Take Your Time And Do It Right: *Delgamuukw*, Self-Government Rights And The Pragmatics Of Advocacy

KERRY WILKINS*

I. DELGAMUUKW AND INHERENT SELF-GOVERNMENT RIGHTS

THE FAILURE OF THE CHARLOTTETOWN PROPOSALS[1] in 1992 brought to an end a decade of sustained political effort to make specific provision in the *Constitution* for Aboriginal rights of self-government[2] and likely postponed indefinitely any prospect of protecting such rights through explicit constitutional

---

* Of the Ontario Bar. This paper was first presented, in slightly different form, at *The Delgamuukw Case: Aboriginal Land Claims and Canada's Regions*, a Fraser Institute Conference in Ottawa, Ontario, on 27 May 1999. A still earlier version appeared as chapter one of my LL.M. thesis [*Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government* (Toronto: University of Toronto Press, 1998)]. Special thanks to Patrick Macklem, Kent McNeil, David Beatty, Eileen Hipfner, Greg Levine, Jonathan Rudin, Lorne Sossin and Deborah Wilkins for their encouragement, and for comments on earlier versions that materially improved the text. Any missteps that remain are despite their best efforts, not because of them.

1 See Canada, *Consensus Report on the Constitution: Charlottetown* (Final Text, 28 August 1992) (Ottawa: Minister of Supply and Services, 1992) [hereinafter *Charlottetown Accord*] and *Draft Legal Text* (9 October 1992).

2 In 1983, a special committee of the House of Commons had recommended federal legislative recognition, and constitutional entrenchment, of a form of Aboriginal self-government: see Canada, H.C., Special Committee on Indian Self-Government, *Indian Self Government in Canada* (Ottawa: Minister of Supply and Services, 20 October 1983) at 43–46. Sections 37–37.1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*], repealed in 1983 and 1987, respectively, by s. 54 and s. 54.1, had made provision for four constitutional conferences to be devoted specifically to Aboriginal issues. Self-government dominated agendas at those conferences. For commentary see *e.g.*, B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research and Public Policy, 1986) [hereinafter Schwartz, *Second Thoughts*]; D. Sanders, "The Constitution, the Provinces, and Aboriginal Peoples" in J.A. Long & M. Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 151 at 165–169; K.L. Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox" (1991) 34 Can. Pub. Admin. 272.

amendment.[3] It did not, however, diminish Aboriginal peoples' own conviction that they have, and always have had, inherent rights to self-government.[4] In the years since then, attention has turned with new intensity to the task of determining whether, as a matter of law, Canada's *Constitution* might *already* protect inherent self-government rights: to whether, that is, such rights might qualify as "existing Aboriginal rights" recognised and affirmed by section 35(1) of the *Constitution Act, 1982*.[5]

The notion that the *Constitution* does now protect the exercise, as Canadian law, of at least some such rights has, of course, both proponents and opponents. Its proponents include the Royal Commission on Aboriginal Peoples (R.C.A.P.),[6] a substantial majority of the legal scholars—Aboriginal and non-Aboriginal—who have written on the issue,[7] and, most recently, the Govern-

---

3 See *e.g.*, J. Simpson, "The Grand Talk of Constitutional Reform for Aboriginals Is a Mirage" *[Toronto] Globe & Mail* (15 August 1995) A16.

4 See *e.g.*, Assembly of First Nations, First Nations Circle on the Constitution, *To the Source* (1992) [hereinafter *To the Source*] at 13–23; Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Ottawa: Minister of Supply and Services, 1996) [hereinafter 2 R.C.A.P. Final Report] at 139.

5 See *e.g.*, K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1994) 19 Queen's L.J. 95 [hereinafter McNeil, *Constitutional Space*].

6 See 2 R.C.A.P. Final Report, *supra* note 4 at 166–169, 186–213.The Royal Commission had announced its support for the inherent right in at least two earlier reports: *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996) [hereinafter R.C.A.P., *Bridging*] at 219–224, and *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa, Minister of Supply and Services, 1993) [hereinafter R.C.A.P., *Partners*] at 29–45.

7 See *e.g.*, S. Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985) 43 U. T. Fac. L. Rev. 72; D.M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U. T. Fac. L. Rev. 1; B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990); M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L. Rev. 498; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 [hereinafter Macklem, *Borders*]; P. Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in M.D. Levin, ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 [hereinafter Macklem, *Ethnonationalism*]; P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311 [hereinafter Macklem, *Distributing Sovereignty*]; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 101; B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 [hereinafter Slattery, *Question of Trust*]; B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101; H. Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Juris-*

ment of Canada which has acknowledged since 1995,as a matter of policy, that the *Constitution* of Canada already protects the inherent right of self-government.[8] Academic journals and R.C.A.P.'s reports and studies are replete

---

diction Act Cases" (1992) 21 Man. L.J. 343; D. Greschner, "Aboriginal Women, the Constitution and Criminal Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 338; A. Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163; M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*" (1992) 17 Queen's L.J. 350 [hereinafter Walters, *Comment on* Delgamuukw]; M.D. Walters, "*Mohegan Indians* v. *Connecticut* (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 [hereinafter Walters, *Mohegan Indians*]; M.D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill L.J. 711; J. Borrows, "Constitutional Law from a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; McNeil, *Constitutional Space*, *supra* note 5; K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. Comp. & Int'l. L. 253 [hereinafter McNeil, *Aboriginal Rights*]; D. Opekokew, "The Inherent Right of Self-Government As an Aboriginal and Treaty Right" in *The Inherent Right of Aboriginal Self-Government*, papers presented to the Canadian Bar Association, Continuing Legal Education Program, Annual Meeting, 1994, vol. 2 [hereinafter C.B.A., *The Inherent Right*]; Mei Lin Ng, *Convenient Illusions: A Consideration of Sovereignty and the Aboriginal Right of Self-Government* (LL.M., Osgoode Hall Law School, York University, 1994) [unpublished]; P.W. Hutchins, C. Hilling & D. Schulze, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C. L. Rev. 251 [hereinafter *Ghost in the Machine*]; P.W. Hogg, *Constitutional Law of Canada*, 4th ed., (Toronto: Carswell, 1997) at 573, 589.

For commentaries that express doubt—some regretfully, some not—about the sufficiency of the legal basis in the existing constitution for meaningful rights of Aboriginal self-government, see Schwartz, *Second Thoughts*, *supra* note 2 at 385–390; W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; H.S. LaForme, "Indian Sovereignty: What Does It Mean?" (1991) 11 Can. J. Native Studies 253; S. Lussier, "Réflexions sur 'Partenaires au Sein de la Confédération' et le Droit 'Inherent' à l'Autonomie Gouvernementale" in C.B.A., *The Inherent Right*, vol. 1; K.J. Tyler, "Another Opinion: A Critique of the Paper Presented by the Royal Commission on Aboriginal Peoples Entitled: *Partners in Confederation*" in C.B.A., *The Inherent Right*, vol. 1; B. Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw* v. *British Columbia*" (1994) 28 U.B.C. L. Rev. 49; B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011 [hereinafter Morse, *Permafrost Rights*]. See also, in the popular press, W. Johnson, "Modern Myths: Elements of Self-government Haven't Been Perpetuated" *The [Montreal] Gazette* (7 July 1992) B3.

8 See Canada, Department of Indian Affairs and Northern Development, *Federal Policy Guide: Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 3–4 [hereinafter *Federal Policy Guide*].

with legal and moral arguments that promote and seek to facilitate judicial accreditation of such rights. Opposition to the notion—both Aboriginal and non-Aboriginal—has appeared most often in the popular media, in considered critiques from outside the legal academy,[9] and in the decisions of Canadian and commonwealth courts. Rarely, if ever, have courts upheld Aboriginal peoples' claims to have free-standing, enforceable self-government rights.[10]

Between 1990 and 1995, Ontario government policy also recognized that First Nations have inherent rights of self-government "under the Constitution of Canada." See B. Rae, "The Road to Self-Determination" in F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1991) [hereinafter *Aboriginal Self-Determination*] at 152, and *Statement of Political Relationship* between Ontario and the First Nations in Ontario, 6 September 1991.

9 See *infra* notes 33–66 and the accompanying text. According to a 1995 Insight Canada research survey commissioned by the federal Department of Indian Affairs, 53 per cent of Canadians believed that Aboriginal peoples were not ready to assume self-government powers, and only 46 per cent believed that Aboriginal peoples should be given more autonomy. By comparison, about 70 per cent of Canadians polled in 1993 had supported ratifying the Charlottetown proposals that would have entrenched the inherent self-government rights. See J. Aubry, "Canadians Wary of Native Autonomy" *Calgary Herald* (1 June 1995) A7.

By no means all the newspaper coverage of self-government issues has been negative. For examples of generally supportive reports or analyses in the public media, see R. Teichroeb, "Democracy on the Reserve: Reserve Proves Model of Democracy" *Winnipeg Free Press* (10 April 1992) B21 [hereinafter Teichroeb, *Model of Democracy*]; P. Ferris, "Native Self-government: Change That Can Help Everyone" *Winnipeg Free Press* (31 May 1992) A7; R. Sheppard, "Maybe It's Racist, But It's a Good Thing" *[Toronto] Globe & Mail* (2 June 1992) A17; S. Hume, "Time to Pop the Self-government Bogeyman Bubble" *Vancouver Sun* (7 October 1992) A15; Editorial, "Self-government and the Charter" *[Toronto] Globe & Mail* (15 October 1992) A30; R. Teichroeb, "Native Self-rule: Is It a Dead End? Victims Are Trying to Reclaim Control" *Winnipeg Free Press* (14 July 1996) B2 [hereinafter Teichroeb, *Victims Are Trying*].

10 For Canadian and commonwealth cases rejecting assertions of free-standing rights or powers of Aboriginal governance, see *e.g.*, *Doe d. Sheldon* v. *Ramsay* (1852), 9 U.C.Q.B. 105, Burns J.; *R.* v. *Beboning* (1908), 17 O.L.R. 23 (C.A.); *Sero* v. *Gault* (1921), 50 O.L.R. 27 (S.C.); *Logan* v. *Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.); *Isaac* v. *Davey* (1974), 5 O.R. (2d) 610 (Ont. C.A.), aff'd. on other grounds (*sub nom. Davey* v. *Isaac*), [1977] 2 S.C.R. 897; *Coe* v. *Commonwealth of Australia (No. 1)* (1979), 24 A.L.R. 118 (H.C.A.); *Re Stacey and Montour and The Queen* (1981), 63 C.C.C. (2d) 61 (Que. C.A.); *A.G. Ontario* v. *Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.) at 407, aff'd. on other grounds (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), aff'd. without reference to the point [1991] 2 S.C.R. 570; *Delgamuukw* v. *The Queen in right of B.C.* (1991), 79 D.L.R. (4th) 185 (B.C. S.C.) [hereinafter *Delgamuukw* (S.C.)], aff'd. on this point [1993] 5 W.W.R. 97 (B.C. C.A.) [hereinafter *Delgamuukw* (C.A.)], rev'd. on other grounds [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]; *Coe* v. *Commonwealth of Australia (No. 2)* (1993), 118 A.L.R. 193 (H.C.A.); *Walker* v. *New South Wales* (1994), 182 C.L.R. 45 (H.C.A.); *R.* v. *Pamajewon*, [1993] 3 C.N.L.R. 209 (Ont. Prov. D.), aff'd. on other grounds (1994), 95 C.C.C. (3d) 97 (Ont. C.A.) [hereinafter *Pamajewon* (C.A.)], aff'd. [1996] 2 S.C.R. 821 [hereinaf-

Several things about these patterns are interesting and surprising. For one thing, it is unusual to see so much agreement among interested legal academics about an issue that is, by any standard, so controversial. It is rare, as well, to see both the federal government and a royal commission—two of whose members were current or former judges—accepting or asserting as law a position that courts, when asked in actual cases, have continued to resist. It is striking that the judicial and the academic opinion about the inherent right have diverged so conspicuously, and that these streams of opinion have seemed to give one another so little weight. And it is remarkable how little communication and interaction there seems to have been between those who support Aboriginal peoples' inherent self-government rights and those who are apprehensive about them.

Small wonder, then, that everyone concerned with self-government issues anticipated so eagerly the Supreme Court's decision in *Delgamuukw*.[11] *Delgamuukw* was not, of course, the first case in which the Court had occasion to shape the law on self-government. In at least three earlier decisions, the Court has given preliminary, if indirect and uncoordinated, indications regarding the issue.[12] It was, however, the first Supreme Court case in which a claim to a con-

---

ter *Pamajewon*]; *R.* v. *Williams*, [1995] 2 C.N.L.R. 229 (B.C. C.A.); *R* v. *Chief*, [1997] 2 C.N.L.R. 212 (Sask. Q.B.); *R.* v. *Kahpeechoose*, [1997] 4 C.N.L.R. 215 (Sask. Prov. Ct.); *R.* v. *Ignace* (1998), 156 D.L.R. (4th) 713 (B.C. C.A.); *R.* v. *David* (21 February 2000)(Ont. S.C.)[unreported]; and, *R.* v. *Janvier* (27 March 2000)(Alta. Q.B.)[unreported]. For Canadian and commonwealth judgments that suggest at least some basis for argument in support of existing Aboriginal rights of self-government, see *Connolly* v. *Woolrich* (1867), 17 R.J.R.Q. 75 (S.C.) at 83–84, 138, 1 C.N.L.C. 70 at 78–79, 132, aff'd. *sub. nom. Johnstone* v. *Connolly* (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Q.B.); *Arani* v. *Public Trustee of New Zealand*, [1920] A.C. 198 (P.C.); *Delgamuukw* (C.A.), *ibid.*, Lambert J.A. (dissenting in part), Hutcheon J.A. (dissenting in part); *Casimel* v. *Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (C.A.); *R.* v. *Bear Claw Casino Ltd.*, [1994] 4 C.N.L.R. 81 (Sask. Prov. Ct.); and, *Mushkegowuk Council* v. *The Queen in right of Ontario* (1999), 178 D.L.R. (4th) 283 (Ont. C.A.), set aside without reference to the point [(2000), 184 D.L.R. (4th) 532(Ont. C.A.)]. *Pamajewon* (C.A.), *ibid.*, gives both sides some comfort.

For Supreme Court of Canada consideration of Aboriginal self-government, see *infra*, note 12.

11 *Ibid.*

12 In *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1103 [hereinafter *Sparrow*], the Court made it clear that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [Aboriginal] lands vested in the Crown." In *Matsqui Indian Band* v. *Canadian Pacific Ltd.*, [1995] 1 S.C.R. 3, it allowed its approach to a question of statutory procedure to be shaped in part by a federal policy supportive of Aboriginal self-government. In *Pamajewon*, *supra* note 10, a case whose facts, for this purpose, were about as unsympathetic as one could easily imagine, the Court showed considerable restraint in dismissing the suggestion that self-government rights protected from mainstream regulation a large-scale commercial gaming operation that a band council had organised on its reserve. See also, *Corbière* v. *The Queen in right of Canada*, [1999] 2 S.C.R. 203 at248–249, where the minority judgment, with the concurrence of the majority (*ibid.*

stitutional right of self-government, anchored in traditional practice and forms of social organisation and based on a thorough factual record, was at the heart of the business before the Court. The two strong dissents supporting self-government in the B.C. Court of Appeal had only increased the sense of anticipation.[13] Few believed the Supreme Court could decide the *Delgamuukw* appeal without indicating clearly whether the *Constitution* leaves room for Aboriginal rights of self-government.

We all know what happened. The Supreme Court, having decided already to send the case back to trial, declined not only to determine the claim of self-government on its merits, but even to offer substantive guidance for future litigation.[14] In one important sense, it decided nothing. And because the Court *decided* nothing about the law on self-government, it is tempting and natural to suppose that it *told* us nothing of interest about that law.

Part of the purpose here is to dispute that supposition. My personal view is that the Supreme Court's decision *not* to decide the fate of self-government rights in *Delgamuukw* was the best possible contribution to the self-government conversation that it could have made in the circumstances. I believe, as well, that it told us some very important things about the orientation of self-government law. By deferring the issue as it did, and in the manner it did, the Court defined and shifted the ground on which the destiny of the inherent right, considered as a feature of existing Canadian law, is to be determined.

To begin with, I think the Court made it clear that it is not eager to close the discussion, or the door, on inherent self-government rights. It would have been very easy for the Court to expunge such rights altogether from the universe of Canadian legal and constitutional discourse. All it had to do was express agreement with the courts below that any self-government rights that the Gitksan and Wet'suwet'en may ever have had were extinguished, at the latest, when British Columbia joined Confederation in 1871.[15] After more than ten years of litigation, that conclusion, well-supported by existing authority,[16] would have been the line of least resistance. Instead, the Supreme Court elected, for the time being, to keep the ball in play. For self-government law, that decision is extremely significant. It means that the Court is open to persuasion, in a

---

at 224), again gently deferred an argument based on self-government rights, this time in response to a claim that statutory residency requirements for band council elections violate the equality rights guaranteed in s. 15(1) of the *Canadian Charter of Rights and Freedoms* [Part I of the *Constitution Act*, 1982] [hereinafter *Charter* or *Charter of Rights*].

13 See *Delgamuukw* (C.A.), *supra* note 10 at 305, 348–353, 359–364 per Lambert J.A.; at 394–396 per Hutcheon J.A.

14 *Ibid.* at 1114–1115 per Lamer C.J.C.; at 1134 per La Forest J.

15 See *Delgamuukw* (S.C.), *supra* note 10 at 437–455, 473; *Delgammukw* (C.A.), *supra* note 10 at 148–153 per Macfarlane J.A.; at 222–226 per Wallace J.A.

16 See *Delgamuukw* (S.C.), *supra* note 10.

proper case, that such rights survive and that they qualify for constitutional protection as existing Aboriginal rights. It means, in other words, that the Court is prepared, in principle, to accept that inherent right claims may well have a credible basis in mainstream law.[17] It will, from now on, be more difficult for opponents of the inherent right to rely exclusively on blanket extinguishment arguments to dispatch such claims.

For someone of my persuasion, this is very good news. I am someone whose Canada leaves room for the constitutionally-protected rights of Aboriginal self-government. I believe, as well, that a responsible mainstream court could conclude today, on the basis of credible and attractive legal arguments, that many, if not all, traditional Aboriginal collectivities have self-government rights entitled to protection under Canada's current *Constitution*—even without the benefit of a constitutional amendment.[18] I find it encouraging, therefore, that the Supreme Court of Canada has indicated publicly its willingness to continue entertaining such arguments. So too, no doubt, do the lawyers, legal scholars, researchers and bureaucrats who have devoted themselves to the development of such arguments.

---

[17] The Court's forbearance in dealing with the appellants' self-government claims is not the only evidence in the decision of such openness. Elsewhere, *supra* note 10, the Court acknowledged that pre-existing systems of Aboriginal law and governance contribute in mainstream law to the proof and content of Aboriginal title [see *e.g.*, *ibid.* at 1082, 1099–1100, 1105 & 1106], and that the Constitution, by protecting Aboriginal title, protects at least some aspects of ongoing collective decision-making in the Aboriginal communities to which the interest in Aboriginal title lands belongs [see *ibid.* at 1082–1083]. For a similar observation in a somewhat different context, see D.W. Elliott, "*Delgamuukw*: Back to Court?" (1998) 26 Man. L.J. 97 at 125.

[18] Tempting though it is, I cannot pause here to substantiate this conclusion in any detail. Personally, I am satisfied: 1) that social organisation with some recognisable form of governance and laws is a precondition to the kinds of Aboriginal rights that the Supreme Court of Canada has already recognised [see *e.g.*, *Delgamuukw*, *ibid.* at 1099–1100, quoting *Hamlet of Baker Lake* v. *Minister of Indian Affairs & Northern Development*, [1980] 1 F.C. 518 (T.D.) at 559; *Mabo* v. *Queensland (No. 2)* (1992), 175 C.L.R. 1 (H.C.A.) at 59–62 [hereinafter *Mabo*]; McNeil, *Aboriginal Rights*, *supra* note 7 at 285–289]; 2) that jurisdiction and governance arrangements were, as a matter of anthropological fact, characteristic generally of North American Aboriginal societies identifiable as such [see C. Bell & M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: U.B.C. Press, 1997) 38 at 64–71 [hereinafter *Aboriginal and Treaty Rights*]; 3) that colonial law provided for pre-existing indigenous legal arrangements to survive and continue to operate in British colonies, subject only to the power of duly authorised colonial legislatures to extinguish them [see *e.g.*, Walters, *Comment on* Delgamuukw, *supra* note 7; Walters, *Mohegan Indians*, *supra* note 7]; and, 4) that nothing that any duly authorised Imperial, colonial or Canadian legislature is known to have done exhibited a sufficiently clear and plain intention to extinguish Aboriginal communities' pre-existing rights and powers of self-government [see *e.g.*, 2 R.C.A.P. Final Report, *supra* note 4 at 206–213].

It would, however, be a mistake, in my view, for proponents of inherent self-government rights to assume that credible legal or moral arguments will suffice to convince the courts to take responsibility for including such rights within the scope of the *Constitution*'s protection. Attractive as I find the best such arguments on their legal merits, they are not, by any measure, so compelling legally that no responsible court could decide the question otherwise. Most judicial authority, as I have said, still opposes acknowledgement of existing self-government rights.[19] And there is, as some have already noted, a certain rhetorical awkwardness about arguing now—after five unsuccessful efforts in 15 years—to amend the *Constitution* to provide for self-government rightswhen, in fact, they have been there all along.[20]

In these circumstances, a worthy legal argument that equips courts to embrace inherent self-government rights is little more than an instrument available for their use. It almost certainly will not give courts reason enough to em-

---

19 See *supra* note 10 and accompanying text.

20 K. Tyler, not one of the inherent right's most ardent supporters, has framed the situation with characteristic flair:

> Were the Aboriginal governments secretly inducted into the Confederation partnership on the 17th of April, 1982? There is no evidence that any of the participants in the patriation of the Canadian constitution thought they were doing any such thing. Neither the Queen, nor the Prime Minister, nor any of the Provincial Premiers, nor any member of the Canadian or United Kingdom Parliaments made any mention of such a momentous event. Representatives of the First Nations themselves, far from greeting their long-awaited acceptance into the Canadian family, rushed to the English Courts in a desperate and unsuccessful attempt to block an initiative which there were convinced placed their Aboriginal and Treaty rights in mortal danger. Since 1982 we have had four First Minister's [sic] Conferences devoted exclusively to Aboriginal Constitutional Reform plus the Charlottetown process, in each of which the major priority for the Aboriginal participants was to have the "right of self-government" entrenched in the *Constitution*. Surely it would require some very startling new evidence, and some very convincing arguments, to persuade Canadians that all of these efforts were unnecessary, and all of the earnest concerns of the Aboriginal people were unwarranted, because the framers of the *Constitution Act, 1982* had unwittingly accomplished all that they desired:

Tyler, *supra* note 7 at 25. See also B. Schwartz, "The General Sense of Things: *Delgamuukw* and the Courts" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 161 at 174 [hereinafter Schwartz, *General Sense*]:

> The 1982 *Constitution* recognizes the "existing" rights of Aboriginal peoples. Can the courts, in good intellectual conscience, suddenly "discover" that these rights all along contained rights for self-government that would require a massive set of negotiations, leading to a certain kind of outcome?

brace such rights, unless, on other grounds, they already find them attractive and appropriate for mainstream accreditation. The Supreme Court's decision in *Delgamuukw* to defer the self-government issue is a signal that it is open, for now, to persuasion on this ground, as well. It is, however, also a sign—to me, an unmistakable one—that the Court is going to *need* such persuasion: that it is deeply troubled by the magnitude, and the consequences, of the decision it is being asked to make. Consider the following passage from the majority judgment:

> 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 submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach.[21]

This observation came at the culmination of legal proceedings whose trial record included—as the Supreme Court itself has acknowledged—318 days of evidence, 56 days of legal argument, roughly 35,000 pages of transcript evidence and over 50,000 pages of exhibit evidence.[22] It is hard to imagine a clearer sign that the Court considers something crucial to have been missing from the discussion, and that it feels deeply unprepared, by circumstance and by the litigants that have come before it, for the huge—and, once undertaken, inescapable—task of integrating such rights into the mainstream constitutional order.

I must say I find the Court's reticence here well-founded. The fact is that we do not yet 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. This being so, it is hardly surprising that there has been some public apprehension. In these circumstances, and in the absence of clearer intuitions about these basic legal practicalities, it is hardly grounds for complaint that the courts are wary of being the ones to accord such rights full institutional credibility. It is reasonable for them first to insist on substantive assistance with these issues.

For those whose project it is to open the *Constitution* to inherent self-government rights, the most compelling current task is, almost certainly, to address, constructively and candidly, that legitimate sense of judicial unreadiness. The mainstream courts' receptiveness to the merits of the legal and moral arguments that could anchor such rights seems sure to depend, in significant part, on the success or failure of this endeavour.

---

21 *Delgamuukw*, *supra* note 10 at 1115.

22 See *Delgamuukw*, *ibid.* at 1070; *Delgamuukw* (S.C.), *supra* note 10 at 199.

Any realistic effort to carry out this task, however, must begin from an appreciation of the nature and the dimensions of the public apprehension that, for better or worse, already exists about inherent self-government rights. In practical terms, that apprehension represents and expresses the case that advocates of self-government rights have to meet. What makes this enterprise still more challenging is that it must also take care to proceed in a way that continues to honour the integrity of the collective Aboriginal experience that inherent self-government rights exist,if they make any difference at all, to preserve and to promote.

I want in the rest of this article to explore what such an enterprise entails. The first step is to grasp more concretely why inherent rights of self-government matter, and why they give pause.

II. WHY THE INHERENT RIGHT MATTERS

FOR ABORIGINAL COMMUNITIES, THEIR MEMBERS AND SUPPORTERS, acknowledgement that they have enforceable rights to govern themselves—to resume responsibility for their own collective destinies[23]—may well now be the minimum price the mainstream legal system must pay to earn a from them modicum of respect.[24] For centuries now, such communities have done everything humanly possible to maintain the integrity and vitality of their own traditions, languages, ceremonies and other authoritative internal arrangements, and to continue fulfilling their ancestral obligations to one another and to the rest of creation,[25] despite catastrophic changes to their physical and economic circumstances, inexorable pressures from non-Aboriginal settlement and often con-

---

23 See 2 R.C.A.P. Final Report, *supra* note 4 at 139–141.

24 As a non-Aboriginal person, mindful of the differences of view among Aboriginal peoples and communities themselves, I say this with some trepidation—please discount and cross-check this observation accordingly. But see first M.E. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989–90) 6 Can. Hum. Rts. Y.B. 3 at 25–26, 33–34, 45 [hereinafter Turpel, *Interpretive Monopolies*]; P.A. Monture-Okanee & M. E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 239 at 262–263 [hereinafter *Rethinking Justice*]; Asch & Macklem, *supra* note 7 at 517, and the other sources cited in this text paragraph. Compare A.D. Doerr, "Building New Orders of Government—The Future of Aboriginal Self-Government" (1997) 40 Can. Pub. Admin. 274 at 275.

25 For accounts of such efforts in two unrelated Aboriginal communities, see Johnston, *supra* note 7 (Iroquois);and J.J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 (Anishnabek). Compare J. (Sakej) Youngblood Henderson, "First Nation Legal Inheritances in Canada: The Mi'kmaq Model" (1996) 23 Man. L.J. 1 [hereinafter Henderson, *Legal Inheritances*]; J.E. Chamberlin, "Culture and Anarchy in Indian Country" in *Aboriginal and Treaty Rights*, *supra* note 18 at 3.

certed efforts by settler peoples to undermine and marginalise their most sensitive and deeply grounded relationships.[26] To qualify as a meaningful departure from this history of interference and exploitation, mainstream acknowledgement of such rights must begin from a respect for both the fact and the legitimacy of Aboriginal difference:[27] must dedicate sufficient "constitutional space for Aboriginal peoples to be Aboriginal," to borrow Donna Greschner's wonderful phrase.[28] This entails respecting and protecting communities' power, and indeed duty, to defend such individuals, lands and resources as may remain to them against mainstream "laws and policies which are demonstrably threatening to their culture,"[29] and generally to address their own needs and imperatives in ways that they themselves consider effective and appropriate, even when those aims and ways differ substantially from what we in the mainstream culture might have done or preferred.[30] This, in turn, necessarily involves "the signifi-

---

26 There are, of course, too many useful accounts of colonial oppression of Aboriginal peoples in Canada to list in a single footnote. For a representative sampling of brief accounts, see J.R. Miller, "The Historical Context of the Drive for Self-Government" in R. Gosse, J. Youngblood Henderson & R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) 41 at 42 [hereinafter *Poundmaker*]; M.E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174 at 181–182 [hereinafter Turpel, *Patriarchy*]; M.E. Turpel-Lafond, "Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance," research study prepared for the Royal Commission on Aboriginal Peoples, 1995 at 9–15 [hereinafter Turpel-Lafond, *Enhancing Integrity*]; J. Youngblood Henderson, "All Is Never Said" in *Poundmaker*, *ibid.* 423 esp. at 428, and the sources cited in these publications. See also S.L. Harring, *White Men's Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: Osgoode Society, University of Toronto Press, 1998).

27 Turpel, *Patriarchy*, *ibid.* at 185:

> To me, to be a First Nations person in Canada means to be free to exist politically and culturally (these are not separate concepts): to be free to understand our roles according to our own cultural and political systems and not according to a value system imposed upon us by the Indian Act for over 100 years, nor by role definition accepted in the Anglo-European culture.

See also Turpel, *Interpretive Monopolies*, *supra* note 24 at 33.

28 See Greschner, *supra* note 7 at 342.

29 LaForme, *supra* note 7 at 263. See also *Rethinking Justice*, *supra* note 24 at 263.

30 See LaForme, *ibid.* at 263–264:

> It is this capacity to deal with threats to cultural survival, in a manner that may be drastically different from that required by other elements of Canadian society, which is needed to ensure the survival of Aboriginal cultures.

Macklem, *Distributing Sovereignty*, *supra* note 7 at 1354:

> Indian government involves more than the conferral of special rights to engage in particular activities: It also involves rights to determine how, when,

cant letting go of Canadian government power over the lives of Aboriginal citizens,"[31] and accepting that self-governing Aboriginal communities are bound sometimes to make mistakes—even by their own reckoning—that it cannot be our business, uninvited, to correct.

Respect for the integrity of Aboriginal difference is, in my view, the first imperative that defines inherent right advocacy. It requires opposition to all unnecessary restrictions on fundamental Aboriginal values and on the governance arrangements integral to the enduring Aboriginal legal traditions. Below this threshold, any mainstream arrangement to preserve or acknowledge self-government rights ceases to offer them meaningful legal protection, and forfeits its authenticity.

III. PUBLIC APPREHENSIONS ABOUT SELF-GOVERNMENT

A. What The Apprehensions Are

For those in the non-indigenous mainstream, on the other hand, the prospect of giving enforceable legal effect to inherent self-government rights may be troubling for any of several complex and layered reasons. For some, especially those in positions of real power or legal authority, judicial confirmation now of inherent self-government rights would most probably register, apart from everything else, as a strong rebuke: a rebuke to decades—perhaps centuries—of careful, considered practice informed by accepted conceptions of permissible conduct and of the public interest. For if Aboriginal peoples today possess inherent self-government rights, it follows necessarily that they have always had such rights, at common law, in Anglo-Canadian jurisprudence,[32] and that a great deal that has happened to Aboriginal peoples and communities since the Crown asserted sovereignty in North America has been, by domestic Canadian standards, in breach of those rights. To be judged and found wanting, according to enforceable standards one has no choice but to accept, for having failed to respect legal

---

> where and by whom such activity can occur, and the possibility that such decisions will be made in ways that conflict with non-indigenous political values ... .

R.C.A.P., *Bridging*, *supra* note 6 at 277.

31 P. Monture-OKanee, "Thinking About Aboriginal Justice: Myths and Revolution" in *Poundmaker*, *supra* note 26, 222 at 230. See also Tyler, *supra* note 7 at 7–8.

32 This is so whether or not such rights, as a matter of history, had ever received "the legal recognition and approval of European colonizers:" *Delgamuukw*, *supra* note 10 at 1092–1093, quoting *Côté* v. *The Queen*, [1996] 3 S.C.R. 139 at 174 [hereinafter *Côté*].

rights that one's predecessors considered too insubstantial to bother extinguishing is, undoubtedly, not a welcome experience.

Other widely-shared apprehensions, which reinforce but do not depend upon such discomfiture,[33] concern the practical consequences of constitutional protection for self-government rights. Most such apprehensions fit within at least one of three general categories.

1. *Concerns About Capacity and Readiness*

Transitions from colonial to indigenous forms of governance require patience and particular care, some commentators suggest, especially given the impatience and the unrealistically high expectations that such transitions often prompt in community members themselves. Even at the best of times, there are real risks of failure and frustration—outcomes that can undermine communities' social vitality and the legitimacy, in the eyes of their members, of their self-government efforts.[34] These risks seem to some to be acute in many of Canada's Aboriginal communities, for two reasons. The first is the truly staggering scale of deprivation, despair, abuse and dysfunction that one too often finds in such communities, problems of a kind and scale beyond the contemplation of the collective coping mechanisms traditional to Aboriginal societies plague the communities.[35] The second is their fear that many such communities have too few members with sufficient leadership skills, technical expertise or practical experience to meet the collective's needs in these highly complex and difficult circumstances.[36] Indications that leaders in some Aboriginal communities have

---

33 See *e.g.*, R. Gosse, "Charting the Course for Aboriginal Justice Reform Through Aboriginal Self-Government" in *Poundmaker*, *supra* note 26, 1 at 16.

34 R. Gibbins & J.R. Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in A. Cairns & C. Williams, eds., *The Politics of Gender, Ethnicity and Language in Canada* (Toronto: University of Toronto Press, 1986) 171 at 189, 192, 220–221. See also M. Morrisseau, "Will Self-government Set Natives Against Each Other?" *The [Montreal] Gazette* (18 August 1992) B3: "And what will be left of the fragile unity that now exists [among Aboriginal peoples] when we have only ourselves to blame?"

35 See M.E. Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in *Poundmaker*, *supra* note 26, 206 at 209:

> Problems of alcohol and solvent abuse, family violence and sexual abuse, and youth crime—these are indications of a fundamental breakdown in the social order in Aboriginal communities of a magnitude never known before.

Monture-OKanee, *supra* note 31 at 227:

> We cannot look to the past to find the mechanisms to address concerns such as abuse, because many of the mechanisms did not exist. The mechanisms did not exist because they were not needed.

36 Gibbins & Ponting, *supra* note 34 at 191; D.C. Hawkes & A.M. Maslove, "Fiscal Arrangements for Aboriginal Self-Government" in D.C. Hawkes, ed., *Aboriginal Peoples and Gov-*

not used effectively even the very limited powers now available to them make many outsiders still more cautious about the prospect of their having more power.[37]

2. *Concerns About Vulnerable Individuals*

According to several commentators, individuals living in Aboriginal communities[38] are especially vulnerable to the power of their Aboriginal governments. This is not so much because those governments happen to be Aboriginal, but because such communities share a number of features each of which contributes independently to the risk of excessive centralisation of official power. In the first place, transitions from colonial to local rule are, on this view, themselves occasions and incentives for those in power at the time to consolidate their authority by trading on their prestige.[39] Second, when communities have no tradition of selecting their leaders regularly and democratically,[40] and their governments obtain the vast majority of their wealth through fiscal transfers from sources outside the community,[41] those governments have much less incentive to ac-

---

ernment Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1989) 93 at 123; J. Simpson, "Just What Is a 'Nation' and How Can It Work Like A Province?" *[Toronto] Globe & Mail* (27 February 1997) A18; B. Cooper & D. Bercuson, "An Abdication of Responsibility: Ottawa Must See Through the Job of Transferring Lands to Natives" *The [London] Free Press* (23 January 1999) F6. See also *To the Source*, *supra* note 4 at vi:

> While all the people spoke of the need for change, many also said, almost in the same breath, that they are not ready for it. They are afraid, and their fears need to be addressed.

37 See *e.g.*, G. Flood, "Native Woman, Elder Fear Self-government" *Winnipeg Free Press* (8 October 1992) B5, quoting a native elder in Manitoba: "Aboriginal leaders have failed in their efforts to improve conditions, and now expect to be trusted with more power"; T. Oleson, "Native Self-rule: Is It a Dead End? Know Sovereignty Before Building It" *Winnipeg Free Press* (14 July 1996) B2: "[Self-government] might receive more public sympathy ... if there could be a clearer perception that the bands could run well the business they already have authority over ... "; G. Gibson, "It's A Matter of Principles" *National Post* (30 October 1999) B7 [hereinafter Gibson, *Principles*].

38 Even, perhaps especially, the non-Aboriginal people, according to some accounts. See *e.g.*, Cooper & Bercuson, *supra* note 36.

39 See Gibbins & Ponting, *supra* note 34 at 190; Schwartz, *Second Thoughts*, *supra* note 2 at 396.

40 See W. Johnson, "Not All Are Leaping on Native Self-government Bandwagon" *The [Montreal] Gazette* (5 May 1992) B3 [hereinafter Johnson, *Bandwagon*]; W. Johnson, "Native Self-government: Let's Pay Attention" *The [Montreal] Gazette* (12 May 1992) B3 [hereinafter Johnson, *Let's Pay Attention*]; Editorial, "Band Councils Must Be Accountable" *The [Brantford] Expositor* (24 March 1999) A6 [hereinafter *Must Be Accountable*].

41 Hawkes & Maslove, *supra* note 36 at 113:

count to community members for their conduct or to make a point of addressing community members' needs or concerns, because they are effectively insulated from the consequences of residents' disapproval. Finally, individual rights and freedoms, generally speaking, are, in the view of these commentators, more vulnerable in small, homogeneous communities, because such arrangements encourage highly personal styles of community management and discourage both the diversity of overlapping minorities that tend to foster respect for such rights and the articulation of separate roles and powers within government that tend to be required to protect them.[42] Published reports of favouritism,[43] personal harassment,[44] misuses of funds,[45] unaccountable leadership[46] and other

---

> If a high proportion of total revenues are provided by an external authority, can the accountability link between the Aboriginal government and its citizens be as strong and effective as in situations in which the community itself is the major source of government revenues?

See also *ibid.* at 123; 2 R.C.A.P. Final Report, *supra* note 4 at 345–346; R. Simeon, "Sharing Power: How Can First Nations Government Work?" in *Aboriginal Self-Determination*, *supra* note 8, 99 at 105; Schwartz, *Second Thoughts*, *supra* note 2 at 396; W. Johnson, "What Would Indian Self-government Look Like? Big, Very Big" *The [Montreal] Gazette* (20 May 1992) B3 [hereinafter Johnson, *Big, Very Big*]; W. Johnson, "Why Native Leaders Don't Want Charter of Rights in Their Government" *The [Montreal] Gazette* (10 October 1992) B5 [hereinafter Johnson, *Don't Want Charter*]; T. Flanagan, "An Unworkable Vision of Self-Government" (March 1997) 18 Policy Options 19 at 20.

42 See generally Schwartz, *Second Thoughts*, *ibid.* at 394–396; B. Schwartz, "Bryan Schwartz Takes a Close Look at Aboriginal Self-government" *[Toronto] Globe & Mail* (4 August 1992) A12 [hereinafter Schwartz, *Close Look*]; Gibbins & Ponting, *supra* note 34 at 216–219; R. Gibbins, "Citizenship, Political, and Intergovernmental Problems with Indian Self-Government" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 369 at 374–376 [hereinafter Gibbins, *Problems*]; Johnson, *Bandwagon*, *supra* note 40 ; Johnson, *Big, Very Big*, *ibid.*; Flanagan, *ibid.* at 20–21; J. Cockerill & R. Gibbins, "Reluctant Citizens? First Nations in the Canadian Federal State" in J.R. Ponting, ed., *First Nations in Canada: Perspectives on Opportunity, Empowerment, and Self-Determination* (Toronto: McGraw-Hill Ryerson, 1997) 383 at 393–394; Gibson, *Principles*, *supra* note 37.

43 See *e.g.*, I. Yudal, "Chiefs Abuse Power, Funds, Group Charges" *Winnipeg Free Press* (21 February 1992) B23; R. Teichroeb, "Democracy on the Reserve: Limits Sought on Powers of Chiefs" *Winnipeg Free Press* (6 April 1992) B13 [hereinafter Teichroeb, *Limits*]; W. Dudley, "MP Sees Pitfalls in Self-rule" *Calgary Herald* (12 September 1994) B1; R. Platiel, "Native Councils Facing Challenges from Within" *[Toronto] Globe & Mail* (15 May 1996) A8; *Must Be Accountable*, *supra* note 40; N. Ayed, "Self-government a Mess, Native Coalition Testifies" *Toronto Star* (3 March 1999) A6; A. Duffy, "Create Watchdog to Curb Chiefs: Corruption Rife on Reserves Group Fears" *The [Ottawa] Citizen* (3 March 1999) A4.

44 See *e.g.*, H. Graham, "Natives 'Rebels' Meet in Bid to 'Get Self-government Stalled'" *Winnipeg Free Press* (29 March 1992) B14; P. Nagle, "Male Domination Heightens Fear of Self-rule" *Calgary Herald* (1 April 1992) B8; Teichroeb, *Limits*, *ibid.*; R. Teichroeb, "Democracy

alleged abuses of political authority by chiefs or other band officials in some communities[47] only lend credibility to these apprehensions.[48] For example, the Royal Commission on Aboriginal Peoples received more than 200 submissions expressing concerns about ethics and conflicts of interest in Aboriginal governments.[49] Such reports and experiences, one may suppose, contribute significantly to Aboriginal voters' own reluctance to support the explicit constitutional entrenchment of their inherent self-government rights pursuant to the *Charlottetown Accord*.

No issue better illustrates this kind of apprehension—among both Aboriginal and non-Aboriginal people—than the concern about the fate of Aboriginal women if today's band governments were constitutionally empowered. It is widely accepted that neither sexual nor domestic abuse nor any of the other

---

on the Reserve: Mother Who Reported Abuse Ostracized" *Winnipeg Free Press* (8 April 1992) B18 [hereinafter Teichroeb, *Mother Ostracized*]; R. Teichroeb, "Democracy on the Reserve: Family Pays Heavy Price for Reporting Sex Abuse" *Winnipeg Free Press* (8 April 1992) B18 [hereinafter Teichroeb, *Heavy Price*]; Flood, *supra* note 37; Platiel, *ibid.*; Cockerill & Gibbins, *supra* note 42 at 393–394; Ayed, *ibid.*

45 See *e.g.*, "Native Group Fears Dictatorial Ways" *Calgary Herald* (21 February 1992) A9; Yudal, *supra* note 43; Teichroeb, *Limits*, *supra* note 43; Platiel, *supra* note 43; *Must Be Accountable*, *supra* note 40; Ayed, *ibid.*; Duffy, *supra* note 43; R. Mofina, "Allegations of Native Fraud Soaring" *Vancouver Sun* (10 November 1999) A6.

46 See generally Turpel-Lafond, *Enhancing Integrity*, *supra* note 26 at 1–23.

47 Some communities, of course, have no such problems: see *e.g.*, Teichroeb, *Model of Democracy*, *supra* note 9. For a somewhat more favourable account of the internal accountability practices and attitudes among leaders of Aboriginal communities generally, see S. McInnes & P. Billingsley, "Canada's Indians: Norms of Responsible Government Under Federalism" (1992) 35 Can. Pub. Admin. 215.

48 See 2 R.C.A.P. Final Report, *supra* note 4 at 345: "There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent"; Turpel-Lafond, *Enhancing Integrity*, *supra* note 26 at 19:

> Without the existence of [internal conflict of interest guidelines], the trust and confidence in the integrity of a band council to act in the interest of all members is significantly lessened due to the inability to require individuals to account for their conduct.

See also Editorial, "Inherent But Unclear" *Winnipeg Free Press* (11 April 1992) A6; Johnson, *Big, Very Big*, *supra* note 41; P. O'Neil, "Self-rule for Natives Arouses Hopes, Doubts" *Vancouver Sun* (7 October 1992) A4 [hereinafter O'Neil, *Hopes, Doubts*]; Johnson, *Don't Want Charter*, *supra* note 41; *Must Be Accountable*, *supra* note 40; Editorial, "Where Do Bands Go From Here?" *Thunder Bay Chronicle-Journal* (4 March 1999) A6 [hereinafter *Where Do Bands*]; Editorial, "Listening to Dissenters on Reserves" *The [Hamilton] Spectator* (8 March 1999) A10 [hereinafter *Listening to Dissenters*].

49 Turpel-Lafond, *Enhancing Integrity*, *ibid.* at 1. See also *To the Source*, *supra* note 4 at 21: "... many of our witnesses ... worried that additional power could be abused by some of the leaders."

usual incidents of patriarchy or sexism was characteristic of North American native societies before they began to have regular contact with the Europeans.[50] Even so, it seems clear, at least to several commentators, that substantial numbers of Aboriginal men today—including many in positions of community leadership—have engaged in such practices and acted upon such attitudes to the disadvantage of the women in their communities.[51] During negotiations that led to the *Charlottetown Accord*, for example, it became clear that many Aboriginal women simply did not believe that male Aboriginal leaders, armed with constitutionally protected self-government rights, could be trusted to respond fairly and respectfully to the women's interests or to give sufficient priority to the need for protection from abuse.[52] N.W.A.C. has insisted that mainstream hu-

---

50 See *e.g.*, *To the Source*, *ibid.* at 59; T. Isaac & M.S. Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 Man. L.J. 453 at 454–457; Greschner, *supra* note 7 at 339–340; J. Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum 110 at 112; Turpel, *Patriarchy*, *supra* note 26 at 180; Monture-OKanee, *Myths and Revolution*, *supra* note 31 at 227. See also E. LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in *Aboriginal and Treaty Rights*, *supra* note 18, 75 at 83–84.

51 See *e.g.*, *To the Source*, *ibid.* at 59–61; Isaac & Maloughney, *ibid.*; Nagle, *supra* note 44; Teichroeb, *Limits*, *supra* note 43; Teichroeb, *Mother Ostracized*, *supra* note 44; Teichroeb, *Heavy Price*, *supra* note 44; R. Teichroeb, "Democracy on the Reserve: Professor Says Indian Women Have Reason to Fear Autonomy" *Winnipeg Free Press* (8 April 1992) B18 [hereinafter Teichroeb, *Professor Says*]; Turpel, *Patriarchy*, *supra* note 26 at 181–182; Green, *ibid.* at 112; J. Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics" (1994) 43 U.N.B.L.J. 19 at 46 [hereinafter Borrows, *Equality*]: K. Byrne, "Indian Women Want Protection" *Winnipeg Free Press* (27 March 1994) A3; P. Robertson, "Native Women Demand Role" *Winnipeg Free Press* (18 May 1996) A11; LaRocque, *ibid.*

52 In the words of Sharon McIvor, at the time a spokesperson for the Native Women's Association of Canada (N.W.A.C.):

> It's really scary to know that these guys are going to be in complete control, they are going to be able to do whatever they want ... We are lost; if you non-Indian Canadians don't put pressure on your people to help look after our rights, then we are dead in the water:

"Native Women Fear Autonomy Will Hide Sex Abuse" *Calgary Herald* (29 July 1992) A9.

See also *To the Source*, *ibid.* at 61:

> Women who have been raped, beaten, sexually harassed, overlooked, excluded, ignored, or otherwise oppressed by Aboriginal men are hardly eager to trust the men to look after their interests.

S. Delacourt, "Natives Divided Over Charter" *[Toronto] Globe & Mail* (14 March 1992) A4 [hereinafter Delacourt, *Natives Divided*]; P. O'Neil, "Native Women Push for Human Rights" *Vancouver Sun* (14 March 1992) A3 [hereinafter O'Neil, *Native Women Push*]; S.

man rights standards and mainstream courts remain available for the protection of Aboriginal women in communities acting pursuant to rights of self-government.[53] It considered these protections so crucial to the safety and well-being of Canada's Aboriginal women, and its support of them so different from the positions being taken by the four Aboriginal organisations participating officially in the Charlottetown negotiations, that it brought legal proceedings seeking independent representation at those negotiations.[54]

Scott, "The Native Rights Stuff: Many Women Fear Self-government Without Charter Guarantees" *The [Montreal] Gazette* (28 March 1992) B5 [hereinafter Scott, *Native Rights Stuff*]; Nagle, *supra* note 44; Teichroeb, *Limits*, *ibid.*; Teichroeb, *Professor Says*, *ibid.*; "Native Fights for Charter" *Calgary Herald* (23 April 1992) A12 [hereinafter *Native Fights for Charter*]; Flood, *supra* note 37; Green, *ibid.*; Byrne, *ibid.*; Borrows, *Equality*, *ibid.* at 41–46; LaRocque, *ibid.* at 93–95. Compare Ayed, *supra* note 43.

53 N.W.A.C., *Statement on the Canada Package* (Ottawa: N.W.A.C., 1992) at 7, quoted in Borrows, *Equality*, *ibid.*at 41:

> Aboriginal women have sexual equality rights. We want those rights respected. Governments simply cannot choose to recognise the patriarchal forms of government which now exist in our communities. The band councils and Chiefs who preside over our lives are not our traditional forms of government ... Recognising the inherent right to self-government does not mean recognising the patriarchy created by a foreign government.

See also M. Rouleau, "Proposal for Native Self-government Could Deny Fundamental Human Rights to Women" *The [Montreal] Gazette* (23 October 1992) B3; Green, *ibid.*; LaRocque, *ibid.* at 93–95.

There is controversy, especially among Aboriginal peoples, over the extent to which these views of the current male Aboriginal leadership are fair and—assuming that they are fair—about whether recourse to external tribunals and standards is, as N.W.A.C. maintains, the most appropriate way of addressing that reality in self-governing Aboriginal communities. These issues, unfortunately, lie beyond the scope of the present work. The academic sources cited here, and in *supra* notes 50–52, provide a useful range of views about them. For additional contributions and viewpoints, see *e.g.*, Turpel, *Interpretive Monopolies*, *supra* note 24; M.E. Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) 10:2/3 Can. Woman Studies 149; W. Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's L.J. 279; R. Teichroeb, "Democracy on the Reserve: Solidarity Vital, Province's Native Leaders Say" *Winnipeg Free Press* (10 April 1992) B1; "Native Women Urged to Ignore 'White Feminists'" *Calgary Herald* (31 July 1992) A10; M.A. Jackson, "Aboriginal Women and Self-Government" in J.H. Hylton, ed., *Aboriginal Self-Government in Canada* (Saskatoon: Purich Publishing, 1994) 180.

54 *The Queen* v. *Native Women's Association of Canada*, [1994] 3 S.C.R. 627. For commentary on this litigation and the context from which it arose, see Green, *ibid.* and Borrows, *Equality*, *ibid.* at 42–44.

3. *Concerns About Mainstream Society and Its Institutions*

To some commentators, apprehensions such as these matter not just for their own sake, as signs of an altruistic regard for disadvantaged peoples, but also because the Aboriginal peoples of Canada are entitled to the ongoing assurance that the law will protect their rights as individuals no less fully than it protects the rights of other Canadian citizens.[55] To them it would be awkward at best for Canada's federal and provincial governments, each of which is subject to enforceable obligations to respect and protect the constitutional rights of individuals, to have to provide ongoing financial support to Aboriginal governments that recognised, and were subject to, no such constraints.[56]

These and other commentators, including the Royal Commission on the Economic Union,[57] have expressed public concern about what could happen to the institutions and arrangements on which Canadians and their governments now routinely depend if Canada were suddenly to accredit as many as 600 self-governing Aboriginal communities.[58] Intensifying some such concerns are apprehensions about the breadth and strength of the powers and the immunities thought to be expected by such communities.[59] For some critics, the mere existence of so many additional governments, each with its own internal structures, conventions and priorities, poses serious risks of fragmentation in a country

---

55 See *e.g.*, Canada, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Minister of Supply and Services, 1985) at 371 [hereinafter 3 Macdonald Report]; Gibbins & Ponting, *supra* note 34 at 205, 218–219; Schwartz, *General Sense*, *supra* note 20 at 172; *Inherent But Unclear*, *supra* note 48 ; Cockerill & Gibbins, *supra* note 42 at 383–384, 388, 390–391, 398–399.

56 Schwartz, *Second Thoughts*, *supra* note 2 at 394; Gibbins, *Problems*, *supra* note 42 at 376.

57 3 Macdonald Report, *supra* note 55 at 368–371.

58 Gibbins, *Problems*, *supra* note 42 at 376:

> At this point we cannot assume that self-government can be implemented without inflicting serious damage to democratic principles, to the intergovernmental structures of the Canadian federal state, and to the citizenship rights of Canadian Indians.

See also Binnie, *supra* note 7 at 218, 225; W. Johnson, "Mercredi Has No Mandate, But That Doesn't Stop Him" *The [Montreal] Gazette* (26 June 1992) B3; P. Authier, "Quebec Lawyers Slam Native Self-government: It Poses 'Unprecedented Threat to Province's Powers,' Legal Paper Says" *The [Montreal] Gazette* (22 July 1992) B1; Schwartz, *Close Look*, *supra* note 42; B. Cox, "Self-rule Scenario Packs Potential for Future Conflict, Author Says" *Vancouver Sun* (29 September 1992) A8; "Reformer Inflaming Issues, Says Minister" *Calgary Herald* (8 February 1994) A9; Cockerill & Gibbins, *supra* note 42 at 385–387.

59 See *e.g.*, Johnson, *Big, Very Big*, *supra* note 41; T. Byfield, "Native Self-government Goes Beyond What Canadians Think" *Financial Post* (21–23 March 1992) S3; Tyler, *supra* note 7 at 7–10.

whose national institutions already seem dangerously weak,[60] and whose need for economic integration can only continue to grow.[61] Others have emphasised the risks that such potentially different approaches and outlooks pose to the country's defining and fundamental values.[62] Still others doubt the possibility of creating workable intergovernmental arrangements that could possibly accommodate so many distinct Aboriginal polities that are at once so small and so poorly resourced, and insist that self-government cannot work unless there is significant consolidation of Aboriginal communities into larger governance units that have the power to bind all their members.[63]

B. Why The Apprehensions Matter

For these, and occasionally other, less credible,[64] reasons, many non-native individuals and institutions, and some Aboriginal people themselves, continue in some measure to fear, and even sometimes to oppose, the notion of Aboriginal governments having constitutional protection.[65] According to published reports,

---

60 See *e.g.*, Johnson, *Bandwagon*, *supra* note 40; Authier, *supra* note 58; Schwartz, *Close Look*, *supra* note 42; M. Cernetig, "Reform Attacks Native Self-rule" *[Toronto] Globe & Mail* (5 October 1992) A1 at A1, A4.

61 See J. Simpson, "The Words Are Magnificent, But Can They Be Realistically Implemented" *[Toronto] Globe & Mail* (28 February 1997) A18, a review of the R.C.A.P. Final Report.

62 See Editorial, "Aboriginal Gamble" *Winnipeg Free Press* (2 June 1992) A6; Authier, *supra* note 58; G. Gibson, "Where the Aboriginal Report Takes a Wrong Turn" *[Toronto] Globe & Mail* (26 November 1996) A19 [hereinafter Gibson, *Wrong Turn*]; Cockerill & Gibbins, *supra* note 42 at 383–384, 387–388.

63 See 3 Macdonald Report, *supra* note 55 at 370–371; Gibbins & Ponting, *supra* note 34 at 209–213; Cockerill & Gibbins, *ibid.* at 385–387.

64 See *e.g.*, G. Gibson, "Let's Not Use Racism to Tackle Native Needs: Isolating Aboriginal People from the Mainstream Is a Mistake" *[Toronto] Globe & Mail* (1 June 1992) A15.

65 See *e.g.*, Byfield, *supra* note 59; S. Delacourt, "Native Self-government Difficult Sell, Clark Says" *[Toronto] Globe & Mail* (2 June 1992) A1 at A1–A2; P. O'Neil, "B.C. Tories Voice Fears Over Native Government" *Vancouver Sun* (4 June 1992) A4; S. Contenta, "Native Deal Stirs Deep Fears in Quebec" *Toronto Star* (19 July 1992) A10; Editorial, "Go Slowly on Self-government: Canadians Deserve More Than Vague Concepts" *The [Montreal] Gazette* (24 January 1994) B2; Oleson, *supra* note 37; Gibson, *Wrong Turn*, *supra* note 62; *Must Be Accountable*, *supra* note 40.

From this standpoint, it has not helped that Aboriginal communities have gone to court in recent years asserting constitutionally protected rights: to abduct community members and subject them, without consent, to tribal rituals involving physical punishment [*Thomas* v. *Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.)]; to hear on the reserve, exclusively before a jury composed of community members, sexual assault charges brought against a community elder, despite objections from the complainant—also a community member—that she could not be safe, or be fairly heard, in such circumstances [*R.* v. *A. F.* (1994), 30 C.R. (4th) 333

the Chretien government, having recognised the potential for public opposition to this notion, gave serious thought in 1995 to backing away from its earlier promise to treat the inherent right of self-government as an existing Aboriginal right.[66]

Considered as reasons to withhold the *Constitution*'s protection from inherent self-government rights,[67] these various apprehensions are open to criticism on several grounds. Members of surviving Aboriginal communities, whose cultures and institutional arrangements have already endured much worse, and whose ancestors were not given the option of weighing the merits and implications of settler peoples' self-government claims, will be forgiven for finding many of them ironic, if not precious, and for observing how little faith those who express them seem to have in the staying power of the mainstream system.[68] No less ironic, or unfair, from their standpoint is the inference that Aboriginal peoples are now disqualified from governing themselves precisely because of all the disruption and deprivation suffered in their communities at the hands of the

---

(Ont. G.D.), aff'd. (1997), 101 O.A.C. 146 (C.A.)]; to withhold band membership and related entitlements from women born and raised in the community merely because they had "married out" [*Sawridge Band* v. *The Queen*, [1996] 1 F.C. 3 (T.D.), rev'd. [1997] 3 F.C. 580 (C.A.)], and to promote and engage in high-stakes gaming completely free of any provincial or federal supervision [*Pamajewon*, *supra* note 10].

66 J. Bronskill, "Liberals Wavered on Promise: Native Self-government Memorandum" *Calgary Herald* (6 May 1996) A8. In the end, the Federal Government confirmed its original intention to proceed on the basis that the *Constitution* already protects the inherent right: *ibid.*; *Federal Policy Guide*, *supra* note 8.

67 There are other legitimate reasons for identifying such concerns and taking them seriously. Several of those cited above with concerns about self-government made it clear that their intention was not to discourage its eventual constitutional entrenchment or accreditation, but only to identify pitfalls that would have to be addressed in the course of design or implementation. See *e.g.*, Gibbins & Ponting, *supra* note 34 at 174, 193, 235; Schwartz, *Second Thoughts*, *supra* note 2 at 396; Green, *supra* note 50 at 119; Cockerill & Gibbins, *supra* note 42 at 384. The final report of the Royal Commission on Aboriginal Peoples acknowledges that there are grounds for many of these concerns and suggests concrete proposals for dealing with them in the course of giving effect to inherent self-government rights: see 2 R.C.A.P. Final Report, *supra* note 4 at 326–353. See also infra notes 73–84 and the accompanying text.

68 B. Favel, "First Nations Perspective of the Split in Jurisdiction" in *Poundmaker*, *supra* note 26, 136 at 139:

> [H]ave faith that your own system of laws is flexible enough and will not crumble if you accept that First Nations have a right to administer their own justice.

See also Monture-OKanee, *supra* note 31 at 224–225. Compare Asch & Macklem, *supra* note 7 at 517.

settler peoples.[69] Others are bound to find convenient, if not colourable, some non-native critics sudden expressions of tender concern for the welfare of native women and other vulnerable individuals engaged with Aboriginal communities.[70] Still others who have documented the courts' propensity, when adjudicating the claims of Aboriginal peoples, to rely on unacknowledged and unacceptable assumptions about the superiority of mainstream traditions and arrangements, are apt to conclude, with some justification, that most of the apprehensions being expressed by self-government's critics are further examples of this pattern, and of such assumptions.[71] Others still, asked to imagine settler society's powerlessness to deal with rogue inherent right communities, may insist on recalling the "very large club" that mainstream governments will continue to hold over Aboriginal peoples dependent on their fiscal transfers.[72]

---

69 See *e.g.*, Macklem, *Distributing Sovereignty*, *supra* note 7 at 1360; Teichroeb, *Victims Are Trying*, *supra* note 9. Compare J.A. Long & K. Beaty Chiste, "Indian Governments and the *Canadian Charter of Rights and Freedoms*" (1994) 18 Am. Ind. Culture & Rsch. J. 91 at 103–111.

70 Greschner, *supra* note 7 at 339:

> Concern for Aboriginal women is piously invoked by closet opponents of Aboriginal self-determination who reject the idea and practice of Aboriginal sovereignty and use a new-found solidarity with women as an expedient and politically correct justification for their resistance. This belief in an inherent or irremediable chauvinism of Aboriginal men, worse than the chauvinism of non-Aboriginal men, must be shown for what it is: false, pernicious and racist.

See also Borrows, *Equality*, *supra* note 51 at 46–47. Compare Turpel-Lafond, *Enhancing Integrity*, *supra* note 26 at 2, 5.

71 Patrick Macklem has explored these issues most thoroughly and consistently. See *e.g.*, Asch & Macklem, *supra* note 7; Macklem, *Borders*, *supra* note 7; Macklem, *Ethnonationalism*, *supra* note 7; P. Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125. See also C.H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck & J.B. Waldram, eds., *Anthropology, Public Policy, and Native Peoples in Canada* (Montreal: McGill-Queen's University Press, 1993) 311 at 327; and, Turpel, *Interpretive Monopolies*, *supra* note 24 at 33–35.

72 Gibbins, *Problems*, *supra* note 42 at 370:

> The point to stress here is that any continued dependency on fiscal transfers from the broader Canadian community gives the federal and provincial governments a very large club that can be used to force Indian compliance with conventional norms of taxation.

See also Gibbins & Ponting, *supra* note 34 at 233; Hawkes & Maslove, *supra* note 36 at 123; O'Neil, *Hopes, Doubts*, *supra* note 48:

Personally, I share these reservations about the critique of self-government rights. For these and similar reasons, I do not believe it justifies rejection or abandonment of the project of earning such rights in mainstream judicial acceptance. I do believe firmly, however, that one cannot pursue that project responsibly without acknowledging the currency and appeal of that critique and without engaging it on its merits. This is so for at least three reasons.

First, whatever else one may say about the critique or about its proponents, it does identify some real problems that need attention, like it or not, if effective self-government arrangements are to endure and flourish, even—perhaps especially—if under the special protection of the *Constitution*.[73] Practically speaking, it is going to take patience, care and special effort to situate such arrangements, and such rights, in relation to the rest of the mainstream order. Underestimating the magnitude of these challenges will not make them easier to address.

Second, whatever the law may say, the success or failure of self-government initiatives here in Canada is going to depend, indefinitely, on how much support and co-operation they receive from non-Aboriginal Canadians.[74] Mainstream Canadians, generally speaking, are likely to be less supportive of the self-government rights and arrangements of Aboriginal peoples if they are apprehensive about the impact such arrangements may have on the individuals living in self-governing communities,[75] on themselves, or on Canadian society as a whole. Hostility or resistance from the non-native public may very well make prohibitively time-consuming, expensive and difficult the already daunting tasks

---

> One government official pointed out that few if any Aboriginal governments will be self-sufficient. Any that abuse individual rights will have trouble getting government cooperation.

[73] See *e.g.*, 2 R.C.A.P. Final Report, *supra* note 4 at 326–353.

[74] Borrows, *Equality*, *supra* note 51 at 23:

> In reconstructing our world we cannot just do what we want. We require a measure of our oppressors' cooperation to disentangle ourselves from the web of enslavement they created.

Compare B.W. Morse, "Indigenous Laws and State Legal Systems: Conflict and Compatibility" in B.W. Morse & G.R. Woodman, eds., *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 101 at 114 [hereinafter *Indigenous Law*]:

> The challenge today is to find a mix of solutions which can respond to the different needs and circumstances of indigenous peoples. To do so will require the support of the general community, which means that some minimum standards must be adhered to in order to gain that approval and tolerance.

[75] See Turpel-Lafond, *Enhancing Integrity*, *supra* note 26 at 2, 5, quoted below in the text accompanying *infra* note 91. See also *ibid.* at 39–40; *Where Do Bands*, *supra* note 48; *Listening to Dissenters*, *supra* note 48 .

of restoring, realising and protecting indigenous forms of government for contemporary use.[76]

Finally—and perhaps most important, for now we come full-circle—the very existence of this critique, and of the concerns it expresses, cannot help but affect the perceptions and the intuitions of the courts that, sooner or later, will have to determine the destiny, within our law, of inherent self-government rights. It seems all but inconceivable that Canadian courts will treat such rights as constitutional rights unless they are confident that the existing law equips them to address, in practical ways and case by case, the kinds of concerns that self-government's critics have identified. It is extremely important to appreciate why this is so.

As I suggested earlier, the task of integrating inherent rights of self-government into the mainstream legal order, and with them the substantially different cultural orientations that such rights presuppose and exist to protect, would be a major conceptual challenge for the courts in the best of circumstances as it would propel them against the current, and into uncharted waters.[77] I am, as I said, among those who consider it just and appropriate—and, from a legal standpoint, more than defensible—for courts, despite these disincentives, to make this task their own. Even so, one is bound to acknowledge the effort, and the professional courage, it will require of them to do so, especially in the absence of explicit constitutional text that compels, or even encourages, them to embrace it. If self-government's proponents expect Canadian courts to undertake so pervasive a project, they must take responsibility for establishing, at a minimum, not only that it deserves institutional interest and support, but that the judges, *as* judges, will be able, in full conscience, to recognise and to engage in it.[78] In today's vernacular, that means showing that rights of self-government can be "reconciled with the sovereignty of the Crown."[79]

---

[76] For confirmation, one need only recall the unprecedented hostility that arose toward Aboriginal fishers in Atlantic Canada in the aftermath of the Supreme Court's decision in *Marshall* v. *The Queen*, [1999] 3 S.C.R. 456 [hereinafter *Marshall*], that Mi'kmaq peoples have existing treaty rights to earn a moderate livelihood from trade in fish and game. See *e.g.*, J. Simpson, "The Cost of Expectations" *[Toronto] Globe & Mail* (29 October 1999) A19; R. Mofina, "Police Were Braced for Violence After Native Fishing Ruling, Report Says" *National Post* (21 February 2000) A!0. See also *infra* note 80 and the accompanying text .

[77] See *supra* notes 20–23 and the accompanying text. Compare Elliott, *supra* note 17, who suggests that "we may be reaching the limit of judicial effectiveness" in respect of self-government rights, because "the notion of government [, not being,] susceptible to ready definition by courts [,] ... should probably not be subject to final definition by courts [but] by elected representatives": *ibid.* at 131, 123–124.

[78] Compare *Mabo*, *supra* note 18 per Brennan J. (for the plurality) at 29–30:

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and

It is this additional task that public apprehensions about self-government complicate. Many of them, taken full strength, suggest that self-government rights and powers, unchecked, could pose significant risks to values, institutions and arrangements considered fundamental to, and constitutive of, the Canadian legal and constitutional order. The character of those apprehensions, the basis they often appear to have in observable fact and the hold they seem, from the coverage, to have on the public imagination make them especially difficult for mainstream courts to ignore.[80] Courts would almost certainly consider it irre-

---

> human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency ... Whenever such a question [here, about overturning some well-established pre-existing common law rule] arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

See also J. Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L. Rev. 5 at 27–28.

79 *Van der Peet* v. *The Queen*, [1996] 2 S.C.R. 507 at 539 [hereinafter *Van der Peet*]; *Delgamuukw*, *supra* note 10 at 1096.

80 C. Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 65–66:

> The large number of intervenors and the significant economic dimensions of the 1996 [Supreme Court] decisions [on Aboriginal rights] are a clear indication to the court that they [sic] must be constantly aware of the practical and political consequences of their decisions in this area. Decisions which are detrimental to existing non-Aboriginal government and economic interests are bound to result in increased public criticism as Canadian citizens feel the impact of Supreme Court decisions in their daily lives.

Compare J. Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R.* v. *Sparrow*, *R.* v. *Van der Peet* and *Delgamuukw* v. *British Columbia*" (1998) 13 J. L. & Soc. Policy. 67 at 68: "In the area of Aboriginal rights, the Court cannot provide much support in the face of significant political opposition to the expansion of such rights." As Rudin observes, the courts cannot afford to ignore the political climate in which they proceed, because they must depend on other branches of government, and on public cooperation, to give effect to their decisions: *ibid.* at 79–89.

Recent events have given Canadians a clear real life example. In November 1999, the Supreme Court of Canada, having endured two months of unremitting public concern and controversy over its treaty rights decision in *Marshall*, *supra* note 76, took the unprecedented step of issuing written reasons clarifying, and emphasising the narrow dimensions of that earlier decision in response to an intervener's motion requesting rehearing of the matter [*Marshall* v. *The Queen*, [1999] 3 S.C.R. 533]. It is worth recalling, too, that both the United States government and the Georgia state courts refused to enforce the U.S. Supreme Court's landmark decision on Aboriginal sovereignty in *Worcester* v. *Georgia*, 31 U.S.

sponsible to recognise and enforce such rights within Canadian law without first satisfying themselves that the legal system, as a whole, can absorb and manage such risks.[81]

The paramount concern is that section 35(1) of the *Constitution Act, 1982*, if it protected inherent rights of self-government at all, would protect them so well as to deprive the mainstream orders and branches of Canadian government of the effective capacity to prevent or contain such potential risks to the constitutional order.

It was Ian Binnie who, several years before his own judicial appointment, first articulated this concern. Writing almost immediately after the *Sparrow* decision,[82] in which the Supreme Court first prescribed the kind and degree of protection that section 35(1) was to give Aboriginal rights, he observed that:

> ... the *Sparrow* doctrine makes it improbable that the judicial concept of Aboriginal rights will extend to such key objectives as Aboriginal self government. The application of the Supreme Court's interpretations of section 35 in *Sparrow* would afford too much immunity from other levels of government to Aboriginal communities, many of which lie cheek by jowl with non-Aboriginal communities in densely populated areas of southern Canada. "Constitutionalizing" a right to Aboriginal self-government would, in light of *Sparrow*, leave the courts with inadequate mechanisms to regulate the overlapping interests of communities occupying contiguous territory.[83]

If one accepts Binnie's premises, it seems almost impossible to quarrel with his conclusion. In the absence of clear affirmative constitutional text, Canadian judges are unlikely to take responsibility for extending *Sparrow*'s protection to rights of self-government if they are frightened, as judges, by the consequences of doing so, no matter how many scholars and royal commissions tell them—correctly, in my view—that it would be the right thing for them to do. Accrediting constitutional rights that pose uncontainable threats to basic mainstream institutions or fundamental mainstream values would certainly frighten them.[84]

(6 Peters) 515 (1832). See *e.g.*, P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) at 111–114 and the sources cited there.

81 Compare *Delgamuukw*, *supra* note 10 at 1066, where the Court insisted that any accommodation of Aboriginal perspectives in respect of the treatment of evidence of Aboriginal rights "must be done in a manner which does not strain 'the Canadian legal and constitutional structure'" [the inner quotation is from *Van der Peet*, *supra* note 79 at 550].

82 *Sparrow*, *supra* note 12.

83 Binnie, *supra* note 7 at 218. *Ibid.* at 225, 234.

84 Consider, for instance, the Court's evident anxiety in *Gladstone* v. *The Queen*, [1996] 2 S.C.R. 723 at 774–775 [hereinafter *Gladstone*], regarding how to accommodate, within mainstream commercial arrangements, the constitutionally protected right of the Heiltsuk to harvest herring spawn on kelp for commercial purposes and in commercial quantities.

C. How To Address Them

If all this is so, the second imperative shaping inherent right advocacy must surely be to show that, and how, it is possible to integrate such rights harmoniously into the larger legal framework for which the mainstream courts are responsible. Success at this undertaking depends on perseverance in two related tasks: reducing to a minimum the *avoidable* tensions and apprehensions that now attend the notion of Aboriginal self-government; and, demonstrating, in response to Binnie's challenge, that Canada's legal system already provides sufficient means to ensure that self-government rights could not be exercised, even with the *Constitution*'s protection, in ways or for purposes that would do violence to the principles and arrangements on which our legal order depends. I want to consider each of these tasks briefly, and in turn.

1. Minimising Avoidable Apprehensions

Meeting the first of these expectations means increasing mainstream public confidence in the enterprise of Aboriginal self-government by improving the public understanding of what self-government is, why it matters, and how it is intended that it will operate.[85] Efforts to do so might usefully call greater attention to the complementarity that already exists, especially at the higher levels of generality, between Aboriginal peoples' various defining traditions and values and those of the mainstream culture,[86] and to the extent to which Aboriginal practice and precedent have already informed and improved the development of mainstream political institutions in North America.[87] Success at this part of

---

[85] The results of a 1992 study, based on the constitutional reform proposals for self-government as of September 1991, support the hypotheses that public attitudes toward Aboriginal self-government correlate affirmatively with cultural and economic security and "that providing factual information about Aboriginal self-government would result in an attitude change towards favouring Aboriginal self-government": M. Wells & J.W. Berry, "Attitudes Toward Aboriginal Self-Government: The Influences of Knowledge, and Cultural and Economic Security" (1992) 12 Can. J. Native Studies 75 at 85.

Wells & Berry, *ibid.*, add:

> Many people have heard of Aboriginal self-government but are unfamiliar with the meaning. As a result, many people may hold inaccurate beliefs about it. The results of this study suggest that if people knew more about the meaning of Aboriginal self-government they would hold more positive attitudes towards it.

[86] See *e.g.*, J.W. Zion, "Searching for Indian Common Law" in *Indigenous Law*, *supra* note 74, 121 at 123–125. But see Turpel, *Interpretive Monopolies*, *supra* note 24 at 30, for a pointed warning about the risks, built into such efforts, of overlooking important differences among distinct Aboriginal cultural systems.

[87] See *e.g.*, Henderson, *Legal Inheritances*, *supra* note 25 at 9; B. Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution* (Ipswich, Mass.: Gambit Inc., 1982); R.C.A.P., *Partners*, *supra* note 6 at 40; M. Boldt J.A. & J.A. Long,

the larger task, however, will be difficult unless there is real progress, soon, at two others.

The first is for Aboriginal people themselves to begin addressing the reasons for the apparent loss, within significant numbers of Aboriginal communities, of trust and confidence in community leadership and governance arrangements.[88] It is, to begin with, essential that mainstream Canadians not be further tempted to regard Aboriginal peoples' legal traditions and governance forms as anthropological ephemera—as talismans suitable only for the purposes of nostalgia. The mainstream must instead be encouraged to perceive and experience, even if only from a distance, the living presence of those laws and arrangements and their power, even today, to organise, shape and constrain the activity that takes place within Aboriginal collectivities.[89] It is, from this standpoint, vital that the members of communities seeking mainstream affirmation of their self-government rights communicate, by practice and example, their own ongoing conviction in the resonance and the authority of those forms and traditions.[90] It is equally important to seek to dispel mainstream perception—and the predisposition to believe—that power in Aboriginal communities is being used arbitrarily and irresponsibly. As long as those who live in such communities are widely perceived to be suffering under unresponsive and untrustworthy leader-

---

"Tribal Philosophies and the *Canadian Charter of Rights and Freedoms*" in M. Boldt and J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165 at 170; Greschner, *supra* note 7 at 345–347, and the cited sources.

88 *To the Source*, *supra* note 4 at vi:

> We must also establish trust and communication between our leaders and the people. The Elders said: listen to your grassroots. The youth said: walk your talk. Leaders must assure the people that the grassroots will be involved in rebuilding and re-implementing self-government. The grassroots feel that their leaders have left them behind. The leaders must also be consistent: if they talk about self-government, they should act according to their own traditions and values, not the Indian Act. Again, education and communication are essential.

89 For one very helpful such account, see Henderson, *Legal Inheritances*, *supra* note 25.

90 J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 at 663:

> In fact, the chance of Canadian law accepting First Nations legal principles would be substantially weakened if the First Nations did not continue to practice their own laws within their own systems.

See generally *ibid.* at 657–664. The project that Borrows, Trish Monture, Sakej Henderson and others have undertaken to make indigenous laws and legal traditions accessible, to their own people and to others, as objects of reflection and study [*ibid.* at n. 166] seems to have some real potential to add substance to mainstream perceptions of those traditions.

ship, and as long as Aboriginal women are perceived to face aggravated risks of abuse and marginalisation in their own communities, Canada's non-native governments will remain reluctant to relax the supervisory powers they now exert over such communities, and mainstream courts will continue to be hesitant to be the ones to set aside protected constitutional space for community laws and governance. This is so regardless of where responsibility ultimately lies for the deterioration of conditions in those communities.[91]

The other is for those who would find self-government rights in the *Constitution* to start being much more specific about the parameters—legal, political and operational—of the rights being claimed. The greater the public uncertainty about what such rights might mean, about the size and composition of the self-governing Aboriginal collectivities and about the interface between such units and existing mainstream governments, the less eager the courts are going to be—as *Delgamuukw* illustrates—to assume the responsibility for locating such rights within the existing *Constitution*.[92] Fortunately, the self-

---

91 As Mary Ellen Turpel-Lafond observed in her report about these issues to R.C.A.P.:

> [The adversarial character of some disputes between Aboriginal citizens and their governments] is the consequences [sic] of an absence of alternative internal political structures to address grievances regarding ethics and accountability in Aboriginal governments. Meanwhile, increased media attention is being paid to these allegations and internal debates. Without appropriate responses or initiatives, public confidence in self-government initiatives on these matters, already tentative in many regions, faces further erosion. What is required by Aboriginal leaders is to squarely address these concerns and the underlying problems from which they stem.
>
> ...
>
> Any widely-held perception that First Nations' governments act arbitrarily, unilaterally and capriciously and are not accountable to their people, whether legitimate or otherwise, will have adverse effects upon the opportunities for First Nations to implement self-government and assume greater recognition for First Nations' governments. Indeed, increased negative attention to the activities of the former are particularly susceptible to being seized upon to discredit self-government.

Turpel-Lafond, *Enhancing Integrity*, *supra* note 26 at 2, 5. See also *ibid.* at 39–40; R.C.A.P., *Bridging*, *supra* note 6 at 275–277. For some confirmation of Turpel's observations about the impact of such concerns on public attitudes, see *supra* notes 43–54 and the accompanying text.

92 See *e.g.*, *supra* note 21 and the accompanying text; compare *Pamajewon*, *supra* note 10 at 834, where the Court expressed its displeasure at the "excessively general terms" in which communities were framing their claims to have constitutional rights of self-government. Even before these two cases, the Court emphasised, as a general matter, the importance of "identify[ing] precisely the nature of the claim being made" in Aboriginal rights litigation: see *e.g.*, *Van der Peet*, *supra* note 79 at 551–553.

government options proposed for consideration in the R.C.A.P. Final Report,[93] the recent developments in the Canadian law of Aboriginal rights,[94] and the federal government's recent willingness to proceed on the basis that the inherent right is already in the *Constitution*[95] should make it much easier than it would have been even five years ago to begin thinking more concretely about self-government issues.

2. *Protecting Fundamental Mainstream Values*

Progress toward minimising the avoidable apprehensions about the potential impact of Aboriginal rights of self-government will encourage, and free, the courts to be more receptive to the legal arguments now available in support of such rights. Even complete success at that work, however, seems unlikely to eliminate altogether the kinds of risks to which Binnie has alluded: the risk that the exercise of such rights would threaten values and institutions fundamental to the Canadian constitutional order and that section 35(1) of the *Constitution Act, 1982*, would protect such rights so well that mainstream courts and governments could not contain such threats as they arose.[96] This second challenge, therefore, deserves and requires independent attention.

A full and proper answer to it is, of course, far beyond the scope of this article. It is my view, however, that the courts already have all the power they need to constrain, as necessary, the exercise of existing Aboriginal rights of self-government in the interest of preserving truly fundamental Canadian values and institutions.[97] This is so because the courts, in giving effect to *any* rights enforceable within mainstream law, have both the power and the duty to define the scope of such rights in a way that ensures their ongoing harmony with the arrangements and values essential to the legal system on which the protection of those rights depends.[98] Properly understood, the task of protecting our legal

---

93 See 2 R.C.A.P. Final Report, *supra* note 4.

94 See especially *Nikal* v. *The Queen*, [1996] 1 S.C.R. 1013; *Van der Peet*, *supra* note 79; *Gladstone*, *supra* note 84; *Adams* v. *The Queen*, [1996] 3 S.C.R. 101; *Côté*, *supra* note 32; *Delgamuukw*, *supra* note 10.

95 See *supra* note 8 and the accompanying text.

96 See *supra* notes 80–84 and the accompanying text.

97 Just to be clear, I say this without assuming that inherent right communities and governments would, as such, be subject to the *Charter of Rights*. My own view is that the *Charter* most probably would not, and should not, apply to communities exercising Aboriginal rights of self-government. For that discussion, see K. Wilkins, " ... But We Need the Eggs: The Royal Commission, the *Charter of Rights*, and the Inherent Right of Aboriginal Self-Government" (1999) 49 U.T.L.J. 53.

98 For earlier adumbration of this general approach, see B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the* Canadian Charter of Rights and Freedoms (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 2, 24–29, 50–52; *Ghost in the Machine*, *supra*

system's integrity—what the court in *Mabo* called its "skeleton of principle"[99]—from the harms that could result from misuse of self-government rights requires not a one-time-only assessment, winner take all, of the havoc such rights could conceivably cause, but continuing alertness to the need for systemic harmony in the ongoing work of articulating what such rights mean, and protect, and what they do not.

To me, the more serious danger is that the courts will find it too easy, and too tempting, to constrict the protected scope of self-government rights in the course of applying them. The purpose of the harmonisation exercise is not to find ways of domesticating, to the point of impotence or uniformity, what are supposed to be *inherent* rights. The virtue of finding self-government rights within the *Constitution*'s protection—at least for those of us who believe that doing so *has* some virtue—just is again to secure constitutional space within which Aboriginal difference, its sources and foundations, are authoritative, not just inconveniences in need of ongoing management, and within which respect for Aboriginal difference is enforceable. Constraining more than necessary authoritative expressions or examples of Aboriginal difference would compromise the integrity of any undertaking from the courts, and from our constitutional order, to protect self-government rights.[100] Where fundamental values or institutions are not at risk, therefore, it will be extremely important that courts approach such rights with restraint and respect in order to maximise the protected space available to inherent right communities for self-direction and self-realisation.

IV. CONCLUSION

THE SUPREME COURT'S RECENT PREDILECTION—in cases examining Aboriginal rights—has been to deliver broad, sometimes exploratory, judgments that organise the law for application in lower courts, sometimes even when the case

---

note 7 at 293–298. See also D. Russell & J. Rudin, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1992?) at 154–155. My own elaboration and defence of this conclusion appears in my LL.M. thesis *Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government* (Toronto: University of Toronto Press, 1998) c. 2, 4.

99 See *Mabo*, *supra* note 18 at 29–30 per Brennan J. (for the plurality), quoted above at *supra* note 78.

100 See *supra* notes 23–32 and the accompanying text. Concern about this type of risk has given rise to doubts regarding the "cultural authority" of mainstream courts to interpret, apply and enforce Aboriginal peoples' self-government rights. See *e.g.*, Gibbins & Ponting, *supra* note 34 at 229–230; Turpel, *Interpretive Monopolies*, *supra* note 24 at 4–6, 23–26, 45; R.C.A.P., *Bridging*, *supra* note 6 at 277–279; K. Gallagher-Mackay, "Interpreting Self-Government: Approaches to Building Cultural Authority," [1997] 4 C.N.L.R. 1.

before them has not required that they do so. *Delgamuukw* itself is one recent example, as regards Aboriginal title. Despite that predilection, however, the Court took pains in *Delgamuukw*, as it had once before in *Pamajewon*, to avoid deciding the fate of claims to inherent self-government rights. By doing so, in the way it did so, it signalled both its openness to further legal argument designed to establish a place for such rights within mainstream legal doctrine and its profound discomfort with the uncertainty and the apprehension that could result from acceptance of such rights as constitutional rights.

Taken together, these indications amount to an invitation to proponents of self-government rights to demonstrate how such rights might integrate into the larger legal and constitutional framework for which the courts themselves are responsible. It will be a prudent invitation for us to accept before the next self-government case appears before the courts. For if it is forced to decide the issue without being shown a cogent way of addressing the risks that self-government rights, at their worst, could pose to Aboriginal peoples and to the rest of society, the Supreme Court will, I am almost certain, close the door on such rights. It will not expose the rest of the legal order to risks that it does not believe it can contain.

Successful mainstream advocacy for inherent self-government rights, therefore, is going to require more than defensible legal—or moral—arguments supportive of the existence of such rights. It will also require concerted ongoing efforts to satisfy two other, sometimes contrary, imperatives: on the one hand, demonstration that the courts will continue to be able, even after giving constitutional effect to such rights, to protect the coherence and the integrity of the mainstream order and its defining arrangements and values; on the other, ongoing and vigilant opposition to all unnecessary restrictions on the scope and exercise of such rights. Securing constitutional acceptance for self-government rights means finding and maintaining equipoise between these imperatives: a hard and delicate task to be sure, but one that is, in my view, both essential and achievable.