The need for a principled framework to effectively negotiate and implement the Aboriginal right to self-government in Canada

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November 2002

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirement of the degree of LL.M.

Your file Votre référence
ISBN: 0-612-88128-8
Our file Notre référence
ISBN: 0-612-88128-8

Abstract

The aim of this thesis is to reveal the need for a principled framework that would establish an effective implementation of the aboriginal peoples' right to self-government in Canada. In recent decades, many agreements instituting the right to self-government of First Nations have been concluded between the federal and provincial governments and aboriginal peoples. It then becomes important to evaluate the attempts of the two existing orders of government and the courts of Canada as regards the right to self-government and assess the potential usefulness of the two's efforts at defining and implementing the right. Firstly, the importance and legitimacy of the right to self-government is recognized through its beginnings in the human right norm of self-determination in international law to the establishment of the right in Canadian domestic law. Secondly, an evaluation of the principal attempts, on behalf of the governments and the courts, to give meaning and scope to the aboriginal right to self-government, which culminate in the conclusion of modern agreements, reveals their many inefficiencies and the need for a workable and concrete alternative. Lastly, the main lacunae of the negotiation process, the main process by which the right is concluded and implemented, and the use of the courts to determine the scope and protection of the right to self-government, are revealed. An analysis of European initiatives to entrench the right to self-government, mainly the *European Charter of Self-Government* and its established set of principles that guide the creation of self-government agreements, are also used in order to propose a viable option for the establishment of a principled framework for the aboriginal right to self-government in Canada.

Résumé

Le but de cette thèse est de montrer l'importance d'élaborer un cadre de référence capable de poser les principes nécessaires à la mise en oeuvre du droit des peuples autochtones à l'auto-gouvernance. Au cours des dernières décennies, nombre d'ententes conclues entre les gouvernements du Canada et les groupes autochtones ont reconnu le droit des Premières nations à l'auto-gouvernance. Identifier ces actes de reconnaissance ponctuelle du droit à l'auto-gouvernance des autochtones de la part des gouvernements et des tribunaux est une chose, en apprécier la pertinence et la valeur au regard de la définition et de l'effectivité du droit en question en est une autre. Cette appréciation des efforts des institutions canadiennes passe d'abord par la reconnaissance de l'importance et de la légitimité du droit à l'auto-gouvernance, lequel est inclus dans la norme internationale du droit de la personne relatif à l'autodétermination et, à ce titre, devrait lui-même faire partie du droit canadien. Ensuite l'évaluation des efforts des gouvernements et des tribunaux pour donner un sens et une portée au droit des peuples autochtones à l'auto-gouvernance, efforts qui se reflètent avec le plus d'éclat dans les ententes les plus récentes, révèle au grand jour les nombreuses lacunes de ces conventions et, surtout, montre le besoin pressant d'imaginer une alternative fonctionnelle. Finalement, seront mises en lumière les lacunes relatives au processus de négociation, procédure principale par laquelle le droit à l'auto-gouvernance est négocié et mis en oeuvre, et celles relatives à l'utilisation des tribunaux pour interpréter l'étendue de la protection accordée au droit à l'auto-gouvernance par les ententes ainsi négociées. L'analyse des initiatives européennes afin d'enchâsser le droit à l'autodétermination, principalement la Charte européenne de l'autonomie locale et l'ensemble des principes qu'elle exprime et qui doivent guider l'élaboration des ententes relatives à l'auto-gouvernance, sert de fondement au cadre de référence proposé, seule alternative viable afin donner toute sa plénitude au droit à l'auto-gouvernance des peuples autochtones.

ACKNOWLEDGEMENTS

J'aimerais premièrement remercier mon directeur de thèse, Professeur René Provost pour son appui et ses conseils pendant l'écriture de cette thèse. Merci aussi à Madame Carole Hilling pour ses conseils indispensables au moment ou le sujet de ma thèse en était encore au stage embryonnaire.

Surtout un gros merci à toute ma famille; mes parents, Gisèle et Laurent Lavoie, pour leur patience et leur appui continu au fils de mes études, ainsi que ma sœur Sophie et mon frère Réjean; sans leurs encouragements je n'aurais jamais pu terminer. Merci aussi à mes grands-parents, Adeline, Henri, Maurice et aussi Blanche, maintenant disparue, des personnes fabuleuses qui font tout leur possible pour encourager leurs petits-enfants.

À mes collègues du LL.M, particulièrement Ulrika et Marianne pour m'avoir écouté et Xavier, Henning et Horacio pour leur appui humoristique tant que moral, ainsi que les bons moments passés avec mes chers Julie et Jens, Alexia, Jan, Alejandro et sa famille et tous les autres étudiants; vos soutiens ont été tout pour moi. Un merci particulier à Anna, Kevin, Dona et Andrea ainsi que tous mes collègues de LL.B. pour leurs encouragements continus de loin. Merci aussi à Patrick Forget pour ses corrections et James Irving pour son aide.

J'aimerais aussi reconnaître l'aide financière de Fondation pour l'avancement du droit du Nouveau-Brunswick qui a rendu cette année de maîtrise possible, sans votre appui financier généreux, je n'aurais pas pu compléter mon année aussi aisément. J'en suis très reconnaissante.

INTRODUCTION

In recent years, there has been a drastic increase in claims for the right to self-government by aboriginal peoples of the world. Due to their often inferior status within the states in which they reside, aboriginals peoples have sought to utilize the affirmed international human right to self-determination and, consequently, the natural outcome of this human right: self-government. These claims to self-government would redefine the indigenous peoples' status within the State, creating a modern partnership of equality, a partnership that would simultaneously encompass both their needs and the needs of non-Aboriginals. These claims have not been ignored, especially in Canada where, in the mid-1990s, the constitutional right to aboriginal self-government for all natives living on its territory was finally recognized in a governmental policy guide and case law. This recognition set into motion a nation-wide process of modern treaty negotiations with aims to establish this right and other accessory and necessary rights (i.e. to lands) for the aboriginal groups of Canada.

The focal point of the demands of aboriginal peoples within Canada is that the established government must directly reflect the needs and aspiration of their people in order to achieve an amelioration of their socio-economic and cultural situations, which, it cannot be denied, are in peril. The need for First Nations to decide their own affairs is pressing. For aboriginal peoples, it is only through the right of self-determination that their nations can flourish as they would be able to create their own institutions, their own systems of laws etc. that would protect their special status as aboriginals as well as their culture. Although the definition of the right to self-determination is quite complex and wrought with debate, it is quite important to firstly answer the question as to whether Canada has put into practice this right to self-determination, and, if so, if it applied to the First Nations groups living within the boundaries of the state.

The determination of the affirmation of the right to self-determination by Canada is of prime importance before aboriginals can move to the next step of their claims. In Canada, aboriginals have focused specifically on the right to self-

government, relying on the protection afforded to their rights, both existing *and* treaty rights, by the Constitution of Canada. Although the right to self-government has now been affirmed as being a right protected by the Constitution of Canada by the judiciary, as well as elaborated upon in a policy paper by the government of Canada, its scope and meaning have not yet been concretely elaborated, nor is it explicitly constitutionally protected. This signifies that the exact meaning and extent of this right, as would usually be delineated by the courts and the legislator, has not been established. Aboriginal groups must seek a more tangible and real affirmation of their rights or risk being at the mercy of the judiciary and legislative realms' discretion. As past experience has shown, this could be detrimental to their rights and general aims in society.

The determination of Aboriginal title with the assumption of underlying Crown title, the interpretation of the scope of certain treaty rights, as well as the determination of constitutionally protected rights by the judiciary have, in the past, shown that the weight carried by the natives' perspective in the protection of these rights is not necessarily central to the courts interpretations. Although, in the last century, the judiciary's interpretation of native peoples' rights has dramatically evolved in the direction of the establishment and the protection of these rights– *in lieu* of past trends that tended to limit their breadth- much remains to be achieved in order to concretely shield aboriginal rights from possible infringements that are detrimental to their lives. If you couple the aforementioned preoccupation with the Canadian government's recent rush to the negotiation of modern treaties in the aftermath of their declaration of a constitutionally protected right to self-government of aboriginals in a policy guide emitted by the federal government in 1995, it would seem that the constitutionally protected right of aboriginals to self-government could be severely curtailed or applied in a manner which would not be totally beneficial to the aboriginal groups' interests.

Given the effort being made in the domestic realm by aboriginal groups of Canada in the aims to obtain self-government, it is of prime importance to determine the scope and meaning of this recently recognized right and the extent to which it

could be limited or extended by the judiciary. As many modern treaties and agreements have recently been concluded with regards to aboriginal lands and resources within the context of negotiations elaborated by the federal and provincial governments, it is critical to analyse whether the negotiations of these treaties are following an acceptable and constitutional the right path, one that would seek and affirm the right to self-government of native peoples rather than limiting it. I propose that a nation-wide principled framework would perhaps be better suited to protect the right of aboriginals to self-government, as it would define its scope and core principles assuring that this right to self-government, as a fundamental right to indigenous peoples' survival, is better protected.

The aim of this thesis is to evaluate the effectiveness of the previous attempts of the federal government to delimit and establish the right to self-government as well as the success of the existing negotiations between the State and aboriginal groups in order to establish their rights to self-government; principally the judiciary's and the legislature's roles in the delimitation of aboriginal rights in general, of the right to self-government in light of this delimitation, as well as the federal and provincial governments' negotiated modern agreements with the aboriginal groups. As such, this thesis would analyse the state of the law in Canada, taking into account the limitations it has already established on aboriginal peoples' rights. To further push the analysis, two modern treaties will be presented and analysed. Although the focus will be on the right to self-government in Canada, an example of an already existing principled framework with regards to autonomy within Europe will be analysed to propose a possible structure for the further protection of the right to self-government for the native peoples of Canada.

The first chapter will delineate the right of aboriginals to self-government, placing it within firstly the context of the greater human right of self-determination as well as within the place made for it by the Canadian judiciary as regards the common law, treaty law, the fiduciary obligations of the Crown and the separation of powers as presented in the Constitution of Canada. Because of the strong connection between

these elements and their importance in the determination of the aboriginals' right to self-government, it is crucial to conceptualize the right to self-government within these categories in order to establish the right's legal "standing", both in the international and domestic sphere. They are essential to the debate surrounding the right to self-government in Canada.

In the second chapter, there will firstly be an analysis of the main governmental initiatives to define, delimit and implement the right of self-government in Canada, attempts that served as the foundation for the development of a definition of self-government in Canada, as well as for the negotiations taking place today between the native peoples of Canada and the federal and provincial governments. The role of the courts as regards the definition of this right will also be investigated. Also included within this chapter will be a full analysis of two modern agreements, or "modern treaties" that have been concluded in Canada in the last 5 years. The agreements will be analysed separately and compared with the norms that have been established with regards to the right to self-government. In short, it will be sought to establish if these treaties are respecting of the established "norms" of self-government and as to whether these treaties are threatened from future judicial and legislative intervention and interpretation. Furthermore, the answer to the question as to whether these treaties reflect the right to self-government and the needs and preoccupations of the aboriginals will be sought.

The third chapter will begin with an analysis of the role of the courts in the determination of the right to aboriginal self-government and seek to answer the question as to whether the judiciary should and could play a role in its delimitation and protection considering the lack of basic guidelines establishing the right. Secondly, the lack of guidelines in guiding the implementation of the right will be analysed in light of the negotiation process. Finally, the Council of Europe's efforts in confirming local and regional self-government by the establishment of international instruments delimiting this very right will serve to propose a type of principled framework that could be employed by the native peoples of Canada in order to assure a greater degree

of legislative and institutional protection to their newly recognized right to self-government. Although negotiations in good faith between natives and the orders of government have been proven to be somewhat effective in the past, it will be explained that they do not respond to the inequality in bargaining power that exists between aboriginal groups and Canada's federal and provincial governments. In this paper, it will not be sought to construct the principled framework itself, an enterprise that should be undertaken by the parties to the negotiation process. What will be done, however, through the compilation of the questions that are shown to arise in the previous chapters regarding the right to aboriginal self-government, is to bring together the major points and notions that should be addressed by the parties in their quest to establish concrete guiding principles. Although the negotiated agreements between the aboriginals and the governments will probably vary greatly in their content and scope, they will all build upon the same basic set of principles. The definite need for clear constitutional principles, judicial remedies and litigation to affirm the right to self-government, as well as a host of other principles, will be demonstrated. In doing this, a more effective method of ensuring the establishment of the right to self-government for aboriginal peoples will be shown.

1. THE DOMESTIC AND INTERNATIONAL FRAMEWORK FOR THE RIGHT TO SELF-GOVERNMENT: THE HUMAN RIGHT OF SELF-DETERMINATION AND GENERAL ABORIGINAL RIGHTS IN CANADA

1.1. Introduction

The legal foundations of the right to self-government can be found to have originated, primarily, in the international realm. Although the self-determination of colonized peoples has been an international pre-occupation for quite some time, the protection of indigenous peoples'[1] rights to self-determination and their subsequent rights to self-government has only come to the forefront of the debates in the last thirty years. The rights of peoples to freely determine their destinies, either in their political, social, economic or cultural aspects, have been subject to many international and internal debates. This debate has lately been extended to indigenous people as their plight has garnered accrued international interest. At the centre of the discussion is the question as to whether aboriginals can be considered as "peoples" enabling them to merit the ability to control their own futures through self-determination. It would seem, however, that indigenous peoples have the uncontested right to self-determination as affirmed in several international instruments.

Aboriginals have continuously been denied their rights to fully participate in the administration of their own affairs. Because of centuries of misconceptions regarding their status as First Nations on the territory that is now Canada, aboriginals have been prevented from effectively taking control of their lives. Both judicial and legislative interpretations of the rights of aboriginals' rights have, in the past, severally limited their rights within Canada. Although the judicial interpretation of aboriginal peoples' rights has much advanced, and legislation concerning indigenous affairs has evolved to give them greater autonomy, it is not quite certain where newly recognized

[1] Similarly to other authors writing about native peoples, the term "indigenous" is used interchangeably with such terms as "First Nations", "indigenous populations", "indigenous peoples", "aboriginals" or "natives".

rights of aboriginal peoples, such as that of self-government, would fit into this judicial and legislative scheme.

It is only in the last ten years, however, that the government has affirmed the aboriginal peoples of Canada's constitutional right to self-government, despite the state's adherence to international instruments affirming the right to self-determination. Furthermore, case law has also affirmed this right. Yet, it is still not clear as to the scope and meaning of this right and the degree of protection that it has been afforded. Taking into account the limiting manner by which the protection of aboriginal rights has been delimited by the judiciary, it is believed that the right to self-government is at risk.

Therefore, the goal of this chapter is to outline the development of the norm of self-government for the Aboriginals of Canada, through an analysis of the fundamental importance of the human right of self-determination and its evolution, as well as a review of the different rights affirmed for the indigenous peoples of Canada and the limitations that can be imposed on them by the government. Once this framework has been established, it will then be possible to analyse the many concepts and questions that will influence the right of Aboriginals in Canada to self-government, as well as serving to put them into the practical context of modern treaties.

1.2. Self-Determination: From "Peoples" to "Indigenous Peoples" and Threats to the State

The origins of the theory of self-determination can be traced back to approximately three hundred years ago as being utilised by peoples of different ethnic, linguistic, or religious of certain states seeking to create smaller political divisions[2]. Since then, the principle of self-determination has developed to become of the highest order as a human right, its importance shown by its incorporation in prestigious

[2] H. Hannum, "SYMPOSIUM ON THE FUTURE OF INTERNATIONAL HUMAN RIGHTS: The Right to Self-Determination in the Twenty-First Century" (1998), 55 Wash & Lee L. Rev. 773, at 776.

international instruments such as the *United Nations Charter*[3], the two international covenants[4] as well as several other instruments. The majority of these documents contain similar definitions of self-determination; a right held by all peoples enabling them to pursue their own political status as well as economic, social and cultural development. It is clear that such a definition, in its all-encompassing style, would unavoidably lead to heated debates concerning the particular nature and scope of the right. Particularly, the underlying idea of the independence of peoples, as well as the definition of the term "peoples" in itself, caused the most concern.

In this context, self-determination in international law was the subject of two studies conducted simultaneously by Hector Gros Espiell[5] and Aurelia Critescu[6] for the United Nations in the 1970s. The interest for the United Nations during the course of this decade was the self-determination of colonized peoples, *peoples* considered to be under foreign domination or alien domination. It was question at this time that these peoples should achieve a certain measure of independence from the countries controlling their affairs. The concept of independence for self-determination was, furthermore, imagined in two parts: external self-determination, the accession of total state independence, and internal self-determination which corresponded, *grosso modo*, to the right of the peoples to govern themselves, associatively, within a state[7] without putting into peril neither the political unity nor the territorial integrity of the State from which the peoples wanted to "secede"[8]. These two different notions were, however, envisaged concurrently inasmuch as they were both considered to be viable options for different categories of peoples.

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[3] *Charter of the United Nations,* 26 June 1945, Can. T.S. 1945 No.7., art. 1(2).
[4] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), (entered into force 23 March 1976) at art. 1(1) [*ICESCR*], and *International Covenant on Civil and Political Rights*, Dec.16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200 (XXI), (entered into force 23 March 1976) at art. 1(1) [*ICCPR*].
[5] *Implementation of the United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*, U.N. Doc. E/Cn.4/Sub.2/405/Rev.1, U.N. (1980) (H. Gros Espiell, Special Rapporteur).
[6] *The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, U.N.Doc. E/CN.4/Sub.2/404/Rev.1, U.N. (1981) (A. Critescu, Special Rapporteur).
[7] H. Gors Espiell, *supra* note 5 at 44-103.
[8] S. Wiessner, "Rights and Status of Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harv. Hum. Rts. J. 57, at. 116.

1.2.1. The Term "Peoples" and the Right to Self-Determination

Since the era of decolonisation, however, the concept of Aboriginal self-determination has grown to considerable proportions as more indigenous peoples have affirmed their right to govern themselves in accordance to the widely recognized international human right. Consequently, states have clearly limited the breadth of this right as regards the indigenous "peoples" living within their borders, as, according to the definition of self-determination in international law, it is only "peoples"[9], and no other defined groups, who benefit from this right.

For example, the International Labour Organization's (ILO) Convention n.169[10] expressly limited, due to pressure from many states, the effects of the use of the term "peoples" to describe indigenous peoples as to avoid any implications as to too broad claims that could be made as regards the rights and obligations stemming from this term in the international legal setting as, for example, the claim of the right to secession.[11] Similarly, the term "peoples" within the *Draft Declaration on the Rights of Indigenous Peoples*[12] seems to be suffering from the same fate. Furthermore, it is foreseeable that states will impose this same limitation in the Organization of American States' *Draft American Declaration on the Rights of Indigenous Peoples*[13]. It is to be noted that Canada has often joined the ranks of those in opposition to, or limiting of, the use of the term peoples as it could be applied to indigenous groups.

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[9] H. Gors Espiell, *supra* note 5 at 15-17, in his study on self-determination reported that although the right of self-determination was affirmed in relation to the right of peoples "under colonial and alien domination", the criteria of 'domination' had to be perceived from the point of view of the peoples themselves.

[10] *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 72 ILO Official Bull. 59 (entered into force 5 September 1991) [*ILO Convention 169*].

[11] R. L. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law" (1986) 80 A.J.I.L. 369, at 44.

[12] *Draft United Nations Declaration in the Rights of Indigenous Peoples*, U.N. Doc E/CN.4/1995/2, E/Cn.4/Sub.2/1994/56 (1994) [*Draft Declaration*].

[13] *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights at its 133rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997 [*Proposed American Declaration*].

The definition of indigenous peoples has been very difficult to elaborate and many international jurists have attempted to construct an acceptable definition of the term. Although almost all of them have fallen victim to quick criticisms from governments, jurists and aboriginal peoples alike, one particular definition has survived the myriad of amendment attempts and has become the most widely accepted and recognized definitions; that of the UN Special Rapporteur Jose R. Martinez Cobo's classification, elaborated in 1983.

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[14]

The importance of the definitional issue is paramount as can be deduced from the aforementioned debates on the meanings of the term "peoples" within certain international instruments; instruments that could greatly shape the international recognition of indigenous peoples' rights. It is clear that the definition of 'indigenous peoples' is included in that of 'peoples', however, it has not been recognized as such.

Furthermore, jurists have eventually whittled down the above definition as to only encompass the fundamental factors that define indigenous groups: that of priority in time as applied to a specific territory; the intentional continuation of the peoples' distinctive culture; self-identification, or identification by another official party, of their group as a distinct collectivity and, lastly; that the group has suffered oppressive regimes of exclusion or marginalization.[15] Authors have also found that the indigenous

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[14] See remarks made by J. R. Martinez Cobo, the Special Rapporteur to the Sub-Commission on the Protection of Minority Rights in his *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/Cn.4/Sub.2/L.566 (1983), at par. 34 and 45.

[15] For an in-depth analysis of these criterion, see S. Wiessner, *supra* note 8 at 115, as well as, Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, E.-I. A. Daes, on the concept of "indigenous people", U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996), at 5.

peoples' ties to their land or lands are fundamental to the definition of the term[16], a factor that is critical to the right of self-government.

There must exist a particular motive for the continued reticence of states to recognize indigenous peoples as being "peoples" in accordance to the internationally protected human right to self-determination. One likely reason would be that if aboriginal peoples' status as "peoples" were to be accepted, that states having ratified the ICESCR and the ICCPR could possibly be constrained to act quickly as regards the rights of aboriginal peoples within their boundaries, which could prove to be a costly affair. As it now stands, the U.N. Human Rights Committee has refused to broaden its jurisdiction to hear the claims to self-determination of the Mikmaq of Canada, a First Nations group, and stated that they did not consider this claim an actionable right.[17] Additionally, the idea of peoples as being able to freely determine their own fates involves a certain form of independence. States seem to fear, at first glance, the achievement of this independence through secession.

1.2.2. States and the Threat to Territorial Integrity and Political Unity of Self-Determination: Does the Idea of Peoples' Independence Always Entail Secession?

In the process of asserting a peoples' right to self-determination within their borders, states would obviously be concerned with the peoples' subsequent rights to independence. Consequently, the definition and affirmation of self-determination were not well received by certain states with "peoples" within its borders, as this right was erroneously equated with another right, considered to be absolute, to gain territorial independence and form a separate state. In a country such as Canada, for example, if all of its aboriginal groups would claim the right to their own territory, the result would

[16] For a discussion on the importance of indigenous peoples' ties to the land, see S. J. Anaya and R.A. Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" (2001) 14 Harv. Hum. Rts. J. 33.

[17] *The Mikmaq Tribal Society* v. *Canada*, Communication No. 78/1980 (30 September 1980), 39 U.N. GAOR, Supp. No. 40, at 200, U.N. Doc. A/39/40 (1984). The final decision regarding claims of the Mikmaq was rendered in December of 1991 and stated that this specific aboriginal group had no special rights over those held by non-Aboriginals.

be a patchwork of Canadian and First Nations jurisdictions. This concern was not entirely unlikely, as the legal concept of self-determination, it must be remembered, had been elaborated in international law to primarily free colonized peoples of the shackles of their colonizers, offering them the option to form independent states. In the latter context, however, territorial integrity still remained a barrier to the granting of self-determination to the colonized peoples.

Two principal elements of the concept of self-determination should, however, not be confused: that of the right of peoples to determine their own political, economic, social, religious and cultural destinies, which would be the right to self-determination, and that of that of the right of peoples to form their own independent states. There do exist some adherents to the theory that the right to self-determination entails secession from the host state, however, this theory has not been accepted in international law, as it would belittle the right to self-determination by implying that it is, in fact, merely a right to secession.[18] It is even advanced that "no state, no foreign ministry, and very few disinterested writers or scholars suggest that every people has the right to a state, and they implicitly or explicitly reject a right to secession"[19]. As will be shown in the following paragraphs, the process of secession is not simply "available to all" as it is governed by set rules of international law.

1.2.3. Is Secession a Right for *any* "Peoples" at *any* Time?

Secession of a population or peoples from the "host" state, a process by which there is a re-organization of the original boundaries of a particular state territory, was restricted by the United Nations' General Assembly in its *Declaration of Principles on Friendly Relations among States in Accordance with the Charter of the United*

[18] H. Hannum, *supra* note 2 at 776. See also, for a detailed discussion surrounding this notion; H. Hannum, "The Spectre of Secession: Responding to Claims for Ethnic Self-Determination" (1998) 77 Foreign Aff. 1, at 13.
[19] H. Hannum, *Ibid.* at 776.

Nations[20]. In the *Declaration on Friendly Relations*, it is stated that if the government of a country is effectively representing all of its population, it will be considered to be carrying out its obligations in conformity to the principles of self-determination and equality.[21] If states do not fulfill these basic obligations, then the question of secession could be considered an appropriate legal recourse for the peoples concerned. However, this process was further limited in that "only when all peaceful means of achieving self-determination had failed should other measures be adopted"[22]. This implies, to a certain extent, that peoples would have to exhaust the means available to them within the state (i.e. negotiations) before the right to secession could be recognized. Furthermore, many authors have accepted the idea, taken from the Declaration, that secession would be a suitable recourse only in such cases in which the substantive aspects of self-determination were not easily achievable within the state in question or in which the specific state is guilty of systematic and persistent oppression or violence against the peoples within its borders.[23] Examples of the latter situation would be the current situation within the state of Tibet. In the postcolonial era, however, "secession would most likely be a cure worse then the disease from the standpoint of all concerned"[24]. In light of the above principles, it is unlikely that Canada's aboriginals could be found to fulfill the "criteria" for secession.

Although provisions do exist to protect a state's territorial integrity and political unity within international instruments[25], they should not be used in manners that would be contrary to basic human rights or in ways that would justify their violation. As Espiell had already elaborated in the late 70s, the right to self-determination is of primary importance as a "prerequisite for the enjoyment of all other

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[20] *Declaration of Principles on Friendly Relations among States in Accordance with the Charter of the United Nations*, GA Res. 2025, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (1970) [*Declaration on Friendly Nations*].
[21] *Ibid.* at 121.
[22] *Ibid.* at. 66.
[23] S. J. Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996) at 84-85.
[24] *Ibid.* at 85.
[25] As well as the *Declaration on Friendly Relations*, *supra* note 20, the importance of the preservation of the territorial integrity of states has also been affirmed in the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

human rights"[26], clearly showing that the right should not be under-emphasized in any case. The questions of territorial integrity and sovereignty should not relegate the right to self-determination to a secondary role.

In Canada, the international right to self-determination was tried and tested in the case of an eventual unilateral declaration of independence by the province of Quebec in *Reference Re Secession of Quebec*[27], which confirmed that Quebec could not unilaterally secede but could, on the other hand, achieve the goal of secession by constitutional amendment.[28] As well, in discussing the right to self-determination, the Court stated

> The international law right to self-determination only generated, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural determination because they have been denied the ability to exert their right to self-determination[29]

Although not specifically discussing the plight of the aboriginal peoples in Quebec in the case of the latter's secession because it did not feel that such a discussion was necessary, the Court did affirm that Canada recognized the right to self-determination[30] but chose not to apply it in the situation at hand.

In the context of indigenous peoples' rights, the importance of the existing dichotomy between internal and external self-determination, compounded by the many different variants of self-determination that have been defined, creates quite a quagmire of theories. Yet, it is fundamental to the plight of indigenous peoples around the world that this right be considered in such a way as to advance their various causes, be it their land rights, cultural rights or very survival as peoples. Under the issues of territorial integrity, political unity and sovereignty and the theorizing on the

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[26] H. Gors Espiell, *supra* note 5 at 4.
[27] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*].
[28] For a complete resume of the case, see C.-A. Sheppard, "The Cree Intervention in the Canadian Supreme Court Reference on Quebec Secession: A Subjective Assessment" (1999) 23 Vt. L. Rev. 845.
[29] *Quebec Secession Reference supra* note 27 at 442.
[30] *Ibid.* at 434-435.

implications of the definition of the right to self-determination, many aboriginal peoples' rights are either ignored or suspended, waiting to be affirmed.

1.3. Towards a Reconceptualization of Self-Determination

A strict definition of self-determination seeking to protect territorial integrity over all else should no longer be observed in the international realm, especially in light of the global trend which has seen nations moving away from the traditional practice of the state affirming its supreme, complete and lasting sovereignty, to a system of world-wide or, at least, regional interdependence.[31] Such trends are illustrated by groupings of states such as the European Union, or in the establishment of new parliaments in Scotland and Wales by the United Kingdom; changes are made in which there is a "pooling of sovereignty in certain areas of governance, and in other areas granting greater autonomy"[32]. There does not seem to be great obstacles in the path of states that could prohibit them from effectively creating new and modern ways to administer their affairs and distribute autonomy. This new state of affairs will be further examined in the final chapter on a European charter that exemplifies this modern trend towards overlapping spheres of autonomy between regions and states.

J.S. Anaya has reconceptualized the notion of self-determination to respond the global trend of "multiple, overlapping spheres of community, authority and inter-dependency"[33] by elaborating a substantive concept, in two parts, of self-determination in which there would be at least a requirement of minimal participation in the process of developing and changing of the existing governmental authority to include all different sections of a state's populations (*constitutive* aspect). [34] This aspect is based on the requirement of participation and consent, so that the will of the people would be

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[31] Remarks of S. Talbott, Address at the Aspen Institute (visited august 24, 1999) reprinted online at <http://www.state.gov/www/policy remarks/1999/990824talbotaspen.html>, as they appear in L.M. Graham, "International Law Weekend Proceedings: Self-Determination For Indigenous Peoples After Kosovo: Translating Self-Determination 'Into Practice' and 'Into Peace'" (2000) 6 ILSA J. Int'l & Comp. L. 455, at 458.

[32] S. Talbott in L.M. Graham, *ibid.*

[33] S.J. Anaya, *supra* note 23 at 77-79.

[34] *Ibid.* at 81-82.

recognized. Furthermore, this type of self-determination would be continuous, allowing for peoples and indigenous peoples to make decisions about affairs that affect their lives through a continued participation in the affairs of the state in question (on-*going* aspect).[35] This aspect's importance is deduced from the requirement for the permanent participation of indigenous groups in the determination of their affairs. Interestingly enough, the notion of continual participation would preclude the conclusion of absolute agreements and modern treaties that would not make room for further negotiation. It is, however, a necessary characteristic of the right to self-determination as indigenous peoples have the right to contribute to a 'belated' state-building process that will effectively respond to their future needs on a continual basis.[36] In this way, the negotiation for aboriginal self-government would not be a "once and for all" affair but rather a part of an on-going process seeking to refine the right's application.

Anaya further emphasizes the statement that "an effectively state-centred conception of self-determination is anachronistic in a world in which state boundaries mean less and less and are by no means coextensive with all relevant spheres of community"[37]. The example of the Iroquois Confederacy, a regrouping of Iroquois Nations within the territories of the U.S. and Canada under the Great Law of Peace, shows that the nations within this grouping had separate political structures defined by the affinity of the peoples, the location of the groups and the functions fulfilled by the specific union.[38] The concepts of different spheres of "autonomy" that seem to be so threatening to non-Aboriginals, the latter being habituated to living within their *own* nations, have long been a part of indigenous peoples history.

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[35] *Ibid.*

[36] For more on aboriginal peoples' non-participation in nation-building, see *Discrimination Against Indigenous People; Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Session, Agenda Item 14, at 14, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (1993).

[37] S.J. Anaya, *supra* note 23 at 78.

[38] D. Champagne, "Beyond Assimilation as a Strategy for National Integration: The Persistence of American Indian Political Identities" (1993) 3 Transnat'l L. & Contemp. Probs. 109, at 112-114.

Another conceptualization of self-determination makes the case for the acceptance of the right for indigenous peoples of the world. As such authors as T.M. Franck have elaborated, the right to self-determination is inherently tied to democracy: "Self-determination is the oldest aspect of the democratic entitlement [...] Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement"[39]. States that embrace democracy, such as Canada, should also embrace self-determination, for all its populations. Democracy should not be afforded to certain groups at the exclusion of others.

1.4. Canada and the Right of Self-Determination as Regards the Indigenous Peoples Living within Its Borders

The question as to whether Canada has recognized the right to self-determination is source of much debate. As a party to the U.N. Charter and signatory to both international covenants, instruments that have all included the right to self-determination within its provisions, Canada is required to incorporate the principles of these international instruments in its domestic law. There is still some question as to whether this has actually been done, especially in the light of past remarks made by the Human Rights Committee in 1999, which urged "[Canada] to report adequately on implementation of article 1 of the [International Covenant on Civil and Political Rights] in its next periodic report"[40]. Other authors view self-determination as a general principle of international law that would consequently transform the right into a rule of customary international law.[41] Canadian case law has shown that rules of customary international law can be automatically integrated into Canadian internal law without any need for statutes,[42] although this has been source of debate.[43]

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[39] T.M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 Am. J. Int.'l L. 46, at 52.
[40] U.N. Committee in Human Rights, Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, 1999, UN Doc. CCPR/C/79/Add. 105, at para. 7.
[41] J.-M. Arbour, *Droit International Public* (Cowansville, Québec: Éditions Yvon Blais, 1997) at 116.
[42] G. Otis & B. Melkevik, *Peuples autochtones et normes internationales: Analyse et textes relatifs au régime de protection identitaire des peuples autochtones* (Cowansville, Québec: Éditions Yvon Blais, 1996) at 4.

As was enounced in the Supreme Court of Canada's 1998 consultation, *Reference Re Secession of Quebec*, "the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law"[44]. Such a principle would, of course, have extensive implications for indigenous peoples if these groups were to be recognized under the term 'peoples' of this right. Yet, aboriginal peoples have not been recognized to belong to this definition. In consequence, the right to self-determination of peoples has not been officially recognized in Canada. The government of Canada had declared, in 1996, speaking about the right to self-determination, that "[a]s a state party to the U.N. Charter and the Covenants, Canada is [...] legally and morally committed to the observance and protection of this right and, furthermore, that self-determination "applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law"[45]. Although the latter statement and the existence of certain forms of aboriginal government in Canada might prompt some to consider that self-determination of indigenous peoples does exist within that state, until this right is formally acknowledged and established within a principled framework, the right of aboriginal peoples to oversee their own fates will not be adequately protected.

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[43] S. J. Toope, in his article entitled *"Re* Reference by Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada" (1999) 93 A.J.I.L. 519 (edited by Bernard H. Oxman) makes the point that it is not at all certain as to whether international law norms automatically become part of the law in Canada, especially in light of the *Quebec Secession Reference*, *supra* note 27, in which the judges displayed a complete disregard of customary international law, international law in general only being "considered" in the matter and not applied. This demonstrates that it is not clear as to whether the right to self-determination is actually a part of Canadian domestic law or if it is not.

[44] *Quebec Secession Reference*, *supra* note 27 at par. 114.

[45] *Statements of the Canadian Delegation*, Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2nd Sess. Geneva, 21 October-1 November 1996, as cited in *Consultations Between Canadian Aboriginal Organizations and DFAIT in Preparation for the 53rd Session of the UN Commission on Human Rights*, February 4, 1997.

1.5. Self-Determination and Indigenous Peoples of Canada: Assessment

The purpose of this section was to illustrate the tension between the right to self-determination and states as regards to the association of "aboriginal peoples" to the term "peoples" within the definition of this right. It was sought to demonstrate, albeit briefly because a full discussion of self-determination in relation to indigenous peoples is beyond the breadth of this paper, that the right to self-determination for indigenous peoples, although mostly swept under the rug by many states (including Canada), should not be a feared concept. Because of its highly malleable capacity to evolve and accommodate different arrangements regarding autonomy, it is everything but static. An international affirmation of the right of self-determination of *indigenous* peoples is one means by which the nation-wide right to self-government of Canada's aboriginals could be affirmed, through domestic recognition. Some could consider that Canada has already formally recognized self-determination of indigenous peoples because of the existence of band governments and other political rights, as well as because of the aforementioned declarations made by the Canadian government to the Human Rights Commission. As it rests, the scope of the right has not been elaborated and one of its norms, self-government, is instead being established region by region in Canada. This process is at risk of being arbitrary in its determination and application of the right to self-government and could, as a negative consequence, put First Nations in jeopardy.

Canada and other states can longer hide behind the fear of secession, territorial disintegration and political disunity, as it is clear that they have the power and resources to adequately structure the claims to self-determination of indigenous peoples within their territory. Canada especially, considered in the lead for the protection of indigenous peoples' rights, should fulfill its obligations and demonstrate its willingness to affirm and implement the right to self-determination on its territory for its aboriginal peoples.

However, it remains that the rights of indigenous peoples to self-determination and, as will be seen in the next chapter, its important sub-norm of self-government, central to any groups advancement, are not protected in the international realm because of the aforementioned state reticence. It is clear that modern conceptions of self-determination, such as that principally elaborated by Anaya, should be considered in order for this to occur. The likeliness of experiencing much movement on the international level with regards to the indigenous peoples' rights as elaborated within the Draft Declaration, or the Proposed American Declaration, however, is far from being great. The negative repercussion of non-protection of indigenous peoples' right to self-determination on the international scale is that the right to self-government of the indigenous peoples of Canada must find another sphere in which to frame this right. We will now analyse the state of the domestic law in Canada in order to ascertain this right to self-government's protection in that realm.

1.6. Aboriginal Rights within the Canadian Legal Context

As was shown in the preceding sections, there is very little protection of *indigenous* peoples' rights in the international sphere, not for lack of initiative on the part of indigenous groups, but for states' perpetual dread of the natural consequences of affirming the right to self-determination as extending to aboriginals peoples. Secession and extended rights, it would seem, is the feared result. This would not seem to be an encouraging state of affairs for indigenous peoples of Canada since they cannot rely on the international realm for affirmation of their rights. Yet, the norm of self-government, as one of the primary norms of self-determination[46] that establishes the political agenda of indigenous peoples, is of uttermost significance in that it shows that the government reflects the will of the peoples governed. Using this right,

[46] Beyond the norm of self-government, S.J. Anaya lists and analyses four other norms elaborating the elements of self-determination: non-discrimination, cultural integrity, lands and natural resources and social welfare and development. In Canada, all these other norms are often considered in the same context as the norm of self-government. For example, in negotiating self-government agreements, the parties usually necessarily consider the question of land. See S.J. Anaya, *supra* note 23 at Part II, Chapter 4.

indigenous peoples would be able to control many, *voir* all, aspects of their lives directly related to their affairs.

Canada's judiciary and legislature have, over the years, recognized many aboriginal rights ranging from the right to fish using a net longer than permitted by a provincial statute, to the fundamental right to self-government. These rights have been found to originate from many sources; previously concluded treaties, Aboriginal title to land and aboriginal rights in general, the constitutional division of powers and in the Constitution of Canada. For each source of the specific right exists a particular judicial framework by which to ascertain these rights. Accordingly, as each right is affirmed, it must first be subjected to the rules of interpretation set out, principally, by the Supreme Court of Canada.

The right to self-government is rather convoluted. It cannot be separated from, for example, the ties that indigenous peoples have to the land (i.e. as a means of subsistence or spiritually) or from their cultural attachment to certain methods of legal sanctions (i.e. banishment). This is why, in discussing its scope and breadth, the many aspects of aboriginal culture must be kept in mind. Yet, the right to self-government would not escape the authority of the judiciary and legislature in establishing its scope, either its breadth or its limitations, creating possible unlawful limitations to the rights of aboriginal peoples. The following sections will not delve exhaustively into the very nature and specifics of the decisional processes of the Canadian courts and the country's government, as this would be beyond the scope of this paper. Instead, it is sought to establish the many frameworks in which the right to self-government of aboriginal peoples could be interpreted as a right and finish the analysis with the judiciary's elaborated test to judge this right in *R.* v. *Sparrow*[47].

[47] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at 1110 [*Sparrow*].

1.6.1. Aboriginal Title

Aboriginal title in lands is a specific aspect of native rights that would greatly affect the right to self-government. P. Macklem asserted, in 1991, that if Canada's common law of property would

> reflect the fact that native peoples were the first nations of Canada, protect native interests in land from nonnative interference, permit the establishment of a territorial base from which native self-government could flourish and grow, and facilitate the meaningful expression of the diverse ways in which native peoples relate to the land, the law conceivably could assist in giving native people more control over their ability to shape their destiny[48].

Significant case law has, since then, answered to Macklem's urgings. At the time the article was written, the manner by which the Canadian government treated the aboriginals' relationship with land was based upon the conception that the Crown was the sole owner of all of the Canadian territory, and its division into parcels was to the government's complete prerogative. This philosophy, instead of regarding the First Nations as nations capable of governing themselves, regarded aboriginals as conquered peoples necessarily submitted to the rule of the conqueror[49]. Yet, land base for a particular group or peoples would be of fundamental importance as to their rights to self-government; who can rule when one does not have a territory to rule from?

The importance of aboriginal title lies in the deduction that aboriginal peoples inhabited the territory that is now called Canada[50] before the colonizers; they had their own societies on their own territories. To even assert that these territories had become, after conquest, the sole property of the Canadian Crown, or even that the aboriginals

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[48] P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382, at 396.

[49] This statement is quite shallow as it does not expand on the fact that the colonizers of Canada often thought in a lesser way of the aboriginals, considering them to be "uncivilized" and as "savages" needing to be civilized to the European culture. There is ample documentation attesting to these archaic attitudes.

[50] The history of the naming of the country, as depicted in a Canadian Heritage television commercial sponsored by the Ministry of Canadian Heritage, depicts the discovery of the territory of what is now Canada by Jacques Cartier of France in 1535, the discoverers mistakenly thinking that the aboriginal guides saying '*Kanata*' were referring to the country as a whole and not simply their "towns" or "settlements" (*Kanata* being an Iroquois word for the latter terms).

only possessed a "personal and usufructuary right" to the land[51], was and is still quite incongruous. Yet, for quite some time, this was the state of the law in Canada. In the United States, however, the aboriginals' right to lands and self-government had been recognized for quite some time by a grouping of three cases named after the judge who had decided them, the Marshall Trilogy[52]. The last of these cases, *Worcester* v. *Georgia*, established that aboriginal nations on U.S. soil had always been considered "as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil"[53]. From this point, aboriginal peoples on U.S. soil have retained a highly protected right to their lands, a situation not seen in Canada until recently.

In Canada the extent of the rights to land was quite different. Even as late as 1973, the Supreme Court in *Calder* v. *A.G.B.C.*[54], although recognizing aboriginal title in land, also recognized the possible unilateral extinguishment of native title by the Crown, despite the Nisga'a's- one of the indigenous groups within British Columbia- claims that their right to the land stemmed "from time immemorial". Glimmers of hope, however, could be found in the dissenting judges views that the Nisga'a possessed common law property title to the land[55] and that it could not simply be extinguished. In reading the decision, however, it is still clear that the dissenters still acknowledge that the Crown possessed the underlying title to the lands. As a result, aboriginal groups are not the possessors of their own lands and remained submitted to the sovereign authority.

Nearly twenty years later, in the seminal case of *Delgamuukw* v. *B.C.*[56], the Supreme Court finally recognized that Aboriginal title "arises from the prior

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[51] *St. Catherines Milling and Lumber Co.* v. *The Queen* (1887), 13 S.C.R. 577 [*St. Catherines Milling*].
[52] *Johnson* v. *M'Intosh*,, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1931) and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1823). [respectively; *Johnson*, *Cherokee Nation* and *Worcester*].
[53] *Worcester*, *ibid.* at 559.
[54] *Calder* v. *A.G.B.C.*, [1973] S.C.R. 313 [*Calder*].
[55] *Ibid.* at 368.
[56] *Delgamuukw* v. *B.C.*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

occupation of Canada by Aboriginal peoples"[57], that it is a "collective right to land held by all members of an aboriginal nation"[58] and that the land could be used for purposes at the Aboriginal group's discretion, purposes that did not need to be essential to the native peoples' cultures[59]. Two exceptions were, however, mentioned as regards to the use of the land: that the land could not be used in a manner that was incompatible to the indigenous peoples attachment to the lands and, in the case that the aboriginal groups would want to do so, that the lands would have to be sold to the Crown, and converted to "non-title lands".[60] So, what effect does this notion of aboriginal title as an aboriginal right have on the concept of self-government?

Two interesting points come up within the discussion of aboriginal title; the first being that if the rights of the aboriginals are granted collectively, than it is implied that a type of public consensus must be obtained from the aboriginals living on a particular tract of land. Any decision that would affect the land would have to be decided by the group; the decision-making process then becomes of a higher order, as one or a few people cannot exercise a collective right. This seems to be an effective argument for self-government.[61]

The second fundamental aspect of the *Delgamuukw* decision is that the court has imposed limitations on the right to lands, limitations that have the potential to limit the right of an aboriginal group to self-government in the future. In saying that the use of the land must be compatible with the nature of the aboriginals' attachment, as well as the land not being able to be used in ways that aboriginal title does not permit would leave the regulating of the land to the courts, even in the case of a negotiated treaty. It is not suggested that aboriginals should have the right to, hypothetically, over-fish (an incompatible use of the water resources), as we have already seen in the past, the Courts could attribute quite a diverse meaning to the terms "incompatible uses" and

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[57] *Ibid.* at para. 114 & 126.
[58] *Ibid.* at para. 115.
[59] *Ibid.* at para. 117 & 124.
[60] *Ibid.* the two exceptions appear respectively at para. 125 and para. 131.
[61] For an extended argument as to the link between the collective right to land and self-government, see K. McNeil, "Aboriginal Rights in Canada: From the Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. Comp. & Int'l L. 253, at 285.

use it to limit the peoples' right to the regulation of their lands. To native peoples, "land and natural resources are not mere economic commodities [as] [t]he lands occupied and used by an indigenous community are crucial to its existence, continuity and culture"[62]. Foreseeable is a situation in which the government of Canada curtails the land rights of aboriginal peoples, even those affirmed by modern treaties, and justify these limitations using the aforementioned exceptions. A determination of a use as "incompatible" could be based on quite subjective criteria.

To further illustrate the point, consider the recent case in front of the Inter-American Commission on Human Rights that deals with the Carrier Sekani Tribal Council of British Columbia, who asserted that Canada is violating their rights to land and natural resources because of the relocation of their timber rights[63]. The relevance of this case in the current context is that the Carrier Tekani were alleging these state violations *at the same time that negotiations were taking place* between the tribe, the provincial government and the federal government, supposedly within the new framework of negotiations.[64] A great deal is at risk in those cases in which lands and natural resources are at stake, in fact, the very cultural survival of aboriginal peoples is threatened. Treaty rights and their protection will now be analysed.

1.6.2. Treaty Rights

As the treaties of the old, the treaties of the new will certainly be subjected to a judicial framework of interpretation that establishes the extent of the specific right being interpreted. The vast majority of these treaties concluded between the Crown and the aboriginal groups were and are in relation to lands. Any changes to the ancestral land base of aboriginal peoples could have potentially detrimental effects to the right of self-government as this right "is inextricably tied to native peoples' relationship to

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[62] S.J. Anaya & R. A. Williams, *supra* note 16 at 49.
[63] *Carrier Sekani Tribal Council* v. *Canada*, March 1 2000, Case No. 12.279, online: Organization of American States, Human Rights, OAS Court of Human Rights, Jurisprudence <http://www.oas.org/>.
[64] S.J. Anaya & R.A. Williams, *supra* 16 note at 40.

ancestral lands"[65]. This having been said, the first interpretations by the courts of treaties concluded between indigenous peoples and Canadian governments were infused with racist imperialism and, as the decisions evolved became less overtly prejudiced, little room was left for the possible expectations and interests of the aboriginal groups that had concluded the treaty[66]. Aboriginal peoples' rights to their lands and other treaty rights were either entirely ignored or threatened as the Supreme Court often interpreted treaties as beneficial to the Crown. This state of affairs, however, did change.

As regarded treaties, the *Constitutional Act, 1982*[67], guaranteed that treaty rights could not be extinguished at the mere prerogative of the Crown, being explicitly protected under article 35(1). It was only in the case of *R.* v. *Simon* that the Supreme Court finally elaborated a principle of interpretation by which it was necessary that the treaties be construed not only according to the plain meanings of the words, but as the aboriginal group in question would have understood the words to have meant.[68] This concept was taken even further in the subsequent jurisprudence of *R.* v. *Sioui*, which elaborated that a broad and liberal interpretation was to be applied to the treaty's provisions[69] as well as following the principles of interpretation from *Simon*.

More recently, the case *R.* v. *Marshall*[70], which generated much controversy in the east of Canada, elaborated many applicable principles: that treaties were sacred and solemn promises, their interpretation must preserve their honour of the Crown, oral tradition in asserting treaty rights is accepted, treaties should be liberally construed and ambiguities resolved in favour of aboriginals, historical and cultural contexts are important in a treaty's interpretation, common intent should be given priority through

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[65] P. Macklem, *supra* note 48 at 427.
[66] Although many cases exist that show the courts racially prejudiced stance and Canadian bias, two examples of such decisions are, respectively; *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 and *Pawis* v. *R.*,[1980] 102 D.L.R. (3d) 602.
[67] *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, reading the "existing aboriginal and treating rights are hereby recognized and affirmed"[*Constitutional Act, 1982*].
[68] *R.* v. *Simon*, [1985] 2 S.C.R. 387, at 402 [*Simon*].
[69] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at 1031 [*Sioui*].
[70] *R.* v. *Marshall*, [1999] 3 S.C.R. 456 [*Marshall*].

the implied sense of the meaning of the words, a static approach to the rights should be avoided, the *process of restricting or extinguishing a treaty right should be narrowly construed*, the *onus of proving that a treaty is extinguished or restricted is on the party so claiming* by strict proof and clear and plain intent and, lastly, that the principles applicable to the interpretation of treaties apply to all types of treaties.[71]

The most important aspect of treaty rights with respect to the right of self-government is that the rights determined within these political compromises could be extinguished or restricted. In Canada, either the provincial, in certain cases, or federal governments, can extinguish or restrict these rights. Although, as we will see in a latter section, the rules for such processes are strict, they still remain a threat to treaty either previously concluded treaties or those concluded in the present and future. If a right to self-government for aboriginal peoples exists, as it has been affirmed, and is recognized within a treaty, should the judiciary or legislature retain any authority to restrict it or extinguish it? If so, are these measure efficiently controlled as to assure the preservation of the inherent rights of indigenous peoples? The *Sparrow* test, described in a latter section, will answer these queries.

1.6.3. Federal Common Law and the Division of Powers

The notion of Federal common law is an idea that all aboriginal rights make up a body of law, separate from other bodies of law within Canada. As Professors Evans and Slattery have elaborated, when the notions of the common law of aboriginal title, aboriginal rights and treaty rights "[...] became a body of basic public law operating uniformly across the country within the federal sphere of competence"[72], this created the federal common law. In addition, Chief Justice Lamer, in his judgement for the

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[71] For an explanation of these principles, see R. Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2001) at 49-50.
[72] J.M. Evans & B. Slatterly, "Federal Jurisdiction-Pendant Parties- Aboriginal Title and Federal Common Law- Charter Challenges -Reform Proposals: *Roberts* v. *Canada*" (1989) Can. Bar. Rev. 817 at 832.

case of *R.* v. *Coté*[73], affirmed that the doctrine of federal common law was also part of a body of fundamental constitutional law which, "like *all other doctrines of colonial law*, applied automatically to a *new colony* when the colony was acquired [...] [as well as supplying] the presumptive legal structure governing the position of native peoples [emphasis added]"[74]. The existence of federal common law is quite important in the context of indigenous self-government as the latter, it would seem, would still have to function within the federal sphere. If this were the case, to what "degree" would indigenous self-government be autonomous, especially as federal common law was developed in the context of a "colonial" spirit? As well, the federal common law applies uniformly across the country, but, if self-government agreements are concluded, can uniformity be achieved. If not, does the corpus of federal common law stay? Also important to the notions of aboriginal rights is the following discussion on the separation of powers.

The distribution of powers, an intrinsic characteristic of the Canadian federalist system, attributed the jurisdiction over "Indians, and Lands reserved for the Indians"[75] to Parliament, thus placing the First Nations of Canada within the federal sphere of constitutional authority. Of course, at this period in time, the Crown's sovereignty was affirmed over any forms of existing indigenous peoples' government. The exclusive power of Parliament over aboriginals was affirmed in several important cases such as *St.Catherines Milling*[76], where it was determined that it is the exclusive power of Parliament to pass legislation as regards aboriginal title, a standard which was also affirmed in the recent case of *Delgamuukw*[77]. In the latter case it was also affirmed that, prior to 1982, Parliament was the only power enabled to extinguish aboriginal title.

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[73] *R.* v. *Coté*, [1996] 3 S.C.R. 139 [*Coté*].
[74] *Ibid.* at 173, para. 49.
[75] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 91(24), reprinted in R.S.C. 1985, App. II, No.5 [*Constitution Act, 1867*].
[76] *St.Catherines Milling*, *supra* note 51.
[77] *Delgamuuk*, *supra* note 51.

Furthermore, the fact that aboriginals and their lands were within the jurisdiction of the federal government had the further result of restricting the effect on aboriginals and their lands of any provincial legislation. In fact, this restriction was inserted into the *Indian Act*[78], and Act which severely restricted the powers of aboriginal groups in Canada and subjected them to federal and provincial powers, at its 88th article that provided "for the application to "Indians" of provincial laws of general application that would not otherwise be constitutionally applicable on their own force (*ex proprio vigore*) and that incidentally affect[ed] the core of "Indianness"[79]. Aboriginal title, aboriginal rights and treaty rights are all considered to be rights that affect "Indianness", as it is shown by their constitutional protection[80], precluding them from any provincial legislation.

There are a great number of questions arising from the question of aboriginals and their right to self-government in the context of federal common law and the division of powers. Notably, if in the future there were to be negotiated agreements between aboriginals and governments as regards the extent of the autonomy afforded to the specific groups, this would result in a patchwork of myriad forms of self-government in the country. If this is the case, how will the notion of federal common law, as a corpus of rules applying across the country, stand? As well, if the right to self-government has been recognized as a constitutional right and will be, consequently, subjected to the federal common law rules, would this not be in fact limiting the indigenous peoples' autonomy? By this we mean that different groups would be afforded different forms of self-government, making it extremely difficult and complex to maintain uniform and applicable standards to all of them. A principled framework for the right to self-government could remedy to this.

These uncertainties are also tampered by the division of powers, a division which, as well as enacting rules for Parliament and the provinces as to the degree of

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[78] *Indian Act*, R.S.C., 1985, c. I-5. s. 88.
[79] R. Mainville, *supra* note 71 at 69.
[80] The constitutional protection of aboriginal rights can be found in the *Constitution Act, 1982*, at s. 35 and s. 25.

interference that is allowed with regards to indigenous peoples, also enables them to regulate certain core aspects of their lives. In fact, "the law relating to the distribution of authority perpetuates a legal relationship of dependence between native people and the Canadian state" while accepting without question "legislative sovereignty over native peoples"[81]. It is difficult to see how Canada can effectively institute aboriginal self-government while retaining its actual legislative supremacy. In fact, it is quite antithetical. It is not being suggested that Parliament immediately resigns its authority, but a structural change is necessary. It would seem that the demands of aboriginal peoples to autonomy have been disregarded by the doctrinal structure of Canadian federalism[82], a structure that inherently inhibits the proper establishment of an aboriginal right to self-government and can be used, as we will see in Chapter II, to limit the negotiation processes[83].

1.6.4. The Fiduciary Relationship and the Federal Government

The fiduciary relationship between the Crown and the First Nations is one that is evoked when the Crown exercises its discretion in dealing with aboriginal peoples as regards any of their affairs.[84] These obligations come into effect when there is Crown participation to questions that treat of the lands, the general rights and the treaty rights of aboriginal peoples. In fact, they affect all aspects of the relationship between the two entities[85] as they stem for the 'taking-over' of the First Nations' sovereignty by the colonizers. Since the Crown has greatly exploited aboriginal peoples in the past, it is now obligated to conduct all of its affairs concerning aboriginal matters according to the fiduciary relationship. The fiduciary obligations of the provincial governments are

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[81] P. Macklem, *supra* note 48 at 423.

[82] B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill L.J. 308, at 322.

[83] The case regarding the Nisga'a Treaty of British Columbia, initiated by now-Premier Campbell is a particular excellent example of the governments' encroachment on aboriginal rights to self-government.

[84] R. Mainville, *supra* note 71 at 53.

[85] For a more detailed explanation of the Crown's fiduciary obligations, see B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261, L. I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), P. Hutchins *et al.*, "When do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995) 59 Sask. L. Rev. 97.

not assumed, however, they will be held to the same standards as when the province infringes upon aboriginal rights.[86] These fiduciary obligations of the Canadian government were firstly established in *Guérin* v. *The Queen*[87], in which the amount of $10 million dollars was afforded to the Musqueam First Nations group for the federal government's missteps in handling a land transaction.

The particularity of the fiduciary relationship between the orders of government and the aboriginal groups is that it colours *any aspect of their relationship.* Furthermore, these fiduciary standards are subject to review and enforcement by the courts.[88] Yet, it is believed that, as regards self-government, the fiduciary obligations of the governments will be phased out as aboriginal groups gain more and more power through their political self-determination. The repercussions of this in the context of the rights of aboriginal peoples to self-government could be quite considerable, especially in a hypothetical context of a quickly negotiated agreement that has accounted for the phasing out of the fiduciary relationship. Although it is preferable that the aboriginal peoples themselves regulate all of their affairs, as would dictate the very notion of self-government, until the self-government agreements that have been concluded with the governments of Canada have become, in time, stable and effective, it would not be recommended that the governments be able to extinguish their obligations towards aboriginal peoples. The very question of the fiduciary relationship that exists as between the aboriginal groups and the government as well as the provisions or principles that would regulate it in the context of a negotiated self-government agreement must be determined in advance if the rights of aboriginals are to be protected.

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[86] R. Mainville, *supra* note 71at 59.
[87] *Guérin* v. *The Queen*, [1984] 2 S.C.R. 335 [*Guérin*].
[88] R. Mainville, *supra* note 71 at 60.

1.6.5. Principles Governing the Infringement of Aboriginal and Treaty Rights: Where does this leave the right to Self-Government?

In the past and prior to 1982, it was possible for aboriginal and treaty rights to be restricted or extinguished by Parliament, according to the powers vested in the Federal government through the *Constitution Act, 1867* under article 91(24). As explained by Chief Justice Lamer in *Delgamuukw*, "[t]hat head of jurisdiction [...] encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title"[89]. Treaty rights were judged using the same approach in that they could easily be extinguished unilaterally by legislation[90]. With the advent of the *Constitution Act, 1982*, however, and its protection of aboriginal peoples' existing and treaty rights at section 35(1), the power to extinguish these rights was severely restricted. As was stated in *R.* v. *Sparrow*, the case in which was elaborated the "test" for an infringement of rights, the burden of proof "of justifying any legislation that has some negative effect on any aboriginal right protected under 35(1)"[91] rests on the government. As to the importance of this for the thesis at hand, it is of prime importance to analyse the *Sparrow* test in order to determine the extent to which any rights and especially the right to self-government, is guarded from infringement.

The *Sparrow* test was elaborated in many parts and remains, to a certain extent, subjective.[92] The court, in this case, elaborated a two-step process in the determination of the infringement of an aboriginal right: first, there must be a *prima facie* infringement of a right recognized under section 35 and, secondly, that there must be a justification of such an infringement. The test as to the existence of a the *prima facie* infringement is also broken down into many parts: the need to establish the right in question (i.e. does the restriction impose undue hardship or is it unreasonable; is there a preferred means to exercise this right?), the requirement that the test not be too

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[89] *Delgamuukw*, *supra* note 51 at 1116, para. 173.
[90] *Marshall*, *supra* note at 496, para. 48.
[91] *Sparrow*, *supra* note 47 at 1110.
[92] For an excellent resume of the infringement and justification test appearing in the following paragraphs, please see, R. Mainville, *supra* note 71 at 71-84.

onerous, as well as the presumption of infringement in the case that the legislation in question was a result of a delegation of powers from one government to another.

Once this *prima facie* infringement has been established, the courts must then move to the issue of the justification of the intrusion that is in itself in two parts: i) that there must be a valid and compelling objective to the legislation and, ii) that the regulation must be consistent with the fiduciary duty of the Crown (i.e. through minimum impairment, just compensation for the breach and extensive consultation of the indigenous peoples). The test, as elaborated, seems to be adequately conceived to protect the rights of aboriginal peoples. It does, to a certain extent, force the legislature and the judiciary to shoulder the burden of proof that would show the restriction or extinguishment of a specific right. Yet, many of the criteria elaborated are quite subjective, and, as shown in the following section, the courts have recently broadened the domain of "valid objectives" that could be used to justify the infringement of these rights. From this, it could be implied that few obstacles could stand in the way of a further broadening of the subjective criteria concerning aboriginal rights, even the right to self-government.

As well, the general method for identifying and defining Aboriginal rights was determined in the trio of cases *R.* v. *Van der Peet, R.* v. *N.T.C. Smokehouse Ltd.* and *R.* v. *Gladstone*[93]. These cases served to develop a way by which the courts could perceive a specific act to be a right as, for example, if an aboriginal person had the right to sell 10 salmon that her spouse had caught for 50$ even if the sale contravened a federal law.[94] The test of C.J. Lamer, as he then was sought, in *Van der Peet*, to identify "the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans"[95]. The two-step test consisted in firstly determining the precise nature of the claim that was being made and, secondly, to determine if the practice or custom was of central significance to the

[93] *R.* v. *Van der Peet,* [1996] 3 S.C.R. 101, *R.* v. *N.T.C. Smokehouse Ltd.* [1996] 2 S.C.R. 672, *R.*. v. *Gladstone*, [1996] 2 S.C.R. 723 [respectively; *Van der Peet, Smokehouse* and *Gladstone*].
[94] This example actually mirrors the facts of *R.* v. *Van der Peet, ibid.*
[95] *R.* v. *Van der Peet, supra* note 93 at 548.

aboriginal society claiming the right.[96] Evidently, this test would have significant effects on the claimed right to aboriginal self-government, as we will see in the *Pamajewon*[97] decision, as, in the lower courts, the right could be found to have been extinguished. It is clear that in using the approach developed by the Supreme Court in *Van der Peet*, the court has evidently chosen to treat the right to aboriginal self-government as it would any other aboriginal right, as well as choosing to apply a "subjective assessment" to the definition of this right. If, let us say, the inherent right to self-government is as secure as some will state, what would happen to those rights that are intrinsically linked to the right to self-government, such as those to land or natural resources? It is possible that they may be limited, putting into jeopardy the greater right to self-government.

1.7. Aboriginal Rights: Assessment

The test elaborated in *Sparrow* seemed strict enough, at first, to ensure the vigilant protection of aboriginal rights. It is worthy to recall at this time that the rights in question encompass *all* rights stemming from aboriginal title to treaty rights as regulated by the spheres of federal common law and the federal division of powers. The *Van der Peet* test, when used to determine exactly what is an aboriginal right, however, could severely limit their affirmation; either limiting the right to self-government itself or even important collateral rights, such as that to land. As well, with the 1997 decision of *Delgamuukw,* the vigilance of the test for the infringement and justification in the case of the violation of aboriginal rights has become a little less sure. This could put, in the future, the right to self-government in peril of being severely limited. Take note of the following extract of the decision;

> The range of legislative objectives that can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and a part of, a broader social, political and economic community" [citing Gladstone, at para. 73]. In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior (of

[96] R. Mainville, *supra* note 71at 27.
[97] *Pamajewon*, *infra* note 109.

> British Columbia), protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.[98]

Although this citation singles out aboriginal title, it is certain that the same broadening of categories is added to other aboriginal rights, as the *Sparrow* test has been found to apply to them all. This implies that the rights of aboriginals within Canada, as they are uniform across the nation according to the principles of the federal common law of aboriginal rights, are at a potential risk of being infringed and the violating action justified as a valid objective. In the present, when many aboriginal groups are negotiating their futures, including the important right to self-government that would regulate their lands and resources, can it be possible that such an important right remain at the mercy of the judiciary's interpretation, especially as this right is being established by treaties and agreements whose violation could be justified according to the principles established in *Delgamuukw* and *Sparrow*? It would seem to be quite detrimental to aboriginal rights to do so. If the right to self-government is to be correctly established within Canada, it is absolutely necessary to elaborate a "principled framework" establishing such a right and in a properly constitutional and protected manner. As both international and internal law regarding aboriginal rights stand, the right of self-government is threatened.

1.8. Conclusion

In this chapter, I have sought construct the framework, both in the international and domestic realm, for the right to self-government by firstly establishing the importance of the acceptance of the human right to self-determination for aboriginal peoples in Canada, as the right to self-government, a right sought after by Canada's indigenous groups, would be a natural outcome of this broader right. Because of the state's reticence to officially affirm the right to self-determination as extending to aboriginal peoples, the right, being mired in uncertainty, does not afford aboriginal groups' right to self-government much protection. This is also the case for aboriginal

[98] *Delgamuukw*, *supra* note 51at 1111, citing *R.* c. *Gladstone*, *supra* note 93 at para. 73.

rights within Canada, as the justification test as to their extinguishment and restriction by the State is relatively subjective. In short, both the international and the domestic realm lack the necessary framework that would assure an effective protection of the aboriginal peoples' inherent right to self-government. The next section will analyse the intricacies of this right and the norms that have been elaborated in order to determine its scope and application in the context of the modern Canadian conception of self-government and modern treaties.

2. THE IMPLEMENTATION OF SELF-GOVERNMENT IN CANADA: A REVIEW OF LEGISLATIVE AND JUDICIAL ATTEMPTS AND AN ANALYSIS OF RECENTLY CONCLUDED MODERN AGREEMENTS

2.1. Introduction

In the last two decades, the universal concern for indigenous peoples' plights combined with the lobbying strength of aboriginal groups in the domestic and international realms has spurned, in several countries, much-awaited governmental initiatives aimed at achieving the betterment of the aboriginals' situation within their borders. With regards to the rights of aboriginal peoples living within its borders, Canada is no exception to these initiatives. Over the years, as well as establishing a legal system that has evolved to protect the rights of aboriginals, the government has commissioned many studies to fully evaluate and investigate the state of indigenous peoples' groups and their concerns, one of the most complete being the *Report of the Royal Commission on Aboriginal Peoples*.[99] These reports have affirmed that the need is urgent for aboriginal peoples of Canada to obtain a greater degree of control over their destinies. This control was, and is, seen as being absolutely necessary to preserve their very existence. As well, the provinces have made some initiatives to develop accords between indigenous peoples and the orders of government.[100]

The presumption that the right to self-government-or the right of peoples to determine their own political destinies- is part of the "existing and treaty rights" protected at s. 35(1) of the *Constitutional Act, 1982*[101] is rather apparent. This stems from the fact that aboriginal peoples had, at a time prior to the advent of the colonizers, established legal, educational and governmental structures forming separate and

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[99] Two notable reports; *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Supply and Services Canada, 1983) [*Penner Report*] and the five-volume *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship* (Ottawa: Canada Communications Group, 1996) [*Report of the Royal Commission on Aboriginal Peoples*].

[100] The government of Ontario had signed, in 1985, a *Declaration of Political Intent with the First Nations*, and, consequently, a *Statement of Political Relationship*, in August of 1991. Although the last document does recognize the inherent right to aboriginal self-government, both documents are only accords and not formal acts of the legislature. Quebec, as we will see in the latter section describing the modern treaties, has also concluded accords unilaterally.

[101] *Constitutional Act, 1982, supra* note 67 at s. 35(1).

distinct societies. This fact, combined with the reality that the autonomy of First Nations could not simply be extinguished, contributed to the establishment of self-government as an existing right for aboriginal peoples. In the previously mentioned American case of *Cherokee Nation* v. *Georgia*, Marshall J. took great pains to contradict the idea that a conquered nation, as he considered aboriginal nations to be, loses its right to self-government at the time of conquest because it, instead, according to the law of nations, simply places itself under the protection of the stronger state[102]. This idea pervaded the development of aboriginal law within the United States, leading to a much-advanced system of self-government and self-determination for the aboriginal peoples living within the borders of the U.S.[103] As demonstrated in Chapter I, this was simply not the case in Canada, where, for a long time, aboriginals were not considered to be proprietors of their own lands and subjected to the state's widespread policies of assimilation.[104]

The aforementioned government-commissioned reports about aboriginal peoples had firstly officially established the need for an accrued participation by aboriginal peoples in the political process of Canada. Furthermore, the Charlottetown Accord of 1992[105], an agreement reached between the eleven first ministers, two territorial leaders and four members of key aboriginal organizations would have

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[102] *Worcester*, *supra* note 52 at 561.

[103] Although the U.S. federal government has reserved for itself exclusive jurisdiction over aboriginals and their affairs (a power much like s. 91(24) of the *Constitutional Act, 1982*), and this concept has emanated from several cases including *United States* v. *Kagama*, 118 U.S. 375 (1886), the U.S. has also adopted the *Indian Self-Determination and Education Assistance Act of 1975*, PL 93-638; 88 Stat. 2203; 42 USC 450-458. This law was designed to compel all of the federal government's agencies to accept the right of aboriginal peoples to be self-determining and to apply this notion to any interaction between the government, its agencies and the tribes. For a more detailed description of this law, please see B.W. Morse, "Comparative Assessment of the Position of Indigenous Peoples in Quebec, Canada and Abroad" (2002) Vol. 2, No. 32, Legal Scholarship Network (LSN), online: <http://papers.ssrn.com/paper.taf?abstract_id=31240> (date accessed: September 3 2002).

[104] The American system was, however, not perfect. The scholarship as regards the policies and effects of assimilationist policies aimed at aboriginal peoples in general is quite vast. See E.A. Segal & K.M. Kilty, eds., *Pressing Issues if Inequality and American Indian Communities* (New York: Haworth Press, 1998), C. Ewing, *Childhood Lost: the residential school experience* (Saskatoon: Saskatchewan Indian Cultural Center, 2001) and J.R. Miller, *Skyscraper hide the heavens: a history of Indian-white relations in Canada*, 3d ed. (Toronto: University of Toronto Press, 2000).

[105] The text of the Accord and the Draft Legal Text are available in the appendices of K. McRoberts & P.J. Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993). The *Charlottetown Accord* was not the first of its kind, see *Ibid.*

established the inherent right to self-government for aboriginals as well as required that aboriginal consent and consultation be obtained as regards any constitutional amendments that would affect their affairs.[106] This Accord was, however, overcome by referendum. Frustratingly enough, at this point in time, the aboriginal right to self-government had not been recognized as being protected by section 35(1) of the *Constitution Act, 1982*.

The *Federal Policy Guide* of 1995[107], in combination with other reports, notably the recommendations of the *Report of the Royal Commission on Aboriginal Peoples*, now serves as the base document as regards the elaboration and implementation of the inherent right to self-government in Canada. This guide, although quite elaborate in certain sections, mainly stresses the importance of negotiations between the spheres of government and the aboriginal peoples as the primary, and implicitly *only*, manner by which an aboriginal people could achieve self-government. As regards negotiations, although the right to self-government as being protected by section 35(1) of the *Constitution Act, 1982* is, and has been in the past, recognized by jurists and politicians alike, it has been forwarded that this right, because it is necessary to negotiate in order to obtain it, is a "contingent right"[108]. Such a right is not inherent but created through negotiation. As a right that is one of the aboriginal peoples' most important rights recognized within the Constitution of Canada, this would see to be an unacceptable state of affairs for aboriginals. As well, the policy guide does not provide adequate guidelines and policies that would serve to properly guide negotiations and protect the rights, either past or future, of aboriginals. In fact, it is plain that the guide does not address many of the basic issues (i.e. the extent and continuation of the fiduciary obligations of the federal government after negotiations) that could have severe repercussions on the rights of indigenous peoples of Canada in the future.

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[106] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997) at 67 (note 41) and 92.
[107] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: Federal Policy Guide- The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995).
[108] B. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. *v.* Pamajewon" (1997) 42 McGill L. J. 1011, at 1038.

The right to self-government is furthermore burdened by the Canadian Supreme Court's hesitation to take a chance on a modern definition of the right to self-government and its scope. Although the it has previously taken the opportunity to define and elaborate upon many aboriginal rights, it has remained uncomfortably mum on the topic of self-government, even when given the chance to rule a question which considers the right. In the recent case of *R.* v. *Pamajewon*[109], one of the main issues considered both the Eagle Lake and the Shawanaga First Nations' rights to govern their own affairs. Yet, this right was not discussed in detail, and, at trial, was severely limited as a right that could be extinguished. This limitation could have had the negative effect of establishing the right to self-government as simply another aboriginal right. Henceforth, the political determination of aboriginals would be perceived as a "historical practice", not a modern one, which has since been modified by the Crown of Canada. The Court in *Delgamuukw* did not much advance the discussion, except to underline the fact that it would not judge a question for which it had not been given sufficient information and guiding principles. The recently decided case of *Campbell* v. *British Columbia (A.G.)*[110], though still in the lower courts, has now significantly changed the judicial landscape as regards the aboriginal right to self-government. It is not known how the decision will stand on appeal and the aboriginal right to self-government may be severely affected.

The goal of this chapter, besides demonstrating the lack of established principles in past governmental and judicial attempts to delimit the right to self-government, is to outline the existence of the right to self-government in light of two recently concluded treaties in Canada. It is sought to answer the question as to whether the right to self-government is truly recognized or if the negotiation processes engaged by the Canadian government are simply wanton in that they do afford some aboriginal groups some political self-determination yet fall short of an established and Canada-wide protected right to self-government. First, it is necessary to *attempt* to define the

[109] *R.* v. *Pamajewon,* [1996] 2 S.C.R. 821 [*Pamajewon*].
[110] *Campbell* v. *British Columbia (A.G.)* (2000), 79 B.C.L.R. (3d) 122 (B.C.S.C.) [*Campbell*].

right to self-government. Secondly, an analysis of the right to self-government and the many attempts to define, delimit, protect and implement it through the courts, constitutional reform, government-commissioned reports and a federal policy guide will be analysed to demonstrate that none of these attempts reconcile all of the particular needs of aboriginal groups and of the governments as they seek to achieve the effective implementation of the inherent right to self-government of aboriginal peoples. The analysis of the right to self-government and its treatment in the courts will be presented, albeit briefly. The framework of the right to self-government within the country in the possibilities previously elaborated in both the *Report of the Royal Commission on Aboriginal Peoples* and the *Federal Policy Guide* of 1995 will also be discussed with a particular emphasis on the latter as it is being used as a model for occurring negotiations. Lastly, two modern agreements between aboriginal groups and the governments will be analysed in order to ascertain as to whether the right to self-government is being affirmed in a manner that is conducive to a favourable implementation of the right to self-government of aboriginals. It is thus hoped to establish that a principled framework is absolutely necessary in order to effectively institute the right to self-government in Canada.

Before beginning this chapter, I would like to establish that nothing in this section should be understood as undermining or critiquing the will of the aboriginal peoples in determining their own fates, in the context of the discussion regarding the conclusion of the two modern agreements. It is clear that the aboriginal peoples that have concluded these agreements have done so of their own volition, and, hopefully, according to their pressing and future needs. It could be, however, that in the negotiation process, inequalities result. This will be further discussed in Chapter III. At this time, I seek only to demonstrate that the right to self-government of aboriginals is not protected by a principled approach, a framework of principles that would seek, to a certain extent, to guarantee an effective conclusion and implementation of the right in Canada.

2.1.1. Definition(s): Self-Government

As can easily be deduced, an exact definition of the right to self-government for aboriginal peoples is not effortlessly achieved within a modern context. Many variables come into play; the definition of the term according to international human rights law and Canadian internal law, the issue of self-government from the natives' perspective or as seen from the Canadian government's perspective[111] and, as seen presently, the necessities of the different tribes negotiating their right to self-government at the present time as contrasting with the needs of the provincial governments and the federal government. All of the aforementioned have an effect on the elaboration of the scope of the right to self-government. Additionally, these variables further complicate the issue when found in different permutations. Furthermore, the effort to construct an elaborate and concise definition has been frustrated by the lack of formal elaborations of this right in much of the doctrine regarding the aboriginal right to self-government. This lack of concrete definition, however, begs the questions as to if one is absolutely necessary; the general meaning of the term "self-government" being easily described as general political determination. The more precise aspects of this term, as well as its breadth, would have to be determined by the parties involved, such as is the case of the modern negotiations between the Canadian government and aboriginal groups. Yet it is this very process which is precarious. If many different types of self-government agreements are concluded, what becomes of the right itself? What exact form of the right could then be claimed to be protected by section 35(1) of the *Constitution Act, 1982*? It is proposed, in this thesis, following the suggestions of many jurists, that what is needed instead is a legal and policy framework regrouping the many aspects of the right to self-government, as, for example, the degree of protection that it is afforded from adverse

[111] F. Cassidy & R.L. Bish, *Indian Government: Meaning in Practice* (Lantzville, B.C.: Oolichan Books, 1989) at 33-46, in which the perspective of the natives is presented as being one which see the right to self-government as "inherent" (stemming from the land and the resources) as opposed to the Canadian government's perspective that sees the right to self-government as being, indeed, a right that is delegated from the federal power.

legislation, in order to achieve the implementation of the inherent right to self-government in a valid and effective manner.[112]

Negotiations have been occurring on a regular basis between governments and aboriginal groups over the years, yet, the right to self-government has never been properly delimited into guidelines nor, consequently, adequately protected. The "good faith" of both the government and the aboriginal groups in the process of negotiations are not being questioned in this paper. What is being questioned is more the fact that, although the right to self-government with regards to a specific aboriginal groups' definition of the right is being elaborated in accordance with the wills of both negotiating parties, the very system of law that would govern the *broader right to self-government* puts the right at risk. This places both the future of aboriginal peoples and their right of self-government in jeopardy.

2.1.2. Aboriginal Self-Government: The International Sphere's Definition

It cannot be denied that aboriginal peoples, on a global scale, reside in a position of political vulnerability, habitually denied access to the many decision-making processes of the government of the state in which they reside. As such, it became necessary to protect their interests in international instruments. However, because of the states' reticence to accept the question of the independence and autonomy of peoples as extending to aboriginal peoples, many of the international instruments protecting the rights to autonomy were found not to apply to indigenous populations. In this way, aboriginals were left with no means to protect their rights until the elaboration of two international instruments, one of the first being the *International Labour Organization's (ILO) Convention No.169*[113], of 1989. This convention was seen as ground-breaking in the international sphere as it moved away

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[112] P.W. Hogg and M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-government: Legal and Constitutional Issues* (Ottawa, Canada Communications Group Publishing, 1995) at 381 and 387.
[113] *ILO Convention No. 169*, *supra* note 10.

from the policies of assimilation of the *International Labour Organization's Convention No. 107*[114] to instead recognize "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live"[115]. At first glance, these attributes would seem to be all the attributes necessary for self-government.

The second instrument that was principal in developing the right to aboriginal self-government in the international sphere was the *Draft United Nations Declaration on the Rights of Indigenous Peoples*[116], developed in 1994. As the U.N. Declaration states:

> Indigenous peoples, as a specific from of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as ways and means for financing these autonomous functions.[117]

Although the *Declaration* has not been yet been finalized, this definition of self-government nevertheless serves to illustrate the international concern for the rights of aboriginal peoples and the need for the elaboration of an international definition of self-government in order to protect them. This definition includes many, if not all, aspects of the core elements needed in order to affirm the right of peoples to decide their own affairs. Although the importance of both the role of international law in protecting basic human rights and the acceptance of the broader human right of self-determination is fundamental to the right to self-government, the government of Canada has chosen to elaborate and put into practice the right in a manner which, as will be determined, may or may not respond to its responsibilities and the indigenous peoples' aspirations.

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[114] *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959) [*ILO Convention No 107*]
[115] *ILO Convention No. 169*, *supra* note 10 at fifth preambular paragraph.
[116] *Draft Declaration*, *supra* note 12.
[117] *Ibid.* at art. 33.

2.1.3. Aboriginal Self-Government: The Canadian Definition

The question of the inherent right to aboriginal self-government in Canada has been much elaborated upon, the exact scope and nature of the right having been a great preoccupation of the last decades. Although it is generally accepted in doctrine that the right to self-government of the aboriginal peoples has never been extinguished, and this according to governmental policies as well as, of course, aboriginal peoples themselves, the question still remains as to the degree of protection that this right is afforded, if any at all. For our purposes, we will use the definition borrowed by P. Macklem that establishes the right to self-government for the aboriginals of Canada as

> the need for a territorial bases on native land, some forms of administrative and political structures and institutions for the airing of native voices and political decision-making, the transfer of jurisdictional responsibilities from Parliament to native people, the ability of native people to organize their societies and pass laws governing their lives free from federal or provincial interference, and access to sufficient resources to meet these responsibilities.[118]

As well, the right to self-government is not only perceived as a right, but an *inherent* right, a term which is not necessarily always explained in the doctrine but which is, however, central to the discussion of self-government as it is, by its very nature, of fundamental importance to aboriginal people. The term 'inherent' when it is affixed to a right is usually contrasted with a 'created' or 'derived' right, such rights having been specifically manufactured by the government or legislature in a statute, be it a law, the Constitution or prerogative grant.[119] The term 'inherent' then, when applied to rights, is to "acknowledge that it exists before and apart from any authority vested in, or conferred by, any of these sources of mainstream government power"[120]. This assures that the aboriginals' right to self-government is given its due, not only as a right, but as a right that stands alone of the any derivative power from the Canadian government; a *pre-existing* right.

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[118] P. Macklem, *supra* note 48 at 389, borrowing from J.R. Ponting & R. Gibbins, "Thorns in the Bed of Roses: A Socio-Political View of the Problem of Indian Government", in L. Little Bear, M. Boldt & J.A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) at 65.

[119] K. Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-government" (1999) 49 Univ. of Toronto L.J. 53, at 62-63.

[120] *Ibid.* at 63.

In fact, the importance of the definition of self-government does not reside in elaborating and categorizing its many specific workings, but in the fact that it needs, as a fundamental human right of the indigenous peoples of Canada, a real *and* legal statewide protection. Some efforts have been made, over the years, to assure the protection of the right to self-government for aboriginal people, yet, have these means led to any conclusive protection?

2.2. *The Many Attempts of the Canadian Legislature and Judiciary to Define, Delimit, Protect and Implement the Aboriginal Right to Self-Government*

Over the years, many governmental initiatives have attempted to define, delimit, protect and implement the aboriginal right to self-government. As well, the right has been claimed by First Nation groups, claims that have been brought before the Supreme Court. In this section, it is shown that although self-government has been the protagonist of many governmental initiatives and judicial analysis, the right remains at risk of contest as aboriginal peoples are simply not afforded their complete due right. An investigation of modern agreements demonstrates this state of affairs.

2.2.1. The Constitution and Section 35(1): To What Extent is The Right to Self-Government Protected?

In the period prior to the constitutional amendments of 1982, the Canadian constitution made no mention as to the rights of aboriginal peoples. There existed no protection of their rights as First Nations. In fact, as was shown in the previous section dealing with the federal division of powers within Canada, the only mention of the indigenous groups was at section 91(24) of the *Constitution Act, 1867* in which it was elaborated that the Indians and their lands fell under the jurisdiction of the federal government. According to some, this division of powers now simply means that the elaboration of "Indians" and "Indian lands" under the federal head of government was

meant to only exclude the interference of the provincial government and was never meant to affect the aboriginals' inherent right to self-government[121], an important distinction.

After 1982, however, the completed amendments appeared to entrench the right to aboriginal self-government in the very Constitution of Canada in the form of s. 35(1) that affirmed that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"[122]. Suffice it to say that it was difficult to conceive that the aboriginals had renounced their rights to govern themselves in the past, so that the right to self-government was found to fall under the protection of those rights found to be "existing". As mentioned, the right to self-government *appeared* to have been protected in the Constitution because at the time, as well as now, there was no explicit mention as to the right's protection from the legislative and judicial spheres of Canada. Although quite a few aboriginal rights had been previously discussed and recognized by the judiciary using the protection afforded to them under s. 35(1), the right to self-government had never been subjected to any extended judicial scrutiny as to its specificities.[123] It is also a very different state of affairs to state that a right is constitutionally protected all the while not taking the time to elaborate upon the extent of that protection within the framework of Canada's judicial and legislative spheres. The nature and importance of the right is foremost, as its defined scope would be instrumental to the many indigenous groups of Canada. Because of this, many provincial and federal leaders and aboriginal representatives believed that this right needed special recognition in the Constitution.

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[121] *Report of the Royal Commission on Aboriginal Peoples, supra* note 99 at 210. This is according to the members of the Commission and the aboriginal groups and governments opinions that it reported upon.

[122] *Constitutional Act, 1982*, at s. 35(1).

[123] As previously mentioned, although the claimants in the cases of *Pamajewon* and *Delgamuukw* claimed the right to self-government, the court chose not too discuss the issue in detail. Rights to fish and hunt as well as rights to land and a host of other rights have, however, all been discussed in light of s. 35(1).

2.2.2. The *Charlottetown Accord*: An Attempt at Definition and Protection

As regards the right to self-government's inclusion in the Constitution, the failed Charlottetown Accord had sought a constitutional amendment that would have affirmed the right to self-government in the Constitution of Canada. The following proposed contextual statement[124] regarding the right to self-government that, in some re-worked form, would have been included in the Constitution, affirmed that the implementation of the right to self-government included the "authority of the duly constituted legislative bodies of Aboriginal peoples, each within its own jurisdiction to "safeguard and develop their languages, cultures, economies, identities, institutions and traditions" and 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 ensure the integrity of their societies"[125]. Although many of the more specific elements of self-government would have had to have been determined through explicit negotiations, the right to aboriginal self-government could have benefited from a certain degree of protection and *could* have led to a constitutionally based principled framework on the scope and breadth of the right. As P.W. Hogg and M.E. Turpel advance, the Charlottetown Accord also inferred that Aboriginal governments would be sovereign in the own spheres, making-up a third order of government, one that would share the same status as the other two, provincial and federal.[126]

The Accord was defeated by referendum, however, and the issue of self-government, although the breadth of the right is being determined as we speak between governments and individual or groupings of aboriginal groups, is still in a political and legal indeterminate state. The Charlottetown Accord's text protecting the aboriginal right to government, although brave in its initiative, would have still only seemingly

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[124] Although there does exists a proposed textual statement as it would have appeared if included in the Constitution of Canada, since the Accord was defeated, no final legal text was ratified by the parties to the Accord. The value of the proposed statement is not known.

[125] *Consensus Report on the Constitution, August* 28, 1992 (Ottawa: Minister of Supply and Services, 1992) at 17 [*Consensus Report*].

[126] P.W. Hogg and M.E. Turpel, *supra* note 112 at 381.

achieved that which seems obvious: that the right is indeed constitutionally protected, as affirmed in the *Federal Policy Guide* and the *Report of the Royal Commission on Aboriginals*. It could seem, at first light, that the Accord would have had little or no effect on the right to self-government for aboriginals beyond what has been established today. Yet, the Accord could have advanced the right to self-government by elaborating more precise and defined principles guiding the implementation of the right within the Constitution. The right would have occupied its own Constitutional place, thus creating a base upon which to create nation-wide guidelines. In the aftermath of the Accord, a more negative point of view surfaced concerning the inherent right to self-government. Since the right to self-government had actually not officially been recognized, it was thought to, for a lack of a better expression, not exist. As Professor Morse has explained,

> This latter position [the position that since the proposal of the Charlottetown Accord was to affirm the right to self-government for aboriginals as existing within in the constitution] basically means that a right of self-government does not currently exist within Canadian law and can only be created through negotiating self-government agreements. These agreements would then establish the general right of self-government and define its precise scope. As such, the right of self-government is contingent upon ever reaching agreements and is unenforceable at present through the Canadian courts. This contrast with a right being recognized as freestanding and pre-existing the Canadian constitution such that the focus of negotiations is on resolving the interface among governments and implementing the right.[127]

Professor Morse also makes the point that after the defeat of the referendum; most non-aboriginal governments reverted back to the contingent rights policy.[128] The prospect that the *inherent* right to self-government could only be perceived as contingent is alarming, as this would mean that that particular right for all aboriginal groups does not actually exist, save for those who have negotiated self-government agreements. This is contradictory, to a certain extent, to the nature of self-government, especially to that of its *inherent* capacity. In saying that a right can be inherent yet contingent on negotiations for its implementation, plainly demonstrates that the negotiations between the aboriginal groups and the governments are not seeking to establish a durable system of aboriginal government that will be stable and effective, as well as

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[127] B. Morse, *supra* note 108 at footnote 131, at p. 1039.
[128] *Ibid.*

implementing an inherent right to self-government. Quite on the contrary, in saying that the right is contingent upon negotiations exemplifies a show of governmental power that seeks only to install a system of delegated municipal powers, a show of power to control the whole process. If the right to aboriginal self-government were truly inherent, it would stand notwithstanding the process of negotiations. Suffice it to say that it may be preferable to adopt the opinions of the *Federal Policy Guide* and the on Aboriginal People expressed in the following sections that state that the right to self-government *is* inherent.

2.2.3. The *Report of the Royal Commission on Aboriginal Peoples* and Self-government

The Royal Commission on Aboriginal Peoples, a governmental-based group commissioned by the federal government to fully investigate the situation of aboriginal peoples within Canada, undertook an investigation that led to a voluminous five-book report, published in 1996, on almost all aspects of modern aboriginal life.[129] Included in this report was a sizeable section detailing the nature and scope of the aboriginal right to self-government. Although it is beyond the breadth of this paper to explain in detail all of the findings and the suggestions of the Royal Commission, a brief outline of what was principally suggested for the self-governance of First Nations will be elaborated.

For the Royal Commission on Aboriginal Peoples, there was never any question as to the constitutionally protected status of the inherent right to self-government for aboriginals within section 35(1) of the *Constitution Act, 1982*, nor that aboriginal peoples were considered to be, and still are, foreign nations by the colonizers[130] with rights to self-governance, although these issues are explored in full. Besides treating of these issues, the Report also heavily focuses on the exact implementation of the right, especially on different models of self-government that

[129] *Report of the Royal Commission on Aboriginal Peoples, supra* note 99.
[130] *Ibid.* Vol. 1, Chapter. 9: The *Indian Act*, at 262.

would serve to accommodate the many indigenous groups within Canada[131], as well as manners in which to implement these models. The Commission concluded that:

> [...] the enactment of section 35 of the *Constitution Act, 1982*, has had far-reaching significance. It served to confirm the status of Aboriginal peoples as equal partners in the complex federal arrangements that make-up Canada. It provides the basis for recognizing Aboriginal governments as one of the three distinct orders of government in Canada: Aboriginal, Federal and Provincial [and that they] are sovereign within their several spheres rather than by delegation.[132]

Furthermore, the Report explains that, because of the fiduciary relationship that was found to exist in *Guérin* between the Crown and the aboriginal nations, as was explained in Chapter I, this means that the Canadian Crown has a duty to protect these nations.[133] As we will see in the section that treats of the *Federal Policy Guide*, the question of Canada's fiduciary relationship with the different aboriginal groups is quite significant as regards the right to self-government.

Perhaps the most important aspect of the Report is found in Volume 2, Part One, where the Royal Commission explains its views on the implementation of the right to self-government through the enactment of an act of national intention, seen as a "royal proclamation that will indicate to all Canadians the nature of the relationship to be created, the principles that support it, the processes envisaged for its establishment, and the government of Canada's intention to give the relationship a legislative base through companion legislation"[134]. The Commission also recommends the enactment of specific statutory acts as well as the establishment of bodies to decide upon them as regards treaties, lands and treaties, aboriginal nations recognition and government, the establishment of an aboriginal parliament, and the creation of an aboriginal relations department and Indian and Inuit services department.[135] As well as these acts, the Commission recommended the negotiating of a Canada-wide framework by a forum comprised of federal/provincial/territorial ministers of Aboriginal relations

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[131] The three main models of self-government for aboriginal peoples would be the nation model, the public government model and the community of interest model found in *Report of the Royal Commission on Aboriginal Peoples*, *Ibid.* Vol. 2, Part 1, Chapter 3, at 250-280.
[132] *Ibid.* Vol. 2, Part One, Chapter 3: Governance, at 244.
[133] *Ibid.*
[134] *Ibid.* Vol. 2, Part Two, Chapter 6: Conclusions, at 1016-1017.
[135] *Ibid.*

as well as the leaders of national Aboriginal organizations, that would settle the following principles:

1. principles that would guide the treaty process;
2. principles to guide the negotiations leading to the allocation of lands and resources;
3. principles to govern the negotiations of interim relief agreements to take effect before the conclusion of the treaties;
4. the full extent of the jurisdiction to be exercised by Aboriginal governments after treaty processes have been concluded;
5. co-operative agreements to handle areas of co-jurisdiction;
6. fiscal arrangements among the three orders of government; and
7. an interim agreement setting out the core powers that Canadian governments are prepared to acknowledge Aboriginal nations can exercise once they are recognized. [136]

The *Report of the Royal Commission on Aboriginal Peoples* was received with mixed critiques. Although quite far-reaching in its vision, it is easy to see that the full extent of the report seems quite overwhelming, even to the most optimistic and eager jurist. The Report's fallibility would seem to reside in its forceful 'all-or-nothing' approach that seems to say that the totality of the aforementioned elements need to be implemented in order for the situation of aboriginal peoples to improve. This could very well be true if the aboriginal groups concerned did not reside within the boundaries of Canada, however, they do, and in the context of the Canadian federalist system, the proposals made by the Royal Commission may not be instantly feasible, constitutionally speaking[137]. Furthermore, the Commission pushes the proclamation and the enactment of the acts *before* the institution of the principled framework, a situation that would seem, as the old adage says, "to put the cart before the horse". The idea of the Aboriginal Nations Recognition and Government Act, as previously mentioned, does seem to be an excellent idea as it would establish the criteria and process that would be used to recognize and Aboriginal nation, delimit the law-making capacity of the nation in question as regards their life, welfare, culture and identity, establish the division of powers in accordance with section 91(24) of the *Constitution*

[136] *Ibid.* at 1018.
[137] If we take, as an example, the creation of the proposed *Aboriginal Parliament Act*, for example, it is quite easy to see the major constitutional reforms necessary to establish such an act, constitutionally speaking. *Aboriginal Parliament Act*, *Ibid.* at 1016-1017.

Act, 1867, as well as detailing the financing of this aboriginal government.[138] However, shouldn't the Royal Commission's principled framework be instituted in order to firstly establish the base on which to build self-government negotiations? As well, the established principles make no mention of possible future litigation. It is mentioned, in the discussion regarding the acts that certain commissions and tribunals would have to be created in order to assure, as for example, that new and old treaties are well clarified and modernized. Would the right of aboriginal to a judicial review of the ensuing decisions accompany these acts? Although the *Report of the Royal Commission* seems to be replete with good intentions, it still does not address the protection afforded to the rights of aboriginal peoples from adverse legislation or judicial decisions. Although the Report does elaborate upon certain of these questions, such as the division of powers, it does not elaborate upon the extent that this order of government, aboriginal that is, will be protected. In short, the establishment of a Canada-wide principled framework in a more detailed fashion would achieve what the Commission has sought to do, but in a manner more appropriate in its consideration of the Canadian federation. As we will see in the following section, the Canadian courts have implicitly highlighted the lack of precision as regards aboriginal rights by refusing to emit a decision as regards the right to aboriginal self-government.

2.2.4. The Canadian Courts and Claims of Aboriginal Self-government

Many Canadian and Commonwealth cases have considered, albeit somewhat briefly, the question of the aboriginal right to self-governance.[139] Given the magnitude of the negative repercussions that could ensue from a court decision regarding

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[138] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, Part Two, Chapter 6: Conclusions, *supra* note 99 at 1017.

[139] A very brief selection would include *A.G. Ontario* v. *Bear Island Foundation*, [1991] 2 S.C.R. 570, *Delgamuukw*, *supra* note 51, *Pamajewon*, *supra* note 109, *R.* v. *Williams*, [1995] 2 C.N.L.R. 229 (B.C. C.A.). An exhaustive list of all cases, including Commonwealth cases, that have dealt, even in passing, of the right to governance of aboriginal peoples, please see K. Wilkins, "Take Your Time And Do It Right: Delgamuukw, Self-Government Rights And the Pragmatics of Advocacy" (2000), 27 Man. L.J. 241, at footnotes 10 and 12.

aboriginal rights that either misconstrued, misread or broadened certain rights[140], the question of Canada's territorial integrity and sovereignty and the importance of the right of aboriginal self-government for the aboriginal peoples of Canada's continued existence, a judicial analysis of the right would have to be undertaken in such a meticulous and careful manner that is difficult to even envisage the process. Although the rendering of a correct and just decision must always be a major preoccupation of the court, the question of the inherent right to aboriginal self-government is one that is particularly delicate. The breadth of the risks, which could result from the rendering of a decision seeking to establish a definition and the scope of the right to aboriginal self-government, are difficult to envisage in their entirety. This is why higher courts have often chosen to remain mum on the question of aboriginal self-government, consistently deferring to the legislature. Two key Canadian cases, that of the previously cited *Pamajewon* and *Delgamuukw*, have most contributed to the debate of the nature of the right to self-government for aboriginals. Although the Supreme Court in both cases chose to not discuss the right in depth, they did reveal some of their insights as to the future of the right in Canada and the manner in which they believe it should be instituted. However, the case of *Campbell* v. *British Columbia (A.G.)*[141], decided in 2000 in the British Columbia Supreme Court, revolutionized the right of self-government for aboriginals. Both *Pamajewon* and *Delgamuukw* will be discussed separately and briefly and, although many other issues were discussed within the cases, such as land and gaming rights, only the analysis pertaining to the right to self-government will be discussed. The case of *Campbell* will be discussed in great lengths in a later section concerned with the Nisga'a Treaty. It will not be treated in depth in this section being a decision of a B.C. lower court, and will certainly eventually be decided on appeal to the Supreme Court of Canada.

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[140] A clear and unfortunate example of the negative repercussions of a decision that was misperceived by both aboriginal and non-aboriginal groups would be the events that occurred in the community of Burnt Church, New Brunswick following *R.* v. *Marshall*, *supra* note 70, a decision which prompted a disregard by aboriginals of provincial fishing legislation, creating much strife. For a review of the aforementioned events please visit: CBC NEWS, CBC Archived Stories, "Fishing Fury", online: <http://cbc.ca/news/indepth/fishing/media.html> (date accessed August 28 2002). The decision also prompted the Supreme Court to re-convene and provide an explanatory decision, an unprecedented occurrence, see *R.* v. *Marshall*, [1999] 3 S.C.R. 533.

[141] *Campbell*, *supra* note 110.

2.2.4.1. *R.* v. *Pamajewon*: Gaming and Self-government

In the case of *Pamajewon*, two nations, the Eagle Lake First Nation and the Shawanaga First Nation, asserted their rights to establish gaming facilities on the reserve. Although the precise facts of the case are very involved, suffice it to say that it was the first time in the history of Canada that an aboriginal group claimed the right to self-government. Both nations claimed pleaded that the authority to regulate gaming activities on the reserve stemmed from their right to govern their own affairs. For procedural reasons, two cases were decided in the lower courts[142].

At trial, the judge in *Pamajewon* used the test elaborated in *Sparrow*[143] to conclude that the Crown has the right to extinguish any aboriginal right prior to the *Constitution Act, 1982* and section 35(1) protecting aboriginal rights, and that, in effect, the right to self-government of the Eagle Lake First nations had been extinguished. In *Gardner*, the judge did not discuss the right to self-government, choosing instead to decide that gaming in the manner that the Shawanaga tribe was trying to regulate it did not fall within the scope of section 35(1). It was at the Ontario Court of Appeal[144], before which the separate claimants were joined in one case, that the appellants claimed that the regulation of gaming by the province violated their right to self-government in accordance to section 35(1). The judge in this case refused to recognize the right to self-government as he asserted, again using the test in *Sparrow*, that the activity of *regulating* gaming had to be shown to have been an activity of the particular nation. Furthermore, the judge did not consider the right to be evolutionary in character. According to this logic, what was gaming years ago for the First Nations could not be reconciled with their modern gaming practices. The judge concluded that the authority to make decisions regarding gaming was not the aboriginals.

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[142] In the test case of *R.* v. *Jones and Pamajewon*, [1993] 3 C.N.L.R. 209 (Ont. Prov. Div.), the two individuals assumed legal responsibility for the Shawanaga First Nation, and on the second case regarding Gardner, Pitchenese and Gardner, the individuals assumed responsibility for the Eagle Lake First Nation as a whole. [*Pamajewon* and *Gardner*]

[143] *Sparrow*, *supra* note 47, discussed in Chapter 1, section 1.6.5.

[144] *R.* v. *Gardner*, *R.* v. *Jones* (1994), 21 O.R. (3d) 385 (Ont. C.A.).

The Supreme Court's decision was quite a bit more involved as the judges chose to use the newly elaborated test of *R.* v. *Van der Peet*[145], which was described by Lamer C.J. as he then was, as "the test for determining the practices, traditions or customs which fall within section 35(1)"[146], meaning that that all aboriginal rights, from the right to fish with a longer net to hunt, should all be evaluated according to this test. The test in *Van der Peet* establishes that "in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition, integral to the distinctive culture of the aboriginal group claiming the right"[147]. Using the two-step test[148], Lamer C.J. decided that the nature of the right and activity (i.e. first step) claimed was "the right to participate in, and to regulate gambling activities on the respective reserve lands"[149]. After considering if this right was an integral and essential feature of the aboriginal group in question (i.e. second step), and found that it was not, the court decided that since the activity was not part of the First Nations' past, it was not necessary to determine if section 35(1) encompassed the aboriginals' inherent right to self-government.

As can easily be deduced, much of the *Pamajewon* decision was heavily critiqued, especially the approach used by the courts to analyse the rights of the aboriginal groups. In considering if the right was integral and essential to the culture, the courts are implicitly saying that the rights of aboriginals groups are frozen in time, a time in which "new" rights such as the right to regulate gaming were simply not existent. Professor Morse critiqued the decision in *Pamajewon* saying that "the scant reasons and weakness of the analysis [were] particularly disappointing"[150]. Instead of affirming legal rules as to the determination of a right and applying the constitutional protection of section 35(1), the court chose instead to delve into a "juridical assessment of historical, sociological and anthropological evidence of what constitutes an integral,

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[145] *R.* v. *Van der Peet, supra* note 93.
[146] *Pamajewon, supra* note 109 at 833.
[147] *Van der Peet, supra* note 93 at 549.
[148] The *Van der Peet* test is elaborated in section Chapter I, section 1.6.5.
[149] *Pamajewon, supra* note 109 at 833.
[150] B. Morse, *supra* note 108 at 1017.

central, significant, defining or distinctive part of a culture that was freeze-dried at the time of contact with Europeans"[151].

More alarmingly, the court has chosen to analyse the right to self-government as any other aboriginal right, disregarding its constitutionally protected status. The court could have instead perceived it as a question of legislative jurisdiction, as the right had already been established in federal government documents as being protected in the Constitution, between an aboriginal government and the provincial government, each attempting to exercise its legislative jurisdiction.[152] More importantly, although negotiation seems now to be the only remaining option, as we shall see in a latter section, these processes would significantly reduce the leverage detained by aboriginal groups around the negotiating table, as the option of going to court in order to put pressure on governments to respect rights was, in the wake of the *Pamajewon* decision, severely curtailed.[153] This has been somewhat changed by the B.C. Supreme Court's decision in *Campbell*, as will be shown in a latter section.

2.2.4.2. *Delgamuukw*: Land and Self-government

The decision of the court in *Delgamuukw*[154], in which first nations were claiming the fee simple ownership to a 58 000 km^2 tract of land in British Columbia, was one of the longest and most complex trials dealing with aboriginal matters.[155] A full analysis of all of the issues and details of the challenge as it voyaged through the courts is beyond the breath of this paper. Consequently, the issue of self-government, which was claimed at the appeals level[156], and ultimately appealed to the Supreme Court, will only be discussed.

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[151] *Ibid.* at 1031.
[152] *Ibid.* at 1034.
[153] *Ibid.* at 1037.
[154] *Delgamuukw, supra* note 51.
[155] The trial comprised of 374 days of evidence and produced, at trial, a 400 page decision, see R. Mainville, *supra* note 71at 31.
[156] *R.* v. *Delgamuukw*, [1993] 5 W.W.R. 97 (B.C. C.A.).

As to the issue of self-government, the Court stated that it had not been presented enough evidence that it could use to make any judicial determination as regards the aboriginal right to self-government[157], and that "the rights to self-government, if they existed, cannot be framed in excessively general terms"[158]. Throughout this decision, it is evident that the court, in the context of the right to self-government, is quite aware of the implications involved in deciding such as right as the right to self-government of aboriginals. Consider the following passage:

> The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to that issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organisation etc. We received little in the way of submission that would help us grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach.[159]

The Supreme Court has given all groups concerned with the implementation and protection of the right to self-government fair warning; it has shown that without the proper tools guiding their decision, such as, we suggest, a principled framework establishing the broader dimensions of the right, the Supreme Court will not discuss the matter of the right any further. Of course, there does remain the risk exposed by Wilkins, that which would result if the Supreme Court was forced "to decide the issues without being shown a cogent way of addressing the risks that self-government rights, at their worst, could pose to Aboriginal peoples and the rest of society, [it will] [...] close the door on such rights", not wanting "to expose the rest of the legal order to risks that it does not believe it can contain" [160]. As the bench states itself, it needs something that would help them grapple with the many different issues at stake, and, in light of the fact that it does not possess these 'legal tools', suggests that until it does, negotiation between the aboriginal groups and the government is the best alternative.

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[157] P. Joffe, "Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec" (2000) 45 R.D. McGill 155, at 167, citing at para. 170, Lamer C.J.C. and at para. 205, La Forest J.
[158] *Delgamuukw*, *supra* note 51 at 208.
[159] *Ibid.* at 1115.
[160] K. Wilkins, *supra* note 139 at 272.

2.2.4.3. The Nisga'a Treaty and the Constitutional Challenge to Self-Government in *Campbell* v. *British Columbia*

Despite the plea of the Supreme Court in the *Delgamuukw* case for action on behalf of the legislature to quickly delimit the issues surrounding self-government as well as developing a "cogent" manner by which to address the issues, the Supreme Court of British Columbia, through the decision of *Campbell* by Williamson J., chose to delimit the state of the law without any indications by the Supreme Court or the federal government as to the manner by which to proceed. Although the decision will in all probability be appealed, it has, for the moment, revolutionized the protection and constitutional legitimacy of the aboriginal right to self-government. Not only has Williamson J. directly stated that the right to self-government is a right protected in section 35(1) of the *Constitution Act, 1982*, but he has also stated that the powers delimited under sections 91 and 92 of the *Constitution Act, 1867* are not exclusive in that they did leave some room for the creation of a third order of aboriginal self-government. Basing his arguments on the fact that aboriginal sovereignty had only been limited, and not extinguished, by the Crown, Williamson J. decided that the form of self-government that had been affirmed for the Nisga'a corresponded to this 'remaining' form of limited government.[161] Although the judge's reasoning in the case can be questioned as to its soundness, if the door that he has opened as regards the right of self-government for aboriginals is not closed by a higher court, it does indeed broaden the inherent right to self-government. The *Campbell* judgement has, *grosso modo*, created a third order of government, as well as confirmed the protection of the right under section 35(1).

2.2.4.4. The Canadian Judiciary and the Aboriginal Right to Self-government: Assessment

The Canadian Supreme Court, in deciding *Delgamuukw* and *Pamajewon*, has decided to remain silent when faced with the question of aboriginal self-government.

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[161] *Campbell*, *supra* note 110 at para. 93.

Although the debate still rages as to the correctness of the court's stance, it would seem that it has acted quite wisely, more in the *Delgamuukw* decision than in the *Pamajewon* decision. The right to aboriginal self-government was perceived as a Pandora's box by the judiciary, a box that should not be opened until concrete measures had been enacted to conceptualize the right within the broader Canadian legal and political framework. The courts had mentioned, in the *Delgamuukw* decision, that it did not possess sufficient tools to effectively render a decision as regards the right to aboriginal self-government, and it is our opinion that it still does not. Additionally, the court in the *Pamajewon* decision, instead of perceiving the right to self-government as inherent and separate from the right to regulate gaming, combined the two and, after applying an approach to aboriginal rights that would leave them relegated to the past and incapable of evolving to modern times, finally decided that it did not even have to consider the right to self-government. Even more dangerous, was the lower court's decision in this case that found that *the right to self-government had been extinguished.* Yet, how could an inherent right be extinguished? However, the decision in *Campbell* has entirely reversed the notion of judicial reserve upside down. In deciding the question of the protection of the inherent right to self-government, Williamson J. has either opened the door for a broader protection of the right or forced the higher courts to severely limit the right in order to preserve Canada's two existing orders of government. Interestingly enough, and as we will discuss later in the section treating of the *Federal Policy Guide* as well as in Chapter III, the very role, if any at all, of the courts in the determination of this right has been heavily questioned. Despite this, the Supreme Court has not completely left itself out of the equation as, instead of taking the position that the issue of the right to aboriginal self-government should perhaps be left of the decision-making process as regards the right to self-government, it has implicitly hinted that, given the proper guidelines or policy framework- which implies that the existing guidelines are simply not enough- it could, in the future, judge this particular right. If this were the case, would the right be adequately protected from adverse judicial intervention, such as a misapplication of the *Sparrow* test? The formal guidelines elaborated by the *Federal Policy Guide*, and discussed in the following section, may have addressed this issue.

2.2.5. The Federal Policy Guide

In 1995, the Liberal government of the time, led by Jean Chrétien, issued a policy guide which affirmed the aboriginal right to self-government in Canada, as well as proposing a distinct course of action for its implementation.[162] The federal policy guide does offer an explicit recognition of the inherent right to self-government as being protected by section 35(1) of the *Constitution Act, 1982.* As well, it considers the constitutional context of the right to self-government, the scope of the negotiations and the powers that will be given to aboriginal groups, the mechanisms of the implementation of the right, the ways of dealing with the existing treaties, land claims agreements, and existing self-government agreements, the application of laws, the financial agreements and, amongst other issues, the many approaches to self-government in accordance to the three recognized groups of aboriginals: Aboriginals, Métis and the Inuit. The explanation of the many complex details of the *Federal Policy Guide* and a thorough analysis of all its components cannot be discussed in this paper, for sheer lack of space. Only several core and instrumental details of the policy guide that directly affect the topic at hand will be investigated.

The *Federal Policy Guide*, in its introduction, affirms the inherent right to self-government as an existing right within section 35(1) of the *Constitution Act, 1982.* It also states that the approach developed to achieve the implementation of this right, principally through negotiations between distinct groups and the government, "focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to determine it in abstract terms"[163], a phrase which shows the government's hesitance in establishing a definition. Pointing out the failure of the Charlottetown Accord's proposed constitutional amendments as regards aboriginal self-government, the guide ascertains that negotiations are the preferred manners in which to proceed in order to successfully implement the right in Canada. Negotiations between aboriginal groups and governments have gained much momentum over the

[162] *Federal Policy Guide*, 1995, *supra* note 107.
[163] *Ibid.* Introduction, at 1.

years, especially after the affirmations of the *Federal Policy Guide* and its direct praise of negotiations as the most effective tool in achieving a successful implementation of the right to self-government. Yet, their lasting effectiveness remains to be seen.

2.2.5.1. The *Federal Policy Guide:* Implications

The *Federal Policy Guide*, although elaborating guidelines for the implementation of the inherent right to self-government, leaves the latter's scope and protection open to interpretation, presumably because of the guide's essential theme, that of "implementation by negotiation". It is unclear, however, as to exactly why renewed constitutional amendments, as an example of an alternative, would not lead to the same successful implementation. An additional point, and one that is central to our thesis, is that the *Federal Policy Guide* seems reticent to even consider the possibility that the inherent right to self-government could be, in the future, threatened by a host of different factors, factors which are considerable politically (i.e. the judiciary's powers of judicial interpretation or the legislature's power to pass adverse legislation) to affect the right of self-government across the country. These factors, such as the Supreme Courts' power to interpret the breadth of a specific aboriginal right (e.g. the right to self-government) have the potential, as was discussed in Chapter I, to severally limit the application and protection of the aboriginals' right to self-government. In addition to the guide's reticence to explore any possible future threats to the successful implementation of the right to self-government of aboriginals, it also contains several questionable statements that could exemplify these very threats.

The first controversial statement is contained in an interesting paragraph that commences Part I of the policy guide. Although the message of the paragraph is not extensively threatening in itself to the aboriginal right to self-government, certain phrases are questionable, however;

> The Government acknowledges that the inherent right of self-government *may be enforceable* through the courts and that there are *different views about the nature, scope and content of the inherent right.* However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, *the courts are*

> *likely to provide general guidance* to the parties involved, leaving it to them to work out detailed arrangements [the emphasis is mine][164]

In affirming that litigation is a last resort- litigation that would invariably see the necessity in establishing a basic definition of the right or the elaboration of its scope in order to give a ruling- it would seem that the government seeks to establish many different types and levels of self-government throughout Canada in a manner which makes the government seem willing to accommodate all of the aboriginal groups. Although it is true that the aboriginal groups are too diverse and different to assume that the right to self-government would be practiced unvaryingly and uniformly throughout the country, it would seem that *a right as fundamental as the right to self-government* could, and should, be enforceable by the courts, being a constitutionally protected right. In stating that the right *could* be enforceable, the federal government would seem to be saying that the right does not actually exist, a highly problematic conclusion. Although the role of the court in deciding such a right had been questioned in the past (this issue will be discussed in Chapter III), it would seem that if the right and the implications of its implementation were appropriately outlined, the court could have the authority to hear potential litigation if the need arose.

The second questionable affirmation is also contained within this paragraph. Its wording is quite problematic as, in saying that the right "*may be* enforceable through the courts", the government is effectively saying that once the right is established, it may be precluded from any judicial intervention, which, in a federal system where the system of checks and balances of the executive branches are an absolute necessity, the power of the judiciary is vital. One possible, but unlikely, reason for this reserve is that the government is willing to extend absolute independence to the many self-governing nations, erasing any possibility that, in the future, aboriginal groups would need to experience litigation. Another hypothesis is that the government has such faith in the proposed negotiations that it cannot even envisage a situation for which there would be a need for litigation concerning the terms of the agreements, a highly unlikely situation considering the nature and importance of the right in question and several existing

[164] *Ibid.* Part I: Policy Framework, at 2.

precedents of post-negotiation conflict.[165] Another possible hypothesis would be that the government believes that the concluded rights to self-government between the many tribes and the orders of government will not be subjected to the controls of the judiciary. None of these situations are, however, constitutionally viable. Although the *Federal Policy Guide* does show a distinct preference for alternate dispute mechanisms to settle disputes that arise form future negotiated settlements, this could not possibly imply that recourse to litigation is not an option. On the contrary, in seeking to establish a just and equitable system of self-government, it is fundamental to the entire process that the rights of aboriginals be protected by Canada's judicial sphere.

Admittedly, the role of the courts in the determination of the right to inherent self-government is questionable or uncertain at best, a question that will be addressed in a latter section. However, if the right to self-government continues to be negotiated in the many different forms as we are seeing today, this would probably result in a certain degree of involvement of the courts. If this right were to be protected in a state-wide policy framework that detailed its nature and the scope of its protection, as well as addressing fundamental aspects of its implementation, would this not at least afford to the right a minimum of protection and serve to guide the courts in its analysis, in future litigation? To believe that litigation will not result from the implementation of such an important right, as the policy of the government of the *Federal Policy Guide* seems to impart, is quite astonishing considering its very nature and fundamental importance. The question remains, as Schiveley has concluded in his article concerning the role of the common law courts in determining title issues, "if everyone agrees that these issues [concerning title to lands and other aboriginal rights] should be negotiated why are they still going to court?"[166]. Good question indeed.

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[165] Amongst the many precedents are included the previously mentioned case of *Carrier Sekani Tribal Council v. Canada*, March.1, 2000, Case No. 12.279, *supra* note 63, and the situation which was created by the original James Bay Phase I Agreement between the governments and the Cree of Quebec, a situation which we will analyse in detail in a latter section.

[166] G.R. Schiveley, "Negotiations and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues" (2000) 33 Vand. J. Transnat'l L. 427, at 467.

Concerning the protection and correct implementation of the right to self-government, the *Federal Policy Guide* formulates another questionable guideline to self-government in its section entitled 'Application of laws'[167]. The opening paragraph to this section affirms that many federal and provincial laws will continue to apply to Aboriginals, or, at least, continue to exist in parallel with Aboriginal laws.[168] The second paragraph continues by stating that all concluded agreements between the aboriginals and the orders of government should indicate rules of priority in order that any possible conflicts between the laws could be resolved.[169] More importantly, "[t]he government takes the position that negotiated rules of priority may provide for the paramountcy of Aboriginal Laws, but may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws"[170]. It is clear from this paragraph that the federal and provincial governments will still retain most of the powers over aboriginal laws, considering the aforementioned reservations. Of course, it is understood why Canada, in trying to preserve its current form of government and the security of the nation, all the while trying to implement the inherent right to self-government of aboriginal peoples, would establish such limitations. The argument does not lie in questioning the legitimacy of the acts of the Canadian government. On the contrary, the argument lies in the fact that, considering the actual measures that have been determined in the past by the judicial branch of Canada in order to resolve conflicts between government legislation and Aboriginal rights[171]- that are, it has been argued, inherently linked to aboriginal lands and inherent right to self-government[172]- is it not clear that the aboriginal right to inherent self-government is at the mercy, in potential litigation, of being severely limited in favour of the federal or provincial governmental prerogative? The *Sparrow* test as regards the valid objectives of the government legislation that could limit aboriginal rights has been shown to have been considerably

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[167] *Federal Policy Guide*, Section: Application of Laws, *supra* note 107, at 8.
[168] *Ibid.* Section: Application of Laws, at para.1
[169] *Ibid.* Section: Application of Laws, at para.2.
[170] *Ibid.*
[171] For the test elaborated by the courts to test federal and provincial legislation infringements, see *Sparrow*, *supra* note 47 and *Delgamuukw*, *supra* note 51.
[172] G.R. Schiveley, *supra* note 166 at 428-431.

broadened in *Delgamuukw*[173]. Could this not happen again, and have quite a detrimental effect on the right to self-government for the indigenous peoples of Canada? A clear principled framework, elaborating the limitations to federal and provincial legislation as to the degree that they could possibly infringe upon aboriginal laws serving to implement the right to self-government, could provide the necessary protection for the aboriginal right to self-government. The constitutional rules that govern Canada's strict division of powers can also serve for aboriginal governments, yet, these rules would have to be specifically elaborated by the parties involved.

Another area of potential conflict would be the fiduciary relationship that has been established in the case of *Guérin*, as previously discussed.[174] The *Federal Policy Guide* establishes, in the section entitled 'Fiduciary Obligations'[175], that the right to self-government may change the nature of the fiduciary relationship between aboriginals and governments. The main concern with the phasing out of the fiduciary obligations is that it could, in fact, be detrimental to aboriginal groups as the obligations of the government towards the aboriginals has, in the past, served an important function as to their good faith in many negotiations concerning aboriginal affairs. On the other hand, it should be noted that a lessening of this obligation could also serve to formally sever ties with the federal government, ties that have served to keep aboriginal groups under the thumb of the federal government. It is clear that the fiduciary relationship does serve an important purpose, perhaps more in the embryonic stages of the negotiations, to the relationship between the government and the aboriginal nations, especially during the course of negotiations. The importance that it serves in the nascent stage of the development of the right to self-government should be included within a principle framework in order to assure that it is not either misused or forgotten.

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[173] See section 1.7. (The expansion of the *Delgamuukw* "valid objectives" test).
[174] *Guérin*, *supra* note 87.
[175] *Federal Policy Guide*, *supra* note 107, Section: Fiduciary Obligations, at 9.

2.2.5.2. Self-government and the *Federal Policy Guide*: Assessment

There exist many other items of debate within the policy guide. However, the aforementioned issues are central to our thesis in that they demonstrate that, although the *Federal Policy Guide* is a step forward for the implementation of the right to self-government in Canada, much remains to be determined with regards to the right's scope, and, especially, its protection from any adverse action, legislative or otherwise, initiated by the orders of government. Particularly, the guide is perceived by some aboriginal leaders to be nothing more than a delegation of municipal-type forms of government.[176] Despite this adversity, the guide seems to be the standing influence. Although it seems to prefer negotiation to litigation, the government cannot entirely forgo that the latter might occur. In fact, in light of the nature of the past relationship between the governments and aboriginal groups, it is almost certain that legal actions will transpire from negotiations between the orders of government and aboriginal groups. Yet, how will these legal actions conclude without a principled framework elaborating the many issues encompassed by the inherent right to self-government held by aboriginals of Canada? Through the following analysis of two modern treaties and their development over time, as well as the adversity that they have faced or face, it will be sought to demonstrate the ineffectiveness of the current negotiations in light of the legal and judicial limitations to aboriginal rights.

2.3. *Self-government in the context of Canada's Legislative and Judicial Spheres: Assessment*

As we have seen in the preceding sections, the right to self-government for the aboriginal peoples of Canada is a complex issue, couched in many layers of debate. It is pulled at the same time by the different and varying interests: the aboriginal groups, the two existing orders of government, and the various interests of the two. The definition of the right to self-government and its scope has been shown to ensue from

[176] B. Morse, *supra* note 108 at 1038.

the international sphere, the work of many jurists in the domestic sphere, section 35(1) of the *Constitution Act, 1982*, the Supreme Court of Canada, the recommendations of a Royal Commission, and, finally, from the policies of the federal government itself. What cannot be denied is that there *does* exist the danger that if an exact definition were to be crafted, it would necessarily entail either the restriction of the right for certain groups or a widening of the right that could dilute its very meaning. If we look, as an example of this danger, to the definition of "indigenous peoples"[177] as regards the right to self-determination in international law, it, and its many characteristics, are used to withhold the right from deserving groups.[178]

Even more clear, however, is that the *Federal Policy Guide*, the *Report of the Royal Commission on Aboriginal Peoples*, the stance of the Supreme Courts of Canada, and all other juridical positions taken together emphasize the many unresolved issues which revolve around the right to aboriginal self-government- and in consequence other aboriginal rights- that could result in a potentially dangerous situation for the right of aboriginals to inherent self-government. It is not proposed that the government has ignored these issues, as the policy guide has shown at least an interest in issues that could generate potential strife (i.e. the division of powers), but what the guide *does* do, is leave many of the issues to be negotiated between the different First Nations and the governments. These issues should not be left to be determined through the negotiation of individual agreements. Of course, indigenous groups should have the right to establish self-government regimes that respond to their particular situations, any other arrangements would be quite inadequate. However, certain issues, such as the division of powers between governments, the fiduciary obligations, and, more importantly, the future judicial interpretation of aboriginal rights including the right to self-government – an occurrence that is almost certain to arise- should first be established in a principled framework for all aboriginal groups

[177] The definition of indigenous peoples is reproduced at J. M. Cobo, *supra* note 14.

[178] For example, since the definition of 'indigenous peoples' puts a heavy emphasis on the ties that exist between indigenous peoples and their lands, the *Roma* (also pejoratively known as "Gypsies"), who are nomadic peoples, would be want to prove their ties to "specific lands". This characteristic could, in fact, serve to limit their rights as indigenous peoples. For in-depth essays in indigenous peoples and minorities and discussions on the issues of the Roma, see the essays in B. Brölmann et al., eds., *Peoples and Minorities in International Law* (Netherlands: Kluwer Academic Publishers, 1993).

living in Canada. For our hypothesis to ring true, the following examination of modern treaties should demonstrate some fundamental problems with the resulting negotiated agreements.

2.4. Modern Treaties and Self-government: An Assessment of the Process

Despite the many reports, recommendations, court decisions and numerous opinions expressed through doctrine which have hinted at the need for a principled framework in order to correctly introduce the right to self-government in Canada, the governments, both federal and provincial, together or separately, have entered into numerous negotiations with First Nations in order conclude agreements within these groups. Two well-known agreements, the Nisga'a Treaty, concluded in British Columbia between the First Nation and the two orders of government, and the recent New Agreement, concluded between the Crees of Quebec and the provincial government, are two very different examples of the negotiations being undertaken in Canada today. In this section, it is sought to analyse the particular negotiations and their consequences, particularly to see if they have, in fact, functioned well, especially considering the effective implementation of the aboriginals right to self-government.

2.4.1. Agreements with the Crees of James Bay: Past and Present

Although our analysis reposes on modern agreements concluded after the many court challenges, the reports and one major *Federal Policy Guide* discussing the right to self-government, our first agreement is the modernized version of an older agreement, concluded almost thirty years ago between the Crees of James Bay and the Province of Quebec. Although the older agreement does not fall under all of the new judicial and legislative developments which we have previously discussed, it is interesting to our analysis as it creates a "past and present" to negotiations between the

governments and aboriginal groups, the latter process being seen as the primary method to be used in order to achieve self-government treaties.

2.4.1.1. James Bay and Northern Quebec Agreement Phase I: Lawsuits and Discord For the First Modern Treaty

The relationship between the Crees and the provincial government of Quebec in the past forty years is crucial to a complete understanding of the "Agreement Concerning a New Relationship Between le Gouvernment du Québec and the Crees of Québec"[179] that was recently concluded between the two parties on February 7th, 2001. Their relationship began many years ago as the Crees have lived through the colonisation of their lands by various foreign parties. In fact, the Crees have inhabited the James Bay area since time immemorial. However, it is in the early 70s, with Premier Bourassa, the premier of Quebec at that time, that the destinies of the two parties became politically embroiled. Faced with lagging popular opinion because of strife within the province in 1971[180], Bourassa initiated the construction of a massive hydroelectric project in the north of Quebec in the James Bay region to bolster the province's economy. Living on this land were 6 000 Crees, and thousands of other aboriginal groups, none of which were consulted concerning the drastic changes that their lands were about to undergo.[181] The fact that the Crees depended on their land for their subsistence, through fishing and hunting, was seemingly not considered at all.

Led by Billy Diamond, a 22 year-old of Crees origin, the aboriginals fought to achieve an injunction to halt the progress of the work, a motion that was allowed by the trail judge only to be overturned by the Quebec Court of Appeal only one week

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[179] *Agreement Concerning a New Relationship Between Le Gouvernment du Québec and The Crees of Québec*, Secrétariat aux affaires autochtones, Ministère du Conseil Exécutif, Province du Québec, online: http://www.mce.gouv.qc.ca/w/objets/entente-020207.pdf (date accessed: August 2002). [*New Agreement*]

[180] D.M. Decampo, "The James Bay Story So Far" (19 August 2002), online: Native Net, http://nativenet.uthscsa.edu/archive/nl/9303/0043.html >.

[181] *Ibid.*

later.[182] Both parties feared the progress of the case to the Supreme Court which lead to speedy negotiations: the Crees demanded a minimisation of the impact on the traditional Crees way of life (i.e. hunting and fishing grounds) as well as an increased Crees role in the development of their lands.[183] The Crees also took the chance to redefine their relationship with the provincial governments with respect to some of their affairs, yet, as can be determined from the James Bay and Northern Quebec Agreement and Complimentary Agreements[184], the powers agreed upon fell short of being full-out political decision-making, self-government, remaining instead delegated-type administrative powers.

The provisions concerning the self-government of the Crees as well as the Naskapis, an aboriginal group that were also to be affected by the hydro project, were enacted in the *Cree-Naskapi (of Quebec) Act*[185]. This was, in fact, the first self-government agreement between any aboriginal group living within the boundaries of Canada and the government. In the preambular paragraphs, the Act calls for an "orderly and efficient system of Cree and Naskapi local government, for the administration..." of lands and "of certain individual and collective rights under the said agreement" as well as providing that nothing in the Act could prohibit the Crees from receiving full benefits from any subsequent legislation concerning further self-government of the Crees.[186] The issues dealt with within the Act remain administrative in nature: the band councils (e.g. election of members, council meetings)[187], the bands' financial administration[188], the residence and access rights to different categories of,

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[182] *Robert Kanatewat et al.* v. *James Bay Development Corporation et al.*, [1974] R.P. 38 (Sup. Ct.); [1975] C.A. 166.
[183] H. Feit, "Legitimation and Autonomy in James Bay Cree Responses to Hydro-Electric Development" in N. Dyck, ed., *Indigenous Peoples and the Nations-State: 'Fourth World' Politics in Canada, Australia and Norway* (St. John's, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985) at 44 and 57.
[184] *James Bay and Northern Quebec Agreement and Complimentary Agreements* (Québec: les Publications du Québec, 1991 edition) [*James Bay Phase I*] which were subsequently enacted in legislation by federal and provincial acts of Parliament: *James Bay and Northern Quebec Native Claims Settlement Act* R.S.C. 1976, c. 32; *An Act approving the Agreement Concerning James Bay and Northern Quebec* R.S.Q. 1976, c. 46.
[185] *Cree-Naskapi (of Quebec) Act*, R.C.S. 1984 c. 18 [the *Act*].
[186] *Ibid*, first preambular paragraph.
[187] *Ibid.* Part I & II.
[188] *Ibid.* Part IV.

yet specifically delimited, lands[189], the expropriation of certain lands by Quebec[190], successions[191], policing[192] and offences[193]. Despite the fact that this "statute merely provide[d] delegated powers to the Cree, Naskapi [...] as opposed to implementing the widespread Aboriginal desire for recognition of an inherent right to self-government legislation"[194], this form of accord did afford the Crees a substantial amount of power.

The Agreement itself provides for various other things as well. One of the most important would be the classification of the land into different categories[195]: Category I lands are owned by the Crees, yet are further divided into Category IA lands (federal jurisdiction), and category IB lands (provincial jurisdiction), owned by native corporations.[196] The federal government does not exclusively hold Category IA lands, the Crees are still allowed to exert their rights to hunt, fish and trap. IB lands are the exclusive jurisdiction of the province of Quebec, although owned by the native corporations. Category II lands is Crown land that is not occupied, on which the Crees have exclusive rights to continue their traditional activities, that can be appropriated by Quebec and is under the jurisdiction of the James Bay Regional Zone Council.[197]

As regards self-government, the Crees have native corporations, local councils and band councils[198] as well as boards and committees that are established in the local level to handle different community functions such as the Joint Economic and Community Development Committee, the James Bay Native Development Corporation and the Cree School Board.[199] Short of developing their own courts, it is provided that the judiciary demonstrate a greater openness towards the Cree way of life

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[189] *Ibid* . Part VI.
[190] *Ibid.* Part VII.
[191] *Ibid.* Part XIII
[192] *Ibid.* Part XVI.
[193] *Ibid.* Part XVII.
[194] B. Morse, *supra* note 103 at 90.
[195] For an explanation of the division of the land into separate categories, see F. Cassidy and R.L. Bish, *supra* note 111 at 145.
[196] *James Bay and Northern Quebec Agreement*, *supra* note 184 at S.5.1.
[197] *Ibid.* at S.5.2.
[198] *Ibid.* at S. 9 & 10.
[199] *Ibid.* respectively, S. 28.8.1, S. 28.2.1 and S. 16.0.4.

as regards justices.[200] Most importantly, as its effectiveness has been shown in subsequent negotiations and debates with the orders of government, the Cree Regional Authority was established which represents the entire James Bay Cree population, appoints the Crees to the administrative bodies which share jurisdiction with the Canadian governments, as well as a host of other mandates.[201]

2.4.1.2. James Bay Agreement: Preliminary Assessment

The important status of the James Bay Agreement as a modern treaty cannot be disputed as it combined comprehensive land claims agreement as well as provisions for the development of resources in the region. Although the Agreement provided for a substantial power increase for the Crees of Quebec, most of the powers given were administrative in nature, powers that seems to fall short of complete autonomy over certain spheres of life, such as justice or policing.[202] More importantly, the governing bodies were quite fragmented; instead of a unified governing power that would exercise its jurisdiction over many aspects of policy-making, several bodies administrated very different areas of Cree life. Note, as well, that the lands, which have been said to belong to native corporations, still fell under the jurisdiction of the federal and provincial governments. Although at this stage the right to the self-government of aboriginals was not being extensively discussed in Canada and constitutional reforms were still quite a ways away, it still remains remarkable, however, that the right of the Crees to govern their own affairs as their *inherent* right to self-government was not taken into account.

The benefits of the Agreement and the Act, however, cannot be denied as it was the first time that an aboriginal groups was given so much control over their own lands and development. Many problems with the Agreement, however, are primary to our discussion. Under the *Cree-Naskapi (of Quebec) Act*, there exist provisions that do

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[200] *Ibid.* at S.18.
[201] *Ibid.*
[202] *Cree-Naskapi (of Quebec) Act*, see footnotes 185-193.

affirm that this Act is only subject to the *James Bay Agreement's Act*[203] and that it prevails over any act of Parliament. As well, and following the general law on this subject to provincial laws of general application do not apply when they come into conflict with the Act.[204] Additionally, under section 5 it is even found that the *Indian Act*[205] legislation, long seen as being the symbol of imperialist control over aboriginal peoples, does not apply to the *Cree-Naskapi Act*. However, the Act does "not empower the affected Indian government with the delegated authority to make a constitution" as these "have been created in the conventional form of municipal governments"[206]. More importantly, all of the entities, such as the aforementioned Cree Regional School Board, received their powers as delegated from the province. This meant that the Crees did not form a "government" *per se* and could not, through negotiations, bargain with the federal and provincial orders of government as regards health services, education and other types of services.[207]

One aspect of the Act that is interesting in the context of self-government is the jurisdictional concerns, more particularly the involvement of the provinces in any agreement. As we have shown, the federal government retain jurisdiction under 91(24) over aboriginal people and their lands, however, in the context of the James Bay Agreement, this power was, of sorts, handed over to the provinces. Cassidy and Bish affirm that the effects of this jurisdictional transfer will vary from province to province because of their differences.[208] An example of a problem that could result from this jurisdictional transfer can be seen after the conclusion of the James Bay agreement, when serious health affects were suffered by aboriginals in various Cree communities, effects caused as it was believed by the Crees and environmentalists by a lack of respect by the governments of their obligations. Poor water and sanitation services were found to be the culprits, services believed to be the obligations of the federal

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[203] *James Bay and Northern Quebec Native Claims Settlement Act, supra* note 184.
[204] *Cree-Naskapi (of Quebec) Act, supra* note 185 at arts. 3-4.
[205] *Indian Act, supra* note 78.
[206] F. Cassidy and R.L. Bish, *supra* note 111 at 146-147.
[207] This was not the case for the *Sechelt Indian Band Self-government Act* in British Columbia, R.S.C., 1986 c.27. which could negotiate and reach agreements with both orders of government, as could a distinct order of government. See F. Cassidy and R.L. Bish, *supra* note 111 at 147 on the question.
[208] F. Cassidy and R.L. Bish, *Ibid.* at 148.

government and the provincial governments.[209] The federal government denied any responsibility concerning these ill effects. It is clear that all of the three parties to the agreement, the provincial government, the federal government and the Cree group all had a distinct manner by which to interpret the terms of the Agreement. Yet the federal government has many times claimed during litigation, as in the above situation regarding health services, that the jurisdiction in question has been delegated to the provincial government according to the Agreement. The danger in doing transferring jurisdiction is palpable. Cassidy and Bish show that "[i]n transferring some of its responsibilities for Indians and Indian lands to Quebec, the Crees feel the federal government has decided, if not declared, that some of its responsibilities under the Constitution are now the business of the province rather than itself. This, the Cree assert, should not be the case"[210].

Furthermore, the Tait Report[211], a report commissioned by the federal government to investigate the implementation of the Agreement generally found that the many interpretations given to the report were extremely varied to the point that signatories did not have the same to the same understanding. Similarly, as it has been found to occur during the conclusion of the James Bay agreement, and many times in the past, the differences in the understanding of the parties to the proceedings and to the particularities of the agreement were quite broad.

The most important conclusions that can be drawn from the James Bay Agreement are many[212]: first and foremost, the delegation of federal powers to the provinces is risky in that aboriginal governments want to deal with the two orders of government as an equal, not just relegated to making arrangements with one order. The

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[209] Because they were said to fall under "social and economic development", such as that found in Section 14 of the Agreement which provided the establishment by the province of Quebec of a Cree Board of Health, and of Section 28 which held that both Canada and Quebec were to provide health and sanitation services to the communities of Crees, the aboriginal group felt that both the federal and provincial spheres were responsible for the breach of terms, a hotly disputed allegation. See Cassidy and Bish, *Ibid.* at 149-151.

[210] F. Cassidy and R.L. Bish, *Ibid.* at 151.

[211] *Tait Report*, INAC, Government of Canada, 1982.

[212] The experiences of the James Bay Crees teach a particular lesson to aboriginal groups seeking to conclude agreements with the government, See F. Cassidy and R. L. Bish, *supra* note 111 at 152-155.

Cree government saw the James Bay Agreement, for example, as "a three-way beneficial relationship"[213]. Aboriginal governments would like to interrelate with provincial and federal governments just as any independent government would cooperate with another, however, the relationship that stems from the James Bay Agreement seemed to imply that the relationship resembles more the interaction of bureaucracies at a basic administrative level.[214] This can be remedied by direct involvement by the two orders of government, especially the federal government, and a clear statement as to their obligations. Secondly, agreements must be clear and precise as to all arrangements involved in the modern treaty; in fact, the terms can never be precise enough.[215]

Although there are bound to be conflicts as to the interpretations of certain terms and the resulting obligations, the James Bay Agreement demonstrates that although negotiations and accords can be concluded, unless there is much work and a basic addressing of the most important issues concerning the question, strife and litigation will inescapably result. Before commencing the negotiation and the implementation of an agreement, or a self-government treaty, it is absolutely necessary to firstly resolve questions of fundamental importance. In the case of self-government, these questions would be, among others, the obligations of the governments, the monitoring of these agreements, the determination of the aboriginal right, as well as the extent of the protection afforded to the rights that are determined. Without these basic considerations, disagreement can only result.

In fact, beside the significant negative environmental consequences[216] of the James Bay Phase 1 Project, many cases surfaced in the aftermath of the James Bay

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[213] C.-A. Sheppard, *supra* note 28 at 852. In *Quebec Secession reference*, *supra* note 27, the Crees argued that any relationship between themselves and the governments stemmed is a tri-partite agreement. This was used to claim that Quebec could not secede from Canada, the federal government not having the authority, because of the nature of their relationship, to delegate its powers to the province.

[214] F. Cassidy and R.L. Bish, *supra* note 111 at 153.

[215] *Ibid.*

[216] The negative environmental repercussions were substantial as the James Bay Phase 1 project was begun with no environmental assessment. Along with the shrinking of rivers, the increase in size of stagnant water pools and the proliferation of algae, high levels of mercury were also created by dam-

Agreement, yet were subsequently "resolved" upon the conclusion of the Agreement on a New Relationship which dealt primarily with the obligations of the orders of the governments as regards native issues, issues that were not resolved during the negotiations. Twelve cases[217] in all were awaiting trial or conclusion. Cases such as Grand Chief Matthew Coon Come I and II[218], which dealt with $2.8. billion dollars concerning mainly natural resources, economic and community development, and the implementation of the James Bay and Northern Quebec Agreement, and the case dealing with the Cree School Board[219], concerning the funding of Cree education, were all settled, or pending settlement. The disillusionment of the Cree at the time, however, was palpable.

> I told you about our constant efforts to obtain responses from Canada and Quebec. The failure of ministers and government officials to respond to our requests to put the agreement into effect, to take the agreement seriously, and finally – to do what the agreement says the government will do. We have made requests, we have begged for answers we have negotiated, we have waited, and we have been ignored.[220]

Therefore, although the James Bay Agreement did have definite positive effects for the Crees of Quebec, it is apparent that the negotiating process, the agreement negotiated and its consequent implementation were replete with uncertainties, the latter being at the detriment of the Crees. We shall now see if the New Agreement has attempted to modify these shortcomings.

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water back-up, infecting the fish, and, consequently, the aboriginal peoples' way of life, see K. Fiddler, "The James Bay Hydroelectric Project"(6 June 2001), Pearson College Home Page, online: Pearson College Homepage <http://www.uwc.ca/pearson/ensy/mega/kinwa.htm>.

[217] The names, serial numbers and issues dealt with within these cases are too numerous to enumerate here. For further information concerning the cases, they are detailed in the *Agreement on a New Relationship supra* note 179 at Chapter 9-Legal Proceedings.

[218] *Grand Chief Matthew Coon Come et al.* v. *Hydro-Québec, the Attorney General of Québec and the Attorney General of Canada*, (S.C.M. 500-05-004330-906) and *Grand Chief Matthew Coon Come et al.* v. *The Attorney General of Québec and the Attorney General of Canada et al.*(500-05-027984-960).

[219] *Cree School Board, Grand Council of the Crees (Eeyou Istchee), Cree Regional Authority et al. The Minister of Education of Quebec et al.*, v . *S.C.M.* (500-09-006312-987).

[220] Grand Chief Matthew Coon-Come, Grand Council of the Crees, Speeches, Briefs, Submissions presented on Behalf of the Crees (of Quebec) From April 19, 1988 – November 1990, Grand Council of the Cress (of Quebec) and Cree Regional Authority, Speech No. MCCS4B, at 1.

2.4.1.3. Agreement Concerning a New Relationship

Although the relationship between the Crees of Quebec and the two orders of government were somewhat marred by the refusal of the federal government to recognize or comply with some of their obligations as well as a multitude of other problems stemming from the James Bay Agreement, the flailing relationship between Quebec and the Crees of Quebec was attended to through the aforementioned "Agreement Concerning a New Relationship Between Le Gouvernement du Québec et The Crees of Québec". This agreement was hailed by Matthew Coon-Come as "the cutting edge of development in the relations between Aboriginal peoples and the provinces"[221]. And herein this statement lays the challenging assertion as regards the right of the Cree peoples to self-government: although the new agreement is forward-thinking in many of its provisions, it is an agreement that has only been concluded between the aboriginal group and the province of Quebec. The federal government is *rarely* mentioned within the agreement's provisions, although it, in fact, detains the power to deal with native peoples and their affairs under section 91(24) of the *Constitution Act of 1867*. Although the courts, the federal policy guides and the many federally-commissioned reports have extolled the virtues of tri-partite negotiations, not only for self-government but for a host of other concerns and issues, there is a conspicuous lack of these in this case. It appears that the province of Quebec seems to be proceeding unaccompanied. Alleged hidden political agendas aside, these unilateral undertakings could become quite detrimental to claims to self-government of aboriginal groups. In any case, the fiscal benefits of the Agreement for the Cree are understandable:

> The traplines [the would be affected by the deviation of the Rupert River] will continue to be productive; but we can't support that many people on the land no matter what happens. Tourism, crafts, jobs in the band office-that won't do it. We need another much bigger and more reliable source of income, and that can only come from a diverse economic strategy including resource development [as concluded in the New Agreement].[222]

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[221] Eeyou Eenou, The Nation: The Voice of the People, February 2002, Editorial by B. Namagoose, Editor, at 3.
[222] *Ibid.* Interview with Ted Moses, at 8.

Of course the benefits from the New Agreement are apparent, as the power of the aboriginals would certainly be accrued by a renewed financial clout, however, it would have perhaps been more prudent to conclude this new agreement along with its inclusion of aboriginal self-government within a constitutional and principled framework to avoid another James Bay I debacle: obligations of both orders of government, in the context of the many responsibilities and roles that they have been assigned in the past as regards aboriginal rights, *must* be clarified.

The New Agreement does cover an extensive area of jurisdiction: provisions have been made for forestry, hydroelectricity, mining, economic and community development, financing, the Cree Development Corporation, the settling of legal proceedings and the settlement of disputes.[223] Furthermore, the preambular paragraphs lead off the Chapters by asserting that "the parties [the provincial government and the Cree] hereby enter into a nation-to-nation Agreement [...] in favour of greater autonomy and greater responsibility on the part of the Crees for their development"[224], the terms used could afford the Crees the impression that, because they are designated as 'nations', that it is the right to inherent self-government that they are achieving. However, the Agreement concludes that this "[a]greement does not contemplate and does not affect the obligations of Canada towards the Crees stipulated, among others, in the James Bay and Northern Québec Agreement"[225]. Please note that the same exact provision reappears at section 2.10 of Chapter 2. The language is quite telling; although the agreement states that the agreement signed is between "nations", a position reminiscent of Judge Marshall's take on the status of the aboriginals[226], it is clear that Canada's obligations in this relationship are undetermined besides those that exist for other established aboriginal rights (e.g. fiduciary obligations). However, because of the federal structure of the government, the concluded "agreements" should include the participation of the federal government as well. If self-government were really being discussed, as it has been exclaimed, would it not be logical that the federal

[223] *Agreement on New Relationship*, *supra* note 179 at Chapters 3 –12.
[224] *Ibid.* at preambular paragraphs 1 & 2.
[225] *Ibid.* at preambular paragraph 5.
[226] See the Marshall trilogy of cases, *supra* note 52.

government be also wholeheartedly involved, as was determined in the *Federal Policy Guide*? But the purpose of the New Agreement is not to include the federal government as it speaks mainly about natural resources. In this situation, the power over natural resources falls under the jurisdiction of the provinces according to 92(5)[227], thus justifying, to a certain degree, the exclusion of the federal government. On the other hand, when a specific agreement is being heralded and presented as one that is 'nation-to-nation' and talks of self-government ensue, the federal government would and should have a distinct role to play within the negotiations of such agreements, as is their power under 91(24) of the *Constitution Act, 1867*. Several questions, because of this situation, remain unanswered: who are the nations involved in the signing of this new agreement that included specific provisions as to self-government? Only Quebec and the Crees? Should they not include the federal government as well? As well, is it not significant that the federal government, over the course of the implementation of the James Bay Agreement Phase 1, was repeatedly blamed for non-respect of its contracted obligations (i.e. health and sanitation funding)?[228] If this was the case, why not discuss its further responsibilities within the New Agreement? Although the economic benefits of the agreement are indisputable, it is less clear as to whether the Crees' right to self-government is protected by this agreement.

Although the conclusion of the Agreement is hailed as having achieved an "niveau inégalé au chapitre de l'autonomie gouvernmentale reclamée par les bandes autochtones"[229], this viewpoint seems to be based on the fact that the Crees hold he

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[227] *Constitution Act, 1867*, *supra* note 75 at s. 92(5).

[228] In a more recent case, the Supreme Court of Canada in *Procureur Général du Canada et al.* c. *La Commission scolaire crie et al.* (Québec) (2892), online: Supreme Court of Canada- Judgements in leave of applications, Ottawa, 24/10/02 <http:www.scc-csc.gc.ca> rejected an appeal from the government of Canada of a decision rendered in the Quebec Court of Appeals in *Procureur général du Canada* c. *Commission scolaire crie*, No. 5000-09-006312-987, 5 septembre, 2001, online: Décisions des Tribunaux du Québec <http:www.jugements.qu.ca/ca/200109fr.html> which had decided that aboriginal groups had the right to treat as equals with the two orders of government as regards the financing of aboriginal education services. As late as 2001, the federal government was still attempting to escape its obligations regarding negotiated provisions, a situation that could still occur in the future in the absence of specifically delimited principles. See also, G. Norman, "Les Cris gagnent en Cour Suprême" *La Presse* (26 Octobre 2002).

[229] J.J. Samson, Éditorial, "Un traité innovateur", *Le Soleil* (24 October 2001) A16.

majority of the seats on the various councils administering the exploitation of the natural resources of the territories[230]. Would this not be that self-government is being buried, in this context, under the intricacies of the economic development? Again, it would be of no use to contradict the beneficial effects of financial power for aboriginal groups, however, this does seems at odds with the structure of self-government that had been elaborated for the last thirty years in various spheres. Expressions that are used within the new agreement such as; "continue the [...] self-fulfilment of the Cree Nation" [231](instead of self-government), and, about the new 'nation to nation' relationship as it promotes "a greater responsibility on the part of the Cree Nation for its own development within the context of greater autonomy"[232] (instead of full responsibility through the inherent right to self-government), do not establish concretely that the right is being implemented correctly. The reasons cannot be attributed to a lack of precedents, the Nisga'a Treaty having been previously concluded as well as the elaboration of guidelines by both the *Report of the Royal Commission on Aboriginal Peoples* and the *Federal Policy Guide.*

Some authors have suggested that there is more to the relationship between the indigenous people in the province of Quebec and its current secessionist government. It remains that the presence of indigenous peoples on the territory of Quebec would prove to be an obstacle in the quest of Quebec peoples to secede from the rest of Canada. In fact, the plight of the aboriginal peoples within the provinces' borders proved to be a considerable point of contention during the Supreme Court's reference regarding the right of Quebec to secede from Canada.[233] If aboriginal groups within Quebec continue to identify themselves as 'peoples', than the status of 'Quebec peoples' as having a right to self-determination as a distinct group could not stand, other groups existing within its borders.[234] According to Joffe, whom refers to the neglect of the use of the term 'peoples' in one of Quebec's latest policies regarding the

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[230] *Ibid.*
[231] *Agreement on a New Relationship, supra* note 179 at Chapter 2-General Provisions, s. 2.1.
[232] *Ibid.* at Chapter 2-General Provisions, s. 2.3.
[233] *Quebec Secession Reference, supra* note 27.
[234] P. Joffe, *supra* note 157 at 196.

aboriginal peoples living in the province of Quebec[235], "the current PQ [Parti Québecois] government apparently believes that if it refers to Aboriginal peoples as 'nations' and not 'peoples', it can continue to deny the first peoples their right of self-determination"[236]. The use of the term 'nations' in the Agreement Concerning a New Relationship has been heralded as a break-through for aboriginal peoples, a proof of their self-governance[237], seemingly affirming the aboriginals' inherent right to self-government as a 'nation' able to determine its own fate. Theoretically, this is advancement for the plight of indigenous peoples. Realistically, and legally, the affirmation of aboriginal peoples as 'nations', as seen within the greater constitutional and governmental context, holds almost no meaning.[238]

Joffe continues, regarding the James Bay and Northern Quebec Agreement, to state that the government of Quebec seems to be proceeding in such a manner in that it could, in the future, unilaterally assume the obligations of the federal government in a situation where the province could be in a situation leading to secession.[239] The Agreement Concerning a New Relationship does seem, in the measure that the mentions of any obligations of Canada are conspicuously excluded, to be quite independent of the federal government, but it is impossible to conclude as to a hidden agenda for Quebec. In the measure that the federal government has fiduciary obligations towards the aboriginal groups duty as well as a host of other obligations under the federal jurisdiction in the division of powers and the established decisions of Canada's judiciary, can it be acceptable that the rights of the Crees (e.g. economic and

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[235] Québec, Aboriginal Affairs, *Partnership, Development, Achievement* (Quebec Government Guidelines) (Québec: Les Publications du Gouvernement du Québec, 1998).
[236] P. Joffe, *supra* note 157 at 196.
[237] Numerous newspaper articles reported on the use of 'nation-to-nation' to denote the new relationship between the Crees and the Quebec government, see J.J. Samson, *supra* note 229, Auteur non connu, 'Les Cris disent oui à la phase deux de la Baie James", *Le Journal de Montréal*, Politique (8 February 2002) 13, M. Cloutier, "La paix des braves" *Le Devoir* (24 Octobre 2001) A-1 et A-2.
[238] Please see J. Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill L.J. 281, where the argument is made that in the situation of the secession of Quebec, the consent of aboriginal peoples would not even be required. This indicates that Quebec's hidden agenda, if it does indeed have one, would not be for the benefit of aboriginal peoples. Quebec's rights to unilateral secession are also affirmed by D. Turp, "Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection" in S.H. Hartt et al., *Tangled Web: Legal Aspects of Deconfederation* (Canada Round, No. 15) (Toronto: C.D. House Institute, 1992) at 99.
[239] P. Joffe, *supra* note 157 at 198.

social rights), including that to self-government, are being determined between the province of Quebec and the Crees without the direct participation of the federal government? Such a precedent seems quite risky as it puts the inherent right to self-government of aboriginal peoples at risk of being unnecessarily limited by the particular interests of a province and without the accompanying protection of the federal government's obligations towards First Nations. Although the new agreement was the result of the wills and determination of the aboriginal groups involved, in light of past negative experiences with both levels of government as regards agreements (e.g. as occurred with the antecedent to the New Agreement; the much debated James Bay Phase 1 Agreement), would it not be more prudent to involve the federal government in such agreements, as well as construct them using established Canada-wide base principles? Such an option seems the best as it would firstly shield the right from a province's special interests and further protect it under the federal government's continuing obligations. Let us not forget, in parting, the twelve court challenges that were almost all "resolved" after the signing of the current billion-dollar agreement. These claims that were the direct result of the non-respect of governmental obligations during the agreement of James Bay Phase 1. Lessons can be learned from past experiences, although, in this case, only the future will reveal if history will repeat itself.

2.4.2. Nisga'a and Self-Government: the Second Modern Treaty

Although quite different from the first discussed treaty, the Nisga'a Agreement[240] was one-of-a-kind in that it was one of the first pact that concluded an accord that considered not only specific land claims, but also sustainable development for the aboriginal group, as well as clear provisions as to the Nisga'a's self-governance.[241] In fact, the Final Agreement provided for quite an extensive system of self-rule that included provisions for a constitution, their legal status as a government,

[240] *Nisga'a Final Agreement*, initialled 4 August 1998 [*Nisga'a Treaty*] which followed the *Nisga'a Treaty Negotiations Agreement-in-Principle*, 15 February 196. Issued jointly by the Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council.

[241] The Sechelt Indian Band of British Columbia has also had, since 1984, a similar type of self-government with a constitution, jurisdiction over their lands and a variety of other powers.

their structure, elections, provisions that had previously rarely been seen together in a negotiated treaty. As it can easily be deduced, because of this extensive allocation of power by both the provincial and federal governments, much debate has ensued from the conclusion of the Nisga'a treaty. In this section, it will be sought to analyse whether this treaty is, indeed, a fulfillment of the government's role in according the right of aboriginal peoples to self-government, as they detain in accordance to section 35(1) of the *Constitution Act, 1982*.

2.4.2.1. The Nisga'a Agreement

The purpose of the Agreement between the Nisga'a and the two other orders of government is clear: it was the only way through which to produce a "just and equitable settlement" that could "result in reconciliation and establish a new relationship among them [the provincial government and the Nisga'a]"[242]. The first time that the Nisga'a entered the fray in the fight for aboriginal rights was in 1973, when they claimed aboriginal title to certain lands in British Columbia. Because the Nisga'a nation had never concluded any treaties with the Canadian Crown, it was not clear at that time whether their claim to land could stand during the course of legal proceedings but, armed with proof of historical occupation of the land, the allegation that their title stemmed from the *Royal Proclamation of 1763*[243], and assertions that their title had never been extinguished, the Nisga'a's claim succeeded.[244] The judges in the case asserted that the Nisga'a "were from time immemorial a distinctive cultural entity"[245], a tremendous affirmation that could be interpreted as saying that the First Nation also detained the right to self-government. Twenty-five years later, a comprehensive recognition of the Nisga'a's right to self-government finally transpired.

The Treaty does give quite a bit to the Nisga'a First Nation. Besides granting approximately 2 000 square kilometres of land located in northwest British Columbia

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[242] *Nisga'a Final Agreement, supra* note 240 at 1.
[243] *Royal Proclamation of 1763.*
[244] R. Mainville, *supra* note 71 at 20.
[245] *Calder, supra* note 54 at 375.

to the group (although this allocation only amounts to approximately 8% of traditional Nisga'a lands), it also covered such diverse issues such as land titles, governance[246], administration of justice, minerals, water, forests, fisheries, wildlife, fiscal relations (e.g. taxation), cultural property and dispute resolution. The debate as to whether the Nisga'a obtained enough through this treaty has raged amongst various groups (e.g. the provincial government, the non-aboriginal occupants of British Columbia and some, but few, aboriginal objectors) since it's signing in 1998.

For some authors, it is of primary importance to judge the scope the treaty allows to the Nisga'a group to follow an economic, social and political path to progress that does not necessary mirror the Canadian model.[247] In looking at this scope, it could be deduced that the Nisga'a could incur serious losses at the hand of the treaty's provisions.[248] Among some of the main issues identified by one author would be: that some of the land that the Nisga'a detain in fee simple interest could be alienated in the future and thus become unavailable for their use, that the structure of government that has been concluded departs markedly from the tradition Nisga'a's structure of government (e.g. the traditional "house (wilps)" system of government, that some of the Nisga'a's law-making capacities will be subject to federal and provincial laws, that the Nisga'a courts and their decisions could be submitted to judicial review and appeals by the Supreme Court of British Columbia, and, finally, that disagreements which concern the Final Agreement will be reviewed by the Canadian Courts.[249] Thus, for Borrows, it is somewhat evident that the Nisga'a have sustained substantial losses in comparison with, perhaps, what they *could have obtained* in the future or *would have had* if their right to self-government had not, according to the author, been slighted by negotiations. Contrarily, Jenkins questions as to whether the powers given to the Nisga'a were in fact, perhaps *too* extensive in the context of Canadian federalism. He speaks of the provisions of the treaty as affirmations of "broad powers

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[246] *Nisga'a Final Agreement*, supra note 240, at Governance.
[247] J. Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 Mc Gill L.J. 615, at 635.
[248] For a discussion and list of these losses, see J. Borrows, *Ibid.* at 635.
[249] Respectively, the provisions concerned with the perceived "losses" will be: lands: 32, c. 3, s. 4 (a); governance: 159-60, c. 11, ss. 2-8; law-making authority: 66-68 (forestry equivalency provisions); Nisga'a court decisions: 162-63; Paramountcy of Canadian courts: 239. See. J. Burrows, *Ibid.* at 635.

of self-government [...] to the extent of granting primacy to Nisga'a legislation over that of the federal Parliament, in some instances"[250]. As cautious as Jenkins seems to be, faced with this "usurpation" of powers by the Nisga'a, he seems to imply that the notions of self-government that have been concluded within the provision of the modern treaty, and their subsequent interpretation, could be considered "radical"[251].

Although it is not within the breadth of this paper to determine the ultimate truth hidden in both of the aforementioned views, suffice it to say that the resulting pact received broad support of the people that it directly concerned: the Nisga'a. In a way, it is perhaps then futile to argue that they will experience substantial losses to their rights in the future, as, to a certain extent, they have agreed to these losses of their own volition. On the other hand, to state, as Jenkins has, that the orders of government in Canada are 'threatened' by this "new" take on self-government, and that the federal powers are weakened by the treaty, is quite unconvincing. The aboriginal groups can only attempt to equal the power of the two orders of government in negotiations and bargaining positions, and it is unlikely that they will do so. As such, it is difficult to envisage that the two established orders of government in Canada would engage their obligations in Agreements with aboriginal groups that would bind them to the extent that it would detrimentally alter Canada's system of government. The question that should instead be of concern in the context of the Nisga'a treaty is: Does this treaty sufficiently protect the Nisga'a's inherent right to self-government from undue adversity? To answer this question, we must analyse the recent events that have occurred in British Columbia that have affected the relationship between the Nisga'a and the provincial government and, ultimately, the right to self-government of the aboriginal people in general.

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[250] C.D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) 35 U.B.C.L. Rev. 1, at 3.
[251] *Ibid.* at 3.

2.4.2.2. Et tu Brute? British Columbia's Liberal Government

The extent of the right to self-government that was recognized for the Nisga'a nation living within the boundaries of British Columbia was quite broad indeed, as an inherent right can certainly be envisaged as being. Because of the fact that the right would share in the constitutional distribution of powers with the provincial and federal orders of government, a development that had never been seen before in the context of aboriginal rights, the scope of the treaty was source of a much-heated debate. On the provincial government front, the debate regarding the division of powers was led by members of the Liberal official opposition to the NDP government, the government that had firstly concluded the treaty with the Nisga'a. The decision was also subject to a negative media blitz. In this regards, it seems that "the notion of an Aboriginal group asserting rights over land and potentially acting in a manner contrary to the interests of non-aboriginal peoples residing on those lands caused many to object to such a thing being *allowed* to happen"[252].

Also source of debate was that Canadian citizens were not afforded any decision-making power, by referendum, during the conclusion of the treaty between the governments and the aboriginal groups. This condemned the process as being

> profoundly undemocratic, or an abuse of the Canadian Constitution [...] This opposition continuing] despite the manifestly obvious fact that s. 35(3) of the *Constitution Act, 1982* specifically provides that post-1982 land claim agreement, such as the Nisga'a agreement, are constitutionally protected as treaties and that the rights contained within them are guaranteed as treaty rights without the need for constitutional amendment[253]

More obviously, if land claims agreements are constitutionally entrenched, according to section 35(3), the public would simply not need to give their approval by referendum.[254] The same can be said for the inherent right to self-government that has been recognized by section 35(1) of the *Constitution Act, 1982*, further protecting the concluded treaty with the Nisga'a.

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[252] L.I. Rotman, "Perspective on Marshall: 'My Hovercraft is Full of Eels': Smoking out the Message in R. v. Marshall" (2000) 63 Sask. L. Rev. 617, at 627.
[253] *Ibid.* at 627-628.
[254] *Ibid.* at note 44.

The biggest threat to the agreement with the Nisga'a Nation, however, came in the form of an official claim brought forth by three members of the Liberal party, the official opposition in the legislative assembly of British Columbia at that time. One of these members, Gordon Campbell has recently become Premier of British Columbia, the Liberal Party having swept the NPD out of power. In any case, these three members challenged the constitutionality of the treaty. In *Campbell* v. *British Columbia (A.G.)*[255] , the assertion brought forth was that the negotiated treaty violated Canada's constitution because it interfered with the distribution of powers according to sections 91 and 92 of the *Constitution Act, 1867*, with the rights of non-aboriginals whom resided on Nisga'a lands under the Charter of Rights and Freedoms, and with the concept of royal assent.[256] The defendants denied the allegations and stated that the treaty provisions were protected by section 35 of the *Constitution Act, 1982*.[257] The judge found that royal assent was not necessary in this case as well as finding that the interests of non-aboriginals were not limited. Concerning the issue of the distribution of powers, as an issue that is primary to the discussion of an aboriginal right to self-government, the judge also found in favour of the defendants.

Regarding the exhaustiveness of the legislative authority distributed to the orders of government, the judge did not concur and demonstrated that the preamble to the *Constitution Act, 1867* also incorporated unwritten rules of law and that "sections 91 and 92 interfered with neither the royal prerogative to negotiate Indian treaties, nor the common law of aboriginal rights"[258]. As well,

> Aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division 'internal' to the Crown.[259]

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[255] *Campbell* v. *British Columbia (A.G.)*, *supra* note 110.
[256] *Ibid.* at para. 12.
[257] *Ibid.* at para. 13.
[258] C.D. Jenkins, *supra* note 250 at 36.
[259] *Campbell*, *supra* note 110 at para.81.

Having thus concluded that self-government was not excluded from existing within the *Constitution Act, 1867*, Williamson J. also affirmed that such as right continued to exist. The judge also used the American cases[260] judged by John Marshall to conclude that

> (1) the indigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but did nit extinguish aboriginal powers and rights; (3) among the powers retained by aboriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with aboriginal peoples was to be "minimal".[261]

Due to these conclusions, which some has deemed questionable[262], the judge in Campbell concluded that the inherent right of self-government was found to exist within the parameters of section 35 of the Canadian Constitution. For the rest of his judgement, Williamson J. concentrated on the task of showing that section 35 did indeed include the right to self-government, s fact that was hotly contested by the plaintiffs in the case. Ultimately, Williamson rejected the fact that sections 91 and 92 had exhaustively distributed powers to the orders of government, claiming instead that there remained some constitutional space for the limited form of self-government that was affirmed within the Nisga'a Treaty.[263]

The decision rendered in the *Campbell* case is quite substantial as it accomplishes something that had never been envisaged in the preceding decisions of *Pamajewon* and *Delgamuukw*: it succeeded in affirming the inherent right to self-government as existing within section 35 of the *Constitution Act, 1982*. The decision also confirmed, to a certain extent, that the powers of the federal and the provincial governments that are delimited under section 91 and 92 of the *Constitution Act, 1867*, are not exhaustively distributed in that they could be enlarged to accommodate a distribution of legislative powers to an aboriginal government. Although this has been said to "institutionalize Aboriginal Self-government at the expense of provincial and

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[260] For the three cases which comprise the *Marshall Trilogy* see *supra* note 52.
[261] *Campbell*, *supra* note 110 at para. 91.
[262] See J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389, at 404 which refers to Williamson's analysis of the division of powers in Canada according to the principles elaborated by Marshall in *Campbell* as "questionable aspects of this reasoning". As well, C.D. Jenkins, *supra* note 250 at 38, describes the conclusions of Williamson as "far-reaching conclusions".
[263] *Campbell*, *supra* note 110 at 181.

especially federal legislative power"[264] it is clear that the decision in *Campbell* affords a meaningful share of power to the aboriginal peoples of British Columbia and in other parts of Canada, a share of power that finally allows them to participate significantly in Canada's constitutional landscape. Although it is not certain and in fact highly improbable that this decision will not be altered at the appeals level, it is clear that the judiciary in this particular case, as opposed to the decisions rendered in prior cases, is broadening its view on the role that it should play in including the right to aboriginal self-government within Canadian society. What is made even clearer in this case is that the right to self-government of aboriginal peoples is still threatened by constitutional challenges despite being widely accepted by legislators and jurists alike as being recognized within the Constitution. The following section, treating of the referendum led by British Columbia's government concerning treaty negotiations between the orders of government and aboriginal peoples, will demonstrate another threat.

2.4.2.3. Does Meaningful Protection of the Right to Self-government really exist? One Government Change, One Keen Premier and One Referendum Later

J.L. Garcia-Aguilar had said, in an article published in 1999, that the "treaty signed with the Nisga'a exemplifies the political and constitutional struggles that the search for indigenous autonomy can result in for a country"[265]. He also added that the manner by which the Nisga'a people were afforded "autonomy, land, and cultural rights shows that, even with the inevitable tensions, it is possible to have coherence between democratic aspirations of marginalized peoples and the constitutional interpretations about the unity of the nation-state and its sovereignty"[266]. In light of recent events that have occurred in British Columbia, it begs the question as to whether Garcia-Aguilar would hold the same opinion as to the "coherence" that he spoke about so admiringly.

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[264] C.D. Jenkins, *supra* note 250 at 41.
[265] J. L. Garcia-Aguilar, "The Autonomy and Democracy of Indigenous Peoples in Canada and Mexico" (1999) 565 Annals 79, at 86.
[266] *Ibid.* at 87.

Evidenced by the direct court challenge to the Nisga'a Treaty of the *Campbell* case, the conclusion of the agreement was still not accepted by members of the government and a certain segment of the British Columbia public. In the beginning, when the Liberal Party was not in power, the government at the time was being pressured to hold a referendum that would either allow or disallow the 'amendment' that had been made to the Constitution of Canada, the 'amendment' in question being that the powers of self-government that had been given to the Nisga'a nation were too broad[267], as well as allegedly impeding on the other orders of government. Jurists, especially constitutionalists, generally deemed this referendum as ridiculous as no amendment to the Constitution of Canada had actually taken place, the right to self-government already having been affirmed as existing within section 35(1).[268] As the Liberal Party came to power within the province, talks of a referendum as to future negotiations with indigenous groups within the province surfaced. As the idea gained more support within the Liberal party, the planned referendum began to take shape, although still subjected to considerable controversy.

The referendum consisted of eight affirmations that would invite the public to answer either a "yes" vote or a "no" vote. The eight statements: (1) Private Property should not be expropriated for treaty settlements, (2) The terms and conditions of leases and licenses should be respected; fair compensation for unavoidable disruption of commercial interest should be ensured, (3) Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians, (4) Parks and protected areas should be maintained for the use and benefit of all British Columbians, (5) Province wide standards of resource management and environmental protection should continue to apply, (6) Aboriginal self-government should have the characteristics of local-government, with powers delegated from Canada and British Columbia, (7) Treaties should include mechanisms for harmonizing land-use planning between aboriginal government and neighbouring local governments, and (8) The

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[267] J. Bakan, D. Cohen & M. Young, "Nisga'a Referendum Not Needed (three legal opinions on the Nisga'a Treaty" (16 December 1998), online: Canadian Centre for Policy Alternatives <http://www.policyalternatives.ca>.
[268] J. Bakan, D. Cohen & M. Young, *ibid.*

existing tax exemptions for aboriginal peoples should be phased out.[269] The central idea behind the exercise was to create a determined set of principles that would guide the provincial government's position during negotiations. These principles would be determined by the non-aboriginal citizens of British Columbia: in answering "yes" to a proposition, that statement in question would be adopted by the provincial government during treaty negotiations. A "no" vote to the statements would indicate that the government would not be bound to adopt the principle during the negotiation process with aboriginal groups. In short, this would mean that the majority was, in fact, determining the minority's fate, an incredible development both legally *and* morally.

This referendum did not take the British Columbians to the polls, preferring a "mail-in" ballot to be filled in by non-aboriginals of the province, a form of vote that had never been previously used in Canada. In all, "about 760,000 ballots –one-third- were returned by the May 15 deadline, [a]boriginal groups [saying that] another 30,000 spoiled ballots were sent to them"[270]. As well, all eight questions received a "yes" vote of more than 80 per cent.[271] After the vote, Premier Campbell asserted that "[a]fter many years of being shut out of the treaty process, the peoples of our province have sent a resounding message to the First Nations and to Canadians alike that we are committed to pursuing the negotiations of treaties that are affordable, that are workable, that create certainty, finality and equality"[272]. The referendum incited widespread disapproval that took the form of court challenges and public protests by labour groups, aboriginal groups and civil libertarians whom questioned the legality of the referendum, as well as decrying the fact that the referendum was a clear example of the views of the dominant majority as being imposed on a majority.

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[269] T. Fiss, "Analysis of the British Columbia Treaty Referendum Questions", Center for Aboriginal Policy Change, Canadian Taxpayers Federation, online: <http://www.taxpayer.com> (date accessed: August 4 2002).

[270] D. Meissner, The Canadian Press, online: <http://www.vcn.bc.ca/~dastow/20703cpl.txt> (date accessed: August 4 2002).

[271] J. Bowman, B.C. Treaty Referendum, "Update", CBC News Online, online: <http://cbc.ca/news/features/treatyreferendum1.html> (date accessed: August 5 2002).

[272] Premier of British Columbia, Gordon Campbell, as quoted in D. Meissner, *supra* note 270.

Many jurists quickly condemned the referendum process as unnecessary and meaningless such as Frank Cassidy, a professor at the University of Victoria specializing in aboriginal self-government and treaties, who noted that "the B.C. court's decision [in *Campbell*] in favour of the Nisga'a self-government provisions is the law [and added:]'and it says there is an inherent right to self-government'"[273], meaning that non-Aboriginal citizens could not unilaterally elaborate the principles that would dictate future negotiations between aboriginal groups and the governments. He was furthermore cited as saying that he did not believe that the B.C. government had any legal basis on which to support the referendum as the position had already been taken to court in the *Campbell* case and decided in favour of the constitutionality of the aboriginal treaty.[274] Furthermore, the response of Ottawa came in the form of Federal Indian Affairs Minister Robert Nault's declaration that at least one of the affirmations of the referendum that regarded the creation of a municipal-type government for aboriginal peoples was not an option as it has been proven to be ineffective in the past.[275] As well, he added that the Supreme Court had already ruled the aboriginals' right to self-government as inherent, making it therefore impossible to be delegated by the federal government or the provinces.[276] The B.C. government has now accepted the principles of the referendum as principles that would guide the negotiation process between the government and the aboriginal groups. Nevertheless, the Nisga'a Treaty has not been detrimentally affected. The rights of future aboriginal groups negotiating for their right to self-government, however, could be. Interestingly enough, it would seem that one of the goals of Premier Campbell would be to elaborate a set of principles that could help the negotiation process respond to the needs of all parties involved, a goal that is parallel to the thesis of this paper. Yet, it is a perfect example of the process that *should not* be used in the determination of the principles that would help negotiate aboriginal self-government agreements; a procedure that

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[273] F. Cassidy, as quoted in G. Joyce, "B.C. treaty referendum question on native self-government starts fiery debate", Yahoo News, Thursday July 4 2002, online: <http://ca.news.yahoo.com/020704/6/nglo.html> (date accessed: August 5 2002).
[274] F. Cassidy, as quoted in G. Joyce, *ibid.*
[275] CBC NEWS, CBC British Columbia, July 5th 2002, British Columbia Online News, online: <http://vancouver.cbc.ca/templates/servlet/View?filename=bc_treaty020705> (date accessed: July 20 2002).
[276] *Ibid.*

does not take into account the diverse views, interests and needs of *all* parties party to the negotiation process yet takes the opinion of few citizens to determine broad principles that should help determine the inherent rights of aboriginal peoples. Such a referendum is quite dangerous and seemingly illegal as it supersedes previous acts of the provincial and federal governments as well as also showing a complete disregard for the interests and rights of First Nations living within the boundaries of British Columbia.

Yet, what does this have to do with the analysis of this thesis and the right of aboriginal self-government? Very much indeed as the constitutional challenge that was first brought about by members of the province of British Columbia's government in the *Campbell* case, and the subsequent referendum by non-aboriginals concerning principles that are now helping steer the negotiating process, are actions that aim to detrimentally affect the inherent right of aboriginal peoples that have been affirmed to exist within section 35 of the *Constitution Act, 1982*. Although the negotiations that brought about the Nisga'a Treaty followed the loose guidelines elaborated by the courts the advice of the *Report of the Royal Commission on Aboriginal Peoples*, as well as the loose guidelines elaborated by the *Federal Policy Guide*, it is clear that base principles regarding the constitutionality of aboriginal self-government, the courts' role in the interpretation of self-government and a host of other factors need to be clearly delimited and established in order for the rights of aboriginal peoples to self-government can effectively be implemented. The claim brought forth by *Campbell* has still to be decided on appeal, and will, it is certain, be decided by the Supreme Court of Canada. The fate of the right to self-government is not yet assured.

2.4.2.4. Modern Treaties: Conclusion

Treaties and agreements between governments and aboriginal groups are being negotiated as these very words are being typed. In fact, two very important agreements, the Nisga'a Treaty and the Agreement Concerning a New Relationship between the Crees of Quebec and the Government of Quebec have been concluded in the last five

years. Yet, their implementation and recognition by the public and the orders of government have not always been uncomplicated processes, nor have they been free from adverse interference. As was demonstrated by the Agreement with the Crees of Quebec, the non-participation of the federal government in the negotiating process and the conclusion of these treaties may leave them vulnerable to violations of federal obligations, as was the case during the implementation of the James Bay Phase I Agreement. During the course of the first agreement, although granted it was not concluded in the same political climate and without the same protection to aboriginal peoples' rights in general, the obligations of the federal government were often not executed, leaving the aboriginal groups to litigate *ad infinitum* for their rights. Furthermore, the particular political agendas of certain provinces, as for example; interests in certain natural resources or self-determination issues, may affect and hinder the proper implementation of a right to self-government, the province in question preferring to conclude agreements that suit more their needs than the needs of the aboriginal group with whom they are negotiating. The Nisga'a Treaty, on the other hand, is an example of tri-partite negotiations between the province, the federal government and the aboriginal group. Although hailed as a great success by some, the marked opposition to the treaty by prominent political figures in the province, as well as the subsequent forceful constitutional challenge that was brought to court against the province for having concluded the Nisga'a Treaty which allegedly created a "third order of government", begs the answer to the question as to whether sufficient mechanisms are in place that effectively protect the right to self-government from adverse claims of this nature in the future. Perhaps even more logically, it would not be more beneficial to all parties involved to conclude a principled-framework that would address issues of contention once for all? Such a framework would certainly be effective.

2.5. Conclusion

What is the result of this analysis? It is clear now that the aboriginal right to self-government, and all rights that stem from this principal and primary right, is not

protected in the political, social and legal climate of contemporary Canadian society. Although many attempts have been made by the governments, commissions and the courts to delimit, protect, define and implement the right to aboriginal self-government, no adequate attention has been paid to the need for a clear principled framework addressing the main issues surrounding the right. It cannot be said that the Canadian government, either the provinces or the federal government, is not actively attempting to negotiate self-government agreements as accords are being concluded regularly. What can be affirmed, however, is this: these agreements still remain at the mercy of constitutional challenges in the courts, challenges as to the existence of the right to self-government within the *Constitution Act, 1982*, as to the division of powers in the *Constitution Act, 1867*, the role of the court in interpreting such a right, the obligations of the federal and provincial governments towards the aboriginal nations upon conclusion and implementation of the treaty, the fact as to whether the provinces can proceed alone to negotiate self-government type agreements and a host of other factors which affect the negotiation, the ratification and the implementation of self-government agreements across the country. The aboriginal right to self-government is now left at the mercy of the courts by the decision rendered in the *Campbell* case, a decision which will certainly be heard on appeal and, eventually, by the Supreme Court of Canada. And what will be the end result of the court's decision? Faced with uncertainty as to its breadth and scope, even a *basic* definition or elaboration of principles as regards the right to self-governance of aboriginal in Canada, the Court may choose to completely close the door on the right. It would be worth to repeat the words of Wilkins whom warns that if the Supreme Court was forced "to decide the issues [surrounding self-government] without being shown a cogent way of addressing the risks that self-government rights, at their worst, could pose to Aboriginal peoples and the rest of society, [it will] [...] close the door on such rights", not wanting "to expose the rest of the legal order to risks that it does not believe it can contain"[277]. As much as the Court solicits principles and guidelines by which to determine self-government, it may be forced, in the near future, to decide such a right at a considerable risk to its breadth and scope. This is clearly not acceptable, as much for

[277] K. Wilkins, *supra* note 139 at 272.

aboriginal rights alone as the fact that the government is breaching the fiduciary obligations that it has towards indigenous groups in Canada. It would seem that the federal government must act now and propose, with equal consultation with the provinces and representatives of aboriginal groups, a principled framework that will effectively structure the right to self-government within Canada.

In the next chapter, the negotiating process, the role of the courts and the fundamental roles played by both processes in the determination of aboriginal rights will be analysed. As well, we will explore a specific option, found in the international sphere, which could serve as an adequate model for a principled framework regarding the aboriginals' inherent right to self-government.

3. TOWARDS A PRINCIPLED FRAMEWORK EFFECTIVELY IMPLEMENTING SELF-GOVERNMENT FOR INDIGINEOUS PEOPLES IN CANADA: THE COURTS, THE NEGOTIATION PROCESS AND THE COUNCIL OF EUROPE'S *EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT*

3.1. Introduction

Although agreements between aboriginal groups and the two orders of government in Canada have been concluded more frequently in the last years, there remains a marked lack of established basic principles and norms which would underlie the right in Canada and assure its effective construction within the Canadian legal sphere. As it has been shown in the first chapter, the right to self-government, as stemming from the broader right to self-determination in the international sphere and as framed within the broader legislative and judicial context of Canadian society, shows that it is a right that is of such fundamental importance that it is necessary to effectively protect it.

The right of self-determination has been given a new vision by many jurists[278], a new definition that demonstrates that it cannot be continuously tied to traditional notions of secession, sovereignty and territorial integrity, the stability and constitutions of these very notions having been drastically altered in various ways to fit within a modern global climate. No longer is it realistic to hold the conservative view that states can remain unified and unchanged as the years pass, as show the examples of the dissolution of the USSR, the reunification of Germany and, more recently, the dissolution of the ex-Yugoslavia. Some jurists even propose that peoples' loyalties can range from the nation, the tribe and the ethnic group to civil society, the transnational corporation, the global religion and a Socialist International[279] as well as a host of other loyalties. Canada simply cannot continue to hide behind its vision of an

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[278] See, generally, S.J. Anaya, *supra* note 23, and the arguments of W. Kymlicka in R. Spaulding, "Peoples as National Minorities : A Review of Will Kymlicka's Argument for Aboriginal Rights From a Self-Determination Perspective" (1997) 47 Univ. of Toronto L.J. 35.

[279] T. M. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", at 6, in R.J. Beck, T. Ambrosio, eds., *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups* (New York: Chatham House Publishers, 2001).

immovable federalist state holding resolutely to its beginnings in the *Constitution Act, 1867*. The state simply cannot, and must not, keep the thousands of aboriginal groups living within its borders, peoples with rights and expectations, from a stable and effective manner by which they can govern their affairs. Because of these reasons, there exists both a legal and a moral reason establishing the need for action on behalf of the governments.

The government has, in the past, realized that action was necessary as regarded the rights of indigenous peoples living within its state borders. In commissioning many studies, generating many attempts to include the protection of the totality of First Nation's rights within the *Constitution Act, 1982*, such as the Charlottetown Accord, as well as emitting a policy guide to direct negotiations of the right in question, the government has shown its interest in finding an effective and workable system within which to affirm the aboriginals' right to self-government. However, it has been shown that none of these options were effective as a basis to the right to self-government, as they did not provide sufficient protection of the right. As demonstrated in the previous chapter, however, although the negotiations have often resulted in concrete agreements and modern treaties, critics have always put the resulting accords to the test as to whether the process by which they were concluded was appropriate (negotiation), the process by which they were to be protected in the event that their terms were challenged (litigation) as well as a host of other criticisms. The will needed to effect change is present, but the means by which to achieve an effective application of aboriginal self-governance is not.

Our present analysis, although firstly treating of the appropriateness of the negotiation process and, secondly, of the extent of the role of the courts in deciding the many cases which could result from the non-respect of obligations which stem from concluded agreements, will also incorporate an analysis of the Council of Europe's shift, in the 80s, towards a more local and regional form of government. The importance of this rather 'modern' development is that the Council of Europe has had, in the acceptance of the idea of local self-government, to elaborate many basic

principles of which this new autonomous order would be comprised. The fact remains that this agglomeration of states, 44 at last count and including many powerful countries (e.g. France, Germany and the United Kingdom), have recognized the principle of effective democracy, not only for its citizens on a continental or a national level, but on a local and regional level. Guided by specific legal instruments, the Council of Europe has even endeavoured to achieve a transnational, cross-border union of regions and localities.

In using the Council of Europe's achievements in the area of local and regional autonomy, it is hoped to demonstrate that through the use of distinct guidelines and a principled framework, as the Council has employed, it is possible to achieve stable and effective forms of sub-national self-governments. If this model could be effectively adapted to the particular question of aboriginal self-government in Canada and successfully implemented, it would reduce the many criticisms directed at the negotiation process and the role of the courts as regards the right to self-government, as well as enhancing the protection of the aboriginal groups' fundamental rights. Seeing as specific guidelines by which to frame the right to autonomy would be formulated, the problems that arise from the act of surrendering this right to the discretion of the negotiators and the courts will certainly become less frequent and eventually cease.[280] Without a principled approach to implement the inherent right of aboriginals to self-government, the problems that have arisen in the past will not disappear, resurfacing time and time again in political discourse and judicial intervention. Firstly, we will give a brief overview of the nature of a principled framework Secondly and thirdly, both the role of the courts and the effectiveness of negotiations as regards the right to self-government will be evaluated in order to ascertain their effectiveness. Lastly, we will assess the Council of Europe's work on the question of local and regional self-government and the framework by which it is seeking to assure a full implementation and working of self-government.

[280] Please see section 3.1.4. in this chapter for a brief critique of the negotiation process.

3.1.1. What is a "Principled Framework"?

Before embarking into the principal analysis of Chapter III, it is most important to determine, generally, what has been expounded as a 'principled framework' by which to implement and protect the inherent right to aboriginal self-government. A principled framework elaborating the guidelines on which must be built the negotiations for self-government, it must first be mentioned, would not be the panacea to any difficulties being experienced by the parties to negotiations in their processes of establishing self-government agreements in Canada. Nor would it merely be a political draft serving more public relations than a concrete reform. A principled framework *would*, however, "offer good guidelines to those constructing good democratic governments" within states, as well as "form[ing] a basis for fruitful dialogue around future reforms"[281], especially if the obligations of all parties were clearly delimited. Professor Ståhlberg, in his presentation for the Council of Europe on the development of an eventual *Declaration on regional self-government*, explained that although all of the regions within all of the states were, in fact, very different, the needs of the people within the different regions were basically the same: education, health care, social security, good infrastructure and development[282], although there still remained room for the inclusion of alternative needs. Similar arguments can be made for the development of aboriginal self-government in Canada. As regards aboriginal people in Canada, however, many more issues need to be resolved before self-government agreements can be proven to be effective in their implementation and their protection. One way by which to 'resolve' these issues would be to affirm them in the form of general principles. As we have shown in the previous chapters, the right to self-government, as its foundations in international and domestic law were exposed in Chapter I, is a fundamental human right that also resides within the general development of an extensive history of general aboriginal rights in Canada. In Chapter II, however, we have seen that although the right to self-government has gained considerable ground in the last decades, much remains to be attained, especially as

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[281] K. Ståhlberg, *Presentation on European principles and models*, Conference of European ministers responsible for local and regional government, 13th Session, Helsinki, 27-28 June 2002, at 8.
[282] *Ibid.* at 9.

regards the negotiation, conclusion, implementation and protection of modern treaties, as an analysis of the modern treaties' inherent problems has shown.

It has been revealed as well, in Chapter I, that the rights of aboriginals can stem from various sources, sources that are embroiled in a considerable and complex legal past. The notions of Aboriginal title, the many rights consecrated in treaties, the federal common law and the division of powers, the fiduciary obligations of the federal government towards the aboriginals and the principles that govern the infringement of all these rights are all indivisible notions that are somehow each intrinsically linked to the right to self-government. The *Federal Policy Guide* has, to a certain extent, mentioned each of these sources and their effect on negotiation processes, however, most of the statements of the guide are quite general in nature[283] and, most importantly, hold no force in law. Although well meaning in its direction, the guide falls short of the protection and guidance that would be afforded to the right to self-government of aboriginals if it was either constitutionally or, although to a lesser extent, legislatively protected within a principled framework. It is clear that the different aboriginal groups living across the nation are too different for an application of a common model of aboriginal self-government. The difference between the small groupings of Mikmaq in several provinces and the cohesion of the Nisga'a population confirm that different forms of self-governments would need to apply and it is probable that one form of self-government alone would only create more dissent amongst the parties involved. It is not this presumption that is in dispute. What is, on the other hand, being questioned is the fact that all of the aforementioned notions that would affect the right to self-government such as, for example, fiduciary obligations, are obligations that Canada has towards all aboriginal groups, irrespective of their many differences and locations.

Yet, as self-government agreements are being concluded, it is not yet clear as to how these obligations will fit into the grander picture: Will the obligations be phased

[283] The fiduciary obligations of the federal government are only one example of the generality of the government's policies through the use of its language; "Aboriginal self-government may change the nature of this [fiduciary] relationship" and the "Crown responsibilities will lessen" but "...not disappear, but rather, will evolve". Nothing in this language suggests a clear game plan for an effective phasing-out of the fiduciary relationship in the *Federal Policy Guide*, supra note 107 at Fiduciary Obligations.

out? Will they remain and, in case they do not, how much longer will Canada be bound by these duties? If a First Nations' group has a 'lesser' form of autonomy institutionally and politically, will, for example, the fiduciary obligations of the government be different towards that particular group? Brad Morse states; "treaties, legislation, contracts and other forms of understandings could be utilized to give effect to agreements on self-government"[284]. Nonetheless, all of these legal instruments can be changed by different legal rules. Many questions also arise form the conclusion of the Nisga'a Treaty. This agreement was concluded before the *Campbell* v. *British Columbia*[285] decision was rendered and before the referendum affirmed the use of "principles" to guide future negotiations. Because of this, will future negotiations with other First Nations in the province be affected? Could a possible result of this be that the nature of the rights, which are given to the different aboriginal nations, be drastically different? The probability of this occurring, even if it is slight, is a strong argument in favour for the creation and conclusion of a broad principled framework addressing the many complexities associated with the inherent right to aboriginal self-government.

Furthermore, it must be mentioned that it is impossible, within the breadth of this paper, to detail the many principles and their specificities that could be included in such a principled framework. In fact, these principles *should* be determined and elaborated by the parties themselves, although an attempt will be made to list these principles at the end of the chapter as they have been exemplified throughout this paper. In light of this have been exposed, in Chapter I, the many sources of aboriginal rights that can and could come into play during the conclusion of negotiations and could subsequently be affected by the conclusion of modern treaties. All of the enumerated sources, as well as others, must be addressed in future negotiations. Furthermore, Chapter II has expanded significantly on all of the attempts of the courts, government commissions, accords and federal policy guides to protect and implement

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[284] B. Morse, "Indigenous Renascence: Law, Culture & Society in the 21st Century: Common Roots But Modern Divergences: Aboriginals Policies in Canada and the United States" (1997) 10 St. Thomas L. Rev. 115, at 138.
[285] *Campbell*, *supra* note 110.

the right of aboriginals to self-government. The problems with the modern treaties, as shown in Chapter II, have revealed that the results of these attempts have not been successful, only in that they are open to many challenges as to their validity or as to their obligations by future litigation. Of course, no process is perfect, but it is advanced that many of the problems resulting from the current negotiation process would be eliminated by the creation of principled guidelines by which to implement the right to aboriginal self-government. They are successful, however, in that they are the achievement of intense negotiations between all parties involved and reflect, to a certain extent, their will.[286] The principles elaborated by the Royal Commission on Aboriginal Peoples, as they elaborate core principles that would guide the treaty process, the allocation of lands and resources, the negotiation of interim relief agreements, the full extent of the jurisdiction to be exercised by Aboriginal governments, fiscal arrangements[287] etc., however, are a good starting point, although they do lack a few fundamental aspects of aboriginal rights such as the principles that would regulate the fiduciary obligations as well as judicial recourse for indigenous peoples. The base principles, obviously, would have to be determined through an extensive consultation of all parties involved; representatives of all aboriginal groups, government negotiators and outside observers confirming the impartiality of the process.

3.1.2. The Vehicle for a Principled Framework

Very few authors have directly called for a principled approach to aboriginal self-government in Canada and none, even faced with the outcomes of recent self-government negotiations, have presented a detailed vehicle by which such a framework can be conceived and implemented. Instead, these authors have mostly concentrated on

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[286] Although the success of the negotiated agreements cannot be disputed as a step forward for many indigenous groups, many authors have still remained critical as to the process of negotiations, a process that still reflects the inequality in bargaining power between the parties involved. For more details on this inequality, see B. Morse, *supra* note 284, for inequalities in the negotiation process and P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311, for the notion of the inequality of aboriginals in the broader Canadian society.

[287] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, Part Two, Chapter 6: Conclusions, *supra* note 99 at 1018.

the right itself or a specific aspect of it, its theoretical application to the larger Canadian society, the notion of equality as a foundation for the right etc. Some authors in the past have, however, not only called for the need for a principled framework but actually provided solutions or examples of models that could work, yet many of these musings are brief. One of these ideas, forwarded by P.W. Hogg and M.E. Turpel, is that a principled framework could actually be an alternative to a contextual statement of the right within the Constitution, "a framework for implementing the inherent right of self-government"[288]. To provide such a framework, both professors propose the alternative of federal legislation that "would enable the development of specific political accords with Aboriginal people and allow for flexibility in accommodating differences in [their] circumstances and priorities"[289]. Furthermore, such a solution would not be expensive and quite expedient, enabling the negotiation of separate political agreements on all of the principles of the framework without having to deal with each issue one by one with every aboriginal group. The legislation would institute certain broad principles that could then be dealt with during individual negotiations.[290] Yet, federal legislation can still be easily challenged, again not significantly protecting the right to self-government. These ideas, however, signify a fine beginning in the development of a principled framework.

P. Joffe emits the thesis that the general right to aboriginal self-government is at risk as it is being concluded within a unilateral framework, a one-sided framework that is exemplified by the recent negotiations between aboriginal groups and the Quebec government. Joffe also bases the need for a principled framework on certain other notions:

> Clearly, principles of sovereignty must be adequately enunciated if we are to effectively address the self-government rights of Aboriginal peoples in the Constitution of Canada. In developing a principled legal framework for the consideration of Aboriginal self-government, it is also critical to examine the underlying constitutional principle of democracy, as well as the right to self-determination.[291]

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[288] P.W. Hogg & M.E. Turpel, *supra* note 112 at 387.
[289] *Ibid.*
[290] *Ibid.*
[291] P. Joffe, *supra* note 157 at 174.

Joffe seems to agree that the present conclusions of self-government agreements are simply not effective in that they are creating skewed and inequitable agreements, his particular example pointing to the conclusion of agreements by the Quebec provincial government. Joffe also emphasizes the fact that a principled framework is essential to the conclusion of future negotiations and specifies that the framework must necessarily include the First Nations' values, principles of democracy and, as well, international norms.[292] The importance of international norm of self-determination, besides being emphasized in Chapter I in the section, has also been much discussed by P. Macklem in his work.[293] The inclusion of these international norms couches the right in another layer of legitimacy and displays a strong regard for human rights on both the national and international spheres.

As to the specific vehicle by which the principled framework will be brought to fruition, its delimitation is a difficult task. Although Hogg, Turpel and Joffe propose different ideas as to the conclusion of a principled framework, they do not delve into its primary characteristics. Their reticence is warranted, as the issue is certainly quite complex. However, it is a necessary task. At the risk of superseding the abilities required to suggest such a structure, exemplified by the hesitance of established jurists such as Hogg and Turpel to welcome the challenge, certain of its elements will be proposed in the following paragraphs.

The particular structure of the principled framework favoured in this thesis would be the conclusion of a major treaty between the orders of government and the aboriginal groups, a quasi-constitutional instrument that would consider and address the major issues that would or could influence an aboriginal group's right to self-government. Because of the failures of the past constitutional conferences, and the frail protection of the right to aboriginal self-government of the current *Federal Policy Guide*, a viable alternative to constitutional amendment is sought. The task at hand will be sufficiently difficult without requiring a major constitutional amendment. The conclusion of a tri-partite treaty is a feasible option because such an instrument is

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[292] *Ibid.* at 205.
[293] P. Macklem, "Aboriginal Rights and State Obligations" (1997) 36 Alta. L. Rev. 97, at 113-15.

already constitutionally protected under section 35(1) of the *Constitution Act, 1982*. The creation of a principled framework in the form of an all-inclusive treaty would not only seek to establish the principles necessary to an effective delimitation and implementation of the aboriginal right to self-government, but it would also constitutionally protect the right.

Another idea that is central to the development of a principled framework is the need for the participation of all of the parties involved and affected by the principles that comprise the right to self-government of First Nations; the Aboriginal Parties themselves, the federal government and the provincial governments.[294] These parties would participate in an on-going conference that would negotiate the broad principle directing the right to self-government. The participation of representatives of all aboriginal groups in Canada, as well as representatives of the two orders of government, is key to the conclusion of an effective principled framework as all of the nominated aboriginal representatives and others would bring their peoples' or groups' interests to the table. As well, for this process to be truly effective, it would be also practical to include outside observers, perhaps from the international realm. As we have seen in Chapter II, the agreement recently concluded between the Crees and the Quebec government does not directly include the federal government. In the James Bay Phase I treaty, on the other hand, the non-respect of its obligations by the federal government resulted in much of the litigation. Much of it had still not been resolved at the conclusion of the New Agreement between Quebec and the Crees. It is for these reasons that all parties must be party to the negotiation of a principled framework. It is also for this reason that a general assembly of aboriginal representatives should be constituted after the conclusion of the principled framework in order to assure that the framework and its principles affirming the right to self-government of aboriginal peoples is continually being applied fairly and correctly.

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[294] The participation of all three main actors has always been assumed as they would all, logically, be affected by the resulting agreements, see *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 99 at Vol. 2, Part One, Chapter 3: Governance, 163 which details a third order of government, and *Federal Policy Guide*, *supra* note 107 at 'Within the Canadian Constitutional Framework', which states the "provincial governments are necessary parties to negotiations".

As well, the international sphere must not be forgotten. Although Canada has been reticent in the past to accept the *Draft Declaration on Indigenous Peoples*, many of its provisions are the fundamental rights of aboriginal peoples throughout the world and Canada. For various reasons, states have been unforthcoming as to their endorsement of the provisions of this instrument. In creating a principled framework incorporating many indigenous rights, Canada has a chance to only fulfill its obligations towards First Nations at the domestic level, but in the international sphere as well. This would serve to put Canada on the map as a leader for the rights of aboriginal peoples. Furthermore, as the right to self-government would be structured and implemented in the most beneficial manner possible for the indigenous groups, it would indicate Canada's devotion to human rights in general and, especially, the human right of self-determination, a right that is, it must remembered, the *basis* for all other human rights. Without a voice, peoples cannot continue to be.

It is clear that the above is only a minor blueprint for a possible principled framework, but it *is* a beginning. In the next section, a discussion of the role of the courts in the determination of the right to self-government and an analysis of the negotiation process will also point to the need to conclude a principled framework in the immediate future. Firstly, the inclusion of the judiciary in the process of the elaboration of a principled framework seeking to establish the correct implementation and protection of the right to self-government has been hotly debated. In fact, as will be seen in the next section, some authors firmly believe that the courts should play a lesser role in the determination and delimitation of the right to self-government for aboriginals.

3.1.3. The Courts: An Unlikely Source of Law As Regards The Inherent Right to Self-Government

The role of the courts in deciding the place for the inherent right to self-government of aboriginals within the Canadian constitutional and legal sphere has

been heavily discussed in legal literature.[295] Because of the very nature of the inherent right to self-government and the particular place that it must find for itself within the legal framework of Canada, the scope and nature of the right is seen as only being determinable as between aboriginal groups and the two orders of Canada. Wilkins, as previously mentioned, has claimed that the marked reluctance of the Supreme Court in discussing the right to self-government of aboriginals in the *Delgamuukw* decision[296] was perhaps the best contribution that it could have made under the circumstances to the issue of aboriginal self-government in Canada.[297] In claiming that it had not been presented all of the necessary information, the Supreme Court clearly stated that it did not receive any submissions by the parties that would assist it in tackling the various difficult and fundamental issues of the right to self-government and that, furthermore, any endeavour on their part to delimit the right in these circumstances would be quite imprudent considering the complexity of the issue.[298] The court had specifically taken into account the "apprehension and uncertainty that exists, among both aboriginal and non-aboriginal populations, about the impact that such rights might have on the lives of community members and on the interests, values and arrangements important to the mainstream legal and social orders"[299].

Williamson J. did not take this into account in the 2000 *Campbell* decision, which decided the right to self-government of the Nisga'a and the division of powers between the Nisga'a government, the federal government and the provincial government of British Columbia[300]. The Supreme Court will, in all certainty, eventually have to respond to the questions presented in the *Campbell* case as to the scope and constitutionality of the right to self-government and, forced with the need for a decision as regards self-government, might limit or otherwise affect it. Should the government await this decision? It is my opinion that it should not, as the right could severely be affected. Yet, no principled framework exists to put this right into an

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[295] See among others, K. Wilkins, *supra* note 139, K. Wilkins, *supra* note 119, B. Morse, *supra* note 284 and G.R. Schiveley, *supra* note 166.
[296] As well as other decision, for example, *Pamajewon*.
[297] K. Wilkins, *supra* note 139 at 246.
[298] *Delgamuukw*, *supra* note 56 at 1115.
[299] K. Wilkins, *supra* note 119 at 55.
[300] See the discussion on the *Campbell* case, *supra* note 110.

appropriate context that could serve to establish its protection and correct implementation in Canada. The government must act now if the right is to be protected.

Wilkins, in explaining why the courts are not well-equipped to deal with the definition of the right to self-government, a question which will be fundamental to our argumentation in latter sections, points out that the Supreme Court's apprehension in affirming a constitutional right to inherent self-government stems from the fact that there does not exist, in Canada, a concrete and distinct understanding of just what is this right to self-government as regards its scope, its limitations and its protection from adversities. Specifically, "we [jurists and other scholars] do not have a shared and trustworthy understanding, even in outline, of how self-government rights would work within mainstream legal arrangements, or of the impact they may have on them"[301], and, it must be added, vice versa. The question that remains, however, is how this "shared and trustworthy understanding" of the manner by which the right to self-government is put into effect is supposed to be achieved when, as these words are being written, self-government agreements are being negotiated throughout Canada, implementing this very right in a manner leaving to be desired any form of uniformity?

One of the only existing options to remedy the above problem is the development of a principled framework establishing the main guidelines needed in order to establish the right in a manner that effectively protects the rights of aboriginals. In the context that Canadian society, including jurists, citizens, government and aboriginal groups, does not understand how the right to self-government of aboriginals would work in the mainstream legal society, and in the absence of "basic legal practicalities"[302], the role of the courts in the determination of the scope and exactitude of the right to self-government of aboriginals should be naught. However, if specific guidelines were to be established, the courts would

[301] K. Wilkins, *supra* note 139 at 249.
[302] *Ibid.*

certainly have a new role to play in their determination and the safeguard of their application, if a question were to arise.

It is the very role of the court that has tended to be curtailed by certain provisions of the recent agreements between the aboriginal groups and the governments, as both parties have often negotiated alternative modes of dispute resolution as an alternative to litigation.[303] This a quite perplexing development when it is compounded by the fact that a limited role of the courts can put the right of First Nations to self-government into peril. This is because the right to self-government and decisions which affect it must firstly "demonstrate how such rights might integrate into the larger legal and constitutional framework for which the courts themselves are responsible"[304]. Since the right to aboriginal self-government has been deemed to be protected in the *Constitution Act, 1982* under section 35(1), and it is the courts who deal with constitutional challenges to rights of this nature, if they are to play no role in the defence and protection of this right, whom or what institutional structure is responsible or can guarantee that this right will be effectively implemented and respected in the future? Although the governments' responsibilities in the safe-guard of this right could seem to be the obvious answer, past experiences have shown that this is not always the case, especially in the context of negotiations.

3.1.4. An Analysis of the Process of Negotiations: Without a Principled Framework is This Process Effective?

Negotiations have been heralded as the one of the most important tools in the governments' initiatives to implement the right to self-government for indigenous peoples of Canada, and have led many of the consultations to date. Negotiation, and other methods of alternative dispute resolution, has been gaining in popularity over the years as effective tools in resolving disputes for the involved parties that do not, on the

[303] Both the Nisga'a Treaty and the New Agreement between the Quebec government and the Crees provided for alternative methods of dispute resolution to decide any dispute that arose from the implementation of the treaties.
[304] K. Wilkins, *supra* note 139 at 272.

contrary, leave them to delve in a quagmire of lengthy and expensive litigation.[305] The many intricacies of the debate seeking to answer the question as to whether negotiation is more effective over litigation in the context of general legal matters is not the focus of this paper. Instead, the focus will be directed to negotiations as used between the federal, provincial and aboriginal groups in order to conclude self-government agreements. In the examples of the modern treaties studied in Chapter II, negotiations were the primary tool used to conclude these agreements, although the Nisga'a Treaty was the result of nearly 25 years of talks, the Agreement in Principle, which lead to the Agreement between the Government of Quebec and the Crees, was the result of several weeks of intense negotiations. In this paper, it is not sought to denounce the negotiation procedures between governments and aboriginal groups for the simple and important reason that these processes have led to the conclusion of groundbreaking modern treaties. It cannot be denied, however, that the negotiating processes are in need of refinement as concerns the issues that these processes address and the negotiation process itself.

G.R. Schiveley, sharing a general view of negotiations as compared to litigation, is of the opinion that negotiations are best for the determination and delimitation of self-government agreements for aboriginal peoples because of three key reasons: 1) there are no set procedural guidelines by which to initiate the negotiation process which leaves room for the parties to adapt the process to their particular needs, 2) unlike litigation which utilises precedent rulings which have been developed in the non-aboriginal perspective, these are not present in the negotiation process and, 3) negotiations are not part of an adversarial process, a process which has generated

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[305] For more on alternative methods of dispute resolution, see R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (New York: Penguin Books, 1983) and the comments of Lamer C.J. (as he then was) affirming the importance of negotiation in *Delgamuukw*, *supra* note 56 at 1123-1124; "Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* (*supra* note 93 at para. 31), to be a basic purpose of s. 35(1) – 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay.".

unequal results, in the past, and has served to limit aboriginal peoples' rights.[306] These reasons are convincing but they excluded many major negative attributes of the negotiation process between aboriginals and the governments. Furthermore, Schiveley concludes that the negotiation process probably sets the aboriginal peoples on an equal footing with the federal and provincial governments for the first time in history[307], a questionable assertion at best. It cannot be disputed that aboriginal groups may have more chances at having their voice heard in the course of negotiations because it does not follow usual patterns of 'them' (the aboriginal groups) against a non-Aboriginal judge, institution and legal structure, yet to qualify this as 'equal footing' is a stretch considering that the other negotiator is the Government of Canada with all of its power and resources.

Professor B. Morse, on the other hand, although also stating that negotiations has been seen as the best method by both aboriginal groups and representatives of the government[308], also makes the case for the presence of major impediments to the negotiation process. Among the major hindrances identified by Morse are 1) the question of the lack of faith in the good will of the parties to the negotiations, 2) the fact that the parties to the process have had very different "life experiences" and have quite distinct world views on many topics, 3) the use of a particular language by both parties, in that the governments utilise bureaucratic terms and the such, 4) the fact that there is usually an accent put on the written word and not the oral, 5) the financial power and strength in human resources of the governments as compared with the aboriginal groups, 6) the fact that many of the aboriginal negotiators are usually represented by their political leaders and the governments negotiators are not often the principal political actors, 7) the access to information by aboriginal groups as to costs, expenditures etc, is quite limited and 8) the fact that there is a monumental imbalance of power between both groups.[309] Although all of these factors simply exemplify the fact that there do exist quite many problems with the negotiation process between the

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[306] G.R. Schiveley, *supra* note 166 at 461-462.
[307] *Ibid.* at 463.
[308] B. Morse, *supra* note 284 at 140-141.
[309] For a more in-depth discussion of all these factors, see B. Morse, *Ibid.* at 140-148

governmental negotiators and the aboriginals, if we compound the weaknesses in the process with the lack of basic guidelines establishing the very principles of the right to self-government within a stable framework, it is simple to deduce that is could be possible for negotiations to produce less-then-effective modern treaties.

Yet, it is important to pinpoint exactly the *why* of the uncertainty created through the negotiation of the concluded treaties. In every negotiation, the parties tend to bargain from a consensual base of principles.[310] For example, if two companies are negotiating a contract for the cutting of timber on the lands of the other, certain rules have to apply to this transaction; such as the going price of timber, the fact that the wood-cutter has to follow certain environmental guidelines, etc. The general guidelines of their transaction, of their very relationship, have already been established through legislation. This example is quite simplistic in comparison with the vastness and breadth of the domain of aboriginal rights. Nevertheless, its worth remains. The example serves to demonstrate that the agreements implementing the right to self-government, as negotiated between the governments and the aboriginal groups, are still being concluded despite the lack of existing and accepted guidelines. These negotiations result in the conclusion of premature agreements, agreements that do not have a base on which to build upon. It could even be said that the parties to the treaty are actually embarking on a road to litigation especially if we look at the weaknesses of the negotiation process as elaborated by Morse and presented in the preceding paragraph. It is clear that this process is inherently problematic and that, if specific guidelines are not established to effectively implement the right to self-government, the process is doomed to be significantly faulty. A principled framework is necessary. In using examples of international compromises, such as key agreements concluded by the 44 states party to the Council of Europe, a solution can perhaps be found.

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[310] See, generally, Fisher & Ury, *supra* note 305.

3.2. *The European Charter of Local Self-government: Initiative of the Council of Europe for Local and Regional Self-Government*

This section will consider the Council of Europe's initiatives as regards local and regional self-government. The importance of this section lies in demonstrating that if it is possible for a grouping of states as extensive as the Council to agree upon common principles of autonomy for smaller factions within the states of the union, then it is possible that a similar model can be effectively discussed and adapted to the development and implementation of the right to aboriginal self-government in Canada. It will not be advanced that the Council of Europe's model is faultless as a thorough investigation of the European model is beyond the breadth of this paper, and as well, as regards some institutional issues, may not be entirely adaptable. Its usefulness lies, however, in that fact that it demonstrates that the use of a principled approach to guide the implementation of the right to self-government is an effective manner by which to gain autonomy.

3.2.1. The Council of Europe

The Council of Europe is a political and institutional grouping of different European states that was founded by the signing of its draft statue on May 5, 1949. Winston Churchill is credited as the first statesman to have formulated the idea in saying that what was needed in Europe was "a remedy which, as if by miracle, would transform the whole scene and in a few years make all of Europe as free and happy as Switzerland is today [...][w]e must build a kind of United States of Europe"[311]. Before any formal arrangements had been made concerning a council, talks had already led to the creation of certain movements and associations, the precursors of the modern Council. Aiming for European unity, these organizations included, for example, the United Europe Movement and the International Committee of the Movements for

[311] W. Churchill as cited in, A short History of the Council of Europe, Council of Europe Portal, online: http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/A_Short_Story/ (date accessed: August 24 2002).

European Unity, the formation of which culminated in the Congress of Europe at The Hague in 1948.[312] Springing from a collective stance against Communism, and an opposition to the values and ideologies expounded by that particular political theory, the ten founding states sought to promote the rule of law, democratic systems and democracy as well as a unified Western Europe.[313] The signing of the statute was the conclusion of much discussion regarding the essential features of a new political organisation, a 'functional approach' that would seek to create a voluntary collaboration between states, the latter, however, retaining their full sovereign powers.[314] The sheer importance of this statue is quite difficult to appreciate: ten states of varying political systems succeeded in successfully forming a political, social and cultural union that would furthermore extend to various sectors of the economy. The member states to the organization now number 44, the last accepted member being the newly autonomous Bosnia & Herzegovina, which joined the Council on the 24th of May 2002[315]. It is also interesting to note that Canada sits as an observer to the Council of Europe.

The aims of the Council, as set out in article 1, seek to achieve an accrued "unity between its members for the purposes of safe-guarding and realising the ideals and principles which are their common heritage and *facilitating their economic and social progress* (the emphasis is mine)"[316] regarding economic, legal, cultural, administrative, scientific and in the further protection of fundamental freedoms and human rights.[317] Although relatively all matters would fall under common concern, only the concept of national defence remains under the exclusive jurisdiction of the countries themselves[318], an occurrence that shows that although co-operation is

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[312] P. Sands & P. Klein, *Bowett's Law of International Institutions*, 5th Edition (London: Sweet & Maxwell, 2001) at 161.
[313] H.J. Steiner & P. Alston , eds., *International Human Rights in Context: Law Politics Morals*, 2 ed. (Oxford: Oxford University Press, 2000) at 789.
[314] P. Sands & P. Klein, *supra* note 312 at 161.
[315] Bosnia & Herzegovina joined the council shortly after Armenia, the 25th of January 2001, and Azerbaijan, on the 25th of January 2001. The Federal Republic of Yugoslavia is still not a member of the organization.
[316] *Statute of the Council of Europe*, at art. 1.
[317] *Ibid.* at art. 1(d).
[318] *Ibid.* at art. 1(d). Because of the reticence of few states to form a military bloc, such as Switzerland and Sweden, this was one particular area of jurisdiction that was withheld from the sharing of powers.

possible to a great extent, some matters which are quite important must remain under the jurisdiction of the governments. The Council had two principal organs, the Committee of Ministers[319] and the Consultative Assembly[320], as well as third recent institution: the Congress of Local and Regional Authorities[321], voted by resolution. All three are served by a Secretariat.

Although the Committee cannot take decisions that would bind their respective governments, it does have a considerable role in the recommending of matters to governments, as well as playing an important role in the conclusion[322] of agreements and conventions concerned with communal affairs. The Consultative Assembly, an organ whose member states have a number of representatives, which corresponds to its population size, has the power to make recommendations to the Committee of Ministers, in the form of either resolutions or recommendations.[323] Within the Assembly itself sits many committees regulating different spheres of the Council's jurisdiction; Political Affairs, Economic Affairs and Development, Social and Health Questions, Legal Affairs, and a host of other issues.[324] Lastly, the Congress of Local and Regional Authorities of Europe, bases it premise *on the fact that the basis for a truly democratic society is the continuation of solid and effective local and regional democracies which do have a say-so in the political and institutional structure* of the Council of Europe.[325] The local and regional democracies are not only encouraged to become effective at the grass-roots level, but are instead formally engaged in the greater political and institutional spheres. This Congress is, furthermore, comprised of representatives of localities or regions, the representatives having been elected by that particular constituency or region.

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[319] *Ibid.* at art. 14, the Committee is composed of the Foreign Affaires Ministers of the respective countries.
[320] *Ibid.* at art. 35(a).
[321] *Congress of Local and Regional Authorities*, Statutory resolution (94) 3 of January 14, 1994; now changed to resolution (2000) 1 of March 15, 2000. The *Congress* was previously known as the Standing Conference of Local and Regional Authorities of Europe and was renamed on the 14 January 1994 by the Committee of Ministers. The *Congress* oversees the States of Europe's compliance with the *European Charter of Local Self-Government*, *infra* note 327.
[322] P. Sands & P. Klein, *supra* note 312 at 163.
[323] *Ibid.*
[324] *Ibid.*
[325] *Congress of Local and Regional Authorities*, preambular paragraphs.

The principal notions that can be retained from the previous discussion concerning the Council of Europe and its auxiliary bodies are two-fold. The first is that the states of which comprised the Council did not see a diminution of their sovereignty as a possible result of their union with other states. Instead, it was an indication that the individual countries were, on the contrary, quite anxious to expand on their political, economic and social relationships, relationships that could only result in an eventual strengthening of the states. Secondly, not only did the states not fear for their sovereignty and distinct powers, but they also provided political space for the representation of local and regional governments, marked move towards a decentralisation of the states' powers. Using an entirely democratic union as their main goal, in increasing the democratic representation of all states and their localities and regions, the states of the Council of Europe assured a durable and co-operative relationship. The sheer strength and the development of the Council can clearly attest to this. One of the principal aims of the Council is "to help consolidate democratic stability in Europe by backing political, legislative and constitutional reform" and "to seek solutions to problems facing European society (discrimination against minorities...)[326]. The states of the Council seem to recognize that they cannot keep their countries under 'strict sovereignty' with closed borders, choosing instead to find accurate and stable means by which to implement this stability, especially as regards local and regional populations. In order to do this, they have developed quite a few international legal instruments by which to affirm the rights of the localities and regions' self-government and autonomy as well as instruments seeking to protect the rights of national minorities.

[326] An Overview of the Council of Europe, online: Council of Europe Portal <http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/A_Short_Story/ > (date accessed: August 24 2002).

3.2.2. The Development of International Instruments Aiming to Protect the Particularities of Local and Regional Democracies and Their Populations

The Council of Europe, in recognizing the accrued importance of affecting to localities and regions a heightened autonomy, have concluded many international instruments dealing with various aspects of this effective self-governance: matters of transnational cooperation between communities, local and regional autonomy, the participation of foreigners to the local public affairs, the protection of regional or minority languages, and the general protection of national minorities[327] have all been protected by a particular European instrument.

As an example, for matters of trans-border co-operation between local and regional communities in Europe, many documents have been concluded which demonstrate the Council of Europe's initiatives to encourage an exchange between these communities across the continent. This initiative has even developed to the point of elaborating a specific manual that goes to great lengths to describe the process by which a local and regional community can be defined, the creation of institutions that would regulate the international relationships between localities, as well as the areas of jurisdiction that could fall under this co-operation: environment, transport, economy, health, education, culture etc.[328] This handbook even goes to the extent of delimiting the concerns that, in the future, could become necessary to immediately address. Furthermore, the Council of Europe has gone beyond putting an emphasis on local and regional communities to also couch this preoccupation within the context of human

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[327] *European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities*, European Treaty Series, ETS n°106, 21 May 1980, entered into force 22 December 1981, *European Charter of Local Self-Government*, European Treaty Series, ETS n°122. 15 October 1852, entered into force 1 September 1988, *Convention on the Participation of Foreigners in Public Life at Local Level*, European Treaty Series, ETS n°144, 5 February 1992, entered into force le 1 May 1997, *European Charter for Regional or Minority Languages*, European Treaty Series, ETS n° 148, 5 November 1992, entered into force 1 May, 1997, *Framework Convention for the Protection of National Minorities*, European Treaty Series, ETS n°157, 1 February 1995, entered into force 1 March 1998.

[328] *Manuel de Coopération Transfrontalière à l'Usage des Collectivités Locales et Régionales en Europe*, 3e édition, Coopération Tranfrontalière en Europe, n°4 (Strasbourg: Éditions du Conseil de L'Europe, 1996).

rights, treating the trans-border exchanges of national minorities as fundamental to the preservation of their culture and other aspects of their development.[329]

In considering the interest of the Council in both the aspect of localities and regions as well as the welfare of national minorities, ethnic or not, it can be deduced that a certain framework for the protection of minority communities and persons is being continuously elaborated in Europe. This being, it is indisputable that the minorities in many of the 44 states of which the Council is comprised cannot be compared with that of the aboriginal peoples in Canada, as all of the groups greatly vary in history and tradition. Furthermore, there is also in international law, much debate as to whether 'minorities' can be 'peoples'[330], as in the question for the many aboriginal groups of Canada. Are the First Nations they minorities or peoples? A thorough analysis of the question is beyond the particular scope of this paper, yet this problem can be approached in the context of the discussion regarding the term 'peoples' of Chapter I and will be addressed further in section 3.5.3. Nevertheless, it is the framework that is of interest: a system of protection and an elaboration of norms and rules to guide the governments in enacting either the protection of the minorities or the communities.

For the purposes of this thesis, the *European Charter of Local Self-Government* will be the only instrument necessary to our goal to demonstrate that through the elaboration of concrete and effective guidelines, an effective implementation of self-government can be achieved. Nevertheless, the mentioned international instruments demonstrate Europe's commitment to the on-going development of local and regional affairs, the very fact of their conclusion, over the years and until recently, showing this continued interest.

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[329] *Formes Exemplaires de Coopération Tranfrontalière Concerant les Membres de Groupes Ethniques Résidant sur le Territoire de Plusieurs États*, Coopération transfrontalière en Europe, n°5 (Strasbourg: Éditions du Conseil de l'Europe, 1995).

[330] For more on the minority *versus* peoples debate, see N. Rouland et al., *Droit des minorities et peoples autochtones* (Paris: Presses Universitaires de France, 1996); the essays in C. Brolmann, R. Lefeber, M. Ziek, eds., *Peoples and Minorities in International Law* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1993) and M. Shaw "The Definition of Minorities in International Law", (1991) 20 Israel Yearbook on Human Rights 13.

3.2.3. Europe and Autonomy: Certain Implications

It is first necessary to expound the difficulties experienced by the Council of Europe in its progress towards regional and local autonomy before engaging in an in-depth discussion of the *European Charter* and its principle attributes that could help develop an effective system of self-government for aboriginals in Canada, as we will attempt in a latter section. It is apparent that a dichotomy arises within the context of the goals of the Council of Europe, that of a unified Europe[331], and the notion of territorial autonomy, as would be see in the process of the creation of many regional and local governments. In fact, the Standing Conference of Local and regional Authorities of Europe[332], in March 1992, voiced its concern about the "situation of national, ethnic and linguistic minorities and the revival of nationalism in the emerging democracies of Central and Eastern Europe [and that] such tendencies [could] ultimately pose a serious threat to European unity and peace"[333].

The solution of the Standing Conference was to proclaim that the only way in which to adequately address this problem was to redistribute the powers away from the central governments, paying particular attention to the identities and rights of the minorities living within each of the states, all the while respecting the administrative structures of the states themselves.[334] Although it can be pointed out that the form of autonomy that is granted to 'minorities' of European states is quite varied[335], a direct comparison with the existence and structures of Canada is quite difficult, and almost impossible. First of all, aboriginal peoples are quite reticent to label themselves as minorities for the simple reason that they hold special rights under the *Constitution Act, 1982*, because of their particular status. No other minorities within Canada hold

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[331] See, *supra* note 311.
[332] See, *supra* note 321.
[333] S. Lewis-Anthony, "Autonomy and the Council of Europe-With Special Reference to the Application of Article 3 of the First Protocol of the European Convention on Human Rights", in M. Suksi, ed., *Autonomy: Application and Implications* (The Hague: Kluwer Law International, 1998) at 319.
[334] Standing Conference of Local and regional Authorities of Europe, 27th Session, 17-19 March 1992, Res. 232 (1992) on the subjects of autonomy, minorities, nationalism and European Union, of 18 March 1992, 2nd sitting, at para. II.4.
[335] Y. Dinstein, "The Degree of Self Rule of Minorities in Unitarian and Federal States" in C. Brölmann & al., *supra* note 330.

such unique rights as treaty rights, aboriginal title to lands and the inherent right to self-government. For this, aboriginal *peoples* are unique. Furthermore, the Canadian governments have made the distinct and very specific attempts towards the implementation of a right to local self-government within the political spheres of the Canadian state. The concerns of the states of Europe as regards autonomy, in that they could affect 'minorities' and not 'peoples' are of no particular concern to the subject at hand. The importance of the initiatives lies in the framework used to implement self-government.

3.2.4. The European Charter of Local Self-Government

The *European Charter of Local Self-Government* is an interesting model to examine as regards the protection and correct implementation of the right to aboriginal self-government in Canada. Created within the greater context of the Council of Europe, this instrument can be seen as a natural move towards the idea of decentralisation in Europe as a whole. The borders and distinct characteristics of the States having become increasingly blurred as particular social, political and economic aspects of society become transnational as opposed to state-particular, distinct localities and regions with either different or separate political, social and economic agendas have sought to find an accrued representation on the state and international level. To a certain extent, they have found this recognition by the conclusion of the European Charter. Interestingly enough, this recognition of local autonomy was achieved more than fifteen years ago, and the process initiated as early as the late 1950s. As a result of this move towards decentralisation, the powers afforded to the localities and regions, and the means now available to them, have significantly accrued. This shows that the strengthening of the autonomy of a certain group or region does need to evolve, to a certain extent, in time. No process exists that has not gone through growing pains.

3.2.4.1. The European Charter: Foundations and Provisions

The *European Charter* was the natural result of a series of initiatives and deliberations of the Council of Europe that considered local and regional self-government to be the cornerstone of democracy.[336] As early as 1957, initiatives were undertaken to examine the question more closely.[337] This international instrument was meant to expose all of the guiding principles that would regulate local autonomy, principles that would be recognised by the states of the Council party to the Charter. Furthermore, one of the main preoccupations surrounding the creation and implementation of the *European Charter of Local Self-Government* was that the principal actors in the effective implementation of local self-government, the very governments of the states, had to adhere to all of the principles herein invoked[338] in order for a European Charter to be successful. Over a period of approximately fifty-years, the initiatives undertaken to produce a document were guided by the belief of all parties involved that, in order to guarantee the effectiveness of the statute, it could not be of a general or basic character, but, instead, must contain clear and plain principles.[339] As well, it was deemed *fundamental* to the creation of the Charter that it be comprised of principles that would bind the states because of both the general importance of local autonomy and the presence of many threats to its continued existence, a preoccupation that resulted in a general agreement amongst states that the Charter was to be obligatory to its signatories.[340]

Although the Council deemed that the Charter be binding upon the states, it was clear that in order for these political actors to agree and accept the Charter, certain of its principles has to bear a certain degree of flexibility. The acceptance of compromise by the parties entering new political agreements seems to be essential to its effectiveness. This is why the provisions of the European Charter are worded to

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[336] *Explanatory Report of the European Charter of Local Self-Government*, ETS no. 122, online: Council of Europe Portal <http://conventions.coe.int/treaty/fr/Reports/Html/122.htm> .
[337] *Ibid.* at A. Origins of the Charter, para. 3.
[338] *Ibid.* at para. 2.
[339] *Ibid.* at para. 4-5.
[340] *Ibid.* at para. 5.

take into account the particular state's constitutional principles and its administrative traditions.[341] It is simple to presuppose that if the Council, in providing a principled framework regarding local self-government, had ignored or left out these legal and political provisions from the Charter, controversy, litigation and strife could be the result. In a situation where a locality or region's particular needs are not being met or taken in to account by the nation's governments, dissent could be one of the eventual results.[342]

The aims of the European Charter are clear: compensating for the lack of common principles, norms and institutions throughout Europe that would determine and protect the rights of local populations as well as providing them with a means to effectively participate in the decision-making process and to specifically address the questions that concern or affect their environment.[343] Furthermore, the European Charter obliges the parties that have ratified it to respect the fundamental rules which guarantee political, administrative and financial independence for localities and regions, in this way assuring the observance of basic democratic principles and fundamental human rights of all.[344] The majority of the states forming the Council of Europe have ratified the European Charter.[345]

The *European Charter of Local Self-Government* in comprised of three major parts, the specific provisions of each can be found within the document itself.[346] Opening the Charter, the preamble confirms the importance of local self-government as the cornerstone of any democratic regime, as well as establishing that in order for

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[341] *Ibid.* at para 5.
[342] As well as the examples of the Basque separatists of Spain, the Corsican separatists of France and many other examples around the globe, another example could be the aboriginal groups in Canada which have manifested their dissention in the recent past; the first example regarding the use of Mohawk traditional burial grounds by the Crown, which led to the Oka, Quebec stand-off between the First Nations and the army, as well as a second example, the fishing dispute which occurred in Burnt Church, New Brunswick creating much conflict between aboriginal and non-aboriginal fishers.
[343] *Explanatory Report of the European Charter of Local Self-Government*, *supra* note 336 at B. General Remarks, at para. 1.
[344] *Ibid.* at para. 2.
[345] Only 5 states have not ratified the Charter: Andorra, France, Georgia, Switzerland and Russia, although France and Georgia are both signatories.
[346] *European Charter on Local Self-Government*, *supra* note 327.

this right to be correctly exercised, the local governments must be "endowed with democratically constituted decision-making bodies [as well as] possessing a wide degree of autonomy as regards their responsibilities"[347]. Another important idea of the preambular paragraphs is that which expounds the fact that the states forming the Council of Europe, in affirming the autonomy of localities and regions, can in this way contribute to the building of a Europe based on "principles of democracy and decentralisation of power"[348].

Part I of the European Charter is comprised of the provisions explaining the very principles of local self-government. In Article 2, the provision states that self-government must establish its foundations in constitutional and legal instruments. Article 3 and 4 establish firstly, the concept of local self-government and secondly, its scope, without actually producing an exact definition of the nature of the right. Any other manner by which to proceed, (i.e. by giving an exact and precise definition of all the elements of which is comprised the right to self-government), could only be unnecessarily too broad or too narrow as to exclude meriting communities from local self-government itself.[349] The scope of self-government includes many interesting aspects of the powers of the local government; provisions for the directions of the basic powers and responsibilities of the governments (art.4(1)) and for the allowance for full discretion of the authorities (art.4(2)). More importantly, the article provides that the powers that are given to the local authorities shall be full and exclusive and that "they may not be undermined or limited by another, central or regional, authority except as provided for by the law"[350]. Furthermore, delegated powers must be allowed to be adapted to the particularities of the locality or the region in which they will be exercised.[351]

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[347] *Ibid.* at Preamble.
[348] *Ibid.*
[349] If we look as a reference to the definition of 'peoples' and 'minorities' in international law, the first as explained in Chapter I, we can see that the many characteristics of which is comprised the definition can either lead to the exclusion of a specific group or the unnecessary inclusion of other factions.
[350] *European Charter on Local Self-Government, supra* note 327 at para. 4(4).
[351] *Ibid.* at para. 4(5).

Other provisions call for the protection of local authority boundaries (art.5), which would require a referendum of the population if they were to be changed, the determination, by local authorities of the appropriate administrative structures and resources for the tasks of the local authorities (art.6) and the conditions under which responsibilities at local level are exercised (art.7). Article 8 provides, interestingly, that any administrative supervision of the granted autonomy "may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute", therefore limiting any 'outside intervention' to a significant degree. Adequate financial resources for the local self-governments are provided within article 9, which seeks to establish the responsibilities of the state and the localities and regions as regards the finances. Article 10 is perhaps one of the most interesting, as, in keeping with the policies of the Council of Europe encouraging trans-border co-operation between localities and regions, in that it affords them the right to freely associate with other localities and regions-even if the other are in another state- for their "common interests". Finally, the last article of Part I states that the local authorities "shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation"[352].

Part II of the European Charter establishes the breadth of the commitments that the parties have made. The Charter, as was previously mentioned, seeks to establish a delicate balance between the worries of the states as regards their basic constitutional principles, their territorial integrity and political structure, and the rights of those who seek to establish local self-government. It is difficult to take into account all of the legal and institutional particularities of the state.[353] It is for this reason that within this section exist provisions that would enable the parties to the Charter to exclude certain of its provisions.[354] At first light, this would seem to be contrary to the very exercise of

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[352] *Ibid.* at art. 11.

[353] *Explanatory Report of the European Charter of Local Self-Government, supra* note 336 at B. General Remarks, para. 4.

[354] Certain countries, like Denmark, have chosen to apply the European Charter in its entirety. Others, such as Bulgaria, will chose not to be tied to some provisions such as para. 7(2), which provides for financial compensation for the exercise of local officials time in office and other provisions. Other

the right. However, "[i]l s'agit donc là d'un compromis entre, d'une part, la reconnaissance du fait que l'autonomie locale concerne la structure et l'organisation de l'État lui-même, ce qui est une pré-occupation fondamentale du gouvernement, et d'autre part, l'objectif visant à protéger un minimum de principes fondamentaux que tout système démocratique d'administration locale doit respecter"[355]. However, Article 12 nevertheless still provides for a minimum of articles that must be observed by each signatory party. Contrarily, the Charter also makes room that the parties can expand on their obligations if they see fit.

There are no provisions in the Charter for an institutional 'watch-dog' to control the implementation of the *European Charter of Local Self-Government*, this in part because of the existence of the Congress of Local and Regional Authorities of Europe that, as we have previously mentioned, reports directly to the Council of Europe's Committee of Ministers. As the Congress is made up of elected representatives directly from the localities and regions themselves, the Council of Europe did not see fit to create a controlling institution. Part III simply provides for the habitual processes evoked in the signing of an international instrument such as the singing of the document, the notifications, etc. In short, the European Charter is the result of an extraction of a number of common principles that a majority of states have subscribed to. Although it is highly probable that some of the localities, the regions or the states themselves are not entirely keen on the existence of principles enounced in the Charter, the resulting compromises are still considerable.

3.2.4.2. The Model of the European Charter as applied to the Right to Aboriginal Self-government in Canada: Success?

The European Charter can bring much to the discussion and the implementation of a principled framework instituting the right to aboriginal self-government in Canada. As was previously mentioned, it is impossible to directly apply the first to the

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reservations are quite often more serious, see the Czech Republic's reserve on para. 4(5) concerning the delegation of powers to local authorities.

[355] *Explanatory Report* (French: *Rapport Explicatif*), *supra* note 336 at para. 4.

latter because of the differences in political structures and general circumstances, economic or otherwise. As well, the right to local self-government in Europe does not necessarily entail the protection of an ethnic group, only a set population. However, its importance remains, as it is an effective model to follow in order to instil an effective principled framework that would seek to achieve the inherent right to aboriginal self-government in Canada. Many principles that have already been elaborated within the European Charter could be shown to be effective for the right to self-government of aboriginal peoples, as we will see in the following paragraphs.

The first point of importance is the general description of the scope and breadth of the right to self-government that is enounced in the very first provisions of the Charter. Although the terms "aboriginal self-government" are often expounded in Canadian law and general society, they are still waiting to be generally described. What exactly do the indigenous peoples want to achieve in Canada, and what is the feasibility of this being achieved? Do they want to separate and form their own countries or do they want orders of governments that will function in concert with the other two orders of government in Canada? Secondly, the right must have a constitutional and legal base. In other words, it is not enough to simply trot out the right when necessary like a Sunday suit only worn for special occasions; the right *must* be explicitly established in the constitution.

> [T]he AFN [Assembly of First Nations] is often asked why we pursue further amendments to the Canadian Constitution while subsection 35(1) already recognizes and affirms our existing aboriginal and treaty rights. That subsection is protecting our rights...includ[ing]...our inherent right of self-government. But because of the history of our relations in the past federal and provincial governments, as well as the way we have been treated in the Canadian legal system, we have to insist, for greater certainty, on explicit recognition of our rights [emphasis added].[356]

Extra legislation, if it was needed, could also set apart the right to self-government from others in certain specific domains, such as fiscal arrangements for aboriginal groups. Thirdly, the discretionary power of the local and regional authorities

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[356] G. Erasmus, Grand Chief of Assembly of First Nations (as he was), "Address (First Ministers' Conference on Aboriginal Constitutional Matters, 26-27 March 1987) in J.A. Long & M. Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) at 257.

is primary to any government. If a government is in any way controlled by another order in that its powers are continuously curtailed and questioned, it ceases to be a governing body, remaining a lesser administration.

In concert with the provision concerning the discretionary power of the local and regional governments, the provision stating that the power of the government, either local or regional, cannot be curtailed by other orders of government except as provided for by law, is highly recommended for the right to self-government of aboriginal peoples. This would mean, for aboriginal governments, that any concluded right or previous agreements would have to follow previously concluded concessions (in the form of provisions) as to what should be done with the specific right. This would, in effect, limit the intrusions that could be affected by the two orders of government in Canada. As well, the principles concerning the supervision of the administration of this government would also have to be directly delimited in order to avoid the encroachment of another order of government.

The fact that the European Charter also applies somewhat uniformly across Europe, as states still have the power to abstain from certain of its provisions, is quite telling indeed. Although we have already mentioned that the aboriginal groups of Canada are simply too diverse for principles of self-government to apply consistently across the territory, the fact remains that general principles *must* be found to apply to the aboriginal groups' right to self-government across the country. In the process of implementing a right, it is extremely difficult to construct an efficient legal and institutional framework seeking to effectively protect it, especially if this very right manifests itself in various forms. If, however, general principles exist by which its implementation can be successfully guided, the right can become more stable. In light of this, the provisions concerning the cooperation of the many local and regional self-government authorities, a cooperation that would span all the States belonging to the European council, are also extremely useful in the context of the right to self-government of aboriginals. To think that aboriginal governments would only be able to treat with the provincial and federal orders of government would be, in effect, severely

limiting their right to govern their own affairs. Aboriginal groups could greatly learn from the many trials and tribulations of the implementation of the right in another First Nation group, in another province. The experiences and expertise of other governments that would be gained from other indigenous peoples would be instrumental in creating an effective framework.

The provisions for a judicial remedy, in that aboriginal people would have a recourse to certain breaches of obligations by the federal and provincial governments instead of only resorting to alternate dispute mechanisms are also instrumental to the right of aboriginal self-government. It would seem that the Canadian government, in its *Federal Policy Guide*, would like to limit the judicial recourse of the aboriginals in the conclusion of self-government agreements. It is my opinion that if general principles, principles that would be set out form the start as regards the many general principles that would apply in to aboriginal self-government, such a measure would not need to be taken. Judicial recourse would then become, as it is for the other orders of government in matters in which there is an encroachment upon the competences of the other, a method of solving a jurisdictional dispute.

As well, the European Charter does not have a 'watch-dog' to assure the good implementation of the Charter within countries. This was not deemed necessary, probably because of the existence of the Congress of Local and Regional Authorities of Europe and the fact that their representatives are close to the Council of Ministers. Rightly so, it was deduced that if matters arose that concerned the localities and regions, the representatives of the Congress would effectively address it. Contrarily to the Council of Europe, Canada does not have any official aboriginal representatives to its government that would serve to ensure the appropriate treatment in dealing with the matters of the many aboriginal First Nation tribes exercising their right to self-government. This principle, that of having institutional representatives to assure a correct implementation and conclusion of affairs that would affect them, seems to also be necessary for aboriginal peoples.

Another important principle that can be borrowed from the model of the European Charter would be the existence of the notion of the political 'compromise', which is in Part II. The states of the Council of Europe have realized that there cannot be an agreement as to the self-government of regions and localities without a certain measure of compromise. It is impossible to believe that agreements can be reached without one of the parties having to give a little bit of ground concerning specific powers. For example, in Canada, is unreasonable to believe that effective aboriginal self-government can be established that is comprised of only delegated powers. The key to effective compromise is when the parties are both giving up a certain measure of their jurisdiction to the other. As was previously mentioned as regards the lands that were reserved for the Nisga'a upon the conclusion of the Nisga'a Treaty[357], the aboriginal peoples are conceding quite a bit of their previously held power. As opposed to an unlimited access to lands and resources and the right to decide their own affairs as they see fit, Aboriginal groups were, in the past, relegated to a position of almost total dependency upon the state for even basic needs. Yet, the provinces of Canada will want to monitor the manner in which their power is affected by the power of aboriginal governments. This is why compromise is important in order to correctly institute the right to self-government.

Lastly, the principled framework cannot be general in character. In other words, it cannot be too similar to the *Federal Policy Guide*'s general policies nor too precise as the sweeping solutions of the *Report of the Royal Commission on Aboriginal Peoples*. Instead of the broad and imprecise details of the first, of the precise and hurried details of the second, the principled framework that we envisage would serve to address the main and principle preoccupations that concern the inherent right to self-government such as: the scope and breadth of the right to self-government, the division of powers, the constitutional and legislative entrenchment of the right to self-government, the uniform application of the principles to aboriginal groups across the nation, the need for judicial recourse and an institutional watch-dog in order to

[357] The Nisga'a were allocated approximately only 8% of their traditional lands. Yet, this allocation was still much debated.

properly monitor the implementation of the right, the existence of leeway for non-adherence to certain provisions of a specific province and, finally, the not too-general character of the principled framework must all be taken into account in order to correctly implement, and, most importantly, *protect*, the inherent right to self-government of aboriginal peoples.

3.2.4.4. Recent Developments: The Proposed *Helsinki Declaration on Regional Self-Government*

Despite the fact that the *European Charter* is quite extensive in the fact that it regroups many principles, the result of much compromise for 44 nation-states, there are still many efforts being made to expand the right of regions to self-government and, specifically, the extent of their powers. In fact, much more can be obtained for the regions seeking to become autonomous. It is for this reason that the European ministers responsible for local and regional government have begun a new process in their quest for the establishment of a *Declaration on Regional Self-government*[358] that would be more comprehensive than the European Charter. On the 27 and the 28th of June 2002, the European Ministers responsible for local and regional government met in Helsinki, Finland to discuss the issues surrounding the concept of local self-government. The ministers saw fit to construct a new regrouping of principles, this time more extensive in their breadth. Notice however, that the new principles would be in relation to the regions, areas geographically more extensive than localities and thus more important.

The core concepts and common principles of regional self-government are many[359] and are ruled by the primary declaration that the authority of these regional governments is territorial. The core principles of the future Declaration would "apply to all states wishing to establish or reform a democratic regional tier of

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[358] Congress of Local and Regional Authorities of Europe, 3rd Sess. (2-4 July 1996), *Draft Resolution on the European Charter of Regional Self-Government*, CPR (3) 3.

[359] Conference of European Ministers responsible for local and regional government, *Core Concepts and common principles of regional self-government*, 13th session, Helsinki, 27-28th June 2002, online: <http://www.intermin.fi/ec2002> (date accessed: September 21 2002).

government"[360]. In the section of the core concepts and principles, the paper establishes that regional government would be in fact broader than local government but still submitted to the authority of the state.[361] Part 1 of the section detailing regional competences set out the many rules that would regulate the jurisdiction of the regions. These provisions entail a sizeable degree of discretion on the part of the regional governments; speak of a right to govern matters that fall within their interests as well as the occurrence of delegated powers. Part 2 of the common principles provides for associations between regional authorities, Part 3 for the involvement of the regional authorities in the State decision-making process and Part 4 for the supervision of regional authorities by State authorities. Part 5 affords protection to the regional self-government in the form of judicial recourse "in order to secure the free exercise of their powers and respect for the principles of regional self-government enshrined in domestic law"[362]. There are also protections of the right to association (common principle 6), the right to have external relations which means to have representatives in the activities of European Institutions (common principle 7) and the internal organisation of the regional authority (common principle 8). Finally, the new Declaration would also entail the particularities of the regional bodies (elections, assembly, conditions of office) (common principle 9), the regional administration (common principle 10), financial resources (common principle 11) and financial equalization and transfers (common principle 12).

In the foreword to the principles, it is explained that the elaborated provisions are not meant to be one-size-fits-all for all aspiring regional authorities. Instead, the provisions mirror the general rule as it should be accepted, not the innumerable exceptions that are obvious now or will certainly surface in the future. Although a Declaration has not yet been accepted, it could become another important reference point for the plight of aboriginal peoples in Canada to obtain an effective implementation and protection of their right to self-government.

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[360] *Ibid.* at 5.
[361] *Ibid.* at 6.
[362] *Ibid.* at 7.

3.3. The Main Principles: Conclusion

In short, many of the principles to be included within a principled framework, would need to be delimited after intense consultations with all of the parties involved within the short blueprint described in sections 3.1.1. and 3.1.2.. As we have seen in the section detailing with the creation and implementation of the *European Charter of Local Self-Government*, a European charter that now establishes local and regional government, many other principles must be taken into account besides those that directly affect aboriginal rights. Basic principles of democracy must also be included.

To summarize, it is my opinion that a principled framework, which would seek to effectively establish the right to self-government, must include principles treating all of the following issues:

1. The affirmation of the basic principles of democracy that would assure equality for Aboriginals and non-Aboriginals alike.

2. The scope and breadth of the right to self-government in that it would affirm that the right to aboriginal self-government is protected constitutionally. The rules would also generally delimit the scope of the right within the Canadian legal and political context as to its jurisdiction so as to create a certain measure of uniformity for aboriginal groups irrespective of the particular group's power and coherence.

3. Treaty rights and treaty processes should be defined and elaborated, especially as to the treaties that have been recognized for specific aboriginal groups. As well, this section would include rules as to the limitation and extinction of treaty rights in detail, including the treaty by which is affirmed the principled framework. This would seek to prevent unnecessary infringement by the federal and provincial governments upon the jurisdictions of aboriginal groups.

4. The allocation of lands and resources to all aboriginals seeking self-government. In order to effectively implement self-government, different aboriginal groups would need their own land. As well, the rules determining aboriginal title and its infringement would also be included and established within the principle framework, ensuring that aboriginal groups would have protected rights to land.

5. The full extent of the jurisdictions to be exercised by Aboriginal governments and the division of powers as they exist in the *Constitution Act, 1867* should be determined within the principled framework in order to discourage provinces

and other parties to challenge the constitutionality of the agreements with aboriginal groups and other undue interference. Also included in this would be the agreements of co-operation for over-lapping jurisdictions.

6. Fiscal arrangements between the governments and aboriginal groups as to the financing of certain aspects of the self-government agreements, as well as the specific obligations of the orders of government. As we saw in the James Bay Phase I Agreement, the federal government was challenged several times on its financing arrangements regarding, for example, the government claiming no responsibility.

7. Judicial recourse for the aboriginal groups in the case of a breach of obligations of the either parties. As we have seen, modern agreements have favoured alternate dispute mechanisms, yet, if aboriginals are to exercise powers of self-government, they should also be able to utilize the courts as would the provincial and federal governments as to their rights and jurisdiction.

8. The creation of an institutional 'watch-dog' to oversee the treaty implementation and the respect of the obligations herein delimited should be duly created, as a body comprised of aboriginal representatives from across the country.

9. The declaration as to the direct participation of both orders of government, both the provincial and the federal, in the negotiation process for the right to self-government.

10. The possible extinguishment of aboriginal rights in general should be included in the framework including the methods by which this could occur as well as an enumeration as to the reasons that extinguishment could take place. This would assure that the rights of aboriginals are protected and controlled by themselves and not simply the federal and provincial orders of government.

11. Measures of co-operation between the different aboriginal governments in the different provinces and territories would also need to be included and facilitated.

12. The fiduciary obligations of the governments as to its definition and continuation as regards aboriginal peoples after the conclusion of self-government agreements. This would need to be specified as to protect aboriginal peoples against the breach of the governments' obligations towards the aboriginal groups.

13. Norms of international human rights law that consecrate the right to self-determination and self-government. This would assure Canada's continuing involvement in human rights and indigenous peoples' rights in both the domestic and international spheres.

Besides the principles that should be developed from the existing aboriginal rights in Canada and the regards given to the pre-existing political, social, cultural and legal situation that exists within the state, principles such as those elaborated by the Council of Europe to implement the self-government of localities and regions, can and should, also be included. The complex nature of all of the above issues, and the fact that they have not been all addressed in the agreements being negotiated giving the right to self-government for aboriginal peoples across Canada, demonstrates the need for the elaboration of a principled framework that would effectively implement and protect the aboriginals' right to self-government.

IV. CONCLUSION

Although some indigenous peoples of the world have achieved, to a certain extent, recognition of their basic rights both at the international and domestic levels, much remains to be accomplished. Indigenous peoples of the world continue to live in severely disadvantageous positions that are markedly distinct from the positions of the dominant others with which they co-exist, the racism of the past still perpetuating continued inequality between state groups as regards landholdings, access to resources and their participation in political, social and cultural institutions.[363] This state of affairs for indigenous peoples is not exclusive to other states as it is prevalent in almost every country including Canada. The situations of certain aboriginal groups living within the Canadian borders are, simply, dire.

It is undeniable that the achievement of autonomy and equal access to the economic and political institutions, through the effective implementation of the right to self-government, could help to ameliorate the aboriginal groups' standing in society. To a certain point, Canada has aimed to accommodate such a process, however, the efficacy of the process is questionable. The aim of this thesis is then to clearly demonstrate the pressing need for a principled framework by which to implement the right of aboriginal peoples to self-government within the Canadian legal and political context. The principles within this framework would structure the right to self-governance within the existing doctrine of aboriginal rights and all other elements by which it could be affected, such as the federal division of powers.

The response of Canada's legislature and judiciary, when faced with aboriginal peoples' many demands for the affirmation of their rights as First Nations, including the right to self-government, has been quite swift. This has shown the country's lead role as regards the rights of the indigenous peoples living within its borders. Although other countries have chosen to remain silent faced with the demands of aboriginal peoples living within their borders, Canada has chosen to act and work in concert with

[363] S. J. Anaya, *Supra* note 23, at 3.

native groups to determine and implement those rights. As more and more rights are being recognized, especially rights to hunt, fish as well as the right to access natural resources, it was part of a natural progression that indigenous peoples chose to claim their inherent right to self-government, especially after the repatriation of the constitution in 1982, in which aboriginal rights, both treaty and existing, were recognized in section 35(1).

In Chapter I, the importance of the right to self-government is demonstrated through its conceptualization within the basic human right of self-determination, a right that has been accepted and upheld by many states through the conclusion of several international instruments. Although most states have not been particularly reticent to ratify international instruments in which the specific right to self-determination was included, a marked hesitancy on behalf of the states arises, especially in situations where the right is brought up in the context of the rights of aboriginal peoples. This is because of the attribution of the notion of 'independence' to self-determination and the state's subsequent perception that this independence could include possible secession for the indigenous peoples within its borders. The protection of their state's territorial integrity and political unity has kept countries from recognizing aboriginal peoples as 'peoples' within the definition of the right to self-determination. Canada, through a series of cases, and the inclusion of section 35(1) of the *Constitution Act, 1982*, came to affirm many aboriginal rights; aboriginal rights to land, as well as myriad treaty rights. Within this affirmation of these many rights, the hope for the recognition of the aboriginal right to self-government arose bringing with it the question as to how the many sources of aboriginal rights could be reconciled with the recognition of such an important right. The breadth of the influence of the human right to self-determination in the case of the right to self-governance is, however, not certain. What is certain, however, is that aboriginal peoples hold many rights that are all connected in specific ways to the right to self-governance, and that these rights, as well as the right to self-governance, may be limited in the future by the courts.

The right to self-government of aboriginal peoples and the evolution of its recognition in Canada as a right protected under section 35(1) of the *Constitution Act, 1982* is discussed in Chapter II. Although many attempts have been made on behalf of the Canadian legislature and judiciary to either delimit, define, protect and implement this right, the use of government-commissioned studies, accords, policy guides and court cases have not been fruitful nor effective as the notion of self-government in the context of Canada's legislative and judicial sphere is still quite indeterminate. Many attempts have simply not addressed the many issues at stake within a discussion of the aboriginal right to self-governance. Although the aforementioned attempts are all useful, especially the Federal Policy Guide, to some extent in the establishing of an effective negotiation process, an investigation of these sources and two modern treaties which have been concluded in their wake shows a definite need for the establishment of preliminary principles that would effectively implement the right to self-government. The recent agreements, which are investigated in this paper, clearly expose some deep-rooted problems within the whole process of negotiation for the right to self-governance and the piece-meal framework in which it is couched. This process is being determined in such a way that it leaves the aboriginal groups' right to self-government at risk, as well as any collateral rights.

In Chapter III, litigation and negotiation are processes that are both shown to be somewhat ineffective in the determination of the aboriginal right to self-government, but only if their roles are exercised *previously to* the establishment of a principled framework to correctly institute the right. Although current negotiations do reflect, to some extent, the wills of the parties to the process, it is argued that the process cannot be effective until basic considerations are addressed. To this end, the example of the Council of Europe's *European Charter of Local Self-Government* is used to demonstrate a specific principled approach to autonomy that, importantly, firstly establishes the basic conditions of the decentralization process before any local demands for autonomy can be made. Although the Canadian attempts can be said to have delimited some basic principles surrounding the right to aboriginal self-government in Canada, the list of all of the elements, listed at section 3.6 of Chapter

III, that should be firstly discussed before the negotiation process continues, clearly demonstrate the need for the structuring of a principle framework including these standards in order for the aboriginal right to self-government to be effectively protected and implemented in Canada.

Although such a process will be lengthy, it is the only manner by which the right to self-government of aboriginals can be effectively protected. Canada and the provinces' intentions, as they negotiate modern agreements, cannot be simply dismissed as being exploitative; yet, they are not processes that correctly manage the important right to self-government of aboriginals. Historically, the government has had dubious past dealings with the aboriginals that have resulted in systematic inequalities between Aboriginal and non-Aboriginals in Canada. Unless a principled framework is elaborated by which to establish and implement the right of self-government for all indigenous groups across the country in an equal and effective manner, inequalities will persist.

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