

# **Reconciling Indigenous Peoples' Sovereignty and State Sovereignty**

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# **RECONCILING INDIGENOUS PEOPLES' SOVEREIGNTY AND STATE SOVEREIGNTY**

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## **ABSTRACT**

The concept of 'shared sovereignty' is examined as a contribution to the debate on reconciliation with Indigenous peoples in Canada and Australia. The discussion includes some commentary on some common features of the reconciliation debate in both countries. The main focus is on the views of a minority of justices in a Supreme Court of Canada case and their comparison with the analysis of Canada's 1996 Royal Commission on Aboriginal Peoples.

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## 1. Introduction

Australia and Canada have many things in common. Both countries are former British colonies that have become independent democratic States. They are geographically large countries, with a relatively small population and they are at best middle-range participants in international politics. Both countries have vast natural resources that sustain vibrant economies within which trade outweighs manufacturing. Another comparison, which provides the context for the subject of this paper, is that each country harbours an indigenous population upon whose homelands these modern Nation-States and their vibrant economies have been built. In each country, the indigenous peoples have endured being dispossessed, socially and economically marginalized, and politically subjugated.

Although many descendants of the original inhabitants have assimilated into the general population, there remain very significant numbers of indigenous communities that retain their distinct cultural and social character and institutions, and that continue to live in and with their ancient homelands. These distinct societies are commonly referred to as 'nations' or 'peoples', although historically the indigenous population has been referred to as 'Aborigines', 'Indians', or more recently, 'First Nations'. Each country is currently involved in a search for better relations with its indigenous peoples. This search is usually referred to as a process of 'reconciliation'.

Australia and Canada have adopted various processes and policies in the search for better relations. This has involved institutions, some old, such as the Canadian treaties with First Nations and the common law courts, and some new, such as the recently dismantled *Aboriginal and Torres Strait Islander Commission* in Australia and Canada's modern treaty process. There have been some successes, and there have been some failures.

In this paper I aim to contribute to reflection and debate within the movement for reconciliation. The particular contribution is to explain the concept of 'shared sovereignties' and to introduce it as an idea that may be helpful in the search for common conceptual ground in legal and political developments on the issue of reconciliation. The discussion aims to build the momentum gained by recent conceptual shifts that have cleared some underbrush from the path of reconciliation. The reference here is to the recent initial shift that jettisoned the idea of '*terra nullius*'.

The legal concept of '*terra nullius*' proposed that when the British colonizers came to Australia the land belonged to no one. Since in fact there were many here who had been living in their homelands for at least fifty thousand years, the concept meant that the peoples who were here did not matter in English colonial law. The *Mabo* case (1992) is widely regarded as having put this notion into the dust bin of legal history, which is where justice demands it be discarded.

The concept of 'shared sovereignties' adds to the legal and political advancement that resulted from *Mabo*. It proposes that it is not only the physical presence of Aboriginal peoples on their lands that matters in law, but that the political action of Aboriginal peoples also matters in the sense that contemporary political action ought to contribute to the development of political, legal, and constitutional norms in Australia. The concept demands that attention be paid to the permeable boundaries between political and legal norms, and the role of legitimate political and legal actors in this

process. It seeks to put Aboriginal peoples on an equal footing with other Australians and Canadians in the development of the principles and values of the national constitution under which those who share the land are governed. One of the attributes of the law of the constitution that assists the present analysis is that it is often within its sphere that the meeting of law and politics can occasionally be seen in sharper relief than one can expect in other institutions such as the common law courts or the administration of law.

The discussion that follows begins with an overview of the concept of ‘shared sovereignties’ that was developed by Canada’s Royal Commission on Aboriginal Peoples (RCAP) in its 1996 final report (Canada 1996). The concept emerged from the commission’s analysis and recommendations on the aboriginal right of self-government, as a right protected by the law of the constitution.

The discussion then shifts to review the judicial adoption of the concept of shared sovereignties by two justices of the Supreme Court of Canada in the *Mitchell* case (2001), where they called it ‘merged sovereignties’.<sup>1</sup> This development shows that the concept of ‘shared sovereignties’ developed by the RCAP has already contributed to the evolution of Aboriginal rights jurisprudence in Canada. It is an open question that is introduced here whether a similar contribution can be made in Australia.

The other question raised in this paper is whether the concept of ‘shared sovereignty’ can make a useful contribution to the rhetoric of reconciliation discussions and ultimately produce the result that the political actions of Aboriginal peoples contribute to the development of political, legal, and constitutional norms in Australia.

In order to clarify what reconciliation means and does not mean in this paper, it is useful to begin by considering the meaning of the term and to add a few comments on some of the other ideas and strategies or actions that are often associated closely with reconciliation.

## 2. On reconciliation

The general meaning of ‘reconciliation’ is to re-establish good relations between parties, or ‘to make friendly again’. If so, then it is worth noting that in the context of relations between indigenous peoples and Nation-states such as Canada and Australia, the term is often used in the sense of ‘conciliation’. This is so because of the insurmountable challenge of showing that every indigenous people has had good relations with the State’s agents and representatives at some point in history.

Inspiration for the comments that follow has been gained from the goals articulated by *Reconciliation Australia* (Reconciliation Australia 2005) which declares that:

Our vision is for an Australia that recognises the special place and culture of Aboriginal and Torres Strait Islander peoples as the First Australians, values their participation and provides equal life chances for all.

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<sup>1</sup> Those who harbour sceptical notions about the merits of the idea of ‘merged sovereignties’ have the option of calling it ‘submerged sovereignties’ to display their disagreement. The main reason for not adopting the former term is to reflect the ideas that informed the development of the concept of ‘shared sovereignties’ within the work of the RCAP, where, *inter alia*, the principle of ‘mutual sharing’ guided the analysis and recommendations.

Reconciliation involves justice, recognition and healing. It's about helping all Australians move forward with a better understanding of the past and how the past affects the lives of Indigenous people today.

Reconciliation involves symbolic recognition of the honoured place of the first Australians, as well as practical measures to address the disadvantage experienced by Indigenous people in health, employment, education and general opportunity.

### ***Truth and reconciliation***

The concept of 'truth' is closely associated with that of reconciliation, especially in the context of State policies or institutions that aim at healing the collective wounds of past conflicts and troubled relationships between peoples living within the common borders of a single State. The relationship between the two ideas is evident in the name of the South African Truth and Reconciliation Commission and, in Canada, in the 'Truth and Reconciliation' label that has been adopted for the Assembly of First Nations' newly established commission relating to Indian Residential Schools (AFN 2009).

The objectives of *Reconciliation Australia* state that: 'Reconciliation involves justice, recognition and healing. It's about helping all Australians move forward with a better understanding of the past and how the past affects the lives of Indigenous people today'. That may reasonably be taken to mean that truth is an important part of a reconciliation movement, involving a search for a common truth in describing the past and its present effects upon indigenous peoples.

Although we may intuitively share similar understandings about the meaning of 'truth' in the context of reconciliation, it may reasonably be thought that more rather than less discussion about it is better. Speaking at a national conference addressing the Truth and Reconciliation Commission of the Assembly of First Nations in June 2007, I suggested that the idea of truth in the context of reconciliation might be described with the metaphor of the thin, fragile ice that forms overnight on the shallow ponds that are formed by the melting snow in western Canada where I grew up. I call this 'spring ice', although some of my friends know it as 'rubber ice' for its relatively elastic quality compared to the hard ice of winter. Like many others I recall, as a young child, delighting in testing the strength of the flexible but fragile ice sheets in roadside ditches on the way to school, risking a cold soaking of my hand-me-down jeans with every daring step. Sometimes at play we would break off pieces of this window-pane-thin ice and see how large a piece one could break off and lift triumphantly to sparkle in the springtime sun.

Truth is like fragile spring ice. Any one person can pick up a small piece of it. But larger pieces can only be held up by many hands, working together with great care. When held up this way we know it is the springtime of our relations and the sun makes it a thing of shining beauty. But it is very fragile, and if any one grasps on to it too firmly, it shatters and crumbles at one's feet.

### ***Peace and justice and reconciliation***

Peace and justice are also closely associated with the idea of reconciliation. Peace by itself is not always an unmitigated good. It can be imposed by brutal force to silence and to subjugate. In Canada, those who control the public media have associated the idea of peace in relations with indigenous peoples with economics. Immediately after the release of the final report of the Royal Commission on Aboriginal Peoples in 1996, the

newspaper editorial commentaries across the country focussed on the commission's calculations of \$2 billion as the yearly financial costs of implementing its twenty-year plan. It is still fair to state that the central question that accurately captures the way that the Canadian media portrays Aboriginal policy is to seek 'peace at the lowest price'. Are there better ways to describe a true reconciliation policy with Aboriginal peoples? Should we not also ask 'What is the price for justice?' Justice must always be the companion of peace in discussions on reconciliation between States and indigenous peoples (Bradford 2003:27).

### ***Apology and reconciliation***

One of the vexed issues surrounding reconciliation processes is the question of an apology. Is an apology by the State's representatives a necessary part of a reconciliation process? If so, what words should be said? Perhaps some lessons may be learned from events associated with reconciliation processes where indigenous peoples have not been involved.

One of the memorable and powerful images in the field of reconciliation happened in Warsaw, Poland, on 7 December 1970. On that day, the German Chancellor, Willy Brandt, attended a commemoration of the Jewish victims of the Warsaw Ghetto uprising of 1943. Although it had been decades since the historic uprising and the end of the Holocaust, Brandt spontaneously dropped to his knees before the commemoration monument, a profound act of apology and repentance. Although he spoke no words, the image of this silent apology, seen in the news by so many Poles and Germans, had a powerful effect on both nations. Brandt himself has been said to have reflected on the moment and said 'I did what people do when words fail them' (Brandt 1994:214).<sup>2</sup>

In Canada the Royal Commission on Aboriginal Peoples proposed that a Royal Proclamation be issued by the federal government, a formal act of recognition, healing and future promise. An instrument without legal effect, the Proclamation was seen by the commissioners as a powerful symbol of the government's commitment to better relations with Aboriginal peoples. The recommendation was not an inspiration of the commissioners; rather, it meant to respond directly to the views of Aboriginal persons that were expressed in the nearly one hundred public hearings held by the commission. The government has ignored that recommendation. Almost two years after the report was published, a statement of regret was made, not by the Prime Minister, but by the Minister of Indian Affairs, who has responsibility only for some aspects of Aboriginal policy. The churches have issued apologies in regards to their roles in the destruction of Aboriginal culture and the harms done to individual and family lives by the residential schools system.

Like many others perhaps, I harboured doubts for a long time about the merits of an official apology, especially when it is offered to a people only as a matter of public duty by a State agent. I used to think of the analogy of the little boy who is forced to say 'sorry' for hitting his little sister while harbouring thoughts of doing it again the very next chance he gets. But in listening carefully to what Aboriginal persons have had to say about the issue, I found reason to support the idea. It has to do with wrongs done by humans to other humans as acts sanctioned by State authority. The State has a monopoly on the use of force and coercion. We can think not only of extremes such as the

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<sup>2</sup> A recent discussion of this well-known event is that by Rauer (2006:257).

death penalty but the quelling of riots, and the collection of taxes and the issuing of fines and penalties. The State must always justify its use of power. It is never good enough to argue that wrongs may be inflicted upon groups of people 'in the public interest'.<sup>3</sup> It is reasonable to argue that some personal interests must be sacrificed for the good of the national community: taxpayers know that. But coercive tax policies always strive for equity and fairness and are always imposed in a context where it is naturally accepted that they must be justified. It is not the same where unjustifiable wrongs have been done and continue to be done. Apologies can temper fears and a sense of grievance, both of which are significant facts applicable to Aboriginal peoples in both countries and which cover a wide range of events and particularities, from Aboriginal deaths in custody to the personal fears of policemen that I have heard described by several Aboriginal women in several parts of Canada.

Returning to the matter of 'public interest', it is politicians in charge of the State government who decide what laws and policies are in the public interest, and they are the representatives of the State. They issue apologies on behalf of the State for its past actions. An official apology does not demean the national population or its soul; it builds bridges that contribute to the constitution of national communities.<sup>4</sup>

Surely if those who have suffered from the wrongs inflicted by official State sanction say they want an apology, then there can be no doubt an apology will contribute to reconciliation. If we accept the proposition that Australia and Canada ought to have a national sense of identity grounded in a sense of community with a shared national vision based upon commonly-held values and objectives, then it is imperative that the goals of reconciliation with the Aboriginal peoples be heeded.

I am now convinced that there is good reason for an apology. It amounts to a formal statement on the part of the State's representatives who control the reins of power that the ones who have been wronged need not fear: it is a powerful symbol and statement of a commitment to use the State's power for good and not for wrong. 'Not under our watch shall these wrongs be repeated'.

### **3. Canada's Royal Commission on Aboriginal peoples, and 'merged sovereignties'**

The concept of 'merged sovereignties' emerged from the commission's constitutional analysis which led it to conclude that Section 35 of the *Constitution Act 1982* recognises and affirms an inherent right of self-government that is vested in 'nations' of Aboriginal peoples. In the descriptions that follow, direct quotations from the sources will advance the purpose of setting out in brief form the main issues and ideas developed by the commission and later adopted in the Supreme Court of Canada. Introductory descriptions of the concept of 'merged sovereignties', first the concept proposed by the RCAP, and then the concept proposed in the *Mitchell* case will be followed by a discussion and concluding remarks.

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<sup>3</sup> Chamberlin (1975) has provided an eloquent portrayal of the point that Aboriginal peoples in Canada and the United States have historically been wronged in the name of the public good.

<sup>4</sup> There is a voluminous literature on the subject of apologies and reconciliation in various contexts; for example, Josephs (2004:18).

The commission's discussion began with a review of some of the views it had received on the meaning of 'sovereignty' in public hearings and other submissions by Aboriginal persons (RCAP 1996:112):

Commissioners heard differing views about what Aboriginal sovereignty means for the relationship between Aboriginal peoples and Canada. Some Aboriginal people spoke about degrees of sovereignty and joint jurisdiction. A number of treaty nations used the term "shared sovereignty" and maintained that their treaties created a confederal relationship with the Crown, or a form of treaty federalism. For example, the Federation of Saskatchewan Indian Nations outlined a vision of shared but equal sovereignties, affirmed by treaties between First Nations and the Crown.

The commission noted that some Aboriginal persons had criticized the adoption of the concept of sovereignty in debates involving political autonomy and authority. Terms drawn from European thought such as 'sovereignty' skew the reconciliation debate against Aboriginal peoples because use of those terms implies acceptance of basic premises behind the concept that may not be upheld by the Aboriginal side. By way of example, the commission cited Gerald Alfred's suggestion of the Mohawk word '*tewatatowie*', which means 'we help ourselves', and is linked to concepts embodied in the Iroquois *Kaianerekowa*, or Great Law of Peace. It is understood not only in terms of interests and boundaries, but also in terms of land, relationships and spirituality. 'The essence of Mohawk sovereignty is harmony, achieved through balanced relationships' (RCAP 1996:111).

The commission then engaged in an analysis that concluded that the common law doctrine of Aboriginal rights includes an inherent right of Aboriginal peoples to govern themselves within Canada. 'This right is inherent in that it originates from the collective lives and traditions of these peoples themselves rather than from the Crown or Parliament' (RCAP 1996:192).

At this point the commission report examined the process of constitution building. This discussion introduces the proposition that the political actions of Aboriginal peoples matter in the development of the law of the constitution, and also identifies the inspiration for the concept of 'merged sovereignties' (RCAP 1996:193-194):

The constitution of Canada has a complex internal structure that bears the imprint of a wide range of historical processes and events. The process of building the Canadian federation was not restricted to the pact struck in the 1860s between the French-speaking and English-speaking representatives of Lower Canada, Upper Canada, Nova Scotia and New Brunswick and to the negotiations bringing in the other provinces at later stages. The Canadian federation also finds its roots in the ancient annals of treaties and alliances between the Aboriginal peoples and the Crown.

The modern state of Canada emerged in part from a multi-faceted historical process involving extensive relations among various bodies of Aboriginal people and incoming French and British settlers. These relations were reflected in a wide variety of formal legal instruments, including treaties, statutes and Crown instruments such as the Royal Proclamation of 1763. The resulting body of practice eventually gave rise to a unique body of inter-societal common law that spanned the gap between the societies in question and provided the basic underpinning for ongoing relations between them.

Over time and by a variety of methods, Aboriginal peoples became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law.

...

... this process was not fully consensual.[internal reference omitted] It was marred by elements of coercion, misrepresentation and outright fraud. It was often characterized by broken promises, widespread acts of dispossession and a blatant disregard for established rights. Nevertheless, it is also true that the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held (and continue to hold) with the Crown and the rights that flow from those relations.

A principle of fundamental importance for the commission's analysis is the principle of 'continuity'. The principle has been well articulated in Aboriginal rights scholarship and also in the context of the 'compact theory' of confederation, which argues that the Provinces did not receive power from the central government, but on the contrary, the federal government was a result of the consensual association and compact under which the Provinces retained all their original powers not ceded to the federal government. On this point the commission stated that, behind the compact theory is the fundamental principle of continuity which has been described as 'a right or a power can no more be taken away from a nation than an individual, except by a law which revokes it or by a voluntary abandonment' (RCAP 1996:195).<sup>5</sup>

The principle of continuity supports the proposition (RCAP 1996:195-196):

... that Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. They retained their ancient constitutions so far as these were consistent with the new relationship.

...

... the process of constitution building has taken place over a very long time. It has ranged from such ancient arrangements as the seventeenth-century Covenant Chain between the Five Nations and the French and British Crowns to the relatively recent entry of Newfoundland in 1949. The federal union in 1867, in which French- and English-speaking peoples joined to form the new country of Canada, was a significant landmark in the process. However, it was only one part of a protracted historical evolution that, in one way or another, had already been proceeding for some time and has continued to the present day.

...

Recognition of national and regional rights has been a major structuring principle of the constitution from earliest times. This principle of continuity ensured that when a distinct national or regional group became part of Canada, it did not necessarily surrender its special character or lose its distinguishing features, whether these took the form of a distinct language, religion, legal system, culture, educational system or political system. In its most developed form, the principle has enabled certain national groups to determine the dominant legal, linguistic, cultural or political character of an entire territorial unit within Confederation, whether this be a province or an Aboriginal territory. In more modest form, it has preserved certain collective rights of national groups within these territorial units.

The commission then noted that the courts had taken the view that treaties and other rights of Aboriginal peoples could be unilaterally abrogated or extinguished by legislation, pursuant to the courts' understanding of the meaning of 'parliamentary sovereignty' (RCAP 1996:198). That theory was jettisoned with the Constitutional entrenchment of Aboriginal and treaty rights in 1982. The main provision was Section 35, which provides, in part (Canada 1982 Chapter 11) that:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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<sup>5</sup> Authorities on the compact theory are cited at n.146 and n.147 and discussed in the text of the commission report at pp.194-195.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

The final report of the commission set out the argument for the constitutional right of self-government, basing it largely upon the existing jurisprudence of the Supreme Court of Canada (RCAP 1996:202 n10):

At the time of European contact, Aboriginal peoples were sovereign and independent peoples, possessing their own territories, political systems and customary laws. Although colonial rule modified this situation, it did not deprive Aboriginal peoples of their inherent right of self-government, which formed an integral part of their cultures. This right continued to exist, in the absence of clear and plain legislation to the contrary. Although in many cases the right was curtailed and tightly regulated, it was never completely extinguished. As a result, the inherent right of self-government was recognized and affirmed in section 35(1) of the Constitution Act 1982 as an existing Aboriginal or treaty-protected right. This constitutional right assumes a contemporary form, one that takes account of the changes that have occurred since contact, the modern needs of Aboriginal peoples, and the existence of a federal system in Canada.

The commission then noted the vulnerability of the right of self-government to extinguishment prior to 1982, and argued that in applying the term ‘existing’ in Section 35 that (RCAP 1996:203):

... we should consider not only the terms of any legislation passed before 1982 but also the character and weight of the particular right in question, as a matter of basic human rights and international standards.

... it is unimaginable that, in their own homelands, Aboriginal peoples should ever be denied Aboriginal and treaty rights that are central to their existence as peoples. This broader approach reinforces the conclusion that the inherent right of self-government still exists for all Aboriginal peoples in Canada and that this right exists notwithstanding the terms of legislation passed before 1982.

The commission explained the nature and scope of the Aboriginal right of self-government that is protected in Section 35 and contrasted that right with other rights that are based on other foundations (RCAP 1996:213):

... we have in mind the particular version of that right of self-government now recognized in Canadian constitutional law. We are not referring to the broad right of self-government that is asserted by many Aboriginal peoples on the basis of their treaties or on other historical and political grounds.

The commission made it clear that the right of self-government was not the same as the right of self-determination that all ‘peoples’ have by virtue of international law. The following extracts capture the essence of the RCAP approach (RCAP 1996:169, 172, 174-175):

In our view, the Aboriginal peoples of Canada possess the right of self-determination. This right is grounded in emerging norms of international law and basic principles of public morality.

...

The right of self-determination is held by all the Aboriginal peoples of Canada, including First Nations, Inuit and Metis people. It gives Aboriginal peoples the right to opt for a large variety of governmental arrangements within Canada, including some that involve a high degree of sovereignty. However, it does not entitle Aboriginal peoples to secede or form independent states, except in the case of grave oppression or a total disintegration of the Canadian state.

...

It is important to distinguish between self-determination and self-government. Although closely related, the two concepts are distinct and involve different practical consequences. Self-determination refers to the right of an Aboriginal nation to choose how it will be governed – whether, for example, it should adopt separate governmental institutions or join in public governments that embrace Aboriginal and non-Aboriginal people alike. Self-government, by contrast, is one natural outcome of the exercise of the right of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice.

The report then explained that the Section 35 right (RCAP 1996:213)

... is inherent in its source, in the sense that it finds its origins within Aboriginal peoples, as a contemporary manifestation of the powers they originally held as independent and sovereign nations. It does not stem from constitutional grant, that is, it is not a derivative right.

The discussion reviewed the distinction between the two approaches just described and offers a comment that was to be quoted later in the Supreme Court: 'Under the second doctrine, Aboriginal governments give the constitution its deepest and most resilient roots in the Canadian soil' (RCAP 1996:213-214; *Mitchell* para.129).

The final report concluded that (RCAP 1996:214; *Mitchell* para.134):

The Aboriginal right of self-government is recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1). So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while Aboriginal peoples have the inherent right to govern themselves under section 35(1), this constitutional right is exercisable only within the framework of Canada. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

The commission's analysis then proceeded with a discussion that elaborates the meaning of 'circumscribed rather than unlimited' (RCAP 1996:214):

Within their sphere of jurisdiction ... the authority of Aboriginal governments is immune to indiscriminate federal or provincial interference.

Referring to the co-existing federal and provincial governments, the report proposed an 'organic model' of the constitution made up of three orders of government with distinct but overlapping spheres of authority (RCAP 1996:215):

The Aboriginal sphere of jurisdiction includes all matters relating to the good government and welfare of Aboriginal peoples and their territories.... This sphere consists of both a core and a periphery. In core areas of jurisdiction, an Aboriginal people is free to implement its inherent right of self-government by self-starting initiatives, without the need for agreements with the federal and provincial governments, ... in the periphery, the inherent right of self-government can be exercised only following the conclusion of agreements with the federal and provincial governments.

For present purposes it is important to note the following explanation. According to the commission (RCAP 1996:215):

the core of Aboriginal jurisdiction, ... includes all matters that:

...

- are of vital concern to the life and welfare of a particular Aboriginal people, is culture and identity;
- do not have a major impact on adjacent jurisdictions; and
- are not otherwise the object of transcendent federal provincial concern.

The periphery makes up the remainder of the sphere of inherent Aboriginal jurisdiction.

The report then engaged in an extended discussion of the two spheres of Aboriginal jurisdiction (RCAP 1996:215-223).

Although the right of self-government was not explicitly mentioned in Section 35, subsequent political developments in Canada revealed political acceptance of its existence and meaning. This acceptance is contained in the terms of the *Charlottetown Accord*, a national constitutional agreement which included Aboriginal provisions agreed by First Ministers of the Crown representing the federal and provincial governments, and Aboriginal political leaders (RCAP 1996:220, 400 n.188). Participants in the negotiations leading up to agreement on the Accord informed the commissioners that an earlier analysis and recommendations by the commission on Aboriginal self-government had assisted the discussions and eventual political acceptance of the inherent right of self-government (Canada 1993:220).

The commission's final report, following the discussion of the Aboriginal spheres of jurisdiction, compared the approach it had described with proposals in the draft *Charlottetown Accord* that had been politically accepted by First Ministers and Aboriginal leaders on 9 October 1992, which, *inter alia*, provided (Canada 1993:220) that:

35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada. [not Aboriginal right]

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

(3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

...

35.4(1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.

(2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preserving of peace, order and good government of Canada. [emphasis added]

(3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

Although the *Charlottetown Accord*, of which the Aboriginal provisions were only a part, did not pass into law because it failed in a national referendum, the Aboriginal

provisions are quite properly viewed as the high-water mark of political acceptance of the inherent right of self-government of Aboriginal peoples in Canada. It is evident that, even in this best model, Canada would retain authority or sovereignty over matters of national interest.

Further political developments extended Canada's official acceptance of an inherent right of self-government as argued by the commission. In August 1995 the federal government issued a policy guide entitled *Aboriginal Self-Government*, which was designed to serve as a framework for the negotiation of agreements implementing the inherent right of self-government, and which still guides negotiations aimed at reaching agreement on the terms of modern treaties with First Nations (Canada 1995).<sup>6</sup>

The 1995 policy guide was reviewed in the commission's final report, which noted three lists of powers that the federal government had stated it was willing to recognise within the broad definition of matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution. The first list consists of matters the government views as proper subjects for negotiations under this definition. The second list contains subjects that go beyond the definition, but in respect to which the government is prepared to negotiate some measure of Aboriginal jurisdiction, while specifying that primary law-making authority would remain with the federal or provincial governments, whose laws would prevail in the case of a conflict with Aboriginal laws.

The third list deserves close scrutiny for its relevance to the issues in this paper. That list includes subject matters where there are no compelling reasons for Aboriginal governments to exercise law-making authority and that cannot be characterized as either integral to Aboriginal cultures or internal to Aboriginal groups.

These subject matters are grouped under two headings. Both relate to what the federal guide views as 'national interest powers', but it is only the subject matters in the first list that concern our immediate purposes (RCAP 1996:222 n.10):

1. Powers related to Canadian sovereignty, defence and external relations, including
  - international relations, diplomatic relations and foreign policy
  - national defence and security
  - security of national borders
  - international treaty making
  - immigration, naturalization and aliens
  - international trade, including tariffs and import-export policy.

The commission noted that, in the policy guide (RCAP 1996:223),

... while matters on the third list are excluded from self-government negotiations, the policy guide envisages the possibility of entering into 'administrative arrangements' in these areas, where such arrangements are feasible and appropriate.

The commission concluded this part by referring to the government's policy on laws enacted by Aboriginal governments and conflicts with laws of other governments (RCAP 1996:223):

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<sup>6</sup> As cited in RCAP 1996 at n.218, p.402. The 1995 policy guide is discussed at pp.221-223,

The policy guide affirms that implementation of the inherent right of self-government will not lead to the automatic exclusion of federal and provincial laws, many of which will continue to apply to Aboriginal peoples or co-exist with Aboriginal laws. To minimize conflicts between Aboriginal laws and federal or provincial laws, the federal government proposes that all self-government should establish rules of priority for resolving such conflicts. While these rules may provide for the paramountcy of Aboriginal laws, in the federal government's view, they may not deviate from the basic principle that "federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws".

The claim in the *Mitchell* case will be examined in the next section. This is the case in which two justices of the Supreme Court of Canada gave a minority judgment in which they adopted the RCAP notion of 'shared sovereignty'. The case developed as a challenge that went to the very heart of these matters of 'overriding national importance', by asserting an Aboriginal right to import goods from the United States into Canada free from import taxes or duties.

#### **4. Judicial adoption of the concept of 'shared sovereignties'**

In the previous section, the RCAP's argument for an inherent Aboriginal right of self-government recognised and protected by the Constitution was reviewed. The concept of 'shared sovereignties' formed part of that argument. In the argument, the original authority and power of Aboriginal peoples to govern themselves had been absorbed into the body politic and the law of the constitution of Canada. The law of the constitution had been developed in part by the political actions of Aboriginal peoples in the course of historic Crown-Aboriginal relations. I interpret the analysis of the RCAP to mean that the political actions of Aboriginal peoples in contemporary and future Crown-Aboriginal relations ought to continue to inform the dynamic evolution of the law of the constitution in Canada. Not only constitutional conventions and practices, but fundamental rights emerge from political action whereby actors identify the interests they value, and, in time, the law recognises these interests and protects them as legal rights. The political developments of the last three decades which resulted in the recognition of the right of self-government of Aboriginal peoples in Canada are part of, and illustrative of, that dynamic process.

If the political autonomy evident in a constitutional right of self-government is viewed as a protected space within Canadian sovereignty for the continuing force of Aboriginal sovereignty, it remained to be seen how the judicial arm of the Canadian government might view the idea of 'shared sovereignties'. Earlier case law had left this question open.<sup>7</sup> The first indication came from the minority decision in the difficult case brought on appeal to the Supreme Court of Canada by Chief Mike Mitchell (*Mitchell* n.3).

Given the facts of the case and the argument made, it was apparent that Chief Mitchell had taken a case to the courts of Canada that stood squarely against the views of the executive branch of government of what constituted matters of transcendent national importance. Regardless of how the Aboriginal-right claim was ultimately to be framed as a matter of law by the courts, it did involve activities across a political border

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<sup>7</sup> Thomas Isaac (2004) has provided a discussion of the jurisprudence on the issue of Aboriginal self-government. Also *Campbell v British Columbia (A.G.)* 2000.

into Canada.<sup>8</sup> The case was also built, not upon a foundation of Canadian law, but on a foundation of the rules of a political entity distinct from Canada, the Haudenosaunee situated in New York State. This would seem to raise a question of private international law, or conflict of laws, but the action was framed as a matter of Canadian constitutional law.

The majority based its decision on an interpretation of Canadian law, not on an interpretation of the status of laws of the Haudenosaunee as may be enforceable in Canada under established rules in the sphere of conflict of laws or private international law. This was accomplished by responding to the claim for an Aboriginal right protected by Section 35. It has been suggested in academic commentary that the court could have given weight to evidence in support of the right claimed by Mitchell (Coyle 2003).

Be that as it may, it is difficult not to believe that the court was most concerned with reaching a decision that did not challenge Canada's control of its political borders and policies related to tariffs, customs and imports and exports. Doing otherwise would have meant that the court was making decisions that stood in the face of what the executive arm of government had officially announced it viewed as matters of national interest and not appropriate for discussion under the guise of Aboriginal rights. The Supreme Court had earlier demonstrated its sensitivity to the political reception of its decisions on Aboriginal rights following its decision in the *Marshall* treaty case (*R v Marshall* 1999).

Binnie, J. wrote the minority judgment concurred in by Major, J (*Mitchell v Canada* [2001]). His Honour explained that Aboriginal interests and rights are to be reconciled with the 'sovereignty' of a new entity that includes Aboriginal peoples:

"Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final Report of the Royal Commission on Aboriginal Peoples, vol.2 (Restructuring the Relationship (1996)), at p.214, says (sic) that "Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil." This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s.35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled."

He then wrote that:

The final Report of the Royal Commission on Aboriginal Peoples, vol.2, goes on to describe "shared" sovereignty at pp. 240-41 as follows:

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial

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<sup>8</sup> William R Di Iorio (2007) has provided a discussion of the problems and possible solutions of border security for Native Americans, which also contains some reference to the Canadian border. At the time of writing, in late 2007, the Assembly of First Nations (AFN 2007) in Canada has had communications with senior Canadian and American officials and with the National Congress of American Indians on border security issues.

governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

On this view, to return to the nautical metaphor of the “two-row” wampum, “merged” sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel’s components pull together as a harmonious whole, but the wood remains wood, the iron remains iron and the canvas remains canvas. Non-aboriginal leaders, including Sir Wilfred Laurier, have used similar metaphors. It represents, in a phrase, partnership without assimilation.

Binnie, J. then briefly considered the established law that Aboriginal persons are citizens of Canada as a matter of common law, in addition to the particular status they might possess pursuant to treaties, legislation or other laws.<sup>9</sup> He then quoted Lamer C.J. who stated by way of *obiter dictum*<sup>10</sup> in *Delgamuukw* that:

... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign. The constitutional objective is reconciliation not mutual isolation.

And later on His Honour wrote:

... The Royal Commission Final Report, vol.2, states at p.214 that:

Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

It is unnecessary, for present purposes, to come to any conclusion about these assertions. What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are a part of it.

The protection of its citizens and territory from intrusion is widely regarded as a primary obligation, if not a *raison d’etre*, of States. Binnie J. addressed the question squarely, citing authority for the proposition that ‘Control over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of

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<sup>9</sup> *Mitchell* (n.3 at para.133) quoted Dickson, C.J.C. in *Nowegijick v. The Queen* [1983] 1 SCR 29, at 36, where he stated that ‘Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all the responsibilities including payment of taxes, of other Canadian citizens’. The more complete statement of the law is that all Aboriginal persons enjoy all the same rights and responsibilities of citizens except as may have been changed or removed by valid legislation, subject to the effects of the 1982 Constitutional amendments, which will require that the validity of such legislation be tested against the recognition and affirmation of the rights in S.35. Early decisions affirming the status of registered Indians *qua* citizens include *Regina ex rel Gibb v White* (1870), 5 PR 315; 2 CNLC 315, and *Sanderson v Heap* (1909), 11 WLR 238; 19 Man. R. 122; 3 CNLC 238.

<sup>10</sup> ‘Law. An opinion voiced by a judge that has only incidental bearing on the case in question and is therefore not binding. ...’. *West’s Encyclopedia of American Law* <[www.answers.com/topic/obiter-dictum](http://www.answers.com/topic/obiter-dictum)>; ‘[Latin, By the way.] Words of an opinion entirely unnecessary for the decision of the case. A remark made or opinion expressed by a judge in a decision upon a cause, “by the way”, that is, incidentally or collaterally, and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.’ *The Free Dictionary* (legal) <[legal-dictionary.thefreedictionary.com/Obiter+Dictum](http://legal-dictionary.thefreedictionary.com/Obiter+Dictum)> both accessed 14Sep09. – Editor.

sovereignty.' Continuing, His Honour explained that '... not only does authority over the border exist as an incident of sovereignty, the State is expected to exercise it in the public interest'.

Mitchell's claim, it will be recalled, was not based upon a foundation of Canadian law but upon his status as a citizen of the Haudenosaunee nation based at Onondaga, New York, within the territorial boundaries of the United States of America. Binnie cited a range of authorities including from American and international law, and also Blackstone, who stated that 'Upon exactly the same reason stands the prerogative of granting safe conducts, without which by the law of nations no member of one society has a right to intrude into another'.

Mitchell's claim was characterized by the minority as essentially a right of entry into Canada, not as a right of a citizen of Canada, which he is, but as an incident of the privileges or rights that inhere in citizenship in another political society, the Haudenosaunee. Accordingly, having thus framed the issue, the minority reached the conclusion that:

... the ... right claimed by the respondent as a citizen of the Haudenosaunee Confederacy is incompatible with the historical attributes of Canadian sovereignty.

This conclusion reflects the explanation provided by RCAP in a part of its analysis that was reviewed earlier, and which explained that (RCAP 1996: n.31):

The Aboriginal right of self-government is recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1). So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law.

The minority judgment then addressed the question 'whether this conclusion is at odds with the purpose of S.35(1), i.e. the reconciliation of the interests of aboriginal peoples with Crown sovereignty?' Addressing himself to the facts at issue, Binnie J. applied the test for proof of Aboriginal rights, stating;

A finding of distinctiveness is a judgment that to fulfil the purpose of s.35, a measure of constitutional space is required to accommodate particular activities (traditions, customs or practices) rooted in the aboriginal peoples' [sic] prior occupation of the land. In this case a finding against "distinctiveness" is a conclusion that the respondent's claim does not relate to a "defining feature" that makes Mohawk "culture what it is"... it is a conclusion that to extend constitutional protection to the respondent's claim finds no support in the pre-1982 jurisprudence and would overshoot the purpose of s.35 (1).

In the conclusion to this discussion, His Honour used language reminiscent of the 'shared rule' and 'self-rule' dichotomy of Aboriginal self-government in Canada, and the list of subject-matters that are viewed as matters of national interest in the 1995 federal government's policy guide on Aboriginal self-government:

In terms of sovereign incompatibility, it is a conclusion that the respondent's claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of those interests in this particular case favours an affirmation of our collective sovereignty.

The justices in the minority felt compelled to add to their *obiter* discussion some additional commentary on the implications of their analysis for Aboriginal self-

government institutions in Canada. An example of such an institution would be the Nisga'a treaty.<sup>11</sup>

The commentary begins with a discussion of the American jurisprudence on the well-known concept of 'domestic dependent nations' articulated in the nineteenth century Marshall decisions, and the development of the 'plenary power' doctrine whereby Congress can legislate in derogation of the sovereign powers of the Indian tribes. It is recognised that the RCAP analysis differs from the American model. The example cited is the RCAP's inclusion of an independent self-sustaining economic base within the concept of Aboriginal self-government. Their Honours also noted that American law had rejected a claim by a Canadian Aboriginal person to enter the United States with goods free of duty.

The minority decision concluded by noting that in the instant case the facts did not support the claimed right as a matter of law, and emphasized that the commentary in the dissenting opinion ought not to be 'taken as either foreclosing or endorsing any position on the compatibility or incompatibility of internal (emphasis in original) self-governing institutions of First Nations in Canada with Crown sovereignty, either past or present'.

## 5. Discussion

It is evident in the above review that both the RCAP and the minority justices in *Mitchell* sought a way to reconcile some harsh historical truths about dispossession and subjugation with an analytical foundation suitable for reconciliation. The goal of reconciliation is a principle which guides the judicial interpretation of the law of the Constitution that protects the rights of the Aboriginal peoples in Canada. The common approach that was reviewed in the previous section aims to recognise the constitutional status of a right of self-government that can be exercised within Canada, while at the same time recognising that the Aboriginal peoples share a common future with non-Aboriginal peoples in Canada. The common approach reflects the common law's role of reconciling conflicting interests by drawing upon general principles.

For the sake of convenience, the views shared by the commissioners of the RCAP and the minority in the *Mitchell* case will now be referred to as the 'shared approach'.

One of the contributions of the 'shared approach' is that it can help to change the way that politicians, the public, and policy-makers think about Aboriginal peoples. It moves us beyond the official admission that *terra nullius* does not reflect contemporary values and norms in denying that the existence and possession of their lands by Aboriginal peoples mattered when the intruders came to North America and Australia.

It shifts thinking towards the recognition that it is not only the *existence* of Aboriginal peoples, and the possession of their lands, that matters in law and politics. The 'shared approach' argues that the **political action** of Aboriginal peoples matters in law and politics. The political action mattered historically, and thereby the interests of Aboriginal peoples crystallized into rights recognisable and enforceable within the Canadian and Australian legal systems. Just as discarding *terra nullius* recognises the equal human dignity and legal significance of Aboriginal peoples, the 'shared approach' recognises that the political action of Aboriginal peoples matters equally with those of

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<sup>11</sup> This treaty was passed into federal law by *The Nisga'a Final Agreement Act* SC200 c.7 and into provincial law by the *Nisga'a Final Agreement Act* SBC 1999 c.2.

non-Aboriginal actors in the political processes out of which constitutional and legal norms emerge. This is a forward-looking approach, appropriate for reconciliation. It asserts that Aboriginal peoples' political action mattered, not only yesterday, but matters today and will continue to matter tomorrow.

The function of political action in creating constitutionally and legally relevant principles was expressed by the commission by stating that 'the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held (and continue to hold) with the Crown and the rights that flow from these relations' (RCAP 1996:194).

The minority in the *Mitchell* case took the same view by directly adopting the commission's analysis; 'Aboriginal governments give the constitution its deepest and most resilient roots in the Canadian soil' (RCAP 1996:214; *Mitchell* para.129). This is necessarily a recognition that the political action of Aboriginal peoples mattered and continues to matter because it gave rise to constitutionally-affirmed political authority to act that may be exercised now and into the future.

The 'shared approach' is built on the practical recognition that Canada is a Nation-State that has effectively exercised *de facto* power and authority over the population within Canadian political borders for a long time. Sovereignty is generally understood to refer to the assertion and exertion of power and authority of a State over the population on its territory. The 'shared approach' is an argument that *de jure* sovereignty or authority to act is shared between the federal and provincial governments that are recognised in the law of the constitution, and Aboriginal nations that have an Aboriginal right of self-government.

The 'shared approach' is an argument for including Aboriginal power and authority within the exercise of Canadian domestic sovereignty. The 'shared approach' is thus suited for reconciliation dialogues that can be adopted not only by advocates of Aboriginal interests, but by non-Aboriginal actors who must insist that Canadian or Australian sovereignty can not be effectively impaired.

The argument of the 'shared approach' is the argument for a right of Aboriginal self-government. The essential reconciliation at issue in this argument is the reconciliation of conflicting spheres of interest as governments, both Aboriginal and others, undertake to exercise power and authority to determine what is the nature and scope of the 'public interest' within their respective spheres. When it argued that, under the principle of 'continuity', the historical political action of Aboriginal peoples had generated rights to continue governing themselves, the commission stated that 'They retained their ancient constitutions so far as these were consistent with the new relationship' (RCAP 1996:195). The commission elaborated by stating that the Aboriginal right of self-government assumes a contemporary form in Canada, one that takes account of, *inter alia*, 'the existence of a federal system in Canada' (RCAP 1996: 202). Binnie, J., speaking for the minority in *Mitchell* quoted favourably another extract from the commission's report on the same point; 'Shared sovereignty, ... is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government' (*Mitchell* n.3 at para.130; RCAP 1996:240-241).

It is necessary to pause to emphasize two critical points that are often incorrectly described, whether advertently or not, by commentators, especially in the public dialogue and news media. The first is that the Aboriginal right of self-government is a collective right vested in Aboriginal nations. The second point is to distinguish between the Aboriginal right of self-government and the individual rights of citizenship. These two general points, and their implications, deserve some brief elaboration and emphasis if the concept of 'shared sovereignty' is to be fully appreciated.

The commission adopted the term 'nations' to recognise the possibility that although Section 35 refers to three particular Aboriginal 'peoples', some subgroups of those three large 'peoples' might also constitute a 'people' entitled to exercise an aboriginal right of self-government. More important for our purposes, the final report identified a 'nation' as having the following three attributes (RCAP 1996:182):

- a collective sense of national identity evinced in a common history, language, culture, traditions, political consciousness, laws, government structures, spirituality, ancestry and homeland;
- of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-government in an effective manner;
- it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.

Contrary to the political assertions of politicians and others hostile to Aboriginal rights (RCAP 1996:177),

Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages that include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change their internal composition.

The collective Aboriginal right of self-government is distinct from individual rights of citizenship. It is established law that Aboriginal persons are citizens of Canada.<sup>12</sup> As citizens, Aboriginal persons have all the same rights and responsibilities as all Canadian citizens, regardless of whether or not that person also belongs to an Aboriginal nation that has a collective right to decide its vision of the good society by exercising an inherent right of self-government. All policies that aim at providing equal benefits of citizenship to Aboriginal peoples do not fall into the sphere of 'special rights' or 'special treatment'. Such policy approaches have to do with distributive justice among equal citizens. The titles by which such policy initiatives are known often reveal that fact, such as the 'closing the gap' expression common to Canada and Australia, as well as elsewhere. Such policies reflect the 'we are all Canadians', or 'we are all equal Australians' approach. Recognising that Aboriginal persons are equal citizens, while some Aboriginal persons also have collective Aboriginal rights is not to recognise differences in citizenship rights.

Binnie, J. explained the results of the concept of Aboriginal citizenship within Canada when he stated (*Mitchell* n.3; Binnie J para.129):

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<sup>12</sup> Note 9 above. Some rights of citizenship, such as voting, were historically taken away from 'Indians' under the federal *Indian Act* by legislation, thus altering the 'equal citizenship' status that they and all other Aboriginal persons have at common law.

If the principle of “merged sovereignty” articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

This aspect of ‘shared sovereignty’ can easily be overlooked. Canada’s rule over Aboriginal citizens can only be legitimate if they are effectively represented in Canadian political institutions, so that they participate in ruling and are not mere subjects who are ruled by others (Chartrand 2003:99-127). Within this concept of shared sovereignty there are Aboriginal voices who can speak up in support of Aboriginal rights. Under this concept, the reconciliation of Aboriginal interests with the interests of others in Canada is a process that engages the roles of not only the judiciary but also of the legislative and executive branches of governments. This permits Aboriginal political action to generate law not only within the sphere of Aboriginal intergovernmental relations, but also in all institutions that channel the exercise of political authority into legal form. As citizens, Aboriginal persons must be represented politically in the mainstream democratic institutions of Canada and Australia if the democratic foundations of these countries are to be legitimate. At the same time, the Aboriginal right of self-government requires the option of political participation within Aboriginal governments. Thus there are two doors to Aboriginal political participation within Canada.

The concept of ‘shared sovereignty’ is an inherent part of the concept of Aboriginal self-government. Wherever and whenever the concept or right of Aboriginal self-government is respected and recognised the concept of ‘shared sovereignty’ is also necessarily respected and recognised. A review of legal and political developments since the RCAP proposed the concept in its original form in *Partners in Confederation* in 1992 has revealed its wide acceptance in Canada.

First of all, ‘shared sovereignty’ has been widely accepted by Aboriginal leaders and national organizations that have embraced the work of the RCAP (e.g. AFN 2006). Chief Mitchell urged it to the justices of the Supreme Court of Canada in his argument for his Aboriginal rights claim.<sup>13</sup> Aboriginal leaders are realistic and do not aspire to secede from Canada, as politicians from the separatist movement in the province of Quebec have proposed they want to do. Aboriginal persons do not carry the political weight or the voting power of the residents of the province of Quebec.

Second, ‘shared sovereignty’ has contributed to the emerging jurisprudence on Aboriginal rights law, notably in the direct adoption of the RCAP analysis of the Aboriginal right of self-government by the minority in the *Mitchell* case. The concept is inherent in the analysis and reasoning in other cases as well (Isaac 2004:457-460 n.43; Crane 2006:59-67; *Mikisew Cree First Nation v Canada*). In *Haida Nation*, the Court’s analysis of positive duties of the Crown to consult with Aboriginal peoples emphasized the concept of Crown ‘assertion’ of sovereignty and its *de facto* control of land and resources. In this view, *de jure* sovereignty can only be achieved in a process of actual consultations between the Crown and Aboriginal peoples where conflicting sovereignty claims can be resolved in a constitutionally-mandated process of consultations designed

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<sup>13</sup> *Mitchell* (n.3, per Binnie J at para.113), where he stated that Chief Mitchell ‘... seeks Mohawk autonomy within the broader framework of Canadian sovereignty’.

to legitimize *de facto* sovereignty by means of agreements on the sharing of resources and jurisdictional authority.

Third, ‘shared sovereignty’ has also contributed to constitutional and legal developments because it is now a part of the treaty negotiations process, and is included in the terms of treaties that have been passed into law by federal and provincial legislation, and which enjoy constitutional protection.<sup>14</sup>

Fourth, ‘shared sovereignty’ has been recognised as part of the precepts of international law that bind Canada in its relations with Aboriginal peoples. More specifically, United Nations treaty bodies that supervise the performance of Canada’s treaty obligations have viewed the RCAP recommendations on Aboriginal self-government as a domestic implementation of the right of self-determination (e.g. UN 1999, 2002). Furthermore, the United Nations *Declaration on the Rights of Indigenous Peoples* specifically endorses both the right of self-determination and the right of self-government.<sup>15</sup> Declarations have a hortatory role but the substantive right of self-government itself is arguably part of existing international law (Wiessner 1999:12).

Fifth, ‘shared sovereignty’ has been accepted as part of official Canadian federal government policy since 1995, and continues to guide treaty negotiations (*Haida Nation* n.63 at 57-59). Most Provinces shy away from formal policy statements on Aboriginal rights issues, but in fact Provinces have recognised the Aboriginal right of self-government in various ways, including by enacting implementation legislation and participating in negotiations (e.g. Cree 1999).

Sixth, ‘shared sovereignty’ received full political acceptance in the terms of the national *Charlottetown Accord* on constitutional reform in 1992 which not only affirmed the existing right of self-government but provided for its implementation (RCAP 1996:220 n.188 p.400). The terms of the Accord now constitute the high-water mark of recognition in Canada of the Aboriginal right of self-government.

The possibilities of the concept of ‘shared sovereignty’ to inform legal and political developments in Australia is an open question. However, there exist some institutions and factors that may constitute a basis for optimism.

First, the concept of ‘shared sovereignty’ seems to be acknowledged as a legitimate aspiration by Indigenous leaders and commentators.<sup>16</sup>

Second, the judicial recognition of Aboriginal laws within the jurisprudence on native title provides a basis for developing a common law jurisprudence that recognises Aboriginal law-making authority and therefore the concept of ‘shared sovereignty’ outside the context of the *Native Title Act* (Australia 2009). The cases on Aboriginal title in

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<sup>14</sup> The recent self-government agreements are examined in *Haida Nation* (Chapter 4 pp.69-100).

<sup>15</sup> The *Declaration on the Rights of Indigenous Peoples* (UN 2007) recognizes self-determination in Article 3 and self-government in Article 4.

<sup>16</sup> Dodson and Strelein (2001) have provided a brief overview of the ‘reconciliation movement’ in the late 1970s and early 1980s in which initial assertions about rights to indigenous autonomy and the need to legitimize the rule of Australian law over indigenous peoples, and for a view that there must be a process for indigenous peoples to renegotiate a place within the constitution of Australia. In his 1999 Vincent Lingiari lecture, Patrick Dodson included five distinct provisions that can be interpreted as ‘shared sovereignty’ as part of an agenda for reconciliation to allow indigenous Australians to move forward ‘as mates’ with other Australians. Also HC Coombs (1994).

Australia have mostly involved interpretation of that Act, and therefore its terms and requirements have steered the current jurisprudence on Aboriginal rights away from common law development.<sup>17</sup>

Third, there exist in Australia independent institutions, including the Lingiari Foundation, Australians for Native Title and Reconciliation (ANTAR n.d.) and Reconciliation Australia, which by their very existence and mandate offer opportunities for nurturing a national legal and political dialogue on 'shared sovereignty'.<sup>18</sup> Such institutions have the capacity to develop dignified spaces in which minds can be influenced and changed, and an ethical vocabulary of understanding, forgiving and accepting may be developed.<sup>19</sup>

Fourth, there has been political support for the concept of a national Aboriginal treaty, an idea which can incorporate the concept of 'shared sovereignty'.<sup>20</sup>

Fifth, emerging precepts of international law require States to recognise collective rights of indigenous peoples that include governance and control over their communities, lands and resources.<sup>21</sup>

At the more general level, both Australia and Canada share a culture that respects the rule of law and where the educative function of law is relatively strong and able to influence public opinion.<sup>22</sup> This general orientation is significant in reflecting on the prospects for the concept of 'shared sovereignty' to influence public opinion, and therefore political action in the longer term if self-government becomes accepted as a requirement of law.

## 6. Concluding remarks

Here I have attempted to contribute to the debate within the reconciliation movement in Canada and Australia. I have introduced and explained the concept of 'shared sovereignty' that was developed in Canada, and offered it as an idea that may be able to make a positive contribution to the reconciliation movement in Australia, a country that shares many attributes with Canada.

The concept of 'shared sovereignties' is presented as an idea that may influence the way citizens think about the indigenous peoples, and their aspirations to live harmoniously with others in circumstances of peace and justice in each country. I have not pretended to determine for indigenous peoples what their aspirations might be, and my contribution is intended to be supportive of aspirations for reconciliation.

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<sup>17</sup> The leading decisions of the High Court of Australia on native title have been reviewed and summarised by Strelein (2006).

<sup>18</sup> The Lingiari Foundation is an independent indigenous-controlled organization dedicated to advancing the rights of indigenous peoples and reconciliation in Australia. Reconciliation Australia (n.d.) was set up by the Australian Council on Aboriginal Reconciliation and its work includes a program on indigenous governance.

<sup>19</sup> This is a slight paraphrasing of the expression used by Krog (2006).

<sup>20</sup> For examples, the views expressed and described by Brennan and others in *Treaty* (2005).

<sup>21</sup> Strelein et al. (2001) have provided an explanation that international obligations require Australia to recognize and protect the rights of indigenous peoples, including that of participating in public policy decision-making; also Wiessner (1999).

<sup>22</sup> Gleeson (2001) and Saunders and Le Roy (2003) have discussed the concept of rule of law in Australia.

An assumption behind the discussion in this paper is that concepts or ideas are useful and practical. It is interesting that politicians in each country have run roughshod over this simple proposition. To illustrate, they have used rhetoric which pretends to assert a preference for ‘practical’ strategies over such things as ‘abstract discussions about rights ...’. The better view would seem to be that ideas or concepts are useful and practical guides for action. In this view, ideas play not only an important but an essential role because they inform actions designed to reach a particular policy objective. Ideas or concepts inform the development of legal rules and build a coherent doctrine governing a particular sphere of law. Furthermore, extremist views, whether advanced by politicians or ivory-tower ideologues, can not, by their very nature, contribute much to reconciliation.

Shared sovereignties as an idea moves collective thinking in a country that has jettisoned the idea of *terra nullius*, and which now accepts that the existence and presence of indigenous peoples on their lands matters, to the more fully equitable notion that not only the existence but also the political action of indigenous peoples matters in the creation of practices, precepts and laws that reflect a consensual view of the fundamental values that guide a vision of the just society and of the constitutional order that ought to sustain it. Indigenous peoples have a right to aspire to live according to their own visions of the good society, inspired by their own concepts about the universe and the values that ought to inform the way that good relations are to be established and maintained within families, communities, and the Nation-State. This is my understanding of the essence of the right of self-determination.

The goal of reconciliation requires respect for the right of self-determination of the indigenous peoples and of the equal right of self-determination of the population of the State. The concept of ‘shared sovereignties’ attaches itself to a reconciliation between the exercise of political power and authority by each side.

The goal of creating harmonious relations can only be achieved, in the long run, by creating and maintaining good relations between representatives of the indigenous peoples and representatives of the State’s governments. The agents and representatives of States, that is, the democratically elected government politicians, decide what is the nature and scope of the ‘public interest’ of all citizens. That includes all Aboriginal persons. Aboriginal persons are entitled to the enjoyment of all the rights of citizens, and are also subject to the obligations of citizenship. So the government represents the public interest of the entire population of the State, and its government members make decisions in the public interest. At the same time, under the concept of ‘shared sovereignty’, those who speak for the Aboriginal peoples have the authority and power to make decisions in the ‘public interest’ of each Aboriginal people that has a right of self-determination.

It is better to live with ‘shared sovereignty’ than with ‘contested sovereignty.’ The latter is the enemy of democracy and the companion of repression, subjugation and civil strife. It is better to legitimize the *de facto* governance of States such as Australia and Canada over the indigenous peoples by welcoming the participation of indigenous citizens in all decision-making that affects the general public interest as well as the public interest of each of the ‘nations’ or ‘peoples’ entitled to self-determination. Wherever decisions are made that affect the interests of indigenous peoples there they must have a voice. The concept of ‘shared sovereignty’ stands for the idea that legitimate political participation today can cure an unconscionable beginning. If a just

vision for our common future in our country must be built upon a common truth about the past, then perhaps 'shared sovereignty' also stands for the idea that as a country we can have a just vision of our society that is built upon an illusion about our ancestors so long as the illusion is commonly held. This should not be surprising if it is accepted that countries or societies seem to build a collective self-identity upon idealized histories.

We better advance reconciliation when we share things. We share a geographically based destiny in Canada and in Australia. If the country is submerged by ocean water, or devastated by winds, we all suffer; if the land is scorched by fire we all suffer. I recall a quote by Miles Richardson, a well-known Haida man in British Columbia who once said, referring to the need to cooperate because of our shared destinies, 'We can't say, "oh, the leak is in their end of the boat"'.

We also share a common humanity. The idea of shared sovereignty reflects the attitude that an idea is more likely to win acceptance if it is based on commonly held ideas and values rather than on the ideas or values of one side. A narrow focus on differences will tend to do that. We will not gain much by focussing on what separates us if reconciliation requires a *rapprochement*. The need to respect and balance the legitimate interests and rights of all sides is imperative.

It is not to be expected that the idea of 'shared sovereignty' will gladly be adopted by all the relevant actors. With that in mind I conclude with a reference to the metaphor of a bridge that was used by the commission in describing the legal foundations of the concept of 'shared sovereignties' (RCAP 1996:191):

The doctrine not only forms a bridge between different societies, it is a bridge constructed from both sides.

It remains to be seen whether the concept can be adopted as a useful one in the political reconciliation debate and in the courts of Australia. But those who wish to act as bridges ought not to be surprised or deterred if they are walked upon from both sides once in a while; for that is what happens when you are a bridge.

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