UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

CARRYING THE COMMERCIAL LAW STRATEGY TO ABORIGINAL JURISDICTION

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Background

[1] The Conference's Commercial Law Strategy was adopted in 1998 following consultations with representatives of governments (provincial, federal and territorial), business groups, law reform organizations, academics and others. It was initially adopted by Deputy Ministers of Justice, and was approved by all Ministers of Justice in December 1999.

[2] According to the Conference's website, "the aim of the Commercial Law Strategy is to modernize and harmonize commercial law in Canada, with a view to creating a comprehensive framework of commercial statute law which will make it easier to do business in Canada, resulting in direct benefits to Canadians and the economy as a whole".

[3] Since the Commercial Law Strategy was approved, the Conference has developed a number of Uniform Acts in key areas of commercial law and has worked to promote their adoption and enactment in the various provincial and territorial jurisdictions. To date, there has been no mechanism for the extension of the Commercial Law Strategy into areas of Aboriginal jurisdiction.

[4] Aboriginal governments have or will possess a range of jurisdiction in relation to commercial matters, whether that arises from the exercise of an inherent right of self-government protected by s. 35 of the ***Constitution Act, 1982***, through treaty-based self-government initiatives, or through the recognition or delegation of jurisdiction via self-government agreements.[1]

[5] The objective of this project is to establish and implement practical methods for the development and enactment of Aboriginal laws as part of the Commercial Law Strategy.

Part 1: Introduction to the Jurisdictional Question

[6] The following description of the jurisdictional issues is included only for the purpose of establishing the context, not in order to "solve" the jurisdictional "problem". The views of the limits of Aboriginal jurisdiction range quite widely and it is unlikely that broad agreement on where the jurisdictional boundaries lie is possible. However, it may be possible to fulfill the objective of Aboriginal governments to implement their own laws, while also meeting the objective of non-Aboriginal governments to achieve acceptable relationships between and

among federal, provincial/territorial and Aboriginal laws, through practical mechanisms for the development of model laws for enactment by Aboriginal governments and recognition by non-Aboriginal governments. An appreciation of the jurisdictional context will assist in understanding the significance of Aboriginal concerns to be able to make their own laws, while at the same time pointing the way to the development of a respectful process of enactment and recognition.

[7] The potential scope of Aboriginal jurisdiction overlaps the jurisdiction provided to both the federal government and to the provinces. This results from the presence of section 91(24) of the ***Constitution Act, 1867***, which provides to the federal government the ability to make laws in relation to "Indians" and their lands.

[8] This is not to suggest that Aboriginal jurisdiction is derived from the Canadian Constitution; the exercise of federal jurisdiction under s.91(24) may only fill a legal vacuum resulting from the practical dearth of Aboriginal legislation. Furthermore, it is clear that Aboriginal jurisdiction is recognized by the Canadian Constitution, not granted by it[2]. This recognition occurs through the protection of Aboriginal and treaty rights[3] and the grounding of the fiduciary relationship in the Constitution, through the requirement for federal and provincial governments to reconcile their "power" to enact laws affecting Aboriginal peoples, with their "duty" to respect Aboriginal and Treaty rights, as directed by the Supreme Court of Canada in the case of ***R. v. Sparrow***.[4]

[9] Because the federal government is the primary bearer of jurisdiction in relation to Indians and their lands as between it and provincial governments, it is primarily this scope of federal power that tells us where Aboriginal governments can begin to act unilaterally. In the terms used by the Royal Commission on Aboriginal Peoples, the scope of the federal jurisdiction under s. 91(24) approximates the scope of the "core" of Aboriginal jurisdiction. Nevertheless, regardless of the arguments that may be made about precisely where the boundaries of jurisdiction lie, it is clear that there are some matters in respect of which Aboriginal jurisdiction could be exercised that would result in laws similar to provincial laws and others that would result in laws similar to federal laws.

The Treaties

[10] For First Nations peoples, the Treaties are significant for a variety of reasons. Perhaps the most important of these is that they established an intergovernmental process, based on a nation-to-nation agreement which acknowledges that First Nations, who were self-governing at the time the Treaties were signed, would continue to be self-governing in this new context. The courts have never suggested that Indian peoples did not have the capacity to enter into Treaties; the Treaties are always assumed to be valid. The question is only what do they provide for. Although the specific language of the Treaty is not itself enough to determine its meaning (since the text alone does not contain within it any of the understandings of the First Nations that are found in their oral history), nevertheless the text of Treaty 4 is typical in this regard and reveals, even from the perspective of the non-Aboriginal signatory, these hopes for the future:

> . . . they [the Indian signatories] will maintain peace and good order between each other, and between themselves and other tribes of Indians and between themselves and others of Her Majesty's subjects, whether Indians, Half-breeds, or whites . . .

[11] The conclusions to be drawn from the Treaty text coupled with the Indian understanding is inescapable. The treaties themselves, by their being, acknowledge the Aboriginal signatories as nations in some sense, and by their continued existence, and indeed by their constitutional protection, we continue to acknowledge them in this way. It follows, therefore, that, at a minimum, First Nation governments have authority to enact laws constituting themselves, determining who their members are, regulating their internal relationships and adjudicating disputes arising under their laws. They also have authority to work out the intergovernmental relationships with their federal and provincial "neighbours." It falls to all parties, Aboriginal, federal and provincial/territorial, to acknowledge and respect each other's existence and to work together to find the practical arrangements between and among neighbours that, in the federal-provincial context, is described as intergovernmental affairs. The development of a mechanism to extend the Conference's Commercial law Strategy to Aboriginal jurisdiction will both rest on and assist in the development of this intergovernmental relationship.

Potential Range of Aboriginal Laws

[12] Aboriginal laws can result from three sources: the exercise of law-making authority as a manifestation of an inherent right of self-government, the exercise of law-making authority under agreements negotiated with Canada and the provinces, and through the ability provided under the authority of other governments to make laws or rules.

An Inherent Right of Self-government

[13] There is not yet a definitive or comprehensive pronouncement from the Supreme Court of Canada that can be said to sum up the nature and extent of Aboriginal jurisdiction. However, some general assumptions can be made. To begin with, it can be assumed that an inherent right of self-government may be protected by section 35 of the ***Constitution Act, 1982***, which may support the exercise of Aboriginal law-making powers.[5] This is not to suggest an unlimited Aboriginal self-government power. Indeed, the Supreme Court has held that self-government claims must be considered according to the same test as is applied to other Aboriginal rights claims.[6] This test, the ***Van der Peet*** test, was articulated by the court in the following manner:

> ... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right.[7]

[14] Nor have the courts yet addressed Aboriginal claims to Treaty protection for their right of self-government. It is premature to attempt to predict exactly how the scope of Aboriginal jurisdiction may expand. This will depend partly on the particular issues that are litigated, partly on the order in which they come forward, and partly on the success of self-government negotiations.

[15] The issue of potential scope of Aboriginal jurisdiction has been most exhaustively addressed by the Royal Commission on Aboriginal Peoples. In the Commission's view, the inherent right of self-government is recognized and affirmed by s. 35 and "generally comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories".[8] Professor Hogg suggests that s. 91(24) authorizes Parliament to makes laws that are rationally connected to intelligible Indian policies, even if the laws would ordinarily be outside federal competence.[9] This is a rather broad scope for law-making, and if the federal government can make laws that are rationally connected to intelligible policies, it seems only reasonable that First Nation governments could do the same.

[16] The Royal Commission, however, divides this sphere of jurisdiction into two parts, which it labels the "core" and the "periphery". The core of inherent Aboriginal jurisdiction includes those matters that are vital to the welfare of a people, culture and identity and that do not have a major impact on adjacent jurisdictions or otherwise are a matter of overriding federal or provincial concern. The periphery, of course, is everything else that might fall within Aboriginal jurisdiction. In the Commission's view, Aboriginal peoples can act unilaterally to enact laws in the core of their jurisdiction, but must negotiate self-government agreements to enact laws in the periphery.

[17] The Commission's basic conception of an inherent Aboriginal right of self-government is not so very different from the basic description of self-government that arises out of the application of the ***Van der Peet*** test. This is not to suggest that the courts are likely to find an inherent right of self-government to exist in the abstract. Rather, it is to suggest that if the scope of an inherent right were to be played out through litigation relating to its unilateral exercise, it would begin with the basic claim to self-determination that manifests itself through the constitution by a people of their governmental structures, the ability to determine membership in the group and the ability to transmit[10] their language and culture to future generations so as to preserve their identity and existence. Rules to govern these aspects of their inter-relationships would fit both the RCAP concept of the core of Aboriginal jurisdiction and the ***Van der Peet*** test. As further amplifications of an inherent right were tested in particular cases this basic range of jurisdiction could be extended. However, it seems unlikely that it could possibly extend any further than the outer edges of the scope of jurisdiction provided to the federal government under section 91(24), for at that point the exercise of jurisdiction would, by definition, go beyond any possible connection to Indians or their lands and would cease to be "Aboriginal".

[18] The question about the extent to which the federal government may enact laws applicable to Indians and their lands is an unresolved one. While the usual "pith and substance" analysis must be brought to bear on the consideration of the extent of the federal power, the test has usually been stated by the courts (in a not especially helpful manner) as being a question of whether or not the law is in relation to "Indians ***qua*** Indians".

[19] On the one hand, it is clear that s. 91(24) must authorize Parliament to enact laws about something other than those things that it has power to enact laws about under other heads of power, because if this were not so s. 91(24) would not have been necessary. On the other hand, it is unlikely that the section allows Parliament to make any law at all just because the

law is made applicable only to Indians, as Professor Hogg indicates.

[20] It is also clear that Parliament has the ability under 91(24) to enact laws that apply to Indians wherever they are.[11] That is, federal laws in relation to Indians are not constitutionally restricted to Indians living on reserves. If Aboriginal jurisdiction is constrained by the same boundaries as is the federal government in exercising its jurisdiction under s. 91(24), it may also, and for similar reasons, extend to Indians wherever they are, on or off reserve.

[21] However, the cases that have considered s.91(24), have for the most part considered it from the other angle – whether or not provincial laws apply in the face of the federal jurisdiction. Even this issue has been largely academic since 1951 when the ***Indian Act*** was amended to provide that provincial laws of general application are also applicable to Indians, subject to the terms of any treaties and subject to any inconsistent federal law (including the ***Indian Act*** itself). The existence of section 88 of the ***Indian Act***, as it now is, means that provincial laws always apply, either on their own (***ex proprio vigore***) or because Parliament said so in exercising its jurisdiction under s. 91(24) by enacting section 88. Now, however, the reason why the provincial law applies is important, because it determines the probable scope of Aboriginal jurisdiction and it also will have an impact on what happens in cases of conflicts between laws.

Negotiated Self-Government Agreements

[22] Although there is a range of jurisdiction that could probably be exercised as a result of an inherent right of self-government, the exercise of jurisdiction by Aboriginal peoples may also occur as a result of negotiated agreements with federal and provincial governments. This does not make the preceding discussion entirely academic, because the negotiating positions of governments, and the compromises that will ultimately be accepted by the parties, are obviously influenced by their perceptions of the legal strength of their negotiating positions.

[23] A number of self-government negotiations have been concluded in Canada. An even larger number of self-government negotiations are on-going across the country. Virtually every province and territory is potentially affected by the prospect of the enactment of Aboriginal laws and the resulting desire for harmonization with the existing legal regime of federal and provincial laws. A key factor in determining the range of jurisdiction that may be provided for in self-government agreements is the extent to which Canada and the provinces are prepared to negotiate. Canada, in particular, is a key party to such negotiations and Canada's inherent right policy is therefore an important factor in considering the potential

scope of Aboriginal jurisdiction under such agreements.[12] Canada's policy leads it to agree to undertake negotiations in respect of subject matters that it has divided into three lists.

[24] List #1 refers to those matters that can be negotiated largely because they are internal to the group, integral to its culture and essential to its operation as a government. In many if not most cases, these topics are matters in relation to which Aboriginal laws might possibly be made whether or not a self-government agreement exists. It includes matters such as education, child and family services, health, housing, social services, justice, and hunting and matters related to the management of reserve lands.

[25] List #2 describes matters that go beyond those that are internal to the group or integral to its culture (e.g., divorce, labour, gambling, and penitentiaries). While the federal government is prepared to negotiate some Aboriginal authority in these areas, to the extent of its own jurisdiction, Canada takes the position that "primary law-making authority will remain with the federal and provincial governments" such that federal/provincial laws will prevail if they conflict with Aboriginal laws.

[26] List #3 identifies those matters where, in Canada's view, there are no compelling reasons for Aboriginal governments to exercise law-making authority, since they are essentially matters that go far beyond the group. This list includes matters that relate to Canadian sovereignty (such as defence) or law and order matters (such as substantive criminal law).

[27] The federal policy thus provides a basic outline of how far Aboriginal jurisdiction will be possible through negotiated arrangements and thus, in practical terms, the extent to which Aboriginal jurisdiction will be possible at all.

[28] The lengthy list of agreements, both at the agreement-in-principle (AIP) and at the final agreement stage, suggests the presence of the potential for the exercise of Aboriginal law-making authority in many parts of the country. The AIP with Meadow Lake Tribal Council (MLTC) and the Final Agreement with the Nisga'a are two examples.

[29] MLTC comprises a group of nine First Nations in northern Saskatchewan. Their AIP covers a comprehensive range of subject matters, including citizenship in the First Nations, lands, natural resources and the environment, culture, social services, health, economic matters, transportation, public and private works and infrastructure, justice, governmental structures, and the potential to extend negotiations to other subject matters. The initial focus of jurisdiction for the MLTC First Nations is in the exercise of their jurisdiction on their own

lands, but there is a commitment to discuss issues related to traditional territories which extend significantly beyond the reserve boundaries. There is also the practical awareness that a final agreement will have to be ratified by all members of the MLTC First Nations, whether they reside on or off reserve. Section 39.01 of the AIP specifically acknowledges the potential need to harmonize federal, provincial and Meadow Lake First Nation laws, as well as to harmonize program and service delivery and to reach other co-operative arrangements.
[30] The Nisga'a Final Agreement is an agreement between Canada, British Columbia and the Nisga'a Nation. It also deals with a broad range of Nisga'a jurisdiction over matters relating to lands and resources, government, membership or citizenship, language and culture, social services, health, child and family services, education, and justice, among many others. Existing federal and provincial laws continue to apply, even where there is Nisga'a jurisdiction, and the relationship among these laws is regulated by a series of paramountcy rules related to conflict and inconsistency. The Nisga'a government is required by the agreement to provide notice of its intention to make laws in various areas[13] and to consult with Canada and British Columbia in relation to a number of matters at their request. Similarly, British Columbia is required by the agreement to provide notice to the Nisga'a of its intention to alter laws that would impact significantly on Nisga'a laws[14] and to consult with the Nisga'a in that respect.

Delegated Powers

[31] Currently, the ***Indian Act*** provides the basic legislative framework for the election of band councils and the governance of First Nations on their lands. Attempts in recent years to revise this legislative framework have met with significant resistance. The stated purpose of the proposed ***First Nations Governance Act***[15] was to provide to bands more effective tools of governance "on an interim basis pending the negotiation and implementation of the inherent right of self-government". It would have authorized bands to develop for adoption by their members codes relating to leadership selection, administration of government, and financial management and accountability and to make laws applicable on reserve to a wide range of matters, including health, provision of services, use of reserve lands and activities conducted on them, resources, and language and culture and provides for the enforcement of band laws through prosecution of offences for their contravention. However, the legislation had not been enacted when Parliament was last dissolved and it has not been re-introduced.

[32] The ***Indian Act*** provides delegated authority to bands to make bylaws applicable on reserve lands relating generally to activities on those lands. The Act also contains provisions relating to trespass on the reserve by persons other than members of the band[16] and provisions that restrict access to property of an Indian or band on reserve for debt enforcement

purposes.[17]

Conflict of Laws

[33] The courts have approached the rigid division of powers between federal and provincial governments in a flexible and pragmatic manner. As a result, there are two ways in which federal and provincial governments can both enact valid laws that apparently impinge on the jurisdiction of the other.

[34] According to the "pith and substance doctrine", a law is valid as long as the true character, or "pith and substance," of the law is within the jurisdiction of the enacting legislating body. Where a statute or a statutory provision in pith and substance extends beyond the jurisdiction of the enacting legislature, it will be declared to be invalid. However, it is permissible for an enactment to be in pith and substance about one thing and yet have an incidental effect on matters within the exclusive jurisdiction of the other level of government. This is known as the "ancillary or incidental effect doctrine".

[35] The courts have also recognized that some laws have more than one "pith and substance," both of which are roughly equal in importance, so that valid laws can be enacted by either government. This is referred to as the "double aspect doctrine".

[36] The doctrine of "interjurisdictional immunity" recognizes that provincial laws that go beyond an incidental effect and trench on the essential character of the federal jurisdiction must be "read down." That is, the provincial laws are valid in their general application, but they are interpreted by the courts as not applying to the matter falling within the federal jurisdiction. At present, section 88 of the ***Indian Act*** renders the doctrine inapplicable in a practical sense in the Aboriginal context.[18] This is because section 88 makes applicable to Indians, provincial laws of general application that would otherwise not apply to them for the reason that the laws trench on the essential character of the federal jurisdiction under s. 91(24) of the ***Constitution Act, 1867***. That is, in the absence of section 88, such provincial laws would have been read down.

[37] Finally, it should be noted that otherwise valid provincial laws are inoperative if they conflict with a valid federal law. This is because, as between the federal and provincial governments, federal paramountcy is always the rule. A conflict occurs when it is not possible to obey one law without disobeying the other or where one statute substantially

frustrates the policy objectives of another. In the absence of an actual operational conflict of this type, all valid laws must be complied with. It should be noted that provincial laws declared to be "inoperative" as opposed to "invalid" will again apply in their entirety where federal legislation is either amended or repealed so as to remove the conflict.

[38] It seems reasonable to assume that courts are likely to build on existing constitutional concepts that have developed in the federal/provincial context when turning their attention to Aboriginal laws. On this assumption, a number of predictions are possible:

1. An Aboriginal law that is in its pith and substance in relation to a matter within the RCAP jurisdictional core or that is recognized in a self-government agreement or authorized to be made under delegated authority will be valid, even where it may have an "incidental effect or impact" on subject matters that are technically outside of the jurisdictional core or the agreement and even if there is another aspect to the law that would result in another government having jurisdiction to enact it.

2. Unless an actual operational conflict occurs, all valid laws will have to be complied with. Potentially, this could include three legal regimes: federal, provincial and Aboriginal.

3. Where an actual operational conflict does occur, a paramountcy rule will have to be developed. Building on the existing federal paramountcy rule, it makes sense that a provincial law that conflicts with an Aboriginal law would have to be read down, because the Aboriginal law would otherwise have fallen within the scope of s. 91(24). In the absence of the Aboriginal law, a similar law could only have been enacted by the federal government and as a federal law it would always be paramount over a provincial law. To put this another way, if an Aboriginal law is in relation to "Indians" or their lands, a conflicting provincial law should yield to it. This is explicitly the result in the context of power exercised under the delegated authority provided now in the ***Indian Act,*** since section 88 explicitly limits the application of the provincial laws it invigorates in this way.

4. An Aboriginal law that results from the exercise of an Aboriginal or Treaty right protected by s. 35 (this would not include a law enacted under delegated authority unless the authority is contained in a self-government agreement that amounts to a treaty within the meaning of s. 35) may only be infringed by laws that can be justified in accordance with the test enunciated by the Supreme Court of Canada in ***R. v.***

Sparrow.[19] Arguably, a provincial law that infringes a constitutionally protected right is invalid or at least inapplicable.[20] Thus, in cases involving provincial laws that until now have applied by virtue of section 88 of the ***Indian Act***, the justification question never actually arises. Provincial laws that apply by virtue of section 88 would also have to be justified in accordance with the ***Sparrow*** test, but presumably the federal government would have to do the justifying because it has enacted the law that incorporates the provincial law by reference.

Summary

[39] It seems clear that the potential for a broad range of Aboriginal laws, either as an exercise of an inherent right of self government or as a result of the negotiation of self-government agreements or delegated powers, and the complex constitutional context, together suggest that harmonization of laws would be a worthwhile objective. Indeed, harmonization is a matter that is touched on in the agreements that have been negotiated and no doubt is an important consideration in the negotiations that are on-going.

[40] Even constrained by the somewhat limited view of the federal government in relation to its own powers under s. 91(24)[21] and its willingness to engage in discussions about Aboriginal jurisdiction, there is a broad range of subject areas in which Aboriginal jurisdiction may be exercised. Most, if not all these areas of jurisdiction would, if Aboriginal peoples were not involved, be the jurisdiction of the provinces. In addition, there is a possible scope of Aboriginal jurisdiction that applies to Aboriginal peoples wherever they are. In this context, questions of what laws apply to whom in what circumstances are practical questions that must be answered and carry with them the need or desire to secure a measure of harmonization between federal, provincial and Aboriginal legal regimes.

Part 2: A Process Model for Enactment and Recognition of Uniform Commercial Laws

[41] Even a cursory review of the jurisdictional context reveals an exceptionally complex relationship of laws among federal, provincial and Aboriginal governments, in which there is a wide range of legal perspectives. Much time, energy and resources have been and will be expended in setting out these perspectives on behalf of all of the parties. However, it may be possible to establish a process for the development of uniform commercial laws for adoption within Aboriginal jurisdiction without having to find agreement about jurisdictional boundaries.

[42] In the United States, the National Conference of Commissioners on Uniform State Laws (NNUSL) has developed a Model Tribal Secured Transactions Act. According to Implementation Guide to the Model Act, the Act is based on Revised Article 9 of the Uniform Commercial Code (UCC) and is intended to ensure a material degree of harmonization between the law of different tribes of American Indians, and between those tribes and state legislatures. The Implementation Guide also points out that there are differences in the Model Act from the UCC that result from the need to accommodate tribal business, legal and cultural environments. Nevertheless, the Model Act integrates the core principles, terminology and processes from the UCC. Thus, the Model Act is not just an enactment of the UCC with a change in the name of the enacting body, but commercial legislation developed to respond to the specific needs of the American Indian tribes to whom it is recommended for enactment. NCCUSL established a liaison committee to work with American Indian tribes and their leaders, advisors and legal counsel to develop the Model Act.

[43] It must also be recognized that the Law Commission of Canada is engaged in a project relating to federal security interests on reserves. The study results from the significant effects that provisions of the ***Indian Act*** have on security held in respect of property on reserves. As referred to earlier in this paper, generally speaking enforcement of money judgments on property located on reserves is virtually impossible because of section 89 of that Act, and conventional lending is therefore largely frustrated on reserve. This paper does not aim to interfere with the work of the Law Commission of Canada, but to develop a process of implementation of Uniform Acts for enactment within Aboriginal jurisdiction that might ultimately be applied supportively to the product of the Law Commission's work.

[44] Such a process model must be respectful of Aboriginal jurisdiction and would require give and take by both Aboriginal and non-Aboriginal governments. Through a fair process that is mindful of the interests of all affected it may be possible to bypass the positional concerns around the jurisdiction question to achieve the pragmatic objective that is the underpinning of the Conference's Commercial Law Strategy in the first place.

[45] It is recommended that a committee or working group be established to identify and secure appropriate representation from Aboriginal governments, and to develop a process for working towards the adoption by the Conference of Uniform Acts within the Commercial law Strategy for adoption by Aboriginal governments.

Part 3: Practical Examples

[46] It is always difficult to consider issues in the abstract. For this reason it is proposed that the development of the process model discussed in Part 2 should proceed on the basis of concrete proposals for uniform Acts. The focus then moves to identifying particular pieces of legislation from the Commercial Law Strategy that would lend themselves more easily to development through the model process.

[47] There are three Uniform Acts from the Commercial Law Strategy that stand out as candidates for use in the development of the process envisaged by this paper. These are the ***Electronic Commerce Act***, the ***International Arbitration Act***, and the ***International Sale of Goods Act***. They stand out because they have been enacted in virtually all provincial/territorial jurisdictions and it would therefore be reasonable in a practical sense to work to extend their application to the Aboriginal context.

Part 4: Implementation

[48] Implementation of Uniform Acts by Aboriginal governments may be more complicated that is implementation by federal and provincial governments. In Saskatchewan in the past, Uniform Acts adopted by the Conference were enacted with a provision stating that the Act was to be interpreted in light of its objective, which was to make uniform the laws of the provinces that enacted it. This type of a provision does not appear to be typically contained in Uniform Acts any longer. However, it illustrates a type of mechanism that could be useful to alert those whose conduct is intended to be regulated by legislation to the intentions of the legislators in enacting it. This approach has the advantage of being wholly contained within the enacting jurisdiction. The extent to which it would b enforceable in a legal proceeding will be the extent to which the court or other decision-maker in the process is persuaded that the application of the legislation on its own terms can be pragmatically supported.

[49] Another possible approach to implementation is to secure recognition from other jurisdictions through their laws. The difficulty with this approach is that it requires not just the enactment of a Uniform Act by an Aboriginal government, but specific recognition in some legislated sense by other governments. In other words, it requires legislative intervention by all governments and not just by one.

[50] It is possible, of course, to develop a hybrid system, for example, one in which the statutory framework authorizes the designation of Uniform Acts adopted by Aboriginal governments for recognition by regulation or order rather than by legislative amendment or

even statutory recognition of the adoption of any Uniform Act by Aboriginal governments. While this is in some sense a simpler process because it would not engage the machinery of the legislatures in all other jurisdictions on a case by case basis, it is nevertheless a mechanism that requires other governments to actively choose to recognize Aboriginal legislation. It appears obvious to say that the recognition by other governments and thee courts of the adoption of a Uniform Act by an Aboriginal government should not be as difficult politically as the adoption of an Act that has not been developed through the Uniform Law Conference.

[51] No doubt there are other approaches to implementation that can be taken, and other advantages and disadvantages to the various ways of proceeding than those mentioned briefly here. Most importantly, these are issues that must be addressed by the Committee or Working Group charged with the responsibility for developing the process.

Conclusion

[52] Aboriginal jurisdiction is not just a question of who gets to make the laws; it includes an assumption that if Aboriginal peoples make their own laws, the laws will both derive from and reinforce Aboriginal culture and identity. It would make no sense, then, for Aboriginal peoples to simply pass the laws that have been passed up until now by non-Aboriginal governments.

[53] In this respect, the relationship between Aboriginal laws and federal and provincial laws is more like the relationship between two language versions of a law. As between French and English versions of a law, the literalness of the translation from one language to the other is less important than the result. The objective is to achieve the same result from either language version of the law and there is a recognition that that result may flow from formulations of words that are not exactly the same. This focus on outcome provides equal respect to both languages by privileging neither specific version.

[54] The situation with Aboriginal laws is similar, but not exactly the same. The need is to produce positive generic results that are generally speaking the same outcomes sought by non-Aboriginal legislation. For example, in relation to matters of education the objective of all governments is to graduate more students from high school and post-secondary education programs. The means by which this objective is achieved, and therefore the laws designed to achieve it, will, however, be different. This difference does not necessarily result from the use of a different language, but it emanates from the foundation of a different culture.

[55] The Conference's Commercial Law Strategy is a pragmatic recognition that the commercial law is an important area of the law in which to achieve some measure of harmonization or uniformity on the assumption that commerce is in many respects blind to language and culture. In many respects it is this same pragmatic quality that underpins this proposal for the adoption of a process to develop Uniform Acts from the Commercial Law Strategy for adoption by Aboriginal governments. The Conference has an opportunity to play an important part in continuing to "modernize and harmonize commercial law in Canada, with a view to creating a comprehensive framework of commercial statute law which will make it easier to do business in Canada, resulting in direct benefits to Canadians and the economy as a whole", including Aboriginal peoples.

Endnotes

1. See a paper prepared on this topic for the Conference in 2002 by Merrilee Rasmussen Q.C., titled, ***The Role of the Uniform Law Conference in relation to Aboriginal Laws***.

2. ***Campbell v. British Columbia (Attorney General)***, [2000] B.C.J. No. 1524.

3. Section 35 of the ***Canada Act, 1982***.

4. [1990] 1 S.C.R. 1075.

5.See, for example, ***R. v. Pamajewon***, [1996] 2 S.C.R. 821, where the Supreme Court considered the possibility that a claim to jurisdiction to regulate high-stakes gambling might be included in an inherent right to self-government. Lamer, C.J., writing for the majority began his analysis by stating, "assuming without deciding that s.35(1) includes self-government claims". Even though the point is explicitly stated as an assumption and not a decision, it seems odd that the court would proceed from an assumption that it thought had no likelihood of being true.

6.***Ibid***.

7.***R. v. Van der Peet***, [1996] 2 S.C.R. 507, at para. 45. Professor Brian Slattery argued in his remarks to the ***Moving Towards Justice*** Conference hosted by the Saskatchewan Institute of Public Policy and the First Nations University of Canada, on March 1-3, 2006, that this case establishes an Aboriginal right to "cultural integrity." (Publication of Conference Proceedings is pending.)

8.***Pamajewon*** was decided on August 22, 1996. The Royal Commission's Final Report was released on November 21, 1996. Since that time there have been several references in the case law to the Royal Commission's report, but none of them in the context of the right of self-government or the possible scope of Aboriginal jurisdiction under such a right.

9. At p. 27-4.

10.The ability to teach members of the group about language and cultures was considered in ***R. v. Côté***, [1996] 3 S.C.R. 139, see, for example, para. 56.

11.See ***Four B Manufacturing Ltd. v. United Garment Workers of America***, [1980] 1 S.C.R. 1031, where Beetz J. said, "The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on reserve any more than it is weakened because it is exercised over Indians off a reserve".

12.This is not to suggest that provincial/territorial negotiation policies are not also important.

However, Canada, as an important player in ***every*** negotiation will influence ***all*** negotiations. Again, while the additional factor of provincial/territorial policies is potentially ***more*** limiting, Canada's policy is a limitation that will ***always*** apply.

13.See section 27 of Chapter 11.

14.Section 30 of Chapter 11.

15.Bill C-61, first reading June 14, 2002.

16. See sections 20 and 30.

17. Sections 89 and 90.

18.This will not change with the enactment of the ***First Nations Governance Act***.

19.***R.*** v. ***Sparrow***, [1990] 1 S.C.R. 1075.

20.In ***Delgamu'ukw*** Lamer C.J. stated that s. 91(24) protects a core of Indianness from provincial intrusion and that core of Indianness includes Aboriginal (and no doubt Treaty) rights.

21.Canada seems on occasion to express the view that its jurisdiction under 91(24) is limited to only those things that it has already legislated in the form of provisions of the ***Indian Act***. This view is clearly incorrect. Parliament's jurisdiction is not defined by Parliament; it is defined by the Constitution. However, the complicating factor that this represents is the assumption that any Aboriginal jurisdiction exercised in relation to any of the List 1 matters is provincial jurisdiction, not federal. In other words, it is not jurisdiction that can be exercised by Canada under s. 91(24).