

THE CONSTITUTIONAL OBLIGATION TO MEDIATE:

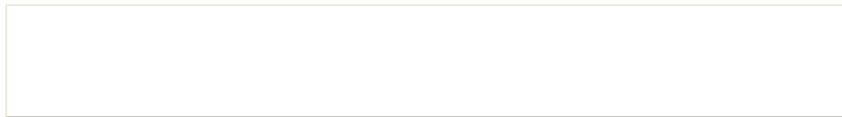
An Appeal for Justice for the Innu of Labrador

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The Royal Commission on Aboriginal Peoples provided one of the earliest authoritative considerations of the potential for mediation and other processes to resolve disputes between aboriginal peoples and public governments. The Supreme Court of Canada has more recently acknowledged this potentiality in dictum that, as recognized and affirmed by s. 35 of the *Constitution Act, 1982*, "[the] nature and scope of the [Crown's] duty of consultation will vary in the circumstances ... [in] most cases, it will be significantly deeper than mere consultation." In this paper, the author argues that this duty requires public governments to engage in mediated self-government negotiations with aboriginal peoples as a matter of state policy and fundamental justice in order to reconcile the past infringement of aboriginal rights. In particular, the adequacy of mediation as a dispute resolution process is discussed in the context of proposing a strategy for remedying the adverse circumstances presently confronting the Innu peoples of Canada.



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I. Introduction

A political impasse currently threatens to displace the fundamental legitimacy of representative democracy in Canada. Perhaps surprisingly, this particular constitutional crisis situation is unlikely to be discussed within the chambers of the National Assembly in Quebec City. To some extent, this unique problem emanates from the humanitarian tragedies that are unfolding in several isolated aboriginal communities who inhabit the mixed forest and subarctic tundra of interior or coastal portions of northern Labrador. Despite recent community based efforts, the social conditions affecting the Innu peoples in this region have deteriorated to the point of third-world comparison: unemployment consistently exceeds 80%, single-family dwellings are commonly occupied by multiple residents, the high school completion rate is less than 5%, and gas sniffing, alcoholism, suicide or physical abuse are perpetual features of everyday life. However, notwithstanding the pressing need to address these significant issues, the ongoing negotiations with federal and provincial governments concerning the permanent devolution of programs and services, the allocation of appropriate funding levels and the realization of local governance in Innu communities appears to have reached a virtual deadlock.

Understandably, the terms of various interim arrangements between these parties reflect the ingrained nature of the conflict underlying this stalemate. For instance, the most recent and highly publicized temporary agreement concerned the treatment of children suffering from solvent addictions and the included provision that mandated the relocation of these children from Sheshatshiu and Davis Inlet to a regional detoxification center. However, it was precisely such a clause that generated considerable opposition to the agreement among parents who repeatedly stated their preference for other alternatives, such as localized medical care within the network of traditional community support systems. Nonetheless, given that the outcome of comprehensive negotiations for a long-term agreement were still unsettled and that the federal government was apparently only willing to discuss the option of removing the children from the community, the Innu leaders reluctantly agreed to the impugned clause and the proposed treatment program. As a result, the local band councils have begun to question the very legitimacy of their existing form of constitutional governance because of a perceived government attitude that is unsympathetic to disadvantaged minorities and reluctant to seriously consider the immediate and ascertainable problems facing Innu communities.

Can this situation be mediated? This paper will suggest that this question can be answered in the affirmative and will examine the potential for mediation to resolve the conflict underlying the impasse between aboriginal peoples and public governments in circumstances similar to those confronting the Innu peoples. After outlining the historical context of the Innu experience in Canada, the deliberations of the Royal Commission on Aboriginal Peoples and the recent decisions of the Supreme Court will be reviewed. Finally, the adequacy of mediation as a dispute resolution process will be discussed and a practical strategy will be proposed. In doing so, the role of culture and aboriginal perspectives in dispute resolution will also be examined. In short, this paper will suggest that public governments should be subjected to a constitutional duty to engage in mediated aboriginal self-government negotiations, as a matter of state policy and justice, in order to facilitate "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

II. The Innu Experience in Canada: a history of hardship and cultural oppression

During the mid-1800s, the Innu basically lived as independent nomadic hunters, although their

eventual involvement in the fur trade did adversely affect their overall self-sufficiency through an increased dependence on commercial goods. Nonetheless, in the winter months, families would frequently journey through the interior of the Labrador peninsula in search of game, walking on snowshoes and pulling their possessions on toboggans. After the "ice break-up" in the summer, they often traveled by canoe to the coast or inland lakes to fish, trade, and repair equipment or socialize with friends and relatives. The central species to the Innu way of life consisted of the expansive herds of caribou that migrated throughout the region, although a traditional diet also included fish, bear, beaver and porcupine. As a main feature of their traditional culture, the caribou provided not only an adequate food source, but also raw material for clothing and housing construction, including bones and antlers for tools.

In turn, this lifestyle provided the foundation for the complex cosmology of the Innu value system, which adhered to the view that the universe is literally alive with potent spiritual forces that profoundly affect living beings, such as the "Masters" who communicate with people through dreams and control the caribou as a shared source of food. Consequently, the Innu typically shared the meat from a hunt amongst the other members of the community and respected the detailed procedures of sacred rituals. For example, the leg bone marrow of the caribou would be carefully preserved and mixed with fat for the ceremonial meal of *mukushan*. Thus, underlying almost every aspect of Innu culture is the notion that human beings should endeavor to understand and work within the boundaries of nature rather than attempting to change or manipulate it.

Regrettably, these cultural elements of a nomadic lifestyle would be profoundly transformed over the next 100 years by the politically organized naturalization of Innu society. By way of example, the federal government began enacting legislation as early as 1857 that openly aimed at assimilating aboriginal peoples into the mainstream of Euro-Canadian life. Remarkably, the essence of this policy was discretely preserved by the general system of public administration throughout the 20th century, including government decisions to relocate the aboriginal peoples to government-built residential communities and to implement conventional education programs for their children. In the meantime, the emergence of substance abuse and other modern hardships that were to be experienced in these communities would merely be symptomatic of a larger process of dispossession, oppression and colonization that effectively extended Euro-Canadian control over Innu Nitassinian territory.

Perhaps the clearest signal of this geopolitical naturalization occurred in 1927. In that year, the Judicial Committee of the Privy Council arbitrarily dissected the existing Nitassinian territory and separated the members of regional groups between francophone Quebec, a part of the Canadian federation, and English-speaking Labrador, then a part of the self-governing British colony of Newfoundland. During the 1930s, life in these Innu communities became increasingly more difficult following the periodic declines in the caribou population and a significant overall decrease in fur prices. Moreover, when Newfoundland finally became a Province of the Dominion of Canada in 1949, the Innu peoples were not even consulted on the legislative drafting of the Terms of Union or registered for benefits under the federal *Indian Act*. Consequently, they were also not granted land reserves or allowed access to the existing and future range of programs and services or limited powers of local governance generally afforded to other aboriginal peoples in Canada.

Between 1952 and 1969, the Newfoundland Department of Northern Labrador Affairs began to employ an more overt policy of "sedentarization" as part of a defined long-term strategy to transform and assimilate aboriginal peoples and culture into the mainstream of Euro-Canadian society. In fact, the compliance of the Innu peoples with these community relocation programs was virtually compelled by the government's demonstrably burdensome tactics, including the use of "housing contracts [that] legally bound Innu families to remain in their houses for ten years in order to receive title to them". In

addition, more than 6000 square kilometers of traditional Innu land was flooded during the 1970s for the purpose of constructing the Churchill hydroelectric project and was carried out in the absence of seemingly appropriate negotiations or financial compensation. Accordingly, in much the same way, the resultant change in circumstances from a culturally nomadic lifestyle to a state of foreign postmodern settlement in Innu communities occurred relatively quickly and without any meaningful political consideration or consultation.

Furthermore, many Canadians were essentially unaware of this lamentable existence of the Labrador Innu until 1992, when worldwide news broadcasts began to relay images of aboriginal children disoriented from the effects of gasoline fumes and started to focus international attention in the area. The following year, a report was issued by the Canadian Human Rights Commission that advised the federal government to acknowledge their "constitutional responsibility" to the Innu and enter into direct self-government negotiations, thereby also confirming a legal right to be registered for federal benefits and to have territorial land reserves created. That report caused the federal government to publish their first official response concerning the domestic management of aboriginal affairs in 1994, which included relatively ambiguous political commitments to provide emergency funding, assist with permanent relocation, support traditional activities and negotiate the devolution of programs and services to Innu control.

In 1999, notwithstanding these prior undertakings, the United Nations Human Rights Committee publicly condemned the Canadian government for its historical practice of extinguishing aboriginal peoples' rights and described the domestic situation of indigenous people as "the most pressing issue facing Canadians". In November of the same year, another international human rights organization published a report that included the following observation:

Our research shows that the problems of the Innu today stem largely from [a] process of colonialism, which has dramatically destabilized Innu society and caused deep psychological trauma. By depriving them of control over their own lives and land, subjecting them to alien institutions such as the judicial system, education, the church and state, and opening their territory to logging, hydroelectric schemes, mining and military low-level flying, Canada is, in fact, denying the Innu many of their most basic human rights.

In the same month, following a local referendum that overwhelmingly supported federal registration and the creation of territorial land reserves as interim measures until the comprehensive land claim and self-government negotiations could be settled, the *Canada-Newfoundland-Innu Accord* was created to facilitate the transfer of authority to pass local bylaws, create education programs and administer community policing. However, even this interim agreement has yet to be implemented by the respective public governments in any significant form.

Until very recently, under the urgent circumstances previously mentioned, it is clear that various government acts have affected the aboriginal rights of the Innu without meaningful consultation. In fact, the historical record demonstrates that the Innu have not voluntarily surrendered their aboriginal rights or their traditional territory, and are only considered "Canadians" because of the unilateral assertion of foreign control over their territory. In addition, it is clear that the Innu are a truly distinct people, with a profoundly unique language, culture, history and understanding of the universe who seem to desire the restoration of justice among their people through a process of meaningful consultation with their respective public governments. Since the summer of 2000, Innu negotiators have repeatedly stated their view that full control of their communities and traditional lands is the only viable solution to rectifying their perplexing social problems. As a result, the Innu peoples are continuing to pursue a fair agreement through good faith negotiations that will provide for the

devolution of programs and services and the equivalent tax treatment as other aboriginal peoples. Correspondingly, their ultimate long-term goal is equitably resolving their land claim and realizing their asserted right to self-government within the constitutional democracy of Canada.

III. *The Administration Aboriginal Justice: a duty to implement alternatives*

A. The Report of the Royal Commission on Aboriginal Peoples

The most authoritative, comprehensive and meaningful consultation process involving aboriginal peoples began in April of 1992, when the Royal Commission on Aboriginal Peoples opened their first round of public hearings in Winnipeg, Manitoba. In fact, over the period of two years, the members of the Commission visited 96 communities and heard from more than 2000 intervenors. In addition, the Commission also examined several documents published over the previous three decades in order to enhance their historical understanding of why prior agreements on the nature of the special relationship between aboriginal peoples and their governments had previously remained elusive. During this time, the mandate of the commissioners was made exceedingly clear: "to encourage dialogue and foster communication and greater understanding around Aboriginal issues".

However, what emerged from the dialogue was a profound message of distress concerning the entire range of distinct problems experienced by many aboriginal communities and an express desire to begin further discussions with regard to resolution and settlement. In response, this message informed the Commission's formulation the framework that acted as a focus for discussion between aboriginal and non-aboriginal peoples. The "four touchstones of reconciliation" included notions of self-determination, healing, self-sufficiency, and a relationship grounded in the concepts of mutual respect, good faith and equality. In turn, these discussions accounted for a consideration of the potential for negotiation and mediation to resolve disputes between aboriginal peoples and public governments.

During the hearings, many of the intervenors dealt with the concept of self-government in the context of the particular issue of the impact of Canadian sovereignty on the relationship between mainstream society and aboriginal peoples in Canada. For example, some of the aboriginal intervenors focused on establishing the federal government's obligation to negotiate in good faith and in a way that acknowledged equality, recognition and respect of collective as well as individual aboriginal rights. Notably, even some of the non-aboriginal intervenors also suggested that the demonstrable lack of political will by previous federal governments in advancing the aboriginal agenda was tantamount to a failure to live up to its constitutional responsibilities in that relationship.

With respect to the possibility of realizing a renewed and mutually beneficial relationship, Grand Chief Phil Fontaine (then of the Assembly of Manitoba Chiefs) supported the implementation of "some form of mediation process using outsiders not connected to either side to help arrive at a satisfactory resolution of [aboriginal] issues, since using the courts or the adversarial process does not work." In addition, several other aboriginal intervenors also discussed their general dissatisfaction with prior self-government negotiations arising from the experienced difficulties associated with "the federal process of backroom decision making in which there is almost no accountability or creativity." In this regard, the North Shore Tribal Council further argued that the "federal government is undermining the nature of the process as a negotiation between equal parties ... by unilaterally dictating timeframes and levels of resources." Moreover, similarly skeptical experiences were also noted by the Conseil des Atikamekw et des Montagnais: "[our] people ... get the impression that the governments have no intention to decide anything, and that they are simply pretending to dialogue with us, when in fact the real decisions are being taken elsewhere."

Upon a review of the published documents from the interval between the Hawthorn report in the late 1960s to the Canada round of constitutional negotiations in the early 1990s, the Commission's interpretation suggested that a true state of aboriginal discourse or dialogue in government negotiations was previously hindered by the application of differing conceptual paradigms and the lack of a general consensus about the areas of joint interest between the relevant "policy participants." For instance, one report discussed how the adoption of these distinctly different paradigms by Canadian governments and aboriginal associations had facilitated the application of multiple meanings to the use of single concepts in prior discussions. In addition, attention was also given to the relative disharmony that can emerge when these related policy participants discuss different and highly complex issues using the same or similar words and the associated potential to "frustrate efforts to achieve a common vision."

In particular, the Commission's study pointed to the fundamental power relationships in society as a possible source of this dissonance that has undermined the effort to achieve an effective dialogue in aboriginal dispute resolution. Given that the federal government is still the dominant participant in the relationship between aboriginal and non-aboriginal peoples, they are also in a position to control what particular parties are able to participate, why certain resolution processes are implemented and what options are made available for settlement. As a result, aboriginal associations have merely been permitted to "react to and cope with this process, recommend changes that the government is in no way compelled to consider, and if time and money permit, seek redress through the courts".

Once a conflict is immersed within the formal judicial system, however, the Canadian courts have not proven to be the most efficient or cost-effective dispute resolution process for aboriginal issues that frequently become more complex and specialized during negotiated process of implementing self-government agreements. Generally, as the courts are rarely able to reflect the unique nuances of aboriginal culture or to represent the existence of a co-equal power relationship, they are repeatedly questioned by critics as an appropriate forum for the resolution of intercultural disputes. In discussing the resultant uncertainty involved in aboriginal litigation and the limited value of court-ordered settlements, the Commission specifically emphasized the reality of this situation and re-asserted the value of seeking court-supported alternative processes:

Even today, the courts have difficulty reconciling Aboriginal concepts with Euro-Canadian legal concepts... Because negotiation is preferable to litigation as a means of resolving disputes between the Crown and aboriginal nations, "courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests." Aboriginal peoples will secure substantive gains in negotiations only if courts order remedies that give Aboriginal peoples more bargaining power than they have under Canadian law at present."

Essentially, the Commission's studies implied that if litigation or court action remained as the only means for aboriginal peoples to induce a government response, then a state of true dialogue or discourse would continue to elude these participants in the foreseeable future of their relationship.

A preferable view suggested by the Commission was to allow for the establishment of facilitative out-of-court processes that could make use of mediators or other expert advisors that would be familiar with the subject area of aboriginal self-government agreements as a means to resolving these issues in a non-adversarial and more informal atmosphere. The mediated consideration of further disputes arising from this process of negotiating and implementing aboriginal self-government in non-judicial forums could be highly cost-effective, expedient and respectful of the contrasted legal and cultural heritage of the parties. Moreover, the Commission noted that the provision of such an expert advisory board could also be firmly incorporated within a preliminary framework agreement between the parties that

would be capable of effectively setting the parameters for self-government negotiations.

In this regard, the Commission suggested that the clear impediments that had stunted previous negotiation attempts could eventually be overcome by these court-ordered consultations: "[dialogue] can be achieved when the right policy actors are present, the process is sustained, frank and respectful of differences, and there is a common vision of what is to be discussed." One illustration of this unhindered approach to negotiation emphasized the value of the "conference and negotiation" approach to settlement employed by the Metis and the government of Alberta, which was said to combine "energy, a practical focus and the longstanding commitment to work things out by negotiation". Another example offered by a Commission report discussed the effectiveness of the mediated dispute resolution processes established to assist the negotiation and implementation of self-government agreements among the Yukon First Nations.

In the final view of the Commission, the facilitation of future aboriginal self-government arrangements could be assisted by a clearly defined or "agreed-upon contextual statement" that would essentially enumerate the purpose of a mediated negotiation and help to guide the process, as well of the content, of any agreement between aboriginal peoples and the public governments of Canada. In other words, the Commission's suggestion of engaging in further consultation and negotiation discussions in aboriginal matters and related policy disputes almost appears to amount to an ethical or political duty of pursuing alternative dispute resolution processes. In the alternative, it was suggested that the absence of such democratically participatory processes might, in some cases, induce the selection of adverse unilateral initiatives by aboriginal peoples or governmental agencies that would give rise to extremely complex and highly unpredictable legal disputes. Thus, in relation to the Commission's important original mandate, it appears that the most significant recommendation to emerge from the public hearings was that new forms of assisted negotiation and mediation are likely to provide the best option or solution for establishing a rehabilitated consultation process to settle any current or future disputes arising from the relationship between aboriginal peoples and public governments.

B. The Supreme Court of Canada Jurisprudence

In hindsight, it is now more apparent that some of the studies of the Royal Commission on Aboriginal Peoples suggested that the process and content of aboriginal negotiation or "consultation" might be captured by s. 35 of the *Constitution Act, 1982*. Subsequently, this theory and many of the other ideas expressed in the Royal Commission's work have become increasingly accepted as a valuable resource and persuasive authority by various Canadian courts. In fact, several recent decisions of the Supreme Court of Canada have considered these concepts in providing some guidance on the basic circumstances that might give rise to a federal duty to consult with aboriginal peoples.

In *R. v. Sparrow*, the court clearly identified that the federal government must consult with aboriginal peoples in situations where it intends to pursue an action that will potentially interfere with the rights associated with an aboriginal community's collective interests or "distinctive culture." Next, the court indicated in *R. v. Badger* that a duty of consultation might also arise where a specific transaction or policy of government infringes a treaty right or other obligation recognized and affirmed by s. 35 of the *Constitution Act, 1982*. Taken together, these cases illustrate that Canadian courts are prepared to recognize the utility of alternative dispute resolution processes in the aboriginal context and willing to enforce an obligation for the relevant parties to act accordingly.

Nonetheless, the leading decision from the Supreme Court on the issue of the duty to consult with aboriginal peoples is clearly found in *Delgamuukw v. British Columbia*. In that case, the court held that certain aboriginal rights and territorial interests were clearly protected as a matter of constitutional law, which imposed a

correlative fiduciary duty on the federal government to consult with aboriginal peoples where a proposed government decision might interfere with that protected aboriginal right or interest. In particular, as a direct response to prior declarations asserting that the institutional competence of the judiciary should not be burdened with the excessive litigation of disputes, and that the parties should rather attempt to achieve negotiated settlements, Lamer C.J. confirmed that:

[ultimately], it is through negotiated settlements, with good faith and give and take on both sides, reinforced by the judgements of this Court, that we will achieve ... the basic purpose of s. 35 - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

In discussing the nature of a more general federal duty to consult and defining the parameters of an obligation to negotiate, the court stated that:

[the] nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions ... Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when the provinces enact hunting and fishing regulations in relation to Aboriginal lands."

As was encouraged by the Royal Commission on Aboriginal Peoples, the court engaged in a discussion of the importance of facilitating reconciliation between public governments and aboriginal peoples and essentially completed an assessment of the constitutional merits of alternative dispute resolution processes. Specifically, the court concluded that:

[Section] 35 'provides a solid constitutional base upon which subsequent negotiations can take place'. Those negotiations should also include other Aboriginal nations which may have a stake in the territory claimed. Moreover, the Crown is under a moral, if not legal, duty to enter into an conduct those negotiations in good faith.

Many commentators interpreted the decision in *Delgamuukw* as a desirable recognition and establishment of new constitutional standards to govern the present relationship between governments and aboriginal peoples. Likewise, the endorsement by the court of negotiated settlements appeared to openly acknowledge the indisputable potential for alternative dispute resolution forums to facilitate mutual party participation and integrative bargaining in constructing agreements, while also confirming the expensive, time-consuming and ineffectual nature of litigation in resolving the complex or competing claims in a manner that accounted for the interests of all the parties. In other words, the judgement was seen as enabling the capacity for more flexibility by the parties in the expression of their priorities and permitting the expansion of the potential range of available solutions. In this way, the general duty to consult was seen as a process consistent with the purpose of s. 35 and the trust-like relationship that would require the Crown to give effect to a *bona fide* effort to negotiate an agreement that remedied aboriginal interests in the event that they were previously infringed.

Other commentators even suggested that the stated "duty of consultation" would possibly act as a preventative measure to protect the potential future infringement of an aboriginal right. In this sense, the duty to negotiate would appropriately recognize the perspectives of aboriginal peoples and ensure that their collective opinions were listened to at the table where aboriginal interests and issues were being decided. However, these observers also noted that specific aspects of the nature and scope of this new approach are

still not articulated and that some of the questions surrounding the overall efficacy of this new duty remain unanswered. For instance, there has yet to be a definitive indication from the Supreme Court that would suggest that all courts are required to order negotiations or mediated consultations as an equitable remedy or as a matter of common law.

As a sign of encouragement in this regard, the landmark judgment in *Delgamuukw* was recently applied by the Federal Court of Canada in *Nunavik Inuit v. Canada*, where Richard A.C.J. acknowledged that the federal government had a duty to consult and negotiate in good faith about the potential establishment of a national park within Nunavik territory. In arriving at this decision, the court also relied on the conclusions and reasoning of the Royal Commission on Aboriginal Peoples as authority for the proposition that litigation is not the proper means to resolve many of the complex and detailed questions arising from "nation-to-nation negotiation," including the substantive definition, recognition and affirmation of aboriginal rights. Instead, the court's interpretation of previous research on aboriginal issues, prior legal precedent and s. 35 of the *Constitution Act, 1982* suggested that the judiciary should rather assume a more procedural role in designing remedies that facilitate, encourage and monitor negotiation and thereby become "something more in the order of constitutional referees."

In the *Succession Reference*, the Supreme Court unreservedly assumed an analogous conciliatory role and amplified the general duty to consult in the context of determining the nature of federal responsibilities during a proposed provincial secession. As a whole, the judgement had the result of entrenching the federal obligation to negotiate within the constitutional order of Canada on the basis of generally accepted legal principles and the "important underlying constitutional values" of federalism, democracy, the rule of law and the respect for minority rights. More importantly, the court essentially held that the principle of respect for minorities encompassed distinct questions of law concerning the purpose and effect of section 35 aboriginal rights:

[consistent] with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35 ... recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

In further commenting on the specific features of the particular right to self-determination, the court accepted that it could be said to exist in the following circumstances:

[the] ... right to self determination only generates, at best, a right to external self determination in situations of former colonies; where a people is oppressed, as for example under former military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social, and cultural development. In all [these] situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.

On the basis of these foregoing principles, one could ultimately argue that aboriginal peoples have a justifiable right to self-determination. Indeed, it appears that the jurisprudence of the Supreme Court, coupled with the Royal Commission's analysis of the relationship between aboriginal and non-aboriginal society, would support a duty to consult on the exercise of this right as an implicit concept within the written text of section 35.

In the context of the Labrador Innu, the historical record of various past instances of unjust government action without consultation would appear to satisfy the *Delgamuukw* test for a breach of an aboriginal right or interest and support the inference that such a violation would constitute a breach of sufficient severity, seriousness and relative importance so as to trigger "a duty significantly deeper than mere consultation." In this sense, the unilateral assertion of sovereignty during the formulation of the Canadian federal state could be considered as the effectuation of secession from the established geopolitical organization in the region "without prior consultation" involving the Innu peoples who lived there. Moreover, whereas constitutions prescribe the appropriate actions of government and the Supreme Court has interpreted a general government obligation under the constitution beyond mere consultation in such circumstances, it is conceivable that this enhanced obligation could furthermore require the Canadian federal government to pursue alternative dispute resolution processes or to engage in mediated self-government negotiations with the Innu peoples as a remedial matter of fundamental justice in reconciling the past infringement of their aboriginal rights.

I. The Mediated Settlement Conference: an attainable alternative

In this paper, frequent reference has been made to the term "mediation" and other related or derivative terms. At the outset, a foremost purpose of this section is to delineate a brief working definition of this term in order to provide an effective framework in the subsequent description of a proposal. However, at first sight, the term "mediation" does not clearly support a single analytical framework that can clearly describe and distinguish it from other decision-making processes. As a result, for present purposes, the following reformulated interpretation will serve as a working definition for outlining a proposal:

Mediation is a decision making process in which the parties are assisted by a third person or persons, the mediator(s), who attempt to systematically isolate disputed issues, develop options and consider alternatives, to improve the process of decision making through the use of a variety of interpersonal skills and techniques and to assist the parties in reaching an outcome to which each of them can consent and that will accommodate their interests.

Although mediation is often referred to as an "alternative dispute resolution process" and perceived as a mere adjunct to the conventional litigation method of managing disputes, it is noted that this term can be misleading as most disputes are actually settled through informal processes like discussion or avoidance. Similarly, as a mediator may not impose his or her judgement on the issues for that of the parties, mediation could also be considered an informal forum in which a neutral third party facilitates natural communication between parties to promote a settlement. Nonetheless, despite these differences, several authors have still observed that mediation often operates very much within the "shadow of the law."

Accordingly, a mediated settlement conference (MSC) is merely one example or alternative form of an informal mediation process. In traditional terms, the MSC essentially constitutes a balance of facilitative and evaluative modes of classical mediation that aims to balance interest-based problem solving mediation with rights-based advisory or managerial mediation. For example, the MSC attempts to have the parties negotiate in terms of their underlying needs and interests towards a settlement agreement that is ultimately consistent with their legal rights and entitlements. In the situation affecting the Innu, this paper assumes that not only is such a form of assisted negotiation the logical dispute resolution process of choice in order to achieve the

degree of meaningful consultation mandated by the Supreme Court, but that mediation is also the most equitable means of restoring a symmetry in the historically unequal relationship between aboriginal and non-aboriginal peoples. Therefore, the adequacy of mediated consultation as an alternative dispute resolution process will be hereinafter discussed within the context of proposing a strategy for remedying the adverse circumstances presently confronting the Innu peoples of Canada.

The Royal Commission on Aboriginal Peoples provides, in itself, a partial macro-illustration of some of the potential benefits to be gained from the mediated resolution of a public policy dispute. Obviously, a more dynamic and flexible version of this model would inevitably vary in relation to a differently defined mandate, such as assisted negotiation rather than information gathering. By the same token, an adapted micro-model of this consensus based process in the mediation context could accordingly be used to complement the existing governmental and Innu decision making process:

A consensus process is one in which all those who have a stake in the outcome aim to reach an agreement on actions and outcomes that resolve or advance issues related to environmental, social and economic sustainability. In a consensus process, participants work together to design a process that maximizes their ability to resolve their differences. Although they may not agree with all aspects of the agreement, consensus is reached if all participants are willing to live with the total package ... A consensus process provides an opportunity for participants to work together as equals to realize acceptable actions or outcomes without imposing the views of one group over another.

The core feature of this model is that, for the most part, the process is participant-designed by the decision makers that are attempting to discover interest-based tradeoffs in building consensus as a basis for decision, which also fosters the growth of a renewed relationship between the disputing parties.

As a consensus based process, the MSC is adapted from a model currently used in the United States to resolve disputes involving persons with mental disabilities and to facilitate the deconstruction of stigmas, myths and stereotypes that are often perpetuated among the disputing parties. Accordingly, the MSC would require the relevant parties to meet with a neutral panel of interdisciplinary experts that could offer an impartial and advisory non-binding opinion regarding the merits of the case. In particular, another important characteristic of this process is that these opinion act as a predicate to focusing further mediated settlement discussions that are highly informal, non-adversarial and supportive of input and participation from the parties that are directly involved. Furthermore, the various interdisciplinary experts can be used as an available reserve of co-mediators to ensure that the negotiation process remains less structured than a mini-trial or non-binding arbitration.

At this point, it is noted that the following discussion of an MSC proposal is not intended as a definitive solution for the Innu peoples, but rather it is merely an available version of an alternative dispute resolution process. Clearly, each substantive and procedural aspect of this proposal would be subject to the input and consent of the parties. For example, subject to review, the following composition and related functions of the interdisciplinary panel members might be considered:

- **Historian.** Simplify the preceding historical complexity of the present context of life in Innu communities.
- **Aboriginal Elder.** Facilitate an understanding of the complex Innu value system. For instance, the absence of a central authority or a prescribed body of knowledge in Innu tradition is due to the fact that cultural values are embedded in traditional oral histories that are taught to younger generations through imitation or observation and often vary between families or communities.

One of these values is the concept that human beings should endeavor to understand and work within the boundaries of nature rather than attempting to change or manipulate it. Another emphasized concept is the value of mutual responsibility and individual autonomy, which permits a wide range of personal behaviour to be tolerated rather than forcing individuals to conform to arbitrary institutional standards. As a result, the person who exhibits premier hunting skills within an Innu community is often recognized as the only legitimate authority figure. However, an obligation to comply with this *utshiman's* views would only arise when a proposed course of action could potentially threaten the survival of the entire group.

- **Professional Mediator.** Assist the parties in reaching an interest-based solution that is consistent with recognized legal obligations.
- **Sociologist or Social Psychologist.** Assess the degree to which cultural assumptions and stereotypes are impeding discourse.
- **Legal Scholar.** Evaluate the persuasive merit of the arguments advanced by the parties.
- **Other Experts Requested by the Parties.**

Overall, the composition of the MSC interdisciplinary panel more or less depends on the preferences of the parties and, as the advisory opinions are non-binding, the number of panel participants is not a logistical problem. As Peter Hogg has noted, it is "clearly in the best interests of all the parties to come to the negotiation table where an agreement can be reached based on reasoning broader than that permitted by legal doctrine" However, as disputes may inevitably arise, and to avoid the danger alluded to by John Steinbeck's quotation on the preface page of this paper, this process of mediated reconciliation with aboriginal peoples should nonetheless be supported and protected by the traditional court system. In essence, it is suggested that legal remedies must be made to be suitable to the particular circumstances of a specific situation and that the parties should be involved in the drafting of a judicial MSC order and the related contextual statement setting out the procedural details.

Although the potential pitfalls of relying on legal processes have been well documented, the role of the courts is essential to support this alternative dispute resolution process and reinforcement is required by an authoritative court order. One possible version of a detailed standing order appears below. In essence, by requiring a more complete response from the parties to the judicial standing order, the purpose is to attempt to develop the MSC from a merely unofficial alternative process to one that has an important outcome in the context of the dispute. In other words, with this approach, the judicial standing order serves to amplify the significance of the MSC in the estimation of the parties.

For the purposes of the following example, the Supreme Court of Canada has been used as the issuing jurisdiction, but there is no reason why the Supreme Court of a Province could not also supervise the MSC process. Of interest, the document includes a contextual statement adapted from the language of the now ineffective Charlottetown Accord and the suggested improvements that appear in one of the research studies of the Royal Commission on Aboriginal Peoples. Basically, the purpose of this item is to offer a perspective in which the discussions on the issue of self-government can be conducted between individual Innu communities and public governments. Also, it can further provide a point of reference for defining the main social issues affecting a particular aboriginal people and negotiating an agreement with government to develop appropriate jurisdictional responses or even clarifying fiscal responsibility. Above all, counsel should be required to provide a copy of the judicial standing order to their clients and to also discuss the points contained therein with the expert panelists prior to the commencement of the MSC.

A Proposed Judicial Standing Order Setting a Mediated Settlement Conference

This self-government negotiation between the Innu peoples of Labrador and the Government of Canada has been set for a mediated settlement conference before the Right Honourable Chief Justice Beverly McLaughlin. All parties and their representatives are ORDERED TO APPEAR at the Newfoundland Convention Center, Hotel Gander, 100 Trans Canada Highway, Gander, NF <<http://www.hotelgander.com>>, on the date and time set forth in the attached court order.

Mediated Settlement Conference Preparation

Whereas the Supreme Court of Canada has acknowledged the significant potential of consultation in resolving disputes between aboriginal peoples and public governments.

And whereas the parties recognize their constitutional duty to engage in more than mere consultation in the negation of disputes involving the rights entrenched under s. 35 of the *Constitution Act, 1982*.

Therefore, this court hereby declares that preparation and involvement in a mediated settlement conference (MSC) should be treated as seriously as preparation and involvement in litigation. As planning is fundamental to this process, the court has found that the following components are essential to a successful mediated settlement conference.

A. Format

1. Pre-Conference Contextual Statement

The authority of a duly constituted legislative association of Innu peoples of Labrador will include the exercise of the right of self government

- a. to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
- b. to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies and recognizing that for the Innu peoples the implementation of self-government will mean the articulation of rights and responsibilities flowing from existing obligations, which should be fully honoured

• Mediation

The expert panelists will generally use a standard mediation format: opening presentations by each party and selected panelists followed by a joint discussion among all the participants and private caucusing by the mediator(s) with each individual party.

• Statements Inadmissible

Any statements made by any party during the MSC will not be admissible in court. The parties are encouraged to be candid and open in their discussions.

• Other Dispute Resolution Processes

If the parties desire the incorporation of private negotiation, non-binding mini-hearing, or other procedure, they should immediately advise the MSC clerk, who will arrange for the alternative procedure or a conference call with the court to discuss the options.

A. Issues to Be Discussed During Conference

The parties should be prepared to discuss the following at the settlement conference:

1. What are your objectives in the negotiation?
2. What issues (factual and legal) need to be resolved? What are the strengths and weaknesses of your position?
3. Do you understand the opposing party's view of the your position? What is wrong with their position? What is right with their perception?
4. What are the points of agreement and disagreement (factual and legal) between the parties?
5. What are the obstacles to achieving settlement?
6. What remedies are available through litigation or otherwise?
7. Are there possibilities for a creative solution of

by Canadian governments as a central part of this self-government implementation.

1. Attendance of the Parties Required

PARTIES WITH ULTIMATE SETTLEMENT AUTHORITY MUST BE PERSONALLY PRESENT. An absent party shall appear by a representative of that party who is authorized to negotiate, and who has AUTHORITY TO SETTLE THE MATTER. Having a party with authority available BY TELEPHONE or other means of communication is NOT an ACCEPTABLE alternative, except under the most extenuating circumstances. Because the expert panelists generally set aside a substantial amount of time for each conference, it is impossible for a party who is not personally present to appreciate the process and the multiplicity of reasons that may justify a change in a party's perspective towards settlement.

the dispute?

8. DO you have adequate information to discuss settlement? If not, how will you obtain sufficient information to facilitate a meaningful settlement discussion?
9. Are any parties missing from the discussion? Do we need to include a representative of another party?

A. Involvement of the Participants

For many of the participants, this will be the first time they will have participated in a court-supervised MSC. For this reason, counsel shall provide a copy of this judicial standing order to their client and shall also discuss the points contained herein with the expert panelists prior to the commencement of the MSC.

B. Visit the Court's Website

For additional information concerning Chief Justice McLaughlin's practices and procedures, visit the court's website on the internet at < <http://www.scc-csc.gc.ca>>. There you will find published articles concerning the elements of conducting a successful MSC. Reading these articles will assist you in preparing for the MSC.

- **ENTER:**
- **DATED: April 26, 2001**
- **Rt. Hon. Beverly McLaughlin,**
Supreme Court of Canada Chief Justice

As the mediated settlement conference progresses, many specific government policies will inevitably need to be reevaluated in order to facilitate a meaningful negotiation process with the aboriginal Innu peoples of Canada. In the meantime, some preliminary observations concerning the possible implementation of a final agreement purporting to outline the nature and constitutive elements of the intrinsic right to Innu self-government can be summarized as follows:

1. The realization of the inherent right to self-government in Innu communities should be implemented by self-government agreements between the Government of Canada and the Innu peoples of Labrador. These agreements will avoid the need for unilateral initiatives by either party, which would likely involve the protracted litigation of disputes and unpredictable outcomes.
2. Legal recognition of the inherent right and the consensual definition of a contextual statement can be included in a preliminary agreement between the public governments and the Innu peoples of Labrador while also forming the framework for specific self-government negotiations.
3. Self-government agreements should include a clearly defined list of powers that are appropriate and necessary for the particular governance of the Innu people. Some powers may be exclusive

and others may be concurrent. Some powers may be based on an individual power over particular Innu peoples and others may be based on a collective power over the Innu people's territory. Emergency powers may also be needed.

4. Self-government agreements should clearly establish alternative dispute resolution procedures for resolving disputes concerning the procedural and substantive implementation of the right of self-government. However, self-government agreements should also grant jurisdictional power to the courts to settle questions of law arising from the interpretation or administration of the agreements.
5. Self-government agreements must include provisions for the resource co-ordination and financing of self-government by taxation and transfers from other branches of government.
6. Self-government agreements should be legally protected within section 35 of the *Constitution Act, 1982*. This constitutional protection will ensure that these agreements are accessible for legislative enactment (in order to be binding on third parties that are not parties to the original agreement) and not vulnerable to unilateral alteration by Parliament or a provincial legislature.

I. Conclusion

Cultural imagination, political determination and simple co-operation will be needed in order to achieve progress in the self-government negotiations of aboriginal peoples in Canada. In the case of the Innu of Labrador, it is clear that the power structures governing Canadian society and the institutionalization of various situational factors (timing, language, paradigm, etc.) have effectively subverted the potential of achieving open discourse and true dialogue. On the basis of the preceding argument, it would appear that public governments are obligated to engage in mediated self-government negotiations with aboriginal peoples as a matter of state policy and fundamental justice in precluding the potential infringement of aboriginal rights in these negotiations.

The foregoing proposal recommends that nothing less than the mediation of aboriginal self-government consultations is needed to break free from a prior history of "subjugation, domination and exploitation" and to restore the integrity and revitalize the legitimacy of our constitutional democracy. Moreover, it is suggested that all courts should be required to facilitate this process and to order assisted negotiations or mediated consultations as an equitable remedy or a matter of constitutional law, as it seems that our most basic notions of fundamental justice virtually require that this situation be mediated. In support of this position, the Supreme Court has constitutionally recognized that the enduring aboriginal sense of autonomy and distinctiveness that has survived the repeated attempts at cultural oppression is now protected in s. 35 of the *Constitution Act, 1982*. Above all, it is asserted that, analogous to Innu belief, public governments should endeavor to understand and work within the boundaries of our constitutional democracy rather than attempting to change or manipulate it.

In sum, this preliminary mediation proposal clearly has the genuine potential to facilitate the restoration of Innu control over the institutions that most profoundly affect their lives, to support the transfer of power to remedy their considerable social problems, to assist in the reconciliation process for past injustices, and to

support in the preparation of building a sustainable relationship for the future. However, if a meaningful reconciliation process is not eventually implemented by our public governments, then Canadians may be destined to forever contemplate the significance of the following submission to the Royal Commission on Aboriginal Peoples as the last remaining evidence of symbolic Innu participation in a democratic process:

[our] territory is the matrix, the source, the absolutely indispensable and primary element from which we will be able to rebuild an independence which for generations has been ridiculed, trampled, and blocked.