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# INDIGENOUS CONSTITUTIONALISM BEYOND SECTION 35 AND SECTION 91(24): THE SIGNIFICANCE OF FIRST NATIONS CONSTITUTIONS IN CANADIAN LAW

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First Nations communities in Canada have been drafting their own constitutions for many years, but these documents have not received significant attention from Canada’s legal community. The constitutions written by First Nations communities raise many legal questions. This paper addresses three of those questions: (1) From what source do First Nations constitutions draw their legitimacy (Canadian legislation, the Canadian constitution, or an inherent Indigenous source)? (2) What aspects of Indigenous self-governance do they address? (3) How have Canadian courts treated them? This paper examines three Indigenous constitutions that are demonstrative of trends in Indigenous constitution-drafting to answer those three questions. The three example constitutions, judicial considerations of these documents, and jurisprudence about Indigenous self-governance reveal two conclusions. These constitutions are better tools than the *Indian Act* for governing relations between Indigenous peoples and the Canadian Crown. However, they run into many of the same issues that most attempts by First Nations communities have in their push for greater self-governance, since

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Canadian courts are only willing to show limited deference to these documents that purport to outline the fundamental principles of the communities who write them.

## I INTRODUCTION

Over the past twenty years, First Nations communities across Canada have been drafting and ratifying their own constitutions. That trend will continue, as many Indigenous groups are in the process of writing these documents, and they are an essential part of the modern treaty process in Canada. Today, the Government of Canada views an Indigenous community having a constitution in place as an important aspect of any negotiations around self-governance.<sup>1</sup> The driving forces behind the creation of these constitutions are Indigenous peoples' desire to exert greater self-determination through self-governance and the need to replace Canada's *Indian Act*<sup>2</sup> as the primary tool shaping relations between Indigenous peoples in Canada and the Canadian Crown. As these Indigenous constitutions<sup>3</sup> assume a greater role in regulating those relations, their legal nature will face increased scrutiny.

Of the constitutional documents that various First Nations have ratified or written, this analysis focuses on three that are representative of trends within Indigenous constitution-writing. The first is the *Gichi-Naaknigewan of Nipissing First Nation* (Ontario).<sup>4</sup> The *Gichi-Naaknigewan* is the first constitution ratified in Ontario—it is one of the most recent of its kind in Canada, and it embodies modern trends in constitution-drafting. The second is the

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1. K Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford: Oxford University Press, 2010) at 73; Indigenous and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (2010), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#ext>>.
  2. RSC 1985, c I-5 [*Indian Act*]. John Borrows adds that Indigenous communities may enact constitutions so other governments appreciate the basis of their law-making authority. J Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 182.
  3. The use of the term "Indigenous constitution" to describe the documents discussed in this paper raises two questions that are beyond the scope of the paper. First, what is a "constitution"? This paper uses the *Oxford English Dictionary's* definition that a constitution is "the system or body of fundamental principles according to which a nation, state, or body politic is constituted or governed" (*The Oxford English Dictionary*, 2nd ed, *sub verbo* "constitution"), and the emphasis is on written declarations of those fundamental principles. Second, what does it mean to impose the idea of a written "constitution" on First Nations who often have little cultural antecedents for such documents? Val Napoleon cautions against "imposing western legal ideas onto Indigenous societies" (V Napoleon, "Thinking about Indigenous Legal Orders" (2007), online at 2: National Centre for First Nations Governance <[http://fngovernance.org/ncfng\\_research/val\\_napoleon.pdf](http://fngovernance.org/ncfng_research/val_napoleon.pdf)>); according to her, Indigenous legal traditions have been recorded in other sources like place names and practices (*ibid* at 13). Therefore, using constitutions may be an attempt to impose a foreign legal constraint on Indigenous peoples. Or perhaps a First Nation has a cultural antecedent for a constitution, but it comes in a different form and from a different worldview than the *OED's* understanding of the nature of a constitution. If a constitution is a master narrative for a society, should a First Nation be forced to use the written constitution form for maintaining its fundamental principles? Although this paper focuses on the practical (First Nations are writing what they call constitutions and using them for governance purposes), those larger theoretical questions (what is a constitution and how should they feature in Indigenous self-governance?) remain in the background of this analysis.
  4. *Gichi-Naaknigewan of Nipissing First Nation* (2014), online <<http://www.nfn.ca/constitution.php>> [*Nipissing Gichi-Naaknigewan*].

*Constitution of the Ta'an Kwäch'än Council* (Yukon).<sup>5</sup> This document is two years older than the *Nipissing Gichi-Naaknigewan* and it illustrates the unique constitution-building process in Yukon. The third is the *Constitution of the Nisga'a Nation* (British Columbia).<sup>6</sup> This constitution is one of the oldest in Canada (ratified in 1998). It remains relevant because it shows some of the outdated ways in which these documents were once drafted and because it has received judicial consideration on multiple occasions. These three examples provide a snapshot of the positive and negative aspects of Indigenous constitutions, they reveal trends in the evolution of constitution-writing, and they offer insight into how Canadian courts may respond to them.

These three constitutions highlight the fact that these documents are positive steps in improving relations between Indigenous peoples in Canada and the Crown because they are Indigenous-created alternatives to the *Indian Act*. However, Indigenous constitutions have failed to significantly strengthen Indigenous self-governance. They have failed because the Crown continues to exert ultimate control over the role of these documents through the workings of Canada's legal framework. Regardless of how the drafters word them, Canada's legal system views these documents as subservient to Canada's laws and will rein in any attempts to have them take on any role that purports to oust the Canadian legal system.

An evaluation of three issues related to Indigenous constitutions illustrates the successes of these documents in replacing the *Indian Act* and their failures as a tool to assert greater self-governance. First, what are the legal sources of legitimacy in which drafters and courts have attempted to ground Indigenous constitutions? Second, what have First Nations bands emphasized in these documents, and what are the legal implications of those choices? Third, how have Canadian courts interpreted the legal effects and consequences of these constitutions? All three of these questions highlight the fact that these constitutions are positive replacements to the *Indian Act* and can assist First Nations in building their capacity to govern; however, they are weak tools for greater self-governance since the Crown and Canadian courts control their relevance.

## II THE LEGAL SOURCES OF LEGITIMACY: DO INDIGENOUS CONSTITUTIONS DRAW THEIR LEGITIMACY FROM CROWN-CONTROLLED SOURCES OR ARE THEY MANIFESTATIONS OF AN INHERENT RIGHT?

The first step in uncovering the value of Indigenous constitutions is to examine the source from which they derive their legitimacy. There are three potential places to ground their legal legitimacy. They could derive it from the federal legislation that accompanies modern treaty

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<sup>5</sup> *Constitution of the Ta'an Kwäch'än Council* (2012), online <<http://taan.ca/legal-and-regulatory/constitutions/>> [*Ta'an Kwäch'än Constitution*].

<sup>6</sup> *Constitution of the Nisga'a Nation* (1998), online <<http://www.nisgaanation.ca/legislation/constitution-nisgaa-nation>> [*Nisga'a Constitution*].

agreements between the Crown and Indigenous peoples.<sup>7</sup> Alternatively, the constitutions could be a part of the Aboriginal right to self-governance that is protected by Section 35 of the *Constitution Act, 1982*.<sup>8</sup> Either of these approaches would respect positivist perspectives on the nature of law since Indigenous constitutions would fit into the legal hierarchy of centralized authority and sovereign command, with Canada's constitutional documents dominating. However, there are pitfalls to grounding Indigenous constitutions in the Canadian legal system, because this approach rests on the assumption that European legal traditions were "received" in Canada and that Indigenous legal traditions are of secondary value.<sup>9</sup> Finally, their legitimacy could come from within Indigenous communities, as these constitutions could draw upon an inherently Indigenous right to govern. This perspective is, according to John Borrows, a more complete portrait of the legal picture in Canada and avoids labelling Indigenous traditions as inferior.<sup>10</sup> Resolving the issue of where their legitimacy comes from has consequences for how Canada's legal framework understands the nature of these constitutions.

## A. The Dangers Of Grounding Legitimacy In Legislation

One possible source of legitimacy for Indigenous constitutions is Canada's legislative framework. They could have the same authority as federal legislation in Canada. This appears to be a logical choice as these documents often accompany federal legislation encapsulating the terms of modern land-claims agreements between the First Nation involved and the Crown, and one of their primary intended purposes is to displace another piece of federal legislation, the *Indian Act*. Historically, the Canadian Crown has claimed it has the constitutional power to legislate Indigenous peoples,<sup>11</sup> and the *Indian Act* was the primary tool it used to do so. The modern land-claims treaty process is a new tool for the Crown, though the *Indian Act* continues to dominate Crown-Indigenous relations. These constitutions are key aspects of that modern treaty process, so it seems a natural fit that they would have the same power as the *Indian Act* they are replacing.

Turning to the example constitutions, the *Nisga'a Constitution* appears to treat itself as having power equal to a Canadian statute. The evidence of this interpretation comes

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<sup>7</sup> For the Nisga'a, the relevant agreement is the *Nisga'a Final Agreement Act*, SC 2000, c 7. For the Ta'an Kwäch'an, the *Yukon First Nations Self-Government Act*, SC 1994, c 35 is the relevant agreement. The Nipissing do not yet have a treaty agreement. These pieces of legislation fall within the category of what Borrows calls "recognition legislation" (Borrows, *supra* note 2 at 181-185).

<sup>8</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [CA, 1982].

<sup>9</sup> Borrows, *supra* note 2 at 13-14. Borrows views this grounding of all legal legitimacy in colonization as "a fiction that continues to erase Indigenous legal systems as a source of law in Canada" (*ibid*). He opposes positivist grounding of Indigenous law (*ibid* at 48).

<sup>10</sup> *Ibid*. Borrows's logic appears to endorse the use of treaty processes (of which written constitutions are a part) to place Indigenous legal traditions, and Canadian law more generally, on firmer ground (*ibid* at 20-21). He cites land claims agreements (like those in British Columbia and Yukon) as an effective place for solidifying the validity of Indigenous legal traditions (*ibid* at 52-55). Another possibility is that Indigenous constitutions could derive their legitimacy from international law (for instance, via the *United Nations Declaration on the Rights of Indigenous Peoples*). However, the same questions would arise about whether Canada implements the international law rights of Indigenous peoples or if First Nations in Canada see this as their own inherent right.

<sup>11</sup> *Constitution Act, 1867* (UK), 30 & 31 Vic, c 3, reprinted in RSC 1985, Appendix II, No 5 [CA, 1867].

from within the constitution itself. Sections 6 and 7 of the *Nisga'a Constitution* highlight its subordination to Canadian laws:

6. The Constitution of the Nisga'a Nation

(1) This Constitution is the supreme law of the Nisga'a Nation, subject only to:

- (a) the Constitution of Canada, and
- (b) the Nisga'a Treaty, which sets out the authority of Nisga'a Government to make laws

(2) The Canadian Charter of Rights and Freedoms applied to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government

7. Validity of Nisga'a Laws

The validity of Nisga'a law may be challenged in the Supreme Court of British Columbia.<sup>12</sup>

In these sections, the drafters' goal appears to be ensuring clarity about how Nisga'a people and Canadian courts will interpret the constitution as it outlines exactly where the document fits into the Canadian legislative framework and it grants Canadian courts the right to rule on internal Nisga'a laws. This approach of respecting Canadian law and Indigenous law reflects Ken Coates's advice that replacing the *Indian Act* is a process that requires certainty for the Indigenous people involved and continuity in the relationship with the federal government.<sup>13</sup>

The problem with this approach is that the Canadian government can overturn legislation. As an example, by drafting the *Nisga'a Constitution* in a way that subordinates it to the federal legislation that accompanies the constitution, the drafters gave Canada's Parliament full power to alter and undermine it. Canada has total control over the legal relevance of these constitutions in Canadian law, but that power structure likely does not reflect the intentions of the Canadian government or the Indigenous signatories of modern treaties.<sup>14</sup>

## B. The Constitutional Protection Of Section 35 Of *The Constitution Act, 1982*

Fortunately, Canadian courts have rejected the possibility of grounding the legal legitimacy of Indigenous constitutions like that of the Nisga'a Nation in Canadian legislation. Instead, Canadian judges have ruled that the true source of these documents' legitimacy is section 35 of the CA, 1982. The *Nisga'a Constitution* is incorporated into the *Nisga'a Final Agreement*

<sup>12</sup> *Nisga'a Constitution*, *supra* note 6, ss 6–7. This subservience reflects the Government of Canada's position that Indigenous self-government agreements "may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws" (Indigenous and Northern Affairs Canada, *supra* note 1). The *Nisga'a Constitution* does acknowledge the continued importance of Nisga'a legal traditions in its preamble, but that provision is overwhelmed by references to the Canadian legal order.

<sup>13</sup> K Coates, "The Indian Act and the Future of Aboriginal Governance in Canada" (2008) at 11, online: National Centre for First Nations Governance <[http://fngovernance.org/ncfng\\_research/coates.pdf](http://fngovernance.org/ncfng_research/coates.pdf)>.

<sup>14</sup> Borrows draws parallels between the growth of civil law traditions in Canada and Indigenous law. According to him, Quebec's *Civil Code* was at one time treated like an ordinary statute, but it has grown in influence since 1975 (Borrows, *supra* note 2 at 114). Perhaps Indigenous constitutions could follow a similar trajectory in which they seem to be mere statutory replacements for the *Indian Act* but grow in stature over time (*ibid* at 116).

*Act*,<sup>15</sup> and Canadian courts have evaluated the legal legitimacy of that *Act* in two key decisions: *Campbell v British Columbia*<sup>16</sup> and *Sga'nisim Sim-augit v Canada*.<sup>17</sup> In *Campbell*, members of British Columbia's government challenged the *Nisga'a Final Agreement Act*. Their argument was that the *Act* bestowed legislative power on the Nisga'a Nation, and this violated the Canadian constitution primarily because the *CA, 1867* divided all legislative authority between the Canadian government and the provincial governments. However, the British Columbia Supreme Court determined that the agreement is constitutionally valid because its legitimacy comes from Canada's constitution. The Court found that "Section 35 of the *Constitution Act, 1982*, then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty. The Nisga'a Final Agreement and the settlement legislation give that limited right definition and content."<sup>18</sup> This decision highlights the fact that Indigenous constitutions have greater importance than other pieces of federal legislation. Although this constitution was also in federal legislation, its power lies in the Aboriginal right of self-governance that is protected by the *CA, 1982*.

In *Sga'nisim*, the British Columbia Court of Appeal reached the same conclusion. The challenge to the constitutional validity of the *Nisga'a Constitution* in that case came from within the First Nation. Chief Mountain, the Nisga'a hereditary chief, made the same arguments about the legality of the document. He challenged it because he felt that the Canadian government was favouring some members of the community and leaving the entire community with little protection.<sup>19</sup> However, the Court of Appeal endorsed a similar analysis to that in *Campbell*.<sup>20</sup> The Supreme Court of Canada gave further credence to this understanding when it dismissed Chief Mountain's attempt to appeal the Court of Appeal's decision. The courts expressed reservations about the limits of Indigenous self-governance in both these cases.<sup>21</sup> At the same time, they suggest that modern treaties and the documents that accompany them will receive constitutional protection in Canadian courts. Thus, Indigenous constitutions draw their legitimacy in the eyes of Canadian law from the *CA, 1982*.

Since the enactment of the *Nisga'a Constitution* in 1998, other drafters of Indigenous constitutions have embraced the understanding that these documents have a home within the Canadian constitution as manifestations of an Aboriginal right of self-governance. However, this understanding produces some tension, because it means Indigenous constitutions are still reliant on the Canadian legal framework. Other constitutions have struggled to try to navigate this tension. For example, the Ta'an Kwäch'än in Yukon attempted to assert the

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<sup>15</sup> *Supra* note 7.

<sup>16</sup> *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 (CanLII), [2000] 4 CNLR 1 [*Campbell*].

<sup>17</sup> *Sga'nisim Sim-augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 (CanLII), [2013] 2 CNLR 226; leave to appeal to SCC refused, 35301 (22 August 2013) [*Sga'nisim*].

<sup>18</sup> *Supra* note 16 at para 181. See the text below accompanying notes 31–35 for more on the potential of the doctrine of residual sovereignty.

<sup>19</sup> J Weston, "Sovereignty without Referendum: Chief Mountain Speaks on Bay Street" (2003) online: The Empire Club of Canada <<http://speeches.empireclub.org/62767/data?n=4>>.

<sup>20</sup> *Supra* note 17 at para 81.

<sup>21</sup> As discussed below at note 26, the primary reservation is that Aboriginal rights under the constitution can be infringed in many contexts.

band's self-reliance while still making their constitution fit into Canadian legal norms.<sup>22</sup> In its preamble, it states

[w]e, the citizens of the Ta'an Kwach'an, by virtue of our inherent rights as provided by the Creator and acknowledged in our Final and Self Government Agreements, and desiring to assume and exercise full responsibility for our own well-being and to safeguard the lands and resources of our traditional territory for ourselves and our children, our grandchildren and all future generations, adopt this Constitution.<sup>23</sup> [emphasis added]

With its word choices, the *Ta'an Kwäch'än Constitution* stakes multiple claims from which it derives its legal legitimacy. First, it affirms that the Crown has a role to play in the recognition of this constitution because it references the Final and Self Government Agreements, which are treaties between the Ta'an Kwäch'än and the Crown. Second, it also asserts an inherent right to self-governance by claiming those agreements simply recognize the First Nation's right to self-govern that comes from the Creator.

Grounding the legitimacy of the *Ta'an Kwäch'än Constitution* in the Canadian constitution (through the references to the Final and Self Government Agreements) may be a positive step toward ensuring these constitutions enable Indigenous groups to assert self-governance and throwing off the shackles of the *Indian Act*. The constitutional drafters are clear in establishing the constitution's place in the Canadian legal system: It is more important than a mere statute like the *Indian Act* and it is an expression of a right provided for in the *CA, 1982*. This clarity is beneficial for ensuring a court or government knows the constitutional value of the constitution. However, that positive step has a limit, because the Crown can always limit constitutionally protected Aboriginal rights and treaty rights if it meets the justifiable infringement tests set out in *R v Sparrow*<sup>24</sup> and *R v Badger*.<sup>25</sup> The *Sparrow/Badger* test is firmly entrenched in Aboriginal rights jurisprudence. Under this test, the Crown can infringe any Aboriginal right where it discharges its procedural duty to consult, demonstrates a compelling and substantial government objective, and shows that its actions are consistent with its fiduciary duties to the affected First Nation.<sup>26</sup> Thus, the constitutional drafters have taken on risk by clearly grounding their constitution in the *CA, 1982*, because it means the Crown can justifiably infringe the *Ta'an Kwäch'än Constitution* and other Indigenous constitutions.

Courts have confirmed this limitation on Indigenous constitutions. The Crown's ability to infringe the Aboriginal right to self-governance and any potential modern treaty rights

<sup>22</sup> First Nations in Yukon have an Umbrella Final Agreement with Yukon and the Government of Canada, but each of its 14 First Nations must write their own constitution (Coates, *supra* note 13 at 17).

<sup>23</sup> *Ta'an Kwäch'än Constitution*, *supra* note 5 at Preamble. The reference to the Creator places the legitimacy of this constitution in part in Sacred Law (Borrows, *supra* note 2 at 25–27).

<sup>24</sup> *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 [*Sparrow*]. According to Borrows, the judicial reasoning in *Sparrow* perpetuates the myth of Indigenous law's inferiority (*supra* note 2 at 18–19).

<sup>25</sup> *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236 [*Badger*].

<sup>26</sup> *Sparrow*, *supra* note 24; *Badger*, *supra* note 25; See *Tsilqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 for an example of the application of the *Sparrow/Badger* test in action. In that case, the Supreme Court explained that an examination of the Crown's fiduciary duty requires an analysis of a rational connection between the government's goal and the infringement and must determine whether the government measure is minimally impairing and whether the benefits are proportional to the adverse effects of the infringement (para 87).

that facilitate self-governance received judicial attention in the Nisga'a Nation context. The *Campbell* decision warns that "both Aboriginal and treaty rights guaranteed by s. 35 [of the CA, 1982] may be impaired if such interference can be justified and is consistent with the honour of the crown."<sup>27</sup> If proponents of Indigenous constitutions rely on an Aboriginal right of self-governance emanating from section 35 of the CA, 1867 for the legitimacy of these constitutions, then these constitutions will be subject to any limits imposed on them by the Crown. This perpetuation of a power imbalance between First Nations and the Crown is likely why subsequent Indigenous constitutions have adopted the aspect of the *Ta'an Kwäch'än Constitution* that relies solely on Indigenous traditions as the source of legitimacy and avoided specific acknowledgements that they are expressions of the Aboriginal right to self-governance.

One example of the risks that arise from viewing the right to self-governance as an Aboriginal right that can be infringed relates to membership codes (as discussed below, membership codes or the power to make laws relating to membership are often included in Indigenous constitutions). If a First Nation developed rules under its constitution to limit membership to only those people living on reserve, the Crown could infringe upon that right. The Crown could do so if it consulted with the First Nation (likely both included and potentially excluded members), made the case that encouraging free movement on and off reserve is a pressing and compelling objective (e.g., to promote band members to engage in seasonal employment in other parts of the country where there is an insufficient labour force), and met its fiduciary duties by balancing the benefits and drawbacks while maintaining a sense of proportionality in its actions. In this hypothetical scenario, it would be possible for any membership section of an Indigenous constitution to be justifiably infringed by an action of the Crown.

### C. The Untested Legitimacy Of An Inherent Right Of Self-governance Based On Indigenous Traditions

The *Ta'an Kwäch'än Constitution* received ratification in 2012, and since then other Indigenous groups have taken up the perspective that such documents derive their legitimacy from within Indigenous traditions, not Canadian traditions. The Nipissing First Nation is the first First Nations band in Ontario to adopt a constitution,<sup>28</sup> and it has pushed the Indigenous claim to self-governance further than the *Ta'an Kwäch'än Constitution* by making no mention of Canada or Canadian legal traditions in its *Nipissing Gichi-Naaknigewin*. Its preamble reads as follows:

We, the people of the Nipissing First Nation, known as the Nipissings, ordain and establish this Gichi-Naaknigewin as our supreme law in accordance with the values and principles upon which our heritage has existed.

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<sup>27</sup> *Campbell*, *supra* note 16.

<sup>28</sup> "Nipissing First Nation Passes First Ontario Aboriginal Constitution," *CBC News* (2014), online: <<http://www.cbc.ca/news/canada/sudbury/nipissing-first-nation-passes-first-ontario-aboriginal-constitution-1.2505488>>.



By this Gichi-Naaknigewin, we declare and acknowledge the Creator for the gifts of Mother Earth, sovereign rights to govern ourselves and for our cultural heritage.<sup>29</sup>

The *Nipissing Gichi-Naaknigewin*'s reference to the Creator as the source of the power to govern is reminiscent of the *Ta'an Kwäch'än Constitution*. However, unlike its Yukon counterpart, the *Nipissing Gichi-Naaknigewin* makes no mention of any legal documents or treaties with Canada; it relies exclusively on an inherent right to govern that comes from within their own tradition. This approach reflects the claim by Kiera Ladner that Indigenous peoples have always retained their "constitutional orders," and any historical treaties or agreements with newcomers to Canada strengthened those Indigenous constitutional orders.<sup>30</sup> Ladner's vision of Indigenous constitutionalism is likely more reflective of what an inherent right to self-governance could be rather than what it actually is today, but it is a vision of an inherent right to self-governance that would cause a shift in the existing legal order in Canada. In this way, the *Nipissing Gichi-Naaknigewin* creates a legal question that no Canadian court has yet ruled upon.

Part of the reason for the aggressive claim for Indigenous self-governance in the *Nipissing Gichi-Naaknigewin* is the fact that the Nipissing do not yet have a modern treaty. The drafters of both the *Ta'an Kwäch'än Constitution* and the *Nisga'a Constitution* wrote their constitutions in the context of completed treaty negotiations with the Crown. In contrast, the Nipissing do not have a modern treaty with the Crown. However, their constitution could still have legitimacy under Canadian law without a treaty in place and without relying on a constitutionally protected Aboriginal right to self-governance. The Nipissing could exercise an inherent right to self-governance through the *Nipissing Gichi-Naaknigewin* by relying on the doctrine of residual sovereignty to lend legitimacy to its constitution.

The doctrine of residual sovereignty comes from Binnie J's concurring judgment in *Mitchell v Canada (MNR)*.<sup>31</sup> That case dealt with whether members of the Akwesasne community could cross the Canada-US border with goods for trade and use. The majority took an orthodox view on Aboriginal rights and based its decision on the principle that Indigenous laws and interests were absorbed by Canadian law; section 35 of the *CA, 1982* clarified that Indigenous laws became part of the Canadian legal system.<sup>32</sup> In a concurring judgment, Binnie

<sup>29</sup> *Nipissing Gichi-Naaknigewin*, *supra* note 4 at preamble. As with the *Ta'an Kwäch'än Constitution*, the reference to the Creator grounds legitimacy in sacred law.

<sup>30</sup> KL Ladner, "Indigenous Governance: Questioning the Status and the Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights" (2006) at 4, online: National Centre for First Nations Governance: <[http://fngovernance.org/ncfng\\_research/kiera\\_ladner.pdf](http://fngovernance.org/ncfng_research/kiera_ladner.pdf)>. Borrows strikes a similar tone when he claims that "Indigenous people do not require formal recognition to possess and exercise law" (*supra* note 2 at 181). Napoleon raises a potential red flag for grounding the legitimacy of an Indigenous law (or constitution) in an inherently Indigenous source because there has been a breakdown in Indigenous legal orders; as she says, "in recent times, Indigenous laws have been broken with no consequences . . . When laws are broken with no recourse, the legal order begins to break down and this has been the experience of Indigenous peoples" (Napoleon, *supra* note 3 at 10). However, Napoleon does not consider this a fatal flaw (*ibid* at 11).

<sup>31</sup> *Mitchell v Canada (MNR)*, 2001 SCC 33 (CanLII), [2001] 1 SCR 911 [*Mitchell*].

<sup>32</sup> *Ibid* at para 10.

proposed an alternative suggestion: He thought it possible to analyze the Indigenous interest in that case through the lens of a “merged sovereignty” in which some residual aspects of Indigenous government were not wholly absorbed into the Canadian legal system.<sup>33</sup> Essentially, residual sovereignty is the principle that Indigenous peoples maintained their sovereignty to govern their nations unless the Crown has taken away that sovereignty. It impacts Indigenous constitutionalism because some issues addressed in an Indigenous constitution may be issues for which First Nations retained sovereignty. Thus, the legitimacy of those aspects of the constitution could be dependent on an inherently Indigenous right to govern instead of an Aboriginal right under the CA, 1982.

However, the likelihood that Canadian courts would embrace a novel approach using the principle of residual sovereignty is unlikely. As Kent McNeil explains,

[This] approach is the only one that is consistent with the Supreme Court’s acknowledgment of the pre-existing sovereignty of the Aboriginal nations. It also places the onus on the Crown of proving how and to what extent that sovereignty has been reduced, which is where I think the onus should lie as a matter of both legal principle and justice. But given that [this] approach has not yet been explicitly accepted by Canadian courts, I cannot state that it is an expression of Canadian law.<sup>34</sup>

Residual sovereignty is a popular doctrine in the United States but not in Canada.<sup>35</sup> McNeil’s warning suggests that a Canadian court may be unwilling to accept a First Nations constitution like the *Nipissing Gichi-Naaknigewin* as an expression of residual sovereignty. Commentators have argued that Indigenous self-governance needs to evolve slowly to gain acceptance from Canada’s legal system.<sup>36</sup> Canadian courts may view the *Nipissing Gichi-Naaknigewin* as an attempt to move the law too quickly.

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<sup>33</sup> *Ibid* at para 129. Binnie ultimately ruled against recognizing the Indigenous rights asserted in that case. Despite that result, Borrows views this case as a signal that Indigenous law survived European settlement and continues to exist (Borrows, *supra* note 2 at 11, 135–136). As Borrows explains, “Indigenous peoples believe many of their rights were not surrendered by treaties and were not extinguished by clear and plain government legislation . . . They believe that their laws coexist with common law and civil law traditions” (*ibid* at 136). Mark Walters also discusses residual sovereignty or Indigenous sovereignty (M Walters, “‘Looking for a Knot in the Bulrush’: Reflections on Law, Sovereignty, and Aboriginal Rights,” in P Macklem and D Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* [Toronto: University of Toronto Press, 2016] at 35). According to Walters, lower courts in Canada have recognized the idea of residual sovereignty, but the Supreme Court has not gone any further than Binnie’s dissent in *Mitchell* (*ibid* at 38).

<sup>34</sup> K McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (2007) at 30, online: National Centre for First Nations Governance <[http://fngovernance.org/ncfng\\_research/kent\\_mcneil.pdf](http://fngovernance.org/ncfng_research/kent_mcneil.pdf)>.

<sup>35</sup> The seminal American case on the issue was the US Supreme Court’s decision in *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823), in which the court stated that Indigenous sovereignty was diminished but not necessarily eliminated by European claims in the New World (Walters, *supra* note 33 at 39).

<sup>36</sup> P Macklem, “Normative Dimensions of the Right of Self-Government,” in *Royal Commission on Aboriginal Peoples, Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Ministry of Supply and Services Canada, 1995), 1 at 9–17; JE 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 at 77; R Missens, “Sovereignty, Good Governance and First Nations Human Resources: Capacity Challenges” (2008) at 1, online: National Centre for First Nations Governance <[http://fngovernance.org/ncfng\\_research/richard\\_missens.pdf](http://fngovernance.org/ncfng_research/richard_missens.pdf)>.

Although the *Nipissing Gichi-Naaknigewin*'s attempt to ground its legitimacy in Indigenous sources without any reference to Canada may raise legal issues that the Canadian legal system is not yet ready to accept, it is equally problematic for Indigenous constitutions to acknowledge their subservience to the Canadian constitution. The wording of the *Nisga'a Constitution* and *Ta'an Kwäch'än Constitution* make it easy for courts to accept those documents as manifestations of the Aboriginal right of self-governance. This source of legitimacy is sufficient for these documents to replace the *Indian Act* as the foundational documents in the relationship between an Indigenous group and the Crown. However, it fails to raise stronger claims for inherent Indigenous rights. Overall, the competing sources from which Indigenous constitutions could derive their legitimacy highlight the challenges facing the drafters of these documents between strengthening Indigenous rights of self-governance while working alongside the Crown and pushing for further Indigenous rights at the expense of the Crown.

### III THE CONTENT OF THE CONSTITUTION: WHAT DO INDIGENOUS CONSTITUTION- DRAFTERS PRIORITIZE?

In addition to their sources of legitimacy, the contents of Indigenous constitutions offer insight into the role that the drafters of these documents intend for them to play in the relations between Indigenous peoples in Canada and the Canadian Crown. A review of those contents highlights two issues that stand out: the importance placed on citizenship codes in these constitutions and the difficulty for the drafters to turn legal traditions that come from oral transmission into written constitutions. These two issues arise in the *Nisga'a Constitution*, the *Ta'an Kwäch'än Constitution*, and the *Nipissing Gichi-Naaknigewin*. The choices of the constitutional drafters are demonstrative of the fact that these constitutions fall short in the push for greater autonomy from the Crown for Indigenous peoples in Canada.

#### A. The Dangers Of Constitutional Citizenship Codes

In all three of these Indigenous constitutions, the drafters address the issue of citizenship or membership in the First Nation. The *Indian Act* historically determined membership in an Indigenous group, and that legislation often completed this task with racist and sexist values. Thus, a key aspect of any Indigenous constitution is the replacement of the problematic rules in the *Indian Act* with rules and regulations around citizenship that the First Nations determine themselves.

Despite the importance of discarding Crown-centric approaches to First Nations band membership, the *Nisga'a Constitution* did not deal with this issue in extensive detail. The *Nisga'a Constitution* simply states the following two points:

##### 8. Citizenship

- (1) Every Nisga'a participant who is a Canadian citizen or permanent resident of Canada is entitled to be a Nisga'a citizen.

- (2) A person who is not a Nisga'a participant and who is a Canadian citizen or permanent resident of Canada may become a Nisga'a citizen if permitted by, and in accordance with, Nisga'a law.<sup>37</sup>

The language in this clause raises problems because “Canada” is central to the determination of Indigenous citizenship. Limiting Nisga'a citizenship to Canadian citizens creates an artificial barrier that has no historical significance for the Nisga'a community since Canada's borders did not exist when the Nisga'a Nation was formed. In the Nisga'a context, this issue has not caused significant problems, likely because the Nisga'a have not made any cross-border claims. However, the potential problems of such a restrictive citizenship agreement have become a reality in other contexts.<sup>38</sup> One example of this issue has arisen in another modern land-claim treaty negotiation in Ontario. Canada, Ontario, and an entity called the Algonquins of Ontario have signed an agreement-in-principle for a modern land-claims agreement in that province; however, this agreement is now in limbo as Algonquin nations based in Quebec have challenged its legitimacy.<sup>39</sup> Thus the *Nisga'a Constitution* is flawed because it uses artificial boundaries based on Canadian territorial divisions for assessing citizenship. This approach undermines the goals of the constitution-making process since it creates greater uncertainty for the Indigenous people who live under these constitutions.

As well, the section on citizenship in the *Nisga'a Constitution* is short and does not appear particularly concerned about issues with citizenship. The clause suggests that the Nisga'a can subsequently create laws to determine citizenship without any constitutional guidance. That apparent lack of concern becomes problematic because Canadian courts have struggled to define the relationship between Indigenous self-governance and the right to determine membership.

The best example of Canadian courts' difficulty in grappling with band membership is *Sawridge Band v Canada*.<sup>40</sup> In the constellation of litigation related to *Sawridge*, a First Nations band took control of its band membership and attempted to exclude some members from the community who would have regained their band membership because of legislative changes to the *Indian Act* (these included women like Elizabeth Poitras, who lost her status because she married a non-Indigenous man). Some individuals, including Poitras, fought for their membership. The bands argued that Canada could not unilaterally impose these changes on them because they have a constitutional right to determine their own membership (either a free-standing right or one that is incidental to their right to self-govern). It would be impossible in this paper to summarize the litigation in the cases related to *Sawridge* for two reasons: (1) The litigation unfolded over 30 years, and (2) there have been many procedural

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<sup>37</sup> *Nisga'a Constitution*, *supra* note 6, s 8.

<sup>38</sup> For example, see the discussion in *Mitchell*, *supra* note 31, where a central issue was the fact that the Akwesasne territory crossed provincial, state, and international borders.

<sup>39</sup> Russell Diabo, “Why Ontario's First Modern-Day Treaty Is Set up to Fail” (November 2016), online: TVO <<http://tvo.org/article/current-affairs/shared-values/why-ontarios-first-modern-day-treaty-is-set-up-to-fail>>.

<sup>40</sup> *Sawridge Band v Canada*, 2006 FCA 228 (CanLII), [2006] 4 CNLR 279 [*Sawridge*]; appeal to the Supreme Court of Canada dismissed, 2007 CanLII 2922.

and substantive decisions (along with interim appeals) since the case began in 1986.<sup>41</sup> However, the Federal Court of Appeal made a statement in one of the most recent interim decisions that is suggestive of a judicial reluctance to examine the question of whether the right to determine membership was a necessary element of the right to self-governance. The Court took the position that it was wise for the Federal Courts to avoid ruling on such an issue if possible. In this case, the Court concluded “it was not incumbent . . . to come to a definitive conclusion on a very difficult issue on which the Supreme Court is yet to pronounce.”<sup>42</sup> Because the relationship between self-governance and membership is unresolved, a First Nation’s constitution appears to be an ideal place to address this issue. However, the *Nisga’a Constitution*, which was ratified before the *Sawridge* decision, does not provide the kind of clarity necessary to provide strong claims for Indigenous self-governance.

Since *Sawridge*, the Supreme Court of Canada has not provided guidance on what the relationship should be between Indigenous self-governance and citizenship codes. Thus, this task now rests with the drafters of subsequent Indigenous constitutions. The *Ta’an Kwäch’än Constitution* and the *Nipissing Gichi-Naaknigewin* are demonstrative of two opposing ways in which these constitutions have resolved issues around citizenship. The *Ta’an Kwäch’än Constitution* defines a citizen as “a person enrolled as a citizen of the Ta’an Kwäch’än Council pursuant to the citizenship code attached to this constitution.”<sup>43</sup> The citizenship code attached to the constitution is a four-page schedule that provides extensive details about who will be a citizen and who will not.<sup>44</sup> This approach is effective at displacing the *Indian Act* because judicial considerations of the explicit content of the *Ta’an Kwäch’än Constitution* have embraced the constitution’s clear language and upheld its provisions. For instance, in *Harpe v Ta’an Kwäch’än Council*, the Supreme Court of Yukon accepted the provisions of the *Ta’an Kwäch’än Constitution* as binding upon that Court.<sup>45</sup> Although that case did not deal with the citizenship code, the citizenship code would likely receive similar judicial deference from Canada’s courts because the court in *Harpe* endorsed respecting clear constitutional statements by Indigenous constitutions.

In contrast to the *Ta’an Kwäch’än Constitution*’s extensive citizenship code, the *Nipissing Gichi-Naaknigewin* takes an approach similar to that of the *Nisga’a Constitution* for determining who is Debendaagziwaad (“those who belong”):

Part 9—Nipissing First Nation Debendaagziwaad

9.1 The Nipissing First Nation has exclusive jurisdiction to make laws for determining Debendaagziwaad.

<sup>41</sup> In addition to the myriad articles and comments that analyze the litigation (e.g. K Gover, “When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada” (2014) 64:2 UTLJ 206; J Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 SCLR (2d) 351), there is an entire book dedicated to the *Sawridge* saga (C Dick, *The Perils of Identity: Group Rights and the Politics of Intragroup Difference* [Vancouver: UBC Press, 2011]).

<sup>42</sup> *Sawridge*, *supra* note 40 at para 43–44. Although this was an interim decision that left the door open for a court to rule on this issue in the future, it is unlikely that will happen in the *Sawridge* context since the case effectively died in 2012 (Gover, “When Tribalism Meets Liberalism,” *supra* note 41 at 231). The *Sawridge* band lost, but the constitutional question remains open.

<sup>43</sup> *Ta’an Kwäch’än Constitution*, *supra* note 5, s 2.1.

<sup>44</sup> *Ibid*, Schedule I: Ta’an Kwäch’än Council Citizenship Code.

<sup>45</sup> *Harpe v Massie and the Ta’an Kwäch’än Council #1*, 2005 YSC 54, [2006] 2 CNLR 54 [*Harpe*].

9.2 The Nipissing First Nation Debendaagziwaad Law will set out the eligibility requirements for the determination of Nipissing First Nation Debendaagziwaad, including the mechanism for reviewing Debendaagziwaad decisions.

9.3 The Nipissing First Nation Debendaagziwaad Law will not remove any Debendaagziwaad from the membership list whose names appear on the Nipissing First Nation Band list on the date that the Debendaagziwaad Law takes effect.<sup>46</sup>

There is no extensive citizenship code in the *Nipissing Gichi-Naaknigewin*. Instead, Part 9 claims that the Nipissing will set rules for determining citizenship.<sup>47</sup> The key difference between the Nipissing approach and the *Nisga'a Constitution* is that the *Nipissing Gichi-Naaknigewin* makes no mention of Canada or any Canadian territorial boundaries. By doing so, the drafters are sending a clear message that the band does not wish to grant any voice to the Canadian government in determining its membership.

The Nipissing approach pushes First Nations governance into the uncharted waters the Federal Court of Appeal did not wish to venture in *Sawridge*.<sup>48</sup> By suggesting that the First Nation will have the exclusive authority to determine membership, the Nipissing may set themselves on a collision course with the Crown's desire to meddle in membership rules. Unlike their Yukon counterparts, who attached their membership code to the treaty between themselves and the Canadian government, the *Nipissing Gichi-Naaknigewin* leaves no room for the Canadian government to involve itself in its membership determinations. The only limitation on the power that the Nipissing First Nation claims to wield is the fact that the Nipissing First Nation will not remove anyone from the membership list on the date that the Debendaagziwaad takes effect. This provision seems to be an attempt to assuage fears that members of the community would lose their citizenship when the *Nipissing Gichi-Naaknigewin* assumes a primary role in Nipissing law. The conflict between Canada's historical desire to involve itself in conversations about First Nations membership, as evidenced by its resistance in *Sawridge*, and the Nipissing claims is exactly what John Borrows explains is a necessary conflict that will lead to the revitalizing of Indigenous legal traditions.<sup>49</sup> It remains to

<sup>46</sup> *Nipissing Gichi-Naaknigewin*, *supra* note 4, s 9.

<sup>47</sup> The *Nipissing Gichi-Naaknigewin* also makes no mention of the *Indian Act*, besides affirming that anyone who has membership in the Nipissing First Nation through the *Indian Act* formula at the time it takes effect will keep his or her membership. Section 10 of the *Indian Act* does permit a First Nation band to develop its own membership code (like the Sawridge band attempted to do) in accordance with rules set out in that provision, including a vote by band members (s 10(2)). If a band does not exercise its right under section 10, then the Government of Canada maintains and controls membership under the rules set out in section 11. According to Indigenous and Northern Affairs Canada, there are currently 229 bands who use section 10 to define membership, and 38 bands that control membership through "self-government legislation outside of the *Indian Act*" (Indigenous and Northern Affairs Canada, "About Band Membership and How to Transfer to or Create a Band" (June 2018), online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470>>).

<sup>48</sup> Though the ultimate failure of the Sawridge band's claims likely sends a negative signal to the Nipissing's approach.

<sup>49</sup> J Borrows, "Seven Generations, Seven Teachings: Ending the *Indian Act*" (May 2008) at 30, online: National Centre for First Nations Governance <[http://fngovernance.org/ncfng\\_research/john\\_borrows.pdf](http://fngovernance.org/ncfng_research/john_borrows.pdf)>.

be seen how Canada's courts will respond to more aggressive demands for control. However, the *Sawridge* decision suggests the *Nipissing Gichi-Naaknigewin* may be claiming more than Canadian courts are willing to accept.

## B. The Act Of Writing Predominantly Oral Legal Traditions

The role of citizenship is central to the value of Indigenous constitutions because it enables people to access the constitutional rights that these constitutions codify. However, the act of codifying the principles that Indigenous communities wish to place in their constitutions is counterintuitive for many of the First Nations who are creating these constitutions. Indigenous legal traditions in Canada are usually contained within the oral tradition of an Indigenous group, so there are concerns about the impact of recording these principles; however, recording these rules is a necessary step toward increasing Indigenous self-governance, and constitutions are an ideal place to do so.<sup>50</sup> Thus, it is no surprise that Indigenous groups have struggled to record constitutions. In British Columbia, the Gitanyow people revealed that during their constitution-writing “it was a difficult process which lasted for two years, as there was a great deal of concern about the effect of reducing the Gitanyow Constitution to writing—it had functioned well for long, long years in an unwritten form, and [it had] the effect of using Western criteria in evaluating their constitution.”<sup>51</sup> Despite the difficulties that the Gitanyow people expressed, recording these constitutions is an essential step in bridging the gap between Indigenous legal traditions and the Canadian legal system. Written constitutions are necessary for dispensing with the *Indian Act*, but they are also problematic because they force Indigenous peoples to accept foreign methods of transmitting legal traditions.

One example of why recording constitutions is essential for the Crown and for Canadian courts is the case of *Orr v Fort McKay First Nation*.<sup>52</sup> Orr worked for the Fort McKay First Nation Band, and the band suspended him pending the result of a sexual assault charge. However, the First Nation had an Election Code, and the Election Code did not contemplate removing an employee in this situation. The First Nation tried to claim that it had exercised its inherent rights of governance when suspending Orr. In the end, the court decided the Election Code was clear and the First Nation could not overcome it via a claim to inherent power.<sup>53</sup> *Orr* is a challenging situation because it presents both the advantages and disadvantages of a recorded Indigenous law. The advantage in this case is that it prevented the Fort McKay First Nation from exercising its power in an arbitrary way. The First Nation was bound by its own written laws. In theory, a constitution plays the role of avoiding the arbitrary exercise of power, so *Orr* seems to support the idea that constitutions could strengthen Indigenous self-

<sup>50</sup> A Dewitt, “Judicial Review as a Limit to Indigenous Self-Governance” (2014) 77:1 Sask L Rev 205 at para 26.

<sup>51</sup> AC Peeling, “Traditional Governance and Constitution Making among the Gitanyow” (2004) at 5, online: National Centre for First Nations Governance <[http://fngovernance.org/resources\\_docs/Constitution\\_Making\\_Among\\_the\\_Gitanyow.pdf](http://fngovernance.org/resources_docs/Constitution_Making_Among_the_Gitanyow.pdf)>. Napoleon also explains that many Indigenous groups record their laws in oral histories (*supra* note 3 at 15). According to Borrows, Indigenous peoples have recorded laws on paper in the past, but “many Indigenous societies prefer to express their legal principles through oral tradition to maintain flexibility and relevance amidst changing circumstances; he supports the co-existence of written and oral aspects of Indigenous law because oral aspects maintain that flexibility (Borrows, *supra* note 2 at 56).

<sup>52</sup> *Orr v Fort McKay First Nation*, 2012 FCA 269 (CanLII), [2013] 1 CNLR 249 [*Orr*].

<sup>53</sup> *Ibid* at para 15–16.

governance. However, the problem in *Orr* was that a Canadian court made a ruling about an Indigenous issue and enforced a written legal document. Having Canadian courts making rulings about Indigenous legal documents appears to be another limit on self-governance. Thus, Indigenous constitutions need to include methods for enforcing their laws, and all three of the constitutions discussed in this paper have mechanisms for making laws and appealing those laws. However, the next step requires reviewing how Canadian courts have accepted the laws made under the auspices of these constitutions.

Drafting Indigenous constitutions is a difficult step and a test of an Indigenous group's capacity for self-governance. Well-drafted constitutions are essential for changing the relationship between these groups and the Crown. Their willingness to write down predominately oral traditions despite the difficulties in doing so illustrates that these First Nations are committed to replacing the *Indian Act* with an internally created constitution. The problem is that these new constitutions and the laws created under them are still coming before Canadian courts. Thus, appreciating the value of these constitutions requires an examination of how Canadian courts have treated these constitutions

#### IV THE LEGAL CONSEQUENCES: HOW HAVE CANADIAN COURTS RESPONDED TO INDIGENOUS CONSTITUTIONS?

Since the *Nisga'a Constitution* and the *Ta'an Kwäch'än Constitution* were ratified (in 1998 and 2012, respectively), both have received attention from the Canadian legal system. The results have been mixed. Overall, it appears that these Canadian courts are willing to defer to Indigenous constitutions and governance structures for issues that are local affairs and internal to those communities. However, the *Nipissing Gichi-Naaknigewin* appears to make claims for jurisdiction that go beyond the narrow scope Canadian courts have accepted; although it has not yet been the subject of a court case, a court likely will not endorse the growing jurisdiction demanded by the Nipissing. In short, it appears these constitutions can successfully receive judicial deference on issues that the *Indian Act* addresses. However, courts will likely reject any attempts by Indigenous peoples to use these constitutions to demand greater self-governance beyond the jurisdiction "given" to them through the *Indian Act* or other statutes.

##### A. Judicial Deference For Constitutional Provisions Regarding Local Affairs

Jurisdictional issues arise when members of the Indigenous communities that have drafted and ratified their own constitutions challenge the legitimacy of those constitutions in a Canadian court. The *Nisga'a Constitution* (and the final agreement that accompanied it) has come before Canadian courts on multiple occasions. So far, the courts have shown deference to the negotiated settlement between the Nisga'a and the Crown, since challenges by both non-Nisga'a politicians and members of the Nisga'a Nation have failed. A closer review of those cases reveals that the deference courts have shown may not be as supportive of Indigenous self-governance as it appears.



The seminal cases that address the Nisga'a Final Agreement and the self-governance apparatuses of the Nisga'a Nation (including its *Nisga'a Constitution*) are *Campbell*<sup>54</sup> and *Sga'nisim*.<sup>55</sup> In *Campbell*, the British Columbia Supreme Court upheld the Nisga'a Nation's constitutional right to self-govern.<sup>56</sup> That decision appears to show full support for Nisga'a self-governance from the Canadian legal system. However, higher courts have not endorsed Nisga'a self-governance with the same level of enthusiasm. In *Sga'nisim*, the British Columbia Court of Appeal rejected an attempt from within the Nisga'a Nation to have the Nisga'a Final Agreement declared invalid, but it made that decision for the wrong reasons. The court endorsed the Nisga'a Final Agreement because it was a well-structured treaty, but it refused to rule on whether the agreement was a manifestation of a constitutional right to self-govern.<sup>57</sup> The court clarified that the agreement does not give the Nisga'a government absolute or sovereign powers; both the treaty and section 35 of the CA, 1982 limit Nisga'a powers.<sup>58</sup> This limit on the *Nisga'a Constitution* means that the Crown still has an ultimate say in the value of its content. If a constitution oversteps the power that the Crown wishes to grant, it can turn to the treaty or to its ability to justifiably infringe any right protected by section 35 of the CA, 1982 (as discussed above). Therefore, the *Nisga'a Constitution* can be viewed as a positive step in moving away from relations between Nisga'a and the Crown centred on the *Indian Act*, but it does not push Indigenous self-governance beyond the limits of the Canadian constitution or treaty statutes.

Just as the *Nisga'a Constitution* appears to have its legal significance limited for the central rules of Indigenous governance and relations with the Crown, the *Ta'an Kwäch'än Constitution* has also received judicial deference, but only for its internal affairs. Yukon First Nations have received respect from the Canadian legal system on its constitutional and self-governance issues, but Yukon is enduring a slow transition away from the *Indian Act*. The Ta'an Kwäch'än Council and other Yukon First Nations groups, like the Kwanlin Dün, have seen the Yukon Supreme Court be as progressive as their colleagues at the British Columbia Court of Appeal in stating that Indigenous constitutions should receive constitutional treatment. In *Edzerza v Kwanlin Dün First Nation*, the court decided that it would avoid restricting the Indigenous community's ability to be self-governing.<sup>59</sup> In *Harpe*, the court explained that "the Constitution of the TKC is protected by ss. 25 and 35 of the Constitution Act, 1982 and should be interpreted as a constitutional document and not a statute."<sup>60</sup> Finally, in *Harpe v Massie*, the court elected not to get involved in a dispute because "it ultimately remains an internal dispute of a First Nation."<sup>61</sup> These cases demonstrate that Yukon's legal system has committed itself to deferring to Indigenous constitutions.

This recognition is a step further from the rigid space in which the *Nisga'a Constitution* operates. However, Yukon's experience has not been entirely positive. Ken Coates explains that "each First Nation is moving at its own pace to assume responsibilities . . . In sum, the changes

<sup>54</sup> *Campbell*, *supra* note 16.

<sup>55</sup> *Sga'nisim*, *supra* note 17.

<sup>56</sup> *Campbell*, *supra* note 16.

<sup>57</sup> *Sga'nisim*, *supra* note 17 at para 53.

<sup>58</sup> *Ibid* at para 82.

<sup>59</sup> *Edzerza v Kwanlin Dün First Nation*, 2008 YKCA 8 (CanLII) at para 27, 256 BCAC 160.

<sup>60</sup> *Harpe*, *supra* note 45 at para 37.

<sup>61</sup> *Harpe v Massie and the Ta'an Kwäch'än Council #2*, 2006 YKSC 39 at para 35, [2006] 4 CNLR 73.

in the Yukon were clearly transformative, albeit with lingering reminders of the long-term role of the Indian Act.”<sup>62</sup> It appears that the *Ta’an Kwäch’än Constitution* and the constitutions of other First Nations in Yukon exemplify this slow progress toward the destruction of the *Indian Act*. With the help of the Yukon courts, these First Nations are evolving toward self-governance at a slow pace. That slow pace will ensure that these groups can effectively eliminate the *Indian Act* and replace it with better relations between the First Nations of the Yukon and the Crown. However, a slow pace of progress means a fuller realization of Indigenous self-governance remains a distant possibility.

## B. The Likelihood of a Negative Reaction to “activist” Constitutions

While the *Nisga’a Constitution* does not do enough to advance the legal status of Indigenous self-governance and the *Ta’an Kwäch’än Constitution’s* improvements to Indigenous self-governance are slow, the *Nipissing Gichi-Naaknigewin* may have the opposite problem as it appears to be claiming more self-governance than Canadian courts are willing to accommodate. No Canadian court has yet considered the legality of the *Nipissing Gichi-Naaknigewin*, but this constitution may raise legal issues that the Crown will fight because the *Nipissing Gichi-Naaknigewin* extends its reach into issues on which the Crown does not want to negotiate with First Nations bands. John Borrows and Leonard Rotman explain how the *Report of the Royal Commission on Aboriginal Peoples* and subsequent government policies<sup>63</sup> have placed limits on Indigenous governments. Indigenous governments only have the inherent jurisdiction to regulate “core” areas of Indigenous jurisdiction, which includes all matters that “are of vital importance to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern.”<sup>64</sup> This perspective revisits a fundamental issue in Canadian–Indigenous relations as it shows that the Crown does not view this relationship as one in which two equal nations are bargaining. Instead, the First Nations governments are subordinate to the Crown.

The *Nipissing Gichi-Naaknigewin* pushes for expanded Indigenous self-governance that defies subordination, and some of its sections consequently could draw the ire of the Crown. For instance, Part 17.1 explains that the “Nipissing First Nation has exclusive jurisdiction to make laws with respect to environmental protection of natural resources. These laws shall be in accordance with Nipissing First Nation cultural practices designed to sustain and maintain our lands, fish, forest, wildlife, water and air and our heritage for future generations.”<sup>65</sup> This clause may be problematic, because although the Government of Canada’s policy states that it will negotiate First Nations control of natural resource management in treaties, the Crown retains the ultimate rights over “environmental protection.”<sup>66</sup> Thus, there appears to be an inconsistency between that policy and the *Nipissing Gichi-Naaknigewin’s* claim of “exclusive” authority. These issues are likely part of the treaty discussions between the Crown and the Nipissing, but this inconsistency will continue to exist until a treaty is in place.

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<sup>62</sup> Coates, *supra* note 13 at 19.

<sup>63</sup> See *supra* note 1.

<sup>64</sup> JJ Borrows and L I Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 4th ed (Markham: LexisNexis, 2012) at 65.

<sup>65</sup> *Nipissing Gichi-Naaknigewin*, *supra* note 4 at Part 17.1.

<sup>66</sup> Indigenous and Northern Affairs Canada, *supra* note 1.

If that inconsistency continues to exist in the absence of a treaty or a treaty does not resolve the inconsistency, a Canadian court will likely have to resolve the issue of whether the *Nipissing Gichi-Naaknigewin* or Canadian environmental laws will govern environmental protection in lands claimed by the Nipissing. Gordon Christie is not optimistic about the result of such a decision:

In the context of Aboriginal law there is a strong tendency on the part of Canadian governments to ignore or downplay what courts have positively stated in respect to Aboriginal and treaty rights. Furthermore, courts have explicitly said very little about self-government rights. What they have said is both (a) fairly vague, and (b) seemingly inappropriate for true governance rights. In addition, this area is highly contentious, with powerful opposing interests at play, of the sort the governments of Canada are likely to want to protect. Finally, there must be concern about how victories and defeats in the law play out. All too often while successful actions are restricted to the “victorious” Aboriginal nation, all nations are exposed to the setbacks. Defeats become precedents, while victories are nearly always restricted to the particular situation.<sup>67</sup>

Christie’s perspective suggests that there is little chance that a court would uphold the law in the *Nipissing Gichi-Naaknigewin* at the expense of Canadian government legislation. Thus, it appears that by asking for too much control, the Nipissing will need to take a more patient approach to Indigenous self-governance in the drafting of a constitution once treaty negotiations with the Crown come to fruition.

Christie’s pessimism stems from the fact that Indigenous rights have generally received unfavourable treatment by Canada’s courts and there has been a lack of judicial support for Indigenous self-governance in Canada. *Mitchell* is an example of a court rejecting claims for stronger self-governance because it would be difficult for courts to wrestle with competing sovereignties in Canada.<sup>68</sup> Thus it appears that Indigenous constitutions will need to continue to evolve slowly over time.

The evolution appears to be moving in a positive direction. The *Nisga’a Constitution* was mildly successful, but courts have given it less weight than proponents of self-governance may wish to see. the *Ta’an Kwäch’än Constitution*, a more recent incarnation, has received greater endorsement from courts in Yukon as those courts seem prepared to accept that these constitutions should be treated like constitutions. The *Nipissing Gichi-Naaknigewin* is the next attempt to move Indigenous self-governance forward. It appears inevitable that this constitution will find itself before the courts since it is inconsistent with official government policy. When it reaches the courts, judges will need to decide to either allow the evolution or push back against it. As Jennifer Dalton points out, this slow pace suits the Crown and the Canadian public generally, but it tests the patience of Indigenous peoples and their

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<sup>67</sup>. G Christie, “Aboriginal Nationhood and the Inherent Right to Self Government” (May 2007) at 3, online: National Centre for First Nations Governance <[http://fngovernance.org/ncfng\\_research/gordon\\_christie.pdf](http://fngovernance.org/ncfng_research/gordon_christie.pdf)>.

<sup>68</sup>. *Mitchell*, *supra* note 31 at paras 112–115.

supporters.<sup>69</sup> Through their constitutions, First Nations can continue to push the pace of change and demand that Canada's courts catch up.

## V CONCLUSION

Indigenous constitutions appear to stand at the crossroads between the old ways that the Crown and Indigenous peoples related to one another and the future of First Nations self-governance. That is why the drafters of these constitutions must be mindful of the dual role that these constitutions need to fulfil.<sup>70</sup> Their first role is they must facilitate the primary goals of modern treaties: dispensing with the *Indian Act* and providing members of First Nations bands with certainty during this period of transition.<sup>71</sup> Accomplishing that task means these constitutions must be cognizable to Canadian courts and make space for shared jurisdiction with the Crown so the two sides can continue to build their relationship. However, their second role appears to be inconsistent with that first role because the second role requires Indigenous constitutions to be documents that advance the cause of Indigenous self-governance. Advancing self-governance requires these constitutions to facilitate Indigenous law-making and leave no space for the Crown to review the contents of these constitutions. This review of three Indigenous constitutions reveals that the first role is easier than the second.

The reasons why it is easier for these constitutions to replace the *Indian Act* but harder for them to assert self-governance without any control from the Crown are threefold. First, it appears that Canadian courts would be unwilling to accept that Indigenous constitutions derive their legitimacy from inherently Indigenous sources. Canada's courts and the Crown would prefer to treat these constitutions as a manifestation of an Aboriginal right to self-governance that the Crown can infringe upon. Second, the drafting of these constitutions appears to favour Crown concerns. While having citizenship codes and written constitutions will help First Nations bands replace the *Indian Act*, the citizenship rules appear to have Canadian, not Indigenous, sources, and codifications are unfamiliar ways of transmitting law for most First Nations. Third, Canadian courts have been lukewarm in their acceptance of Indigenous self-governance and Indigenous constitutions. The cases in British Columbia and Yukon suggest courts are open to endorsing these constitutions for the internal affairs of Indigenous peoples, so Indigenous groups will be able to manage their own affairs without having to contend with external sources of law like the *Indian Act*. However, those courts appear unprepared to accept Indigenous peoples' attempts to grasp greater self-governance than the Crown is willing to acknowledge. Overall, Indigenous constitutions are a positive step

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<sup>69</sup> Dalton, *supra* note 36 at 77.

<sup>70</sup> Although this paper assumes that the creators and drafters of Indigenous constitutions are members of First Nations communities, there is little evidence to support that assumption since the names of drafters are not published with the constitutions. A future avenue of exploration could examine the identities of the drafters and the potential impacts of different drafter characteristics on the content of the constitutions. Are there differences between constitutions written by men or women, lawyers or non-lawyers, Indigenous or non-Indigenous?

<sup>71</sup> Displacing the *Indian Act* is such an essential aspect of the conversation that it is easy to forget its importance. However, the negative implications of the *Indian Act* are severe and beyond the scope of this paper to discuss. In the context of legal traditions, the *Indian Act* has undermined the management of Indigenous legal orders and the application of Indigenous laws (Napoleon, *supra* note 3 at 16). It has also historically failed to incorporate human rights standards, which is why Borrows refers to it as a "racist and sexist document" with a "suffocating embrace" (Borrows, *supra* note 2 at 38, 43).

toward self-governance, but they do not reset the power imbalance between the Crown and Indigenous peoples in Canada.

There is room for hope. As many commentators acknowledge, the movement toward self-governance for Indigenous people is a slow process.<sup>72</sup> Indigenous constitutions can contribute to that process by providing clarity about First Nations law-making for both Indigenous peoples who fear change and for Canadian courts who fear the outcome of greater Indigenous power. While they provide that clarity, Indigenous constitutions can also continue to stake claims for more self-governance through the sources of their legitimacy, the points of emphasis in their content, and the court cases that deal with them. Indigenous constitutions are a step in the right direction on the journey toward self-governance, despite their limitations.

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<sup>72</sup> See especially *supra* note 36.