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The Inherent Right of Indigenous Governance

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I would like to start by acknowledging and thanking the Algonquin Nation, on whose unceded territory we are meeting.

When the Dominion of Canada was created in 1867 by the UK Parliament, the *BNA Act* gave the Parliament of Canada exclusive jurisdiction over "Indians, and Lands reserved for the Indians". Parliament used this authority to enact the *Indian Act* in 1876. That statute gave the Canadian government the power to impose the band council system on First Nations without their consent.

The governance authority of First Nation band councils is therefore delegated authority – it comes from the *Indian Act* and applies only on reserves. Band councils as such have no jurisdiction over First Nations' traditional territories beyond the boundaries of reserves.

Of course First Nations had their own governments and laws that the Canadian government tried to replace with the *Indian Act* system and Canadian law. Indigenous governance and laws existed before Europeans arrived in North America and continued after that. They were not extinguished by colonization and the *Indian Act*, but the Canadian government did attempt to repress them by imposition of the band council system and other oppressive measures, such as outlawing the potlatch and sun dance and establishing residential schools.

Regarding land rights, after decades of unsuccessful efforts to have their rights respected, First Nations in British Columbia planned to go to the Judicial Committee of the Privy Council in England, the court of final appeal for the British Empire. The Parliament of Canada reacted by enacting an amendment to the *Indian Act* in 1927 making it illegal for anyone to raise or pay money to pursue any Indian claims. This is how oppressive things were. But the First Nations did not give in. In many cases they went underground and continued to practice their governance, ceremonies, and laws.

Some of the more repressive provisions in the *Indian Act* were removed in 1951, and status Indians got the right to vote in federal elections in 1960. During the 1960s, First Nations people became more organized politically, especially in opposition to the federal government's infamous 1969 White Paper. The Supreme

Court of Canada also began to acknowledge Aboriginal rights and title in important decisions, such as *Calder* (1973) and *Guerin* (1984).

But the watershed event was the inclusion of section 35 in the *Constitution Act, 1982*. First Nations people have always maintained that the Aboriginal and treaty rights recognized and affirmed by this section include the inherent right of self-government. During the constitutional conferences on Aboriginal and treaty rights during the 1980s, some of the provincial governments in particular refused to acknowledge this.

In 1995, the federal government did accept that First Nations have an inherent right of self-government, but the government still regarded it as contingent. For it to be implemented, negotiations had to take place and the federal and provincial governments had to agree on its parameters.

In my opinion, this contingent approach to the inherent right is inconsistent with section 35. I think what that section did was finally acknowledge in the Canadian constitution that Indigenous peoples are partners in Confederation, as concluded by the Royal Commission on Aboriginal Peoples. Section 35 created the constitutional space, not only for treaty rights, land rights, resource rights, and so on, but also for Indigenous governance.

In other words, section 35 acknowledges the constitutional authority of Indigenous peoples to govern themselves and their territories, just as sections 91 and 92 of the original *BNA Act* (now the *Constitution Act,* 1867) provide the federal and provincial governments with governance authority. But unlike federal and provincial powers, Indigenous governance authority does not come from the Canadian constitution. The Indigenous right of self-government is inherent, meaning that it comes from the fact that the First Nations were sovereign, independent nations prior to European colonization. This right is not contingent – it does not depend on or require the permission of the federal and provincial governments in order for it to be exercised.

So how have Canadian courts dealt with the inherent right of self-government? In my respectful opinion, in a rather confused and inadequate manner. The only case where the Supreme Court of Canada has dealt with this matter directly is the unfortunate *Pamajewon* decision in 1996. In that case, two First Nations in Ontario claimed an Aboriginal right to govern their reserve lands, including a right to operate and regulate gaming activities.

I don't want to criticize these First Nations and their legal counsel, but from a strategic perspective a gambling case was not a good choice to take to the Supreme Court on the inherent right of self-government. It risked setting a bad precedent, and that is what happened because the Court was not sympathetic. It denied that these First Nations any right of self-government over gambling.

But the real problem with *Pamajewon* is the way the Court reached its decision. Chief Justice Lamer applied the *Van der Peet* test and said that, to have a right to self-government over high-stakes gambling, the First Nations had to prove that gambling, and the regulation of it, were practices, customs, and traditions integral to their distinctive cultures at the time of contact with Europeans. This, of course, imposes an impossible burden of proof in most cases. It is also piece-meal – each First Nation has to meet this test for each activity it claims a right of self-government over.

This is really an empty box approach to the section 35 right of self-government. The right is acknowledged in principle, but it has no content until governance authority over specific activities is proven on this piece-meal basis.

This approach can be compared with the approach taken by the Supreme Court of the United States, which has acknowledged the inherent right of self-government of the Indian nations since the 1830s. Chief Justice Marshall, in *Worcester v. Georgia* (1832) in particular, acknowledged that the Indigenous nations were completely sovereign prior to European colonization.

That sovereignty continued after colonization and the creation of the United States. According to Marshall C.J., it was diminished by European acquisition of sovereignty, but the Indian nations retained full authority over their internal affairs and their territories that were not surrendered by treaty or taken by conquest.

However, Indian sovereignty can be limited by Congress because it is not protected by the US Constitution, unlike the inherent right of self-government in Canada that has been constitutionally protected by section 35 since 1982.

The lesson to learn from the United States is that the governance authority of the Indian nations is presumed to consist of a full box of powers, with one exception – in external affairs, they can deal only with the United States government. They can't deal with foreign nations or alienate their lands to private persons.

Apart from that exception, the starting point in the US is acknowledgement that the Indian nations have a full range of governmental powers. So the onus of proof is on the United States government if it contends that their right of self-government has been diminished in some way, which could have occurred as a result of treaties or Acts of Congress.

This is the opposite of the approach in *Pamajewon*, where the onus is on First Nations to prove each of their self-government rights individually. The *Pamajewon* decision has not been overruled, but I doubt that it will be followed in future cases. It is inconsistent with Indigenous peoples' own perspectives on their right of self-government, which the Supreme Court has said have to be taken into account. It is also inconsistent with the Trudeau government's acknowledgment of the right of self-government and its commitment to implement the UN Declaration on the Rights of Indigenous Peoples. In addition, it does not take account of the communal nature of Aboriginal and treaty rights and the need for governmental structures to make collective decisions regarding those rights, as was held by Justice Williamson in *Campbell v. British Columbia* (BCSC, 2000).

So I think the inherent right of self-government is a full box of powers that First Nations can use to govern themselves and their lands without anyone else's permission. But what if this exercise of jurisdiction comes into conflict with federal and provincial laws?

My view is that Indigenous laws in relation to their citizens and territories generally take precedence over federal and provincial laws because Indigenous governments and laws are protected by the constitutional space provided by section 35. In constitutional terms, this means Indigenous laws should be paramount.

However, there is an exception. The Supreme Court has said that federal and provincial legislation can infringe Aboriginal and treaty rights – and this would include the right of self-government – if they can justify the infringement using the *Sparrow* test. Nonetheless, I think the bar for justifying infringements is quite high. If, for example, a First Nation has its own laws regulating use of its Aboriginal title lands in accordance with its own traditions and values, how could the application of conflicting provincial laws be justified?

It is therefore vital for First Nations to exercise their inherent right of self-government by having their own laws in place, which can include traditional laws and new laws created through the exercise of their inherent governmental authority. Otherwise, federal and provincial laws will likely apply by default.

Further Readings

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