 W.W.R. 660 (Man.Co.Ct.) and *R. v. Peter Ballantyne Band*, 47 M.V.R. 299, [1987] 1 C.N.L.R. 67, 45 Sask. R. 33 (Q.B.) both held that a Band is neither a natural person nor a corporation and not a legal person. However, a number of recent cases have held that a Band can sue and be sued and is a legal entity with legal rights and obligations, notwithstanding that it may not be *de facto* a legal person. See *Springhill Lumber Ltd. v. Lake St. Martin Indian Band*, [1986] 2 C.N.L.R. 179 (Man.Q.B.) ; *Clow Darling Ltd. v. Big Trout Lake Band of Indians* (1989), 70 O.R. (2d) 56, [1990] 4 C.N.L.R. 7 (Dist.Ct.) and *R. v. Roberts*, [1991] 3 F.C. 420, 42 F.T.R. 40 (T.D.).
56. For example see Courchene and Powell (1992); Thornton (1991); and Elkins (1992).

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