

**FEDERALISM AND THE FIRST NATIONS:
MAKING SPACE FOR FIRST NATIONS' SELF-DETERMINATION IN THE
FEDERAL INHERENT RIGHT POLICY**

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Abstract:

Too often, Aboriginal self-government is viewed as an illiberal project that must be carefully constrained to protect liberal democratic values. Yet there is a robust branch of liberal theory that supports self-government for distinct cultural communities. As well, Canadian history demonstrates that the development of self-government, first through responsible government in the colonial period and later through federalism, is part of building liberal democracy. This paper reviews the political theory, the history of Canada's constitutional development, and both the successes and challenges in negotiating a self-government Agreement-in-Principle among the Federation of Saskatchewan Indian Nations, the Government of Canada, and the Government of Saskatchewan that would find common ground for First Nations' desire to design their own institutions and rules of social ordering and liberal democratic values, and recommends that federal and provincial governments renew their self-government policies to give meaning to the inherent right of self-government.

Every man, in fact, has the right and the duty to seek self-development according to his nature, to expand his personality. But, to be intelligent and therefore able to foresee his needs and the consequences of his acts, to be free and therefore able to decide what he shall or shall not do, he can only really develop himself as a man by assuming his responsibilities and, in consequence, by having the chance to assume them. ...

On the other hand, since he does not have within himself all the resources required for the accomplishment of his personal vocation, man must seek assistance and help from society. But society does not exist merely to render service to men; if it relieves them of the responsibilities which are normally theirs, not only does it not render them service but it causes them great wrong by treating them in a manner contrary to their natures. ... That is why society's role is not so much to do things by itself as to create conditions which permit its members themselves to act as men.

The same reasoning applies, to a proportionate extent, in the case of superior collectivities with regard to smaller ones. If it is desired to conserve the diversity and complexity of social life and the pluralist character of the common good, the right of inferior or intermediate groups not only to existence but also to

action must be recognized; each must be granted its fair share of activity and responsibility in the functioning of social life, so that, definitively, man may assume his responsibilities at all levels and educate himself to living as a social and political being, which he could not do if the higher collectivity substituted itself for the lower collectivities in the fulfilment of their task. Federalism asks that the principle of subsidiarity be applied to the entire social order.

Definitively, what federalism...aims to establish is a social and political order which will be human, an order made in the image of man, to the measure of man and for man, and consequently penetrated and animated at all stages by life of the spirit, that spirit which is first and foremost conscience, liberty, responsibility, self-decision and self-government.

Report of the Royal Commission of Inquiry on Constitutional Problems (Tremblay Report), as quoted in Whyte and Lederman *Canadian Constitutional Law: Cases, Notes and Materials* 2nd Edition (Toronto: Butterworths, 1977), Chp. 1, pp. 35-36.

These words, written on the eve of Quebec's "Quiet Revolution", do not articulate a particularly radical notion to those familiar with the theory of federalism as a form of political ordering. What they tell us seems completely natural – that self-determination is a necessary condition for the fostering of liberal democracy, and that this is equally important for individuals and for communities, or the so-called "lower collectivities".

Yet, as we attempt to negotiate self-government agreements with First Nations in Canada and debate the implementation of Aboriginal peoples' inherent right to self-government, the dominant society too frequently speaks of Aboriginal self-determination as though it is inherently opposed to liberal democracy. Kymlicka has criticised this attitude, noting that,

Amidst the voluminous post-war liberal literature criticizing collective rights one is hard pressed to find anyone who actually looks at how collective rights affect individuals. These critics apparently believe that the mere fact of group incorporation into the state manifests illiberality, without considering the individual benefits and burdens it involves.¹

Thus, our challenge remains that which Kymlicka identified in 1989 – "for better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate

power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand.”² Alternatively, one could see the challenge as LaSelva does, as a challenge to “imagine a form of federalism that accommodates adequately both the universal and the particular, and reimagines Confederation.”³

The self-government policies of the federal and provincial governments reflect the dominant view that self-government and liberal democracy are opposed. The federal government’s inherent right policy, for example, makes such statements as,

Aboriginal jurisdictions and authorities should...work in harmony with jurisdictions that are exercised by other governments. It is in the interest of both Aboriginal and non-Aboriginal governments to develop co-operative arrangements that will ensure the harmonious relationship of laws which is indispensable to the proper functioning of the federation,

and,

To minimize the possibility of conflicts between Aboriginal laws and federal or provincial laws, the Government [of Canada] believes that all agreements...should establish rules of priority by which such conflicts can be resolved. The Government takes the position that negotiated rules of priority may provide for the paramountcy of Aboriginal laws, but may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws,

and, thirdly,

Aboriginal government and institutions must also be accountable to Parliament for funding provided by the federal government as a result of self-government agreements. Specifically, financing agreements must provide for a mechanism enabling Parliament to assess the extent to which public funds have contributed to the objectives for which they were voted.⁴

These conditions, designed effectively to force First Nations to harmonize their laws with federal and provincial laws and maintain federal and provincial oversight of First

Nations' exercise of their inherent right to self-determination, are inconsistent with the basic principles of responsible government and federalism.

Yet, as both political theory and the history of Canada's own struggle to become self-determining from the 18th century to 1982 can tell us, the capacity for collective self-determination of distinct political communities, through responsible government, is an essential condition of liberalism.

A self-government policy built on a foundation of the recognition of this fact has a far better chance of honestly, honourably, and legitimately integrating Aboriginal and non-Aboriginal perspectives in practice and building respectful intersocietal relations than any policy option implemented in Canada to date, at least south of the 60th parallel. Such a policy could also take advantage of the utility of federalism as a form of political organization that allows for the creation of multiple levels of self-determination, applying Canada's widely-acknowledged leadership in federalism theory and practice to the task of negotiating Aboriginal self-government. The negotiation of a self-government Agreement-in-Principle between the Federation of Saskatchewan Indian Nations, the Government of Canada, and the Government of Saskatchewan, which began in 1996, may provide a practical roadmap for how such a conception of Aboriginal self-government could be implemented. One must also recognize, however, that this Agreement-in-Principle is the result of the good fortune of having, on all three negotiating teams, federalism scholars who also had extensive practical experience in the management of intergovernmental relations in Canada; even with the goodwill and

understanding that developed among these negotiators, it took seven years and significant effort to overcome the resistance of the federal government, in particular, to a model of self-government that did not fit easily within the federal self-government policy and its preconceived notions about Aboriginal self-government. If the model of self-government created in Saskatchewan better reflects modern political thought about the utility of federalism and responsible government in protecting both liberty and community than does the federal government's policy, it is time for the federal government to revisit its policy and ask some challenging questions about its conceptual weakness.

Canadian History as a Struggle for Self-Determination and Liberal Democracy

There are any number of reasons to suggest that creating the means of collective self-determination for sub-state communities, such as First Nations, is an inherent part of the project of building a liberal democratic society. When we speak of collective self-determination, we mean specifically the creation of institutions of government and rules of social ordering that are culturally relevant and responsive to the members of the community, rather than to the dictates of an external governor. The Tremblay Report is clear throughout that, in the same way liberalism seeks to avoid undue interference with the capacity of individuals to exercise their autonomy, a principle that sub-state communities should also be provided with the maximum scope for exercising their autonomy as collectivities of like-minded people joined by a common culture, language, or history is fundamental to liberalism.

This stream of thought has its roots in the Confederation debates of 1865, most notably in the views of Sir George-Etienne Cartier. As LaSelva notes, for Cartier, the justification for federalism was that it accommodated distinct identities within the political framework of the nation; his hope was that ethnic and racial hatreds could be eliminated if rights and identities were respected.⁵ In the aftermath of Confederation, those who advocated a strong provincial rights understanding of the Constitution not only believed in the protection of the vitality of provincial communities but were committed to such liberal principles as respect for the rule of law and individual rights.⁶ It is this strain of liberal thought the Tremblay Report reiterates.

More modern Canadian scholars, including such prominent individuals as Will Kymlicka, Samuel LaSelva, and James Tully, also support this conception of liberalism. Kymlicka, for example, has stated that,

A system of equal rights and common citizenship within an integrated political community is no more *prima facie* just than a system of plural citizenships and special rights within a federation of distinct national communities. Either system can enforce equal respect just as either system can violate it. ... To know whether any particular system of cultural self-government does in fact enforce equal respect, we must look at more than equality of citizenship. We must complement our emphasis on citizenship with a view of cultural membership as an important focal point for the political expression of respect for individuals. A proper balancing of these two perspectives helps define the limits of a fair and just constitution in culturally plural countries...⁷

LaSelva makes a further point, by reference to Pierre Trudeau. In LaSelva's view,

Federalism promotes freedom because, as Trudeau noted, it divides power. In that way, it not only helps to prevent the corruption that power brings; it also ensures that there will be a multiplicity of power-holders in a society. These power-holders represent the fundamental interests that make up a federal society;

dividing power secures areas of independence and self-government to those interests and thus protects their freedom.⁸

History also provides support for the assertion that collective self-determination is an inherent part of the project of building a liberal democratic society. The political history of Canada, from the time of British colonial occupation in the 1700s to the patriation of the Constitution in 1982, is the history of a struggle to build a liberal democratic society on the northern portion of the North American continent. The most important part of this project for most of our history, far more important than the rather late addition of a constitutionally protected statement of individual rights, was the task of replacing colonial governance with self-government.

In the 18th century, the British North American colonies were governed by colonial Governors appointed by the British and responsible to British authorities. Pre-confederation political development of these colonies went through three distinct phases after colonization, which can be thought of as loosely analogous to the development of First Nations governance in Canada. The first of these was a period of rule by decree of the British-appointed Governor and his appointed Council, which, in Nova Scotia for example, lasted from the establishment of a British colony at Halifax in 1749 to 1758. In some ways, this is analogous to the governance of First Nations after reserves had been established until well into the 20th century, when the Indian Agent, who was appointed by and responsible to the federal government, very directly ruled the lives of First Nations people on the reserves.

The second phase in the development of colonial self-determination was the creation of Legislative Assemblies in the colonies. In Nova Scotia, this happened in 1758. As described by Cuthbertson, “Deluged with angry petitions and representations from Halifax merchants demanding an end to rule by decree of the Governor and his appointed Council, the Board [of Trade in London] had finally lost patience with [Governor Charles] Lawrence.”⁹ Thus, the Board of Trade sent Lawrence a dispatch on February 7, 1758 directing him to establish a Legislative Assembly and, on October 2, 1758 the first Legislative Assembly of the colony, with elected members, opened.¹⁰ While the Governor was still appointed by British royal prerogative and responsible to the British Crown, and the Council was still appointed by the Governor and responsible to him, a local representative body with some local law-making authority existed from this point forward. From the point at which the creation of an Assembly was promised, the British Crown could not alter local laws by Order-in-Council.¹¹ In some important ways this is analogous to the current *Indian Act* governance of First Nations, in which there is an elected Chief and Council but, in many ways, they are more accountable to federal officials than to their own voters.

The third phase of the constitutional development of British North America came, in the case of Nova Scotia, 90 years after the achievement of a representative Legislative Assembly. Over time, the problem for the Governor of a colony of having to respond to two competing interests, one local and one Imperial, proved impossible to manage. Lord Durham, in his 1837 Report, proposed, as a solution to this dilemma, that the Governor be required to select his Executive Council from the majority party represented in the

legislative assembly and take their advice on all matters other than those decisions specifically reserved to the Imperial Parliament.¹² The Executive Council, in turn, would have to secure the confidence of the legislative assembly to continue as the government and, if a government bill of certain classes (most notably, bills for the appropriation monies) was defeated in the assembly, the government would be defeated. In this way, the Governor and his Executive Council were responsible to the legislative assembly for their decisions and, through the assembly, to the public. When the Reformers defeated the Tories in the August, 1847 Nova Scotia election by winning 29 of the 51 seats in the Legislative Assembly and took office as the government on February 2, 1848, Durham's idea of responsible government became a reality in British North America.¹³

Territorial governments, too, have followed essentially this same, conventional, path in the latter half of the 20th century to secure the right to exercise self-determination within Canada, through responsible government, and to secure some sort of constitutional protection for this status. Originally considered (and, in some quarters, still considered) mere administrative units of the federal government, Canada's northern territories have Legislative Assemblies, their Executive Councils are drawn from those Legislative Assemblies, and the Assemblies have the authority to make laws in a list of jurisdictions that is nearly identical to that of the provinces. Their government leaders have also been recognized as Premiers and territorial governments participate fully in all intergovernmental fora in Canada. While these governance norms are not explicitly granted constitutional protection in the way that provincial governance arrangements are, it is reasonable to assume that, in the same way Great Britain cannot reverse the

constitutional norms around self-government for Canada that were established by constitutional convention in the colonial period, the federal government could not reverse the evolution of the territories into self-determining political communities within the federation.¹⁴

The evolution of responsible government in British North America and, within Canada, in the northern territories, is, in many ways, what First Nations, too, aspire to when they seek to negotiate self-government agreements to recognize and implement their inherent right to self-determination. First Nations self-determination is, at heart, the same project of building a liberal democratic polity from a formerly colonized people that drove the development of responsible government in British North America over one and a half centuries ago and later drove the development of responsible government within the territories in the last century. The principles of federalism, along with the principles of responsible government, thus provide the conceptual foundation for a new way of imagining First Nations governments within the Canadian political system.

In a federation, sovereignty is shared among two or more orders of government according to a stated division of powers. Within their own spheres of power, each order has the capacity to legislate rules that govern the relevant populace, without reference to the legislative regimes of other governments, subject only to the constitutional norms of responsible government. In a country like Canada, which is explicitly multi-national, federalism serves both to combine communities into a larger collective polity, in those areas in which the increased capacity of larger units is important to protect individual

liberty, capacity and equality, and to protect the cultural distinctiveness of historic communities, in those spheres in which either it is important to protect the communities' distinctiveness or local decisions are likely to be more efficient, effective, or (as suggested in the quote from the Tremblay report at the beginning of this paper) consistent with the principles of liberalism.

The Supreme Court of Canada has also repeatedly protected the distinct legal regimes of different provinces from challenges under the *Canadian Charter of Rights and Freedoms* and specifically has decided that differences in access to public services in provincial jurisdiction between different provinces does not constitute discrimination.¹⁵ In this way, the Court has legitimated the place of both federalism and liberalism in our political arrangements. Liberty and community do create tensions, as was the case in *Ford v. Quebec (A.G.)*, but there is no reason to assume that these tensions create an irreconcilable conflict. Thus, as LaSelva suggests,

The complexities of federalism can promote Aboriginal emancipation, while recognizing the social and moral constraints on it. These constraints...illuminate a key foundation of the Canadian constitutional order. The Canadian Constitution is unlike that of the United States partly because individualistic notions of legitimacy have a less significant role in it. ... Aboriginal [peoples] are distinct members of Canada, but they also share a factual and moral interdependency with other Canadians.¹⁶

Too commonly, though, federal and provincial policies for the negotiation of self-government agreements with First Nations begin from the premise that liberal democratic values must be protected by the federal and provincial governments from illiberal exercises of power by “self-governing” First Nations, as though only the dominant society is committed to the “universal” values of liberalism. Generally, this is to be done

by limiting the capacity of First Nations to be truly self-determining, in the sense of allowing their members to participate in the design of the own, distinct institutions and rules of social ordering, for example by requiring First Nations to abide by both First Nations laws and provincial laws in the absence of a direct conflict. The premise of these policies, however, cannot be true. If liberal values are, indeed, universal, a legitimate, responsible First Nations government will be forced by the community it governs to respect them; if the community rejects those values, the claim that the values must be respected by all governments because they are universal human values is demonstrably untrue and the imposing of those values on allegedly self-governing communities is a divergence from liberalism's commitment to self-determination. As Kymlicka has argued, "aboriginal rights would be more secure if they were viewed, not as competing with liberalism, but as an essential component of liberal political practice."¹⁷

If we can accept that federalism in Canada is consistent with, and may even be essential to, our continued existence as a stable liberal-democratic state, it becomes difficult to justify the assertion that the demand of Aboriginal peoples that they have their inherent right to be distinct, self-determining communities respected and acted upon must somehow be inherently illiberal. Federalists are not universalists precisely because they value local communities and distinctive cultures, but neither are they particularists, who cannot see any possibility for a common existence among distinct peoples.¹⁸ Instead, the idea of fraternity links the particular and the universal, and links the competing values of liberty and community. Though fraternity between Aboriginal and non-Aboriginal Canadians has been difficult to realize, and the typical stance of the dominant community

towards Aboriginal peoples for over a century has been one of paternalism, it is the foundation for Aboriginal peoples' aspirations for self-government; indeed, it is common to hear Aboriginal leaders speak of their desire to fulfil the promises of the Royal Proclamation of 1763 and the treaties to create a "brother-to-brother" relationship among those who share Canada. The draft Agreement-in-Principle negotiated between the Federation of Saskatchewan Indian Nations, the Government of Canada, and the Government of Saskatchewan between 1996 and 2003 represents one such effort to make this fraternal, and federal, relationship a reality, in spite of the limitations and conceptual weaknesses of federal and provincial self-government policies.

Negotiating Self-Government in Saskatchewan

There were three key areas in which the negotiations that led to a draft Agreement-in-Principle among the Federation of Saskatchewan Indian Nations, Canada and Saskatchewan sought to preserve the autonomy of First Nations governments to design their own institutions and regulatory regimes in response to the acceptable norms of the community being governed, rather than imposing a scheme reflective of parliamentary institutions and federal and provincial laws on First Nations. The three areas of negotiation became the chapters of the Agreement-in Principle on "Structures, Powers, and Procedures of First Nation Governments" (which defined what was to be required of First Nations' constitutions), "Membership," and "Relationship of Laws." The course of negotiations in all three areas reflected tensions between the desire of the federal and provincial governments to ensure that First Nations institutions and laws met a liberal

democratic standard that was acceptable to them and the legitimate claim of First Nations to design their institutions and laws in a way that was relevant and responsive to the interests of their communities, without having to reflect the norms of non-Aboriginal governments. The draft Agreement-in-Principle that was the outcome of these negotiations, however, represents a resolution of these tensions grounded in the fundamental principles of federalism.

In some ways, the easiest chapter to negotiate was the chapter on the constitutions of First Nations. Even in this negotiation, though, there was mistrust initially over the transparency of institutions that were not parliamentary in form and a confusion about whether the new First Nations governments exercising authority under a self-government agreement would continue to exercise delegated authority or would be exercising their inherent right. This latter point was reflected in the somewhat odd wording of section 5.10, which stated that, “prior to concluding the Governance Agreement, the Parties shall discuss and agree upon whether and to what extent the Governance Agreement will recognize that a First Nation has Jurisdiction and Authority to establish Institutions as legal entities with the rights, powers, privileges and capacity of a natural person.”¹⁹ Such capacity is generally assumed for governments established within the federation; the inclusion of this provision reflects the limited grasp on the part of the federal government, in particular, of the status of a First Nations government exercising its inherent right to self-determination.

The important conceptual leap came with the acceptance of the FSIN argument that First Nations should have the autonomy to design institutions that reflected First Nations' traditional processes of decision-making. Cultural relevance of institutions is an important component of building meaningful self-government, and innovative institutional design need not lead to the abandonment of liberal democratic values. Once this argument came to be accepted by the other parties to the negotiations, the structure of this chapter of the Agreement-in-Principle was quickly resolved. The chapter provided that, to constitute governments, First Nations (at the local, regional, and province-wide levels) were required to have written constitutions that provided for:

- the establishment of governmental bodies for making, administering and enforcing laws;
- the selection processes and terms of office for members of those bodies;
- procedures for the democratic accountability of the government to its members;
- procedures for making, amending and repealing laws;
- rights of appeal and administrative review for people affected by governmental decisions;
- procedures for the amendment of constitutions; and
- procedures for the delegation of powers between orders of government.²⁰

The only limitations on First Nations' autonomy in designing their constitutional arrangements as they saw fit were in section 5.6, which stated that the constitutions had to be consistent with the principles of legitimacy, accountability, transparency and responsibility, cultural appropriateness, and flexibility, sections 5.13 to 5.16, which required that First Nations laws be in writing and available in a public register, and

section 5.17 which required that First Nations' constitutions or laws provide for mechanisms by which non-members directly and significantly affected by a proposed law have input into consideration of the law.²¹

These fairly simple provisions, contained in a chapter of the draft Agreement-in-Principle that was two pages long, reflect a model by which Aboriginal and non-Aboriginal values and interests in good governance could reasonably be accommodated and a new order of government established within the federation. It constituted a conceptual breakthrough, however, because it required federal and provincial governments to abandon their notion of First Nations governments as delegated administrations which fit within parliamentary governance models. Federal and provincial governments, and the society they represent, were asked to accept, instead, that First Nations governments have a constitutional status as separate orders of government with the capacity to organize their institutions, and their public policies, as their communities see fit. In short, these provisions reflected a change in our understanding of First Nations government from that of self-governing First Nations as quasi-municipal governments to one in which those governments are a natural extension of federalism to another distinct community with a constitutional right to self-determination. They did so, however, without asking society to abandon its commitment to the principles of good government and liberal democracy; in fact, the provisions explicitly reinforced the commitment of all parties in the negotiations to the principles of legitimacy, accountability, transparency, and due process.

The provisions of the draft Agreement-in-Principle on First Nations' jurisdiction to define their membership also reflect this new, more federalist understanding of the place of self-governing First Nations in Canadian governance. Initially, federal officials were quite concerned that allowing First Nations to define their members as they saw fit would affect the rights that First Nations people currently have under the *Indian Act* or increase the federal government's financial responsibilities and, as such, it was very cautious in its approach to the question of First Nations' jurisdiction to define membership. As the discussion at the negotiation table progressed, however, the federal and provincial officials came to understand the fundamental importance to First Nations' capacity to be self-determining of First Nations' governments having autonomy to define their membership according to norms accepted by the community. In the end, the chapter of the draft Agreement-in-Principle on membership placed only one condition on First Nations' autonomy to determine who their members are: that each First Nation must establish a process by which a person denied membership may have the decision reviewed by an independent arbiter, to determine that the decision was made fairly and was consistent with the First Nation's membership legislation.²²

Much more difficult to resolve were the issues arising out of discussions on the relationship of laws. The federal view was that the implementation of the inherent right would not automatically lead to exclusion of federal and provincial laws, but that these laws would apply alongside Aboriginal laws. Rules of priority would be established in self-government agreements to deal with the inevitable conflicts that would arise between or among them.

Although not stated in the federal Inherent Right Policy in any explicit way,²³ this view of the relationship of laws was described by federal officials as the “concurrency model” of the relationship of federal, provincial and Aboriginal laws; they viewed it as being the practical effect of the “pith and substance” doctrine and the related doctrines of “double aspects” and “incidental effects.” The terms “pith and substance”, “double aspect” and “incidental effect” are all concepts that have been developed by the courts in the course of constitutional jurisprudence resulting from disputes between federal and provincial governments about the division of powers between them.

The source of jurisdiction in a federal state is the heads of power assigned to the enacting authority by the constitution. In Canada, s. 91 and s. 92 of the *Constitution Act, 1867* provide the primary division of powers between the federal and provincial governments. The fundamental tenets of federalism require that any law enacted by either must be characterized as being a law “in relation to” a matter that is set out in the relevant provision of the constitution in order to be valid. The phrase, “in relation to” comes from the Constitution itself; it describes the jurisdiction of federal and provincial governments as being the authority to make laws in relation to a list of enumerated subject matters. The key to jurisdiction lies in the characterization of the law: is the law in question a law in relation to, for example, the criminal law power and therefore within the jurisdiction of the federal government to enact? Or is it a law in relation to property and civil rights in the province and therefore a law within the jurisdiction of the provincial government to enact? Of course, characterization determines jurisdiction. Various authorities have

described this task of characterization in various ways. The constitutional scholar Peter Hogg cites many of them:

- “a distillation of the constitutional values represented by the challenged legislation”
- “an abstract of the statute’s content”
- “the true meaning of the challenged law”
- “what in fact does the law do and why?”
- “the content or subject matter”
- “the leading feature”
- “the true character or substance”

But, as Professor Hogg, points out:

[U]sually they described it as “the pith and substance” of the law. The general idea of these and similar formulations is that it is necessary to identify the dominant or most important characteristic of the challenged law.²⁴

Thus, if a law is in its pith and substance in relation to a matter found in section 91, the federal government will have jurisdiction to enact it and if it is in its pith and substance in relation to a matter found in section 92, the provincial government will have jurisdiction to enact it. Sometimes, laws in relation to the same general subject matter can fall into both sections 91 and 92. The idea that different laws may be enacted “in relation to” the same general subject matter because in one aspect they fall in the list of federal powers and in another aspect they fall in the list of provincial powers, is called the “double aspect” doctrine, and is firmly entrenched in Canadian constitutional jurisprudence.²⁵

In addition, a law that is within the competence of one government may have an impact on a matter falling within the competence of another government. So long as the impact

can be described as only “incidental”, both laws will apply. Dickson J. referred to this phenomenon in the Aboriginal context:

One can over-emphasize the extent to which aboriginal peoples are affected only by the decisions and actions of the federal Crown. Part and parcel of the division of powers is the incidental effects doctrine according to which a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other; as recently stated in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, *supra*, at p. 275, "Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects...." As long as Indians are not affected *qua* Indians, a provincial law may affect Indians, and significantly so in terms of everyday life.²⁶

Thus, in order for a law to be validly enacted, the courts have said that its main purpose or true essential character – its pith and substance – must be in relation to a head of jurisdiction assigned to the government that enacts it. A law whose pith and substance relates to a matter about which the government that enacts it may validly enact laws may have an incidental impact on a head of jurisdiction that is assigned to the other level of government. As long as this impact can be described as minimal, or an incidental effect, it will not affect or compromise the validity of the law. Both laws are valid and operative. As well, both levels of government may enact valid laws in relation to the same subject matter, where, because of its double aspect, the law falls within federal jurisdiction for one purpose and within provincial jurisdiction for another.

Because both federal and provincial laws may be validly enacted in relation to the same thing, it is possible to have laws that conflict with one another. A conflict arises where compliance with one law results in violation of another. This is described as an actual operational conflict. It is also possible that the courts will recognize laws as conflicting

where one law creates a fundamentally different regime, so that even though compliance with both laws is possible, compliance with one undermines the legislative scheme created by the other.²⁷ In traditional constitutional division of powers jurisprudence, when federal and provincial laws meet and conflict, the federal law is paramount.

Jurisdiction in relation to agriculture and immigration (s. 95) is the only **explicit** constitutional allocation of concurrent jurisdiction between the federal and provincial governments. However, the judicial development of the “double aspect” doctrine, and the related notion of “incidental effects”, has created what Hogg has described as “practical concurrency,” a phrase that describes in a concrete manner what happens when both federal and provincial governments have the ability to enact valid laws in relation to different aspects of the same matter.²⁸ This is particularly appropriate in the context of the federal and provincial division of powers because of the broad description of the matters about which each can legislate. Thus, for example, Saskatchewan may validly enact a law aimed at preventing drinking and driving (because of its provincial aspects relating to property and civil rights) and Canada can also (because of its criminal law aspect). The more specific and explicit the description of the scope of jurisdiction, however, the less likely it is that matters will take on different aspects.

In the context of division of powers between the federal and provincial governments, this practical concurrency exists at the margins of jurisdictions because the lists of jurisdictional powers contained in sections 91 and 92 are quite different. Although there is a measure of practical concurrency caused by double aspects and incidental effects, the

circumstances under which this results in a conflict of laws problem are relatively few. However, in the context of Aboriginal governments, all of the jurisdiction that they will exercise will, by definition, be allocated under the constitution to either the federal or the provincial government. In other words, **every time** an Aboriginal government enacts a law there will be the potential for conflict with either a federal or provincial law in relation to the same matter. Constitutional jurisprudence developed to address uncertainties at the margins of the division of powers between the federal and provincial governments cannot be applied to these very different circumstances without severely constraining the capacity of Aboriginal governments to be truly self-determining.

The situation is complicated still further by the lack of clarity around the existing parameters of federal jurisdiction under s. 91(24), which provide it with jurisdiction in relation to “Indians, and Lands reserved for the Indians”. This confusion results from the fact that provincial laws of general application apply to Indians as a result of the addition to the *Indian Act* of what is now section 88, which was added when the Act was substantially revised and re-enacted in 1951. Section 88 states that,

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.²⁹

There is nothing in the proceedings of Parliament or any Cabinet papers of the time to indicate the precise reason for the inclusion of section 88.³⁰ It seems likely, however, that

it was intended to promote a policy of assimilation or integration of First Nations people into mainstream society by making applicable provincial laws that would not otherwise have applied. The effect would be to minimize the distinctions between First Nations peoples and white society. While the courts had previously concluded that there were some provincial laws that applied to First Nations people of their own force because they did not bear on the essence of the federal jurisdiction, in most circumstances it became unnecessary to determine how the provincial law applied, because whether of its own force or as a result of the application of section 88; by one means or other, it was applicable. It is therefore difficult to say precisely what the boundaries of the federal jurisdiction are. This difficulty has made it possible for the federal government to take an exceedingly narrow view of its powers to make laws in relation to Indians. This, in turn, has led to federal-provincial friction over which order of government has the responsibility to provide services to First Nations people, a problem which affected the course of negotiations in Saskatchewan on the relationship of laws.

The Relationship of Laws Chapter of the Agreement-in-Principle leaves section 88 to be addressed prior to concluding the Governance Agreement. However, the scope of section 88 is very important to an understanding of the relationship of laws provisions of the draft Agreement-in-Principle. First Nations took the understandable position that the extent to which provincial laws apply to First Nations because of the operation of section 88 is the extent to which First Nation laws should enjoy priority. Ultimately, this position was reflected in the conflict of laws provisions of the chapters in the draft Agreement-in-Principle on Families and Children³¹ and Education.³²

The Federation of Saskatchewan Indian Nations and Saskatchewan officials at the negotiating table recognized that it was untenable to create a situation where two or perhaps three laws would apply to the same situations, so they sought federal agreement to replace the “concurrency” model of the federal policy with what they termed a “displacement” model. For First Nations, the fundamental objective of negotiating a self-government agreement in the first place was to build on the Treaty relationship between the Crown and First Nations by acknowledging their jurisdiction and providing scope for the meaningful exercise of that jurisdiction. Thus, the fundamental concern was not that there be rules for laws that conflict with one another, but that the agreement respect the jurisdiction of First Nation governments to make laws exclusively in some areas. This jurisdictional exclusivity was not proposed by First Nations as a general rule, but in the key areas of families and children and education, which were the two substantive areas under negotiation at the time, it was critical that First Nation governments be able to make laws that would displace the provincial or federal laws that might otherwise apply.

Initially, there was a misunderstanding among the parties about what exactly the displacement model would entail. Federal officials were concerned that displacement would result in “gaps” – situations where no law would be applicable. In this sense, some notion of concurrency was required to ensure that the coming into effect of the agreement would not result in all laws being swept away. This concern was addressed in two ways.

First, section 3.1 of the Relationship of Laws Chapter provided that the status quo would continue until and only to the extent that First Nation laws were enacted in accordance with the agreement. Federal and provincial laws would continue to apply to First Nations in the same manner as they would have applied if the agreement had not been entered into, except as altered by the agreement. However, once First Nation governments took up and exercised jurisdiction, their laws would displace existing federal and provincial laws which addressed the same matters.³³

While this provision did not resolve the concerns around displacement, it provided for the ability for the parties to continue to discuss the point. This was a major concession from from the federal negotiators that allowed First Nations to continue to negotiate. The continued discussion would proceed on the basis that the displacement of a provincial law did not result in a gap or legal vacuum and that there would be a mechanism developed by which the public could be informed of which provincial laws were rendered inapplicable.³⁴ This was the second way in which the federal concern about gaps was addressed in practical terms.

From the perspective of First Nations and Saskatchewan, there was one other problem that made it very difficult to accept the federal concurrency model, and that was the very restricted federal view of what constituted a “conflict” of laws that would trigger a paramountcy rule. The term “conflict” was defined in the Agreement in Principle as “an actual operational conflict or operational incompatibility”. The federal government took the view that only when obeying one law would result in disobeying another would there

be a conflict. In the absence of such a conflict, both or all three laws would have to be obeyed.

This was problematic for First Nations for two reasons. First, it made little sense to engage in the whole process of negotiating a self-government agreement to provide legal recognition for First Nation governments and the laws they enacted, only to have all other laws apply anyway. Secondly, obeying both laws in the absence of actual operational conflict could undermine the whole objective of the First Nation law. For example, Saskatchewan has a law that requires children to go to school between the ages of 7 and 16. If a First Nation government were to decide that it would be preferable that children learn in their home and community until the age of 10 in order to develop a closer connection with their culture and passed a law that did not require children to attend school until age 10, it would make no sense to apply the provincial law to them.

However, there would be no operational conflict between these laws, and under the federal government's concurrency model, both laws would apply. Although it may seem odd at first blush, Saskatchewan officials agreed with the FSIN that certain of its laws should be displaced by the enactment of First Nation laws because of the potential liability the province could incur if its laws continued to apply. Displacement offered a means by which the province could avoid being in the position of having to ensure that First Nation governments met their responsibilities.

Another concern that federal officials expressed over the displacement model was its potential for the creation of "enclaves". This concern was both over-stated and

misplaced. The Supreme Court's rejection of reserves as federal enclaves in its decision in *Calder*³⁵ was an illustration of the doctrine of incidental effects. Provincial laws that only incidentally affect Indians or their lands can apply to them in the absence of conflict. It is only those laws that are in pith and substance in relation to Indians and their lands that are beyond the competence of the province. If, however, First Nations jurisdiction and the displacement of provincial laws by First Nations laws results in "enclaves" or, to describe them another way, self-governing First Nations communities, there is no legal problem.

The whole point of a self-government agreement is self-determination, and self-determination requires that there be areas of jurisdiction in which First Nations can enact laws that will be relevant to them and their culture. Even if First Nations chose to enact the same law as the federal or provincial government, it is important that they have the capacity to make that choice. If the **only** laws that a First Nation can enact are laws that are already enacted by Canada or the province, there would have been little point in entering into an agreement.

The relationship of laws issues and, in particular, the desire to create a displacement model were key stumbling blocks to achieving an Agreement-in-Principle. Without a framework that would recognize First Nation exclusive jurisdiction to enact laws for themselves in the areas of families and children and education, as well as in other areas for which a displacement model would be appropriate that were to be negotiated subsequently, agreement would not have been possible. Although the provisions of the

agreement that were ultimately included were fundamentally just agreements to engage in further negotiations to achieve a mechanism for displacement that would avoid legal gaps and provide notice to the public affected by the laws, they were essential to keep the door open to achieve a Governance Agreement. Achieving federal agreement to these provisions represents a significant accomplishment for the negotiators, one which took four years of effort against the conceptual limitations of the federal government's mandate.

While the Saskatchewan Agreement-in-Principle represents a worthy intellectual experiment in constructing a self-government agreement that is fundamentally federalist in its conception, it ought not to be confused with an affirmation of the utility and conceptual rigour of the self-government policies of either the federal or provincial governments. Too often, the negotiators were confronted by a federal self-government policy, in particular, which would have made the innovative aspects of this agreement impossible to achieve and a federal bureaucracy which resisted reconsidering the federal policy, even if it was essential to securing a self-government agreement in Saskatchewan. While the provincial government's policy was less explicit, provincial officials also frequently resisted the idea that First Nations should have the authority to pass and implement laws without reference to provincial laws and regulatory standards.

Instead, the draft Agreement-in-Principle represents a victory for a group of negotiators who both understood the conceptual underpinnings of what they were attempting to negotiate and were tenacious enough to continue to attempt to secure their desired result

even in the face of bureaucratic resistance. It is far from assured, however, that such circumstances will exist in future negotiations. Rather than rely on the quality of the negotiators, it is time for federal and provincial governments to critically reassess their Aboriginal self-government policies and replace them with a policy framework that extends Canada's traditions of responsible government, federalism and liberal democracy to Aboriginal peoples. It is time that our governments and our society come to the conclusion of Saskatchewan author Maggie Siggins who, in a recent book, has written, "I concluded that all my white society can do now is stand aside and give what is asked."³⁶

¹ Will Kymlicka. *Liberalism, Community and Culture*. (Oxford: Clarendon Press, 1989), p. 212.

² Kymlicka, *Liberalism, Community and Culture*, at 154.

³ Samuel V. LaSelva. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. (Montreal & Kingston: McGill-Queen's University Press, 1996), p. 100.

⁴ Indian and Northern Affairs Canada. *Federal Policy Guide – Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (online version), http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html, accessed November 28, 2001.

⁵ LaSelva, at 189.

⁶ *Ibid.*, at 43.

⁷ *Ibid.*, at 250-251. See also LaSelva; James Tully. *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

⁸ LaSelva, at 68.

⁹ Brian Cuthbertson. *Johnny Bluenose at the Polls*. (Halifax: Formac Publishing, 1994), p. 1.

¹⁰ *Ibid.*, at 1, 29.

¹¹ Whyte and Lederman, Chp. 2, p. 3.

¹² Whyte and Lederman, Chp. 3, p. 13.

¹³ Cuthbertson, p. 288. Responsible government came to the other colonies of British North America later in 1848.

¹⁴ See for example, judgement of Meyer, J. in *St. Jean v. R. and Commissioner of Yukon Territory*. Yukon Reports [1988] 2:116–127 and Northwest Territories Reports [1987]:118– 135. Justice Meyer commented that the role of the Commissioner of the Yukon in assenting to territorial legislation was equivalent to that of a Lieutenant Governor and stated that "the Yukon Territory is not a department of the federal Parliament or the federal government. It is, in my view, an 'infant province,' with most but not all of the attributes of a true province." As such, Justice Meyer concluded, Yukon legislation is not delegated legislation and the Commissioner in Council is not an institution of the Parliament and the government of Canada.

¹⁵ *R. v. Turpin*, [1989] 1 S.C.R. 1296. See also *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.

¹⁶ LaSelva, at 152.

¹⁷ Will Kymlicka, "Liberalism, Individualism, and Minority Rights", Hutchinson and Green, Eds. *Law and the Community* (Toronto: Carswell, 1989), p. 187.

¹⁸ LaSelva, at 29.

¹⁹ *Rolling Draft Agreement in Principle, Draft #18 (July 17, 2003)*, section 5.10. The Agreement-in-Principle has a number of provisions that contain the phrase "prior to concluding the Governance Agreement..." It is important to understand that the parties were negotiating an agreement that would establish the basis upon which a final agreement, in this case to be called the Governance Agreement, would be negotiated. Agreement of the parties to the Agreement-in-Principle would indicate the parties'

commitment to conclude negotiations on the basis of the principles contained in the Agreement-in-Principle. Deviation from those principles could only occur in negotiating the Governance Agreement with the agreement of all parties. In some cases, the issues were sufficiently complex that a resolution within the Agreement-in-Principle was not possible; the phrase “prior to concluding the Governance Agreement...” was a signal both that the matter had not been resolved and that no Governance Agreement could be concluded without resolution of the matter. For example, in the case of this particular provision of the Agreement-in-Principle, the federal Inherent Right Policy did not permit First Nations governments to create their own institutions. This was based on the federal view that legislative action by the federal government (or possibly the provincial government) would be required to provide First Nations’ institutions with legal capacity. First Nations argued that the inherent right to self-government included the right to create necessary institutions and that the federal and provincial governments needed only to commit to recognizing them as valid, once they were established, by directing federal and provincial institutions, and in particular the courts, to recognize them. While the federal officials were not convinced of the First Nations’ position at the time, they were willing to consider the matter further and to continue to discuss it as negotiations moved forward. Thus, the drafters of the Agreement-in-Principle included the phrase “prior to concluding the Governance Agreement...” in section 5.10.

²⁰ Ibid, sections 5.1-5.4.

²¹ Ibid, Chapter 5.

²² Ibid, section 4.2. There were also other provisions, such as the transitional provision that a person who was a member of a band as defined by the *Indian Act* immediately prior to the coming into force of the First Nation’s membership legislation is deemed to be a member of the self-governing First Nation (section 4.3), and the provision stating that membership does not grant Canadian citizenship or confer or deny rights of entry into Canada (section 4.5), but section 4.2 was the only permanent condition placed on First Nations’ autonomy in defining their membership.

²³ The words, “concurrent” or “concurrency” are not used in the federal Inherent Right Policy.

²⁴ Peter Hogg. *Constitutional Law of Canada*, looseleaf edition. (Toronto: Thomson-Carswell, 1997), Chapter 15, pp.6-7.

²⁵ First articulated by the Privy Council in the case of *Hodge v. The Queen* (1883), 9 App. Cases. 117.

²⁶ *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, pp. 108-109.

²⁷ *Bank of Montreal v. Hall*, [1990] 1 S.C.R.121; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113.

²⁸ Hogg, Chapter 15 at 41 .

²⁹ R.S.C. 1985, c. 1-5.

³⁰ See Kerry Wilkins, “Still Crazy After All These Years”: Section 88 of the Indian Act at Fifty”(2000) 38 Alta. L. Rev. (No. 2) 458-503.

³¹ *Rolling Draft Agreement-in-Principle*, Chapter 8.

³² Ibid, Chapter 9.

³³ To ensure that First Nations could gradually take up jurisdiction without displacing all other laws in the field, each head of jurisdiction was broken down into sub-heads. This would allow First Nations to legislate in only part of a head of jurisdiction and displace other governments’ laws only to the extent that they addressed the same part of the jurisdiction as the First Nations law, rather than the entire jurisdiction.

³⁴ This would be one of the purposes of the requirements in sections 5.13 to 5.16 of the draft Agreement-in-Principle that First Nations laws be in writing and be contained in a public register.

³⁵ *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

³⁶ Maggie Siggins. *Bitter Embrace: White Society’s Assault on the Woodland Cree*.(Toronto: McClelland and Stewart, 2005), p. 4.