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A Multifaceted Approach to Recognizing Canadian First Nations Governments: What Courts May Decide

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A MULTIFACETED APPROACH TO RECOGNIZING CANADIAN
FIRST NATIONS GOVERNMENTS: WHAT COURTS MAY DECIDE

by

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Submitted in partial fulfillment of the requirements of the
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King Scholars Program
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INTRODUCTION

In 1991, University of Washington Professor Ralph Johnson published a very thorough article entitled "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians,"¹ in which he compared the history of federal policy in the two countries. The United States, as is still true today, had stabilized its policy by entering into the self-determination policy era.

In contrast to the radical swings in Indian policy in the United States, "the most singular feature of Canadian legislation concerning Indians is that the governmental policy established therein, that of 'civilizing the Indians, has shown almost no variation since the early 19th century when the government assumed responsibility for the society and welfare of the Indian population."²

Canada lacked a founding court decision similar to the United States Supreme Court decision of *Worcester v. Georgia*³ on which to ground tribal governments and exclude states. It had no tribal government (only the delegated band governments of its *Indian Act*), virtually no self-governing powers, and no tribal courts.

There was reason for some optimism, however, in Canada's adoption of Section 35(1) of its Constitution, protecting Aboriginal and treaty rights.⁴ Canada also came out slightly better than the United States in Johnson's comparison of more recent court decisions. While Indian tribes in the United States were suffering losses in such Supreme Court decisions as *Montana v. United States*,⁵ the Supreme Court of Canada had several cases affirming Aboriginal rights. In *R. v. Guerin*,⁶ the Court found that the Government of Canada had a *sui generis*, trust-like

¹ Ralph Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH L. REV. 643.

² Johnson at 666, citing Bartlett, *The Indian Act of Canada*, 27 BUFFALO L. REV. 581, 582 (1978).

³ 31 U.S. (6 Pet.) 515 (1832)

⁴ The Constitution Act, 1982, CAN. REV. STAT. app. II, No. 44, § 35(1) (1985).

⁵ 450 U.S. 544 (1981)

⁶[1984] 2 S.C.R. 335

fiduciary duty toward Aboriginal lands surrendered to it for the purposes of leasing.⁷ In *R. v. Sparrow*,⁸ the Court found that Aboriginal rights preserved by the *Constitution Act, 1982*, were not created by earlier treaties or legislation and needed to be protected in their modern forms; Canadian federal and provincial governments did not have the power to infringe on these rights absent a valid legislative objective consistent with the Crown's special trust relationship with Aboriginal peoples.⁹ It seemed reasonable to predict that future cases would continue to build on these precedents and perhaps even move judicially toward the protection of self-government.

In a world increasingly sensitive to the rights of indigenous individuals and groups, the colonial powers of former centuries today find themselves under enormous pressure to respect the vestiges of indigenous governments they formerly set out to destroy. In the United States and Canada, problems of the proper relationship of federal and state or provincial governments to several levels of indigenous government are often focused on the basic principle of self-government or self-determination. Although any simple definition is an oversimplification, conceptually the idea of self-government means only the right of indigenous governments to make their own decisions about such matters as membership, land use, taxation, family relationships, forms of government, and punishment of offenders.

In the United States, earlier policy periods of assimilation and even termination of indigenous societies have to some extent been remediated through the legislative framework that began with the *Indian Reorganization Act*, through such judicial doctrines as tribal sovereignty, and through a policy period of self-determination that began with President Nixon's 1970

⁷ In *Guerin*, the Musqueam Band of Indians surrendered to the Crown 162 acres of their 463-acre reserve in the City of Vancouver to be leased as a golf course. The Crown leased the land on terms favorable to the course developers and different from the terms agreed to by the band before the surrender. The Court found that the Indians' right to their land was a pre-existing legal right but that the surrender of the land to the Crown created a specific fiduciary duty, which the Crown had breached.

⁸[1990] 3 C.N.L.R. 160

⁹ Thomas Isaac, *Balancing Rights: The Supreme Court of Canada, R. v. Sparrow, and the Future of Aboriginal Rights* at 208, online at web.uvic.ca/ablo/documents/SparrowDecision.pdf. The facts in *Sparrow* involve

message.¹⁰ Self-government is presently under siege from judicial inconsistencies and worse, especially in the Supreme Court; from "citizens" movements out to destroy what they see as special privileges given to Indians; and from an unwieldy and sometimes even malicious administrative structure.¹¹ Nonetheless, the legal foundations of self-government are more present in the United States than in Canada, where, despite the absence of Indian wars and outright genocide that characterized much of early American history, Canada's First Nations have very little in the way of protection for self-government and its subordinate functions.¹² Canada's First Nations have been failed by policy leaders, courts, and legislators. Turning to international fora, they have found their way blocked by the presence of the traditional nation states in drafting the very international documents that would protect them. Thus while in the paper language of government it often appears that Canada respects the inherent right of self-government for its Aboriginal peoples including First Nations, in practice this right has proven indefensible.

Professor Johnson's readings of United States policy as protecting tribal sovereignty and the United States Supreme Court as undercutting it are true today. Similarly, the view of

¹⁰ The standard division of American federal policy on Indian affairs usually contains broad outlines similar to those found on the U.S. Department of Energy's Office of Environmental Management Site: an initial period of contact, Indian Removal from 1816-1846, the Reservation Period from 1865-1890, the Assimilation Period around the turn of the century, a brief policy of toleration, Termination from 1944-1958, and the Self-Determination Era from as early as 1961 to the present day. See <http://web.em.doe.gov/public/tribal/histchro.html>.

¹¹ The Rehnquist Court, in particular, was famous for its disregard of set precedent and principle in Indian law cases. For a recent work critical of the Supreme Court's jurisprudence in Indian law cases, see Robert Williams, Jr., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005). See also Williams' earlier book, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1992). For documented examples of inflammatory rhetoric against indigenous sovereignty, see Chapter 8, "Animosity," in Robert Odawi Porter, *SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER* (2005). Although Felix Cohen cautioned that tribal sovereignty was a protection against unwieldy administrative burdens, today the administrative burden is gargantuan, both in the United States and in Canada.

¹² This fact was also observed by Professor Bradford Morse, who wrote in his article on Canadian Aboriginal law in the 1994 *NATIVE NORTH AMERICAN ALMANAC* that weaknesses in the Canadian system meant that "Aboriginal peoples in Canada [were] in a significantly weaker legal position than U.S. Indian tribes despite a history of less military conflict, constitutional guarantees, and greater political weight, and the fact that they comprise a five times larger percentage of the Canadian population than do U.S. Indians." Duane Champagne, ed., *THE NATIVE NORTH AMERICAN ALMANAC: A REFERENCE WORK ON NATIVE NORTH AMERICANS IN THE UNITED STATES AND CANADA* (1994), at 516.

Canadian federal policy as continuing to pursue the policy of extinguishing Aboriginal rights is still valid. However, where Professor Johnson could have found reason to hope that the building precedents of the Supreme Court of Canada would eventually lead to judicial protection of Aboriginal self-government, the trend has been instead to narrow the Court's Aboriginal rights jurisprudence to the point that many advocates have turned away from the courts and toward legislation and policy to try to reinforce, recover, protect, and expand Aboriginal governments within Canada. Because the doctrine of tribal sovereignty in the United States is a judicial doctrine, and because policymakers in Canada keep coming back to the absence of Supreme Court of Canada rulings to excuse their own inertia, it is vital for advocates to bring cases and arguments to the courts that argue for the recognition of self-government, and vital for judges to understand the precedents thoroughly and to elaborate common-law opinions that do more than just acquiesce to policy weakness.

This paper will briefly address the history of and assault on the inherent right of Aboriginal self-government in Canada before describing the multi-faceted approach necessary to successfully protect that right. Federal policy, legislation, international doctrine, and proactive aboriginal law and government all have their place in the bundle. Ultimately, however, it will take a better-defined judicial doctrine to protect aboriginal rights in court. The broad aboriginal right of self-government has not been decided there, and many cases are not brought from uncertainty as to where the law is and outright fear that the courts, to which many turn because of the positive outcomes of earlier cases, will ironically be the means of closing off hopes for stronger self-government protections. Legislative and bureaucratic processes are stalemated. The right opinion in the right case could provide a badly needed landmark.

HISTORICAL BACKGROUND OF CANADIAN FEDERAL INDIAN POLICY

Like the United States, Canada has a complex history of treaty relationships with indigenous peoples who live within its geographic borders. Settler expansionism, the illegal influx of settlers into Indian lands, with accompanying violence and devastation, occurred throughout British America. The Royal Proclamation of 1763 contained a lengthy admonishment protecting Indian lands and peoples. Lands not ceded or purchased by Great Britain were reserved to “the several Nations or tribes of Indians with whom we are connected.”¹³ Governors and Commanders of colonies were expressly forbidden from issuing new Warrants of Survey or Patents for any of these reserve lands.¹⁴ Subjects of the Crown were forbidden “from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and License for that Purpose first obtained.”¹⁵ Anyone who had willfully or inadvertently settled on lands reserved for the Indians was asked to leave,

And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed, of which they stand accused, in order to take their Trial for the same.¹⁶

Treaties between the Crown and individual First Nations, many of which predate the Proclamation, also show the government-to-government relationship between the Aboriginal and colonial governments. Early Maritime treaties were often not land cession treaties but "peace

¹³ The Royal Proclamation, October 7, 1763, online at The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/proc1763.htm>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ For a more thorough discussion of the proclamation, see Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U.L. REV. 329 (1989).

and friendship" treaties, securing pledges of peaceful relationships between the British and Indian governments during a time when representatives of Britain and France were contesting for colonial domination.¹⁷ Numbered Treaties 1 to 11 took in much of western Canada between 1871 and 1923; these treaties confirmed the separate status of Canada and Indian nations, and were conducted on a government-to-government basis.¹⁸

At the time of Canada's union in 1867, the Constitution of Canada divided political power between the provinces and the federal government.¹⁹ Many writers have since argued that the rights of Indigenous peoples to self-government were at that time extinguished; the consensus, however, is that those rights survived in some form. Parliament's power to pass laws for Indians and Indian lands, found in section 91(24) of the Constitution, means that provincial governments do not have jurisdiction over Indian affairs. Beginning in 1876, the federal government in Canada sought to administer Indian nations through a series of *Indian Act* legislation. Today, the *Indian Act* is universally denounced but a series of attempts to replace it or to just hold it invalid have been unsuccessful.²⁰

THE SECTION 35(1) DILEMMA

¹⁷ Thomas Isaac, *ABORIGINAL LAW: COMMENTARY, CASES AND MATERIALS*. 3rd ed. (2004), 71-74.

¹⁸ Ian Getty, An Overview of Economic Development History on Canadian Native Reserves, 969-983 in Duane Champagne, ed., *THE NATIVE NORTH AMERICAN ALMANAC: A REFERENCE WORK ON NATIVE NORTH AMERICANS IN THE UNITED STATES AND CANADA* (1994) at 973.

¹⁹ Constitution Act, 1867, 91(24).

²⁰ Over 600 First Nations (or First Nations communities) are today governed by the *Indian Act*. There are about 700,000 "status" or *Indian Act* Indians in Canada, individuals who qualify for band membership according to terms of the legislation. Of these, about 400,000 live on actual reserve lands, with the rest living in urban areas of Canada. As First Nations jurisdictions do not extend off-reserve, it is often difficult for members living in urban areas to obtain services. Also, there are somewhat over 1,100,000 people in Canada self-identifying as indigenous people. Since a clear majority of this larger number does not live on reserve, there is a great deal of confusion and a real problem of the dilution of rights of First Nations and their citizens.

A central irony in Canadian federal Aboriginal policy has been that the rights supposedly protected by changes to the Canadian Constitution have proven difficult to use or even altogether absent. Section 35(1) of the Canadian Constitution protects "existing" Aboriginal and treaty rights of Canada's Aboriginal peoples, the three groups of Inuit, Métis, and First Nations.²¹ A number of policy meetings and initiatives throughout the 1980s sought to include the right of self-government more explicitly in the Constitution, but no agreement was reached. While some argued that self-government was already included, the main opposition to more explicit language seems to have been premiers unwilling to grant or recognize self-government as a right of Aboriginal people, partly because of fears of secession.

In a recent book on the protection of Aboriginal sacred sites in Canada, author Michael Lee Ross explains that

The irony of the overall situation should not escape us. The Aboriginal rights of Canada's indigenous peoples were elevated to constitutional status in 1982, yet today, over twenty years later, virtually none of these constitutionally protected rights has legal effect. Most significantly, despite all the attention that has been given to Aboriginal title, no Aboriginal community's Aboriginal title has yet been recognized. Consequently, because they have not established their Aboriginal rights in the courts--a case-by-case process--Aboriginal peoples are precluded from simply taking claims of violations of their constitutional rights to court to have them adjudicated straightaway. This is in stark contrast to the constitutionally enshrined rights of Canadians generally, which are listed in the Canadian Charter of Rights and Freedoms.

Canada's Aboriginal rights regime has become moribund.²²

THE CANADIAN ABORIGINAL FEDERAL POLICY OUTLOOK

While there is no clear guideline as to how federal government policy will proceed under either the present Conservative government or a resurrection of the Liberal Party, possibly under

²¹ Constitution Act, 1982, CAN. REV. STAT. app. II, No. 44 (1985).

²² Michael Lee Ross, *FIRST NATIONS SACRED SITES IN CANADA'S COURTS* (2005).

the leadership of Michael Ignatieff, the parameters of mainstream discussion were sketched out several years ago in a debate between scholars Alan Cairns and Tom Flanagan.²³ In *Citizens Plus*, Alan Cairns advocated, policies of assimilation and parallel government having failed, a policy that combined full Canadian citizenship and special status programs was the most appropriate for Canada's Aboriginal peoples.²⁴ In the very controversial book *First Nations? Second Thoughts*, neoconservative philosopher Tom Flanagan lambasted what he called the "aboriginal orthodoxy" of contemporary liberal thought.²⁵

Flanagan, whose academic expertise was used by the Government of Canada to demystify the Métis hero Louis Riel and to fight against several native land claims, argued that mainstream thought and policy had determined several concepts that needed to be challenged.²⁶ Aboriginal peoples were not special "first" inhabitants; in fact, they were immigrants like later settlers (including Flanagan, who migrated to Canada from the United States in 1968) and, in some cases, arrived after European settlers.²⁷ Only a racist agenda, Flanagan argued, would grant "aboriginal" immigrants special treatment. European civilizations were much further advanced than Aboriginal civilizations and their colonization of the New World was justifiable. The concept of sovereignty and self-government in Canada is inappropriate, as sovereignty is a quality only of states. Aboriginal communities are not "nations": only Canada itself is a nation, and Aboriginal communities are really no different than other local or ethnic subordinate communities. Aboriginal government on Indian reserves is unworkable. The judicial definition

²³ The books of both men were finalists for the 2000 Donner Prize, which Flanagan ultimately won. For an accessible piece showing their debate, see Alan Cairns and Tom Flanagan, *An Exchange*, *Inroads* 10 (October 2004), available online at http://www.inroadsjournal.ca/pdfs/Inroads_10_Cairns_Flanagan.pdf

²⁴ Alan Cairns, *CITIZENS PLUS: ABORIGINAL PEOPLES AND THE CANADIAN STATE* (2000)

²⁵ Tom Flanagan, *FIRST NATIONS? SECOND THOUGHTS* (2000)

²⁶ Flanagan was arguing against the Royal Commission on Aboriginal Peoples Report (1996), the recommendations of which have never been implemented.

²⁷ While the "origins" of individual tribes are of interest historically, Flanagan's rhetoric ignores historical realities and echoes the discarded rhetoric of the failed American policy periods of removal, allotment, and termination.

of Aboriginal property rights neither can nor will provide a workable property regime in modern times. Interpretations of treaties that preserve special rights for Aboriginal peoples are in error. Finally, the only way for Aboriginal people to become economically self-sufficient in a modern economy is through their complete integration into the existing Canadian economy.²⁸

Flanagan's policies would abolish these orthodoxies that prioritize a racial third order over the values of liberal democracy, create an obsession with reparations for injustices, and "encourages aboriginal people to withdraw into themselves, into their own 'First Nations,' under their own 'self-governments,' on their own 'traditional lands,' within their own 'aboriginal economies.'"²⁹ The Government of Canada should, according to Flanagan, avoid programs that keep or draw people back to the reserves when the natural trend would be away from them. As long as reserves and some kind of "self-government" remained necessary, such government should be accountable, utilize independent boards or departments to disperse the power of band councils and familial factions, and implement a regime of individual property rights: "Civil society cannot thrive without containment of political power and wide dispersal of private ownership."³⁰ Despite their ostensible conflict with one another, neither the "conservative" policy advocated by Flanagan nor the "liberal" one advocated by Cairns and pursued to some extent by recent Liberal governments in Canada provide a reasonable policy from an indigenous perspective.

COURTS

²⁸ The foundational work on this point is that of the Harvard Project American Indian Economic Development. See, for example, the summary of findings on the Project's main web site: the first finding is "Sovereignty Matters. When tribes make their own decisions about what approaches to take and what resources to develop, they consistently out-perform non-tribal decision-makers." <http://www.ksg.harvard.edu/hpaied/overview.htm>

²⁹ Tom Flanagan, *FIRST NATIONS? SECOND THOUGHTS* (2000) at 195.

³⁰ *Id.* at 198

Rather than protect the right of Aboriginal self-government, Canada's courts have developed an extremely narrow approach to what aboriginal activities are protected by law.³¹ The approach is best exemplified in *R. v. Van der Peet*³² and related cases. The Court in *Sparrow* had analyzed a claim of government infringement of an Aboriginal right under s. 35 (1) of the Constitution Act, 1982, and provided a framework for so doing: 1. Was the appellant acting "pursuant to an Aboriginal right," 2. Had that right been extinguished? 3. If not, had that right been infringed? 4. If so, was the infringement justified? The facts of *Sparrow*, however, did not raise any real issue as to the question of whether the Aboriginal right in that case, which involved subsistence fishing, actually existed.³³ In *Van der Peet*, the appellant, Dorothy Van der Peet, was charged with selling fish she had caught using an Indian food fish license, in violation of fishing regulations in the province of British Columbia.³⁴

In deciding the *Van der Peet* case, the Supreme Court of Canada, under Chief Justice Lamer, had to decide upon a test that could be used to decide what qualified as a protected aboriginal right. In so doing, Chief Justice Lamer distinguished such rights from the general enlightenment view of human rights: "Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment . . . They arise from the fact that Aboriginal people are Aboriginal. . . . The Court must define the scope of s. 35(1) in a way which captures both the Aboriginal and the rights in Aboriginal rights."³⁵

³¹ See Menno Boldt, J. Anthony Long, and Leroy Little Bear, eds., *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* (1985).

³² *R. v. Van der Peet*, [1996] 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*).

³³ *Id.* at 2, citing *R. v. Sparrow*, [1990] 70 D.L.R. (4th) 385.

³⁴ *Id.* at 5.

³⁵ *Id.* at 20.

Before completing a purposive analysis of s. 35(1) to identify what interests the section was designed to protect, Chief Justice Lamer affirmed basic principles of interpretation to be used in disputes between aboriginal peoples and the Crown. First, as held in *Sparrow*, "s. 35 (1) should be given a generous and liberal interpretation in favour of Aboriginal peoples."³⁶ The Crown must take care to preserve its honor in respecting the fiduciary relationship between the Crown and Aboriginal peoples: "Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35 (1), and other statutory and constitutional provisions protecting the interests of Aboriginal peoples, must be given a generous and liberal interpretation."³⁷ Furthermore, where there is doubt or ambiguity, that doubt or ambiguity must be resolved in favor of Indians.³⁸

Chief Justice Lamer's analysis establishes a test to decide whether a particular activity is an Aboriginal right given Constitutional protection by s. 35 (1): "in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right."³⁹ The difficulty of making such a case can easily be imagined, and becomes no less extreme with Chief Justice Lamer's further elaboration of the concepts: definitions must "take into account the Aboriginal perspective, yet do so in terms which are cognizable to the non-Aboriginal legal system."⁴⁰

Consistent with *Sparrow*, Chief Justice Lamer did caution that "the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly."⁴¹

³⁶ *Id.* at 23.

³⁷ *Id.* at 25.

³⁸ Compare US canons of construction for Indian law.

³⁹ *R. v. Van der Peet* at 45.

⁴⁰ *Id.* at 49.

⁴¹ *Id.* at 64.

However, the test is nearly an impossible one to meet. First, although the activity must be defined in general terms, it may not be among "those aspects of the Aboriginal society" that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the Aboriginal society that are only incidental or occasional to that society...."⁴² The holding in *Van der Peet*, however, was that, while an Aboriginal right to commercial fish sales need not be proven, bartering or trading fish was so incidental a practice that it could not be said to be integral to a culture and thus was not protected.

In contrast, in *R. v. Gladstone*, the Supreme Court of Canada did find that the practice in question was protected.⁴³ In *Gladstone*, two brothers were charged with trying to sell herring spawn on kelp in violation of the regulations governing the Pacific Herring Fishery. To readers trained to think of salmon as the paradigm case of a fishery, the idea of "herring spawn on kelp" sounds fairly trivial, and the case has been used as a shorthand for the lack of utility in Aboriginal rights jurisprudence. However, the most recent research into the history of indigenous peoples in the Americas suggests that the herring fishery, including the herring spawn on kelp component, is an ancient and an important one. The Court in *Gladstone* so found, using evidence including Alexander Mackenzie's description of the practice in historical times to conclude that

The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as 'commercial' prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an Aboriginal right to sell herring spawn on kelp to an extent best described as commercial.⁴⁴

⁴² *R. v. Van der Peet* at 43.

⁴³ *R. v. Gladstone*, [1996] 9 W.W.R. 149.

⁴⁴ *Id.* at 28.

In court, then, Aboriginal rights have tended to be limited to hunting and fishing rights, with some limited decisions favoring commercial practice. When members of the Shawanaga First Nation tried to assert an Aboriginal rights claim to support high stakes bingo and other gambling activities authorized by the Shawanaga First Nation lottery law but not licensed by the provincial Ontario Lottery Corporation, the Court ruled against them. Another group of defendants from the Eagle Lake First Nation had a similar experience. Both organizations had actually refused provincial licenses on the theory that the inherent right of self-government should allow them to conduct and regulate gaming. The appellants wanted a general approval of self-government, but the Court declined this invitation as overly broad. Furthermore, the Court found that "While . . . evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, . . . evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community."⁴⁵ Thus the appellants did not demonstrate that their gambling activities "took place pursuant to an Aboriginal right recognized and affirmed by s. 35(1) of the Constitution Act, 1982 ."⁴⁶

The gaming case, *R. v. Jones*, stands in stark contrast to the seminal United States case on Indian gaming, *California v. Cabazon Band of Mission Indians*.⁴⁷ In that 1987 case, the United States Supreme Court found that the state of California would "impermissibly infringe on tribal government" by regulating tribal bingo and card room activities. The progeny of *Cabazon* include the \$20 billion Indian gaming industry in the United States, a telling example of an area where Canadian and United States law, though originally based on similar colonial experiences, have parted ways.

⁴⁵ *R. v. Jones*, 138 D.L.R. (4th) 204, (sub nom. *R. v. Pamajewon*) at 28. The Supreme Court appeal was dismissed.

⁴⁶ *Id.* at 30.

⁴⁷ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202.

THE 1995 FEDERAL POLICY

While Aboriginal rights were still at court in the landmark case of *Delgamuuk'w*, and while secessionist pressures in the province of Quebec were at their peak, the Government of Canada came out with a federal policy that sounds at first blush as if it decides the matter of Aboriginal self-government in a positive way. Though often called the "Aboriginal Self-Government Policy" or even the "Inherent Right Policy," the Federal Policy Guide subtitle of "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" suggests the complexity and tendency toward stalemate at the heart of the policy. In this policy, put forward under the administration of Minister of Indian Affairs and Northern Development Ron Irwin, "The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982." Rather than being a right that can be immediately exercised, however, the inherent right of self-government is in this policy merely recognized as something that "may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements.

For these reasons, the Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government." The Government of Canada will not recognize individual Aboriginal jurisdictions unless they are part

of extensive negotiations between Aboriginal, federal, and even provincial governments. Some principles are not negotiable: Aboriginal self-government must be within the Canadian Constitutional Framework, not aspire to sovereignty in the international law sense, and respect the Canadian Charter of Rights and Freedoms. Beyond these general principles, the Government of Canada already delineated in its policy particular areas of jurisdiction and assigned them to separate categories based on whether or not they would be available for negotiation.

The first category, likely subjects for negotiation, includes "the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."⁴⁸ A second category is composed of matters that may not be strictly internal to an Aboriginal group and would be less open to negotiation with federal or provincial governments. In the event of a conflict, the other laws would prevail. Many of these areas are in subject matters given to the provinces in the federal/provincial division of authority in Canada. Subjects in the second group include divorce, labour/training, the administration of justice issues (including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws), penitentiaries and parole, environmental protection, assessment and pollution prevention; fisheries co-management; migratory birds co-management; gaming; and emergency preparedness. Finally, in a third category, the Government of Canada sees no reason to negotiate

⁴⁸These areas, which should be noncontroversial but are under the policy only available for negotiation, are establishment of governing structures, internal constitutions, elections, leadership selection processes; membership, marriage, adoption and child welfare; Aboriginal language, culture and religion; education; health; social services administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offenses of the type normally created by local or regional governments for contravention of their laws; policing; property rights, including succession and estates; land management, including: zoning; service fees, land tenure and access, and expropriation of Aboriginal land by Aboriginal governments for their own public purposes; natural resources management; agriculture; hunting, fishing and trapping on Aboriginal lands; taxation in respect of direct taxes and property taxes of members; transfer and management of monies and group assets; management of public works and infrastructure; housing; local transportation; and the licensing, regulation and operation of businesses located on Aboriginal lands.

with Aboriginal governments because the powers involved are too closely related to Canadian federal sovereignty. Among the excluded jurisdictions are international relations, national defence, immigration, international trade, bankruptcy and insolvency, intellectual property, Criminal law offences, public safety, broadcasting and telecommunications, aeronautics, navigation and shipping, postal service, and census and statistics. Several of these areas, such as intellectual property and telecommunications, are areas where one might argue that Aboriginal governments both need and deserve their own authority. For completed agreements, the Government of Canada will offer constitutional protection to the agreements under s. 35 (1). The Government's fiduciary responsibilities will function inversely with self-government authority of Aboriginal governments: "In circumstances where Aboriginal groups wish the Crown to have certain ongoing obligations, self-government jurisdiction or authority will, correspondingly, be limited. In such cases, continuing Crown obligations should be clearly defined. There is no justifiable basis for the Government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control." Aboriginal governments completing negotiations are financially responsible for their share of the negotiation costs, but the Government of Canada offers loans during the process itself.

NEGOTIATION CASE: NISGA'A

A negotiated agreement completed in 2000 is regularly offered as the first real modern treaty in Canada and the first land claim agreement to include self-government. The Nisga'a first contacted explorers when they were visited by Captain Vancouver in 1773. At the time of

establishment of the colony of British Columbia, the population of the colony was composed of 63,000 Indians and 400 whites. In 1877, a cannery was erected on the Nass River; immediately thereafter, the Government of Canada prohibited net fishing in fresh water and distinguished between the subsistence fishing of natives and commercial development of the fishery. In 1913, as the fisheries continued to develop, the Nisga'a took a petition to Ottawa, which was then sent for presentation to Great Britain. Between 1927 and 1951, it was against Canadian law to discuss land issues or pursue Indian land claims. In 1989, the Nisga'a and Federal Government of Canada signed the Framework of their negotiated agreement, finally signed into law (in 2000).

The hundreds of pages of the Nisga'a final agreement are clearly centered around a land claims agreement and an agreement as to sharing the regional fisheries. From the perspective of a self-government agreement, the negotiation is troubling in several areas. It clearly shows the contradictions in asking Aboriginal peoples to negotiate for what is acknowledged to be an inherent right. From the Government of Canada's perspective, the Nisga'a agreement is a dramatic improvement over earlier agreements that extinguished Aboriginal rights. However, although the language has changed--the Nisga'a agree only to practice their inherent self-government in ways "exhaustively" addressed in their agreement--this so-called "modified" rights approach may only represent a semantic improvement. In concluding the agreement, the Nisga'a agreed to have their special Aboriginal tax exemptions phased out; and the new property regime of the Nisga'a agreement moves property into fee simple status, lacking the traditional protections of indigenous land tenure. The so-called final agreement, which took somewhere between fourteen and a hundred years to negotiate, depending upon the chosen starting point, contains reference to several side agreements and to ongoing financing negotiations.

While some areas of the Nisga'a agreement sound like more complete self-government, there remains a wide distance between, as a central example, the suggested legal and policing functions of the agreement and those represented on the Internet as representing Nisga'a law and culture. Chapter 12 of the Nisga'a Final Agreement concerns the Administration of Justice. It gives permission for Nisga'a government to establish policing functions and courts, but only if they meet certain specified standards including being comparable to similar provincial standards, and as approved by the Lieutenant Governor in Council. Yet although the Nisga'a have passed quite a few pieces of legislation since the completion of its agreement, the section on "Justice" on its website has yet to be completed. Most information is three or four years old. One of the most serious objections to the overall agreement between the Government of Canada and the Nisga'a is that the 5,500 citizens of its four towns and three urban locals were granted lands that several other Aboriginal groups also claim, the so-called "overlap" problem.

LEGISLATIVE OPTION

For many First Nations that lack the kinds of resources or land claims that would make complete negotiations with them a priority for the Government of Canada, a better option would be clear recognition by the federal government of the inherent right of Aboriginal self-government. Bills working toward this goal have been introduced in Parliament for more than fifteen years, attempting to build on the so-called "Penner Report," the recommendations of a special committee from 1982. The most recent such bill, Private Member's Bill S-16 in the 39th Session of Parliament, would have offered to First Nations with a land base the opportunity to assert their rights and jurisdictions through a relatively simple process of constitution-making.

During the bill's time in Committee as a "subject matter," a process that kept it off the floor and eventually let it expire "on the order paper" with the session itself, many supporters advocated such legislation as a meaningful alternative to negotiation or litigation.

Opponents of the bill argued that it had not undergone sufficient indigenous consultation processes--despite its having been originated by First Nations in Alberta--was not deferential enough to provincial jurisdictions, would result in human rights violations, and raised a number of other flags, many of which were irrelevant or applied to previous legislation. One criticism was that the bill would at least potentially recognize Indian Act Bands, creations of the *Indian Act*, as the units of Aboriginal government. The bill's drafters and sponsors intended for First Nations themselves to make the decision as to whether they would be most effectively governed as a single band unit, as a confederation, or even as larger Nations reconstituted according to the large historical First Nations of Canada. The bill may be re-introduced in the coming Parliamentary session without the support of any of the major parties. Ironically, the Conservative Party of Canada, having won the most recent federal election, now appears poised, with the support of the Congress of Aboriginal Peoples, a group that represents urban and nonstatus Indians, to reintroduce a previous piece of legislation, the "First Nations Governance Act," that it had previously fought against.

DEFINING SELF-GOVERNMENT FROM WITHIN

With the lack of progress at the level of the national government, many First Nations scholars and activists are of the opinion that the best way to ensure that the Government of Canada is forced to recognize First Nations governments is for those governments to act more

positively on their rights and jurisdictions. One such movement is for the recovery of Aboriginal legal systems; this is the strategy called for by the leading Aboriginal law scholar John Borrows and supported by several academic programs throughout Canada. The first chapter of Borrows' groundbreaking work *Recovering Canada: The Resurgence of Indigenous Law* is tellingly entitled, "With or Without You: First Nations Law in Canada." "There is persuasive precedent in Canadian law recognizing the pre-existence of Aboriginal rights and their associated laws," Borrows argues. "Canadian legal institutions will soon determine if First Nations law will continue with or without them."⁴⁹

At least one Aboriginal confederacy has taken the position that it has ongoing independence and that no further legislation is necessary. The Six Nations Confederacy argues that, to this day, although it finds itself within the boundaries of another nation, it is itself sovereign.

INTERNATIONAL OUTLETS

Another legal avenue taken by Canada's First Nations has been to reach outward to international legal fora as part of the global indigenous movement. Indigenous peoples are able to bring cases directly before such bodies as the United Nations and the Organization of American States. International law, with the basic principle of self-determination for the world's peoples, would seem to provide the necessary support.

In fact, the basic documents of the emerging international law of indigenous peoples are built around the basic idea of self-determination for those peoples. The 1989 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries includes

⁴⁹ John Borrows, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* (2002) at 27.

provisions protecting indigenous priorities for the process of development; the integrity of indigenous values, practices, and institutions; thorough consultation and participation; and other provisions designed to protect indigenous peoples and their resources.⁵⁰ A good example of the balance found in ILO Convention 169 is Article IV:

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the people concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.⁵¹

The *UN Draft Declaration on the Rights of Indigenous Peoples, 1994*, states directly that "Indigenous peoples have the right of self-determination" and may "freely determine their political status and freely pursue their economic, social and cultural development."⁵² The *OAS Proposed American Declaration on the Right of Indigenous Peoples, 1997*, states that "Indigenous peoples have the right to freely preserve, express and develop their cultural identity in all its aspects, free of any attempt at assimilation"; states must not "support or favour an policy of artificial or enforced assimilation of indigenous peoples. . ."⁵³ The OAS Proposed Declaration also contains a broad statement of self-government rights:

Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy or self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare economic activities, land and resource management, the environment and entry by nonmembers; and to determine ways and means for financing these autonomous functions.⁵⁴

⁵⁰ ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

⁵¹ *Id.*

⁵² UN Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994).

⁵³ OAS Proposed American Declaration on the Right of Indigenous Peoples, 1997, Article V--No forced assimilation.

⁵⁴ OAS Proposed American Declaration on the Right of Indigenous Peoples, 1997, Article XV--Right to self government, Section 1.

These documents of international law seem to provide a firm foundation for indigenous peoples including Canada's First Nations to claim protection for self-government rights.

In practice, however, because international law began as a law of *nations*, indigenous peoples within nations have had difficulty being heard. There is a clear sense that the traditional nations work together to obstruct passage of meaningful statements and to deny the legal positions of indigenous persons. Two of the three documents cited above, for example, remain drafts largely because nation states work to frustrate the drafting process itself. Even when international standards are clear and international organizations such as the United Nations call for improved behavior on the part of individual nations, nations are not motivated to act except in their own interests.

In recent participation before the United Nations Commission on Human Rights, Canada delayed its report on self-determination and then argued that it was not sure that there was such a right in international law; simultaneously, Canada has been offering language to drafting sessions on international documents that undercuts the rights of indigenous peoples by arguing that they are not "peoples" in an international law sense. The overall dynamic has something of the flavor of the heroine of a European fairy tale finding that her rescuer was enthralled by the Wicked Witch.

RETURNING TO THE COURTS

Whether through failed attempts at Constitutional reform, negotiated agreements, legal activism, proposed legislation, or appeals to international legal authority, many parties are trying to adjust the relationship between the Government of Canada and First Nations Aboriginal

governments. If at any level the Government were clearly to articulate and act on its recognition of First Nations rights to self-government, then individuals, First Nations governments, and other interested parties could further build on that articulation. As things stand, however, there is a great deal of chaos, confusion, and uncertainty in intergovernmental relations between First Nations and the Government of Canada. The Department of Indian Affairs and Northern Development, sometimes referred to as Indian and Northern Affairs Canada, has been threatened with extinction by several Canadian Governments, yet continues to proliferate bureaucratic inefficiencies. In testimony on the subject matter of Bill S-16, the *First Nations Government Recognition Act*, during the summer of 2005, one Committee member stated that the right to Aboriginal self-government was not part of the Constitution and that, furthermore, the Inherent Rights Policy, even construed most liberally, was only a policy and, as such, could not be relied upon in court.

Although many would argue that it is best to stay out of court amidst such uncertainty, my position is that the multifaceted approach necessary for progress in recovering, restoring, building and protecting Aboriginal governments requires continued development of judicial doctrine. Such concepts as fiduciary duty, tribal sovereignty, and tribal exhaustion are in the United States carried, albeit imperfectly, in the common law and from there sometimes are articulated by statute. The roadblock that presently exists in the recognition of Aboriginal governments by the Government of Canada is in part a problem of interpretation: the Government itself has said that "the inherent right of self-government" is an Aboriginal right that is protected as a s. 35(1) right. Yet the Supreme Court of Canada has said that this right must be argued specifically, following the same analysis as would be used for a specific practice like selling herring spawn on kelp. The Government of Canada is unlikely in the foreseeable future

to open the legislative door toward a more clear statement of the right. Therefore, while Aboriginal governments should certainly continue to develop their own laws and practices, and while those sponsoring self-government recognition legislation should continue to do so, the path must also lead back through the courts.

One goal of such litigation must be to explain American precedents more completely to Canadian judges. There is some precedential value to American common law in Canadian courts, yet the explanation of such cases as *Cabazon* and the Marshall trilogy in Canadian opinions is unsatisfactory.

Another avenue might be to more clearly separate the "inherent right" approach from the "aboriginal right" approach. Just because the Government of Canada in some circumstances--in its policy and in individual negotiations--treats the inherent right of self-government as if it were an aboriginal right does not make it one. Despite Justice Lamer's distinction in *Van der Peet* between the "aboriginal" and the "rights," the rights of peoples, as argued by advocates of the rights of indigenous peoples in international law, include a more general self-determination. On the other hand, there may be some possibility for redefining the test for aboriginal rights itself. There is plenty of language in the *Van der Peet* opinion for a right to a particular form of government even if it has been changed through the colonial process.

CASE STUDIES

As examples of how courts might yet clarify matters differently, I would like to briefly consider three separate cases: the contemporary standoff of Six Nations protestors over a subdivision at Caledonia, Ontario; a ski resort case, *Minister of National Revenue v.*

Ochapowace Ski Resort Inc., decided on traditional Aboriginal rights grounds (or rather, the lack thereof); and the historical matrimonial property case of *Derrickson v. Derrickson*.

For the past two months, indigenous protesters from the near Caledonia, Ontario have been trying to stop the development of a piece of ground they say rightfully belongs to them. Protesters say that the piece of land at issue was part of land only leased back to the government, not sold. Six Nations citizens moved to the area from New York after their land there was taken in treaty action between Great Britain and the United States. Their descendants have filed a number of land claims on contested pieces of the property since the 1970s, and brought suit against the government in 1995, but courts have not moved to decide the suits. When Henco, a company that has owned the 40 acres in question for 15 year according to provincial laws, started to build houses, protesters occupied the site.⁵⁵ Along with a number of negotiation sessions, the conflict has already seen counter protests by local non-Indian residents, civil and then criminal injunctions against the protesters, and early dawn raids resulting in arrests.

The Caledonia conflict is a good example of current issues because the federal and provincial governments are pointing fingers at one another as to who should take responsibility for the situation. In addition, two separate First Nations governments are involved--the elected *Indian Act* government, which does not support the protesters, and the traditional government, which does. Somewhere up the chain of appeals, the case may go to higher Canadian courts, even the Supreme Court of Canada, and become a new paradigm case about tribal sovereignty. The traditional Six Nations government has probably the strongest case in Canada for an aboriginal rights decision actually favoring its form of government. The Court should take the opportunity to also consider inherent rights evidence, even if it only concludes that a clear

⁵⁵ Richard Blackwell, Iroquois Have Unique History On Their Side, Professor Says, globeandmail.com (24 April 06).

recognition of self-government by Parliament is required. The fact that the same First Nation has a traditional government (including a system of clan mothers) and an elected band government sanctioned by the *Indian Act* will make for interesting arguments. In the past, the Court has sometimes called for Canada and First Nations to simply work things out, but the Caledonia conflict is an excellent example of the need for judicial reasoning.

Another area where judicial action could be extremely helpful is in the area of tax cases.⁵⁶ Recently a Saskatchewan provincial court heard the case of *Minister of National Revenue v. Ochapowace Ski Resort Inc.*⁵⁷ Another of a series of cases at least partly designed to test or push the limits of Canadian Indian law, *Ochapowace* involved a ski resort located on a reserve, all shareholders of which were members of the Ochapowace Indian Band.⁵⁸ Brought to court for not collecting the Canadian goods and services tax (GST), the defendants argued that

Indian tribes were independent self governing nations that exercised sovereignty in government and social organization and that such sovereignty has not been lost but has been incorporated into the treaty. The claim is predicated on the view of international law that Canada had not established effective control or occupation of the area covered by treaty 4 by 1874. Evidence was heard from elders and experts to substantiate that position and that evidence will be commented on later in this judgment. As sovereign nations they claim the right to conduct business on the reserve without interference from the Canadian government. Non interference is given an extended meaning such that it includes the right to govern in an unfettered manner. Under this "full box" theory, the right to self government carries with it all the necessary ancillary rights.⁵⁹

The Court found this approach confusing and was unable to grasp that "at one and the same time that Indian nations are protected independent nations while at the same time Indians are subjects

⁵⁶ Canada's tax cases involving Indian tax issues have gone through a narrowing process similar to the Aboriginal rights jurisprudence and involving a similar "integral to their culture" test as well as increasingly unusable instructions for factors connecting income to a reserve. For an excellent analysis, see Martha O'Brien, *Income Tax, Investment Income, and the Indian Act: Getting Back on Track*, CANADIAN TAX JOURNAL 50.5 (2002) 1570.

⁵⁷ *Minister of National Revenue v. Ochapowace Ski Resort Inc.*, 2002 CarswellSask564.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 17.

of the Queen but still denying the authority of the Crown."⁶⁰ While the Penner report had called for implementation of Aboriginal government as a third order something like the American notion of domestic dependent nations, the actual state of Canadian government was delegated powers under the *Indian Act*.⁶¹ The court "tried without success to narrow the issue of self government," but "Defense was unable or unwilling to narrow the definition of self government to anything less than the right to self government and the right to acquisition of resources."⁶² With the court seemingly unable to comprehend the notion of tribal sovereignty, a term not mentioned in the opinion despite a brief discussion of the Marshall Court decisions, the defendants in *Ochapowace* really have no chance. The court looks at Aboriginal and treaty rights as possible defenses but, given the precedents involving specific infringement of cultural practices, can find no grounds on which to rule for the defense. Although the tone of the opinion is in general restrained, there are moments where a sort of pique with unworkable materials shows through, as when the court mentions that "the Canadian government has indicated that Indians have an inherent right to self government, apparently without forethought as to the definition of such a term."⁶³ Because there is no governmental or judicial precedent for defining self-government broadly, the court in *Ochapowace* chooses to define it in a way similar to that used by Canada in circumventing indigenous rights in international fora: self-government means only the right of individual adults to make their own decisions. Consequently, the defendant band and its chief, Denton George, are held guilty although the corporations, because of a Crown position that their prosecution was not required, are left alone.

⁶⁰ *Id.* at 40.

⁶¹ *Id.* at 66.

⁶² *Id.* at 78.

⁶³ *Id.* at 86.

Ochapowace clearly demonstrates the weakness of self-government jurisprudence in Canada and the need for stronger rulings to clarify a situation left "confusing" by both legal and political policymakers. The case also shows the need for better briefing on the American concepts of tribal sovereignty and self-government to show courts stronger reasoning. Even when courts in Canada have made rulings that seem to be in favor of First Nations, a lack of understanding of vital concepts that have proven useful in American courts has hurt the strength of First Nations governments and communities.

The clearest example of such a ruling is the matrimonial property ruling of *Derrickson v. Derrickson*. In the *Derrickson* case, a wife sought to have the matrimonial home divided on divorce; because the home was on reserve, however, the Court ruled that it was controlled by the *Indian Act* provisions for possession, which did not allow for such division. The Court distinguished the *Paul* case only by the fact that the wife in the case sought occupancy of the matrimonial home with her children; again, the Court found that s.77 of the *Family Relations Act*, R.S.B.C. 1979, c. 121 was inapplicable because of the conflict with s. 20 of the *Indian Act*, R.S.C. 1970, c. I-6.⁶⁴ The decision was especially troubling because many Aboriginal communities have a tradition that the family home should go to whoever is caring for the children in a divorce.

Both *Derrickson* and *Paul* found that provincial laws could not apply to the situation of matrimonial property on reserve because of section 91.24 of the *Constitution Act, 1867*, which gave lawmaking power over Indians and Indian lands to the federal government and not to the provincial government. The doctrine of federal legislative paramountcy required that the provincial laws in actual conflict with federal laws be held invalid.

⁶⁴ *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Paul v. Paul*, [1986] 1 S.C.R. 306.

After these cases, the federal government neither passed laws to remediate the lack of law governing the distribution of marital property on reserve in the case of reserve nor respected First Nations laws.

In testimony on this issue April 12, Tina Leveque, chief of the Brokenhead Ojibway Nation in Treaty 1 territory in Manitoba and a representative of the Assembly of First Nations, told about the Sucker Creek First Nation, which made its own matrimonial property law, endorsed through referendum: “Even though the law was fully supported by the community and addresses the gaps and the problems in current legislation, the response received by the Sucker Creek First Nation from the federal government is that it cannot accept the first nations law because it exceeds the bylaw-making powers in section 81 of the Indian Act”; consequently, even though Sucker Creek was not trying to use bylaw power, its law was ruled invalid. As Chief Leveque explained, “The federal government created legislation in the form of the Indian Act, which it recognizes is flawed and unfair, but it cannot accept or accommodate a solution from a first nation, because it does not conform to the flawed and unfair legislation it is trying to fix.”⁶⁵

The federal government put little energy into solving the problem until about 2003. In the meantime, the Native Women's Association of Canada filed suit against the Queen asking for a declaration that the lack of law covering the separation of matrimonial property on reserve was in violation of section 15 of the *Canadian Charter of Rights and Freedoms* as well as section 35.4 of the *Constitution Act, 1982*, which guarantees Aboriginal rights equally to men and women. While the federal government legally challenged NWAC's ability to bring the case in court, Parliament held committee hearings in the Senate and in the House of Commons, at which NWAC representatives were among those invited to speak. The House of Commons Committee

⁶⁵ Leveque testimony. Evidence, House of Commons, April 12, 2005.

made a very thorough report in 2005 which recommended a combination of approaches: use of provincial laws as stopgaps; respect for First Nations models, including both codes developed within the framework of the First Nations Land Management Act and independent self-government agreements; and Indian Act amendment for First Nations that have no matrimonial property code of their own.⁶⁶ All of these measures require legislation, however, and it has taken almost twenty years since the *Derrickson* and *Paul* cases just to get this far. In deciding the original cases, the Court missed an opportunity to recognize custom and tradition to fill the legal gap without compromising its rulings. An opinion incorporating indigenous law would have been a much better precedent than the actual opinion has been.

CONCLUSION

Canada's Indian law jurisprudence shows a misunderstanding of American precedent, an unwillingness to decide broad issues, and a lack of judicial will in actually deciding cases that would help to resolve bureaucratic stalemates, endless negotiations and claim procedures, deteriorating government-to-government relationships between federal and First Nations governments, and frustration of First Nations desires for self-government and self-determination. The resulting quagmire serves no one well. Although there is an understandable desire to avoid courts that might make matters worse with poorly considered decisions, clearer direction is unlikely to come from other legal and political policy sources. Consequently, the best approach to better policy is a multifaceted one that does not depend on federal policy, international support, or judicial opinion alone. Advocates in all branches of government must focus on providing the necessary materials for decision-makers. History has shown, however, that

⁶⁶ House of Commons Committee Report.

progress is unlikely without meaningful legal opinions. Therefore, Canadian judges must be better briefed on the crucial issue of self-government and encouraged to write opinions that fill in gaps and provide a way forward in developing a more useful Aboriginal jurisprudence on which other policymakers, federal and indigenous, may depend.