REVIEW ESSAY

COMMENT ON PARTNERS IN CONFEDERATION, A REPORT ON SELF-GOVERNMENT BY THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

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I. INTRODUCTION

On April 17, 1982, the Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed in the Canadian constitution.[1] In the following years, several First Ministers' conferences were held to address Aboriginal constitutional matters. A recurring topic was the recognition of a right of Aboriginal peoples to self-government. The existence, nature and scope of such a right were at the heart of the self-government debate. In the end, Aboriginal and government representatives could not agree on the need, desirability and effect of an articulated definition of self-government in the Canadian constitution. Throughout this debate, many Aboriginal peoples and academics claimed that the existing Aboriginal and treaty rights recognized in the *Constitution Act, 1982* included an inherent right to self-government.[2] According to this view, specific articulation of the right may be politically desirable but not legally necessary. One can argue that questions of scope, jurisdiction and implementation are properly addressed in negotiations with specific Aboriginal Nations and

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1 *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

2 The word "inherent" indicates that the right finds its source within Aboriginal nations. This concept can be contrasted to the concept of delegated or created rights which presumes that Aboriginal rights are limited to those delegated by the federal and provincial governments.

not as part of the Constitutional process. This view has been rejected by the federal and provincial governments, with the result that the implementation of the self-government goals of Aboriginal peoples has been severely limited. Small steps toward autonomy have been taken through amendments to the federal *Indian Act*,[3] legislatively sanctioned community arrangements allowing Indian bands to opt out of the *Indian Act* for limited purposes, and community self-administration agreements in various policy sectors such as education, child welfare and surface resources. The limited political rights acquired through these arrangements have reflected the philosophy that Aboriginal self-government is subject to the political will of, and delegation by, federal and provincial governments.

The desirability of a constitutional amendment explicitly recognizing an inherent right to Aboriginal self-government was brought back to the constitutional arena during the negotiation of the Charlottetown Accord. Several intensive rounds of discussion resulted in agreement by government delegates and representatives of National Aboriginal political organizations that the constitution should be amended to recognize that Aboriginal peoples of Canada have "the inherent right of self-government within Canada."[4] The provision did not claim to create or delegate this right. Rather, the right was to be interpreted in a manner consistent with the philosophy that Aboriginal peoples constituted one of three orders of government in Canada. The scope of jurisdiction of Aboriginal government was described in very broad terms. The argument that self-government was a delegated right that needed to be defined in terms of scope and jurisdiction (which dominated the constitutional debate in the 1980s) was finally abandoned in favour of the recognition of an inherent right that could be exercised subject only to provincial and federal laws "essential to the preservation of peace, order and good government in Canada."[5] Further, it was agreed that Aboriginal governments would be subject to the *Canadian Charter of Rights and Freedoms*,[6] but, like the federal and provincial governments, Aboriginal governments could exercise the s. 33 override power which would enable them to enact legislation that could operate notwithstanding s. 2 or ss. 7 to 15 of the Charter. Support for these amendments varied among members of the Aboriginal community. While many feared

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3 R.S.C. 1985, c. I-5.

4 See First Ministers' Meeting on the Constitution, *Consensus Report on the Constitution*, Charlottetown, P.E.I., 28 August, 1992, and *Draft Legal Text*, 9 October, 1992.

5 *Ibid.*

6 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Charter].

that the proposed limits on jurisdiction eroded political rights currently recognized by treaties, others applauded the Charlottetown Accord for recognizing the inherent nature of the right and the wisdom of leaving the issues of scope and implementation to community-specific negotiations.[7]

The demise of the Charlottetown Accord in the fall of 1992 left Aboriginal peoples asking "What now?" On the day of its demise, Ovide Mercredi, Grande Chief of the Assembly of First Nations suggested that the only option left was for Aboriginal Nations to "take the power themselves."[8] In an address to the students of the Faculty of Law, University of Alberta, Mr. Mercredi asked the students to help him find an alternative to "*de facto* self- government."[9] In his opinion, Aboriginal people could wait no longer for agreement on the implementation of their right to self-government. They had waited 125 years for their treaties to be respected in Canadian law and had tried peacefully to negotiate recognition of their rights through the Constitutional process. The only solution he could see was for Aboriginal Nations to assert their jurisdiction. This would no doubt run in direct opposition to some existing laws, create further disputes with federal and provincial governments and result in the arrest of Aboriginal peoples and the involvement of Canadian courts in the resolution of the battle for autonomy. Given the reluctance of Canadian courts to define Aboriginal rights and to consider the Aboriginal perspective on an equal basis in the resolution of Aboriginal rights disputes, the future of Aboriginal government looked bleak. Initiating self-government action might very well mean awaiting approval of the federal and provincial governments, which proved unsatisfactory in the past. Whether the consensus on Aboriginal issues reached in the Charlottetown Accord will improve relations and have

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7 The majority of voters on Indian reserves across Canada rejected the Charlottetown Accord. The "biggest issues for most native people were the limitations on self-government" and lack of guaranteed financial support. See, for example, G. York "Indians rejected accord, tallies show" *The Globe and Mail* (28 October 1992) A10. The proposed amendments were also viewed by many as a serious erosion of treaty rights. See, for example, R. Platiel, "Mohawks reject deal on self-rule" *The Globe and Mail* (22 August 1992) A4; D. Roberts, "Proposals on self-rule ring hollow, chiefs say" *The Globe and Mail* (2 September 1992) A4; "A Message To All Canadians From First Nations of Treaty 6 and 7" *The Globe and Mail* (24 September 1992) A5; J. Danylchuk, "Urban natives fear constitutional clause may undermine treaty, aboriginal rights" *Edmonton Journal* (27 September 1992) A3; J. Danylchuk, "Native political groups sharply divided over merits of package" *Edmonton Journal* (28 September 1992) A3; and J. Danylchuk, "Mercredi fails to get chiefs' assent" *Edmonton Journal* (17 October 1992) A3.

8 J. Danylchuk, "No vote didn't close door on natives seeking self-rule" *Edmonton Journal* (2 November 1992) A3.

9 O. Mercredi, "On Sovereignty" Address to the Faculty of Law, University of Alberta, 24 Nov., 1992 [unpublished]. See also Canadian Press, "Natives set to assert sovereignty" *Edmonton Journal* (2 October 1993) A9.

moral and political force in future community specific negotiations remains to be determined.

As a result of the failure of the political process, once again Aboriginal people are asking whether or not it is necessary to recognize explicitly an inherent right to self-government in the Constitution in order for Aboriginal peoples to have a legal right to initiate self-government action. Although the most peaceful and practical approach would be one of cooperation, the question remains: "Does Canadian law require agreement by the affected provincial or federal governments for Aboriginal Nations to have a legally enforceable right to bring self-government actions in the Canadian courts?" According to the Royal Commission on Aboriginal Peoples, the answer to this question is "no" if action is taken in core areas of Aboriginal jurisdiction that are of "vital concern to the life and welfare of the community that . . . do not have a major impact on adjacent jurisdictions and do not rise to the level of overriding national or regional concern."[10] Aboriginal laws within this core area of jurisdiction could not be abolished by federal or provincial law unless infringement on Aboriginal authority could be justified in accordance with the principles set out in the recent *Sparrow* decision.[11]

This article reviews and comments on the major findings of the Royal Commission in its recently released report, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution.*[12] The strength of the report is that it provides a legal framework, within the limits of domestic Canadian law, for Canadian courts to support and enforce the assertion of some Aboriginal governmental powers without federal or provincial agreement or an amendment to the Canadian constitution. The major weakness of the report is its uncritical and selective analysis of Canadian law, which severely limits the consideration of treaties as a major source of substantive and procedural Canadian law. The report unveils arguments that support the amendments proposed to s. 35 in the Charlottetown Accord but fails to address the criticisms aimed at the Accord by many Aboriginal peoples.

II. THE REPORT OF THE ROYAL COMMISSION

Partners in Confederation examines the legal and historical arguments that support the conclusion that an inherent right to Aboriginal self-government is an existing Aboriginal and treaty right recognized and

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10 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Co-Chairs R. Dussault, j.c.a. and G. Erasmus) (Ottawa: Canada Communication Group, 1993) at 38.

11 (1990), 70 D.L.R. (4th) 385 (S.C.C.).

12 *Supra*, note 10.

affirmed by s. 35(1) of the *Constitution Act, 1982*. The preface to the report recognizes that the historical analysis is limited to a review of historical relations between First Nations and the Crown but suggests that "a review of the history of Inuit and Métis as distinct Aboriginal peoples would lead to the same conclusions."[13] A second limitation recognized in the preface and introduction is the narrow scope of the legal analysis. In particular, the report examines the concept of self-government within the framework of Canadian law on Aboriginal rights and the Canadian constitution. The report does not offer a critique of the legitimacy or appropriateness of these frameworks but does recognize that "other sources for the right of self-government, such as international law, natural law, treaties, or the laws, constitutions, and spiritual beliefs of particular Aboriginal groups" do exist.[14] Recognizing that "more wide-ranging discussions . . . need to be pursued,"[15] the Commission states that its goals are to "help fill the vacuum left by the failure of the constitutional reform process and to rekindle discussion of the potential for Aboriginal self-government in the existing Constitution."[16]

Chapter one of the report discusses the original status of Aboriginal peoples. Drawing on early British and American decisions such as *Conolly* v. *Woolrich*[17] and *Worcester* v. *Georgia*,[18] relations between British colonies and Aboriginal peoples, treaties, Royal Charters, letters of instruction and early Royal Commissions, the report concludes that Aboriginal-English relations were founded on two fundamental principles. The first is that "Aboriginal peoples were generally recognized as autonomous political units capable of holding treaty relations with the Crown."[19] The second principle, which emerged from the British practice of entering treaties, was that "Aboriginal nations were entitled to the territories in their possession unless or until they ceded them away."[20] These principles were subsequently "captured in an introductory preamble" of the Royal Proclamation of 1763.[21] According to the Commission, the Proclamation

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13 *Ibid.* at v.

14 *Ibid.* at 3.

15 *Ibid.*

16 *Ibid.* at vi.

17 (1867), 17 Rapports Judiciaries Revisés de la Province de Québec 75 (Québec Superior Court), also reported in 11 Lower Canada Jurist 197.

18 (1832), 6 Peters 515.

19 *Supra*, note 10 at 13.

20 *Ibid.* at 14.

21 *Ibid.* at 16.

> portrays Aboriginal nations as autonomous political units living under the Crown's protection, holding inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement. It views the links between Aboriginal peoples and the Crown as broadly 'confederal.'[22]

Key words in the description of Aboriginal autonomy are "inherent" and "internal." Operating on the premise that Britain, and subsequently Canada, asserted sovereignty over Aboriginal peoples and keeping the analysis within the confines of British policy and Canadian law, the report envisages Aboriginal autonomy as a sphere of political autonomy within a confederation of distinct national groups. The body of law which "defines the basic constitutional links between Aboriginal peoples and the Crown and regulates the interaction between general Canadian systems of law and government on the one hand and Aboriginal laws, governmental institutions, and territories on the other" is the Canadian law of Aboriginal rights.[23] This body of law recognizes the inherent nature of Aboriginal government and at the same time places limits on Aboriginal autonomy within Canada.

Looking to landmark Canadian decisions such as *Roberts* v. *Canada*[24] and *Calder* v. *A.G. British Columbia*,[25] the Commission argues that the doctrine of Aboriginal rights supports the conclusion that the right to self-government is "inherent in the sense that it finds its ultimate origins in the communities themselves rather than in the Crown or Parliament."[26] Advocating a "broader understanding of the Constitution," the Commission suggests that respect for national rights (in particular those of English, French and Aboriginal peoples) "has been a major structuring principle of Confederation from earliest times."[27] In the words of the Commission

> [The] principle of continuity ensured that when a distinct national group entered Confederation it did not necessarily surrender its national character as a people or lose its distinguishing features, whether these took the form of a distinct language, religion, law, culture, educational system, or political system. In its most developed form, the principle allows certain national groups to determine the dominant legal, linguistic, cultural, or political character of an entire territorial unit within Confederation, whether this be a province or an Aboriginal territory. In more modest form, it has ensured the

22 *Ibid.* at 17.

23 *Ibid.* at 19.

24 [1989] 1 S.C.R. 322.

25 [1973] S.C.R. 313.

26 *Supra*, note 10 at 21.

27 *Ibid.* at 23 and 24.

preservation of certain collective rights of national groups within these territorial units.[28]

The Commission also notes that national rights are limited by constitutional boundaries. According to the Commission, constitutional law is diverse not only in its origins but also in its legal character. In addition to a variety of written sources such as treaties, proclamations, royal instructions, acts of British Parliament and federal statutes, constitutional law incorporates "unwritten principles and rules, which can be described as the common law of the Constitution."[29] According to these unwritten rules, prior to April 17, 1982, Aboriginal treaties and Aboriginal rights could be altered or terminated by legislation. Although this does not correspond to Aboriginal understanding of the treaties or the promises of Crown negotiators, it does correspond with British constitutional tradition and is a rule that has consistently been upheld by Canadian courts. This situation has changed only in relation to post-1982 federal and provincial action because of the recognition and affirmation of Aboriginal and treaty rights in the 1982 constitutional amendments.[30]

Chapter two of the report addresses the effects of s. 35 of the *Constitution Act, 1982* with a particular emphasis on the recognition of an inherent right to self-government and methods for implementing it. An important premise in this chapter is that "section 35 serves to confirm and entrench the status of Aboriginal peoples as original partners in Confederation."[31] Further, the Aboriginal rights protected by this section include a right to self-government, which is "reinforced by treaties that protect or presuppose the internal autonomy of First Peoples."[32] Adopting the *Sparrow* analysis of s. 35(1), the Commission concludes that the important question to be decided is "whether the right of self-government had been extinguished by legislation prior to 1982."[33] Although some have argued that the division of legislative power under the *Constitution Act, 1867*[34] had the effect of extinguishing Aboriginal rights to self-government, the Commission suggests that this argument confuses the issue of the "*scope* of federal and provincial powers with the question of the *exclusiveness* of those powers."[35] Asserting that it is

28 *Ibid.* at 24.

29 *Ibid.* at 25.

30 *Ibid.* at 25-26.

31 *Ibid.* at 29.

32 *Ibid.* at 31.

33 *Ibid.*

34 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

35 *Supra,* note 10 at 32, emphasis in original.

possible in constitutional law for overlapping or "concurrent" governmental powers, the Commission illustrates how post-confederation legislation is consistent with the view that Aboriginal governmental powers survived the *Constitution Act, 1867*. The key issue is whether post-Confederation federal legislation extinguished this right. The Commission concludes that legislation, namely the *Indian Act*, may have "severely disrupted and distorted" Aboriginal political structures and left them with "very limited powers," but the right was not completely extinguished prior to 1982.[36] Applying the *Sparrow* principle that regulated rights are "existing rights" protected by s. 35, the Commission concludes that the right to self-government "was still in existence when the *Constitution Act, 1982* was enacted."[37]

The character of Aboriginal governmental rights and the implementation of those rights are the subjects of the remainder of the report. The Commission emphasizes that the right to self-government is inherent, but "as a matter of current status it is a right held in Canadian law."[38] As a result, Aboriginal governmental power, like federal and provincial power, is only exercisable within the limits of Confederation. Aboriginal sovereignty and unlimited powers are rejected in favour of circumscribed powers. Important questions that need to be addressed are the identification of the jurisdictional sphere of Aboriginal governmental power and which laws prevail in the event of conflict with external legislation.

The Commission draws a distinction between *actual* and *potential* rights to self-government. The actual sphere of authority is limited to "matters of vital concern to the life and welfare of the community that, at the same time, do not have a major impact on adjacent jurisdictions and do not rise to the level of overriding national or regional concern."[39] The combination of the actual and potential spheres of authority "has roughly the same scope as the federal head of power over 'Indians, and Lands reserved for the Indians' recognized in section 91(24) of the *Constitution Act, 1867*."[40] Within this sphere, Aboriginal governments and the federal government have concurrent jurisdiction. Once again drawing on the interpretive framework offered by the *Sparrow* decision, the Commission maintains that Aboriginal laws should prevail over federal laws within this sphere unless federal laws can be justified according to the standards set out in the *Sparrow* case. The vagueness of

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36 *Ibid.* at 35.

37 *Ibid.*

38 *Ibid.* at 36.

39 *Ibid.* at 38.

40 *Ibid.*

the standards and the interpretation of crucial concepts such as the fiduciary obligation of the Crown in its dealings with Aboriginal people are not discussed. Recognizing that prior to 1982 the provinces also had the ability to limit the exercise of Aboriginal rights, the Commission suggests that the rules that govern the overlap of federal and provincial laws in concurrent areas of jurisdiction could also apply, "with relevant adaptations, to the interaction of Aboriginal and provincial laws."[41]

The Commission also addresses the application of the Charter to Aboriginal governments. It maintains that a distinction must be made between the existence and the exercise of the Aboriginal right to self-government. As is the case with the federal and provincial governments, the Charter is said to regulate the manner in which Aboriginal governments exercise their powers. So, in addition to the limits imposed by the division of governmental powers and the *Sparrow* decision, the autonomy of Aboriginal government is also viewed as limited by the Charter.

The remainder of the report addresses the issue of implementation. Recognizing that implementation "means different things to different Aboriginal groups," the Commission suggests four general guidelines.[42] These are:

(1) group initiative and responsibility;

(2) Crown responsiveness;

(3) structural flexibility; and

(4) fiscal stability and parity.[43]

The first principle reflects the notion that Aboriginal government should respond to the needs of its membership. The second recognizes the desirability of self-government being implemented with the cooperation of the federal and provincial governments, "which should be ready to respond in a timely and appropriate fashion to the initiatives of Aboriginal peoples."[44] The third principle suggests a need for a wide range of options ranging from "extensive reforms in a single step" to "a slower, more incremental approach" given the different needs of Aboriginal communities.[45] The fourth principle recognizes the need for "secure, long-term fiscal arrangements as well as increased access to lands and resources to allow for greater self-sufficiency."[46] Whatever the

41 *Ibid.* at 39.

42 *Ibid.* at 41.

43 *Ibid.*

44 *Ibid.* at 42.

45 *Ibid.*

46 *Ibid.*

approach taken, an Aboriginal group is said to have the right to "assume control over its own affairs within the core areas of Aboriginal jurisdiction, at its own initiative and without necessarily waiting for inter-governmental agreements."[47] Until the group assumes power, with or without the agreement of federal and provincial governments, enacted federal and provincial laws continue to apply. In the event of conflict between the assumption of governmental power by Aboriginal peoples and existing legislation, the interaction of this legislation should, according to the Commission, be determined according to the principles discussed above.

Should an Aboriginal group choose to exercise its right of self-government, the Commission concludes that two pre-conditions must be met. First, a constitution should be developed that outlines the basic powers and structures of Aboriginal government. Second, a citizenship code should be developed which identifies the groups members. According to the Commission, once these conditions are met, an Aboriginal group is ready to "exercise its right of self-government within the core areas of Aboriginal jurisdiction."[48]

III. COMMENTS

Assuming that the report of the Commission generates governmental response, it could result in the negotiation of community government agreements that extend beyond the delegated limitations contained in prior agreements; that is, Aboriginal Nations may be able to negotiate jurisdiction is areas previously excluded or narrowed by existing delegated self-government arrangements. Future constitutional negotiations, which in the past have proven unsuccessful when all parties are at the table, can be avoided. In provinces less receptive to Aboriginal government, litigation may ensue if Aboriginal peoples assert their jurisdiction in the absence of inter-governmental agreements. If accepted by the Canadian courts, the Commission's work provides a new legal framework for interpreting the Canadian constitution in a way that includes Aboriginal peoples in the distribution of legislative powers.

The strength of the report is that the theoretical structure proposed is not a drastic departure from traditional interpretations of constitutional law, which should make it more likely to appeal to Canadian courts. It provides a mechanism, within the limits of domestic Canadian law, for a court to support and enforce the assertion of Aboriginal governmental powers without simultaneously challenging the sovereignty of Canada

47 *Ibid.* at 43.

48 *Ibid.* at 45.

or being accused of inappropriate judicial activism. In this way the report meets its goal of helping to "fill the vacuum left by the failure of the constitutional reform process."[49] The vacuum is filled by providing the historical and legal arguments which provide the rationale for, but also make unnecessary, the proposed amendment to the Constitution that would have recognized the existing inherent right of Aboriginal self-government within Canada. On a more political level, the report provided a rationale for co-chair of the Commission, René Dussault j.c.a., to endorse publicly the Aboriginal right to self-government. The significance of this endorsement should not be lost in light of the contemporary conflicts over autonomy between Aboriginal Nations in Quebec and the provincial government of Quebec and the fact that Dussault is from Quebec.[50] In short, the report provides a mechanism that is likely to be successful in gaining the acceptance of Aboriginal self-government by non-Aboriginal Canadians.

Unfortunately, the positive aspects of the report are counter-balanced, if not outweighed, by its difficulties. The report merely "fills the vacuum" with an uncritical, selective analysis of Canadian law that perpetuates the exclusion of sources of law that support Aboriginal interpretations of legal history. Although reference is made to other sources, such as treaties, international law and Aboriginal laws, these are not treated as key sources of Canadian law or used in defining the limits of power exercised by the federal and provincial governments over Aboriginal peoples.

There is more than one way to argue for the continued existence of an inherent right to self-government in Canadian law and more than one way to interpret Canadian law on Aboriginal and treaty rights. The approach of the Commission is to adopt what I call the erosion theory. According to this theory, the inherent right of self-government is viewed as surviving the assertion of British and Canadian sovereignty. The legal issue is "to what extent had legislation eroded this right prior to the protection of Aboriginal rights in 1982?" Central to the erosion theory is an acceptance of the principle that the body of law that recognizes Aboriginal rights is subject to the overriding authority of the Crown in Parliament. This notion of legislative sovereignty has informed the courts' interpretation of the power of the federal and provincial governments to extinguish, or limit the use of, Aboriginal and treaty rights. Slattery explains the principle as follows:

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49 *Ibid.* at vi.

50 Montreal Gazette, "Self-government for aboriginal an established right, commission says" *Edmonton Journal* (19 August 1993) A11.

> As a common law doctrine, albeit a fundamental one, the doctrine of Aboriginal rights can in principle be overridden or modified by legislation passed by a competent legislature in the absence of constitutional barriers. It seems doubtful whether Indian peoples initially understood or accepted the principle that legislation could nullify their aboriginal rights without their consent, and inconsistent Crown practice may have contributed to the confusion. Nevertheless, the standard British doctrine attributing paramountcy to Acts of parliament has been applied [by Canadian courts].[51]

Another approach to the question is to focus on treaties not just as evidence of British practice but as a source of Canadian law. An emphasis on British rules of paramountcy regards treaties as largely irrelevant in understanding British and Canadian law. However, treaties are prominent in the understanding of legal relations with Britain and Canada by many Aboriginal peoples. If the understanding of Aboriginal peoples is to be given any consideration in the present development of Canadian constitutional law, the legal significance of treaties must be explored. Consideration of treaties provides an alternative lens for examining legislative power, a lens rooted in historical fact and principles of international law. This approach could result in a very different interpretation of Canadian law, one that endorses the principle of *consent*, rather than the British doctrine of paramountcy, as the legal principle which determines the legality of the limitation and extinguishment of Aboriginal rights. Several academics have argued that if one accepts treaties as the instruments that define Aboriginal and Crown relations, it becomes clear that Canadian courts have historically "engaged in a process of judicial revision of the original principles of Native rights."[52] Further, accepting legislative sovereignty over Aboriginal peoples without question severely limits the potential for constitutional reform. For example, if we accept the notion of concurrent federal and Aboriginal jurisdiction under s. 91(24) and the principle of consent, we may argue that the section should be "re-interpreted as authorizing Parliament to pass laws specifically in relation to native people only if native people participate in and consent to the formation of these

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51 B. Slattery, "Understanding Aboriginal Rights" (1987) 66 *C.B.R.* 727 at 740-41. Constitutional barriers that impose limits on Crown power recognized by Canadian courts are the division of powers under s. 91(24) of the *Constitution Act, 1867, supra*, note 34 and s. 35 of the *Constitution Act, 1982, supra*, note 1. The impact of the concept of fiduciary obligation on the interpretation of Crown power has only received brief attention by the court. This area of the law has yet to be explored to any great extent.

52 M. Jackson, "The Articulation of Native Rights in Canadian Law" (1984) 18:2 *U.B.C. L. Rev.* 255 at 267. See also B.A. Clark, *Native Liberty: Crown Sovereignty* (Montreal: McGill-Queen's University Press, 1990) and P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 *McGill L. J.* 382.

laws."[53] These arguments are not considered or explored by the Commission. Rather, the Commission's approach is rooted in a theory which reduces treaties to historical practice rather than a source of procedural and substantive law.

A consideration of treaty law also has an impact on how Canadian law is to be applied to the question of extinguishment. In this framework the *Simon*[54] and *Sioui*[55] decisions take on greater significance. *Simon* stands for the proposition that treaties are to be liberally construed and doubtful expressions resolved in favour of the Indian signatories. In *Sioui*, Mr. Justice Lamer describes the historical relations between Great Britain and Indian peoples as falling somewhere between "the kind of relations conducted with sovereign states and relations such states had with their own citizens."[56] The recognition that Aboriginal nations had sufficient autonomy to enter into solemn agreements with the Crown influences Lamer's interpretation of the Crown's power of extinguishment and his willingness to find intentional breach of treaties by the Crown. Emphasizing the sacred nature of treaties, he suggests that consent is necessary for legally abrogating treaty rights. The Commission refers to *Sioui* to support "the right of Aboriginal peoples to govern themselves as component units of Confederation." However, the impact of the interpretation, and misinterpretation, of treaties on the question of extinguishment is not explored.

The *Sparrow* case, which is pivotal in the Commission's analysis, concerns Aboriginal rights, not treaty rights.[57] Although lower courts have extended this analysis to treaty rights, the existence of a treaty should make it more difficult for governments to alter treaty rights. Support for this proposition can be found in the *Sparrow* decision, which states that the post-1982 activity of the federal Crown must be justified by a valid legislative objective and be obtained in a way that *upholds the honour of the Crown.* Further, the Supreme Court maintained that the responsibility of the government to act in a fiduciary capacity is crucial in determining whether the legislation or government action at issue can be justified. Although the law of fiduciary obligation is yet to be developed by Canadian courts, the recent *Bear Island* decision suggests that unilateral abrogation of treaty rights could be considered a breach of that obligation.[58]

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53 Macklem, *ibid.* at 425.

54 *R.* v. *Simon*, [1985] 2 S.C.R. 387.

55 *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.).

56 *Ibid.* at 1038.

57 *Supra*, note 10 at 31.

58 *A.G. Ontario* v. *Bear Island Foundation*, [1991] 3 C.N.L.R. 79 (S.C.C.) at 81.

This reader could not help feeling that the report was a public unveiling of the arguments presented to support the proposed self-government amendment to the Charlottetown Accord. The limited autonomy proposed is subject to the same criticisms aimed at the Charlottetown Accord by Aboriginal peoples. For example, many Aboriginal peoples view the application of provincial laws and the involvement of provincial governments as one of the biggest barriers to Aboriginal self-government. Canadian courts have recognized the ability of the province to limit the exercise of Aboriginal rights, and this is viewed by many Aboriginal peoples as a violation of the principle of non-interference reflected in the treaties and the Royal Proclamation of 1763.[59] Legal arguments can be made to support the conclusion that the application of provincial laws to Aboriginal peoples is in fact unconstitutional and s. 91(24) of the *Constitution Act, 1867* has been misinterpreted by the courts in that regard.[60] Also, it should be remembered that the rules developed by the courts on the application of provincial law were developed during a time when the core issue was the extent of federal and provincial autonomy. Within this framework, s. 91(24) of the *Constitution Act, 1867* and s. 88 of the *Indian Act* have been interpreted in a manner that is contrary to the recognition of Aboriginal autonomy. For example, s. 88 has been interpreted as allowing provincial laws of general application that affect matters central to native identity to apply to Aboriginal people.[61] This interpretation needs to be revisited in light of the concept of Aboriginal autonomy and jurisdiction.[62] The Commission fails to address these concerns at all or in a meaningful way.

Finally, the Commission gives limited consideration to the philosophy of inequality which underlies the doctrine of Crown sovereignty and unilateral extinguishment. Even if one rejects the principle of consent and accepts that the doctrine of unilateral extinguishment reflects accurately British and Canadian constitutional law, it is important to question whether that view should be maintained in law. Of particular concern is the fact that the concept of sovereignty is applied in

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59 See, for example, "A Message to All Canadians From First Nations on Treaty 6 and 7", *supra*, note 7 and A.F.N., *First Nations Circle on the Constitution* (21 November 1991).

60 See, for example, Clark, *supra*, note 52 and L. Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in J. Long et al., *Governments in Conflict* (Toronto: University of Toronto Press, 1988) 175.

61 See, for example, Macklem, *supra*, note 52 and D. Sanders, "The Constitution, the Provinces and Aboriginal Peoples" in Long et al., *ibid.* 151.

62 For a general discussion see Macklem, *ibid.* and B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L. J. 308.

a "self-serving manner" by Canadian courts, a manner that does not question the legitimacy of the Crown's claims in international law.[63] Further, theories that trivialize treaties and emphasize the legislative power of the federal and provincial governments are rooted in antiquated principles of law that presume the superiority of European nations and their institutions. The continued use of principles founded on inequality should be challenged.

Some may dismiss these comments as a statement on what the law "should be" rather than what the "law is." In some areas of my analysis this may be true. However, I conclude by asking the question "What is the purpose of the Royal Commission?" Shall we accept legal and political institutions founded in assumptions of European superiority or challenge ourselves to revisit the law and develop new approaches founded in contemporary theories of cultural relativism and the equality of peoples? The Report of the Royal Commission provides a practical political and legal compromise.

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63 Slattery, *supra*, note 51 at 735.