Legal Pluralism and *Caron v Alberta*: A Canadian Case Study in Constitutional Interpretation

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This article offers a close reading of the majority and dissenting reasons in Caron v Alberta, *a 2015 decision of the Supreme Court of Canada, as a case study of contrasting approaches to the constitutional interpretation of historic agreements and relations between the Crown and Indigenous peoples. At issue in* Caron *were negotiations that took place in 1870 between the Métis provisional government at Red River and Canada, allowing for the annexation of Rupert's Land and the North-Western Territory to Canada. The question before the Court was whether those negotiations led to the constitutional entrenchment of legislative bilingualism across the Territory (including modern-day Alberta). By a majority of 6 to 3, the Court said no.*

This article draws on Caron *to explore broader questions about the relation between (1) a state's founding historic agreements, (2) the constitutional instruments and provisions designed to implement those agreements, and (3) the judicial task of interpreting those historic agreements as embodied in the relevant constitutional instruments and provisions. The interpretive approaches of both majority and*

Cet article propose une lecture attentive des motifs majoritaires et de dissidence dans l'arrêt Caron c. Alberta*, rendu en 2015 par la Cour suprême du Canada, en tant qu'étude de cas d'approches contrastées de l'interprétation constitutionnelle d'accords historiques et des relations entre la Couronne et les peuples autochtones. Dans l'affaire* Caron*, des négociations avaient eu lieu en 1870 entre le gouvernement provisoire métis de Red River et le Canada, permettant l'annexion de la Terre de Rupert et du Territoire du Nord-Ouest au Canada. La Cour était saisie de savoir si ces négociations avaient abouti à l'enracinement constitutionnel du bilinguisme législatif dans tout le territoire (y compris l'Alberta moderne). À la majorité de 6 voix contre 3, la Cour a répondu par la négative.*

L'article s'appuie sur Caron *pour explorer des questions plus larges sur la relation entre (1) les accords fondateurs historiques d'un État, (2) les instruments constitutionnels et les dispositions destinées à mettre en œuvre ces accords, et (3) la tâche judiciaire consistant à interpréter ces accords historiques tels qu'ils sont énoncés dans les instruments et dispositions constitutionnels*

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dissent are composed of a series of specific, contrasting interpretive manoeuvres, which are unpacked here. The interpretive approach of the majority is seen to be more state-centric and positivist, while that of the dissent takes a more pluralist tack. These competing interpretive approaches may find application (and tension) in other areas of Canadian law in coming decades, including treaty interpretation, UNDRIP implementation, and the revision of federalism doctrines to recognize Indigenous orders of government.

pertinents. Les approches interprétatives de la majorité et de la dissidence sont composées d'une série de manœuvres interprétatives spécifiques et contrastées, qui sont présentées ci-dessous. L'approche interprétative de la majorité est perçue comme étant plus positiviste et centrée sur l'État, tandis que celle de la dissidence adopte une approche plus pluraliste. Ces approches interprétatives concurrentes pourraient trouver application (et créer des tensions) dans d'autres domaines du droit canadien au cours des prochaines décennies, notamment l'interprétation des traités, la mise en œuvre de la DNUDPA et la révision des doctrines du fédéralisme afin de reconnaître les ordres de gouvernement autochtones.

> Law's exile of moral, philosophical, and religious insight about the nature of its own meaning-making metaphysics sustains a dangerous lack of self-reflexivity.
>
> *- John Borrows*[1]

> The dominant experience over constitutional history in Canada has been of a constitution as compact and political compromise.
>
> *- Benjamin L Berger*[2]

1. Introduction

What impact should the Supreme Court of Canada's (occasional) recognition of deep legal pluralism in Canada have on its work of constitutional interpretation? How might it articulate this recognition, which has thus far come through broad statements of principle and aspiration, in a more detailed account of the legal grounds that a pluralist vision offers for resolving disputes? This paper addresses those questions with a particular focus on the Court's 2015 judgment in *Caron v Alberta*.[3]

1 John Borrows, "Origin Stories and the Law: Treaty Metaphysics in Canada and New Zealand" in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Oxon, UK: Routledge, 2019) 30 at 38.

2 Benjamin L Berger, "Children of Two Logics: A Way into Canadian Constitutional Culture" (2013) 11:2 Intl J Constitutional L 319 at 328.

3 *Caron v Alberta*, 2015 SCC 56 [*Caron*].

In speaking of the Court's recognition of deep pluralism, I have in mind the Court's acknowledgment of competing sovereign claims ("pre-existing Aboriginal sovereignty" and "assumed Crown sovereignty") and the *de facto* character of Crown sovereignty in at least some areas of the country,[4] of a source of Aboriginal rights and title in legal systems that pre-date assertions of Crown sovereignty,[5] of a legal obligation on the Crown to negotiate treaties to resolve competing claims (at least in certain circumstances),[6] and of the authority of Canadian courts to question sovereign claims made by the Crown.[7]

4 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20: "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*" [*Haida*]; See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42: "The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty" [emphasis in original].

5 See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 126, DLR (4th) 193: "aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law"; *Guerin v R*, [1984] 2 SCR 335 at 379: "Their [referring to 'Indians'] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act,* or by any other executive order or legislative provision" [*Guerin*].

6 See *Haida*, *supra* note 4 at para 20: "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims." See also *ibid* at at para 25: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, *requires the Crown, acting honourably, to participate in processes of negotiation*" [emphasis added]. In *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 17, the Court confirmed that para 25 of *Haida*, *supra* note 4, was speaking of a *legal* duty: "The Court in *Haida* stated that the Crown had not only a moral duty, but *a legal duty to negotiate in good faith to resolve land claims*" [emphasis added]. Note, however, that the British Columbia Supreme Court, for one, explicitly declined to read *Haida* and *Tsilhqot'in* as affirming "a new principle of general application compelling negotiation in all aboriginal litigation": See *Songhees Nation v British Columbia*, 2014 BCSC 1783 at para 19. Courts are generally reluctant to compel, as opposed to encourage, negotiations. It remains to be seen whether particular sets of circumstances may prompt more specific court orders compelling the Crown to negotiate. Some duty-to-consult judgments arguably impose more specific obligations to negotiate *if the Crown wishes to pursue its proposed course of action*. See e.g. *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153, [*Tsleil-Waututh*] which I discuss briefly near the end of section four below. This is different, however, from imposing on the Crown a stand-alone obligation to negotiate, independent of any action the Crown wishes to pursue.

7 See *R v Sparrow*, [1990] 1 SCR 1075 at 1106, 70 DLR (4th) 385 citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26:1 Osgoode Hall LJ 95 at 100: "Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown" [*Sparrow*].

Read in isolation, these moments of recognition suggest a court untethering itself from emanations of Crown or state authority and positioning itself to interpret the Canadian Constitution so as to do justice even to claims that raise questions about the legitimacy of the state's assertions of sovereignty.

That is an unnatural move for a domestic court, to say the least. The Court's statements thus raise hard questions about how it proposes to execute this move beyond rhetoric and broad statements of principle. In other words, what specific guidance will it offer to Canadian courts to implement this recognition of deep pluralism in their work of constitutional interpretation? What are the elements of a serviceable approach to constitutional interpretation that would implement the Court's occasional recognition of deep pluralism?

I do not believe that this question can be usefully answered with broad theories or principles, at least not so long as we're looking for answers that we can plausibly imagine the courts implementing. I think it more promising to try cobbling together conceptual and interpretive tools drawn case-by-case, or context-by-context, from Canadian courts' existing body of work. Adopting this method, the goal of this paper is to assemble a number of interpretive tools that may be useful in developing practices of interpretation that do some justice to deep pluralism in the Canadian context. In closing, I will tentatively suggest ways these tools might be applied in the contexts of treaty interpretation, of implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*)[8], and of recognizing forms of Indigenous jurisdiction and orders of government in Canadian law.

To get there, I will first enter the case law through a somewhat different question: Is the Constitution made to serve historic agreements, or are historic agreements made to serve the Constitution? This question, in different guises, regularly comes before the courts as matter for constitutional interpretation. The courts have developed various interpretive tools and approaches in answering it, case-by-case and context-by-context. In any given case, contrasting interpretive approaches can play a decisive role both in determining specific legal outcomes and in shaping, or re-imagining, broader constitutional visions discernible in existing case law. Below, I make these points by looking in detail at the majority and dissenting reasons in *Caron*, as these two sets of reasons bring distinct interpretive approaches into particularly clear contrast.

8 *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/49/Vol.3 (2007) [*UNDRIP*].

Caron turned on the Court's interpretation of the negotiations and resulting agreement in 1870 between representatives of Canada and of the provisional government, led by Louis Riel, established at Red River to represent inhabitants of Rupert's Land and the North-Western Territory ("the Métis provisional government") in the shadow of Canada's request that Britain annex that Territory to Canada. In particular, the Court had to decide whether the outcome of those negotiations included a guarantee of legislative bilingualism throughout the entire Territory after annexation to Canada, such that the guarantee remained constitutionally binding on Alberta after the province's creation. By a count of six judges to three, the Court said no.

The majority in *Caron* drew on features of the Canadian constitutional order — notably, modern understandings of provincial sovereignty, minority language rights, and constitutional entrenchment — in order to interpret the content of the agreement between Canada and the Métis provisional government. In effect, the majority circumscribed the legal significance of that agreement by requiring consistency with modern elements of Canadian constitutionalism.[9] Conversely, the dissent laid primary emphasis on historical context in first determining the content of the negotiated agreement, in order then to ask how the relevant constitutional provisions might be interpreted to give effect to the agreement. Oversimplifying greatly (and somewhat unfairly to both majority and dissent), we might say that the majority interpreted the historic agreement instrumentally for consistency with modern constitutional structure, while the dissent interpreted relevant constitutional provisions instrumentally to fulfill the historic agreement.

Two contrasting constitutional visions are working themselves out in the majority and dissenting reasons, and I will make some general comments about those visions throughout this paper. The aim is not, however, to extract ready-made constitutional visions or wholly formed theories of constitutional interpretation from these judgments. For the meaning and function of a constitutional vision or interpretive approach are grounded in the details of how that vision or approach is worked out in concrete situations and cases. Thus, the value of examining the constitutional visions and interpretive approaches in *Caron* lies in the conceptual and rhetorical tools such examination provides for thinking through, case-by-case, "what constitutions are really *for*."[10] In

9 The majority adopts an interpretive approach that John Borrows points to as common in treaty interpretation. See Borrows, *supra* note 1 at 30: "Parties engaged in treaty interpretation often act as if post-hoc national structures mirror historical circumstances."

10 See Berger, *supra* note 2 at 322 [emphasis in original]. Berger's discussion of the "two logics" of Canadian constitutionalism has been particularly helpful as I think through the issues I address in

practice, constitutional visions and approaches to constitutional interpretation emerge over time, through series of cases, as *trends built from particular interpretive maneuvers* rather than as tidy theoretical accounts of the nature of constitutions and constitutional interpretation.

I therefore devote the bulk of this paper to a relatively fine-grained analysis of the majority and dissenting reasons in *Caron*, to show in detail how their respective interpretive approaches organize the "matter"[11] before the Court in support of opposing legal outcomes. I will then make some tentative suggestions as to how these interpretive approaches and contrasting constitutional visions may work themselves out in the contexts of treaty interpretation, *UNDRIP* implementation, and the constitutional recognition of forms of Indigenous jurisdiction and orders of government.

That said, it will be useful, perhaps, to begin by briefly placing *Caron* within the broader background of colonial common law and legal philosophy. That is the topic of section two below. Section three then unpacks the interpretive approaches of the majority and dissent in *Caron*. Finally, section four offers some thoughts on the prospects for these contrasting approaches in the contexts of treaties, *UNDRIP*, and section 35 of the *Constitution Act, 1982*.[12]

2. Deep pluralism, or the limits of domestic legal positivism

It is law's ceaseless toil to build and rebuild history with an eye to present-day purposes, sifting through commitments undertaken, explicitly or imputed, in order to hatch together promises sturdy enough to bind a legal structure.

This is especially true of constitutional law (at least in a modern state). The term "constitutional history" conveys something of the ambiguity or interplay between law and history at work here. Law often refers to historical events, e.g. negotiations leading to a historic political compact, as factual events that in part produced, or provided the foundation for, subsequently binding constitutional structure. In sifting through historic negotiations and agreements as the stuff of history, the law seeks to extract the stuff of law, i.e. the political com-

this paper. The contrasting interpretive approaches and visions that I draw out from the majority and dissent in *Caron* have some resonance with, but do not track, Berger's "two logics", as I explain below.

11 As Borrows, *supra* note 1 at 34, writes: "origins *are* matter; they spawn the elements from legal worlds are subsequently formed." The interpretive approaches I examine in this paper function as organizing principles vying to form legal worlds from those elements.

12 *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

pact as it was ultimately "enshrined in law" — indeed, it is often the explicit purpose of historic negotiations themselves to reach an agreement enshrined in law.

Thus, the law's talk of "historic agreements" or "political compacts", etc., is often ambiguous as to whether it refers to historical events as they actually took place or rather the legally binding fruits of those events, as interpreted by the courts themselves in light of various principles of legal interpretation. Of course, this formulation of the ambiguity is itself misleading, insofar as it suggests some clear line between "extra-legal" historical events and the legal result of those events. As already noted, the historical events themselves may be explicitly structured by and geared towards producing legally binding constitutional compacts, such that the participants themselves understand the events and their participation in them in light of (their respective understandings of) relevant principles of legal interpretation.

In this way, the meaning of the historical events in question, *what actually took place*, cannot be understood independently of relevant legal notions as to how negotiations produce legally binding agreements, i.e., cannot be understood independently of *the legal interpretation of the historical events, the historic negotiations and agreements, in question*.

It belongs to the very constitution, then, of such events that they are themselves structured by existing (though surely various, conflicting, and incomplete) legal notions even as participants intend for the outcome of such events to structure the legal regime(s) under which they will live in relation to one another. There is a certain unavoidable circularity here. In such contexts, we cannot plausibly speak of historical accounts of negotiations and agreements independently of their legal interpretation.

That said, these broad philosophical points should not distract us from the fact that there are very different ways to read law into history and history into law.

Let us therefore ground these broad philosophical matters in a more specific context. How do these very broad issues play out in the work of domestic courts providing legal interpretation of historic events, particularly historic agreements that are, in some sense, foundational to the constitutional order(s) in which the interpretations are being articulated? In rough and provisional terms, we can note two distinct orientations that courts adopt to undertake this work. First, courts may focus on established constitutional provisions, structures, and principles to fix the legal meaning of historic political agreements

and make sense of their authoritative relevance today. That is, courts may interpret historic agreements through a relatively thick lens of constitutional commitments, perhaps emphasizing the need to maintain and elaborate the internal logic of an existing constitutional order, or at least not to tear too roughly at the constitutional fabric.

Second, and by way of contrast, courts may place primary focus on the historical events themselves, and on their historical and political context, in order *thereby* to assess the legal significance of resulting constitutional bargains. This second approach may be motivated, explicitly or implicitly, by a sense that the legitimacy of constitutional fabric requires that it be woven with strands carefully drawn from relevant historic agreements. More plainly stated, this second approach may look for constitutional legitimacy less in internal coherence of the constitutional order and more in fidelity to founding historic agreements.

Three points will, I hope, underscore the modesty of the claims expressed through the above metaphors. First, I emphasize the "less" and "more" in the previous paragraph, because I believe the contrasting interpretive approaches drawn out in this paper are separated by degrees, rather than standing in absolute contrast. That said, although this contrast is a matter of degrees, these contrasting approaches may lead to opposing views of particular disputes and, ultimately, to the development of recognizably distinct constitutional visions and modes of interpretation in the case law.

Second, this paper assesses these contrasting interpretive approaches in the specific context of domestic courts fixing the legally binding content of foundational historic agreements. That is a fairly limited context, and I am not addressing in this paper broader questions about the nature of legal interpretation as such, or how the contrasting approaches highlighted here might figure in answers to such broad questions.

Finally, when I speak of fidelity to founding historic agreements, I do not understand this in necessarily originalist terms, if such terms are understood to fix the meaning of constitutional provisions at the time of their adoption. Rather, the fidelity I have in mind is one that explores the content of historic agreements in order to assess the legal significance of constitutional provisions at the time they were adopted. This approach leaves open the possibility that the meaning of those provisions may then be taken to have evolved over time. I am contrasting this form of fidelity with an approach that begins with the existing constitutional commitments of a legal order as a framework to contain the legal interpretation of historic agreements.

These points are best illustrated in the context of a concrete legal dispute or historical situation. That is the aim of the next section, in which the discussion is grounded in the specific context of Canadian judges issuing reasons in a particular dispute. In this section, I simply wish to offer a few preliminary observations on how the first interpretive approach mentioned — filtering the legal significance of historic events through a thick lens of established constitutional commitments — resonates with a division of law and politics that is perhaps most naturally associated with legal positivism, though it is not necessarily tied to any particular theory of law. Hopefully, these preliminary observations may be helpful for some readers, but I do not think anything essential in the ensuing discussion of *Caron* turns on them.

Legal positivism insists on a particular separation of law and politics. According to positivists, a functioning modern legal system contains both primary rules and secondary rules.[13] Primary rules require or prohibit particular actions (e.g. driving faster than a set speed limit on a given highway), while secondary rules contain the criteria of legal validity for primary (and sometimes other secondary) rules. Secondary rules thus include, for example, the procedural requirements that must be followed for a legislature to validly adopt bills into law. The ultimate criteria of validity in a legal system are those secondary rules that are accepted by legal officials without needing validation through any further secondary rules. The rules enshrined in constitutional documents are the most obvious candidates for such ultimate criteria of validity, but these criteria may also include unwritten constitutional principles and case law precedent.

Now, legal positivism insists that it is a matter of socio-political fact whether there exists sufficient consensus within a political community, particularly amongst its legal officials, on the ultimate criteria of legal validity. Whether the constitution is accepted as the law of the land is, on this view, a question of fact, sharply distinguished from questions of legal validity *under* the constitution, such as (to take an example from the Canadian context) whether federal legislation imposing a nationwide carbon tax is constitutionally valid. It would be a category mistake to ask whether the ultimate criteria themselves are valid or invalid; rather, they are either accepted (at least, by a critical mass of legal officials applying them) or they are not, in which case there is no functioning legal system. (Of course, there can be borderline cases, in which it is debatable

13 There is a vast literature on legal positivism. In the Anglo-American legal world, the discussion has been organized largely around "the Hart-Dworkin debate". A helpful overview can be found in Scott J Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', in Arthur Ripstein, ed, *Ronald Dworkin* (Cambridge: Cambridge University Press 2007) 22.

whether the legitimacy of a constitution is accepted by a critical mass of legal officials. That would, however, remain a political and not a legal debate, on the positivist view.)

We might use the term "domestic legal positivism" to refer to legal positivism as articulated from the institutional perspective of domestic courts. For domestic legal positivism, state assertions of sovereignty within its territory may be the quintessential ultimate criteria of legal validity, with all legal validity within the domestic legal order resting ultimately on the acceptance of the legitimacy of the state's assertions of sovereignty. On this view, domestic judges must, by virtue of their office, *accept* the legitimacy of state assertions of sovereignty, and thus cannot *reason* about the legality or legitimacy of such assertions of sovereignty. Such reasoning simply cannot be understood or intelligibly cognized from within domestic legal positivism's internal point of view, since the acceptance of sovereign legitimacy is understood as essential to opening and keeping open the public space of legal reason.

In this respect, consider the following well-known statement from Chief Justice John Marshall of the United States Supreme Court in his 1823 opinion in *Johnson v M'Intosh*,[14] a foundational case in US federal Indian law, later taken up by the Supreme Court of Canada.[15] Chief Justice Marshall acknowledged that the US "pretension" to sovereignty over Indigenous territory and to dominion over Indigenous peoples might be "extravagant," yet insisted that US courts could not question that pretension:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[16]

As Marshall CJ explained earlier in the same judgment: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[17] Speculation about the "original justice" of the political community's legal foundations is confined to "private opinions"; this confinement is necessary because the legal system's internal

14 *Johnson v M'Intosh*, 21 US 543 (1823) [*Johnson*].

15 See *Guerin*, *supra* note 5 at 380; *Sparrow*, *supra* note 7 at 1103; *Wewaykum Indian Band v Canada*, 2002 SCC 79, at para 75.

16 *Johnson*, *supra* note 14 at 591.

17 *Ibid* at 588.

point of view, its public space of legal reason, is established on those legal foundations and kept clear through the prohibition on questioning their validity.

Along similar lines, in *Coe v Commonwealth of Australia*, Jacobs J in the High Court of Australia stated that a challenge to a nation's sovereignty was "not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged."[18] In *Mabo v Queensland (No 2)*, the High Court upheld the proposition that "[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."[19]

This is not to suggest we read an entire theory of legal positivism into these brief statements by US and Australian courts, which speak most directly to the institutional role of domestic courts. What I wish to highlight is that these statements on the institutional role of domestic courts, as well as domestic legal positivism (which provides one possible theoretical justification for such statements), pose a substantial challenge to the recognition of deep pluralism in the various statements of the Supreme Court of Canada ("SCC") highlighted in the Introduction above, which notably affirm the authority of Canadian courts to question sovereign claims made by the Crown and to adjudicate, in some sense, between such claims and those based in pre-existing Indigenous sovereignty.[20]

The question put to the SCC by domestic legal positivism is: *on what basis?* Can the SCC point to a principled basis for the authority it affirms? What legal principles, what criteria of legal validity or legitimacy, does it propose to draw from, in order to question the sovereign claims made by the Crown, or to adjudicate competing Indigenous and Crown sovereign claims? Does the SCC have a constitutional vision and interpretive approach that are appropriate to the context of deep pluralism that it occasionally glimpses?

It may be helpful, in focusing this distinction between deep pluralism and domestic legal positivism, to note a related but separate distinction between

18 *Coe v Commonwealth of Australia*, [1979] HCA 68 at para 3 of the reasons of Jacobs J, dissenting in the outcome (the appeal before the Court dealing with an application to amend pleadings), though this substantive point was not in dispute between members of the Court. The principal reasons of the Court were written by Gibbs J, who similarly stated, at para 12 of his reasons: "The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged".

19 *Mabo v Queensland (No 2)* [1992] HCA 23 at para 31 of the reasons of Brennan J.

20 See notes 4-7 and accompanying text for further discussion.

understanding the Constitution as political compact and understanding it as a statement of universal rights and values. Ben Berger, in "Children of Two Logics," has traced these two understandings, or "two logics," through Canadian constitutionalism; the "older" logic of political compact is grounded especially in *The British North America Act, 1867* (since renamed the *Constitution Act, 1867*),[21] while the "newer" logic of universal rights and values is expressed most powerfully through the *Charter*.[22]

The distinction I am drawing between the perspectives of deep pluralism and legal positivism does not track the distinction Berger draws between the two logics of constitution-as-political-compact and constitution-as-universal-rights-and-values. For the internal perspective of domestic legal positivism is, at least in principle, compatible with the older logic of constitution as compact and political compromise, so long as the compacts and compromises in question are built into the constitution itself, e.g. through such provisions as sections 93 and 133 of the *BNA Act, 1867*.[23] Such compacts and compromises are reached between parties who undertake the project of constitution-building together, and who are therefore equally accepting of the project's legitimacy, on behalf of the "founding peoples" whom they represent in constitutional negotiations. These peoples together found and clear a public space of legal reason, which therefore need not lead to competing sovereign claims or legal systems, nor therefore to a situation of deep pluralism.

21 *The British North America Act, 1867*, 30 & 31 Vict, c 3 (UK) [*BNA Act, 1867*].

22 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 12 [*Charter*].

23 *BNA Act, 1867*, *supra* note 21, ss. 93, 133. See Berger, *supra* note 2 at 323-327, discussing in some detail the history of section 93. While Berger does not discuss section 133, the change in the SCC's reading of that provision over time offers, I believe, a sharp illustration of the way a shift from the logic of constitution-as-political-compact to constitution-as-universal-rights can alter the meaning of a constitutional provision. In earlier cases, the Court insisted that section 133 language rights embodied a historical compromise and lacked the universality of "basic rights". In *MacDonald v City of Montréal*, [1986] 1 SCR 460 at 500, 27 DLR (4th) 321, the majority stated that "language rights such as those protected by s. 133, while constitutionally protected, remain peculiar to Canada. They are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice." However, a majority of the Court subsequently rejected this restrictive reading of the language rights guaranteed in section 133. In *R v Beaulac*, [1999] 1 SCR 768, 173 DLR (4th) 193, the majority reviewed the early cases and rejected the proposition contained in them that language rights were less universal than *Charter* rights or other basic legal rights, stating at para 24: "Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights … the existence of a political compromise is without consequence with regard to the scope of language rights." This shift in interpretation does not, however, affect the point I am making here that the political compromises embodied in the *BNA Act, 1867* were reached between parties co-founding a new constitutional structure.

Whatever value we see in domestic legal positivism as a theory of law in such contexts of co-founding peoples, it cannot easily be transposed to situations where historic compacts and compromises, which may have been designed precisely to preserve distinct legal systems and sovereign claims (or, as in *Caron*, to be ratified by distinct legal systems through their respective mechanisms for ratification), are invoked in domestic courts to question the legality or legitimacy of the state's sovereign claims. Rather, domestic legal positivism deals with such situations by squarely rejecting the notion that any questions about the legality or legitimacy of state sovereignty can properly be formulated *as questions of law* addressed to the state's domestic courts.

A priori, of course, this is not necessarily a problem for domestic legal positivism. As suggested above, it in fact raises difficult issues for any court that, like the SCC, claims to the contrary that it does have the authority to treat such questions as questions of law. I do not think that broad constitutional theories or accounts of legal interpretation will provide courts like the SCC with workable answers on these issues. Rather, the tools for providing useful answers will have to be worked out case-by-case through the context of specific disputes.

In this respect, *Caron* is a particularly interesting case. It is something of a "borderline" case insofar as it deals with a historic agreement reached shortly after the constitutional founding of Canada through the *BNA Act, 1867*. The historic agreement in question was embedded in Canada's Constitution, or at least partially ratified by it, notably through an Act of the Parliament of Canada, the *Manitoba Act, 1870*,[24] an order of the Imperial Crown in Council, the *1870 Order*,[25] and an Act of the Imperial Parliament, the *British North America Act, 1871*,[26] each of which is discussed in greater detail below. It may be tempting, then, to think of the historic agreement between the Métis provisional government and Canada as, in essence, a moment of constitutional co-founding captured by the internal perspective of the Canadian constitutional system through these legal instruments. The majority in *Caron* was more than tempted.

Yet, Canada and the Métis provisional government were adverse, even hostile, parties in the negotiations leading to annexation. Moreover, when the Métis provisional government sent delegates to Ottawa in 1870 to complete

24 *Manitoba Act, 1870*, 33 Vict, c 3 (Canada) reprinted in RSC 1970, Appendix II.

25 *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, 23 June 1870, reprinted in RSC 1970, Appendix II.

26 *The British North America Act, 1871*, 34 & 35 Vict, c 28 (UK) reprinted in RSC 1970, Appendix II [*BNA Act, 1871*].

negotiations with Canada, "it informed the delegates that they were not empowered to conclude final arrangements with the Canadian government; any agreement entered into would require the approval of and ratification by the provisional government".[27] We are therefore not dealing with a compact between co-founding peoples in the sense of the *BNA Act, 1867*. Canada used its own existing legal mechanisms to give effect to the agreement, while the Métis provisional government reserved the power to do so through its own legal mechanisms. Given this situation of negotiations across legal orders (however asymmetric), and given that Canada was an interested party to the negotiations, does it not make sense first to be clear on the content of the historic agreement as understood by the two parties before asking how the legal mechanisms used by Canada can best be interpreted to implement the agreement? The dissent thought so.

In the next section, I briefly summarize the background to *Caron* before turning to details of the interpretive approaches adopted by the majority and dissent, respectively. I believe the dissent can be read as developing an interpretive approach that grounds the legitimacy and meaning of relevant constitutional provisions in the content of a historic agreement reached between the Canadian state and a provisional government representing people whose acceptance of Canadian state sovereignty was being sought by Canada — and sought, precisely, through the process of negotiation leading to the historic agreement in question. The interpretive approach of the dissent thus arguably offers one possible response to the challenge put by domestic legal positivism: the meaning and legitimacy of legal instruments through which a state asserts sovereignty may properly be assessed against the content of historic agreements which were to be given effect through those instruments.

3. *Caron v Alberta*, or how to constitutionally interpret a historic agreement

The appellants in *Caron*, Gilles Caron and Pierre Boutet, had been charged with traffic offences in Alberta. They conceded the relevant facts but challenged the applicable provincial law and regulation as unconstitutional because they had not been enacted or published in French.[28] They argued that Alberta had a constitutional obligation to "enact, print, and publish its laws and regulations in both French and English."[29] In other words, they claimed a right to

27 *Caron*, *supra* note 3 at para 176.
28 *Ibid* at para 8.
29 *Ibid*.

legislative bilingualism in Alberta. To understand their argument requires a brief excursus through Canadian history.

The adoption of the *BNA Act, 1867* foresaw the likelihood that the vast area of Rupert's Land and the North-Western Territory, then governed by the Hudson's Bay Company ("HBC"), would eventually be annexed to Canada. In particular, section 146 of the *BNA Act, 1867* stated that it would "be lawful for the Queen, … on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions … as are in the Addresses expressed and as the Queen thinks fit to approve."[30] That is, the Parliament of Canada could ask the Queen (in effect, the Imperial Privy Council) to annex the Territory to Canada and, section 146 continued, "any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."[31]

In December 1867, the Parliament of Canada sent an Address ("the *1867 Address*" [32]) to the Queen requesting that the Territory be admitted into the Union. In the *1867 Address*, the Parliament of Canada promised that it would respect the "legal rights of any corporation, company, or individual" in the Territory.[33] That promise became a central focus of argument in *Caron*, and I return to it below.

However, Britain was not prepared to accede to Canada's request in the absence of agreement with the HBC. Canada therefore entered into negotiations with the HBC, ultimately agreeing to pay the Company "£300,000 and to allow it to retain some land around its trading post" as compensation for the transfer of the Territory to Canada.[34] The agreement with the HBC in hand, the Parliament of Canada issued another address to the Queen in May 1869 ("the *1869 Address*" [35]), providing details of that agreement and again requesting that the Territory be annexed to Canada.

30 *BNA Act, 1867*, *supra* note 20, s 146.

31 *Ibid*.

32 *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, 17 December 1867, being Schedule A to the *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, 23 June 1870, reprinted in RSC 1970, Appendix II [*1867 Address*].

33 *Caron*, *supra* note 3 at para 3.

34 *Ibid* at para 17.

35 *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, 31 May 1869, being Schedule A to the *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, 23 June 1870, reprinted in RSC 1970, Appendix II [*1869 Address*].

To this point, no one had sought the input of the inhabitants of the Territory, but reports of imminent annexation had reached them and "led to unrest … particularly in the major population centre of the Red River Settlement".[36] The situation escalated:

> In November 1869, a group of inhabitants blocked the entry of Canada's proposed Lieutenant Governor of the new territory. Shortly thereafter, a group of Métis inhabitants, including Louis Riel, seized control of Upper Fort Garry in the Red River Settlement. Riel summoned representatives of the English- and French-speaking parishes. These representatives and others subsequently formed a provisional government.[37]

The provisional government issued at least three "Lists of Rights" between December 1869 and March 1870, as demands "that Canada would have to satisfy before they would accept Canadian control".[38] These Lists included a demand for legislative bilingualism throughout the Territory, as well as a demand that the entire Territory enter the Union as a province. Both the majority and dissent in *Caron* accepted the findings of the trial judge that legislative bilingualism was already at that time the *de facto* reality under HBC rule.

Canada did not want to accept the formal transfer of the Territory under conditions of unrest and suggested to Britain that the transfer be delayed. In the meantime, however, the HBC had surrendered its charter to the British Crown, who opposed the delay and pressured Canada to negotiate with the provisional government. As a result, Canada sent a delegation to Red River to negotiate:

> Canadian representative Donald Smith met with Riel and members of the provisional government in early 1870 to discuss their concerns … Canada subsequently invited a delegation to Ottawa to present the demands of the settlers. Three delegates from the provisional government travelled to Ottawa in April 1870 to negotiate … They met and negotiated with Prime Minister John A. Macdonald and the Minister of Militia and Defence, George-Étienne Cartier.[39]

While the majority stated (and the dissent did not dispute) that "there is little evidence regarding the substance of [the] negotiations" that took place in Ottawa,[40] the negotiations between Smith and the provisional government

36 *Ibid* at para 19.
37 *Ibid*.
38 *Ibid* at para 20.
39 *Ibid* at para 23.
40 *Ibid*. Father Noël-Joseph Ritchot, the Métis provisional government representative who took the lead in negotiations with Prime Minister Macdonald and Minister Cartier, in fact kept a detailed record

at Red River are well documented in the record that was before the SCC. Notably, responding specifically to demands presented in one of the Lists of Rights, "Smith assured the inhabitants of their right to legislative bilingualism, stating: '… I have to say, that its propriety is so very evident that it will unquestionably be provided for'."[41]

When the provisional government sent its delegates, in turn, to Ottawa in April 1870 to pursue further negotiations, it advised those delegates in a letter of instruction that the demand for legislative bilingualism was peremptory.[42] It also "informed the delegates that they were not empowered to conclude final arrangements with the Canadian government; any agreement entered into would require the approval of and ratification by the provisional government."[43] There seems to be no record of what, if anything, was said specifically about the "peremptory" demand for legislative bilingualism in the course of the negotiations in Ottawa between the representatives of the provisional government and Minister Cartier. (Prime Minister Macdonald was "indisposed" and absent from negotiations from April 28 until May 2, leaving Minister Cartier to lead the negotiations on behalf of Canada.[44])

However, one undisputed outcome of the negotiations is that in May 1870 the Parliament of Canada adopted the *Manitoba Act, 1870*, which created a new province out of only a small portion of the Territory. The Territory as a whole was formally annexed to Canada in June 1870 by an order of the Queen in Council ("the *1870 Order*"). The *Manitoba Act, 1870* included a guarantee of legislative bilingualism in the newly created province. The remainder of the Territory admitted into the Union came under federal jurisdiction — in particular, the legislative authority of Parliament, which has a constitutional

of the negotiations in his diary. This portion of Father Ritchot's diary was published in George FG Stanley, "Le journal de l'abbé N.-J. Ritchot - 1870" (1964) 17:4 R d'histoire de l'Amérique française 537.

There has been extensive academic and legal debate over the interpretation of this diary, particularly in the context of the Manitoba Metis Federation case that eventually reached the SCC: See *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14. The SCC did not mention the diary in its judgment, though it had been the subject of extensive debate at trial (see below). For academic commentary, see e.g. Darren O'Toole, "Section 31 of the *Manitoba Act, 1870*: A Land Claim Agreement" (2015) 38:1 Man LJ 73; Thomas R Berger, "The Manitoba Metis Decision and the Uses of History" (2015) 38:1 Man LJ 1. For an opposing view, also discussing Father Ritchot's diary, see Thomas Flanagan, "The Case Against Metis Aboriginal Rights" (1983) 9:3 Can Public Policy 314. Flanagan was an expert witness for Canada at trial in *Manitoba Metis Federation Inc v Canada (AG)*, 2007 MBQB 293, in which the Court extensively discussed Father Ritchot's diary.

41 *Caron*, *supra* note 3 at para 190.

42 *Ibid* at para 176.

43 *Ibid*.

44 See Stanley, *supra* note 40 at 548-549.

obligation of legislative bilingualism under section 133 of the *Constitution Act, 1867*.[45]

What to make of this situation? The Métis provisional government was, it seems, unsuccessful in pressing its demand that the entire Territory enter the Union as a province. (Though it's worth noting that Father Ritchot, who was, in effect, the lead negotiator in Ottawa on behalf of the Métis provisional government, considered this outcome not inconsistent with the demand that the Territory become a province of Canada.[46] He accepted Minister Cartier's proposal for the immediate creation of Manitoba as a province, with the creation of further provinces out of the remaining territory to follow at a later date.)

Was the provisional government also unsuccessful in its demand that legislative bilingualism be guaranteed throughout the Territory? Perhaps the most that can be said without controversy is that the newly admitted Territory was formally split under two legislative authorities — that of Manitoba (in matters of provincial jurisdiction) in the new province and that of Parliament in the remainder of the Territory, both of which had constitutional obligations of legislative bilingualism. But did that amount to a permanent constitutional entrenchment of legislative bilingualism across the entire Territory? Perhaps the most that can be said here without controversy is that when the provinces of Alberta and Saskatchewan were later formed from parts of the Territory, those new provinces assumed that the federal obligation of legislative bilingualism did not pass to their legislatures. The SCC seemed to confirm this assumption in *Mercure*.[47]

However, the Court in *Mercure* did not consider in any detail the constitutional significance of Canada's negotiations and agreement with the Métis provisional government, nor how that agreement may have been entrenched through the *1870 Order*. The *1870 Order* belongs to Canada's Constitution by

45 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 133, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

46 In his diary, Father Ritchot notes, with respect to the first clause in the instructions he received from the Métis provisional government (which clause stated that the Territory should enter the Union as a province): "Le projet de constituer une petite province … accompagné du projet de faire rentrer le reste des terres de Rupert et du Nord-Ouest dans la Confédération comme province ne me paraît pas contredire le contenu de la 1ère clause de nos instructions": Stanley, *supra* note 40 at 561. That is, Father Ritchot considered that it was consistent with the provisional government's demand that Canada should commit first to create the province of Manitoba over a small portion of the Territory, and subsequently to admit the rest of the Territory as a further province, or further provinces. As he reiterates later in the diary: "Je comprends que l'intention est de former plus tard des territoires restés en dehors du Manitoba, d'autres provinces" (*ibid* at 563).

47 *R v Mercure*, [1988] 1 SCR 234, 48 DLR (4th) 1 [*Mercure*].

virtue of being listed (Item 3) in the Schedule to the *Constitution Act, 1982*. In turn, the *1867 Address* and the *1869 Address* are attached as schedules to the *1870 Order*, which became the focus of constitutional interpretation in *Caron*. The majority and dissent both accepted that the promise in the *1867 Address* to protect the "legal rights of any corporation, company, or individual" was the most plausible textual hook on which to hang the appellants' argument that Canada's promise to ensure legislative bilingualism throughout the Territory had indeed found its way into the constitutional provisions through which Canada gave effect to the historic agreement.

There are, of course, many additional elements to be drawn from the historical context that are relevant to the dispute in *Caron*. My aim here is not to re-litigate the case, nor to argue that either the majority or the dissent was right. The purpose of subsection (a) to (e) below is simply to highlight key points of contrast in the respective interpretive approaches taken by the majority and the dissent.

a. Opening salvos: to frame history with law, or law with history?

The opening paragraphs of the majority and dissenting reasons are a study in contrasting frames. The opening sentence of the majority's reasons takes us squarely to the heart of modern Canadian constitutional law: "These appeals sit at a contentious crossroads in Canadian constitutional law, the intersection of minority language rights and provincial legislative powers."[48] The majority reasons repeatedly draw on constitutional principles relating to minority language rights and provincial legislative powers to interpret the outcome of negotiations in 1870 between Canada and the Métis provisional government.

In sharp contrast, the first paragraph of the dissenting reasons immediately foregrounds the historic negotiations and agreement, insisting that the question before the Court "requires us to go back to the country's foundational moments, to its 'constitution' in the most literal sense. More precisely, at the heart of this case are the negotiations regarding the annexation of Rupert's Land and the North-Western Territory to Canada."[49] The dissent closes its first paragraph by stressing that the negotiations and compromise were the necessary foundation for any constitutional moment to emerge: "It is common ground that [the negotiations] unequivocally resulted in a historic political compromise that permitted the annexation of those territories."[50]

48 *Caron*, *supra* note 3 at para 1.
49 *Ibid* at para 115.
50 *Ibid*.

b. Are we asking which rights were *granted* or *agreed upon*?

Having placed the interpretation of the historic agreement squarely within the frame of Canadian constitutional questions, at a specific intersection even, the majority naturally turned to the question of what the Constitution *granted*. The majority found an insurmountable obstacle to the appellants' argument in the fact that the *1870 Order* did not explicitly address legislative bilingualism. In particular, the majority found it "inconceivable that such an important right, if it were *granted*, would not have been granted in explicit language."[51]

The dissent, for its part focusing on the historical context and negotiations, did not ask what the Constitution granted, but what the parties had agreed upon. The dissent concluded that Alberta did have an obligation of legislative bilingualism, stating that "[we] reach this conclusion on the basis that the historic agreement between the Canadian government and the inhabitants of Rupert's Land and the North-Western Territory contained a promise to protect legislative bilingualism."[52] Beginning from its view that the historical evidence clearly established that a promise of legislative bilingualism was contained in the historic agreement, the dissent "accept[ed] the appellants' argument that that agreement is constitutionally entrenched by virtue of the *1867 Address*."[53]

c. Okay, but didn't the *1867 Address* precede the negotiations?

The majority quite fairly points out that the *1867 Address*, including its promise that the "legal rights of any corporation, company, or individual" in the Territory would be assured after annexation, preceded by more than two years any negotiations between Canada and the Métis provisional government. Even if it were possible to overlook the fact that the *1867 Address* nowhere mentions legislative bilingualism or language rights, how could anyone possibly think that it entrenched a promise of legislative bilingualism made years later? The majority found it simply could not build a constitutional guarantee of legislative bilingualism from "broad and uncontroversial generalities" or "infus[e] vague phrases with improbable meanings."[54]

The dissent again countered with a focus on the political and historical context. True, when Parliament issued the *1867 Address*, it clearly had not turned its mind specifically to any right to legislative bilingualism. Yet, as

51 *Ibid* at para 4 [emphasis added].
52 *Ibid* at para 116.
53 *Ibid*.
54 *Ibid* at para 6.

events ultimately unfolded, the British Crown refused to issue the order requested in the *1867 Address* and again in the *1869 Address* until Canada had reached a settlement with the provisional government at Red River. In this context, Parliament's promise in the *1867 Address* to protect the "legal rights of any corporation, company, or individual" in the Territory was transformed into "a forward-looking undertaking that was meant to be shaped by subsequent negotiations. The meaning of its terms must therefore be informed by those negotiations."[55] By the time the *1867 Address* was attached to the *1870 Order*, *subsequent* to the conclusion of negotiations, it was clear, in the dissent's view, that the "legal rights" that had actually been negotiated in the interim included the right to legislative bilingualism.

These contrasting readings of the *1867 Address* are where the clash of interpretive approaches in *Caron* really came to a head. The majority was dismissive of "the complex web of instruments, vague phrases, political pronouncements and historical context on which the appellants' claims depend."[56] The dissent countered that the majority's interpretive approach was both inaccurate and unjust:

> The British government was applying significant pressure on Canada to negotiate reasonable terms for the transfer. This was the socio-political context in which the negotiations and the promises made to the inhabitants by the Canadian government must be understood. *An interpretation that does not account for this context is not only inaccurate, but also unjust.*[57]

For good measure, the dissent supported its interpretation of the legal effect of the negotiations and promises with a constitutional principle of its own — the nature of the Constitution as an expression of the will of the people:

> The Constitution of Canada emerged from negotiations and compromises between the founding peoples, and continues to develop on the basis of similar negotiations and compromises. Such compromises are achieved when parties to the negotiations make concessions in pursuit of a mutual agreement and reach a meeting of the minds. Therefore, our reading of constitutional documents must be informed by the intentions and perspectives of all the parties, as revealed by the historical evidence. It is in this context that we will apply the third interpretive principle regarding the nature of a constitution as a statement of the will of the people.[58]

55 *Ibid* at para 130.
56 *Ibid* at para 46.
57 *Ibid* at para 183 [emphasis added].
58 *Ibid* at para 235.

This is a good reminder that the contrasting approaches of the majority and dissent are not black-and-white. Of interest here are the animating tendencies of the respective interpretive approaches, and the particular conceptual tools or moves from which these tendencies are built. Clearly, both approaches interpret constitutional text and historical events in mutually informing ways, but there is a clear difference in emphasis. Thus, even when the dissent draws on the "interpretive principle regarding the nature of a constitution as a statement of the will of the people," it does so to insist on the perspective of those who negotiate constitutional agreements with Canada:

> [I]n assessing the historical context of the promise contained in the *1867 Address*, due weight must be given to the perspective of the people who, through their representatives, concluded a historic compromise that resulted in the peaceful entry of their territories into Canada. As the historical record discussed above demonstrates, they had every reason to believe that they had secured the right to legislative bilingualism as a condition for their entry into union.[59]

And in more general terms:

> The story of our nation's founding therefore cannot be understood without considering the perspective the people who agreed to enter into Confederation. If only the Canadian government's perspective is taken into account, the result is a truncated view of the concessions made in the negotiations.[60]

In case there was any doubt as to whether historical context is driving the dissent's analysis, the closing paragraphs stress that it is the historical context that "*dictates* an interpretation of 'legal rights' that recognizes this promise" of legislative bilingualism.[61]

d. Didn't they know how to entrench language rights?

The majority places great stock in the notion that Parliament knew how to entrench language rights if it wanted to. Thus, "[t]he words in the *1867 Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the *1867 Address*".[62] As noted in

59 *Ibid* at para 219.

60 *Ibid* at para 236.

61 *Ibid* at para 240 [emphasis added].

62 *Ibid* at para 103. See also *ibid* at para 46: "the express and mandatory language respecting legislative bilingualism used by the Imperial Parliament in s. 133 of the *Constitution Act, 1867* and by the Parliament of Canada in the *Manitoba Act, 1870* stands in marked contrast to the complex web of instruments, vague phrases, political pronouncements and historical context on which the appellants' claims depend." This suggests that the majority's real point about the contrasting instruments

subsections (b) and (c) above, this focus on what Parliament intended flows from the majority's framing of the case in terms of what rights were "granted" to the inhabitants of the Territory. Even setting that point aside, the majority's emphasis on Parliament knowing how to entrench language rights in 1870 is anachronistic, for at least two reasons.

First, Parliament did not really know how to entrench anything at the time. On basic principles of parliamentary sovereignty derived from Britain, no parliament could entrench an act against itself. Thus, it was, at the very least, highly doubtful whether the *Manitoba Act, 1870* was entrenched against the Parliament of Canada, which had passed the *Act* into law. Or, to put the point somewhat differently, it was unclear whether the Parliament of Canada had the power to create new provinces within the federal structure of Canada established by the *BNA Act, 1867*.

It is hard to assess the historical legal situation with certainty, since the *BNA Act, 1867*, adopted by the Imperial Parliament, was undoubtedly entrenched against the Parliament of Canada and divided powers between that Parliament and the provincial legislatures. Arguably, then, the *Manitoba Act, 1870*, once adopted by the Parliament of Canada, achieved a measure of protection insofar as the new province's jurisdictional powers were protected under the *BNA Act, 1867*. Yet precisely such a result — the Parliament of Canada successfully entrenching an Act against itself — conflicts with British notions of parliamentary sovereignty and raises questions about the power of the Parliament of Canada to create new provinces.

At a minimum, this situation is hardly a model of clarity. Indeed, this state of uncertainty led the Imperial Parliament to enact the *British North America Act, 1871*, in order to address "doubts … respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or which may hereafter be admitted, into the Dominion of Canada."[63] If the historic agreement between Canada and the provisional government was to stand or fall with Parliament's know-how for constitutional entrenchment, it was on shaky ground.

involved is not so much about entrenchment as about the fact that the *Manitoba Act, 1870* explicitly addresses linguistic rights, while the *1870 Order* does not. As noted in the text below, this point fails to grapple with the fact that the *1870 Order* placed the Territory outside the new province of Manitoba under the legislative authority of the Parliament of Canada, which unquestionably did have a constitutionally entrenched obligation of legislative bilingualism.

63 *BNA, 1871*, *supra* note 26, Preamble.

Second, as the dissent in *Caron* explained, the *Manitoba Act, 1870* and the *1870 Order* "are not really comparable, as they did not come from the same legislative authorities — the *Manitoba Act, 1870* was passed by the Canadian Parliament, while the *1870 Order* was issued by Imperial authorities."[64] Moreover, "the annexed territories fell under federal authority. It was therefore guaranteed pursuant to s. 133 of the *Constitution Act, 1867* that federal Acts applicable to the territories would be printed and published in both languages as a consequence of their being Acts of the Parliament of Canada."[65] Arguably, the protection for legislative bilingualism would have appeared stronger in 1870 in the annexed territories under federal authority, than in Manitoba, since there was no doubt that section 133 was entrenched against the Parliament of Canada.

e. No privileging of Parliament's intentions — just its legal instruments

Despite the points highlighted above, the majority insists that it is not privileging Parliament's intentions:

> Of course, this is not to suggest that the intentions of Parliament occupy a position of privilege over those of the territorial inhabitants negotiating three years later in 1870. On the contrary, the understanding and intention of the representatives and negotiators also informs the context of the negotiations in 1870. However, there is no evidence that they used the words "legal rights" from the *1867 Address* in the broad manner suggested by the appellants.[66]

The majority here says that it is not privileging the intentions of Parliament, and is ready to give equal to consideration to the meaning that the territorial inhabitants' representatives attached to words used by Parliament. This reveals how deeply anchored the majority's approach is in the perspective of Parliament, or at least in a perspective grounded in the legal instruments used by Parliament.

By contrast, the dissent does not focus on the meaning that the Métis provisional government, or the inhabitants it represented, would have attached to words *used in constitutional instruments by Canada and Britain* to give effect to the historic agreement. Rather, the dissent focuses on the words used in negotiations between Canadian representatives and representatives of the Métis

64 *Caron*, *supra* note 3 at para 214.
65 *Ibid*.
66 *Ibid* at para 56.

provisional government, and evidence of what those parties agreed to, in order to interpret the words that Canada and Britain *later* used in constitutional instruments to give effect to the agreement that had been reached.

On each of the five points addressed in subsections (a) to (e) above, the majority and dissent made contrasting interpretive maneuvers. These respective series of maneuvers linked together to produce opposing conclusions on the proper resolution of the legal dispute before the Court.

4. Tentative thoughts on the application of deep pluralist approaches in Canadian law

The dissent in *Caron* develops an interpretive approach that acknowledges the legal pluralism inherent in the historic negotiations and agreement of 1870. The dissent's interpretive approach would also carry forward the legal effects of that pluralism to present-day constitutional interpretation of the historic negotiations and agreement, at least to the extent of reading the relevant constitutional provisions as instruments used by one party to the negotiations to give effect to the agreement within that party's legal system. Seeing the constitutional provisions as one party's legal instruments, in this sense, allows for a more instrumental reading, such that the meaning of those provisions is largely controlled by the terms of the historic agreement.

Of course, there are limits to such an instrumental reading. The legal "instruments" in question function within a legal system that has its own logic. For instance, under section 146 of the *Constitution Act, 1867*, the *1870 Order* is accorded the status of an act of the Imperial Parliament.[67] That means, among other things, that within the Canadian legal system the *1870 Order* is constitutionally entrenched and could not be modified by a simple act of Parliament or of a provincial legislature. No one was contesting this point in *Caron*, and it is hard to see how any argument attempting to do so could even get off the ground: hence, the importance to all parties in *Caron* of determining the precise terms that were incorporated into the *1870 Order*. In other words, the legal "instruments" at issue operate in a medium (a legal system, including a world of legal practice) that offers various forms of resistance; as with all instruments, such resistance or friction is necessary for the instruments to operate at all.

Thus, as I hope the discussion in section three above made clear, what I'm here calling the "instrumental reading" carried out by the dissent is a matter of

67 *Constitution Act, 1867*, *supra* note 45, s 146.

degrees, not of pure instrumentalization or disregard for the way "instruments" such as the *1870 Order* function within the Canadian legal system. Because the distinction between the interpretive approaches of the majority and dissent is ultimately a matter of degrees, the significance of that distinction can only be properly grasped by observing the respective interpretive approaches in action and noting how a series of interpretive maneuvers link together, in each set of reasons, to reach opposing conclusions regarding the particular legal dispute at the heart of *Caron*. Section three above is an attempt to carry out that work of observing contrasting interpretive approaches in action, which is the principal aim of this paper.

In this section, I would like to point, briefly and provisionally, to three areas of law in Canada in which variations on the *Caron* dissent's interpretive approach and (implicit) pluralist vision may find traction. Whether and precisely how such an approach may work itself out in these areas is difficult to predict, but these questions may be worth reflecting on for Canadian legal practitioners and the public more generally.

a. Treaty interpretation

The relevance of the above discussion to treaty interpretation in Canada should be obvious, at least in a general sense. Treaties between the Crown and Indigenous peoples were negotiated across legal orders. The written record of treaties and their incorporation within the Canadian legal system involve instruments through which Canada purports to give effect to the treaties within its legal system. When interpreting an Indigenous-Crown treaty, should Canadian courts focus primarily on the written record of the treaty in question and its function within the Canadian legal system, or begin their analysis rather with a reconstruction of the agreement reached across legal systems as that agreement would have been understood by all parties at the time the treaty was concluded?

Again, possible answers to this question are best understood in action. The recent decision of the Superior Court of Ontario in *Restoule* is particularly instructive.[68] At issue was the interpretation of treaties agreed in 1850 between Anishinaabe peoples and the Crown in the upper Great Lakes region of Ontario, in particular the interpretation of a clause in those treaties dealing with potential increases in treaty annuities. The Court accepted the Anishinaabe plaintiffs' request that it "interpret the Treaties' long-forgotten

68 *Restoule v Canada (AG)*, 2018 ONSC 7701 [*Restoule*].

promise to increase the annuities according to the common intention that best reconciles the interests of the parties at the time the Treaties were signed."[69] This was the correct interpretive approach in the Court's view, and required "an appreciation of the Anishinaabe and Euro-Canadian perspectives, the history of the parties' cross-cultural shared experience, and the Crown's duty of honourable dealings with Indigenous peoples."[70]

In carrying out this interpretive task, the Court in *Restoule* accepted extensive expert evidence on Anishinaable legal principles and engaged in a detailed analysis of this evidence to draw inferences about the understanding Anishinaabe negotiators would have had of the treaty terms. These inferences were central to the conclusions the Court ultimately drew about the meaning of the treaty provisions in dispute in *Restoule*. The Court thus adopted interpretive maneuvers in line with those of the dissent in *Caron*.

b. Implementing the *United Nations Declaration on the Rights of Indigenous Peoples*

The procedural rights enshrined in *UNDRIP* have arguably yet to receive the attention that their importance merits.[71] I think article 27 is especially worth noting:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[72]

Implementing article 27 requires approaching Indigenous-Crown relationships, and disputes that arise therein, with a focus on the actual content of agreements reached between Indigenous peoples and the Crown (whether those agreements are contained in treaties or otherwise, including any eventual agreements for dispute resolution and adjudication as mandated by article 27), rather than heavily filtering such relationships and agreements through

69 *Ibid* at para 2.

70 *Ibid*.

71 I develop this argument in Ryan Beaton, "Articles 27 and 46(2): UNDRIP Signposts pointing beyond the Justifiable-Infringement Morass of Section 35" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019).

72 *UNDRIP*, *supra* note 8, art 27.

the lens of Canadian constitutional principles along the lines of the majority's interpretive approach in *Caron*. This, in turn, requires recognizing that such relationships and agreements are developed across legal systems and traditions. The dissent in *Caron* and the Court in *Restoule* develop interpretive approaches that help implement such recognition.

c. Constitutional recognition of Indigenous orders of government

Finally, I note that a greater embrace of legal pluralism might ultimately be forced on Canadian case law through its own tangled jurisprudence under section 35 of the *Constitution Act, 1982*. In this final subsection, I briefly consider a few recent cases from British Columbia that suggest how a greater recognition of Indigenous legal orders may be emerging in the case law.

In *Coastal First Nations v British Columbia (Minister of Environment)*,[73] the British Columbia Supreme Court held that, while British Columbia could (and did) reach an agreement with Canada to rely on the federal environmental assessment for the Northern Gateway Pipeline project, the province could not abdicate its powers under the province's own *Environmental Assessment Act* to decide whether to issue an environmental assessment certificate (and, if so, subject to what conditions). In other words, the province could use the federal assessment as the input for its decisions relating to the issuance of a certificate, but could not fail entirely to exercise that decision-making power. The Court stated:

> I agree that the Crown is indivisible when it comes to such concepts as the "honour of the Crown". However, where action is required on the part of the Crown in right of the Province or federal government, or has been undertaken by either — the manifestation of the honour of the Crown, such as the duty to consult and accommodate First Nations, is clearly divisible by whichever Crown holds the constitutional authority to act. In this case, where environmental jurisdictions overlap, each jurisdiction must maintain and discharge its duty to consult and accommodate. Illustrative of this concept are discussions in several Supreme Court of Canada decisions, in differing contexts, demonstrating that each Crown has specific responsibilities to consult First Nations as their respective legislative powers intersect and affect s. 35 guarantees.[74]

This line of reasoning suggests that, at least in some circumstances, provinces may have constitutional obligations to exercise their authority over environ-

73 *Coastal First Nations v British Columbia (Minister of Environment)*, 2016 BCSC 34 [*Coastal*].
74 *Ibid* at para 196.

mental matters *together with affected Indigenous peoples*. Provinces cannot transfer such constitutional obligations to the federal Crown.

In *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*,[75] the British Columbia Supreme Court had to consider the potential conflict between two different sets of provincial constitutional obligations under section 35: on the one hand, treaty obligations to the Nisga'a Nation finalized in the *Nisga'a Final Agreement* and, on the other hand, obligations to consult the Gitanyow Nation with respect to their Aboriginal rights and title claims. The Court found that, in the case of conflict, provincial treaty obligations would take precedence over and displace the duty to consult, to the extent of the conflict. *Gamlaxyeltxw* shows that the courts are now starting to tackle questions having to do with the divisibility of Crown obligations under section 35 (here divisible into treaty and non-treaty obligations, rather than into provincial and federal obligations as in *Coastal First Nations*), and it also helps provide an interesting point of comparison for a case like *Burnaby City*, which I consider next.

In *Burnaby (City) v Trans Mountain Pipeline ULC*,[76] the Court found that by-laws adopted by the city conflicted with National Energy Board ("NEB") orders relating to routing of work on the Trans Mountain pipeline expansion ("TMX") project. Since the Court found that the NEB orders were squarely within the NEB's jurisdiction over the pipeline project as a federal undertaking, the Court concluded that, by the doctrine of federal paramountcy, the by-laws were inoperative to the extent of the conflict with NEB orders.

Suppose instead of conflicting by-laws, a case like *Burnaby City* involved conflict between NEB orders (or other valid federal law) and provincial treaty obligations of the kind considered in *Gamlaxyeltxw*. I know of no court precedent or principle of federalism that would justify, in any straightforward sense, holding that federal law may render inoperative provincial treaty obligations and thus override corresponding treaty rights. Federal law cannot override constitutional rights. By the same logic, federal law could not render inoperative non-treaty provincial constitutional obligations owed with respect to asserted section 35 rights.

Finally, I note that the Federal Court of Appeal, in *Tsleil-Waututh*, held that the section 35 Crown duty of consultation and accommodation requires

75 *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440 [*Gamlaxyeltxw*].

76 *Burnaby (City of) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140 [*Burnaby*].

the Crown to engage in "responsive, considered and meaningful dialogue"[77] to the proposals of First Nations whose Aboriginal interests may be adversely affected by proposed Crown action. In *Tsleil-Waututh* the Court noted in particular proposals for First Nations co-management,[78] stewardship,[79] and imposition of a resource development tax.[80]

These evolving strands of the case law suggest the need for both (i) fundamentally reconsidering federalism doctrines such as paramountcy in light of divisible Crown constitutional obligations under section 35, and (ii) for recognizing the centrality of Indigenous governance and legal structures to Indigenous-Crown discussions that are mandated under the rubric of the section 35 Crown duty to consult and accommodate. In other words, the case law seems poised to move toward recognizing some forms of Indigenous jurisdiction, notably in environmental matters relating to development projects. Of course, such a broad statement says little about the particular forms such recognition will take. In the context of this paper, I simply want to suggest that constitutional visions and interpretive approaches built from the more pluralist interpretive tools discussed above may build a sturdier framework for such recognition.

Conclusion

The Supreme Court of Canada has made several striking statements suggesting a distinctively pluralist constitutional vision of Indigenous-Crown relationships. These statements stand in stark contrast with statements made by domestic courts in the US and Australia, similarly addressing the legacies and current realities of interactions across Indigenous legal systems and colonial common law systems. The concerns expressed by the US and Australian courts for the limits of their own institutional authority highlight the challenge for Canadian courts in developing credible and workable interpretive tools for implementing our Supreme Court's seemingly more pluralist vision, notably in cases requiring the legal interpretation of historic agreements between Indigenous peoples and the Crown.

This paper explored the majority and dissenting reasons in *Caron*, a 2015 decision of the Supreme Court of Canada, as illustrative of contrasting interpretive approaches to such historic agreements. In section three, the heart of

77 *Ibid* at para 559.
78 *Ibid* at paras 681-727.
79 *Ibid* at para 736.
80 *Ibid* at paras 741-751.

this paper, I examined a series of contrasting interpretive tools or maneuvers as the elements constituting the majority and dissenting approaches, respectively. Roughly speaking, the respective series of maneuvers reflected the majority's reading of the historic agreement through a thick lens of constitutional commitments developed within the Canadian legal system, and the dissent's reading of relevant constitutional provisions as instruments to give effect to the historic agreement reached across legal systems by Canadian representatives and a provisional government representing inhabitants of land that had yet to be annexed to Canada.

As I have stressed throughout this paper, however, it is not such general characterizations of the contrasting interpretive approaches that carries their meaning, but rather the particular maneuvers that trace their key lines, and the use to which these maneuvers may be put in other contexts. In the final section of the paper, I have therefore indicated, in a provisional way, areas of Canadian law in which these maneuvers or tools may find application, namely treaty interpretation, *UNDRIP* implementation, and the recognition within Canadian case law of Indigenous jurisdiction and orders of government.

It remains to be seen whether these areas of Canadian law will develop along the more pluralist lines suggested by the interpretive approach of the dissent in *Caron*. Will we see a significant shift in the courts' approach to treaty interpretation, as perhaps suggested by *Restoule*, signalling a greater willingness to understand the meaning of treaty provisions from the perspective of Indigenous legal orders? Might such a shift help Canadian governments find the political will, in line with commitments to fully implement *UNDRIP* (article 27 in particular), to establish "in conjunction with indigenous peoples concerned"[81] the adjudicative and other processes required to fully implement Indigenous-Crown treaties? Perhaps co-management boards, in some form, could ultimately play an adjudicative role in such contexts, applying both Canadian state law and relevant Indigenous law, with Indigenous legal experts interpreting and developing appropriate Indigenous legal principles. Finally, will Canadian courts arrive at a revision of principles of federalism, notably paramountcy, that includes a clear recognition of Indigenous jurisdiction, as partly suggested in subsection 4(c) above?

These are broad and difficult questions currently raised but unsettled in Canadian case law. In addressing them, the courts will face a multitude of further sub-questions. While I am sceptical of any detailed prognostications on

81 *UNDRIP*, *supra* note 8, art 27.

the answers courts will ultimately provide, I expect that the more state-centric and more pluralist approaches taken by the majority and dissent in *Caron*, respectively, will continue to create tension as the case law evolves in these areas. This tension will be worth watching closely to see whether a more pluralist approach and vision of Canadian constitutionalism makes substantial inroads on the more state-centric approach.