Is "Inherent Aboriginal Self-Government" Constitutional?

by Jeffrey K. Rustand

CANADIAN CONSTITUTION FOUNDATION

January 2010

About the Canadian Constitution Foundation

The Canadian Constitution Foundation is a registered charity, independent and non-partisan, with a unique charter which allows it to engage in litigation. The CCF receives no funding from governments. We rely on the voluntary contributions of Canadians to carry out our legal and education work. Our registered charitable number with the Canada Revenue Agency is **86617 6654 RR0001**.

Our Mission

We protect the constitutional freedoms of Canadians through education, communication and litigation.

Our Vision

We envision a Canada where:

- Every Canadian is equal before the law, and is treated equally by governments;
- There is freedom from fear and oppression;
- Canadians have the knowledge and motivation to recognize, protect and preserve their constitutional rights and freedoms;
- Individuals control their own destiny as free and responsible members of society;
- Governments are held accountable to our Constitution in making and applying laws, regulations and policies.

Our litigation priorities

Through education and public interest litigation, the Foundation supports:

- **Individual freedom** – the "fundamental freedoms" in section 2 of the *Charter*:
  - *freedom of association*;
  - *freedom of peaceful assembly*;
  - *freedoms of conscience and religion*;
  - *freedoms of thought, belief, opinion and expression*.
- **Economic liberty** – the right to earn a living, and to own and enjoy property, as part of the *Charter* section 7 right to "life, liberty and security of the person."
- **Equality before the law** – the *Charter* section 15 should mean equal freedom and equal opportunities for all Canadians, special privileges for none.

Cover design by Tarah Stock. Please note that the map of Canada featured on the cover page is an artist's rendering, and does not attempt to portray actual land claims.

Is "Inherent Aboriginal Self-Government" Constitutional?

Executive Summary

Since 1995 Canada's federal government has recognized an "inherent right of aboriginal self-government." While undoubtedly motivated by good intentions, this federal policy is not compatible with the Constitution of Canada.

The Constitution of Canada establishes two orders of government, the federal and the provincial, and these two orders exercise the totality of Canada's sovereign jurisdiction. There is no third order of government. Other governments in Canada (e.g., municipal governments; territorial governments) are established by federal or provincial legislation that delegates jurisdiction and authority to these bodies. Aboriginal self-government may be achieved through similar delegating legislation, and this has been done successfully (e.g., the *Indian Act*; *Sechelt Indian Band Self-Government Act*). This is fundamentally different from recognizing "inherent" aboriginal self-government power that is not derived from Crown sovereignty.

The only inherent government power in Canada is that which flows from Canadian sovereignty, referred to in law as Crown sovereignty. Section 35 of the *Constitution Act, 1982* protects aboriginal and treaty *rights* from the exercise of Canadian government powers, and the purpose of this protection is the reconciliation of pre-existing aboriginal societies with the sovereignty of the Crown.

Aboriginal communities can possess a right of internal self-regulation by which they manage their own affairs, the exercise of aboriginal rights, and the use of aboriginal title lands. This internal self-regulation does not involve coercive powers of government, and it does not require enabling legislation.

The federal policy's major error is treating aboriginal claims for self-government as a rights claim, when in fact it is a claim for governmental power.

Legislative and administrative means providing for aboriginal self-government exist within Canada's constitutional framework through delegation of powers and authority. These means are flexible and effective and today remain the most common means by which aboriginal self-government is achieved. The salutary objective of seeing aboriginal people manage their own affairs without being controlled by Ottawa's politicians and bureaucrats can be achieved within Canada's Constitution. There is no reason whatever for resorting to illegal and unconstitutional action.

The federal policy recognizing an inherent power of aboriginal government is as unnecessary as it is unconstitutional.

The Federal Government Policy on Aboriginal Self-Government

Since 1995 the federal government has recognized the existence of an "inherent aboriginal right of self-government"[1] as a right under section 35 of the *Constitution Act, 1982*, which states:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

By "self-government" is meant jurisdiction and authority like that exercised by other governments in Canada, including legislative jurisdiction to make enforceable laws like the laws of Parliament and provincial Legislatures. "Inherent" means self-originating, in this case an alleged right of self-government that originates in an aboriginal group and is not dependent for its existence on Crown sovereignty, or on the Constitution, or on federal legislation.[2]

A form of self-government may be validly created through federal legislation that delegates government powers and authority to an aboriginal community. Recognition of *inherent* government powers (powers that have not been delegated by Parliament) is incompatible with the Constitution, and contrary to over 125 years of jurisprudence.

Until 1995 the federal government acted with fidelity to the Constitution. When Prime Minister Brian Mulroney and the Premiers of the day attempted to insert an inherent aboriginal right of self-government into the Constitution through the Charlottetown Accord, they correctly understood that a constitutional order of aboriginal government could be achieved only by an amendment to the Constitution. This attempt was however rebuffed by Canadians in the 1992 referendum. Consequently, the federal government proceeded to invert its understanding of the Constitution by recognizing, as policy, the claimed inherent aboriginal right self-government as if it already existed in the Constitution without a constitutional amendment.

This paper explains why this federal government policy is incompatible with Canada's Constitution.

---

[1] The federal policy is described in detail at: www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp

[2] For an excellent discussion of the term "inherent self-government" see Gordon Gibson's discussion at pages 141-5 in his book *A New Look at Canadian Indian Policy*, Fraser Institute, 2009.

The Constitution

The Constitution of Canada is defined in section 52(2) of the *Constitution Act, 1982* to be composed of several constitutional texts, the most important of which are the *Constitution Act, 1867* and the *Constitution Act, 1982*. The 1867 Act primarily establishes Canada's federal structure and distributes sovereign legislative, executive and judicial authority. Its principal concern is distributing and regulating the exercise of sovereign power. The *Constitution Act, 1982* is primarily concerned with entrenching rights in the Constitution, most importantly, the rights guaranteed by the *Canadian Charter of Rights and Freedoms*, and the aboriginal and treaty rights recognized and affirmed by section 35. Equally important, it also provides in section 52(1) that the Constitution is the "supreme law of Canada," and provides in Part V the amending procedures that must be followed to amend the Constitution.

Canada is a sovereign country. Canada is also a constitutional monarchy, which means that by law sovereignty is reposed in the Crown, and that sovereign powers are distributed and controlled by the Constitution and by the body of rules and principles known as constitutional law. The federal and provincial governments are the only sovereign governments in all of Canada's territory.

The central characteristic of *government* is the exercise of *coercive* power. This means the power to interfere with the physical integrity and freedom of persons, to seize or determine ownership of their property and assets, to create rights and liabilities, to impose burdens, to determine citizenship, and to determine who can vote and be part of government itself. Recognizing an entity as "government" has serious implications.

For the sake of simplicity and brevity, this paper will focus primarily on Parliament and its legislative jurisdiction. But the same points apply in respect of executive and judicial authority, and in respect of the provincial order of government.

Our highest judicial authorities have consistently stated that Canada's sovereignty is Crown sovereignty, that the Constitution distributes all legislative jurisdiction to Parliament and the provincial Legislatures, that this distribution is exhaustive and exclusive, and that the jurisdiction is sovereign jurisdiction.[3] The scope and mode of exercise of this jurisdiction is provided in Part VI of the *Constitution Act, 1867* (see in particular sections 91 and 92). The only other federal law-making powers are those exercised by delegates of Parliament under the authority conferred on them by federal legislation.

[3] *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.); *A.G. Ontario v. A.G. Canada*, [1912] A.C. 571 (P.C.); *Re Gray* (1918), 57 S.C.R. 150; *Re: Initiative and Referendum Act*, [1919] A.C. 935 (P.C.); *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1951] S.C.R. 31; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; ; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (BCCA); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; .

In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (at page 1103) the Supreme Court of Canada summarized the constitutional situation vis-à-vis aboriginal rights:

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

Accordingly, only Canada's federal and provincial governments, and their delegates, can exercise governmental power.

This principle applies to aboriginal Canadians as well, for like other Canadians they too are citizens and are subject to, and entitled to the protection of, the Constitution and Canada's laws. Under federal legislation, hundreds of aboriginal communities exercise delegated self-government powers.[4] This is constitutionally valid.

Aboriginal peoples also have aboriginal and treaty rights, not possessed by other Canadians, and these rights are protected by section 35 of the *Constitution Act, 1982*. It is important to be clear on this section and its implications: Section 35 does not *create* any rights. It recognizes and affirms rights that existed in 1982. New treaty rights are limited to those acquired through land claims agreements.

Aboriginal and Treaty Rights

An aboriginal right is an *activity* that meets the test set out by the Supreme Court of Canada in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paragraph 46: an activity that at the time of contact with European civilization was "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."

An aboriginal right is a common law right, not a statutory right. Only the courts can determine the existence of an aboriginal right; it cannot be declared into existence by the federal government, nor can aboriginal rights be created by legislation. The Crown can, however, negotiate land claims agreements.

The word "right" in section 35 refers to the same conception of right as used in the *Canadian Charter of Rights and Freedoms*: a shield that protects non-governmental activities and interests from interference and encroachment by coercive government power. *An aboriginal right is most definitely not a "sword" that affirms the exercise of governmental power.*

[4] E.g., the *Yukon First Nations Self-Government Act*, S.C., 1994, c. 35; *Sechelt Indian Band Self-Government Act*, S.C., 1986, c. 27; *Indian Act*, R.S.C. 1985, c. I-5; and *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18.

The Supreme Court of Canada addressed the nature of aboriginal rights in *Van der Peet*, and stated in paragraph 20:

> 20 The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights. [Underlining added.]

The Court goes on to explain the purpose and rationale of section 35 in paragraph 31:

> 31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.
> [Underlining added]

The need for specificity is further elaborated in paragraph 56:

> 56 The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [Underlining added.]

In *R. v. Pamajewon*, [1996] 2 S.C.R. 821, the Supreme Court of Canada rejected the claim for an inherent aboriginal right of self-government that was advanced in connection with the claim of an aboriginal right to gamble. The court introduced its reasoning by saying at paragraph 24:

> The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to

> regulate gambling activities on the reservation. Assuming without deciding that s. 35(1) includes self government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet*, *supra*. Assuming s. 35(1) encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*, *supra*. [Underlining added]

The court rejected the claim that gambling was an aboriginal right, and also rejected the claim of self-government. In defining the claimed right of self-government the court said at paragraph 27:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so. [Underlining added]

This reasoning of the Supreme Court of Canada precludes anything remotely resembling legislative jurisdiction as an aboriginal right. It also precludes any claim to a general right of coercive self-government, let alone sovereign powers.

The Right of Self-Regulation

There is, however, room in Canada's Constitution for a qualitatively different right, that of internal self-regulation, which is non-coercive and consensual. This was discussed in the dissenting judgments (Hutcheon J.A. and Lambert J.A.) of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.). In *Delgamuukw*, the Court of Appeal rejected the Plaintiffs' claim for an inherent aboriginal right of legislative jurisdiction on two grounds: (1) it is inconsistent with the Crown's sovereign legislative jurisdiction; and (2) it is inconsistent with the exhaustive and exclusive distribution of legislative jurisdiction in the *Constitution Act, 1867*. The dissenting judgments agreed with the majority that there could be no inherent aboriginal right of legislative jurisdiction, but reformulated the claim as one of self-regulation, which was permissible. The Supreme Court of Canada remitted the issue for a new trial on the basis of mistakes of fact, neither impugning nor endorsing the reasoning in any of the judgments.

The distinction between *self-government* (coercive powers) and *self-regulation* (non-coercive and consensual) is vital. For a government to be constitutional in Canada it must be provided for in the Constitution (i.e., the federal and provincial orders of government) or be created and empowered by federal or provincial legislation (e.g., municipal governments, territorial governments, the Yukon first nations governments, and *Indian Act* band councils). Any other purported exercise of governmental powers is inconsistent with the Constitution, and hence invalid.

Self-regulation, on the other hand, requires no special authorization.[5] It is the freedom of individuals to freely associate together and establish consensual rules for their conduct. No coercive powers are included in this kind of self-regulation, and the persons involved need no government authorization to engage in it.

Aboriginal communities have a right to *self-regulation*, internal to the aboriginal community, to regulate the exercise of aboriginal rights and other community activities. In the case of aboriginal title land, aboriginals can enjoy the right to manage how the land is to be used, just like joint landowners of fee simple lands manage among themselves the use of the jointly owned land. This is consistent with rights that can be created by an *agreement*, such as a treaty. It is also consistent with the Constitution of Canada.

This also explains why, once it found that gambling was not an aboriginal right, the Supreme Court of Canada in *Pamajewon* did not go on to examine the claim for self-government. Without the claimed aboriginal right of gambling there was nothing to which a right of *self-regulation* could attach or relate. This connection between the activities comprising an aboriginal right and any right of self-regulation is a necessary corollary of the requirement that aboriginal rights be framed as specific *activities* rather than as general, abstract claims such as a general right of "self-government" to make and enforce laws.

Only a court can adjudicate on what is and what is not a common law aboriginal right. Only Parliament or a provincial Legislature may enact legislation delegating government powers. The federal Crown may negotiate treaties. Insofar as a treaty may include provisions of self-government (as opposed to self-regulation) the coercive powers must be delegated by federal legislation, and after 1982 the only section 35 treaty rights that can be created are those acquired by way of land claims agreements (a specific form of treaty that settles land claims).

Federal Policy and the Law: Politics vs. the Constitution

The federal government's policy recognizing an *inherent aboriginal right of self-government* is a purely political statement for political purposes. Such a right cannot exist under Canada's Constitution and the federal government cannot create it, short of

[5] This is distinct from the form of self-regulation exercised by professional societies, like law societies, which exercise coercive powers delegated to them.

initiating a process under Part V of the *Constitution Act, 1982* for a constitutional amendment.

How could the federal government have reasoned itself into such a profoundly unconstitutional policy? The elementary error is failure to distinguish between self-regulation (as described above) and self-government (as in coercive power), and this root error can be traced to the following misconceptions:

(1) The federal policy fails to recognize the difference between a *power* and a *right*;

(2) The federal policy misconceives aboriginal communities *as intrinsically governmental in nature*, which they are not; and

(3) The federal policy mistakenly recognizes the existence of sovereign powers outside of the Constitution.

Although the word "right" is routinely used in reference to the claim for aboriginal government, what is in fact being claimed is the *power* of government. The distinction between a right and a power is a crucial one, and informs the deepest structures of the Constitution. Government power is the capacity to legitimately exercise coercive force over a person and over property. This would include legislative jurisdiction by which enforceable laws are made, executive authority to administer laws, and judicial authority to enforce laws through judicial process.

This is why the "inherent right to aboriginal self-government" qualitatively differs from other aboriginal rights claims: the claim is for legislative, executive and judicial *powers* over individuals and their property, over aboriginals and other Canadians alike.

Entrenchment of a right in the Constitution is one of the primary means by which government power is limited. Aboriginal and treaty rights are entrenched in the Constitution by section 35 of the *Constitution Act, 1982*, and like the rights guaranteed by the *Canadian Charter of Rights and Freedoms* they serve to limit government powers.

The federal policy of recognizing an inherent power of aboriginal self-government as a section 35 "right" inverts section 35, so that instead of protecting *rights* it purports to entrench a third order of *government* in the Constitution. Creation of a third constitutional order of government cannot validly be done by federal policy or even by legislation. It can be done only through a constitutional amendment, as was tried unsuccessfully in the Charlottetown Accord.

By its unsound reasoning, the federal government evades both the Constitution and the *Van der Peet* test for aboriginal rights. In consequence the federal policy is flawed at its foundations, and is not a legal basis upon which the federal government may proceed in its dealings with aboriginal peoples.

Conundrums

Apart from its striking illegality, current federal policy recognizing an *inherent* right to self-government leads to at least three serious conundrums:

(1) If aboriginal communities have an *inherent* power of self-government they would have it regardless of whether the federal government recognizes it or not, and the power could not be extinguished by Parliament because it is protected by section 35, and because it exists at a sovereign level.

(2) An *inherent* power of self-government equivalent to legislative jurisdiction would be concurrent jurisdiction with federal and provincial jurisdiction, and this could only exist at a sovereign level, comparable to, and equivalent to, Crown sovereignty. This would mean that Canada's sovereignty is not Crown sovereignty, that it is instead some kind of merged, parallel, shared or condominium sovereignty. The further conclusion would be that the sovereign powers exercised by hundreds of aboriginal groups, not being defined, distributed and limited by the Constitution, are undefined, at large and uncontrolled – and effective and exercisable *now* throughout Canadian territory.

(3) If there exists an *inherent* aboriginal power of government, then federal and provincial jurisdiction would necessarily be correspondingly reduced. The justification test,[6] designed to limit government interference with aboriginal *rights*, would be transformed into a rule of paramountcy regulating conflicts among contending legislative jurisdictions, and would necessarily import some form of inter-jurisdictional immunity to protect a core aboriginal jurisdiction.

It is difficult to imagine a state of affairs more in conflict with Canada's constitutional order, and with its underlying principles and values.

Why This Matters

The practical consequences are serious:

1. The recognition and accommodation of hundreds of constitutionalized aboriginal jurisdictions, each co-ordinate with the federal and provincial orders, with no clear rules for reconciling conflicting laws and authorities. Even if clear rules could be enacted or agreed the unwieldy complexity would spell the end of "good government" in Canada, the jurisdictional tangle being beyond rational management.

2. An excessively complex legal environment for business. Whereas before there were federal, provincial and municipal laws to comply with, businesses will have to contend with up to hundreds of aboriginal legal regimes all across Canada. Inevitably this will deter business investment and greatly add to the cost of business activity.

[6] See *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

3. Multiplication of taxes as aboriginal jurisdictions impose taxes and royalties.

4. Dual or multiple citizenship conflicts concerning which laws apply to whom, including the rights of voting and eligibility for public office.

5. Limited federal and provincial powers to remedy problems and conflicts that arise from the multiplicity of jurisdictions.

6. Quite apart from theory and rosy prognoses, the reality on most aboriginal territories will be withdrawal of competent and functional government administration and law enforcement and their replacement with aboriginal counterparts. Recognition of inherent aboriginal government over Canadian territory constitutes withdrawal of Canadian government authority and law from that territory, an act known, and strictly prohibited, in constitutional law as abdication.

If we were to exercise common sense we would look to those territories from which federal and provincial governments have already withdrawn for an indication of what to expect in future. The best examples are several Mohawk reserves in Ontario and Quebec, where police and border security have largely withdrawn, with the following results:

a. Minimal law enforcement;

b. Abandoned border posts and reduced border control along portions of the Canadian-American border;

c. Expansion of organized crime (aboriginal and non-aboriginal, and including international criminal organizations) using reserves as safe havens;

d. Increased criminal activity and violence.

These are the predictable results, anywhere in the world, when effective government and law enforcement are lacking. Usually this occurs in failed or failing states. Canada is unique in being a strong state with an effective legal system but which, for failure of political nerve, has withdrawn from parts of its own territory.

More recently the lawsuit of David Brown and Dana Chatwell against the Ontario government and Ontario Provincial Police (OPP) has highlighted in dramatic fashion how quick and violent can be the descent that follows withdrawal of law enforcement, in this case *outside* Indian reserves. The reason for the withdrawal was a failure of politics, not a failure of government *per se*. Neither Canada nor Ontario is by any means a failed or failing state; it is weak *governance* and abysmally irresponsible policies that have led to conditions normally found only in failed or failing states.

Conclusion

Canada's Constitution does not allow the federal government to recognize governmental powers in a group of people (any group of people) in the absence of delegating legislation. Unfortunately this has not restrained the federal government from entering into treaties and agreements with aboriginal groups purporting to recognize those groups as having non-delegated inherent government power over property and persons, aboriginal and non-aboriginal alike.[7]

Through its current approach to aboriginal policy and treaty negotiations, the federal government treats certain groups of Canadian citizens as if they had *inherent* power over their neighbours, including powers of coercion over their physical integrity and freedom of movement, and their property and assets. It makes no difference, and is no defense or justification, that the groups in question are aboriginal rather than white, black, Hispanic or Chinese. In Canada, racial or ethnic identity is not a principle by which government power is distributed.

The federal government can achieve its policy objective of aboriginal self-government properly through the granting of delegated powers, as has already been done in many cases.[8] The salutary objective of seeing aboriginal people manage their own affairs without being controlled by Ottawa's politicians and bureaucrats can be achieved within Canada's Constitution. There is no reason whatever for resorting to illegal and unconstitutional action.

Conforming to the Constitution and constitutional law would not only enjoy the virtue of adhering to constitutional mandates and the rule of law. It would also prevent us from stepping down the fateful path to allocating governmental powers and privileges to groups of Canadian citizens on the basis of race and ethnicity, and the withdrawal of Canadian government and law from significant portions of Canadian territory.

[7] E.g., the Nisga'a Final Agreement; the Tsawwassen First Nation Final Agreement; the Westbank First Nation Self-Government Agreement.

[8] E.g., the *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; *Sechelt Indian Band Self-Government Act*; *Indian Act*, R.S.C. 1985, c. I-5; and *Cree-Naskapi (of Quebec) Act (CNA)*, S.C. 1984, c. 46.