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Jurisdiction Devolution: An Interim Transitional Arrangement on the Road to Indigenous Self-Government

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Indigenous self-government is a key component of reconciliation between Canada and Indigenous Nations. The negotiation of self-government agreements and exercise of self-government should occur on Indigenous Peoples' own terms. Negotiations, however, can be lengthy. There are more immediate power-sharing alternatives. These include recognition legislation, where federal and provincial governments recognize Indigenous Peoples' inherent right to self-government over certain affairs, thus creating space for Indigenous Nations to exercise their inherent self-government rights. They also include jurisdictional devolution, a fuller form of delegation, which might include law-making and enforcement powers. This latter option is "somewhat unpalatable" because the source of the governance powers comes from the delegating federal or provincial government and not an inherent right, but it beneficially allows Indigenous communities to exercise self-government immediately. I argue that jurisdictional devolution must not be thought of as the destination on the road to Indigenous self-government, but rather as a transitional point, which might broaden and deepen the exercise of Indigenous self-government. First, I define the recognition and delegation models and situate jurisdictional devolution in relation to them. Second, I argue that the existence of jurisdictional devolution, recognition, and treaties demonstrates a spectrum of jurisdiction sharing between federal and provincial governments and Indigenous Nations. All three reveal the importance of the relationship between the state and Indigenous Nations as they exercise self-government. Third, I argue that jurisdictional devolution can give rise to practical constraints which may be difficult for federal and provincial governments to displace and evolve into a constitutional convention, therefore placing effective limits on federal and provincial governments' ability to displace it. Jurisdictional devolution has the capacity to entrench Indigenous jurisdiction and can create momentum to negotiate treaties or implement recognition legislation.

L'autonomie gouvernementale des autochtones est un élément clé de la réconciliation entre le Canada et les nations autochtones. La négociation des accords d'autonomie et l'exercice de l'autonomie doivent se faire selon les propres conditions des peuples autochtones. Les négociations peuvent toutefois être longues. Il existe des solutions plus immédiates pour le partage du pouvoir. Il s'agit notamment de la législation de reconnaissance, dans laquelle les gouvernements fédéral et provinciaux reconnaissent le droit inhérent des peuples autochtones à l'autonomie dans certains domaines, créant ainsi un espace permettant aux nations autochtones d'exercer leurs droits inhérents à l'autonomie. Il y a aussi le transfert de compétences, une forme plus complète de délégation, qui pourrait inclure des pouvoirs législatifs et d'exécution. Cette dernière option est « quelque peu désagréable » parce que les pouvoirs de gouvernance proviennent du gouvernement fédéral ou provincial délégant et non d'un droit inhérent, mais elle permet aux communautés autochtones d'exercer immédiatement leur autonomie gouvernementale. Je soutiens que le transfert de compétences ne doit pas être considéré comme la destination sur la voie de l'autonomie gouvernementale autochtone, mais plutôt comme un point de transition susceptible d'élargir et d'approfondir l'exercice de l'autonomie gouvernementale autochtone. Tout d'abord, je définis les modèles de reconnaissance et de délégation et je situe le transfert de compétences par rapport à eux. Ensuite, je soutiens que l'existence du transfert de compétences, de la reconnaissance et des traités démontre un éventail de partage des compétences entre les gouvernements fédéral et provinciaux. Ces trois éléments révèlent l'importance de la relation entre l'État et les nations autochtones dans l'exercice de l'autonomie gouvernementale. Troisièmement, je soutiens que le transfert de compétences peut donner lieu à des contraintes pratiques qu'il peut être difficile pour les gouvernements fédéral et provinciaux de déplacer et de transformer en convention constitutionnelle, limitant ainsi efficacement la capacité des gouvernements fédéral et provinciaux à le déplacer. Le transfert de compétences a la capacité d'ancrer la compétence autochtone et peut créer une dynamique pour négocier des traités ou mettre en œuvre une législation de reconnaissance.

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Introduction

Self-governance has long been a goal for Indigenous communities and Canada is arguably starting to make concrete gains in facilitating this goal. As John Borrows writes, "Indigenous legal traditions will more positively permeate our societies if their power is acknowledged by official state and community institutions" like federal and provincial governments and courts.[1] Now more than ever, conversations abound about how Canada and Indigenous Peoples may reconcile after a dark past of federal and provincial assimilation policies. Nation-to-nation relationships and treaties between Canada and Indigenous Nations are key steps in achieving reconciliation.[2] To date, 25 self-government agreements have been negotiated.[3] Canada has

1. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2020) at 178 [Borrows, *Indigenous Constitution*].
2. In this paper, Indigenous Nations refers to First Nations, Inuit, and Métis communities. See Zach Parrott, "Indigenous Peoples in Canada," *The Canadian Encyclopedia* (13 March 2007), online: <thecanadianencyclopedia.ca/en/article/aboriginal-people> [perma.cc/G28F-S8HB].
3. Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Self-government" (Ottawa, last modified 25 August 2020), online: <rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314#chp3> [perma.cc/Z566-MYSE]. Self-government agreements can take different forms. One form is that of a modern treaty, or comprehensive land agreement, like the Nunavut Agreement. Another form is

committed to incorporating the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") into domestic law.[4] The Trudeau government has also committed to implementing the Calls to Action from the Truth and Reconciliation Report.[5] These are important stops on the path of reconciliation.

The road to self-government, however, can be long. Negotiating self-government agreements often takes years.[6] In the interim, many Indigenous communities have neither the jurisdiction nor the resources to pass laws or exercise control over their own communities. Naiomi Metallic writes that First Nations governments therefore "currently appear to be stuck between the proverbial 'rock and a hard place' when it comes to having a means to exercise effective control over programs and services affecting their community members."[7] Metallic argues that in the interim, it is important to develop a viable solution to counter an unacceptable status quo where many Indigenous communities do not have the means to exercise self-government at all.[8]

In this paper, I argue that jurisdictional devolution has an important role to play, as a transitional tool, on the road to self-government agreements or legislation that recognizes self-government rights under section 35 of the *Constitution Act 1982*. I pick up the mantle from Metallic's scholarship. Metallic suggests that the *Indian Act* by-law powers, which delegate some legislative powers to band councils, might be a viable transitional solution to allow for more immediate self-government in many communities.

"where law-making power is negotiated with an Indigenous group in only 1 or 2 key areas such as the Education Agreement in Nova Scotia and the Anishinabek Nation Agreement in Ontario." *Ibid*.

4. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDA*]; see also Canada, Department of Justice, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act" (Ottawa: last modified 1 December 2023), online: <justice.gc.ca/eng/declaration/index.html> [perma.cc/T5V7-JL52]; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly*, 2 October 2007, A/RES/61/295 [UNDRIP].

5. John Paul Tasker, "Justin Trudeau announces 3 steps to help enact Truth and Reconciliation calls to action," *CBC News (*15 December 2016), online: <cbc.ca/news/politics/trudeau-indigenous-leaders-trc-1.3897902> [perma.cc/7U88-ZBMC]; Truth and Reconciliation Commission of Canada, Calls to Action, (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015), online (pdf): <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf> [perma.cc/326Q-W2HK].

6. Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211 at 214, online: <journals.lib.unb.ca/index.php/unblj/article/view/29079/1882524263> [perma.cc/AHZ7-YKKP] [Metallic, "Indian Act By-Laws"]. See also Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev Legal Soc Issues 29.

7. Metallic, "Indian Act By-Laws," *supra* note 6 at 215.

8. *Ibid.*

Metallic acknowledges that the *Indian Act* has a "dark history…as [a] tool for assimilation" and that the delegated nature of jurisdiction under the *Indian Act* is "somewhat unpalatable."[9] Making use of these tools, however, is far better than the alternative, which would allow for no self-government at all for many communities until nation-to-nation agreements might be forged years later.[10] The use of *Indian Act* by-law powers might therefore be thought of as a transitional point on the way to Indigenous self-government on communities' own terms. Other possible transitional points which allow Indigenous Peoples to exercise more immediate jurisdiction may include other forms of delegation of jurisdiction from Canadian governments to Indigenous Peoples.

Part I defines two separate models, the recognition model and the delegation model, both of which have been used by governments to create space in Canada's legal order for the practical exercise of Indigenous self-government (a right that exists irrespective of government recognition or delegation). I will then situate jurisdictional devolution in these models and will also consider the role of treaties. The existence of jurisdictional devolution, recognition, and treaties demonstrate that, in practical terms, there exists a spectrum of jurisdiction sharing between Canadian governments and Indigenous Nations. In Part II, I will argue that jurisdictional devolution to Indigenous communities gives rise to practical constraints, which may be difficult to displace. Over time, these constraints can lead to the emergence of a constitutional convention. Jurisdictional devolution legislation will thus be legally possible to overturn but will be practically, and perhaps constitutionally, difficult to overturn. The constitutional contours to jurisdictional devolution stand to entrench Indigenous jurisdiction and be a key pit stop on the road to Indigenous self-government through treaties or recognition. Finally, Part III concludes with implications for the jurisdictional devolution model. I make a case for how, rather than viewing devolution as an end in and of itself, it should

9. *Ibid* at 212. It is worth pointing out that the *Indian Act* by-law making powers are only available to First Nation communities that are still governed by the *Indian Act*, which are referred to as bands—the members of which have "status." Other First Nations are self-governing, and the *Indian Act* no longer applies to them. See Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Differences between Self-Governing First Nations and Indian Act Bands" (Ottawa, last modified 15 September 2010), online: <rcaanc-cirnac.gc.ca/eng/1100100028429/161678961776> [perma.cc/B9BD-VK5E]. Further, the *Indian Act*-imposed band structure may not always correspond to the political and Nation structure of Indigenous Peoples, including historically. See John A Price & René R Gadacz, "First Nation Bands in Canada," *The Canadian Encyclopedia* (6 June 2011), online <thecanadianencyclopedia.ca/en/article/band> [perma.cc/RCN4-MQUE].

10. Metallic, "Indian Act By-Laws," *supra* note 6 at 215.

be viewed as an interim step—and perhaps even a facilitator—towards deepening and broadening Indigenous self-government in Canadian law.[11]

I. *Recognition and Delegation*

1. *Self-Government*

Self-government cannot be precisely defined because its exact contents will vary between each distinct nation.[12] Patrick Macklem defines self-government not as a "technical legal term" but rather as "a set of aspirations connected with the desire of native people to have control over the ability to define their own individual and collective identities."[13]

Nonetheless, common features of self-government can be identified. Self-government is *not* self-administration, where bodies outside of the First Nation or Indigenous group make the major decisions and the First Nation is left to simply implement the programs.[14] Further, varied expressions of self-government do share some identifiable—and perhaps essential—elements, including a conditional scheme for how the nation will govern itself, law-making abilities, the ability to make and implement day-to-day decisions, and local dispute resolution mechanisms.[15] Macklem elaborates that self-government:

> [A]t least refers to the need for a territorial base on native land, some forms of administrative and political structures and institutions… the ability of native people to organize their societies and pass laws governing their lives free from federal or provincial interference, and

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11. A note on framing: this paper theorizes recognition and self-government primarily from the perspective of federal policy proposals and frameworks. It is important that normative discussions of self-determination reach beyond a state policy-oriented framework to describe decolonial pathways. This paper focuses on state institutions because this is the framework within which the state, courts, and many Indigenous groups (often in response to state institutions) currently operate. While for pragmatic reasons this is the frame in which this paper operates, the merits of such an approach have been debated and critiqued (see e.g. Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) [Simpson, *Mohawk Interruptus*]). My focus in this paper on self-government is not designed to undermine these views. Rather, my aim is to assess how Indigenous jurisdiction, as approached by state institutions, may become entrenched and open further, broader jurisdictional avenues on Indigenous Peoples' own terms.

12. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36:2 McGill LJ 382 at 388.

13. *Ibid* at 387.

14. Stephen Cornell, Catherine Curtis & Miriam Jorgensen, "The Concept of Governance and its Implications for First Nations" (2004) Native Nations Institute & The Harvard Project on American Indian Economic Development, Working Paper No 2004-02 at 9, online (pdf): <hwpi.harvard.edu/files/hpaied/files/the_concept_of_governance_and_its_implications_for_first_nations.pdf?m=1639579282> [perma.cc/UTT3-PGTE]; see also Judith Rae, "Program Delivery Devolution: A Stepping Stone or a Quagmire for First Nations?" (2009) 7:2 Indigenous LJ 1.

15. Cornell, Curtis & Jorgensen, *supra* note 14 at 10-14.

> access to sufficient fiscal resources to meet these responsibilities.[16]

The transfer of jurisdictional responsibilities from Parliament to Indigenous groups is another potential indicator of self-government.[17]

This definition of self-government helps frame the central argument in this paper. Sébastien Grammond, a judge on the Federal Court, writes that the two ways Canadian and Indigenous legal systems interact are through "the Canadian legal system's *delegation* of law-making authority to Indigenous bodies and its *recognition* of Indigenous peoples' pre-existing, or inherent, law making powers."[18] If we agree with Macklem's argument that transfer of responsibilities is an indicator of self-government, then the source of Indigenous communities' practical ability to *exercise* their self-government rights may either be an inherent right protected by section 35 (that federal and provincial governments may recognize as an Aboriginal right through legislation), or delegation of jurisdiction from Parliament or a provincial government.

While Indigenous self-government has generally been seen as a positive development in the Canadian legal landscape, it is important to acknowledge that for many Indigenous communities, self-government is a compromise. One need only look to the judicial history of the landmark decision in *Delgamuukw v British Columbia*, and how the pleadings developed in the case's lifecycle.[19] Before the British Columbia Supreme Court, the Gitksan and Wet'suwet'en Nations originally argued that they owned and had jurisdiction over 133 territories.[20] After a devastating loss at trial, the Gitksan and Wet'suwet'en Nations changed their strategy on appeal by replacing their arguments for ownership and jurisdiction with claims for Aboriginal title and self-government.[21] In *Delgamuukw*, self-government was not the Nations' first choice. Some and even many Indigenous Nations might understand self-government as a quasi-delegated form of Indigenous authority that relies on federal and provincial governments' interests and power to define its contours.

16. Macklem, *supra* note 12 at 389.
17. *Ibid.*
18. Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 at 9 [Grammond, "Recognizing Indigenous Law"].
19. See *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC).
20. John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37:3 Osgoode Hall LJ 537 at 552.
21. *Ibid.*

2. *Recognition*

Grammond defines recognition as meaning "a legal system's decision that a particular situation is governed by another, independent legal system."[22] The recognition model acknowledges that "the inherent right of self-government is an inherent right with its source outside the Canadian constitution"; recognition simply "mak[es] this inherent jurisdiction explicit."[23] According to Grammond, state institutions play a large role under this model, as they must decide which Indigenous laws are to be recognized, the identity of the group subject to those laws, and whether there will be judicial or executive review of those laws.[24] Though Indigenous Nations do not rely on formal acts of recognition, like Recognition Acts, to have their own laws and related systems, such Acts could be "very important in facilitating multi-juridicalism in Canada."[25]

The theory of recognition aligns with what Asch and Macklem have termed as the "inherent rights approach."[26] According to Asch and Macklem, the inherent rights approach "views aboriginal rights as existing independently of the legal creation of Canada and not requiring explicit legislative or executive recognition for their existence."[27] Asch and Macklem are quite right that the inherent right to self-government is not contingent on government recognition. As Borrows put it, "Indigenous peoples do not require formal recognition to possess and exercise law."[28] Borrows argues that recognition helpfully brings an already-accepted idea back into society's awareness.[29] But, practically speaking, the inherent self-government right will be difficult to exercise without the state acknowledging the existence of that right in legislation. Despite the existence of the inherent right, absent recognition or a court challenge that confirms that the right falls under section 35, Indigenous groups would have little to no recourse when the state legislates over those rights.

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22. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 14.
23. Naiomi Walqwan Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's *Aboriginal Nation Recognition and Government Act*" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships Indigenous Peoples and Canada* (Saskatoon: Wiyasiwewin Mikiwahp Native Law Centre, 2019) 243 at 270 [Metallic, "Ending Piecemeal Recognition"]. In this passage, Metallic writes in the context of the Royal Commission on Aboriginal Peoples' recommended *Aboriginal Nation Recognition and Governance Act*, which could be described as recognition legislation.
24. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 15.
25. Borrows, *Indigenous Constitution*, *supra* note 1 at 181.
26. Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 Alberta L Rev 498 at 500.
27. *Ibid.*
28. Borrows, *Indigenous Constitution*, *supra* note 1 at 181.
29. *Ibid.*

Recognition Acts and formal state gestures of recognition are not unique to Canada. Maggie Blackhawk has recently argued that exploring federal Indian law in the United States offers a perspective into "legislative constitutionalism"—how Congress and the Executive make, interpret, and enforce constitutional law.[30] Prodded by Native Peoples' activism, lobbying, and diplomacy, "Congress has affirmed and structured the recognition of inherent tribal sovereignty and it continues to structure and facilitate the ongoing government-to-government relationship between the United States and the 574 federally recognized Native Nations."[31]

The recognition model is attractive because governments may very reasonably implement "national legislation recognizing the right of Indigenous peoples to organize themselves collectively and govern themselves in core areas of jurisdiction as they see fit," along with appropriate funding and resources to aid capacity building.[32] Of course, it is also important to critique the way the recognition model has been operationalized in Canada thus far. For example, Metallic critiques a piecemeal implementation of the recognition model.[33] At its best, however, this model aligns with international instruments, like UNDRIP, which affirm Indigenous self-determination, and with domestic principles of reconciliation. Metallic writes that she believes "'reconciliation' is a more complete description of what such laws do" because those laws "seek to respect, promote, protect, and accommodate inherent rights through mechanisms or frameworks elaborated upon within the statute."[34]

Section 35 has a strong role to play in the recognition model. Both constitutional and Aboriginal law scholars have suggested that section 35 protects the recognition of Indigenous laws. The Royal Commission on Aboriginal Peoples' Final Report asserts that Indigenous Peoples' inherent right to self-government is guaranteed under section 35.[35] Borrows argues that "Aboriginal peoples could claim the practice of Indigenous law as a right requiring recognition and affirmation under [section 35]

30. Maggie Blackhawk, "Legislative Constitutionalism and Federal Indian Law" (2023) 132:7 Yale LJ 2205 at 2212, 2214.
31. *Ibid* at 2212-2213.
32. Metallic, "Ending Piecemeal Recognition," *supra* note 23.
33. *Ibid* at 270.
34. Naiomi S Walqwan Metallic, "Aboriginal Rights, Legislative Reconciliation and Constitutionalism" (2023) 27:2 Rev Const Stud 1 at 5, online: <digitalcommons.schulichlaw.dal.ca/scholarly_works/1201/> [perma.cc/SF4T-EMKP] [Metallic, "Legislative Reconciliation"].
35. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996) at 298, online (pdf): <data2.archives.ca/e/e448/e011188230-02.pdf> [perma.cc/GR75-VHR4]. See also *ibid* at 5.

and the government could recognize this fact."[36] The Court of Appeal of Quebec found in a recent Reference that self-government is an inherent Aboriginal right protected under section 35, though the Supreme Court was more equivocal on the question on appeal.[37] Protecting inherent rights under section 35 holds legal weight, as the Supreme Court in *R v Van der Peet* endorsed the inherency of Aboriginal rights. The Court found that "[A]boriginal rights in general derive from the historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment…[t]his position is known as the 'inherent theory' of aboriginal rights."[38] Since section 35 recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada," section 35 protects inherent, unextinguished Aboriginal rights.[39]

It is worth underscoring that some Indigenous scholars approach recognition with skepticism or point to its colonial underpinnings. Perhaps the leading perspective highlighting the dangers of state recognition is that of Glen Coulthard. In his book *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*, Coulthard looks to "recognition" as the culprit for continued colonial hierarchies.[40] Coulthard argues that "relations of recognition can have a positive (when mutual or affirmative) or detrimental (when unequal and disparaging) effect on our status as *free and self-determining agents*."[41] When recognition is achieved by delegation or through litigation for Aboriginal rights and title, colonial power is reproduced in a way antithetical to Indigenous demands for recognition.[42] In other words, recognition can also constitute a colonial pathway towards elimination of Indigenous legal culture. Coulthard is far from the only scholar to point out the erasure linked to state recognition.

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36. Borrows, *Indigenous Constitution*, *supra* note 1 at 185.
37. *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis,* 2022 QCCA 185, at para 517, rev'd 2024 SCC 5 [*Renvoi relatif à la Loi* (QCCA)]; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [*Reference re An Act* (SCC)]. The Supreme Court did not go so far as to say that child and family services was an inherent right under section 35, but did acknowledge that "[w]hile it is unnecessary to determine the limits of s. 35(1) for the purposes of this reference, it is nevertheless worth noting that Parliament, after thoroughly inquiring into the matter, chose to advance reconciliation by affirming that the right of self-government in relation to child and family services is 'inherent' as well as 'recognized and affirmed by section 35 of the *Constitution Act, 1982*.' This affirmation, set out in section 18(1), is therefore an important factor in deciding this reference. The importance of this affirmation will undoubtedly also be a factor to consider when the courts are called upon to formally rule on the scope of s. 35" (*ibid* at para 117).
38. *R v Van der Peet*, 1996 CanLII 216 at para 112 (SCC) [*Van der Peet*].
39. *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35(1).
40. Coulthard, *supra* note 11.
41. *Ibid* at 17 [emphasis in original].
42. *Ibid* at 3.

Audra Simpson views political recognition in the American court case *Canada v RJ Reynolds Tobacco Holdings Inc* as "empire building" because the legal reasoning "responds to and effaces, again, [I]ndigenous [P]eople's claims of their '[A]boriginal' right to trade."[43] Simpson argues that in *RJ Reynolds*, "the possibility of a third legal system at work was not admitted into the analysis, thus solidifying settler sovereignty as normal, natural, and ultimately just."[44] In her book, *Mohawk Interruptus*, Simpson looks to the "politics of refusal" as an alternative to the politics of recognition. The politics of refusal "argues against reducing Indigenous visions of justice to state recognition;" Indigenous peoples, by "refusing to disappear," "challenge the legitimacy of the Canadian state" and thus "destabilize the discourses and instruments of recognition which have historically been employed to define and delimit the terms of their identity."[45] Simpson argues that Indigenous Nations as sovereign political entities can both exist within and reject the legitimacy of a larger sovereign state to govern them.[46]

At the same time, many Indigenous scholars point to the benefits of certain types of recognition.[47] For example, Metallic argues that legislation that recognizes and accommodates "various inherent rights, including hunting and fishing rights, cultural and linguistic rights, land rights, and jurisdictional rights" under section 35 of the Constitution is vital as existing approaches (negotiation, constitutional litigation) are alone insufficient to bring about reconciliation.[48] Practically speaking, "without explicit recognition of Indigenous peoples' jurisdiction in legislation," many government lawyers and bureaucrats "are reticent to accept that section 35 provides a sufficiently firm legal foundation for inherent rights."[49] Similarly, Borrows writes that "Indigenous legal traditions are a reality within Canada and should be more effectively recognized as such."[50] He goes on to write that "[i]f recognized and given resources and room to grow, each legal tradition can be relevant in contemporary circumstances"

43. Audra Simpson, "Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent" (2008) 71:3 Law & Contemp Probs 191 at 198 [Simpson, "Subjects of Sovereignty"]; *Canada v RJ Reynolds Tobacco Holdings, Inc*, 268 F (3d) 103 (2d Cir 2001).
44. Simpson, "Subjects of Sovereignty," *supra* note 43 at 198.
45. Lucie Robathan, "'Presencing of the Present': The Politics of Refusal as a Spiritual Practice" (2018) 46 Arc: The Journal of the School of Religious Studies 1 at 1-2.
46. Simpson, *Mohawk Interruptus*, *supra* note 11.
47. See e.g. Metallic, "Legislative Reconciliation," *supra* note 34; Blackhawk, *supra* note 30; John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash UJL & Pol'y 167 at 216-218 [Borrows, "Indigenous Legal Traditions"].
48. Metallic, "Legislative Reconciliation," *supra* note 34 at 8, 38.
49. *Ibid* at 12.
50. Borrows, "Indigenous Legal Traditions," *supra* note 47 at 174.

and recommends that "there could be greater recognition of [I]ndigenous governments and dispute resolution bodies through the courts, parliament, legislatures, the executive, law societies and law schools."[51] When recognition is approached carefully, Indigenous advocates may build Canadian recognition legislation into "a framework that recognizes tribal sovereignty and supports self-determination and collaborative lawmaking."[52]

Despite the benefits of recognition, a delegation model should not be wholly abandoned. Delegation—together with recognition—are ways Indigenous Nations may leverage myriad tools currently available to them to pursue greater self-government powers. Grammond writes that he does not mean to suggest that delegation is inferior to the recognition model or that delegation ought to be abandoned; rather, "Indigenous peoples may find advantages in using existing mechanisms of delegation or negotiating new ones."[53] Borrows suggests that "[o]ther opportunities for reform might be missed, particularly in regard to federalism, if too much reliance is placed on section 35" as it "does not replicate jurisdictional powers for Aboriginal peoples as found in sections 91 and 92 of the *Constitution Act, 1867*."[54] And Metallic highlights that *Indian Act* by-law powers, which are a form of delegation, can be a legitimate and helpful source of self-government power.[55] What, then, is the role for delegation in deepening the exercise of Indigenous self-government?

3. *Delegation*

Under a delegation model, a centralized government grants certain powers to a subordinate institution. Grammond argues that delegation "relies on the well-known concept of delegation of administrative powers to explain Indigenous law-making."[56] There are some limited benefits to delegation, which include clarity as to the Indigenous group which has the power to make laws, a clear definition of the territorial scope of defined powers and to whom they apply, and providing a familiar interface to non-Indigenous jurists regarding how self-government can be exercised.[57]

These limited benefits, however, are met with drawbacks. Metallic argues that these "discrete statutes" are "half measures" that "offer greater

51. *Ibid* at 175, 198.
52. Blackhawk, *supra* note 30 at 2211.
53. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 9.
54. Borrows, *Indigenous Constitution*, *supra* note 1 at 199.
55. Metallic, "Indian Act By-Laws," *supra* note 6.
56. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 10.
57. *Ibid* at 12.

control, but still with many restrictions."[58] Grammond agrees. He argues that exercising delegated powers means staying within the confines of the delegation without being able to fully embrace Indigenous legal traditions since the exercise of power must fit a "Western mould."[59] Perhaps presenting the most difficulty is that delegation assumes that the centralized government holds the power that they then award to an entity that does not have any power. This model ignores that Indigenous communities have an inherent right to self-government. This theory aligns with what Asch and Macklem have termed as the "contingent rights approach," which "sees aboriginal rights contingent upon formal recognition by legislative or executive authority or explicit constitutional amendment."[60]

Delegation often falls into the trap of failing to provide adequate law-making abilities and associated funding. Judith Rae writes about how provincial and federal governments devolve program administration and management to local Indigenous communities without corresponding legislative or policy-building capabilities. She calls this phenomenon "program devolution." Rae refers to this type of devolution as a "downloading process" of "self-administration or perhaps self-management," and accurately distinguishes this from true jurisdiction over local affairs.[61] Metallic has identified several problems with program devolution: (1) given there is no legal framework for program devolution, federal agencies have "extensive discretion and control over First Nations' affairs"; (2) the programs are underfunded, which exacerbates already-existing situations of poverty; and (3) "devolution does not encourage thoughtful, culturally appropriate, policy-making sensitive to the particular needs and circumstance of First Nations people."[62]

II. *A spectrum of power-sharing*

Canadian courts have been reluctant to bring recognition of inherent rights to its full potential absent "statutory cues."[63] The burden remains on the legislature: absent these statutory cues, courts have been reticent to recognize a self-government right under section 35. At the same time, statutory delegation models do not meaningfully recognize inherent rights of self-government and may even contribute to piecemeal recognition of Indigenous self-government rights. As a result, communities may not be

58. Metallic, "Ending Piecemeal Recognition," *supra* note 23 at 270.
59. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 12-13.
60. Asch & Macklem, *supra* note 26 at 500.
61. Rae, *supra* note 14 at 7.
62. Metallic, "Indian Act By-Laws," *supra* note 6 at 213-214.
63. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 15.

able to exercise self-government when there are conflicting provincial and federal laws to which they are subject. Absent a finding that section 35 protects those self-government rights, the provincial and federal governments need not justify an infringement of Indigenous laws under the *R v Sparrow* test, which asks the complainant to establish that the impugned law, in effect, interferes with an Aboriginal right before the burden shifts to the Crown to justify that infringement.

In this practical sense, jurisdictional devolution broadens and deepens Indigenous self-government. It can be useful to conceive of power-sharing as a spectrum regarding how Canadian governments and Indigenous communities' laws interact. Delegation of jurisdiction can be narrow (i.e. administrative delegation) or broad (i.e. delegation of jurisdiction and law-making powers). Devolution can accelerate the recognition of the inherent right to self-government along a power-sharing spectrum. As part of the power-sharing spectrum, courts have, for example, considered modern treaties. Even though I am persuaded that the source of law-making powers in treaties is an inhernet right, court cases indicate that the same power identified as delegation one day might be later recognized as an inherent right.

1. *Jurisdictional devolution*

Jurisdictional devolution legislation grants jurisdiction from a centralized power to other polities. D.E. Smith discusses jurisdictional devolution in the context of Australia's relationship with Indigenous communities as a "process of power sharing within a common legal and government order."[64] According to Smith, "[a]ny move along the centralised-devolved continuum can therefore take a range of forms with variation in jurisdictional coverage and in the extent of autonomy and interdependence."[65] Grammond writes that an Indigenous community may wish to exercise delegated authority over some issues, but not others, "thereby enabling a gradual transition towards a full exercise of its own jurisdiction."[66] When a Canadian government delegates jurisdiction over a subject matter through their section 91 or 92 powers to Indigenous communities, they engage in jurisdictional devolution. As will be further discussed, doing so can entrench Indigenous self-government.

64. DE Smith, "Jurisdictional Devolution: Towards an Effective Model for Indigenous Community Self-Determination" (2002) Centre for Aboriginal Economic Policy Research, The Australian National University Working Paper No 233 at 5, online (pdf): <caepr.cass.anu.edu.au/sites/default/files/docs/2002_DP233_0.pdf> [perma.cc/96RM-439C].

65. *Ibid.*

66. Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28:1-2 J L & Soc Pol'y 132 at 134 [Grammond, "Federal Legislation"].

Devolution legislation delegates jurisdictional power "downwards" to intermediate or local polities.[67] There are several features of a devolved system of sovereignty. For example, the centralized polity retains the formal possibility to overturn devolution legislation because devolution legislation is regular law.[68] Jurisdictional devolution is thus a practical explanation for what occurs when the legislature *gives* Indigenous communities jurisdiction, rather than recognizes their inherent jurisdiction. Under jurisdictional devolution, the inherent right to self-government is not given full force because the legislature can repeal the granted jurisdiction without needing to justify it.

Jurisdictional devolution is part of the delegation model, but it differs notably from other types of delegation. Unlike administrative devolution, jurisdictional devolution devolves *jurisdiction*, rather than limited program and service administration, to Indigenous communities. Instead of administering another government's programs, genuine local jurisdiction involves final decision-making power and the development of institutions designed by local communities.[69] Of course, the difference requires careful treatment. Policy-makers must take care to ensure that any jurisdictional devolution to Indigenous communities does not merely encompass the offloading of responsibility without adequate financial supports.

Smith's argument of a "centralised-devolved continuum" is useful here and can be pushed further. It is more useful to see delegation and recognition as existing on a scale or continuum of Indigenous self-government. On one end, only limited administrative delegation may occur. At the other end, Parliament and legislatures may recognize the inherent right of self-government.

While each model has a different constitutional source (section 91 or section 92, versus an inherent right protected by section 35) they may be placed on the same continuum because of the legislatures' key role in each to date. As Grammond writes, courts have usually waited for statutory cues to "slowly…draw out the implications of section 35 of the *Constitution Act, 1982* for the recognition of Indigenous laws."[70] These statutory cues often "target a relatively narrow legal issue and instruct judges or other legal officials to resolve it through the application of Indigenous laws."[71]

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67. Robert Agranoff, "Autonomy, Devolution and Intergovernmental Relations" (2004) 14:1 Regional & Fed Stud 26 at 26, DOI: <10.1080/1359756042000245160>.
68. Stefan Wolff, "Conflict Management in Divided Societies: The Many Uses of Territorial Self-Governance" (2013) 20:1 Intl J on Minority & Group Rts 27 at 33.
69. Rae, *supra* note 14 at 8.
70. Grammond, "Recognizing Indigenous Law," *supra* note 18 at 15.
71. *Ibid* at 17.

Even under a recognition model "state institutions retain a significant role" because "[d]ecisions have to be made as to which Indigenous laws should be recognized, how the contents of these laws can be conveyed to non-Indigenous legal actors, [and] who will be subject to these laws."[72] Borrows also argues that while Canadian governments and courts should be placed "in their proper place," they can still "play an important ancillary role…Indigenous laws could be overlooked and undervalued if they are not championed by more centralized institutions."[73] Thus, while formal recognition is not needed for Indigenous Peoples "to possess and exercise law," the state does play a powerful role in advancing statutory cues and choosing which Indigenous laws to recognize.[74]

As Metallic has explained, recognition laws "are unique because they are based on recognition that the subject of the legislation…are Aboriginal (or 'inherent') rights, protected by section 35(1) of the *Constitution Act, 1982*, that all Indigenous peoples in Canada hold."[75] In a recent reference case, the Court of Appeal of Quebec found that the federal *Act respecting First Nations, Inuit and Métis children, youth and families* was constitutional and that Indigenous self-government over child and family services is a "generic" right protected under section 35.[76] Scholars have cited this conclusion as a departure from and potential revisitation of *R v Pamajewon*, the only Supreme Court decision that considered Indigenous self-government.[77] It is worth noting that when the reference was appealed, the Supreme Court did not go quite so far as to find a generic right, but also did not close the door to the possibility.[78]

At the same time, the *Act respecting First Nations, Inuit and Métis children, youth and families* is not unidimensional. There are parts of it that could be characterized as a very particular and novel form of devolution.

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72. *Ibid* at 15.
73. Borrows, *Indigenous Constitution*, *supra* note 1 at 180.
74. *Ibid* at 181.
75. Metallic, "Legislative Reconciliation," *supra* note 34 at 4.
76. *Renvoi relatif à la Loi*, *supra* note 37; *Reference re an Act*, *supra* note 37; *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [*FNIM Act*].
77. See Robert Hamilton, "Is the *Act respecting First Nations, Inuit and Métis children, youth and families* Constitutional?" (28 April 2022), online (blog): <ablawg.ca/2022/04/28/is-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-families-constitutional/> [perma.cc/3RDW-32DA]; Kent McNeil, "The Inherent Indigenous Right of Self-Government" (4 May 2022), online (blog): <ablawg.ca/2022/05/04/the-inherent-indigenous-right-of-self-government/> [perma.cc/38T6-DA98]; *R v Pamajewon*, 1996 CanLII 161 at para 27 (SCC). In *Pamajewon*, the Supreme Court declined to find an Aboriginal right to gambling on reserve lands. In doing so, the Court noted that the appellants' characterization of their claim as a "broad right to manage the use of their reserve land" is too general, because Aboriginal rights, "including any asserted right of self-government" must be looked at in light of the specific circumstances, history, and culture of the Aboriginal group claiming the right.
78. *Reference re An Act* (SCC), *supra* note 37 at para 117.

Namely, sections 21 and 22(3) of the Act, working together, clarify that Indigenous laws, appropriately passed and under certain conditions, have the force of federal law. Therefore, in the event of inconsistency between the Indigenous law and a provincial law, the Indigenous law would prevail. In the reference, the Court of Appeal of Quebec concluded that these provisions were unconstitutional. Several scholars, however, disagree with that disposition along traditional federalism lines. For example, Metallic roots the constitutionality of those provisions under the federal government's section 91(24) powers and its protective purpose.[79] For his part, Kerry Wilkins points out that "the *Act* incorporates all such [Indigenous] laws from time to time by reference *into* federal law," which is constitutionally permissible.[80] Thereafter, through federal paramountcy, the Indigenous law, which has been validly incorporated into federal law, prevails over conflicting provincial law. According to these commentators, then, the Indigenous laws' prevalence over provincial law is rooted in section 91(24) and traditional federalist doctrines. If these sections are rooted only in section 91(24), with no reference to section 35 protected rights, then they might not themselves be properly characterized as recognition legislation even when housed in what might be broadly characterized as recognition legislation.

Other examples may include the "reconciliation agreements" signed between Indigenous Nations and the Government of British Columbia, as well as various types of sectoral agreements. The goal of reconciliation agreements is to achieve on-the-ground reconciliation and therefore they may cover myriad topics. Kathryn L. Kickbush has correctly noted that reconciliation agreements may take many forms and that "negotiations could ostensibly cover any topic of interest to the parties."[81] Vanessa Sloan Morgan and Heather Castleden similarly note that reconciliation agreements in British Columbia have encompassed incremental agreements, natural gas pipeline benefit agreements, and expanded consultation and revenue-sharing agreements, including other arrangements like self-government

79. Naiomi W Metallic, "Extending Paramountcy to Indigenous Child Welfare Laws Does Not Offend our Constitutional Architecture or Jordan's Principle" (29 August 2022), online (blog): <ablawg.ca/2022/08/29/extending-paramountcy-to-indigenous-child-welfare-laws-does-not-offend-our-constitutional-architecture-or-jordans-principle/> [perma.cc/PL7C-D9JH].

80. Kerry Wilkins, "With a Little Help from the Feds: Incorporation by Reference and Bill C-92" (17 May 2022), online (blog): <ablawg.ca/2022/05/17/with-a-little-help-from-the-feds-incorporation-by-reference-and-bill-c-92/> [perma.cc/X8RR-DX47]; *Reference re An Act* (SCC), *supra* note 37 at paras 119-130.

81. Kathryn L Kickbush, "Can Section 35 Carry the Heavy Weight of Reconciliation?" (2010) 68:4 Advocate 503 at 507.

agreements.[82] Some reconciliation agreements, like those grounded in self-government, include Indigenous law-making authority, while others do not.

Even those reconciliation agreements that do not envision law-making capabilities are, however, meant to broadly recognize Indigenous jurisdiction. Major, and even main, components underlying reconciliation agreements are Indigenous Nations' self-determination and jurisdiction. According to British Columbia, reconciliation agreements are "based on respect, recognition and accommodation of Aboriginal title and rights; respect for each other's laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions."[83] Many agreements therefore establish forms of shared jurisdiction and decision-making that may be properly classified as jurisdictional devolution, even if classical and autonomous law-making authority is not envisioned, because these agreements make space for the exercise of Indigenous law. While it is presently unclear whether these agreements will "support reconciliatory relationships," many reconciliation agreements include "very clear examples of language that makes space for Aboriginal groups' traditional laws and values to shape collaborative decision-making on traditional territories."[84]

Similarly, sectoral self-government agreements in education may be considered examples of jurisdictional devolution. Pursuant to the *First Nations Jurisdiction over Education in British Columbia Act*, Canada and Indigenous Nations may negotiate jurisdiction agreements on education that allow First Nations in British Columbia to "provide education on First Nation Land."[85] The First Nation may "delegate their authorities over school certification, teacher certification, examination and graduation standards to [the] FNEA [First Nations Education Authority]."[86] These jurisdiction agreements have the force of law, and therefore Indigenous jurisdiction over education in their communities, as set out in the agreements, can be

82. Vanessa Sloan Morgan & Heather Castleden, "'This is Going to Affect Our Lives': Exploring Huu-ay-aht First Nations, the Government of Canada and British Columbia's New Relationship Through the Implementation of the Maa-nulth Treaty" (2018) 33:3 CJLS 309 at 324, n 13.

83. British Columbia, "Reconciliation and Other Agreements" (last modified 15 May 2023), online: <gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>; See also Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) 13:1 MJSDL 1 at 47.

84. Ariss, Fraser & Somani, *supra* note 83.

85. *First Nations Jurisdiction over Education in British Columbia Act*, SC 2006, c 10, s 18.

86. *Order Bringing Individual Agreements with First Nations into Effect*, SOR/2022-158, online: <canadagazette.gc.ca/rp-pr/p2/2022/2022-07-06/html/sor-dors158-eng.html> [perma.cc/G39L-T6ED].

exercised.[87] Other examples of education sectoral agreements include the *Anishinabek Nation Education Agreement Act* and the *Mi'kmaq Education Act*, both of which are examples of self-government initiatives that have widened the scope of delegated power to Indigenous Peoples.[88] Section 7 of the *Anishinabek Education Act* provides that "[a] participating First Nation may, to the extent provided by the Agreement, make laws respecting education that are applicable on its reserve."[89] Section 6 of the *Mi'kmaq Education Act* recognizes that "[a] community may, to the extent provided by the Agreement, make laws applicable on the reserve of the community in relation to primary, elementary and secondary education" as well as "to the administration and expenditure of community funds in support of post-secondary education."[90] The jurisdictional model represented in sectoral agreements on education creates space for increased Indigenous jurisdiction, and therefore falls under the heading of jurisdictional devolution.

Canada may see increasing rates of jurisdictional devolution models in the future. Section 5 of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* requires Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[91] A similar article exists in British Columbia's *Declaration on the Rights of Indigenous Peoples Act*.[92] In turn, article 4 of UNDRIP envisions that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs."[93] To bring laws into conformity with UNDRIP, Canada and British Columbia may find it expeditious to jurisdictionally devolve matters relating to Indigenous communities' internal and local affairs. Indeed, doing so seems to be contemplated by the parts of an *Act respecting First Nations, Inuit and Métis children, youth and families* that envision coordination agreements between Indigenous governing bodies and a Canadian government.[94] It is also contemplated by sections 6-7 of British Columbia's *Declaration Act*, which provide that the provincial government may enter into an agreement with an Indigenous governing

87. *Ibid.*
88. *Anishinabek Nation Education Agreement Act*, SC 2017, c 32 [*Anishinabek Education Act*]; *Mi'kmaq Education Act*, SC 1998, c 24 [*Mi'kmaq Education Act*]; Grammond, "Recognizing Indigenous Law," *supra* note 18 at 10, n 31.
89. *Anishinabek Education Act*, *supra* note 88.
90. *Mi'kmaq Education Act*, *supra* note 88.
91. *UNDA*, *supra* note 4.
92. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s 3 [*Declaration Act*].
93. *UNDRIP*, *supra* note 4.
94. *FNIM Act*, *supra* note 76, s 20.

body relating to "the exercise of statutory power of decision jointly by the Indigenous governing body and the government or another decision maker," or "the consent of the Indigenous governing body before the exercise of a statutory power of decision."[95] The consent-based decision-making agreement forged between the Tahltan Central Government and British Columbia pursuant to section 7 of British Columbia's *Declaration Act* serves as a powerful example of how these agreements might play out.[96] The agreement "honours Tahltan's jurisdiction in land-management decisions in Tahltan Territory" and "outlines consent-based decision-making related to the environmental assessment of the Eskay Creek Revitalization Project."[97]

Jurisdictional devolution, therefore, falls on my proposed continuum. Jurisdictional devolution is a fuller form of governance than administrative delegation, but it is still rooted in a delegation model which does not alone recognize the inherent right of Indigenous self-government. The benefit of jurisdictional devolution, I argue, is that it can push self-government further on the continuum towards eventual recognition of inherent rights. It does this by revitalizing the exercise of rights and, potentially, could turn that jurisdiction into a constitutional convention over time.

2. *Treaties*

Divergent discussions by courts on the source of rights encapsulated by treaties showcases the usefulness of a spectrum-model approach to jurisdiction. Debates about the source of the legislative powers arising from treaties and self-government agreements have only heated up in recent years. For example, *Cindy Dickson v Vuntut Gwitchin First Nation* was recently heard and decided at the Supreme Court.[98] In the lower court decision, the Court of Appeal of Yukon considered whether the rights and authority of the Vuntut Gwitchin governing authority set forth in self-government agreements were inherent self-government rights, but did not conclude one way or another.[99]

For a classic example, one only needs to consider divergent case law on the Nisga'a Final Agreement. One court in British Columbia found that

95. *Declaration Act*, *supra* note 92.
96. *Declaration Act Consent Decision-Making Agreement for Eskay Creek Project*, (6 June 2022), online: <tahltan.org/declaration-act-consent-decision-making-agreement-for-eskay-creek-project/> [perma.cc/KN4J-FUBR].
97. British Columbia Office of the Premier, News Release, "Tahltan Central Government, B.C. make history under Declaration Act" (6 June 2022), online: <news.gov.bc.ca/26953> [perma.cc/W8VQ-M6MZ].
98. *Dickson v Vantut Gwitchin First Nation*, 2024 SCC 10 [*Dickson* (SCC)].
99. *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson* (YKCA)].

the source of the powers in the treaty was an inherent self-government right.[100] Another British Columbia court de facto identified the source of the powers as delegation.[101] The fact that a treaty could be defined in such opposing manners demonstrates that even if the source of law-making powers is identified as delegation in one case, in another case, on another day, the source of the power might be identified as an inherent self-government right.

The powers in the Final Agreement have been rooted in an inherent right to self-government. In *Campbell v British Columbia (AG)*, Justice Williamson of the British Columbia Supreme Court found that the powers in treaties derived from the diminished sovereignty of Aboriginal peoples.[102] This allows for self-government and the constitutional protection of this right under section 35.[103] Justice Williamson found that Nisga'a self-government over local matters was constitutional and did not disrupt the section 91 and 92 division of powers between the federal and provincial governments.[104] Indeed, Canada's Constitution does not distribute all legislative powers between Parliament and the legislatures.[105] He elaborated that the *Constitution Act, 1867* "did not purport to, and does not end, what remains of the royal prerogative or [A]boriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982."[106] After 1982 and the constitutional implementation of section 35, these rights are non-extinguishable, but they can be "defined (given content) in a treaty."[107]

The same treaty has also been characterized as an act of delegation. Justice Harris of the British Columbia Court of Appeal considered the Final Agreement when he decided *Sga'nism Sim'augit (Chief Mountain) v Canada (AG)*. The appeal was similar to *Campbell*, but this time, the challenge against the Final Agreement was launched by members of the Nisga'a Nation. Justice Harris characterized the appellants as believing they were "inheriting and advancing" the issues litigated in *Campbell*, especially as neither the provincial or federal government, nor the

100. *Campbell v British Columbia (AG)*, 2000 BCSC 1123 [*Campbell*].
101. *Sga'nism Sim'augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49, at para 6 [*Chief Mountain*]; see also Joshua Nichols, "A Reconciliation without Recollection—Chief Mountain and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.
102. *Campbell*, *supra* note 100 at para 95.
103. Nichols, *supra* note 101 at 531.
104. *Campbell*, *supra* note 100.
105. *Ibid* at para 180; see also Nichols, *supra* note 101 at 527.
106. *Campbell*, *supra* note 100 at para 180.
107. *Ibid* at para 179; see also Nichols, *supra* note 101 at 526-527.

Nation, had appealed *Campbell* thirteen years before.[108] At issue in *Chief Mountain* was the constitutionality of the Nisga'a Final Agreement treaty, and part of this consideration included whether the self-government and law-making powers in the treaty derived from their inherent right to self-government.[109] The alternative argument was whether Parliament and the legislature validly delegated those powers. Did the treaty represent the federal government's abdication of authority or delegation of more powers than was constitutionally permitted?[110]

Justice Harris found the agreement valid but declined to identify whether the source of the treaty rights flowed from delegation under section 91(24) or from an inherent right recognized under section 35. As he put it, "[t]reaty rights owe their validity to agreement, and it is unnecessary specifically to identify their source provided that the parties have the capacity to enter the agreement."[111] Joshua Nichols writes that "Harris JA employs the language of delegation and subordinate bodies without consistently qualifying those terms as being contingent on the continued agreement of the parties."[112] He persuasively argues that Justice Harris, by removing the source of the relationship from his analysis and declining to answer it, de facto characterized the agreement as delegation.[113] According to Nichols, Justice Harris looked at the parties' capacity to enter into the treaty, framing the Crown's capacity as their ability to delegate and calling the Nisga'a Government "a subordinate body."[114] This assumes unilateral Crown authority.[115] Metallic agrees that this "appellate decision has characterized these treaties as delegations of provincial and federal powers."[116]

I ultimately ascribe to Nichols' argument. Treaty relationships, at least in the modern context, are clearly not the same as unilateral acts of delegation. If they were, treaties would be framed as surrender documents or would proclaim that Indigenous Peoples are subject to Crown authority without consent.[117] Nichols argues that delegation is premised on a party conditionally transferring authority to another party who previously did

108. *Chief Mountain*, *supra* note 101 at para 6.
109. *Ibid* at paras 17, 45.
110. *Ibid* at para 17.
111. *Ibid* at para 46.
112. Nichols, *supra* note 101 at 525.
113. *Ibid* at 522.
114. *Ibid* at 523.
115. Metallic, "Indian Act By-Laws," *supra* note 6 at 232.
116. *Ibid.*
117. Nichols, *supra* note 101 at 517.

not have it.[118] Conversely, he argues that "a treaty is normally understood as a compact made between two or more independent nations."[119] Certain treaty provisions might also be protected under section 35 if they enshrine an Aboriginal right. For example, Grammond argues that treaty provisions that recognize Indigenous jurisdiction over their own child welfare systems "would be protected by section 35 of the *Constitution Act, 1982*" because "Indigenous jurisdiction over child welfare and adoption may very well be an Aboriginal right protected by section 35."[120] The source of Indigenous Peoples' treaty rights does not come from a federal power delegated to Indigenous Peoples, and so must be an inherent right. However, though "many scholars and lower courts…have taken for granted that the legislative powers arising under self-government and modern treaties are a recognition of the right of self-government, [*Chief Mountain*] has characterized these treaties as delegations."[121] The delegation argument must thus be assessed, even if its merits can be debated.

At least three salient points arise from these divergent cases. First, the distinction between inherent versus delegated rights may not matter in practice. In other words, "[i]n practice, there may be very little difference between exercising 'delegated' powers and exercising 'inherent' powers in terms of permitting effective control by First Nations."[122] Metallic makes a similar argument in relation to the *Dickson* case, arguing that it is often arbitrary to distinguish between inherent and delegated jurisdiction because "courts have been clear that exercises of self-government, including both delegated or inherent are worthy of respect and deference."[123] Amy Swiffen agrees, suggesting that in certain contexts, "distinctions between delegated vs inherent governments…could also be seen as formalistic and not be determinative."[124]

I hasten to add that these arguments do not necessarily mean that it is desirable for courts to ignore the source of Indigenous self-government rights. In *Dickson*, the Yukon courts balked at identifying the source of self-government rights as inherent under the self-government agreements, but it has been argued that "the courts must bring greater precision to

118. *Ibid.*
119. *Ibid.*
120. Grammond, "Federal Legislation," *supra* note 66 at 140, 142, 147.
121. Metallic, "Indian Act By-Laws," *supra* note 6 at 232.
122. *Ibid.*
123. Naiomi Metallic, "Checking our Attachment to the *Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments*" (2022) 31:2 Const Forum Const 3 at 10, n 40.
124. Amy Swiffen, "*Dickson v Vuntut Gwitchin First Nation*, Section 25 and a Plurinational Charter" (2022) 31:2 Const Forum Const 27 at 31.

their analysis of the doctrinal significance of Indigenous sovereignty and self-government" for purposes of reconciliation and to rationalize theories of shared sovereignty.[125] While identifying the source of the right would certainly be more precise and aid with reconciliation, I ultimately agree with Metallic and Swiffen that the source of the self-government rights as either inherent or delegated may not ultimately have practical significance. Even more cynical views seem to accord with Metallic and Swiffen's perspectives. While *Campbell* leaves open a line of reasoning that *Chief Mountain* does not—that the Crown cannot unilaterally infringe treaty rights without the consent of the Indigenous Nation—Nichols concedes that this line of jurisprudential development is "unlikely" and that the practical results in *Campbell* and *Chief Mountain* are "virtually identical."[126]

Second, both delegation and an inherent right can be at play at once in the same document. For example, Metallic points to the Spallumcheen by-law, in which the First Nation cited both the relevant *Indian Act* by-law powers and their inherent right to self-government as the source of its law-making authority.[127] Indeed, in *Chief Mountain*, Justice Harris did not rule out that the source of the law-making powers could be an inherent self-government right, even though he lapsed into reasoning that aligned with delegation. Moreover, even if a court explicitly identifies the source of the law-making power in a treaty as delegation, the court may have mislabelled what is actually an inherent right. Much like in the Spallumcheen by-law, communities can affirm that the exercise of their rights stems from an unextinguished inherent right. This paves the road for the centralized government to one day recognize that the source of the Indigenous law-making power is solely an inherent right.

Finally, *Campbell* and *Chief Mountain* demonstrate that different state actors, like judges, may find that the same power is alternatively an inherent right or a delegated power. Though *Chief Mountain* was decided over a decade after *Campbell*, these cases still demonstrate the usefulness of the spectrum model. The pendulum may swing between recognition of an inherent right and characterizing jurisdictional powers as devolution, but as Indigenous Nations continue to negotiate treaties and exercise their law-making powers, over time the Crown may be more likely to recognize these rights as inherent. This is particularly so if the Nations continue

125. Ryan Beaton, "Doctrine Calling: Inherent Indigenous Jurisdiction in *Vuntut Gwitchin*" (2022) 31:2 Const Forum Const 39 at 42.
126. Nichols, *supra* note 101 at 535, 537.
127. Metallic, "Indian Act By-Laws," *supra* note 6 at 232.

to identify the source of their jurisdiction as an inherent right. Vanessa MacDonnell writes that Canada's parliamentary sovereignty, while important, is "constrained and legitimated by its respect for constitutional rights."[128] If the source of Indigenous law-making powers as an inherent right protected by section 35 continues to gain ground in doctrine and jurisprudence, legislatures may shift their power-sharing model from delegation to recognition.

To conclude, I should note that the legal parameters of devolution and recognition are not confined to the questions raised in *Campbell* or *Chief Mountain*. Obviously, the legal contours of devolution do not exist solely in the modern self-government treaty context. For example, it remains to be seen whether courts will consistently root the source of Indigenous law-making power, as recognized by provincial and federal governments in recognition legislation, reconciliation agreements, and sectoral agreements, as an inherent right under section 35 or as delegated authority under sections 91 or 92, or even as a mix of both. The benefit of the treaty example is that, in this context, questions about the source of self-government authority have been winding their way through courts for decades. While other identified examples may still be legally nascent, the lessons extrapolated from the treaty context can almost certainly be applied to other instances of devolution.

III. *Entrenching devolution legislation*

Devolution legislation creates a one-way path because repealing the legislation can be politically costly. Thus, a paradox is created: there is legal ability to overturn devolution legislation, but the impracticality of doing so makes it rare that such legislation is ever overturned. This means that jurisdictional devolution can broaden and deepen Indigenous jurisdiction, thus speeding up the process of recognition of inherent self-government rights. This recognition might be asserted through formal legislation or through negotiated nation-to-nation treaties. Recall that Indigenous Nations do not need formal recognition to have an inherent right, but formal recognition allows for easier exercise of that inherent right in Canada's federalist system.

I argue that jurisdictional devolution is difficult to reverse once implemented, which leads to entrenchment of the devolved jurisdiction. Conceiving jurisdictional devolution as an interim arrangement on the road to self-government is helpful. Jurisdictional entrenchment creates

128. Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21:1 Rev Const Stud 13 at 31.

momentum towards Indigenous self-government for two reasons. First, the jurisdiction, once recognized, is unlikely to be repealed for practical and constitutional reasons. Second, in the meantime, Indigenous communities will develop capacity and local institutions to exercise that jurisdiction (which in turn practically entrenches the jurisdiction). A comparative study of Scottish devolution and devolution to Canada's territories supports this argument.

1. *Practical constraints*

When devolution legislation is first implemented, practical constraints make the legislation difficult to reverse. Legally, the body legislating the devolution legislation does have power to repeal acts of devolution. This is because devolution is protected by "regular laws," rather than constitutional laws, which weakens its degree of protection from repeal.[129] As A.V. Dicey argues, the legislature constitutionally can alter devolution legislation as "freely and in the same manner" as any other law.[130] Similarly, the by-law making powers in the *Indian Act*, for example, grant Indigenous communities jurisdiction over local child welfare, but Canada retains the ability to repeal the *Act*.[131]

Traditional Diceyan Parliamentary sovereignty suggests that the federal government can repeal any legislation it implements, but in practice jurisdictional devolution legislation is difficult to reverse once it becomes de facto entrenched.[132] Taking back these competencies becomes less tenable as communities get better at administering local matters like child welfare. For example, in response to *An Act respecting First Nations, Inuit and Métis children, youth and families*, Indigenous governments will likely create institutions and administrative bodies, including local government decision-making agencies. These institutions will become adept at administering the matters over which the community now has jurisdiction. The existence of these institutions will make it difficult to

129. Wolff, *supra* note 68.

130. A V Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915) at 39; The *Indian Act* can be amended or repealed by the Canadian federal government, even without Indigenous consent (see Harry S LaForm, "Indian Sovereignty: What does it Mean?" (1991) 11:2 Can J of Native Stud 253 at 260).

131. See Metallic, "Indian Act By-Laws," *supra* note 6 at 216-217.

132. But see Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1990) 36:2 McGill LJ 309 at 315 (Ryder argues that the "British principle of Parliamentary sovereignty has to be further adapted to the Canadian constitutional context by taking into account not only the existence of federal division of powers between the provinces and federal government and of entrenched constitutional rights, but also the existence of the surrendered inherent sovereignty of the First Nations" because the inherent sovereignty of Indigenous Peoples was never surrendered. Parliamentary sovereignty can thus also be understood as Parliamentary intention along with recognition of the inherent right to self-government).

overturn devolution legislation. As these institutions develop internal processes, they will become entrenched, making it increasingly difficult to overturn the devolution legislation that lead—indirectly—to their creation. Eventually, the new forms of administration, supported by institutions that facilitate self-government, may even become the norm. The recognized jurisdiction creates a path wherein the Canadian governments, and Canadian society generally, are likely to acknowledge in a more permanent way Indigenous jurisdiction over children, youth, and families. The legislation is thus unlikely to be abrogated.

The above can be described as the practical constraint of path dependency. Path dependency occurs when existing and entrenched practices influence the later range of choices, because of incentives to maintain the embarked upon course of action and disincentives to stray from course.[133] Due in part to path dependency, it is difficult for a provincial or federal government to practically repeal institutional changes once those changes are politically or legally granted. Devolution legislation achieves institutional change, as it allows diverse peoples to exercise self-determination while also existing within a central framework: it is likely that diverse Indigenous societies asserting self-determination will entrench their jurisdiction through practice once jurisdiction is devolved.[134]

The argument in this paper is not that Parliament can now bind its own hands and the hands of future Parliaments through devolution legislation. The view that Parliament can now "place legal limits on its capacity to legislate in devolved matters" is not adequately nuanced.[135] Even if Parliament has the power to place legal limits upon its ability to repeal or legislate over devolved matters, Parliament rarely—if ever—exercises that power. For example, and as will be discussed further in this section, the Westminster Parliament has not explicitly placed such legal limits on itself, at least not in the case of Scottish devolution. Canada has also failed to place such limits on its legislative abilities through delegation to Indigenous communities, including in the *Indian Act* or even devolution to the territories, and as such will retain the power to repeal the legislation.

While devolution and secession legislation are distinct, they share similar practical constraints on repeal, and both have the effect of entrenching the new structure of delegated power. Peter Hogg writes that secession legislation limits parliamentary sovereignty because over time

133. Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) at 98.
134. Wolff, *supra* note 68 at 38.
135. NW Barber, "The Afterlife of Parliamentary Sovereignty" (2011) 9:1 Intl J Const L 144 at 154.

courts of the former colony will not accept legislation abrogating the colony's independence.[136] Hogg's analysis can be pushed further. The British Parliament has the legal capacity to overturn secession legislation like the *Canada Act, 1982*, but would likely never do so in part because of the institutional constraint of Canadian courts. However, this institutional constraint is not a British legal constraint, and thus from Britain's perspective is merely an external political constraint. This political constraint arguably has become a convention over time. Britain chooses not to repeal the *Canada Act, 1982*, even though the devolving government retains ultimate legislative power over devolved matters. Over time, similar practical and political constraints would prevent the repeal of devolution legislation to Indigenous communities.

As a thought experiment, repeal of devolution legislation is likely legally tenable, but it might require the Canadian government to accept the logic that the Westminster Parliament could likewise abrogate the *Canada Act* under parliamentary supremacy.[137] Just as the Westminster Parliament would face "tremendous political opposition" should it attempt to abrogate devolution legislation granting Scotland jurisdiction over local affairs, Canada would potentially face similar opposition if it were to abrogate legislation granting Indigenous communities' jurisdiction.[138] If Canada were to repeal jurisdiction-granting legislation to Indigenous communities, doing so might also call into question the permanence of Canada's own sovereignty, which was itself granted by British law through the *Canada Act*.[139] While the *Canada Act* is a piece of succession legislation, it shares many similarities to devolution legislation. Secession legislation is a law from the centralized state granting independence to the seceding polity. The Supreme Court of Canada has defined secession as "the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood."[140] Jurisdictional devolution legislation and secession legislation are fundamentally similar concepts because each grant jurisdiction from a centralized power to other polities. Practically, repeal of the *Canada Act* could create constitutional difficulty for the centralized state (Britain) as Canadian courts would nullify Britain's abrogation law even though Britain still has legal power

136. Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2016) at 3.5(d).
137. FM Brookfield, "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5:4 Otago L Rev 603 at 607.
138. David Jenkins, "Both Ends Against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom" (2002) Temp Intl & Comp LJ 1 at 5.
139. *Canada Act 1982* (UK), 1982, c 11.
140. *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 83 [*Secession Reference*].

to repeal the *Canada Act*.[141] If Canada repeals jurisdictional devolution, constitutional difficulties may also emerge as Canada could be admitting its own instability as an independent nation. This is because the *Canada Act* resembles a grant of devolution similar to acts of devolution towards Indigenous communities. Within this thought experiment, admitting the latter could be repealed could be taken to admit the *Canada Act* could be repealed as well.

Another apt example in the Canadian context is devolution to the territories. Devolution, as a concept, has been used to describe the transfer of jurisdiction from the Canadian federal government to Canada's northern territories of Nunavut, the Northwest Territories, and Yukon. Canada's territories have a different constitutional status than the provinces. While the provinces derive their jurisdiction from section 92 of the *Constitution Act*, *1867*, the territories are subject to federal laws.[142] The Canadian government has identified the devolution of powers to Canada's northern territories as a key policy objective. According to the Canadian government, Yukon has managed its natural resources and land since 2003 and devolution in the Northwest Territories has been effective since 2014.[143] Devolution to Nunavut is in progress. Interestingly, in addition to the Canadian federal government and the Government of Nunavut, a party to Nunavut's devolution process is the Nunavut Tunngavik Incorporated, which represents the Inuit peoples in the territory in negotiations.[144]

In addition to policy papers, there is a body of academic scholarship that has investigated the different contours of devolution to the territories.[145] This body of scholarship is useful to understand the scope, benefits, and drawbacks of a devolved system of jurisdiction in Canada's northern territories. For example, some scholars have pointed out that jurisdiction over Nunavut's lands and resources has not been devolved to the territory, which means that Nunavummiut have very little "jurisdictional clout" over their lands and resources in the House of Commons.[146] This highlights the

141. Hogg, *supra* note 136 at 3.5(d).
142. *Constitution Act, 1871* (UK), 34 & 35 Vict, c 28, s 4.
143. Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Nunavut Devolution" (Ottawa: last modified 19 August 2019), online: <canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/08/nunavut-devolution.html> [perma.cc/V9DL-5YU4] [*Nunavut Devolution*]; Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Arctic and Northern Policy Framework: Safety, security, and defence chapter" (Ottawa: last modified 10 September 2019), online: <rcaanc-cirnac.gc.ca/eng/1562939617400/1562939658000> [perma.cc/4SLJ-73XL].
144. Nunavut, *Devolution* (Iqaluit: Government of Nunavut), online: <gov.nu.ca/devolution>.
145. See Jerald Sabin, "A Federation within a Federation? Devolution and Indigenous Government in the Northwest Territories" (last modified 21 November 2017), online: <irpp.org/research-studies/study-no66/> [perma.cc/7FY4-WVRF].
146. Tony Penikett & Adam Goldenberg, "Closing the Citizenship Gap in Canada's North: Indigenous

limitations of jurisdictional devolution, including that jurisdiction extends only to that which has been devolved. This may create gaps in an Indigenous community's ability to manage its own affairs. Other scholarship argues that Nunavut devolution fosters democratic legislative representation in an environment where the electorate is mostly Inuit, which protects Inuit interests in the territorial legislature.[147] This argument is fundamentally rooted in the constitutional principle of democracy.

The territories are a useful vantage from which to explore the practical constraints of devolution for several reasons. The territories are home to increasingly decentralized federalism. In the territories, there is devolution from the federal government to more local government, which may often include Indigenous electorates and representatives. Some of the most robust forms of Indigenous self-government in Canada are found in the territories, which may serve as a model for the rest of the country. For example, in 2021, the Canadian Government, the Government of the Northwest Territories, and the Northwest Territory Métis Nation agreed to a framework towards self-determination and self-government for the Métis Nation as part of negotiating a land claim.[148] In the Yukon, eleven of fourteen First Nations have self-government and land claims agreements.[149] Gabrielle Slowey points out that this number represents nearly half of all such agreements in Canada, and therefore can pave the way for similar agreements elsewhere in Canada.[150]

The layers of jurisdiction found in the territories are shared between federal, territorial, and Indigenous governments and represent an increasingly decentralized form of federalism that has, and continues to, evolve. As devolution takes hold in other Canadian provinces, the decentralized forms of federalism found in the territories may manifest in similar ways across Canada. Canada has not yet rolled back devolved powers in the territories and doing so may be difficult for practical reasons (institutions now support these various jurisdictional layers) and political reasons (rolling back Indigenous self-government rights may not be

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Rights, Arctic Sovereignty, and Devolution in Nunavut" (2013) 22:1 Mich St Int'l L Rev 23 at 47.

147. Kevin R Gray, "The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self-Government" (1994) 52:2 U Toronto Fac L Rev 300 at 309.

148. Crown-Indigenous Relations and Northern Affairs Canada, News Release, "Self-Government Framework Agreement signed by Canada, the Northwest Territory Métis Nation, and the Government of the Northwest Territories to guide negotiations" (20 May 2021), online: <canada.ca/en/crown-indigenous-relations-northern-affairs/news/2021/05/self-government-framework-agreement-signed-by-canada-the-northwest-territory-metis-nation-and-the-government-of-the-northwest-territories-to-guide-.html> [perma.cc/Q6DN-BQZE].

149. Gabrielle A Slowey, *Indigenous Self-Government in Yukon: Looking for Ways to Pass the Torch* (Ottawa: Centre of Excellence on the Canadian Federation, 2021).

150. *Ibid.*

politically well-received). Therefore, Parliament may not be able to easily overturn devolution legislation due to political constraints.

2. *Constitutional Convention*

The practical limitations explored above have the potential to turn into a constitutional convention over time. The eventual constitutional contours of jurisdictional devolution further entrench jurisdiction and pave the way for recognizing an inherent right to self-government, either through treaty negotiation and implementation or recognition rooted in section 35.

Sir W. Ivor Jennings's requirements for establishing a constitutional convention were adopted by the Supreme Court in the *Patriation Reference*.[151] Jennings wrote that "We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"[152] The difference between a practical constraint, as explored above, and a constitutional convention is that the latter guides political behaviour based on rules of "political morality."[153] As the Supreme Court said, conventions "must be normative."[154] While practical constraints do guide political behaviour, they do not necessarily do so because the relevant political actors believe in their normative value.

Jurisdictional devolution to Indigenous communities stands to become a constitutional convention over time based on the three outlined criteria. First, there is a precedent. The precedents constitute an intersection of constitutional history, politics, administration, and the law.[155] Second, there is a reason for the rule. Jurisdictional devolution, especially understood as an interim arrangement on the road to self-government, would reflect attempts at reconciliation. Indigenous jurisdiction recognizes that Indigenous Peoples exercised self-government before European contact and that different institutions at the local political level now administer certain functions. And, finally, it is conceivable that the actors would believe themselves to be bound. Once jurisdiction is devolved, particularly to Indigenous communities with whom federal and provincial governments are trying to reconcile, the reason for the rule (or the rule of political morality) may dictate that such powers are not to be reneged. This in turn would create the minimum expectation that the federal or provincial government will not overturn the legislation and will leave

151. *Re Resolution to amend the Constitution*, 1981 CanLII 25 (SCC) at 888 [*Patriation Reference*].
152. *Ibid.*
153. See Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR 117.
154. *Patriation Reference*, *supra* note 151.
155. See Dodek, *supra* note 153 at 113.

devolved jurisdiction to the Indigenous community. Already, section 5 of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* provides that Canada must take all necessary measures to conform Canadian laws with UNDRIP.[156] Will this provision give rise to remedies if a federal or provincial government withdrew jurisdictional devolution legislation? While the answer is not entirely clear at present, domestic UNDRIP legislation may play a role in contributing to the "stickiness" of jurisdictional devolution legislation. All this is to say, it seems likely that the actors would believe themselves bound.

The potential for a practical constraint to turn into a constitutional convention has been recognized by courts in Canada. The Supreme Court of Canada in the *Patriation Reference* quoted Sir William Holdsworth's writings that constitutional conventions spring "where the powers of government are vested in different persons or bodies."[157] If Canada devolves jurisdiction to Indigenous governments, governance powers will become vested, or shared, between different bodies. This means that constitutional conventions, which stand to normatively guide federal and provincial government action, can grow from interactions between the Canadian governments and Indigenous governments.

Constitutional conventions are not permanent. Constitutional conventions are "of the period."[158] They may erode over time as society's values shift. However, in the case of devolved jurisdiction to Indigenous communities, what will remain over time is a core that is difficult to overturn. This core will remain because of the unique nature of devolution legislation, which includes the practical constraints that emerge where institutions and administrative bodies become established. As explored above, these institutions and actors gain experience in administrating devolved jurisdictional matters. Political actors recognize that these institutions are now those with competence to administer the devolved matters, which further entrenches jurisdiction.

Overturning devolution legislation becomes more difficult over time because jurisdiction over devolved areas stands to become a constitutional convention. There are examples of how path dependency plays a central role in how self-government and jurisdiction become entrenched in the constitutional order. For example, the *Scotland Act, 2016* further entrenches Scottish sovereignty first recognized by the similar 1998 Act, including by affirming the Scottish Parliament as a permanent fixture in the

156. *UNDA, supra* note 4 at s 5.
157. *Patriation Reference*, *supra* note 151 at 879.
158. *Ibid* at 880.

British constitutional order.[159] For the purposes of this section it suffices to say that acts of delegation will likely be refined and constitutionally affirmed as they are challenged and reaffirmed—or as the scope of the power contained within those acts are refined—in the courts.[160] For example, the Supreme Court of the United Kingdom has been called upon repeatedly to rule on the scope of the Scottish government's powers under the *Scotland Act*.[161] Though the UK Supreme Court has both upheld and struck down bills passed by the Scottish government for being inside or outside "devolved competence", respectively, the devolution itself has gained legitimacy as the scope of Scotland's powers has been shaped through court challenge.[162] By determining which powers do and do not fall within *Scotland Act*, the *Act* itself is entrenched as legitimate. Similar court challenges are likely to occur with respect to devolution legislation in Canada. In the process, the legislation and the practices it protects will become entrenched in Canadian law.

One counter argument comes from the Supreme Court of Canada's recent decision in *Toronto (City) v Ontario (AG)*. In that case, the Court reaffirmed that municipalities are "creatures of provincial statute."[163] They "hold delegated provincial powers" and "exercise whatever powers… that provincial legislatures consider fit."[164] As a result, the province has "absolute and unfettered legal power" to grant and take away municipal power and to alter their institutions.[165] If provinces by virtue of their sovereignty can alter the number of city council seats in a municipality, what makes altering that which has been devolved to Indigenous communities any different?

I do not take the view that Canadian governments would be unable to alter the devolved jurisdiction. I only argue that an ultimately non-enforceable constitutional convention may emerge. The convention has normative weight, and political actors might believe themselves to be bound to it. Further, Indigenous communities' status as pre-existing peoples and Nations differentiates them from municipalities. Unlike with

159. *Scotland Act, 2006* (UK), 2006, c 11.
160. For an exploration on how courts will continue to find the federal delegation of child welfare services to Indigenous communities constitutional under a division of powers analysis see Grammond, "Federal Legislation" *supra* note 66.
161. See Philip Sim, "Why does the Scottish government keep losing court cases?" *BBC* (9 December 2023), online: <bbc.com/news/uk-scotland-scotland-politics-67648200> [perma.cc/JL4G-RML7].
162. *Ibid*.
163. *Toronto (City) v Ontario (AG)*, 2021 SCC 34 at para 2 [*Toronto (City)*].
164. *Ibid* at paras 2, 82.
165. *Ibid* at para 2, citing *Public School Boards' Assn of Alberta v Alberta (AG)*, 2000 SCC 45 at paras 33-34.

municipalities, the honour of the Crown is always at stake in the Crown's dealings with Indigenous Peoples.[166] As the Court wrote in *Toronto (City)*, the unwritten constitutional principle of the honour of the Crown is sui generis. Though other unwritten constitutional principles cannot invalidate legislation, the Court found that it "need not decide here whether the [honour of the Crown] is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard."[167] The Court thus declined to paint Indigenous Nations with the same brushstroke as municipalities. I would also decline to do so here.

Finally, in the context of Indigenous Peoples, the honour of the Crown may play a role in entrenching devolution legislation. Defining the honour of the Crown is not as simple as might initially appear. As Thomas McMorrow writes, "the honour of the Crown is conceptually complex, and normatively contested."[168] What is clear is that the honour of the Crown is a "constitutional principle with instrumental and symbolic significance" that "shapes the manner in which the Crown is obligated to discharge its duties."[169] The Supreme Court has recently affirmed that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples" and, "[a]s it emerges from the Crown's assertion of sovereignty, it binds the Crown *qua* sovereign."[170] As Gib van Ert has pointed out, the honour of the Crown means that it "is always assumed that the Crown intends to fulfil its promises" to Indigenous Peoples.[171] It also means that there should be no sharp dealing on the part of the Crown vis-à-vis Indigenous Peoples.[172] van Ert argues that while the Court has made these statements in the context of treaty interpretation between Indigenous Peoples and the Crown or statutes affecting Indigenous Peoples, "the principle is not limited to any particular context" because the honour of the Crown is *always* at stake in Crown dealings with Indigenous Peoples.[173] The honour of the Crown thus may play a role in entrenching devolution legislation as a difficult-to-reverse convention over time, particularly if the Crown makes explicit promises to Indigenous Peoples.

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166. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 23 [*Mikisew Cree*].
167. *Toronto (City)*, *supra* note 163 at para 62.
168. Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35 Windsor YB on Access to Just 311 at 313.
169. *Ibid.*
170. *Mikisew Cree*, *supra* note 166 at para 23.
171. Gib van Ert, "Three Good Reasons Why UNDRIP Can't Be Law—And One Good Reason Why It Can" (2017) 75:1 Advocate (Vancouver) 29 at 33, citing *R v Badger*, 1996 CanLII 236 (SCC) at para 41.
172. van Ert, *supra* note 171.
173. *Ibid.*

Finally, as the legislation is legitimized, the failure of constitutional challenges and lack of political will to repeal devolution legislation may also facilitate a convention against abrogation. Nuancing Dicey's view of Parliamentary sovereignty referenced above vis-à-vis devolution is necessary to understand how devolution to Indigenous communities stands to become constitutionally, as well as factually, entrenched in Canada's legal order. David Jenkins believes that devolution legislation has potential to become a convention, wherein political and legal communities believe it to be binding.[174] This indicator fits well with the test adopted in the *Patriation Reference*, where a convention arises when the engaged actors believe that they are bound by a rule. If legal communities accept that the devolution is constitutional and binding, over time those communities will continue to accept that local Indigenous communities can make laws falling under the ambit of local jurisdiction and self-government powers. The laws themselves become accepted, and the jurisdiction becomes expected, in the legal community.

Arguably, the American context supports the idea that that these types of power sharing arrangements can become entrenched as the legislature interprets the Constitution. Blackhawk argues that since the founding of the United States, Native Peoples successfully transferred power from the American government to their own governments by advocating for the recognition of inherent tribal sovereignty through the President and Congress, not the courts, and "by shaping the reach and meaning of that recognition."[175] Today, this manifests as "complex and innovative forms of recognition and collaborative lawmaking."[176] Blackhawk identifies the *Indian Recognition Act* of 1934 as a "super-statute," or a "quasi-constitutional" law, that establishes normative or institutional frameworks that become entrenched within the law and "effects broad change."[177] Like the recognition or devolution legislation emerging in Canada, the *Indian Recognition Act* recognizes Indigenous Nations' inherent sovereignty, offers a way for Nations to form constitutional governments recognized by the state, and creates power sharing arrangements.[178] In the Canadian context, forms of devolution legislation and shared law-making might similarly become quasi-constitutional "super statutes" and therefore create

174. Jenkins, *supra* note 138 at 8.
175. Blackhawk, *supra* note 30 at 2240.
176. *Ibid.*
177. *Ibid* at 2241, n 159, citing William N Eskridge Jr & John Ferejohn, "Super-Statutes" (2001) 50 Duke LJ 1215.
178. *Ibid.*

"effective limitations" on Parliamentary sovereignty to abrogate these laws.[179]

Even though Canada has not placed legal limitations on its ability to legislate over devolved matters, and indeed cannot under traditional views of parliamentary sovereignty, constitutional norms may spring up over time due to de facto limitations on the devolving parliament. For example, the Westminster Parliament factually refrains from legislating over devolved Scottish matters. Over time, it has begun to ask Scotland permission before legislating over devolved matters, even though Westminster has the legal capacity to legislate freely.[180] A constitutional convention has thus emerged. Based on this framework, it is likely that over time the Canadian government will ask for consent from Indigenous communities when legislating over devolved matters, like Indigenous child welfare.[181]

Under jurisdictional devolution, where practical constraints morph into constitutional conventions, political actors become accustomed to the existence of the right of Indigenous jurisdiction. This transitional arrangement can lead towards the eventual exercise of the inherent right in a way that is not necessarily devolved. Jurisdictional devolution, and the constitutional convention it entrenches, describes what occurs when the legislature and courts recognize Indigenous jurisdiction. This theory is not prescriptive in nature, though it does suggest that devolution can create momentum towards a more desirable form of Indigenous self-government, with its source as an inherent Aboriginal right, by building local capacity and creating constitutional entrenchment.

Indeed, just as Recognition Acts can "once more prominently bring Indigenous law to a society's attention," exercising devolved jurisdiction over local affairs can revitalize the exercise of unextinguished Aboriginal rights.[182] It can also remind communities that these rights were never extinguished. This can be helpful for section 35 claims. While there "is no requirement of 'an unbroken chain of continuity'" when claiming an unextinguished Aboriginal right, continuity is still a factor to be considered

179. Jenkins, *supra* note 138 at 8, 21; David Torrance, "'The Settled Will'? Devolution in Scotland, 1998–2018" (2018) UK House of Commons Library Briefing Paper 08441 at 6, online (pdf): <researchbriefings.files.parliament.uk/documents/CBP-8441/CBP-8441.pdf>.

180. *Ibid*.

181. For example, while Parliament is not mandated to consult with Indigenous Peoples when legislating over Indigenous affairs, consultations with Indigenous Peoples do occur when Parliament legislates over Indigenous communities (*Mikisew Cree*, *supra* note 166 at para 32; see *FNIM Act*, *supra* note 76). This suggests an existing normative practice that *de facto* (though not legally) limits parliamentary sovereignty in the Aboriginal law space.

182. Borrows, *Indigenous Constitution*, *supra* note 1 at 181.

under the *Van der Peet* test.[183] Revitalizing traditions and customs, even under a jurisdictional devolution model, can serve to bring the exercise of the jurisdiction back into the Indigenous community's awareness.

Further, courts will likely uphold the constitutionality of jurisdictional devolution to Indigenous communities as intra vires Parliament under section 91(24).[184] As Peter Hogg writes, "If section 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary. It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence."[185] These political and judicial actors will therefore practically uphold, and therefore in some ways normatively enforce, Indigenous jurisdiction over these matters. Though Parliament could technically repeal the legislation, in my view, under this theory, Parliament is unlikely to abrogate the delegation as a constitutional convention emerges over time. Parliament will thus gain and maintain legitimacy in its respect for the constitutional convention that emerges.

Conclusion

The Court of Appeal of Quebec recently found in a Reference that Indigenous self-government over child and family services is an unextinguished and inherent Aboriginal right protected by section 35 of the *Constitution Act, 1982*. The panel came to this conclusion because Parliament had passed *An Act Respecting First Nations, Inuit and Métis children, youth and families*, which in section 18 recognizes and affirms under section 35 of the *Constitution Act, 1982* that the inherent right of self-government includes jurisdiction in relation to child and family services. This type of recognition from the federal or provincial governments can take various forms, including legislation like the *Act* or treaties. The Reference, like *Campbell*, has brought recognition legislation and treaties into the forefront of how federal and provincial governments can recognize Indigenous self-government.

At the same time, solutions under jurisdictional devolution have not been wholly abandoned as a way Indigenous communities can exercise self-government, even though jurisdictional devolution is "somewhat unpalatable" and should not be a dominant model. This paper does not aim to be prescriptive. Rather, since jurisdictional devolution has been and is currently being used as a power-sharing method, this paper has

183. *R v Desautel*, 2021 SCC 17 at para 8 [*Desautel*]; *Van der Peet*, *supra* note 38 at paras 63-65.
184. See Grammond, "Federal Legislation," *supra* note 66 at 138.
185. Hogg, *supra* note 136 at 28-25.

identified how jurisdictional delegation can be an interim stop on the road to Indigenous self-government on communities' own terms. In this paper, I have identified some benefits of jurisdictional devolution, including Metallic's argument that it allows for Indigenous communities to more immediately exercise jurisdiction over their local affairs. I also argue that jurisdictional devolution can broaden and deepen Indigenous self-government. Not only may devolution revitalize the exercise of Indigenous self-government over local affairs, but the jurisdiction also stands to turn into a constitutional convention over time after it becomes practically entrenched. This can lead to Canadian governments' eventual recognition of the inherent right either through legislation or treaties.

Ultimately, jurisdictional devolution should not be viewed as the final destination on the road to Indigenous self-government. Rather, in this paper I argue that jurisdictional devolution can be an important transitional step towards broadening and deepening Indigenous self-government. Indigenous communities will continue to exercise their inherent jurisdiction by using a variety of legal tactics. Through the process, the exercise of this right stands to maintain constitutional legitimacy in myriad ways.