

EXERCISING JURISDICTION OVER COLLECTIVE RIGHTS

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Preface

On October 21st and 22nd, the 17th annual conference of the Indigenous Bar Association took place at Casino Rama in Rama, Ontario. Members of the Indigenous Bar, Indigenous legal scholars, law practitioners, and Indigenous leaders gathered to discuss the important topic of collective Indigenous jurisdiction in Canada.

It is of particular importance to note that this conference was held on traditional Indigenous lands. A “proud and progressive First Nation”, the Chippewas of Mnjikaning First Nation have taken significant steps to maintain and regain, control over their destiny as an Indigenous people. The Nation has taken strong positions on Indigenous jurisdiction with a philosophy of realizing self-government through a process of incrementally asserting jurisdiction over various areas.

The Indigenous Bar Association commends the Mnjikaning First Nation in its continuing efforts to assert collective Indigenous jurisdiction and wishes to extend its appreciation to the Nation for the opportunity to dialogue on Indigenous jurisdiction, a matter of fundamental importance to all Indigenous peoples.

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Chapter I: Introduction

Historically, Indigenous peoples asserted and exercised collective jurisdiction as sovereign Indigenous nations. They determined laws and governance principles that governed societal relations and those between nations. These authorities, which were often unwritten but understood; determined and facilitated the maintenance of peace, trade and alliance between the Indigenous peoples that occupied this part of the world. Nations had treaties or agreements with each another about how they would inter-relate, including rules about peace and war, inter-marriage, and use of traditional territories.

When Europeans first arrived to this continent, they saw that Indigenous peoples existed in organized societies with governments that exercised effective jurisdiction. Newcomers respected the authority and autonomy of the Indigenous governments. European governments entered into binding treaty relations with the Indigenous nations in order to secure European presence in Indigenous territory.

This history of Indigenous peoples, their societies, and forms of political organization and government, is demonstrative of the collective jurisdiction that was historically exercised and recognized as legitimate. How and why is it that Indigenous peoples and governments in Canada are no

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longer recognized as equal and legitimate governments within their own Indigenous territory? In April 1987, the Honourable Justice Murray Sinclair described to a group of law and policy-makers the essence of the Indigenous experience in Canada:

“There is great disruption among our people today as a direct result of some of the laws that have been passed in this country...Beginning with Confederation in 1867, the government set out on a deliberate attempt to undermine the very existence of Aboriginal communities, to undermine the very nature of Aboriginal families within society. The view was, it would be better for Aboriginal people to assimilate into Canadian society and to therefore, become more civilized... They passed laws designed to undermine some of the institutions of our existence that they felt had created our state of inferiority.”¹

The multi-faceted approaches taken by government over time to assimilate Indigenous peoples have had a detrimental effect Indigenous peoples' ability to assert and exercise their collective jurisdiction. If a people cannot assert its authority, and be recognized and respected as the representative authority of its citizens, its legitimacy as such is irreparably harmed.

Indigenous peoples and their governments desire meaningful recognition of their continuing right to exercise collective jurisdiction as legitimate

¹ Hon. Murray Sinclair. A.C.J., *Elders-Policy Makers-Academics Constituency Group Meeting*, Transcript of Presentation, April 1987, p. 5.

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Indigenous governments. As this Discussion Paper will demonstrate, reacquiring the ability to exercise collective jurisdiction in a self-determined matter will require multiple and continuing efforts by many players.

Indigenous peoples and governments have often expressed a willingness to dialogue with Canadians and with Canadian governments on how Indigenous jurisdiction can be accommodated within the existing constitutional framework. This Discussion Paper has been prepared for the purpose of promoting a better understanding of some of the key legal issues arising with respect to the exercise of jurisdiction by Indigenous peoples. In particular, it has been drafted as a tool to assist those working in law and policy to be aware of some of these issues, as Indigenous peoples have described them. This understanding includes an awareness of fundamental issues such as what collective jurisdiction means from an Indigenous perspective, as well as how Canadian law and politics impacts Indigenous peoples in their efforts to maintain their existence as peoples in Canada. Gaining insight into these issues will enable law and policy-makers to appreciate why it is imperative that Indigenous peoples have the opportunity to exercise their collective jurisdiction.

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The Indigenous Bar Association Conference highlighted a number of key issues surrounding the exercise of Indigenous jurisdiction, including building Indigenous institutions within Indigenous communities, the importance of good governance and capacity-building, and internal health and well-being of Indigenous communities. Presenters discussed examples of how Indigenous peoples are actively asserting and exercising jurisdiction in various regions of Canada. The principals described in these success stories are described herein for the purpose of providing insight about how Indigenous communities are in fact determining for themselves the direction of their Nations and are in effect exercising collective jurisdiction.

Chapter II: Setting the Context - Indigenous Perspectives

Jurisdiction

Jurisdiction provides the basis for the authority to govern. It includes, but is not limited to: the authority to determine and administer law, control and manage lands and resources; determine economic development priorities; to meet the self-determined political, social, and cultural needs of a given society. Jurisdiction gives a government the right to determine, on behalf of its constituents, what the priorities of governance will be for that society. It can have different meanings, depending on the needs, aspirations, capabilities and goals of the society and its government.

An array of issues are involved in the recognition and implementation of collective jurisdiction by Indigenous peoples. Some of the fundamental questions Indigenous governments and their citizens' grapple with are:

Subject matter: Will the Nation's collective jurisdiction apply to a specific territory or subject area? Is there and should there be any distinctions with respect to residency? Do membership rules reflect the needs of the Nation? What are the rules with respect to leadership selection?

Extent of authority: Who will be subject to the Nation's jurisdiction? Members of the Nation? Those occupiers of the Nation's lands?

Accommodation of jurisdiction: How will jurisdiction be reconciled between governments? Indigenous? Federal and provincial? Will there be concurrent jurisdictional powers? How can Indigenous legal traditions be accommodated in the existing constitutional framework?

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Capacity: What is required for Indigenous nations to acquire and maintain the capacity to exercise jurisdiction effectively? Accumulation of capital? Is there an economic development plan? Does the Nation have any resource revenue-sharing arrangements? What are the Nation's human capital requirements?

For the most part, these and numerous other matters relating to and effecting collective jurisdiction remain unresolved issues for Indigenous peoples and their governments. In the face of these challenges, efforts continue to be made by Indigenous peoples throughout Canada to accomplish the goals that they have set for themselves. As examples, consider that Indigenous peoples exercise collective jurisdiction when they are directly involved in the design and administration of a law school program between a post-secondary institution and an Inuit community²; when they take steps to reconstruct customary leadership through the enactment of a customary band election code³; when a community committee determines land allocation following the death of a Métis community member⁴. Each of these is a unique example of collective jurisdiction in practice. Each has been built upon a foundation of the distinct capacities and goals of the Indigenous collective. The important

² Established in 1995, the Akitsiraq Law School adopts an innovative approach to delivering legal education to Inuit students in their own social, cultural, and geographical environment. The School is based on a partnership between the Akitsiraq Law School Society, the University of Victoria, Faculty of Law, and Nunavut Arctic College.

³ Several First Nations in Canada have adopted customary band election codes, enabling them to incorporate their collective's legal and customary practices relating to community leadership. Examples include Bigstone Cree Nation (Treaty 8, Alberta; the Mohawk Council of Kanesatake (Mohawk Territory)

⁴ Customary practices of some of the Métis Settlements in northern Alberta enable surviving spouses (common-law or married) and their children to retain lands following death of a spouse regardless of the surviving spouse's status.

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common element of these examples is the self-determined involvement of the citizens of an Indigenous community deciding for itself what is best for the community and taking necessary actions to achieve its self-determined goals.

Collective jurisdiction by Indigenous peoples does not necessarily imply state sanction. In most cases, Canadian governments perceive jurisdiction to lay only with the federal and provincial governments, as set out in Sections 91 through 95 of the Canadian Constitution.⁵ Indigenous governments, if they exist at all, are treated and referred to as local governments, possessing only those powers that are delegated to them by the federal or provincial governments. The jurisdiction that is claimed and exercised by authorities other than the federal and provincial governments is, according to this position, pursuant to the authority granted or consented to by the crown. Even the jurisdiction to assert one's existence as a representative Indigenous people is in many contexts considered an unresolved legal issue.

Having and exercising jurisdiction implies significant responsibility and power. It is not surprising then that the right to exercise collective

⁵ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 91 – 95.

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jurisdiction lays at the core of the enduring debate between Indigenous peoples and federal and provincial governments in Canada.

Who are Indigenous Peoples?

There are numerous complexities inherent to individual and collective identity, status, recognition and citizenry. With respect to the collective rights of Indigenous peoples in Canada, it is important to appreciate that there are legal, political, and contextual distinctions between the terms “Indigenous” and “Aboriginal”, and between “people” and “peoples”. It is of fundamental importance when discussing the rights of Indigenous peoples, including their rights to exercise collective jurisdiction that the reader appreciate these distinctions. These issues are mentioned here only for highlighting the difficulties that may arise in respect of understanding important issues relating to collective jurisdiction if these fundamental questions are not reflected on.

Over time various terms have been used to refer to Indigenous peoples and nations. “Native”, “Aborigine”, “Indian”, and more recently, “Aboriginal” are terms used in reference to individual Indigenous persons. With respect to collective identity, terms used over time have included

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“band” and “tribe”. More recent titles including “Aboriginal group”, “Aboriginal community” and “First Nation” are common.

Do these terms, most of which derive from external sources, have the same meaning as “Indigenous peoples” or “Indigenous Nation”? Critical analysis of the terms would suggest not. Consider for example the contemporary term “Aboriginal”, a term loosely used in reference to persons who are recognized or perceived by others to be Indian, Inuit, and Métis or of some measure of Aboriginal ancestry. Often such characterization is simply for administrative purposes, and not in relation to any Indigenous nationhood affiliation or recognition. In contrast, Indigenous persons will often self-identity as being Indigenous, Indian, Inuit, or Métis. They will usually identify with a specific nation for the purpose of situating themselves among the Indigenous peoples within Canada. This self-identity does not necessarily coincide with the status that has been designated by external governments.

To illustrate this point, consider the situation that commonly occurs within the category of “Indian”. Status Indians are usually those persons who are recognized as meeting the statutory requirements set out in the federal *Indian Act*⁶ and who are therefore recognized as being Indian by

⁶ *Indian Act*, R.S.C. 1985, c. I-5, as. am., s. 6

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the federal government. Comparatively, Treaty Indians may be those individuals whose ancestors were signatories to the treaties made between various Indian tribes or nations with Britain and later Canada. Treaty Indians do not necessarily have status under the *Indian Act*. Numerous of these individuals were disenfranchised as a result of historic changes made to that legislation. In other instances, regardless of their status with the federal government, many such persons self-identify as being a member of a specific Indigenous Nation or community, emphasizing the government-to-government relationship that properly exists between their Nation and Canada. Their status with Canada does not affect their “Indian-ness”. Nor does it affect whether or not they are Indigenous, or that they are a member of an Indigenous people.

In the international arena substantial attention has been given to setting out general parameters regarding meaning of the term *Indigenous peoples*. The most notable interpretation was given in 1986, following a study completed by Martinez Cobo, then-Special Rapporteur to Indigenous Peoples.⁷ As part of this study, Cobo proposed the following working definition of “Indigenous” (peoples, communities and nations):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and

⁷ M. Cobo Study, Part Third: *Conclusions, Proposals and Recommendations*: UN Doc. E/CN.4/Sub-2/1983/21 Add. 8.

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*pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems.*⁸

The United Nations, the Working Group on Indigenous Peoples, and countless Indigenous peoples throughout the world have accepted Cobo's definition of Indigenous peoples. Consistent with this definition, the Union of BC Chiefs defines Indigenous Nations as being "... comprised of distinct Peoples who have a common history, language and culture. Nations have distinct territories, governed by their distinct social organizations and political, social and economic laws. Indigenous Nations embrace the complete population of a Peoples, bound together by common ties of Self-Determination."⁹

What are Collective Rights?

In this Discussion Paper, the collective rights referred to are those ascribed to the Indigenous peoples of Canada, including the historic and contemporary nations of the Anishinabek, Chipewyan, Cree, Dené, Gitk'san, G'wichin, Haida, Haudenosaunee, Inuit, Innu, Kwakwaka'wakw,

⁸ *Ibid.*, para. 380.

⁹ Union of BC Chiefs Website: <http://www.ubcic.bc.ca/Resources/implementation.htm>

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Maliseet, Mi'kmaw, Métis, Montagnais, Salish, Tahltan, and Tsimshian peoples.¹⁰ To varying degrees, and in various contexts, these peoples have asserted and exercised their inherent rights of jurisdiction for the purpose of ensuring the continuing existence of their distinct Indigenous societies.

Collective rights are those rights that inhere in the people as a group. Depending on their character, the rights of the collective may be exerciseable by individual members of the people. The rights may not necessarily be codified or recorded. Examples include, but are not limited to: family law, including customary marriage and adoptions, environmental science, education, health, spirituality, governance, and cultural practices.

In various contexts “self-government”, “self-determination”, “autonomy”, and “local control” are terms that are used to describe the jurisdictional bases of Indigenous governments in Canada. Although their chosen means for achieving greater self-determination or jurisdiction may vary, there is a remarkable consistency among Indigenous peoples “concerning

¹⁰ L. Weber, *Indigenous Legal Traditions*, Paper Prepared for the Indigenous Bar Association, March 2005, at p. 4. Also see J. Borrows, *Indigenous Legal Traditions in Canada*, Unpublished paper for IBA/CBA Forum on Indigenous Legal Traditions. Ottawa, March 2005 at p. 10.

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the origin, constitutional status, extent and applicability of the inherent jurisdiction of their governments”.¹¹

Exercising collective jurisdiction in a meaningful way implies recognition and respect by Indigenous citizens of the authority of their Indigenous governments. It is enhanced by reciprocal recognition among Indigenous peoples of the jurisdictional authority of their nation in its relations with other Indigenous nations. Exercising jurisdiction by Indigenous governments will require recognition and acknowledgement between Indigenous and state governments with respect to the scope of each government’s jurisdiction.

Canada acknowledges Indigenous peoples’ inherent rights to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources”.¹² What is required is acknowledgement and acceptance of these as having a legitimate place within Canada’s legal and political order.

¹¹ F. Cassidy and R. Bisch, *Indian Government: Its Meaning in Practice* (Lantzville: Oolichan Books, 1989) at 32

¹² See The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

CHAPTER III: KEY LEGAL ISSUES

Notwithstanding the positive affirmations made by Indigenous peoples of their inherent rights to exercise collective jurisdiction as nations, domestic and international laws and policies continue to undermine these efforts. In this section, a sample of laws and policies are considered for the purpose of demonstrating some of the challenges faced by Indigenous peoples and governments with respect to asserting their collective rights of jurisdiction.

DOMESTIC LEGAL ISSUES

Aboriginal and Treaty Rights in the Courts

Since 1982, the doctrine of Aboriginal rights has developed as a concept of the common law, and has played a principal role in defining relationships between the Crown and Indigenous peoples in Canada. The 1982 entrenchment of Aboriginal and treaty rights in the Canadian Constitution was Canada's first formal commitment to recognize and affirm the customs, practices and traditions of Indigenous peoples. The relevant constitutional provision, Section 35(1) of the *Constitution Act, 1982* reads:

*The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.*¹³

¹³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

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Indigenous groups within Canada have become accustomed to advocating for recognition of their collective rights within the context of the Canadian Constitution, and specifically within the context of Section 35 (1). Notwithstanding the positive affirmation of Aboriginal and treaty rights in that provision, Indigenous people are becoming increasingly aware of the constitutional veil that has been created by the interpretations given to this provision. Judicial analyses and interpretations of Indigenous rights often obscure meaningful recognition of their collective rights.

To contextualize this issue, consider the situation faced by Indigenous peoples whose traditions include hunting and fishing practices. Legislation and regulations which have a direct effect on Aboriginal peoples' harvesting practices have become the subject matter of numerous cases heard by the Supreme Court of Canada since the constitutional entrenchment of Aboriginal and Treaty rights in Section 35.¹⁴ It is apparent, in consideration of many of these cases, that triggering the recognition and affirmation promised in Section 35 is inevitably prompted

¹⁴ The majority of cases heard by the Supreme Court of Canada since 1982 involving Aboriginal defendants have involved claims based on unextinguished Aboriginal and/or treaty rights pursuant to s. 35 of the *Constitution Act, 1982*. These include: *R. v. Sparrow*, [1990] 3 C.N.L.R. 160; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger* [1996] 1 S.C.R. 771; *R. v. Gladstone* [1996] 2 S.C.R. 723; *R. v. Powley*, [2003] 2 S.C.R. 207; *R. v. Blais* [2003] 2 S.C.R. 236

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by Aboriginal people's traditional practices, which have been characterized at law as being illegal.¹⁵

In a similar vein, landmark cases such as *Delgamuukw v. British Columbia* are often regarded as being instrumental to the furtherance of Indigenous peoples' collective rights.¹⁶ Critical review of that case demonstrates however that while it did contribute to the development of Aboriginal rights jurisprudence, the court in *Delgamuukw* sustained a legal framework that has no place for Indigenous jurisdiction:

...the Court's unreflecting acceptance of the Crown's assertion of sovereignty...risks undermining the very purpose of s. 35 (1) by perpetuating the historical injustice suffered by [a]boriginal peoples at the hands of colonizers who failed to respect the distinctive culture of pre-existing aboriginal societies."¹⁷

In addition to substantive issues dealt with in Aboriginal and Treaty rights cases, judicial processes and procedures involved in bringing matters before the courts can have as significant an impact on Indigenous

¹⁵ Here we are referring to both statutory and common law. For example, according to the provincial laws in numerous provinces, it is illegal to hunt without being in possession of a license issued by the province. Thus, an Aboriginal person hunting without such a license would be committing an offence. Similarly, common law procedure may result in the finding of guilt of such persons, implying then that the common law characterizes these traditional practices as being against the law.

¹⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.)

¹⁷ J. Borrows, *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia*, (1999) 37 Osgoode Hall L.J. 527-596 at para. 10.

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peoples' collective jurisdiction. Again, using *Delgamuukw* as the example, consider the fact that the Court would not consider the Gitks'an and Wet'suwet'en claims of ownership and jurisdiction over their traditional territories because of a perceived defect in the pleadings.¹⁸ Aptly noted by Professor John Borrows:

"in effect, pleadings become a 'necessary passport to gain entry to the common law courts'. Acquiring such a visa is obligatory in disputing the justice of Crown dealings with Aboriginal peoples – the Crown does not recognize legal claims brought in any other way...This...is effective in further extending Canadian sovereignty over Aboriginal territories."
¹⁹

These points alone cause one to reflect on the question: "Do the means of dealing with Aboriginal rights claims recognize and affirm, let alone respect the collective and pre-existing rights as Indigenous peoples? Deliberations on this question, when considered in the context of the collective rights of "peoples" as that term is interpreted in international law will raise tenuous conclusions to this question."²⁰

Reconciling Individual Rights with Collective Rights

Reconciliation of individual rights with the collective rights of Indigenous peoples and governments is essentially an unexplored legal issue in

¹⁸ *Supra* note 14 at 1061.

¹⁹ *Supra* note 15 at para. 13.

²⁰ The inherent rights of peoples in international law are discussed herein.

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Canadian jurisprudence. Although the Constitution provides that all individuals have civil liberties as set out in the Charter Rights and Freedoms, Section 25 also states that these rights shall not abrogate or derogate from Aboriginal rights:

- s. 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including*
- a. Any rights or freedoms that have been recognized by the Royal Proclamation of October 17, 1763; and*
 - b. Any rights or freedoms that now exist by way of land claim agreements or may be so acquired.²¹*

For the purpose of discussing the reconciliation of individual rights with collective rights, consider the 1999 Nisga'a Treaty²² and the application of the Charter to the Nisga'a Government. The Nisga'a Treaty provides the Nisga'a government with authority over internal matters, including Nisga'a government, citizenship, culture, language, lands, and assets.²³ Federal and British Columbia provincial laws continue to apply and while any of these governments may pass laws, where there is a conflict between laws concerning matters "internal" to the Nisga'a Nation, Nisga'a law will prevail.²⁴ Conversely, for specific matters,²⁴ federal and provincial laws will prevail. With respect to Charter challenges, the Nisga'a Treaty

²¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

²² See Nisga'a Final Agreement Act, S.C. 2000, c. 7. Final Agreement can be viewed at http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex8_e.pdf

²³ *Ibid* c. 11, article 34.

²⁴ *Ibid*. 2, article 13.

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specifies that the Charter does apply to the Nisga'a Government in respect of all matters within its authority.²⁵

These provisions of the Nisga'a Treaty can be interpreted as usurping the collective rights of Indigenous peoples and governments to determine laws for themselves. Conversely, organizations representing historically disadvantaged groups such as the Native Women's Association of Canada, advocate that the Charter must apply to Aboriginal jurisdiction, and that taking a non-interventionist approach to interpreting the Charter risks rendering basic liberties and freedoms meaningless within Indigenous nations.²⁶

Obviously there will be varying opinions regarding the application of Canadian laws to Indigenous peoples and communities. With respect to matters internal to Indigenous nations and governments, most would argue at least in theory that balancing rights of individual members of a society with those of the collective are matters more properly situated with the Indigenous nation. As with any other organized and recognized government exercising collective jurisdiction, where disputes arise in regard to violation of self-determined rights, including individual rights and freedoms, these matters could be resolved through the dispute resolution

²⁵ *Ibid* article 9.

²⁶ See *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 at 635-636.

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mechanisms that have been put in place for citizen recourse. In any event, it would be up to the nation and its citizens, through its governance mechanisms to determine how individual and collective rights are reconciled in a manner that is reflective of the values, customs and traditions of that nation.

Federalism

Canada is a federalist state. Federalism implies a division of sovereign power between a central or federal legislature and those at the local or provincial level. The apportionment of power between the central and regional governments is reflected in the written constitution of the country. The first constitution of Canada was proclaimed by Britain in 1867 as the *British North America Act, 1867* (also referred to as the *Constitution Act, 1867*)²⁷. Sections 91 and 92 of the *Constitution Act, 1867* enumerate the subject matters for which each of the federal and provincial governments can enact law, with section 91 listing matters of federal jurisdiction and section 92 listing matters of provincial jurisdiction.²⁸

In a federalist state there will often be varying interests and needs between the different governments and their constituents. It is thus foreseeable that there will also be jurisdictional disputes and negotiations

²⁷ *Supra* note 5.

²⁸ *Supra*, ss. 91 and 92.

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regarding jurisdictional powers. To accommodate this reality the common law has provided mechanisms for collaboration between levels of governments. Doctrines such as concurrency²⁹ and paramountcy³⁰ enable collaboration and flexibility with respect to the specific and regional needs of the different legislatures. In addition, concepts such as asymmetrical federalism have enabled the federal and provincial governments to circumvent what would otherwise amount to violation of jurisdictional authority.³¹

The existing constitutional framework enables Canada to recognize customary Indigenous governments and leadership processes, their decisions and decision-making processes, and traditional Indigenous dispute resolution processes. In other words, the current constitutional framework in Canada is capable of accommodating the exercise of collective jurisdiction by Indigenous governments. Notwithstanding this

²⁹ Concurrent allocation of responsibility arises from the fact that the powers assigned to the federal Parliament and provincial legislatures by certain sections of the *Constitution Act, 1867* are expressed in general terms: (cite). As a result, their respective constitutional powers overlap, with the result that within the area of overlap, either Parliament or the legislatures have constitutional power to legislate. The power to legislate within this area of overlap is thus said to be concurrent. See http://www.cric.ca/en_html/guide/federalism/federalism.html#FEDERALISM.

³⁰ The doctrine of federal paramountcy occurs where there is both a federal and provincial law dealing with the same or similar subject matters. Where there is a conflict between those laws, the federal law will be determined operative and will supercede the provincial law (to the extent of the conflict). The provincial law will still remain valid but will not operate so long as the central or federal law “occupies” that field.

³¹ See <http://pm.gc.ca/grfx/docs/QuebecENG.pdf>. “Asymmetrical Federalism That Respects Quebec’s Jurisdiction”. Communiqué discussing federal-provincial management agreement regarding health services within and by Quebec.

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reality, Indigenous governments are not being accommodated within the constitutional framework in meaningful ways. Canadian federalism denies Indigenous governments the inherent authority and jurisdictional powers that they historically exercised when Europeans claimed sovereignty over this continent. The only Aboriginal³² governments and powers that are recognized in and by Canada are those granted by Canadian laws and policies. The ability of Indigenous governments to therefore function as full and equal partners in the federal system is fundamentally impaired by the power imbalance that exists at the root of these relationships.

INTERNATIONAL LEGAL ISSUES

Right of Self-determination

In this section a great deal of emphasis is placed on the right of self-determination as a fundamental principle of international law. Self-determination encompasses all other rights – civil, political, social, and cultural rights. It is an inherent right accorded to all peoples of the world, guaranteeing cultural security, self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights

³² Here I am distinguishing between “Aboriginal governments” and “Indigenous governments” to make the point that Aboriginal governments are those that are effectively created by and therefore acknowledged as legitimate by the crown, for example through the federal *Indian Act*; while Indigenous governments are those that are created and legitimized by the Indigenous peoples and nations themselves.

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and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.³³

Setting aside broad legal principles around the issue of self-determination, it must be acknowledged that self-determination may exist in different forms and be expressed in a manner considered appropriate and acceptable by the peoples concerned.

Self-determination may make some people think of the right to vote, or the right to belong to political parties or the right to self-government. And those are all political aspects of self-determination and the right to democratic governance. But when I think of self-determination I think also of hunting, fishing, and trapping. I think of the land we have lost. I think of all of the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land ”³⁴

This reality epitomizes the significance of the right of “self-determination” which inherently includes the liberty to determine, as a people, what the scope of self-determination will be and what form it will be expressed in.

³³ As cited in M. C. van Walt van Praag and O. Seroo (eds.), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999), pp, 19-20, at 19.

³⁴ T. Moses in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Pekka Aikio and Martin Scheinin, eds. Institute for Human Right. Abo Akademi University, Turku, 2000.

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Self-determination is not merely a philosophical statement; it is reflective of the fact that there exists an integral connection between indigenous peoples' social, cultural and political customs and traditions, beliefs, and values. The manner and context within which Indigenous peoples express claims and grievances also demonstrates this connection. Violations of peoples' rights of self-determination have often been posed in the context of land use violations, treaty and Aboriginal rights infringements, civil and political rights violations, loss of culture, or loss of livelihood.³⁵ All of these elements or "grounds" fall within the general ambit of the right of self-determination accorded to peoples in international law.³⁶

Notwithstanding the increased focus given to the positive effects of global economic development, globalization irreversibly impacts Indigenous peoples, their cultures, practices and indeed existence. The interests of world economic trade, resource development, and political relations between countries and multi-national corporations participating in these trade activities have traditionally superseded the advocacy efforts of Indigenous individuals, groups, and peoples.

³⁵ This is by no means an exhaustive list but rather reflects some of the more commonly articulated concerns of Indigenous peoples within Canada.

³⁶ An unresolved question remains as to whether or not "Aboriginal people" in Section 35 of the *Constitution Act, 1982* has an equivalent meaning to the term Indigenous peoples, which is used throughout the world, including those whose Indigenous territory is within Canada's geo-political boundaries. Although it is an important one, this issue is beyond the scope of this Discussion Paper.

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As phenomena, globalization has caused Indigenous peoples to expand their role into the international arena through active participation in complaints processes, international relations, Indigenous management of lands and resources – “these are manifestations of our rights of self-determination as peoples”.³⁷

Recognition as Peoples

It is presumed in this Discussion paper that Indigenous peoples are philosophically *and* legally peoples within the meaning of the term in international law. It is not the intent of this paper to discuss or debate this premise at length. It is important to note however that a stalemate exists between Indigenous peoples and several nation states, including Canada in the international arena on this fundamental issue. With respect to Crown-Indigenous relations in Canada, it is important to note that this lack of recognition is contradictory to the spirit and intent of Section 35 of the *Constitution Act*, 1982, which professes to recognize and affirm the existing Aboriginal and treaty rights of the Aboriginal people of Canada.

³⁷ Roberta Jamieson, Keynote Presentation, October 21, 2005. Indigenous Bar Association Conference. Rama, Ontario.

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Articles 1 and 2 of the *International Covenant on the Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*:

*Article 1: **All peoples** [my emphasis] have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;*

*Article 2: **All peoples** [my emphasis] may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence;*

Article 3: The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.³⁸

The two Covenants, together with the Universal Declaration of Human Rights, form what is referred to as the “International Bill of Human Rights”. Both Covenants stipulate that State signatories shall promote the realization of the right of self-determination, and shall respect that right, in

³⁸ *International Covenant on Civil and Political Rights*, 23 March 1976, see <http://www.ohchr.org/english/law/ccpr.htm>; *International Covenant on Economic Social and Cultural Rights*, 16 December 1966, see http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

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conformity with the provisions of the Charter of the United Nation.³⁹ Taking this and similar principles set out in international human rights instruments, it becomes apparent then that the fundamental issue is determining who, as peoples, are entitled to the enjoyment and freedom to exercise these rights.

Recognition of Indigenous peoples as peoples in international law has not occurred. This has had a negative impact on the advocacy efforts of Indigenous peoples in international law. Numerous nation states, including Canada, continue to question the existence of Indigenous peoples as peoples in international law.⁴⁰ For example, in 1984, Chief Bernard Ominayak and the Lubicon Lake Band filed a communication with the UN Human Rights Committee claiming violation of the collective rights of the Lubicon Cree as a people.⁴¹ Canada's response to that communication was that the Lubicon Lake Band was not a people within the meaning of article 1 of the Covenant on Civil and Political Rights and therefore the Lubicon did not have standing to file such a communication. Presumably State opposition to such recognition is due to the legal

³⁹ It should be noted that Canada is a party to both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*.

⁴¹ See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN Document CCPR/C/38/D/167/1984, at para. 6.1.

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implications of the designation of “peoples” at international law, which carries with it an array of freedoms, obligations and responsibilities.⁴²

Indigenous representatives advocate that it should be a matter of principle that Indigenous peoples be acknowledged as *peoples* as that term is used at international law. However, they do not seek formal codification of the term “Indigenous peoples” in international law. Rather, they effectively state that defining the term “Indigenous” for the purpose of international representation and participation would impose rigid and unworkable standards.⁴³

Recognition as Nations

A contemporary presumption exists in mainstream thought that the sovereign power of the Canadian State is absolute. All forms of social control – policing, land holding, government rights and responsibilities -

⁴² Presumably, the primary reason for State opposition to this acknowledgement is fear of the implications that such recognition would have on the status quo power of Nation States, including the perceived threat on state territorial integrity - territorial integrity is discussed in this paper in more detail.

⁴³ Advocates identify that due to the organizational structure of the United Nations; any definition of Indigenous peoples would be subject to Member State decision-making – indisputably an undesired outcome. And, finally, using principles of human rights law and the concept of just and fair treatment for all peoples, Indigenous advocates aptly identify that no formal definition of “nation” or “state” is followed in the United Nations system, and that to otherwise require Indigenous peoples to be defined would be inequitable treatment.⁴³ Accordingly, the definition of and very process of defining “Indigenous peoples” has become one of the most controversial matters between Nation States and Indigenous players in the international arena, an issue that threatens the furtherance of international norms and laws regarding Indigenous peoples.

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are constructed within the impugned system of power and control exerted by the Canadian government as sovereign.⁴⁴ In the introduction of this Discussion Paper we reflected on how Indigenous nations conducted themselves and were recognized as autonomous, sovereign nations. At some crystallization point which, many commentators identify as Confederation, Canadian government policy became one of ignoring this historic reality and instead, asserting the absolute authority of itself as against all others, including the Indigenous nations of Canada.

This challenge was first made apparent in the international arena when Levi General Deskaheh, Chief of the Younger Bear Clan of the Cayuga Nation and spokesman of the Six Nations of the Grand River sought opportunity in 1923 to be heard by the League of Nations regarding a dispute with the Canadian government over tribal self-government. The position of Six Nations, then-stated:

“The constituent members of the State of the Six Nations of the Iroquois,...now are and have been for many centuries, organized and self-governing peoples, respectively, within the domains of their own and united in the oldest League of Nations, the League of the Iroquois, for the maintenance of mutual peace”.

⁴⁴ Havemann, Paul in *Indigenous Law and the State*, Morse, Bradford W. and Gordon R. Woodman, eds., Foris Publications Holland, Province RI, USA, at 74.

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Canada's response to Deskaheh's request makes the disparity of positions between Indigenous peoples and the Crown apparent:

"The Six Nations are not now, and have not been for 'many centuries' a recognized or self-governing people but are...subjects of the British Crown residing within the Dominion of Canada".⁴⁵

Although the League of Nations did not accept Deskaheh's claims of sovereignty on behalf of The Six Nations, it is important to acknowledge that his actions did successfully garner moral support and public awareness of the claims of The Six Nations of the Iroquois as Indigenous peoples. Readers might note that Deskaheh was reportedly denied re-entry in Canada after his appearance and presentation at the League of Nations.

The disparity of views reflected in this historic event is reflective of the legal position maintained by the Crown in Right of Canada *vis-à-vis* the various Indigenous peoples of this country, that they are subjects of the Crown and accordingly, subject to the sovereign will of the Crown. One might question why then were treaties entered into between the Indigenous nations and the (French and then) British sovereign if the original inhabitants were not indeed "nations" having the capacity to enter into such binding and sacred agreements? In reality, Indigenous peoples

⁴⁵ R. Niezen, "The Origins of Indigenism, Human Rights and the Politics of Identity". Berkeley and Los Angeles, California: University of California Press, 2003.

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and governments continue to experience inter-generational oppression through a system “designed to eliminate us as distinct political and cultural entities with distinct legal rights and responsibilities”.⁴⁶

COLLECTIVE JURISDICTION IN PRACTICE

Working with Government Policy

Crown-Indigenous relations in Canada are being shaped and defined according to policies and processes that have evolved as a result of governments’ response to developments in the law, fiscal priorities and political agendas. On the part of Indigenous governments and peoples, policies (and programs implemented pursuant to policies) have been seized as opportunities to gain greater autonomy and empowerment as nations within the legal and constitutional constructs of Canadian federalism.

Although these arrangements tend to focus on programs and services that have been determined by the federal and provincial government policy as priority, agreements are often entered into by representative organizations with a view to furthering goals and objectives of self-

46 D. Thunderchild and K. Lickers, Challenges to Exercising Indigenous Jurisdiction: Health and Education, Unpublished Paper presented to the Indigenous Bar Association, October 2005, at p. 2.

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government and collective jurisdiction. This approach does not imply that sovereignty, Aboriginal and Treaty rights recognition, and constitutional entrenchment of the inherent right of self-government are not issues of paramount importance. Rather, Indigenous governments treat these policy options as opportunities to regain control and autonomy of their nations. Contemporary examples are evident in the Aboriginal Human Resource Development Agreements, self-government agreements concluded with various First Nations and Inuit groups, and devolution of programs and services to First Nations and Métis organizations and service-providers.

Indigenous peoples and governments recognize that while management and administration of programs may provide some sense of control and autonomy to Indigenous nations, administration of federal and provincial programs and services does not constitute unfettered collective jurisdiction. It will often be the case that Indigenous visions of what are considered priorities and needs of their communities do not correspond with the opinion of the federal and/or provincial governments. Most funding from such programs derives from federal and provincial departments with strict reporting and outcome requirements.

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Indigenous peoples must ensure that their own definitions and exercise of collective jurisdiction are not lost in the process of delivering necessary services to their citizens. They must define for themselves what self-determination and self-government means within the context of their own nations and this may not correspond with the characterization given by the federal and/or provincial governments.

Federal and provincial governments could amend policies and laws affecting the recognition of Indigenous governments and their decision-making powers. As an example, the Canadian justice system and its processes could be altered to recognize the important role that traditional justice plays in the resolution of disputes within Aboriginal communities. Canada could recognize and accept customary leadership selection processes, adoption practices, marriage practices, land-holding and management, and estate matters – all of which are currently subject to externally imposed legislative regimes.

Building Capacity Within Indigenous Collectives

The Harvard Project on Indian Economic Development⁴⁷ is often cited as a leading authority for Indigenous governments aspiring to lead their communities into a self-sustaining future. Advisors with the Project have

⁴⁷ <http://www.ksg.harvard.edu/hpaied/overview.htm>

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determined that Indigenous nations who seize a “nation-building” approach are most likely to succeed in their endeavours to achieve self-sustaining and determining communities. The nation-building approach requires the laying of essential political and economic foundations of which there are four key factors:

Self-rule: Indigenous nations must have real decision-making power over their own affairs. This includes organization of their governments, management of resources, design and management of dispute resolution mechanisms for the group;

Capable institutions of self-governance: Indigenous governments must have capable governing institutions that separate business from politics, deliver on promises, administer programs and manage resources efficiently;

Cultural match: The formal institutions of governance must have the support of the people it is intended to serve. The community has to have a sense of ownership about their institutions. This means that institutions cannot simply be imposed from outside and according to someone else’s model.

Strategic orientation: Indigenous governments must ask themselves: what kind of society are we trying to build for the long term, and what decisions should we be making now in support of that objective?

Presenters at the IBA Conference echoed the advice of the Harvard Project when discussing the keys to success for Indigenous nations in Canada. Case studies discussed by presenters illustrate that Indigenous peoples and governments are applying these factors to the specific needs of their communities. In various contexts, they are using innovative

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methods to meet the jurisdictional needs of their communities – in education, health, child welfare, economic development, resource management, and policing as examples. While the experiences of Indigenous communities will be unique to their circumstances, certain criteria were identified as essential elements to asserting and exercising Indigenous collective jurisdiction. Each of these is discussed below.

1. Building Effective Institutions

Assuming and acquiring collective jurisdiction is a process. It may require Indigenous governments incrementally assuming jurisdiction through the administration of programs and services that would otherwise be provided by external authorities. Various Indigenous governments in Canada are designing and redefining institutions in response to the expressed needs and preparedness of their communities. They are placing increased emphasis on the strength and well being of their communities, and are utilizing processes that reflect the needs and priorities of their communities. As an Indigenous institution, the Carrier Sekani Family Services in northern British Columbia grew out of such experiences. By taking charge of health and social services for members of their communities, this group of First Nations has “successfully established institutional space to assert and exercise their jurisdiction within the health

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field.”⁴⁸ By providing necessary services to their people, these Indigenous governments are exercising collective jurisdiction in practice.

2. Identifying Economic Needs and Seizing Opportunities

“Indigenous communities need to self-reflect, determine what they need economically and seize the initiatives themselves. They need to just do it.”⁴⁹

It is a matter of common sense that a strong economic base will be necessary if Indigenous governments in Canada are to achieve their goals of healthy and self-sustaining communities. Indeed, in the absence of a significant economic base to support communities, collective jurisdiction will be an exercise in illusion and futility.

One means of providing Indigenous communities with a secure source of revenues to support their communities and governments is through resource revenue sharing. Revenues generated from resource development can provide Indigenous governments with the resources necessary to build and sustain healthy communities. It can provide the necessary means to enable self-determined education systems, healthy living and housing, water resources, and community members.

⁴⁸ *Supra* note 43 at 4.

⁴⁹ Daniel Brant, *Speech to the Indigenous Bar Association*, October 22, 2005. Indigenous Bar Association Conference. Rama, Ontario.

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Reflective of developments in the law which have clearly determined that Aboriginal interest in lands encompasses mineral rights as well as surface interests⁵⁰, modern land claim and self-government agreements between the federal government and Indigenous peoples are providing for resource revenue sharing between government and First Nations as an independent source of self-government funding.⁵¹ Federal government policy has also identified resource revenue sharing as a means of renewing fiscal relationships with First Nations.⁵²

3. Assuming Collective Jurisdiction – “Just Doing it”

In order for Indigenous jurisdiction to flourish, presenters emphasized that Indigenous peoples - their communities, their institutions and their governments – must build from within.

⁵⁰ A number of judgments have confirmed that Aboriginal interest in lands encompasses much more than rights of occupation. The most prominent judgment on this issue was the landmark decision in *Delgamuukw v. British Columbia*, *supra* note 14.

⁵¹ As examples, see *Gwich'in Comprehensive Land Claim*, Backgrounder at http://www.ainc-inac.gc.ca/pr/info/info22_e.html; *James Bay and Northern Quebec Agreement*, Backgrounder at http://www.ainc-inac.gc.ca/pr/info/info14_e.html

⁵² A recent First Nations-Federal Crown Political Accord between the Assembly of First Nations and Canada reflects crown recognition that access to, sharing and benefit from lands and resources contributes to sustainable governments, including First Nations governments. See *A First Nations-Federal Crown Political Accord* at <http://www.afn.ca/cmslib/general/PolAcc.pdf>

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The foregoing demonstrates the strong legal and political foundation for Indigenous peoples and governments to secure the economic well being of their communities through resource revenue sharing. It will nonetheless be up to First Nations, Métis and Inuit peoples to seize the initiative themselves, to develop innovative solutions to their own problems, taking into account their local situations. This may involve negotiations on resource revenue sharing. Other options and opportunities may be more suitable for the peoples concerned.

Having collective jurisdiction will enable Indigenous communities and governments to determine for themselves what is the best course of action suited to their particular circumstances. As stated by Daniel Brant, CEO of the National Aboriginal Capital Corporation Association (“NACCA”), “Aboriginal economic development is more successful when there is Aboriginal jurisdiction”.⁵³ Brant was referring to the experience of the NACCA, an association of Aboriginal financial institutions whose mandate is to serve the capital needs of Aboriginal entrepreneurs in Canada. This network “has turned over one billion dollars in loans and assisted in the creation of twelve thousand Aboriginal businesses”⁵⁴ throughout Canada. The success of institutions like NACCA is multi-faceted. It involves a solid foundation built on an Indigenous vision; intimate knowledge of Indigenous

⁵³ *Supra* note 49.

⁵⁴ *Ibid.*

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community need and strengths; a strong belief and confidence in the ability of Indigenous communities and governments to seize opportunities for themselves.

Finally, capacity is identified as an essential element for successful self-sustaining Indigenous communities and governments. “Capital and jurisdiction over its use are both needed in equal measure to empower us and make us economically successful...When these two elements are brought together through the will of Aboriginal people, we will succeed.”⁵⁵

⁵⁵ *Ibid.*

CHAPTER V: CONCLUSION

Self-determination is an essential element to exercising meaningful collective jurisdiction. Achieving self-determination itself is a process that requires abundant technical work at all levels. At the community level Indigenous peoples must reflect on what the needs and aspirations are of their communities. At the regional level, Indigenous communities and their governments will need to collaborate on matters such as shared jurisdiction, shared land bases, and protocol agreements. As Indigenous governments assert their autonomy, cooperative arrangements will need to be made with federal and provincial governments. At the national and international levels all governments, respect for Indigenous jurisdiction over other matters, including land and resources, economies, education, services will require a transformation and revisioning of existing jurisdictional arrangements.

Given the centuries of assimilation and interference that Indigenous peoples in Canada have endured in the name of civilization and advancement, it will require the dedicated work of many generations in order to rebuild and achieve a level of collective jurisdiction desired by Indigenous peoples and their governments.

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There are numerous and complex issues affecting the exercise of collective jurisdiction by Indigenous peoples and governments in Canada. Although this Discussion Paper addresses some of these issues, it is by no means an exhaustive list. Rather, this Paper is intended to provide insight about some of the ways in which Indigenous communities are determining for themselves the direction of their nations and are in effect exercising collective jurisdiction.

Their approach is often a silent one, yet grounded in a solid belief in their inherent right and responsibility to do so. The need for Indigenous peoples to press for increased recognition of their right to exercise jurisdiction is more than a matter of principle. It has become, in many cases, a necessary means of ensuring their survival as distinct Indigenous societies and peoples within their Indigenous territories.

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