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What is the Inherent Right of Self-Government?

Speaking Notes

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Let me begin by thanking Satsan and his team at the National Centre for First Nations Governance for making it possible for me to be here, and Shana Manson and the Hul'qumi'num Treaty Group for inviting me. I am honoured to be asked to speak to you.

I was uncertain at first about what to say. What can I, whose ancestors came from Scotland and settled in Eastern Canada, and later moved to Saskatchewan, say to you about your rights? I am always somewhat uncomfortable when asked to talk to First Nations people about your rights, especially your inherent right of self-government.

But while I do not think I am qualified to explain this or any of your inherent rights to you, what I probably can do is describe how Canadian law views the right of self-government. I acknowledge that this is not necessarily the way you view this right.

Canadian law has 2 main sources:

1. Legislation, such as the *Indian Act*, and
2. Court decisions.

Canada's supreme law is found in the Constitution of Canada.

As you know, in 1982 section 35 of the new *Constitution Act* recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. These rights are undefined in section 35, and so Canadian courts have taken on the task of defining them.

All this assumes that Canadian law applies and that Canadian courts have the authority to define your rights. I think this is problematic, because the application of Canadian law and the authority of Canadian courts depend on Crown sovereignty.

I have serious doubts about the legitimacy of Crown sovereignty in British Columbia. But legitimacy and reality can be two different things, and I think Crown sovereignty is a reality, despite the fact that it was probably acquired illegitimately.

The reality is that the federal and provincial governments exist, and they have imposed their authority on you. Like it or not, this has to be faced.

I mentioned a moment ago that court decisions are one source of Canadian law. So in order to explain how Canadian law views the inherent right of self-government, I am going to have to talk about court decisions.

But before doing that, I want to emphasize that all the Aboriginal rights recognized and affirmed by section 35, including the right of self-government, are inherent.

This means that they do not depend on the Canadian constitution and Canadian law for their existence. Aboriginal rights exist because Aboriginal peoples lived in Canada prior to European colonization, and you had your own societies, political systems, forms of government, laws, and so on.

Section 35 acknowledged these pre-existing rights – it did not create them.

Section 35 also protects these pre-existing rights from unjustifiable interference by the federal and provincial governments.

So what have Canadian courts said about the inherent right of self-government that is recognized and affirmed by s. 35? The truth is that there is a great deal of uncertainty over the inherent right of self-government in Canadian law.

I think one can identify three different judicial approaches to this matter. I will list these approaches first, and then go on and try to explain them.

1. The first approach views the inherent right of self-government as a free-standing Aboriginal right within the meaning of section 35 of the 1982 *Constitution Act*.

2. The second approach regards the inherent right as a right of self-regulation over all other section 35 Aboriginal and treaty rights.

3. The third understanding of the inherent right is that it is the residual sovereignty that was retained by First Nations after European colonization.

So, let's start with the inherent right of self-government as a free-standing Aboriginal right.

This was the approach the Supreme Court of Canada took in 1996 in *R v. Pamajewon*, involving a claim to an Aboriginal right of self-government in relation to gambling on Indian reserves.

The Court said that for this right to be established, the *Van der Peet* test for proof of Aboriginal rights generally had to be met.

The *Van der Peet* test came from another case decided in 1996, involving a claim by the Sto:lo Nation in B.C. to an Aboriginal right to fish for the purpose of trade or sale.

The Supreme Court said that for this right to be established, the Sto:lo Nation would have to prove that fishing for trade or sale had been integral to their distinctive culture at the time of contact with Europeans.

In *Pamajewon*, the Court said self-government is no different from fishing in this regard. I find this to be rather surprising, given that the common law has always recognized a fundamental distinction between rights to resources such as fish on the one hand and governmental authority or jurisdiction on the other, but that's what the Court said.

The two Anishnabe First Nations whose right of self-government was in question in *Pamajewon* failed to establish this right because they did not prove that high-stakes gambling was integral to their distinctive cultures, and regulated by them, at the time of European contact.

The *Pamajewon* approach has made it very impractical, if not impossible, for First Nations to prove an Aboriginal right of self-government in Canadian courts. The approach fragments the right of self-government into little bits of jurisdiction, places an unreasonable burden of proof on First Nations, and is ultimately very costly.

But the federal and provincial governments are going to tell you that the *Pamajewon* approach is the law when it comes to the right of self-government. I think it is important to counter that by pointing out to them that there are two other approaches to the right of self-government that have received judicial attention.

The second approach involves linking rights of self-government to other Aboriginal and treaty rights, especially Aboriginal title to land.

Instead of proving an Aboriginal right of self-government directly by way of *Pamajewon*, this second approach involves relying on Aboriginal title to land or some other Aboriginal or treaty right.

The Supreme Court has held on several occasions that Aboriginal and treaty rights are generally communal. It has also held that the First Nations who hold these rights have decision-making authority over them. The Court decided this in relation to Aboriginal title in *Delgamuukw v. British Columbia* (1997), and in relation to treaty rights in *R. v. Marshall [No. 2]* (1999).

This line of authority was taken one step further by Justice Williamson of the B.C. Supreme Court in *Campbell v. British Columbia* (2000), a case involving a challenge to the constitutionality of the self-government provisions in the Nisga'a Treaty.

In upholding the constitutionality of those provisions, Justice Williamson said that the decision-making authority First Nations have over their communal rights is necessarily governmental in nature. So if the Nisga'a have Aboriginal title to land – as he obviously thought they do – they must also have a right of self-government in relation to their Aboriginal title lands.

It is important to emphasize that the *Campbell* decision is the law in British Columbia. The province cannot discount it on the ground that it was only a

decision of the B.C. Supreme Court, not of the Court of Appeal or the Supreme Court of Canada. It wasn't appealed, and so stands as the law in this province.

I think the reasoning in the *Campbell* decision must apply, not only to Aboriginal title, but to every other Aboriginal and treaty right as well. They are all communal, and First Nations have decision-making authority over them, authority that Justice Williamson held to be governmental.

So on this second approach, an Aboriginal right to self-government can be established by relying on other Aboriginal rights.

Moreover, those rights do not have to be proven in court or recognized in a treaty for First Nations to be able to rely on them. In the *Haida Nation* case (2004), the Supreme Court of Canada said that if a First Nation claims Aboriginal title to land and has evidence to support that claim, the province of B.C. cannot run rough-shod over their potential rights by ignoring their claim.

The Court said that the province has to consult with them before authorizing any kind of development – like lumbering – that might have an impact on their rights. In appropriate circumstances, the province has to go further and accommodate their rights and interests.

The *Haida* case was not about reserve lands – it was about the Haida Nation's claim to Aboriginal title over their whole territory, Haida Gwaii (the Queen Charlotte Islands) and surrounding waters.

Also, the duty to consult that the Supreme Court placed on the province reveals once again a right of self-government that the Haida have in relation to their Aboriginal title lands because consultation can't take place with individual Haida persons – it has to take place with Haida government.

So the second approach the courts have taken to self-government provides a real opportunity for First Nations to assert jurisdiction over their traditional territories.

As Satsan said yesterday evening, First Nations do not have to ask the province or the federal government for permission to exercise this jurisdiction. You already have it, and can assert and exercise it.

And the *Haida Nation* case reveals that the province and the federal government have to take this seriously and consult with you and accommodate your interests.

This brings me to the third approach to the inherent right of self-government, which I have called the "residual sovereignty" approach.

This approach accepts the self-evident fact that the Aboriginal peoples were fully independent nations in North America prior to European colonization.

Through colonization and the imposition of Crown sovereignty, Aboriginal sovereignty was reduced, but not eliminated.

So to determine the extent of the inherent right of self-government of any First Nation today, one starts with complete First Nation sovereignty and asks how it has been limited.

On this approach the onus of proof is reversed. On the *Pamajewon* approach, it was up to First Nations to prove their rights of self-government in relation to particular areas of jurisdiction. Otherwise, they were assumed to have none.

On the residual sovereignty approach, yours rights of self-government are presumed, and it is up to the Crown to prove how they have been reduced.

This is basically the approach to tribal sovereignty that has been taken by the U.S. Supreme Court, starting with the Cherokee cases in the 1830s: *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832).

Is there any indication that the Supreme Court of Canada will ever adopt this approach?

In light of *Pamajewon*, one would think not. But there are other Supreme Court decisions, authored by Antonio Lamer both before and after he became Chief Justice, that endorsed and apparently relied upon Marshall C.J.'s judgment in *Worcester v. Georgia*, namely *R. v. Sioui* (1990) and *R. v. Van der Peet* (1996).

And yet Lamer C.J. also delivered the *Pamajewon* decision for the Court, in which the approach is very different from the residual sovereignty approach of the U.S. Supreme Court. So we have been getting conflicting messages from our highest Court.

More recently, the issue of self-government was broached by Justice Binnie in the *Mitchell v. M.N.R.* (2001). That case involved a claim by the Akwesasne Mohawk Nation to an Aboriginal right to bring goods from New York State into Canada without paying Canadian custom duties.

The court held that the right had not been proven, and so dismissed the claim. A majority of the judges therefore found it unnecessary to address an argument made by Canada that an Aboriginal right to bring goods into Canada duty free would be inconsistent with Canadian sovereignty.

However, Justice Binnie, Major J. concurring, did address this argument. In his opinion, control of borders is an essential component of Canadian sovereignty, and an Aboriginal right to bring goods into Canada duty free would be inconsistent with this aspect of Canadian sovereignty.

But he was careful to emphasize that this does not mean that First Nations do not have rights of internal self-government within Canada.

In so doing, he pointed out that the U.S. Supreme Court has had no difficulty accepting the concept of residual Indian sovereignty – indeed, it has done so ever since the Cherokee cases in the 1830s.

While Justice Binnie was speaking for only two of the nine members of the Supreme Court, his comments may indicate that at least some Supreme Court justices are uncomfortable with the *Pamajewon* approach, and are willing to move to a residual sovereignty approach that is similar to that of the American Supreme Court.

But we still don't know whether this will actually happen.

In my opinion, the residual sovereignty approach is more respectful of First Nations because it acknowledges your complete inherent sovereignty prior to European colonization.

It acknowledges the reality of that colonization and the impact of Crown assertion of sovereignty on First Nations, but it places the onus of proving how First Nation sovereignty was reduced on the Crown.

But as I said, we do not know at this point whether the Supreme Court will go there in the future.

In the meantime, I think the approach to the inherent right that regards self-government as a necessary incident of every other Aboriginal right gives you a lot to work with.

It provides the constitutional space for an immediate assertion of your inherent right of self-government.

The *Pamajewon* approach, on the other hand, is a dead-letter in my opinion. I think it has been superceded by the communal right and self-regulation approach expressed by Chief Justice Lamer in *Delgamuukw* and applied by Justice Williamson in *Campbell*, combined with the duty to consult and accommodate set out in *Haida Nation*.

Thank you very much for your kind attention.