UN Declaration on the Rights of Indigenous Peoples and Treaty Federalism in Canada

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Canadian federalism is the framework of public law through which to understand constitutional law. It is an incomplete framework, based on settler colonialism, that has had many different cycles. The original federalism, generated by the Aboriginal nations and applied to the treaty negotiations with the sovereign of Great Britain, was ignored in the colonial era, but is now part of the supreme law of Canada and firmly recognized by the United Nations Declaration on the Rights of Indigenous Peoples. *Treaty federalism is equally relevant to the contemporary constitutional framework of cooperative federalism. In this article, I argue for a more inclusive federalism by highlighting the centrality of treaty federalism to provincial federalism. Inclusive federalism reaches beyond the colonial binary of federal and provincial powers to reimagine and establish an inclusive, decolonized Canada. The consolidation of treaty federalism with provincial federalism offers a different set of principles and lessons about how best to distribute and limit power to prevent the governmental abuse of Aboriginal peoples. It also strengthens our constitutional governance and realizes an authentic nation-to-nation relationship.*

Le fédéralisme canadien constitue le cadre du droit public permettant de comprendre le droit constitutionnel. Il s'agit d'un cadre incomplet fondé sur les colonies de peuplement qui a connu de nombreux cycles différents. Le fédéralisme originel, créé par les nations autochtones et appliqué aux réconciliations des traités avec le souverain de la Grande-Bretagne, a été ignoré à l'époque coloniale, mais celui-ci fait maintenant partie de la loi suprême du Canada et est officiellement reconnu par la Déclaration des Nations Unies sur les droits des peuples autochtones. *Le fédéralisme de traité est également pertinent dans le cadre constitutionnel contemporain du fédéralisme coopératif. Dans cet article, je plaide pour un fédéralisme plus inclusif en soulignant le rôle central du fédéralisme de traité versus celui du fédéralisme provincial. Celui-ci dépasse le cadre colonial binaire des pouvoirs fédéral et provinciaux pour réinventer et établir un Canada inclusif et décolonisé. La consolidation du fédéralisme de traité avec le fédéralisme provincial offre un ensemble différent de principes et d'enseignements sur la meilleure façon de répartir et de limiter les pouvoirs afin de prévenir les abus gouvernementaux envers les peuples autochtones, de renforcer notre gouvernance constitutionnelle, et de réaliser une relation idéale de nation à nation.*

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> *You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties.*[1]

> *Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. … It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.*[2]

> *Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements … Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.*[3]

Introduction

Much of what we mean by the Constitution of Canada cannot be found in the visible text of the documents. Indeed, much of the structure and text of the written Constitution is silent on its foundations. In the constitutional reforms of the *Canada Act, 1982*, the structural provisions of the colonial constitution, which create the institutional framework for federalism and representa-

1 Queen Elizabeth II (Calgary, 5 July 1973) quoted in Canada, Indian and Northern Affairs, *Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People* (Ottawa: Indian and Northern Affairs, 1973) at 2, online (pdf): *Government of Canada* <publications.gc.ca/collections/collection_2018/aanc-inac/R5-645-1973.pdf>. The Treaty rights were subsequently affirmed in *Constitution Act*, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [*Canada Act, 1982*].

2 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20. See also *R v Sparrow*, [1990] 1 SCR 1075 at 1105-1106, 70 DLR (4th) 385 [*Sparrow*].

3 *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), art 37(1) [*UNDRIP*]. In 2010, Canada issued a statement of support endorsing a political commitment to the principles of the *UN Declaration*. See Indigenous and Northern Affairs, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010, last modified 30 July 2012), online: *Government of Canada* <aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>. In 2015, Canada announced that it was a full supporter, without qualification, of the *UN Declaration* under the Canadian Constitution. See Tim Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples" (10 May 2016), online *CBC News* <cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>. The OAS, General Assembly, 46th Sess, *American Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.P/AG/RES.2888 (XLVI-O/16) (2016) art XXIV [*American Declaration*] includes a stronger provision than the UN *Declaration*, establishing the principle that treaties shall be recognized and enforced "in accordance with their true spirit and intent in good faith" and providing for the submission of related disputes to regional and international bodies. See also John Borrows et al, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019).

tive governments, were limited by the new rights that placed limitations on governmental powers.

In 1998, the Supreme Court of Canada (the "Court") in the *Quebec Secession Reference,* articulated the new principles of constitutional interpretation.[4] The unanimous Court comprehended that the Constitution is more than a written text. In its analysis of the Constitution, the Canadian courts have considered the underlying legacies and principles. A superficial or fragmented reading of provisions of the written imperial acts enacted by the Queen-in-Parliament in the United Kingdom, known as constitutional acts, may be misleading about the sources and nature of constitutional authority. A more comprehensive reading is necessary to grasp the implicit and underlying principles animating the constitutional structure identified by the Court: "federalism, democracy, constitutionalism and the rule of law, and respect for minorities."[5] These implicit principles are founded more on Aboriginal thought than on British or French thought.[6]

The various written imperial acts were a veneer that concealed an even longer historical legacy about the source and nature of governmental authority and legitimacy. This legacy embraces the unwritten traditions and principles of centuries of confrontation between the king and parliament that forged the unwritten British constitution, as well as the global framework of consensual rules and principles governing the exercise of constitutional authority in Canada.[7] In North America, these legacies rest on the ignored legacies of the sovereignty of the Aboriginal nations and their treaty reconciliations with the British sovereign in the law of nations. These imperial treaties from many Aboriginal nations established the fundamental delegation of authority that informs the source and nature of British authority in North America.[8]

The various constitution acts enacted by the United Kingdom Parliament, for example, are supported by a deep and invisible foundation of Aboriginal sovereignty and treaty reconciliations with the imperial Crown of Great

4 *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Quebec Secession Reference* cited to SCR]

5 *Ibid* at para 49. See also *ibid* at paras 44, 50-54.

6 See political philosopher John Raul Saul's insights in *A Fair Country: Telling Truths About Canada* (Toronto: Viking Canada, 2008). In the first part of the book, he argues that Canadian political thought is heavily influenced and shaped by Aboriginal ideas.

7 *Quebec Secession Reference*, *supra* note 4 at paras 32, 49.

8 See *Ibid* at para 82. See also James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Carswell 2007); James (Sa'ke'j) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241 at 258-65 [Henderson, "Empowering"].

Britain, upon which provides the architecture for imperial acts and gives the text its meaning. Following the constitutional patriation of Canada, the United Kingdom expressly affirmed these resilient and foundational powers. It renewed the oldest legal foundation of the Canadian nation and affirmed these foundational powers as constitutional rights protected by constitutional supremacy. These legacies have much to contribute in reformulating and reimagining the patriated Constitution.

Little in the text of the Constitution informs us on how to give meaning to the context or text of the constitutional acts, much less to aboriginal and treaty rights. More importantly, nothing in the text of the Constitution reveals how to read the treaties and acts together. Justice McLachlin for the Court has articulated the controlling doctrine of constitutional convergence among its parts: "It is a basic rule … that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[9] This doctrine of horizontal constitutionalism requires the courts to generate a "symbiosis" of the different parts of the Constitution that compose the supreme law of patriated Canada, but none is absolute over the other.[10]

The goal of this article is to make the foundational principles of the unwritten and written text of the treaties more visible, and to reveal how to reconcile and integrate these principles with the institutional and governmental future.

The Enduring Meaning of the Treaties

In 2015, Canada embarked on another moment of national reconstitution. It addressed as an essential part of constitutional reconciliation how Treaty Nations can make self-determining decisions for themselves to rebuild their nations.[11] Constitutional reconciliation involves generating a constitutional convergence among treaty rights and the other constitutional powers. The nation-to-nation reconstruction of the Treaty Nations is an affirmation of the

9 See *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 373, 100 DLR (4th) 212 [*New Brunswick*]; See also *Quebec Secession Reference*, *supra* note 4 at para 49.

10 See *Quebec Secession Reference*, *supra* note 4 at paras 49-50; See also *Sparrow*, *supra* note 2 at 1109; *R v Van der Peet*, [1996] 2 SCR 507 at paras 42, 49-50, 137 DLR (4th) 289, Lamer CJC [*Van der Peet*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 82, 148, 153 DLR (4th) 193. See the partial attempts in *R v Badger* [1996] 1 SCR 771, 133 DLR (4th) 324.

11 See The Honourable Jody Wilson-Raybould, Address (delivered at Assembly of First Nations Annual General Assembly, Niagara Falls, ON, 12 July 2016), online: *Government of Canada* <www.canada.ca/en/department-justice/news/2016/07/assembly-of-first-nations-annual-general-assembly.html>.

constitutional supremacy and the rule of law. It is an attempt to connect the imperial treaties, instructions, proclamations, and acts symbiotically to reconfigure patriated Canada as a nation in the enduring future.

In the nation-rebuilding process, Canada will transition from its current role of designing and administering programs as well as providing services under the federal *Indian Act*,[12] to a role that supports the self-determination of Treaty Nations and its constitutional relationship with Canada and the provinces. The pernicious *Indian Act* has always been the antithesis of self-determination. The nation-rebuilding seeks to reweave the past treaties into the future.

When adequately understood by the interpretative principles developed and revealed by the Court, the imperial treaties with distinct nations are one of the grand inventions of modern legal consciousness. The treaty authority of each nation was based on their inherent powers, *ex proprio vigore*. The treaties reveal the existence of these inherent powers of the Aboriginal nations that establish the foundational nation-to-nation relationship that supports the imperial acts that determine the Constitution of Canada but lie outside of them.

Against the background of the European law of nations, the treaty negotiations, the oral promises in the negotiations, and the written terms of the treaties illuminate a coherent and conceptual legal order and the relationship between the sovereigns. The treaties posit a consensual relationship that preserved the cohesive families of the Treaty Nations, their control over a particular territory, and their identities. The sovereigns' treaties created and sustained an innovative way of structuring British North America and its expansion across the continent on mutual promises. Through distinct world-views and languages and legal systems, the treaty reconciliations converge desire and power with the capabilities of compromise and trust. The promises invoke optimism of shared beliefs that speaks consensually, rationally, and authoritatively about future relations and jurisdictions.

The shared intent, purposes, and principles of the sovereigns in the imperial treaties resolve the challenge of facing a conquest, war, or subordination to existing orders of either party. The sovereigns committed to a vision of the transatlantic rule of law and a feasible, necessary structure of a consensual and desirable treaty commonwealth or federation. The sovereigns created treaty based on mutual consent[13] and required strict construction of the rights guided

12 *Indian Act*, RSC 1985, c I-5.

13 This is usually represented by the phrase "said chiefs and principal men do freely, fully and voluntarily" surrender a tract of land for money. See Robinson Treaty Made in the Year 1850

by the understanding of the Treaty Nations that is founded on a trans-systemic synthesis founded in Aboriginal law and imperial constitutional law. The imperial treaties were not one-time historical events that extinguished the Treaty Nations, their jurisdiction, treaty tenure, or their rights; instead, they create a continuous, forward-looking relationship and structured process for building the imperial constitutional order in North America.

In the treaties, the sovereigns made intelligible the framework of treaty federation in imperial constitutional law. The various terms of the imperial treaties over time reveal structural similarities of the Treaty relationship, with the Treaty Nations delegated specific jurisdictions and obligations to the British sovereign. These similarities are drawn from the inherent powers of each nation, not rights. The British sovereign recognizes, affirms, and respects the Treaty Nations' inherent sovereignty, which existed prior to, and apart from, the treaties. The imperial treaties stabilize and protect these inherent powers in the imperial reconciliation with the pre-existing Aboriginal nations' order, law, and territories.

The imperial treaties inaugurate the basic transatlantic Treaty commonwealth or federation with the United Kingdom as the foundation of the Constitution of Canada. The Treaty federation, however incomplete, generated the invariant foundation for the liminal imperial proclamation, instructions, and acts directed toward responsible and good governance and the division of powers in the Constitution of Canada.

In the imperial treaties, the various Treaty Nations chose to retain inherent powers, independence, and liberties under the protection of Great Britain. The continuity of treaty sovereignty and governance was affirmed implicitly or expressly in most treaties. The Treaty Nations did not agree to foreign rule in the treaties. The Treaty Nations' delegation to the imperial Crown authorized settlements and immigration, but they never authorized imperial authority or colonization over them.[14] Treaty Nations and tribes, in the spirit and intent of peace and friendship in the Georgian treaties, retained their inherent power to

with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown, 9 September 1850, online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1100100028984/1100100028994>; Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Superior Conveying Certain Lands to the Crown, 7 September 1850, online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1100100028978/1100100028982>.

14 See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at 25-26 [*Partners in Confederation*]. See also Michael Asch & Pattrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*" (1991) 29:2 Alta L Rev 498.

governance. In the Victorian Treaties, Aboriginal governance was vested in the Treaty chiefs to maintain "peace and good order" in the transferred territory over all inhabitants.[15] The treaties reveal the inescapable reliance among the Treaty Nations in governing themselves and offer no evidence of toleration for provincial or federal governance over them. Their express and incidental rights established an innovative and inspired vision of foundational and complementary legal systems operating based on consent and trust.

The oral promises and written terms of the imperial treaties delegate and determine the shape and limits of an innovative and normative treaty confederation.[16] They resolved issues consensually by, what would otherwise be indeterminant among the nations, leaving flexible and residual authority in Treaty Nations to apply their laws over specific peoples and territories. They seek to ensure that even the unknown and the unforeseeable can be subject to consensual negotiations and dialogical and honourable reconciliation. Their express terms and incidental rights establish an innovative and inspired vision of honourable governance.

Section 35 of the *Constitution Act*, *1982*, part of the *Canada Act, 1982*, belatedly affirms and preserves, from within the Constitution itself, these nation-to-nation relationship rights of the Treaty Nations in the global order.[17] Constitutional affirmation of treaty rights amalgamated the Treaty Nations into the patriated nation. They reveal the foundational benchmark of constitutional law and analysis. The purpose of the belated confirmation of these treaty rights was to create a constitutional shield against parliamentary supremacy; the existence of Treaty Nations could no longer be denied, displaced, or denigrated simply because they weren't explicitly mentioned in the constitutional text.

Another part of the global order that is embraced by the patriated nation is the *UN Declaration of Rights of Indigenous peoples* [*UNDRIP*] that has established corroborating constitutive principles and rules concerning the affirmed aboriginal and treaty rights in the Constitution.[18] Its 7th preambular paragraph affirms that the rights and standards are "inherent" or pre-existing; they are not new rights.[19] It reflects the existing global consensus that Indigenous peoples are the bearers of inherent and inalienable human rights. Article 1 incorporates

15 See Henderson, "Empowering", *supra* note 8 at 258-65.

16 See *Badger*, *supra* note 10.

17 *Constitution Act*, 1982, *supra* note 1, s 35.

18 *UNDRIP*, *supra* note 3.

19 *Ibid*, Preamble.

the human rights law to Indigenous peoples and is crucial to the interpretation of the other articles.[20] In the tradition of human rights law, the other articles clarify the rights of Indigenous peoples in specific knowledge, cultural, historical, social, and economic circumstances and the obligations of the states.

The *UNDRIP* unequivocally states that "indigenous peoples have the right to self-determination".[21] In articles 1, 3, 4, 5, 20 and 34, it reiterates the right to self-determination consistent with the UN treaty on *International Covenant on Political and Civil Rights* as well as the *International Covenant on Economic, Social, and Cultural Rights* [referred to collectively as *Covenants*].[22] The right to self-determination is an enabling right; it is the animating principle of the inherent dignity, integrity, and humanity of Indigenous peoples for the realization of their vast potential. It exemplifies the indivisibility of human rights in its enabling extensions to Indigenous law, governance and land as well as knowledge governance to culture, and technological and economic development.

The *Covenants* and *UNDRIP* provide valuable guidance for the understanding of inherent dignity as a foundation of justice[23] as well as inherent powers of aboriginal and treaty rights. Since the human rights and fundamental freedoms derive from inherent human dignity, this dignity and the related human rights are not given by governmental authority, but are pre-existing rights which are inherent in every human being and family. The spirit and purpose of most knowledge systems teach us how to live and nourish our inherent dignity throughout our lives. These inherent rights, like Aboriginal rights, cannot be legitimately waived, diminished, or taken away by any humans, governments, courts, or societies. Their legitimacy is derived from extra-legal sources, similar to the concept of sovereignty. They go right to the heart of what it means to be human. The purpose of human rights law is to boldly, but skillfully, affirm,

20 *Ibid*, art 1.

21 *Ibid*, art 3.

22 *Ibid*, arts 1, 3-5, 20, 34; *International Covenant on Civil and Political Rights*, GA Res 2200 (XXI)A, UNGAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966), 52 (ratified by Canada in 1976); *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200(XXI)A, UNGAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966), 49 (ratified by Canada in 1976); See also *Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200 (XXI)A, UNGAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966), 59 (ratified by Canada in 1976); See also *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

23 See James (Sa'ke'j) Youngblood Henderson, "The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems" in Centre for International Governance Innovation, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo, ON: Centre of International Governance Innovation, 2018) 9.

weave, and harmonize distinct knowledge systems that nourish the inherent dignity of humans into an innovative global and national order.

The supremacy of treaty rights is affirmed in the *UNDRIP*.[24] The 13th preambular paragraph in the *UNDRIP* states that the rights affirmed in treaties between States and Indigenous peoples are, in some situations, matters of international concern, interest, responsibility, and character.[25] Moreover, treaties and the relationship they represent, are the basis for a strengthened partnership among Indigenous peoples and States. Article 37(1) declared Indigenous peoples have the right to the recognition, observance, and enforcement of treaties, and to have States honour and respect such treaties.[26] Moreover, 37(2) declares: "[n]othing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements."[27]

To honourably implement the treaties and the right to self-determination in Canada requires the constitutional reconciliation of the treaty federation with the provincial federation to generate an honourable Canadian federation. As Grand Chief Willie Littlechild perceives the supremacy of treaties, the *UNDRIP* and the calls to action of Canada's Truth and Reconciliation Commission[28] are the strands of a sweetgrass braid that are being woven together to breathe life into section 35 of the Constitution and make it stronger.

Constitutional Reconciling with Treaty Federation

The *Canada Act, 1982* renewed and revived the underlying principle of the treaty promises and rights as part of constitutional supremacy. It unsettled the prevailing narrative of national federalism and its distribution and limitation of power. This decolonizing imperial act was intended to eliminate the dark era of colonialism and racism of Canadian nationalism that obstructed the achievement of the Treaty federalism as part of the shared rule in Canada. Nonetheless, the existing Treaty order that generated British North America and now Canada has remained ignored and excluded in provincial federalism.

24 *UNDRIP*, *supra* note 3, Preamble, art 37
25 *Ibid*, Preamble.
26 *Ibid*, art 37(1).
27 *Ibid*, art 37(2).
28 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: A Summary of the Final Report of the Truth and Reconciliation Commission* (Ottawa: Truth and Reconciliation Commission of Canada, 2015).

This exclusion illustrates the incompleteness of constitutional governance, both descriptively and normatively.

Many reasons for the exclusion exist. The imperial Crown did not effectively translate or transmit the meaning of the treaties to the colonialists or their governmental entity. This miscommunication caused the treaties to remain a nation-to-nation agreement in the international or foreign affairs and imperial constitutional law. While the federal parliament was authorized to implement these treaties,[29] they did not. Colonial provinces and federal parliament avoided and ignored the interests and rights of the Treaty Nations.[30] The local authorities created negative images of the Treaty Nations as uncivilized to justify the assimilation of members of Treaty Nations to British colonial society.[31] Parliament's endless array of creative and argumentative strategies and abeyances around treaty implementation and judicial interpretation reveals a dark and destructive legacy.

Colonialism and the artifacts of colonial law have been rigidly woven into constitutional abeyances. They narrowly focused on the relations between Great Britain and its subjects in foreign lands or colonies.[32] This system of rules that established constitutional law was based on the Treaty order with the

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29 In this regard, sections 91(24) and 132 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, Appendix II, No 5 (*The British North America Act, 1867*) *[Constitution Act, 1867*] must not only be read with one another, but with sections 25 and 35 of *Canada Act, 1982*, *supra* note 1.

30 See Great Britain, Select Committee on Aborigines, *Report of the Select Committee on Aborigines* (1837) at 77-78, online: <babel.hathitrust.org/cgi/pt?id=nyp.33433000271902&view=1up&seq=83>.

31 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) [*Final Report*, vol 1]; *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) [*Final Report*, vol 2]; *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services Canada, 1996) [*Final Report*, vol 3]; *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4 (Ottawa: Supply and Services Canada, 1996) [*Final Report*, vol 4]; *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Supply and Services Canada, 1996) [*Final Report*, vol 5]. See especially vols 1 and 2. See generally The Honourable Jane Stewart, Address (delivered at unveiling of *Gathering Strength — Canada's Aboriginal Action Plan*, Ottawa, 7 January 1998), online: *Government of Canada* <aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>; See also James (Sa'ke'j) Youngblood Henderson, "Post-Colonial Ghost Dancing: Diagnosing European Colonialism" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) at 57.

32 See Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harv Intl LJ 1; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A Prager, 1966); Charles Clark, A *Summary of Colonial Law: The Practice of the Court of Appeals from the Plantations, and of the Laws and Their Administration in All the Colonies* (London: S Sweet, 1834).

Treaty Nations. Since the colonialists were forced to live by prerogatives of the imperial Crown and then the imperial Parliament, the very concept of imperial treaty rights acquired a nuance of domination. The imperial authorities were distant, negligent, and rarely legislated or provided oversight for the colonies. British colonists became comfortable in believing that Canadian federalism grew out of the mystical traditions of Great Britain as they moved from the Blackstonian or Whig sovereignty of an unwritten constitution, to legal pluralism and a written constitution. These beliefs are as much a matter of prejudice as a convenience.[33] These imperial acts need fundamental rethinking about how to protect Treaty nations with constitutional rights.[34]

Under constitutional reforms in the *Canada Act, 1982* inviolable treaties and Treaty Nations are revealed as the source of the ancient constitution that justifies the limited sovereign authority of Great Britain in North America. The Aboriginal nations' delegated authority to the British sovereign in the treaties were the source and foundation for most of the provinces and the federal government. Thus, much of constitutional law is established by treaty federalism and is integral to constitutional interpretation.

Regardless of the legacy of denial, unfulfilled promises and avoidance of treaty rights and responsibilities as constitutional rights and responsibilities, the affirmative rights and obligations of the treaties require Canada to be constitutional to reconcile the imperial acts with the imperial treaties. The spirit and wording of section 35, the *Final Report* of the Royal Commission on Aboriginal peoples, and the Court's decisions have rejected the malevolent assumptions of British colonialism, racism, and the legal interpretations of the meaning of the treaties. Section 35 denies organizing the future of Canada on the colonial quest for self-rule that camouflaged treaty rights and responsibilities.

The *Final Report* of the Royal Commission on Aboriginal Peoples concluded that, because of false colonial premises, it is "indisputable that … existing treaties have been honoured by governments more in the breach than in the observance."[35] It stated that the Treaty relationship between Treaty Nations and the Canadian government was "mired in ignorance, mistrust and prejudice. Indeed, this has been the case for generations."[36] The Commission's find-

33 See generally Andrew W Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990).

34 See in particular *Constitution Act*, 1930, 20 & 21 Geo 5, c 26 (UK), reprinted in RSC 1970, Appendix II, No 25; See also *R v Horseman*, [1990] 1 SCR 901 at 933, 936, 108 AR 1; *Badger*, *supra* note 10 at paras 41-48, 83-85.

35 *Final Report*, vol 2, *supra* note 31 at 3.

36 *Ibid* at 35.

ings characterized the dishonoured treaties as part of the harmful "ghosts" of Canadian history.[37]

The Report referred to the constitutional recognition and affirmation of treaty rights in section 35(1) of the *Constitution Act, 1982*[38] as the "bedrock" of Canadian law[39] and have paved the way for Canada's federalistic and pluralistic society.[40] It affirmed the existing imperial treaties are "sacred," and they create "sacred compacts."[41] It said the Treaty Nations are the "bearers of ancient and enduring powers"[42] that created "treaty federalism" in Canada, which "is an integral part of the Canadian constitution."[43] The Report noted that the existing treaties are comparable to the "terms of union whereby former British colonies entered Confederation as provinces."[44] It interpreted section 35 as confirming the status of Treaty Nations as equal partners in the complex arrangements that make up patriated Canada.[45]

In *People to People, Nation to Nation,* a volume of highlights, the Commission stated that "[a]n agreed treaty process can be the mechanism for implementing virtually all the recommendations in our report — indeed, it may be the only legitimate way to do so."[46] Recommendation 2.2.1 of the *Report* restated the fundamental principle of Treaty federalism or confederalism: authority is derived from the agreements of Treaty Nations with the British sovereign rather than from parliamentary sovereignty.[47] It recommended that the Canadian governments enter into new treaty negotiations with Aboriginal

37 Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation, Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996) at 4-5 [*People to People*]. In *Sparrow*, *supra* note 2 at 1103-1104, the Court alluded to a similar vision of history marked by denial and domination where governments and legal institutions ignored Aboriginals' legal rights, claims, and perspectives and primarily served non-Aboriginal interests.

38 *Final Report*, vol 2, *supra* note 31 at 20-21.

39 *Ibid* at 33. This is comparable to AV Dicey's assertion in *The Introduction to the Study of the Law of the Constitution*, 9th ed (London: Macmillan and Co, 1939) that the doctrine of parliamentary sovereignty is "the very keystone of the law of the [United Kingdom] constitution" at 70. See also *ibid* at para 39.

40 *Final Report*, vol 2, *supra* note 31 at 14 (pluralism) and 356 (federalism).

41 *Ibid* at 17-18 (sacred); 19 (social contract); 17, 48 (sacred compact).

42 *Partners in Confederation*, *supra* note 14 at 36.

43 *Final Report*, vol 2, *supra* note 31 at 184.

44 *Ibid* at 19. See similar language at 16, 20.

45 *Ibid* at 231.

46 *People to People, supra* note 37 at 51.

47 *Final Report*, vol 2, *supra* note 31 at 20. See *ibid* at 18-22 for commentary. See *ibid* at 195-196 for discussion on Parliamentary sovereignty and inherent rights.

peoples who do not have a treaty relationship with Canada. It said that a secure constitutional foundation must replace false colonial premises.[48]

The Court has spoken about the implicit and underlying principles of Canadian federalism[49] and the inclusive, dynamic and cooperative nature of these principles.[50] These decisions underscore the flexible nature of our constitutionalized federalism to meet the changing realities of Canadians. They reflect one of the enduring strengths of the Canadian federation — its ability to allow diverse nationalities and peoples to co-habit and prosper within post-colonial institutions of governance in a democratic nation.

The Court has established that section 35(1) affirms the fair and just reconciliation between Treaty nations and the divided Crowns.[51] The honour of the Crown is a controlling principle that arises from the "Crown's assertion of sovereignty over an Aboriginal peoples."[52] Since reconciliation is conceived as an ongoing process, the acknowledgement of treaty reconciliation presents an existing, consensual, and vested reconciliation, which requires the federal duty to respect their constitutionally protected agreements, to maintain the honour of the Crown, and to make the constitutional power of the federal government to legislate for Indians to be consistent with the spirit, intent, and text of the treaties.[53] Harmonizing treaty reconciliation with federal and provincial powers and laws does not involve the balancing of distinct rights, but the convergence and implementation of treaty rights with the existing constitutional powers and their institutional and governance structures.[54] Writing on behalf of a unanimous Court, Chief Justice McLachlin observed that, "[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed

48 *Final Report*, vol 1, *supra* note 31 at 685.

49 See *Quebec Secession Reference*, *supra* note 4 at para 43.

50 *Reference Re Same-Sex Marriage*, 2004 SCC 79 at paras 22-24.

51 See *Sparrow*, *supra* note 2 at 1109*; Van der Peet*, *supra* note 10 at para 43, Lamer CJC, para 230, McLachlin J, dissenting; *Delgamuukw*, *supra* note 10 at para 186; *Haida Nation*, *supra* note 2 at para 20; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director*), 2004 SCC 74 at para 24.

52 See *Haida Nation*, *supra* note 2 at para 32. See also *ibid* at para 38. This unanimous decision embodies the dissent of McLachlin J (as she then was) in *Van der Peet*, *supra* note 10 at para 310, questioning how the majority's version of reconciliation of the different legal cultures could be accomplished: "More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does."

53 See *Sparrow*, *supra* note 2 at 1106-1107; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 51, 54, 57 [*Mikisew Nation* 2005].

54 See *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 35 [*Grassy Narrows*].

Crown sovereignty".[55] Treaty reconciliations cannot undermine the existing Treaty rights or inherent powers retained by the Treaty Nations. Neither the Treaty Nations nor the framers of section 35(1) deliberately chose to subordinate the exercise of treaty rights to the good of British or Canadian society.[56]

The imperial treaties reveal the underlying principles of treaty federalism. The proposed treaty federalism is consistent with the most fundamental federal principle in Canada, one that recognizes a "multi-tiered government combining elements of shared-rule and regional self-rule."[57] Treaty federalism is the foundation and operates similarly to the imperial acts that united the federation of the colonies into a Canadian federation as a response to the aspirations of diverse political colonialists, particularly the British and French. Treaty federalism under the constitution of Canada is similar to the spirit and intent of the *Balfour Declaration* reference to "autonomous Communities … equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown."[58] Thibaudeau Rinfret CJC reminded Canada and the provinces in the *Nova Scotia Interdelegation* case: "[t]he constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled."[59]

The Court has affirmed that a constitutional purpose of section 35 is to protect, recognize, and enhance the survival of Aboriginal peoples' distinctive communities.[60] It has established that one of the purposes of the federal structure for Canada was for the protection of cultural and linguistic diversity and local autonomy of Aboriginal peoples.[61] Given that "a review of the written provisions of the Constitution does not provide the entire picture"[62] of

55 See *Haida Nation*, *supra* note 2 at para 20.

56 See *R v Marshall*, [1999] 3 SCR 533 at para 45, 179 DLR (4th) 193 [*Marshall*]; *Van der Peet*, *supra* note 10 at paras 308, 315, McLachlin J, dissenting).

57 See Ronald L Watts, *Comparing Federal Systems*, 3rd ed (Montreal & Kingston: McGill-Queen's University Press, 2008) at 8.

58 *Report of the Inter-Imperial Relations Committee (Balfour Declaration* 1926*)* in Maurice Ollivier, ed, *The Colonial and Imperial Conference: From 1887 to 1937*, vol 3 (Ottawa: Edmond Cloutier, 1954) 145 at 146.

59 *Nova Scotia (AG) v Canada (AG)*, [1951] SCR 31 at 34, (*sub nom Reference Re Constitutional Validity of Bill No 136 (Nova Scotia)*) [1950] 4 DLR 369 [*Nova Scotia Interdelegation*]. See also *Quebec Secession Reference*, *supra* note 4 at para 85: "The Constitution is the expression of the sovereignty of the people of Canada."

60 See *R v Powley*, 2003 SCC 43 at paras 13, 17.

61 See *Quebec Secession Reference*, *supra* note 4 at paras 43, 59-60.

62 See *Ibid* at para 55.

Canadian federalism, reconceptualizing and establishing a unified federation that includes Treaty Nations is required to "fill out gaps in the express terms of the constitutional scheme."[63] Legal and academic commentators have noted the value of this approach.[64] They are constitutionally required to pursue the reconciliation process as laid out by the Court that distances Canada from past efforts at colonialism, racism, and assimilation, by restoring Treaty Nations to a place within the Canadian constitutional order, and forging a new relationship marked by collaboration and partnership.

In the way forward, no one way of thinking, talking, writing, or symbolizing enjoys a privilege of best-representing reconciliation of the concept of Treaty federalism in a nation-to-nation relationship or the expression of treaty self-determination or governance. The Government of Canada has affirmed the *UNDRIP* and is seeking a way to implement it. It is integral to Canada's declaration of principles respecting Canada's relationship with Indigenous peoples[65] that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

Consolidation of Treaty Federation with Provincial Federation

The *Canada Act, 1982* sought to resolve these incoherencies about legitimate authority in Canada. The *Final Report* of the Royal Commission and the decision of the Court provided a supporting set of ideas to guide the reconciliation and reconstruction of the governing institutions of Canada. It reaffirmed that Canadian federalism arose out of Treaty federalism.[66] The source of Canadian federalism arose from the authority of these imperial Acts that were initially derived from the Treaty Nations' consensual delegation to the imperial Crown,

63 See *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at 95, 150 DLR (4th) 577; See also *Mitchell v. MNR*, 2001 SCC 33 at paras 129, 135, Binnie J; *Campbell v British Columbia (AG)*, 2000 BCSC 1123 at paras 68, 80-81.

64 See Henderson, "Empowering, *supra* note 8; Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34:1 Osgoode Hall LJ 101; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); See also the work of political scientists like Kiera L Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in François Rocher and Miriam Smith, eds, *New Trends in Canadian Federalism*, 2nd ed (Peterborough, ON: Broadview Press, 2003) 167.

65 See Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: Department of Justice Canada, 2017) (last modified 14 February 2018), online: *Government of Canada* <justice.gc.ca/eng/csj-sjc/principles-principes.html>.

66 *Final Report*, vol 2, *supra* note 31 at 15 ("Canadians are not taught that Canada was built on the formal treaty alliances that European explorers, military commanders and later civil authorities were able to forge with the nations they encountered on this continent").

rather than by the inherent sovereign of the imperial Crown. Out of the derivative rights arising from the sovereign or imperial treaties with Aboriginal nations, the imperial Crown established the provinces in British North America and the subsequent provincial federalism by imperial acts.

However, the imperial Crown-in-Parliament unilaterally used its political conventions and rules to establish these provinces and responsible government without the consent of the Treaty Nations in the treaties. These imperial acts failed to define the processes of selecting a government. Instead, the preamble provides for a federal union with "a constitution similar in principle" to that of the United Kingdom.[67] The royal prerogative, treaties, and law of nations are integral parts of the imperial transatlantic constitutional law of the United Kingdom.[68] Thus, they are part of the global law. No prohibition exists with these principles against Treaty Nations being part of the union.

Because of section 35(1), the *Final Report* of the Royal Commission concluded a profound need exists for new processes that will allow Aboriginal peoples the opportunity to restructure existing governmental institutions and to participate as partners in the Canadian federation on terms they freely accept. It recommended that all governments in Canada recognize that section 35 provides the basis for an Aboriginal order of government that coexists within the framework of Canada along with the federal and provincial orders of government. Each order of government operates within its distinct sovereign sphere, as defined by the Canadian Constitution, and exercises authority within spheres of jurisdiction that have both overlapping and exclusive components.[69]

The *Report* argued for the unification of treaty federalism with provincial federalism as an integral part of displacing the colonial legacy in Canada with a constitutional legacy.[70] This unification needs institutional reform to

67 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, Appendix II, No 5 (*The British North America Act, 1867*). The *Constitution Act, 1867* provides for the confederating provinces to "be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom." See generally *New Brunswick*, *supra* note 9, where the court found the doctrine of parliamentary privilege is included in the Constitution of Canada, although it is not mentioned in section 52(2) of the *Constitution Act, 1982*, *supra* note 1.

68 The boundaries of constitutional law of the United Kingdom have never been satisfactorily defined. See *Halsbury's Laws of England*, vol 8, *Compulsory Acquisition of Land, Conflict of Laws, Constitutional Law* at paras 801, 889-1082, but as part of the constitutional law, treaties are included in the royal prerogatives (*ibid* at paras 985-86) and the United Nations (*ibid* at para 988).

69 See *Final Report,* vol 2, *supra* note 31, Recommendation 2.3.12 at 244.

70 See *ibid* at 188-201. See also *Simon v R*, [1985] 2 SCR 387 at 404, 24 DLR (4th) 390 [*Simon*] and its effect on *R v Syliboy*, [1929] 1 DLR 307, 4 CNLC 430 (Treaty of 1752); *R v Côté*, [1996] 3 SCR 139 at paras 52-53; *Marshall*, *supra* note 56 at para 45 (describing the purpose of s 35(1)

implement the constitutional transformation of treaty rights that could lead to actualizing a shared future by creating an authentic Canadian federation, creating authentic democracy, consolidating treaty federalism, and implementing good faith into treaty rights and obligations.

Concerning the existing historical treaties, the *Report* recommended that the parties implement them from the perspectives of both justice and reconciliation. Since treaty promises were part of the foundation of Canada (and keeping those promises is a challenge to the honour and legitimacy of Canada), the implementation of legally recognized rights under the treaties will demonstrate that the Crown's honour is reflected in the Crown's actions. Justice requires the fulfillment of the agreed-upon terms of the treaties as recorded in the treaty text and supplemented by oral evidence. Reconciliation involves the establishment of proper principles to govern the continuing treaty relationship and to complete treaties that are incomplete because of the absence of consensus.[71]

Since the affirmation of Treaty rights as part of the supreme law of Canada, the constitutional rights of Treaty Nations must be reflected in Canadian federalism and their cultural realities protected in the constitutional order. The affirmation provides the constitutional authority for the protection of these inherent powers and rights for majority tyranny of the past and institutional transformation. The underlying constitutional architecture for the change exists; what is required is a fresh examination of the provincial federalism from the constitutionally required lens of the treaties, the honour of the Crown, reconciliation, and dialogical governance.[72] The courts have established constitutional principles that should guide these political processes and principled negotiations.[73] These constitutional principles extend back to remedy the past avoidance of aboriginal and treaty rights by courts and politicians. They also

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by rejecting the idea that non-Treaty nations licenses or privileges can displace the constitutional rights of Aboriginal peoples).

71 See *Final Report*, vol 2, *supra* note 31, Recommendation 2.2.2 at 46.

72 The idea of governance by a continuous dialogue among competing constitutional interests rather than legislation is emerging in many contemporary sites. See the constitutional discussion of negotiations in *Quebec Secession Reference, supra* note 4 at para 63. See also James (Sa'ke'j) Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72:1 Sask L Rev 29; Peter W Hogg & Allison A Bushell "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)" (1997) 35:1 Osgoode Hall LJ 75; Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80:1/2 Can Bar Rev 481; A Wayne Mackay, "The Legislature, The Executive and the Courts: The Delicate Balance of Power or Who is Running this Country Anyway?" (2001) 24:2 Dal LJ 37.

73 See *Delgamuukw*, *supra* note 10 at para 207; *Quebec Secession Reference*, *supra* note 4 at paras 94-104.

continue forward to embrace a political commitment to negotiate a more positive and durable relationship based on constitutional supremacy. In short, these principles create a shared future and sovereignty.

Section 35 affirms the residual right of self-determination of the Treaty Nations through the exercise of their existing treaty rights and its territorial boundaries as treaty governance. Treaty governance is an affirmative treaty right. It is the territorial jurisdiction created by the treaties for the exercise of inherent powers, federal implementation of affirmative promissory obligations in the treaties, and other rights and freedoms.[74]

Section 35 limits the authority of the federal Parliament and the provinces over treaty rights.[75] Constitutional supremacy and the honour of the Crown requires institutional reforms involving treaty rights in the nation-to-nation relationship that will create an inclusive Canada, distinct from colonial Canada.[76] These reforms require converging Treaty federalism with provincial federalism to improve and generate an inclusive Canadian federalism, democracy, and government. The "core," "centrepiece," or "heart" of Canadian federalism and governance are a legitimate governmental authority.

Additionally, the *Charter* sought to impose the rule of law and placed limits on federal and provincial governmental power over Canadians. Under the global vision of self-determination and human rights of the UN *Covenants* and *UNDRIP*, the patriated constitutional order should link provincial federalism and Treaty federalism into an authentic Canadian federation. All of these constitutional changes affirm the right to belated nation-building and the need for reconciliation based on the right of self-determination.

The constitutional reforms, the decisions of the Court, the *Final Report* of the Royal Commission, and the *UNDRIP* have established the foundation to reconcile Treaty Nations into a shared constitutional future, a society that is uncontaminated by colonial thinking and laws. Canada has started to comprehend that a dynamic nation-to-nation relationship is a necessary reform to the

74 See *Canadian Charter of Rights and Freedoms*, ss 25-26, Part I of the *Constitution Act, 1982*, *supra* note 1. Section 26 provides: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." This rule of construction defines the other unenumerated "rights and freedoms" clause in section 25, which together can be interpreted as applying the UN *Covenants* and *UNDRIP* to Aboriginal people of Canada.

75 See e.g. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193.

76 See *Quebec Secession Reference*, *supra* note 4 at paras 70-78.

existing institutional systems and to imagine a creative pluralistic future of new chances and unlimited possibilities; we shall begin to share our future.

A coherent and authentic patriated Canada can only be created by understanding the necessity of acknowledging treaties established by the territorial jurisdiction of treaty governance.[77] This territorial jurisdiction of treaties has to be respected equally with provincial jurisdiction. The treaty boundaries and provincial boundaries generate ecological, political, and social identities. These territorial jurisdictions of the treaties are simultaneously cartographical, normative, and discursive service delivery areas. These jurisdictions have the inherent authority to define their laws and their systems of governance, and implement their treaty rights. These elements cannot be neatly severed. They are an inherent part of the Constitution.

Further, Canada has to reconcile treaty and provincial federalism into a national federation based on the right of free association and self-determination. To combine Treaty federalism with provincial federalism is a transformation from colonialism to inclusive constitutionalism. The goal of the consolidation is to create institutional reforms rather than replacing existing institutions by others. It must be to change the character as well as the content of the institutions. Such reforms should re-imagine and remake parts of the constitutional governance framework to include Treaty Nations. Reconciling treaty federalism with provincial federalism would be a necessarily belated nation-building process that would create a significant patriated nation, federation, and democratic society. Without such a convergence, Canada does not have a coherent vision of federalism or democracy that is consistent with its Constitution. Canada's political conventions imported from Great Britain have established structural inequalities that are not only inconsistent with its Constitution but have blocked effective free association of the Treaty Nations and participation and representation in both treaty governance and Canadian governance.[78]

Constitutional reform requires Canada to provide national leadership on uniting provincial federalism with treaty federalism. Both territorial jurisdictions need to be unified in Parliament. Treaty jurisdictions are foundational; provincial jurisdiction is synthetic and derivative; federal jurisdiction is epiphenomenal. Each jurisdiction is equally essential to patriated Canada.

77 See Henderson, "Empowering", *supra* note 8 at 250-69.

78 See Committee for Aboriginal Electoral Reform, "The Path to Electoral Equality" in Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol 4, (Ottawa: Communication Group, 1991) 229 at 241-45 [Committee for Aboriginal Electoral Reform].

Many structural or institutional reforms are necessary for consolidation. The existing treaty relationship and constitutional rights need the establishment of both an Attorney General for Treaty Nations[79] and a Queen's Treaty Council similar to the current Privy Council. Both these institutional reforms are needed to develop and ensure a treaty strategy on the implementation of rights or settling disputes. They should study and implement law reform initiatives, process mapping, reversals of administrative boards and agencies, and be a central clearing-house for discussions and disputes about the interpretation, application, and management of the various treaty relationships that have created Canada. They could develop mechanisms and processes to identify and potentially resolve treaty gaps, disputes, or accommodations. They could generate a wide variety of options for managing and strengthening the treaty relationships, and supplemental agreements on disputed issues based on baseline studies, transitional planning, and cumulative effects synthesis.

Generating Canadian Democracy

In addition to consolidating treaty federalism with provincial federalism to establish honourable federal governance, Canadian governments should revise their electoral systems to create authentic boundaries of representative-democratic governance. Equally as important, provincial governments should be fundamentally reformed to include representation from treaty federalism. The unique constitutional rights of Treaty Nations must be recognized as politically equal with provincial powers. This recognition can be an effective bridge between communities that respects, rather than subverts, the equitable distribution of political power. Canadian institutions need to include treaty delegates from the Treaty Nations to have a coherent and democratic Constitution.

At the centre of existing federalism rests the question of how power ought to be distributed to optimize representation, avoid corruption, and prevent majority abuse. The existing electoral system was copied from British political conventions, mostly unwritten, that have established structural inequalities for Treaty Nations. The inequalities have blocked effective participation and representation by Treaty Nations.[80] The Treaty Nations are challenging to view the existing forms of governance as anything but segregation. Moreover, the courts have acknowledged that these non-representative governments have the implied power to infringe on the constitutional rights protecting the Aboriginal

79 See James (Sa'ke'j) Youngblood Henderson, "Aboriginal Attorney General" (2003) 22 Windsor YB Access Just 265.

80 See Committee for Aboriginal Electoral Reform, *supra* note 78 at 241-45.

peoples if justified. No legitimate reason exists for Canadian democracy to exclude the Treaty Nations from political institutions.

Canada has a history of uneven steps toward the political franchise as it developed a responsible government based on compromises and deals that protect diversity and minorities against the tyranny of the majority.[81] The facts reveal that the colonialists have never allowed participation of Treaty Nations in the political process. These constitutional voices have been excluded from the debate on public policy and the law-making process. As a consequence of their exclusion from parliament, the Treaty Nations have engaged with law-making through nonelectoral mechanisms and protests.

I do not think it's provocative to say that a representative-democracy lacks legitimacy if ruled solely by elite minorities or certain majority. All democratic ideals follow the principle that governments "must not fall permanently hostage to a faction, however broadly the term faction may be defined."[82] Canadian democracy was created by the colonists to serve their purposes. At every level, democracy in Canada and the provinces has been controlled by the colonialist-immigrant faction; this dynamic has generated systemic inequality and political segregation for Treaty Nations. While Treaty Nations governance of its peoples is a practical necessity for self-determination within the treaty's territorial boundaries, without representation in parliament and legislative assemblies, this systemic inequality cannot be resolved. Without a restructuring of Canadian democracy to include representation of the Treaty Nations, Canadian democracy will remain more a fiction than a reality, more hypocritical than humanistic, and more tyrannical than national.

A true patriated federalism and democracy can be created by understanding the necessity of the equality of treaty federalism in Canadian legislatures as a constitutional right of self-determination. It can empower Treaty Nations based on the idea of constitutional equality, rather than a minority interest limiting majority power. Constitutional equality is an antidote to the individual franchise of the modern electoral system. It embraces treaty jurisdiction as a means of protecting Treaty Nations and rights from hegemonic oppression and compulsory assimilation of a unitary and repressive colonialist culture of the past. The oppressive project of political apartheid must yield to respect the uniqueness of treaty difference.

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81 See *Quebec Secession Reference*, *supra* note 4 at paras 63-69.

82 See Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986) at 27. See also *ibid* at 28-31.

The constitutional doctrine of the honour of the Crown and duty to consult and accommodate with Treaty Nations[83] as well as the right to free, prior, and informed consent are proxies for the non-representative nature of Canadian Parliament and provincial legislative assemblies. If the Treaty Nations were directly represented in these representative institutions of Canadian governance, the reliance on consent, consultation and accommodation would be lessened.

The recent decision of the Court that the constitutional treaty right to consultation does not apply to Parliament demonstrates and enforces the need for treaty delegates to be an active participant in Parliament and to provincial legislative assemblies.[84] Under the inherent authority of the treaties, the Treaty Nations should send treaty delegates to Parliament and to the provincial legislative assemblies to represent their constitutional rights in law-making. Treaty delegates will generate a new partnership in revitalized federalism and an extraordinary democracy, and resolve their subordination.

Recently, some First Nations, Métis, and Inuit peoples have represented an existing riding as individuals, but none have been delegated as authorized to speak for treaty rights. While the federal *Electoral Boundaries Readjustment Act*[85] allows for group interests to be taken into account in drawing electoral boundaries, federal legislation has not been responsive to the constitutional interests of Treaty Nations. Current electoral laws fail to recognize treaty rights as defining new constitutional communities of interest distinct from other "group interests." Especially important is their right to cultural association.[86]

The tremendous effort to empower the powerless Indigenous peoples by dialogues in the United Nations and the Organization of American States has proven the validity of Indigenous peoples as change agents in overcoming the hardened resistance of Eurocentric colonial thought. The independent Aboriginal senators have demonstrated the same dialogical abilities could prevail in Parliament and provincial governments.

While creating authentic self-determination and democratic government in Canada, a constitutional reconciliation of Treaty federalism and provincial

83 See *Mikisew Nation* 2005, *supra* note 53 at 51-58 for greater discussion of the honor of the Crown and duty to consult.

84 See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 32-33, 38-40.

85 *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3.

86 See United Nations Human Rights Committee, *Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions* (New York: United Nations, 1985) at 83.

federalism can be accomplished without undermining the constitutional foundations of Canada.[87] Article 19 of the *UNDRIP* provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[88]

In contrast, the *American Declaration of Rights of Indigenous Peoples* (2016) of the Organization of American States has expressly declared that Indigenous peoples have the right to equal opportunities to access and participate fully and effectively as peoples in all national institutions and fora, including deliberative bodies.[89] Both these international documents are consistent with the idea of Treaty delegates.

The establishment of Treaty delegates will not require constitutional amendments; this reconciliation can proceed under electoral reforms or federal legislation applying section 35 of the *Constitution Act, 1982* to federal election laws. The treaty delegates can be elected from the existing treaty boundaries similarly to the provincial and territorial boundaries.[90] They should be elected following Treaty Nations' laws. Each federal, territorial and provincial governments have the constitutional obligations to fulfill the treaty promises within the division of powers under the constitution.[91] The treaty voice must be included in the election laws of federal, territorial, and provincial governments.

How long should Treaty Nations wait for Canadian governments to reconcile the democratic principle they uphold with the existing structural inequality and extravagant powers Canadian institutions unjustly maintain over them? Most First Nations peoples realize Canadian political elites have perverted treaty and human rights through systemic racism, greed, and preferential rights. Thus, Treaty Nations have been prevented from becoming equal partners in Canada, and Canada has been prevented from becoming a constitutional democracy. This situation must be resolved.

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87 See *Delgamuukw, supra* note 10 at para 82 citing *Van der Peet*, *supra* note 10 at para 49: "accommodation of [Aboriginal rights] must be done in a manner which does not strain 'the Canadian legal and constitutional structure'." Treaties are the foundational architecture of the legal and constitutional structure of British North America (or Canada).

88 *UNDRIP*, *supra* note 3, art 19.

89 *American Declaration*, *supra* note 3, art XXI at para 2. Canada took a "non-position" on the *American Declaration*.

90 See Committee for Aboriginal Electoral Reform, *supra* note 78 at 259-60, 273-77.

91 See *Grassy Narrows, supra* note 54 at para 35.

Conclusion

In interpreting the Constitution, the courts have developed a more holistic concern for cooperative federalism with overlapping powers and the just distribution of power.[92] The silence of the watertight structure and text of the Constitution should not be construed as denying institutional change that urges reconciliation with the existing Treaty Nations. It must be remembered that the entire text of the Constitution is silent concerning federalism[93] and democracy.[94] The judiciary discovered these implicit concepts in the structure and text of the Constitution, and they defined and normalized them. It is indefensible to treat these implied concepts as though they reflected strategic choices to exclude the Treaty Nations forever. The inherent powers of the Aboriginal nations are the oldest foundation of the Constitution.[95]

Cooperative federalism requires a new, connected patriated structure for Canadian federalism and democracy in Canada consistent with constitutional reforms and the pre-emptive norms of self-determination found in the UN *Covenants* and the *UNDRIP*.[96] As a constitutional standard of Canada, Treaty federalism is not a racial, ethnic, religious, linguistic, or minority standard. Instead, the concept focuses on constitutional rights that are interlinked to create patriated Canada rather than on the fate of being born into a particular racialized group or culture. It is a concept and mechanism that is essential for the elimination of the adverse effects of colonialism and systemic racism in the modern constitutional debate between colonial and Treaty Nations about the meaning of Canada.

Merging Treaty federalism with provincial federalism into cooperative federalism must explicitly require the governments to obtain the legitimate consent of each Treaty Nation. Each Treaty Nation must determine its relations with Canada and the provinces. Only a fair and honourable constitutional reconciliation process will allow Treaty Nations to take over their affairs and destiny.

92 See *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 24, 37, 42; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 148-150.

93 See *Quebec Secession Reference*, *supra* note 4 at paras 55-56.

94 *Ibid* at para 62.

95 See *Charter*, *supra* note 74, ss 25-26.

96 See generally *Quebec Secession Reference*, *supra* note 4 at para 74 ("a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference").

Treaty federalism in a renewed nation-to-nation relationship is not about merely moving boxes around in organizational charts. It requires structural and institutional changes in the idea of federalism and representative governments. It has at least eight vectors: (1) recognizing of the legal personality of Treaty Nations already acknowledged by imperial treaties; (2) consolidating and implementing the existing treaties; (3) the immediate vesting of the specific power of self-determination of Treaty Nations; (4) including Treaty Nations in the national equalization formula; (5) limiting the powers of federal and provincial governments over Treaty Nations to those that were formally delegated to the Crown in the treaties; (6) broadly acknowledging the right of Aboriginal nations to enter into new treaties where there are no existing treaties; (7) including the Treaty Nations in the electoral apportionment of federal and provincial governments; and (8) filling gaps in the old treaties in accordance with UN human rights covenants.

These eight goals are essential to a renewed Canadian federalism. They are based on the principles of cultural integrity, political liberty, equality of economic opportunity, and human dignity. Canadians are not being asked to accept or advance unfamiliar values, but only to apply existing constitutional values to the Treaty Nations. The union of treaty federalism and provincial federalism is based on the idea that humans can come to honourable agreements on the terms of life and relationship. It is a belief in the unlimited potential of mutual problem-solving that enhances collective and individual life choices. This capacity can overcome the power of hierarchies of nationality, class, race, and gender. It is an enduring, covenantal relationship — not just an idea or an empty promise. The greatness of Canada lies in future relationships and new ways of living together as well as healing past wrongs.