

# ABORIGINAL GOVERNMENTS AND THE *CANADIAN CHARTER* *OF RIGHTS AND FREEDOMS*<sup>©</sup>

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Starting with the premise that the Aboriginal peoples of Canada have an inherent right of self-government which is constitutionally protected, this article analyzes the issue of whether Aboriginal governments exercising that right are subject to the *Canadian Charter of Rights and Freedoms*. This issue is examined from a legal perspective based on textual analysis and common law principles. It is concluded that, as a matter of Canadian constitutional law, with the exception of the section 28 gender equality provision, the *Charter* does not apply to Aboriginal governments. This avoids imposition of the *Charter* generally on these governments by judicial decree, leaving the more fundamental policy issue of whether the *Charter* should apply in this context open to negotiation and political agreement with the Aboriginal peoples.

En partant du principe que les peuples autochtones du Canada ont le droit inhérent au gouvernement autonome, cet article analyse la question de la juridiction de la *Charte canadienne des droits et libertés* l'égard de ces gouvernements. Cette question est abordée d'une perspective légale fondée sur l'analyse textuelle ainsi que les principes du droit commun. L'article conclut qu'en droit constitutionnel canadien, à l'exception de l'article 28 sur l'égalité sexuelle, la *Charte* ne peut être appliquée aux gouvernements autochtones. Ceci évite l'imposition générale de la *Charte* sur ces gouvernements par décret judiciaire, laissant la question politique plus fondamentale de la justice de l'application de la *Charte* dans ce contexte à la négociation et l'accord politique avec les peuples autochtones.

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## I. INTRODUCTION

The defeat of the *Charlottetown Accord* (*Accord*) in the referendum of 26 October 1992 has left the controversial issue of the application of the *Canadian Charter of Rights and Freedoms* to Aboriginal governments<sup>3</sup> unresolved. The *Accord*, as everyone knows, would have recognized that “the Aboriginal peoples have the inherent right of self-government within Canada,” but would have made the *Charter* “apply immediately to governments of Aboriginal people.” Had the *Accord* been approved, those provisions would have settled the issue of the *Charter’s* application to Aboriginal governments by a political compromise. But with the *Accord’s* defeat, this contentious issue has been thrown back into the legal and political arenas, where it now must be addressed.

In the legal arena, it will be mainly up to Canadian courts to decide whether the *Charter* applies to Aboriginal governments under the existing Constitution. This article will examine some of the legal arguments that may be raised in that context. It will attempt to determine whether the *Charter* presently applies to various forms of Aboriginal government, in particular traditional Aboriginal governments, *Indian Act* band councils, James Bay Cree local government, and Sechelt Indian government.

In Canada, there is no doubt that the rights and freedoms guaranteed by the *Charter* are available to Aboriginal individuals as against the federal, provincial, and territorial governments.<sup>4</sup> However,

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<sup>1</sup> *Consensus Report on the Constitution: Charlottetown, 28 August 1992, Final Text* (Ottawa: Supply & Services Canada, 1992) [hereinafter *Charlottetown Accord*]. A draft legal text was also prepared: *Draft Legal Text* (Ottawa: 9 October 1992) [hereinafter *Draft Legal Text*].

<sup>2</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>3</sup> In this article, the term “government,” whether referring to an Aboriginal, provincial, territorial, or the federal government, will generally be used to encompass all aspects of government including, where appropriate, the legislative, executive, and judicial branches of government (see *infra* note 25). Where the context requires, however, it will occasionally be used in its more narrow sense to refer solely to the executive branch. On these usages, see *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 573 at 598 [hereinafter *Dolphin Delivery*].

<sup>4</sup> The following sections of the *Charter* have been successfully relied upon by Aboriginal persons:

s. 2(a), conscience and religion: *Bearshirt v. Canada*, [1987] 2 C.N.L.R. 55 (Alta. Q.B.);

s. 2(b), expression and assembly: *R. v. Skead*, [1984] 4 C.N.L.R. 108 (Alta. Prov. Ct.); compare *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 627 [hereinafter *NWAC No. 1*]; and *Native Women’s Association of Canada v. Canada*, [1993] 1 F.C. 171 (T.D.) [hereinafter *NWAC No. 2*], *aff’d* (1992) 145 N.R. 253 (F.C.A.);

there is virtually no case law on the application of the *Charter* to Aboriginal governments.<sup>5</sup> The matter therefore has to be approached as one of first impression by examining relevant constitutional principles and statutory provisions, and attempting to construct rational and coherent legal doctrine.

## II. TRADITIONAL ABORIGINAL GOVERNMENTS

By “traditional Aboriginal governments,” I mean Indian, Inuit, and Métis governments which do not have a statutory or explicit constitutional base, but which exist or could be constituted by Aboriginal

s. 7, life, liberty, and security of the person: *R. v. Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.) [hereinafter *Daniels Q.B.*], rev'd on jurisdictional grounds (1991), 93 Sask. R. 144 (C.A.) [hereinafter *Daniels C.A.*], leave to appeal refused, [1992] 1 S.C.R. vii; compare *R. v. Kent* (1986), 40 Man. R. (2d) 160 (C.A.) [hereinafter *Kent*]; *Bruce v. Yukon Territory (Commissioner)* [1994] 3 C.N.L.R. 25 (Y.T.S.C.) [hereinafter *Bruce*]; *R. v. Fiddler*, [1994] 4 C.N.L.R. 99 (Ont. Ct. (Gen. Div.)) [hereinafter *Fiddler*]; *R. v. Nahdee*, [1994] 4 C.N.L.R. 158 (Ont. Ct. (Gen. Div.)) [hereinafter *Nahdee*]; *R. v. Yooya* (1994), 126 Sask. R. 1 (Q.B.) [hereinafter *Yooya*]; *R. v. Redhead* (1995), 103 Man. R. (2d) 269 (Q.B.) [hereinafter *Redhead*]; and *R. v. Campbell* (1996), 106 Man. R. (2d) 135 (Q.B.) [hereinafter *Campbell*];

s. 8, unreasonable search or seizure: *R. v. Noltcho*, [1987] 1 C.N.L.R. 108 (Sask. Prov. Ct.); *Douglas v. R.*, [1984] 3 C.N.L.R. 65 (B.C. Cty. Ct.) [hereinafter *Douglas*]; and *R. v. Jackson*, [1992] 4 C.N.L.R. 121 (Ont. Prov. Ct.) [hereinafter *Jackson*]. Compare *R. v. Milton* (1987), 10 B.C.L.R. (2d) 1 (C.A.) [hereinafter *Milton*];

s. 10(b), right to counsel: *Jackson*;

s. 11(b), trial within a reasonable time: *R. v. Bird* (1990), 82 Sask. R. 51 (Q.B.);

s. 11(d), presumption of innocence: *Douglas*; compare *Milton*, *Fiddler*, *Nahdee*, *Yooya* and *Redhead*

s. 12, cruel and unusual punishment: *R. v. Pratt*, [1986] 1 C.N.L.R. 123 (Sask. Prov. Ct.); *R. v. Herman* (1985), [1986] 1 C.N.L.R. 72 (Sask. Prov. Ct.); *R. v. Chief*, [1990] N.W.T.R. 55 (Y.T.C.A.); *Daniels C.A.*; *R. v. Iyerak*, [1991] N.W.T.R. 40 (S.C.); *R. v. McGillivray* (1991), 93 Sask. R. 144 (C.A.); compare *R. v. Tabac*, [1986] 1 C.N.L.R. 138 (N.W.T.C.A.); *R. v. Smokeyday* (1990), 76 Sask. R. 221 (Q.B.); and *R. v. Johnson*, [1995] 2 C.N.L.R. 158 (Y.T.C.A.);

s. 15(1), equality rights: *R. v. Punch*, [1985] N.W.T.R. 373 (S.C.); *Daniels C.A.*; *R. v. Bob* (1991), 88 Sask. R. 302 (C.A.); *Corbiere v. Canada (Indian & Northern Affairs)* [1994] 1 F.C. 394 (T.D.) [hereinafter *Corbiere*]; *Sawridge Band v. Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.) [hereinafter *Sawridge*]; *R. v. Perry*, [1996] 2 C.N.L.R. 167 (Ont. Ct. (Gen. Div.)); *Willierv. Alberta (Liquor Control Board)* [1996] 3 C.N.L.R. 233 (Alta. Liquor Licensing Appeal Council); and *R. v. Morin*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.). Compare *Kent*, *R. v. Goulais*, [1988] 3 C.N.L.R. 125 (Ont. C.A.); *Bruce*, *Fiddler*, *Nahdee*, *NWAC No. 1*; *Yooya*, *Campbell*; and *Redhead* and

s. 28, gender equality: *Daniels C.A.* Compare *NWAC No. 1*; *NWAC No. 2*; and *Sawridge* at 227-28.

<sup>5</sup> Decisions which do touch on this issue include: *Waskaganish Band v. Blackned*, [1986] 3 C.N.L.R. 168 (Que. Prov. Ct.) [hereinafter *Waskaganish*], discussed *infra* note 142; *Eastmain Band v. Gilpin (No. 1)*, [1987] 3 C.N.L.R. 54 (Que. Prov. Ct.) [hereinafter *Eastmain No. 1*], discussed *infra* note 119; *Eastmain Band v. Gilpin (No. 2)*, [1988] 3 C.N.L.R. 15 (Que. Prov. Ct.) [hereinafter *Eastmain No. 2*], discussed *infra* note 121; *R. v. Hatchard* (1991), [1993] 1 C.N.L.R. 96 (Ont. Ct. (Gen. Div.)) [hereinafter *Hatchard*], discussed *infra* note 100; and *R. v. Laforme*, [1996] 1 C.N.L.R. 193 (Ont. Prov. Ct.) [hereinafter *Laforme*], discussed *infra* note 100.

peoples as expressions of their inherent right of self-government.<sup>6</sup> This right flows from the original sovereignty which the Aboriginal nations exercised over their own peoples and territories prior to being colonized and integrated into the Canadian state.<sup>7</sup>

Although not explicitly recognized by the Canadian Constitution, compelling arguments can be made that the inherent right of self-government is an existing Aboriginal and treaty right which is recognized

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<sup>6</sup> To the extent that these governments already exist, they operate “unofficially” in the sense that they have not yet been recognized by non-Aboriginal governments in Canada. However, if the inherent right of self-government is constitutionally protected (as will be argued in the text accompanying *infra* notes 8-11), then recognition is unnecessary. Also, by “traditional,” I do not mean to imply that Aboriginal governments need to be modelled on forms of government which existed prior to European colonization. I have chosen that term, for want of a better, to suggest the connection between forms of Aboriginal government and the cultural traditions of the various Aboriginal peoples. The extent to which a particular Aboriginal nation chooses to maintain or revive pre-existing governmental structures and procedures, or adopt new forms of government, must be determined by the members of that nation for self-government to be real and effective. Compare *R. v. Pamajewon* (1996), 138 D.L.R. (4th) 204 (S.C.C.) [hereinafter *Pamajewon S.C.C.*].

<sup>7</sup> See Canada, Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Queen’s Printer, 1992) at 16-23 [hereinafter *Right of Self-Government*]; and Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canada Communication Group, 1993) at 36 [hereinafter *Partners in Confederation*]. Regarding the Métis, who originally came into being as a result of the union of European fur-traders and Indian women, the inherency of their right of self-government might be contested on the ground that their existence as a distinct people post-dated European colonization: see, for example, *Sawridge*, *supra* note 4 at 141, where Muldoon J. said that “the Métis can hardly be thought of as ‘Aboriginal,’ having been a people only since the advent of the European people,” (see also at 147); compare *R. v. Van der Peet* (1996), 137 D.L.R. (4th) 289 (S.C.C.), Lamer C.J. at 317, and L’Heureux-Dubé J. at 347 (dissenting) [hereinafter *Van der Peet*]. However, the Métis emerged as a separate Aboriginal nation around Red River in the late eighteenth and early nineteenth centuries at a time when British control over the region was at best tenuous, and British jurisdiction over the Métis was questionable. Even in 1849, the ineffectiveness of British authority over the Métis through the medium of the Hudson’s Bay Company was revealed in the famous Sayer case when, in face of Métis opposition, the Company failed to maintain the monopoly over the fur trade which the Rupert’s Land *Charter* of 1670 purported to give it: see W.L. Morton, *Manitoba: A History* 2d ed. (Toronto: University of Toronto Press, 1967) at 77; and G. Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987) at 100-01. In 1869-70, the political and military power of the Métis Nation was revealed again when they successfully resisted British and Canadian efforts to decide their future without their consent. At that time, the Métis set up their own provisional government in the Red River region, and negotiated the entry of the region into Confederation as the province of Manitoba: see G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961) at 65-125; and D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo: Wilfrid Laurier University Press, 1988) at 33-64. For a critical appraisal of the British Crown’s claims to sovereignty over another part of Rupert’s Land which was not effectively controlled by the Hudson’s Bay Company, see K. McNeil, “Aboriginal Nations and Quebec’s Boundaries: Canada Couldn’t Give What It Didn’t Have” in D. Drache & R. Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: Lorimer, 1992) 107 [hereinafter “Quebec’s Boundaries”].

and affirmed by the general language of section 35(1) of the *Constitution Act, 1982*.<sup>8</sup> One argument proceeds on the lines that the right of self-government is an Aboriginal right which may have been regulated by federal legislation but has never been extinguished; accordingly, it was in existence in 1982 when section 35(1) came into force, and is therefore constitutionally entrenched by that section as interpreted by the Supreme Court of Canada in *R. v. Sparrow*.<sup>9</sup> A second line of argument, which reinforces the first and leads to a similar result, is that section 35(1) created a constitutional space for self-government by placing Aboriginal and treaty rights beyond the scope of federal and provincial jurisdiction, except in circumstances where the exercise of federal jurisdiction over those rights can be justified by the stringent test laid down in *Sparrow*.<sup>10</sup> In other words, to prevent a legal vacuum from occurring, Aboriginal jurisdiction must exist and extend to at least those areas of Aboriginal and treaty rights which have been placed beyond federal and provincial competence by section 35(1).<sup>11</sup> These arguments support the widely held view of Aboriginal people that their right of self-government is an inherent Aboriginal right which has never been surrendered or extinguished.

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<sup>8</sup> Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*]. Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>9</sup> [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]. For articulation of this argument, see *Partners in Confederation* *supra* note 7 at 31-36. See also *infra* notes 92-95 and accompanying text.

<sup>10</sup> See K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95, especially at 133-36 [hereinafter "Constitutional Space"]. The *Sparrow* test, in simplified terms, requires the federal government to justify any legislative infringement of Aboriginal rights by proving, first, that the legislation fulfils a valid legislative objective, and second, that the legislation is consistent with the government's fiduciary duty towards the Aboriginal peoples. See also *R. v. Nikal*, [1996] 1 S.C.R. 1013 [hereinafter *Nikal S.C.C.*], affg (1993), 80 B.C.L.R. (2d) 75 (C.A.) [hereinafter *Nikal B.C.C.A.*]; *R. v. NTC Smokehouse* (1996), 137 D.L.R. (4th) 528 (S.C.C.); and *R. v. Gladstone* (1996), 137 D.L.R. (4th) 648 (S.C.C.) [hereinafter *Gladstone*], for application of the test. Compare McLachlin J.'s dissenting opinion in *Van der Peet* *supra* note 7. For critical commentary on the justification test, see K. McNeil, "How Can Infringements of the Constitutional Rights of the Aboriginal Peoples Be Justified?" (1996) 8 Const. Forum [forthcoming].

<sup>11</sup> Aboriginal jurisdiction is necessarily exclusive with respect to those aspects of Aboriginal and treaty rights that are beyond federal and provincial competence: compare *Partners in Confederation* *supra* note 7 at 38-39. Regarding Aboriginal and treaty rights that can be regulated by federal legislation which meets the *Sparrow* test of justification, Aboriginal and federal jurisdiction are concurrent, with federal legislation being paramount in the event of direct conflict: accord *Partners in Confederation* at 38-39. For the *Sparrow* test to be met, however, the onus would be on the federal government to show a valid legislative objective which was not being adequately fulfilled by Aboriginal laws: see "Constitutional Space," *supra* note 10 at 134-36.

I accept the validity of these lines of argument, and so will base my analysis in this paper on the conclusion that the inherent right of self-government is already constitutionally entrenched in section 35(1).<sup>12</sup> As the right is inherent, flowing from the original sovereignty of the Aboriginal nations, its expression is not determined by the Constitution.<sup>13</sup> In other words, section 35(1) guarantees the right, but does not specify the manner in which it may be exercised. That is left to the Aboriginal peoples, who are free to choose their own forms of government in accordance with their own traditions, values, and present

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<sup>12</sup> Compare *Delgamuukw v. R.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), aff'd (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) [hereinafter *Delgamuukw*], Macfarlane J.A. at 519-20 and Wallace J.A. at 591-93, holding that the Aboriginal right of self-government in British Columbia was extinguished, at the latest, when that province joined Confederation in 1871. However, Lambert J.A. (dissenting), at 730, said that in the absence of federal laws, "Gitksan and Wet'suwet'en customary laws of self-government and self-regulation have continued to the present day and are now constitutionally protected by s. 35 of the *Constitution Act, 1982*" Hutcheon J.A. (dissenting), at 763-64, expressed a view similar to Lambert J.A.'s.

The majority decision in *Delgamuukw* was applied in *R. v. Williams*, [1994] 3 C.N.L.R. 173 (B.C.S.C.), aff'd [1995] 2 C.N.L.R. 229 (B.C.C.A.) [hereinafter *Williams*]. In *R. v. Pamajewon*, [1993] 3 C.N.L.R. 209 (Ont. Prov. Ct) [hereinafter *Pamajewon*], it was held that the inherent right of self-government of the Shawanaga First Nation had been clearly and plainly extinguished, apparently by the *Royal Proclamation, 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter *Royal Proclamation*]; the Robinson Huron Treaty of 1850 in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Bedforde, Clarke, 1880) at 305; and the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App II, No. 5, s. 91(24) [hereinafter *Constitution Act, 1867*]. On appeal in *R. v. Pamajewon* (1994), 21 O.R. (3d) 385 (C.A.), Osborne J.A. was willing to assume that the Shawanaga First Nation (and the Eagle Lake Band, who were involved in a parallel appeal heard at the same time) still had some rights of self-government in 1982, when s. 35(1) of the *Charter* came into force. He nonetheless held that those rights had never included a right to regulate high-stakes gambling, and if they had included such a right, that right would have been extinguished by federal legislative provisions relating to gambling, now contained in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 197, 201, 206, and 207 [hereinafter *Criminal Code*]. This decision was affirmed by the Supreme Court of Canada in *Pamajewon S.C.C.*, supra note 6, on the basis that the accused had not established that large-scale gambling had been integral historically to the distinctive cultures of their peoples and subject to regulation by them. Compare *R. v. Bear Claw Casino Ltd.*, [1994] 4 C.N.L.R. 81 (Sask. Prov. Ct.). See also *Sawridge*, supra note 4; *Nikal (B.C.C.A.)*, supra note 10. The Supreme Court of Canada, however, did not discuss the right of self-government in *Nikal S.C.C.*, supra note 10.

<sup>13</sup> In this regard, the right resembles that of the Indian tribes in the United States, which operate outside the scope of the American Constitution: see *Talton v. Mayes*, 163 U.S. 376 (1896); and *Pueblo v. Martinez*, 436 U.S. 49 (1978). However, there is this important difference: in the United States the right of self-government is not constitutionally protected, and so can be diminished and even extinguished by exercise of the plenary power of Congress, whereas in Canada the right has been constitutionally protected since 1982 by s. 35(1) of the *Constitution Act, 1982* supra note 8, and so cannot be diminished or extinguished without Aboriginal consent, constitutional amendment, or justification under the *Sparrow* test: see *Right of Self-Government* supra note 7 at 13-15.

needs.<sup>14</sup> The question arising in this context, which this article seeks to answer is this: does the *Charter* apply to and place restrictions on these Aboriginal forms of governments, as it does with respect to the federal and provincial governments? Or do Aboriginal governments operate outside the scope of the *Charter*?

Section 35 is in Part II of the *Constitution Act, 1982* immediately after the *Charter*, which comprises Part I. The section's location outside the *Charter* is consistent with the view that it recognizes and affirms the Aboriginal right of self-government, as the primary goal of the *Charter* is to protect individual rights against infringement by government.<sup>15</sup> Section 35, on the other hand, delineates a constitutional space within which Aboriginal governments can function, as well as protecting Aboriginal persons and groups from infringements of their Aboriginal and treaty rights by the federal and provincial governments.<sup>16</sup> Unlike the *Charter* provisions, section 35 therefore has a dual function, one branch of which shelters the governmental powers of the Aboriginal peoples. For that reason, it would have been inappropriate for section 35 to be placed in the *Charter*.<sup>17</sup>

However, the location of section 35 outside the *Charter* does not necessarily mean that Aboriginal governments functioning in the

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<sup>14</sup> See *Partners in Confederation* *supra* note 7 at 41-42. Compare *Pamajewon S.C.C.*, *supra* note 6.

<sup>15</sup> Some *Charter* rights, such as the right to an education in one of Canada's two official languages (s. 23), are sometimes regarded as collective rights because they pertain to certain groups in Canadian society, but in another sense they are individual because they are enjoyed by Canadian citizens as individuals.

<sup>16</sup> In *Sparrow*, *supra* note 9, for example, the Court decided that the Aboriginal fishing rights of members of the Musqueam Nation are protected against limiting federal legislation which fails to meet the test for justification that the Court set out.

<sup>17</sup> Another possible reason for locating s. 35 outside the *Charter* was to avoid the application of s. 1, which subjects *Charter* rights "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": see K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 *Supreme Court L. Rev.* 255 at 255-56 [hereinafter "Constitutional Rights"]; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 *Queen's L.J.* 232 at 234 [hereinafter "Guarantee of Treaty Rights"]; and *Van der Peet*, *supra* note 7 at 392-93, McLachlin J. (dissenting). In *Sparrow*, *supra* note 9 at 1102, the Supreme Court acknowledged that s. 1 does not apply to s. 35, but nonetheless created a test for justifying federal infringements of Aboriginal rights which is very similar to the s. 1 test it uses to justify infringements of *Charter* rights: see "Constitutional Space," *supra* note 10. In light of the *Sparrow* decision, there must be some other explanation for the location of s. 35 outside the *Charter*. Another possibility, which may have been more in the minds of the politicians who agreed to the *Constitution Act, 1982* *supra* note 8, is that the *Charter* relates mainly to the rights and freedoms of persons and citizens generally, whereas s. 35 relates only to the rights and freedoms of the Aboriginal peoples of Canada. Put another way, Part I of the *Act* contains the "Canadian *Charter*," whereas Part II contains the "Aboriginal Peoples' *Charter*."

constitutional space which that section provides are not subject to the *Charter's* provisions. While both the federal and provincial governments exercise jurisdiction that is derived from outside the *Charter*,<sup>18</sup> they are obviously subject to its provisions. However, the application of the *Charter* to them is made explicit by section 32(1), which provides:

32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *Dolphin Delivery*<sup>19</sup> the Supreme Court of Canada decided that the *Charter* does not apply to actions by private parties. McIntyre J. gave the following justification for this conclusion: “It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government.”<sup>20</sup> Commenting on this passage in one of its publications,<sup>21</sup> the Royal Commission on Aboriginal Peoples stated that “[t]his holding suggests that the purpose of section 32 is to draw the dividing line between private and government actors, rather than to list in a comprehensive fashion the governmental bodies to which the *Charter* applies.”<sup>22</sup> As a consequence, the Commission suggested that the *Charter* would apply to protect individual Aboriginal persons in their relations with their own governments.<sup>23</sup> This is debatable. Not only is there no indication in the *Dolphin Delivery* decision that McIntyre J. intended to bring traditional Aboriginal governments within the scope of section 32,<sup>24</sup> but the very language he used—“legislative, executive and administrative branches of

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<sup>18</sup> Principally from ss. 91 and 92 of the *Constitution Act, 1867* *supra* note 12.

<sup>19</sup> *Supra* note 3.

<sup>20</sup> *Ibid.* at 598. See also *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at 264.

<sup>21</sup> *Partners in Confederation* *supra* note 7 at 65, note 139.

<sup>22</sup> *Ibid.* at 65, note 139.

<sup>23</sup> *Ibid.* at 39. Compare Manitoba, Aboriginal Justice Inquiry, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People* (Winnipeg: Queen's Printer, 1991), vol. 1 at 333-34 (Commissioners: A.C. Hamilton & C.M. Sinclair) [hereinafter *Manitoba Inquiry*].

<sup>24</sup> On the contrary, in *Dolphin Delivery* *supra* note 3 at 598, he stated: “I am of the opinion that the word ‘government’ is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the Provinces.”



government”—may not encompass Aboriginal governments that choose to structure themselves along lines which do not conform with the federal and provincial models that McIntyre J. obviously had in mind.<sup>25</sup>

Moreover, if the legislative intent had been for section 32 to refer to government bodies generally, broad language to that effect could have been used. Instead, the legislators chose to specify which governments are included.<sup>26</sup> It may well be that they thought the words of section 32(1) would include all government bodies, as judicial precedent had established that all legislative powers in Canada had been exhaustively distributed between the federal Parliament and provincial legislatures by the *Constitution Act, 1867*.<sup>27</sup> In 1982, the only Aboriginal governments functioning officially were doing so under federal legislation, in particular the *Indian Act*.<sup>28</sup> But if traditional Aboriginal governments were not contemplated by the law-makers who enacted the *Charter*, one must ask whether it would be appropriate to apply the *Charter* to them as a kind of afterthought. This raises complex issues of political principle which cannot be resolved by resorting to canons of

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<sup>25</sup> The Royal Commission acknowledged that some Aboriginal groups might legitimately choose to revive “traditional government structures”: *Partners in Confederation* *supra* note 7 at 41. Such structures would not necessarily have distinct legislative, executive, and administrative functions: see, for example, K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941) at 67-98; T. Porter, “Traditions of the Constitution of the Six Nations,” in L. Little Bear, M. Boldt & J.A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 14; and O. Mercredi & M.E. Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1993) at 98-102 [hereinafter *In the Rapids*].

<sup>26</sup> See B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 385. A fundamental maxim of statutory interpretation, *expressio unius exclusio alterius* provides that “mention of one or more things of a particular class may be regarded as silently excluding all other members of the class”: P.St.J. Langan, *Maxwell on the Interpretation of Statutes*, 2nd ed. (London: Sweet & Maxwell, 1976) at 293; see also F.A.R. Bennion, *Statutory Interpretation: A Code*, 2nd ed. (London: Butterworths, 1992) at 873-79. Applying this rule to s. 32(1) of the *Charter*, only the federal and provincial governments and their delegates are covered: see *Dolphin Delivery* *supra* note 3 at 602-03.

<sup>27</sup> See *Bank of Toronto v. Lambe* (1887), 12 A.C. 575 at 587 (P.C.); *Union Colliery Co. v. Bryden*, [1899] A.C. 580 at 587 (P.C.); *Murphy v. C.P.R.*, [1958] S.C.R. 626 at 643; *Jones v. New Brunswick (A.G.)*, [1975] 2 S.C.R. 182 at 195. For a compelling argument that these cases are not inconsistent with the continuance of the Aboriginal right of self-government, as exhaustive distribution does not necessarily involve exclusive jurisdiction, see *Partners in Confederation* *supra* note 7 at 31-34. Compare *Delgamuukw*, *supra* note 12 at 519, Macfarlane J.A.

<sup>28</sup> R.S.C. 1970, c. I-6 (now R.S.C. 1985, c. I-5) [hereinafter *Indian Act*]. See also discussion of Cree local government under the James Bay and Northern Quebec Agreement [hereinafter “Agreement”] in Quebec, *James Bay and Northern Quebec Agreement and Complementary Agreements* 1991 ed. (Québec: Les Publications du Québec, 1991) [hereinafter *James Bay Agreement*], discussed in Part IV, below.

constitutional interpretation. Before any decision to apply the *Charter* to Aboriginal governments is made, an in-depth examination of the impact the *Charter* might have on them should be undertaken, and an extensive public dialogue on the issue should take place. The Aboriginal peoples should not only be consulted, but their consent should be a prerequisite to the application of the *Charter* to their governments.<sup>29</sup> It should not be forgotten that the Aboriginal peoples were not directly involved in patriation of the Constitution and inclusion of the *Charter* in 1981-82; on the contrary, there was strong opposition to patriation among them.<sup>30</sup> For the *Charter* to be unilaterally imposed on their governments today through a questionable interpretation of section 32(1) would turn the clock back to a time when the Aboriginal peoples were often not given

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<sup>29</sup> See *In the Rapids* *supra* note 25 at 96-103. The federal government, and all the provincial governments except Quebec, consented to be subject to the *Charter*. The absence of Quebec's participation has been deeply felt, and two serious attempts have been made to meet that province's concerns and obtain its consent to the 1982 constitutional package. The first attempt, *Constitution Amendment, 1987* (Ottawa: Government of Canada, 1987) [hereinafter *Meech Lake Accord*] failed to secure sufficient provincial approval in 1990, and the second, the *Charlottetown Accord* *supra* note 1, was defeated in a national referendum. The same mistake should not be made in another context by unilaterally imposing the *Charter* on Aboriginal governments. Nor should it be contended that the Aboriginal peoples already consented to the application of the *Charter* to their governments when the leaders of the four national Aboriginal organizations agreed to that in the *Charlottetown Accord*. That *Accord* was a compromise, by which the various parties made concessions in return for certain benefits. Acceptance of the application of the *Charter* to their governments was probably a concession that would not have been made by all the Aboriginal leaders without obtaining benefits that were nullified by the defeat of the *Accord* in the referendum: see *Native Women's Association of Canada v. Canada*, [1993] 3 F.C. 192 at 204-07 (C.A.), rev'd by *NWAC No. 1*, *supra* note 4, on Aboriginal positions about the application of the *Charter* prior to the *Charlottetown Accord*. Compromises of this sort have to be distinguished from other elements of the *Charlottetown Accord* which were not negated by its defeat because they involve acknowledgement of certain Canadian realities, such as the existence of a distinct society in Quebec and the inherency of the Aboriginal right of self-government: see R. George, "A few questions for the Prime Minister" *The [Toronto] Globe and Mail* (28 August 1993) D7. For discussions of the *Accord* and Aboriginal rights, see *In the Rapids*, *supra* note 25 at 207-28; M.E. Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in K. McRoberts & P. Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117; and K. McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7 *W. Legal Hist.* 113.

<sup>30</sup> Representatives of some of the First Nations lobbied in London against the new Constitution, and attempted to block patriation in the British courts: see D.E. Sanders, "The Indian Lobby" in K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 301; and *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex Parte Indian Association of Alberta*, [1982] 2 All E.R. 118 (C.A.). See also *Eastmain No. 1*, *supra* note 5 at 66.

the opportunity to participate when important decisions affecting their constitutional rights were made.<sup>31</sup>

There is another, more legalistic argument for not interpreting section 32(1) to include Aboriginal governments. In a series of decisions, the Supreme Court of Canada has held that treaties and statutes which have an impact on the rights of the Aboriginal peoples should be interpreted in favour of those peoples as far as possible.<sup>32</sup> In other words, any ambiguities are to be resolved by choosing the interpretation which is most beneficial to Aboriginal rights. Applying this rule to section 32(1),<sup>33</sup> any doubt over whether it applies to Aboriginal governments should be resolved in favour of Aboriginal rights. If the section can be interpreted as either applying or not applying the *Charter* to Aboriginal governments, then the question to be answered is this: which of these interpretations is more favourable to Aboriginal rights?

Interpreting the section so the *Charter* applies to Aboriginal governments may be more favourable to the *Charter* rights of individual Aboriginal persons, but not to their *Aboriginal* rights. Aboriginal rights are generally regarded not as individual rights but as collective rights which are vested in the Aboriginal peoples as social and political

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<sup>31</sup> As late as 1987, the *Meech Lake Accord* *supra* note 29, which could have affected Aboriginal rights in negative ways, was reached without the participation or consent of the Aboriginal peoples: see L. Bruyere, "Aboriginal Peoples and the *Meech Lake Accord*" (1985) 5 Can. Hum. Rts. Y.B. 49; G. Erasmus, "Introduction: Twenty Years of Disappointed Hopes" in B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 1 at 6-7 and 26-27. As is well known, Aboriginal exclusion from the process was a significant factor in the demise of the *Meech Lake Accord* see M.E. Turpel & P.A. Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord" (1990) 15 Queen's L.J. 345; and J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* rev. ed. (Toronto: University of Toronto Press, 1991) at 299-303.

<sup>32</sup> See *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36; *Simon v. R.*, [1985] 2 S.C.R. 387 at 402; *R. v. Horse*, [1988] 1 S.C.R. 187 at 202-03; *R. v. Horseman*, [1990] 1 S.C.R. 901 at 906-08 and 930; *Quebec (A.G.) v. Sioui*, [1990] 1 S.C.R. 1025 at 1035; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 98-100 and 142-47; *R. v. Badger*, [1996] 1 S.C.R. 771 at 782 and 793-94 [hereinafter *Badger S.C.C.*]; and *R. v. Lewis*, [1996] 1 S.C.R. 921 at 954. Compare *Eastmain Band v. Canada*, [1993] 1 F.C. 501 at 514-20 (C.A.).

<sup>33</sup> In *Sparrow*, *supra* note 9 at 1107-08, and *Van der Peet* *supra* note 7, paras. 23-25, the Court applied the rule to s. 35(1), and so made its relevance to constitutional interpretation clear. See also *Badger S.C.C.*, *supra* note 32 at 782 and 794-96, where the Court applied the rule to the Alberta Natural Resources Transfer Agreement, which was constitutionalized by the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. 5, c. 26, reprinted in R.S.C. 1985, App. II, No. 26.

entities.<sup>34</sup> I concluded above that one of the rights an Aboriginal people has is the right of self-government. External restrictions on the exercise of that right necessarily entail a limitation of the right itself.<sup>35</sup> As the Aboriginal peoples have not consented to the application of the *Charter* to their governments, an interpretation of section 32(1) which has that effect involves an externally imposed limitation on their right of self-government. Such a limitation may or may not be desirable—that is a further question, involving policy considerations which go well beyond the scope of this article. The point made here is that to impose the limitation through interpretation of section 32(1) involves a violation of the well-established rule that ambiguities in statutory and constitutional provisions are to be resolved in favour of the rights of the Aboriginal peoples.

Interpreting section 32(1) to include Aboriginal governments would create an additional problem because that section is subject to the “notwithstanding” clause, which provides:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.

Section 33(1) gives Parliament and the provincial legislatures the power to avoid the full effect of section 32(1). So if section 32(1) is interpreted as including Aboriginal governments, should section 33(1) be interpreted to include them as well? To do so would require considerable stretching of the language. In particular, the words “Act of Parliament or of the legislature” would have to be read as including legislative enactments of Aboriginal governments, even though those enactments might not take the form of “Act” as that word is commonly understood. However, the alternative of applying the *Charter* to Aboriginal governments without providing them with the option other

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<sup>34</sup> This is confirmed by the *Constitution Act, 1982* *supra* note 8, in both ss. 25 and 35, which refer to the Aboriginal and treaty rights of the Aboriginal “peoples,” not “people” or “persons.” For a discussion of Aboriginal rights as collective rights see W. Pentney, “The Rights and Freedoms of the Aboriginal Peoples of Canada and the Constitution Act, 1982. Part I: The Interpretive Prism of Section 25” (1988) 22 U.B.C. L. Rev. 21 at 23-27.

<sup>35</sup> In the United States, Congress imposed civil rights guarantees on tribal governments without their consent by enacting the *Indian Civil Rights Act of 1968* Pub. L. No. 90-284, 82 Stat. 77-78 (1968). No one doubts that the statute limited tribal sovereignty by placing restrictions on it that did not exist before. The controversial issue arising out of the legislation has not been the fact of limitation but its desirability.

governments have to use the notwithstanding clause seems inappropriate and unjustifiable.<sup>36</sup>

The problem just discussed is avoided by interpreting section 32(1) in favour of the right of self-government, which excludes Aboriginal governments from the application of the *Charter*. This interpretation is fortified by section 25:

25. The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreement or may be so acquired.<sup>37</sup>

As I have already concluded that the right of self-government is an Aboriginal and treaty right for the purposes of section 35(1), it follows that it is also a right protected by the even more inclusive language of section 25.<sup>38</sup> As such, it cannot be abrogated or derogated from by other provisions in the *Charter*. “Abrogate” and “derogate” are distinct terms, providing the right of self-government with protection against two potential dangers: (1) destruction as a result of complete inconsistency with some *Charter* right or freedom, for example, if the very existence of Aboriginal governments was for some reason found to violate the democratic rights in sections 3 to 5; and (2) limitation due to a partial conflict with some *Charter* right or freedom, for example, where an Aboriginal government exercising its right of self-government made a law that violated section 15 equality rights.<sup>39</sup>

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<sup>36</sup> The *Charlottetown Accord* *supra* note 1 at 20-21, in applying the *Charter* to Aboriginal governments, would have provided them with the same access to the notwithstanding clause as other governments. Significantly, the *Draft Legal Text* *supra* note 1 at 36, would have amended s. 32(1) to make the *Charter* apply explicitly “to all legislative bodies and governments of the Aboriginal peoples of Canada in respect of all matters within the authority of their respective legislative bodies.” So in the view of the legal drafters, as it now reads, s. 32(1) apparently does not include Aboriginal governments.

<sup>37</sup> *Constitution Act, 1982* *supra* note 8, as am. by *Constitutional Amendment Proclamation, 1983*, SI/84-102, reprinted in R.S.C. 1985, App. II, No. 46 [hereinafter *Amendment Proclamation*].

<sup>38</sup> See *Partners in Confederation*, *supra* note 7 at 39. Moreover, the *Royal Proclamation*, *supra* note 12 (also mentioned in s. 25 of the *Charter*), probably recognized the authority of Aboriginal governments over the internal affairs of the Aboriginal nations: see *Partners in Confederation* at 15-19; and B.A. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen’s University Press, 1990) at 70-83.

<sup>39</sup> See Pentney, *supra* note 34 at 29.

An argument has nonetheless been made that, while section 25 shields the right of self-government as such from *Charter* review, individual Aboriginal persons enjoy *Charter* protection in their dealings with their own governments. The Royal Commission on Aboriginal Peoples presents the argument in this way:

This approach distinguishes between the *right* of self-government proper and the *exercise* of government powers flowing from that right. Insofar as the right of self-government is an Aboriginal right, section 25 protects it from suppression or amputation at the hands of the *Charter*. However, individual members of Aboriginal groups, like other Canadians, enjoy *Charter* rights in their relations with governments, and this protection extends to Aboriginal governments. In this view, then, the *Charter* regulates the manner in which Aboriginal governments exercise their powers, but it does not have the effect of abrogating the right of self-government proper.<sup>40</sup>

In my view, this argument does not take sufficient account of the dual protection offered by section 25. In particular, it does not give the word “derogate” adequate weight. If the *Charter* applies to protect individual Aboriginal persons in their relations with their own governments, this necessarily involves a limitation on the powers of those governments which can only be characterized as a derogation from the right of self-government.<sup>41</sup>

One cannot avoid this conclusion by attempting to draw a distinction between the right of self-government and the exercise of powers flowing from that right. While that distinction may be valid in the context of the application of the *Charter* to Parliament and the provincial legislatures,<sup>42</sup> that is because there is no doubt that the *Charter* applies to those bodies. To take the distinction out of that context and try to use it to justify the application of the *Charter* to Aboriginal governments begs the initial question of whether the *Charter* applies to them at all. Section 25 was clearly intended to shield the

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<sup>40</sup> *Partners in Confederation* supra note 7 at 39 [footnotes omitted]. See also B. Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar. Rev. 261 at 286-87 [hereinafter “Question of Trust”].

<sup>41</sup> See *Donahoe v. Canadian Broadcasting Corp.*, [1993] 1 S.C.R. 319 at 389 [hereinafter *Donahoe*] (“the *Charter* has impinged on the supreme authority of the legislative branches”); and *Hydro-Quebec v. Canada (A.G.)*, [1991] 3 C.N.L.R. 40 at 59 (Que. C.A.) [hereinafter *Hydro-Quebec*] (“the *Charter* operates globally as a limit to legislative powers of governments and to certain forms of their action”). I am assuming that the Aboriginal governments in question are legitimate expressions of the right of self-government of the Aboriginal peoples concerned. In situations where this is not the case, the equation I make between those governments and the exercise of the right of self-government would not apply.

<sup>42</sup> See *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1206-07 [hereinafter *Education Reference*]; *Reference Re Provincial Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158 at 179; and *Donahoe*, supra note 41 at 390-93 and 404-05.

rights of the Aboriginal peoples, and thus the right of self-government, not just from abrogation but from derogation by the *Charter* as well. The question, then, which must be addressed is this: would the application of the *Charter* to relations between Aboriginal individuals and their own governments amount to derogation from the right of self-government? Keeping in mind the nature of the right, I think the answer must be yes because any limitation on the exercise of the right necessarily involves a derogation from the right itself. Where Parliament and the provincial legislatures are concerned, this is permitted by section 32(1) of the *Charter*, where Aboriginal governments exercising the inherent right of self-government of their peoples are concerned, this is explicitly prohibited by section 25.<sup>43</sup>

As an Aboriginal right, the right of self-government is therefore shielded from the general application of the *Charter* by section 25.<sup>44</sup>

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<sup>43</sup> The cases cited, *supra* note 42, reveal that the distinction between a constitutional right and its exercise is very closely related to the distinction between abrogation of and derogation from that right. To conclude that Aboriginal governments are subject to the *Charter* in the exercise of the right of self-government amounts to concluding that the *Charter* can derogate from that right. This conclusion offends the express language of s. 25. In *Donahoe*, *supra* note 41 at 368, McLachlin J. said that a right which has constitutional status “is not one that can be abrogated by the *Charter*.” As the right of self-government, along with other Aboriginal and treaty rights, has constitutional status due to s. 35(1), it would not have required s. 25 to be protected against abrogation by the *Charter*. To give s. 25 work to do where the Aboriginal right of self-government is concerned, and to give significance to the words “derogate from” as well as to the word “abrogate,” the section must shield not only the existence but also the exercise of the right from the *Charter*.

<sup>44</sup> Compare *Sawridge*, *supra* note 4 at 141-42. However, it would seem that s. 25 does not protect the collective rights and freedoms of the Aboriginal peoples from an assertion of individual rights which are not *Charter* rights. In *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 at 157 (B.C.S.C.) [hereinafter *Thomas*], Hood J. noted that both counsel agreed that s. 25 was not relevant to a defence against assault, battery, and false imprisonment based on the defendants’ Aboriginal right to carry on the sacred tradition of the Coast Salish Spirit Dance. That must be correct, as no *Charter* right was being asserted by the plaintiff, quite apart from the fact that Hood J. found the *Charter* to be inapplicable to private litigation not involving some form of government intervention (a right of self-government as such was not claimed by the defendants). Hood J. went on to dismiss the defence based on s. 35(1) on the ground that spirit dancing, or at least those aspects of it that involved the use of force, did not survive the reception of English law in British Columbia. However, even if it had, he could not envisage how the exercise of that right might prevail over the plaintiff’s common-law right not to be assaulted. Counsel for the defendants tried to argue that the *Sparrow* test for justification (see *supra* note 10) would have to be met for the common law to prevail, but Hood J., at 160-61, was uncomprehending and unsympathetic:

I see no reason why there should be any onus on the plaintiff to justify the paramountcy of the common law to the alleged Aboriginal right, or to justify his enjoyment of his civil rights to be free from assault and wrongful imprisonment. Further, if some justification inquiry or reconciling process were necessary, the protection of the rights of the individual plaintiff from these wrongs would prevail, and for obvious reasons.

He concluded, at 162, that contrary to defence counsel’s argument, the plaintiff’s “rights and freedoms are not ‘subject to the collective rights of the Aboriginal nation to which he belongs.’” In

However, section 25 is subject to *Charter* provisions which are expressly stated to override the rest of the *Charter*; specifically section 28:

28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.<sup>45</sup>

It might be argued that the rights and freedoms mentioned in this section are only those that are “guaranteed” by the *Charter*, which the rights and freedoms of the Aboriginal peoples are not.<sup>46</sup> However, the words “referred to” are more inclusive than “guaranteed,” and can be interpreted as extending the application of section 28 to section 25 rights and freedoms.<sup>47</sup>

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my respectful view, Hood J. failed to take sufficient account of the fact that Aboriginal rights are constitutionalized, whereas common law rights generally are not. So Aboriginal rights should prevail in the event of conflict, unless the *Sparrow* test for justification, if applicable, can be met. While that test clearly applies to federal legislation, it probably cannot be used generally to justify provincial legislation which infringes Aboriginal rights: see “Question of Trust,” *supra* note 40 at 284-85; and P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 693. However, the courts have held that provincial laws which infringe Aboriginal and treaty rights are justifiable in two situations: first, where the legislation has been referentially incorporated into federal law, *e.g.* by s. 88 of the *Indian Act*, *supra* note 28; (see *R. v. Alphonse* (1993), 80 B.C.L.R. (2d) 17 at 36-40 (C.A.); and *R. v. Dick* (1993), 80 B.C.L.R. (2d) 62 at 68-69 (C.A.)); and second, where provincial game laws in the prairie provinces infringe the right to hunt for food in the context of the Natural Resources Transfer Agreements (see *Badger S.C.C.*, *supra* note 32 at 783-85 and 809-23). Neither of these situations encompasses *provincial common law* infringements of Aboriginal or treaty rights, so these infringements should not be justifiable under the *Sparrow* test. For commentary on *Thomas*, see T. Isaac, “Individual Versus Collective Rights: Aboriginal Peoples and the Significance of *Thomas v. Norris*” (1992) 21 Man. L.J. 618.

<sup>45</sup> Section 28 appears to be the only section with real potential to limit s. 25 rights in this way. Section 16(3), which provides that “[n]othing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French,” is itself limited by s. 22: “[n]othing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this *Charter* with respect to any language that is not English or French.” As pointed out in B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 24, the proviso in s. 22 no doubt prevents s. 16(3) from being used to interfere with the use of Aboriginal languages, irrespective of the relation of s. 16(3) to s. 25. For a case where a s. 28 argument was unsuccessfully made in the context of s. 2(b) of the *Charter* (freedom of expression), see *NWAC No. 1*, *supra* note 4. See also *Daniels Q.B.*, *supra* note 4.

<sup>46</sup> Section 35, by recognizing and affirming Aboriginal and treaty rights, does provide a guarantee, but it is located outside the *Charter*. Section 25 acts as a shield, rather than as a substantive guarantee, for Aboriginal rights: see *R. v. Steinhauer* (1985), 63 A.R. 381 at 385 (Q.B.); *R. v. Augustine* (1986), 74 N.B.R. (2d) 156 at 189-90 (C.A.); *R. v. Agawa* (1988), 65 O.R. (2d) 505 at 510-11 (C.A.) [hereinafter *Agawa*], leave to appeal refused [1990] 2 S.C.R. v; and see the discussion in Wildsmith, *supra* note 45 at 9-23; and Pentney, *supra* note 34 at 27-30.

<sup>47</sup> See “Guarantee of Treaty Rights,” *supra* note 17 at 240-42; M. Eberts, “Sex-based Discrimination and the *Charter*” in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 183 at 217-18; D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 211-12; and T. Isaac & M.S. Malouhney, “Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the



Any ambiguity that may have existed in this respect was probably removed when subsection (4) was added to section 35 in 1983:

35. (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.<sup>48</sup>

While this amendment applies specifically to section 35(1), it would be inconsistent for Aboriginal and treaty rights to be guaranteed equally to men and women for the purposes of that section and not for the purposes of section 25. As William Pentney has written in the context of the general relationship between sections 25 and 35, “constitutional provisions should be interpreted with reference to other relevant constitutional guarantees in order to ensure that the entire document is interpreted and applied in a consistent manner.”<sup>49</sup> To avoid inconsistency, the rights referred to in section 25 should be subject to the same guarantee of gender equality as section 35 rights. This interpretation may be supported by legislative intent, as section 35(4) was probably added to accomplish the same purpose *vis-à-vis* section 35(1) as section 28 was already thought to accomplish *vis-à-vis* section 25, namely to ensure that no gender discrimination took place insofar as the rights of the Aboriginal peoples are concerned. Moreover, Aboriginal consent to the principle of gender equality in section 28 can be implied from the agreement of the leaders of the four national Aboriginal organizations to the addition of section 35(4) in 1983.<sup>50</sup>

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Inherent Right of Self-Government” (1992) 21 Man. L.J. 453 at 465-67. Compare D. Sanders, “The Rights of the Aboriginal Peoples of Canada” (1983) 61 Can. Bar Rev. 314 at 327. It might, however, be asked how s. 28 can apply to the right of self-government if, as we concluded in the text accompanying *supra* notes 19-36, s. 32(1) does not make the *Charter* apply to Aboriginal governments. The answer to this must be found in s. 28 in the words “[n]otwithstanding anything in this *Charter*,” which seem to override any limitations on the *Charter*’s applicability where gender equality in relation to the rights and freedoms referred to in the *Charter* is concerned.

<sup>48</sup> *Amendment Proclamation supra* note 37. See Eberts, *supra* note 47 at 218; Isaac & Maloughney, *supra* note 47 at 468 and 470-71; and J. Borrows, “Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics” (1994) 43 U.N.B.L.J. 19 at 29-32. In *Sawridge, supra* note 4 at 142, Muldoon J. held that this “constitutional provision exacts equality of rights between male and female persons, no matter what rights or responsibilities may have pertained in earlier times”: see also at 221. For Muldoon J., s. 35(4) operates to end any past inequalities that may have existed between Indian men and women under Indian custom.

<sup>49</sup> Pentney, *supra* note 34 at 30, relying on *Dubois v. R.*, [1985] 2 S.C.R. 350 at 365-66 (use of evidence). See also *Sawridge, supra* note 4 at 142, 227, and 228.

<sup>50</sup> That amendment was agreed to at the first of four First Ministers’ Conferences on Aboriginal issues, attended by leaders of the Assembly of First Nations, the Inuit Committee on National Issues, the Métis National Council, and the Native Council of Canada: on the conference, see Schwartz, *supra* note 26 at 95-146; and N.K. Zlotkin, “The 1983 and 1984 Constitutional Conferences: Only the Beginning” [1984] 3 C.N.L.R. 3 at 10.

If this is correct, the combined effect of sections 28 and 35(4) is to place some constitutional limitations on the Aboriginal right of self-government. Aboriginal governments are restrained from making laws and administrative decisions which discriminate on the basis of gender. Enforcement of this restraint, however, might be problematic insofar as section 25 is concerned. The *Charter's* enforcement provision is as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This provision cannot apply directly to the rights and freedoms referred to in section 25, as they are not guaranteed by the *Charter*.<sup>51</sup> But section 28, on the interpretation offered above, does guarantee those rights and freedoms equally to male and female persons. So arguably the guarantee of gender equality, which ensures that Aboriginal men and women benefit equally from section 25 rights and freedoms, would be enforceable under section 24(1). In other words, it is not the section 25 rights and freedoms but the section 28 guarantee of equal treatment with respect to those rights that is enforceable.<sup>52</sup>

Section 24(1) provides for enforcement by a "court of competent jurisdiction."<sup>53</sup> Choosing such a court may not present significant difficulties where federal or provincial infringement of *Charter* rights is concerned, but where infringement of gender equality by an Aboriginal government is alleged the choice may be problematic. Assigning jurisdiction to a non-Aboriginal Canadian court, especially in the first instance, would offend the principle of self-government because it would give authority over constitutional rights within an Aboriginal nation to a judge who in most cases would not be a member of that nation.<sup>54</sup> To be

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<sup>51</sup> See *supra* note 46.

<sup>52</sup> Even if s. 24(1) was held not to apply in this context, a court would probably use s. 52(1) to decide that s. 28 is enforceable nonetheless, in much the same way as the Supreme Court of Canada in *Sparrow*, *supra* note 9, found s. 35 to be enforceable even though it is outside the *Charter* and, as was held in *Agawa*, *supra* note 46 at 510-12, is therefore not encompassed by s. 24(1).

<sup>53</sup> For judicial interpretation of this provision, see *Singh v. Canada (Employment and Immigration)*, [1985] 1 S.C.R. 177 at 222; *Mills v. R.*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588, especially at 603-04; *R. v. Smith*, [1989] 2 S.C.R. 1120 at 1128-30; and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. See also Hogg, *supra* note 44 at 918-21.

<sup>54</sup> Canada experienced an equivalent denial of self-government in the judicial domain for as long as the Privy Council remained the final court of appeal. Appeals to the Privy Council were abolished in 1949 as part of Canada's progression to independence: see Hogg, *supra* note 44 at 202-04. In the Supreme Court of Canada, provincial interests are protected, however imperfectly, by regional representation on the Court: Hogg at 205. In the case of Quebec, which is a distinct society

whole and effective, Aboriginal self-government must encompass judicial as well as legislative and executive functions,<sup>55</sup> and any judicial review of legislative and executive action should at least start within the Aboriginal nation concerned. A “court of competent jurisdiction” should therefore be interpreted to mean a court of the Aboriginal nation whose government has allegedly violated the gender equality protection in section 28.<sup>56</sup> This presupposes that the Aboriginal nation in question does have some sort of judicial forum for resolving disputes. It is therefore essential for Aboriginal nations to set up culturally relevant adjudicative bodies as they move toward self-government. Otherwise, they risk judicial interference from the outside by default.

In summary, with the exception of section 28, traditional Aboriginal governments are not subject to the provisions of the *Charter*. Section 32(1), which specifies that the *Charter* applies to the federal, provincial, and territorial governments,<sup>57</sup> does not encompass Aboriginal governments. Moreover, section 25 shields the rights and freedoms of the Aboriginal peoples, including their right of self-government, from abrogation or derogation by the *Charter*. Apart from gender equality, which they are obliged by sections 28 and 35(4) to respect, traditional Aboriginal governments, therefore, are not constrained by the *Charter* in their exercise of the Aboriginal peoples’ inherent right of self-government.

### III. INDIAN ACT BAND COUNCIL GOVERNMENTS

The *Indian Act*<sup>58</sup> is a federal statute, enacted by Parliament pursuant to its jurisdiction over “Indians, and Lands reserved for the

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with a civil law system, this representation amounts to three of the nine judges: *Supreme Court Act* R.S.C. 1985, c. S-26, s. 6. The *Charlottetown Accord* *supra* note 1 at 7, had it been approved, would have constitutionalized Quebec’s current representation, and provided for more input from the provinces in the selection of Supreme Court judges.

<sup>55</sup> However, this would not necessarily entail a separation of these functions equivalent to the separation of powers in the Anglo-Canadian system of government: see generally *supra* note 25 and accompanying text.

<sup>56</sup> Gender equality issues should be decided with sensitivity to the culture and values of the people involved. There is grave danger in allowing these issues to be decided, especially at first instance, by judges who are unfamiliar with the cultural context.

<sup>57</sup> See also s. 30: “A reference in this *Charter* to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.”

<sup>58</sup> *Supra* note 28.

Indians.”<sup>59</sup> The *Act*, in sections 74 to 86 as amended, provides for the government of Indian bands by a chief and councillors. However, it is plain from the *Act* that band governments do not necessarily derive their existence from its provisions. Section 2(1) defines “council of the band” as follows:

(a) in the case of a band to which section 74 applies, the council established pursuant to that section,

(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band.

The *Act* therefore envisages band council governments which owe their existence to Aboriginal custom.<sup>60</sup> Section 74(1) empowers the Minister of Indian Affairs, “when he deems it advisable for the good government of a band,” to declare by order that the chief and councillors shall be chosen by elections.<sup>61</sup> While this would alter the selection process for the chief and councillors by replacing customary procedures with elections, it would not change the fact that the band council was a pre-existing entity that did not derive its existence from the *Indian Act*.<sup>62</sup> This conclusion is supported by recent case law holding that band

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<sup>59</sup> *Constitution Act, 1867* *supra* note 12, s. 91(24).

<sup>60</sup> Although the definition first appeared in the 1951 version of the *Indian Act*, S.C. 1951, c. 29, s. 2(1)(c), it clearly assumes that selection of band councils or chiefs by Aboriginal custom had not been abolished by earlier versions of the *Act*. In *Bone v. Sioux Valley Indian Band No. 290 Council* (1996), 107 F.T.R. 133 at 141 (F.C.T.D.) [hereinafter *Bone*], Heald J. said:

The definition of “council of a band” acknowledges that prior to the enactment of the *Indian Act* in 1951, Indian Bands had their own methods for selecting the Band Council. The power or ability to continue choosing the Band Council in the customary manner is left intact by the *Indian Act*, except in those cases where that power is removed from the Band by a ministerial order under s. 74(1) of the *Act*.

Note that when the validity of selection by custom is challenged in a non-Aboriginal court, evidence of the custom has to be provided: see *Baptiste v. Goodstoney Indian Band* [1991] 1 C.N.L.R. 34 at 39 (F.C.T.D.) [hereinafter *Baptiste*].

<sup>61</sup> In *Badger v. Canada*, [1991] 1 F.C. 191 at 197-98 (T.D.) [hereinafter *Badger F.C.T.D.*], it was held that the consent of the members of a band or band council, though desirable, is not required before the Minister issues or repeals a s. 74(1) order. See also *Six Nations Traditional Hereditary Chiefs v. Canada (Indian and Northern Affairs)* (1991), 43 F.T.R. 132 (F.C.T.D.) [hereinafter *Six Nations*].

<sup>62</sup> See J. Woodward, *Native Law* (Toronto: Carswell, 1989) at 82-83; and *Partners in Confederation* *supra* note 7 at 34-35.

custom for the selection of a chief and councillors is revived if a section 74(1) ministerial order for the band is repealed.<sup>63</sup>

The statutory jurisdiction of band councils is set out primarily in sections 81 to 83 and 85.1. Section 81 provides a list of purposes, including such things as observance of law and order, and the survey, zoning, and allotment of reserve lands, for which the “council of a band may make by-laws, not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister.”<sup>64</sup> Section 82 gives the Minister forty days to disallow any by-law made under section 81. Section 83 allows band councils to make by-laws, “subject to the approval of the Minister,” for the purposes of taxing interests in land and licensing businesses, among other things.<sup>65</sup> By-laws relating to possession, manufacture, and sale of intoxicants on reserves, which may be made under section 85.1, are not subject to ministerial disallowance but must be approved by a majority of the band’s electors who vote at a special meeting called to consider the by-law.<sup>66</sup>

It has generally been assumed that the jurisdiction of band councils is limited to the by-law making authority described in the *Indian Act*.<sup>67</sup> While this would probably be correct if band councils owed their existence to the *Indian Act*,<sup>68</sup> it cannot be the case insofar as they existed

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<sup>63</sup> See *Jock v. Canada (Indian and Northern Affairs)* [1991] 2 F.C. 355 (T.D.) [hereinafter *Jock*]; *Sparvierv. Cowessess Indian Band No. 73* [1993] 3 F.C. 142 (T.D.) [hereinafter *Sparvier*], add’l reasons [1993] 3 F.C. 175 (T.D.). In *Corbiere, supra* note 4 at 405, Strayer J. wrote:

By s-s. 74(1) the Minister may declare by order that the elections of particular bands are to be held in accordance with the Act. Such a declaration can also be repealed. When this is done by the definition of “council of the band” [in the *Indian Act*], s. 2, the council must be elected pursuant to band custom.

<sup>64</sup> *Indian Act, supra* note 28, as am. by S.C. 1985, c. 27, ss. 15-15.1 [R.S.C. 1985, c. 32 (1st Supp.), s. 15].

<sup>65</sup> *Indian Act, supra* note 28, as am. by S.C. 1988, c. 23, s. 10 [R.S.C. 1985, c. 17 (4th Supp.), s. 10]. On s. 83, see *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995] 1 S.C.R. 3.

<sup>66</sup> Section 85.1 was added to the *Indian Act* by S.C. 1985, c. 27, s. 16 [R.S.C. 1985, c. 32 (1st Supp.), s. 16].

<sup>67</sup> See J.S. Molloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change,” in I.A.L. Getty & A.S. Lussier, eds., *As Long as the Sun Shines and the Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 56; R.H. Bartlett, *Indian Act of Canada*, 2d ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 16-23; *Paul Band v. R.* (1984), 50 A.R. 190 at 195-96 (C.A.) [hereinafter *Paul Band*]; and *St. Mary’s Indian Band v. Canada*, [1996] 2 C.N.L.R. 214 (F.C.T.D.). Compare *Telecom Leasing Canada Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 13* (1993), 133 A.R. 355 at 358-59 (Q.B.).

<sup>68</sup> In that case, they probably would have no jurisdiction beyond that which Parliament assigned to them. As delegates of Parliament, they would be constrained by the delegating legislation: see Bennion, *supra* note 26 at 160; D.C. Holland & J.P. McGowan, *Delegated Legislation*

under Aboriginal custom before being brought within the electoral provisions of the *Act* by a section 74(1) declaration of the Minister. The original jurisdiction exercised by a customary band council would have its origins in the customs of the band, which no doubt would have predated the enactment of the *Indian Act* and earlier equivalent legislation.<sup>69</sup> In other words, a customary band council would be exercising inherent rather than delegated jurisdiction, in the same way as a traditional Aboriginal government.<sup>70</sup> Indeed, a customary band council might be a form of traditional Aboriginal government.<sup>71</sup>

A customary band council which is not subject to the *Indian Act*'s electoral provisions nonetheless has the same statutory authority to make by-laws as elected band councils.<sup>72</sup> However, the *Indian Act* does not stipulate that the jurisdiction of band councils is limited to that by-law making authority. If a customary band council previously exercised jurisdiction beyond that limited authority, there is no convincing reason

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in Canada (Toronto: Carswell, 1989) at 194-209; and J.M. Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992) at 181.

<sup>69</sup> The *Indian Act*, as first enacted in 1876, provided for band council government: S.C. 1876, c. 18, ss. 61-63. Equivalent provisions were contained in an earlier federal statute, *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31 Vict., c. 42*, S.C. 1869, c. 6, ss. 10 and 12.

<sup>70</sup> For an illuminating account of how one band, the Chippewa of the Nawash, exercised their inherent right of self-government despite the *Indian Act*, see J.J. Borrows, "A Genealogy of Law: Inherent Jurisdiction and First Nations Self-Government" (1992) 30 *Osgoode Hall L.J.* 291 at 340-53.

<sup>71</sup> It must be stressed that not all *Indian Act* band councils originated from traditional Aboriginal governments. Indeed, in some cases the band council was created by imposing the *Indian Act* provisions on an Aboriginal people in opposition to their wishes in order to suppress the traditional government. For example, band council government was imposed on the Six Nations in 1924, resulting in a lasting schism between the traditional government and the band government: see D.M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *U.T. Fac. L. Rev.* 1 at 14-23; *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.J.); and *Isaac v. Davey*, [1977] 2 S.C.R. 897. The discussion in the text relates only to customary band councils which became *Indian Act* band councils; it does not apply to traditional Aboriginal governments which were replaced, whether successfully or unsuccessfully, by *Indian Act* band councils. Moreover, it is not my intention to defend the *Indian Act* or to suggest that the band council form of government provided by it is an adequate expression of Aboriginal self-government. On the contrary, I agree with the statement that the *Act* is a "colonial relic" that must give way to genuine Aboriginal self-determination within Canada: *In the Rapids supra* note 25 at 80-95.

<sup>72</sup> This is because the by-law making provisions of the *Indian Act* apply to the "council of the band," which, as we have seen, is defined in s. 2(1) to include both elected and customary band councils: see *supra* note 60 and accompanying text. See also *Bigstone v. Big Eagle* (1992), 52 F.T.R. 109 at 116 (F.C.T.D.) [hereinafter *Bigstone*].

to conclude that the *Indian Act* implicitly abrogated that authority.<sup>73</sup> On the contrary, there are strong arguments against such implicit abrogation.

A general rule of statutory interpretation directs that legislation is to be interpreted, as far as possible, so as not to infringe vested rights.<sup>74</sup> If the right of self-government is an inherent Aboriginal right, as I have concluded it is,<sup>75</sup> then the *Indian Act* should be interpreted in favour of the preservation of that right. This approach is supported by a further rule, mentioned above, that ambiguities in statutes are to be interpreted in favour of Aboriginal rights.<sup>76</sup> Moreover, in *Sparrow*, the Supreme Court of Canada held that any statutory extinguishment of Aboriginal rights must be “clear and plain.”<sup>77</sup> So if Parliament intended

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<sup>73</sup> In addition to envisaging selection of band councils by custom, the *Indian Act* acknowledges the validity of customary adoptions in its definition of child in s. 2(1): “‘child’ includes a child born in or out of wedlock, a legally adopted child, and a child adopted in accordance with Indian custom.” This inclusion of customary adoptions in the definition section of the *Act* was added by amendment in 1985: S.C. 1985, c. 27, s. 1(1) (now R.S.C. 1985, 1st Supp., c. 32, s. 1(1)). From 1956 to 1985, s. 48(16) provided that the definition of “child” for the purpose of distribution of property on intestacy included “a child adopted in accordance with Indian custom”: S.C. 1956, c. 40, s. 13; and R.S.C. 1985, c. I-5. These definitions of “child” support case law upholding the validity of customary adoptions: see *Re Adoption of Katia* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.); *Re Beaulieu’s Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T. Terr. Ct.); *Re Deborah* (1972), 27 D.L.R. (3d) 225 (N.W.T.C.A.); *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.); *Re Tagornak Adoption Petition* (1983), 50 A.R. 237 (N.W.T.S.C.) [hereinafter *Tagornak*]; *Casimel v. ICBC* (1993), 82 B.C.L.R. (2d) 387 (B.C.C.A.); and the discussion in N.K. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” [1984] 4 C.N.L.R. 1; compare *Michell v. Dennis* (1983), 51 B.C.L.R. 27 (S.C.). The statutory provisions and the cases recognizing customary adoptions also support the conclusion that the *Indian Act*, *supra* note 28, did not abrogate the inherent right of Indian bands to govern themselves. Indian customs are not static, as they obviously must adapt to the changing society which they are meant to serve. This reality was acknowledged in the context of Maori customary adoption in New Zealand in *Arani v. Public Trustee of New Zealand* (1919), [1920] A.C. 198 at 204-05 (P.C.):

It may well be that ... the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi-legislative internal authority which can modify it.

Whether the governing body of an Indian nation, be it the band council or some other entity, has the authority to change the customs would depend on the jurisdiction of that body, derived from the customs themselves: see further discussion in text accompanying *infra* notes 80-88, regarding selection of band councils by custom.

<sup>74</sup> See Langan, *supra* note 26 at 251-56; S.G.G. Edgar, *Craies on Statute Law* 7th ed. (London: Sweet & Maxwell, 1971) at 118-21; and E.A. Driedger, *Construction of Statutes* 2d ed. (Toronto: Butterworths, 1983) at 183-85.

<sup>75</sup> See *supra* notes 8-11 and accompanying text.

<sup>76</sup> See *supra* note 32 and accompanying text.

<sup>77</sup> *Supra* note 9 at 1099. See also *Badger S.C.C.*, *supra* note 32 at 794.

the *Indian Act* to take away all band council jurisdiction that was not delineated in the *Act*, it should have made that intention clear and plain.<sup>78</sup> Assigning specific jurisdiction to make by-laws relating to certain matters therefore should not be interpreted as implicitly abrogating pre-existing band council rights of self-government in relation to other matters.<sup>79</sup>

Recent case law supports the conclusion that the jurisdiction of band councils is not limited to the by-law making authority in the *Indian Act*. *Jock*<sup>80</sup> involved a challenge to the validity of the *Akwesasne Election Regulations*,<sup>81</sup> adopted by an Akwesasne band council resolution on 23 April 1988. Those regulations provided for a reversion to what Teitelbaum J. referred to as “custom election regulations,”<sup>82</sup> as set out in the challenged regulations, from the *Indian Act* election rules under which the band had previously been operating due to a s.74(1) declaration. In refusing *quo warranto* and a declaration that an election under the regulations was invalid, Teitelbaum J. said that a reversion to band custom does not require a ministerial order.<sup>83</sup> Apparently that happens automatically when a section 74(1) ministerial order is repealed.<sup>84</sup> In *Jock*, however, the customs in question were not pre-existing customs which had been revived, but so-called custom election regulations made by a band council resolution. If those regulations were valid, then it seems that an *Indian Act* band council can create new customary election procedures by resolution. As authority to do so is not conferred on the band council by the *Act*, this suggests another source of authority, namely band custom. The case is nonetheless troubling because Teitelbaum J. did not consider whether Akwesasne band custom actually conferred this authority on the band council. The authority may have resided in the band as a whole, to be exercised in

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<sup>78</sup> See *Delgamuukw*, *supra* note 12 at 730, Lambert J.A. (dissenting) and at 763, Hutcheon J.A. (dissenting). The majority, however, held that the Aboriginal right of self-government had already been extinguished in British Columbia, at the latest when that province joined Confederation in 1871.

<sup>79</sup> In this context, the *expressio unius* rule (see *supra* note 26) is rendered inapplicable by the rules favouring the preservation of the Aboriginal right of self-government.

<sup>80</sup> *Supra* note 63.

<sup>81</sup> Cited *ibid.* at 360.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at 368. Note that the claim for a declaration was not pursued by the applicants for procedural reasons.

<sup>84</sup> See also *supra* note 63.



accordance with custom, whether by referendum or some other means.<sup>85</sup> The band council seems to have assumed authority to make custom election regulations without evidence that it had customary power to do so.<sup>86</sup>

*Sparvier*<sup>87</sup> involved an application to quash a decision of an election Appeal Tribunal made under the *Cowessess Indian Reserve Election Act*. According to Rothstein J., that *Act*, which had been adopted by the Cowessess Band in 1980,

codified, at least to some extent, the Band's customs as the basis for selecting a chief and councillors. This reversion to Band custom was approved by the federal government on the 10th day of November, 1980, when Order in Council P.C. 6016 was amended by deleting from the Schedule thereto, the Cowessess Band of Indians. The effect of this deletion was that members of the Cowessess Band would no longer select their Chief and Councillors pursuant to the *Indian Act* ... but rather, according to the custom of their Band. As a result, the *Cowessess Indian Reserve Elections Act* enacted by the Cowessess Indian Band No. 73 now governs the election of chief and councillors.<sup>88</sup>

Unfortunately, Rothstein J. did not specify whether the *Cowessess Indian Reserve Election Act* had been adopted by band council resolution, referendum, or other means. He nonetheless proceeded on the basis that the *Act* was valid. As authority for Indian bands or band councils to pass Acts governing elections is not provided by the *Indian Act*, this

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<sup>85</sup> See *Bone*, *supra* note 60 at 141, where Heald J. said that "it is the Band itself, not the Band Council, that has the power to determine what constitutes the Band's custom." On this issue, Heald J. expressed agreement with Strayer J.'s statement in *Bigstone*, *supra* note 72 at 117, that "[u]nless otherwise defined in respect of a particular band, 'custom' must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus."

<sup>86</sup> Compare *Six Nations*, *supra* note 61 at 144-45, where Rouleau J. suggested that a referendum would be illegal as a means of determining whether a band council should be elected or selected by custom if the holding of a referendum violated band custom. In his view, s. 35 of the *Constitution Act, 1982* "entrenches the customs of aboriginal peoples, but if the latter decide that they will no longer elect the band council in accordance with custom, they cannot be accused of infringing their own customs." In other words, an Aboriginal people can decide to dispense with their own customs, but for that decision to be valid they must abide by customary decision-making procedures in reaching it. See also *Badger F.C.T.D.*, *supra* note 61, where Strayer J. declined to deal with the validity of a referendum or band council resolution purporting to approve reversion to band custom for selection of the band council.

<sup>87</sup> *Supra* note 63.

<sup>88</sup> *Sparvier*, *supra* note 63 at 149-50. Order-in-Council P.C. 6010, dated 12 November 1951, had brought the Cowessess Band under the *Indian Act* electoral provisions.

<sup>89</sup> *Ibid.* at 150.

authority must be derived from some other source, namely the inherent jurisdiction of the band as a self-governing entity.<sup>90</sup>

The *Jock* and *Sparvier* decisions reveal that the *Indian Act*, by expressly maintaining the validity of band custom for the selection of band councils, has acknowledged that the jurisdiction of Indian bands and their governing councils is not limited to the by-law making powers set out in the *Act*. Bands have inherent rights of self-government that can be used to codify, and no doubt modify, their procedures for the selection of their chiefs and councillors.<sup>91</sup>

It might, however, be argued that preservation of Indian bands' inherent jurisdiction to develop their own customs for selection of their leaders is a legislatively sanctioned exception to the general scheme of the *Indian Act*, which in most other respects limits band councils' powers to those which are specifically set out in the *Act*.<sup>92</sup> But this argument, even if valid, is self-defeating because it contains an admission that the inherent right of self-government was not extinguished by the *Indian Act*. Moreover, by recognizing the existence of that right in the context of the selection of band councils, Parliament has also acknowledged that the right has not been generally extinguished by other prerogative or legislative acts. As the right of self-government is still exercisable, albeit in attenuated form, it must have been an "existing" right in 1982 when the *Constitution Act, 1982* came into force. As such, it is constitutionally

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<sup>90</sup> See *Bone*, *supra* note 60 at 141-42, where Heald J. wrote:

I do not think that the power of the Band to choose its council in a customary manner is a "power conferred on the Band" as is contemplated by s. 2(3)(a) of the *Indian Act*. Rather it is an inherent power of the Band; it is a power the Band has always had, which the *Indian Act* only interferes with in limited circumstances, as provided for under s. 74 of the *Act*.

<sup>91</sup> Neither *Jock*, *supra* note 63, nor *Sparvier*, *supra* note 63, indicates that the election procedures must be based on immutable custom. On the contrary, both judgments suggest that the procedures do not lose their customary nature by being set out in legislative form. See also *Bone*, *supra* note 60. In *Bigstone*, *supra* note 72 at 117, Strayer J. stated that, in circumstances where "a newly re-established band whose circumstances are vastly different ... from those of the band dissolved some 90 years earlier, it is not surprising that innovative measures would have to be taken to establish a contemporary 'custom.'" This approach is consistent with the Supreme Court of Canada's rejection of a frozen rights approach to s. 35(1) of the *Constitution Act, 1982* in *Sparrow*, *supra* note 9 at 1093: "the phrase 'existing aboriginal rights' must be interpreted flexibly to permit their evolution over time." Compare *Van der Peet*, *supra* note 7. See also *supra* notes 73 and 85.

<sup>92</sup> See *Joe v. John*, [1991] 3 C.N.L.R. 63 at 70 and 76 (F.C.T.D.). Compare *Joe v. Findlay* (1987), 12 B.C.L.R. (2d) 166 (S.C.). Another exception involves a band's jurisdiction to make custom for adoption, which is also sanctioned by the *Indian Act*: see *supra* note 73.

protected by section 35(1).<sup>93</sup> Any limitations on the right in the *Indian Act* would therefore be invalid from that time forward unless they could be justified under the test laid down in *Sparrow*.<sup>94</sup> As a result, since 1982, at least, the jurisdiction of Indian bands and their governing councils has not been limited to the by-law making authority set out in that *Act*.<sup>95</sup>

It is therefore concluded that a band council's jurisdiction includes both the by-law making authority described in the *Indian Act* and any inherent authority that the band council exercised prior to being brought under the *Act*.<sup>96</sup> In fact, the by-law making authority itself may be a re-expression in statutory form of part of the jurisdiction which band councils already had.<sup>97</sup> To that extent, the *Indian Act* provisions respecting the authority to make by-laws would be merely declaratory. It follows from this that band councils do not exercise their authority as

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<sup>93</sup> See *Partners in Confederation* *supra* note 7 at 35. Compare the decisions cited *supra* note 12. None of those decisions, however, took account of the implications of the *Indian Act* definition of "council of the band" for the status of the right of self-government as an existing right under s. 35(1) of the *Constitution Act, 1982*.

<sup>94</sup> See *supra* note 10. Limitations on Indian custom would also be invalid if they did not meet the test because the right of an Indian band to be governed by its own custom is an Aboriginal right protected by s. 35(1) of the *Constitution Act, 1982* see *Tagornak*, *supra* note 73; and *Six Nations*, *supra* note 61. Compare *Sawridge*, *supra* note 4.

<sup>95</sup> Compare the cases cited, *supra* note 67; and *Sault v. Mississaugas of the New Credit Indian Band Council*, [1989] 2 F.C. 701 (T.D.), where s. 35(1) was not invoked. Another contrary authority, *R. v. Stacey* (1981), 63 C.C.C. (2d) 61 (Que. C.A.), was decided before the *Constitution Act, 1982* was enacted. Note also that the jurisdiction of a band might be broader than that of its council, depending on the extent of the council's authority under band custom: see *supra*, notes 73, 85, and 86.

<sup>96</sup> This conclusion applies equally to band councils that were brought under the *Indian Act*'s electoral provisions by a s. 74(1) declaration made prior to the enactment of the *Constitution Act, 1982* and to band councils that were not. This is because a band's right to select its council by customary means is not extinguished by a s. 74(1) declaration. The case law clearly shows that the effect of such a declaration is merely to suspend that right, as it revives automatically upon the repeal of the declaration: see *supra* note 63. Rights that are capable of revival in this way must have been "existing" rights within the meaning of s. 35(1) of the *Constitution Act, 1982* even if unexercisable when that section came into force: see "Constitutional Rights," *supra* note 17 at 258. Another consequence of this might be that a s. 74(1) declaration, if made without the consent of the band in question, could be challenged as a violation of the band's right, which was constitutionalized in 1982, to select its council in accordance with its own custom. A challenge of this sort could probably be brought as well if consent was originally given but later withdrawn. If this is correct, a band could use its constitutional right to select its council by custom to force the Minister to repeal a s. 74(1) order.

<sup>97</sup> This possibility was not considered in *Public Service Alliance of Canada v. St. Regis Indian Band*, [1982] 2 S.C.R. 72 [hereinafter *PSAC*], where Martland J. said at 76: "The powers exercisable by the Council and the Band arise by virtue of the provisions of the *Indian Act*." See also *Bear v. John Smith Indian Band* (1983), 26 Sask. R. 280 (Q.B.).

mere delegates of Parliament.<sup>98</sup> Neither their existence nor the entirety of their powers is derived from that source.<sup>99</sup>

We are now in a position to address the issue of whether the *Charter* applies to band council governments. As band councils are not mere delegates of Parliament, they may not be within the scope of section 32(1), which, as we have seen, makes the *Charter* applicable to the federal and provincial governments.<sup>100</sup> It will be recalled as well that

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<sup>98</sup> This conclusion does not conflict with case law which has held that a band council is a “federal board, commission or other tribunal” within the meaning of ss. 2 and 18 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as am. by S.C. 1990, c. 8, ss. 1 and 4: see *Riderv. Ear* (1979), 103 D.L.R. (3d) 168 (Alta. Q.B.); *Gabriel v. Canatonquin*, [1978] 1 F.C. 124 (T.D.), aff’d [1980] 2 F.C. 792 (C.A.); *Beauvais v. Canada*, [1982] 1 F.C. 171 (T.D.); *Jock*, *supra* note 63 at 361-63; and *Frank v. Bottle*, [1994] 1 F.C. 171 (T.D.). Section 2 of the *Federal Court Act* defines “federal board, commission or other tribunal” as:

any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

The fact that band councils exercise powers conferred on them by the *Indian Act*, *supra* note 28, as was held in the *Jock* decision, does not mean that they cannot also have inherent jurisdiction or that the *Indian Act* provisions conferring powers on them cannot be at least in part declaratory: see *Bigstone*, *supra* note 72 at 116-18; and *Bone*, *supra* note 60 at 140-42.

<sup>99</sup> Compare F. Cassidy & R.L. Bish, eds., *Indian Government: Its Meaning in Practice* (Lantzville, B.C.: Oolichan Books, 1989) at 40-42; see also *Whitebear Band Council v. Carpenters Provincial Council* (1982), 15 Sask. R. 37 at 43-44 (C.A.); *Paul Band*, *supra* note 67 at 196. In *PSAC*, *supra* note 97 at 78, Martland J. stated that “[t]he Band Council is a creature of the *Indian Act*.” However, as Martland J. did not consider the effect of the definition of “council of the band” in s. 2(1), that statement appears to have been made *per incuriam*. As Woodward pointed out, *supra* note 62 at 166, note 176, the broad statements made on occasion by the courts regarding band councils tend to be “flawed by overgeneralization.”

<sup>100</sup> See Wildsmith, *supra* note 45 at 39. Section 32(1) of the *Charter* is discussed in the text accompanying *supra* notes 18-36. Compare *Manitoba Inquiry*, *supra* note 23 at 333. See also *Hatchard*, *supra* note 5, which involved a band by-law prohibiting the possession of intoxicants on a reserve. In that case a band constable, who was employed by and derived his authority solely from the band council, searched the accused’s luggage when it was brought onto the Big Trout Lake Reserve in a remote area of northern Ontario. The accused contended that the search contravened s. 8 of the *Charter*, and therefore the illegal narcotics which were found should be excluded as evidence under s. 24(2). Stach J., at 109, decided that the constable was neither a “peace officer” under s. 2 of the *Criminal Code*, *supra* note 12, nor a private citizen: “the scheme of the *Indian Act*, in relation to elected band councils, introduces a semblance of government-like organization in a ‘body of Indians’ specifically recognized by statute. That degree of organization and that kind of structure does not comport well with most notions of ‘private citizen’ activity.” Stach J. proceeded on the assumption, without deciding the issue, that the *Charter* applied to the actions by the constable. He nonetheless concluded, at 115, that the evidence should not be excluded under s. 24(2) because

the potential harm to the integrity of the judicial system from excluding the evidence will be so great that it is the exclusion of the evidence and not its admission which would

section 25 provides that the “guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” The inherent authority exercised by band councils is part of the bands’ Aboriginal right of self-government. To the extent that the authority of band councils is derived from the *Indian Act*,<sup>101</sup> the powers conferred on them by the *Act* would appear to be “other rights or freedoms that pertain to the aboriginal peoples” within the meaning of section 25.<sup>102</sup> As both their inherent and statutory authority are protected by that section against abrogation or derogation by the *Charter*, it follows that the *Charter* cannot generally apply to limit

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bring the administration of justice into disrepute.

The Canadian community at large would be shocked, I think, if the collective effort of a remote Aboriginal community to remove from its midst the social destructiveness of intoxicants were met with the exclusion of essential evidence in the circumstances as I have found them to be.

See also *Laforme*, *supra* note 5, where it was held that a band by-law prohibiting the sale of intoxicants on a reserve did not violate s. 15(1) of the *Charter* because it was not discriminatory (s. 32(1) of the *Charter* was not referred to). Compare *Campbell*, *supra* note 4, where it was held that s. 85.1 of the *Indian Act*, *supra* note 28, which authorizes band councils to make by-laws respecting the possession and sale of intoxicants on reserves, violates s. 15(1) but is justified under s. 1 of the *Charter* as a reasonable limit prescribed by law. Neither *Hatchard* nor *Laforme* was mentioned in *Campbell*.

<sup>101</sup> That is, to the extent, if at all, that the *Act*’s by-law making provisions convey authority on band councils which they did not already have as part of the bands’ inherent right of self-government.

<sup>102</sup> Accord Wildsmith, *supra* note 45 at 38; compare at 27-29, discussed *infra* note 142. See also Sanders, *supra* note 47 at 327; and Pentney, *supra* note 34 at 56-57. Compare *Corbiere* *supra* note 4, where Strayer J. held s. 77(1) of the *Indian Act*, *supra* note 28, which limited the right to vote in band council elections to band members who are “ordinarily resident on the reserve,” to be unconstitutional because it violates s. 15(1) of the *Charter* by discriminating against non-resident members. Section 25 of the *Charter* was not mentioned in the judgment, perhaps because the provision in question, instead of conferring rights or freedoms, negated them. *Corbiere* therefore shows that the *Charter* can be used to strike down aspects of the *Indian Act* which restrict the rights or freedoms of the Aboriginal peoples: for discussion, see T. Isaac, “Case Commentary: *Corbiere v. Canada*” [1994] 1 C.N.L.R. 55. The case did not decide that the *Charter* applies to those aspects of the *Act* which confer rights or freedoms on the Aboriginal peoples to whom it applies. Moreover, in *Education Reference* *supra* note 42 at 1206, Estey J. said in *obiter dictum* that s. 91(24) of the *Constitution Act, 1867* *supra* note 12, “authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others”: see also the text accompanying *supra* note 59. This suggests that, even without s. 25, the *Charter* could not be used by other Canadians to challenge the rights and freedoms conferred on Indians by the *Indian Act*. However, in *Campbell*, *supra* note 4 at 160, Wright J. stated:

While I have not in this judgment dealt with s. 35(1) of the *Constitution Act, 1982* and s. 25 of the *Charter*, both of which relate to aboriginal rights, I am certainly aware of these provisions, but nevertheless, I am not prepared to accept, at least at this point in time, that beneficial federal legislation pursuant to s. 91(24) [of the *Constitution Act, 1867*] constitutional authority is free from the strictures of s. 15(1).

the exercise of their powers.<sup>103</sup> However, for reasons already discussed in relation to traditional Aboriginal governments, the guarantee of gender equality in section 28 does apply to band councils in the exercise of both their inherent and statutory authority.<sup>104</sup>

#### IV. OTHER FORMS OF ABORIGINAL GOVERNMENT

The issue of the application of the *Charter* arises in another context whenever an Aboriginal government is recognized by the Canadian government and, as usually happens today, the recognition is confirmed by legislation. For example, a land claims agreement might contain provisions for self-government by the Aboriginal people who signed the agreement. In the absence of an express provision regarding its application, does the *Charter* apply to the Aboriginal government in that situation or not?

To answer this question, one must examine the circumstances of that particular Aboriginal people and the nature of the recognition that has been accorded to its government. For the purposes of illustration, we will discuss two instances of recognition of Aboriginal governments, the first involving the James Bay Crees in Quebec and the second involving the Sechelt Indians in British Columbia.

##### A. *Cree Local Government Under the James Bay and Northern Quebec Agreement*

On 11 November 1975, the James Bay and Northern Quebec Agreement (Agreement) was signed to settle the land claims of the Crees and Inuit of northern Quebec and allow the James Bay hydro-electric project to proceed.<sup>105</sup> No attempt will be made here to analyze this complex Agreement as a whole, or to enter into the controversy over

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<sup>103</sup> The argument against the application of the *Charter* in this context follows the same lines as the more detailed argument presented above with respect to traditional Aboriginal governments: see *supra* notes 18-44 and accompanying text.

<sup>104</sup> See *supra* notes 45-56 and accompanying text.

<sup>105</sup> The "Agreement," *supra* note 28, was ratified by federal and provincial legislation, especially the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32; and *An Act Approving the Agreement concerning James Bay and Northern Quebec*, S.Q. 1976, c. 46 (now R.S.Q. 1977, c. C-67). See also *Quebec (A.G.) v. Cree Regional Authority*, [1991] 3 F.C. 533 (C.A.), leave to appeal refused, [1991] 3 S.C.R. x.

its implementation.<sup>106</sup> Instead, our modest goal is to segregate one part of the Agreement, dealing with Cree local government over Category 1A lands,<sup>107</sup> and to determine whether the *Charter* applies in that context.<sup>108</sup>

Section 9.0.1 of the Agreement provides that, “[s]ubject 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 1A lands allocated to them.” The section goes on to outline in broad terms the contents of the proposed legislation. Section 9.0.2 provides, *inter alia*, that the *Indian Act* applies to such lands until the legislation is enacted. Parliament complied with the section 9.0.1 requirement in 1984 by enacting the *Cree-Naskapi (of Quebec) Act*<sup>109</sup>

The *Cree-Naskapi Act* in section 12, incorporates eight *Indian Act* Cree bands, and goes on to provide in the following section:

13. On the coming into force of this Part, the *Indian Act* Cree bands listed in paragraphs 12(1)(a) to (h) cease to exist, and all their rights, titles, interests, assets, obligations and liabilities, including those of their band councils, shall vest, respectively, in the bands listed in paragraphs 12(2)(a) to (h).

Section 21 sets out the objects of the bands, including use, management, administration, and regulation of Category 1A lands and the promotion

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<sup>106</sup> See Cassidy & Bish, *supra* note 99 at 144-54; W. Moss, “The Implementation of the James Bay and Northern Quebec Agreement,” in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) 684; M. Coon-Come, Grand Chief, Grand Council of the Crees (of Quebec) “Implementation: How Will First Nations Government Happen?” in F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1992) 114. The Crees have challenged, among other things, the validity of the land surrender provision in the “Agreement,” *supra* note 28, on the grounds that the federal and provincial governments have not fulfilled their obligations under the “Agreement”: see *Hydro-Quebec*, *supra* note 41.

<sup>107</sup> “Category 1A lands are lands set aside for the exclusive use and benefit of the respective James Bay Cree bands”: “Agreement,” *supra* note 28, s. 5.1.2.

<sup>108</sup> Cree local government over Category 1B lands, the Cree Regional Authority, the James Bay Regional Zone Council, and local government north of the 55th parallel, all of which are provided for by the “Agreement,” *supra* note 28, ss. 10-12, will not be examined.

<sup>109</sup> S.C. 1984, c. 18 [hereinafter *Cree Naskapi Act*]. Note that the *Act* applies to both Cree local government under the “Agreement,” *supra* note 28, and Naskapi local government under the “Northeastern Quebec Agreement” in Canada, Department of Indian and Northern Affairs, *Northeastern Quebec Agreement* (Ottawa: Indian Affairs and Northern Development, 1984) [hereinafter “Northeastern Quebec Agreement”], signed with the Naskapis de Schefferville on 31 January 1978. For simplicity, our analysis of the legislation is confined to its application to James Bay Crees. However, the analysis should be equally applicable to the Naskapis, as their rights to local self-government under the *Act* are the same as those of the Crees. On implementation of the *Cree Naskapi Act* see *Reports of the Cree-Naskapi Commission* (Ottawa: The Commission, 1986/1988/1991/1994/1996) (Chair: R.F. Paul J.)

and preservation of “the culture, values and traditions of the Crees.” A further object is “to exercise the powers and carry out the duties conferred or imposed on the band or on its predecessor *Indian Act* band by any Act of Parliament or regulations made thereunder, and by the Agreements.”<sup>110</sup>

The *Cree-Naskapi Act* also provides for elected band councils,<sup>111</sup> through which the bands shall act “in exercising [their] powers and carrying out [their] duties under this Act.”<sup>112</sup> The statutory definition of the bands’ jurisdiction, to be exercised by the band councils, is contained mainly in by-law making powers set out in sections 45 to 48. Broad jurisdiction over matters of local concern is conferred by the following section:

45. (1) Subject to this section, a band may make by-laws of a local nature for the good government of its Category 1A ... land and of the inhabitants of such land, and for the general welfare of the members of the band, and, without limiting the generality of the foregoing, may make by-laws respecting ... . [Specific heads of jurisdiction, such as “health and hygiene,” “public order and safety,” “protection of the environment,” and “taxation [of certain interests in land] for local purposes” are then listed].

Sections 46 to 48 confer by-law making powers regarding “land and resource use and planning,” “zoning,” and “hunting, fishing and trapping and the protection of wildlife,” respectively. Certain by-laws, specifically those involving real property taxation, zoning, and hunting, fishing, and trapping, are subject to approval by the electors of the band at a special meeting or by referendum.

Section 55(1) provides that

a member of a band or any other interested person may make application to the Provincial Court or Superior Court of Quebec to have a by-law or resolution of the band quashed, in whole or in part, for illegality or for irregularity in the manner or form of its enactment or adoption.

For our purposes, this section raises the question of whether “illegality” includes contravention of the *Charter*. Apparently this was not Parliament’s intention, as section 56(2) provides that “[a]n application made under section 55 based on the illegality of the by-law or resolution may not be brought after six months after the coming into force of the by-law or resolution.” Reading sections 55 and 56 together, “illegality”

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<sup>110</sup> *Cree Naskapi Act* *supra* note 109, s. 21(j). The “Agreements” referred to are the James Bay and Northern Quebec Agreement, *supra* note 28; and the “Northeastern Quebec Agreement,” *supra* note 109.

<sup>111</sup> *Cree Naskapi Act* *supra* note 109, s. 25.

<sup>112</sup> *Ibid.* s. 26.



should be interpreted not to include contravention of the *Charter*, as it would be unconstitutional for a federal statute to place a time limit on legal action to challenge such a contravention, and statutes should be interpreted to preserve their constitutionality if possible.<sup>113</sup> But while section 55 does not provide for judicial review on *Charter* grounds, our inquiry does not end there, for the application of the *Charter* cannot be excluded by the terms of an ordinary statute.<sup>114</sup>

We therefore need to utilize the kind of analysis we used above in relation to *Indian Act* band council governments to determine whether the *Charter* applies to James Bay Cree local governments. We have seen that the James Bay Cree bands, acting through their band councils, are the successors to the *Indian Act* bands which they replaced.<sup>115</sup> The band councils as well succeeded to the *Indian Act* band councils, with the same councillors remaining in office for up to two years after the relevant part of the *Cree-Naskapi Act* came into force.<sup>116</sup> While the statutory jurisdiction that the new band councils can exercise is more extensive than that of their *Indian Act* predecessors, they are no more delegates of Parliament than the band councils they replaced.<sup>117</sup> Neither the Agreement nor the *Cree-Naskapi Act* took away the inherent right to govern themselves that the James Bay Cree retained under the *Indian Act*.<sup>118</sup> The source of the jurisdiction of the James Bay Crees over their lands and peoples originates in that inherent right, rather than in the legislation which regulates its exercise. So when section 45(1) of

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<sup>113</sup> See Hogg, *supra* note 44 at 859-60.

<sup>114</sup> Whether a statute could extend the application of the *Charter* by purporting to make it apply to an Aboriginal government which would not otherwise be subject to it is another question. Arguably not, as that might be tantamount to amending ss. 25 and 32 of the *Charter*. Compare Wildsmith, *supra* note 45 at 41.

<sup>115</sup> See the text following *supra* note 109.

<sup>116</sup> *Cree Naskapi Act* *supra* note 109, s. 58.

<sup>117</sup> Contrast *Waskaganish*, *supra* note 5, especially at 187 and 191-92.

<sup>118</sup> The "Agreement," *supra* note 28, s. 2.1, provides that, in consideration of the rights and benefits set out therein, "the James Bay Crees ... hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Québec" (the "Territory" is defined in s. 1.16 as the entire area included in the province of Quebec by the boundary extension Acts of 1898 and 1912: see the discussion in "Quebec's Boundaries," *supra* note 7; and M.E. Turpel, "Does the Road to Québec Sovereignty Run through Aboriginal Territory?" in Drache & Perin, *supra* note 7 at 93). This cession relates only to Aboriginal land rights, not to the right of self-government, which, like other Aboriginal rights, is presumed to continue until extinguished by clear and plain intent: see *supra* notes 77-78 and accompanying text; and *Cree Regional Authority. Robinson* (1991), [1992] 1 F.C. 440 (T.D.) [hereinafter *Robinson*] in which Rouleau J., applying the clear and plain intent test, held that the rights of the Crees could only be extinguished expressly.

the *Cree-Naskapi Act* provides that a band “may make by-laws of a local nature for the good government of its Category 1A ... land and of the inhabitants of such land, and for the general welfare of the members of the band,” that is a declaratory affirmation of pre-existing authority rather than an original source of jurisdiction.<sup>119</sup> For this reason, the James Bay Cree band councils, like the *Indian Act* band councils before them, are not brought within the general scope of the *Charter* by section 32(1).<sup>120</sup>

With respect to section 25 of the *Charter*, the argument that it provides additional protection is even stronger where Cree local government is concerned.<sup>121</sup> While *Indian Act* band council governments must rely on the general words “other rights or freedoms” to shield their statutory jurisdiction from abrogation or derogation by the *Charter*, the rights of the James Bay Crees to govern themselves in accordance with the provisions of section 9.0.1 of the Agreement, as implemented by the *Cree-Naskapi Act*<sup>122</sup> are specifically shielded by

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<sup>119</sup> In *Eastmain No. 1*, *supra* note 5, a band council by-law, adopted under s. 45 of the *Cree-Naskapi Act*, *supra* note 109, to impose a curfew on people under sixteen years of age, was challenged on the basis that it discriminated on the basis of age. Counsel for the accused did not rely on s. 15 of the *Charter*, but argued instead that the authority which had been delegated to the band by Parliament did not include power to discriminate in this way. Lavergne P.C.J. rejected this argument and upheld the by-law. He held that the Crees’ right of local government under the “Agreement,” *supra* note 28 and the *Cree-Naskapi Act* *supra* note 109, is constitutionalized by s. 35(3) of the *Constitution Act, 1982* *supra* note 8, which makes it unique and unlike regulatory power which is delegated to other bodies. He concluded, at 67, that the “Agreement” and the *Act* “must be interpreted, by necessary implication, as conferring the Cree bands full power to legislate within specified fields, according to community needs identified by themselves. In this perspective, the Court agrees with the proposition that the Crees hold some sort of residual sovereignty as regards their local governments.” See also *Eastmain No. 2*, *supra* note 5, discussed *infra* note 121.

<sup>120</sup> See T. Isaac, “The Constitution Act, 1982 and the Constitutionalization of Aboriginal Self-Government in Canada: Cree-Naskapi (of Quebec) Act” [1991] 1 C.N.L.R. 1 at 5-6 [hereinafter “Constitutionalization”].

<sup>121</sup> Wildsmith, *supra* note 45 at 39-40, writes: “The position of the land claims settlement agreements as a source of section 25 rights and freedoms is, unlike the *Indian Act* provisions, unassailable and unambiguous.” Wildsmith goes on to conclude that the Aboriginal government provisions in the “Agreement,” *supra* note 28, give rise to s. 25 rights and freedoms that are therefore shielded from the *Charter*. Compare *Waskaganish*, *supra* note 5, where s. 25 was not even mentioned in the court’s discussion of the application of the *Charter* to a Cree band council under the *Cree-Naskapi Act* *supra* note 109. In *Eastmain Band No. 2*, *supra* note 5, s. 25 was raised to shield a Cree curfew by-law against a s. 15(1) *Charter* challenge that alleged discrimination on the basis of age. The court, at 18, said that it did not have to deal with the s. 25 argument because discrimination had not been established, and even if it had been, the by-law would be saved by s. 1 of the *Charter*.

<sup>122</sup> Section 2.1 of the “Agreement,” *supra* note 28, provides that the Crees are surrendering their land rights “[i]n consideration of the rights and benefits herein set forth.” Section 9 of the “Agreement” clearly sets forth a “right” of Cree local self-government because s. 9.0.4 provides that

section 25(b), which protects “any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”<sup>123</sup> This provision therefore provides constitutional protection to Cree local government from all the provisions of the *Charter* except section 28, which, as we have seen, overrides section 25 in the interest of gender equality.<sup>124</sup>

### B. *Sechelt Indian Government*

On 17 June 1986, the *Sechelt Indian Band Self-Government Act*<sup>125</sup> received royal assent. That federal statute, which was enacted pursuant to the wishes of the members of the Sechelt Band expressed in a referendum,<sup>126</sup> created a new legal entity, the Sechelt Indian Band (the Band), to replace the *Indian Act* Sechelt band.<sup>127</sup> The statute also replaced the council of the *Indian Act* Sechelt band with a new governing body, the Sechelt Indian Band Council (the Council), with legislative powers beyond the by-law making powers conferred on band councils by the *Indian Act*.<sup>128</sup> In addition, the legislation provided for the establishment of the Sechelt Indian Government District Council (the District Council), with such legislative powers as might be transferred to it from the Band or Council by the Governor in Council or granted to it by an Act of the British Columbia legislature.<sup>129</sup>

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the “provisions of this Section can only be amended with the consent of Canada and the interested Native party.” As s. 9 provides for a right in partial exchange for surrendered rights, the right of self-government accorded by it must have the same protection under s. 25 of the *Charter* as the rights which have been given up: see Wildsmith, *supra* note 45 at 40.

<sup>123</sup> See “Constitutionalization,” *supra* note 120 at 6 and 11. This provision was amended, and s. 35(3) was added, to ensure that pre-*Charter* as well as post-*Charter* land claims agreements would be constitutionally protected: *Amendment Proclamation* *supra* note 37. The James Bay Crees were instrumental in having these amendments agreed to at the 1983 First Ministers’ Conference on Aboriginal Affairs: see R. MacGregor, *Chief: The Fearless Vision of Billy Diamond* (Markham, Ont.: Penguin Books, 1990) at 201-02.

<sup>124</sup> See *supra* notes 45-56. Substantive constitutional protection for Cree local government, which prevents it from being infringed by legislation that does not meet the *Sparrow* test, *supra* note 10, is also provided by section 35(3) of the *Constitution Act, 1982* *supra* note 8: see Cassidy & Bish, *supra* note 99 at 147-48; “Constitutionalization,” *supra* note 120; *Eastmain No. 1*, *supra* note 5 at 66; and *Robinson*, *supra* note 118 at 464.

<sup>125</sup> S.C. 1986, c. 27 [hereinafter *Sechelt Band Act*].

<sup>126</sup> *Ibid.* preamble.

<sup>127</sup> *Ibid.* ss. 5-6.

<sup>128</sup> *Ibid.* ss. 8, 9, 14-16, and 44.

<sup>129</sup> *Ibid.* ss. 17-22. The *Sechelt Indian Government District Enabling Act* (S.B.C. 1987, c. 16, s. 3, provides that, where “the District Council enacts laws or bylaws that a municipality has power to enact under an Act of the Province, those laws or bylaws shall, for the purposes of this Act, be

Considering the Council first, it replaced the *Indian Act* band council as the governing body of the newly established Band. The Band took over all the rights and obligations of the *Indian Act* band and its council,<sup>130</sup> but the *Sechelt Band Act* obliges the Band to “act through the Council in exercising its powers and carrying out its duties and functions.”<sup>131</sup> It would thus appear that the Council, in addition to the legislative powers specifically conferred on it by the *Sechelt Band Act* can exercise any inherent right of self-government which the *Indian Act* band council could have exercised prior to being replaced by the Council.<sup>132</sup> While it is beyond the scope of this article to examine the extent of the right of self-government of the Sechelt *Indian Act* band council, it can be assumed from our earlier discussion of *Indian Act* band council governments generally that this right was probably not limited to the by-law making authority conferred on that band council by the *Indian Act*.<sup>133</sup> Thus the Council, while created by the *Sechelt Band Act* succeeds to and exercises the powers of a band council that was probably not a mere delegate of Parliament.<sup>134</sup> Arguably, therefore, the Council is not encompassed by section 32(1)(a) of the *Charter*, which makes the *Charter* apply to the Parliament and government of Canada.<sup>135</sup>

Turning to the District Council, it owes its existence entirely to the *Sechelt Band Act*. Its membership is the same as that of the

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deemed to have been enacted under the authority of that Act of the Province.” For a descriptive analysis of the government structure for the Sechelt Indian Band, see J.P. Taylor & G. Paget, “Federal/Provincial Responsibility and the Sechelt,” in D.C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 297. For a more critical perspective, see Cassidy & Bish, *supra* note 99 at 135-44.

<sup>130</sup> *Sechelt Band Act* *supra* note 125, s. 5(2).

<sup>131</sup> *Ibid.* s. 9. The capacity and powers of the Band as a legal entity are those of a natural person (s. 6), and are to be carried out in accordance with the Band’s constitution (s. 7), created pursuant to ss. 10-11.

<sup>132</sup> Section 4 of the *Sechelt Band Act* *supra* note 125, makes clear that there was no intention to take away powers which the *Indian Act* band council previously had: “The purposes of this Act are to enable the Sechelt Indian Band to exercise and maintain self-government on Sechelt lands and to obtain control over and the administration of the resources and services available to its members.”

<sup>133</sup> See *supra* notes 58-99 and accompanying text. Note also that s. 3 of the *Sechelt Band Act*, *supra* note 125, provides: “For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the members of the Sechelt Indian Band, or any other aboriginal peoples of Canada, under section 35 of the *Constitution Act, 1982*.” Thus, if the Sechelt people had an inherent right of self-government prior to the passage of the *Sechelt Band Act* that right was preserved.

<sup>134</sup> Compare Cassidy & Bish, *supra* note 99, especially at 141: “The Sechelt approach is based on delegated powers.”

<sup>135</sup> See text between *supra* notes 18 and 19.

Council,<sup>136</sup> but it is a distinct legal entity established by the *Act*.<sup>137</sup> Its powers consist of a combination of municipal powers granted to it by the British Columbia legislature and powers transferred to it from the Band or the Council.<sup>138</sup> With respect to its municipal powers, the District Council would no doubt be exercising authority delegated to it by the provincial legislature, and therefore would be within the scope of section 32(1)(b) of the *Charter*, which makes the *Charter* apply to the legislatures and governments of the provinces.<sup>139</sup> However, powers transferred to it from the Band or Council might include powers originating from the Sechelt's inherent right of self-government. In exercising those powers, the District Council would not be a delegate of either Parliament or the provincial legislature. To that extent, at least, the District Council should not be subject to the *Charter*.<sup>140</sup>

Section 25 of the *Charter* is also relevant here. Any Aboriginal, treaty, or other rights or freedoms which the Sechelt people have would be protected by section 25 against abrogation or derogation by the *Charter*. So their inherent right of self-government, as well as any governmental rights or freedoms conferred on the Council or the District Council by either federal or provincial legislation, would be shielded from the *Charter* by section 25.<sup>141</sup> It follows from this that they would not be subject to the *Charter* generally in exercising any of their powers, including any powers delegated to them by or pursuant to the *Sechelt Band Act*.<sup>142</sup> However, for the reasons already discussed in

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<sup>136</sup> *Sechelt Band Act* *supra* note 125, s. 19(2).

<sup>137</sup> *Ibid.* ss. 18 and 19(1).

<sup>138</sup> *Supra* note 129.

<sup>139</sup> See *Re McCutcheon and City of Toronto* (1983), 41 O.R. (2d) 652 at 662 (H.C.J.), where Linden J. said that "[s]ection 32(1) contemplates municipal by-laws being subject to the *Charter*." See also *Hardie v. Sutherland (District of)* (1985), 68 B.C.L.R. 244 (S.C.); and *Conrad v. Halifax (County of)* (1993), 124 N.S.R. (2d) 251 at 270 (N.S.S.C.), *aff'd* on other grounds (1994) 130 N.S.R. (2d) 305 (C.A), leave to appeal refused [1994] 3 S.C.R. vi.

<sup>140</sup> It would not be very workable for the District Council to be subject to the *Charter* in the exercise of some of its powers and not others, as that would create confusion and the potential for costly litigation. The preferable approach would be for either none or all of the District Council's powers to be subject to the *Charter*. For reasons given in the next paragraph regarding s. 25 of the *Charter*, the option most consistent with the Constitution is for the *Charter* not to apply at all.

<sup>141</sup> See *supra* notes 100-103 and accompanying text.

<sup>142</sup> Accord Wildsmith, *supra* note 45 at 27-28. However, he goes on to suggest, at 28, that [w]ithout saying the section 25 right to self-government is subject to the *Charter*, a court might nevertheless vindicate values embodied in the *Charter* by holding that Parliament never intended that the powers it conferred upon the [Sechelt] band council would be used to deny freedom of expression or religion, for example.

relation to traditional Aboriginal governments, *Indian Act* band councils, and James Bay Cree local government, they would be subject to the gender equality guarantee in section 28.<sup>143</sup>

## V. CONCLUSION

There are compelling legal arguments for concluding that, apart from the gender equality provision in section 28, the *Charter* does not apply to the forms of Aboriginal government that we have considered in this article. Courts may, however, be tempted to downplay these arguments out of fear that fundamental rights and freedoms will not be protected if Aboriginal governments are permitted to function outside the scope of the *Charter*. That kind of judicial activism should be avoided. The issue of whether or not to apply the *Charter* is a political one that should not be decided until the matter has been thoroughly investigated and publicly debated, and the consequences of applying the *Charter* to Aboriginal governments adequately understood. We are a long way from achieving anything like an adequate understanding of this matter at the present time.<sup>144</sup>

The *Charter* was designed to apply to parliamentary forms of government based on Euro-Canadian laws and traditions.<sup>145</sup> The

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At 28-29, he also suggests that the *Canadian Bill of Rights* S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*], might be "a likely source of limitations on statutory forms of Indian self-government ... . There is no counterpart to section 25 of the Charter in the *Canadian Bill of Rights* and neither the *Indian Act* nor the *Sechelt Indian Band Self-Government Act* expressed to operate notwithstanding the Bill." See also *Waskaganish*, *supra* note 5, where Ouellet J. found the *Bill of Rights* to be applicable to a Cree Band Council under the *Cree-Naskapi Act* *supra* note 109. However, both Wildsmith and Ouellet J. assumed that the powers exercised by the band councils under those *Acts* were conferred by statute, which we have seen is not necessarily the case. To the extent that band councils exercise powers which originate in the Aboriginal peoples' inherent right of self-government, no limitation can arise from implied legislative intent, nor would the *Bill of Rights* which is restricted in its application to federal legislation, be applicable. This is not to say, however, that the Supreme Court of Canada will not create limitations on its own initiative, given that it has already sanctioned limitations of s. 35 Aboriginal rights in *Sparrow*, *supra* note 9, by deciding that federal legislation can validly infringe those rights if it meets the Court's justificatory test. See also *Badger S.C.C.*, *supra* note 32; and *Gladstone*, *supra* note 10.

<sup>143</sup> See *supra* notes 44-56 and accompanying text.

<sup>144</sup> In my opinion, the decision in the *Charlottetown Accord* *supra* note 1, to apply the *Charter* to Aboriginal governments was made much too hastily, with insufficient thought given to the consequences.

<sup>145</sup> See M. Boldt & J.A. Long, "Tribal Philosophies and the Canadian *Charter* of Rights and Freedoms," in M. Boldt & J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165; and M.E. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3.

structures of those governments were well known when the *Charter* was introduced, and its potential impact, while far from certain, was nonetheless within a predictable range. Where traditional Aboriginal governments are concerned, this is not the case. Many Aboriginal peoples are still in the process of determining the form of the governments to be constituted through the exercise of their inherent right of self-government. Aboriginal courts have no official status at present, and may be structured very differently from other Canadian courts. Applying *Charter* rights, such as the right to counsel or the right to remain silent, to Aboriginal courts, for example, may constrain the structure of those courts, and oblige them to conform to culturally inappropriate Euro-Canadian models.

My fear is that the judiciary, perhaps in the context of a hard case, will decide that the *Charter* applies generally to Aboriginal governments before the consequences of that are adequately understood. Once that kind of decision has been made by the Supreme Court of Canada, it will be difficult to change without a constitutional amendment exempting Aboriginal governments from the *Charter*. In my opinion, the likelihood for such an amendment to be even debated, let alone adopted, would be very slight. If, on the other hand, the courts exercise judicial restraint and refuse to apply the *Charter* to Aboriginal governments, I am confident that the matter will be subjected to public scrutiny that will spark thorough investigation and discussion. That process will, I hope, lead to a political solution which will strike an appropriate balance between the individual and collective rights which are at the heart of this matter.