

3) Aboriginal Representation on the Supreme Court of Canada

The case for Aboriginal representation on the Supreme Court of Canada (SCC) is part of the broader case for Aboriginal participation in Canada's governmental and public institutions. The case rests upon principles that are already well established outside the context of determining the place of the Aboriginal peoples within our constitutional democracy. These principles are deeply rooted in Canada's history, constitution, law, and politics. These principles, when interpreted in light of recent political events and judicial decisions, are cutting a channel towards the creation of a new constitutional convention, or norm of expected political behaviour, to include the Aboriginal peoples' consent and participation as part of a legitimate Canadian constitutional order. The major recent

⁶⁰ M. Foucault, *Discipline and Punish: the Birth of the Prison*, trans. A. Sheridan (New York: Pantheon Books, 1977) at 27; M. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977); KM. MacDonald, *The Sociology of the Professions* (London: Sage, 1995); D.W. Rossides, *Professions and Disciplines: Functional and Conflict Perspectives* (Upper Saddle River, New Jersey: Prentice Hall, 1998).

⁶¹ As Burton Bledston has noted, the "culture of professionalism" seemed ... capable of transcending 'the favoritism of politics, the corruption of personality, and the exclusiveness of partisanship,' as cited by W.W. Pue, "Lawyering for a Fragmented World: Professionalism after God" (1998) *Int'l J. Leg. Prof.* 125 at 126.

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landmark event is the constitutional affirmation and recognition of the rights of “the aboriginal peoples” in the Constitution Act 1982(CA82)⁶² and the events surrounding it.

The case for Aboriginal representation on the SCC will be developed as follows. First, the legal status of Aboriginal persons as Canadian citizens will be reviewed, explaining the sphere within which the concepts of equal citizenship and affirmative action for persons of ‘racial ancestry’ operate. The case for representation on the SCC being made here does not rest on this basis, but it is important to debunk political arguments that are often mistakenly based on these considerations. That will be done following the analysis in the next section.

The next section will review the unique constitutional status of ‘the aboriginal peoples’ which are often described as ‘nations’ within Canada, and upon which the case for special representation is based. Here will be considered the norms behind the right of self-determination in international law and self-government in domestic law, and the constitutional framework within which individual rights are mediated with the collective rights of the ‘nations’. The differences between group ‘national’ identity and ‘racial’ identity will be clarified, and the foundations of legal pluralism reviewed. An analogy will be drawn between the provinces and aboriginal peoples as constitutional entities and actors whose participation in national institutions matter for constitutional legitimacy. This analysis will show how some common arguments against Aboriginal representation on the SCC are mistakenly based upon considerations relevant to Aboriginal persons *qua* citizens, but which are irrelevant to the case of Aboriginal ‘nations’.

The implications of this analysis for the judiciary and judicial appointments will then be addressed. Canada’s constitutional commitments to political and legal pluralism will show the significance of the judicial role in deciding questions intimately linked to the political and legal identity and rights of the Aboriginal peoples, and how this raises the issues of political legitimacy, judicial merit, and competence. The conclusion will identify recent views on the subject of Aboriginal representation on the SCC, and make specific recommendations.

a) Aboriginal persons as individual Canadian citizens

Canadian Aboriginal persons are citizens, and as such they stand in the same legal position as all Canadians citizens. As a matter of law, the benefits and burdens of Canadian citizenship apply generally without regard to Aboriginal status. Aboriginal people, including Indians with special legislated status under the *Indian Act*⁶³ have all the

⁶² *Constitution Act, 1982* [being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11] S 35 provides: 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

⁶³ *RSC 1985, c.I-5.*

legal rights of citizens unless the rights are taken away by valid legislation.⁶⁴ This happened historically, for example, with the removal of the electoral franchise from status Indians,⁶⁵ but it is safe to presume that this would not now be constitutionally possible. As individual citizens, Aboriginal persons have no legal claim for special treatment by the general laws of Canada, or for special representation on any existing courts, unless such special treatment is mandated by the law of the constitution.

It happens that the law of the Constitution *does* provide, but outside the realm of special representation, for special treatment of certain groups within which Aboriginal persons may be included. It is necessary to briefly examine this special provision because it is central to the distinctions that need to be made for present purposes. The affirmative action provision of s.15 (2) of the *Charter of Rights and Freedoms* (the Charter)⁶⁶ a subject of intense political and theoretical contention, allows special discriminatory state action for the benefit of persons belonging to historically disadvantaged groups. The bases for such constitutionally legitimate action include several categories listed in s.15(2), including 'race, ethnic or national origin,' as well as a number of new categories created by the SCC. It seems clear that Aboriginal persons can belong to a number of these categories, and can therefore become the subject of remedial discretionary state actions and laws. This, however, does not serve to distinguish them from other citizens who also fall within the same categories.

The concept of equality among citizens applies to Aboriginal persons, as such, as it does to all Canadian citizens. This proposition is subject only to constitutional exceptions, exemplified by the affirmative action provisions in s.15 (2). A further exception operates in the case of the category of those among Aboriginal persons who enjoy the status of membership or citizenship in Aboriginal 'nations'. This is addressed in the next section, which will show why the category of persons in s.15 must not be conflated with the category of persons comprising the 'peoples' recognized in s.35, which lies outside the *Charter* and outside the reach of arguments relevant to individual citizenship.

⁶⁴ See *Sanderson v. Heap* (1909), 19 Man. R. 122., where, at p. 125, Mathers J. says: Unlike the Indians of the United States, who are aliens, the Indians of Canada are British subjects and entitled to all the rights and privileges of subjects, except in so far as these rights are restricted by statute. See also *Regina ex rel Gibb v White* (1870), 5 P.R. 315; 2 C.N.L.C. 565. It is beyond the scope of this paper to discuss the differences and similarities between the concepts of citizenship and subject, and their implications for a legitimate governing order. For a discussion, see, e.g. John Pocock, "The Ideal of Citizenship Since Classical Times" in *The Citizenship Debates*, Ed. Gershon Shafir, Minneapolis, University of Minnesota Press, 1998, pp. 31-42.

⁶⁵ John Leslie and Ron Maguire, ed. *The Historical Development of the Indian Act* (Ottawa: Indian Affairs and Northern Development, 1978)

⁶⁶ S.15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

b) Aboriginal peoples as ‘nations’

S.35 of the CA82 recognizes and affirms the rights of ‘peoples’. The precise meaning of this term has not been established even in international law where ‘peoples’ enjoy recognized collective rights, including the right of self-determination.⁶⁷ It is well beyond the scope of the present project to deal comprehensively with the domestic constitutional meaning of the term in s.35. It is however, important to emphasize, as the RCAP concluded, that Aboriginal peoples constitute social and political communities descended from historic ‘nations’, rather than racial groups: “Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change their internal composition.”⁶⁸

It was easy for the early colonists in North America to see that the ancestral communities of today’s Aboriginal peoples “were separate and distinct entities, both territorially and in terms of culture and political organization. They were regarded as political units...”,⁶⁹ and recognized as such in treaties and other arrangements. Today, the distinct Aboriginal societies encountered by the early British colonists have seen their societal institutions eroded and destroyed, and their descendants are, to many people, visible only as individuals within the general population. The distinct political character of first nations has remained elusive also because of the failure of the federal government to legislate a comprehensive recognition scheme to make the Constitutional recognition effective to protect the group rights of all the Aboriginal peoples that s.35 guarantees.⁷⁰ The only group usually perceived as politically distinct consists of the Aboriginal who

⁶⁷ Canada has been criticized in three reports for failing to implement the right of self-determination of Aboriginal Peoples as recommended by the RCAP, and for other failures. See CERD CERD/C/61/CO/3, 23 August, 2002; CESCR Document E/C.12/1/Add 31, ‘Concluding Observations of the Committee: Canada 10/12/98; Human Rights Committee “Concluding Observations: Canada 07/04/99, Document CCPR/C/79/Add 105. For a discussion of Canadian obligations, see, e.g. Paul Joffe, “Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec” (200)45 McGill L.J. 155. For a series of essays on the right of self-determination, see Pekka Aikio and Martin Scheinin, ed. *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Abo, Finland, Institute for Human Rights, Abo Akedemi University, 2000).

⁶⁸ Canada, RCAP, Final Report of the Royal Commission: vol 2: Restructuring the Relationship c. 3, esp. at 177. See also the definition of a rights-bearing ‘nation’ at 276. For an argument typical of those who erroneously characterize First Nations as ‘races’, see Jim Prentice, National Post ‘A Bad Deal for Canada’ Thursday, 9 December, 2004, page A19 where the federal Conservative Party Aboriginal Affairs critic states: “...Ottawa is creating a Tlicho government that is founded explicitly upon race. This is the opposite of Nunavut, which will eventually achieve provincial status based upon governance structures in which all citizens are equal.”

⁶⁹ John Giokas, “Domestic Recognition in the United States and Canada” in Paul L.A.H. Chartrand, ed. *Who Are Canada’s Aboriginal Peoples: Recognition, Definition, and Jurisdiction* (Saskatoon, Purich Publishing Ltd, 2002) [Chartrand 2002], c.4, at 128.

⁷⁰ This point is developed in Chartrand, *ibid*, passim.

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live on reserved lands and whose affairs there are still administered by the federal executive under the terms of *Indian Act* which dates back from the 19th century.⁷¹

Events in recent times, however, have started the long overdue process of recognizing that First Nations are entitled to determine for themselves what is their vision of the good society, or in other words, to decide the nature and scope of their national 'public interest', and to govern themselves accordingly within Canada. Current federal policy has, since 1995, recognized the political right of self-government of Aboriginal peoples, and modern treaties are shaping a new recognition scheme based on the recognition of inherent constitutional and political rights of Aboriginal 'nations'. The unique political character of the Aboriginal peoples is implicit in the terms of s.35.1, which acknowledges a unique role for Aboriginal political representatives in the process of amending the Constitution of Canada, one similar to that of the other political units in the Canadian federation, the provinces.⁷² The recognition of this unique political and constitutional role emerged from political action of the Aboriginal representatives prior to, during, and after, the 'patriation' of the Constitution in 1982.⁷³ In the 1980s, Aboriginal participation in the First Ministers' Conferences on Aboriginal Constitutional Reform, which was based upon the now spent provisions of s.37 and s.37.1 of the CA82, gave rise to new political practices and conventions whereby Aboriginal representatives are now participants in national discussions with government leaders on a range of issues that affect the interests of the peoples they represent.⁷⁴ At the time of writing, the Prime Minister and other federal ministers are involved in Round Table discussions on policy-making with national Aboriginal leaders.⁷⁵ It is in the context of this emerging political norm or constitutional convention, one which mandates the participation of Aboriginal

⁷¹ R.S.C. 1985, c. I-5. Useful studies of Indian policy include: John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in J.R. Miller, ed. *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991); Leslie, John. "Assimilation, Interpretation or Termination? The Development of Canadian Indian Policy (1943-1963)." PhD Thesis, Carleton University, 1999; Taylor, John L. "The Development of an Indian Policy for the Canadian North-West." PhD Thesis, Queen's University, 1975.

⁷² S 35.1 provides: "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part, (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

⁷³ *R v Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49, File No.: 20311. "It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis..."

⁷⁴ See Norman K. Zlotkin, “The 1983 and 1984 Constitutional Conferences: Only the Beginning” (1984) 3 C.N.L.R. 3-29 for a discussion of conventions in this context. The RCAP has suggested that a constitutional convention requires Aboriginal participation in future constitutional conferences: Volume 5: Libraxus CD-ROM version.

⁷⁵ Information about the Aboriginal Round Table process is available on a government website: http://www.aboriginalroundtable.ca/index_e.html Current information can also be obtained on the websites of the national Aboriginal representative organizations, which can be accessed via the Aboriginal Portal at <http://www.aboriginalcanada.gc.ca/acp/site.nsf/en-frames/index.html>

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peoples in a legitimate governing order in Canada, that emerges the case for Aboriginal representation on the SCC.

The case for Aboriginal representation on the SCC does not depend, then, as is often asserted by opponents, on concepts of affirmative action, special treatment for ethnic minorities, nor on ‘race-based’ special treatment. It is shameful to rely on the discredited concept of biological determinism implied by ‘race’.⁷⁶ It is a constitutional error to conflate the groups in s.15 with the Aboriginal peoples in s.35, and to use concepts relating to individual rights to attack the historic group rights in s.35. Where Aboriginal persons are members of the nations or peoples in s.35, then, the relationship between the citizenship rights and other Charter rights of these Aboriginal persons are constitutionally balanced with the collective rights of the Aboriginal people or nation to which they belong, by the operation of s.25. It is the unique constitutional status of the Aboriginal peoples as historic nations that warrants special group accommodation, not their designation as ‘races’ or ‘ethnic groups’.

The Aboriginal peoples have a unique political and constitutional status in Canada. This status reflects the Canadian commitment to political and legal pluralism, which is also evident in the status and role of the provinces, and also in the status and role of the common law and civil law traditions. Federal concepts and structures change to accommodate this pluralism. The SCC has stated, in this regard, that; “In our constitutional tradition, legality and legitimacy are linked” and, Canada’s constitutional history “demonstrates that our governing institutions have adapted and changed to reflect changing social and political values.”⁷⁷

Canadian political pluralism has always been reflected in the status and roles of the provinces. Provinces have differential rights of membership, vested in their residents, and differential laws that require accommodation and representation in legitimate decision-making. The new political pluralism recognizes the unique constitutional status and role of *all* constitutionally significant political entities: federal, provincial and territorial jurisdictions and polities, as well as those of Aboriginal peoples. This has significant implications for constitutional legitimacy. For example, the principle of consent that was discussed in the *Manitoba Language Reference* case⁷⁸ arguably means that the consent of the Aboriginal peoples must underpin constitutional legitimacy, while the principles

⁷⁶ The pernicious connotations of ‘race’ are debunked in Ashley Montagu’s classic work: *Man’s Most Dangerous Myth: The Fallacy of Race*, 6th ed (Walnut Creek, CA: Altamira Press, 1997) A useful general commentary is: “[T]here is no distinctive biological reality called ‘race’ that can be determined by objective scientific procedures. The social, medical and physical sciences have demonstrated this fact... Human populations singled out as ‘races’ are simply groups with visible differences that Europeans and European Americans have decided to emphasize as important in their social, economic, and political relations”. Joe R. Feagin & C.B. Feagin, ‘Racial and Ethnic Relations’ in Juan F. Perea, et al, ed. *Race and Races: Cases and Materials for a Diverse America* (St.Paul, MN: West Group, American Case Book Series, 200) at 57.

⁷⁷ *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217, at 240.

⁷⁸ *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721, at 745, para 56.

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elaborated in the *Quebec Secession Reference* case⁷⁹ arguably entitle Aboriginal peoples to call for negotiations on the constitutional terms to which *their* consent is to attach.⁸⁰

Turning now to legal pluralism, the legislative authority of Aboriginal peoples has now been constitutionally and legislatively recognized in recent treaties, for example, with the Nisga'a nation. Aboriginal legislation now fits within the Canadian legal system. This point can be made without the need to rely on, although it would be augmented by, the view that there is an inherent legislative authority vested in Aboriginal societies.⁸¹

In addition to the treaty-based legislative powers that are being recognized now, the traditional laws of the Aboriginal people are part of the Canadian legal system. Colonial courts directly applied Aboriginal laws,⁸² and the SCC returned Canadian law to the original imperial constitutional principles that governed the relationship between indigenous laws and legal cultures and those of the British colonists in decisions in the 1990s.⁸³

The implications for the judiciary and judicial appointments of the emerging constitutional convention which requires accommodation of the Aboriginal peoples in Canadian political and legal pluralism will be considered next.

c) implications of s.35 of the *Constitution Act of 1982* for the judiciary and judicial appointments

The enactment of s.35 was described earlier as the landmark event among others that have given rise to the new norm of political behaviour that includes Aboriginal peoples in national statecraft. Section 35 guarantees group rights the content of which is to be elaborated by the judiciary in its role of interpreting the law of the constitution.⁸⁴ The judicial role will be supplemented by, and will necessarily reflect the results of current

⁷⁹ Note x.

⁸⁰ Furthermore, if the right of self-determination is a human right, then it is a principle that must inform the interpretation of the Constitution: see, *R v Demers* (2004) 2 S.C.R. 489; [2004]S.C.J. No 43 File #29234 QL. Per LeBel, J. at para 79ff.

⁸¹ The view is stated, e.g., in the Supreme Court of B.C. in *Campbell v B.C. (Att.Gen)*, [200] B.C.J. No 1524.

⁸² See.e.g. *Connolly v. Woolrich*, (1867), 17 R.J.R.Q. 75; (1867), 11 L.C.Jur. 197 (C.S. Que.); upheld on appeal: *Johnstone v Connolly* (1869), 17 R.J. R.Q. 266; 1 R.L.O.S. 253, (Q.B.Q.), 1 CNLC 70, and the discussion of the case and its implications in Volume 1 of the final report of the RCAP, supra., note 68. See also the commentary by Paul L.A.H. Chartrand in 22 April 2005 issue of *Lawyer's Weekly*. See also *Campbell v. B.C. (Attorney General)*, [200] B.C.J. No 1524 (S.C.)

⁸³ See generally Russel L. Barsh, "Indigenous Rights and the Lex Loci in British Imperial Law" in Kerry Wilkins, ed. *Advancing Aboriginal Claims* (Saskatoon, Purich Publishing Ltd, 2004) For a recent case in which status derived from the laws of the Stellaquo people was given legal effect, see *Casimel v Insurance Corp of B.C.*[1993] B.C.J. No 1834 (C.A.); [1994] 2C.N.L.R. 22 [BCCA].

⁸⁴ In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 745, the SCC said “The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.”

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and future political action between Aboriginal peoples' representatives and Canadian governments' representatives,⁸⁵ as well as actions by the executive and legislative branches.⁸⁶ The judiciary stands at an important juncture in the work of national public institutions that will play an important role in determining what is to be the place of the Aboriginal peoples in Canada. In essence, the SCC will decide the balance between 'the public interest' of each Aboriginal people with the general 'public interest' of all Canadians.⁸⁷ In this context, it is unavoidable that Aboriginal peoples will have an interest in who sits on the SCC to make these decisions. The political legitimacy of the judicial role in this regard is inescapable. Support for the rule of law will suffer if the institutions that make decisions that affect the fundamental interests of the Aboriginal peoples do not attract their support and confidence.

Turning to the implications of legal pluralism, it has long been recognized that all of Canada's legal cultures must be represented on the SCC.⁸⁸ The distinct character of the Aboriginal legal cultures upon whose understanding and interpretation the decisions of the SCC on aboriginal rights depend has been described by the SCC: "... a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives' of the two vastly dissimilar legal cultures [emphasis added] of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition"[some punctuation omitted]⁸⁹

The case for Aboriginal representation on the SCC requires only the even, principled, application of a well-established concept, but to a much less politically influential group. The particular analogy with the province of Quebec, with its civil law tradition, serves to emphasize the implications of legal pluralism for the representation of distinct legal orders within Canada's legal system. To this it may be objected that in comparison to Quebec, the Aboriginal legal orders are inchoate and diverse, and can not all be represented. Several answers can be given in reply. Aboriginal representation on the SCC is an inadequate and conservative measure that improves a situation that would best be

⁸⁵ Constitutional amendments resulted from the participation of Aboriginal peoples' representatives in First Ministers meetings in the 1980s. This history accords with the theory that basic rights emerge from a process of political action where particular interests are identified as deserving recognition and respect by the state. These interests may be recognized, once ascertained, as legally enforceable rights. Other interests may remain as politically enforceable claims.

⁸⁶ The Crown, symbol of executive power in Canada, has special constitutionally based relationship with the Aboriginal peoples. Legislation is essential for effective government Aboriginal policy. The outdated Indian Act is being supplemented by new legislation, and the SCC has begun to strike down past legislative action as unconstitutional: See John Giokas and Robert K. Groves, "Collective and Individual Recognition in Canada: The *Indian Act* regime" in Chartrand, *supra*, note 69, chapter two, 40, and especially the commentary on the *Corbiere* case at 69-73.

⁸⁷ In *R v Van der Peet* it was stated that "Courts will be asked... to balance and reconcile the conflicting interests of native people (sic: Aboriginal people) on the one hand, and of the rest of Canadian society, on the other." Per L'Heureux-Dube, at para 135. [1996] 2 S.C.R. 507.QL>

⁸⁸ S 6 of the *Supreme Court Act* R.S.C. 1985, c. S-26, provides: ‘At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.’ *Report of the CBA Committee on the appointment of judges in Canada* (August 20, 1985), Rec. No 8: ‘Appointments to the SCC must continue to be representative of the regions and legal systems of Canada...’

⁸⁹ *Van der Peet*, supra, note 87, at para 232 QL
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served by developing distinct Aboriginal judicial systems and courts. There are significant commonalities among Aboriginal legal traditions. Moreover, Aboriginal peoples have similar structural relationships to governmental authority and the Canadian constitution.

Aboriginal representation not only augments the legitimacy of judicial appointments; it contributes to enhanced competence of the courts generally and the SCC in particular as a decision-making body which must understand and apply distinct legal traditions. Competence means an adequate knowledge of Aboriginal law and legal culture for the purpose of making judicial decisions that properly reflect them.⁹⁰

The question of judicial competence does not conflict with the case for merit in making judicial appointments.⁹¹ Indeed, it is proper to regard judicial competence as a component of merit, and there is not a shortage of competent Aboriginal judges in Canada.

Conclusion

The idea of Aboriginal representation on the SCC has been gaining support and expression in recent times. The Royal Commission on Aboriginal Peoples stated in its 1996 final report, that, "...the Supreme Court of Canada should include at least one Aboriginal member", and that "...a requirement that one of the justices be Aboriginal should be the subject of a constitutional amendment."⁹² The *Charlottetown Accord* called for "a reasonable process of consulting representatives of the Aboriginal peoples in the preparation of a list of candidates to fill vacancies on the Supreme Court."⁹³ Academic scholars suggested that, especially given the significance of Aboriginal law, that Aboriginal representation would enhance legitimacy of SCC decisions.⁹⁴ The Indigenous Bar Association of Canada, a body representing Aboriginal law graduates, continues to support Aboriginal appointments to the judiciary.⁹⁵ A paper prepared for the organization made eight recommendations on Aboriginal appointments to courts and other public institutions, including that an Aboriginal justice be appointed to the SCC, and that an advisory body be established to select a pool of possible appointments from which the selection would be made. One of the members of the body ought to be a member of the

⁹⁰ For a brief discussion of the matter of judicial competence in relation to First Nation issues, see John Borrows, (2003-2004) 29 *Queen's L.J.* 103, at 123-124.

⁹¹ See the *National Post* editorial "Let merit reign supreme" which, in an attack on Aboriginal appointments to the SCC, not only uses 'race' and 'ethnicity' interchangeably, but also characterizes Aboriginal appointments as affirmative action. *National Post*, Tuesday, 22 February, 2005, at A14

⁹² RCAP, *supra* note 68, Vol 5, No 2.3 "Institutional Amendments". (*Libraxus CD*)

⁹³ S20, as cited in Peter Russell, "Towards a Tri-cultural Canadian Judiciary", notes for a joint conference of the CBA's National Aboriginal Law Section and the Indigenous Bar Association, Ottawa, Friday, 4 March, 2005. Unpublished document, in the committee's possession.

⁹⁴ Devlin, MacKay and Kim, *supra* note 6, at 843.

⁹⁵ See the information on the IBA website at www.indigenousbar.ca including a paper written for the IBA by James C. Hopkins and Albert C. Peeling, dated 6 April, 2004 entitled “Aboriginal Judicial Appointments to the Supreme Court of Canada”.
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IBA, and any plans to formalize the selection process should invite participation by Aboriginal people.

A constitutional amendment in accordance with s.41, which means provincial unanimity, is required for changes to the composition of the Supreme Court of Canada. In the absence of such an amendment, CALT, along with other leaders in the area of judicial appointments discourse, should fulfill its role by contributing to the creation of an appropriate constitutional convention that an Aboriginal justice be appointed to the SCC and that in designing a legitimate and democratic process of appointment, representatives of the Indigenous Bar Association and of the Aboriginal peoples should be consulted.
