WANDERING WITHOUT A TORCH: FEDERALISM AS A GUIDING LIGHT

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> "If the national mental illness of the United States is megalomania, that of Canada is paranoid schizophrenia." – Margaret Atwood[1]

INTRODUCTION AND BACKGROUND

It is uncontroversial to state that the constitutional entrenchment of an inherent right of Aboriginal self-government has vexed jurists, legislators, and Aboriginal peoples for generations over. The historic failure of the *Charlottetown Accord* is evidence of this vexation. The *Charlottetown Accord* would have entrenched a third order of Aboriginal self-government (similar to the provincial order of government set out in s.92 of the *Constitution Act*, *1867*) and set out its relationship to the catalogue of federal and provincial powers in the *Constitution Act*, *1867*.[2] This third order of government would have been inherent: it would arise because of an Aboriginal group's distinctive history and would not be dependent on Crown sovereignty. Of course, that accord failed by referendum, leaving the Constitution devoid of any recognition of a third order of government in the Canadian constitutional framework. The aftermath of the *Charlottetown Accord* and the subsequent failure to explicitly entrench an inherent right of self-government for Aboriginal peoples can be chalked up to at least two historical problems: the common law method and the difficulty of constitutional amendment. Both of these historical problems contribute today to the wandering of Aboriginal peoples without a torch in the annals of constitutional law. Thus, wrapping our heads around these issues is vitally important; particularly as we enter an era of reconciliation in Canada, following the election of a government that promises to do more to build a nation-to-nation relationship.

The first historical problem is the common law system—the case law method and its interaction with the complex amending formula contained in the Canadian Constitution. Justice Antonin Scalia put the essence of the common law method succinctly:

> This is the image of the law-the common law-to which an aspiring […] lawyer is first exposed, even if he has not read Holmes over the previous summer as he was supposed to. He learns the law, not by reading statutes

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[1] Margaret Atwood, *The Journals of Susanna Moodie* (Toronto: Oxford UP, 1970) at 62.

[2] *Charlottetown Accord, Draft Legal Text, October 9, 1992 [Charlottetown Accord]*.

> that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it. This is the famous case-law method.[3]

The natural corollary of the case law method ensures that lawyers litigate; as such, the fundamental issues of our time (including the question of inherent Aboriginal self-government) are punted to the courts. The common law method of adjudicating rights has also been supported by the advent of the *Charter of Rights and Freedoms* (the *Charter*).[4] On this issue, the courts have responded by declining to answer whether a right to Aboriginal self-government is an "existing" Aboriginal right contained in s. 35(1) of the *Constitution Act, 1982*.[5] With the *Charter*, we are left with both a political and legal void on the issue.[6]

The second historical problem is the notoriously difficult amendment process contained in the *Constitution Act, 1982*. For ordinary amendments to the Constitution, seven of the provinces representing 50% of the population must agree.[7] For some amendments, unanimous provincial consent is required.[8] The difficulty in amending the Constitution continues to lead to real political consequences; now, constitutional amendments are covered with the cloak of impossibility. As such, a generation of Aboriginal sympathizers and advocates in the common law tradition have forced Aboriginal issues to the courts.

These two historical forces have led us to the current page of Canada's constitutional story. Inherent (pre-existing and not granted by the Constitution)[9] Aboriginal self-government does not truly exist in Canada. In other words, "at the time of Confederation there was no independent recognition of the status of the jurisdiction of Aboriginal governments."[10] Instead, the Canadian government and Aboriginal groups, because of the difficulty of establishing a constitutional mandate,

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[3] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) at 4 [Scalia, *Interpretation*].

[4] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [The *Charter*]. For the sake of absolute clarity, it should be noted that the *Charter* does not expressly address Aboriginal peoples. That task is left to s. 35(1) of the *Constitution Act, 1982*. However, for the purposes of this paper, I believe that s. 35(1) must be considered in light of the *Charter*. Both arise out of the same historic and philosophic contexts, and are similarly problematic in terms of Aboriginal self-government. To the extent I use the terms interchangeably, I do so for the foregoing reason.

[5] See the comments of Lamer CJC in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 171 [*Delgamuukw*].

[6] Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in Kenneth McRoberts & Patrick Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117.

[7] Peter Hogg, *Constitutional Law of Canada Student Edition*, 5th ed (Toronto: Carswell, 2014) at 4-14.

[8] *Ibid* at 4-25.

[9] Turpel, *supra* note 6 at 125.

[10] *Ibid* at 120.

have opted for delegated forms of authority operating under Crown authority.[11] This is not *inherent* government in the sense that the legitimacy of Aboriginal self-government derives from the historic occupation of lands by Aboriginal peoples; instead, legitimacy comes from a transfer of Crown sovereignty.[12] The Constitution, in other words, does not recognize the different basis of legitimacy for Aboriginal rights.[13] This is not a complete vindication of Aboriginal rights, nor has it led to any clarity in the relationship between the Canadian Constitution and the rights emanating from self-government. Indeed, the only substantial statement on Aboriginal self-government coming from the government in recent memory was the *1995 Self-Government Statement*. But this does not carry the day—it is not a matter of constitutional law.[14] Thus, we are at a crossroads: the Supreme Court of Canada has not directly tackled the implications for federalism and the division of powers if Aboriginal self-government does, indeed, exist.[15]

Not all is lost. The fact that Canadian federalism, in constitutional letter, does not recognize an inherent right to Aboriginal self-government is not an inexorable conclusion. Indeed, starting from first principles, the political system of federalism is conceptually broader than its codification into the terms of the *Constitution Act*, *1867*. The Supreme Court of Canada recognized as much in the *Quebec Secession Reference*, listing federalism as one of the unwritten constitutional principles of Canada.[16]

All of this said, this paper will argue that the issue of Aboriginal self-government should be revisited from the perspective of federalism. To that end, I will focus on the benefits which might accrue from the recognition, once and for all, of an inherent right to self-government for Aboriginal peoples in the Canadian Constitution. This means, in turn, recognizing that the legitimacy of Aboriginal self-government does not derive from Crown sovereignty, nor is it recognized as a limited scope, *Van der Peet* Aboriginal right.[17] Rather, it is a problem of jurisdiction that can be understood through the doctrines of federalism. On this reading, we have

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[11] Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19:1 Queen's LJ 95 at 117.

[12] *Ibid* at 99.

[13] Section 35(1) of the *Constitution Act*, *1982* only recognizes "existing" Aboriginal rights; as *Delgamuukw*, *supra* note 5, makes clear, a full jurisdictional right to inherent self-government is not considered in the ambit of this section.

[14] See Jeffery K Rustand, *Is "Inherent Aboriginal Self-Government" Constitutional?* (Calgary: The Canadian Constitutional Foundation, 2010).

[15] Patrick Macklem et al, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 646.

[16] *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 55, 161 DLR (4th) 385 [Quebec Secession Reference].

[17] See the definition of Aboriginal rights and the justificatory test for infringement in *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 and *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385, respectively.

been barking up the wrong tree to vindicate Aboriginal rights. Relying on the *Charter* for resolution is not ideal.

In order to make this contention, this paper will proceed in two parts. In Part I, I will describe the salient features of political federalism to explain why federalism *can* encompass a truly inherent right to Aboriginal self-government. Political federalism, in both theory and practice, has proven capable of flexibility. Various doctrines of federalism have led to more flexibility in the Canadian structure, such as the aspect doctrine and the pith and substance doctrine. There is no reason to believe that this flexibility could not be extended to Aboriginal peoples if they are recognized as a third order of government. Beyond flexibility, the text of the *Constitution Act*, *1867* and its subsequent interpretation by the Judicial Committee of the Privy Council has led to a generous interpretation of rights for the provincial order of government. That same generous interpretation could be applied to inherent Aboriginal self-government as a third order of government in Canada.

In Part II, I will turn to the next logical question: even though political federalism can accommodate an inherent right to Aboriginal self-government, why *should* it? This paper will respond to this contention in two ways. First, I will argue that federalism will provide clarity and consistency to the relationship between Aboriginal peoples and the Government of Canada, while allowing Aboriginal peoples the latitude to grow and develop without regard to the tumult of Ottawa's occupants. This will only be possible via the process of constitutional amendment, as envisioned by the *Charlottetown Accord.*[18] Second, delegated authority does not provide for the scope of independence that has been historically sought by Aboriginal peoples in Canada. At least part of the material difficulties that are faced by Aboriginal peoples in the 21st century can be chalked up to the legacy of colonialism; the inability to truly control their futures as self-governing peoples.[19] In my estimation, inherent self-government will go some way to creating the conditions for the improvement of these material conditions.

In terms of methodology, this paper will rely heavily on Phillip Bobbitt's *Constitutional Fate*, which proposes five types of constitutional argumentation.[20] I will implicitly focus on two of these forms of argument: structural argumentation (arguing from the values and framework of the existing constitutional federalism to support constitutional amendment) and prudential argumentation (ethical and normative claims about the sort of government sought by Aboriginal peoples). Both of these types of argument will form the backdrop of this paper.

Additionally, this paper will endeavour to answer a broader question: why does federalism matter anymore? With respect to Aboriginal rights in Canada,

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[18] Rustand, *supra* note 14 at 11.

[19] See generally Taiake Alfred, *Peace, Power, Righteousness*, 2nd ed (Don Mills: Oxford University Press, 2009).

[20] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982).

students of law in the last twenty-five years have been inculcated in the *Charter of Rights and Freedoms*. Many of the discussions with respect to the distribution of powers, the common law, and the structure of Canadian federalism have been forgotten because of an unfortunate case of "*Charter*itis"—a tendency to forget the foundational principles of law that arose before the *Charter*.[21] But we are entering a new era in Ottawa: one in which the government has recommitted to a productive relationship with Aboriginal peoples and Premiers in Canada. This paper will posit that the concepts of federalism and the distribution of powers are tools of reconciliation if we are to decide where Aboriginal peoples will fit in the Canadian federation. Such a shift in thinking requires courage; courage to look away from the Supreme Court, and towards political channels as a means of vindicating rights. For those of us raised on the *Charter* as our security blanket, that is perhaps the stuff of dreams. But, I hope to demonstrate that today's generation of law students and lawyers should not forget their dusty federalism book—it could be vital in placing Aboriginal peoples in the Canadian federation.[22]

I. THE NATURE OF CANADIAN POLITICAL FEDERALISM

A. Culture and Demographics

One cannot begin to evaluate why an express recognition of inherent self-government in the federal structure is a way forward for Aboriginal peoples without first analyzing the values and culture of Canadian federalism. Again, one must start from first principles. As noted above, the Court has not yet assessed the implications for Canada's federal system if Aboriginal self-government is recognized as a third order.[23] Perhaps the Court is unable to do so. For this reason, understanding the very bases of Canadian constitutionalism is a starting point to determine the place of Aboriginal peoples in the Canadian federation.

One must begin with the obvious: the text of the law is but one way to express legal and quasi-legal principles. In the case of Canadian federalism, there is more behind the text. For the purposes of recognizing the ability of federalism to accommodate Aboriginal self-government, analyzing what is behind the text is vitally important.

To that end, demographics can influence the law of the Constitution in order to understand why federalism is flexible at its core. Noted political scientist Nelson Wiseman analyzes this thorny issue in his book *In Search of Canadian Political Culture*.[24] Wiseman argues that culture and Constitution cannot be viewed independently of one another. Instead, he posits that cultures create the basis by

[21] David W Mossop, "'Charteritis' and Other Legal Diseases" (1985) 43:2 Advocate 201.

[22] Federalism is an area that has been almost forgotten in Aboriginal law since the advent of the *Constitution Act, 1982*.

[23] Macklem et al, *supra* note 15.

[24] Nelson Wiseman, *In Search of Canadian Political Culture* (Vancouver: UBC Press, 2007).

which Constitutions are understood. He notes that cultures and Constitutions have a symbiotic relationship.[25] It is for this reason that the demographics at the time of Confederation are important for understanding the essence of political federalism—by analyzing the cultures reflected in the Constitution, one can discern the values that the system, reflected in our Constitution, is meant to protect.

At the time of Confederation, Canada was a sum of many diverse cultures, interests, and economic drivers. Confederation was conceived as a plan "whereby, through mutual concession, cultural and local loyalties could be preserved and reconciled with the political strength and solidarity of the whole."[26] Mutual concession required concrete accommodations for different political collectives; English-speaking persons in Lower Canada were expected to release expectations of a union with English speakers in Upper Canada, whereas subsidiarity allowed for French Canada to be "secured in the sole control of the cherished values it so tenaciously held."[27] Those in the Maritimes, similarly, were offered security for their own distinctive and historic traditions.[28]

Of course, this proposition came with controversy. At least some of the Fathers of Confederation desired a unitary state for Canada. To their dismay, such an idea was simply not practical, specifically for French Canada.[29] George-Etienne Cartier, one of Canada's founding fathers, celebrated the federative principle and its ability to protect diversity as a key founding principle of the new nation: "…diversity will not disappear. The idea of a fusion of the races in one is utopian; it is an impossibility. Distinctions…will always exist."[30]

And distinctions there were. From a historical perspective, 30,000 Loyalists settled in Nova Scotia and established New Brunswick, while 10,000 others settled in Ontario.[31] French Canadians, of course, were numerous in Lower Canada. Federalism was a way to find harmony in the diversity of these component parts. A unitary state, where distinctions could not be present, was not a feasible option for the creation of a country like Canada, where there were distinctive cultural cleavages from the very beginning.

The relevance of this exercise is clear. Setting the cultural basis in this way demonstrates that Canada is not an easily describable entity: it is a sum of its parts, at least on the demographic and cultural level. This fact has certain legal implications for Aboriginal peoples. Importantly, the legal doctrines that are connected to the Canadian cultural reality are important in defining the jurisdictional scope of

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[25] *Ibid* at 60.

[26] Bora Laskin, *Canadian Constitutional Law* (Toronto: Carswell, 1969) at 1.

[27] *Ibid* at 2.

[28] *Ibid*.

[29] *Ibid* at 1.

[30] Wiseman, *supra* note 24 at 95–96.

[31] *Ibid* at 31.

Aboriginal governments in the Canadian constitutional scheme. As will be seen later on, this is a fundamental project of Aboriginal constitutional law.

B. Expression in Law: The Federalism Doctrines and the Judicial Committee

From the foregoing, one can conclude that federalism in theory is reflective of the diverse conditions of Canadian Confederation. Based on the demographic considerations at play, Confederation was designed to reflect a certain diversity of peoples who signed on to the compact. That said, the conclusions thus far have only been pertinent to the realm of political science. But they also have import for the law of the Constitution. From a canvass of the literature, the political diversity of Confederation found its expression in law in two ways: first, through the development of various doctrines and interpretive mechanisms which allow for *flexible* legislative action on the part of each order of government, and second, through a *generous* interpretation of local rights by the Judicial Committee of the Privy Council. Ultimately, the latter consideration has been a boon for French-Canadians, and could be similarly beneficial to Aboriginal peoples. But this conclusion only follows if Aboriginal peoples are recognized as an order of government for the purposes of constitutional law by amendment.

The Supreme Court of Canada has canvassed the first issue of flexibility. In examining the basis of the constitutional framework, the Court certainly agreed with Cartier's conception of Confederation:

> This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference*, *supra*, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the *Patriation Reference*, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the *Charter*, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.[32]

Federalism holds an exalted place in the Canadian constitutional order for a reason. The underlying social and political realities of which the Court speaks are undoubtedly the demographic desires of the distinct majorities and minorities who built Confederation. Logically, then, federalism is the political premise by which the text of the Constitution is interpreted. This has important implications for Aboriginal peoples.

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[32] *Quebec Secession Reference*, *supra* note 16 at para 57.

The development of federalism as described by the Supreme Court of Canada is further reflected in the actual mechanisms that have been judicially created to interpret the catalogue of powers contained in ss. 91 and 92. These doctrines do not exist in isolation—they contribute to the story of federalism, which is one of constant evolution, dynamism and flexibility with respect to the cultural particularities of Canada. The aspect doctrine and the pith and substance doctrine are examples of the flexibility of legal federalism as between ss. 91 and 92. It is trite that characterization of laws in federalism analysis is conducted by a determination of the law's "pith and substance," or dominant purpose.[33] Once the pith and substance of a law is determined, the law is assigned to a class of subject in s. 91 or s. 92.[34] But the doctrine necessarily allows for incidental effects or overlap between jurisdictional spheres. So long as the pith and substance of the law is wholly within the competence of one of the orders of government, the law is constitutional for the purposes of the distribution of powers. This means that certain matters may have more than one part of equal importance[35]—each of which could be accessed by the provincial or federal governments. This is the essence of the aspect doctrine. One can see how it can allow for maximum operation of provincial laws that are particular to the cultural specifics of that particular province.

An example may be useful. The doctrine first arose in 1883. In *Hodge v The Queen*, the Judicial Committee of the Privy Council undercut the exclusivity of the classes of subjects in ss. 91 and 92.[36] Lord Fitzgerald, for the Judicial Committee, famously opined, "subjects which in one aspect and for one purpose fall within sec. 92, may in another aspect and for another purpose fall within sec. 91."[37] The law lords further held that the provinces were not subordinate to the federal government; in fact, they were coordinate and sovereign in their own spheres.[38] Theoretically, this means that the provincial and federal governments could legislate in respect to different aspects of the same matters. This has led to administrative flexibility for the provinces and federal government with respect to a diverse array of matters; for example, securities,[39] temperance,[40] and entertainment in taverns.[41] The exercise of the aspect doctrine ultimately allows provinces a greater scope to pass laws that are

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[33] John P McEvoy, "The Federalism Jurisprudence of Michel Bastarache" in Nicolas CG Lambert, ed, *At the Forefront of Duality: Essays in Honour of Michel Bastarache* (Toronto: Carswell, 2011) 325.

[34] Hogg, *supra* note 7 at 15-7.

[35] WR Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9:3 McGill LJ 185 at 188.

[36] *Hodge v The Queen*, [1883] CR 9 AC 13, 3 Cart BNA 144 [*Hodge*].

[37] *Ibid* at para 30.

[38] *Ibid* at para 36.

[39] *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161, 138 DLR (3d) 1.

[40] *Hodge*, *supra* note 36.

[41] *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59, 44 DLR (4th) 663.

particular to their needs. As will be explored later in this paper, one wonders why this same flexibility cannot be afforded to distinctive Aboriginal governments.

The pith and substance doctrine and the aspect doctrine have led to *de facto* concurrent powers over certain matters in the federalism analysis. This invariably leads to more flexibility in law for levels of government recognized as orders in the Canadian federation. Binnie and LeBel JJ in *Canadian Western Bank* referred to this proposition as the "dominant tide" of Canadian federalism.[42] This, in at least one way, is reasonably attributable to a desire to allow for distinctive, self-governing units (represented by provinces) to legislate with a maximum amount of flexibility.

Flexibility in the legislative practice of Canadian self-government is but one legal implication of political diversity. The other legal implication derives from the text of the *Constitution Act, 1867* itself, and its interpretation by the Judicial Committee of the Privy Council. The text and its subsequent interpretation has led, one can conclude, to an overall conception of Canadian federalism that grants a *generous* host of powers to the provinces, representing their own distinctive interests. In an insightful article, Peter Hogg and Wade Wright analyze the text of the *Constitution Act, 1867* on this point. The article analyzes many aspects of the *Constitution Act*, *1867* and makes an overall conclusion that "the *Act*, as drafted, was intended to form the foundation for a federal system that is less centralized than many English-Canadian commentators have supposed."[43] However, how Hogg and Wright reach this conclusion with respect to textual analysis is important:

> Our conclusion is that the *Constitution Act*, *1867* includes conflicting signals as to the degree of centralization or decentralization stipulated by the federal scheme that the *Act* established. In our view, the framers deliberately tolerated these conflicting signals in the *Act* because they needed to accommodate conflicting goals—the desire for a strong central government (English-Canada) *and the desire to protect local languages, cultures, and institutions (French-Canada and the Maritimes). The text is ambiguous, probably intentionally so. The framers of the Constitution needed these conflicting signals in order to ensure approval of their handiwork by the British North American colonists, who were divided by language, religion, tradition and location.*[44]

The express recognition of different cultures, languages, and other particularities in the text of the *Constitution Act*, *1867* is a strong indication that the framers wished for the demographic realities described above to have some force in law.

However, the text is not the end. The early interpretation of the text, because of the doctrine of *stare decisis*, has largely bound today's courts in interpreting the distribution of powers contained in the *Constitution Act*, *1867*. As

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[42] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37, [2007] 2 SCR 3.

[43] Peter W Hogg & Wade K Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) 38:2 UBC L Rev 329 at 338.

[44] *Ibid* (emphasis added).

Hogg and Wright note, "[t]here is no doubt that the Privy Council favoured the provinces in federalism cases."[45] However, they follow that conclusion with an analysis of *why* the Privy Council was sympathetic to the provinces. Hogg and Wright argue that the Judicial Committee's decisions were consistent with the demographic forces at play in Canada. As a short aside, an example is in order. In the *Aeronautics Reference*, Lord Sankey famously confirmed this thesis regarding the Judicial Committee's predilection towards the provinces. The law lord stated:

> Inasmuch as the Act [of 1867] embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original compact upon which the federation was founded.[46]

Clearly, one of the major forces at play for the Judicial Committee was the influence of Quebec (Aboriginal peoples are equally, as will be seen below, an unrecognized force). According to Hogg and Wright, "[the] desire to protect their [French Canadian] language and culture has taken on the form of an insistence on provincial rights."[47] This cultural insistence seeped into other areas, beyond what was decided by the Judicial Committee in the *Aeronautics Reference*. From an economic standpoint, Hogg and Wright argue that the decisions of the law lords had an impact on the development of resources in Canada. Specifically, it would have been a perverse result for the Canadian economy to be completely dominated from the centre; and so, one sees the rise of distinctive provincial economies and cultures surrounding those economies.[48] These forces led the Judicial Committee to give a narrow interpretation to the federal trade and commerce power, a generous interpretation to the provincial property and civil rights power, and a narrow interpretation to the federal residuary power.[49] Of course, this legacy of the Judicial Committee largely lives on today.

Thus, with respect to the Canadian federation, two traits of legal significance emerge from the political demographics described earlier. The first trait is an abiding flexibility that allows for coordinate exercise of power as between the provinces and the federal government. This flexibility is represented in the various doctrines, which provide a rich understanding of the distribution of powers: namely, the aspect doctrine and the pith and substance doctrine. The second trait, fuelled by

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[45] *Ibid* at 339.

[46] *Reference re the Regulation and Control of Aeronautics in Canada*, [1932] AC 54 at para 70, 1 DLR 58 [Aeronautics Reference].

[47] Hogg & Wright, *supra* note 43 at 344.

[48] *Ibid* at 345–46.

[49] *Ibid* at 339–40.

the distinctive interplay between English and French at the time of Confederation, is an impetus towards decentralization to accommodate distinctive cultures. This trait is largely influenced by the text of the *Constitution Act, 1867*, but also by the sympathy of the Judicial Committee of the Privy Council, specifically as it relates to the trade and commerce power, the peace order and good government power, and property and civil rights in the province.

These conclusions, and the demographic reality to which they are connected, are devoid of one particular group: Aboriginal peoples. Simply put, if Aboriginal peoples were viewed as a distinctive order of government, their governments would be able to access the flexible and generous approach to Canadian federalism in obvious ways. That said, one must articulate the importance of these conclusions for Aboriginal peoples. The Canadian experience is one of diversity, and the legal doctrines explored above reflect this reality. Therefore, the question of how Aboriginal peoples take advantage of these doctrines is, ultimately, a jurisdictional one.

C. Aboriginal Peoples

An eager reader may respond by saying that these conclusions mean nothing for Aboriginal peoples. After all, Aboriginal peoples were not parties to the original Confederation compact; in fact, they were actively marginalized.[50] Further, the *Charter* has been inconclusive on a clear, existing right to Aboriginal self-government in whole. While Canadian federalism may be flexible, so the critical analysis goes, it has been remarkably inflexible for Aboriginal peoples. At present, no inherent right to Aboriginal self-government, as a third order of government distinctive in its differing legitimacy, is recognized in the Constitution.

Implicit in the above is a normative and legal criticism. The normative criticism is a form of "constitutional privity"—or in this case, a lack thereof. This argument proceeds on the basis that Aboriginal peoples lack "privity" to the original Confederation agreement.[51] In that sense, it cannot (and some would argue, should not) matter that federalism is capable of absorbing a distinctive Aboriginal culture in Canada.

The problem with the inflexibility of federalism for Aboriginal peoples derives from the fact that Aboriginal peoples have never truly been parties to Canada's federal system (except, of course, as a class of subject in s. 91(24)). Though Aboriginal peoples were not "officially" parties to the Canadian federation at its outset (in that they were not recognized as a discrete order of government for the purposes of the *Constitution Act, 1867*) there is a great deal of history that has passed since that particular time. At present, s.35 of the *Constitution Act, 1982* specifically elevates treaties between Aboriginal peoples and the government of

[50] Turpel, *supra* note 6.

[51] *Ibid*.

Canada to constitutional status.[52] This elevation is based, at least in part, on Aboriginal history. To that end, the bases and legitimacy of Aboriginal self-government differ from the bases of Crown sovereignty. However, given the flexibility and generosity of Canadian federalism, this difference should not be viewed as an impediment; nor should a lack of constitutional privity be conclusive. Indeed, as the Royal Commission on Aboriginal Peoples note, the generous interpretation of provincial rights by the Judicial Committee is equally applicable to Aboriginal collectives.[53] The answer is constitutional recognition of the differing basis for the legitimacy of Aboriginal governments, once and for all.

In support of this conclusion, Aboriginal history must be briefly explored. While many academic and historical projects have reviewed this history (and it is beyond the scope of this paper to survey them all), perhaps one of the most famous is the report of the Royal Commission on Aboriginal Peoples.[54] In that report, the Commission lays out a compelling case for inherent Aboriginal self-government, and delineates the possible explanations for this form of self-government. In this context, the Commission traces the history of Aboriginal peoples in Canada with reference to the case of *Connolly v Woolrich*.[55] The facts of this particular case are less relevant than the holding of the Quebec Superior Court. The Commission lays the decision out as follows:

> Justice Monk stated that he was prepared to assume, for the sake of argument, that the first European traders to inhabit the North West brought with them their own laws as their birthright. Nevertheless, the region was already occupied by "numerous and powerful tribes of Indians; by aboriginal nations, who had been in possession of these countries for ages." Assuming that French or English law had been introduced in the area at some point, "will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with their aboriginal occupants?" Answering his own question in the negative, Justice Monk wrote: "In my opinion, it is beyond commentary that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives"…In summary, then, the decision portrays Aboriginal peoples as autonomous nations living under the protection of the Crown, retaining their territorial rights, political organizations, and common laws…[56]

Based on this historical treatment, the Report goes on to conclude:

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[52] The *Charter*, *supra* note 4 at s. 35(1).

[53] Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 22 [Royal Commission].

[54] *Ibid*.

[55] *Connolly v Woolrich* (1867), 17 RJRQ 75, 1 CNLC 70.

[56] Royal Commission, *supra* note 53 at 6–7.

> The doctrine of Aboriginal rights is not a modern innovation, invented by the courts to remedy injustices perpetrated in the past. It is one of the most ancient and enduring doctrines of Canadian law. It is reflected in the numerous treaties of peace and friendship concluded in the seventeenth and eighteenth centuries, between Aboriginal peoples and the French and British Crowns, in the Royal Proclamation of 1763 and other instruments of the same period, in the treaties signed in Ontario, the West, and the North-West during the late nineteenth and early twentieth centuries, in many statutes dealing with Aboriginal matters from earliest times, and not least in a series of judicial decisions extending over nearly two centuries.[57]

The historical context referred to by the Commission has given rise, in its estimation, to a number of conclusions. One of these is apparent: the source of legitimacy for Aboriginal law and self-government is rooted not in the text of the *Constitution Act*, *1867*, but in a historic occupation of land, coupled with an ongoing, privileged relationship with the British Crown. In other words, legitimacy is derived not from Crown sovereignty, but "by reason of the fact that Aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada."[58] Secondly, if one combines this historical analysis with the above legal review of federalism, a conclusion becomes clear: our constitutional law is remarkably flexible in Canada. More importantly, it shows a diversity in its component parts that could, and should, easily encapsulate distinctive Aboriginal traits, including the differing bases of legitimacy.[59]

Thus, there is no principled reason to argue that the diversity of the Canadian Constitution cannot *recognize* the fact that Aboriginal sovereignty arises from a different legitimacy than does Crown sovereignty. These different bases can be recognized as coordinate in the Constitution, but different in their sources.[60] Thus, while one can debate whether the *writ large* right to Aboriginal self-government has been extinguished, our Constitution currently lacks such an explicit recognition for the different source of legitimacy for Aboriginal self-government rights. Recognition is the key, regardless of whether or not the right exists outside of the Constitution.[61]

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[57] *Ibid.* The Commission further argues, based on this historical context, that the inherent right to self-government already exists in s.35(1) of the Charter. Given the Supreme Court's pronouncements on this issue, I do not agree with the Commission's conclusion. What is abundantly clear is this: the inherent right to Aboriginal self-government derives from a historical basis. Our Constitution, at the current moment, does not expressly recognize this right. This is a question of jurisdiction.

[58] Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983) 8:1 Queen's LJ 232 at 242.

[59] Though this paper has focused on describing the historical basis for the legitimacy of Aboriginal governments, the Supreme Court of Canada has done a far better job of exploring the relevant history. See *Calder v British Columbia (AG)* [1973] SCR 313, 34 DLR (3d) 145.

[60] *Hodge, supra* note 36, holds that this is true for provinces: why not for Aboriginal governments?

[61] Again, this is different than the argument made by the Commission, which presupposed the existence of a general right to Aboriginal self-government as an existing right in s. 35(1) of the *Charter*. This is an example of the rights-based approach which has dominated Aboriginal jurisprudence. Defining what is existing is the concern of this approach. My concern is delineating the scope of orders of government as a matter of federalism.

To that end, Canada's federalism is capable, on any reasonable reading, of this important task. Questioning Crown sovereignty in this way should not necessarily be anathema; after all, the federal system would not fall apart. It would simply require practical negotiations as to the interactions between federal and provincial governments, and Aboriginal lands and laws. Simply, recognition would provide the basis for these practical negotiations to occur.

That said, the second part of this paper presents a thornier problem: while it might be apparent that federalism *can* accommodate a more generous interpretation of Aboriginal rights in Canada, premised on the different source of legitimacy, *should* it accommodate this same generous interpretation, as a means of reconciliation? It is to that question that this paper now turns.

II. ABORIGINAL PEOPLES IN THE CANADIAN FABRIC

A. The Current Situation

In attempting to answer why Canadian federalism should adapt to the reality of Aboriginal self-government rights in an inherent fashion, one must review the current situation of Aboriginal self-government in Canada. The key issue, as noted above, is constitutional recognition of the differing bases of legitimacy for Aboriginal self-government rights.

As Kent McNeil cogently describes in his oft-quoted article on the subject, one cannot understand the place of Aboriginal peoples in Canada without describing the death of the *Charlottetown Accord*. As McNeil notes, the defeat of the *Charlottetown Accord* jeopardized the political will to make explicit and inherent self-government a reality in Canada.[62] In the immediate aftermath of the *Charlottetown Accord*, McNeil argued that other options existed for Aboriginal peoples to achieve self-government within the Canadian constitutional framework. Namely, he suggested negotiated agreements with the federal and some provincial governments. These agreements would involve delegated rather than inherent authority, and they may not be constitutionally protected.[63] McNeil's foresight was remarkably prescient; indeed, as of 2015, Canada has negotiated twenty-two of these same self-government agreements, eighteen of which are part of comprehensive land claims agreements.[64] Three of these agreements have not been implemented by legislation, and because they are not inherent in nature, implementation is required.[65] Hundreds of Aboriginal communities exercise self-government at the pleasure of

[62] McNeil, s*upra* note 11 at 98.

[63] *Ibid* at 99.

[64] Canada, Indigenous and Northern Affairs, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal-Self Government* (Canada: Indigenous and Northern Affairs, 2010) online: <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#PartI>.

[65] *Ibid*.

Crown delegation.[66] There are various types of these agreements; some connected to modern treaties and others stand-alone self-government agreements, while still others convey sectoral jurisdiction for Aboriginal peoples over certain areas of policy (education, for example).[67]

In short, these self-government agreements do provide a certain form of self-regulation for Aboriginal peoples within their communities. However, these self-government agreements differ from an inherent right to Aboriginal self-government that exists independently from Crown sovereignty.[68] In this case, as noted by Turpel, inherent means pre-existing and not granted by the Constitution (note the difference between grant and recognition). If one extends the point, inherency cannot and does not depend on statutory delegation (in this case, Crown sovereignty) for its existence.[69]

The federal government, however, has something different to say on the matter. In 1995, it famously announced that it, unilaterally, recognized the inherent right of self-government for Aboriginal peoples flowing from s. 35 of the *Constitution Act*, 1982.[70] Indeed, the federal government essentially committed to pursuing delegated agreements as described above in 1995 in order to affect the recognition of inherent self-government. Specifically, it is prudent to quote generously from a parliamentary paper on the subject, which describes the very essence of the federal government's policy at the relevant time:

> Under this policy, the range of subjects that the federal government is willing to negotiate includes matters internal to the group, integral to Aboriginal culture, and essential to operating as a government or institution. Examples are the establishment of government structures and internal…
>
> The Minister of Indian Affairs has a mandate to enter into negotiations with First Nations, the Inuit, and Métis groups in the north. The Federal Interlocutor for Métis and Non-Status Indians has a mandate to enter into negotiations with Métis south of the 60th parallel and Indian people who reside off a land base. For groups without a land base, the government is prepared to consider forms of public government, the devolution of programs and services, the development of institutions providing services, and arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.[71]

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[66] Rustand, *supra* note 14 at 4.

[67] *Ibid.*

[68] *Ibid* at 8.

[69] Turpel, *supra* note 6 at 125.

[70] Rustand, *supra* note 14 at 8.

[71] Canada, Parliamentary Research Branch, *Aboriginal Self-Government* by Jill Wherrett (Canada: Parliamentary Research Branch, 1999) online: <www.parl.gc.ca/Content/LOP/researchpublications/962-e.htm>.

The problem with the approach employed by the federal government is one of legitimacy. There is an important distinction to be drawn between truly inherent Aboriginal self-government and inherency as recognized by the federal government in 1995. One sees from the foregoing that legitimacy flows from the Crown, not from the self-governing history of Aboriginal peoples—in other words, this is not inherent in any sense of the term. The federal government is "willing to negotiate" only what it is willing to negotiate, and nothing more. This is in stark contrast to the *Charlottetown Accord*, as described by the Commission, which provided that Aboriginal governments were to be sovereign in their own spheres and not inferior to the other orders of government, with accompanying rules for inconsistent laws between the three orders of government in Canada.[72] One sees why inherent government may be more desirable for Aboriginal peoples: it allows them to exercise sovereignty according to their own "values [and] priorities" in accordance with their "languages, cultures, economies, identities, institutions and traditions."[73] This seems to be in concert with the plea of Aboriginal peoples across Canada.[74]

In summary, the federal government's policy (which, as noted above, has continued in the present day in large part through the negotiation of delegated-sovereignty agreements) is a mystery wrapped in a riddle—at its heart is a vexing contradiction. On the one hand, it recognizes through an administrative policy the inherent right to self-government for Aboriginal peoples in Canada (which has not been recognized by the courts).[75] Yet the actions of the government belie this policy by delegating powers. As noted above, the inherent right to self-government can only be recognized via a third order of government, in a constitutional amendment process.[76] It is to that problem that this paper now turns.

B. Why Inherent?

The underlying argument of this exposition, so far enunciated, holds that federalism is a forgotten tool of reconciliation between Aboriginal peoples and Canada. Recognizing the flexibility of the federal structure is the key to understanding the potential for recognizing distinct forms of legitimacy—specifically for Aboriginal peoples.

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[72] Peter W Hogg & Mary Ellen Turpel "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can Bar Rev 187 at 191. The built-in dispute mechanisms are one of the reasons, to be surveyed later, why inherent self-government brings a great deal of clarity to the law in this area.

[73] *Charlottetown Accord*, *supra* note 2.

[74] Compare and contrast the Contextual Statement with the demands of the recent Idle No More movement. As seen below, both the Contextual Statement and the demands of the Idle No More movement tie the importance of self-government to Aboriginal self-determination.

[75] *Delgamuukw, supra* note 5.

[76] Rustand, *supra* note 14 at 2.

On the other hand, the creative progeny of policymakers and Aboriginal peoples in Canada, an observer might argue, is entitled to deference. After all, we have ended years of complex constitutional negotiations (Meech Lake and Charlottetown, for example) and have been able to accomplish complicated public policy goals as it pertains to Aboriginal peoples without the need for provincial consent. Nevertheless, the federal government has papered over larger problems. The problem is fundamentally theoretical—it is important to define the scope of difference between the delegated self-government promulgated by the Canadian government since 1995 and the inherent self-government promised by the *Charlottetown Accord*. As Peter Hogg notes:

> …the aboriginal right of self-government extends only to activities that took place before European contact, and then only to those activities that were an integral part of the aboriginal society. These restrictions are very severe even for rights to hunt and fish and harvest, *but they are singularly inappropriate to the right of self-government.* In order to give meaning to self-government in a modern context, it should be couched in wider terms.[77]

Surely, true Aboriginal self-government should be defined beyond the scope of an Aboriginal right defined in *Sparrow* or a delegated form of sovereignty that relies on the Crown for legitimacy. This said, there are two reasons why inherent Aboriginal self-government is a better road for the Canadian federation and Aboriginal peoples alike. First, the *Charter* and its associated system of common law adjudication is the primary means, but not the best means, by which Aboriginal peoples have attempted to vindicate their rights. Legal scholars, Aboriginal peoples themselves, and politicians have not given much thought to the idea of political reconciliation through federalism—a recognition of the Aboriginal peoples of Canada as *peoples*, rather than as individuals. The recognition of Aboriginal self-government would do much to entrench an understanding of Aboriginal peoples in Canada's constitution, beyond the *Charter*'s limited court-centric conception. Second, connected to this recognition, inherent Aboriginal self-government would restore balance to Aboriginal communities, with a corresponding benefit accruing with respect to material Aboriginal issues. Again, this sort of benefit is best accessed through political channels, not judicial ones.

1. Political and Legal Considerations

The politics of the *Charter* has contributed to a court-centric conception of Canadian constitutionalism. Instead of viewing the Constitution as an organic document which binds different communities together, individualized rights litigation has become the name of the *Charter* game. It is as if we have forgotten one half of our Constitution—the distribution of powers and the values that it represents. This sense of forgetfulness has contributed to a political and legal vacuum in terms of

[77] Hogg, supra note 7 at 28-26 (emphasis added).

Aboriginal issues. As noted by Dr. Nicole O'Byrne, all law is politics, [78] and so one cannot view the issue of a "third order" of government in isolation.

Dealing first with the political issues, the fate of Aboriginal peoples in Canada (perhaps as a function of their status as "federal persons" under s. 91(24) of the *Constitution Act, 1867*) has long been tied to the ballot box. Between the 1969 *White Paper*, which would have stripped Aboriginal peoples of their status in Canada, and the *Charlottetown Accord*, one can see two very different approaches and conceptions to the way in which Aboriginal peoples fit into the Canadian compact. Yet, this political footballing does not end at theory—indeed, one need only look at the story of the *Kelowna Accord*, and its subsequent scrapping, to see how intricately politics ties in with the place of Aboriginal peoples in Canada.[79]

The benefit of inherent self-government in mitigating against this sort of political interference and vacillation is this: it insulates Aboriginal peoples from the need to rely, solely, on federal government assistance, support, and the courts to vindicate their inherent rights. As Mary Ellen Turpel notes, "recognizing three orders of government served to ensure that the *Indian Act* style of domination would be left behind, not retrenched."[80] To be sure, the entrenchment of constitutional status for an order of Aboriginal government would require the sorting out of implementation issues—constitutional entrenchment is not enough.[81] Bilateral negotiations would have to work out the intricacies of the political and financial arrangements between Aboriginal governments and the federal government. This criticism of inherent self-government should not be understated: in the aftermath of the *Charlottetown Accord*, one of the principle criticisms was that the *Accord* was lacking in detail and clarity in how it would actually operate on the ground.[82]

Yet, one could presume self-government would bring clarity and consistency to the relationship between the federal and Aboriginal governments. Provinces do not have their very fates thrown to the winds because of a change in the federal government. That is because of their status as constitutionally protected jurisdictions. A whole field of federalism has arisen which manages relations and negotiations between the provincial and federal governments—executive federalism.[83] There is no reason to believe that these same styles of federalism, in

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[78] Nicole O'Byrne, "Address" (Aboriginal Peoples and Law Seminar Class delivered at the Faculty of Law, University of New Brunswick, 19 September 2015) [unpublished].

[79] John Weinstein, *Quiet Revolution West: The Rebirth of Métis Nationalism* (Calgary: Fifth House Publishers, 2007) at 175–190.

[80] Turpel, *supra* note 6 at 128.

[81] See Hogg & Turpel, *supra* note 72. Financing and negotiation would work out the particulars of the right, but those negotiations would start from the premise of inherency. This was the promise of Charlottetown.

[82] *Ibid* at 191.

[83] See, for example, intergovernmental agreements, which Charlottetown would have made legally enforceable and binding as in Macklem et al, *supra* note 15 at 478–81.

addition to the legal dispute mechanisms detailed below, would be unsuitable to the task of mediating disputes between Aboriginal and federal governments.

If constitutional protection is to be extended not only to Aboriginal *rights* (as per s. 35(1) of the *Constitution Act*, *1982*), but also to Aboriginal peoples as an order of government, Aboriginal peoples would be insulated from the tides of political opportunism in a fashion similar to the provinces. This boils down to a simple principle of constitutional theory. Once a matter has been constitutionally entrenched, or in other cases, proscribed, the matter is removed from political debate and from the control of the majority.[84] Of course, constitutional amendment to achieve this goal is cloaked in legitimacy—judicial amendment, in such a wholesale fashion, may not be.[85]

Political considerations aside, there are distinct legal benefits associated with entrenching an Aboriginal order of government in the Canadian Constitution. Two come to mind. In the first place, as previously noted in this paper, Aboriginal peoples and their supporters have resorted almost exclusively to the courts to vindicate their rights. One can see why: the *Charlottetown Accord* failed because the majority chose not to ratify it; the *Kelowna Accord* was scrapped as a matter of political choice. Resort to the courts, however, is not tied to political failure. This is directly because the *Charter* has transformed our constitutional understanding. Specifically, it has changed the role of Canada's judiciary and the way that the courts do their work.

The courts no longer review law exclusively—after the *Charter*, as Carl and Ellen Baar argue, the Supreme Court emphasizes its law development function.[86] It makes new law in a variety of fields; the Court sets aside old precedent for new law, and attempts to piece together disparate strands of law in an attempt to come to sensible dispositions in cases involving a certain set of parties.[87] But the Supreme Court has also self-described itself as "guardian of the Constitution."[88] It has become a "constitutional oracle," issuing broad declarations of constitutional policy which shape our discourse and define our rights.[89] If the Supreme Court says we have a right to physician assisted dying, we do;[90] if the Supreme Court decides there is a right to strike protected by the *Charter*, there is;[91] if the Supreme Court says that

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[84] Antonin Scalia, "Romancing the Constitution: Interpretation as Invention" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham: LexisNexis Canada, 2004) 340.

[85] *Ibid.*

[86] Carl Baar & Ellen Baar, "Diagnostic Adjudication in Appellate Courts: The Supreme Court of Canada and the Charter of Rights" (1989) 27:1 Osgoode Hall LJ 1.

[87] *Ibid*.

[88] *Hunter v Southam Inc* [1984] 2 SCR 145 at para 16, 11 DLR (4th) 641.

[89] FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000) at 53.

[90] *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331.

[91] *Mounted Police Association of Ontario v Canada (AG)* 2015 SCC 1, [2015] 1 SCR 3.

discrimination must impugn human dignity to be constitutionally proscribed, it must;[92] but if the Court then decides that human dignity means nothing, it does not.[93] The nature of the Court's decisions in these cases certainly supports a conclusion: the *Charter* has transformed the judiciary into a political institution, a role for which it is not designed.

The impetus for Aboriginal peoples to establish their rights through the courts is understandable, given the highly political nature of judicial decision-making at the Supreme Court. On the other hand, for those who believe in predictability and clarity in the law, the result has not been perfect. With specific reference to Aboriginal rights, Hogg and Turpel note that the issues related to inherent Aboriginal self-government are wide open to judicial interpretation, and for that reason, they are not amenable to judicial resolution—constitutional amendment is the preferred approach.[94] As a larger statement, the preference for constitutional amendment is a function of deficiencies in the common law system to define the relationships between orders of government. In essence, this might be an unfortunate symptom of the common law system to which we are accustomed in the Western world. Indeed, Justice Antonin Scalia argues:

> …this system of making law by judicial opinion, and making law by distinguishing earlier cases, is what every American law student, every newborn lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge…who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear until (bravo!) he reaches the goal—good law.[95]

This practice of avoiding precedent, distinguishing cases, and on some occasions, misapplying law, can clearly lead to disjointed results—this is even more so given the Court's penchant for intervention in more cases of greater importance. The goal of the common law system is the adjudication of discrete disputes between adverse parties—it is difficult to arrive at systemic, consistent and clear jurisdictional conclusions in the adversarial context. The varying cases on Aboriginal title, rights, and treaty interpretation is but an illustration of this reality. How can one reconcile *St. Catherine's Milling* with *Tsilqho'tin*?[96] On the other hand, how can *J (J)* be seen as anything more than a gross misapplication of *Sparrow*?[97] How can be *Sioui* be

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[92] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.

[93] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

[94] Hogg & Turpel, *supra* note 72 at 190–91.

[95] Scalia, *Interpretation*, *supra* note 3 at 9.

[96] Compare *St. Catherine's Milling and Lumber Company v The Queen* [1888] UKPC 70, 14 App Cas 46 and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

[97] The Agenda with Steve Paikin, "Treating Aboriginal Rights" (November 25, 2014), online: YouTube <www.youtube.com/watch?v=nCnLQGX0ZKU> at 00h:5m:24s.

reconciled with *Marshall #1*?[98] This comparison merely illustrates the inconsistency of the common law method in adjudicating Aboriginal law disputes. Of course, one can point to areas of the law where jurisprudential approaches have evolved over the course of many years, leading to different legal results. That said, this contention does not change the fact that the area of Aboriginal law in Canada is a minefield. There would be a certain repose associated with entrenching an inherent right of self-government, and all which flows from it, in the Constitution. Otherwise, Aboriginal rights will remain a web of cases and judicial opinions that are at cross-purposes.

Connected to the unsuitability of the common law courts to adjudicate the breadth of relationships between coordinate jurisdictions, the second benefit relates to dispute mechanisms. As previously noted, Canadian constitutional law has evolved to include a flexible set of doctrines that mediate and delineate jurisdictions and disputes between orders of government.[99] For example, the *Charlottetown Accord* expressly included a limitation on inherent Aboriginal self-government in the form of a peace, order, and good government provision, similar to the provision which heads the catalogue of federal powers in s.91 of the *Constitution Act*, *1867*.[100] Of course, as a third order of government, should constitutional amendment be pursued, Aboriginal peoples could maximize the scope of their jurisdiction with reliance on the pith and substance and the aspect doctrines. In the same way provinces benefit from a generous and flexible federalism (heralded, in part, by the Judicial Committee), Aboriginal peoples could become a part of the fabric of Canadian constitutional federalism and benefit as well. This is why the flexibility of Canadian federalism is so integral, and why federal structures still matter—separate from the *Charter*, these structures provide the space for Aboriginal peoples to govern themselves within Canada if the structure properly recognizes Aboriginal peoples as a central part of Confederation.

In this respect, one could theorize that there would be fewer jurisdictional disputes and fewer application-of-laws disputes, which have largely been the centerpiece of Aboriginal defendants in provincial offences prosecutions.[101] There would be an existing set of dispute mechanisms which have successfully mediated disputes between orders of government since 1867. No doubt, these mechanisms would have to be expanded and massaged in order to adapt to a reality where three orders of government exist. However, as noted previously, Canadian federalism is remarkably flexible. It can accommodate difference and asymmetry. In this respect, the legal benefit of flexibility in federalism would provide clarity to an uncertain area

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[98] Compare *R v Sioui* [1990] 1 SCR 1025, 70 DLR (4th) 427 and *R v Marshall* [1999] 3 SCR 456, 177 DLR (4th) 513.

[99] In addition to the pith and substance doctrine and the aspect doctrine, the paramountcy doctrine, the doctrine of interjurisdictional immunity, and the peace, order and good government power also govern provincial-federal relations. Each of these doctrines bring stability to relations between the orders of government.

[100] *Charlottetown Accord*, *supra* note 2.

[101] See the litany of cases relating to provincial prosecutions and Aboriginal/treaty rights erected as a defence.

of the law in Canada. Federalism in Canada already contains the tools of dispute resolution.[102]

2. Material Aboriginal Issues

Constitutional theory is not the end goal of inherent self-government. As noted in the Introduction of this paper, the theoretical considerations are threshold matters to get to the real heart of the issue: the way by which Aboriginal peoples can achieve meaningful reconciliation in the Canadian federation.

This question is not only a problem of constitutional law—it has material consequences as well. Mary Ellen Turpel noted this connection in the aftermath of the *Charlottetown Accord*:

> Why are there grave social, economic and political problems for Aboriginal peoples in Canada? […] One way of understanding matters is to realize that the current situation for Aboriginal peoples in Canada is one of imbalance […] First Nations do not have a balance in their relations with Canadian governments or the Canadian people. This imbalance is echoed in Aboriginal communities, where social harmony, a key objective of community life, has deteriorated. Aboriginal peoples have never been full partners in nation building in Canada.[103]

Turpel's comment has a modern impact. As an example, take Idle No More. That movement was, arguably, the closest we have come in Canada to a cohesive statement of Aboriginal peoples across the country. One must not forget that the context of Idle No More was underlined by revelations of material and abject poverty in a Northern Ontario reserve community, Attawapiskat.[104] This poverty formed the backdrop to a series of demands on the part of Idle No More, one of which related directly to issues of Aboriginal rights. Indeed, in its list of objectives, the movement called on the Government of Canada, along with the provinces and territories, to "[c]ease its policy of extinguishment of Aboriginal Title and recognize and affirm Aboriginal Title and Rights, as set out in section 35 of Canada's constitution, and recommended by the Royal Commission on Aboriginal Peoples."[105] As noted above, the Commission was particularly interested in inherent self-government. One cannot, in this respect, divorce the material conditions of Aboriginal peoples in Canada from the demands for a proper space for self-government as *recognized* in the Constitution. To do so would run directly counter to the Idle No More vision.

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[102] I am alive to a potential criticism: there is no doubt that the doctrines heretofore described arose out of common law disputes between provinces and the federal government. Yet the application of the federalism doctrines is not controversial—nowadays, their application leads to predictable outcomes, as doctrines should. The case, as described earlier, is different when it comes to the *Charter*.

[103] Turpel, *supra* note 6 at 120.

[104] See Charlie Angus, *Children of the Broken Treaty* (Regina: University of Regina Press, 2015).

[105] See Idle No More, "Calls for Change", online: Idle No More <www.idlenomore.ca/calls_for_change>.

Of course, one can question the efficacy of the advocacy strategy employed by Idle No More. However, at least in this connection between material conditions and governance claims, there can be no mistake that the movement was seized by the right idea in concert with traditional Aboriginal concerns. Indeed, the relationship between culture, material wellbeing, and sound political systems is central to the Aboriginal understanding of the world. This proposition is made clear in Taiake Alfred's work, *Peace, Power, and Righteousness: An Indigenous Manifesto*. In his work, Alfred approaches material problems of Aboriginal peoples from the position of Aboriginal doctrine. That is, he views and explains social and political problems from an Aboriginal lens. At the social level, Alfred cogently describes the tragic state of Aboriginal peoples *writ large* in a material sense. According to Alfred, the current situation of Aboriginal peoples in Canada is "…diametrically opposed to the social and political culture that sustained [our] communities in the past."[106] This connects to the traditional relationship between Aboriginal peoples and Canada, according to Alfred: "(T)he legacy and history of Canada's past subjugation of Aboriginal peoples has led to dispossession, disempowerment, and disease…"[107] He further argues that:

> Most Native life is a painful burden that is the result of colonialism. Yet the real tragedy is that many Native people are left to wander aimlessly for want of the inspiration that a healthy, supportive, and cohesive community can provide. Cultural dislocation has led to despair…"[108]

A progressive might view Alfred's view as backwards looking. That said, his connection between cultural dislocation, systemic political issues, and material problems is a connection supported in the modern-day Idle No More movement and by non-Aboriginal observers alike. The poor material status of many Aboriginal peoples in this country is a matter of the public record. Indeed, Wiseman, as a non-Aboriginal political observer, tends to agree with Alfred's description of current Aboriginal affairs and takes the argument a step further by citing current material problems in Aboriginal communities. Wiseman notes "…Aboriginal identity and culture were at first systematically and zealously suppressed. Aboriginal culture was derided and vilified as inhumane."[109] According to Wiseman, this "often entailed the forced separation of parents and children, the suppression of their languages, and the indoctrination of Aboriginal children with the exoteric trappings of religions and customs alien to their own esoteric spiritual, cultural traditions."[110]

Connected to the conduct of Canadian authority, Wiseman notes that Aboriginal cultures are "disproportionately afflicted with social pathologies: exceptionally high rates of incarceration, spousal, sexual, and substance abuse, alcoholism, and suicide."[111] These social pathologies have broken apart Aboriginal

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[106] Alfred, *supra* note 19 at 46.

[107] *Ibid* at 58.

[108] *Ibid.*

[109] Wiseman, *supra* note 24 at 103.

[110] *Ibid.*

[111] *Ibid* at 105.

families and have contributed to a general cultural dislocation in these communities. However, the material problems of Aboriginal peoples certainly do not stop there. Wiseman argues that "[a]s a group, Aboriginals are economic have-nots: poorly housed, overrepresented among the unemployed, of below average incomes and levels of educational attainment."[112] Further, the cultural dislocation described by Alfred has adversely affected health outcomes in Aboriginal communities. Wiseman submits that Aboriginal peoples are generally "[s]ubject to shorter-than-average lifespans, they suffer comparatively high rates of infant mortality, tuberculosis, diabetes, and HIV-AIDS."[113]

These social facts are largely indisputable. Not as a matter of coincidence, the *Charlottetown Accord* (with its promise of inherent Aboriginal self-government) made this same connection in similar terms. In the Contextual Statement of the *Accord*, the framers put it as such:

> The exercise of the right referred to in subsection (1) ['the inherent right of self-government within Canada'] includes the authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
>
> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
>
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment,
>
> so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.[114]

Idle No More, Alfred's thesis, and the above *Charlottetown Accord* Contextual Statement, in one clear way, affect the same conclusion. All thread together an integral benefit of inherent control over one's land and government—that is, the salutary benefits that flow in terms of material well-being and cultural development.

Some radical Aboriginal activists have argued for full sovereign independence from Canada as a means of achieving these goals. If Canada is the problem, so the argument goes, independence is the solution. However, most serious observers view this as impossible, or if not, practically problematic.[115] Inherent self-government within the Canadian constitutional framework provides an alternative to the independence suggestion—it accomplishes the same salutary objectives while recognizing the Aboriginal fact in constitutional letter. This, if one follows Alfred and the other authorities, will have the effect of recognizing the foundation for stronger and healthier Aboriginal communities.

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[112] *Ibid.*

[113] *Ibid.*

[114] *Charlottetown Accord*, *supra* note 2.

[115] Turpel, *supra* note 6 at 140–41.

More can be said on the material problems that plague Aboriginal peoples in this country. Books have been, and could be written. Constitutional law cannot solve poverty generally. However, constitutional law and theory can provide an adequate first step by which Aboriginal peoples can develop their own societies and solve their own problems. This has long been the project of Aboriginal peoples in Canada.

III. CONCLUSION

There can be no doubt that the recognition of a third order of inherent Aboriginal self-government is easier said than done. The process of constitutional amendment, as noted earlier, is particularly taxing by the numbers, and in any event, requires herculean political will. Further, constitutional entrenchment will not solve every problem, material or political, in Aboriginal communities. Entrenchment would require good-faith negotiations to work out the particulars of any inherent self-government arrangement. If Aboriginal communities are self-governing, as provinces are, they would need to be geographically defined. Resource management would be a particular concern, as between the federal government, the provinces, and these new, self-sustaining Aboriginal communities. These are practical considerations which should not be forgotten.

It is unclear whether anyone is able to even begin thinking about these questions at this point. After all, we are all still bed-ridden with *Charter*itis. We await with bated-breath the next Court decision, that maybe, just might, finally, emancipate Aboriginal peoples in a way that time has not allowed. Of course, this seems ludicrous if we think about it for a fraction of a minute. Until we get ourselves off this intoxicating sickness, we abdicate our collective responsibility as a country to come to meaningful political resolutions. Doing so will involve a dose of courage.

Courage involves, at a very basic level, viewing the cavernous divide between Aboriginal peoples and Canada through the correct theoretical lens. But difficulty with respect to theory should not be conflated with impossibility. The state of Aboriginal law in Canada is currently in flux; it lacks certainty; and this uncertainty, in the estimation of this exposition, cannot lead to a meaningful vindication of rights for any group. There must be a better way.

By way of review, the main contention of this paper was that federalism in Canada *can* and *should* recognize a constitutionally entrenched third order of inherent Aboriginal self-government. In other words, some academic concern should centre around federalism rather than the *Charter* for a satisfying resolution to issues of Aboriginal jurisdiction in Canada. On the first branch of this argument, this paper contended that the history of Canadian federalism has demonstrated two abiding traits: a respect for diversity and minority rights, and a flexibility that permits the exercise of these diverse rights as component parts of a larger whole. To this end, this paper reviewed the legal codification of these traits by the Judicial Committee of the Privy Council and reviewed the current legal doctrines of federalism to make the case for diversity and flexibility with respect to an inherent right of self-government.

On the second branch of the argument, this paper articulated the reasons why Canadian federalism should evolve to incorporate a right to inherent self-government for Aboriginal peoples. This paper reviewed why the current system of delegated Crown-sovereignty is not inherent, and why inherent control of governments for Aboriginal peoples is beneficial from a legal and political perspective. The fact of historic Aboriginal self-government is not enough; recognition of that fact is integral from a position of legal clarity. In whole, this paper has attempted to make the argument that inherent self-government for Aboriginal peoples must be achieved through constitutional amendment and recognition in order to be truly inherent. Once accomplished, the existing doctrines of federalism can aid in incorporating Aboriginal peoples into the fabric of the Canadian Constitution.

These questions are fundamentally important in present-day Canada. As previously noted, Canada is embarking on a new era. That era is paradoxical in nature—it is hopeful from a political perspective, but frustrated in a sense that a resolution seems far off. Yet, on the eve of a new administration in Ottawa that seeks to create a meaningful, lasting relationship with Aboriginal peoples in Canada, it will no longer be enough to simply throw money at the problem. Money has not solved the issues in Kaschechewan, for example. Additionally, it has not provided a meaningful political resolution for Aboriginal leaders, nor Aboriginal peoples. There seems to be an appetite for foundational change—Aboriginal peoples are seeking a *place* in this country. In the present-day where there is a great deal of sympathy for the plight of Aboriginal peoples in this country, and alongside the litany of other constitutional problems facing Canada (the Senate of Canada, for example), perhaps now is the moment—the moment where a major step can be taken towards reconciliation in the Canadian constitutional order.

Back to courage. Courage in this context involves shifting our gaze to federalism. The tools of federalism, as analyzed and applied in this paper, can be the bridge towards reconciliation. Federalism is fundamentally about the place of coordinate authorities in Canada—and, significantly, the doctrines of federalism can locate a place for Aboriginal peoples in Canada. But this requires viewing the issue of Aboriginal self-government as one of community. Perhaps it was said best by Justice Scalia when he said:

> It is foolish to sit, wringing one's hands, wondering what the Supreme Court is going to tell us the Constitution requires on an issue […]. And that is what we are condemned to do unless we can screw up our courage and say, "*Let's throw the dice.*"[116]

The Supreme Court of Canada does not control the futures of Aboriginal peoples. Aboriginal peoples do. When we view the issue as a problem of community, federalism as a potential solution becomes clear. Courage to go back to the future, back to federalism, is the antidote to a bad case of *Charter*itis.

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[116] Antonin Scalia, "A Constitutional Convention: How Well Would It Work?" (Forum address delivered at the American Enterprise Institute for Public Policy Research, 23 May 1979) at 19.