Thinking Outside the 20th Century Box: Revisiting 'Mitchell'—Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government

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Canadian government policy recognizes the inherent right of self-government as an existing Aboriginal right under s. 35 of the Constitution Act, 1982. *Precisely what this means remains an open question. The one constant of the federal approach to the self-government issue has been that the supremacy of Crown sovereignty is not up for debate. The judiciary for almost two centuries has shown unquestioning allegiance to the concept of Crown sovereignty. Contemporary academic commentary has pitted advocates of an "inherent rights approach" to Aboriginal rights (pro Aboriginal sovereignty) against those of a "contingent rights approach" (pro Crown sovereignty). The debate, though interesting, ultimately has resolved nothing.*

The author argues that the recent judgment of Justice Binnie in Mitchell v. M.N.R. *addresses the self-government issue with a candidness and creativity rarely before seen in Canadian courtrooms, certainly never at the Supreme Court of Canada level, and that his approach constitutes a doctrinal breakthrough. The author further suggests that adoption of Binnie J.'s approach by a majority of the Court could provide a pragmatic means of circumventing the sovereignty impasse, thereby perhaps finally clearing the way for the creation of "constitutional space for aboriginal peoples to be aboriginal."*

Le gouvernement du Canada, à l'article 35 de la Loi constitutionnelle de 1982, *reconnaît le droit inhérent à l'autonomie gouvernementale comme un droit autochtone réel. La portée précise de ce droit fait toujours l'objet de débat. La constante dans la vision fédérale relative à l'autonomie gouvernementale est que la suprématie de la souveraineté de la Couronne est une question arrêtée. Depuis près de deux siècles les tribunaux ont démontré leur allégeance incontestée au concept de la souveraineté de la Couronne. Les universitaires dans des commentaires contemporains opposent les promoteurs de la thèse des droits inhérents en matière des droits autochtones (en faveur de la souveraineté autochtone) à celle des droits conditionnels (en faveur de la souveraineté de la Couronne). Ce débat, bien qu'intéressant, ne règle absolument rien en bout de ligne.*

L'auteur argumente que l'arrêt récent rendu par le juge Binnie dans l'affaire Mitchell c. M.R.N. *examine la question de l'autonomie gouvernementale avec une candeur et une créativité rarement vues jusque là dans les tribunaux canadiens, et certainement pas à la Cour suprême du Canada. Cette approche marque un nouveau jalon dans la doctrine. L'auteur suggère en outre que l'adoption du point de vue du juge Binnie par la majorité de la Cour pourrait fournir une solution pragmatique pour surmonter l'impasse de la souveraineté et, par ricochet, laisser enfin libre cours à la création d'une « place dans la Constitution pour que les autochtones puissent être des autochtones ».*

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> ... the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[1]
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> —*Patterson Co. Ct. J. (Acting)*

I. Introduction

THE FOREGOING PASSAGE EXEMPLIFIES classic colonial thinking about the historical place of First Nation peoples in North America. They were not sufficiently "civilized" to have constituted independent polities exercising sovereign powers. They were objects that "passed with" the land, a "problem" to be dealt with, amongst many others, by the colonizers in their crusade to tame the wilderness and introduce European institutions, values, ideologies and practices.

It is curious to see how entrenched and unwavering remains the "conqueror" mentality in many segments of Canadian society. The sentiments of McEachern C.J.B.C. in his trial judgment in *Delgamuukw v. British Columbia*[2] are remarkable echoes of those expressed by Patterson Co.Ct.J.(Acting) in 1929:

> [T]he events of the last 200 years are far more significant than any military conquest or treaties would have been... [Aboriginal people] became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not, compete.[3]

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1. *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 313, (1928), 50 C.C.C. 389 at 396 (N.S. Co. Ct.).
2. (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C. S.C.) [*Delgamuukw B.C.S.C.* cited to D.L.R.].
3. *Ibid.* at 285, 342.

McEachern C.J.B.C.'s words may be more unusual in their clarity and candidness than in their substance. Eurocentric thinking prevails in this country and continually throws up obstacles to genuine reconciliation between Aboriginal and non-Aboriginal peoples. For some, the "conqueror" and "conquered" categories remain appropriate. Historical fact and political reality, they say, leave no room for anything else.

Against this backdrop have arisen, in the past three decades or so, increasingly frequent and vocal calls by Aboriginal representatives for enhanced "self-government". Precisely what constitutes Aboriginal self-government is virtually impossible to pin down. The concept may have almost as many meanings as it has proponents. The Royal Commission on Aboriginal Peoples ("RCAP") devoted much energy, and ink, to canvassing the scope and nuances of self-government.[4] In the Supreme Court of Canada's reasons in *Delgamuukw v. British Columbia*,[5] Lamer C.J.C. refused to "step into the breach,"[6] commented on the "difficult conceptual issues which surround the recognition of aboriginal self-government"[7] and pointed to the *RCAP Report* to support his decision not to engage in any consideration of self-government issues in the context of the case at hand:

> The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues.[8]

This article explores how Canadian courts, particularly the Supreme Court of Canada, have to date grappled (or not grappled) with the concept of Aboriginal self-government. It considers the attitudes and approaches adopted by the courts, and what influences appear to be at play in shaping those attitudes and approaches. The discussion begins with some contextual analysis, engaging in examinations of contemporary political moves toward self-government, and of early judicial perspectives on "Aboriginal sovereignty." The focus then shifts to what the Supreme Court has had to say, and why it has said what it has, about Aboriginal self-government and sovereignty in the last quarter of the 20th century. The article also attempts to canvass some of the relevant academic discourse, particularly through the 1990s. Finally, consideration is given to some recent jurisprudence that may mark the turning of an intellectual corner in the ongoing debate about the essence of Aboriginal sovereignty and the right to self-government. Of particular

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4. Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, pt. 1 (Ottawa: Canada Communication Group, 1996) [*RCAP Report*].
5. [1997] 3 S.C.R. 1010, (1998), 153 D.L.R. (4th) 193 [*Delgamuukw*].
6. *Ibid.* at para. 171.
7. *Ibid.*
8. *Ibid.*

interest is the concurring judgment of Binnie J. in *Mitchell v. M.N.R.*.[9] It is posited here that *Mitchell*, if viewed in a historically appropriate light, has been given short shrift by academic commentators and is potentially a watershed case.

The article concludes that, notwithstanding the existence of persuasive legal arguments in support of the concepts of Aboriginal sovereignty and inherent self-government, the judiciary has traditionally adhered to certain entrenched "legal fictions." While there may be broad disinclination by the courts to stray beyond the conceptual boundaries reinforced by the Supreme Court in recent decades, some creative judicial thinking (influenced by academic discourse and the *RCAP Report*) has in fact already leapt "outside the 20th century box." That jurisprudential creativity may clear the way to more practical and inclusive approaches to the perennial Canadian dilemma of how best to realize Aboriginal aspirations of self-government.

The discussion in this article has specific relevance in light of the pending *First Nations Governance Act*.[10] The *First Nations Governance Act* has been the subject of heated criticism since its introduction in Parliament in mid-2002.[11] First Nation voices of protest have focused on the limited scope of the Act and its perpetuation of the broadly despised (and often maligned) *Indian Act*[12] regime. By the time this article goes to print the *First Nations Governance Act* may very well be law, this notwithstanding strong opposition from the very people it will most directly affect. In a press release issued June 14, 2002, the day Bill C-7's predecessor, Bill C-61,[13] was introduced in the House of Commons, the Minister of Indian Affairs and Northern Development, Robert Nault, said:

> The proposed Act would provide an interim step towards self-government. The governance initiative is not intended to replace existing treaties or self-government and treaty negotiations, but to provide First Nations communities with tools that would allow them to build self-sustaining communities.[14]

The word "interim," of course, has no temporal limitation. The *Indian Act* itself, when introduced more than a century and a quarter ago, was contemplated to be transitional—filling a gap that would close, once and for all, when Indians were fully assimilated in the Canadian polity. Despite the optimistic tone of Minister Nault's press release, the view of the preponderance

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9. [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385 [*Mitchell*].
10. Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 2d. Sess., 37th Parl., 2002 (first reading 9 October 2002).
11. See *e.g.* Scott Edmonds "Natives pledge fight against governance" *The Chronicle-Herald* (20 March 2003) A8; "Natives prepare for governance bill protest in Toronto" *The Chronicle-Herald* (19 March 2003) A15.
12. R.S.C. 1985, c. I-5.
13. *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 1st. Sess., 37th Parl., 2002 (first reading 14 June 2002).
14. Canada, "News Release/Communiqué No. 2-02152-E" (Ottawa, 14 June 2002), online: http://www.fng-gpn.gc.ca.

of political realists likely would be that widespread Aboriginal self-government is not exactly around the corner. The passing of the *First Nations Governance Act*, and its subsequent implementation in Native communities, will therefore surely stir the hornet's nest and fuel a fervent new phase of the debate on self-government. It is hoped that the survey style used in the initial segments of this article, with emphasis both on the political side of the self-government issue and the judicial approach to sovereignty situated in its historical context, will be of use to some readers as that debate unfolds. I also hope my fresh discussion of Binnie J.'s pronouncements in *Mitchell* will highlight the potential of those pronouncements to help resolve the subject matter of the debate.

II. Aboriginal Self-Government: "Political" Perspectives

NOTWITHSTANDING THE COMPLEX and ethereal nature of the Aboriginal self-government concept,[15] at several "political" levels it already exists.[16]

The *Indian Act* gives band councils certain legislative and administrative powers. The *First Nations Governance Act* proposes to augment some of those powers (though at the same time imposing fresh obligations on band councils).

There have been specific negotiated self-government agreements with a number of Aboriginal communities in Canada. These include, by way of example, the agreement encapsulated in the *Sechelt Indian Band Self-*

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15. The RCAP, as noted by Lamer C.J. in *Delgamuukw*, *supra* note 5, applied an enormous amount of effort and thought in examining the concepts of "self-government," "self-determination" and "sovereignty." That this is an extraordinarily difficult area to which to bring even a semblance of intellectual uniformity is exemplified throughout the *RCAP Report*'s lengthy chapter on "Governance." One passage serves to illuminate this:

> Self-government is one path Aboriginal people may take in putting the principle of self-determination into effect. Self-government flows from the principle of self-determination. In its most basic sense, it is the ability to assess and satisfy needs without outside influence, permission or restriction ... Of course, self-government may take a variety of forms ... While the terms sovereignty, self-determination and self-government have distinct meanings, they are versatile concepts, with meanings that overlap one another. They are used by different peoples in different ways (*RCAP Report*, *supra* note 4 at 108–09).

It is well beyond the scope of this article to attempt any kind of comprehensive overview of the scholarly self-government debate. There exists a significant body of literature in this area (some of which is referred to throughout the RCAP chapter on "Governance" and, particularly, in note 182). The narrow focus of this article is only to consider some judicial viewpoints and leanings in relation to the self-government issue.

16. Note that this reference to "political" is restricted to examples within the framework of the existing Canadian polity. Other examples of self-government or self-determination, but outside the legal/constitutional/political parameters of Eurocentric Canada, would include the traditional system of governance operated by the Mohawk people. This type of political authority is rooted in self-help/self-control notions "linked to philosophical concepts embodied in the Iroquois *Kaianerekowa*, or Great Law of Peace." (*RCAP Report*, *supra* note 4 at 111).

Government Act[17] and the *Nisga'a Final Agreement.*[18]

The *Constitution Act, 1982*[19] did not expressly incorporate an entrenched right of Aboriginal self-government, but the issue occupied a fairly high-level place on the federal government's policy agenda in the several years following 1982.[20] By the time of the Meech Lake Accord of 1987, the political focus had turned to Quebec and ways to obtain its support for the *Constitution Act, 1982.* The summer of 1990 saw the death of the Meech Lake Accord, the Supreme Court of Canada's judgment on Aboriginal rights in *R. v. Sparrow*[21] and the confrontations at Oka, Quebec between members of the Kanastake First Nation and provincial police and federal armed forces. The events of 1990 put Aboriginal issues back in the spotlight, and the constitutional discussions leading up to the Charlottetown Accord of 1992 gave those issues heightened attention. The Accord itself included many Aboriginal provisions, including an entrenched inherent right of self-government. As Professor Hogg has remarked, "[t]he existence of 'the inherent right of self-government within Canada' was agreed to by all the First Ministers in the Charlottetown Accord of 1992, which, if it had been ratified, would have explicitly protected (and regulated) this right in a new s. 35.1 of the *Constitution Act, 1982.*"[22] Subsection (3) of that new provision would have read as follows:

> The exercise of the right referred to in subsection (1) ["the inherent right of self-government within Canada"] includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
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> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
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> (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.[23]

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17. S.C. 1986, c. 27.
18. *Nisga'a Final Agreement*, between the Nisga'a Nation, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of British Columbia, August 4, 1998. The *Agreement* was approved by the Nisga'a people in a referendum in November, 1998, and settlement legislation was passed by Parliament on April 13, 2000, and by the Legislative Assembly of British Columbia on April 26, 1999. The *Agreement* came into effect on May 11, 2000: See *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2 and *Nisga'a Final Agreement Act*, S.C. 2000, c. 7. The *Nisga'a Final Agreement*, interestingly, also results in the Nisga'a ceding any inherent right to self-government.
19. Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
20. A House of Commons Special Committee on Indian Self-Government issued a report in 1983 (House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada*, Report of the Special Committee, 20 October 1983). Four constitutional conferences were held (in 1983, 1984, 1985 and 1987) to discuss entrenchment of an Aboriginal right of self-government.
21. [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*].
22. Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, Ont.: Thomson Canada, 1997) vol. 1 at 27-22 [Hogg].
23. Canada, *Charlottetown Accord, 1992, Draft Legal Text* (Ottawa: Supply and Services Canada, 1992) at 37–38 cited in Hogg, *ibid.* at 27–23.

The Charlottetown Accord contemplated having the content of self-government negotiated with Aboriginal groups and enshrined in self-government agreements. The proposed implementation process prohibited "direct judicial enforcement of the new inherent-right provision for a period of five years ... [but] if an aboriginal nation had not negotiated an agreement within the five-year period, the right was, in principle, enforceable without an agreement."[24] This was an innovative hybrid of constitutional amendment and prescribed negotiation, with a judicial "hammer" tacked on for good measure.[25]

Ultimately, of course, the Charlottetown Accord followed the Meech Lake Accord to the constitutional amendment graveyard. But the Charlottetown Accord and the process leading up to it highlighted three key ideas accepted by federal and provincial policy-makers relative to the concept of Aboriginal self-government.

First, the right of Aboriginal self-government was both inherent and worthy of constitutional entrenchment. It was not just a fanciful whim of hard-line Aboriginal leaders.

Second, though there may have been acknowledgment of Aboriginal self-government at the political theory level, it was a concept extraordinarily difficult to define with any precision. Intensive rounds of one-on-one negotiation would therefore need to follow any constitutional entrenchment of a right of Aboriginal self-government. It was implicit here that different versions of self-government would emerge for different Aboriginal groups, depending on their unique circumstances, needs and desires. At the end of the day, while the concept of self-government (undefined except in general terms) may have been explicitly accepted, the fleshing out of the concept left enormous room for difference of opinion and practical maneuvering.

Third, there was a real anticipation that the process of filling in the content of Aboriginal self-government was something the parties themselves would be incapable of doing, either in whole or in part. The judiciary would

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24. *Ibid.*

25. The Charlottetown Accord's unique approach to the Aboriginal self-government issue did not just come out of the blue. In the early 1990s, there was much effort at the federal level to arrive at an approach to Aboriginal self-government that would move the main issue forward in the face of the many complex sub-issues generated by it. See David W. Elliott, *Law and Aboriginal Peoples in Canada*, 4th ed. (North York, Ont.: Captus Press, 2000) at 172: "In its September 1991 paper, *Shaping Canada Together: Proposals*, the federal government proposed a new constitutional 'Canada clause.' This would acknowledge 'that the aboriginal peoples were historically self-governing,' and would recognize 'their rights within Canada.' The government proposed 'an amendment to the Constitution to entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the [*Charter*], with the nature of the right to self-government described so as to facilitate [its interpretation] by the courts.' To allow the parties to agree on the content of this right, its enforceability would be delayed for up to ten years. This general approach was followed with modifications in the February 28, 1992, Beaudoin-Dobbie Committee Report and the June 11, 1992, Status Report of the Multilateral Meetings on the Constitution." [footnotes omitted].

therefore likely be compelled to become an active participant in the process, rendering "political" decisions under the thin guise of legal reasoning.

By the time of the demise of the Charlottetown Accord, then, political acceptance (in principle, at least) of inherent Aboriginal self-government had been achieved at both the federal and provincial levels. Formal policy followed in 1995. A federal policy statement[26] described Aboriginal self-government as both inherent and subject to constitutional protection:

> The government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.[27]

This was a significant accomplishment by Aboriginal advocates. Or was it? Political recognition of the inherent right to Aboriginal self-government was far from determinative of the matter. These were words only, and were presented in nothing more than a policy statement. They entailed neither legal recognition nor constitutional protection. And linked to the concept was a hefty obligation to negotiate specifics and, in the event of failure of such negotiations, an implicit directive to go to the courts for assistance. To avoid court-imposed resolutions of aspects of self-government arrangements, federal policy-makers seem to have assumed motivation on the part of Aboriginal negotiators to cut deals whenever possible. To fail to agree would be to lose control of some of the ultimate substantive content of self-government agreements.

The complexities associated with the concept of Aboriginal self-government make it appear likely that, in many cases, and notwithstanding strong efforts to reach settlement through negotiation, court involvement will from time to time be necessary.[28] Moreover, to give impetus to the broader negotiation process, it seems sensible to have the judiciary, preferably the Supreme Court of Canada, provide some guidance regarding the *legal* content and scope of the Aboriginal right to self-government (and to

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26. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995) [*1995 Policy Statement*] (referred to in the *RCAP Report*, *supra* note 4 at 205).

27. *1995 Policy Statement*, *ibid.* at 3.

28. Some commentators disagree with this assertion. See *e.g.* Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187 [Hogg & Turpel], where the authors argue that the details of the powers of self-government and the applicable paramouncy rules are much better dealt with in negotiated agreements, and it is absolutely possible for such agreements to address governance issues clearly and comprehensively enough to preclude involvement of the courts.

confirm its constitutionally protected status). To date, the federal government, through policy initiatives, particularly the *1995 Policy Statement*, has attempted to establish the *political* parameters of self-government. It has delimited general areas that, in its opinion, can or cannot fall within Aboriginal jurisdiction and has suggested when, and to what degree, federal or provincial laws could override Aboriginal jurisdictional power.[29] Absolutely fundamental to this federal parameter-setting process is the ideological position that Aboriginal self-government "does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states,"[30] and that Aboriginal self-government must exist "within the framework of the Canadian Constitution."[31] Many Aboriginal groups and individuals have a starkly different view of the nature of Aboriginal sovereignty:

> The Creator gave us life, inherent rights and laws which governed our relationship with nations and all peoples in the spirit of coexistence. This continues to this day .... We as original caretakers, not owners of this great country now called Canada, never gave up our rights to govern ourselves and thus are sovereign nations.[32]

Politically, acceptance of the idea of Aboriginal sovereignty is, and has been, a non-starter in non-Aboriginal Canada. This is reflected in the *1995 Policy Statement* and approaches taken by the federal government in recent years. The "sovereignty" word, at least in an "international law sense," is taboo. The right of Aboriginal self-government is inherent, so concede Canada's policy-makers, but cannot be described in terms of "sovereignty" (except in a very constrained way).[33] There can only be one holder of sovereign powers within a nation, and in Canada, goes the government position, those powers rest exclusively in the federal and provincial Crowns. The powers can be delegated, they can be exercised through agents, but they cannot be abdicated.

The worldview of many Aboriginal peoples still includes Aboriginal sovereignty. Indeed, the concept often underpins the approach of First Nations to their discussions with Canadian governments on the right of self-government. One of the recommendations of the RCAP, by way of reinforcement, is that all governments in Canada recognize the inherent right of Aboriginal self-government with characteristics including, *inter alia*, that the

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29. See *1995 Policy Statement*, *supra* note 26 at 5–8 and *RCAP Report*, *supra* note 4 at 221–23.
30. *1995 Policy Statement*, *ibid.* at 4.
31. *Ibid.* at 3.
32. Grand Chief Harold Turner, "Address" (Address of Swampy Creek Tribal Council, The Pas, Man., 20 May 1992), cited in Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, pt. 2 (Ottawa: Canada Communication Group, 1996) at 436.
33. It is somewhat difficult to rationalize the notion that there can be an inherent right of Aboriginal self-government that does not invoke the existence of Aboriginal sovereignty. The word "inherent," after all, connotes an idea of something self-generated, long-held and not reliant on external sources. These descriptions also apply to "sovereign" and "sovereignty."

right "arises from the *sovereign and independent status of Aboriginal peoples and nations....*"[34]

The political process relating to Aboriginal self-government has, notwithstanding the conceptual "breakthroughs" of the early and mid 1990s, reached an impasse. With a few exceptions, concept has not transitioned to content. It does not appear that there exists sufficient political will to take the process to the next level. Pending some dramatic (and unexpected) development, it seems the Supreme Court of Canada must sooner or later "step into the breach," engage in a full and frank discussion of the competing concepts of sovereignty and issue its guidance on what are the legal contours of the Aboriginal right of self-government.

III. Early Judicial Perspectives on the Sovereignty Issue

AS A PRELUDE TO DISCUSSING contemporary Canadian judicial responses to assertions of Aboriginal self-government, it is appropriate to first look briefly at 19th century judicial perspectives on Aboriginal versus Crown sovereignty. The discussion here is focused on some of the jurisprudential offerings of John Marshall, former Chief Justice of the United Stated Supreme Court, and of the Privy Council in its 1888 decision in *St. Catherine's Milling and Lumber Company v. The Queen*.[35]

The starting point, however, must be King George III's *The Royal Proclamation of 1763*.[36] The *Royal Proclamation*, as one might expect from an 18th century executive decree, constituted a declaration of the Crown's complete and uncontroverted sovereign power. It speaks of "Our Dominions and Territories" in an all-encompassing way. It reserves to the "Indians...under Our protection" certain territories for hunting purposes, but only "for the present," at "Our Royal Will and Pleasure" and under "Our Sovereignty, Protection, and Dominion."

The Privy Council in *St. Catherine's Milling*, the first major post-Confederation decision to examine "Indian" title in the context of the federal system, sourced all Aboriginal rights exclusively in the *Royal Proclamation*.[37] Those rights, said the Privy Council, were given by the Crown, and thus were transitory and revocable at the Crown's discretion. For the Privy Council judges, Indian rights amounted to no more than an entitlement to continue possessing such lands as had not been "ceded to or purchased by" the Crown, for hunting and similar traditional uses, until such

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34. *RCAP Report*, *supra* note 4 at 225 (emphasis added).
35. C.R. 10 A.C. 13, 14 A.C. 46 [*St. Catherine's Milling* cited to C.R.].
36. 1763 (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].
37. *St. Catherine's Milling*, *supra* note 35 at 25.

time as the Crown determined to purchase the lands or otherwise take them for settlement or other necessary public purposes.[38] Lord Watson, who wrote the judgment, noted that there "was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point."[39]

More than sixty years prior to *St. Catherine's Milling*, Chief Justice Marshall had indeed considered it necessary and appropriate to express some opinions on the "precise quality of the Indian right." The judgments he wrote in *Johnson v. M'Intosh*[40] and *Worcester v. Georgia*[41] are often cited in 20th century litigation as the key pieces of early jurisprudence on Aboriginal sovereignty and Aboriginal land rights.[42] It is curious, though, that while *Johnson v. M'Intosh* and *Worcester v. Georgia* were raised in argument by counsel in *St. Catherine's Milling*,[43] neither case was referred to by the Privy Council in its decision. This is even more curious given the apparent heavy reliance by the lower Canadian courts, in *St. Catherine's Milling*, on *Johnson v. M'Intosh* and *Worcester v. Georgia*.[44] Lord Watson apparently felt he did not need the guidance of an American of an earlier generation.

In *Johnson v. M'Intosh*, Marshall C.J.'s focus was on the issue of land rights. In trying to reconcile Aboriginal and non-Aboriginal land entitlements, he relied on the "principle of discovery" to support the paramouncy of the non-Aboriginal claim. He said the discovery of the North American continent by Europeans, and their concomitant assertion of sovereign power, was sufficient to eclipse any pre-existing sovereign power held by the continent's original inhabitants:

> [Indians'] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil of their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[45]

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38. *Ibid.* ("[T]he tenure of the Indians was a personal and usufructuary right, depending on the good will of the Sovereign.")
39. *Ibid.* at 26. *St. Catherine's Milling* therefore left many unanswered questions about the nature of the "Indian right." The case was, after all, a federal/provincial jurisdictional dispute. The "Indian issue" was somewhat incidental.
40. 21 U.S. (8 Wheat.) 543 (1823) [*Johnson v. M'Intosh*].
41. 31 U.S. (6 Pet.) 515 (1832) [*Worcester v. Georgia*].
42. A third significant, and related, judgment written by Marshall C.J. in this period was *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). In this decision Marshall C.J. commented, at 16, that although the legislative powers of Indian nations had been diminished, they were still "domestic dependent nations".
43. *Supra* note 35 at 16.
44. In *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 320, 34 D.L.R. (3d) 145 at 151 [*Calder* cited to S.C.R.], Judson J. commented that the "reasons for judgment delivered in the Canadian Courts in the *St. Catherine's* case were strongly influenced by two early judgments delivered in the Supreme Court of the United States by Chief Justice Marshall ..."
45. *Supra* note 40 at 574.

> ....
> [D]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.[46]

Marshall C.J., in *Johnson v. M'Intosh*, refused to "enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, *on abstract principles*, to expel hunters from the territory they possess, or to contract their limits."[47] He stated:

> *Conquest gives a title which the Courts of the conqueror cannot deny*, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government ... asserted a title to all the lands occupied by Indians ... [and] asserted also a limited sovereignty over [the Indians] .... These claims have been maintained and established ... by the sword. The title to a vast portion of the lands we now hold, originates in them. *It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.*[48]

Marshall C.J.'s reasoning in *Johnson v. M'Intosh* suggests that Aboriginal peoples had an inherent right to continue to possess and use certain North American lands, subject to that right somehow being extinguished, and a corresponding inherent right to continue to govern their own affairs, but again subject to that right being continually diminished to "such a degree ... as the circumstances of the [non-Aboriginal] people would allow."[49] In other words, some combination of discovery, conquest and/or settlement (precisely which, and in what quantum, do not seem to have mattered to Marshall C.J.) had resulted in British sovereignty (and later United States and Canadian sovereignty) displacing Aboriginal sovereignty in North America. This "sovereignty displacement" was an ongoing process, as new lands were taken up in the westward expansion across the continent. While some contemporaries apparently did not consider the displacement of Aboriginal sovereignty to be rightful, at least not on the basis of "abstract principles," for Marshall C.J., at the time of *Johnson v. M'Intosh* anyway, such displacement seems to have been accepted as part of the undeniable reality of the world. *It was something in the political realm, not the legal*, and therefore beyond the judiciary to question.

While often cited in concert with *Johnson v. M'Intosh*, Marshall C.J.'s judgment in *Worcester v. Georgia* contains quite different statements on the Indian right of sovereign power. In *Worcester v. Georgia*, Chief Justice Marshall overtly questions the legal underpinnings of the "doctrine of discovery," the very basis of his decision in *Johnson v. M'Intosh*, and contrary to

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46. *Ibid.* at 587.
47. *Ibid.* at 588 (emphasis added).
48. *Ibid.* at 588–89 (emphasis added).
49. *Ibid.* at 587.

his comments in *Johnson v. M'Intosh* on the "limited," and apparently continually diminishing, sovereignty of Indian peoples, in *Worcester v. Georgia*, he seems to affirm their sovereign nation status.

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other ... or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.[50]
>
> ....
>
> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians .... The king ... never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.[51]
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> ....
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> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights ... with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer ....[52]

The tone and emphasis of Marshall C.J.'s words in *Worcester v. Georgia* were no doubt influenced by the facts of the case and the result he was seeking to substantiate.[53] It is quite possible, though, to view his statements in *Worcester v. Georgia* as being consistent, in a broad political sense, with those in *Johnson v. M'Intosh*. While the doctrine of discovery "is difficult to comprehend" from a legal analytical perspective, it is nevertheless a political reality and outside the authority of the courts to scrutinize.[54] Similarly, while it could not be disputed, based on historical fact, that the Indian nations had always been "distinct, independent political communities,"[55] the political

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50. *Supra* note 41 at 543.
51. *Ibid.* at 547.
52. *Ibid.* at 559.
53. The majority of the Court held that state law was invalid where it impinged on federal treaties and federal legislation relating to Indians. Marshall C.J. very likely, however, did not need to make his sweeping pronouncements on the political independence of Indian nations in order to buttress his legal conclusions regarding the federal/state jurisdictional question.
54. *Worcester v. Georgia*, *supra* note 41 at 543.
55. *Ibid.* at 559.

reality of British/Canadian/American sovereignty could diminish, or extinguish, that independence at any time.[56]

To recap, early judicial perspectives on the sovereignty issue did not attempt to engage in any legal analysis of why Aboriginal sovereignty, and the corresponding right to self-government, apparently ceased to exist at some point or points along the continuum of European occupation of North America. Marshall C.J., in *Johnson v. M'Intosh*, expressed the opinion that courts could not meddle in matters of national sovereignty. That was politics, not law. It was a matter beyond the jurisdictional reach of the judiciary. While Marshall C.J. muddied the waters somewhat in *Worcester v. Georgia*, with his statements about the broad powers of self-government held by American Indians, the Quebec Court of Appeal in *Johnstone v. Connolly* and the Privy Council in *St. Catherine's Milling* both lined up behind the ideas on Aboriginal sovereignty espoused by Marshall C.J. in *Johnston v. M'Intosh*.[57] The Quebec Court of Appeal did it explicitly. The Privy Council, of course, did not. For the Privy Council there was not even a need to mention the "controversy ... on abstract principles" that preoccupied Marshall C.J.[58] In true imperialist form, their Lordships were unquestioning in their view of the sovereign power and authority of the British Crown.

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56. One pre-Confederation "Canadian" case that expressly endorses Marshall C.J.'s views on Indian governance, as set out in *Worcester v. Georgia*, *supra* note 41, is *Connolly v. Woolrich* (1867), 1 C.N.L.C. 70, 11 L.C. Jur. 197. In that case, Monk J. for the Quebec Superior Court, at 79 C.N.L.C., 205 L.C. Jur., supported the position that the pre-existing political, legal and land tenure rights of Aboriginal peoples were not eliminated by the arrival in North America of French and English "discoverers":

    > [I]t [is] contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated, that they ceased to exist, when those two European nations began to trade with the aboriginal inhabitants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives.

    The *RCAP Report*, *supra* note 4 at 187–88, concludes that this case "sheds a remarkable light on the constitutional status of Aboriginal nations and their relations with incoming French and English settlers...[and] stands in contrast...to the common impression that Aboriginal peoples do not have any general right to govern themselves." With due respect, the RCAP, in my view, overstated the significance of this decision given the factual content. In the part of Canada in question (the Athabaska area), any assertion of British sovereignty at the beginning of the 19th century would have been a weak or non-existent one. The *RCAP Report* omits to mention what the judges of the Quebec Court of Appeal had to say about the effect of European sovereignty assertions: *Johnstone v. Connolly* (1869), 1 C.N.L.C. 151, (1896), 17 R.J.R.Q 266. Badgley J., at 218–19 C.N.L.R., 333-34 R.J.R.Q., cited the words of Marshall C.J. that "[I]t is true that conquest gaves [*sic*] a title which the courts of the conqueror cannot deny," and added that, upon displacement of one sovereign by another, "the relations of the people with their ancient sovereign or government are dissolved." Badgley J. did concede, however, that, in the case of a change of sovereign authority, "the relations to each other [of the subjects of the displaced sovereign], and their customs and usages remain undisturbed."

57. The same ideas do show up in places in *Worcester v. Georgia*, *supra* note 41. At 543, Marshall C.J. stated that "power, war, conquest give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin ...."

58. For a very good discussion of some of the theoretical debate on the legality of Aboriginal dispossession that existed in the Maritime provinces of Canada (as they later would become), in the decades prior to Confederation, see: D.G. Bell, "Was Amerindian Dispossession Lawful? The Response of 19th-Century Maritime Intellectuals" (2000) 23 Dal. L.J. 168.

In the eighty-five years following *St. Catherine's Milling*, the sovereign power and authority of the Crown remained unquestioned. Indeed, judging from pronouncements such as those in *R. v. Syliboy*,[59] the view from the bench may even have regressed. Aboriginal sovereignty perhaps had never been usurped because "uncivilized people or savages" could not have held it in the first place. Thankfully, the Supreme Court of Canada's judgment in *Calder*, in 1973, began, albeit belatedly, the period of post-colonial revision of the law relating to Canadian Aboriginal peoples.

IV. Supreme Court of Canada Discussion of the Sovereignty Issue and Responses to Aboriginal Assertions of Self-Government—Calder to Delgamuukw

IT DOES NOT TAKE TOO LONG to canvass the body of modern Canadian jurisprudence that discusses the sovereignty issue and/or speaks to the concept of Aboriginal self-government. This is particularly so if the focus is only at the Supreme Court of Canada level. While *Calder* got the ball rolling in terms of detaching Aboriginal rights from the "Royal Will and Pleasure" of the Crown, it nonetheless did not stray far from the 19th century attitude of unquestioning acceptance of the absolute and exclusive sovereignty of the Crown. Judson J., in *Calder*, ventured that the reasons of the Privy Council in *St. Catherine's Milling* did not "mean that the Proclamation was the exclusive source of Indian title [to land]."[60] But he added that "[t]here can be no question that this right [of Indians to continued occupation of traditional lands] was 'dependent on the goodwill of the Sovereign.'"[61] Hall J., similarly, asserted that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment,"[62] but also quoted from *Johnson v. M'Intosh* that the rights of Aboriginal peoples "to complete sovereignty, as independent nations, were necessarily diminished...by the original fundamental principle that discovery gave exclusive title to those who made it."[63] Hall J., in fact and despite his moniker as the father of post-colonial Aboriginal

59. *Supra* note 1.
60. *Supra* note 44 at 322.
61. *Ibid.* at 328.
62. *Ibid.* at 390.
63. *Ibid* at 382.

jurisprudence,[64] went on to cite certain "propositions of conquest" pronounced by Chief Justice Mansfield in 1774[65] and to extend those principles to "lands which become subject to British sovereignty by *discovery* or by *declaration*."[66]

In *Guerin v. The Queen*,[67] the Supreme Court picked up from *Calder* and continued wrestling with the concept of Indian title to land. Both Dickson and Wilson JJ., in their separate judgments, spoke of Indian title being based on historic occupation and use. Dickson J., as he then was, remarked on the "principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants...."[68] The Court's view of the implicit legitimacy of a "change in sovereignty" is evident here. Whether through discovery, conquest and/or declaration, there had been a "change in sovereignty" in Canada. This went unquestioned by the Court. The only issue was how to reconcile "Indian title" to land with "Crown title" to land. "Indian title" originally flowed out of, and was inextricably linked to, Indian governmental control of the land and its people (that is, *Indian sovereignty*). "Crown title" flowed out of, and was inextricably linked to, Crown governmental control of the land and its people (that is, *Crown sovereignty*). The Court's reasoning in *Guerin* assumed three things: (1) that there can only be one sovereign power within a given "nation"; (2) that a change in sovereignty, and/or in governmental control, can occur through various means, and in fact had occurred in Canada as between the Aboriginal sovereign power and the subsequent British sovereign power; and (3) that a "change in sovereignty," in the sense of overall governmental control, does not necessarily drag with it full control of the land over which the governmental control is exerted.

These assumptions lie at the heart of most of what the Supreme Court has said to date about Aboriginal sovereignty and Aboriginal title. General sovereign power shifted from Aboriginal hands to British, and later to Canadian hands. General sovereign power cannot be shared. Sovereign title in land also shifted from Aboriginal hands to British, and later to Canadian

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64. See James [Sákéj] Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18 Dal. L.J. 196 at note 44: "The decolonization of Canadian law was initiated by Justice Hall of the Supreme Court of Canada when he condemned the practice of invoking the savage/civilization dualism in litigation in his opinion in *Calder* ...." To be fair, and despite his unflinching allegiance to the underlying sovereignty of the British Crown, Hall J. in *Calder* not only recognized Aboriginal "title" as free-standing and based in ancient possession, but also set up a tough test regarding its extinguishment. He said, at 404 S.C.R., 210 D.L.R., that for government to extinguish Aboriginal title there must be a "clear and plain" intention to do so. Judson J., on the other hand, opined (at 343–45 S.C.R., 166-68 D.L.R.) that extinguishment could happen through government action, legislative or executive, that was necessarily inconsistent with the continued existence of Aboriginal title.

65. *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045, cited in *Calder*, *supra* note 44 at 387–89. (The propositions include that a "country conquered by the British arms becomes a dominion of the King ... and, therefore, necessarily subject to the Legislature, and Parliament of Great Britain.")

66. *Calder*, *ibid.* at 389 (emphasis added).

67. [1984] 2 S.C.R. 335; 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

hands. But title in land can be shared. At least, based on English common law real property concepts, there can exist lesser "interests" or "estates" that sit atop the Crown's underlying paramount title. It was this common law baggage relating to fractionation of land interests that permitted the Supreme Court in *Guerin* to pause at this fork in the sovereignty road, and then embark down a unique path solely in respect of Aboriginal title.[69] But general sovereign power was a different story. The Supreme Court in *Guerin*, and subsequently, had no interest in scrutinizing the general sovereign power of the Crown.[70] The Court stated its view on this clearly in *R. v. Sparrow*: "[T]here was from the outset never any doubt that *sovereignty and legislative power*, and indeed the underlying title, to such lands *vested in the Crown*...."[71]

R. v. Pamajewon[72] gave the Supreme Court of Canada its first opportunity to expressly comment on an assertion of Aboriginal self-government. It deftly sidestepped the issue there, and to this day has avoided tackling it head-on. It is evident that it is something in which the Court would prefer not to become entangled.

In *Pamajewon*, the claim involved criminal convictions related to gambling activities on reserves. The appellants argued that gambling was protected by subsection 35(1) of the *Constitution Act, 1982* as an "existing aboriginal right."[73] The argument was that gambling was an "aboriginal right" in and of itself, or was an "aboriginal right" that was incidental to a broader right of self-government. The Court in *Pamajewon* specifically declined to decide whether subsection 35(1) can include an Aboriginal right to self-government: "Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet*...."[74] As the gambling activities in question did not satisfy the "distinctive practices test" set out in *R. v. Van der Peet*,[75] the appellants' claim, however they framed it, failed. L'Heureux-Dubé J. wrote a concurring judgment in *Pamajewon* that was less circumspect on the self-government ques-

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68. *Ibid.* at 378.
69. Dickson J. in *Guerin* thus characterized the Indians' interest in land as *sui generis*. Aside from the interest being inalienable except to the Crown, and the Crown having a fiduciary duty in dealing with the land on Indians' behalf when their interest is surrendered, Dickson J. suggested, at 382, that any further description of the "Indians' interest in land" would be "both unnecessary and potentially misleading." This advice did not dissuade subsequent courts from trying to flesh out the scope and content of Aboriginal title. These efforts culminated, so far, in the Supreme Court of Canada's *Delgamuukw* judgment in 1997.
70. *Supra* note 67 at 379. The Supreme Court's willingness to explore the Aboriginal title concept, it should be made perfectly clear, also in no way involved scrutiny of the validity of the underlying sovereign and absolute Crown title. *Aboriginal title was, and remains, simply an interest in the Crown's land.*
71. *Supra* note 21 at para. 49 (emphasis added).
72. [1996] 2 S.C.R. 821; 138 D.L.R. (4th) 204 [*Pamajewon*].
73. *Supra* note 19, s. 35(1).
74. *Pamajewon*, *supra* note 72 at para. 24.
75. [1996] 2 S.C.R. 507; 137 D.L.R. (4th) 289 [*Van der Peet*].

tion than that issued by Lamer C.J.C. for the rest of the Court. L'Heureux-Dubé J. concluded, as Lamer C.J.C. had, that it was not necessary, for the purpose of rendering a judgment on the facts at hand, to consider the question of self-government.[76] However she stated that, to the extent it was necessary to deal with the issue,[77] she was content to rely on what she had previously said in her dissenting judgment in *Van der Peet*:

> This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands ... The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, *which is the result of the British assertion of sovereignty over Canadian territory*.[78]

In *Delgamuukw*, the appellants also attempted to make out a claim to self-government protected by subsection 35(1) of the *Constitution Act, 1982*. The Supreme Court decided that "this is not the right case for the Court to lay down the legal principles to guide future litigation."[79] Lamer C.J.C. also referred back to *Pamajewon* and his determination there that "rights to self-government, if they existed, cannot be framed in excessively general terms."[80] Any right to self-government advanced in very broad terms would not, he said, be "cognizable under s. 35(1)."[81]

Lamer C.J.C.'s "purposive analysis" of subsection 35(1) in *Van der Peet* also had at its core the irrefutable fact of "the sovereignty of the Crown." For Lamer C.J.C., "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here* ...."[82] Because, and only because, of that fact, Aboriginal peoples are able to be separated "from all other minority groups in Canadian society and .... [given] their special legal, and now constitutional, status."[83] Lamer C.J.C.'s analysis involves no interrogation of Crown sovereignty. To the contrary, Crown sovereignty is the bedrock—its pre-eminence and legitimacy absolutely assumed. Subsection 35(1) is only about "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[84] It is about attempting to accommodate Aboriginal claims and perspectives

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76. *Supra* note 72 at para. 41.
77. *Ibid.* at para. 42. Since Justice L'Heureux-Dubé had, in the previous breath, concluded that it was not necessary, one can draw the inference that she succumbed to a compulsion just to share her views on the point.
78. *Ibid.* (emphasis added).
79. *Delgamuukw*, *supra* note 5 at para. 170.
80. *Ibid.*
81. *Ibid.* at para. 171.
82. *Van der Peet*, *supra* note 75 at para. 30 (emphasis in original).
83. *Ibid.*
84. *Ibid.* at para. 31.

within the *existing* "general legal system of Canada."[85] It is not about the creation of separate systems and institutions. The accommodation of Aboriginal claims and perspectives must always be done "in a manner which does not strain 'the Canadian legal and constitutional structure.'"[86]

It is a little difficult to envision an assessment of a claim of Aboriginal self-government using the purposive analysis of subsection 35(1) laid down by the Supreme Court in *Van der Peet* (and reiterated in all subsection 35(1) cases since *Van der Peet*).[87] This may partially explain why the Supreme Court has been dragging its heels in facing and adjudicating a self-government claim. One would anticipate most variations of Aboriginal self-government having as their foundation an assertion that pre-contact Aboriginal sovereignty was not, or was not fully, displaced by Crown sovereignty. This type of argument, however, does not work well within the parameters of the *Van der Peet* purposive analysis of subsection 35(1). That analysis does not allow for competing claims of sovereignty. Crown sovereignty is unchallengeable. This presumptive roadblock significantly limits the shape any self-government claim can take. Lamer C.J.C. enunciated this limitation in Delgamuukw when he said, "rights to self-government, if they existed, cannot be framed in excessively general terms."[88]

What the Supreme Court was saying, in the "rights" cases of 1996 and 1997, was more or less what Marshall C.J. had said more than a century and a half earlier: Issues of sovereignty, Aboriginal versus Crown, are ones of politics not law, and the judiciary is bound to accept, unquestioningly, that the Crown "occupies the field" when it comes to sovereign power in Canada. McEachern C.J.B.C. in *Delgamuukw B.C.S.C* vocalized the point most clearly and succinctly:

> After much consideration, I am driven to find that jurisdiction and sovereignty are such absolute concepts that there is no halfway house .... [N]either this nor any court has the jurisdiction to undo the establishment of the colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any court to award .... Canadian ... sovereignty is a legal reality recognized both by the law of nations and by this court.[89]

The practical consequence of all this seems to be a position, fixed by the close of the 20th century, whereby the Supreme Court determined that it would consider only narrow assertions of specific self-government powers on a case-by-case basis, each time invoking the *Van der Peet* "distinctive practices test" in assessing the claimed right. As a result, there was erected a

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85. *Ibid.* at para. 49.
86. *Delgamuukw*, *supra* note 5 at para. 82.
87. See *e.g. R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648; *Delgamuukw*, *supra* note 5.
88. *Supra* note 5 at para. 170.
89. *Supra* note 2 at 454.

potentially severe disincentive to Aboriginal claimants to go to court to try to win recognition of a broad self-government right. The most that could be achieved through the judicial process, so it appeared, was halting and piecemeal recognition of isolated subsection 35(1) rights that might, or might not, fall into the category of self-government. Given the time and cost commitments associated with such litigation, and the likelihood of narrow results, after *Pamajewon* and *Delgamuukw* it was understandable if Aboriginal groups decided to forego pursuing self-government claims through the courts, and instead refocus on the political approach.[90]

v. Missives from Academia

ACADEMIC COMMENTARY REGARDING the "aboriginal rights" protected by subsection 35(1) of the *Constitution Act, 1982* gushed forth in the aftermath of *Sparrow* (which was also the aftermath of Oka and the death of the Meech Lake Accord). The RCAP was struck in early 1991. Things were happening. Efforts toward Aboriginal self-government in the political realm had not, from 1982 onward, proved particularly fruitful. Renewed attempts to constitutionalize some kind of self-government right came to a halt with the demise of the Charlottetown Accord in 1992. Yet, as has been discussed in Part II of this article, federal government policy did get itself to the point of formally acquiescing to the concept of inherent Aboriginal self-government. It continues to be federal policy, although not much headway has been made in terms of converting it into reality.

With the political winds seemingly favouring the Aboriginal self-government concept, it is little wonder the 1990s witnessed much scholarly output on the subject. Precisely how should self-government be accommodated within the Canadian polity? Should there be different forms of self-government for different Aboriginal groups in different parts of the country? If so, how would those groups interact with each other, and with non-Aboriginal segments of society? What about Aboriginal peoples with little or no land base (urban Aboriginals)? How could their aspirations realistically be met? These, and multifarious other questions, fueled an ongoing discourse. The RCAP engaged in a parallel discourse, exploring the complex issues associated with self-government and the different models and approaches available to try to implement the concept.

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90. There is, though, a tactical dilemma involved in this. Hogg, *supra* note 22 at 27-24 has commented: "[I]f the aboriginal right of self-government is defined too narrowly by the Court, the bargaining power of aboriginal nations will be impaired, and the incentive of governments to reach agreements will be reduced." On the other hand, ceasing altogether to pursue matters through the courts may similarly cause governments to lose incentive to negotiate.

Michael Asch and Patrick Macklem in 1991 leveled criticism at the *Sparrow* decision,[91] saying by choosing a "contingent rights approach" to Aboriginal rights (they depend on state action) rather than an "inherent rights approach"[92] (as was begun in *Calder* and *Guerin*), the "Court severely curtailed the possibility that s. 35(1) includes an aboriginal right to sovereignty and rendered fragile s. 35(1)'s embrace of a constitutional right to self-government."[93] Macklem followed up on this theme that same year,[94] arguing that the acceptance of an inherent right to sovereignty and constitutional protection of First Nations self-government was required to commence the process of full participation by First Nation peoples in Canadian society: "The borders of the Canadian legal imagination must be redrawn so as to include the aspiration of native people to have greater control over their individual and collective destinies."[95] In response to Asch and Macklem, Thomas Isaac delivered a couple of salvos in 1992.[96] In these articles Isaac critiqued the discussions by Asch and Macklem about the two competing theories of Aboriginal rights (contingent and inherent) and the authors' insistence on a judicial recognition of the inherent rights approach:

> The court has accepted Canadian sovereignty as a legal and political reality. It does so not on the basis that European nations are superior, but rather that Canadian sovereignty is a well-established fact in the political and legal framework of Canada. Aboriginal sovereignty, if not explicitly, then implicitly, has been extinguished for centuries. Any recognition of aboriginal sovereignty must take place within the existing legal and constitutional framework. Once this is recognized, aboriginal sovereignty becomes the wrong term to use because sovereignty denotes a form of absolute power. Both inherent rights theory and aboriginal sovereignty are based upon notions of absolute power. Inherent aboriginal rights are not dependent upon the state and are, therefore, absolute. The use of this type of language is not productive. It aims for the unattainable not only at law but also politically. Absolute power, as found in inherent rights and "sovereignty", is unfounded for aboriginal peoples
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> ....
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> Nowhere is an aboriginal right of self-government, in the inherent or aboriginal sovereignty form, recognized
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> ....

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91. Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498.
92. *Ibid.* at 501, 503.
93. *Ibid.* at 516.
94. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.
95. *Ibid.* at 456.
96. Thomas Isaac, "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem" (1992) 30 Alta. L. Rev. 708 [Isaac, "Rose-Coloured Glasses"]; T. Isaac, "The Storm Over Aboriginal Self-Government: Section 35 of the *Constitution Act, 1982* and the Redefinition of the Inherent Right of Aboriginal Self-Government" [1992] 2 C.N.L.R. 6 [Isaac, "Storm Over Self-Government"].

> Their [Asch and Macklem] views are interesting but do not appear to consider the legal reality of Canadian sovereignty and the difficulty of absolute terminology such as "inherent" and "aboriginal sovereignty". Inherent self-government must be based on "something" and until that "something" is produced in concrete form, the evidence suggests that no such right exists. One's imagination must be tempered by realism
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> ....
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> In order for realism to prevail, absolutism must be forgotten. The language of absolutism in this debate on self-government is misleading. It is the unattainable and unthinkable. Of course, in order for a right of self-government to work, outside of absolute sovereignty, the federal and provincial governments must support such a right with solid funding and infrastructural support.[97]

Perhaps in partial response to the reluctance of some, exemplified by Isaac, to accept the concept of an "inherent Aboriginal right of self-government," a number of authors contemporaneously or subsequently embarked on detailed treatises aimed at buttressing the "inherentness" of Aboriginal sovereignty and rights to self-govern.[98] The specifics of those commentaries will not be discussed here. Suffice it to say that, at least on an intellectual level, they are intriguing and quite persuasive. They draw, variously, on historical research and analysis, positive international law and basic principles of justice to substantiate the position that inherent Aboriginal sovereignty is legitimate and viable.[99]

By the mid 1990s the academic discourse had been tempered somewhat by the release by the RCAP of its interim report on self-government,[100] and by the apparent willingness by politicians, as illustrated by the Charlottetown Accord wording and the *1995 Policy Statement*, to accept the concept of inherent Aboriginal self-government. The emphasis shifted, to some extent, to questions of how best to implement this freshly recognized inherent right to self-govern.[101]

The continuing judicial unwillingness to engage the self-government debate, however, set off a new round of academic critiques in the latter part of the 1990s. Most noteworthy of these, because of its bluntness, is an article written by John Borrows in 1999.[102] In that article the author goes back to the heart of the matter, Aboriginal sovereignty, and chastises the Supreme

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97. "Isaac, "Rose-Coloured Glasses", *ibid.* at 709–12.
98. See *e.g.* Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681; John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 [Borrows, "Self-Government and the Royal Proclamation"].
99. See also Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173.
100. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993).
101. See *e.g.* Hogg & Turpel, *supra* note 28.
102. John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537 [Borrows, "Sovereignty's Alchemy"].

Court of Canada for its ongoing failure to interrogate Crown sovereignty:

> This article questions the Court's unreflecting acceptance of the Crown's assertion of sovereignty over Aboriginal peoples in British Columbia...[103]

> Sovereignty's incantation is like magic ... This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims. Contemporary Canadian jurisprudence has been susceptible to this artifice ... [A]s in past centuries, sovereignty heralds the diminishment of another's possessions. In this respect, the decision echoes ancient discourses of conquest. Is this, as the Court requires of its jurisprudence, "a morally and politically defensible conception of aboriginal rights"? Is the mere assertion of sovereignty an acceptable justification for the Crown's displacement of indigenous titles?[104]

> [D]espite the challenges a judge may encounter in questioning assertions of Crown sovereignty, the criteria that must be used to arrive at such a decision cannot be based on a numeric tally of public opinion. The judiciary is independent. Conclusions must be legally expressed. It is not appropriate for judges to use their power in any other way. While most judges would no doubt struggle with such a ruling, if they were led to such a conclusion (because they found in law that the effects of assertions of Crown sovereignty on Aboriginal peoples legally "did not make sense") and they did not express it, the very integrity of the Canadian legal fabric would be undermined.[105]

Thomas Isaac must have suffered a moment of apoplexy when he read this! Borrows in this article brings back, with a vengeance, the "language of absolutism" and, arguably, disregards the "political and legal reality of Canada." Why would Borrows do this? Is there really any point in casting doubts on the impartiality of the Supreme Court of Canada[106] and demanding that it critically review the whole basis of Crown sovereignty?[107] Perhaps Borrows was just venting. Perhaps, and this seems more likely, he was reiterating the extreme Aboriginal perspective as his contribution to the "to and fro" of Aboriginal/non-Aboriginal discourse and negotiation.[108] Interestingly, Borrows tones down his approach somewhat in some of his later writings, to the extent that they are actually referred to with approval

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103. *Ibid.* at 548.
104. *Ibid.* at 562 [footnote deleted].
105. *Ibid.* at 579 [footnotes deleted].
106. "If the judiciary is to take the Constitution, the rule of law, and their own office seriously, judicial independence mandates 'impartial and disinterested umpires.' As such, any judge reviewing the assertion of sovereignty over Aboriginal peoples would be expected to do so in an impartial manner, without bias or predisposition to the result." (*ibid.* at 579-580) [footnotes deleted].
107. "The Court's acceptance of assertions of Crown sovereignty ensures that the Crown does not have to meet ... the same strict legal standard as Aboriginal peoples in proving its claims. This double standard is deeply discriminatory and unjust .... Whatever the justification advanced in earlier days for relieving the Crown of this burden, an unjust and discriminatory doctrine of this kind can no longer be accepted." (*ibid.* at 573).
108. In "Borrows, "Self-Government and the Royal Proclamation", *supra* note 98 at note 16, Borrows described his role in the movement for First Nations self-government as assisting "direct political action... through prescriptive legal action and writing that challenges the explanations of those people and institutions that continue to oppress First Nation governments."

by the Supreme Court.[109] Even in "Sovereignty's Alchemy" itself, he concedes that "the Court's use of 'sovereignty' defines the terrain on which Aboriginal peoples must operate if they are going to dispute the Crown's actions in Canadian courts."[110]

VI. "Wiggle" Room in the 21st Century?

TO THE END OF THE 20TH CENTURY, then, there persisted a judicial disinclination to delve deeply into the labyrinth of self-government (hoping, no doubt, that federal concessions in the policy realm would heighten chances of political resolution). Apparently, the "right case for the Court to lay down the legal principles" of self-government still has not materialized. The academic debate over "inherent" and "contingent" rights theories, and the nature and scope of Aboriginal sovereignty, if it exists, continues without definitive result.

Two recent cases do, however, hold promise for helping to move the self-government debate outside the "20th century box." They are *Campbell v. British Columbia (Attorney General)*[111] and *Mitchell*.[112]

Campbell involved an application for a declaration that the *Nisga'a Final Agreement* was in part inconsistent with the Constitution of Canada and, therefore, in part, of no force and effect. The applicants were opposition members of the Legislative Assembly of British Columbia. They included Gordon Campbell, who subsequently became premier of the province.

The basis of the application was that the *Nisga'a Final Agreement* conferred upon the Nisga'a Government certain legislative jurisdiction, which allegedly violated constitutional principles. The jurisdiction included the power to "make laws which prevail over federal and provincial laws or limit to Nisga'a citizens the right to vote for, or to be candidates for, Nisga'a Government."[113] The applicants claimed that ss. 91 and 92 of the *Constitution Act, 1867*[114] "exhaustively" distributed all legislative power in Canada between Parliament and the legislative assemblies. A constitutional amendment was therefore required, they said, to enable the Nisga'a Nation to validly make laws that prevailed over federal or provincial laws. The applicants also claimed that legislative powers properly allocated between federal and provincial governments could not be abdicated by those governments, without constitutional amendment, and transferred to the Nisga'a Government (being a "new order of government" not recognized,

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109. In his concurring judgment in *Mitchell*, *supra* note 9 at paras. 134 and 164, Binnie J., in the context of a discussion of Aboriginal self-government, referred twice to comments of Borrows in his "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001), 80 Can. Bar Rev. 15.
110. Borrows, "Sovereignty's Alchemy", *supra* note 102 at 548.
111. (2000), 79 B.C.L.R. (3d) 122, 189 D.L.R. (4th) 333 (S.C.) [*Campbell*].
112. *Supra* note 9.
113. *Campbell*, *supra* note 111 at para. 13.
114. 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5.

argued the applicants, by Canada's Constitution).

Williamson J. of the British Columbia Supreme Court rejected the application and held the *Nisga'a Final Agreement*, and the corresponding settlement legislation, constitutionally valid. Williamson J.'s judgment is convincingly written. And, because the applicants assumed governmental power in British Columbia subsequent to the judgment being rendered, and thereafter were precluded from pursuing an appeal, it stands as law.

Williamson J. held that the *Constitution Act, 1867* did not exhaustively distribute legislative power between Parliament and the provincial legislatures. There was a "gap." Into this gap could be fit the "diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982."[115] The Nisga'a Nation, so determined Williamson J., exercised inherent powers of self-government long before European contact, and elements of those powers had survived into the 21st century.

> ... I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly.[116]

The judgment includes a detailed examination of the relevant jurisprudential background (with some attention allotted to Marshall C.J.C.'s 19th century decisions) and whether a "limited right" to self-government can be protected constitutionally by s. 35(1). On the latter point, Williamson J. displayed no hesitation. Part of his justification for so deciding came from consideration of the activities in the political realm in the 1980s and 1990s. He quoted, *inter alia*, from the *1995 Policy Statement*, and concluded:

> These extrinsic documents are evidence that the framers of s. 35(3) considered that a form of self-government yet to be defined was to be included in the bundle of rights protected by that section, and that the Crown in right of Canada accepted treaties as a method of defining such rights as part of its policy.[117]

While Williamson J. determined that a right of self-government exists (at least for the Nisga'a people), and is protected by s. 35(1) of the *Constitution Act, 1982*, he was careful to say that it is a "limited form of self-government which remained with the Nisga'a after the assertion of sovereignty,"[118] and that "the Nisga'a government...does not have absolute or

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115. *Campbell, supra* note 111 at para. 180.
116. *Ibid.* at para. 179.
117. *Ibid.* at para. 176.
118. *Ibid.* at para. 181.

sovereign powers."[119] There is a clear attempt here to demarcate between "aboriginal self-government," on the one hand, and concepts of "sovereignty" and "absolute power," on the other. Williamson J. also avoided using the descriptor "inherent" in talking about the right to self-government. His approach is reminiscent of what Thomas Isaac suggested in 1992 about discarding the language of "inherent rights...and aboriginal sovereignty."[120] Williamson J.'s judgment, in avoiding the "sovereignty" and "inherent" words, might perhaps be considered an acceptance of the "contingent rights" doctrine. But, at the same time, he discussed and acknowledged the fact that the "Nisga'a never ceded their rights or lands to the Crown."[121] The judgment, therefore, is an intriguing blend of the "inherent" and "contingent" approaches to Aboriginal rights, applied to achieve a pragmatic result.

The judgment of Binnie J. in *Mitchell*, (concurring in the result with that of the majority written by McLachlin C.J.C.), to some extent seems to implicitly pick up on and elaborate the approach of Williamson J. in Campbell. In my view, Binnie J.'s reasons (agreed to by Major J.) break exciting new ground in the long and stale discourse regarding "Aboriginal sovereignty" and "inherent self-government." Law journal articles on *Mitchell*[122] published to date, to the extent they address Binnie J.'s judgment,

119. *Ibid.* at para. 183.

120. Isaac, "Rose-Coloured Glasses", *supra* note 96 at 109.

121. *Ibid.* at para. 32.

122. Leonard I. Rotman, "Developments in Aboriginal Law: The 2000–2001 Term" (2001) 15 Sup. Ct. L. Rev. (2d) 1 at 20; Peter W. Hutchins & Anjali Choksi, "From *Calder to Mitchell*: Should the Courts Patrol Cultural Borders?" (2002) 16 Sup. Ct. L. Rev. (2d) 24; Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 Sup. Ct. L. Rev. (2d) 285; Thomas Isaac, "The Meaning of Subsection 35(1) of the *Constitution Act, 1982*: A Comment on *Mitchell v. Minister of National Revenue*" (2002) 60:6 The Advocate 853 [Isaac, "Comment on *Mitchell*"]; Michael Coyle, "Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples" (2003) 40:4 Alta. L. Rev. 841 (QL).

largely run in diametric opposition to this viewpoint.[123]

The *Mitchell* commentaries offered by Professors Christie and Rotman in, respectively, "Rewriting the Two-row Wampum" and "Aboriginal Law Developments," focus sharply on Justice Binnie's judgment. Neither article captures, in my view, the essential significance of Binnie J.'s explicit adoption of the "sovereign incompatibility principle"[124] nor his thoughts on the concept of "merged sovereignty." Both authors categorize his efforts as regressive and potentially very harmful to the Native/non-Native reconciliation process. Their commentaries are, again in my view and with all due respect, unfair and not well-founded. They severely undervalue the importance of Binnie J.'s attempt to recast judicially the sovereignty concept to render it inclusive of Aboriginal values and perspectives.

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123. "Isaac, "Comment on *Mitchell*", *ibid.*, is the only one of *Mitchell* commentaries that suggests the majority got it more or less right. Isaac likes the fact that the Supreme Court felt no compunction to elaborate its existing tests, but was content to apply the "law" to the facts at hand. That the Court in *Mitchell* apparently felt it had enough jurisprudential ammunition to make a ruling is, to Isaac, a welcomed sign that a plateau in Aboriginal rights adjudication may have been reached. Isaac, at 858, suggests, *Mitchell* represents "a natural evolution in interpretation" and, at 860, that it represents "a significant development in the maturity of aboriginal law in Canada." He says, at 863, "*Mitchell* is indicative of a Supreme Court focused more on the application of sound legal principles, rather than the development of further theoretical discussions respecting aboriginal law." Isaac's comments on Binnie J.'s concurring judgment are minimal. This is surprising given Isaac's pleas in 1992 (see note 92) for the "language of absolutism" to be discarded—something Binnie J.'s judgment actively encourages, although not quite the way Isaac suggested a decade earlier.

Hutchins and Choksi, *ibid.*, also do not devote much attention to what Justice Binnie had to say. They dwell on the majority judgment's strict characterization of the Aboriginal right(s) in question, its handling of evidentiary issues, and its determination to rigidly apply established tests regarding Aboriginal rights rather than expanding any jurisprudential boundaries. The authors conclude that the majority judgment was narrow and unimaginative, indeed somewhat of a reversal of the "generous and liberal" approach to Aboriginal rights adjudication espoused and, sometimes, applied by the Court in the decade since *Sparrow*.

Coyle, *ibid.*, a very recent article, comments generally on the Supreme Court's current approach to s. 35 of the *Constitution Act, 1982* and the limitations thrown up by this approach vis-à-vis protection of distinctive aspects of Aboriginal cultures. He uses *Mitchell* to help illustrate these limitations. He also, however, recognizes the potential significance of Justice Binnie's concurring judgment, at least in respect of its efforts to engage in some overt discussion of Aboriginal sovereignty and self-government. Coyle, at para. 15, suggests that Binnie J.'s judgment "offers new insight into what may be generally held concerns by members of the Court about Aboriginal assertions of autonomy as a right protected by s. 35." He goes on to say, at para. 25, that while "Justice Binnie's analysis will no doubt disturb those who are already concerned about the existing limitations that have been placed on the recognition of Aboriginal rights under s. 35... an open discussion of Binnie J.'s concerns may be helpful in triggering a fresh look at the potential of s. 35 to safeguard Aboriginal autonomy." Coyle, while by no means ascribing any earth-shattering significance to Binnie J.'s approach, and indeed critiquing his analysis of "merged" and "shared" sovereignty, nevertheless posits, at para. 30, that "the issue of balance is a critical one for the continued formulation of a broader, workable view of the Aboriginal rights protected by s. 35," and suggests that "[a]rguably, the basis of such a balance can be found, at least by inference, in the logic of the minority's reasons."

124. This wording appears to have been adopted from a 1987 article written by Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, wherein he commented, as paraphrased by McLachlin C.J.C. in *Mitchell*, *supra* note 9 at para. 10: "... aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them."

Mitchell involved the issue of "whether the Mohawk Canadians of Akwasasne have the right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties."[125] The federal government argued application of "sovereign incompatibility." McLachlin C.J.C. found it unnecessary to rule on the applicability of such a principle, but went on to discuss it anyway. She said the federal government's contention was that "s. 35(1) of the *Constitution Act, 1982* extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty."[126] This sounds very much like the orthodox government position (judicially supported, to this point) that Crown sovereignty "fully occupies the field" and leaves no room for assertions of Aboriginal rights somehow tied to a competing sovereignty concept. McLachlin C.J.C. noted that "[t]his Court has not expressly invoked the doctrine of 'sovereign incompatibility' in defining the rights protected under s. 35(1)."[127] She concluded, in response to the Crown contention, "that 'sovereign incompatibility' is an implicit element of the *Van der Peet* test,"[128] and that she "would prefer to refrain from comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue."[129]

McLachlin C.J.C.'s reluctance to sanction an express "sovereign incompatibility" approach to Aboriginal rights adjudication is itself significant. It suggests a continuing hope that things will sort themselves out in the political arena. Stated otherwise, McLachlin C.J.C.'s words in *Mitchell* suggest that she, too, is not yet ready (or willing) to "step into the breach." It is not difficult to appreciate her quandary. To engage in judicial consideration of the validity and applicability of "colonial laws of sovereign succession"[130] is to open a Pandora's box that has always been clamped tightly shut. Yet it seems to be a task that probably, sooner or later, will have to be undertaken by the Supreme Court. McLachlin C.J.C. may merely have deferred the inevitable.

Binnie J., unlike McLachlin C.J.C., saw fit to invoke the "sovereign incompatibility principle." He held that the "international trade/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of

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125. *Mitchell, supra* note 9 at para. 1.
126. *Ibid.* at para 61.
127. *Ibid.* at para. 63.
128. *Ibid.* at para. 64.
129. *Ibid.*
130. Borrows, "Sovereignty's Alchemy", *supra* note 102, very convincingly argues the legal bases to authorize such judicial consideration. Binnie J.'s willingness in *Mitchell* to analyze the "sovereignty" concept suggests that he (and Major J. also) might be receptive to some of Borrows' arguments.

Canadian sovereignty."[131] Binnie J.'s embrace of "sovereign incompatibility" has attracted much of the academic criticism leveled at his judgment. In my opinion, however, it is not the most noteworthy aspect of that judgment. He went on to enunciate a concept of "shared" or "merged" sovereignty that marks a viewpoint very different than anything previously coming from the Supreme Court. Binnie J.'s concept is *something new for the 21st century*. It offers a bridge, in effect, to get over the old doctrinal impasse relating to who is "sovereign" and who is not. It says that *both* Aboriginal and non-Aboriginal Canada jointly hold sovereignty power.

The "merged" or "shared" sovereignty idea comes from the *RCAP Report*. Binnie J. in *Mitchell* quoted from the *Report* 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 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.[132]

Binnie J.'s (and Major J.'s) apparent support for the idea of "merged" or "shared" sovereignty is, I am suggesting, extremely significant. It is also a classic example of creative judicial law-making. Binnie J. explained that "[m]erged sovereignty asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became *merger partners*."[133] He said that when the Constitution was patriated in 1982, the "s. 35(1) reconciliation process was established...[and] all aspects of our sovereignty became firmly located within our borders."[134]

The result was an "updated concept of Crown sovereignty [that] is of importance."[135] Binnie J. continued:

> If the principal 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.[136]

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131. *Mitchell*, *supra* note 9 at para. 163.
132. *Ibid.* at para. 130, quoting from *RCAP Report*, *supra* note 4 at 240–41. It is encouraging to see the *RCAP Report* used in this manner by the Supreme Court of Canada. John Borrows, in his "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 at 661 [Borrows, "Domesticating Doctrines"], lamented the "domestication of Aboriginal and treaty rights" and encouraged "[g]reater adherence to [RCAP's] recommendations."
133. *Mitchell*, *supra* note 9 at para. 129 (emphasis added).
134. *Ibid.*
135. *Ibid.*
136. *Ibid.* (emphasis in original).

If this revised version of sovereignty emerged in 1982, one wonders why it took almost two decades for it to be vocalized at the Supreme Court level! Obviously it did not just "emerge"; it evolved. The "merged sovereignty" concept is drastically different than the old-fashioned "Crown sovereignty" that is at the core of the purposive 35(1) analysis enunciated by Lamer C.J.C. in *Van der Peet* and *Gladstone*, and applied in *Pamajewon* and *Delgamuukw*. Binnie J. no doubt realized that assertions of inherent Aboriginal self-government, with their built-in elements of Aboriginal sovereignty, would likely have to fail utterly in a head-on clash with Crown sovereignty. In the interests of continuing the reconciliation envisioned by section 35(1), "Crown sovereignty" would therefore have to be given a full makeover. Williamson J.'s decision in *Campbell* reached a just result, but did not really do much to advance the theoretical framework of inherent sovereignty. *Campbell* was, as discussed earlier in this Part, arguably not much more than a dressed-up version of the old "contingent rights" approach. *Campbell*'s significance was its finding that federal and provincial legislative powers did not fully "occupy the field," that limited Aboriginal self-government rights could be squeezed into the resulting gap, and that those rights were constitutionally protected.

In *Mitchell*, Binnie J. laid the groundwork for a future full review by the Supreme Court of the legal underpinnings of inherent Aboriginal self-government. Binnie J.'s preparatory work is remarkable both in its responsiveness and its anticipatory eye on the task that lay ahead. It implicitly acknowledged the deficiencies of Lamer C.J.C.'s analytical framework, in respect of any application of that framework to the self-government issue. It also implicitly acknowledged that the self-government issue likely will not be settled politically and, as much as the Court would like to continue sidestepping the issue, it will not be able to do so forever. It took notice, explicitly or implicitly, of the scholarly discourse, the political maneuverings, the advice of the *RCAP Report* and the post-*Pamajewon* judicial dilemma vis-à-vis the self-government issue (as exemplified in *Campbell*). Binnie J.'s judgment, in sum, represents a masterful effort at reading the nuances of an entrenched and long-standing legal/political problem, and sets up a fresh doctrinal approach to respond to that problem in a pragmatic and broadly acceptable manner.

It is perplexing that Binnie J.'s support of "merged sovereignty" has not received much more attention, and some backing, from Canada's Aboriginal community. It is even more perplexing that most of the academic commentary to date has derided his acceptance of "sovereign incompatibility" and vilified what he had to say about sharing sovereign power. An appreciation of the historical context and existing jurisprudence, which this article has attempted to lay out (albeit summarily), should result in praise, not derision, of Justice Binnie's efforts. There is something wrong with the picture. Perhaps it just boils down to skepticism: a suspicion that Binnie J.'s

analysis is more semantics than a genuine judicial expression of willingness to deconstruct the Canadian sovereignty concept. My answer to that one is 'time will tell,' but there is nothing apparent from the *Mitchell* judgment to cast doubt on the sincerity of what Justice Binnie has said. The articles penned by Professors Christie and Rotman, however, exude more than skepticism. They both ascribe to Justice Binnie an intention to subvert Aboriginal aspirations of self-determination (while contemporaneously buttressing Crown sovereignty). A careful reading of Binnie J.'s judgment, properly contextualized, suggests quite the opposite.

Professor Christie's commentary in "Rewriting the Two-row Wampum" offers explicit criticism, backed by legal analysis, of both the "sovereign incompatibility principle" and the "merged sovereignty" concept vocalized by Binnie J. With respect, however, Professor Christie's arguments revert to the "language of absolutism," urging adherence to the tired, all-or-nothing contest of Crown sovereignty versus Aboriginal sovereignty. To use the words of Professor Borrows, an Aboriginal scholar renowned as a staunch advocate for the rights and betterment of his people, it is time for "a new story, new solutions."[137] Borrows says that what is now needed to promote the advancement of Aboriginal rights is a "transformative message in a reactionary time."[138] Christie's message is stuck inside the "20th century box." It is Justice Binnie in *Mitchell* who is trying to be transformative.

Christie labels Binnie J.'s suggested path as "a radical extension and amplification of [a] troubling doctrine...[that] would...be serious and disturbing."[139] His critique is on two levels. First, he suggests that the "sovereign incompatibility principle," as approved and implemented by Justice Binnie, is both unnecessary and situated on shaky doctrinal ground. Sovereign incompatibility is unnecessary, he says, because the concepts of extinguishment and infringement can be used to deal with "unacceptable"

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137. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto/Buffalo/London: University of Toronto Press, 2002) at 140 [Borrows, *Recovering Canada*].

138. *Ibid.*, Borrows explains: "To preserve and extend our participation with the land, and our association with those who now live on it, it is time to talk of Aboriginal control of Canadian affairs... Some have expended a tremendous amount of time and effort developing messages of an exclusive citizenship and measured separatism for Indians, through a form of self-government. But that approach, while appropriate, helpful, and deserving of recognition, is not rich enough to encompass the wide variety of relationships we need to negotiate in order to live with the hybridity, displacement, and positive potential of our widening circles. The extension of Aboriginal citizenship into Canadian affairs is a developing reality because of our increasingly complex social, economic, and political relations. Intercultural forces of education, urbanization, politics, and intermarriage draw Indigenous people into closer relationship with non-Aboriginal Canadian society... Aboriginal control of Aboriginal affairs, while necessary, is not enough to reflect our cultural participation within Canada... Participation within Canada may not sound or appear to be 'Aboriginal'. It may be argued that this notion violates sacred treaties and compromises traditional cultural values. Yet, it should be asked: what does it mean to be Aboriginal or traditional? Aboriginal practices and traditions are not 'frozen'... Aboriginal identity is constantly undergoing renegotiation. We are traditional, modern, and postmodern people." (*ibid.* at 140, 144–45, 147–48) [footnotes deleted] (emphasis added).

139. Christie, *supra* note 122 at 286.

Aboriginal rights claims—so sovereign incompatibility, which Christie labels "extinguishment before birth"[140] is, at best, duplicative. This actually is not a bad argument. Christie's doctrinal criticism, on the other hand, goes back to the old problem of unwillingness to legitimize any approach to Aboriginal/non-Aboriginal relations based on historic and contemporary assertions of Crown sovereignty.

I see the primary motivation for Binnie J.'s adoption of the "sovereign incompatibility principle" as a desire to inject some common sense and expediency into the sovereignty discourse. All the legal word-twisting and doctrine-bashing in the world cannot take away from the reality (yes, the *reality*) that certain manifestations of Canadian sovereignty are here to stay. These include such things as controlling the national borders; participating in global military, peacekeeping and aid missions; maintaining monetary and fiscal policies, currency controls and diplomatic arrangements and initiatives. Such manifestations of Canadian sovereignty reflect the nation's modern persona and place in the international community, and are thus *as much a reflection of Aboriginal Canada as non-Aboriginal Canada*. Further, I suggest that most Aboriginal people likely would not care much about these things, would be content to let them fall into the category of exclusive Canadian sovereignty and, in fact, might even be a source of some pride for them.[141] Aboriginal Canadians hold, by way of example, an honourable legacy of service in Canada's military and peacekeeping initiatives abroad. Putting aside the specific Mohawk contention that sparked *Mitchell*, it is my view that the majority of Aboriginal people in Canada would call the academic squabbling over sovereign incompatibility a bit silly. "Let the federal government run (and pay for) the military, continue to print money and co-ordinate continental security with the Americans," they might say. "We have neither the resources nor a burning desire to intervene in these spheres. Our focus is primarily internal, on the health, welfare and cultural integrity of our people. We don't need to occupy a separate spot on the international stage; we have our hands full securing and enhancing aspects of our *domestic*

140. *Ibid.* at 292.

141. Letting certain powers and functions be categorized within "Canadian" sovereignty does not mean Aboriginal people would be precluded from having input, just that that input would be channeled through the "ordinary" Euro-centric mechanisms and would not be attributed any special weight.

sovereignty."[142] While the legal basis of Canadian sovereignty is admittedly dubious, the question has to be asked whether there is anything worthwhile to be gained from spending time and energy trying to usurp those modern manifestations of Canadian sovereignty that have a dominant external projection (such as global peacekeeping), and/or are relatively innocuous, and of more or less impartial application to all citizens (such as monetary policy).

Binnie J.'s decision on sovereign incompatibility was, I suggest, neither "insidious"[143] nor "dangerous."[144] It was, rather, a forthright and pragmatic effort to "cut to the chase" on the sovereignty issue, to clear the path a little by articulating the notion that there are certain elements of contemporary Canadian sovereignty that truly supersede "Aboriginal sovereignty," in large part because Aboriginal sovereignty has no serious need or desire to compete. In *Mitchell*, Binnie J. was very careful to state his expectation that the "sovereign incompatibility doctrine" would "be sparingly applied,"[145] warning, "it is a doctrine that must be applied with caution."[146] While concluding that the particular right being claimed by Chief Mitchell was not compatible with *external* (that is, international) manifestations of Canadian sovereignty, Binnie J. expressly stated that he did "not wish to be taken as either foreclosing or endorsing any position on the compatibility or incompatibility of *internal* self-governing institutions of First Nations with Crown sovereignty, either past or present."[147] As I see it, the academic fuss over sovereign incompatibility is a proverbial tempest in a teapot. The doctrine is inherently sensible. It assuredly will be well circumscribed.[148] So let it be, let it serve its function of clearing the path so that the more intractable and important aspects of sovereignty reconciliation can be given full attention.[149]

This takes us back to the "merged sovereignty" concept, and the second level of Professor Christie's critique of the Binnie judgment in *Mitchell*.

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142. My assumptions here have no specific empirical back-up, but are based on a general sense of what really matters for most Aboriginal people. To the extent these assumptions can be substantiated, one might look at comments of the RCAP. The lengthy commentary on "Governance" in the *RCAP Report* places almost all emphasis, and strongly intimates Aboriginal people also place most of their emphasis, on self-government features that are internal (that is, in the domestic realm) and largely local in nature. At 139 and 140 of the RCAP Report, *supra* note 4, the RCAP summarizes: "Aboriginal people affirm that they have the inherent right to determine their own future *within Canada* and to govern themselves under institutions of their own choice and design... Accordingly, Aboriginal visions of self-government embrace two distinct but related goals. The first involves greater authority over a traditional territory and its inhabitants.... The second involves greater control over matters that affect the particular Aboriginal nation in question: its culture, identity and collective well-being." (emphasis added).
143. Christie, *supra* note 122 at 296.
144. *Ibid.*
145. *Mitchell*, *supra* note 9 at para. 154.
146. *Ibid.* at para. 151.
147. *Ibid.* at para. 165 (emphasis in original).
148. If it is not, heavy criticism will properly and speedily drop on those who purport to apply it expansively.
149. These comments of course assume the doctrine will ultimately be adopted by a majority of the Supreme Court. Otherwise, this whole discussion truly is a teapot tempest.

Christie says that "[t]he central defining feature of Binnie J.'s argument is a rewriting of the Two-row Wampum."[150] He continues:

> From a composition which speaks of two separate vessels traveling side-by-side, each party in each vessel refraining from steering the other, Binnie J. arrives at a notion of "merged sovereignty," a vision of one vessel, composed of the materials of the previous two, "pulling together as a harmonious whole." This is said to be a "modern embodiment of the 'two-row' [W]ampum concept, modified to reflect some of the realities of a modern state."[151]

Christie expresses concern with this approach taken by Binnie J. He asks: "What legitimates this rewriting? How can a representative of the one vessel decide to reformulate the nature of the relationship?"[152] Christie goes on to say "Justice Binnie argues that the two vessels are now one, and under the control of the Crown."[153] This is not, I suggest, an accurate characterization of Justice Binnie's words. Binnie J. in fact takes pains to avoid saying that Aboriginal sovereignty is subsumed in and "controlled" by Crown sovereignty. That is the whole point of introducing the "merged sovereignty" concept.

> 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 part of it.*[154]

Justice Binnie has indeed attempted a rewriting of the Two-row Wampum, but it is a rewriting that expressly recognizes the need to accommodate Aboriginal sovereignty. Professor Christie's castigation of Binnie J.'s pronouncements on "merged sovereignty" is inappropriate.[155] The idea is not to forget the colonial past, but to somehow move beyond the debilitating rhetorical game to enable real work that is useful and constructive. The notion of "merged sovereignty," let it be remembered, comes from the RCAP, a body dominated by Aboriginal members that spent five years criss-crossing the country to canvass the views of Aboriginal Canadians and crafting its reports to reflect that input. Much greater use of the RCAP's work and recommendations has been urged for years by Aboriginal spokespersons.[156] And, interestingly, modification of the Two-row Wampum concept along the lines detailed by Justice Binnie in *Mitchell* corresponds, to a significant degree, to a reworking of the concept suggested by an Aboriginal legal scholar as pre-eminent as John Borrows:

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150. Christie, *supra* note 122 at 294.
151. *Ibid.* [footnote deleted].
152. *Ibid.*
153. *Ibid.*
154. *Mitchell*, *supra* note 9 at para. 135 (emphasis added).
155. See Christie, *supra* note 122 at 295, where it is stated: "People of conscience cannot imagine beginning today with a 'clean slate', forgetting the colonial history upon which Canada now rests. People of conscience cannot imagine that living 'with a foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities' signals acceptance of this rewriting of the Two-row Wampum." [footnote deleted].

> The Gus Wen Tah [Two-row Wampum] ... belt consists of three parallel rows of white beads, separated by two rows of purple. To some, the belt suggests a separate nation-to-nation relationship between First Nations and the Crown that prohibits Aboriginal participation in Canadian affairs. This interpretation flows from a focus on the purple rows .... In considering the potential of the Gus Wen Tah for embracing a notion of citizenship that includes non-Aboriginal people, two important observations must be made. First, the Gus Wen Tah contains more than two rows of beads. The three rows of white beads represent a counterbalancing message that signifies the importance of sharing and interdependence. These white rows, referred to as the bed of the agreement, stand for peace, friendship, and respect. When these principles are read together with those depicted in the purple rows, it becomes clear that ideas of citizenship must also be rooted in notions of mutuality and interconnectedness ... This is one reason for developing a narrative of Aboriginal citizenship that speaks more strongly to relationships that exist beyond 'Aboriginal affairs.' *Tradition, in this case represented by the Gus Wen Tah, can support such an interpretation.*[157]

Professor Borrows seemingly has found room in his conscience to consider the pragmatic potential of a "merged sovereignty" approach to reconciling Aboriginal/non-Aboriginal differences! The Two-row Wampum does, after all, appear on *one* belt. The single belt and constant white background, or "bed," perhaps illustrate, as pointed out by Borrows, a directive to focus on the mutuality and interconnectedness of the relationship as much as on its distinct streams.

Professor Rotman's analysis of the *Mitchell* judgment is as disappointing as Professor Christie's. After dutifully recounting the substance of the majority and concurring decisions,[158] Rotman quickly turns his focus to Binnie J.'s judgment, the one of the two *Mitchell* judgments, he says, "likely to have greater and more lasting effects on Canadian Aboriginal rights jurisprudence...."[159] Rotman states that while the *Pamajewon* decision was a "setback" to the determination of the issue of inherent Aboriginal self-government, Binnie J.'s judgment "shut the door on the topic."[160] Rotman, like Christie, reverts to the "language of absolutism" (and the concepts that go with it) to ground his critique of *Mitchell*. He states the judgments "reflect the notion of the supremacy of the Canadian state and, with it, the affirma-

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156. See *e.g.* Borrows, "Domesticating Doctrines", *supra* note 132.
157. Borrows, *Recovering Canada*, *supra* note 137 at 148-49 [footnote deleted] (emphasis added).
158. In commenting on McLachlin C.J.C.'s reasons, Rotman, in "Aboriginal Law Developments", incorrectly described her position on "sovereign incompatibility." In Rotman, *supra* note 122 at 20, he says: "As a result, she held that "sovereign incompatibility" be regarded as an implicit element of the Van der Peet test for the proof of Aboriginal rights." Chief Justice McLachlin actually said in *Mitchell*, *supra* note 9 at para. 64: "The Crown now contends that "sovereign incompatibility" is an implicit element of the *Van der Peet* test... In view of my conclusion that Chief Mitchell... has not proven his claim to an aboriginal right, I need not consider the merits of this submission. Rather, I would prefer to refrain from comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of Aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue."
159. Rotman, *ibid.* at 23.
160. *Ibid.*

tion of the doctrine of sovereign incompatibility."[161] He suggests the "issue of inherent sovereignty [has been] seemingly stalled by the judgments in *Mitchell*, albeit more vociferously in Binnie J.'s reasons than in those of Chief Justice McLachlin...."[162] These comments, in my view, indicate a misapprehension of the central message of Binnie J.'s judgment. Talk of "stalling" is misplaced. Judicial consideration of Aboriginal sovereignty and self-government issues has never even gotten its engine started! Justice Binnie in *Mitchell* put the key in the ignition.

Rotman in his article goes off the track at several points. The first is when he asserts that inherent Aboriginal self-government "would take effect politically at an international level."[163] This assertion, if substantiated, would render redundant the entire concept of sovereign incompatibility. But the suggestion that self-governance powers must generate full sovereign-nation status in the international community displays the kind of distance from reality that perpetually bogs down Aboriginal/non-Aboriginal reconciliation. For one thing, urbanization of many Aboriginal peoples and the extent of their physical integration with non-Aboriginal society (through, for instance, intermarriage), make even the idea of full sovereign-nation status extremely impractical.[164] Whereas Aboriginal people in Canada remain generally unified for certain purposes, at ground level they are quite fractured and disparate. As Binnie J. noted in his *Mitchell* judgment, quoting from the *RCAP Report*, "[there are] '60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities'...."[165] Also, as was argued earlier in this article, most Aboriginal Canadians likely do not have the need, desire or capacity to operate politically at an international level.

Rotman also accuses Justice Binnie of "'throwing a bone' to the Aboriginal peoples so that their defeat in the case would not be regarded as total."[166] The "bone," says Rotman, "came in the form of Binnie J.'s suggestion that a form of domestic, dependent nationhood, such as that existing under American jurisprudence, might exist in Canada."[167] Binnie J. did not, however, recommend for Canada the "American model," based as it is on government acquiescence and, therefore, more a "contingent" right than an "inherent" one. To the contrary, he was careful to distinguish the Canadian situation from that existing to the south:

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161. *Ibid.*
162. *Ibid.* at 24.
163. *Ibid.* at 23.
164. See note 138.
165. *Mitchell*, *supra* note 9 at para. 134.
166. Rotman, *supra* note 122 at 24.
167. *Ibid.* at 25.

> The U.S. doctrine of domestic dependent nation differs in material respects from the proposals of our Royal Commission on Aboriginal Peoples. The concepts of merged sovereignty and shared sovereignty, which are said to be essential to the achievement of reconciliation as well as to the maintenance of diversity, are not reflected in the American jurisprudence.[168]

Rotman takes some further artistic licence in his interpretation of Binnie J.'s remarks that the adoption of the sovereign incompatibility principle was not intended to "foreclos[e] or endors[e] any position on the compatibility or incompatibility of *internal* self-governing institutions of First Nations with Crown sovereignty, either past or present."[169] As previously suggested in this article, it is my view that Binnie J.'s endorsement of sovereign incompatibility was meant to have a very limited effect; it was meant to apply largely to manifestations of Canadian sovereignty projected beyond the national borders. Rotman, though, takes the Binnie "internal" comment and expands it to preclude any extension of Aboriginal governmental power *externally* into "Canadian" jurisdiction. He says Binnie J.'s "italicization of the word 'internal' only serves to reinforce the notion that the idea of a compatibility between *external* self-governing institutions of First Nations with Crown sovereignty is, at present, a non-starter in Canadian jurisprudence."[170] I submit that this interpretation by Rotman fails to give due credit to Binnie J.'s attempt to engage the sovereignty debate, and in fact spins the wording of the judgment in the opposite direction.

A final comment on the Rotman article perhaps best illustrates his apparent effort to go out of his way to discredit Justice Binnie's judgment. Binnie J. stated: "The common law concept of aboriginal rights is built around the doctrine of sovereign succession in British colonial law."[171] Binnie J.'s subsequent analysis of this statement, offers Rotman, "does not appear to appreciate that section 35(1), like the recognition of Aboriginal rights in the *Royal Proclamation of 1763*, did not create rights, but merely affirmed existing ones."[172] There could not be a more entrenched doctrinal component of contemporary Canadian Aboriginal rights law than that those rights pre-dated European contact and therefore were self-sourced. To suggest that Justice Binnie was not aware of this, or did not appreciate its significance, is, at best, discourteous. This is particularly so when one looks at Binnie J.'s full reasons and finds a direct reference to *Calder*, and the doctrine that flowed out of it: "It has been almost 30 years since this Court emphatically rejected the argument that the mere assertion of sovereignty

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168. *Mitchell*, *supra* note 9 at para. 167.
169. *Ibid.* at para. 165 (emphasis in original).
170. Rotman, *supra* note 122 at 25-26 (emphasis in original).
171. *Mitchell*, *supra* note 9 at para. 114.
172. Rotman, *supra* note 122 at 27 [footnote deleted] (emphasis in original).

by the European powers in North America was necessarily incompatible with the survival and continuation of aboriginal rights...."[173]

VII. Conclusion

IN VAN DER PEET, Lamer C.J.C. stated that the reconciliation of the assertion of Crown sovereignty with the prior occupation of North America by Aboriginal peoples necessitated the factoring in of the "aboriginal perspective while at the same time taking into account the perspective of the common law [and that]...[t]rue reconciliation will, equally, place weight on each."[174] This sentiment sounds noble enough, but is it? Lamer C.J.C. chose his words carefully. He could have said, "true reconciliation will *place equal weight on each*;" he did not. Maybe it is just semantics. But Lamer C.J.C's expressed vision of accommodating Aboriginal interests and aspirations does not, in actual fact, demonstrate real equality. The overarching supremacy of Crown sovereignty is the fixed, immutable bedrock of that vision. The interests and aspirations of Canada's Aboriginal peoples will only be accommodated to the extent they can rest on that bedrock. A little chipping away may be permitted, but anything that might cause cracks in the bedrock or, heaven forbid, its full extraction, cannot be tolerated. This is the reality of the "reconciliation" spoken of by Lamer C.J.C. The centrality of Crown sovereignty is a constant, as it was in the jurisprudence that came before *Van der Peet* (and has since followed it, with the exception of, in my view, *Mitchell*).

Sovereignty, by orthodox definition, is not a shared domain. Sovereignty embodies the idea of unitary political hegemony. It has at its core the reality that there can be one, and only one, supreme polity within a given "nation." Otherwise, it is said, nationhood is compromised. This is the essential dilemma of the "reconciliation" process between Aboriginal and non-Aboriginal peoples of Canada.

Suggestions that individual judges declare the assertion of Crown sovereignty invalid[175] do not, in my view, give sufficient weight to the social discord that would ensue from such a realignment of sovereignty.[176] The mere perception of such discord materializing is more than enough to preclude any move toward true recognition of Aboriginal sovereignty. Most proponents of Aboriginal sovereignty realize this. As intellectually and morally persuasive as their arguments may be, political reality has kept those arguments from gaining much of toehold and is likely to continue to do so indef-

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173. *Mitchell*, *supra* note 9 at para. 67.
174. *Supra* note 75 at para. 50.
175. Borrows, "Sovereignty's Alchemy", *supra* note 102 at 579.
176. Even more questionable is the corollary argument that the judiciary would enhance its reputation, and gain respect and credibility, by agreeing to the usurpation of Crown sovereignty: *ibid.*

initely.[177] This was Thomas Isaac's point in his 1992 articles[178] when he encouraged a jettisoning of rhetoric and labels in favour of a focus on the substance of rights and powers. But labels sometimes are important. They symbolize principles and emotional stances that are not easily jettisoned.

When Lamer C.J.C. made reference, in *Van der Peet*, to "a morally and politically defensible conception of aboriginal rights,"[179] he had no intention of discarding the doctrine of Crown sovereignty. But a morally and politically defensible conception of Aboriginal rights, and more particularly of Aboriginal self-government, is precisely what this country needs.

Binnie J.'s "shared" or "merged" approach to the concept of sovereignty, picking up on the suggestions of the RCAP, may be the doctrinal path to this result.[180] Binnie J.'s approach has the symmetrical beauty of allowing both sides to win. There is mutual "saving of face." Aboriginal sovereignty is acknowledged–it is not supreme, but it is acknowledged. Crown sovereignty is preserved, but its essence is modified in a subdued, technical sort of way that is not likely to upset non-Aboriginal Canada. The end result is a clearing away of rhetoric, but in a much softer and more conciliatory fashion than that advocated by Thomas Isaac.

If Binnie J.'s "updated concept of Crown sovereignty" is embraced by a majority of the Supreme Court, the Court should be able to establish guidelines for a delimitation of actual powers that are, one hopes, largely satisfactory to Aboriginal, provincial and federal governments. Such a process of delimiting specific spheres of power is reflective of the approach set out in the *1995 Policy Statement*, is discussed in the *RCAP Report* and is implemented in the *Nisga'a Final Agreement*. With express judicial recognition that the three governments (Aboriginal, provincial and federal) are sovereign within their respective spheres, the never-ending posturing and statements of principle should subside. Left will be the task of sorting legislative powers

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177. Why, then, one might ask, is so much time and effort spent on developing and expounding theories that are so far out in "left field?" That, legal theorists would say, is the point of theory. The idea is to "push the envelope", to come up with new ideas and approaches, and new ways of looking at old ideas and old approaches. If the theory is defensible, in a purely legal analytical sense, it is able to live on and struggle to take root in reality.

178. *Supra* note 96.

179. *Supra* note 75 at para. 41, citing Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992) 17 Queen's L.J. 350 at 413.

180. The argument is often made that the line between law and politics is a blurred one. See *e.g.* David Kairys, "Legal Reasoning" in David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982) 11 at 14 and 17:

> Judicial decisions ultimately depend on judgments based on values and priorities that vary with particular judges (and even with the same judge, depending on the context) and are the result of a composite of social, political, institutional, experiential, and personal factors.
>
> ....
>
> Courts determine the meaning and applicability of the pertinent language; similar arguments and distinctions are available; and the ultimate basis is a social and political judgment... *Law is simply politics by other means.* (emphasis added)

into appropriate spheres. This task will involve its own complexities. Negotiation alone may suffice to see the task to conclusion, although further judicial intervention is entirely possible. There always remains some risk, of course, of restrictive judicial application of the "sovereign incompatibility principle" and the concept of "merged sovereignty." These are, after all, just tools. But at least having in place a mutually acceptable theoretical foundation might break the sovereignty logjam and, to quote Justice Binnie, thereby "create sufficient 'constitutional space for aboriginal peoples to be aboriginal.'"[181]

A frank and open Supreme Court discussion of Aboriginal self-government is long overdue. The inherent right to self-government must be given constitutional protection by the judiciary. But that, at this stage, is only half the job. The Court must also engage in the difficult task of defining the content of self-government. Binnie J. has put on a golden platter the tools needed for beginning this task. The full Court should follow his lead and seize the first opportunity to endorse the "merged"/"shared" sovereignty concept. It represents a fair and sensible doctrinal shift, enabling the real work of structuring power-sharing arrangements to then be pursued with fresh vigour and purpose.

181. *Mitchell, supra* note 9 at para. 134, quoting from Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" (1992) U.B.C. L. Rev. (Sp. ed.) 338 at 342.