Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy In Canada

By Paul LAH Chartrand*

This article outlines the argument that the legitimacy of the law of the Constitution of Canada requires the consent of the Aboriginal or indigenous[1] peoples and that Canada has a positive duty to negotiate constitutional agreements with indigenous peoples in certain circumstances. The argument draws upon fundamental unwritten principles of the Constitution that have been elaborated by the courts and also upon express constitutional provisions. It also draws upon precepts from international law.

The distinction between indigenous persons and indigenous peoples is important in this argument. Indigenous persons in Canada have the status, rights and obligations of citizens.[2] Government policies dealing with Aboriginal persons are usually directed at providing them with the services due to all citizens. The Constitution of Canada and democratic principles require equal and fair treatment of all citizens by the organs of the state. The rationale for positive action in favour of aboriginal persons is often revealed in the labels by which the policies are known, such as "Closing the Gap", which imply the objective of redistributive justice to remedy the effects of past unequal treatment by the state.

The argument in this article will focus upon the rights of indigenous peoples. Indigenous persons constitute distinct communities with distinct collective rights in Canada, as they do in other former Commonwealth states. The political and legal recognition of this distinct status and of the collective rights of indigenous peoples is evident, inter alia, in the history of the early political relations and Treaties between indigenous peoples and British colonial and Canadian state agents.[3]

The recognition of the distinct status and of the group rights of indigenous peoples is supported and strengthened contemporarily by recent and emerging developments in both domestic constitutional law and in international precepts. Salient features of the former include the express affirmation and recognition of the Treaty and Aboriginal rights of the aboriginal "peoples" in the

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* Manitoba, Canada.

1 The indigenous peoples in Canada are referred to as "aboriginal peoples" in the text of the Constitution that affirms and recognises their collective treaty and aboriginal rights: Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), Chapter 11, s 35.

2 For a discussion of the status and rights of indigenous persons as citizens and the rights of indigenous peoples within states, see Paul LAH Chartrand "Citizenship Rights and Aboriginal Rights in Canada. From 'Citizens Plus' to 'Citizens Plural'" in John E Fossum, Johanne Poirier and Paul Magnette, ed. *The Ties That Bind: Accommodating Diversity in Canada and the European Union* (PIE Peter Lang, Bruxelles, 2009) and the Canadian cases cited therein.

3 See, eg John Giokas and Robert K Groves, "Collective and Individual Recognition in Canada" in Paul LAH Chartrand, *Who Are Canada's Aboriginal Peoples* (Purich Publishing, Saskatoon, 2002) at 41–82. For an excellent overview of the history see J Edward Chamberlin *The Harrowing of Eden: White Attitudes Towards Native Americans* (Seabury Press, New York, 1975).

Constitution of Canada in 1982; the formal recognition of the constitutional role of Aboriginal peoples in constitutional reform, and the judicial elaboration of certain unwritten principles of the Constitution of Canada.

At the international level, the distinct status and rights of indigenous peoples is evident in the right of self-determination that is vested in all "peoples" and in the precepts emerging from state practice and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples. In the Quebec Secession Reference (QSR) the Supreme Court of Canada (SCC) stated;

> While international law generally regulates the conduct of nation states, it does in some specific circumstances, also recognize the "rights" of entities other than nation states – such as the right of a *people* – to self-determination.
>
> …the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law.[4]

In brief outline the basic proposition that will be argued is as follows. Where an Aboriginal people expresses by democratic means its will to negotiate the terms of the Constitution under which it is prepared to live, then Canada has a constitutional duty to negotiate an agreement. The result of the negotiations is a political matter over which the courts have no jurisdiction: it is the existence of the duty to negotiate that is at issue. The argument ties the consent of indigenous peoples to constitutional legitimacy in Canada.

Where might the argument be put to good use in contemporary Canada? Three applications present themselves.

It is notorious that the historic treaties with First Nations have been largely overlooked in Canadian law and policy. Now that the Constitution Act 1982 has recognised and affirmed treaty rights, the proposition may be used to require that historic treaties be appropriately respected and implemented.

Second, the proposition may be used to require negotiations on modern treaties where no historic treaty was entered into.

Third, the argument may be advanced to demand amendments to the existing terms of the Constitution, such as the Constitution Act 1930 which contains agreements between the federal government and each of the three prairie provinces on the transfer of lands and natural resources from the former to the latter governments. Those agreements are widely condemned by First Nations as breaches of treaty promises.[5]

Over the past three decades there has been much discussion and writing about the place of Aboriginal peoples in Canada. There are many arguments and judicial authorities to support the recognition of Aboriginal peoples as distinct political and constitutional entities with distinct collective rights. For immediate purposes it is useful to draw attention to two concepts or approaches that inform the argument in this article.

The first concept proposes the existence of conflicting "public interests". In this view, each Aboriginal people has a right to determine its own vision of its public interest, and to take measures for its identification, recognition, development and protection. This, it seems, is the heart of

4 *In Re Reference re Secession of Quebec,* [1998] 2 SCR 217, 161 DLR (4th) 385, 55 CRR (2d) 1, 1998 CanLII 793 (SCC) at [113], [114] [Quebec Secession Reference].

5 This fact is known from the personal experience of the writer, which includes participation in recent meetings of First Nation leaders to discuss ways to challenge the agreements that form schedules to the Constitution Act 1930 and that are commonly referred to as the Natural Resources Transfer Agreements Acts (NRTA).

the concept of "self-determination" which constitutes the right of all peoples to self-determination. Viewed this way, the meaning of "reconciliation" as described by the SCC is the reconciliation of conflicting public interests.[6]

The second concept conceives the existence of legitimising "compacts" that identify the constitutionally distinct relationships between constitutionally relevant actors whose rights and interests are reconciled by the application of common constitutional values and principles of interpretation. The concept strengthens the argument that consent is essential for a legitimate constitution.

The compact theory[7] was recently invoked in *Beckman* where Deschamps J stated in a vigorous dissenting minority judgment:[8]

> In *Reference re Secession of Quebec*, 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217, at paras. 48-82, this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.

Deschamps J then added an observation that shows the distinction that was mentioned earlier between the rights of citizens that Aboriginal persons have and the collective rights and status of Aboriginal peoples:[9]

> The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s. 35(1) of the Constitution Act, 1982. The framers of the Constitution also considered it advisable to specify in s. 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary. Finally, s. 35(4) provides that, notwithstanding any other provision of the *Constitution Act, 1982*, the Aboriginal and treaty rights recognized and affirmed in s. 35(1) "are guaranteed equally to male and female persons". The compact relating to the special rights of Aboriginal peoples is therefore in harmony with the other two basic compacts and with the four organizing principles of our constitutional system. …

I. Aboriginal 'Peoples' are Constitutionally Relevant Entities whose Consent Matters

Consent is a constitutional principle of the highest order. It is accepted widely as the basis for lawful governing authority, including in the United States of America, in Australia, and in the European Union. In the case of many Aboriginal peoples, finding the basis for their consent to the constitutional order of Canada is problematic.

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6 *Mikisew Cree v AG Canada* (2005) 3 SCR 388.

7 See the discussion of the Canadian compact theory in Canada *Report of the Royal Commission on Aboriginal Peoples* Vol 2 *Restructuring the Relationship* Pt 1 ch 3 "Governance" (Ottawa, 1996) 105–419 at 194–195, and see the sources cited in note 146, p 392. [Vol 2 will be referred to henceforth as RCAP Vol 2].

8 *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53 (CanLII) at [97].

9 Ibid at [98].

The idea that the consent of the people legitimises governing authority is a widely accepted proposition in political theory.[10] The proposition is, however, not free from philosophical opposition and criticism.[11]

The philosophical debate need not detain attention for long for the purpose of a Canadian constitutional argument, however, because there is ample Canadian judicial authority in support of the proposition that consent legitimises constitutional authority and governance.

In the QSR[12] case the SCC stated:

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. …

And:[13]

> As this Court held in the Manitoba Language Rights Reference, supra, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.

In Canada there are distinct constitutional entities that categorise "the people" for constitutional purposes. These purposes include self-government. The argument being presented here is that Aboriginal peoples are a relevant constitutional entity and as such they have a right to demand negotiations to reach agreement on the terms of the Constitution under which they are prepared to attach their consent. The proposition has been applied by the SCC in respect to the people of a province and it is proposed here that an Aboriginal people stands in the same position as a province in this respect.

II. Self-Determination and Defining the Public Interest

The provinces are created and recognised by the Constitution as entities with self-government authority and jurisdiction.[14] In the QSR the SCC recognised that the people of a province are organised as a province and as such the people of a province have a right to call for negotiations on the terms of the Constitution to which it will attach its consent.

The broad purpose of recognising that the consent of the people of a province is needed to legitimise the Constitution seems to reflect the value behind the concept of self-determination.[15] Self-determination essentially recognises the right of a people to define its own vision of the good society and to act to implement it. In other words, a people, including the people of a province in Canada, has a right to define its own "public interest". It is this authority to define and act to promote the public interest of the people of a province that defines the role of provincial governments. None of this should be contentious.

The authority to govern in Canada is constitutionally divided into separate and distinct spheres of jurisdiction within which the federal and provincial governments are free to decide what is in

10 See generally Steven M Cahn (ed) *Classics of Political and Moral Philosophy* (Oxford University Press, New York, 2002); Alan Gewirth *Political Philosophy* (MacMillan, New York, 1965); John Simmons *On The Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press, Princeton, NJ, 1993).

11 See for example, Peter Josephson *The Great Art of Government: Locke's Use of Consent* (University of Kansas Press, Lawrence, 2002); CW Cassinelli "The 'Consent' of the Governed" (1959) 12 *Western Political Quarterly,* 391.

12 *Reference re Secession of Quebec,* above n 4, at [67].

13 Ibid at [85].

14 The jurisdictional spheres are identified mainly in ss 91 and 92 of the Constitution Act 1867.

15 See the discussion on the international law right of self-determination in RCAP Vol 2, above n 7, at 169–174.

the public interest of the people, either nationally in the case of the federal government, and provincially in the case of provincial governments. As the SCC has stated, our constitutional regime

> recognizes the diversity of component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.[16]

The courts defer to the authority of elected governments to decide what is in the public interest so long as it complies with the Constitution. The will of the people of a province is expressed in the political actions of the elected provincial government representatives of the people. According to the analysis in the QSR, the government of the people of a province have the authority to organise the way in which the people express their political will.

In the QSR case[17] the SCC also said this:

> The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada.

If this test is applied broadly to the case of Aboriginal peoples, in light of the compact theory adumbrated earlier, then an Aboriginal people has the power to effect whatever constitutional arrangements are desired within Canadian territory if an Aboriginal people is a constitutionally recognised governmental authority.

If the duty to negotiate arises upon the expression of the will of the people of a province, it also arises upon the expression of the will of another constitutional sub-state entity: an Aboriginal people. Both are forms of constitutionally recognised political forms under which "the people" may be organised and identified. In these forms, the people are free to express their opinion about what values and rules and principles shall constitute legitimate governance for them. The provinces and Aboriginal peoples share the character of being "constituent" units of Canada, and as "constituting units" of Canada.

We turn then to examine the concept of an Aboriginal "people" and its constitutional and governmental character.

III. Aboriginal "Peoples" in the Constitution

The Constitution of Canada affirms and recognises, in s 35 of the Constitution Act 1982, the aboriginal and treaty rights of the Aboriginal "peoples" of Canada. The meaning of a "people" for purposes of s 35 has not been judicially determined but it is the constitutional entity the consent of which matters for constitutional legitimacy.

International law provides little assistance in establishing the meaning of a "people" that has a right of self-determination. There is no universally accepted definition of a "people".[18] The recent United Nations Declaration on the Rights of Indigenous Peoples does not include a definition and

16 *Reference re Secession of Quebec*, above n 4, at 251, as quoted in *Athabasca Chipewyan First Nation v B.C.,* 2001 ABCA 112 (CanLII)

17 Ibid at [85].

18 *Reference re Secession of Quebec*, above n 4, esp at [123], [124].

the idea of including a definition was vigorously resisted by indigenous peoples' representatives during the lengthy process of elaborating the text of the Declaration.[19]

The SCC has stated that:[20]

> It is clear that "a people" may include only a portion of the population of an existing state. The right of self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

At the same time the SCC also stated that a people's right of self-determination is one that is normally attainable within the constitutional framework of a state:[21]

> While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

In its 1996 final report the Canadian Royal Commission on Aboriginal Peoples (RCAP) stated:[22]

> The right of self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements within Canada and to implement such reforms by negotiations and agreements with other Canadian governments, which have the duty to negotiate in good faith and in light of fiduciary obligation owed by the Crown to Aboriginal peoples. Any reforms must be approved by the Aboriginal people concerned through a democratic process, ordinarily involving a referendum. Where these reforms necessitate alter nations in the Canadian constitution, they must be implemented through the normal amending procedures laid out in the *Constitution Act, 1982*.

The Commission proposed that an Aboriginal people with a right of self-determination is:[23]

> A sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories.

This definition, as elaborated by the Commission,[24] is adopted for immediate purposes.

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19 The author makes this assertion based upon personal experience as a participant in many of the sessions from 1986 to 2007 at the UN offices in Geneva where state representatives deliberated the text of the Declaration with indigenous representatives from around the world.

20 *Reference re Secession of Quebec*, above n 4, at [124].

21 Ibid, at [130].

22 RCAP Vol 2, above n 7, at 172.

23 Ibid, at 178. For reasons explained there, which are not relevant to the current discussion, the RCAP used the term "nations" as a synonym for "peoples".

24 Ibid, at 178–180. It is beyond the scope of this paper to examine in detail the features that may characterise an Aboriginal people.

IV. The Constitutional and Governmental Character of an "Aboriginal People"

Judicial authority in the SCC supports the proposition that an aboriginal "people" is a distinct political entity that has a governmental character and the collective will of which matters for constitutional purposes. The approach recognises the historical and contemporary constitutional significance of political action by representatives of Aboriginal peoples.

In *Sparrow,* the SCC's unanimous decision included the following comments:[25]

> It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place…

And:

> In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95, says the following about s. 35(1), at p. 100:
>
> … the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.
>
> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from *general principles of constitutional interpretation, principles relating to aboriginal rights,* and the purposes behind the constitutional provision itself. …

In addition to this judicial support, the text of an amendment to s 35 of the Constitution Act 1982 affirms by implication that Aboriginal "peoples" have a distinct constitutional character and role. That unique character is political and governmental in nature.

Section 35.1 provides:[26]

> The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act, or to this Part,
>
> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada, and
>
> (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Section 35.1 itself resulted from national conferences on constitutional reform at which the participants were all Canadian first ministers and representatives of the Aboriginal peoples of Cana-

25 *R v Sparrow* [1990] 1 S.C.R. 1075 at 1105.

26 See above n 1.

da.[27] Representatives of the Aboriginal peoples of Canada have, since the 1980s participated in intergovernmental meetings on national and provincial political issues.

An Aboriginal "people" is a distinct constitutional entity that has governmental functions and that has a distinct role in constitutional statecraft. The history of Aboriginal peoples, in particular the negotiations and agreements leading to the historic treaties with the First Nations, demonstrates that Aboriginal peoples are distinct constitutional entities whose consent matters for constitutional legitimacy.

It will be recalled that s 35.1 constitutionalises the commitment of the federal and provincial governments to the "principle" that Aboriginal peoples have a role in constitutional reform on matters that affect their interests and rights. If this is a principle then s 35.1 ought to be read so as to apply beyond the specific provisions that are listed in s 35.1 and to include all provisions of the Constitution that affect the interests and rights of Aboriginal peoples, including the relevant provisions of the Constitution Act 1930. This interpretation makes the present argument applicable to the intention of First Nations to seek changes to the lands and natural resources provisions in that Constitutional document, as mentioned above.

The principle that Aboriginal peoples' representatives have a legitimate role in governmental and intergovernmental affairs in Canada is reinforced by the federal policy first adopted in 1995 which recognises the inherent right of self-government and leads to negotiations on the modern treaties with First Nations.[28]

V. Canada's Unwritten Principles of the Constitution

In addition to the political principle in s 35.1, there are the unwritten principles that have been elaborated by the SCC, as mentioned earlier.

Within the limits of this article, the focus will be on the most immediately relevant principles instead of undertaking a comprehensive review. It seems evident that additional arguments may be added to show how the principles support the participation of Aboriginal peoples in the legitimisation of the Constitution of Canada.

To reiterate, the principles that are said to underlie the whole of the Constitution and of its evolution include: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism.[29]

The SCC explained the function of these unwritten principles in the following terms:[30]

> The principles assist in the interpretation of the text and the *delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions*. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional *development and*

27 For a brief introductory description of the conferences see Paul LAH Chartrand "Background" in Paul LAH Chartrand (ed) *Who Are Canada's Aboriginal Peoples?* (Purich Publishing, Saskatoon, 2002), at 27–29. See also Peter W Hogg *Constitutional Law of Canada* (Student ed, Carswell, Toronto, 2009) at 673–674 where the author, a leading constitutional expert, opines that by s 35.1 "the aboriginal peoples have gained entry to the constitutional amendment process. This privilege is accorded to no other group outside government, which emphasizes that the special status of the aboriginal peoples is now firmly accepted in Canada."

28 Canada, *Aboriginal Self-Government* (Minister of Public Works and Services Canada, Ottawa, 1995). For information about the policy and about modern treaties, see <www.ainc-inac.gc.ca/al/ldc/ccl/sgb-eng.asp> [Accessed on 08 September 2011].

29 *Beckman v Little Salmon/Carmacks First Nation*, above n 8, at [97].

30 *Reference re Secession of Quebec,* above n 4, at [52].

> *evolution of our Constitution as a "living tree"*, to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick *Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319, Canadians have long recognized the *existence* and importance of unwritten constitutional principles in our system of government.

In respect to the present argument, the above-quoted commentary is applied in the sense that the unwritten constitutional principles assist to delineate the role of the representatives of Aboriginal peoples and representatives of governments, and the "political institutions" at issue include the participation of Aboriginal peoples' representatives in intergovernmental meetings and in other statecraft where the interests and rights of Aboriginal peoples are at stake.

Observance and respect for the principles would promote the substantive and aspirational precepts in the United Nations Declaration on the Rights of Indigenous Peoples which exhorts states to: "promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration".[31]

Among the rights of indigenous peoples that states are urged to respect and apply is the right of self-government. Thus article 4 provides:

> Article 4
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The significance and role of Aboriginal political institutions within the State are evident in article 5, which also recalls the significance and role of the compact theory outlined by Deschamps J, *ante*:[32]

> Article 5
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Returning to the SCC's explanation of the role of the unwritten constitutional principles, the following may be noted:[33]

> Underlying constitutional principles may in certain circumstances *give rise to substantive legal obligations* (have "full legal force", as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. *These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature*. The principles are not merely descriptive, but are also invested with a powerful normative force, and *are binding upon both courts and governments*. "In other words", as this Court confirmed in the Manitoba Language Rights Reference, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.

This judicial explanation informs the argument that governments have a positive legal obligation to respond to a request by an Aboriginal people to negotiate the terms of the Constitution under which it is prepared to live. The courts have found the existence of the obligation and they have a

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31 "United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 September 2007" (2007) <www.un.org/esa/socdev/unpfii/en/declaration.html> article 42.

32 *Beckman v Little Salmon/Carmacks First Nation,* above n 8.

33 *Reference re Secession of Quebec,* above n 4, at [54].

role to play in declaring its existence. As will be mentioned below, the courts have no role in the substantive negotiations themselves, or in assessing their results.

The primary objective of this article is to set out an argument in its general outline. Accordingly, although all of the principles have a prima facie application to the argument that is being made, it is sufficient to emphasise that the principle of democracy bears an important relationship to the aboriginal right of self-government, which is at the heart of the argument since an Aboriginal people may choose self-government as one of the choices open to it under the right of self-determination.

According to the SCC:[34]

> Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling, supra*, at p. 306, *democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities*: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process.

In the present view, the principle of democracy promotes the goal of negotiating and achieving self-government in order to permit an Aboriginal people to identify and realise its vision of its "public interest" within Canada, where governments have the jurisdiction and authority to identify and realise the broader "public interest". The promotion of self-government and the realisation of a people's vision of the good society are asserted to be the most legitimate means of accommodating the cultural and group identities of the Aboriginal peoples in Canada.

It is, at the time of writing, an open question in Canadian constitutional law whether an Aboriginal people's right of self-government is recognised and affirmed in s 35 of the Constitution Act 1982. For present purposes it is assumed that an Aboriginal people has a right of self-government, whether the right is recognised by s 35 or by the common law, or by international human rights norms and obligations that bind Canada.[35]

In its final report the RCAP wrote:

> [T]he inherent right of self-government was recognized and affirmed in section 35(1) of the *Constitution Act 1982* as an existing Aboriginal or treaty-protected right. This constitutional right assumes a contemporary form, one that takes account of the changes that have occurred since contact, the modern needs of Aboriginal peoples, and the *existence of a federal system in Canada*.[36]

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34 *Reference re Secession of Quebec,* above n 4, at [64].

35 For a discussion of the jurisprudence and constitutional status of the aboriginal right of self-government see Hogg, above n 27, at 640–642. See also *Campbell et al.* v. *Attorney General of British Columbia, the Attorney General of Canada and the Nisga'a Nation et al.* 2000 BCSC 1123. For an example of a UN treaty body urging Canada to implement the recommendations of the RCAP on self-government and lands and resources, see United Nations Human Rights Committee "International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee" (7 April 1999) CCPR/C79/Add.105 at [8] It is disclosed that the author was a commissioner on the RCAP. The federal government has recognised the existence of the right of self-government of Aboriginal peoples as a matter of policy since 1995: see Canada *Aboriginal Self-Government* (Minister of Public Works and Services, Ottawa, 1995).

36 RCAP Vol 2, above n 7 at 202.

In *Mitchell*, the minority in the SCC subscribed to the view that shared sovereignty or authority to govern was a feature of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government.[37]

In addition to the unwritten principles which have been found by the SCC, there is also judicial support in that Court for the proposition that respect for human rights and freedoms is also such a fundamental principle.[38] Accordingly the human right of self-determination of every Aboriginal people in Canada demands the respect of governments and courts. Therefore, governments and courts ought to be receptive to requests by Aboriginal peoples to negotiate or renegotiate the terms of the Constitution to which they are willing to attach their consent. The legitimacy of the law and practice of the Constitution requires the consent of the Aboriginal peoples.

The present argument can promote the "development and evolution of our Constitution as a 'living tree'"[39] in part by drawing upon the concept of "shared sovereignties" that has been proposed by the RCAP and endorsed judicially in a minority decision in *Mitchell v M.N. R.*[40]

In that case the minority reviewed the argument of the RCAP:[41]

> The final Report of the Royal Commission on Aboriginal Peoples, vol.2, goes on to describe "shared" sovereignty at pp. 240-41 as follows: "Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.…
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> "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final Report of the Royal Commission on Aboriginal Peoples, vol.2 (Restructuring the Relationship (1996)), at p.214, says (sic) that "Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil." This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s.35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

This reconciliation of conflicting "public interests" must engage political institutions wherein representatives of Aboriginal peoples and governments negotiate agreements based upon their respective visions of the good society. The role of the courts is to declare the existence of the positive obligation of governments to negotiate.

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37 *Mitchell v Canada (Minister of National Revenue – MNR)* [2001] 1 SCR 911; *Mitchell v MNR* 2001 SCC 33 (CanLII) at [130], quoting RCAP Vol 2 at 240–241. See also Sari Graben "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6:2 Indigenous Law Journal 63.

38 *R v Demers* 2004 SCC 46, [2004] 2 SCR 489 per LeBel, J dissenting, in argument.

39 *Reference re Secession of Quebec*, above n 4.

40 *Mitchell* cases above n 37. See also the discussion in Paul LAH Chartrand, *Reconciling Indigenous Peoples' Sovereignty and State Sovereignty* (AIATSIS, Canberra, 2009) AIATSIS Research Discussion Paper No 26 at 12–14. <www.aiatsis.gov.au/research/docs/dp/DP26.pdf>.

41 Ibid, at 13.

As stated in *Sparrow,* the political action of Aboriginal representatives has already given rise to particular Constitutional terms, and the text and principles of the Constitution require negotiations by the respective political representatives.[42]

VI. Process

If the law of the Constitution imposes upon governments an obligation to negotiate legitimate terms of the Constitution with representatives of an Aboriginal people in particular circumstances, the limits of the judicial role must be appreciated. The ambit of the courts' role was explained as follows in QSR:[43]

> The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. *To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.*

The basic function of a declaration on the existence of the duty to negotiate is to bring the governments to the negotiating table. Aboriginal peoples suffer from a great imbalance of power in dealings with governments and have great difficulty in getting governments to respond effectively to their attempts to negotiate.

The duty to negotiate would come into existence, or be "triggered", by the means that the SCC identified in the case of a province in the QSR. The trigger is the expression of the will of a people to enter into negotiations. According to the SCC, the expression of the will of the people must take a democratic form. The RCAP and the SCC in QSR both recommended a referendum as the appropriate democratic method of ascertaining the will of the people in this regard.[44] It is interesting to speculate whether a democratic revolution of a people would also be regarded as an appropriate democratic mechanism to trigger the duty to negotiate.

As mentioned above, it is the expression of the will of an Aboriginal "people" that is relevant. That would in principle exclude the small "bands" that are created and operate under the federal Indian Act. Ultimately the meaning of a "people" would be determined by political means in a political context.

The RCAP has made detailed recommendations on a national process for negotiating contemporary agreements or treaties between Aboriginal peoples and governments.[45] That work can assist in designing processes for negotiations but, in the long run, it is the experience and good faith of the participants that will determine the best means or procedures to be followed.

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42 *R v Sparrow,* above n 25.

43 *Reference re Secession of Quebec,* above n 4, at [153].

44 RCAP Vol 2, above n 7.

45 RCAP Vol 2, above n 7, at 245–418.

VII. Advantages of Negotiations

Canada's southern neighbours have a history of revolution against British authority. The American model rejects an illegitimate government.[46] In Canada, we talk. Canadians have an evolutionary political history, which has generated a political culture of deference to authority. The rise of revolutionary and secessionist tendencies in the province of Quebec since the 1960s is itself a recent phenomenon that has been characterised more by talk than by action.

The political commitment to talk has been the central feature of Aboriginal policy in Canada since at least the 1880s, as illustrated by the following extract from a letter written by the Prime Minister of the day in 1884 concerning grievances of western Aboriginal peoples:[47]

> I think the true policy is rather to encourage them to specify their grievances in memorials and send them with or without delegations to Ottawa. This will allow time for the present effervescence to subside, and on the approach of winter the climate will keep things quiet until next spring.

The approach in favour of talk over secession developed by the SCC has deep roots in Canadian political culture and history. The approach was developed in response to a political crisis that involved the province of Quebec, a province with great political influence on national politics. The proposal to apply the approach developed in the Quebec case argues that justice demands for the politically weak what it provides for the politically influential. It has been notoriously difficult for Aboriginal peoples to get governments to negotiate any changes to the status quo.

In 1982 the Constitution of Canada was amended to include an express recognition and affirmation of the rights of the indigenous peoples. For a number of years national meetings were held between leaders of indigenous representative organisations and Canadian government leaders to agree on the identification of those rights. No substantive agreements resulted after the constitutional amendments achieved at the 1983 meeting, and since then the nature and scope of the treaty and Aboriginal rights of the Aboriginal peoples have been determined by judges in the courts. The argument outlined in this article offers a new approach which tentatively seems to reveal certain advantages, both practical and theoretical, over adjudication.

First, the approach that is argued here would provide a forum for political negotiations and would, therefore, accord more firmly with the democratic proposition that legitimacy depends upon consent and that each "people" is best able to determine what is the nature and scope of its "public interest" and its vision of the future development of that collective interest.

In this regard the United Nations Declaration provides:

> Article 5
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The SCC is not legitimately competent to determine what is the public interest of an Aboriginal people. The argument here would shift that burden to the legitimate political representatives of an Aboriginal people. Concepts and approaches developed in the SCC, such as the concept of the fiduciary relationship, have the admitted weakness that the Crown "wears two hats" as the protector of the general public interest and at the same time the protector of the particular public interest

46 See for example, James Thurlow Adams *Jeffersonian Principles and Hamiltonian Principles* (Little, Brown, Boston, 1928).

47 Letter from Sir JA Macdonald to Governor-General the Marquess of Lansdowne, 12 August 1884. <www.archives.org/stream/correspondenceof 00macduoft_djvu.txt> last accessed 6 September 2011.

of an Aboriginal people. That inherent tension is removed where each side is represented by its legitimate political representatives.

Second, negotiations that are based upon respect for the general principles of the Constitution of Canada ought to be supported by both sides. This is the basic project of reconciliation in Canada. It involves the reconciliation of conflicting public interests. It can reasonably be expected that agreement can more readily be reached where negotiations are based upon respect for commonly-held constitutional values and principles rather than being asked to compromise them.

Third, the present argument reduces the need for the courts to develop a right of self-government, a task that the courts have been extremely reluctant to undertake while being aware that the right itself is undeniable. The SCC will not fundamentally alter the status quo nor create visions of public interests or negotiate deals, or erect a complex statutory regime.

Fourth, the argument requires political aggregation of small communities into a sizeable "people", and involves the advantages of aggregated economic, human and other collective resources.

Fifth, the approach has advantages that can deal with current problems associated with the identification of the Aboriginal peoples whose rights are recognised and affirmed in the Constitution. Historically, federal policy based upon the 1876 Indian Act has driven federal recognition of Aboriginal peoples and rights. The 1982 constitutional amendments have specified that Inuit, Metis and Indian people are Aboriginal peoples. Successive governments since then have done very little to alter the historic approach. As the writer has argued elsewhere, there is no constitutional imperative behind the compartmentalisation of Aboriginal peoples' identities.[48] Accordingly, the current argument would eliminate the requirement that an Aboriginal people attach any particular label to itself, whether Indian, Inuit or Metis. All that is required is that Aboriginal people be organised and able to democratically express its collective will.

VIII. Conclusion

In the Manitoba Language Reference case[49] the SCC stated:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it…

It has been proposed here that "the will of the people" includes the collective will of Aboriginal peoples. The argument that has been presented aims to shift thinking towards the recognition that, in addition to what the courts seem to be stating, it is not only the *existence* of Aboriginal peoples, and the possession of their lands that matters in law and politics. The approach argues that the *political action* of Aboriginal people matters in law and politics.[50] The political action mattered historically, and thereby the interests of Aboriginal peoples crystallised into rights recognisable and enforceable within the Canadian legal system. Just as discarding *terra nullius* recognises the equal human dignity and legal significance of Aboriginal peoples, this approach recognises that the political action of Aboriginal peoples matters equally with that of non-Aboriginal actors in the

48 Paul LAH Chartrand, "Defining the 'Metis' of Canada: A Principled Approach to Crown-Aboriginal Relations'in Frederica Wilson and Melanie Mallet (eds) *Metis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Irwin Law, Toronto, 2008) at 27–70.

49 *Re Manitoba Language Rights* [1985] 1 SCR 721 at [48].

50 This conclusion draws from the analysis in Chartrand, above n 40.

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