

SELF-GOVERNMENT AND INTER- GOVERNMENTAL RELATIONS

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This paper discusses the issue of intergovernmental relations between provincial governments and Aboriginal Peoples. The topic is not only interesting, because it challenges our ability to think creatively, constructively and flexibly, but it also represents a significant political challenge to all governments in Canada, particularly to the Government of Saskatchewan, as we re-invent federalism on the brink of the twenty-first century.

The intergovernmental problems that confront us today revolve around the need to find an answer to the question of what *are* the "aboriginal and treaty rights" that are recognized and affirmed by section 35 of the *Constitution Act, 1982*. It is generally understood and accepted that this entrenchment of Aboriginal rights in the Canadian Constitution represents the crossing of a significant threshold. Now it is necessary to find out exactly what that means.

The negotiations on the Aboriginal component of what culminated in the Charlottetown Accord about this time last year reflected a pragmatic approach to the difficulties associated with defining the precise nature of an inherent right of self-government. We know that much criticism of this aspect of the Charlottetown Accord was directed at the lack of definition around the inherent right itself. In traditional Canadian fashion, however, we had been able to set out a reasonably detailed process for negotiating a specific meaning for the inherent right of self-government in the particular context of each Aboriginal community and its government.

Of course, the rejection of the Charlottetown Accord resulted in no constitutional amendment and the loss of the intergovernmental process that had been developed in relation to it. It also left Canadians generally, and politicians particularly, with an aversion for talking out loud in any way about the Constitution. But the fact is, the existing Constitution *does* recognize and affirm certain rights. And intergovernmentally we must find a way to discuss and resolve the problems that arise out of our differing understandings of what the Constitution might mean.

The country entered a transitional stage after the rejection of the Charlottetown Accord. During the last year, many Canadians have argued about exactly what it was that was rejected in last year's referendum. Some have said that we shouldn't discuss anything that was at Charlottetown for fear of precipitating another rejection or deepening the political cynicism that is gripping the country.

In July of 1993, ministers and Aboriginal leaders met at Inuvik, and Aboriginal leaders met with premiers the following August in Nova Scotia. A reconfirmation of support for the inherent right of self-government emerged in these meetings, but we all still lack an appetite for explicit constitutional change. How do we—how can we—proceed with self-government without constitutional amendment?

And, of course, the intergovernmental context has the potential to change rapidly. Premier Bourassa announced his resignation in the summer of 1993. There may very well be a Parti Québécois government in Québec by the end of 1994, perhaps supported in Parliament itself through a strong Bloc Québécois contingent of MPs, and the constitutional issues that are now simmering on the back burner will once more be brought to the fore.

The Royal Commission on Aboriginal Peoples has recently stepped in to provide us some food for thought with the release of its discussion paper: *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*.¹ The Royal Commission makes the case that the inherent right of self-government itself is one of the rights that is already recognized and affirmed by section 35 of the *Constitution Act, 1982*. The recognition is implicit—section 35 doesn't refer to an inherent right of self-government explicitly—but it is recognition nonetheless.

The idea that the Constitution relates to rights implicitly is not an odd one. Constitutions are, by their nature, vaguely worded. Constitutions generally talk about broad principles, although in Canada we have had some more specific wording on some subjects, such as Sable Island and who is responsible for it. So, for example, the Charter guarantees freedom of speech (and all agree that freedom of speech is the lifeblood of democracy), but there may well be legitimate disagreement about how the concept of freedom of speech applies in a particular situation—say, in relation to the right of a business person to put a sign on the front of his or her store in a particular language.

The Royal Commission goes on, though, to describe a number of facets of an inherent right of self-government that are, of course, also implicit:

- ♦ Because the right is recognized and affirmed by the Canadian Constitution, it must be exercised within the framework of the Constitution.

The inherent right of self-government is therefore circumscribed—it is not the equivalent of the sovereignty exercised by independent nation states.

- ♦ Aboriginal jurisdiction, law-making power, is roughly equivalent to the content of the jurisdiction granted to Parliament via 91(24) of the *Constitution Act, 1867*, thus, federal and Aboriginal governments have concurrent law-making power and Aboriginal law will generally be paramount unless federal interference is justified under the test enunciated by the Supreme Court of Canada in *Sparrow*.²
- ♦ Aboriginal jurisdiction is further divided into a core and a periphery: the core relates to matters of vital concern to the life and welfare of the Aboriginal community that don't affect in any significant way persons outside the community; the periphery is the remainder of the content of 91(24).
- ♦ Core Aboriginal jurisdiction may be exercised unilaterally, but the exercise of jurisdiction in the periphery must be implemented through self-government agreements with other governments or through arbitral mechanisms designed to deal with dispute-resolution in this area.

Thus, according to the model proposed by the Royal Commission, the relationship between Aboriginal and provincial governments will be determined by the nature of the arrangements that are developed inter-governmentally in implementing the periphery of Aboriginal jurisdiction.

Mr. Justice René Dussault presented the Royal Commission's argument in a succinct September 7 "Commentary" in *The Globe and Mail*. He admitted that the Commission had, as he put it, "succumbed to the unfashionable view that history matters." Of course, history does matter. The notion that those who forget history are doomed to repeat it has become a commonplace. And, as we look around the globe today, we see the tensions of history repeating themselves in many locations.

However, the issue of whether or not and to what extent an inherent right of self-government resides in section 35 will ultimately be resolved in the Supreme Court of Canada. This leads one to speculate: what are the implications that will result if the Royal Commission's argument from history is upheld in the Supreme Court—or if it is not?

If the Royal Commission is "right," all governments will need to do is to negotiate self-government agreements that will define the "core" and the "periphery" of Aboriginal jurisdiction and the intergovernmental relationships between federal, provincial and Aboriginal governments. Of course, as a provincial government, Saskatchewan has no legislative authority in relation to Indians (as the courts say) *qua* Indians—or (in plain language) in

relation to those things that are the essence of being Indian.

I should mention here that when I speak of "Indian" in the context of constitutional jurisdiction as set out in the 1867 Act, I am using the term in its 1867 sense. That is, "Indian" includes Indians, Inuit and Métis. I am not intending to restrict the term to those persons who fit the definition of "Indian" contained in the federal *Indian Act*.

What will be involved in those negotiations? A great deal of discussion will be aimed at achieving a common understanding of what the core and the periphery of Aboriginal jurisdiction contain. And no doubt there will be disagreements.

And so, since in the Royal Commission's model the totality of Aboriginal jurisdiction will be in relation to matters about which the provincial government is not competent to legislate, the discussions between provinces and Aboriginal governments will necessarily be confined to an articulation of the recognized content of the core and the periphery, and the development of relationships between governments.

There are some things that all will agree are contained within the core of Aboriginal jurisdiction. Others may be more difficult. And some of those difficulties won't relate to difficulties about content; they may be perhaps described as relating more to process. We may prefer to categorize matters as lying on the borders of the core and periphery because, in a practical sense, it will be necessary to work out how our systems of law will interrelate.

As an example, in the Royal Commission's model, is jurisdiction in relation to the welfare of Indian children who are members of a band living off the reserve in the core or in the periphery of Aboriginal jurisdiction? While there is no doubt that law affecting a child's links to his or her Aboriginal heritage has got to be understood as being legislation that goes to the essence of what it is to be "Indian," does the fact that the child lives in the City of Saskatoon transform the situation into an issue in the periphery, because of the impact the Aboriginal law would have on non-Aboriginal interests? Of course, this is a specific illustration of one of the difficulties encountered when legislative authority is separated from geography and attached to people.

The Charlottetown proposals recognized this difficulty and would have dealt with this and other similar problems through a requirement to negotiate self-government agreements. The Royal Commission's periphery concept provides a place for the negotiation of something like the self-government agreements called for by Charlottetown. The precise nature of these agreements is variable. They might be political accords in the nature of diplomatic arrangements reached in the international law sphere, or they might be modern treaties that could be constitutionalized through the

existing provisions of section 35.

And what are the constraints on Aboriginal jurisdiction that the Royal Commission has described as being overriding issues of national concern? In this category, Saskatchewan would likely place the *Criminal Code*. Gaming may be the practical example here.

Gaming is a complex issue because it is regulated by Parliament under the *Criminal Code*, that is, through Parliament's exclusive constitutional jurisdiction in relation to criminal law. Of course, the province has no constitutional jurisdiction over criminal law. But the province is designated, under the *Criminal Code*, as the local regulating authority respecting gaming. The province is involved in regulating gaming, but through the federal authority rather than through its own constitutional authority. And because that federal authority is the *Criminal Code*, Saskatchewan would argue that gaming falls not within the core of Aboriginal constitutional authority, but on the periphery.

It's also necessary to consider the possibility that the Royal Commission may be "wrong." If it is, in what legal and constitutional limbo does that place the intergovernmental agreements that may have been devised to set out our shared understanding of our respective jurisdiction? What liabilities might that impose on all of us in relation to individual claims that may arise in an uncertain legal and constitutional context?

From an intergovernmental-relations perspective, the unresolved legal and constitutional issues dictate a pragmatic response to the practical reality. We must find creative ways to deal with one another that will respect the possibilities in the absence of legal certainty. We need to find "win/win" mechanisms that will permit us to move forward progressively in our relationships. What are those mechanisms?

Well, first of all we need to agree to the basis on which federal and provincial governments will recognize Aboriginal authorities. We acknowledge that the representatives of the Aboriginal Peoples are determined by the Aboriginal people themselves, but how will we, as governments, know who are the Aboriginal Peoples or that *these* representatives and not *those* truly speak for the people they claim to represent? Aboriginal Peoples and provincial and federal governments need to develop and agree to the criteria by which recognition ought to occur.

Secondly, we need credible dispute-resolution mechanisms. We acknowledge that the "white man's court" may not be the most appropriate place to settle disagreements among Aboriginal Peoples about who their representatives are, for example. But we also are aware that it is a matter of legal and constitutional fact that those courts will be called on to adjudicate issues where a party sees an advantage in proceeding down the legal route. We are also aware that, in the present legal and constitutional reality, the

power of the state is brought to bear on the enforcement of the decisions of those courts—whether we like it or not.

Not only must we develop this dispute-resolution mechanism, but we have to develop it in a pan-Canadian context. Generally speaking, the same rules must be used to resolve these issues wherever they arise in Canada, although we know that the specific issues will vary greatly from region to region and from place to place. So, we require a national umbrella under which guiding principles are articulated and a regional focus for specific decision-making.

Thirdly, we need to arrive at a common understanding of what the "Aboriginal and treaty rights" are that are recognized and affirmed under section 35. Again, we need a national umbrella for the guiding principles and a regional capability in relation to specific situations. For example, the treaty rights that exist under the various numbered treaties on the prairies must be drawn out of the specific context of each of those treaties. The understandings we come to in relation to those treaties will have little relevance to the Indians in British Columbia or to the Métis in Saskatchewan. The rights of all Aboriginal Peoples under the Constitution will not be the same.

Finally, we need to find the legal instruments that will permit us to give effect to the understandings we achieve. Human nature being what it is, neither Aboriginal Peoples nor federal or provincial governments will want to foreclose potential arguments about jurisdiction. Thus, we are all likely to be somewhat reticent about agreeing where the precise boundary lines can be drawn. At the same time, the practical reality is that all governments must deal with these issues and deal with them before they will have been resolved in a legal sense through pronouncements from the Supreme Court of Canada.

How can we do this? For example, all governments—federal, provincial and Aboriginal—might enact complementary legislation. Under such a scenario, we would negotiate the desired intergovernmental relationship and we would prepare the legislation that would give effect to the negotiated result, as if it were to be enacted by some supreme and complete power. *We would then each enact it.* Together, there is no doubt that we have the power to give effect to the legislation; the question is do we need to know precisely who has the power to do precisely what? We will also face difficult technical questions, such as can we bind ourselves in this manner to a future amendment process requiring the consent of all governments to change; or, can we sever portions of the legislation about which we don't have jurisdiction from those about which we do? We can provide generally that, to the extent that any authority *must* be devolved to an Aboriginal government to provide it with that authority, it *is* devolved.

Proceeding in this manner might obviate almost entirely the need to address the whole matter of provincial jurisdiction and instead permit concentration on the relationship between the province and Aboriginal governments.

There is no doubt that the federal government's involvement in this negotiation process is essential. Self-government cannot work without federal participation. The Royal Commission's description of Aboriginal jurisdiction as being co-terminous with the federal jurisdiction under section 91(24) underscores that point. The Royal Commission's conception of the inherent right places Aboriginal governments in competition with the federal government over the wielding of specific authority and in negotiation with provincial governments over intergovernmental relationships. That, itself, raises other interesting questions. For example, although the Royal Commission postulates limited sovereignty because the right of self-government occurs within the framework of the Canadian Constitution, would Aboriginal governments be in the same position vis à vis implementation of international treaties as are provincial governments?

Unfortunately, however, the Royal Commission has not yet fully addressed two particular issues of special interest to Saskatchewan: the Métis and the issue of treaty implementation. The Royal Commission has acknowledged the existence of an inherent right of self-government for Métis people, but might have provided a more substantive analysis of the inherent right in the Métis context. And a treaty rights implementation process—a major feature of the Aboriginal component of the Charlottetown Accord—may be, for many First Nations, a more important aspect of the rights recognized and affirmed by section 35 of the *Constitution Act, 1982* than the negotiation of new agreements bearing the label of “self-government.”

The Royal Commission's proposal has no doubt injected a new life into the issue of the inherent right of self-government. Whether the Commission's model, or some variation of it, is ultimately adopted or whether some other model emerges over the coming weeks and months, the discussion about the inherent right of self-government will continue.

While our interests in talking to one another are different, there is no doubt that we need to talk. As Saskatchewan said in its submission to the Royal Commission:

These are not problems that any single jurisdiction in Canada can solve alone. However, we would be further down the road to solution if we worked cooperatively toward achieving one. We need to devise new models for our behaviour. We need to begin to see ourselves as members of a non-profit corporation in which each of us has an equal interest, a company in which

each of us has an equal number of shares. We can't browbeat one another into submission—because we believe we have constitutional jurisdiction, perhaps (the equivalent, in the corporate world, of more shares). We must instead persuade each other of the merits of the course of action we propose.

Our first step is to develop a formalized, cooperative, and open process to facilitate discussions . . . about our common problems with a view to their solution.

A new cooperative federalism is finding ways to solve problems together, cooperatively, as equal partners. A new cooperative federalism will obligate all of us to seek the consensus solutions to our common problems and to deal reasonably and rationally with the thorny questions of legal obligations and financial responsibility.

NOTES

- 1 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993).
- 2 *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160.