

# Reconciling Sovereignties, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?

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## Abstract

Should the Canadian Charter of Rights and Freedoms apply to constrain the actions of Aboriginal governments in Canada exercising the “inherent right” of self-government? Is the Charter’s application to these governments necessary to secure the human rights of those they govern, or would it amount to a violation of aboriginal sovereignty that, in any case, would do undue violence to the cultural practices and traditions of Aboriginal communities? This article seeks to contribute to the larger debate over how to balance the rights of individuals with the rights of groups by laying out a methodical, clear-eyed analysis of the strengths and weaknesses of the major arguments found in the literature for and against the Charter’s application. I argue that while the Charter’s application to inherent-right governments would amount to a limit on Aboriginal sovereignty, this is justifiable, in light of the fact that Aboriginal sovereignty should not be construed as absolute, and given the Supreme Court of Canada’s assertion that the purpose of the Canadian Constitution’s recognition of Aboriginal rights is reconciliation. I claim that requiring that the right of Aboriginal self-government be exercised in accordance with the Charter would further the goal of reconciliation, whereas allowing the right to be exercised irrespective of the requirements of the Charter would impede it. I thus conclude that the Charter should apply to inherent-right governments, although I stress that it should be applied in a flexible manner, in recognition of the fact that the proper safeguarding of rights can occur in different ways in different cultural contexts.

## *French translation*

Réconcilier les souverainetés, réconcilier les peuples: La Charte Canadienne des droits et des libertés devrait-elle s’appliquer aux gouvernements autochtones de droit inhérent ?

La Charte Canadienne des droits et des libertés devrait-elle pouvoir limiter les actions des gouvernements autochtones qui exercent leur ‘droit inhérent’ à l’autonomie gouvernementale au Canada ? L’application de la Charte à ces gouvernements est-elle nécessaire à la préservation des droits humains de ceux qu’ils gouvernent ou, au contraire, cela constituerait-il une violation de la souveraineté autochtone qui ferait indûment violence aux pratiques et traditions des communautés autochtones ? Cet article cherche à contribuer au plus large débat sur la manière de balancer les droits de l’individu avec les ceux des groupes en proposant une analyse méthodique et lucide des forces et des faiblesses des arguments principaux rencontrés dans la littérature à la fois pour et contre l’application de la Charte. J’argumenterai que, bien que l’application de la Charte aux gouvernements autochtones de droit inhérent poserait une limite à la souveraineté autochtone, cette

limitation est justifiable, puisque d'une part la souveraineté autochtone ne devrait pas être entendue comme absolue, et que, de l'autre, la Cour Suprême du Canada a affirmé que le but de la reconnaissance des droits des autochtones dans la Constitution canadienne est la réconciliation. J'affirme que requérir que le droit à l'autonomie gouvernementale autochtone soit exercé conformément à la Charte participerait à la promotion la réconciliation, alors qu'au contraire permettre un exercice du droit indépendant des exigences de la Charte l'entraverait. Je conclurai donc que la Charte devrait s'appliquer aux gouvernements de droit inhérent, toutefois je souligne abondamment le besoin que celle-ci soit appliquée de manière flexible, en reconnaissance du fait que la préservation appropriée des droits peut prendre diverses formes au sein de divers contextes culturels.

*Spanish translation*

¿Debería aplicarse la Carta de Derechos y Libertades de Canadá para restringir la capacidad de los gobiernos indígenas de ejercer el "derecho inherente" al autogobierno? ¿Es necesaria la aplicación de la Carta a estos gobiernos para garantizar los derechos humanos de quienes gobiernan, o equivaldría a una violación de la soberanía indígena que, en cualquier caso, violentaría indebidamente las prácticas y tradiciones culturales de las comunidades indígenas?

El presente artículo busca contribuir al debate más amplio sobre cómo equilibrar los derechos individuales con los derechos de los grupos, mediante un análisis metódico y claro de las fortalezas y debilidades de los principales argumentos encontrados en la literatura a favor y en contra de la aplicación de la Carta.

Sostengo que, si bien la aplicación de la Carta a los gobiernos de derechos inherentes supondría un límite a la soberanía indígena, el límite es justificable, dado que la soberanía indígena no debe interpretarse como absoluta y debido a la afirmación del Tribunal Supremo del Canadá que la reconciliación es el propósito del reconocimiento de los derechos indígenas en la Constitución canadiense.

Afirmo que exigir que el ejercicio del derecho al autogobierno indígena se ejerza de conformidad con la Carta promovería el objetivo de la reconciliación, mientras permitir el ejercicio del derecho independientemente de los requisitos de la Carta lo impediría. Por lo tanto, concluyo que la Carta debe aplicarse a los gobiernos de derechos inherentes, aunque recalco que debe aplicarse de manera flexible, reconociendo que la salvaguarda adecuada de los derechos puede ocurrir de maneras distintas en diferentes contextos culturales.

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## Introduction

In the notorious 1992 case of *Norris v Thomas*, Hood J. of the British Columbia Supreme Court found that the plaintiff, David Thomas, a member of the Lyackson Band (part of the Coast Salish People), had been “grabbed” and taken against his will by other members of the band to a ceremonial longhouse.<sup>1</sup> He was imprisoned there for four days without food and forced to undergo a spirit dancer initiation ceremony that included being made to walk naked in a creek and being bitten and whipped by his captors. According to his testimony, at no time did he consent to the treatment he received. The Court found—over the protestations of the defence that the defendant band members’ conduct amounted to the exercise of an Aboriginal right protected by s. 35(1) of Canada’s *Constitution Act, 1982*—that there was insufficient evidence to show that such a right existed.<sup>2</sup> Moreover, Hood J. reasoned, if there did exist an Aboriginal right to conduct spirit dancing initiation ceremonies, “those aspects of it which were contrary to English common law, such as the use of force, assault, battery, and wrongful imprisonment, did not survive the introduction of English law in British Columbia.”<sup>3</sup> His Honour further wrote that “[w]hile the plaintiff may have special rights and status in Canada as an Indian, the ‘original’ rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike.”<sup>4</sup>

This case represents a particularly stark example of the way in which the collective rights of an Aboriginal group might come into conflict with the individual rights of specific members of that group.<sup>5</sup> How, if at all, should the law of Canada be brought to bear in such scenarios? Should the rights of the individual trump those of the collective? Should it be the other way round? This paper will wade into this larger debate by laying out a methodical, clear-eyed analysis of the strengths and weaknesses of the major arguments found in the literature for and against applying the Canadian *Charter of Rights and Freedoms* to Aboriginal “inherent-right” governments in Canada. Is the *Charter’s* application to such governmental action—i.e., action taken pursuant to the inherent right of Aboriginal self-government believed by many to be contained within s. 35 of the *Constitution Act, 1982*<sup>6</sup>—necessary in order to protect the basic human rights of individual Aboriginal Canadians living under those governments? Or would the *Charter’s* application do violence to the cultures and

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<sup>1</sup> *Norris v Thomas* [1992] 2 CNLR 139 at para 9, 1992 CarswellBC 740 (BCSC).

<sup>2</sup> *Ibid* at para 103.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid* at para 110.

<sup>5</sup> For a specific discussion on this case as drawing out a tension between individual and collective rights, see generally Thomas Isaac, “Individual versus collective rights: Aboriginal people and the significance of *Thomas v Norris*” (1992) 21:3 *Man LJ* 618; Canada, Canadian Human Rights Commission, *Balancing Collective and Individual Rights: Implementation of Section 1.2 of the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2010). For an extended argument that viewing this case and others like it solely within the individual rights versus collective rights paradigm obscures how courts are actually deciding these cases, see also Avigail Eisenberg, “The politics of individual and group difference in Canadian jurisprudence” (1994) 27:1 *CJPS*.

<sup>6</sup> Section 35(1) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” For the view that s. 35 encompasses an inherent right to self-government, see *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996) at 166-167 [Royal Commission: Restructuring the Relationship]; Canada, Department of Indian Affairs and Northern Development, *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) at 3–4; Kerry Wilkins, “...But we need the eggs: the Royal Commission, the *Charter of Rights* and the inherent right of Aboriginal self-government” (1999) 49:1 *UTLJ* 53.

traditions of these communities, thus failing to respect Aboriginal sovereignty and the inherent right of self-government? After canvassing the key arguments on both sides, I conclude that it is appropriate for the *Charter* to be applied, in a culturally sensitive manner, to inherent-right governments, since this would best advance the goal of reconciliation that animates the Constitution's recognition of Aboriginal rights in s. 35.

## I. Preliminaries

Whether the *Charter should* apply to inherent-right Aboriginal governments—that is, whether it is appropriate that it apply—might be thought of as the wrong question to ask. Perhaps instead we should simply focus on whether it *does* apply as a matter of law. On that score, the current state of the law would appear to be that Aboriginal governments exercising *inherent* (as opposed to delegated) powers of self-government do not fall within the scope of section 32 of the *Charter*—which states that the *Charter* applies to “the Parliament and government of Canada” and to “the legislature and government of each province”—and thus are not automatically subject to the *Charter's* provisions.<sup>7</sup> There is, however, considerable uncertainty on the point, and it is one that has generated significant scholarly disagreement.<sup>8</sup> Further, as constitutional law scholar Patrick Macklem has argued, it is likely that the courts *would* apply the *Charter* to exercises of the inherent right of self-government where this right is exercised in the context of a formal self-government agreement that specifically states that the *Charter* is to apply<sup>9</sup>—i.e., where the *Charter's* application is *consented* to by the relevant Aboriginal government and the federal and provincial governments.<sup>10</sup>

<sup>7</sup> See, e.g. Wilkins, *ibid*; Kent McNeil, “Aboriginal governments and the *Canadian Charter of Rights and Freedoms*” (1996) 34:1 Osgoode Hall LJ 61; Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) 215; Peter Hogg and Mary Ellen Turpel, “Implementing Aboriginal self-government: constitutional and jurisdictional issues,” (1995) 74:2 Can Bar Rev at 192 & 214, citing *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573 (as authority for the proposition that s. 32 represents an exhaustive statement of the bodies that are bound by the *Charter*).

<sup>8</sup> See Hogg and Turpel, *ibid* (claiming, notwithstanding their view that s. 32 is an exhaustive list of the entities subject to the *Charter*, that the “it is probable that a court would hold that Aboriginal governments are bound by the *Charter*” at 214); Royal Commission: Restructuring the Relationship, *supra* note 6 (“[t]he *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals within their jurisdiction” at 160). For a book-length argument for why the *Charter* should apply to Aboriginal governments, see also David Leo Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012). Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 202, 225, 226, 199, and 201 has written that whether the *Charter* applies to exercises of the inherent-right of self-government depends on whether one adopts an ‘inclusive; or ‘exclusive’ interpretation of s. 32. (Favoring an inclusive interpretation, he argues that the *Charter* should be read as applying where inherent-right governments implement “internal restrictions” that “clash with *Charter* guarantees,” but permitting these governments to introduce “external protections” that “protect interests associated with indigenous difference” at 225-226. If the question that is asked is the perfectly general one of whether the *Charter* applies to Aboriginal governments, the answer is surely yes. That is, whether the *Charter* applies to a given Aboriginal government depends on what sort of governmental authority the Aboriginal government is exercising—i.e., on “whether it is delegated, treaty-based, or inherent in nature” at 199. It is uncontroversial, for instance, that Aboriginal governments exercising delegated statutory authority are subject to the *Charter*. When it comes to “treaty-based Aboriginal governmental authority, the *Charter* applies at least to federal and provincial participation in the treaty process, and by extension to the treaty itself” at 201). See also Peter Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> Ed (Toronto: Thomson Reuters, 2018) at §37-13.

<sup>9</sup> It is in fact the stated policy of the federal government that “the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the *Charter*. Self-government agreements, including treaties, will, therefore, have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities” (Crown-Indigenous Relations and Northern Affairs Canada, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (n.d.), online: Indigenous and Northern Affairs Canada, <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#inhrsg>).

<sup>10</sup> See Macklem, *supra* note 8 (“[E]ven if the *Charter* does not independently apply to the exercise of inherent Aboriginal governmental authority, it likely applies on consent of the parties” at 201).

This point brings us, however, to another potential practical obstacle that might lie in the way of applying the *Charter* to inherent-right governments—s. 25 of the *Charter*. Section 25 states that:

The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.<sup>11</sup>

If section 25 is given a literal interpretation,<sup>12</sup> then even if the *Charter* would technically apply to an inherent-right government where that government has consented to the *Charter*'s application—i.e., even if s. 32 would not preclude its application in these circumstances—s. 25 would nevertheless appear to prevent the *Charter*'s other provisions from having any real effect on the government's actions. For example, since Aboriginal self-government is now increasingly understood (albeit without the benefit of a dispositive judicial pronouncement on the question) to be encompassed by s. 35(1)<sup>13</sup>—and thus by s. 25—the latter provision would appear to preclude the possibility that the *Charter* could be used to strike down or otherwise constrain exercises of the inherent right, since that would amount to ‘derogating’ from an Aboriginal right contemplated by s. 25.<sup>14</sup> I do not, however, regard the provision as an insuperable obstacle on this score. A full analysis of how s. 25 ought to be interpreted—and how such an interpretation would affect the *Charter*'s application to inherent-right governments in particular—must await another day. However, analyses of the legislative history of s. 25 not only reveal that there was no consensus that a right to self-government was included in the “Aboriginal rights” referred to by s. 25 (or by 35(1)), but also demonstrate that s. 25 was included for the specific purpose of ensuring that the *Charter*'s s. 15 equality guarantees could not be used to strike down legal rights granted to Aboriginal peoples *qua* Aboriginal peoples (on the grounds that such special rights amounted to

<sup>11</sup> *Constitution Act, 1982*, s 25, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canadian Charter*].

<sup>12</sup> There is a dearth of judicial treatment of s. 25, with the result that the proper interpretation of the section is still very much an open question. Cf *R v Kapp*, 2008 SCC 41 [2008] 2 SCR 483 (the majority decision, in obiter, adopted the view that s. 25 is not an “absolute bar” to *Charter* review, but rather an “interpretive provision informing the construction of potentially conflicting *Charter* rights” at para 64; Bastarache J. favored an interpretation of s. 25 according to which the provision is a “shield” for the rights it encompasses, rendering them immune from *Charter* review, but also asserted that this shield is “obviously” not an absolute one, at paras 93 and 97).

<sup>13</sup> See Ian Peach, “More than a Section 35 Right: Indigenous Self-government as Inherent in Canada’s Constitutional Structure” (2011) at 2–3, online (pdf): Canadian Political Science Association <[www.cpsa-acsp.ca/papers-2011/Peach.pdf](http://www.cpsa-acsp.ca/papers-2011/Peach.pdf)> (the Supreme Court “has [hinted] at an openness to finding a right of self-government within section 35 of the Constitution Act, 1982, but it has yet to clearly pronounce on the question and, instead, continually encourages governments to negotiate a resolution to the self-government claims of Indigenous peoples”. For such a ‘hint’, see generally *R v Pamajewon*, [1996] 2 SCR 821 [*Pamajewon*]. Peach also notes “[l]ikely the strongest case law on the existence of an aboriginal right to self-government is the decision of the British Columbia Supreme Court in *Campbell v British Columbia (Attorney General)*, 2001 BCSC 1123, though this case was never appealed to a higher court”). See also the Royal Commission on Aboriginal Peoples’ Final Report, *supra* note 9, at 95, which called for “explicit recognition that section 35 includes the inherent right of self-government as an Aboriginal right.” This is in fact the official policy position of the Canadian federal government: “[T]he Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*” Crown-Indigenous Relations and Northern Affairs Canada, *supra* note 9.

<sup>14</sup> For what I believe to be an ultimately misguided attempt to blunt the apparent force of s. 25 by way of positing a tenuous distinction between having a right to self-government and *exercising* such a right, see also Brian Slattery, “First Nations and the Constitution: A Question of Trust?”, (1992) 71 Can Bar Rev 261 at 286–287.

discrimination against non-Aboriginals).<sup>15</sup> To instead read s. 25 as a total shield protecting the exercise of Aboriginal self-government from *Charter* scrutiny would thus appear to ignore legislative intent, and to turn away from a purposive interpretation of the provision. This “complete shield”<sup>16</sup> interpretation would also sit very uncomfortably with current s. 35 jurisprudence, as it would imply that whereas policy concerns may rightly limit s. 35 Aboriginal rights (per the *Sparrow* test<sup>17</sup>), the *Charter*’s provisions could never do so. Further, as David Milward has pointed out, “the odd time that any Supreme Court of Canada justice has ever commented on this issue [of the effect of s. 25] it has been in favour of the *Charter*’s having some application to Aboriginal governments.”<sup>18</sup> Milward draws the conclusion that “[i]f the Court is ever called upon to directly decide this issue, irrespective of any present or future composition, the justices may be deeply concerned about exempting Aboriginal governments from the *Charter*.”<sup>19</sup>

Ultimately, however, even if the *Charter*’s application to inherent-right governments were straightforwardly precluded as a matter of law, exploring the issue of whether it would be a good thing for the *Charter* to apply to constrain the actions of these governments would still be worthwhile, since what the law is and what the law should be can plainly be two separate things.<sup>20</sup> Further, the question of whether it is normatively appropriate for the *Charter* to apply to inherent-right governments need not be held in abeyance until such time as we have definitive word from the courts that ss. 32 and 25 permit the *Charter* to be applied in this manner. For the very question of how these provisions should be read, it can be

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<sup>15</sup> See Hogg and Turpel, *supra* note 7 (“[T]he main purpose of section 25 is to make clear that the prohibition of racial discrimination in section 15 of the *Charter* is not to be interpreted as abrogating aboriginal or treaty rights that are possessed by a class of people defined by culture or race. It is, therefore, designed as a shield to guard against diminishing aboriginal and treaty rights in situations where non-Aboriginal peoples might challenge the special status and rights of Aboriginal peoples as contrary to equality guarantees” at 214). See also Milward, *supra* note 8; Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 2–4.

<sup>16</sup> See Celeste Hutchinson, “Case Comment on R v Kapp: An Analytical Framework for Section 25 of the *Charter*”, (2007) 52:1 McGill LJ at 182. See also Wildsmith, *ibid* at 182.

<sup>17</sup> R v *Sparrow*, [1990] 1 SCR 1075 at paras 67ff (QL) [*Sparrow*].

<sup>18</sup> Milward, *supra* note 8 at 66.

<sup>19</sup> *Ibid*.

<sup>20</sup> See e.g. Kent McNeil, “Aboriginal Governments and the *Charter*: Lessons from the United States,” (2002) 17:2 CJLS 73 (the article “leaves aside the unresolved question of whether the *Charter* currently applies to [inherent-right Aboriginal] governments as a matter of Canadian constitutional law, seeking instead to shed some light on the normative issue of whether the *Charter* should apply” at 74). For other works touching on this normative question (some of which also tackle the doctrinal question of whether the *Charter* does apply to Aboriginal governments), see Milward, *supra* note 8; Menno Boldt & J Anthony Long, “Tribal Philosophies and the *Canadian Charter of Rights and Freedoms*” in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165; John Borrows, “Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics” (1994) 43 UNBLJ 19; Thomas Isaac and Mary Sue Maloughney, “Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Self-Government” (1992) 21 Man L Rev 453; J Anthony Long and Katherine Beaty Chiste, “Indian Governments and the *Canadian Charter of Rights and Freedoms*” (1994) 18:2 Am Indian Culture & Rsch J 91 [Long and Chiste]; Timothy Dickson “Section 25 and Intercultural Judgment” (2003) UT Fac L Rev 141; Sharon Donna McIvor, *Self-Government and Aboriginal Women in Margaret Jackson & N. Kathleen Sam Banks, eds, Ten Years Later: The Charter and Equality for Women: A Symposium Assessing the Impact of the Equality Provisions on Women in Canada* (Burnaby: Public Policy Programs, Simon Fraser University at Harbour Centre, 1996) 77; Teresa Nahane, “Dancing with a Gorilla: Aboriginal Women, Justice and the *Charter*” in *Royal Commission on Aboriginal Peoples: Aboriginal Peoples and the Justice System, Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Canada Communication Group, 1993); Bryan Schwartz, “The Application of the *Canadian Charter of Rights and Freedoms* to Aboriginal Governments” in Bryan Schwartz, ed, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986); Aki-Kwe/Mary Ellen Turpel, “Aboriginal Peoples and the *Canadian Charter of Rights and Freedoms*: Contradictions and Challenges” (1989) 10:2,3 Can Wom Stud 149 [Turpel, “*Canadian Charter of Rights and Freedoms*”]; Mary Ellen Turpel, “Aboriginal Peoples and the *Canadian Charter*: Interpretive Monopolies, Cultural Differences” (1989-90) 6 Can Hum Rts YB 3 [Turpel, “Interpretive Monopolies”]; Royal Commission: Restructuring the Relationship, *supra* note 6 at 226-234; Wilkins, *supra* note 6; Dan Russell, *A People’s Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000); Bill Rafoss, *The Application of the Canadian Charter of Rights and Freedoms to First Nations’ Jurisdiction: An Analysis of the Debate* (Masters of Arts In the Department of Political Studies, University of Saskatchewan, 2005) [unpublished].

argued, requires that we at least turn our mind to the issue of the likely beneficial or deleterious effects of the competing interpretations.<sup>21</sup> In addition, even if we take the very firm line that it should never be open to judges to engage in this kind of consequentialist reasoning when determining the meaning of a disputed constitutional provision, it is not at all clear that the courts will do so as well—and thereby come down against the *Charter's* application to inherent-right governments—should they be forced to rule directly on the issue.<sup>22</sup> Thus even if we think that the consequences of the *Charter's* application in these cases should not inform the courts' interpretations of ss. 32 and 25, it seems only prudent that we get clear on those consequences, given the possibility that the courts may well apply the *Charter* to inherent-right governmental action at some point in the future.<sup>23</sup>

As a final preliminary matter, it is worth making clear that the question of whether it would be appropriate to apply the *Charter* to inherent-right governments is of course relevant to the question of whether it is appropriate as a general matter for the *Charter* to apply to Aboriginal governments of any sort. By focussing on the question of whether the *Charter* should apply to inherent-right governments, we take the case against applying the *Charter* to Aboriginal governments *generally*—i.e., whether the Aboriginal government acts pursuant to statutory authority (such as the *Indian Act*<sup>24</sup>), or pursuant to a self-government agreement, or via the exercise of the inherent right of Aboriginal self-government, or via some combination thereof)—at its strongest. This is so because in these cases, where what is contemplated is the imposition of restrictions on how the inherent right of self-government can be exercised, our concerns over diminution of Aboriginal *sovereignty* will be at their most acute. If, even on this relatively inhospitable terrain, we can make the case that the *Charter* ought to apply, it seems highly likely that the same will be true in contexts where the relevant Aboriginal government is not acting purely pursuant to the inherent right of self-government, but rather is exercising delegated statutory authority or acting in accordance with a self-government agreement.

## II. Arguments for the Charter's Application

<sup>21</sup> For an argument to this effect, see especially Milward, *ibid* at 68, who claims that the *Charter's* application to inherent-right governments, which would see the *Charter's* protections afforded to a wider segment of Canadians than they otherwise would be, is in keeping with a purposive interpretation of the *Charter*—given, as he argues, that “in *Hunter v. Southam*, Chief Justice Dickson stated at 58 that the goal of the purposive approach is to secure for individuals the full benefit of the *Charter's* protection.” See also Patrick Macklem, *supra* note 9, who concludes at 209 that “[i]nterpreting section 32 of the *Charter* as applying to the exercise of Aboriginal governmental authority recognized by the Constitution best accommodates [the] competing concerns” of respect for “collective values of community and responsibility” and “protect[ing] less powerful members of Aboriginal societies against potential abuses of Aboriginal governmental authority.”

<sup>22</sup> See Milward, *ibid* at 67. See also Hogg and Turpel, *supra* note 7 (“[d]espite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the *Charter*” at 214; their subsequent analysis in that article, however, would seem to restrict this prediction to scenarios in which “[self-government institutions have been created or empowered by statute,” or “[w]here self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement” at 214; they equally note that “[i]t is unlikely that a court would regard section 25 as giving Aboriginal governments blanket immunity from the *Charter*, even though the governments were exercising powers of self-government derived from a treaty or from an Aboriginal right (the inherent right)” at 214–215).

<sup>23</sup> It is probably also worth considering here that it is not out of the question that the federal and provincial governments might seek to amend s. 32 to explicitly allow for the *Charter's* application to all Aboriginal governments. This was of course attempted via the 1992 Charlottetown Accord, which proposed to enshrine the right of Aboriginal self-government in the Constitution and, in s. 26(c) of the Accord's text, to amend s. 32 to refer to “all legislative bodies and governments of the Aboriginal peoples of Canada in respect of all matters within the authority of their respective legislative bodies.”

<sup>24</sup> *Indian Act*, RSC 1985, c I-5.



Those who advocate for the *Charter's* application to inherent-right Aboriginal governments generally offer two main arguments for why the *Charter* should apply.<sup>25</sup> The first argument usually runs something like this: the *Charter* must apply to Aboriginal governments in order to safeguard the basic human rights of all Aboriginal Canadians, especially the most vulnerable members of Aboriginal communities. The second argument put forward focuses not on the freedom of individual Aboriginals, but on the institution of Canadian citizenship. Specifically, the argument is that “differential access to *Charter* rights would compromise the character of Canadian citizenship by denying a substantial part of its benefit to aboriginal Canadians.”<sup>26</sup> Let us consider both arguments in turn.

#### A. *The Human Rights Argument*

The human rights protection rationale for the *Charter's* application to inherent-right governments, as summarized above, is rather straightforward. The argument is that the *Charter's* provisions protect basic human rights, such as the right to freedom of expression and association, and the right to be free from arbitrary detention, along with other, less fundamental sorts of rights such as rights to minority language education.<sup>27</sup> Further, the argument runs, Aboriginal Canadians living under inherent-right governments are entitled to the protection of their basic human rights, and the *Charter's* application to inherent-right governments would be an effective means of providing them with such protection.<sup>28</sup> Therefore the *Charter* ought to apply.

#### B. *The Equal Citizenship Argument*

This second argument for the *Charter's* application to inherent-right governments asserts that differential access to the *Charter* denies Aboriginal Canadians full citizenship. Specifically, the claim is that the ideal of equal citizenship is undermined when Aboriginal Canadians have, relative to non-Aboriginals, less opportunity or, worse yet, no ability to invoke the *Charter* as against their own inherent-right governments. Surely if the Canadian state demands that Aboriginal citizens obey its laws, these individuals are entitled to equal protection of the law in return? On this view, Canadian citizenship cannot but be damaged where a discrete and

<sup>25</sup> See Wilkins, *supra* note 6 at 82–83.

<sup>26</sup> *Ibid* at 83 (Wilkins is here describing an argument that is often employed, but does not endorse it).

<sup>27</sup> See Leslie Green, “Are Language Rights Fundamental?” (1987) 25:4 Osgoode Hall LJ 639 (Green argues that language rights, too, are “fundamental”).

<sup>28</sup> It is perfectly consistent with this view to concede that the Canadian *Charter* may not be the most effective possible means of protecting Aboriginal Canadians living under inherent-right governments from having their human rights violated by those governments. It is clearly possible, for instance, to argue that a more effective means of providing such protection is by way of bills of rights drafted by the relevant Aboriginal community itself, along the lines of the already existing Labrador Inuit *Charter* of Rights and Responsibilities. See Hogg and Turpel, *supra* note 7 (“[T]he solution might be the development of an Aboriginal Charter (or Charters) of Rights which could exist alongside the Canadian *Charter*” at 213). See also Isaac, *supra* note 5, at 629. Even if Aboriginal-drafted charters are all to the good, however, this would not undermine the central thesis of this paper—that the Canadian *Charter* should presently be applied to inherent right Aboriginal governments. That thesis clearly can coexist with a belief that we should hope for a future in which inherent right governments are constrained by Aboriginal-drafted charters. Further, since, as the quotation from Hogg and Turpel indicates, it seems clear as a matter of law that the creation of such Aboriginal-drafted charters would not automatically supplant the Canadian *Charter* (see Hogg and Turpel, *supra* note 7, at 218: “Any such Aboriginal Charter . . . could be interpreted alongside the Canadian *Charter*, although it would not replace the Canadian *Charter*”; see also Milward, *supra* note 8, at 76–77), the question of whether the Canadian *Charter's* application to inherent-right governments would do more harm than good would remain a very live one even in a future environment in which these governments were also constrained by Aboriginal-drafted charters.

sizeable segment of the population is completely denied access to the *Charter's* protections.<sup>29</sup> According to this logic, there is an irony to Aboriginal groups' demands to be recognized as 'citizens plus.'<sup>30</sup> Specifically, in recognizing that Aboriginal Canadians *qua* Aboriginals are entitled to certain special rights in virtue of Aboriginals' distinct cultural traditions, as well as their prior occupancy of and control over much of the territory now comprising the Canadian state, there is a risk that securing these collective rights could involve undermining the basic individual rights of Aboriginal persons. For instance, if collective Aboriginal rights such as the inherent right to self-government are held to be non-derogable, even vis-à-vis basic *Charter* rights,<sup>31</sup> then Aboriginal communities will be ensured of their collective Aboriginal rights, but at the cost of leaving the individuals who make up those various communities unable to assert against their Aboriginal governments certain fundamental individual rights that the *Charter* contemplates. In this way, legal recognition of Aboriginals as 'citizens plus' may require that they are simultaneously made 'citizens minus.'

I think this is a very compelling argument, but not one that takes its strength solely from a concern with citizenship. For instance, we should be and are concerned that unequal access to the *Charter's* protections undermines equal citizenship not just because enjoying the protection of the *Charter* is widely regarded as a central feature of what it is to be a Canadian,<sup>32</sup> but because Aboriginal Canadians not having the same access as non-Aboriginal Canadians leaves the former at a comparative disadvantage. This offends our commitment to equality, because we view access to the *Charter* as a good and as such are rightly concerned that this good be distributed equally among all Canadians. However, if the *Charter* is a good, it is so in light of the fact that it protects fundamental individual rights from abuse at the hands of governmental authorities. As a result, the argument from equal citizenship ultimately relies for its force on the first argument we looked at about the value of the *Charter* as a means of vindicating basic human rights. Those who frame their arguments for the *Charter's* application to Aboriginal governments in terms of the demands of citizenship

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<sup>29</sup> Where a government invokes section 33 of the *Charter*—the 'notwithstanding clause'—this will mean that certain provisions of the *Charter* will not apply exactly equally to all Canadians. One might seize on this fact to argue that exempting Aboriginal governments from *Charter* scrutiny cannot possibly offend a norm according to which the *Charter* applies equally to all Canadians, since such a norm does not exist. However, even putting aside the fact that invocations of s. 33 are very much the exception rather than the rule, the bare presence of the notwithstanding clause merely suggests that should the *Charter* be held to apply to a given Aboriginal government, that government, like the federal and provincial governments to which s. 33 explicitly refers, should have recourse to the section in cases where they feel its invocation is warranted—*not* that they (alone among the orders of Canadian government) should be totally immune from *Charter* scrutiny.

<sup>30</sup> Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 67–68 (Cairns takes his title from that of the so-called "Red Paper" of 1970, composed by Aboriginal Canadians in response to the federal government's notorious White Paper of 1969).

<sup>31</sup> Some of the very limited judicial treatment of s. 25 might seem to suggest this. See generally *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 at paras 153–158; *R v Kapp*, 2006 BCCA 277 (decision by Kirkpatrick JA at paras 117–153); *Kapp*, *supra* note 12 (decision by Bastarache J at paras 67–123). However, in the Supreme Court of Canada's decision in *Kapp*, an eight member majority of the Court conspicuously declined to adopt an interpretation of s. 25 of the *Charter* that would have this effect, preferring not to issue a definitive statement on the matter, and instead allowing the issues surrounding s. 25 to be resolved on a case-by-case basis (at paras 63–65). (That the Court exhibited such reticence, when they might have disposed of the case by holding s. 25 to be a 'complete shield' against *Charter* scrutiny, has been interpreted by some as strong evidence that it will be unwilling to countenance such an ousting of *Charter* review (see e.g. Milward, *supra* note 8, at 67).)

<sup>32</sup> See e.g. The Right Honourable Beverley McLachlin, "Remarks of the Rights Honourable Beverley McLachlin, P.C. Chief Justice of Canada" (Canadian Rights and Freedoms: 20 years under the *Charter* delivered at Ottawa on 17 April 2002), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2002-04-17-eng.aspx>>. See also MD, "Charter Fights", *The Economist* (7 July 2013), online: <<https://www.economist.com/americas-view/2014/07/07/charter-fights>> (when the federal government "asked Canadians to suggest the people and feats they want celebrated in 2017, the country's 150th birthday, Medicare, peacekeeping and the charter of rights and freedoms were the top three accomplishments. Pierre Trudeau, the former Liberal prime minister who brought in the *Charter*, was the most inspiring Canadian"). See also "The Canadian Charter of Rights and Freedom" online: *Canadian Human Rights Commission* <<https://www.chrc-ccdp.gc.ca/historical-perspective/en/timePortals/milestones/113mile.asp>> (according to the Canadian Human Rights Commission, "human rights became an intrinsic and irrevocable part of our Canadian identity" "with [the] signing [of the *Charter*])." See further Lysiane Gagnon, "The *Charter* and Quebec" in Philip Bryden, Steven Davis & John Russell, eds, *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 2000) 45. Cf Nik Nanos, "Charter values don't equal Canadian values: strong support for same sex and property rights" (1 February 2013), online: Policy Options <<http://policyoptions.irpp.org/magazines/the-charter-25/charter-values-dont-equal-canadian-values-strong-support-for-same-sex-and-property-rights/>>.

should therefore be seen as appealing, ultimately, to the idea that all Canadians are entitled to have access to an effective mechanism for challenging governmental action that violates their basic rights.

### C. *Taking Stock*

Having outlined the human rights argument and the equal citizenship argument, we should conclude that there is a strong *prima facie* case in favour of the *Charter's* application to inherent right Aboriginal governments. The *Charter*—while not universally beloved<sup>33</sup>—is widely regarded not only as a central and unifying feature of Canadian identity, but also as having had a very salutary impact on ensuring that exercises of governmental power respect the basic rights of citizens.<sup>34</sup> The onus should therefore be on those who argue that this important rights-protecting mechanism should not be available to Aboriginal Canadians who wish to challenge the actions of their inherent right governments. We will turn now to an analysis of three such arguments.

## III. Arguments against the Charter's Application

### A. *The No Consent Argument*

One argument for why the *Charter* should not apply to inherent-right Aboriginal governments is that Canada's Aboriginal groups did not consent to the *Charter* in the first place. Kerry Wilkins, for instance, asserts that the Constitutional amendments of 1982 that included the *Charter* were “implemented without the consent, and despite the objections, of Canada's aboriginal peoples.”<sup>35</sup>

However, even if it can fairly be said that Canada's Aboriginal peoples, taken *en bloc*, objected to the *Charter* at its inception, it is not clear that applying the *Charter* to the governments of these communities today is therefore illegitimate. Consider, for instance, the case of Quebec. Quebec's lack of consent to the *Charter* in 1982 is notorious. However, more than 35 years after ‘patriation’, few would claim that there is anything fundamentally unjust about the fact that the *Charter* applies to the Quebec government just as it does to the governments of the other provinces. An important reason for this, it would seem, is that there is a very clear commitment on the part of Quebecers and their government to just the sort of individual liberties the *Charter* protects. For example, support for the *Charter* today is actually higher in Quebec than anywhere else in Canada. According to the Centre for Research and Information on Canada, for instance, 88% of Canadians nationwide say the *Charter* is a ‘good thing for Canada’, and “72% say it adequately protects the rights of

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<sup>33</sup> In particular, a perennial objection to bills of rights, such as the *Charter*, that authorize judicial review of legislation is that they are fundamentally anti-democratic. See e.g. Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 *Yale L.J.* 1346 (2006); James Allan, *Democracy in Decline: Steps in the Wrong Direction* (Montreal: McGill-Queen's University Press 2014); FL Morton, “The *Charter* Revolution and the Court Party” (1992) 30:3 *Osgoode Hall L.J.* 627.

<sup>34</sup> See e.g. Kate Sutherland, “The New Equality Paradigm: The Impact of *Charter* Equality Principles on Private Law Decisions”, in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 245; Didi Herman, “The Good, the Bad, and the Smugly: Sexual Orientation and Perspectives on the *Charter*”, in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 200; Peter Hogg and Allison Bushell, “The *Charter* Dialogue between Courts and Legislatures” (1997) 35:1 *Osgoode Hall L.J.* 75.

<sup>35</sup> See Wilkins, *supra* note 6 at 77.

Canadians.”<sup>36</sup> That survey also finds that “[s]upport for the *Charter* is strong in all regions, running from a high of 91% in Quebec to a low of 86% in western Canada.”<sup>37</sup> Similarly, a survey conducted by SES Research on the occasion of the 25<sup>th</sup> anniversary of the *Charter* found that support for the proposition that the *Charter* was moving the country in the right direction was highest in Quebec.<sup>38</sup> Clear evidence of the shared philosophical commitment to individual liberties that obtains between Quebec and the rest of Canada is also found in the existence of Quebec’s own provincial *Charter*, which is largely of a piece with Canada’s.<sup>39</sup>

In summary, the fact that the Quebec government initially objected to the *Charter* does not mean that the *Charter*’s present application in that province is unjust. We do not see the Quebec government’s being constrained by the *Charter* as unduly undermining Quebec’s collective autonomy, and a significant reason why we don’t see things that way is because Quebecers now do consent to the *Charter*’s application. So while requiring the Quebec government to abide by a *Charter* to which it did not initially consent might appear unjust on its face, this concern is mitigated by the fact that Canadians from every province, especially Quebec, appear to share a deep commitment to the liberal values the *Charter* enshrines.

So the no initial consent argument does not succeed on its own. However, precisely the sort of general commitment to the *Charter*’s protections that explains much of why the *Charter*’s application in Quebec today is not regarded as particularly contentious is what is alleged to be conspicuously absent in Aboriginal societies. If that is the case, then does this fact not render the *Charter*’s application to the governments of these communities illegitimate? This question leads us directly to the second argument against the *Charter*’s application that we will consider.

### B. *The Alien Values Argument*

A second argument against applying the *Charter* to inherent-right governments has it that because the values and concepts that animate it are so alien to Aboriginal world views, striking down action by inherent-right governments for non-conformity with the *Charter* threatens to undermine the traditions and cultural practices of the relevant Aboriginal community. On this view, any benefits that might accrue from the *Charter*’s application in terms of the ability of individual Aboriginals to challenge human rights abuses by their inherent-right governments are outweighed by the attendant risks of (externally imposed) cultural degradation.

Before directly examining the claim that the *Charter*’s values are alien to Canada’s Aboriginal peoples, it is worth getting clear on the fact that the *Charter* did not emerge out of a cultural vacuum. Instead, the document was created by non-Aboriginal Canadians who inevitably drew on their own particular cultural values in shaping the *Charter*’s provisions. Thus the *Charter* does not represent a “view from nowhere.”<sup>40</sup> It is instead a view from Canada, for Canadians.<sup>41</sup> Joseph Carens illustrates the point well when he writes that “[p]olitical and legal institutions are simultaneously cultural institutions in ways that are

<sup>36</sup> Andrew Parkin, “What is the *Canadian Charter of Rights and Freedoms*” Center for Research and Information Canada at York University, online: <<http://www.yorku.ca/lfoster/2012-13/MPPAL%206130/lectures/WhatistheCanadianCharterofRightsandFreedoms.html>>

<sup>37</sup> *Ibid.*

<sup>38</sup> Nanos, *supra* note 33.

<sup>39</sup> *Charter of human rights and freedoms*, CQLR c-12.

<sup>40</sup> This phrase is taken from Thomas Nagel’s book by the same name: *The View from Nowhere* (New York: Oxford University Press, 1986).

<sup>41</sup> Whether it is properly regarded as being ‘for’ all Canadians—i.e., Aboriginal and non-Aboriginal alike—is one of the central questions this paper seeks to answer.

sometimes invisible to those who share the culture.”<sup>42</sup> Consequently, the notion that the *Charter* could undermine the very (non-Aboriginal) social life of which it is a product is much less likely than the prospect that it might undermine the traditional practices of Aboriginal groups.<sup>43</sup> We do, then, have reason to worry that imposing a rights regime created within one cultural setting on another, distinct, cultural group may undercut the ability of the latter group to continue to live by their traditional practices. So we can’t short-circuit the ‘alien values’ argument by denying out of hand the possibility that the alleged foreignness of the *Charter’s* values will do violence to Aboriginal customs and traditions. We must turn, instead, to an evaluation of the argument’s premise that the liberal values enshrined by the *Charter* are indeed fundamentally alien to Aboriginal societies.

Essentially, there are two claims that are often made by those who emphasize the profound or intractable quality of the “epistemological problems”<sup>44</sup> thrown up by “gaps”<sup>45</sup> between Aboriginal and Western ways of knowing and of looking at the world. First, it is suggested that traditional Aboriginal societies did not embrace the value of personal autonomy generally, or individual rights more specifically, that animates both the *Charter* and so much of Western political thought. Secondly, it is argued that Canada’s Aboriginal peoples today cannot embrace the *Charter* itself (at least not without denying their unique indigenous identity), since it remains a foreign artifact of a very different cultural tradition.

In order to assess these claims, we should begin by dispelling a particularly unhelpful and widespread myth. The myth has it that whereas the wider Canadian society, and the *Charter* itself, is undergirded by a staunchly individualist worldview that valorises personal autonomy and the negative liberty secured by individual rights, Aboriginal societies are characterized by a thoroughgoing communitarian commitment to harmony and balance between all aspects of creation, and understand human freedom as involving a system of “reciprocal relations and mutual obligations based on the need to preserve the harmonious whole.”<sup>46</sup> On this view, modern notions of individual human rights, such as those protected by the *Charter*, would have been completely foreign to traditional Aboriginal societies. This much seems to follow, for instance, from the blunt assertion of Taiaiake Alfred that “the cultural ideal of respectful coexistence as a tolerant and harmony seeking first principle” that was embraced by the original peoples of Canada, is “[d]iametrically opposed to the possessive individualism” that typifies Canadian society and its Constitution.<sup>47</sup>

But this is surely overstated. Without ignoring the very real differences in emphasis between Aboriginal and Western society when it comes to conceiving of the relationship between individual freedom and the collective good, we must reject the notion that the wider Canadian society and Aboriginal communities fit neatly into opposite sides of a binary that separates individualism from collectivism. Even Mary Ellen Turpel, for instance, (in the course of an article devoted to showing how Aboriginal societies manifest such a “different

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<sup>42</sup> Joseph H Carens, *Culture, Citizenship and Community*, (New York: Oxford University Press, 2000) at 189.

<sup>43</sup> I recognize that this discussion runs the risk of taking ‘non-Aboriginal Canada’ as a homogenous bloc, which it surely isn’t. There are, for example, marginalized non-Aboriginal communities that also may have cause to see the *Charter* as fitting uncomfortably with their group’s broader social life. My point, however, is that since Aboriginal Canadians had little input into the *Charter’s* creation, the document has something like a built-in sensitivity towards the wider (non-Aboriginal, predominately white, male, and perhaps Anglophone) culture of those who were seated at the drafting table, that does not extend in the same manner to Aboriginal cultures.

<sup>44</sup> Turpel, “Interpretive Monopolies”, *supra* note 20 at 24.

<sup>45</sup> *Ibid* at 13.

<sup>46</sup> Long and Chiste, *supra* note 20 at 97.

<sup>47</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999) xiv (emphasis added). See also Turpel, “Interpretive Monopolies”, *supra* note 20 (“[t]he collective or communal basis of Aboriginal life does not really, to my knowledge, have a parallel to individual rights: the conceptions of law are simply incommensurable” at 30).

human (collective) imagination”<sup>48</sup> from that animating liberal democracies that the *Charter’s* application to Aboriginal governments would be an injustice) admits that “[t]here is no polity that is purely individualistic or purely collectivist.”<sup>49</sup> Further, as she goes on to suggest, we should not view “‘society’ as an either-or,” in the sense that Aboriginal communities, if they place great emphasis on the social harmony of the group, must be entirely collectivist in orientation.<sup>50</sup>

What is more, it would be a serious mistake to portray autonomy as alien to the pre-European contact peoples of Turtle Island. Taiaiake Alfred himself, for instance, contends that “the heart and soul of indigenous nations” consists in “a set of values that challenge the destructive and homogenizing force of Western liberalism and free market capitalism.”<sup>51</sup> While this might seem to suggest that indigenous nations do not respect individual freedom, Alfred emphatically rejects that notion. He insists that these same indigenous values that challenge liberalism also simultaneously “honour the autonomy of individual conscience.”<sup>52</sup>

Alfred’s view of the importance of individual autonomy in traditional Aboriginal societies is shared by other commentators. According to Menno Boldt and J. Anthony Long, for example, when pressed to list the “cultural traits and values shared by most Indian tribes,” one must include “the reaching of decisions by consensus, institutionalized sharing, [and] respect for personal autonomy....”<sup>53</sup> Moreover, they further assert, “[s]elf-direction (autonomy), an aristocratic prerogative in European society, was everyone’s right in Indian society.”<sup>54</sup> Indeed, many traditional Aboriginal tribes can be regarded as radically libertarian in outlook. Long and Chiste write, for example, that “[h]istorically, Plains Indians did not accept the idea that anyone could be given the right to govern others, except for limited periods of time and under restricted circumstances.”<sup>55</sup> As they also write, again in reference to the Plains Indian groups they studied:

A great deal of personal autonomy existed and was reflected in the exercise of authority as well as in collective decision-making. Individual autonomy, however, was not based on an atomistic view of human nature, but rather on a concept of human dignity stemming from the equality of status and interdependence of individuals within the cosmic order, as conceived by the Creator.<sup>56</sup>

With all of this in mind, the emphasis on community harmony and a cohesive social life, common among pre-contact Aboriginal nations, can be seen as a necessity of survival in societies where sustenance often had to be painstakingly coaxed out of harsh physical environments. It was far from a flat rejection of the value of individual freedom.

We can conclude, then, that the ideal of personal autonomy that animates many of the *Charter’s* guarantees of rights and freedoms was far from alien to pre-contact Aboriginal

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<sup>48</sup> Turpel, “*Canadian Charter of Rights and Freedoms*”, supra note 20 at 34.

<sup>49</sup> *Ibid* at 16.

<sup>50</sup> *Ibid*.

<sup>51</sup> Alfred, supra note 47 at 60.

<sup>52</sup> *Ibid*.

<sup>53</sup> Menno Boldt & J Anthony Long, “Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada’s Native Indians” in Menno Boldt, J Anthony Long, & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: Toronto University Press, 1985) 333 at 334.

<sup>54</sup> *Ibid* at 339.

<sup>55</sup> *Supra* note 20, at 99.

<sup>56</sup> *Ibid* at 98.

communities in what is now Canada. Admittedly, however, respect for the larger notion of individual autonomy is not the same as acceptance of the specific individual rights that find expression in the *Charter*. Recall, for instance, the passage from Long and Chiste quoted above, to the effect that notions of autonomy in Plains Indian tribes were premised on a commitment to a cosmic order characterized by a system of right relations among all its constituent parts, and especially by the equality and interdependence of persons. This quotation suggests that while the concept of personal autonomy was not alien to traditional Aboriginal societies, the *Charter's* language of individual rights might well have been foreign, since for Aboriginal communities autonomy was grounded not in the view of the individual as an atomistic free-chooser which is (rightly or wrongly) said to animate liberalism,<sup>57</sup> but rather in a conception of human dignity that presupposes the equality and interdependence of individuals.

Given this latter view of the importance of interdependence, the argument runs, insisting on one's individual rights as against other members of the community could be deeply divisive and may threaten the society's social fabric. According to Turpel, for instance, the very concept of rights is in fact in irresolvable tension with Aboriginal societies' understandings of social life.<sup>58</sup> This is so because Anglo-European political thought since Locke has located "the conceptual basis of rights analysis in notions of property and exclusive ownership" that were foreign to indigeneity.<sup>59</sup> Specifically, whereas Aboriginal societies' understandings of social life included the idea that autonomy was best secured by ensuring dignified, harmonious cooperation between the community's members, the European concept of rights carries with it "a highly individualistic and negative concept of social life based on the fear of attack on one's 'private' sphere."<sup>60</sup>

Another critique along these lines has been levelled by Gordon Christie, who, in the course of attempting to "highlight [...] the cultural divide between Western theorists and the worlds of Aboriginal peoples", asserts that "a liberal vision underlies and animates the law, and ... while grounded in this vision, the law cannot protect the interests of Aboriginal peoples."<sup>61</sup> As David Milward helpfully summarizes Christie's views, "the imposition of liberal legal structures amounts to oppression in that it fails to respect the collective autonomy of Aboriginal communities, [and] promotes the pursuit of individual self-interest at the expense of Aboriginal cultural values of responsibility."<sup>62</sup>

The problem with this picture of *Charter* rights as militantly individualistic is that it—like the notion that Aboriginal societies are entirely collectivist in orientation—is quite hyperbolic. There are, for instance, many different theories of what it is to have a right. Some of these locate the foundation of rights in ideas of 'property and exclusive ownership', but others do not. It is misleading, therefore, to portray a commitment to individual rights as necessarily antithetical to collective projects and community wellbeing. In the western tradition, for instance, the two leading accounts of rights are the interest theory

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<sup>57</sup> My own view is that the so-called 'communitarian critique' of liberalism misses the mark, since it is a mistake to regard liberals as necessarily presupposing such an atomistic view of the self. (For prominent examples of works by liberals who clearly appreciate the way in which individual autonomy depends upon and is asserted within a supportive social and cultural milieu, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1996); Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton: Princeton University Press, 2014); Leslie Green, "What is Freedom For?" (2012) Oxford Legal Studies Research Paper No 77/2012.

<sup>58</sup> Turpel, "Interpretive Monopolies", *supra* note 20 at 509.

<sup>59</sup> *Ibid* at 14–15.

<sup>60</sup> *Ibid* at 15.

<sup>61</sup> Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous LJ* at 68.

<sup>62</sup> Milward, *supra* note 9 at 51.

and the will theory. On the will theory, “the function of a right is to give its holder control over another’s duty”,<sup>63</sup> in the sense that the right-holder is “a small scale sovereign”<sup>64</sup> with the power, for instance, to either grant or refuse permission for someone else to use their property in a certain way. On the interest theory, by contrast, rights protect the right-holders’ interests. If a person has a right to be provided with the necessities of life, say, that is because it is in her interest to receive them. What is important to note is that the interest theory is in considerably less tension than the will theory with the idea of a society’s communal life being a dense and delicate web of interdependence. And while there continues to be an energetic, if perhaps not particularly fruitful,<sup>65</sup> debate among will theorists and interest theorists, the interest theory appears to be more heavily subscribed to.

Those who would claim that the very notion of rights is incompatible with indigeneity are thus guilty of homogenizing the rich theoretical literature on rights, or of ignoring that literature altogether. In addition, they will have their work cut out for them when it comes to explaining away the widely accepted view that groups, and not just individual persons, can be and often are rights-holders. Further, there is widespread, albeit not universal, recognition today that individuals possess not only so-called ‘negative’ rights—such as freedom from various forms of governmental control or abuse—but ‘positive’ rights as well—such as entitlements to various social, cultural, and economic goods and the opportunity to participate in the social, cultural, and economic life of their communities. The picture of rights as inherently divisive weapons that individuals employ, consciously or unconsciously, to the detriment of social harmony is much harder to maintain once we allow into view such social, economic, and cultural rights.

In the end, the argument put forward by Turpel is doubly misleading. She invokes, as we saw, a Lockean view of rights as grounded in notions of private property in order to suggest that the rights the *Charter* protects are alien to Aboriginal Canadians today. Notice that Turpel is holding up for analysis a particular take on the basis of rights that was in vogue hundreds of years ago, but holds much less sway today. It may well be, for instance, that Locke’s views about rights to property would have been completely foreign to every pre-contact Aboriginal group in North America. But what clearly does not follow is that the conception of rights *that the Charter articulates today* is foreign to Canada’s Aboriginal communities *as we find them today*.

As it happens, furthermore, the bare notion of individual rights as against the larger community would not have been inconsistent “with Aboriginal societies’ understandings of social life” (to use Turpel’s words again) even in the pre-contact period. Certainly, some of the specific conceptions of the nature of rights that leading theorists in the liberal tradition have from time to time advanced would likely have been in “irresolvable tension” with these “understandings.” However, the central premise upon which the *Charter’s* rights protection regime is based—the notion that humans are autonomous agents, and that as a result of this fact they possess interests in having certain things or in being free to act in various ways which are sufficiently weighty that it is appropriate to demand that others respect those interests—would have been in no such tension.<sup>66</sup>

<sup>63</sup> Leif Wenar, “Rights” in Edward N Nelta ed, *Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Lab Stanford University, 2015), online: <[plato.stanford.edu/archives/fall2015/entries/rights/](http://plato.stanford.edu/archives/fall2015/entries/rights/)>.

<sup>64</sup> HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) at 183.

<sup>65</sup> See Van Duffel, “The Nature of Rights Debate Rests on a Mistake” (2012) 93 *Phil Q* 104; Tim Hayward, “On Prepositional Duties” (2013) 123 *Ethics* 264.

<sup>66</sup> In all of this, of course, we must be careful not to regard pre-contact Aboriginal society as a monolithic whole. The many Aboriginal communities clearly differed from one another in countless ways. Taking all of them together, however, its true as a general matter that these communities would not have found alien the idea that individual human beings are autonomous and have interests that justify holding others under duties to act, or refrain from acting, in certain ways.



To summarize, we have found that, in general, traditional Aboriginal societies tended to be more collectivist in outlook than is the wider Canadian society today. But we also found that none of these pre-contact Aboriginal communities were wholly collectivist in orientation, to the exclusion of concern for individual freedom. In these traditional Aboriginal communities—as in both Aboriginal and non-Aboriginal communities today—individual autonomy was acknowledged and prized. It was not an alien value. Further, we found reason to believe that the notion that individuals are entitled, owing to their interests in personal autonomy, to be free from certain kinds of domination would not have been alien to traditional Aboriginal communities either, even if the extensive rights discourse that has built up around these notions in liberal democracies today would have been.

But even if we are wrong on that score—even if the idea of individual rights would have been completely foreign to the social understandings of traditional Aboriginal peoples—what does seem clear is that these notions of individual rights are not at all foreign to most of Canada’s Aboriginal peoples *today*. Standing on one’s legal rights and seeking their vindication in courts of law was clearly not a common feature of life in pre-contact Aboriginal communities. But it is not uncommon for members of modern-day Aboriginal communities to do exactly this. Further, when we are assessing whether the *Charter’s* values are sufficiently foreign to certain Aboriginal communities such that the *Charter’s* application to the governments of these communities would do violence to their way of life, we should take as the society under study not some long-ago version of the community. Rather, we should ask whether the *Charter’s* values are really alien to the community as it stands before us—i.e., in the present-day. Evidence suggesting that notions of autonomy and individual rights would have been alien to many pre-contact Aboriginal communities—even if it existed—would be rather weak evidence that these ideals are foreign to contemporary Aboriginal communities. This is because Aboriginal societies, like all political communities, naturally and inevitably change over time—even absent the assimilationist pressures of colonialism. As David Milward asks rhetorically in his book-length search for a “culturally sensitive interpretation” of the *Charter*,<sup>67</sup> “[c]an any Aboriginal people (or any other society for that matter) confidently assert that their laws and practices have remained exactly the same throughout the ages?”<sup>68</sup>

When we turn our lens to an examination of Aboriginal communities as we presently find them, we see strong evidence of a fairly widespread endorsement of both human rights in general and the *Charter* in particular. As Turpel conceded more than 25 years ago, in arguing against the propriety of applying the *Charter* to inherent-right governments she was “faced with the fact that rights discourse has been widely appropriated by Aboriginal peoples in struggles against the effects of colonialism.”<sup>69</sup> In the years since her article was published, instances of Aboriginals turning to the courts to protect their rights have, of course, continued apace.<sup>70</sup>

<sup>67</sup> See Milward, *supra* note 8 at 62–77.

<sup>68</sup> *Ibid* at 59.

<sup>69</sup> Turpel, “Interpretive Monopolies”, *supra* note 20 at 10–11.

<sup>70</sup> These include, to mention just a few of the most consequential cases involving Aboriginal persons or peoples seeking to vindicate their Aboriginal rights, *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]; *Pamajewon*, *supra* note 13; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*]; *Sparrow*, *supra* note 17; *R v Marshall*, [1999] 3 SCR 456; *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Tsilhqot’in Nation v British Columbia*, [2014] 2 SCR 257. Of particular relevance for our purposes is *McIvor v Canada (Registrar of Indian and Northern Affairs)*, [2009] BCCA 153 in which an Aboriginal woman successfully invoked the equality provision (s. 15) of the *Charter* to attack s. 6 of the Indian Act on the grounds that it violated gender equality. That section of the Act provided that Indian status under the Act was retained by Indian men who married ‘non-status Indian’ women, whereas status women who married non-status Indian men lost their status and became unable to pass that status down to their children.

Now, it is possible that, as Turpel alleges, Aboriginal Canadians may “appropriate this conceptual framework as the only (or last) resort without sharing or accepting the distinctly Western and liberal political vision of human rights concepts.”<sup>71</sup> So we must be careful not to automatically assume that all Aboriginal individuals who invoke the *Charter* (for instance in an attempt to avoid conviction for a criminal offence) actually endorse the view of human beings as possessed of individual rights that the *Charter* manifests. But we don’t have to merely assume that Aboriginal Canadians embrace the *Charter*’s values. We can observe this from readily available data. According to Statistics Canada, for example, “Aboriginal people tended to have similar views on the leading Canadian national symbols, with no significant differences in the proportion of Aboriginal people and non-Aboriginal people who thought the *Charter*, flag and national anthem were very important to the Canadian identity.”<sup>72</sup> The same survey found that “a strong appreciation of national symbols [including the *Charter*] was more common among Aboriginal people than non-Aboriginal people born in Canada.”<sup>73</sup> By 2001, legal scholar Bradford Morse noted, in his paper “20 Years Under the *Charter*: The Status of Aboriginal Peoples under the *Canadian Charter of Rights and Freedoms*,” that “the individual rights and liberties emphasized by the *Charter* are becoming more accepted and internalized by many Aboriginal people as the imposition of laws and policies by any government without their consent, including by their own governments, are being viewed as contrary to traditional values that stress individual freedom and consensus decision-making.”<sup>74</sup> The fact that “the Native Women’s Association of Canada has argued strenuously for the application of the *Charter* to Aboriginal jurisdictions”<sup>75</sup> is another prominent example of the internalization of individual rights norms by Aboriginal Canadians.<sup>76</sup>

This evidence of Aboriginal Canadians’ familiarity with and acceptance of human rights norms and the *Charter* should be viewed against the backdrop of another salient fact. Without denying the real differences that do exist between indigenous and non-indigenous societies, it is true that Aboriginal groups today have an incentive to over-emphasize their cultural distinctness. Consider the following quotation from Taiaiake Alfred, a Mohawk: “[t]o be Native today is to be cultured.... But we cannot have just any culture; it has to be “traditional” culture.... Our very sovereignty... depends on it, as we must continually prove

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<sup>71</sup> Turpel, “Interpretive Monopolies”, *supra* note 20 at 33.

<sup>72</sup> See Maire Sinha, “Canadian Identity, 2013” (1 October 2013) at 8, online (pdf): Statistics Canada <www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2015005-eng.htm>. (More than nine in ten Canadians surveyed believed the *Charter* and the flag were either very or somewhat important to national identity; 88% said this in respect of the anthem.)

<sup>73</sup> *Ibid.*

<sup>74</sup> See Bradford W Morse, “Twenty Years of *Charter* Protection: The Status of Indigenous Peoples Under the *Canadian Charter of Rights and Freedoms*” (2002) 21 Windsor YB Access Just 385 at 430.

<sup>75</sup> Dickson, *supra* note 20 at 149.

<sup>76</sup> As Monique Deveaux writes, although “[n]ative women were by no means unanimous in their call for formal constitutional protection of their individual equality rights by means of the *Charter*, and disagreement continues today,” “a significant number of native women went on record as supporting continued *Charter* protection for Aboriginal peoples precisely because they feared the erosion of women’s rights”—a concern, according to Deveaux, that was “reflected not only in the positions taken by NWAC and provincial native women’s groups, but also in the rejection (in the referendum vote) of the Charlottetown Accord by two thirds of native peoples on reserves” (*Conflicting Equalities? Cultural Group Rights and Sex Equality* 48 *Political Studies* 522, 532 (2000)). For further discussion of the *Charter*’s importance to securing the rights of Aboriginal women, see Nahance, *supra* note 20 at 359; McIvor, *supra* note 20 at 77.

our difference in order to have our rights respected.”<sup>77</sup> Despite this largely judicially-created phenomenon, Long and Chiste conclude that a “transformation has occurred in governing processes and value systems within Indian societies.”<sup>78</sup> At present, Long and Chiste continue, “there appears to be a convergence of modern Indian values and those of Western liberalism around ... individual rights as personal entitlements and a paralleling belief in the equality of persons.”<sup>79</sup>

### 1. A Less Alien Alternative?

The argument that the *Charter* must not apply to inherent-right governments because its values are too alien to those of Aboriginal communities must therefore be rejected. Those who remain opposed to the *Charter's* application might change tack at this point, however. For instance, it might be argued that to the extent that individual rights serve to protect citizens of modern Western societies from abuse at the hands of their governments, in traditional Aboriginal communities the internal application of the community's customary law and traditions served the same function. According to the study of Plains Indian communities by Long and Chiste, for instance, these communities' customs “constituted a type of impersonal authority that served to protect individuals from arbitrary coercion by leaders, thereby protecting the status of individuals within the group,” and thus “served as a surrogate” for the individual rights regimes opted for by “contemporary democratic societies.”<sup>80</sup>

It might be argued, then, that while the *Charter's* human rights values are not alien to Aboriginal Canadians today, there nevertheless exists an alternative method for protecting Aboriginals from oppression at the hands of their inherent-right governments that is more in keeping with the various communities' traditional values—indeed, one that is by definition consistent with and respectful of those values. This proposal suggests that we can secure all the benefits of human rights protection that the *Charter's* application promises, without having to pay any of the costs. That is, we can prevent the violation of individual rights without having to worry about potential conflict between the *Charter's* provisions and traditional practices, since it will be such traditional practices themselves that preclude the rights violations. In short, why resort to applying the *Charter* when the human rights of these Aboriginal Canadians could be adequately safeguarded simply by letting the inherent-right governments use their community's internal customs and traditions to police themselves?

The proper response here is that we simply cannot trust inherent-right Aboriginal governments to self-regulate in this way. We can't trust such Aboriginal governments to do so not because they are *Aboriginal* governments, of course, but because they are governments. According to David Milward, the case for “some form of formal rights protections” within Aboriginal societies is strong precisely because such formal protections

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<sup>77</sup> *Supra* note 48 at 66. To be clear, this unhappy situation is not the fault of Canada's Aboriginal communities, but rather is due to the Supreme Court of Canada's unfortunate jurisprudence relating to Aboriginal rights since its seminal decision in *Van der Peet*, in which the Court found that Aboriginal rights are “rooted in the historical presence—the ancestry—of aboriginal peoples in North America” (*Van der Peet*, *supra* note 70 at para 32). See e.g. Wilkins, *supra* note 6 at 93–94 describing the state of the law post-*Van der Peet*.

[Aboriginal rights] exist to protect, in contemporary form, ‘the crucial elements of those pre-existing aboriginal societies’ [quoting from *Van der Peet*]. Contemporary practices, activities and relationships qualify as protected uses of aboriginal rights only where, and only because, they demonstrably keep faith with the customs, themes and traditions constitutive of those cultures before and apart from European influence.

<sup>78</sup> Turpel, “Canadian Charter of Rights and Freedoms”, *supra* note 20 at 111.

<sup>79</sup> *Ibid* at 112. Long and Chiste go on to add at 111 this endorsement of liberal norms by Aboriginal peoples has not supplanted all traditional Aboriginal values: “present-day First Nations are best characterized as unique mixtures of traditional Indian and Western liberal values and institutions.”

<sup>80</sup> *Ibid* at 99.

are “relevant to the needs and realities of *contemporary* Aboriginal communities.”<sup>81</sup> For Milward, while relying on customs and traditions to prevent abuses of power may have been sufficient in the days before the arrival of Europeans, “Aboriginal peoples live in a far different world than the one they lived in prior to contact. It is a world that is marked by different technologies and different economics and, therefore, one that is thoroughly suffused with relationships of hierarchy and power.”<sup>82</sup> Further, Milward is surely correct when he asserts that “[w]ith such relationships comes a greater potential for the abuse of power.”<sup>83</sup> As such, it seems totally naïve to offer an affirmative response to the rhetorical question he goes on to pose: “Is it a realistic hope that any people, Aboriginal or non-Aboriginal, can completely avoid the need for formal safeguards against governing power in today’s world?”<sup>84</sup>

Now, it is not clear that it is only due to momentous changes in economic and governmental structures within Aboriginal communities that formal rights protection mechanisms are needed. Perhaps the picture painted by Long and Chiste is too rosy when extrapolated across all of the various pre-contact Aboriginal peoples. Surely some of these societies, at times, would have been marked by serious and enduring human rights violations. Perhaps some formalized practice of overseeing decision-making for conformity with human rights norms would have been salutary even in these pre-contact societies. In other words, it seems possible that the reach of the modern state and the shift to capitalist industrial economies are not necessary conditions that must be satisfied before formalized rights-protection mechanisms will be appropriate. It is at least arguable that we could lay out a list of (jointly) sufficient conditions that omit reference to the technological sophistication and governing structures typical of modern societies. Perhaps, for instance, it is appropriate for an independent body to scrutinize governmental decision-making for conformity with rights norms wherever we have reason to fear that those with decision-making power may advance their own interests—or those of their friends and family—at the expense of other members of the community; or where we believe some officials may be prejudiced against certain members of the community; or even where we recognize that officials will at times be tempted to prioritize diffuse gains in overall community well-being over the fair and just treatment of each member of the society.

This line of thinking is admittedly speculative and underdeveloped. The important point, however, is that most of the reasons for favouring judicial review in contemporary non-Aboriginal contexts apply with equal force in the context of inherent-right communities today. In other words, without having to isolate specific features of present-day Aboriginal communities that pre-contact Aboriginal societies lacked (and the having of which purportedly makes the *Charter’s* application appropriate), it is enough to simply notice that for those of us who believe that judicial review is on balance a good thing in the broader Canadian society, the realities (and temptations) of governing that we think gives rise to the need for such judicial review are also present in the context of contemporary Aboriginal communities.

Indeed, a number of commentators (both Aboriginal and non-Aboriginal) argue that modern Aboriginal governments, as compared to the federal government and the governments of the provinces, are *more* likely to perpetrate human rights abuses. According

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<sup>81</sup> Milward, *supra* note 8 at 60 (emphasis added).

<sup>82</sup> *Ibid.* John Borrows makes a different, although related, point when he argues that Indigenous traditions can cease to be “uplifting, positive, and liberating forces” “when they are treated as timeless models of unchanging truth that require unwavering deference and unquestioning obedience” (*Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at i).

<sup>83</sup> Milward, *supra* note 8 at 61.

<sup>84</sup> *Ibid.*

to Roger Gibbins, for example, “the *Charter* takes on additional importance when we realize that individual rights and freedoms are likely to come under greater threat from Indian governments than they are from other governments in Canada.”<sup>85</sup> The reason for this, Gibbins clarifies, is due to “the size and homogeneity of Indian communities rather than [...] their ‘Indianness’ per se. Indian communities tend to be small and characterized by extensive family and kinship ties, and it is in just such communities that individual rights and freedoms are most vulnerable.”<sup>86</sup> Milward picks up on this theme, asserting that “contemporary Aboriginal communities are often characterized by strife between rival clans or families.”<sup>87</sup> He then explains how in such circumstances those who wield power may seek to legitimize their abuse of it by disingenuously claiming that in violating the rights of their members they are in fact only acting to preserve the community’s collective traditions: “If a family wrests the reins of power for itself, that family can set the ‘collective goals’ for the Aboriginal community at large. The pursuit of such ‘collective goals’ can end up leading to the benefit of the dominant family and to the neglect or even persecution of rival families.”<sup>88</sup>

Ultimately, then, the claim that the *Charter* must not apply to inherent-right governments because we can reliably secure the same human rights-protecting benefits it offers via a less alien means is not compelling. We do not have good reason to be confident on this score. If, therefore, we accept that the *Charter* has salutary human rights-protecting effects, but still wish to argue that it should not apply to inherent-right governments, we will have to point to some countervailing downside that its application would have. We will turn our attention to this possibility by addressing what we might label the ‘sovereignty argument’ against the *Charter*’s application.

### C. *The Sovereignty Argument*

The final argument against the *Charter*’s application to inherent-right communities that we will examine has it that were Aboriginal governments required to act within the bounds laid out by the *Charter*, this would unacceptably undermine Aboriginal sovereignty. What should we make of this claim?

Firstly, we should get clear on what we mean by the concept of sovereignty. Often, it appears that ‘sovereignty’ is used to refer to having complete and unqualified control over a given jurisdiction.<sup>89</sup> Other times, however, we clearly have no qualms in referring to a body as sovereign even though its powers are limited in various ways, as, for instance, when we speak of the Canadian federal government as exercising sovereignty, despite the obvious fact that in doing so it must comply with the *Charter* and with the Constitution’s division of powers between the federal and provincial governments. Further, it is clear that Canada’s Aboriginal peoples do not possess “external sovereignty,” in the sense of being sovereign states.<sup>90</sup> Rather, they are a part of the Canadian state and exercise their sovereignty within it.

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<sup>85</sup> Roger Gibbins, “Citizenship, Political, and Intergovernmental Problems with Indian Self-Government” in J. Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto, Ont: McClelland and Stewart 2000) at 374.

<sup>86</sup> *Ibid* at 374–75.

<sup>87</sup> *Supra* note 8 at 52.

<sup>88</sup> *Ibid* at 53.

<sup>89</sup> See e.g. the canonical accounts of a ‘Sovereign’ in John Austin, *The Province of Jurisprudence Determined* (London: J Murray, 1832) and Thomas Hobbes’s *Leviathan* (1651).

<sup>90</sup> Nor, evidently, do many Aboriginal groups aspire to this status.

As the majority of the Supreme Court of Canada wrote in *Gladstone*: “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign.”<sup>91</sup> A similar sentiment is expressed by Binnie J. in his judgment (supported by Major J.) in the 2001 case of *Mitchell*, where, drawing on the notion of “shared” or “merged” sovereignty that had been advanced by the Royal Commission on Aboriginal Peoples, he wrote that “aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.”<sup>92</sup> Binnie J. explicitly found that assenting to this notion is necessary for “the principle of ‘merged sovereignty’ articulated by the Royal Commission on Aboriginal Peoples [...] to have any true meaning.”<sup>93</sup> Indeed, this ideal of “shared” or “merged” sovereignty, as opposed to external sovereignty, most aptly describes the sense in which Canada’s Aboriginal peoples are sovereign.<sup>94</sup>

We should, then, echo the words of the Royal Commission on Aboriginal Peoples’ Final Report that “no sovereignty is absolute or exclusive in any federation.”<sup>95</sup> That is, while we can conceive of an absolute sovereign on the order of Thomas Hobbes’s Leviathan, for our purposes we should not understand a sovereign political community (*qua* sovereign) as being free to exercise public power in any way it sees fit. In a constitutional democracy like Canada, sovereignty must be exercised in accordance with certain fundamental norms, such as democracy and the rule of law.<sup>96</sup> We might wish to see these as *parameters* within which sovereignty is to be exercised in Canada, as opposed to *limitations* that curtail sovereignty.<sup>97</sup> At issue, then, is whether requiring inherent-right Aboriginal governments to comply with the *Charter* would be to unacceptably limit Aboriginal sovereignty, or merely to require that it be exercised within acceptable parameters.

One way, it would seem, in which Aboriginal sovereignty would be unduly limited is if the *Charter*’s application were to force Aboriginal communities to undergo profound cultural change. Certainly a community made to shed its culture and adopt another’s is a community whose status as sovereign is open to doubt. So if complying with the *Charter*’s provisions were to require Aboriginal peoples to turn their backs on their cultural traditions and remake themselves in the image of the more individualistic, rights-focused wider society, the requirement that they exercise self-government in accordance with the *Charter* would appear to be an unacceptable limit on, rather than merely a parameter of, their sovereignty.

Clearly, the line between a ‘limit’ and a ‘parameter’ will be a tough one to draw in many cases. However, it might be that while compliance with the rule of law, say, is an acceptable parameter within which Aboriginal self-government must be exercised, requiring compliance with the whole suite of contemporary liberal-democratic values—such as gender equality, religious freedom, freedom of expression, and the like—would be to diminish

<sup>91</sup> *Gladstone*, *supra* note 70 at para 73.

<sup>92</sup> *Mitchell v MNR*, [2001] 1 SCR 911 at para 129 [*Mitchell*].

<sup>93</sup> *Ibid.*

<sup>94</sup> To be sure, the notion that Aboriginal and Crown sovereignty have merged is not unanimously supported among all Aboriginal communities. But even among groups that broadly speaking do not accept the proposition that sovereignty has merged, this view is not monolithically held. Witness for example the recent Quebec superior court judgment in *Miller v Mohawk Council of Kahnawake* [2018] QCCS 1784, 293 ACWS (3d) 227, in which multiple Mohawk plaintiffs (successfully) sought declarations from the Quebec superior court that a Kahnawake Council law that stripped Kahnawake members of membership benefits if they married a non-Indigenous person violates the *Charter*’s s. 15 equality guarantees.

<sup>95</sup> Royal Commission: Restructuring the Relationship, *supra* note 6 at 310.

<sup>96</sup> Patrick Macklem, *supra* note 8 at 123, goes so far as to say that “the legitimacy of Canadian sovereignty rests on its capacity to co-exist with Aboriginal sovereignty.”

<sup>97</sup> For a distinction between limits and parameters in the context of the challenge of leading a good life, see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000).

Aboriginal sovereignty. The difference here would be that while notions of the rule of law are immanent in Aboriginal legal traditions—and so exercising self-government within this parameter would not require any dramatic alterations to an Aboriginal community’s cultural life—the more specific liberal values just mentioned may well come into conflict with cherished indigenous customs and practices, thus requiring the latter to be profoundly altered in order that they not fall afoul of the former. As John Tomasi controversially puts it, perhaps at least some Aboriginal groups, “accidents of geography to the contrary, are importantly *outside of liberalism*,”<sup>98</sup> in the sense that it would be “inappropriate” to expose these “aboriginal groups to the measures that would be required if we were to insist on treating them as full citizens of liberal society.”<sup>99</sup>

For this ostensibly sovereignty-based argument against the *Charter’s* application to succeed, however, it would have to be the case that Aboriginal groups are indeed ‘outside of liberalism,’ in the sense of not endorsing core liberal values. But this suggestion is just a slightly dressed-up version of the ‘alien values’ argument we rejected above. Because the underlying values of personal autonomy, equality, and human rights that animate liberalism generally and the *Charter* more specifically *are* broadly endorsed by contemporary Aboriginal communities, it is not the case that the *Charter’s* application would necessarily require a profound re-ordering of the collective life of Aboriginal societies. We must, therefore, reject the argument that the *Charter’s* application to inherent-right governments would violate Aboriginal sovereignty by requiring such drastic cultural change.

Perhaps, however, the *Charter’s* application would violate Aboriginal sovereignty in a more straightforward sense—i.e., by making the exercise of Aboriginal self-government beholden to a bill of rights that, while not ‘foreign’ in the sense of advancing values alien to contemporary Aboriginal peoples, is at least of rather foreign providence, in that it was not created by and for the Aboriginal communities upon which it is imposed. At this point, it will be helpful, in order to get clearer on what a violation of Aboriginal sovereignty might look like at law, to refer to the Supreme Court of Canada’s jurisprudence on the question of when it is permissible to limit constitutionally guaranteed Aboriginal rights.

Aboriginal rights are expressly “recognized and affirmed” by s. 35 of Canada’s *Constitution Act, 1982*. While the text of that provision provides no indication as to whether, or how, such Aboriginal rights could permissibly be limited by the federal or provincial governments, the view that s. 35 rights are absolute and subject to no limitation has been emphatically rejected by the Supreme Court. In the important 1990 Supreme Court decision in *Sparrow*, the Court laid out what has become known as the ‘*Sparrow* test’ for determining whether a given limitation of a s. 35 right—including, importantly for our purposes, the inherent right to self-government which is understood to be encompassed by s. 35—is justified. The first step of the justification test involves ascertaining whether the restriction on the Aboriginal right seeks to achieve a valid legislative objective. The second and final step requires determining whether the legislative objective has been pursued in a manner that upholds “the honour of the Crown,” in the sense of discharging its “responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”<sup>100</sup>

In laying out the “*Sparrow* test”, the Supreme Court of Canada held that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal

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<sup>98</sup> John Tomasi, “Kymlicka, Liberalism, and Respect for Cultural Minorities” (1995) 105:3 *Ethics* 580 at 600 (emphasis in original).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Sparrow*, *supra* note 17 at paras 58–59 (Q1).

rights.”<sup>101</sup> In the *Van der Peet* decision in 1996, a seven-member majority of the Supreme Court of Canada held that the underlying purpose of s. 35(1) is to effect a reconciliation between Crown sovereignty on the one hand and the prior occupation of Canada by Aboriginal peoples —“the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures”—on the other.<sup>102</sup> In this way, and returning to our earlier inquiry, federal or provincial legislation will, according to Canadian law, unduly undermine a s. 35 right (such as the inherent right of self-government) where the legislation would limit that right in a way that is inconsistent with achieving the sort of reconciliation the Supreme Court of Canada has said that s. 35 ultimately aims at.

As will be discussed below, it is quite doubtful that the *Sparrow* test would apply, as a matter of law, in cases where the action of an inherent-right government is struck down for non-conformity with the *Charter*. However, I believe that turning to the logic of the *Sparrow* test is helpful in trying to determine whether the *Charter*’s application to inherent-right governments would unduly undermine the sovereignty of the latter. Taking the central question that animates the *Sparrow* test and applying it in the context of the *Charter*’s application to inherent-right governments leads us to query whether the *Charter*’s application would be consistent with the effort to achieve a reconciliation of Crown and Aboriginal sovereignty.<sup>103</sup> We should not, in other words, address the question of whether the *Charter*’s application to Aboriginal governments violates the sovereignty of the latter *in isolation*. Rather, we must also inquire into what effect ruling out the *Charter*’s application would have on the sovereignty of the Crown. There is thus something of a balancing act to be performed; neither Crown sovereignty nor Aboriginal sovereignty is absolute, and both may need to be constrained in certain ways in order to harmoniously co-exist with the other.

How are we to go about striking the balance that reconciliation requires? If Aboriginal and Crown sovereignty are taken as absolute, then the two things are flatly *irreconcilable*: for either sovereignty to be worthy of the name it would not be susceptible to limitation by the other. However, as mentioned above, we should not understand sovereignty in this absolutist sense. Instead, we should regard the Crown and Aboriginal peoples as possessing shared, or merged, sovereignty. At the same time, while it makes sense to speak of shared sovereignty, there does appear to be a zero-sum quality to sovereignty. The sovereignty of the Crown does not cease just because Aboriginal nations also exercise sovereignty within Canada. However, the fact that Aboriginal nations exercise sovereignty—at least within their respective jurisdictions, and in respect of certain fields of governance—means that the Crown exercises less sovereignty than it otherwise would. Where two or more groups exercise sovereignty in a particular political community—putting aside the possibility of discovering new territories or opening up new legislative fields—an increase in one party’s sovereignty will mean a decrease in the other’s.<sup>104</sup>

This zero-sum quality is important for the following reason. The Canadian *Charter* is the product of the Crown exercising its sovereign authority to lay down laws of constitutional status. To say that it should not to apply to all orders of government within the boundaries of the Canadian state can, therefore, reasonably be seen as advocating for a limit on Crown sovereignty. That is, to limit the range of governments to which the *Charter*

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<sup>101</sup> *Ibid* at para 62 (QL).

<sup>102</sup> *Van der Peet*, *supra* note 70 at para 31.

<sup>103</sup> Shortly below, we will question whether these respective sovereignties are in fact what we should understand s. 35 as seeking to reconcile.

<sup>104</sup> To be clear, what I am claiming is that sovereignty admits of degrees. That is, where a body fails to possess a threshold level of legitimate law-making authority, then that body is not sovereign. But it is also true that law-making bodies will vary in how far above that threshold they fall, with those far above the threshold exercising more sovereignty than those just barely above it.



applies, given that it is the product of an exercise of Crown sovereignty, is *ipso facto* to limit Crown sovereignty itself. At the same time, however, to apply the *Charter* to inherent-right governments and thereby constrain the way in which these governments can exercise their sovereignty is to limit that sovereignty. The question is thus: what would best achieve a reconciliation of Aboriginal and Crown sovereignty—requiring inherent-right governments to operate in accordance with the *Charter*, or allowing them to exercise self-government free from the *Charter*'s constraints?

On the whole, I believe that such reconciliation would be best achieved by allowing inherent-right governments to operate free from *Charter* scrutiny. That the Canadian *Charter*—again, a product of the exercise of Crown sovereignty—should apply in inherent-right communities and thereby continuously restrict the way in which those communities' governments can exercise their constitutional right to self-government would be a far greater and more direct limitation on Aboriginal sovereignty than would be the impairment of Crown sovereignty were the *Charter* deemed inapplicable to inherent-right governments. If our objective is to reconcile these two sovereignties, and if regardless of whether we accept or reject the *Charter*'s application to inherent-right governments we will have to abide some curtailment of either Crown or Aboriginal sovereignty, then we should simply choose the lesser evil, so to speak. That is, if Option 1 would limit Aboriginal sovereignty quite significantly and Crown sovereignty not at all, and Option 2 would limit Crown sovereignty rather marginally and Aboriginal sovereignty not at all, we should show favouritism to neither Crown nor Aboriginal sovereignty per se, and should instead select Option 2 on the grounds that the limitation on sovereignty (of either sort) that we will thereby bring about is less than that which would be brought about were we to choose the other option.

It might be argued, however, that having the *Charter* apply to inherent-right governments actually represents a more natural equilibrium point, from the point of view of a concern for an equitable reconciliation of Aboriginal and Crown sovereignty. For instance, it might be pointed out that the *Charter* already constrains the exercise of Crown sovereignty, by requiring that federal and provincial government legislation accord with the *Charter*'s rights and freedoms in order to be legally valid. On this view, since the *Charter* already limits Crown sovereignty, it is right and proper, and fully in keeping with a two-way process of reconciliation, for it to likewise constrain the exercise of Aboriginal sovereignty. The flaw in this line of thinking, however, is that the *Charter* is itself an exercise of Crown, and not Aboriginal, sovereignty. Thus, while Crown sovereignty is in a real sense limited by the *Charter*, this limitation is a *self-imposed* one. The same could obviously not be said of the limitation on Aboriginal sovereignty that the *Charter*'s application to inherent-right governments would occasion.

Alternatively, it might be noted that at present Crown sovereignty is constrained by the need to respect those Aboriginal rights guaranteed by the Constitution (whose impairment is held to be justified only where the *Sparrow* test is met). Further, we can observe that the legal test for whether an Aboriginal right is made out—the *Van der Peet* test, named after the Supreme Court of Canada decision in which it was first articulated—focuses on whether the activity that an Aboriginal group is claiming a right to engage in is an “element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,”<sup>105</sup> and requires that “the practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.”<sup>106</sup> Since we can see the particular culture of any given pre-contact society as a function of the way in which it chose

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<sup>105</sup> *Van der Peet*, *supra* note 70 at para 46.

<sup>106</sup> *Ibid* at para 59.

to exercise its sovereignty, it does not seem too much of a stretch to say that Crown sovereignty is already, to an extent, constrained by the exercise of Aboriginal sovereignty.<sup>107</sup> That is, Crown sovereignty, under the *Sparrow* test, may only be exercised in ways consistent with respect for Aboriginal rights, and these rights are in turn ascertained (pursuant to the *Van der Peet* test) with reference to how Aboriginal sovereignty was exercised. These facts might, therefore, be marshalled to support the following conclusion: requiring Aboriginal sovereignty to be exercised in a manner consistent with Crown sovereignty, which is what the *Charter's* application to inherent-right communities would amount to, is demanded by simple reciprocity.

This argument must be rejected, however. Not only, as mentioned above, would requiring inherent-right governments to exercise their sovereignty only in accordance with the *Charter* be a far greater limitation on Aboriginal sovereignty than is demanding that the Crown not exercise its sovereignty in ways that violate the special rights of Aboriginal peoples, but there is already the right sort of reciprocity in place. For instance, it is true that Aboriginal rights are understood under Canadian law as entitlements held by Aboriginals (both individual Aboriginals and Aboriginal collectives), in virtue of their being Aboriginal.<sup>108</sup> We would have the appropriate analogue, then, of the way in which Crown sovereignty is constrained by the special rights of Aboriginal peoples *qua* Aboriginals, if it were the case that Aboriginal sovereignty is similarly constrained by special rights held by the Crown *qua* Crown. And that is in fact the case. Specifically, Aboriginal sovereignty cannot be exercised in a manner inconsistent with the Crown's *sui generis* 'right' to exercise what are known as "Crown prerogatives" (or "royal prerogatives"). No Aboriginal nation, for example, can declare that Canada is at war, or deny a particular person a Canadian passport. With this in mind, we must conclude again that exempting inherent-right governments from the requirement to operate in compliance with the *Charter* would be consistent with an equitable, two-way attempt to achieve a reconciliation of Crown sovereignty and Aboriginal sovereignty.<sup>109</sup>

#### IV. Rethinking Reconciliation

Above, we considered whether the application of the *Charter* to inherent-right governments is appropriate in light of an understanding that the Aboriginal right of self-government enshrined by s. 35(1) aims to reconcile Aboriginal sovereignty with the

<sup>107</sup> This is what Paul LAH Chartrand, "Reconciling Indigenous Peoples' Sovereignty and State Sovereignty" (23 July 2018), online (pdf): Australian Institute of Aboriginal and Torres Strait Islander Studies <aiatsis.gov.au/sites/default/files/products/discussion\_paper/chartrandp-dp26-reconciling-indigenous-peoples-sovereignty-state-sovereignty\_0.pdf> seems to have in mind when he writes at 16 that "the political action of Aboriginal peoples matters in law and politics. The political action mattered historically, and thereby the interests of Aboriginal peoples crystallized into rights recognisable and enforceable within the Canadian and Australian legal systems." That is, 'political' decisions by Aboriginal peoples today, about how or whether to keep up and regulate an activity with pre-contact roots integral to the group's distinctive culture, will "inform the dynamic evolution of the law of the constitution of Canada" (at 12).

<sup>108</sup> See *Van der Peet*, *supra* note 70 at para 19: "Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*." (Emphasis in original.) See also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 at 776; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29:2 Alta L Rev 498 at 498–502.

<sup>109</sup> Glen Coulthard has written passionately to warn that attempts at 'reconciliation' and securing 'recognition' of Indigenous difference are wrongheaded as they actually do violence to indigeneity, and involve an ultimately degrading process of seeking appreciation from the perpetrators of colonialism (See Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014)). To be clear, I am insisting that reconciliation must be a genuinely mutual, two-way process, involving a search for a way forward that is conducted jointly by parties that already appreciate and respect the other party, as evidenced by recognition on the part of both parties that there exist significant cultural and even epistemological differences between them that are not to be eliminated, but rather bridged in a spirit of acceptance.

sovereignty of the Crown. This view of what it is that s. 35(1) seeks to reconcile is open to question, however. A look at the Supreme Court of Canada case law, for instance, reveals that there has been considerable evolution on this issue.<sup>110</sup> In the *Sparrow* decision of 1990 that we have already mentioned, the Court writes that “federal power must be reconciled with federal duty.”<sup>111</sup> Aboriginal sovereignty per se does not factor in at all under this formulation, and Aboriginal rights generally are only relevant to the reconciliation process in so far as the Crown is under a ‘federal duty’ to respect them.<sup>112</sup> This unsatisfactory conception of reconciliation was revised in the 1996 *Van der Peet* decision, in which the Court stated that s. 35(1) aims for the “reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>113</sup> The Court’s judgment in *Gladstone*, also handed down in 1996, offered a more expansive view of reconciliation. In that case, Lamer C.J.’s judgment for the majority, although it also spoke of “the reconciliation of aboriginal societies with the broader political community of which they are part,”<sup>114</sup> stated that what s. 35(1) seeks to reconcile is “the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory.”<sup>115</sup> According to one commentator, in so doing, “the Gladstone Court sli[d] into” an understanding of reconciliation as “what might be termed ‘social reconciliation?’”<sup>116</sup>

The emphasis on a wide-ranging ‘social reconciliation’ of Aboriginal prior occupation and the assertion of Crown sovereignty might seem to be in keeping with a clear-eyed view of the pervasive disharmony between the Crown and Aboriginal nations. However, the aptness of the descriptor ‘social reconciliation’ really lies in the extent to which the *Gladstone* articulation of reconciliation opened the door to a very wide range of social policies being regarded as potentially capable of overriding Aboriginal rights. For example, the Court in *Gladstone* held that Aboriginal rights needed to be weighed against “objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups,”<sup>117</sup> as well as environmental conservation.<sup>118</sup> Moreover, the Court made clear, “[i]n the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.”<sup>119</sup>

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<sup>110</sup> As Dwight Newman observes, “there is actually a set of conceptions, in the plural, of ‘reconciliation’ being applied in case law on section 35” (Newman, “Reconciliation: Legal Conception(s) and Faces of Justice,” in John D Whyte & Saskatchewan Institute of Public Policy, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publications, 2008) at 80).

<sup>111</sup> *Sparrow*, *supra* note 17 at para 62 (QL).

<sup>112</sup> The minority judgment of Major and Binnie JJ. in *Mitchell*, *supra* note 92 at para 129, however, suggests that what is to be reconciled is Crown sovereignty and Aboriginal rights. That judgment also asserts, however, that “the purpose of s. 35(1)” is “the reconciliation of the interests of aboriginal peoples with Canadian sovereignty” (para 164; emphasis added), while at the same time describing “reconciliation of aboriginal peoples with Canadian sovereignty” as “the purpose that lies at the heart of s. 35(1)” (para 74).

<sup>113</sup> *Van der Peet*, *supra* note 70 at para 31.

<sup>114</sup> *Gladstone*, *supra* note 70 at para 73.

<sup>115</sup> *Ibid*. This is in fact in line with what was said at para 43 of the majority decision in *Van der Peet*, *supra* note 71 at para 43: “prior occupation is [to be] reconciled with the assertion of Crown sovereignty over Canadian territory.” Similar language can be found in *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657 at para 57, and *Delgamuukw*, *supra* note 70 at para 81, and again in *Manitoba Metis Federation Inc v Canada (Attorney General)*, [2013] 1 SCR 623, 355 DLR (4th) 577 at para 66. On the divergent understandings of reconciliation advanced by Lamer C.J. and McLachlin J. (as she then was) in the *Sparrow*, *Van der Peet*, and *Gladstone* decisions, see Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2:1 *Indigenous L.J.* 1 [McNeil].

<sup>116</sup> Rarihokwats, “Reconciliation: Resolving Conflict Between Two Absolute but Opposing Rights: Indigenous Nation ‘Sovereignty’ vs. Crown ‘Sovereignty’” (23 July 2018), online: <[www.academia.edu/21858174/Reconciliation\\_Indigenous\\_Nation\\_Sovereignty\\_v\\_Crown\\_Sovereignty](http://www.academia.edu/21858174/Reconciliation_Indigenous_Nation_Sovereignty_v_Crown_Sovereignty)>.

<sup>117</sup> *Gladstone*, *supra* note 71 at para 75.

<sup>118</sup> *Ibid* at paras 55–69.

<sup>119</sup> *Ibid* at para 75 (emphasis in original).

With a greater willingness in legal and governmental circles to accept that a right of Aboriginal self-government is encompassed by s. 35, the conception of reconciliation animating the Supreme Court's s. 35 jurisprudence began to place greater emphasis on Aboriginal sovereignty. The fact that distinctive communities of Aboriginal peoples occupied what is now Canada long before contact with Europeans shows that these Aboriginal communities were at the time sovereign over their lands. Further, in very many cases this sovereignty was not yielded up to the Crown, either by treaty or conquest. In the result, Aboriginal sovereignty remains something that has to be reckoned with today.<sup>120</sup> The strongest iteration of this view by the Supreme Court of Canada probably came in the *Haida Nation* case of 2004, in which the Court found that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with *assumed* Crown sovereignty.”<sup>121</sup> That case also cited *Van der Peet*, however, for the proposition that we should aim for “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>122</sup> The divergence in these two quotations reveals that the *Haida* decision vacillates on the issue of what to reconcile. Is it pre-existing Aboriginal sovereignty and asserted Crown sovereignty, or merely the pre-existence of Aboriginal peoples and actual Crown sovereignty? The former Dean of the University of New Brunswick's law school, Ian Peach, places emphasis on the former formulation, describing it as a “statement [...] that it is pre-existing Indigenous sovereignty that is to be reconciled with assumed Crown sovereignty.”<sup>123</sup>

Further divergent statements about what exactly is to be reconciled in order to achieve the promise of s. 35(1) can also be found in other Supreme Court decisions. In the 2001 *Mitchell* decision, for instance, the Court speaks of reconciling “the interests of aboriginal peoples with Canadian sovereignty,”<sup>124</sup> and asserts that “the objective of reconciliation of aboriginal peoples with Canadian sovereignty [...], as established by the *Van der Peet* trilogy, is the purpose that lies at the heart of s. 35(1).”<sup>125</sup> In *Taku River*, in language very similar to that used in *Haida Nation*, the Court identifies the purpose of s. 35(1) as “facilitat[ing] the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”<sup>126</sup> The very first sentence of the 2005 *Mikisew* decision, written by Binnie J. on behalf of a unanimous bench, boldly states that “[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”<sup>127</sup> A helpful way to understand what's going on in the Supreme Court of Canada's various descriptions of the reconciliation that s. 35(1) strives to advance might be to look to the words of British Columbia Supreme Court Justice D.H. Vickers, who explained in the course of his judgment in *Tsilhqot'in Nation v British Columbia*<sup>128</sup> (from which an appeal was later heard by the

<sup>120</sup> For an extended argument that such a reckoning with Aboriginal sovereignty is a necessary in order to make reconciliation, grounded in notions of equality and shared sovereignty, possible, see Felix Hoehn, *Reconciling Sovereignties, Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

<sup>121</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20 (emphasis added).

<sup>122</sup> *Ibid* at para 17.

<sup>123</sup> Peach, *supra* note 13 at 1.

<sup>124</sup> Mitchell, *supra* note 93 at para 164.

<sup>125</sup> *Ibid* at para 74.

<sup>126</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at para 42. As Mark D. Walters has noted recently, “[w]hat the Supreme Court of Canada really meant by the idea that

Aboriginal sovereignty is de jure and Crown sovereignty is de facto must await further analysis” (“Looking for a Knot in the Bulrush: Reflections on Law, Sovereignty, and Aboriginal Rights” in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 62.

<sup>127</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 1.

<sup>128</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 Vickers J.

Supreme Court of Canada) that the conception of reconciliation propounded by Lamer C.J. in *Van der Peet* “re-interpreted the *Sparrow* theory of reconciliation (a means to reconcile constitutional recognition of Aboriginal rights with federal legislative power) as a means to work out the appropriate place of Aboriginal people within the Canadian state.”<sup>129</sup>

So which view of reconciliation should we take? What precisely ought we to see as being in need of reconciliation? As a first step towards answering these questions, it will be helpful to develop a better understanding of what the concept of reconciliation entails. On this subject, legal scholar Mark Walters suggests that reconciliation involves “finding within, or bringing to, a situation of discordance a sense of harmony.”<sup>130</sup> He argues that we can understand reconciliation in three different senses: reconciliation as resignation (in the sense of “accepting or being resigned to a certain state of affairs that is unwelcome but beyond [one’s] control,”<sup>131</sup> reconciliation as consistency (for example rendering inconsistent entries in a financial accounting book consistent) and reconciliation as relationship (for example the “reconciliation of spouses after a period of separation”<sup>132</sup>). For Walters, reconciliation as relationship, “unlike the other two forms of reconciliation, is always, to a certain extent, two-sided or reciprocal.”<sup>133</sup> It “invariably... involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship.”<sup>134</sup>

When it comes to reconciling Crown sovereignty and Aboriginal sovereignty, what we should be aiming for is reconciliation as relationship. For our purposes, this is clearly the most normatively attractive of the three species of reconciliation.<sup>135</sup> That is, the reconciliation we are aiming to effect is very much reconciliation between partners in a relationship. We are trying to reconcile two sovereign communities united together in a single state, rather than two apparently discrepant entries in an accounting book. Similarly, the aim is not to have Aboriginal Canadians merely resign themselves to the denial of Aboriginal sovereignty and the violations of Aboriginals’ human rights that occurred in the past, but to establish a basis upon which the Canadian state and its Aboriginal peoples can move forward together in conditions of justice and mutual respect. In short, we should strive to achieve reconciliation as relationship and should aim, along the way, at reconciliation as resignation or as consistency only insofar as these latter two species of reconciliation help us to achieve reconciliation of the former sort.<sup>136</sup>

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<sup>129</sup> *Ibid* at para 1345 and 1358.

<sup>130</sup> Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka and Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008) 167.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid* at 168.

<sup>134</sup> *Ibid*.

<sup>135</sup> It is, however, open to question whether this is the sort of reconciliation that is actually closest in spirit to the vision of a reconciled Canada that the Supreme Court invokes in its s. 35 jurisprudence. *See e.g.* Walters’s view that the Supreme Court of Canada’s jurisprudence on reconciliation invokes a conception of reconciliation as consistency, albeit while “manifest[ing] some evidence of reconciliation as relationship as a normative principle” (*ibid* at 180), and his contention (*ibid* at 181) that the Supreme Court employed a conception of reconciliation as consistency in *Marshall*, *supra* note 70; *R v Bernard*, [2005] 2 SCR 220. *See also* Newman, *supra* note 110 at 80.

<sup>136</sup> Of course, much and indeed most of the work required to achieve a reconciliation of the relationship between the Canadian state and its Aboriginal peoples will take place outside of the legal system. McNeil, for instance, (*supra* note 115 at 23) reads the decision of McLachlin J. (as she then was) in *Van der Peet* as showing that she was “adamant that the way to reconciliation is through the consensual treaty process.”

Ultimately, the reconciliation process, as Walters, *supra* note 127, at 175 notes, should be one of “re-establishing relationships of trust, honour, respect, and tolerance between vastly different peoples at all levels, from individuals to local communities to governments.”

Having sharpened our understanding of the general concept of reconciliation, we can return to our earlier question: what precisely should we see s. 35 as aiming to reconcile? I believe that, as Vickers J. suggests, what we should wish to accomplish, and what we should regard as the underlying objective of s. 35(1), is nothing less than “work[ing] out the appropriate place of Aboriginal people within the Canadian state.”<sup>137</sup> That is, we should strive to reconcile Aboriginal peoples writ large (and not merely the sovereignty that is a feature of Aboriginal nations) with the Canadian state writ large (and not merely the fact of Crown sovereignty that is a feature of the Canadian state).

Why should we aim for reconciliation of this sort, as opposed to, say, the reconciliation of Aboriginal sovereignty and Crown sovereignty, or the reconciliation of Aboriginal peoples and non-Aboriginal peoples? The reason that it is preferable to regard s. 35(1) as striving for reconciliation between Aboriginal peoples and the Canadian state, as opposed to reconciling two apparently competing sovereignties, is that achieving the former sort of reconciliation affords a firmer basis for an enduring and inclusive Canadian identity that is shared by and reflective of Canada’s Aboriginal and non-Aboriginal communities. Merely reconciling Aboriginal and Crown sovereignty, for instance, does little, in itself, to ensure that Aboriginal peoples and the Crown can work together in common cause.<sup>138</sup> It seems correct, for example, to regard Canadian sovereignty as at present perfectly ‘reconciled’ with German sovereignty, and yet what clearly distinguishes the relationship between the Canadian and German states on the one hand, and that between the Canadian state and its Aboriginal peoples on the other, is that Canada’s Aboriginal nations are not external sovereigns but rather part of the Canadian state itself.

Similarly, it is preferable to regard s. 35(1) as striving for a reconciliation between Aboriginal peoples and the Canadian state, as opposed to reconciling Canada’s Aboriginal peoples with its non-Aboriginal peoples (as suggested in *Mikisew*), because the latter directive fails to sufficiently acknowledge the way in which Aboriginal and non-Aboriginal peoples, while culturally distinct in important ways, at the same time also comprise one people and one political community.<sup>139</sup> What is required, then, is to reconcile the state of Canada with a long marginalized and disrespected segment of its populace. We should strive to achieve a reconciliation between Canada’s Aboriginal peoples and a Canadian state that, despite simultaneously demanding their loyalty and obedience, has historically oppressed those peoples.

#### A. *Is the Charter’s Application Consistent with an Expansive View of Reconciliation?*

As we saw, the *Charter’s* application to inherent-right governments would amount to a limitation on the s. 35 right of Aboriginal self-government. We should ask, however, whether the *Charter’s* application to such governments is nevertheless consistent with the reconciliation objective animating s. 35(1), once that reconciliation is conceived of as a reconciliation between the Canadian state and its Aboriginal peoples. I believe the answer to this question is yes. If our concern were merely to achieve a balanced reconciliation of Aboriginal and Crown sovereignty, we should conclude that inherent-right governments should be free to exercise self-government without being subject to *Charter* scrutiny, whereas the federal and provincial governments, and Aboriginal governments exercising delegated

<sup>137</sup> *Tsilhqot’in Nation*, *supra* note 128, at para 1345 (drawing on the words of Gordon Christie, “Aboriginality and Normativity: Judicial Justification of Recent Developments in Aboriginal Law” (2002) 17 Can J L & Soc 41 at 69–70).

<sup>138</sup> As Binnie J. wrote in *Mitchell*, *supra* note 93 at para 133, “The constitutional objective is reconciliation not mutual isolation.”

<sup>139</sup> This idea of partnership is caught by the Lamer formulation of reconciliation of “aboriginal societies with the broader political community of which they are part.” (My talk of ‘the Canadian state’ and its central ‘institutions’ can be regarded as simply a further elaboration of what Lamer C.J. referred to as the Canadian ‘political community’.)

powers, or exercising self-government pursuant to a negotiated agreement explicitly providing for the *Charter's* application, should be subject to the *Charter*. However, when it comes to the goal of reconciling Aboriginal peoples with the Canadian state, the *Charter's* application to inherent-right governments would on the whole advance rather than undermine that objective.

The main reason for this is because of the simple fact that the *Charter* is a central feature of the fundamental architecture of the Canadian state. It is not only legally entrenched in the Constitution but is also, as noted above, now firmly entrenched in the minds of most Canadians as a central part of what it means to be Canadian. The *Charter* today pervades legal and political decision-making; its provisions are top of mind among policy-makers and legislative drafters. It is used to interrogate huge swathes of Canadian law. Further, its *values* have, by a kind of osmosis that goes beyond the direct application of the *Charter's* text by courts, and even beyond the pre-emptive shaping of legislation at the drafting stage in order to avoid the courts striking down portions of the law for non-conformity with the *Charter*, impacted Canadian society and politics in myriad ways.<sup>140</sup> It would be strange, therefore, to claim that the Constitution's guarantee of Aboriginal rights in s. 35 should be interpreted in such a way as to advance a reconciliation of Aboriginal peoples and the Canadian state, and then claim that we needn't strive for a reconciliation of Aboriginal self-government and a key part of the basic law—i.e., the Constitution—that lays out the fundamental structure of that very state.<sup>141</sup>

It is highly instructive to note, furthermore, that s. 35 of the *Constitution Act, 1982* does not contain a limitations clause similar to the *Charter's* s. 1. A logically plausible interpretation of s. 35, therefore, would be that the Aboriginal rights that the section 'recognizes and affirms' are absolute and not subject to any limitations. Of course, the Supreme Court decided otherwise when it essentially read in a limitations clause in the course of articulating the *Sparrow* test. Given that the Court in *Sparrow* decided to go beyond the text of s. 35 and hold the Aboriginal rights contemplated therein to be subject to limitation in order to achieve 'valid legislative objectives', we can expect that it will find—and, in the name of consistency, it should find—that the s. 35 right of self-government is also subject to limitation in order to protect the fundamental rights and freedoms the *Charter* enumerates.<sup>142</sup>

## V. Section 1 and a Flexible Application of the Charter

We have found, then, that it is appropriate, and consistent with the objective of reconciling Aboriginal peoples and the Canadian state of which they are a part, for the *Charter* to apply to inherent-right governments. An important part of the process of applying the *Charter* in real-world cases is of course the s. 1 inquiry. That is, where some action by an inherent-right government is alleged to violate a *Charter* right, the Aboriginal government will be provided an opportunity (pursuant to s. 1 of the *Charter*) to prove to a

<sup>140</sup> One example of this is the way in which Canadian administrative law doctrine requires administrative action to comport with "*Charter* values" (*Doré v Barreau du Québec*, [2012] 1 SCR 395).

<sup>141</sup> It is important to note that I am not claiming that wherever an Aboriginal right is exercised in such a way as to violate a *Charter* right, the *Charter* right must always be vindicated and the Aboriginal right limited. It is possible, for instance, that the objective of reconciliation might recommend that a treaty right, say, should prevail even where its exercise has led to a violation of a *Charter* right.

<sup>142</sup> While the Supreme Court of Canada has not yet been called upon to do so, the Court has gone out of its way *not* to read s. 25 of the *Charter* as straightforwardly ousting *Charter* review of those s. 35 Aboriginal rights also contemplated by s. 25 (see *Kapp*, *supra* note 13). Further, as observed above, all of the noises emanating from the Supreme Court of Canada on the question of how to interpret s. 25 appear to be "in favour of the *Charter's* having some application to Aboriginal governments" (Milward, *supra* note 9, at 66).

reviewing court that the action in question amounts to a reasonable limit on the relevant *Charter* right. Even so, we might harbour a lingering sense that the *Charter's* application in inherent-right communities could do cultural violence to these societies.

At this point, it would be helpful to get clear on exactly which rights, if enforced against particular Aboriginal governments, will cause social disruption, and what the scope of such disruption is likely to be. Critics of the *Charter's* application disappoint on this score.<sup>143</sup> However, there are a few specific *Charter* provisions that are identified in the literature as being especially problematic, and these do suggest that applying the *Charter* to inherent-right governments in the same way that it is applied to other levels of government could cause special hardship for Aboriginal communities. For instance, Kerry Wilkins gives the examples of s. 6 and s. 11(d) of the *Charter*. Section 11(d) guarantees the right of all Canadians to an independent and impartial adjudication of their case if charged with an offence. Section 6, according to Wilkins, “could give to any Canadian citizen or permanent resident the constitutional right to take up residency and work at any time in any inherent-right community, subject only to general community rules and reasonable residency requirements.”<sup>144</sup> Wilkins argues, however, that if inherent-right governments were required to act in accordance with s. 6, the result could be the exposure of Aboriginal “communities’ unique and fragile traditions to still further pressures from the mainstream cultures that most new residents would bring with them when they took up residence.”<sup>145</sup> As for the guarantees of independence and impartiality in s. 11(d), Wilkins admits that these are “absolutely essential” “[w]ithin the mainstream system,”<sup>146</sup> but warns that they could have disastrous consequences for Aboriginal dispute resolution. Specifically, Wilkins notes that “[f]rom the standpoint of traditional aboriginal justice,” the very attribute of detached independence given so much weight by the mainstream justice system, “would disqualify someone from making any useful or authoritative contribution to the task” of conflict resolution.<sup>147</sup> Since traditional Aboriginal notions of discipline and dispute resolution conceive of wrongdoing as incidents of community disharmony, and thus are often seen to *require* that community elders involved in resolving disputes be personally acquainted with “the histories and personal circumstances”<sup>148</sup> of all involved, to insist instead that adjudicators within these communities be entirely independent of the parties “would very probably undermine and transform the entire basis of internal community discipline.”<sup>149</sup>

We might label the larger argument being made here, in line with Patrick Macklem’s summary of it, as the “rigid analytic grid” argument. According to Macklem:

...the *Charter* does pose a risk to the continued vitality of indigenous difference. The *Charter* enables litigants to constitutionally interrogate the rich complexity of Aboriginal societies according to a rigid analytic grid of individual right and state

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<sup>143</sup> But see Russell, *supra* note 20 (itemizes for consideration section 3 of the *Charter* and its application to “clan mother elections”, as well as the *Charter's* “double jeopardy clause” and its “insulat[ing an individual] from having to speak on his or her behalf in court” at 183).

<sup>144</sup> *Supra* note 6 at 85. (As it happens, this appears to be a misreading of s. 6(2) of the *Charter*, which grants to every Canadian citizen and permanent resident the right “to move to and take up residence *in any province*” (emphasis added). The section on its face says nothing about Canadians possessing a right to take up residence in particular communities within the provinces).

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid* at 92.

<sup>147</sup> *Ibid* at 93.

<sup>148</sup> *Ibid* at 91.

<sup>149</sup> *Ibid* at 93.



obligation. It authorizes judicial reorganization of Aboriginal societies according to non-Aboriginal values.<sup>150</sup>

I believe that the rigid analytic grid argument, properly understood, does have considerable force, since applying the *Charter* to Aboriginal governments in exactly the same way that it is enforced against the governments of Canada and the provinces could indeed require Aboriginal communities to significantly alter their traditional practices and customs in order to accord with *Charter* jurisprudence regarding how basic liberties should be protected.

What reason might we have for such a fear, in light of all we said above about Aboriginal peoples today embracing ideals of personal autonomy and, according to a preponderance of available evidence, generally embracing the *Charter* itself? The correct response here is to distinguish between a commitment to personal autonomy and the *Charter's* values, on the one hand, and a commitment to the entire litany of rights set out by the *Charter*, and the surrounding jurisprudence over the precise contours of these rights, on the other. Simply put, the *Charter* is not just an autonomy-securing document. The specific formulation of rights contained in the *Charter* is not the one true articulation of a commitment to individual autonomy and basic human rights; the latter does not lead ineluctably to the former. As Joseph Carens observes, for example, “[t]he *Charter* is not something that directly translates abstract individual rights into social realities. It is not applied liberalism, pure and simple [...]”<sup>151</sup>

Claiming that there is a ‘rigidity’ to the *Charter* (and how it is applied to the federal and provincial governments) allows us to see that imposing it on Aboriginal governments in exactly the same way it is currently applied to the other levels of government can be problematic. However, it is important not to take this concern with the *Charter* as a rigid analytic grid too far. As an argument that the *Charter* should not apply at all to inherent-right governments, for instance, it has much in common with the alien values argument we explored in great detail above. To the extent that Macklem’s assertion might be used to suggest that the entire conceptual framework of individual rights is foreign to Aboriginal societies, we will proceed on the grounds that this claim was successfully refuted above. The rigid analytic grid argument should therefore not be seen as proving that the *Charter* can have *no application* to inherent-right governments without destroying Aboriginal difference. For all the reasons already canvassed, that is not the proper conclusion to draw. A sensible middle-ground is to argue that the *Charter* should be *flexibly* applied to inherent-right Aboriginal governments.

Precisely how, then, should s. 1 be applied so as to, in the language of David Milward, “realize a culturally sensitive interpretation” of the *Charter*?<sup>152</sup> Might it not even be optimistic to the point of naiveté to believe that Canadian courts—being institutions deliberately constructed so as to mirror European courts, and staffed overwhelmingly by non-Aboriginal judges—could apply the reasonable limits test in such a way as to give adequate weight to the cultural practices and beliefs that animate the relevant Aboriginal government’s impugned action?

Clearly, when it comes to navigating an appropriate path between the *Charter's* human rights protections and the Aboriginal sovereignty that forms the basis of the

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<sup>150</sup> *Supra* note 8 at 195.

<sup>151</sup> *Supra* note 43 at 192.

<sup>152</sup> *Supra* note 9 at 62–77.

Constitution's guarantee of the Aboriginal right of self-government, the s. 1 analysis—an analysis of whether governmental action found to impair a *Charter* right or freedom nevertheless constitutes a reasonable limit on that right or freedom pursuant to the so-called *Oakes* test that was formulated for this purpose by the Supreme Court of Canada in 1986 in *R v Oakes*—is essentially where the rubber meets the road. And admittedly, the argument that reconciliation is best advanced by applying the *Charter* to Aboriginal governments places a considerable amount of faith in the ability of the s. 1 inquiry to navigate this slippery terrain. That faith, however, is not misplaced. The main reason this is so is because the *Oakes* test already mandates a contextual inquiry into the circumstances in which, and reasons for which, the impugned governmental action was taken.<sup>153</sup> This is precisely what is required in order to ensure that courts pay due regard to the values and traditions that inherent-right governments may seek to advance by way of action that limits *Charter* rights.

For example, under the first prong of the *Oakes* test, courts must begin their analysis of whether a limitation on a *Charter* right is “demonstrably justified in a free and democratic society”<sup>154</sup> by asking whether the objective behind the governmental action is “pressing and substantial.”<sup>155</sup> This stage of the *Oakes* test allows for a contextual inquiry not only into the specific intentions animating the relevant Aboriginal government, but also into the specific community at issue. Section 1, which contemplates some limits on *Charter* rights as being reasonable in a free and democratic society, should thus not be read as referring only to the wider, *non-Aboriginal* free and democratic society. Rather, in determining whether some Aboriginal government's action, which has limited a *Charter* right, is ‘pressing and substantial’, we should have regard to the beliefs and cultural practices that characterize the particular community in question. We should ask whether the objective is a pressing and substantial one for the leaders of a community that instantiates those beliefs and those practices and which is at the same time a part of the larger Canadian political community. In this way, the inquiry into whether a given limitation of a *Charter* right is ‘demonstrably justified in a free and democratic society’ will take as its subject of analysis an appropriately particular, contextualized ‘free and democratic society’.

What this means, in practice, is that we should be open to the possibility that a measure taken by a given inherent-right government, and which imposes a limit on *Charter* right, may rightly be held to be a reasonable limit on that right, whereas were the federal or a provincial government to implement the same measure, it would thereby unreasonably limit the relevant *Charter* right.<sup>156</sup> The reason that we should accept this state of affairs, of course, is due to the fact that prevailing community beliefs and practices will vary depending upon which community within Canada we have in mind. This being the case, and in light of the fact that a particular community's norms and traditions are relevant to the question of whether the objective behind some act of the community's government is pressing and substantial, it follows that a governmental action that would be an unjustified violation of a *Charter* right in the context of one community may amount to a reasonable limit on that right if taken in a different community. In short, the courts must accept, when applying the

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<sup>153</sup> The contextual nature of the inquiry is evident, for instance, in the famous Quebec sign law case of *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 73, where the Court found that in light of the special circumstances of Quebec, “the aim of the language policy underlying the *Charter of the French Language*”, namely, “the defence and enhancement of the status of the French language in Quebec,” was “a serious and legitimate one.”

<sup>154</sup> *Canadian Charter*, *supra* note 11 at s 1 (“[t]he Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

<sup>155</sup> *R v Oakes*, [1986] 1 SCR 103 at para 69.

<sup>156</sup> Compare Wilkins, *supra* note 6, at 107: “[b]ecause the rights guaranteed in the *Charter* are not designed to make allowance for aboriginal difference, it may well seem appropriate for courts to be more generous than usual when inherent-right communities are the ones engaged in the justification exercise.”

*Oakes* test, that the proper safeguarding of *Charter* rights can occur in different ways in different cultural contexts.

It is important to keep in mind, however, that if our goal is to eventually achieve a full reconciliation of Aboriginal peoples and the Canadian state of which they are part, we cannot simply regard any and all measures taken by inherent-right governments that aim to continue a community practice as thereby aiming at a pressing and substantial objective. The reason for this is that it is quite possible to imagine an established cultural practice within an Aboriginal community that is in irresolvable tension with certain rights guaranteed by the *Charter*. Further, just as ‘maintaining our traditions’ cannot be taken, per se, as a pressing and substantial objective for the purposes of the *Oakes* test, neither can ‘exercising Aboriginal self-government.’ That is, while any measure implemented by an inherent-right government could sensibly be characterized as an exercise of Aboriginal self-government, we must resist any temptation we might feel to regard all such measures as therefore necessarily animated by a ‘pressing and substantial’ objective. To do otherwise would not be in keeping with the goal of reconciliation, nor would it be in keeping with decades of established case law, which has consistently held that for the purposes of the *Oakes* test the objective of governmental action must be narrowly defined.<sup>157</sup>

Ultimately, then, what this sort of flexible s. 1 analysis is committed to is the view that, while there are some fundamental human rights that prevail across Aboriginal and non-Aboriginal Canadian societies,<sup>158</sup> these rights may, again, legitimately find different expression within different cultural contexts.<sup>159</sup> A culturally deferential s. 1 inquiry not only treats this as a real possibility, it also aims to promote a form of dialogue between Aboriginal governments and the non-Aboriginal dominated judiciary.<sup>160</sup> Specifically, it supports a greater understanding of Aboriginal cultural values by mainstream courts, since it encourages Aboriginal governments and other members of the community to explain why,

<sup>157</sup> *R v KRJ*, [2016] 1 SCR 906 at para 63; *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para 22; see also *Tetreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22.

<sup>158</sup> To be clear, for the conclusion that the entirety of the *Charter* ought to apply to self-governing inherent right Aboriginal governments to be sound, it is not required that the rights enshrined in the *Charter* reflect only interests that are universally held by all human beings. (My own view is that the vast majority, at least, of the *Charter*’s protections do reflect universal basic interests.) We can confine the inquiry, instead, to whether the *Charter*’s rights are in any event compatible with the interests of Canada’s Aboriginal peoples. And even if we take the specific *Charter* right that is most arguably incompatible with the cultural values of some of Canada’s Indigenous peoples—s. 11(d)’s guarantee of the “right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”—we still find, I believe, that the underlying interest that this right serves to protect is indeed shared by Aboriginal and non-Aboriginal Canadians alike (and, I would argue, by all peoples everywhere). Specifically, given s. 11(d)’s evident purpose of ensuring a fair hearing, courts should not regard its use of the word ‘independent’ as categorically forbidding anyone who is well acquainted with an accused from determining what dispute resolution steps ought to be taken in their case. We can and should, instead, regard an ‘independent’ tribunal for the purposes of s. 11(d) as one that is not beholden to, or subject to the control or undue influence of, a party to the dispute. Once we have settled on this interpretation, two facts become clearer to us: firstly, that s. 11(d) ultimately reflects a universal human interest; and, secondly, that the right enshrined in s. 11(d) may legitimately find different expression in different cultural contexts. For instance, in the non-Aboriginal context—which, let us assume, lacks the traditions of harmony-restoring dispute resolution procedures partaken of by individuals generally well-acquainted with one another, such as are alive and well in many Aboriginal communities in Canada—ensuring that there is not even an appearance of favouritism or undue influence may well require the sort of independence prized by the non-Aboriginal Canadian legal system—i.e., dispassionate unfamiliarity. But mandating that tribunals be independent according to this latter conception of independence may well not be necessary to support—and could conceivably even undermine—the objective of securing fairness in dispute resolution settings within a given Aboriginal community.

<sup>159</sup> As legal scholar Jeremy Webber puts it with respect to rights more generally, “the same abstract right may legitimately, when instantiated within different legal traditions, take different forms, just as, for example, substantially the same commitment to private property is, in the common- and civil-law traditions, translated into quite different legal concepts” (Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston: McGill-Queen’s University Press, 1994) at 249).

<sup>160</sup> It is possible, although I think ultimately incorrect, to read s. 25 as mandating a culturally deferential interpretation of the *Charter*’s provisions wherever these regulate Aboriginal government action. See Royal Commission: Restructuring the Relationship, *supra* note 6 (“[u]nder section 25, the *Charter* must be interpreted flexibly to account for the distinctive philosophies, traditions and cultural practices of Aboriginal peoples” at 160); See also Hogg and Turpel, *supra* note 7 (“[s]ection 25 allows an Aboriginal government to design programs and laws which are different, for legitimate cultural reasons, and have these reasons considered as relevant should such differences invite judicial review under the *Charter*” at 215).

in light of the particular cultural circumstances of the group, certain *Charter* rights ought to be realized in a manner that differs from the way in which these rights are realized in the wider community.

Importantly, this culturally-sensitive *Oakes* test does not embrace moral relativism. It does not suggest that the individual rights that should be observed by Aboriginal governments are whatever rights their members wish to see observed, for instance. Rather, the question of whether a right-impairing policy amounts to a reasonable limit on that right depends in part on the importance of the objective it seeks to advance. Since the importance of a collective goal is at least partly a function of the values and traditions of the relevant collectivity, the same right-limiting policy might amount to a reasonable limit in one political community and an unreasonable limit in another. Thus, in affirming that some legal rights—such as, perhaps, the right that one’s case be heard by a stranger (or near stranger)—are only essential to protect individual freedom in certain settings, we opt for a morally objectivist position. Indeed, to assume that anything labelled a ‘right’ is necessarily of great value in all times and all places, without looking carefully at whether that right is itself merely the product of one time and place, is to take the path of moral absolutism.

## Conclusion

The question of whether the *Charter* should apply to constrain the actions of inherent-right Aboriginal governments is a difficult one. For reasons of space, we have largely had to put aside arguments to the effect that specific provisions of the *Charter* (such as s. 11(d) in particular) make demands that are simply inappropriate in the context of many Aboriginal communities. We have likewise been unable to take up the claim that the nature of Aboriginal customs means that they will inevitably confound the *Charter*’s section 1 analysis.<sup>161</sup> Even if we assume, as I believe, that these objections are superable, to claim that the *Charter* ought to restrain Aboriginal governments exercising the inherent right of self-government exposes one to the accusation that one has failed to adequately respect that collective right, and has thereby not properly reckoned with the reality of Aboriginal sovereignty. Moreover, the rejoinder that the collective right of self-government is not absolute and must be exercised in accordance with the rights and freedoms guaranteed in the *Charter* is likely to elicit, from those opposed to the *Charter*’s automatic application<sup>162</sup> to these governments, the charge that one is countenancing a kind of cultural imperialism, in which the collectivist and harmony-seeking traditions of Aboriginal groups can find legitimate governmental expression only insofar as they are cognizable within, and acceptable to, a legal system steeped in the hostile individual rights paradigm of liberalism.

Fortunately, as Patrick Macklem has observed, the *Charter* “presents numerous interpretive opportunities to minimize the potentially corrosive effects that litigation might have on Aboriginal forms of social organization, and to maximize the protection it affords

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<sup>161</sup> The concern here being that it is unfairly onerous to require an Aboriginal community to identify the objective animating a potentially ancient custom, and then prove that it is “pressing and substantial” by the lights of 21<sup>st</sup> Century Canadian courts. (See e.g. Wilkins, *supra* note 6, at 104.)

<sup>162</sup> To be clear, while I think the *Charter* should apply automatically to Aboriginal governments—i.e., even in the absence of a self-government agreement under which the parties agree on the *Charter*’s application to the relevant Aboriginal government—nothing said above is meant to suggest that there is no value in having the *Charter*’s application to the Aboriginal government agreed upon by all parties. Quite the contrary. I think it is clear that formal agreements on this issue are all to the good. See also Hogg, *supra* note 8 (“[T]he details of the extent of a First Nation’s powers of self-government, and the paramountcy rules that would govern the application of federal or provincial (or territorial) law to aboriginal lands and people, are of course much better embodied in self-government agreements (with the status of treaties) between aboriginal nations and governments. These agreements can deal comprehensively with all the issues of governance, and supply enough clarity to keep the issues out of the courts” at §28-27).

to less powerful members of Aboriginal societies.<sup>163</sup> Taking advantage of such opportunities offers the promise of protecting the basic human rights of individual Aboriginal Canadians, while showing due respect for indigenous difference and the inherent right of Aboriginal self-government. Further, the *Charter's* application to inherent-right governments would help to advance the objective of reconciliation that animates the Constitution's recognition of Aboriginal rights in s. 35.

To be clear, and to reiterate what has been said above, applying the *Charter* to inherent-right governments would constitute a limitation on Aboriginal sovereignty and on the inherent right of self-government contemplated by s. 35. There is, therefore, a real sense in which we have a clash of rights whenever the exercise of the inherent right of self-government unreasonably limits a *Charter* right. The correct response is, firstly, to acknowledge that we face a dilemma. We should be committed to the view that limitations on *Charter* rights stand in need of justification, and at the same time should also insist that limitations on Aboriginal rights likewise demand justification. Thus where we find, even after employing a culturally sensitive s. 1 analysis, that some particular exercise of the inherent right of Aboriginal self-government gives rise to an unreasonable limit on a *Charter* right, we will have to determine whether it should nevertheless be permitted as the exercise of an Aboriginal right, or forbidden as a violation of the relevant *Charter* right. In doing so, it is appropriate that we have regard to the objectives of the relevant Aboriginal right<sup>164</sup> and the relevant *Charter* right.<sup>165</sup> The Supreme Court of Canada has told us that the overarching objective of s. 35's recognition of Aboriginal rights is reconciliation, and we have found that the sort of reconciliation s. 35 should be understood as aspiring to is reconciliation as relationship—namely, a relationship in which Canada's Aboriginal peoples are reconciled with the Canadian state of which they form an integral part. Requiring the right of Aboriginal self-government to be exercised in accordance with the Canadian Constitution would further that goal; allowing the right to be exercised irrespective of the requirements of the *Charter* would frustrate it. It is therefore right and proper that the *Charter* apply to inherent-right governments.

This is emphatically not to say, of course, that the *Charter's* application is a *sufficient* condition of the kind of reconciliation s. 35 seeks. It seems clear, in fact, that it is much more crucial to pursue reconciliation via other, broadly political means, such as negotiating self-government agreements, reforming (or perhaps even repealing) the *Indian Act*, fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples,<sup>166</sup> and generally improving the social conditions in which Aboriginal Canadians live on- and off-reserve.<sup>167</sup> Furthermore, if we take a long-term view, the *Charter's* application to inherent-right governments is probably not even a *necessary* condition of reconciliation. For instance, it may well be desirable, from the point of view of reconciling Aboriginal peoples and the Canadian state of which they are part, for Canada to one day move to a regime in

<sup>163</sup> Macklem, *supra* note 8 at 195.

<sup>164</sup> See *Sparrow*, *supra* note 17 (“[t]he nature of s. 35(1) itself suggests that it be construed in a purposive way” at para 56).

<sup>165</sup> See *Hunter v Southam*, [1984] 2 SCR 145 on the need for the *Charter* to be given a broad, purposive interpretation.

<sup>166</sup> This is item 43 of the Truth and Reconciliation Committee of Canada's *Calls to Action* (Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: Truth and Reconciliation Commission of Canada, 2015)). It is worth noting that the text of UNDRIP, in laying out the right of indigenous peoples, by no means precludes subjecting Aboriginal self-government to *Charter* review. On the contrary, it shows a clear appreciation for the way in which indigenous rights might be exercised in ways that are in tension with other rights, and countenances limitations on those indigenous rights in such circumstances. Article 46(2), for example, states that: “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

<sup>167</sup> See Royal Commission: Restructuring the Relationship, *supra* note 6 at 950.

which, rather than the Canadian *Charter*, a Charter (or Charters) of rights drafted by Aboriginal communities themselves—and possibly interpreted and applied by special courts comprising judges largely or exclusively of Aboriginal descent—constrain the actions of inherent-right governments. At the present time, however, taking Canada, its legal and constitutional order, and its Aboriginal peoples as we actually find them, applying the *Charter of Rights and Freedoms* to such governments would advance rather than impede the reconciliation that s. 35 compels us to seek.