Weaving a Third Strand Into the Braid of Aboriginal–Crown Relations:

Legal Obligations to Finance Aboriginal Governments Negotiated in Canada

RAMI SHOUCRI*

* LL.B., Osgoode Hall Law School (2007), LL.M. Candidate, University of Toronto Faculty of Law (2008). I would like to thank Professor Shin Imai for his invaluable encouragement and guidance, not only in writing this article, but also throughout my time at Osgoode. I would also like to thank the members of the Inuvialuit Self-Government Negotiating Team, especially Bob Simpson, Vince Teddy and Donna Kisoun, for their hospitality and inspiration during my placement with the Team in the winter of 2006.

Relationships between nations consist of political, legal and economic aspects. This paper will explore the intersection of these three aspects in the context of Aboriginal–Crown relations from the perspective of an analysis of legal obligations on federal and provincial/territorial governments to fund Aboriginal governments arising from politically negotiated agreements within the contemporary Canadian legal framework. The focus will be on arguments based on obligations arising from the sui generis *fiduciary relationship, the need to uphold the honour of the Crown and the common law principle that certain rights may exist if they are necessarily incidental to other, already recognized, rights. Although legal principles are applicable, the challenges of recognizing such obligations as "legal" must also be recognized. The paper will conclude with an examination of the relative merits of several possible, in terms of both form and substance, national frameworks to guide the financial negotiations necessary to implement Aboriginal governments. Specifically, the issues will be traced with reference to the experiences of the Inuvialuit people of the Western Arctic in self-government negotiations with the federal and territorial governments.*

I INTRODUCTION

The analysis undertaken in this paper was inspired by the author's experiences as an intern with the Inuvialuit Self-Government Negotiating Team in the Inuvialuit Settlement Region during the placement phase of the 2006 Intensive Program in Aboriginal Lands, Resources and Governments through Osgoode Hall Law School. It is contended that negotiations and decisions regarding funding of contemporary Aboriginal governments are subject to and must be informed by legal principles. In particular, the implications of (1) the Crown–Aboriginal *sui generis* fiduciary relationship, (2) the need to uphold the honour of the Crown, and (3) the common law principle that certain rights may exist if they are necessarily incidental to other already recognized rights must be respected in order to achieve meaningful implementation of the Aboriginal right to self-government.

The paper begins by briefly exploring the status of the Aboriginal right to self-government as understood in the contemporary Canadian political and legal framework. The paper then proceeds on the assumption that the right to self-government exists, has been recognized and is currently being implemented through individual negotiations to explore the scope of legal obligations on the federal and provincial/territorial governments to finance Aboriginal governments, primarily within this same contemporary Canadian legal framework. Clearly, the legal and political status of an Aboriginal people can be analyzed within different frameworks, including an international[1] and/or a purely Aboriginal[2] one. This paper, however, will not emphasize the distinction between the different perspectives, since to do so might overshadow the inter-community nature of what is known as Aboriginal law within Canada.[3]

After identifying some of the real and/or perceived challenges of applying law to the financing of Aboriginal governments, the paper will conclude with an examination of the relative merits of several possible, in terms of both form and substance, national frameworks to guide the financial negotiations necessary to implement Aboriginal governments. The legal principles discussed throughout the paper must inform these processes in

1. See generally, James Anaya, *Indigenous Peoples in International Law* (New York: Oxford, 1996).
2. See generally, Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford Press, 1999) and John Borrows "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1.
3. See e.g., John Borrows "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629, where the author, among other things, criticizes the contemporary judiciary for not recognizing that First Nation law has, in fact, been incorporated into Canadian law on Aboriginal rights and that it can and should continue to inform the development of the legal system.

order to integrate the legal, political and economic aspects of the Crown–Aboriginal relationship in pursuit of a just and prosperous contemporary Canada.

II THE RIGHT TO SELF-GOVERNMENT

Increased Aboriginal control of Aboriginal political, social and cultural destiny has long been demanded by Aboriginal peoples and supported by countless reports and studies commissioned by governments and organizations, both Aboriginal and non-Aboriginal.[4] This claim has been justified on a number of grounds.[5] Although functional, social policy considerations may support the recognition of a right, there is also a possibility that practical considerations may cause politicians and the general public to hesitate when it comes to implementation. It is at this point that clarity and conviction concerning the nature of the right becomes necessary. A right has at least two different aspects: its source or nature, and its method of recognition, implementation and enforcement. Each aspect is briefly explored below, but the subsequent discussion regarding a right to funding of Aboriginal governments will proceed on the assumption that the right to self-government exists and it has been politically and judicially recognized in Canada.

Source and Nature of the Right

In his work commissioned by the Royal Commission on Aboriginal Peoples ("RCAP"), Patrick Macklem investigated the sources of an Aboriginal right to self-government.[6] He began his analysis by identifying the pitfalls of positivistic modes of thought in general and especially in the context of Aboriginal rights, in the sense that an analysis of written legal documents should not end the inquiry into the extent of Aboriginal legal rights.[7]

---

4. See e.g. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, 5 vols. (Ottawa: Minister of Supply and Services, 1996) [*RCAP Report*] and Speaker of the House of Commons, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Minister of Supply and Services, 1983) [*Penner Report*].
5. See *e.g.* John H. Hylton, "The Case for Self-Government: A Social Policy Perspective" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2d ed. (Saskatoon: Purich Publishing, 1999) 78 for the sociological perspective [Hylton, *Aboriginal Self-Government*].
6. Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) at 3.
7. *Ibid*. at 5.

However, he also cautions against overemphasizing the dichotomy between "legal rights," as recognized in explicit sources of law, and "morally justifiable principles" that are not acknowledged in the law. To overemphasize the distinction risks missing the point that some level of agreement on a proposition, as is reflected in a law, gives the proposition a level of legitimacy proportional to the degree of consensus behind that law.

Macklem's project was to identify why Canada should explicitly recognize an Aboriginal right to self-government. He argues for the explicit recognition of the right to self-government within Canada according to five normative bases: (1) prior sovereignty, (2) prior occupation, (3) treaties, (4) self-determination and (5) protection of minority cultures, all housed in a principle of equality.[8] He advocates for the intentional refusal to limit the source and nature of the right to a single normative basis: "Supported by a number of distinct but intersecting normative justifications, the right of self-government is best defended by a combination of arguments, each supporting a different dimension of the right."[9]

Recognition of the Right

Kent McNeil has argued that the right of Aboriginal peoples to self-government currently exists and has been recognized both politically and judicially within Canada.[10] He identifies the growing body of academic work supporting the idea, the recognition of the right by the federal government in its policies, and implicit judicial support in certain decisions as evidence that the right has been constitutionally recognized.[11]

Political Recognition of the Right

The draft legal text of the Charlottetown Accord, which was approved by all premiers and the prime minister of the time, contained the following amendment: "35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada."[12] The specific wording indicates that the parties believed that the right would not be created by the

8. *Ibid*. at 4.
9. *Ibid*.
10. Kent McNeil, *The Inherent Right of Self-Government: Emerging Directions for Legal Research* (Chilliwack: First Nations Governance Centre, 2004).
11. *Ibid*. at 1.
12. Charlottetown Accord, Draft Legal Text in Kenneth McRoberts & Patrick Monahan *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Toronto University Press, 1993) at 348 ["Charlottetown Accord"].

amendment, but only that the clause would give explicit recognition to the right which Aboriginal peoples already have.

RCAP strongly expressed its view that the right to self-government was an inherent one. In its 1993 preliminary report *Partners in Confederation*,[13] it expressed the view that although explicit recognition of the inherent right in the written constitution of Canada, as was proposed in the Charlottetown Accord, was preferable in terms of clarity, the contemporary Canadian legal and political framework could recognize the inherent right. The commissioners argued that this recognition could occur under the framework set up by section 35(1) of the *Constitution Act, 1982*.

Following the collapse of the Charlottetown Accord and the release of the RCAP *Partners in Confederation* report, the Canadian federal government released its federal policy guide on Aboriginal self-government in 1995.[14] Among some of the highlights of the policy guide were the declarations that the right to self-government is inherent and that it is a right recognized and affirmed under section 35 of the *Constitution Act, 1982*. Some critics have suggested that despite the "inherent" label attached to the right, the policy actually reflects a contingent rights approach because it can only be implemented via negotiation. Supporters of the policy rebut this criticism by pointing out that, by recognizing the right as one falling under section 35, the government added credibility to its recognition of the right as inherent in so far as it has opened itself up to litigation in the courts.[15]

The Contemporary Canadian Judicial View

As currently practiced, the Canadian system entrusts the judiciary as the guardians of the *Constitution*. They are entrusted with the task of interpreting both the written and unwritten aspects, and resolving any constitutional conflicts. With regards to Aboriginal self-government, the Supreme Court has been relatively silent, which tends to be interpreted as unsupportive.

One of the earliest judicial considerations of the right to self-government is found in the *Pamajewon*[16] case. The Supreme Court

13. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 3.
14. Department of Indian Affairs and Northern Development, *Federal Policy Guide: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Supply and Services, 1995), online: <http:www.ainc-inac.gc.ca/2002-templates/ssi/print_e.asp> [*Federal Policy Guide*].
15. Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011 at note 131.
16. *Pamajewon v. The Queen*, [1996] 2 S.C.R. 821 [*Pamajewon*].

unanimously held that, assuming that a right to self-government did exist in the Canadian *Constitution*, it did not include the right to operate high stakes gambling venues. The court refused to decide several issues, including whether section 35(1) could recognize a right to self-government and what exactly such a right would entail. The court, however, did assert that the proper test for the establishment of an Aboriginal right to self-government under section 35(1) was the one established in the *Van der Peet*[17] case.[18] The *Van der Peet* test requires that an Aboriginal right must be derived from a practice, custom or tradition that was an integral part of a distinctive culture prior to contact with the Europeans.[19] This point-of-contact requirement has been criticized as excessively focused on the nature of a right at the "magic date" of contact.[20] This criticism is especially forceful in the context of a claim to a right to self-government, given that adaptation to changing circumstances is one of the core elements of good governance. The court also emphasized that the right must not be framed at a "level of excessive generality."[21]

Shortly after the release of this judgment, Bradford Morse offered the following commentary:

> An alternative approach to assessing the practical implications of *Pamajewon* is to conclude that the Supreme Court has elaborated the law on self-government in such a way as to close the door on future litigation on this subject for the foreseeable future. That is, the Court has created a legal standard that is so hard to meet and has rendered litigation so expensive to pursue that it is thoroughly unattractive for First Nations and the Metis to seek a judicial solution. The political route of pressuring for legislative change, or seeking negotiated self-government agreements with constitutional protection to implement the inherent right, may now have become the only option. If this is accurate, then the negotiating leverage of Aboriginal communities has been diminished significantly.[22]

17. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].
18. *Pamajewon*, *supra* note 16 at para. 24.
19. *Van der Peet*, *supra* note 17 at para. 46.
20. See, for example, Russel Lawrence Barsch & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993. In *R. v. Sappier; R. v. Gray*, 2006 SCC 54 at para. 33, the Supreme Court affirmed that the relevant time-frame is "pre-contact" but emphasized that the evidentiary burden required to establish pre-contact practices must be applied flexibly: "Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular [A]boriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available."
21. *Pamajewon*, *supra* note 16 at para. 27.
22. Morse, *supra* note 15 at 1024.

Interestingly, Morse points out that the point-of-contact magic date may not be as insurmountable an obstacle to some groups as compared with others. Specifically, groups such as the Inuvialuit which have only come into contact with Europeans relatively recently may not find the requirement quite as onerous as those First Nations that were in contact with Europeans starting in the 16th century.[23]

Since *Pamajewon*, the leading judicial considerations relevant to determining the nature and status of the Aboriginal right to self-government within the contemporary Canadian legal and political landscape are Justice Binnie's opinion in the *Mitchell* case[24] and Justice Williamson's consideration of the *Nisga'a Treaty* in the *Campbell* case.[25]

The legal issue in *Mitchell* was essentially the status of the Mohawk Nation, vis-à-vis the Canadian and American states in the context of a dispute as to whether a Mohawk citizen could be assessed duties while crossing the American–Canadian border over traditional Mohawk territory. Justice Binnie's concurring judgment expanded on Justice McLachlin's majority judgment, and commented on the implications of the majority's view regarding sovereignty and what he referred to as "internal" self-government.[26] The *Campbell* case involved a challenge to the recently ratified *Nisga'a Treaty*.

Both judgments refer to the concept of "domestic dependant nations" coined by United States Supreme Court Chief Justice Marshall[27] to describe the relationship between Aboriginal people and the United States of America within the law of the United States. Justice Binnie interprets the American experience as evidence that, despite the literature that repeatedly characterizes American tribes as retaining some level of sovereignty, American tribes are not sovereign in the way that would be understood in Canada,[28] but that this fact does not preclude the functioning of an internal form of self-governance. The framework that he sets up, thus, places the right to self-government in the category of an Aboriginal right, that, if not extinguished by 1982, continues to this day as a constitutionally protected right under section 35(1) within the context of a completely sovereign Canadian state.

---

23. *Ibid*.
24. *Mitchell v. Canada (Minister of National Revenue)*, [2001] S.C.J. No. 33 [*Mitchell*].
25. *Campbell v. British Colombia (A.G.)*, [2000] B.C.S.C. 1123 [*Campbell*].
26. *Mitchell*, *supra* note 24 at para. 165.
27. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) l (1831).
28. *Mitchell*, *supra* note 24 at para. 165, Justice Binnie notes that a simple law of Congress can override any tribal authority in support of this conclusion.

This is not to say that these conclusions are not highly controversial,[29] but only that they seem to be the dominant view of the right to self-government within the contemporary jurisprudential framework.

III SCOPE OF LEGAL OBLIGATIONS REGARDING FUNDING OF ABORIGINAL GOVERNMENTS

Assuming that a legal right to *self-government* exists, the question remains as to whether a government created as a product of a negotiation seeking to implement this right to self-government has a legal right to *funding*. Although this is an intricate legal inquiry and it is the central question of this paper, the reality that any government that intends to compensate its civil service, implement programs and deliver services requires a financial base must also inform the inquiry.

Within a federal system, there are two main sources of revenue, both of which will be relevant to Aboriginal governments negotiated in the current climate. First, there are those that can be generally defined as *own source revenues*, such as revenue generated from taxation, the levying of fines or fees and natural resource rights. Second, there are *transfer payments* between different levels of government. Currently, the approach to the negotiation of Aboriginal or regional government financing involves a determination of the anticipated expenses of that government followed by a negotiation of the distribution of the sources of financing to meet those expenses. This is clearly a political and economic exercise, but the question remains as to whether there is a legal element to such a negotiation.

The legal principles of (A) the *sui generis* Crown–Aboriginal fiduciary relationship, (B) the honour of the Crown, and (C) reasonable incidental rights are analyzed below for their implications regarding legal obligations on the Crown to finance Aboriginal governments.

29. See esp. Binnie J.'s statement regarding any degree of Mohawk autonomy in *Mitchell*, *supra* note 24 at para. 70: "This asserted autonomy, to be sure, does not presently flow from the ancient Iroquois legal order that is said to have created it, but from the *Constitution Act, 1982*. Section 35(1), adopted by the elected representatives of Canadians, recognizes and affirms existing Aboriginal and treaty rights. If the respondent's claimed Aboriginal right is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result."

Applicability of Fiduciary Principles to Crown–Aboriginal Governmental Relations

Fiduciary Principles and Crown–Aboriginal Relations in General

The Supreme Court of Canada has consistently held since the landmark *Guerin*[30] decision that the relationship between Aboriginal people and the Crown has fiduciary characteristics. It is important to note that fiduciary legal principles are not uniquely applicable to the relationship between the Crown and Aboriginal nations.[31] However, the Crown–Aboriginal fiduciary relationship is distinct from other recognized fiduciary relationships and this is reflected in its characterization as *sui generis*.[32] Much of Justice Dickson's analysis in his decision in *Guerin* involved an exploration of how exactly the Crown–Aboriginal fiduciary relationship is *sui generis* relative to other recognized fiduciary relationships.[33]

The issue in *Guerin* was whether the Crown's conduct in leasing surrendered Musqueam reserve lands was subject to judicial scrutiny and, if so, to what standard. Seven of the eight participating justices held that the relationship between the Crown and Aboriginal peoples was a fiduciary one and that this relationship created enforceable obligations on agents of the Crown in the case at bar. Furthermore, these seven justices further held that the Crown agents did not meet the standard that was legally expected of them in their actions. The implications of this decision for the issue at hand are discussed in the section below.

The Supreme Court's most recent and extensive commentary on the nature and scope of the duties arising from the fiduciary relationship can be found in the *Wewaykum*[34] case. The court identifies three incidents of the overall relationship between the Crown and Aboriginal peoples where fiduciary principles apply. The first derives from a relatively narrow reading of the *Guerin* decision. In *Guerin*, the land at issue was reserve land and the

30. *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*].
31. *Ibid.* at para. 55 where Dickson J. describes how fiduciary relationships arise and their nature; "where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."
32. *Ibid.* at para. 61.
33. See, generally, Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) for a discussion of fiduciary law and the nature of the Aboriginal–Crown *sui generis* fiduciary relationship, as well as a critique of the Supreme Court's analysis of the issue in its *Guerin* decision.
34. *Wewaykum Indian Band v. Canada*, [2002] 2 S.C.R. 245 [*Wewaykum*].

Court in *Wewaykum* held that *Guerin* stands for the principle that fiduciary obligations arise when the Crown is dealing with existing reserve lands.[35]

Second, the court in *Wewaykum* recognized section 35 protected Aboriginal and treaty rights as being subject to fiduciary duties as previously noted in the *Sparrow*[36] decision.[37]

The third category that the Court discusses is a residuary one that was recognized in the *Ross River*[38] case:

> All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples.[39]

The Supreme Court in *Wewaykum* thus emphasized that although the relationship between Aboriginal peoples and the Crown has fiduciary characteristics, not all incidents of the relationship will attract the protection of the court based on fiduciary principles. Because the Court recognized, through the articulation of the residuary category, that the incidents of the relationship that will attract this protection are not limited to those identified in *Guerin* and *Sparrow*, it is important to emphasize the policy considerations that underlie fiduciary duties to guide the future development of this important area of law. As summarized by Professor Rotman,

> What is truly important, then, and what fiduciary law is designed to protect, is the integrity of a wide variety of socially valuable or necessary relationships. Therefore, fiduciary law ought to be applied on the basis of its inherent purpose rather than through the application of "established" categories of fiduciary relations.[40]

The Threshold Question: Do Fiduciary Principles Apply to the Crown–Aboriginal Relationship in the Context of Implementing the Right to Self-Government?

Under the *Wewaykum* analysis, the application of fiduciary obligations in the context of a right to self-government would require that the right to self-government is an independent legal interest or one that is recognized as an Aboriginal or treaty right under section 35(1). Furthermore, one would have

35. *Ibid*. at para. 77.
36. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].
37. *Wewaykum*, *supra* note 34 at para. 78.
38. *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816 [*Ross River*].
39. *Wewaykum*, *supra* note 34 at para. 79.
40. Rotman, *supra* note 33 at 153

to demonstrate that the Crown has had discretionary control over the exercise of that right.[41]

The status and method of recognition of the right to self-government was discussed above. For the purposes of this paper, it will be assumed that the right to self-government exists and has been recognized. The requirement to prove that the Crown has had discretionary control over the right to self-government does not seem like it would be a difficult threshold to meet, especially in the context of Aboriginal peoples subject to the *Indian Act* where the minister, for example, is empowered to exercise his or her discretion in the approval of Band Council bylaws.[42] For Aboriginal peoples who have never been subject to the *Indian Act*, such as the Inuvialuit, the demonstration of discretionary control over the right to self-government could focus on the implications of the imposition and enforcement of the laws of general application on their communities, by federal and/or provincial/territorial governments.

Fiduciary Principles and the Right to Funding of Aboriginal Governments

The applicability of fiduciary characteristics to the relationship between the Crown and Aboriginal peoples in the exercise of the right to self-government does not, however, define the content and scope of the duties on the Crown in that context. McNeil argues that "the federal government has a positive fiduciary obligation to provide Aboriginal nations with assistance to rebuild their capacity to govern themselves autonomously. Included in this would be the financial assistance necessary to make self-government work."[43] As discussed above, in order for self-government to work, an Aboriginal government must have some ability to raise its own revenues and have access to transfer payments from other levels of government if they are to function in a way consistent with the accepted understanding of a government, as opposed to an administrative agency. Furthermore, this ability under fiduciary principles would be characterized as a legal right and

41. See David W. Elliot "Much Ado about Dittos: Wewaykum and the Fiduciary Obligation of the Crown" (2003) 29 Queen's L.J. 1 at para. 56 summarizing the Supreme Court's approach to the threshold question: "This duty can apply where the following elements are present: an undertaking, sufficient discretionary power in the Crown, a corresponding vulnerability in the [A]boriginal peoples affected, and an [A]boriginal interest that is both cognizable and independent. To be cognizable, the interest should be sufficiently specific and central to [A]boriginal economies and culture. To be independent, the interest should be sufficiently autonomous of the Crown to give rise to an obligation 'in the nature of a private law duty.' Again and again, Binnie J. suggested that the archetype of an independent interest—that is, an interest that relates to pre-existing aboriginal title—is Indian land."
42. *Indian Act*, R.S.C. 1985, c. I-5, s. 81
43. McNeil, *supra* note 10 at 31.

not merely as a privilege. The significant limitations of these potential legal obligations will be discussed below but, in principle, there seems to be a persuasive argument that fiduciary principles should, at the very least, inform the content of the obligations on the federal, provincial and territorial governments in implementing a right to self-government.

The Tension Between "Fiduciary" and "Nation-to-Nation" Conceptions of Crown–Aboriginal Relationships

Alan Pratt argues that the concepts of the fiduciary relationship and of self-government represent the legal and political aspects, respectively, of the nation-to-nation relationship between the Crown and Aboriginal peoples. He argues that the two concepts are not irreconcilable but are actually two strands of an intertwined braid.[44] Fundamentally, the challenge in linking the two concepts lies in the apparent contradiction between the associations of *autonomy* with the concept of self-government and of *dependence* with the concept of the fiduciary relationship.

The conclusion that the establishment of autonomous Aboriginal governments is inconsistent with the application of fiduciary characteristics to the relationship between these governments and the other Canadian governments is partly based on what Slattery, Pratt and McMurtry have described as a faulty understanding of the source of the *sui generis* fiduciary relationship between the Crown and Aboriginal peoples. As the Supreme Court confirmed in *Wewaykum*, its source is not in the paternalistic attitude characteristic of typical fiduciary law, which would in fact undermine the purpose of self-government. According to the Supreme Court, the source of the *sui generis* fiduciary relationship is found in the nature of the early relationships between the Crown and the Aboriginal nations when Aboriginal nations "were perfectly capable of expressing their dissatisfaction in open hostility endangering the Imperial claim on the continent."[45] As a result, "the Indian people were induced by the promise of protection offered … to alter their legal position"[46] by the Crown in the *Royal Proclamation of 1763*.

On the facts of *Guerin* itself, the majority of the Supreme Court held that the fiduciary relationship did not oblige the Crown agents to get "the

---

44. Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1993) 2 N.J.C.L. 163 at 169.
45. Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 753, quoted in *Wewaykum, supra* note 34 at para. 79.
46. W.R. McMurtry & A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective", [1986] 3 C.N.L.R. 19 at 31 referred to approvingly by the Supreme Court in *Wewaykum, ibid.* at para. 79.

best" deal possible in leasing reserved lands, but only that they take the terms of the lease that were offered by the lessees back to the band for further instruction. This crucial point in this landmark case is actually a shining example of how fiduciary obligations are not only consistent with Aboriginal self-determination within the Canadian federal framework but also supportive of it. The obligation on the Crown was to facilitate the self-determination process of the Musqueam by informing them of the progress of the negotiations regarding their land, not to act as if they were the ultimate arbiters of what was in the best interests of the Musqueam band.

The Emerging Paradigm Under the Need to Uphold the Honour of the Crown

In recent decisions, the Supreme Court seems to be moving away from the concept of the *sui generis* fiduciary relationship to characterize the relationship between Aboriginal people and the Crown. Instead the Court seems to be placing increasing emphasis on the concept of the honour of the Crown as informing all dealings between the Crown and Aboriginal people.

In fact, the Supreme Court in the *Haida Nation* case explicitly grounded the source of the fiduciary relationship in the concept of the honour of the Crown. Chief Justice McLachlin asserted that the *Wewaykum* case held that "[w]here the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty."[47] Interestingly, the paragraph in the *Wewaykum* decision that Justice McLachlin cites for this proposition only states that "[s]omewhat associated with the ethical standards required of a fiduciary [duty] in the context of the Crown and Aboriginal peoples is the need to uphold the 'honour of the Crown.'"[48]

In the *Haida Nation* decision, the Court may also have re-characterized the very nature of the Crown's fiduciary obligations with respect to Aboriginal nations in a way that undermines its compatibility with conceptions of autonomy, relative to the conception in the *Guerin* decision. Chief Justice McLachlin in *Haida Nation* states that "the [fiduciary] duty's fulfillment requires that the Crown act with reference to the Aboriginal group's *best interest in exercising discretionary control* over the specific Aboriginal interest at stake."[49] This suggests a vision in which "the best interest" of the Aboriginal group is not necessarily linked to that Aboriginal

47. *Haida Nation v. British Colombia (Minister of Forests)*, [2004] S.C.J. No. 70 at para. 18 [*Haida Nation*].
48. *Wewaykum*, *supra* note 34 at para. 79.
49. *Haida Nation*, *supra* note 47 at para. 19 [emphasis added].

group itself making the decision, facilitated by Crown agents, as was the vision in the *Guerin* decision. Under the conception in the *Haida Nation* decision, the fulfilment of the fiduciary duty may instead authorize the Crown to make the discretionary decision with the restriction that it must be carried out with the best interest of the Aboriginal group in mind. This conception of the *sui generis* fiduciary relationship can certainly be seen as inconsistent with the autonomy of the group in question and explains the perceived need of the Supreme Court to emphasize an alternative paradigm of Aboriginal–Crown relations based on the need to uphold the honour of the Crown if a degree of autonomy of Aboriginal groups is to be coherently recognized in the Canadian legal framework.

Implications of the Emerging Paradigm for Funding of Aboriginal Governments

If this renewed emphasis on the need to uphold the honour of the Crown does indeed signal a paradigm shift in Crown–Aboriginal relations, then there would be implications for all rights and obligations within the relationship, including *both* the right to self-government and the right to funding for Aboriginal governments. It is worthwhile then to explore the sources and implications of the concept of the honour of the Crown briefly.

Though the need to uphold the honour of the Crown is a fundamental concept in much of European political history and law,[50] Justice Binnie in *Mikisew* specifically traced the legal obligations of Canadian governments towards Aboriginal peoples associated with the need to uphold the honour of the Crown to the *Royal Proclamation of 1763*. According to Justice Binnie, the Crown voluntarily pledged itself to fulfil certain obligations to the Indians in promulgating the *Proclamation*.[51]

Just before the *Mikisew* decision was released, Slattery elaborated on three possible sources of legal obligations arising from a need to uphold the honour of the Crown.[52] Justice Binnie's theory of the Crown *voluntarily* imposing legal obligations on its colonial governments based on the need to uphold its own honour is distinct from either the international customary law source that Slattery suggests is implied in the *Haida Nation* decision or the theory that the obligations arose only after the passing of section 35 of the

50. See David M. Arnot, "The Honour of the Crown" (1996) 60 Sask. L. Rev. 339 for a discussion tracing the fundamental social function of acting honourably in the name of the sovereign back to medieval Europe.
51. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 51[*Mikisew*].
52. Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup. Ct. L. Rev. 433 [Slattery, "Aboriginal Rights"].

Constitution Act, 1982. One of the most important implications of these alternative theories regarding the source of the duties on Canadian governments deriving from the need to uphold the honour of the Crown is the breadth of their applicability. By tracing the obligations to the *Royal Proclamation of 1763*, Justice Binnie's analysis seems to have excluded Aboriginal nations not covered by the *Royal Proclamation of 1763* from benefiting from any legal rights deriving from the Crown's need to uphold its honour.[53] Conversely, the customary international law theory and even the theory based on section 35 of the *Constitution Act, 1982*, would imply that all Aboriginal peoples are entitled to the legal protection associated with the need to uphold the honour of the Crown.

The implications of the *Haida Nation* and *Mikisew* decisions are unclear. If they represent a shift in the characterization of the fundamental legal nature of Crown–Aboriginal relations from one focused on the *sui generis* fiduciary relationship to one motivated by the need to uphold the honour of the Crown, then they are potentially profound. Slattery, writing before the release of the decision in the *Mikisew* case, interpreted the analysis in the *Haida Nation* decision as implying a distinction between "historical" and "settlement" rights. The need to uphold the honour of the Crown would then be the guiding principle in the process of reconciliation between a historically recognized right and a contemporary settlement of that right under this analysis.[54] Slattery suggests that the exact relationship between historical and settlement rights has not yet been established but he advocates for a generative theory to link the two. This approach views Aboriginal rights as operating on two levels: (1) the historical, which is timeless and abstract, and (2) the settlement, which is concrete and time bound.[55] The first level will always be regenerating and refreshing the second.

Within such a paradigm the court would assume a different role in regards to the *principles of recognizing* a historical right and the *principles of reconciling* that historical right with modern conditions. In terms of the principles of recognition, a court could freely and robustly acknowledge the nature and source of a right to self-government. At the same time, the court could take a more cautious approach to articulating the modern form of that right and could instead create a framework for negotiations that would allow the parties to reach a fair and just solution, with the federal and provincial

53. Although the exact geographical boundaries of the *Royal Proclamation, 1763* is a matter of some controversy, it certainly did not apply, by its own terms, to lands that were west of the Mississippi River or north of what was then the boundary of Rupert's Land.
54. Slattery, "Aboriginal Rights", *supra* note 52 at 440, referring to *Haida Nation*, *supra* note 47 at para. 32.
55. *Ibid*. at 443.

governments always being bound by the legal obligation to uphold the honour of the Crown.[56]

If the Supreme Court continues to emphasize the *Royal Proclamation* as the source of legal obligations on Canadian governments towards Aboriginal nations based on the need to uphold the honour of the Crown, then the natural starting point to assess the content of the obligations would be the text and context of the *Royal Proclamation* itself. Since it was unnecessary for deciding the case at hand, Justice Binnie did not explore the commitments that the Crown would have understood in 1763 to be carried out by the colonial governments in relation to the Aboriginal peoples with regard for the need to uphold its honour. However, John Borrows, for example, identifies the *Royal Proclamation* and the events surrounding it, especially the *Treaty of Niagara*, as an acknowledgment and a guarantee of the right of Aboriginal nations to manage their own affairs.[57] Using the analysis of Slattery discussed above, the *Royal Proclamation* would then be a key document in the process of recognizing the historical right of self-government.

This analysis could then accommodate the right to funding within the process of reconciling the historical right of self-government with modern conditions. The historical right of self-government would be meaningless in a modern federal state without an obligation on the recognized governments in the federal state (the federal and provincial/territorial governments) to relinquish some control of the authority to collect revenues or to transfer the necessary resources to the Aboriginal governments. The contemporary necessity of such an arrangement in a federal state is supported by the constitutional entrenchment of the equalization aspect of federal/provincial financial arrangements in section 36(2) of the *Constitution Act, 1982*.[58]

"Honour of the Crown" or "Fiduciary" Paradigms: A Distinction Without a Practical Difference?

Although the theoretical implications of such a development are profound, the practical implications on individual self-government negotiations are less

56. *Ibid*.
57. See John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 for a detailed analysis of this aspect of the Royal Proclamation.
58. Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 36(2) reads "Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

certain. Whether the legal obligations on the Crown in negotiating and implementing self-government agreements are characterized as stemming from the fiduciary nature of the relationship or from the need to uphold the honour of the Crown may not make such a big difference at a negotiating table. Nonetheless, it seems that the Supreme Court has diffused the tension in recognizing fiduciary obligations in the context of the implementation of the right to self-government. Even if one were to persuasively make the argument that the concepts of a "fiduciary relationship" and a "nation-to-nation" relationship arising out of self-government negotiations are irreconcilable, legal obligations could still arise as a consequence of the need to uphold the honour of the Crown.

Right to Funding as a Reasonably Incidental Right to the Right of Self-Government

The Supreme Court of Canada has recognized that Aboriginal people can claim as a right those activities that are reasonably incidental to the practice of a treaty right. In the *R v. Simon*[59] and *R. v. Sundown*[60] cases, the Court considered this principle in the context of a treaty right to hunt. In *Simon*, the Court held that the carrying of a firearm to the location where the treaty right to hunt was to be exercised was reasonably incidental enough to the acknowledged treaty right to hunt to become implicit in the right. Similarly, in *Sundown*, the Court held that for the Joseph Bighead First Nation, the establishment of a hunting cabin was reasonably incidental to the treaty right to hunt to the point that it became implicit in the right.

The principle supports the idea that Aboriginal people would have certain implicit rights that would be reasonably incidental to the exercise of the right to self-government. However, there are several major obstacles to having a court apply the principle to include a right to funding of an Aboriginal government as reasonably incidental to this right. Primarily, it is unclear whether this principle even applies outside the context of a treaty right to hunt. In defining the legal standard regarding the argument, the Supreme Court in *Sundown* introduces the possibility that the principle

59. [1985] 2 S.C.R. 387 [*Simon*].
60. [1999] 1 S.C.R. 393 [*Sundown*].

applies to a treaty right to fish as well,[61] but in neither case is there an indication that it applies in any other context.[62]

The second challenge is finding the circumstances in which this argument can be presented. In *Simon* and *Sundown*, the argument arises because the defendants are charged with an offense that if upheld would prevent them from exercising their right to hunt. In the case of claiming a right to funding as incidental to the right to self-government, it is difficult to imagine where such an argument can be raised other than in a claim for a civil declaration on the issue specifically. Alternatively, an Aboriginal government may be able to challenge a federal or provincial government decision to reduce or eliminate transfer payments on this ground.[63]

The third challenge would be meeting the legal standard set out in *Sundown*. After describing what information a "reasonably informed" person would possess, Justice Cory describes what that reasonably informed person would have to be able to conclude:

> In order to determine what is reasonably incidental to a treaty right to hunt, the reasonable person must examine the historical and contemporary practice of that specific treaty right by the Aboriginal group in question to see how the treaty right has been and continues to be exercised. That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, *taking into account acceptable modern developments or unforeseen alterations in the right.* The question is whether the activity asserted as being reasonably incidental is in fact incidental to an actually practiced treaty right to hunt. The inquiry is largely a factual and historical one. Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of *whether the activity was understood in the past and is understood today as significantly connected to hunting.* Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.[64]

The biggest obstacle in claiming that the right to transfer payments or own source revenues is incidental to the right to self-government according to

---

61. *Ibid*. at para. 28: "Would a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing?".
62. Interestingly, Justice Williamson in *Campbell, supra* note 25 at para. 114 uses this principle to suggest that an argument can be made that a right to self-government, itself, would be implied in the right to Aboriginal title.
63. As discussed in more detail below, the *Cree School Board v. Canada (A.G.)*, [2002] 1 C.N.L.R. 112 (C.A.), leave to appeal at SCC denied [2001] C.S.C.R. No. 563 [*Cree School Board*] reached the courts based on a similar situation. The Cree School Board challenged the validity of an agreement between Canada and Quebec regarding the funding formula for the School Board pursuant to a provision in the *James Bay and Northern Quebec Agreement*.
64. *Sundown, supra* note 60 at para. 30 [emphasis added].

this standard appears to be the requirement to demonstrate that a link between funding and the exercise of Aboriginal governance existed "*in the past*." Though challenging, there are two encouraging aspects of this legal standard for its application to the present argument.

First, the link between the right and that which is incidental to the exercise of the right in the past does not have to be identical to the link claimed contemporaneously. That is, in assessing the past linkage between a right and an incidental right and comparing it to the contemporary right and the claimed incidental right, one can take "into account acceptable modern developments or unforeseen alterations in the right."[65] Second, Justice Cory does not mention a specific point in time at which the right must be examined for its basis. In establishing a treaty right, a court must refer to the date that the treaty was signed to ascertain the intentions of the parties. In establishing an Aboriginal right, a court must refer to either the *Van der Peet* standard (the time of contact) or the *Delgamuukw* standard (the date of the assertion of sovereignty in the case of Aboriginal title) as the relevant time period. Justice Cory, however, seems to be making a conscious effort to avoid an overly "frozen" rights approach to the timing issue in analyzing what is reasonably incidental to the exercise of a right. He simply refers to the necessary continuity between the modern exercise of the right and the exercise of the right "in the past," an approach that might be flexible enough to ground a modern right to financing of Aboriginal governments in, for example, more recent government-to-band council financial relationships.

It would be necessary to establish that the transfer payments that flowed between Canada and band councils, for example, were based on the recognition that financing was "reasonably incidental" to the practice of a right to self-government. One would have to characterize the contemporary exercise of the right to self-government through newly negotiated Aboriginal governments as being "an acceptable modern development of the right" to self-government from "the past" recognition in the form of support of band council governments. Furthermore, the right to funding of new Aboriginal governments through own source revenues and/or transfer payments would have to be characterized as a continuation of the old funding arrangements to continue as a legally enforceable right.

Although it seems paradoxical to justify a new relationship based on the old unsatisfactory relationship, it seems to be an unfortunately necessary

65. *Ibid*.

technique within the prevailing legal paradigm governing Aboriginal and non-Aboriginal relationships in Canada.[66]

IV CHALLENGES OF CHARACTERIZING THE FINANCING OF ABORIGINAL GOVERNMENTS AS LEGAL OBLIGATIONS

Aboriginal governments will not arise as a product of a judicial ruling, although the political process through which they are recognized may be supported by such an event. Similarly, a specific financial agreement will not likely arise as a product of a judicial ruling, although the economics of one could be guided by a court decision. Although, there are constitutional concerns about the scope of the authority of the courts to make orders that affect government spending powers,[67] these are often overstated and, furthermore, must be assessed within the unique context of Aboriginal rights.[68] The intricacies of this debate are beyond the scope of this paper.[69] Furthermore, to focus excessively on the limits of the constitutional authority of the judiciary vis-à-vis the executive and legislative branches of the government unnecessarily detracts from the analysis of the rights and obligations of the Crown and Aboriginal peoples based on the relevant legal principles. The Crown bears the primary responsibility for fulfilling its legal obligations, whether or not there are constitutional limitations on the judiciary in ordering compliance.

Legal principles informing the financial relationship between Aboriginal and other Canadian governments seem to be especially relevant in the current context of discussion surrounding the fiscal imbalance in Canada, a point recognized in the recently released report on the issue for the Council of the Federation.[70] If the right to self-government is clearly established and the implications of the fiduciary relationship, the need to uphold the honour of the Crown and the incidental rights argument are taken to extend towards

66. See generally Stephanie Irlbacher Fox, *Indigenous Self-Government Negotiations in the Northwest Territories (NWT), Canada: Time, Reality and Social Suffering* (Doctor of Philosophy in Polar Studies Thesis, University of Cambridge, 2005).

67. See generally Joseph Eliot Magnet, (ed.), *Constitutional Law of Canada*, vol. 1, 8th ed. (Edmonton: Juriliber, 2001) at 620, "The Spending Power."

68. See, for example, the analysis in Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

69. See, e.g. David W.S. Yudin, "The Federal Spending Power in Canada, Australia and the United States" (2002) 13 Nat'l J. Const. L. 437 for the controversies within the debate.

70. Robert Gagne & Janice Gross Stein, *Reconciling the Irreconcilable: Addressing Canada's Fiscal Imbalance* (Ottawa, Council of the Federation Canada, 2006), online: Council of the Federation <http://www.councilofthefederation.ca/pdfs/Report_Fiscalim_Mar3106.pdf> at 48: "It is obvious to the Panel that federal–territorial financing arrangements should fully recognize the obligations and costs of Aboriginal rights agreements and remove any fiscal disincentives for territorial governments to conclude the remaining agreements".

the funding of Aboriginal governments, then there is at least some legal traction for how governmental decisions regarding funding are made. Currently recognized legal principles can inform constitutional amendments, nationally negotiated frameworks and individual negotiations to more explicitly and directly deal with the difficult issues at stake.

At this point, it may be instructive to refer to a recent experience of the Inuvialuit in their self-government negotiations. Prior to March 2006, the Inuvialuit were involved in a unique process with the Gwich'in nation and the federal and territorial governments initiated by a joint Inuvialuit and Gwich'in proposal submitted in 1993.[71] Although several factors played a part, there is no question that disagreements regarding funding were a key factor in the breakdown of the four-party-process. In particular, the federal government's decision, announced after the ratification of the *Agreement in Principle*[72] in 2003 by all of the signatories, that they would not have any direct financial relationship with the regional public government that formed the core of the *Agreement* caught the Inuvialuit and Gwich'in off-guard. Particularly, Finance Canada has stated that Canada would not enter taxation agreements that included regional public governments as one of the parties and they would not enter into a taxation agreement with an Aboriginal government that would have the power to delegate any resulting taxation room to the regional public government. They would, however, be willing to consider entering into transfer agreements with Aboriginal governments which would have the power to transfer those resources to regional public governments.[73] This was a major reason for the stalling of negotiations and the eventual withdrawal of support by the Gwich'in leadership for the *Agreement in Principle*.[74]

At a minimum, the principles discussed above would seem to be inconsistent with the position taken by the federal government regarding their financial relationship with the regional public government that all parties supported in the 2003 *Agreement in Principle*. The fact that the decision was announced by the Department of Finance illustrates the need to

71. Wendy Moss, "Inuit Perspectives on Treaty Rights and Governance" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) at 107.

72. *Gwich'in and Inuvialuit Self-Government Agreement-in-Principle for the Beaufort-Delta Region, online: Government of the Northweset Territories* <http://www.gov.nt.ca/MAA/agreements/beauf_e.pdf> [*Agreement in Principle*].

73. Interview with GNWT's former director of fiscal policy, Jean A. Guertin (23 April 2006).

74. AFN Resolution no. 29/2005, Moved by Charles Furlong, Aklavik Indian Band, NT.

reaffirm that all federal departments are bound by the fiduciary obligations, not just the Department of Indian and Northern Affairs.[75]

In fairness, the federal government has accepted both the applicability of the fiduciary principle[76] and the need to finance governments[77] in its 1995 policy statement. However, it has not linked the two aspects and it has yet to accept that there is a legal obligation, enforceable in the courts, to finance Aboriginal governments.

Assuming that the unconstitutionality of the courts affecting the spending power of governments is absolute, and that this would limit them in making a ruling that orders funding of an Aboriginal government, does not preclude the recognition of significant procedural rights in determining funding arrangements between the federal, provincial/territorial and Aboriginal governments. In fact, this is exactly what happened in a case involving the interpretation of a funding provision in the *James Bay and Northern Quebec Agreement* ("*JBNQA*").[78]

The case is noteworthy for acknowledging the crucial role finances have in giving meaningful effect to a particular right, in that case, the education rights of the Cree as guaranteed in the *JBNQA*. The analysis of the Quebec Court of Appeal is distinguishable from the point in this article because the *source* of the legal obligation to provide funding was grounded in a provision of the treaty/agreement itself, as opposed to the sources discussed in this article. The court also takes great pains to characterize the remedy as strictly procedural with no corresponding substantive right to funding. It is unclear how much of this emphasis results from the particular wording of the particular clause at stake,[79] but it is fair to say that the judiciary, if it can,

---

75. See e.g., Thomas Berger OM, QC, *The Nunavut land Claims Agreement Implementation Contract Negotiations for the Second Planning Period 2003–2013: Conciliator's Interim Report* (21 August 2005) [*Berger Report*] at 12 commenting, "This statement, and the language of the cases, make another point clearly: the duty to act consistently with the honour of the Crown applies to the entire federal government. While DIAND may take the lead in implementation, the obligations imposed by the honour of the Crown are borne by all government departments with whom the Inuit have dealings. In implementing treaties, all departments, not just DIAND, should be prepared to participate."
76. Federal Policy Guide, supra note 14 at 10.
77. *Ibid.* at 11.
78. *Cree School Board*, *supra* note 63.
79. *Ibid*. at para. 145 quoting s. 16.0.22 "Programs and funding by Québec and Canada, and the obligations of such governments in favour of the James Bay Crees, shall continue, subject to the Agreement. As a result thereof there shall be no decrease in the quality and quantity of educational services presently available to [N]ative persons for their education and the operational and capital funding necessary to ensure services will be provided by Québec and Canada" and at 16.0.23 "The funding by Québec and Canada referred to in paragraph 16.0.22 shall be provided to the Cree School Board in accordance with a formula to be determined by the Québec Department of Education, the Department of Indian Affairs and Northern Development and the Crees."

is more comfortable granting procedural rights as opposed to substantive rights when it comes to financial issues.

The situation in the *Cree School Board* case illustrates another point: Even assuming that the Crown acknowledges obligations to finance Aboriginal governments, even the clearest legal drafting regarding funding may lead to controversy. As Thomas Berger observed in his recently released report on the state of the Government of Nunavut regarding the chronic underfunding of institutions of public government, despite contractual obligations to fund these institutions,

> [t]he obligation is expressed so generally as to be exceedingly difficult to enforce. So long as *some* funding is provided, arguments will be premised on the interpretation of the language, and it is subject to almost impossibly wide interpretation. Drafters employ such phrases to describe obligations precisely because the parties cannot agree on specifics; it is a mistake to think that, come implementation, consensus among the parties as to what the text means—legally speaking—will be any more advanced. In the end, successful implementation depends far more on the goodwill of the parties and the honour of the Crown than any formal requirements derived from the NLCA or the Implementation Contract.[80]

In the final analysis, results will only be achieved if the contemporary political and moral will aligns with the implications of the applicable legal principles. Otherwise, there is a high risk that any recognized legal obligations will either be ignored or attenuated to a point of meaninglessness in the implementation of the right to self-government.[81]

V NATIONAL INITIATIVES ON FINANCING ABORIGINAL GOVERNMENTS

Designing a financial structure for a new government within an established federal system is a complicated task. However, the objective is not to just to *design* and implement such a structure but to *negotiate* it, an infinitely more complicated project. In tackling the challenges, different initiatives can serve different purposes. One issue is whether, considering the history of insensitively designed pan-Canadian Aboriginal policies emanating from the Canadian federal government, the only currently appropriate approach is one that is based on an individualized nation-to-nation relationship. A distinction

80. *Berger Report*, *supra* note 75 at 12 [emphasis in original].

81. See Pratt, *supra* note 44 at 181 commenting, "we must confront the possibility that we are close to the limits of the legitimate role of the law in defining the incidents of the political relationship within which the system of Aboriginal and treaty rights, and corresponding obligations, exists."

must be made with respect to what is meant by a "national" policy or framework. In so far as the Government of Canada represents the interests of all citizens of Canada, any statement or any position taken, whether in relation to an individual set of negotiations or towards a broader audience, can be called a national policy. In this context however, a national policy or framework is meant to refer to a pan-Canadian approach to a single issue, such as self-government.

From the federal government's perspective, the idea of a national policy or framework is comforting because it would make the outcome of negotiations more predictable. On the other hand, each Aboriginal nation has a unique perspective on what Canada should or should not be doing. Some, mostly those in a strong bargaining position, would like to see Canada adopt the nation-to-nation approach, whereas others, perhaps, would like a clear statement and commitment from Canada regarding how it will approach the funding of Aboriginal governments. The interests and concerns of the provinces and territories would also have to be considered in any aggregated agreements or approaches. Are these perspectives irreconcilable? It seems that the answer lies in recognizing that a healthy federal system is constantly balancing centralized decision making with respect for regional differences. The appropriateness of any balance struck must be assessed not only in terms of the substance of the balance but the process by which it was reached.

RCAP's Recommendation for a National Financial Framework

As noted by George Erasmus, "the movement of Aboriginal people to take charge of their lives didn't start with the Commission and it won't end with our report."[82] However, the composition of the Commission, the breadth of its mandate, and the scope of its research and recommendations demand that serious consideration be given to each of its recommendations. At the very least, it provides an invaluable starting point for the analysis of any issue in the field.

One of the recommendations of the Commission was to institute a collaborative process with the goal of developing a national framework to guide the negotiation of self-government agreements. The Commission envisioned that this national framework would address three aspects of the renewed relationship between Aboriginal nations and the two other orders of Canadian government. The goals would be "to achieve agreement on the

82. George Erasmus, quoted in Marlene Brant Castellano, "Renewing the Relationship: A Perspective on the Impact of the Royal Commission on Aboriginal Peoples" in Hylton, *Aboriginal Self-Government*, *supra* note 5 at 100.

areas of Aboriginal self-governing jurisdiction; to provide a policy framework for fiscal arrangements to support the exercise of such jurisdiction and to establish principles to govern negotiations on lands and resources."[83]

The Commission identified two advantages to developing a national fiscal framework. First, such a framework would provide guidance for individual negotiations, thus saving time, effort and expense. Second, it suggests that such a framework would lead to greater fairness among Aboriginal nations. The rationale for this claim is that Aboriginal nations with relatively less bargaining power would be able to benefit from the provisions negotiated by more powerful Aboriginal nations and the national Aboriginal organizations. These would certainly be some of the effects of a national fiscal framework, but depending on what is actually contained within the framework and how it would be instituted, it could be perceived as a disadvantage to an Aboriginal nation with a relatively strong bargaining position, such as the Inuvialuit.

Although the commissioners do not make any formal recommendations as to what specific provisions should be included in the national fiscal framework agreement, they do discuss several possibilities in the text of their report regarding the form and substance of such an agreement. Generally, the commissioners envisioned a document with two parts: (1) a preamble identifying the principles guiding the negotiations regarding the financing of Aboriginal governments and (2) the outline of a financial transfer regime between the three orders of government, each of which is discussed briefly below.

The commissioners recommended that five principles guide future negotiations: (1) self-reliance of Aboriginal governments, (2) equity among Aboriginal governments, between Aboriginal and non-Aboriginal peoples, and between individuals, (3) efficiency, (4) accountability both to citizens and to funding governments, and (5) harmonization of arrangements with adjacent governing bodies.

Regarding the transfer regime, the commissioners suggest that the agreement should identify the purposes, the nature of receipt, the forms and a formula for calculating any transfer among and between the three orders of government. The most significant aspect of this recommendation in terms of reaching pan-Canadian consensus is the formula. Theoretically, a formula could establish a national framework which could account for the variables at each individual negotiation table. The question is whether the interests across the nation align sufficiently to even reach consensus on a formula.

---

83. Vol. II of the *RCAP Report*, *supra* note 4 at 321.

Interestingly, the commissioners' only comment regarding the national fiscal framework and own source revenues was that a national framework agreement "should allow for the harmonization and co-ordination of other shared fiscal arrangements, through various mechanisms and agreements," including taxation.[84] The underlying assumption seems to be that transfer arrangements between federal, provincial, territorial and Aboriginal governments will necessarily be or should be similar enough across the country that agreement would be possible and desirable, whereas own source revenues, including taxation arrangements, are best dealt with on a case-by-case basis.

The commissioners, without any justification or analysis, suggest that such a fiscal framework be recognized in a political accord signed by all of the parties. Considering that the report was being researched and released in the aftermath of the failure of the Charlottetown Accord, the absence of any recommendations on constitutional initiatives regarding funding is understandable.[85]

Drawbacks of a National Framework

Depending on the process used to create the national framework as well as the substantive content of the framework, such an initiative is always susceptible to being seen as another imposition on not just local choices but also on the exercise of rights to self-determination. The process that has in fact taken place since the release of the *RCAP Report* has revealed a major development in what national policies mean in Canada. On 31 May 2005, two separate accords were signed: a political accord between the Assembly of First Nations and Her Majesty the Queen in Right of Canada on the "recognition and implementation of First Nation Governments"[86] and another between the Inuit Tapiriit Kanatami and Her Majesty the Queen in Right of Canada.[87] Both of these accords broadly commit the parties to a process similar to the one recommended by RCAP. Perhaps within the context of these two accords the appropriate balance between the consistency, efficiency and equity that characteristically arise out of broader

84. *Ibid. at* 309.
85. Compare for example, Recommendation 49 of the *Penner Report*, *supra* note 4 at 122, where Constitutional amendments were recommended to recognize obligations to provide resources to Aboriginal governments.
86. *A First Nations–Federal Political Accord on the Recognition and Implementation of First Nations Governments* (31 May 2005), online: Assembly of First Nations <http://www.afn.ca/cmslib/general/PolAcc.pdf>.
87. *Canada–Inuit Partnership Accord* (31 May 2005), online: Inuit Tapiriit Kanatami <http://www.itk.ca/media/supporting-docs/20050531-partnership-accord.pdf>.

agreements, on the one hand, and respect for the rights of individual Aboriginal nations, on the other, can be struck across Canada. Of course, such a division does not account for the reality of the Beaufort-Delta Region, where the Inuvialuit, an Inuit people, and the Gwich'in, a First Nations people, coexist to a significant extent, especially in the towns of Inuvik and Aklavik. Specifically, it is unclear whether either or both of the political accords would have facilitated in any way the implementation, including funding, of the Regional Public Government that formed the basis of the 2003 *Agreement in Principle*.

Alternative Methods of Implementing a National Framework on Financing of Aboriginal Governments

There are at least three other ways in which a nationally applicable obligation regarding funding of Aboriginal governments can be recognized. The first could be from a Supreme Court of Canada judgment, whether on constitutional grounds or otherwise. The possibilities of a statement on the matter were discussed above, but even if the court would address the issue, by necessity, it could not be any more than a guiding principle or two for negotiations on the matter.

The second approach would be to institute an obligation pursuant to a constitutional amendment. The most obvious approach would be to build on the model currently in place between the federal and provincial governments under section 36(2) of the *Constitution Act, 1982*.[88] This proposal was discussed in the negotiations leading up to the Charlottetown Accord, but was not included in the consensus report or the draft legal text that constituted the Accord. Instead a commitment to negotiate the matter and implement it pursuant to a political accord was the consensus reached.[89]

Thirdly, a national framework for financing Aboriginal governments could be instituted pursuant to federal legislation. The main limitation of legislation for this purpose is that, as a unilaterally federal initiative, it seems to be fundamentally inconsistent with the concept of a renewed partnership. But if the primary purpose is to develop a parliamentary approved framework to meet the federal government's legal or political obligations in

88. Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 36(2): "Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

89. Charlottetown Accord, *supra* note 12 at 302.

relation to funding inherent right governments, the criticism loses force. This was recognized as a possibility by the *RCAP Report*.[90]

VI CONCLUSION

One of the most important and difficult challenges facing Crown–Aboriginal relations today and in the future will be negotiating and implementing fair and just self-government agreements. These agreements, by their very nature, have political, legal and economic aspects. The Royal Commission on Aboriginal Peoples recognized the inseparability of the issues of Aboriginal rights to self-government and the financial relationships between newly constituted Aboriginal governments and other Canadian governments and made a series of recommendations on the topic. Different initiatives can serve different purposes in resolving some of the difficult issues. The national Inuit and First Nations accords reached on 31 May 2005 may positively contribute to the process of developing a legally supported and politically negotiated financing agreement if they are flexible enough to allow for meaningful accommodation of individual circumstances and yet are clearly and strongly worded enough to expedite fair and just negotiations.

This paper has sought to demonstrate that the legal principles annunciated by the Supreme Court of Canada over the past 25 years regarding the *sui generis* Aboriginal–Crown fiduciary relationship, the obligations arising from the need to uphold the honour of the Crown and the recognition of certain rights as being reasonably incidental to the exercise of already recognized rights are relevant to the right to self-government in general. In particular, they suggest legal obligations on federal, provincial and territorial governments to ensure the financial viability of newly negotiated Aboriginal governments. These principles, however, will not implement themselves even if they are eventually judicially recognized as being applicable to the funding of Aboriginal governments. They should, however, inform the conduct of all decision makers when considering the important issues regarding funding of Aboriginal governments. This intertwining of the legal, political and economic strands of Aboriginal–Crown relations will provide a stronger and healthier bond between Aboriginal nations and the Crown moving forward in Canada than each strand in isolation can provide.

90. *Supra* note 4, vol. II at 312.