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review

Special Issue

Treaty Federalism

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UNDRIP, Treaty Federalism, and Self-Determination

*Michael Asch**

This paper discusses the possibility that Indigenous expressions of self-determination might be fulfilled despite the fact that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) *subordinates them to the colonial frameworks under which Indigenous peoples now find themselves. Developing an approach to Treaty Federalism that adopts a "consociational" form might assist. Another approach, discussed in more detail in this paper, is based on a form of sharing as expressed in certain treaty negotiations. The latter asserts that the legitimacy of the Canadian state arises, in the first instance, by means of a treaty relationship in which, speaking from a Western point of view, Indigenous peoples still retain "sovereignty".*

Ce document traite de la possibilité que les expressions autochtones d'autodétermination peuvent être remplies malgré le fait que la Déclaration des Nations Unies sur les droits des peuples autochtones (DNUDPA) *les subordonne aux cadres coloniaux dans lesquels se trouvent maintenant les peuples autochtones. Élaborer une approche du fédéralisme de traité qui adopte une forme " consociationaliste " pourrait s'avérer utile. Une autre approche, abordée plus en détail dans le présent document, repose sur une forme de partage telle qu'exprimée dans certaines négociations de traités. Cette dernière atteste que la légitimité de l'État canadien découle en premier lieu d'une relation conventionnelle dans laquelle, d'un point de vue occidental, les peuples autochtones conservent toujours leur " souveraineté ".*

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Introduction

This paper begins with the origin of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*)[1] after the failure of Indigenous peoples to gain recognition under the 1960 United Nations *Declaration on the Granting of Independence to Colonial Countries and Peoples*.[2] I then discuss possible roles the idea of Treaty Federalism might play in countering limitations on the scope of self-determination contained in *UNDRIP*.

On *UNDRIP*

Indigenous peoples are colonized peoples, and so have the same right to self-determination as other colonized peoples, as it is described in the 1960 *Declaration*. This means that, in principle, their right to self-determination includes the right to free themselves from "alien subjugation, domination and exploitation" and to "freely determine their political status and freely pursue their economic, social and cultural development."[3] In other words, the right to independent statehood, and thus a political standing equivalent to any other state in the international community. The application of this resolution here would mean that Indigenous peoples and Canada in principle are equivalent in political status.

Based on this principle, self-determination in Africa and Asia resulted in the formation of politically independent nation-states that are recognized as legitimate by the United Nations, notwithstanding that formerly they were recognized as under the legitimate rule of colonial powers. It is a recognition that stands in contrast to the *Charter of the United Nations* in which the territorial integrity of states is understood to be an inalienable right of each.[4]

However, largely based on technical reasoning (as exemplified by the 'blue water' thesis[5]), the United Nations failed to extend this possibility to those colonized peoples who found themselves to be small minority populations within settler states in North, Central, and South America, as well as New Zealand and Australia. It was the impasse initiated by the refusal of states to negoti-

1 *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*].

2 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, Supp No 16, UN DOC A/RES/4684 (1960) [1960 *Declaration*].

3 *Ibid* at 67.

4 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2.

5 See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 64 [Asch, *On Being*].

ate further on this matter that ultimately led to a political reclassification of these colonized peoples as Indigenous peoples and, on that basis, after years of struggle, to then be acknowledged by the United Nations as having special political rights as Indigenous (not colonized) peoples. That acknowledgment is memorialized in *UNDRIP*.

Hence, while *UNDRIP* follows the 1960 *Declaration* closely in many respects, it does not include a right to self-determination that could lead to the establishment of independent states.[6] Looked at from this perspective, Indigenous peoples become a category of colonized people that do not have such a right.

Aside from making a distinction that contradicts a foundational right guaranteed to other colonized peoples to govern themselves free of external influence, even if that disrupts the territorial integrity of a recognized state, *UNDRIP*'s effect is to offer this category of colonized peoples far less political clout to achieve any desired political relationship than would have been the case were they not excluded from the application of this clause of the 1960 *Declaration*. Here, then, while the right to self-determination in Article 3 includes the "right [to] freely determine their political status and freely pursue their economic, social, and cultural development,"[7] they are limited in Article 4 in the exercise of their right to self-determination "to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"[8] and as per Article 5 "to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[9] It is a proposition that leaves the political initiative to the colonial states in which they find themselves.

At the same time, there is one provision that possibly offers indigenous peoples a means to exercise robust political clout. It is Article 32(2) which says that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territo-

6 *UNDRIP, supra* note 1, art 46: "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".

7 *Ibid*, art 3.

8 *Ibid*, art 4.

9 *Ibid*, art 5.

> ries and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[10]

While there is disagreement as to whether this clause requires the state to gain "prior consent" of Indigenous peoples in such matters or merely that they "consult and cooperate in good faith" to seek that consent has been a matter of great debate in Canada and elsewhere.[11] However, even if it were determined by states or some other authority — as, for example, by means of a UN Resolution — that the prior consent provision applies, it still limits the hegemonic exercise of Indigenous political authority to "project[s] affecting their lands or territories or other resources."[12] In other words, the clause at best operates as a defense against certain state actions rather than as a means to allow Indigenous peoples the authority to seek to develop their lands on their own terms.

In short, looked at on its own, while providing some potentially robust protections, *UNDRIP* really offers Indigenous peoples much less in terms of political rights than are acknowledged for other colonized peoples, for it ultimately legitimates the hegemony of a colonizing state's power rather than liberation from it. In this sense, it seems to guarantee the political subordination of Indigenous peoples. The question is, how could Treaty Federalism change this balance?

Treaty Federalism

Treaty Federalism has been described in many ways by many authors.[13] It is not my intention to outline them here. Rather, let me just offer a quick provisional description with which I hope all will agree. Federalism in this context can be succinctly described as the sharing of political jurisdiction among a number of partners. Here the complexity is in the word "sharing", and it is a matter I will address further.

Treaty is a more complicated term. For my purposes here, I will describe treaty as a set of relations between Canada and Indigenous peoples memorialized at the time of Canadian Confederation principally in the oral accounts of

10 *Ibid*, art 32(2).

11 See S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (Oxford: Oxford University Press, 2004).

12 *UNDRIP*, *supra* note 1, art 32(2).

13 See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995); Russel Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkley, CA: University of California Press, 1980).

the negotiations provided by the Indigenous parties. In addition, I include the evidence provided by Commissioner Morris in his published account of the promises he made on behalf of the Crown during negotiations.[14] Specifically excluded, based on the evidence that these matters were not addressed adequately during negotiations, are the terms memorialized in the written versions, and the so-called cede and surrender clause in particular — matters I discuss at length in *On Being Here to Stay*.[15]

Based on this evidence, the relationship established through treaty entails that the Indigenous parties agree to share their lands in perpetuity with those subjects of the British Crown who wish to settle on them by establishing an enduring partnership akin to one that exists between relatives in a family. More specifically, the partnership is based on an equality of political standing between the parties in which the kind of sharing and mutual aid that flows from kindness are foundational principles.

To be clear, I would not apply the term Treaty Federalism to the current revisionist arrangements advocated by the Federal Government that are currently being negotiated by Carolyn Bennett.[16] These often are imagined as a form of federalism in which a sphere of jurisdiction is allocated to Indigenous parties — sometimes called a fourth level of government and often described as containing powers similar to those now delegated by provinces to municipalities. In other words, it relies on the idea that Indigenous governance is intended to fit within and under the plenary authority of the Canadian state. As such, these arrangements are neither predicated on equality of political standing between the partners nor do they acknowledge that the arrangements flow from an initial moment of graciousness when the Indigenous parties, without ceding their authority as the pre-existing legitimate political authority, gave permission to Canada to establish governance on these lands. I would make a similar observation with respect to so-called Modern treaties, especially in the South (e.g., Nisga'a' and Tsawwassen peoples).

14 The Honorable Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co, 1880). See also Asch, *On Being*, *supra* note 5.

15 Asch, *On Being*, *supra* note 5.

16 See Crown-Indigenous Relations and Northern Affairs Canada, *Departmental Plan, 2019-20* (Ottawa: Government of Canada, 2019); Jorge Barrera, "Battle Brewing Over Indigenous Rights Recognition Framework" (11 September 2018), online: *CBC News* <https://www.cbc.ca/news/indigenous/indigenous-rights-framework-bennett-1.4819510>.

Treaty Federalism and Consociation

Federalism can provide two kinds of institutional arrangements, each of which, under the right circumstances, could be applied to Treaty Federalism as described above. Together, I have described them as forms of consociation, or ways to work out of power sharing among groups within a democracy on an equitable basis. Further, while the political science definition of "consociation" mentions elite accommodation as a fundamental characteristic,[17] the sociological form, which I am following here, does not include that as a necessary aspect.

One form, which I have previously called "indirect consociation",[18] is the kind of territorial federalism that exists in Canada today with respect to the French fact. That is, for example, the organization of provinces in a way that ensures the Québécois form a majority in one and then apportioned jurisdiction in a way that ensured the majority had jurisdiction with respect to Section 92 of the *Constitution Act,* 1867.[19] It is a system that has enabled us to construct a fiction that there is no consociational arrangement, that majority rule is all that matters, and has led, for example, to squabbles in Canada over whether Quebec has special status or is one province among ten.

Indigenous peoples, of course, by and large cannot take advantage of this form of consociation, as they represent small populations scattered through the lands of Canada. Some scholars have tried to resolve this by suggesting that Indigenous territories amalgamate into one that is not contiguous; but the problem here, beyond the difficulty of establishing any territorial form of government on this basis, is that Indigenous peoples do not constitute a homogenous singularity.

The second, which I have called "direct consociation,"[20] is more promising. It specifies the target ethnonational populations that gain political authority constitutionally, and so does not need to rely on territorial considerations at all. The two examples I have previously considered are Belgium and Switzerland, both of which, to be fair, also have a territorial component. Using Belgium as the example, the two constitutionally protected communities are the Dutch speakers and the French speakers. Here, while certain decisions, as in Canada, are made by a majority of representatives for the country, or the province, as

17 See Arend Lijphart, "Consociational Democracy" in Joel Krieger, ed, *The Oxford Companion to Politics of the World*, 2nd ed (Oxford: Oxford University Press, 2001) at 172.

18 Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) at 77-79 [Asch, *Home*].

19 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5.

20 Asch, *Home*, *supra* note 18 at 77-79.

a whole, others would require a double majority — that is, a majority of representatives as a whole that includes a majority of representatives from each ethnonational community and thus apply wherever one might live. Even if the Indigenous contingent only made up 10% of the seats in Parliament or in a legislature, on certain matters a majority of their representatives would have to assent to the legislation. It is something that could perhaps be better modeled in the Senate, were the Senate to have veto power over certain legislation — it could also offer seats to various First Nations communities, thereby providing independent voices. At the same time, this form of consociation provides for self-government through territorial majorities and thus leaves unresolved how it would apply to Indigenous communities that are as scattered as those in Canada.

In general, consociationalism imagines that all parties participate in a Western-based political system, and in the 1980s when the Northwest Territories was considering its form of governance after division, Gurston Dacks and I wrote a paper proposing such a model.[21] However, there was one proposal for governance in the North offered by the Dene Nation in the 1980s called *Public Government for the People of the North*.[22] This proposal would have built a mixed system that would have permitted the Dene to use traditional forms of governance for internal matters — and used an Indigenous senate as the veto mechanism. It was rejected by the Federal Government for a number of reasons, of which one was the resulting dissonance in institutional arrangements. On the other hand, following Nichols, I am persuaded that there is now more willingness to consider political arrangement consonant with the belief in "diverse and cooperative federalism," [23] as well as one that would identify Indigenous peoples as a protected voting bloc.

As I will address a bit further below, such an arrangement, I believe, would meet the standard set for compliance with *UNDRIP* and might come close to meeting the standard for decolonization in cases where the colonized party chooses to remain within the colonial state. Nonetheless, there is something

21 See Michael Asch & Gurston Dacks, "The Relevance of Consociation to the Western Northwest Territories" in Western Constitutional Forum, ed, *Partners for the Future: A Selection of Papers Related to Constitutional Development in the Western Northwest Territories* (Yellowknife: Western Constitutional Forum, 1985) 35.

22 The Dene Nation and Metis Association of the NWT, *Public Government for the People of the North* (Yellowknife: Self-Published, 1982).

23 Joshua Nichols, "Sui Generis Sovereignties: The Relationship Between Treaty Interpretation and Canadian Sovereignty" (Waterloo, ON: Centre for International Governance Innovation, 2018), online (pdf): *Centre for International Governance Innovation* <https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.1_1.pdf> at 11.

about this solution that seems to run counter to the spirit, if not the letter, of the treaty relationship we established. In particular, it would construct a relationship in which oppositional politics rather than cooperation and mutual assistance would play a central role, in that it is set up institutionally to encourage the parties, as in Belgium, to seek self-interest rather than cooperation. But is there another way? It is to this question I now turn.

Federalism in the Spirit and Intent of Confederation Era Treaties

To my mind there is such a possibility, at least in theory. And, while its realization is certainly not on the horizon, I would like to suggest certain principles that might be brought into play were it ever to be considered. To this end, let me return to the right to self-determination.

In its classical formulation, political self-determination is described as governance without interference from those who are not Self — that is, away from the unwanted Other. Thus, the construction of an independent state is a natural consequence of its political expression; for in the classical view, only such entities have the legitimate authority to keep at a distance that which does not belong to the Self. Thus, in this imaginary the goal of the Self is to take care of itself, and the goal of the Other is to take care of itself. Their relationship comes second. In other words, such a world imagines states each of which is in control of a singular Self. The placement of two or more such Selves within the same state with none being in charge as in a consociation conflicts with self-determination's principle responsibility within this imaginary: to put into place that which is necessary for the Self to the exclusion of what is Other. Hence, it becomes a recipe for opposition and conflict as the parties contest over how best to take care of each Self. In that sense, as Nichols points out, it anticipates a form of relationship that imagines "agonism" as a central and eternal feature of political life.[24]

But there is another way to imagine a political relationship between Self and Other. It flows from the understanding that the Self does not exist on its own, but only in relation to Other. In this perspective Self and Other are from the outset intertwined in such a way that the relationship between them is identified as part of who they are. Thus, it presumes that Self cannot live in a space that is cordoned off from Other, for they are always together. Nor does it imagine, for the same reason, that the preoccupation of the Self-determining

24 *Ibid* at 4.

Self is to look after itself to the exclusion of Others — human and other than human. All are always looking after both themselves and others.

As Todorov described in *Life in Common*,[25] many versions of this formulation exist in Western thought. Often, they are modeled on the "mother-child" relationship. I do not wish to use this image as the presumption here is that of a partnership between adults. In a recent article, Tully quotes Mary Parker Follett who, in 1924, describes such a relationship in these words:

> I never react to you but to you-plus-me; or to be more accurate, it is I-plus-you reacting to you-plus-me. "I" can never influence "you" because you have already influenced me; that is, in the very process of meeting, by the very process of meeting, we both become something different. It begins even before we meet, in the anticipation of meeting. On physiological, psychological and social levels… response is always to a relating. Accurately speaking the matter cannot be expressed even in the phrase used above, I-plus-you meeting you-plus-me. It is I plus the-interweaving-between-you-and-me meeting you plus the-interweaving-between you-and-me, etc., etc. This pregnant truth — that response is always to a relation, the relation between the response and that to which the response is being made — is the basic truth for all social sciences.[26]

Another formulation, by Martin Buber, provides an image in which there is no possibility of a Self who is independent of Other. Buber's position is explained by Levinas in his essay "Martin Buber and his Theory of Knowledge" in these words:

> The I-Thou relation is one in which the self is no longer a subject who always remains alone and is for this reason Relation *par excellence*, for it extends beyond the boundaries of the self…The relation is the very essence of the I: whenever the I truly affirms itself, its affirmation is inconceivable without the presence of the Thou.[27]

As Adam Kirsch put it in a recent review in *The New Yorker* of a new book on Buber:

> Only when we say "You" to the world do we perceive its miraculous strangeness and, at the same time, its potential for intimacy. Indeed, it's not only human beings who

25 Tzvetan Todorov, *Life in Common: An Essay in General Anthropology*, translated by Katherine Golsan & Lucy Golsan (Lincoln, NE: University of Nebraska Press, 2001).

26 Mary Parker Follett, *Creative Experience* (New York: Peter Smith, 1924) at 62 cited in James Tully, "Trust, Mistrust and Distrust in Diverse Societies" in Dimitri Karmis and François Rocher, eds, *Trust and Distrust in Political Theory and Practice: The Case of Diverse Societies* (Montreal: McGill-Queen's University Press) [forthcoming in 2019], online: *PhilArchive* <https://philarchive.org/archive/TULTMA-2v1> at 8-9 [Tully, "Trust"].

27 Emmanuel Levinas, "Martin Buber and the Theory of Knowledge" in Seán Hand, ed, *The Levinas Reader* (Oxford: Basil Blackwell, 1989) at 64.

> deserve to be called "You." As Buber wrote, even a cat or a piece of mica can summon up in us the feeling of a genuine encounter with another: "When something does emerge from among things, something living, and becomes a being for me . . . it is for me nothing but You!"[28]

It is a viewpoint that inspires the analysis of the socio-political as found in the work of Marcel Mauss[29] and Claude Lévi-Strauss[30] among others.

As I see it, the contrast between the views of Self and Other can be analogized to the differing ways the Western mind imagines the physical and biological world. The former, at least in Newtonian terms, views the universe as reducible to singularities: objects that move in space. The relationship between them is created through external forces. The image in political thought is a mechanical man, Hobbes' *Leviathan*[31] that contains us under its authority. On the other hand, the biological universe is built on relations between a minimum of two living entities (gendered in the minimal instance) that are different from each other, yet necessary to each other if the collectivity is to survive from one generation to the next. In addition as Levi-Strauss argues, among humans (given the incest taboo) the minimal number must be two families (however these are defined). " This means that, from the beginning (even in the State of Nature in Hobbes), humans build political society through a double connection between Self and Other. The one, which is common in the biological world, is the requirement of biologically different individuals; the other, common to humans alone — in Hobbes' formulation — is that between families. Hence, in both the biological and cultural universes existence requires that Self and Other are simultaneously different from one another, yet in a relationship. This relationship is intrinsic to their continued existence. In this imaginary, beginning with a singularity produces a dead end, for it cannot maintain its existence from one generation to another . It is an idea that is also reflected in Durkheim's dictum to "consider social facts as things,"[32] that is, the idea that the social universe (social facts) consists of interactions between people that empirically produce results (things) that are different from the results produced by individuals acting alone.

28 Adam Kirsch, "Modernity, Faith, and Martin Buber" (29 April 2019), online: *The New Yorker* <https://www.newyorker.com/magazine/2019/05/06/modernity-faith-and-martin-buber>.

29 See Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies,* translated by WD Halls (New York: WW Norton, 1990).

30 See Claude Lévi-Strauss, *Elementary Structures of Kinship* (Oxford: Alden and Mowbray, 1969).

31 Thomas Hobbes, *Leviathan,* ed by Richard Tuck (Cambridge: Cambridge University Press, 1996).

32 Émile Durkheim, *The Rules of Sociological Method*, 8th ed, ed by George EG Catlin, translated by Sarah A Solloway & John H Mueller (New York: Free Press, 1964) at 14.

While such an idea is poorly developed in Western thought, as I discuss in *On Being Here to Stay*,[33] I have come to understand it to be highly developed in Indigenous thought, where, among many other matters, it is applied to the organization of political and other relations between humans, between humans and other than humans, and relations among other than humans. This is how I came to understand political relations as they were explained to me among Dene. It is manifest in relations on the Plains between the Cree, Assiniboine, and Anishinaabe, called the Iron Confederacy,[34] that developed in the fur trade era. It provided a conceptual framework for me to understand how groups, such as Cree and Assiniboine could form communities together notwithstanding that they spoke very different kinds of languages; as an Indigenous student once explained to me, it provides ways to ensure that groups practicing different forms of internal political relationship could nonetheless live together without compromise.

It is to this concept that that Indigenous peoples often apply the term "treaty." So it has been explained to us at least since Kiotseaeton described treaty relations to the French in 1645 as "linking arms" together so tightly that "nothing can part us … Even if the lightning were to fall upon us, it could not separate us; for, if it cuts off the arm that holds you to us, we will at once seize each other by the other arm."[35] That is, through treaty we create a "knot that binds us inseparably."[36]

It is often used to describe the political relationship as understood by Indigenous partners in treaties with the Crown entered into at Confederation and after. As explained by Treaty 8 Chief George Desjarlais at the Royal Commission on Aboriginal Peoples:

> We are treaty people. Our nations entered into a treaty relationship with your Crown, with your sovereign. We agreed to share our lands and territories with the Crown. We did not sell or give up our rights to the land and territories. We agreed to share our custodial responsibility for the land with the Crown. We did not abdicate it to the Crown. We agreed to maintain peace and friendship among ourselves and with the Crown. [37]

33 Asch, *On Being*, *supra* note 5.

34 See John S Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg, MB: University of Manitoba Press, 1988); "Nehiyaw-Pwat: The Iron Confederacy" (15 August 2018), online (blog): *Dibaajimowin* <https://www.dibaajimowin.com/tawnkiyash/nehiyaw-pwat-the-iron-confederacy>.

35 Asch, *On Being*, *supra* note 5 at 118.

36 *Ibid*.

37 *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 428.

Here, the key is sharing. The way that this concept is often viewed is as a means to divide things up, hopefully in an equitable way. In contrast to the *Oxford English Dictionary* definition of "share," it means: "to participate in […] to perform, enjoy, or suffer in common with others."[38] To have a relationship like that, then, must mean that the partners see each other as capable agents who have the intention to act both with kindness towards one another and in the spirit of mutual aid — the latter point being made explicit by all parties during Treaty 6 negotiations.[39] In short, in this way of thinking of Self and Other as inextricably bound together, sharing the land cannot mean dividing it up into jurisdictions, but rather working together to arrive at ways to act in common — ways that simultaneously honour what is important for both Self and Other. That, I believe, is the understanding that must have resulted from Commissioner Morris' repeated use of the word "kindness," and his suggestion that all parties were like brothers to one another and the intent was to share the land, not take over.[40]

Jim Tully has recently described this relationship, following from Indigenous understandings, in these words:

> This unique type of federal relationship of mutual aid is interpreted by indigenous peoples as the gift-recognition-gratitude-reciprocity relationship or, simply, gift-reciprocity. Each member's way of life is organized in such a way that it does no harm to its neighbours and provides some goods or services that help to sustain them. The neighbours recognize this gift *as* a gift and experience the emotion of gratitude. Gratitude moves and freely obliges the recipients to reciprocate by giving their gifts of mutual aid to the same or other neighbours; thus setting in motion a virtuous gift-reciprocity cycle that co-sustains all relatives.[41]

It follows that in this form of relationship the identification of who has sovereignty is largely irrelevant, for we begin not with identifying which party has sovereignty in a certain territory, but rather how to work out arrangements

38 *OED Online* (Oxford University Press, 2019) sub verbo "share, v.2".

39 In particular, during negotiations about famine provisions and the discussion of mutual aid surrounding it.

40 See Morris *supra* note 14 at 108 [parenthetical information added]. Morris writes:

> We have two nations here. We have the Crees, who were here first, and we have the Ojibbeways (Anishinaabe), who came from our country not many suns ago. We find them here; we won't say they stole the land, and the stones and the trees; no, but we will say this, that we believe their brothers, the Crees, said to them when they came in here: "The land is wide, it is wide, it is big enough for us both; let us live here like brothers;" and that is what you say, as you told us on Saturday, as to the Half-Breeds I see around. You say you are one with them; now we all want to be one.

41 Tully, "Trust", *supra* note 26 at 17 [emphasis in original].

that are mutually beneficial. Let me add that I say "largely irrelevant" because, looked at from a Westphalian point of view, Indigenous peoples retain sovereignty. However, here it would be realized not in the construction of an independent state, but as leadership in guiding the parties on how to take care of the land.

Getting from There to Here

Of course, from the time it was first published there have been strong critiques of the political world as constructed by Hobbes. Although they take many forms,[42] among the earliest and strongest have been those that rely on ethics and morality. Basically, they suggest that humans do not act as Hobbes imagines in the State of Nature, and thus the establishment of a political system under the rule of a single sovereign is not necessary to overcome chaos. By and large such arguments have been unsuccessful as the Hobbesian imaginary still dominates the organization of political life in modernity. Yet, virtue arguments persist, likely because there is much truth to them, and I do not wish to discard them here. Humans are better than Hobbes describes, and I would uphold such a perspective in arguing in favour of a political world constructed on relationality.

But in fact, I think we need to add a different argument, for these and many others do not directly address the argument *Leviathan* presents in its own terms. In fine, I am suggesting that *Leviathan* lays out an argument based on necessity that is directed specifically to defeat a virtue argument. That is, the virtue argument is contained in the first law of nature: the Golden Rule. Against this Hobbes presents a necessity argument for individual survival as of a higher value.[43]

So, it appears that it would be useful to construct an argument based on necessity to counter Hobbes. In *On Being Here to Stay* I attempted this in an abbreviated form by discussing Lévi-Strauss' thought experiment on the origins of society to counter Hobbes' thought experiment on the State of Nature.[44] Basically, in my interpretation, Lévi-Strauss brings in as central a matter that

42 For example, anthropology replaces the sovereign in the state of nature with culture.

43 This is because, without some entity to enforce a contract, the right of each individual to defend oneself will lead to mutual annihilation. That is, to Hobbes, Golden Rule or not: "For the sake of self-preservation, people will give up their rights only when others are willing to do the same." And that, I argue along with many others, is the ethic fundamental to the construction of the existing political system in which it is the purpose of Self to protect Self from Other by establishing recognized political borders.

44 Asch, *On Being*, *supra* note 5 at 116-133.

Hobbes ignores — the reproduction of humans from one generation to another. Indeed, Hobbes, who does discuss the family in the State of Nature, pays no attention to the question of generational succession. But one must, all things considered, imagine it to result from relations between families. Yet in his model, such relations cannot be stable; therefore, the ongoing existence of humanity is, at best, precarious. To Lévi-Strauss, then, human survival — the second law of Nature — requires some form of relationship between families. Specifically, he suggests that this stability is provided by the "incest taboo," which in effect is a self-enforcing contract that requires us to build political society by establishing relations with those who are other than Self. This means that, from the beginning, even in the State of Nature in Hobbes, humans build political society through a double connection between Self and Other. The one, which is common in the biological world, is the requirement of biologically different individuals; the other, common to humans alone — in his formulation — is that between families. Therefore, political society is constructed through difference and cooperation rather than separation. Hence, this formulation provides an argument based on necessity to justify relationality that counters, if not defeats, the one based on singularities proposed by Hobbes.

Conclusion

In sum, I am suggesting that there is nothing in Treaty Federalism that can overcome *UNDRIP*'s denial to Indigenous peoples of the scope of the right to self-determination contained in the 1960 *Declaration*. At the same time, it looks to me as though Treaty Federalism can provide means to put *UNDRIP* into practice in ways that does not lead to the subordination of the Indigenous party. Interestingly enough, were Indigenous parties to agree to such arrangements, this would result in Canada coming into compliance with the 1960 *Declaration*, for in addition to a right to an independent state, Resolution 1541, Principle VII — which implements that resolution — asserts that self-determination could result from 'free association' between the parties. This provision is described thusly:

> *(a)* Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes. (b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional process-

> es and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.[45]

A solution along these lines would create a relationship between Indigenous and the Colonizer that reflects the political values and practices Indigenous leaders understood as the spirit and intent of the Confederation era treaties they negotiated. The only question is whether on the one hand, after nearly 150 years of dishonouring the relationship, our Indigenous partners would still espouse that position, and, on the other, whether we are now willing to work with them in good faith to get to that place.

45 *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, GA Res 1541 (XV), UNAGOR, 15th Sess, Supp No 16, UN DOC A/RES/4684 (1960).

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

*James [Sa'ke'j] Youngblood Henderson**

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.*

* Research Fellow, *Wiyasiwewin Mikiwahp* (Native Law Centre of Canada), College of Law, University of Saskatchewan. *Ababinilli*, *maheoo*, *niskam* and others provided guidance; however, I assume full responsibility for interpretation.

> *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

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

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.

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.

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.

Indigenous Peoples and Interstitial Federalism in Canada

Robert Hamilton*

The scope and content of section 35 of the Constitution Act, 1982, *which constitutionalized the recognition of Aboriginal and Treaty rights, was intended to be negotiated at the political level. The failure of that process meant that the job of determining the meaning of the provision fell largely to the judiciary. As a result, the constitutional relationship between Indigenous peoples and the Canadian state has most frequently been theorized in terms of Aboriginal rights and the judicial doctrines interpreting section 35. This paper explicitly considers the relationship between Indigenous peoples and Canadian governments from the perspective of federalism. It does so by emphasizing the interstitial character of federalism. This articulation serves two functions. First, it recognizes the myriad ways that Indigenous peoples exercise jurisdiction as being constitutive of federalism in Canada. That is, it offers a way of re-describing existing practices of governance in Canada in order to shed light on their federal character. Second, this approach offers a view of how constitutional change can occur moving forward, providing a critique of conceptions of federalism that cement a constitutional order that has historically marginalized Indigenous practices of governance. Lastly, it suggests avenues for the development of a federalism that can support Indigenous self-determination.*

La portée et le contenu de l'article 35 de la Loi constitutionnelle de 1982, *constitutionnalisant la reconnaissance des droits ancestraux et issus de traités, devaient être négociés au niveau politique. L'échec de ce processus signifiait que la tâche de déterminer le sens de la disposition incombait en grande partie au pouvoir judiciaire. En conséquence, la relation constitutionnelle entre les peuples autochtones et l'État canadien a été le plus souvent théorisée en matière de droits des autochtones et de doctrines judiciaires interprétant l'article 35. Ce document examine explicitement les relations entre les peuples autochtones et les gouvernements canadiens du point de vue du fédéralisme. Pour ce faire, il souligne le caractère interstitiel du fédéralisme. Cette formulation remplit deux fonctions. Premièrement, elle reconnaît les innombrables façons dont les peuples autochtones exercent leurs compétences en tant que constitutifs du fédéralisme au Canada. C'est-à-dire qu'elle offre un moyen de redécrire les pratiques de gouvernance existantes au Canada afin de faire la lumière sur leur caractère fédéral. Deuxièmement, cette approche donne une idée de la manière dont le changement constitutionnel peut se produire, en proposant une critique des conceptions du fédéralisme qui cimentent un ordre constitutionnel ayant historiquement marginalisé les pratiques de gouvernance autochtones. Enfin, elle suggère des pistes pour l'élaboration d'un fédéralisme pouvant soutenir l'autodétermination des autochtones.*

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Ring the bells (ring the bells) that still can ring
Forget your perfect offering
There is a crack in everything (there is a crack in everything)
That's how the light gets in

Leonard Cohen, "Anthem"

1. Introduction

In 1992, Indigenous and non-Indigenous leaders from across Canada came to an agreement: section 35 of the *Constitution Act, 1982* would be amended to recognize self-government as an Aboriginal right.[1] This agreement resolved some unfinished business from the patriation of the Constitution a decade earlier. Then, in response to pressure from Indigenous peoples — who had been increasingly active politically at the national level since the government White Paper in 1969 motivated a unified opposition — the constitutional patriation package included a section reading: "The existing aboriginal and treaty rights of the Aboriginal People of Canada are hereby recognized and affirmed."[2] This provision, however, created considerable uncertainty: it was unclear how "aboriginal rights" were to be defined and what scope of protections they would receive. Two major Indigenous political organizations opposed the provision, going to the British courts to seek to have it excluded from the patriation package.[3] While the provision was included, section 37 of the *Constitution Act, 1982* stated that subsequent negotiations would be held to determine the scope and content of the provision.[4] While these conferences resulted in minor amendments, a substantial articulation of the scope and content of section 35 was not agreed upon. This despite the fact that many, including prominent federal politicians, believed that it should protect some form of jurisdiction or self-government.[5] The 1992 *Charlottetown Accord* was the product of over two decades

1 See Ovide Mercredi & Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto, Ontario: Viking Publishing/Penguin Books, 1993) at 207-228.

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

3 Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford, United Kingdom: Hart Publishing, 2015) at 44-45; See also *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians,* [1981] 4 CNLR 86 (EWCA).

4 Webber, *supra* note 3 at 47-48. This was reflected in section 37 of the *Constitution Act, 1982.*

5 See e.g. Brian Mulroney, "Opening Statement at the First Ministers' Conference on the Rights of Aboriginal Peoples" (Address at the First Ministers' Conference on the Rights of Aborriginal Peoples, Ottawa, Ontario, 2-3 April 1985) archived at <www.collectionscanada.gc.ca/primeministers/h4-4021-e.html.>. While self-government could generally be agreed upon, Indigenous peoples wanted the clause to be justiciable in the event of conflict, which could not gain agreement; See also Webber, *supra* note 3 at 48. For an account of the political climate surrounding these conferences and the

of discussion about the place of Indigenous peoples in the constitutional order. As it turned out, however, this would mark the end of one trajectory for negotiating the content of section 35. The proposal was part of a larger package of constitutional amendments that failed at referendum, and the process of defining section 35 moved from the political realm to the judicial realm.

The decisions of the courts have only recognized limited forms of Indigenous jurisdiction; as to whether section 35 recognizes political rights, and thereby signals important changes to the federal association in Canada, or a limited set of cultural or identity-based rights, the Supreme Court has leaned toward the latter. In doing so, it has distributed the bargaining power of the parties unequally in a manner that has made achieving recognition of self-government at the negotiating table difficult.[6] The Court has done the political work of defining the constitutional powers of the parties, and it has done so in the context of a rights regime that recognizes limited constitutional authority for Indigenous peoples. This approach has consistently failed to meet the demands of Indigenous peoples for the recognition of their inherent jurisdiction. Federal and provincial governments have too frequently done only the legal minimum, meaning that a judicial framework that does not meaningfully recognize Indigenous jurisdiction has frequently resulted in a refusal to do so in negotiations. While a number of individual self-government agreements have been concluded, they have been finalized largely within the bounds of the section 35 framework the Court has established.[7]

The result has been an impasse, with Indigenous peoples asserting and exercising political rights and jurisdiction while courts and governments remain tied to a limited minority rights paradigm.[8] As a result, while there is important literature theorizing 'Aboriginal rights' in terms of federalism or the place of Indigenous peoples within the constitutional order, the emphasis, especially in legal thought, has tended to work within the doctrinal confines set by the Court.[9] Thus, despite the Supreme Court's recognition that federalism

lead up to the Meech Lake and Charlottetown negotiations, see Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16:1 Rev Const Stud 1.

6 On the distributional role of the courts in this respect, see Patrick Macklem, *Indigenous Difference and the Constitutions of Canada* (Toronto, Ontario: University of Toronto Press, 2001).

7 For an overview of the tensions present in the modern treaty process, see Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver, British Columbia: UBC Press, 2005).

8 See Kiera Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can J Political Sci 923.

9 It should be noted that a major and important exception to this is the theorizing about 'treaty federalism.' Though I will return to treaty federalism later, at this point I should note that nothing

can be described as "the dominant principle of Canadian constitutional law" and that "the principle of federalism remains a central organizational theme of our Constitution,"[10] the Court has not considered the place of Indigenous peoples in the constitutional order through the lens of federalism. This paper articulates a conception of federalism — 'interstitial federalism' — that serves two purposes. First, it provides a descriptive analysis of the myriad ways in which Indigenous peoples engage state and non-state actors at legal and political levels. In this, it provides a lens through which exercises of jurisdiction can be understood as having a federal character — as being *constitutive of* Canadian federalism. Second, it provides a frame for theorizing questions of federalism in the Canadian context. By emphasizing grounded practices of jurisdiction as practices of federalism, it seeks to theorize federalism in a manner that reflects practices of governance rather than idealized conceptions or models. In this regard, this paper is preliminary in nature, a first foray into a set of ideas that will require further testing and articulation.

2. Narratives of Federalism and Enacted Jurisdiction

The place of Indigenous peoples within Canada's federal structure has been only sporadically the subject of analysis and discussion.[11] Most texts on fed-

in this argument should be taken as excluding notions and practices of treaty federalism. Indeed, such practices may be taken as paradigmatic examples of interstitial federalism in the sense it will be described here. On treaty federalism, see James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; See also Andrew Bear Robe, "Treaty Federalism" (1992) 4:1 Const Forum 6; See also Kiera Ladner, "Treaty Federalisms: An Indigenous Vision of Canadian Federalisms" in Francois Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism,* 2nd ed (Toronto, Ontario: Broadview Press, 2003) 167.

10 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 57, 161 DLR (4th) 385 [*Secession Reference*].

11 Notable examples include Jean Leclair, "Socrates, Odysseus, and Federalism" (2013) 18:1 Rev Const Stud 1; See also Francis Abele and Michael Prince, "Alternative Futures: Aboriginal Peoples and Canadian Federalism" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, Ontario: Oxford University Press, 2002) 220; See also Kiera Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James Kelly & Christopher Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver, British Columbia: UBC Press, 2009) 273; See also Martin Papillon, "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy,* 2nd ed (Don Mills, Ontario: Oxford University Press, 2008) 291. See also Sari Graben, "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6:2 Indigenous LJ 63. See also Richard Stacey, "The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism" (2018) 46:4 Federal L Rev 669. See also Ian Peach & Merrilee Rasmussen, "Federalism and the First Nations: Making Space for First Nations' Self-Determination in the Federal Inherent Right Policy" (2005) 31:1 Commonwealth L Bull 3. See also Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in David Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*

eralism deal extensively with issues such as the place of Quebec in the federation, the federal spending power, the impact of the *Charter* on federalism, labour markets, health care, the environment, fiscal federalism, and so on.[12] Federalism is theorized as asymmetrical, flexible, or cooperative, as having 'five faces' or 'four dimensions.'[13] When discussing Indigenous peoples, the focus is less frequently on their role as partners in the federation than on the context of managing diversity within a federal system. Rarely are Indigenous peoples discussed as holders of jurisdiction within the federal association. While the historical role of Indigenous peoples in shaping the political structures in North America is increasingly recognized, conventional 'Western' historical narratives downplayed or ignored this role altogether. Indeed, nation-states are still conceived of in popular and much academic discourse as coming into being fully formed on a particular historical date; the complex forms of negotiated political authority that predated the nation state and from which it slowly and unevenly emerged are obscured.

As they have frequently been excluded from dialogues on federalism, and as section 35 Aboriginal rights have developed unevenly in the courts, Indigenous peoples have moved forward with the business of practicing their inherent jurisdiction, using the courts and negotiations with the Crown strategically while exercising jurisdiction either through state-mediated avenues or on their own terms. This marks an important distinction in the forms of Indigenous jurisdiction that are being enacted on the ground. The first is through negotiated agreements, moves under existing statutory regimes, or some combination of the two. Examples of the former include co-management boards, modern treaty arrangements, reconciliation agreements, and sectoral agreements. These practices are negotiated with state institutions and are typically supported, at least at the formal legal level in Canadian law, by statutory enactment. The latter include the exercise of the limited governance powers under the *Indian Act* or the somewhat more expansive powers included in '*Indian Act*-plus' statutes such as the *First Nations Land Management Act*.[14] At Canadian state law, jurisdiction under these instruments is considered to be a form of delegated authority, and it is therefore subject to judicial supervision. The second type of jurisdiction is exercised purely on the basis of the inherent jurisdiction of

(Montreal-Kingston: McGill-Queen's University Press, 1989) at 19. See also Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31:2 Queen's LJ 521.

12 See e.g. Alain Gagnon, *Contemporary Canadian Federalism: Foundations, Traditions, Institutions* (Toronto, Ontario: University of Toronto Press, 2009).

13 Francois Rocher & Miriam Smith, "The Four Dimensions of Canadian Federalism" in Rocher & Smith, *supra* note 9 at 21-22.

14 *First Nations Land Management Act*, SC 1999, c 24.

the nations and without recourse to the state. Examples are many, but include tribal parks, traditional forms of governance, non-state modes of dispute resolution, language reclamation, various land-based practices, etc. These practices of jurisdiction are not delegated, formally or otherwise, by the Canadian state.

The question of how these practices fit within, or sit in relation to, Canadian law is an open one. Indeed, there are important questions about whether the power of such practices would be compromised by any attempt to frame them within state law.[15] Yet, framing Indigenous jurisdiction in relation to the Canadian constitutional order can provide productive ways to think about the engagement between legal orders. Some level of engagement, some *relation to,* is, after all, unavoidable: theorizing the relationship between legal orders is a descriptive necessity regardless of one's normative stance. Absent active resistance, state law simply fills all voids it encounters. It does not admit to 'blank spots' where it does not apply — nor do the extractive industries with which nation-states are aligned. Capital, as Marx noted, does not abide by limits.[16] Such is the nature of the territorially bounded contemporary nation-state, at least at the conceptual level.

In practice, authority is much more attenuated. Pressures from above (international law and norms, transnational private actors, etc.) and below (substate peoples, cultural and linguistic minorities, various civil society organizations, internal constitutional limitations, etc.) limit the reach of state laws in important respects.[17] Because of the expansive nature of state law and capital, however, contending legal and normative orders always find themselves *in relation to* these forces. The argument I advance here is that by explicitly reading Indigenous assertions of authority and jurisdiction as practices of federalism, and by advancing the conceptual framework for what the Canadian federal association might be, we open up a set of conceptual tools that will be able to descriptively reflect the nature of Indigenous moves *in relation to,* but *separate from,* state apparatuses. It also opens up a set of practical legal and political tools that can assist Indigenous peoples in maintaining and furthering their

15 Leanne Simpson thoughtfully explores this issue. Leanee Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg, Manitoba: Arbeiter Ring Publishing, 2011); See also Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, Minnesota: University of Minnesota Press, 2014).

16 See David Harvey, *Seventeen Contradictions and the End of Capitalism* (New York, New York: Oxford University Press, 2014).

17 This is true historically and, as Lauren Benton has pointed out, should shape how we think about sovereignty in imperial arenas. Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge, United Kingdom: Cambridge University Press, 2009).

autonomy in the face of these ongoing entanglements.[18] This is done not by providing a predetermined or imposed model of governance, which is not the role of non-Indigenous theorists or politicians, and is of questionable value in any event, but by critiquing the state bodies that limit Indigenous authority so that productive spaces may be opened.

An emphasis on points of divergence, relation, and entanglement should not be taken to discount the importance of prefigurative practices that can shape those engagements. 'Resurgence' based arguments that prioritize the 'flourishment of the Indigenous inside,' to use Leanne Simpson's evocative phrase, are essential.[19] Prefigurative practices have enormous transformative potential. In practice, they frequently exist alongside engagements with the state as Indigenous peoples develop strategic counter-hegemonic practices in relation to the opportunities and constraints they encounter. The argument I advance here is that the radical transformation of current institutions and structures of governance has transformative potential that should be explicitly considered as a practical avenue of social transformation.[20] An emphasis on where Canadian institutions can be reformed so as to provide more room to recognize the self-determination of Indigenous peoples is not intended absorb or assimilate Indigenous peoples into a broader Canadian polity; rather, the suggestion is that counter-hegemonic practices that strategically engage the state can give rise to shared structures that can accommodate a plurality of political communities while maintaining their integrity and autonomy. Though there are many ways to begin developing this line of thinking, I discuss it in terms of what I call 'interstitial federalism' — a term I borrow but give new meaning to[21] — arguing that interstitial federalism can respect Indigenous autonomy and develop relationships and practices of non-domination.

18 John Borrows emphasizes the nature of the 'entanglements' in which we find ourselves. John Borrows, *Law's Indigenous Ethics* (Toronto, Ontario: University of Toronto Press, 2019).

19 Simpson, *supra* note 15 at 11. On resurgence generally, see Coulthard, *supra* note 15; See also Taiaiake Alfred, *Wasasé: Indigenous Pathways of Action and Freedom* (Toronto, Ontario: University of Toronto Press, 2005).

20 See Chantal Mouffe, *Agonistics: Thinking the World Politically* (London, United Kingdom: Verso, 2013).

21 The term is borrowed from Rhett Larson. Rhett Larson, "Interstitial Federalism" (2015) 62:4 UCLA L Rev 908. To my knowledge it has not been used elsewhere. The phrase 'interstitial law-making' has been used extensively. As I outline below, my use of the phrase 'interstitial federalism' differs from Larson's in important respects, though his formulation remains important for the argument developed here. My framing is also indebted to Jean Leclair's notion of 'Federal Constitutionalism', in particular insofar as it advocates for understanding Indigenous peoples as constitutive members of a federal association. See Leclair, "Federal Constitutionalism" *supra* note 11.

3. Interstitial as Legal and Political Term

The term interstitial is primarily used in two senses in relation to legal and political matters. In American legal thought, the phrase 'interstitial law-making' is used to describe the 'gap-filling' role that courts play when interpreting statutes or constitutional provisions. The first such use appears to have been by Holmes J.: "I recognize without hesitation that judges do and must legislate, but they can do it only interstitially."[22] This term has been occasionally taken up by Canadian commentators and courts, who have used it in the same sense.[23] In this vein, Scheibel J. wrote in *R.L. Crain Inc. et al.*: "I do not propose to attempt any exhaustive definition of the range of rights encompassed by the phrase 'life, liberty and security of the person.' Indeed, it would be impossible to define the scope of this phrase with any degree of exactness. The boundaries of this broad right will undoubtedly be developed by the courts interstitially as different claims arise."[24] As taken up by the Canadian courts, the use generally indicates that, in terms of law-making, courts must be mindful of their role in relation the legislative branch. Courts must be cautious not to impose their own meaning on a statute or constitutional text; rather, they should constrain themselves to making law *interstitially* by filling in gaps left in the legislation. This understanding was put succinctly by Peter Hogg:

> To the extent that a controversy calls for the exercise of discretion by a court, the discretion is always closely defined by rules of law. That courts "make" new law when they apply vague or ambiguous law to new fact-situations is a commonplace, but judicial law-making is interstitial and incremental, normally staying within the spirit of the pre-existing law, rarely engaging any significant new public policy, and rarely involving the expenditure of public funds.[25]

Thus, the phrase has been used extensively to describe 'gap-filling' law. In the American context, however, it also has more defined and circumstantial mean-

22 *Southern Pacific Co v Jensen,* 244 US 205 at 221 (1917). Holmes J may have borrowed the notion from Henry Maine, who, writing of the prominence of writs in early English law, argued that substantive law was "secreted in the interstices of procedure." Henry Maine, *Dissertations on Early Law and Custom: Chiefly Selected from Lectures Delivered at Oxford* (London, United Kingdom: John Murray, 1883) at 389, quoted in Mark Walters, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, Ontario: University of Toronto Press, 2017) 187 at 188.

23 See e.g. *Harrison v Carswell*, [1976] 2 SCR 200 at 218, 62 DLR (3d) 68.

24 *R.L. Crain Inc. et al. and Moore Corporation Limited et al. and Lawson Business Forms Manitoba Ltd. et al. v Couture, Restrictive Trade Practices Commission, and Lawson*, 1983 CanLII 2475 (Sask QB) at para 85.

25 Peter Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981) 30 UNB LJ 9 at 14.

ings that differentiate it from statutory interpretation writ large. As Kevin Johnson explains:

> When the judiciary is called upon to apply federal statutes, a species of federal common law frequently referred to as interstitial lawmaking comes into play. Congress almost invariably leaves gaps in laws it enacts that the courts feel compelled to fill. A prototypical example of interstitial lawmaking is adding a limitations period to a federal statute lacking one. Rather than the ordinary task of interpreting the text of a statute, the court fills in the blanks left by Congress in the statutory language. Consequently, the task of interstitial lawmaking differs somewhat from traditional statutory interpretation.[26]

The central idea here, again, is that the judiciary can play a role in filling the inevitable gaps that are revealed in the process of applying written laws to real world contexts. The judiciary can do this through a generative mode of statutory interpretation that, in Johnson's view, moves beyond the traditional modes of statutory interpretation that focus on interpreting the plain meaning of the text, the intention of the drafters, and the meaning of the statute as a whole[27] toward a more robust gap-filling exercise more akin to statutory amendment.

Further developing this original sense of gap-filling judicial law-making, the 'interstitial model' has become something of a term of art in American constitutional law scholarship, used to describe the relationship between state and federal courts. The interstitial model here moves beyond statutory and constitutional interpretation, indeed, beyond the role of the courts in relation to the legislative branch, and is used to articulate the role of state and federal courts within a picture of American federalism. Under this view, state courts can look to where the federal courts have retreated from an area when deciding whether to expand or develop the law in that area. In this sense, an interstitial model sees federal law as 'interstitial' in that it occupies vacant spaces rather than relying on a strictly dual sovereignty approach.[28] The 'interstitial model' thus emerges as an alternative to a strict 'dual sovereignty' approach, permitting courts in one jurisdiction to deal with issues that fall within another jurisdiction if that other jurisdiction is silent on the matter.

26 Kevin Johnson, "Bridging The Gap: Some Thoughts About Interstitial Lawmaking And The Federal Securities Laws" (1991) 48:3 Wash & Lee L Rev 879 at 882; See also Bradford Clark, "Federal Common Law: A Structural Reinterpretation" (1996) 144:4 U Pa L Rev 1245 at 1248.

27 See e.g. Frank Cross, *The Theory and Practice of Statutory Interpretation* (Stanford, California: Stanford University Press, 2008) at 85-101.

28 See Ernest Young, "Erie As A Way Of Life" (2018) 52:2 Akron L Rev 193.

Another legal use of the term 'interstitial' has recently emerged in the American context. Rhett Larson has used the phrase 'interstitial federalism' to refer to situations in which the conventional division between state and federal law-making authority leaves gaps in regulation: when, as Larson writes, "[b]oth the state-centric and federal-centric approaches fail to adequately seal [a] jurisdictional crack."[29] In response to such situations, where the conventional division of powers fails to adequately apportion jurisdiction between federal and state governments, Larson argues for the development of institutions of shared governance that can include a plurality of voices and redraw jurisdictional lines to better manage particular resources. In particular, Larson argues that these 'interstitial institutions' can be used to address so-called 'spillover commons,' or "common-pool resources that cross jurisdictional boundaries and are subject to scarcity and overappropriation concerns."[30] In federal systems with clear-cut jurisdictional lines, the regulation of such commons pose problems of scale: the scale of any given institution's jurisdiction must be appropriate to ensure proper management of the resource and, if it is not, the management or regulation of the resource may suffer to the detriment of all. The concern is that if a jurisdiction is too large, if it is held at too high or too distant a level, it will not be able to deal efficiently with certain issues. Water scarcity in a given watershed, for example, may be mismanaged if lawmakers are too distant or removed from the impacts of that scarcity. If a jurisdiction is too small (for example, an individual state), regulation will run into a tragedy of the commons situation as states manage the water in their territorial bounds without concern for how it will affect other states and communities into whose jurisdiction the watershed reaches.[31] Re-thinking jurisdiction in relation to 'spillover commons' leads to an articulation of interstitial federalism as the joint creation of institutions designed to respond to this type of issue in relation to a given resource. Thus, "a choice simply between state and federal jurisdiction-should be abandoned."[32]

Interstitial federalism, on Larson's model, differs from cooperative and horizontal federalism, as those terms are used in the American context, in important ways. Cooperative federalism, in Larson's view, "occurs when a federal agency, using congressionally granted authority, delegates the implementation of a federal statute to a state agency — subject to continued federal oversight."[33] There is no meaningful rearrangement of jurisdiction; the federal order simply delegates authority to a body more competent to carry out a specified task. By

29 Larson, *supra* note 21 at 927.
30 *Ibid* at 910.
31 *Ibid* at 912.
32 *Ibid*.
33 *Ibid* at 929.

contrast, interstitial federalism "redraws jurisdictional boundaries through the interstate compact process in order to be consistent with the geography of spill-over goods."[34] Under an American model of horizontal federalism, federal and state governments jointly develop targets or standards to manage a resource while leaving states with the authority to develop their own processes for how to meet those targets. Interstitial federalism, however, "places an institution whose jurisdictional scope matches that of the spillover commons as the primary regulatory body, in accordance with the internalization prescription."[35] In both instances, shared decision-making bodies are developed and jurisdictional geographies are re-worked to match the governance of a given resource. In the process, the federal order is reworked through the joint development of new institutions and jurisdictions.

The key difference, then, between Larson's conception of interstitial law-making and the traditional use of the phrase in American legal thought is the emphasis on the development of new institutions and the re-drawing of jurisdictional lines. His articulation takes a prescriptive view, arguing that an interstitial model of federalism based on the development of new institutions can better respond to certain types of problems than the traditional division of powers and associated geographically bounded jurisdictions. Whereas traditional interstitial law-making sees the courts as playing a gap-filling role where jurisdictional cracks appear, in Larson's conception, new non-judicial institutions must be developed with exclusive jurisdiction in relation to subject matters that traditionally fell within state or federal jurisdiction but are not effectively managed by those jurisdictions. Larson's use, particularly the generative nature of his prescriptive account, begins to point us toward the other sense in which 'interstitial' is commonly used in the political context.

The phrases 'interstitial revolution' or 'interstitial transformation' are used, primarily in contemporary Marxist thought, to describe processes through which social systems can be transformed.[36] As Erik Olin Wright explains, "The adjective 'interstitial' is used in social theory to describe various kinds of processes that occur in the spaces and cracks within some dominant social structure of power."[37] In this sense, "[o]ne can speak of the interstices of an organiza-

34 *Ibid*.

35 *Ibid* at 930.

36 The two most prominent examples are Erik Olin Wright, *Envisioning Real Utopias* (London, United Kingdom: Verso, 2010) and John Holloway, *Crack Capitalism* (London, United Kingdom: Pluto Press, 2010).

37 Wright, *supra* note 36 at 229.

tion, the interstices of a society, or even the interstices of global capitalism."[38] In speaking of interstices in this way, one relies on an understanding in which the 'social unit' in question can "be understood as a system within which there is some kind of dominant power structure or dominant logic which organizes the system, but that the system is not so coherent and integrated that those dominant power relations govern all of the activities that occur within it."[39] Wright thus uses the term to describe processes that occur in the spaces of a hegemonic social order but outside of that order's dominant institutions. In a slightly different context, the term can refer to processes that occur in the interstices of an institution, but not according to the rules that typically bind the actors within that institution. Larson's use is more clearly aligned with what Wright terms "symbiotic transformation,"[40] or transformation that occurs with and through state institutions.

The articulation of interstitial federalism outlined here does not rely on this distinction. Understood as a reaction to hegemonic structures, the line between interstitial and symbiotic is not always clear. Some of Wright's examples of interstitial strategies illustrate the challenge of drawing a bright line. For example, he writes:

> "[t]here are certainly many interstitial activities in contemporary capitalist societies which are candidates for elements of an interstitial strategy of social emancipation: producer and consumer coops, battered women's shelters, workers factory councils, intentional communities and communes, community-based social economy services, civic environmental councils, community-controlled land trusts, cross-border equal-exchange trade organizations, and many other things."[41]

Several of these forms, while not state institutions *per se*, would be sanctioned by state law: for example, to incorporate, litigate, apportion ownership, tax, etc. As Bob Jessop notes, drawing clear-cut distinctions between state and non-state institutions can be difficult once we take the necessary step of unpacking the concept of the state and relying on an articulation of the state as an assemblage of distinct institutions, each pursuing its own ends.[42] Thus, while the analytic distinction between interstitial and symbiotic transformation is clear, in application it is clear only in respect of ideal types.

38 *Ibid*.
39 *Ibid*.
40 This distinction is addressed in more detail below.
41 Wright, *supra* note 36 at 230.
42 Bob Jessop, *State Power: A Strategic-Relational Approach* (Cambridge, United Kingdom: Polity Press, 2007).

Further, if what is emphasized is the radical transformation of existing institutions rather than working 'outside' the state, the distinction becomes less important. In both cases, the aim is to transform existing institutions through strategic counter-hegemonic practices. Working outside the state or dominant hegemonic orders is crucial but, in this sense, it plays a prefigurative role. As Wright acknowledges, both interstitial and symbiotic strategies are necessary for broad social transformation.[43] In this paper, then, interstitial refers to both types of practice: using an *Indian Act* by-law to expand jurisdiction to an area typically not within its ambit — say, to the regulation of the production and sale of cannabis on a First Nation[44] — is interstitial, as is the development of a resource management protocol on the basis of Indigenous law without engagement with the Crown. This approach is further justified by the fact that any given practice can move between the purely interstitial and symbiotic categories. Duu Guusd, the tribal park on Haida Gwaii, stands as an example: the park was established as a tribal park under Haida law and was only much later also made a park at provincial law. It is now governed by Haida law, but is also recognized by the provincial laws of British Columbia. The parties have developed models of shared governance concerning land and resource use in the park.

This conception of the interstitial is distinct from Wright's use in that it includes practices he refers to as symbiotic.[45] It is also distinct from Larson's use of the term in two important respects. First, Larson works entirely within the confines of existing state (meaning nation-state) apparatuses. While he calls for the development of new institutions, these are institutions created by and through state law. Second, Larson's use seeks to transform governance of particular resources, but it does not seem to be directed toward a substantial transformation of existing institutions in the service of democratic emancipation. While he does emphasize an expanded role for Indigenous peoples[46] in

43 Wright, *supra* note 36.

44 See e.g. Chelsea Laskowski, "How First Nations are Leaving Their Mark on the Cannabis Industry" *CBC News* (19 April 2019), online: <www.cbc.ca/news/canada/saskatoon/saskatchewan-cannabis-industry-first-nations-1.5099265>.

45 The relationship with Holloway's definition is more nuanced. Holloway acknowledges that even state transformations are interstitial in nature. Thus, strategies that engage the state can be considered strategies of interstitial change. Yet, for those challenging state hegemonies, Holloway believes they must engage in interstitial moves 'outside' the state. Holloway, *supra* note 36 at 63. Again, the argument advanced in this paper is that both types of interstitial move are important for understanding constitutional practice and transformation in Canada.

46 As Larson writes: "Tribes should be part of a commission that facilitates stakeholder participation through an inclusive and transparent process."' The aim of this process should be to integrate tribal interests into management decisions, as well as to facilitate both the quantification of tribal rights and the settlement of state general stream adjudications. Tribes should have appointed representa-

the interstitial institutions he proposes, these peoples would play a role akin to stakeholders, and the institutions he describes are not geared explicitly toward greater recognition of their jurisdiction or law-making authority. In this sense, the institutions Larson espouses are akin to many of the current co-management institutions in Canada: they provide a role for Indigenous peoples in the decision-making process but have difficulty accommodating Indigenous legal orders and jurisdiction.[47]

All of the above senses in which the term interstitial is used are important here, as each move in parallel when it comes to re-working notions of federalism in Canada to reflect Indigenous demands for self-determination. The notion of interstitial law-making by the courts can be used to understand how Indigenous law might impact the development of the common law to a greater extent. The development of interstitial institutions along the lines discussed by Larson is already well underway in Canada. Reforming these institutions and reframing them explicitly in terms of federalism can further the reach of Indigenous legal orders and expand Indigenous jurisdiction. The frame of interstitial strategies and transformations can also describe practices of indigenous governance outside provincial and federal apparatuses.

How does this differ from conventional conceptions of federalism in Canada? I do not have the space here to adequately address the myriad ways that federalism has been discussed in Canada. For the purposes of illustration, however, I will briefly address it on the basis of the familiar taxonomy between classical and modern federalism.[48] The latter includes various frames — asymmetrical, flexible, and cooperative federalism, for example — each of which are used in both descriptive and prescriptive fashions in the literature. Classical, or dualist, federalism refers to a federal order with little overlap in the distribution of powers between members of the federation.[49] Exclusive authority over

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tives to interstitial federalism institutions, should be signatories to Congressionally approved compacts dealing with spillover commons on tribal lands, and should be full participants in adjudicating and having their rights adjudicated by interstitial federalism dispute resolution forums." Larson, *supra* note 21 at 955.

47 The challenges implementing the Recommended Peel Watershed Regional Land Use Plan developed by the Peel Watershed Planning Commission — a commission with representation from the Yukon government and modern treaty nations — illustrates some of the difficulties in this regard. See *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 *[First Nation of Nacho Nyak Dun]* .

48 On this taxonomy see Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations," (1991) 36:2 McGill LJ 308 [The Demise and Rise].

49 See George Anderson, *Federalism: An Introduction* (Don Mills, Ontario: Oxford University Press, 2008) at 21. As James MacPherson writes, Beetz J. was perhaps the strongest judicial advocate of classical federalism in the postwar period. James MacPherson, "Justice Jean Beetz — A Rich and

subject matters is assigned to distinct orders of government.[50] Modern federalism, by turn, is characterized by a more restrained interpretation of the notion of 'exclusive' jurisdiction and a judicial approach that emphasizes overlap and concurrence of powers.[51] Each of the other three types of federalism mentioned above — asymmetrical, flexible, and cooperative — are examples of this modern approach.

Interstitial federalism seems at first glance to be an example of the modern approach. Interstitial federalism, insofar as it requires the development of new institutions with jurisdiction over matters previously assigned exclusively federal or provincial governments, clearly seems to point this way. Interstitial federalism draws on each of the three 'types' of federalism under the modern approach. Flexible federalism, for example, refers to the various ways that the clear jurisdictional lines of a classical federalism are blurred. Thus, instruments such as "taxation, the spending power, public ownership, interdelegation, and intergovernmental agreements" are used to "alter the formal distribution of functions and the policy responsibilities of each level of government in many areas."[52] These types of instruments are frequently interstitial in nature, or could be if used in different contexts. For example, the ability of First Nations to collect property or income tax from non-Indigenous residents in their nations — recognized under some Yukon modern treaties — can be characterized as a practice of interstitial federalism. Asymmetrical federalism refers to a federal association in which each of the constituent members do not hold identical authority within the association despite having the same constitutional status.[53] Again, this frame is relevant to interstitial federalism. It reflects the current reality that Indigenous nations across Canada have widely divergent constitutional authority at Canadian law, reflecting the content of the agreements they have entered into with the Crown and the limitations imposed by the *Indian Act*. Further,in a prescriptive sense, the possibility of envisioning federal actors with a range of constitutional authority is essential to interstitial federalism, in which institutions are designed with jurisdictions in relation to particular resources or subject matters, and governments exercise authority on significantly different scales. Similarly, cooperative federalism can be used in both descriptive and prescriptive senses. Descriptively, it simply refers to cooperative

Enduring Legacy in Canadian Constitutional Scholarship and Jurisprudence" (1994) 28:2 RJT 761 at 765.

50 *Ibid*.

51 Ryder, *supra* note 48.

52 Patrick Macklem et al, *Canadian Constitutional Law,* 4th ed (Toronto, Ontario: Emond Montgomery Publication, 2010) at 463.

53 See Bela Pokharel, "Concept of Federalism and Its Application in Nepal" (2017) 11:1 NJA LJ 211.

exercises of authority, frequently in areas of shared or overlapping jurisdiction. In *Canada (Attorney General) v PHS Community Services Society*, for example, the Supreme Court wrote: "Insite was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it."[54] While the Court has, at times, moved toward a more prescriptive reading of cooperative federalism — particularly in sidelining the doctrine of inter-jurisdictional immunity — it has tended to emphasize the descriptive sense.

Exclusivity, however, also proves an important principle in interstitial federalism. Without exclusive jurisdiction, interstitial institutions may be left without clear jurisdiction or final decision-making authority, limiting their powers of governance. In a more classical model, the emphasis on exclusivity cuts in two directions: while a rigid assignment of exclusivity in the federal or provincial governments can exclude other bodies or institutions from holding jurisdiction, overlapping and shared jurisdiction can give more powerful institutions of governance the ability to encroach on the jurisdiction of other bodies.[55] Beetz J.'s support for the classical model, for example, was premised in part on the protection of provincial autonomy, especially for Quebec.[56] And, as Bruce Ryder has argued:

> the modern paradigm has been applied to First Nations people; that is, they are subject to the concurrent jurisdiction of federal and provincial laws even when those laws touch matters at the heart of their collective identities. I will argue that the classical paradigm should be used to promote the autonomy of First Nations people by protecting them from the application of provincial laws, by giving a broad scope to the doctrine of federal paramountcy, and by prohibiting delegation of federal jurisdiction over "Indians and lands reserved for Indians" to the provinces without the consent of First Nations people.[57]

While interstitial federalism draws heavily on a modern approach, the categorization should be nuanced. It is not clear, for example, that elements of a classical approach are inimical to the type of multinational federalism that the interstitial model outlined here is meant to support.

Another argument, of course, surrounds centralized and decentralized visions of federalism, which can each exist in both classical or modern para-

54 *Canada (AG) v. PHS Community Services Society*, 2011 SCC 44 at para 19.

55 For a comprehensive analysis of the benefits and drawbacks of each model see Ryder, *supra* note 48.

56 MacPherson, *supra* note 49. For an argument from the American context that co-operative federalism leads to greater state autonomy, see Roderick Hills Jr, "The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and Dual Sovereignty Doesn't" (1998) 96:4 Mich L Rev 813.

57 Ryder, *supra* note 48 at 332.

digms. The interstitial practices described here are undoubtedly decentralized in nature. Some of the benefits that have been argued as accruing under a decentralized model therefore apply. For example, a pluralist federalism "allows us to think of the modern nation-state in terms that extend beyond monistic and unitary sovereignty, to re-conceptualize the state in multinational terms that accord with the principle of autonomy."[58] In the context of a multinational or plurinational federalism, a decentralized federal order can move beyond conceptions of the nation state and Crown sovereignty that have historically excluded Indigenous peoples from full participation. Emphasizing these features of, or possibilities for, the federal order may lend credence to Richard Stacey's view that "Canada's federal system seems well suited, in form if not yet in its actual details, to accommodating the structures of Indigenous government through which Indigenous peoples have always responded to the particular concerns and interests of their communities."[59] The next section explores these themes along three axes: the reform and development of shared or joint institutions; enacted Indigenous jurisdictions; and the role of the Canadian courts.

4. Interstitial Federalism in Canada

i) Shared and Co-operative Institutions: Existing and Reformed

One significant area for the interstitial development of federalism is the reform of existing federal institutions and the creation of new institutions of shared governance. First, the traditional "shared institutions of 'intrastate federalism,' such as the federal Parliament, the Cabinet, or the Supreme Court"[60] could be reformed to create space for Indigenous peoples and laws. Historically, Indigenous peoples have been largely excluded from these institutions. The importance of these institutions as a means of ensuring influence over shared governance has long been recognized, with customarily fixed regional representation on the Supreme Court and in the Senate as two examples. Yet, there has been little movement to accommodate Indigenous peoples in these ways. There are many possible reforms. I will mention a few here. This list is by no means

58 François Rocher & Marie-Christine Gilbert, "Re-Federalizing Canada: Refocusing the Debate on Decentralization" in Ruth Hubbard & Gilles Paquet, eds, *The Case for Decentralized Federalism* (Ottawa, Ontario: University of Ottawa Press, 2010) 116 at 120. On the importance of decentralized federalism to Indigenous governance see John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285 at 312-314.

59 Stacey, *supra* note 11 at 675

60 Macklem et al, *supra* note 52 at 463.

exhaustive; rather, it is meant to illustrate the type of reform that fit within this category of interstitial transformation.[61]

First, Sakej Henderson has argued that seats should be added to the federal Parliament for representatives from treaty regions.[62] There would be a seat in Parliament for each of the treaty regions, chosen according to a process to be determined by the peoples of those territories. This would add at least 11 seats to Parliament: one for each numbered treaty. Indigenous peoples would, of course, continue to participate in conventional party politics. But, there would be fixed representation from these areas, representation tied not to partisan interests, but to those of Indigenous treaty signatories. This proposal raises additional questions: would there be representation from all historical treaty areas? The Maritime Peace and Friendship treaties, Robinson-Huron, and Vancouver Island treaties, for example, could also be included. Should there be additional representation from modern treaty areas? Does this unduly disadvantage Indigenous peoples who have never entered into treaty with the Crown? If so, how could this be remedied? Adding a seat for each of the above mentioned historical treaty regions, one for Quebec, and one for British Columbia (as areas without historical treaties who may desire representation in a manner they would determine) would move the total number of seats in the house from 338 to 354, sixteen of which would be allocated to Indigenous peoples in the manner just outlined, an allotment that would conveniently reflect the proportion of Indigenous peoples in the Canadian population, at a little over 4%. This would be only slightly more than the number of seats reserved for Maori in the New Zealand legislature, which is about 3.5%.[63]

Second, Indigenous peoples could be better represented on the courts. While there is little empirical research in the Canadian context on the impacts of race and gender on judicial decision-making, in the US context, such

61 For discussion of further examples along these lines see Joanne Cave, "From Rights Recognition to Reconciliation: Reflecting on the Government of Canada's Proposed Indigenous Rights Recognition Framework" (2019) 77:2 UT Fac L Rev 59 at 74-77.

62 Shared in discussion at the "Treaty Federalism and UNDRIP Implementation" workshop, held at the University of Alberta on May 18-19, 2019. Elsewhere, Henderson has also argued for the establishment of an office of "Aboriginal Attorney-General" mandated to protect section 35 rights and interests: James Youngblood Henderson, "Aboriginal Attorney General" (2003) 22 Windsor YB Access Just 265.

63 Of course, the Maori also form a greater percentage of the population in New Zealand, at nearly 15%, so their representation in parliament is not proportional to their representation in the population as a whole. For commentary see Augie Fleras, "From Social Control Towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand" (1985) 18:3 Can J Political Sci 551.

effects have been noted.[64] Further, the ample evidence that bias informs decision-making in other institutional contexts (juries, for example) suggests that courts should not be seen as immune from such concerns.[65] While it may be logistically challenging to ensure an Indigenous appointee sat on the Supreme Court at all times, ensuring that a given percentage of new judicial appointees were Indigenous would have the effect over time of increasing the pool of Indigenous jurists available to serve on the highest court while also ensuring that other courts — which, it should be recalled, deal with many more cases than the Supreme Court — always have Indigenous representation. Ensuring that one in ten new appointments were Indigenous would only slightly 'over-represent' Indigenous peoples relative to their numbers in the population as a whole.

The possibilities and limitations of these forms of representation within existing state structures were displayed during the Honourable Jody Wilson-Raybould's tenure as Canada's Minister of Justice and Attorney-General. While Wilson-Raybould will perhaps be best remembered both as Canada's first Indigenous Attorney-General and for her role in the SNC Lavalin scandal, her ability to impact the direction of government policy towards Indigenous peoples will require the benefit of greater hindsight to properly assess. Under her guidance the government developed a set of ten principles guiding Crown-Indigenous relations, some of which have transformative potential.[66] Wilson-Raybould also released a Directive on Civil Litigation Involving Indigenous Peoples, advising Crown lawyers to act according to a mandate of reconciliation.[67] As with the 1995 federal policy recognizing the right of inherent self-government,[68] however, such policy changes can often have little impact:

64 See Christina Boyd, "Representation on the Courts? The Effects of Trial Judges' Sex and Race" (2016) 69:4 Political Res Q 788.

65 Indeed, while I have not found empirical studies in Canada, it has been widely accepted in the context of sexual abuse that the gender of judges has historically impacted their approach to these issues. The most well-known recent example is likely Judge Robin Camp who asked a plaintiff in a sexual assault case why she did not 'keep her knees together.' See Sean Fine, "Judge in Knees Together Trial Resigns After Council Recommends he be Fired", *The Globe and Mail* (9 March 2017), online: <www.theglobeandmail.com/news/national/judicial-council-recommends-justice-robin-camp-be-fired/article34249312/>.

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

67 Department of Justice, "The Attorney General of Canada's Directive on Civil Litigation Invovling Indigenous Peoples" (last modified 11 January 2019), online: *Canada's System of Justice* <www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

68 See Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (last modified 15 September

their potential relies on people taking them up and using them. The most pronounced example of how Indigenous peoples in traditional institutions can make change interstitially, however, came during Wilson-Raybould's testimony about the SNC Lavalin scandal. During that testimony, Wilson-Raybould stated:

> I was taught to always be careful what you say because you cannot take it back. I was taught to always hold true to your core values and principles and to act with integrity. These are the teachings of my parents, my grandparents and my community. I come from a long line of matriarchs and I am a truth teller in accordance with the laws and traditions of our big house. This is who I am and this is who I always will be.[69]

The significance of Wilson-Raybould's invocation of Indigenous legal orders, of the law of the Kwakwaka'wakw long house, was not lost on people.[70] Here, Canada's highest-ranking lawyer and Minister of Justice said plainly that she was acting not only in accordance with her obligations under Canadian law, but also in light of the obligations placed on her by Kwakwaka'wakw law. This is an example of one of the ways that Indigenous legal orders can be brought into conversation with Canadian laws when Indigenous peoples are represented in Canadian institutions.

Apart from these 'foundational' institutions of Canadian federalism, there are a number of existing institutions and practices of governance in Canada that can be characterized as interstitial. These examples represent what Martin Papillon has described as the "emerging mosaic of Aboriginal multilevel governance."[71] Foremost among these may be modern treaties and co-management regimes.[72] In one view, modern treaties and self-government agreements provide the avenue for the most robust inclusion of Indigenous peoples in the federal association.[73] While the agreements differ in important respects, speaking in general terms, they recognize governing authority in respect of a considerable range of subject matters. In the most ambitious framing, these constitute a negotiated federal order in which Indigenous nations assume ju-

2010), online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

69 The Canadian Press, "'An Inappropriate Effort': Quotes from Wilson-Raybould at Justice Committee", *National Post* (27 February 2019) online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/an-inappropriate-effort-quotes-from-wilson-raybould-at-justice-committee>.

70 Cassandra Szklarski, "The Significance of Jody Wilson-Raybould Invoking Indigenous 'Big House' Laws", *National Post*, (1 March 2019) online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/the-significance-of-jody-wilson-raybould-invoking-indigenous-big-house-laws>.

71 Papillon, *supra* note 11 at 291.

72 For analysis of the Nisg'a Treaty in light of principles of federalism see Graben, *supra* note 11.

73 See Woolford, *supra* note 7.

risdiction on the basis of their inherent rights, a path to self-determination that clearly delineates the relationship between the treaty nation's government and other members of the federation. They include a number of institutions of shared governance, which will be discussed below, the possible development of Indigenous courts, the ability to create property rights, and, in the case of Nunavut, a public government.[74]

In another framing, these agreements represent assimilation and incorporation into colonial governance. They include only delegated forms of authority and are the equivalent to a municipal model of governance. To the extent that they include Indigenous peoples in the federation, they do so on the terms of the federal and provincial governments, maintaining Indigenous peoples in a subservient constitutional position.[75] 'Extinguishment clauses,' which were required in many of the agreements, have the effect of extinguishing Aboriginal rights and replacing them with the rights outlined in the treaty. As a result, these agreements are seen as conceding too much to the Crown and cementing colonial forms of governance.[76]

The case law to date has been mixed. The Supreme Court has had limited opportunities to interpret modern treaties. The Court has held that the duty to consult exists in relation to modern treaties, that even where the Crown is exercising authority that is recognized in the treaty it may be required to satisfy consultation obligations.[77] The decisions dealing most squarely with issues of governance under the treaties are those related to two challenges to the constitutionality of the Nisga'a Final Agreement: *Campbell* and *Chief Mountain*.[78] In both cases, the challenge was based on the reasoning that the agreement amounted to an impermissible constitutional amendment. In *Campbell* the BCSC upheld the constitutionality of the agreement on the basis that the inherent right of self-government had not been extinguished by the BNA Act 1867. In *Chief Mountain,* the BCCA declined to rule on the inherent right of self-government. In two important findings, though, the Court upheld the constitutionality of the agreement on the basis that 1) the powers in the agreement were delegated and could be rescinded and 2) the self-government agree-

74 See Government of Canada, "Treaties and Agreements" (last modified 11 September 2018), online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp4>.

75 See Woolford, *supra* note 7; See also Peter Kulchyski, "Trail to Tears: Considering Modern Treaties in Northern Canada" (2015) 35:1 Can J Native Studies 69.

76 Kulchyski, *supra* note 72.

77 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

78 *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 [*Campbell*]; *House of Sga'nisim v Canada (AG)*, 2007 BCCA 483 [*Chief Mountain*].

ment was part of a treaty protected under section 35 and, therefore, is subject to possible Crown infringement.[79] The case was denied leave to appeal to the Supreme Court, not disturbing the holding regarding the constitutionality of the Nisga'a agreement. The BCCA's reasoning, however, also established potentially damaging precedent that could confirm many criticisms of the modern treaty model, holding that the powers of governance recognized in the treaty are delegated ones subject to rescindment and infringement.[80]

Experience to date suggests that both the proponents and critics of modern treaties and self-government agreements have much to support their arguments.[81] There is not a clear and objective answer about whether the agreements are ultimately beneficial, and any assessment must be made with reference to the experiences of particular Indigenous nations. The treaties undoubtedly represent important moves toward greater recognition of Indigenous autonomy, but they do so on the basis of very real constraints set by Crown notions of sovereignty and the historical development of the law. What do they mean in light of the framework of interstitial federalism outlined above? The agreements themselves and many of the institutions developed under them, some of which will be explored below, are clearly institutions of interstitial federalism on the model outlined by Larson. The treaties and self-government agreements are negotiated agreements that create new governance institutions with jurisdiction over matters historically — in Canadian law — under the exclusive jurisdiction of federal or provincial governments. The cracks in the conventional jurisdictional model reveal themselves when the question of Indigenous jurisdiction is raised. Indigenous demands for recognition of their jurisdictional powers reveal gaps in a constitutional order that fails to acknowledge such jurisdiction. Modern treaties and self-government agreements seek to address these gaps by recognizing areas of shared and exclusive jurisdiction. In doing so, they delineate authority within a shared federal association.

Another form of interstitial institutions are co-management boards of various types.[82] West Coast Aquatic (previously the West Coast Vancouver Island Aquatic Management Board), for example, is an institution of shared governance for marine resources on the west coast of Vancouver Island. Decision-

79 *Chief Mountain*, *supra* note 78.

80 Joshua Nichols, "A Reconciliation Without Recollection? *Chief Mountain* and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

81 See e.g. the implementation problems outlined in the report of the Senate, Standing Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes* (May 2008) (Chair: Gerry St.Germain).

82 See Derek Armitage, Fikret Berkes & Nancy Doubleday, eds, *Adaptive Co-management: Collaboration, Learning, and Multi-level Governance* (Vancouver, British Columbia: UBC Press, 2007).

making is "[m]ulti-party, consensus-based."[83] The board is composed of "representatives from the federal, provincial and regional governments, Nuu-chah-nulth First Nations, commercial harvest, aboriginal harvest, sport/recreational harvest, aquaculture, environment, labour, processing, tourism/recreation, marine transportation and forestry."[84] As Larson writes of interstitial federal institutions, "[t]he responsibility for integrated management decisions should coincide with the ecological unit, nature of the issue, the scale of impact, the ability to collect relevant information, and management capacity."[85] Well-designed co-management structures such as West Coast Aquatic meet these requirements.[86] There are, of course, a number of co-management arrangements in Canada, many under modern treaty agreements. Despite their differences, they represent interstitial institutions on Larson's model. Ideally, they in fact expand on his model; whereas Larson's concern is primarily environmental and ecological, co-management boards are more directly concerned with issues of jurisdiction and sovereignty. Indigenous representation may or may not be necessary when strictly considering optimal resource management, but it surely is if such institutions are to enable practices of Indigenous jurisdiction. As such, their 'federal' nature should be made explicit: they are institutions of interstitial federalism.

These types of co-management institutions can drive a new version of federalism which respects Indigenous autonomy on the basis of "principles of cultural integrity, political liberty and equality of economic opportunity."[87] They may provide avenues for re-thinking jurisdictional boundaries to more appropriately manage lands and resources that cross boundaries between provinces, Indigenous territories, municipalities, and federal lands. Larson's writings on river management illustrate how these jurisdictional lines can be redrawn: "The watershed is thus the natural jurisdictional boundary, and the catchment the appropriate scale of jurisdiction, under the internalization prescription. The jurisdiction of governance institutions should be consistent with geography wherever possible."[88] Interstitial federal institutions can address issues on a number of different geographical bases: traditional territory of a nation, range of a migratory animal or bird population, or the reach of the effects of pol-

83 West Coast Aquatic, "Collaborative Management" (2016), online: *West Coast Aquatic* <westcoastaquatic.ca/>.

84 *Ibid* at "Governance Board".

85 *Ibid* at "Collaborative Management".

86 For an analysis of co-management on the west coast, see Evelyn Pinkerton & Leonard John, "Creating Local Management Legitimacy" (2008) 32:4 Marine Policy 680.

87 Henderson, *supra* note 9 at 337.

88 Larson, *supra* note 21 at 912.

lution of a development. The importance of shared institutions grounded in the recognition and exercise of inherent indigenous jurisdiction is stated in Heiltsuk Nation's *Declaration of Heiltsuk Title and Rights*: "it is our position that reconciliation requires our free, prior, and informed consent to development on Heiltsuk territories and waters as we move forward in a collaborative-management regime."[89] The Heiltsuk thus emphasize both the consent standard — that is, their autonomous self-determination in their traditional territory — and the development of collaborative regimes.

The ability of this style of institution to contribute to robust interstitial transformation will depend on a number of factors. In particular, the degree to which they are autonomous within their sphere is important. Their decision-making authority must be respected. Larson argues that "Strong interstitial federalism institutions with dispute resolution, enforcement, regulatory, permitting, monitoring, and apportionment authority will serve to internalize water management costs to a single jurisdiction whose boundaries are consistent with the watershed itself."[90] In the context of co-management in Canada, problems arise where interstitial bodies do not have final decision-making authority.[91] Assuming for the moment that the structure of such boards provides for fair representation, as most seem to, the extent to which they are able to act as meaningful vehicles in which Indigenous legal traditions can travel alongside state forms of law will depend on the nature of the authority of the institutions. That is, if their decisions are merely suggestive and may be overridden by federal or provincial decision-makers, the transformative potential of the institutions is severely undermined. If, on the other hand, they have final decision-making authority, they can play a much more substantial role. Following Larson, if this is pushed a step further to include dispute resolution functions or regulatory capacities, such institutions can have a genuinely transformative effect on the shape of federalism in Canada. They may then come to be seen more as agreements of co-jurisdiction rather than co-management.[92] For this model to prevail, co-design of the institutions is fundamental.

ii) Indigenous Institutions: Space-Filling Practices of Jurisdiction

The institutions and practices in this category are not shared, co-operative, or co-managed. They are Indigenous exercises of jurisdiction and governance.

89 Heiltsuk Tribal Council, "Declaration of Heiltsuk Title and Rights", online (pdf): *Heiltsuk Nation* <www.heiltsuknation.ca/wp-content/uploads/2015/11/Heiltsuk-Declaration_Final.pdf>.

90 Larson, *supra* note 21 at 952.

91 See *First Nation of Nacho Nyak Dun, supra* note 47.

92 Thanks to Nigel Bankes for drawing this distinction in conversation.

They fill 'jurisdictional cracks' in two ways. First, they can recognize an area where federal or provincial law is insufficient and fill it: where there is an absence of law, they can provide it. Second, they can create a crack through re-description: the jurisdictional crack is created when inherent jurisdiction is asserted and the assumed federal or provincial authority is challenged. Creating new modes of governance in respect of a resource or territory can cause a shift in jurisdiction. These exercises also become more visible if we re-think what is meant by the term 'jurisdiction.' Terms such as 'federalism' and 'jurisdiction' have a normative aspect: they are defined so as to bring about given visions.[93] Both have conventionally been defined in Canada narrowly in ways that exclude Indigenous governance unless it conforms to prefabricated ideas about the place of Indigenous peoples in the constitutional order and the nature of their political authority. This can be re-thought so that notions of federalism and jurisdiction can reflect both past practice — the history of treaty federalism that pre-dated confederation and recognized the autonomy of a plurality of peoples in association with the Crown — and contemporary grounded practices of governance that reflect lived jurisdiction. New articulations of federalism can be modelled on the actual practices of, and dialogues surrounding, governance.[94] They can cause a shift from seeing a given hegemonic assemblage as absolute, solid, and unchanging, to seeing it is subject to contestation and renegotiation — and as already other than what it is construed as through colonial narratives.

One example of this kind of enacted jurisdiction is the creation of tribal parks. There are a number of such parks in Canada. Few are recognized as parks in Canadian law and, for the most part, they occupy an ambivalent space in the state legal system. Their existence is generally accepted, though the scope and nature of the authority in those areas is not delineated in Canadian law, nor does that law have any formal legal recognition of them or formal legal categories into which they can be placed. One example of how tribal parks can represent exercises of jurisdiction is the Wah-nuh-jus — Hilth-hoo-is (Meares Island) Tribal Park on the west coast of Vancouver Island in Tla-o-qui-aht territory. The park was created in 1984 during a dispute over commercial logging in the area. The provincial government has never formally recognized the park. Nonetheless, it was created to stop logging on the island and has been successful in that for over 30 years.[95] As is frequently the case with 'aboriginal

93 As John Whyte writes, "[a] nation's constitutional character is more a function of ethical vision, or even aesthetic rendering, than it is a product of statecraft design." John Whyte, "Federalism Dreams" (2008) 34:1 Queen's LJ 1 at 1.

94 See Graben, *supra* note 11; Leclair, "Federal Constitutionalism", *supra* note 11.

95 *MacMillan Bloedel Ltd. v. Mullin*, 1985 CanLII 696 (BCSC). <http://canlii.ca/t/22kwb>.

rights' issues, this dispute can most productively be understood as a dispute over jurisdiction: both the Tla-o-qui-aht and the province were asserting the authority to determine whether logging would be permitted on the island. That such disputes are frequently cast as 'rights' claims is a function of the Canadian legal system and should not obscure the jurisdictional nature of the disputes.

Similar parks have been created on Haida Gwaii, in the traditional territory of the Tsilhqot'in, and in the territory of the Doig River First Nation. The Haida park, which was created by a resolution of the House of Assembly of the Haida Nation in 1982, was recognized as a park by British Columbia in May 2008.[96] The co-created management plan states, "Duu Guusd is now formally protected by both the Haida Nation as a Haida Heritage Site and the Province of British Columbia as a conservancy."[97] The Tsilhqot'in and Doig River parks have not been recognized by federal or provincial authorities.[98] This lack of recognition, however, has little impact on the nature of the parks as exercises of inherent jurisdiction. As Grant Murray and Leslie King write, "Tribal Parks can be understood as a projection of sovereignty over contested terrain."[99] The contested nature is a function partly of the complex array of legal interests within a park, which may include "a patchwork of different tenures, including Crown (government owned) land, British Columbia Provincial Parks, forest tenures, private lands, and portions of Pacific Rim National Park Reserve."[100]

Another example of this form of Indigenous jurisdiction are inter-Indigenous treaties. The Buffalo Treaty, for example seeks to develop a framework

96 On May 29, 2008, Bill 38 — 2008 (the Protected Areas of British Columbia (Conservancies and Parks) Amendment Act, 2008) established Duu Guusd. On December 17, 2008, the Province of British Columbia passed Order in Council No. 977/2008 which added 6,793 hectares and established revised boundaries for Duu Guusd that included Langara Island and an area of land in Rennell Sound. See *Protected Areas of British Columbia Act,* SBC 2000, c 17.

97 BC Parks, "Duu Guusd Heritage Site/Conservancy" (last visited 21 November 2019), online: *Find a Park Alphabetically* <www.env.gov.bc.ca/bcparks/explore/cnsrvncy/duu_guusd/>.

98 See Dasiqox Tribal Park, "Press Release: Introducing the Nexwagwez?an: Dasiqox Tribal Park Position Paper" (30 June 2016), online (pdf): <dasiqox.org/wp-content/uploads/2018/03/PressRelease-DasiqoxPositionPaper-June302016.pdf>; See also Emma Gilchrist, "'It's No Longer About Saying No': How B.C.'s First Nations Are Taking Charge With Tribal Parks", *The Narwhal* (29 March 2016), online: <www.desmog.ca/2016/03/29/it-s-no-longer-about-saying-no-how-b-c-s-first-nations-are-taking-charge-through-tribal-parks>; For an overview of Tsilhqot'in legal principles, especially governing issues of consultation and consent, see Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873.

99 See Grant Murray & Leslie King, "First Nations Values in Protected Area Governance: Tla-o-qui-aht Tribal Parks and Pacific Rim National Park Reserve" (2012) 40:3 Human Ecology 385 at 389.

100 *Ibid*.

for managing buffalo populations, restoring their habitats, and renewing their population numbers.[101] As Sa'ke'j Henderson explains:

> In 2014, the Blackfoot confederacy and allied nations initiated the continental Buffalo Treaty — titled The Buffalo: A Treaty of Cooperation, Renewal and Restoration — on the Blackfoot reservation in Montana. The treaty is a historic, inspiring, multi-faceted and living agreement. It was the first treaty among the nations in the United States and Canada in more than 150 years, since the 1855 Treaty of Fort Laramie, which adjusted the jurisdiction over buffalo hunting grounds. The Buffalo Treaty is an agreement among the nations, federal and provincial governments, non-governmental organizations, corporations, conservation groups, researchers, and farming and ranching communities.[102]

The treaty leaves it up to each signatory to decide how to approach buffalo and ecological restoration. The treaty acts as an assertion of Indigenous law by articulating standards and norms derived from Indigenous legal traditions and worldviews.[103] For example, the treaty states: "We, collectively, agree to perpetuate all aspects of our respective cultures related to BUFFALO including customs, practices, harvesting, beliefs, songs, and ceremonies."[104] Like the Haida park, then, what began as a strictly Indigenous act of jurisdiction became entangled with a state law in ways that ultimately proved productive. There are examples of contemporary inter-indigenous treaties that do not involve state or non-indigenous actors. For example, the Heiltsuk — Haida Peace Treaty was an oral treaty agreed to in the 19th century which was renewed in 2014.[105] These treaties should be understood as constitutive of Canadian federalism. The frame of interstitial federalism allows them to be seen as such. Of course, caution must be exercised here: the intention is not to alter the nature of these agreements by domesticating them within a colonial constitutional order. Rather, the intention is to re-work a constitutional order that positions

101 James Youngblood Henderson, "Wild Buffalo Recovery and Ecological Restoration of the Grasslands" (27 June 2019), online: *Environmental Challenges on Indigenous Lands* <www.cigionline.org/articles/wild-buffalo-recovery-and-ecological-restoration-grasslands>.

102 *Ibid*.

103 Robert Hamilton, "Buffalo in Banff National Park: Frameworks for Reconciliation in Wildlife Management" (A Symposium on Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection, Canadian Institute for Resources Law, University of Calgary,2-3 March 2018), online (pdf): <live-cirl.ucalgary.ca/sites/default/files/Mar%202018%20Symposium?ENG_Buffalo%20in%20Banff%20national%20Park_Hamilton.pdf>.

104 "The Buffalo: A Treaty of Cooperation, Renewal and Restoration" (last visited 21 November 2019), online (pdf): *University of Saskatchewan* <sens.usask.ca/documents/BuffaloTreaty_2014.pdf>.

105 Heiltsuk Tribal Council, "Heiltsuk-Haida Peace Treaty" (last visited 21 November 2019), online (pdf): *Heiltsuk Naiton* <www.heiltsuknation.ca/wp-content/uploads/2015/06/Peace-treaty-Poster.pdf>; See also Coastal First Nations, "Haida and Heiltsuk Women Rising" (11 April 2018), online: *Coastal First Nations* <coastalfirstnations.ca/haida-and-heiltsuk-women-rising/>.

Indigenous peoples as subject minority populations such that they may be constitutive members of a decolonized federal association.

Examples of the revitalization of Indigenous law abound. Re-thinking what it means to exercise jurisdiction in a federal association can lead us to see these in new ways. They represent avenues for interstitial change by challenging hegemonic state orders of law and governance. Rather than seeing these as an existential threat to those orders, they can be conceived of as part of the ongoing dialogue through which constitutional and federal associations are continually renegotiated. They can be seen as part of the process of renewal that is so central to how many Indigenous peoples understand the treaty relationship.

iii) The Role of the Courts

With attempts to negotiate the content of section 35 ultimately failing, the task of determining the content of the provision fell to the Supreme Court. In developing a framework for the interpretation of section 35, the Court took jurisdictional questions and re-framed them as contingent rights issues. Parsing the moves that took the Court in this direction can help us get a clear view of the constitutional vice-grip Indigenous peoples have been working to loosen. The process began in *Sparrow*,[106] where the Court addressed section 35 for the first time and made two important moves. First, the Court developed a framework permitting the Crown to unilaterally infringe section 35 rights, despite there being no textual support for such authority in the Constitution. The Court recognized that section 35 is not part of the *Charter* and should not therefore be subject to the limitations clause found in section 1. The Court applied such a limitation nonetheless, on the basis that the Crown had *always* had the power to unilaterally infringe rights: section 35 did not change this; rather, it constitutionalized the Crown's fiduciary duty that existed at common law, thereby permitting the courts to supervise exercises of the Crown's discretionary authority.[107] This is an important move, as it is inimical to how courts frame issues of jurisdiction: the Court would not say that the federal government has the power to infringe provincial or municipal jurisdiction. While the federal power may well be paramount in many cases, that is analytically and practically distinct from an infringement test.

106 *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

107 See Joshua Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto, Ontario: University of Toronto Press, 2019); See also Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729.

The second move the Court made relates to the authority to regulate the exercise of a right: the contours of the move can be seen clearly in how the Court dealt with Ronald Sparrow's claim that the aboriginal right to fish included the right to regulate the fishery. The Court dismissed this argument by asking itself whether the Crown had the authority to regulate the fishery. Concluding that it did, the Court considered the question of Musqueam jurisdiction settled: if the Crown has authority to regulate, no one else does.[108] This regulatory power, in the Court's view, is derived from section 91(24) power in relation to "Indian, and lands reserved for the Indians." This head of power then not only establishes that as between federal and provincial governments it is the federal government that will manage affairs in relation to Indigenous peoples, it establishes, on the Court's reading, a regulatory power over Indigenous peoples and their lands that erases their own authority. Again, any limits on the Crown's discretionary power are sourced not from the protection of Aboriginal rights in section 35, but from the Crown's pre-existing fiduciary obligations to Indigenous peoples.[109]

In *Van der Peet,*[110] section 35 was taken further from the recognition of jurisdiction. Here the Court developed its roundly criticized "integral to the distinctive culture" test. The question before the Court was how to determine whether a given activity constitutes an Aboriginal right under section 35. The Court decided that to be recognized as a section 35 right, an activity must be demonstrated to have been integral to the distinctive culture of the group in question at the date of European contact. This is an incredibly onerous test that poses significant evidentiary problems for Indigenous claimants and places the burden on colonized peoples to prove their rights on a case by case basis. It relies on troubling notions of indigeneity rooted in an oversimplified past, undermines the historical exercise of Indigenous agency in the face of European incursions into North America, and ties contemporary Indigenous peoples to Eurocentric visions of 'pre-contact' Indigenous society.

In the *Pamejewon*[111] decision, this problematic framework was applied to a question of self-government in a manner that effectively precludes successful self-government claims. There the Shawanaga and Eagle Lake First Nations claimed the right to regulate gaming activity on reserve on the basis of an Aboriginal right of self-government. Historically, they argued, they regulated economic activity in their nations through self-governing authority. Accordingly, a con-

108 *Sparrow, supra* note 106.
109 *Ibid*.
110 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].
111 *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*].

temporary right of self-government protected their authority to regulate economic activity, including gaming, on reserve. The Court constrained future self-government claims by holding that the right could not be made out, not only because evidence would have to be brought of governance at the time of contact, but because the claim had to be narrowly characterized to match the specific governance power in question. In the result, the First Nations had to prove not that they exercised powers of governance, but that they regulated high stakes gaming. Emphasizing the specific issue of regulation imposes a nearly insurmountable evidentiary burden when combined with the *Van der Peet* test.[112]

What these cases illustrate is that the Court has limited its ability to meaningfully respond to Indigenous jurisdictional claims owing to its commitment to treating Indigenous peoples as cultural minorities rather than as political communities or partners in confederation. This background presumption was made explicit in the *Secession Reference,*[113] where the Court grouped 'aboriginal peoples' with the protection of minority rights in its analytical taxonomy.[114] Issues mediating conflicting constitutional claims of political communities within the federation, the court held, attract the attention of unwritten constitutional principles such as democracy, federalism, constitutionalism, and the rule of law.[115] These principles take the Court beyond technocratic legal reasoning, as they raise the connection between law and legitimacy.[116] Specifically, where a partner to a constitutional arrangement expresses a democratic will to modify the nature of that relationship, the legitimacy of the constitutional order will be put at risk if the courts rely on technical reasoning to thwart that democratic will. Accordingly, the Court held that where the nature of the constitutional relationship itself is being disputed, the parties have a duty to negotiate at the political level.[117] Indigenous peoples, by contrast, were dealt with

112 See Bradford Morse "*Permafrost Rights*: Aboriginal Self-Government and the Supreme Court in. *R. v. Pamajewon"* (1997) 42:3 McGill LJ 1011; See also Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009-2010) 41:1 Ottawa L Rev 101. For lower court cases applying *Pamajewon* in dismissing self-government claims, see *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; See also *Canada (Minister of National Revenue) v Ochapowace Ski Resort Inc*, 2002 SKPC 84; See also *Conseil des Innus de Pessamit v Association des policiers et policières de Pessamit*, 2010 FCA 306; See also *Gauthier (Gisborn) v The Queen,* 2006 TCC 290; See also *Kátlodééche First Nation v HMTQ et al,* 2003 NWTSC 70.

113 *Secession Reference, supra* note 10.

114 *Ibid* at para 96.

115 *Ibid* at para 32.

116 *Ibid* at para 33; See also Hamilton & Nichols, *supra* note 107.

117 *Secession Reference, supra* note 10 at paras 88-90. This, of course, was not unproblematic. Both Quebec and the Federal government declared victory following the decision. From the legal perspec-

as cultural minorities. Indeed, they were not treated as *peoples* at all, despite the arguments put forward by the Grand Council of the Crees as interveners arguing that they must be recognized as such.[118] Thus, while the Court hesitated at the prospect of engaging in explicitly political work where a province challenged the constitutional order, owing to its inability to see Indigenous claims as political — again, they are considered minority rights claims — the Court remained (and remains) comfortable resolving political questions where Indigenous peoples are concerned.

At times, it has seemed that the court has recognized many of these problems. In *Mitchell,* Binnie J. referred to 'sovereignties,' indicating the co-existence of Crown and Indigenous sovereignties.[119] Drawing the distinction between *de jure* and *de facto* sovereignty in *Haida Nation* set up a frame wherein the Indigenous peoples continued to hold legal sovereignty until such time as it was ceded to the Crown.[120] Or, as Ryan Beaton has argued, the Crown — in the Court's view — perfected its sovereignty through the procedural requirements outlined by the Court in *Haida* as 'the duty to consult and accommodate.'[121] Certainly, this duty, at its most robust, has provided space for Indigenous peoples to influence decision-making.[122] In *Mikisew Cree #2,* Abella J., in a dissenting opinion, clearly framed the constitutional issue at stake by noting that section 35 is not part of the *Charter* and deals instead with the 'other parts of the [C]onstitution', particularly those that deal with the division of constitutional authority.[123] That is, she recognized section 35 as being jurisdictional in nature.

The Supreme Court has also repeatedly noted its preference that the issues before it be resolved through negotiation, recognizing the undesirable situation of having the Court resolving Crown-Indigenous conflict over the

tive, the decision left open complicated problems their reasons would create for the existing modes of constitutional amendment. Further, the courts use of history — particularly its claim that the unwritten principles it identified were *always* part of the Canadian constitutional order — has been persuasively called into question: see history paper. See David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto, Ontario: Lorimer & Company, 1999).

118 See H Wade McLaughlin, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76:1-2 Can Bar Rev 155.

119 *Mitchell v. MNR,* 2001 SCC 33 [*Mitchell*].

120 *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 [*Haida Nation*].

121 Ryan Beaton, "De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25. Richard Stacey refers to this as remedying the 'sovereignty deficit.'

122 See e.g. *Tsleil-Waututh Nation v Canada* (*AG*), 2018 FCA 153. For commentary, see Robert Hamilton, "Uncertainty and Indigenous Consent: What the Trans-mountain decision tells us about the current state of the Duty to Consult" (10 September 2018), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf>.

123 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree #2*].

nature of their constitutional relationship. The problem to date has been that the Court's doctrine has not sufficiently motivated the type of negotiations the Court hoped to spur. Because the doctrine continues to permit unilateral Crown action in the face of persistent disagreement, negotiation tables are always tilted toward the Crown at the outset in a way that undermines the bargaining power of the Indigenous parties and frequently prevents Indigenous peoples from having a meaningful role in decision-making.[124] In structuring this dynamic, the Supreme Court has frequently been inattentive to the effect of its decisions on distributing bargaining power to the parties.[125] As a result, the gains made in the case law have remained largely rhetorical; the doctrine as a whole has remained shaped by the early commitments of the Court situating Indigenous peoples in a fixed constitutional position and has been unable to move past the limits those cases put in place.

There are at least three ways that courts can decide cases interstitially: current practice, judicial restraint, and incorporation. Referring to current practice is an acknowledgment that the courts already make law 'interstitially' in this area on a regular basis. As outlined above, section 35 is ambiguous, and the courts have been left to develop its meaning. This is an example of interstitial law-making on the basic American approach, though one could argue that it represents more substantial judicial law-making than advocates of 'interstitial law-making' have in mind. Though this fits within the conventional definition of interstitial, this form of law-making runs counter to the notion of interstitial federalism put forward here. This is not owing to structural issues — if we have courts, they will unavoidably make interstitial law — but substantive issues. As discussed, the Supreme Court's framework for section 35 has severely circumscribed the avenues available for the exercise of Indigenous jurisdiction. To allow practices of interstitial federalism to flourish, the courts must unwind some of the section 35 framework. Joshua Nichols and I have argued elsewhere that a generative 'duty to negotiate' based not on *Sparrow,* but on the *Secession Reference,* would provide a sound legal basis for an incremental shift to a jurisdictional reading of section 35. It is in this sense, also, that judicial restraint is required if interstitial practices are to flourish. Questions of constitutional legitimacy arise when the Court does political work in denying parties to a federal arrangement the ability to democratically revise the nature of their constitutional relationships. In the face of practices of interstitial federalism that challenge established constitutional arrangements — tribal parks or inter-in-

124 For a development of this argument see Hamilton & Nichols, *supra* note 107.

125 See Macklem, *supra* note 6.

digenous treaties, for example — the courts should exercise restraint and limit themselves to providing guidance regarding negotiated solutions.

Finally, the courts can develop interstitial federalism by incorporating Indigenous legal orders. The most well used example of this is the *Connolly and Woolrich*[126] decision, decided in 1867, which upheld the validity of Cree marriage laws.[127] There are many contemporary examples. In two cases arising from the same facts, *Harpe v Massie*[128] and *Harpe v Ta'an Kwach'an Council*,[129] the Yukon Territory Supreme Court dealt with the interpretation of a First Nation constitution developed under a self-government agreement. Specifically, the Court was asked to determine the role of custom in interpreting the Ta'an Kwach'an Constitution and what role elders might play.[130] At issue was the decision of the band to allow the Elders Council to appoint an interim Chief pending an election.[131] The appointment was made necessary due to an apparent oversight in legislative drafting that left the Constitution without provisions for appointing an interim Chief while requiring the presence of a Chief to meet quorum so the council could act.[132] Importantly, the Court characterized the dispute as "an internal dispute between citizens of the Ta'an Kwach'an"[133] as opposed to a dispute between the Crown and the Ta'an Kwach'an, thereby confirming that First Nations constitutions are distinct from the Crown in this regard. Also of significance was the finding that "the interpretation of a First Nation constitution is not the same as the interpretation of a statute."[134] Having made this distinction, the Court went on to describe the relevant principle of interpretation to be applied when interpreting a First Nations constitution:

1. a First Nation constitution must be interpreted as a constitutional document, not a statute;
2. the living tree doctrine should be applied to a First Nation constitution. This means that, as with other constitutions, a First Nation constitution should be given a large and liberal, or progressive interpretation to ensure its continued relevance (see Reference Regarding Same Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79, at para. 23

126 *Connolly v Woolrich et al* (1867), 17 RJRQ 75.
127 *Ibid.* For commentary see Mark Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22:3 Rev Const Stud 347.
128 *Harpe v Massie and Ta'na Kwäch'än Council*, 2006 YKSC 39 [*Harpe v Massie*].
129 *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1 [*Harpe v Ta'an Kwäch'än Council*].
130 *Harpe v Massie*, *supra* note 128 at para 1.
131 *Harpe v Ta'an Kwach'an Council, supra* note 129 at para 1.
132 *Ibid* at para 2.
133 *Ibid* at para 79.
134 *Ibid* at para 94.

and R.W. Hogg, Constitutional Law of Canada, loose leaf, 4th ed. (Toronto: Thomson Canada Limited, 1997) at page 33-16);

3. while a constitutional document should be read generously within its contextual and historical guidelines, it must not overshoot its purpose by giving it an interpretation the words cannot bear (see R. v. Blais, [2003] 2 S.C.R. 236, 2003 SCC 44, at para. 18);
4. aboriginal understanding of words are to be preferred over more legalistic interpretations (see Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at para. 13); and
5. the right to self-government for First Nations should be preserved by giving an interpretation that is the least intrusive (see R.v. Sioui, [1990] 1 S.C.R. 1025, at p. 1055).[135]

Applying these interpretive principles, the Court held that the Ta'an Kwach'an Constitution undoubtedly intended that customs and traditions "would continue to play an important role in their society and laws."[136] As elders traditionally held important decision-making roles in society, it was not a violation of the Ta'an Kwach'an Constitution for them to have done so in this case. The need for judicial deference to Indigenous decision-makers, both in contemporary and traditional modes of governance, was also emphasized by the Federal Court in *Pastion v Dene Tha First Nation*.[137] There, the Court held that "Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue."[138] Accordingly, the Court held, judicial forbearance should be the rule in reviewing decisions from Indigenous decision-makers.[139] There cases have important implications for the interpretation of Indigenous constitutions, both as constitutional documents and as incorporated customary and unwritten laws. This provides the start of an outline for the interpretation of Indigenous constitutions — themselves interstitial federal instruments — in a manner that reflects the traditions and unwritten constitutional principles of the nation.

Courts have continued to find ways to incorporate Indigenous law. In *Restoule v Canada,* the Ontario Superior Court was asked to interpret the Robinson-Huron Treaty of 1850. In doing so, the Court explicitly relied on Anishinaabe legal principles of respect, responsibility, reciprocity, and renewal

135 *Ibid*.
136 *Ibid* at 78.
137 *Pastion v Dene Tha' First Nation,* 2018 FC 648.
138 *Ibid* at para 22.
139 *Ibid* at paras 19-20.

in trying to discern the "Anishinaabe perspective" on the treaty at issue.[140] Hennessy J. detailed how this knowledge had come to the Court through extensive expert witnesses and evidence, and outlined how the Anishinaabe procedures and ceremonies brought their customs, norms, and law into the court proceedings. She writes:

> As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. During the ceremonies, there were often teachings, sometimes centered on *bimaadiziwin* — how to lead a good life. Often teachings were more specific (e.g. on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies). The entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. I believe I speak for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices.[141]

The decision ends: "Miigwech, Miigwech, Miigwech"[142] (thank you, thank you, thank you). This type of approach by the courts is not without risk. Problems of cross-cultural misunderstanding can always persist, and the effort to make Indigenous legal norms cognizable in Canadian courts can alter those norms in the process, bending them to fit Canadian conceptions of 'law.'[143] At worst, such an approach can appropriate and domesticate Indigenous law in the service of maintaining the colonial legal order. Yet, a willingness to bring Indigenous legal orders into discussion with the common law in Canadian courts opens up a new form of interstitial law-making in which Indigenous laws become part of the fabric of Canadian law and shape the constitutional relationships between the parties. There is an incredible transformative potential for Indigenous peoples who chose to try to have their laws shape the application of the common law in this way. This question of transformative potential brings us to the final section of this paper, which examines the potential of interstitial change to meaningfully recalibrate power.

140 *Restoule v Canada (AG),* 2018 ONSC 7701 at paras 412-423 [*Restoule*]. For more on these and other principles of Anishinaabe law see John Borrows, *Law's Indigenous Ethics* (Toronto, Ontario: University of Toronto Press, 2019). For commentary, see Darcy Lindberg, "Historical Lawsuit Affirms Indigenous Laws on Par with Canada's", *The Conversation* (15 January 15, 2019), online: <theconversation.com/historical-lawsuit-affirms-indigenous-laws-on-par-with-canadas-109711>.

141 *Restoule, supra* note 140 at para 610.

142 *Ibid* at para 611.

143 See Aaron Mills, "*The Lifeworlds of Law*: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

5. Interstitial Change and Federal Association

What I have just outlined is an idea of interstitial federalism that encompasses a diverse range of practices of governance and constitutional dialogues. It is a view of how federalism *can* work in the context of multinational democracy, but also an explanatory frame that captures *how* federalism is already being practiced in Canada. The interstitial nature of these structures and practices can be laid out in terms of three distinct categories of practice: shared or co-managed institutions of governance, developed collaboratively and recognizing areas of shared and exclusive jurisdiction; independent practices of indigenous governance that do not engage federal or provincial actors; and interstitial law-making in Canadian courts. These practices are significant, if incomplete, steps towards Indigenous self-determination in the context of a shared federal framework. Yet, colonial practices of law and governance continue to constrain Indigenous jurisdiction in their traditional territories. The question, then, is whether the interstitial practices discussed here can be the basis of the type of systemic change required to meaningfully respond to Indigenous assertions of autonomy and self-determination and whether this can be achieved in a shared federal association.

Of course, the question of social change is a very old one, and the question of the extent to which state institutions might profitably be engaged in struggles for emancipation, from both theoretical and practical perspectives, has a long provenance. An added layer of complexity is added in colonial contexts. Where it is believed that "systemic ruptural strategies" — that is, strategies that aim at the wholesale rupture of existing structures — are either undesirable or impossible, the question becomes which strategies best promote gradual transformations. As Olin Wright puts it, "the only real alternative [to ruptural strategies] is some sort of strategy that envisions transformation largely as a process of metamorphosis in which relatively small transformations cumulatively generate a qualitative shift in the dynamics and logic of a social system."[144] The framing as metamorphosis, however, "does not imply that transformation is a smooth, non-conflictual process that somehow transcends antagonistic interests."[145] As Benjamin Arditi frames it, "the interstice is a space of tension and not a region of unmitigated freedom where the ruled can do as they please. A politics of disturbance uses this interstice to make inroads into the partition of the sensible; it is a space for staging negotiations concerning freedom and

144 Wright, *supra* note 36 at 228.
145 *Ibid*.

equality in everyday life."[146] It does not suggest, in other words, that gradual change is achieved without struggle; rather, it suggests a shift in perspective in which we "see the strategic goals and effects of struggle in a particular way: as the incremental modifications of the underlying structures of a social system and its mechanisms of social reproduction that cumulatively transform the system, rather than as a sharp discontinuity in the centers of power of the system as a whole."[147]

As discussed at the outset, in Wright's view, the adoption of a metamorphic vision of social change gives rise to two approaches: "interstitial transformation and symbiotic transformation."[148] Both visions seek democratic emancipation and social empowerment through gradually enlarging social spaces in which transformation can occur. They differ, in his view, in terms of their engagement with the state, with symbiotic models engaging with the state and interstitial models resisting such engagement.[149] As Wright notes, however, "[t]hese need not constitute antagonistic strategies — in many circumstances they complement each other, and indeed may even require each other."[150] On the basis of this concession and the use of the term "interstitial" in American legal thought, I here proceed without the interstitial/symbiotic distinction for the purposes of understanding how a model of interstitial federalism may facilitate social change.

Interstitial change, then, includes approaches that challenge hegemonic assemblages by working within cracks in systems of power, both through engaging the institutions of those systems and by working outside them.[151] Without explicitly drawing on the terminology of the 'interstitial,' several theorists make arguments along similar lines. James Tully, for example, discusses resistance in terms of the 'practices of freedom' that citizens take up in challenging structures and practices of governance.[152] Gene Sharp, by turn, refers to both "microresistance" and "cultural resistance," the former denoting resistance by individuals or small groups, the latter defined as the "[p]ersistent holding to one's own way of life, language, customs, beliefs, manners, social organization,

146 Benjamin Arditi, *Politics on the Edges of Liberalism: Difference, Populism, Revolution, Agitation* (Edinburgh: Edinburgh University Press, 2007) at 106.
147 Wright, *supra* note 36 at 228.
148 *Ibid*.
149 *Ibid*.
150 *Ibid*.
151 The metaphor of cracks is developed at length by Holloway, *supra* note 36.
152 James Tully, *Public Philosophy in a New Key: Volume 1, Democracy and Civic Freedom* (Cambridge, United Kingdom: Cambridge University Press, 2008).

and ways of doing things despite pressures of another culture."[153] Cultural resistance, which can arise in direct opposition to colonialism, includes the use of language, artistic endeavor, and the practice and revival of cultural practices. As Tully argues, in resisting the various forms of coercion employed by colonial powers, "there is always a range of possible comportments — ways of thinking and acting — that are open in response, from the miniscule range of freedom exercised in hidden insubordination in total institutions such as residential schools to the larger and more public displays."[154] These are what Tully calls a "vast repertoire of arts of infrapolitical resistance."[155] The importance of these forms of 'infrapolitical resistance' are reflected in Mouffe's argument that "radical politics consists in a diversity of moves in a multiplicity of institutional terrains, so as to construct a different hegemony."[156] Articulated slightly differently, Paul Berman argues that legal pluralists seek "to identify places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision."[157] In each of these articulation, the acts of resistance work to prevent alternative modes of social and normative ordering from being subsumed within a sovereign whole. In the result, these forms of resistance have a constitutive effect, maintaining and also producing legal hybridities grounded in alternative constitutional visions.[158] As Wright argues, "The important idea is that what appear to be "limits" are simply the effect of the power of specific institutional arrangements, and interstitial strategies have the capacity to create alternative institutions that weaken those limits."[159] This is the historical perspective taken up by agonistic thinkers, and the notion that struggles over those limits can take place in agonistic, rather than antagonistic, ways, supports the idea that this form of change can happen in the context of shared practices and structures, without violence.[160]

153 Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (New York, New York: Oxford University Press, 2012) at 107.

154 Tully, *supra* note 152 at 265.

155 *Ibid*.

156 Mouffe, *supra* note 20 at XIV.

157 Paul Schiff Berman, *Global Legal Pluralism: Jurisprudence of Law Beyond Borders* (Cambridge, United Kingdom: Cambridge University Press, 2012) at 54.

158 As Wright puts it "The state contains a heterogeneous set of apparatuses, unevenly integrated into a loosely-coupled ensemble, in which a variety of interests and ideologies interact. It is an arena of struggle in which contending forces in civil society meet. It is a site for class compromise as well as class domination. In short, the state must be understood not simply in terms of its relationship to social reproduction, but also in terms of the gaps and contradictions of social reproduction." Wright, *supra* note 36 at 236.

159 *Ibid*.

160 See Mouffe, *supra* note 20 at 9-15.

The above points to strategies of resistance grounded in activities of everyday life. In theorizing such modes of resistance and their relationship to interstitial federalism, an important distinction in Enlightenment thought should be attended to. Amartya Sen describes the distinction as between what he calls the 'transcendentalist' and 'comparativist' approaches to social thought. He articulates the distinction this way: "'transcendental institutionalism,' has two distinct features. First it concentrates its attention on what it identifies as perfect justice, rather than on relative comparisons of justice and injustice… second, in searching for perfection, transcendental institutionalism concentrates primarily on getting the institutions right and it is not directly focused on the actual societies that would ultimately emerge."[161] The comparativist approach, on the other hand, focuses on "the actual behavior of people" and "involved … comparisons of societies that already existed or feasibly could emerge, rather than confining their analyses to transcendental searches for a perfectly just society."[162] The concern for the comparativists was primarily with the removal of injustice from society. The transcendental inquiry addressed a fundamentally distinct question, "a question that may well be of considerable intellectual interest, but which is of no direct relevance to the problem of choice that is to be faced."[163] That is, the question of what an ideal social order might look like has little value to people making strategic decisions in light of the real limits and constraints within which they are operating.

There are two important points to draw out of Sen's argument for present purposes. The first is the caution not to overemphasize institutions themselves and fall into the trap of thinking that there is an ideal set of institutions that will lead to a just social order. People who make up institutions and behave according to their own values or interests have a significant impact on the social order regardless of how institutions are formally structured. Idealized visions conceived at the theoretical level and imposed to bring about a 'just' social order fail to reflect lived reality and the push and pull of political life as these visions are re-worked to meet the demands of groups and individuals. The second is the emphasis on creating change not in light of a predetermined ideal,

161 Amartya Sen, *The Idea of Justice* (Cambridge, Massachusetts: Belknap Press of Harvard University, 2009) at 6-7.

162 *Ibid*. Others, of course, have identified and articulated a similar distinction, albeit sometimes using different terminology. Ian Hunter, for example, draws a distinction between the 'metaphysical' philosophy of Kant and Leibnitz and the 'civil' philosophy of Pufendorf and Thomasius in German enlightenment thought. Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge, United Kingdom: Cambridge University Press, 2001). For commentary see James Tully, "Diverse Enlightenments" (2003) 32:3 Economy and Society 485; See also Mouffe , *supra* note 20 at 35-36.

163 Sen, *supra* note 161 at 17.

but with the materials at hand. A single vision of a just society is never possible. The terms by which competing visions are negotiated, including the institutional forms through which political authority is mediated, must themselves be subject to ongoing contestation and renegotiation. This approach, of strategic counter-hegemonic resistance that itself is generative in nature, can then be thought of in terms of jurisdiction. This requires re-thinking jurisdiction, opening it up to reflected grounded practices and conceptions of those living them out. It moves away from the imposition of top-down theoretical models to a vision that incorporates, indeed is shaped by, the dialogues on governance of those involved.

How, then, does this apply to interstitial federalism? As outlined above, interstitial federalism can be considered as both descriptive and prescriptive. From a descriptive perspective, it allows for the articulation of conceptions of federalism and jurisdiction that reflect actual practices of governance. It allows us to see federalism differently. From a prescriptive perspective, it provides a way to envision how the social order may change to better accommodate Indigenous autonomy and self-determination. The view being put forward here is not a totalizing one. It is not the goal to subsume all Indigenous acts of jurisdiction within a comprehensive federal frame. Rather, it is to re-think jurisdiction and federalism in a way that allows exercises of Indigenous jurisdiction to prefigure transformations in shared federal structures. It opens space for ongoing dialogues about jurisdiction and political authority. By framing the issues as questions of federalism, the languages of engagement shift. With the shift in languages comes a shift in the terms of engagement as well as the available legal tools. The nature of interstitial strategies of social change, as outlined in this section, illustrate that interstitial federalism can prefigure social change. Further, seeing the actual practices of governance and dialogues around jurisdiction and nationhood as constitutive of a federal association allows for the contestation of inherited narratives of unilateral and fixed sovereign authority. With the state and its legal apparatus seen as historically contingent assemblages, interstitial approaches to federalism can work to construct and establish alternative practices and visions.

6. Conclusion

Though Indigenous peoples have often been excluded from discussions of federalism in Canada, this has not always been the case. When European peoples began to settle in North America, they were brought into Indigenous legal orders. Later, as European communities grew beyond the isolated outposts and forts that characterized their early settlement, they entered into extensive treaty relationships with the Indigenous nations whose territories they were entering. These treaties established a constitutional structure governing the relationships between the parties and their rights, responsibilities, and authorities in relation to each other. They established what has been called 'Treaty Federalism.' That a type of federal arrangement would emerge is unsurprising: Indigenous peoples frequently used models of confederation to structure their political relationships as the histories of the Iroquois, Wabanaki, Blackfoot, Creek, and Delaware confederacies, to name but a few, attest.

The strength of federal models of association are that they recognize the autonomy and political character of constituent members while creating negotiated forms of collective governance. It is notable that there are long histories of federal association in North America that pre-date the existence of the Canadian federation. With the benefit of hindsight, it can be seen that the marriage of federalism and the modern nation-state undermined the autonomy and political status of Indigenous peoples, situating them as minority populations within colonial structures of governance. Treaty federalism, which grounded the legitimacy of non-Indigenous governments on the continent, were effectively erased from non-Indigenous accounts, treaties reduced to the protection of a limited range of resource-access rights. It is in response to this that many people have argued for a revitalization of treaty federalism. Sakej Henderson and Andrew Bear Robe both put forward visions of treaty federalism that can structure Crown-Indigenous relations in Canada, giving life to a vision of federalism that recognizes Indigenous autonomy and sovereign authority.[164]

The argument put forward in this paper should not be taken to exclude treaty federalism. Indeed, treaty federalism can be understood as an example of the form of interstitial federalism articulated here. The understanding of interstitial federalism articulated here has both descriptive and prescriptive elements. Descriptively, understanding the many discrete forms of governance that take place in the spaces left open by the formal federal structure as practices of federalism — that is, as constitutive of the model of federalism that

164 See Henderson, *supra* note 9; see also Robe, *supra* note 9; see also Ladner, *supra* note 9.

is actually being practiced — provides a basis for re-articulating practices of Indigenous governance and their relationship to other orders of government in Canada. Prescriptively, it does not provide an outline for a 'model' of federalism; rather, it articulates a vision of how political and legal relationships can be re-worked on the basis of the actual practices of governance that the parties are engaged in. It opens up the possibility of seeing the diverse ways in which governance is being contested and re-negotiated on an ongoing basis as being directed towards new articulations of Canadian federalism.

Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*[1]

*Amy Swiffen**

This paper considers the relationship between the Charter of Rights and Freedoms *and Indigenous self-determination in the context of constitutional reconciliation in Canada. It begins by reviewing case law and legal scholarship on the application of the* Charter *to Aboriginal governments, with a particular focus on the debates over the interpretation of section 25, which stipulates that* Charter *rights cannot "abrogate or derogate" from Aboriginal and treaty rights. I show that, while different options have been suggested for how the* Charter *could be interpreted in the case of a conflict between* Charter *rights and Aboriginal rights, each of these possibilities creates problems of its own. Fundamentally, the seemingly irresolvable tensions that emerge between the various interpretations of section 25 reflect a deeper problem that it is necessary for a project of constitutional reconciliation to address: the underlying assumptions of Crown sovereignty and the place of Indigenous legal cultures in Canadian federalism. Ultimately, the paper argues that the* Charter *does have a role in the articulation of a nation-to-nation relationship between Canada and Indigenous peoples because it imposes a duty on courts to develop interpretations that are cognizable within Indigenous legal traditions.*

Ce document examine la relation entre la Charte des droits et libertés *et l'autodétermination autochtone dans le contexte de la réconciliation constitutionnelle au Canada. Il commence par examiner la jurisprudence ainsi que les connaissances juridiques relatives à l'application de la* Charte *aux gouvernements autochtones, en accordant une attention particulière aux débats sur l'interprétation de l'article 25, qui stipule que les droits garantis par la* Charte *ne peuvent " abroger " les droits ancestraux et issus de traités ou " déroger " à ceux-ci. Je démontre que, bien que différentes options aient été suggérées quant à la manière dont la* Charte *pourrait être interprétée dans le cas d'un conflit entre les droits de la* Charte *et les droits des Autochtones, chacune de ces possibilités crée des problèmes qui lui sont propres. Essentiellement, les tensions apparemment insolubles qui se dessinent entre les diverses interprétations de l'article 25 reflètent un problème plus profond qu'un projet de réconciliation constitutionnelle doit résoudre : les hypothèses sous-jacentes de la souveraineté de la Couronne et la place des cultures juridiques autochtones au sein du fédéralisme canadien. Finalement, le document soutient que la* Charte *joue un rôle dans la formulation d'une relation de nation à nation entre le Canada et les peuples autochtones, car elle oblige les tribunaux à élaborer des interprétations compatibles avec les traditions juridiques autochtones.*

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Introduction: Constitutional Reconciliation and Section 25

This paper considers the meaning of section 25 of the *Charter of Rights and Freedoms*[2] in the context of constitutional reconciliation. It begins by reviewing case law and legal scholarship on the application of section 25, with a focus on the 2008 case *R v Kapp,*[3] in which the Supreme Court of Canada heard a *Charter* challenge to federal fishing regulations that gave priority to the Aboriginal rights of Indigenous fishers. While the case is most well-known for its equality reasoning related to section 15 of the *Charter*, the concurring minority reasons drew instead on section 25. However, there is little academic analysis of this aspect of the *Kapp* decision. This paper identifies several problems with the application. If we turn to legal scholarship on section 25, the situation does not improve. Different options have been suggested for how section 25 could be interpreted to avoid the kinds of problems that emerge in *Kapp*. Yet, each of these possibilities creates new problems. I suggest not that one or another of the current interpretations on offer is correct, but rather that the tensions that emerge among them reflect a deeper problem necessary for a project of legal reconciliation to address, which is the status of Indigenous legal cultures in Canadian federalism.

Most of the existing case law pertaining to section 25 involves situations where the *Charter* has been used by non-Indigenous individuals to challenge the non-derogation clauses found in statutes in the *Indian Act*,[4] the *Fisheries Act*[5], etc., which grant priority to Aboriginal rights in certain contexts. These cases involve challenges to "external protections" for Aboriginal rights that otherwise would conflict with the *Charter*.[6] In this paper, I ask how section 25 would work in challenge to "internal restrictions" by a law or action of an Indigenous government.[7]

2 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982**,** c 11 [*Charter*].

3 *R v Kapp*, 2008 SCC 41 [*Kapp*].

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

5 *Fisheries Act,* RSC 1985, c F-14.

6 Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto, Ontario: University of Toronto Press, 2001) at 231.

7 "Indigenous government" is a deceptively simple term as discussed below there are various types of entities that fall within this category and at this stage they do not all have the same legal status in Canada's settler colonial legal system.

This type of scenario has yet to come before the courts and legal commentary fails to adequately address it.[8] With this in mind, the objective of the paper is threefold. First, to identify the limits of the current section 25 framework in the context of Indigenous governments. Second, to draw on the sociological distinction between governments and peoples to help shed light on the source of some of the difficulties encountered by the current legal approaches. Third, to develop an application of section 25 that can provide an anchor point for understanding the *Charter* in relation to the jurisdiction of Indigenous nations through the creation of a system of Aboriginal Charter Courts with jurisdiction over *Charter* matters. Ultimately, I argue that section 25 has a role in constitutional reconciliation in Canada because it imposes a duty on *Charter* reasoning to be cognizable with Indigenous legal cultures and reflects a post-colonial legal consciousness.[9]

Judicial Interpretation of Section 25: So far, A Shield for Aboriginal Rights

Since the enactment of the *Constitution Act, 1982,*[10] most Aboriginal rights claims have been brought before the courts within the context of section 35.[11] Yet, while there have been fewer cases involving section 25, it is still an important provision. It is the only explicit reference to Aboriginal rights in the *Charter of Rights and Freedoms*. Section 25 reads:

> The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[12]

8 As discussed below, the Supreme Court of Canada also seems reluctant to tackle the question, at least for the times being. It gave limited treatment of s. 25 in *Kapp* and *R v Taypotat* (2015).

9 "Constitutional reconciliation" is understood to mean the incorporation of indigenous law within Canadian constitutional law. It is similar to what Brenda Gunn describes a "post-colonial legal consciousness," which involves "incorporating Indigenous legal values within the Canadian legal system." See Brenda Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6:1 Indigenous LJ 31 at 38.

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

11 Celeste Hutchison, "Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*" (2007) 52:1 McGill LJ 173.

12 *Charter*, *supra* note 2, s 25.

Scholars have pointed out that at the time the *Charter* was being drafted, the biggest perceived threat to Aboriginal rights, including treaty and other rights, was the equality provisions in section 15.[13] According to Hutchison, the legislative record suggests that section 25 was inserted to serve as direction for the judiciary to not interpret the *Charter* in ways that undermine the rights of Indigenous communities or peoples.[14] Similarly, Jane Arbour argues,

> [T]he original and sustained intent of the drafters … was to ensure that the protection of rights by the *Charter* would not affect the rights of Aboriginal peoples in Canada. … … [The] purpose for section 25 can be stated: to prevent *Charter* rights and freedoms from diminishing other rights and freedoms of Aboriginal peoples in Canada, whether those rights are in the nature of Aboriginal, treaty, or "other" rights.[15]

Arbour points to other sections of the *Charter* to bolster this view, such as the corresponding provisions in sections 26 to 29. These sections coincide with the purpose of section 25, as they indicate the legislature intended to increase and protect rights and freedoms with the provisions, rather than restrict them.[16] This legislative intent seems to be reflected in the words of Roger Tassé, Deputy Minister of Justice at the time, who stated the provision was "a rule of construction for the *Charter* in its application to the rights of Aboriginal peoples."[17]

However, former Justice Minister Jean Chrétien framed the provision in a slightly different manner, emphasising that section 25 would not create rights but merely protect Aboriginal rights by preventing other provisions of the *Charter* from infringing upon them.[18] Chrétien's formulation suggests the provision was intended as more of a shield to protect Aboriginal rights that are already recognised elsewhere, not as a rule of construction. In Tasse's formulation of the provision as a rule of construction, however, the provision is relevant at the outset of a *Charter* analysis, at least when Aboriginal rights are involved. In contrast, Chrétien's formulation implies its relevance lies not in the interpretation of *Charter* rights and *prima facia* infringement, but at the justification stage only after an infringement is found. The difference is seemingly subtle,

13 Jane Arbour, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the The Charter of Rights and Freedoms" (2003) 21:1 SCLR 3 at 43; See also Hutchinson, *supra* note 11.

14 Hutchison, *ibid* at 148.

15 Arbour, *supra* note 13 at 36.

16 *Ibid* at 37.

17 House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, vol 4 No 49 (30 January 1981) at 93 cited in Hutchison, *supra* note 11 at 178.

18 Hutchison, *supra* note 11 at 178.

but turns out to be an important signpost for mapping out how the legal and scholarly debate over the meaning of section 25 has unfolded.

The Supreme Court of Canada has commented on section 25 only a handful of times. The *Quebec Secession Reference*[19] indicates in passing that section 25 was included in the *Charter* to protect minority rights. This idea has lead lower courts to find that section 25 is less a rule of construction, and more of a shield to ensure that Aboriginal rights — understood as minority rights defined in treaties, section 35, statute, and case law — are not diminished by the application of the *Charter*.[20] For example, in *R v Redhead*, Oliphant J. states "the section does not confer new rights upon aboriginal people. It merely confirms certain rights held by aboriginal people."[21] Similarly, the court stated in *Campbell v British Columbia*, "the section is meant to be a 'shield' which protects aboriginal, treaty, and other rights from being adversely affected by provisions of the *Charter*."[22] Williamson J. continues, "the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*."[23] The Federal Court of Appeal came to this conclusion in *Shubenacadie Indian Band v. Canada* as well, writing "section 25 of the *Charter* has been held to be a shield which protects the rights mentioned therein from being adversely affected by other *Charter* rights."[24] Most recently, in *Kapp*, Bastarache J.'s minority reasoning reaffirmed this idea, stating the fundamental purpose of section 25 is "protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group."[25]

This case law reflects an understanding that section 25 is relevant only in cases where Aboriginal rights infringe the *Charter*, thus implying it is triggered only after finding an infringement, not at the outset of the analysis when the

19 *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 82, 161 DLR (4th) 385 [*Quebec Secession Reference*].

20 See Hutchison, *supra* note 11 at 180; See e.g. *R v Steinhauer* (1985), 63 AR 381 at paras 19, 58, 15 CRR 175 (Alta QB) [*Steinhauer*].

21 *R v Redhead* (1995), 103 Man R (2d) 269 at para 83, 99 CCC (3d) 559 (Man QB). It is worth noting the current wording of section 25(b) includes reference to rights that exist from land claim agreements *and those that may be so acquired*. This means Oliphant's statement must be understood to mean only that new Aboriginal rights are not recognized by section 25.

22 *Campbell v British Columbia (AG)/Canada (AG) & Nisga'a Nation,* 2000 BCSC 1123 at para 156.

23 *Ibid* at para 158.

24 *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 DLR (4th) 741 at para 43, 184 FTR 10 (FCA) [*Shubenacadie*].

25 *Kapp*, *supra* note 3 at para 89.

violation is merely claimed.[26] In *Shubenacadie*, for example, the court held that "section [25] can only be invoked as a defence if it had been found that the appellant's conduct had violated subsection 15(1) of the *Charter*."[27] Similarly, in *Grismer v Squamish Indian Band* the court proceeded with a *Charter* analysis first and, upon determining that there was a justifiable infringement of subsection 15(1), held that there was no need to consider the section 25 arguments.[28] These cases reflect an approach whereby section 25 is seen as a possible justification for a *Charter* infringement.[29] Overall, the courts see section 25 not as a rule of construction so much as a shield for Aboriginal rights that infringe the *Charter*.[30] In this sense, section 25 could be likened to an alternative or secondary justificatory provision in addition to section 1 in *Charter* cases where Aboriginal rights are engaged.

Scholarly Debate Over Section 25: Shield Provision, Justificatory Framework or Interpretive Prism?

On the surface, the scholarly commentary on section 25 can be roughly categorized into two perspectives. On the one hand, there are scholars who see section 25 as calling on the courts to construct *Charter* rights in culturally sensitive ways that do not undermine Aboriginal rights.[31] The first articulation of this position was offered by William Pentney shortly after the *Charter* came into force. Pentney developed an application of section 25 "intended only as an interpretive guide and not as an independently enforceable guarantee of aboriginal and treaty rights."[32] As Thomas Isaac points out, he argued section

26 See *Steinhauer supra* note 20; See also *Thomas v. Norris*, [1992] 2 CNLR 139 at para 31, 1992 CanLII 354 (BCSC).

27 *Shubenacadie, supra* note 24 at para 43.

28 *Grismer v. Squamish Indian Band,* 2006 FC 1088 [*Grismer*].

29 It is possible the court in *Grismer* was deferring the trouble of ascertaining whether there were any relevant "aboriginal, treaty or other rights" to which s. 25 might apply in that context. The court may have preferred just to leave those worms in that can. Nonetheless, the fact that section 25 was not addressed until after an infringement was found suggests the courts did not regard it as a rule of construction.

30 Hutchison, *supra* note 11 at 180.

31 See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, Ontario: Canada Communication Group Publishing, 1996) at 467-8; See also David Milward, *Aboriginal Justice and the Charter: Realising a Culturally Sensitive Interpretation of Legal Rights* (Vancouver, British Columbia: UBC Press, 2012) at 66-9; See also Timothy Dickson, "Section 25 and Intercultural Judgement" (2003) 61:2 UT Fac L Rev 141 at 157-8.

32 William Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I — The Interpretive Prism of Section 25" (1988) 22:2 UBC L Rev 21 at 28.

25 is triggered at the first stage of a *Charter* analysis and functions as an "interpretive prism" throughout the analysis that permits the courts "to choose the interpretation of a *Charter* right that is "the least intrusive on aboriginal rights."[33] As such, the provision has a role to play before it has been determined if an infringement has occurred. However, Pentney also stipulates in the case of actual conflict where an Aboriginal right and a *Charter* right or freedom cannot be reconciled using interpretive flexibility, the *Charter* right should be given effect. This reflects a hierarchy that prioritises *Charter* rights over Aboriginal rights in the sense that the latter can be justifiably infringed by the former, but not the other way around. Pentney does not explain how this can be reconciled with the "shall not abrogate or derogate from" language in section 25 in the last instance.

Another perspective that has emerged in the scholarly literature suggests that section 25 is not a rule of construction, but a shield that protects Aboriginal rights that infringe the *Charter*. The function of the provision from this perspective is to justify the infringement of *Charter* rights or grant immunity from the *Charter* to ensure Aboriginal rights are not derogated or abrogated.[34] For example, Bruce Wildsmith argues that section 25 should play a shielding role when Aboriginal rights come into conflict with individual *Charter* rights and freedoms.[35] He writes, the "purpose and effect" of section 25 is "to maintain the special position of Canada's aboriginal peoples unimpaired by the *Charter*."[36] His view is that Aboriginal rights must be completely unabridged by the *Charter*. In a situation of "irreconcilable conflict between *Charter* rights or freedoms and section 25 rights or freedoms, section 25 rights or freedoms prevail."[37] Brian Slattery agrees with this interpretation, writing section 25 is more than simply a canon of interpretation; rather, it means "[w]here a *Charter* right impinges on a section 25 right, the latter must prevail."[38] From these perspectives, there is no role for section 25 in the construction of *Charter* rights

33 Thomas Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21:1 Windsor YB Access Just 431 at 436.

34 See Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34:1 Osgoode Hall LJ 61; See also Kerry Wilkins, "… But We Need the Eggs: The Royal Commission, the Charter of Rights, and the Inherent Right of Aboriginal Self-Government" (1999), 49:1 UTLJ 53.

35 Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon, Saskatchewan: University of Saskatchewan Native Law Centre, 1988) at 25.

36 *Ibid* at 2.

37 *Ibid* at 23.

38 Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8:1 Queen's L J 232 at 239. It is interesting to note that Slattery was a key constitutional adviser to RCAP and RCAP took a different view.

and their infringement. Rather, it is a mechanism to adjudicate conflicts between two potentially incompatible sets of rights.

A stronger version of the shield approach has been articulated by Kent McNeil, who argues the "obvious" purpose of section 25, read in the context of sections 35 and 32 of the *Constitution Act*, "is to prevent the *Charter* from being interpreted in a way that infringes on any rights or freedoms the aboriginal peoples may have."[39] McNeil concludes that section 25 completely shields all Aboriginal rights — including the right to self-government — from *Charter* scrutiny.[40] This goes further than Wildsmith's version in that it is not only in cases of irreconcilable conflict that *Charter* rights would give way. In McNeil's view, the only way to ensure Aboriginal rights are not abrogated or derogated is to understand section 25 as a grant of immunity for Indigenous governments from the *Charter*. This position takes note of the fact that Indigenous governments already operate outside the scope of the *Charter*, and that "Aboriginal peoples should not only be consulted, but their consent should be a prerequisite to the application of the *Charter* to their governments."[41] Several other authors agree with McNeil. For example, Kerry Wilkins writes, "from a legal standpoint…the *Charter* has no application to inherent-right communities in the exercise of their self-government right."[42] James Sakej Henderson also finds section 25 creates judicial and legislative immunity for Aboriginal governments within the *Charter*, arguing it carves out "a protective zone from the colonialists' rights paradigm" within the *Charter* itself.[43]

Compared to Pentney's interpretative application of section 25, the shield approaches have received more support among legal scholars. However, not all have embraced the idea that section 25 grants immunity to Indigenous governments from *Charter* challenge. Several have argued instead that it offers a potential justification for infringing *Charter* rights or freedoms. Patrick Macklem has articulated such an interpretation, describing section 25 as a shield that functions as a justificatory provision. He agrees section 25 "protects federal, provincial and Aboriginal initiatives" that make a distinction between Aboriginal and non-Aboriginal people "to protect interests associated with culture, territory, sovereignty, and the treaty process."[44] This means laws that

39 Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4:1 SCLR 225 at 262.

40 McNeil, *supra* note 34 at 77.

41 *Ibid* at 72.

42 Wilkins, supra note 34 at 119.

43 James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 242 at 286.

44 Macklem, *supra* note 6 at 225.

make a distinction between Aboriginal and non-Aboriginal people found to be infringing the *Charter* would have to be justified under section 25 by the objective of protecting Indigenous difference.

However, Macklem makes a further distinction between "external protections" of Indigenous difference and laws of Aboriginal governments that place "internal restrictions" on the rights of some community members. External protections would include provisions in the *Fisheries Act* and the *Indian Act* that infringe section 15 (1) of the *Charter* with the goal of protecting Indigenous difference. So too would some actions of Indigenous governments — for example, an election code that limits the right to vote to recognized community members. Macklem argues these types of laws are external protections of Indigenous difference and should be shielded from *Charter* scrutiny by section 25. In contrast, internal restrictions — laws of an Indigenous government that infringe the *Charter* rights of some community members — would garner a different response. In this type of case, Macklem suggests section 25 should apply differently. In contrast to external protections that are simply shielded from *Charter* scrutiny, internal restrictions must be justified in relation to the purpose of protecting Indigenous difference.

Thus, Macklem's approach involves a court first assessing whether Aboriginal rights are engaged in a *Charter* challenge. If so, it would then assess whether the government action in question is an external or internal protection. If an internal restriction is found to violate the *Charter*, Macklem echoes Pentney in suggesting that section 25 plays an interpretive role. If there are two plausible interpretations of a *Charter* right — one in which the internal restriction violates the *Charter* and one in which it does not — "the judiciary ought to adopt the latter interpretation."[45] If there is no plausible interpretation other than one that results in a *Charter* violation, "section 25 should give way and the restriction should be regarded as a violation and require justification under section 1."[46] At this point, the usual test for justification under section 1 would proceed with the stipulation that instead of assessing infringement in relation to principles of fundamental justice, an Indigenous government's objective is assessed in relation to protecting Indigenous difference. An internal restriction that infringes a *Charter* right would be valid, therefore, if it had the compelling and substantial objective of protecting Indigenous difference and if the deleterious consequences for

45 *Ibid* at 225.
46 *Ibid* at 232.

some members of the community bore a close relation to interests associated with Indigenous difference.[47]

In assessing Macklem's proposal, it is important to note how the hierarchy of rights pointed out in Pentney's interpretation is also at work. In the last instance, the onus is on Indigenous governments to justify their actions and potentially have them rendered void by the courts. Wilkins captures this problem in his characterization of section 25 advanced by the Royal Commission on Aboriginal Peoples, which states that section 25 protects Aboriginal rights — including self-government — "from 'unreasonable' or 'disproportionate' derogation at the hands of the *Charter*," but, as Wilkins points out, "the burden rests on the communities having such rights to show that any derogation would be disproportionate or unreasonable."[48] Wilkins describes this as the most defensible interpretation of RCAP's view of section 25. It might also be the most defensible view of Macklem's. In both, *Charter* rights and freedoms take precedence of Aboriginal rights in the last instance.

More recently, Jane Arbour has attempted to bridge the gap between the interpretive, and shield understandings of section 25, though in a different way than Macklem. Arbour argues the provision should play an interpretive function starting at the outset of a *Charter* analysis. When Aboriginal or treaty rights are engaged, the section imposes a duty on the courts to find interpretations that uphold both types of rights. In cases where this is not possible, i.e. of actual conflict, section 25 operates as a shield to protect the Aboriginal right, which means the *Charter* right or freedom gives way.[49] Arbour suggests if section 25 is triggered and it is not possible for the Court to arrive at interpretations that uphold both Aboriginal and *Charter* rights, the Court should protect the Aboriginal right. Thus, like Macklem, Arbour suggests in cases of irreconcilable conflict a hierarchy of rights is necessary. Unlike Macklem, Arbour argues it is the protection of Aboriginal rights that must take precedence.[50] Yet, a question remains: if section 25 truly imposes a duty to develop interpretations

47 *Ibid* at 231.

48 Wilkins, *supra* note 34 at 114.

49 Arbour, *supra* note 13.

50 Except in cases of where sex-based equality rights are at stake. See Arbour, *supra* note 13 at 62. Arbour notes section 28 of the *Charter* is "a directive to the courts to interpret the scope of *Charter* rights in a manner consistent with the equality of the sexes" and that, "subsection 35(4) and section 28 of the *Charter* (and indeed section 15 of the *Charter*) stand as clear indicators that the interpretation and application of the *Charter* (including section 25) and the determination of the existence and scope of Aboriginal and treaty rights must be consistent with the important constitutional value of the equality of men and women."

that bridge legal cultures, why is there a need to also create a hierarchy between them?[51] If the latter is possible, why is the former necessary?

Most recently, David Milward has attempted to avoid this problem by proposing another version of the interpretive application of section 25; one that he characterizes as non-hierarchical in that it aims to balance the two sets of rights by using culturally sensitive modes of interpretation.[52] As Milward writes, the goal is to not sacrifice one set of rights for another while at the same time "[enabling] Aboriginal communities to pursue what they may decide for themselves to be their own collective goals."[53] He refers to the Supreme Court decision in *Dagenais v Canadian Broadcasting Corp*[54] to suggest section 25 means that the rights must be balanced in the section 1 proportionality analysis. Crucially, however, this analysis must proceed in culturally sensitive ways. Thus, Milward's focus is on Aboriginal rights as shaping the interpretation of *Charter* infringements.[55] To exemplify this, he proposes culturally sensitive interpretations of various *Charter* rights inspired by case law in Canada, the USA, and Australia.

One issue with Milward's proposal is that it does not fully resolve the hierarchy of rights issue it intends to address. While this approach is non-hierarchical, Milward acknowledges that it still means *Charter* rights would be applied to Indigenous governments, just in "limited" and "modified" forms.[56] The burden of proof in a section 1 analysis remains on the government seeking to justify a *Charter* infringement. In Milward's proposal, this means that in a section 25 case involving an internal restriction of an Indigenous government the burden would be on the Indigenous government to justify infringing *Charter* rights. The onus is not to show the infringement of an Aboriginal right is justified by the *Charter*. Thus, Milward's approach succeeds only in creating a lesser sort of hierarchy, since it requires that infringements of *Charter* rights by Aboriginal governments be justified and not the other way around.

Overall, legal scholarship on section 25 reads the provision as either granting immunity to Aboriginal governments (McNeil, Henderson, Wilkins), or as some form of justificatory framework designed to balance Aboriginal rights

51 Presumptions about sovereignty. Ultimately, most commentary assumes that law requires a single locus of sovereignty — some ultimate point of highest authority.

52 Milward, *supra* note 31 at 71.

53 *Ibid*.

54 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12.

55 The implicit hierarchy created between settler state and indigenous is not addressed. Rather, the legal relationship between them is assumed to be subject to sovereign, as opposed to nation to nation.

56 Milward, *supra* note 31 at 71.

and *Charter* rights, while allowing one or the other to take precedence in the last instance (Macklem, Arbour). Milward's reading is the least hierarchical in that he articulates an interpretive application of section 25 that calls for culturally sensitive interpretation of *Charter* rights to ensure the protection of Aboriginal rights.[57] In this approach, *Charter* rights would be limited and modified by Aboriginal rights, but there remains a hierarchy of a lesser sort. In this sense, none of the proposals fully address the settler-colonial power relationship that subtends the question of the application of section 25.

R v Kapp: Section 25 as a Shield and a Justificatory Framework

The legal commentary discussed above, developed after the implementation of the *Charter* and Milward's reading of section 25 seems to be the only one that has emerged since the 2008 Supreme Court of Canada decision in *R v Kapp*, in which Bastarache J., writing for a concurring minority, discusses the application of section 25.[58] *Kapp* is much more well-known for the majority discussion of section 15 of the *Charter*, and in particular section 15(2). However, the reasoning offered by Bastarache J. is relevant to consider in light of the preceding discussion in that it deals with the jurisdiction of the *Charter*. Kapp was one of ten non-Aboriginal individuals who were accused of salmon fishing with a gillnet in an area of British Columbia contrary to Aboriginal communal fishing licence regulations in the *Pacific Fishery Regulations*. The regulations were created by the federal government pursuant to its Aboriginal Fisheries Strategy and under its power in the *Fisheries Act*.[59] The area in which Kapp et al. were fishing was closed for a twenty-four-hour period during which only members of three First Nation bands (the Musqueam, Burrard, and Tsawwassen) could fish.[60] The accused individuals challenged these regulations on the grounds they violated their equality rights under section 15 of the *Charter*.

The trial judge agreed the communal fishing licence regulations discriminated on the basis of race. However, the British Columbia Court of Appeal dismissed the challenge (majority reasons and minority reasons that concurred in result), finding the provisions were saved by section 15(2). In the course

57 *Ibid*; See also Dickson, *supra* note 31 at 141.

58 *Kapp, supra* note 3. The only post-2008 academic discussion of section 25 that I could find was in David Milward's book *Aboriginal Justice and the Charter*, but he does not address *Kapp*.

59 Hutchison, *supra* note 11 at 176.

60 *Ibid* at 175-6. The licenses were created pursuant to the *Aboriginal Communal Fishing Licenses Regulations*, SOR/1993-332.

of its decision, the majority of the BC Court of Appeal commented on section 25, finding it is not applicable unless a *Charter* violation is established in the context of Aboriginal rights. In other words, it is relevant at the justificatory stage after an infringement has been found. In the case at issue, the Court found there was no infringement of section 15 by drawing on subsection 15(2). Because the Court found that section 15(2) saved the communal fishing licence provisions, it concluded section 25 was inapplicable and not necessary to analyse within the facts of the case.[61]

However, the BCCA did present two scenarios in which section 25 may be invoked. They interestingly mirror the scholarly debate mentioned above. First, Low J., writing for the majority, notes section 25 could be viewed as a threshold provision, triggered any time a *Charter* breach is claimed and an Aboriginal right engaged. This implies section 25 could be relevant at the first stage of *Charter* analysis when characterizing a right and its *prima facie* infringement. Second, Low J. suggests that the provision's wording could also be taken to mean it is to be applied only after a *Charter* breach has been proven, rather than merely claimed.[62] This possible application suggests section 25 would become relevant at the justification stage of *Charter* analysis *after* an infringement is found. At that point, it could function as a justificatory provision. The majority in *Kapp* preferred the latter application, stating that section 25 should not be triggered unless a *Charter* violation has been found.[63]

However, Kirkpatrick J.'s concurring minority opinion had a different view. It concluded the appeal should be dismissed on the grounds that section 25 protects the Aboriginal right to fish commercially, finding such statutorily created rights are among the "other rights and freedoms" mentioned by section 25(b) and therefore should be completely shielded from *Charter* challenge.[64] In other words, the appeal could be dismissed immediately by virtue of section 25, without making recourse to section 15 and assessing if an infringement has occurred. Kirkpatrick J's approach thus represents a strong version of the shield application of section 25 in that it protects Aboriginal rights from scrutiny, not simply in cases of actual conflict, but in any case of conflict. Unlike the majority of the BCCA, therefore, which stated section 25 provided a possible justification for *Charter* infringement, Kirkpatrick J. saw the provision func-

61 The appellants also argued the licenses created exclusive fisheries, which was not within the power of Parliament, and was therefore *ultra vires*. This was dismissed by the BC Court of Appeal.

62 *R v Kapp,* 2006 BCCA 227 at para 87 [*Kapp*].

63 It is not clear whether Low J. means that s 25 is triggered when infringement of a *Charter* right is established or only after it has been determined that the breach is not saved by section 1.

64 *Kapp, supra* note 62 at para 138.

tioning as a shield at the outset, not only after establishing a *Charter* violation, but in characterizing what counts as a breach in the first place.

When *Kapp* reached the Supreme Court, the appeal was decided on the basis of section 15 and dismissed without recourse to section 25. The majority agreed with the BCCA's finding that the communal fishing licences were protected by subsection 15(2). However, the minority reasons, while concurring with the majority in result, had a different way of getting there. Like Kirkpatrick J., Bastarache J. reasoned the appellants' constitutional challenge was barred at the outset by section 25 and there was no need to consider section 15(2). Citing legal commentary and case law on the role of section 25 in protecting Aboriginal rights, Bastarache J. frames its purpose as "shield[ing] the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*."[65] This is taken to mean not that section 25 can be used to justify a *Charter* infringement to protect Aboriginal rights, but that in a true conflict the Aboriginal right is protected — no justification required. Bastarache J. offers a three-step approach to applying the section in this way:

> The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter right* and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.[66]

Note, Bastarache J. is not saying section 25 grants immunity to Indigenous governments from *Charter* scrutiny. Rather, in cases of true conflict between government actions and Aboriginal rights, the Aboriginal rights will be protected. Bastarache J. links this interpretation to jurisprudence on minority language rights where, in certain contexts, "collective rights are clearly prioritized in terms of protection … [and] individual equality rights have typically given way."[67] This makes the approach closer to Arbour's position discussed above, as it suggests the need for flexibility in interpreting *Charter* rights when section 25

65 *Campbell*, *supra* note 22 at para 158 cited in *Kapp*, *supra* note 3 at para 96.

66 *Kapp*, *supra* note 3 at para 111.

67 *Ibid* at para 89. Bastarache J continues:

> "In *Reference re Bill 30*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* "si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of

is engaged, but in a case of actual conflict the Aboriginal right must be prioritised over *Charter* rights.

The Self-Government Stymie

It is important to appreciate that all of the case law discussed above pertains to challenges to laws and actions of the Canadian state in one form or another. However, it is interesting to explore the implications of the current thinking around section 25 in the context of an action of an Indigenous government when it is not interpreted as derived from or delegated by the Canadian state. Once we try to apply the current framework to such a case, we see it quickly breaks down.

Which Indigenous Governments Are Engaged by Section 25?

The first issue to clear up is which Indigenous governments would be understood as falling within the scope of section 25. So far in the discussion this category has been assumed, but it is actually highly complex and contested in ways relevant to a comprehensive analysis of section 25. One scenario would be an Indigenous government based on an Aboriginal self-government right under section 35. Other candidates for section 25 protection are Indigenous communities that have negotiated treaties and self-government agreements, such as the Nisga'a. In addition to treaty-based governments, it is also likely that Indigenous communities that have negotiated partial "sectoral" self-government arrangements would also fall under the protection of section 25, at least in some contexts.[68]

However, the scenario of a section 35 right to self-government is far from likely, given the current constitutional framework. At present, there are two precedents that pertain to a right to self-government. One is

the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'".

68 A notable example is the First Nations Land Management Initiative (FNLMI). The FNLMI was launched by fourteen First Nations and led to the enactment of the *First Nations Land Management Act* in 1999. See *First Nations Land Management Act*, SC 1999, c 24 [*FNLMA*]. The initiative has since grown to include 26 First Nations that are "operational" under the *First Nations Land Management Act*. To become operational under the *FNLMA*, a First Nation land code and an individual agreement with Canada must be ratified by the community through a referendum. Each First Nation land code must provide for a community process to develop and consult on the required matrimonial property law. Through the development of a land code, First Nations can decide what specific individual interests in reserve land can be recognized and registered in the First Nations Land Registry. This registry is maintained by the Department of Indian Affairs and Northern Development under the authority of the land codes of the participating First Nations and the authority of federal regulations.

Pajamewon,[69] which concerned criminal charges brought against members of the Shawanaga and Eagle Lake First Nations in Ontario for illegal gambling. Both First Nations had enacted a lottery law authorizing and regulating gambling on their reserves pursuant to an asserted right of self-government.[70] They contended that a right of self-government over land use, including gambling, was incidental to their Aboriginal title. Justice Lamer, writing for a majority, argued this characterization of the right in question was too broad: "aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right."[71]

Justice Lamer then characterized the claim in question much more narrowly as an asserted right "to participate in, and to regulate, gambling activities on their respective reserve lands."[72] The Court proceeded to apply the "integral to the distinctive culture" test formulated in *Van der Peet*,[73] which places the onus on Aboriginal claimants to prove the activity, in relation to which they assert an Aboriginal right was "an element of a practice, custom or tradition integral to [their] distinctive culture" at the time of first contact with Europeans.[74] The *Van der Peet* framework has been criticized for 'freezing' Aboriginal rights with the requirement for historical evidence and continuity. Thus, the assertion of a right to self-government under the current Aboriginal rights framework of section 35 might be possible, but it would be difficult, and it would exclude some communities and only encompass activities demonstrated to have been integral to a distinctive Indigenous culture.[75]

69 *R v Pajamewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pajamewon*].

70 Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver, British Columbia: UBC Press, 2007) 129.

71 *Pajamewon, supra* note 69 at para 27.

72 *Ibid* at para 26.

73 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

74 *Ibid* at para 46.

75 In the case of a right to self-government, these aspects of the test seem especially problematic. The nature of government is to be forward-looking and responsive to citizens' changing needs and interests. Indigenous governments are responsive to their present-day cultural, political, and economic contexts and pursue the collective goals that their various communities choose. Why must a historical continuity be demonstrated with pre-contact governance in order to advance indigenous self-determination today? Furthermore, considering the precedent surrounding the application of the *Charter* to band council governments (discussed below), it is possible that the application of the *Indian Act* could be taken by the courts as a marker of the assertion of sovereignty over internal governance and leadership selection and/or disrupting the 'continuity' required for an Aboriginal right under section 35. See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation

Another possibility is self-government rights that are claimed as incidental to an Aboriginal title recognized under section 35. Such rights would not have to be directly proven but would naturally flow from the so-called *sui generis* nature of Aboriginal title. Aboriginal title is held communally. It cannot be held by individual Aboriginal persons. As explained by the Supreme Court in *Delgamuukw* and affirmed in *Campbell*,[76] "[i]t is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."[77] The fact that decisions regarding the use of land must happen collectively implies a governmental power. Thus, self-government rights are incidental to Aboriginal title simply by virtue of its collective character. Unlike the self-government rights conceived in *Pajamewon*, this right includes uses of the land beyond traditional uses. As McNeil explains, "any use of the land that is encompassed by Aboriginal titleholders' 'right to exclusive use and occupation' should […] be subject to their decision-making authority."[78] This includes uses of the land involving extraction of natural resources, as was held in *Delgamuukw*, as well as other direct uses such as hunting, fishing, farming, building, etc.

In this sense, the possibility of Aboriginal self-government rights as incidental to Aboriginal title represents a more expansive view than articulated in *Pajameon*. However, it is still limited. As noted by McNeil, "[n]ot all activities that take place on land are necessarily a use of the land."[79] McNeil emphasizes that despite Chief Justice Lamer's description of Aboriginal title as a communal right that includes authority to make decisions respecting the land not limited to traditional uses of the land, "it would probably be limited to activities that can properly be classified as uses of the land, rather than as encompassing all activities that might take place on the land."[80]

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and the Trickster" (1997-1998) 22:1 Am Indian L Rev 37; See also Russel Lawrence Barsh & James (Sákéj) Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42:1 McGill LJ 993; See also Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77:1 Can Bar Rev 36 at 44-50.

76 *Campbell, supra* note 22.

77 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115, 153 DLR (4th) 193 [*Delgamuukw*].

78 McNeil, *supra* note 70 at 138.

79 *Ibid* at 143.

80 *Ibid*; *Supra* note 70 at 279, n 88 McNeil points out "in municipal law, authority to make by-laws regulating use of land does not include authority to regulate business operations on the land. See *Jensen v. Corporation of Surrey* (1989), 47 M.P.L.R. 192 (B.C.S.C.); *Texaco Canada v. Corporation of Vanier*, [1981] 1 S.C.R. 254; and *Re Cities Service Oil Co. and the City of Kingston* (1956), 5 D.L.R. (2d) 126 (Ont. H.C.)". In addition, Aboriginal title is also subject to an inherent limit that prevents the land from being used in ways that are irreconcilable with the collective attachment to the land that forms the basis of the title (Delgamuukw, SCC at paras. 125-32). See also Kent McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title," in Kent McNeil, ed, *Emerging Justice?*

The final possibility are Aboriginal self-government rights that fall under the "other rights and freedoms" protected by section 25. Currently, there are two sources for these: statute and inherency. In *Corbiere*, L'Heureux-Dubé J. suggested that statutorily-created rights could qualify as "other rights and freedoms" under section 25.[81] One question is whether the *Indian Act* could be one such statute. Many Indigenous governments were disregarded by the Canadian state, and the *Indian Act* imposed the band council regime. Some band councils continue to operate under procedures created by the *Act*. Could the custom election and membership codes created by band councils constitute Aboriginal rights for the purposes of section 25? As discussed below, so far the answer has been no, and actions of band councils are treated by the courts as forms of delegated federal authority.

The second source of 'other' Aboriginal rights under section 25 could be inherency.[82] Patricia Monture-Angus makes the point that the reasoning for subjecting band councils to the *Charter* implies that pre-existing self-government rights were extinguished. The concept of extinguishment implies the existence of something that can be extinguished; it means groups who did come under the jurisdiction of the *Indian Act* also possessed such rights at one time. This is consistent with *Calder*, which reasoned that prior to contact with European settlers Indigenous peoples lived "organised in societies"[83] — a structure which necessarily involves collective decision-making and normative world-building.[84] Thus, all Indigenous communities have an inherent right to self-government, and this is already acknowledged by the legal framework, just in a negative way. Moreover, Indigenous communities that came under the *Indian Act* cannot be said to have meaningfully chosen to abdicate their capacity for self-government. Monture-Angus argues even band council governments should elicit section 25 protection.[85] This idea is discussed more below, but understanding how, within the current constitutional framework, the concept

Essays on Indigenous Rights in Canada and Australia (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001), 102 at 116-22.

81 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 52, 173 DLR (4th) 1 [*Corbiere*]. L'Heureux-Dubé goes on to say a "mere reference to aboriginal people in a statute, on its own, is not sufficient to bring the statute or the reference within the scope of section 25."

82 See Darlene Johnston, "The Quest of the Six Nations: Confederacy for Self-Determination" (1986) 44:1 UT Fac L Rev 1. Johnston chronicles how Six Nations Confederacy never surrendered its sovereignty.

83 *Calder v British Columbia (AG),* [1973] SCR 313 at 328, 34 DLR (3d) 145.

84 See Joshua Nichols, *Reconciliation and the Foundations of Aboriginal Law in Canada* (PhD Dissertation, University of Victoria, 2016) [unpublished].

85 Patricia Monture-Angus, *Journeying Forward: Dreaming of First Nations' Independence*, (Halifax, Nova Scotia: Fernwood Publishing, 1999) at 150.

of "aboriginal governments" is actually a diverse set of legal entities is useful for thinking about how courts have applied (or avoided applying) section 25 in contexts involving Indigenous governments so far.

External Protections vs. Internal Restrictions

At this stage, I want to address the question of how the legal framework developed thus far would play out if a court did take an action of an Indigenous government as engaging section 25, in both the context of an "external" and "internal" restriction.[86] The scholarly commentary so far seems to have settled on the idea section 25 provides protection in both cases, though there is disagreement as to how much protection should be given and how to hierarchize the relationship between Aboriginal rights and *Charter* rights and freedoms in an actual conflict situation.[87] The *Kapp* case involved the federal government's creation of an external protection. Indeed, most of the existing case law on section 25 pertains to external protections deriving from federal authority or delegated federal authority. Thus, it largely remains to be seen what would happen in a *Charter* challenge to an internal restriction of an Indigenous government if the courts could not characterize it as delegated federal authority. In other words, how the courts would interpret section 25 if there was no other option in the case of a community member claiming an infringement by an action of their government.

As described below, neither of the conflict rules proposed by Arbour or Macklem would seem to work in such a scenario, as both put the individual in the position of having to trade one level of self-determination for another. Either individual *Charter* rights are not protected in cases where one imagines they might be most relevant — when government actions truly conflict with individual rights, which is the outcome under Arbour's proposal; or, the colonial assumption of sovereignty and diminishing collective self-determination are expended in the vindication of individual rights, which is the outcome under Macklem's proposal. It is not clear if there is a third way, as there is no discussion in the case law, including *Kapp,* of a scenario involving an internal restriction. Bastarache J. only mentions the distinction in passing as one of the many contextual factors that should be considered in applying section 25.[88]

The complexity of the question lies in part with the complexity of political and social life, which can be summed up by noting that governments are not

86 See Macklem, *supra* note 6 at 226.
87 See Thomas Isaac, *supra* note 33 at 437.
88 *Kapp*, *supra* note 3 at para 99.

synonymous with peoples. While we can conceptually separate *Charter* rights and Aboriginal rights for the purposes of a legal analysis, pragmatically, they are not separate but linked organically in the people they belong to. *Charter* rights and freedoms, and Aboriginal rights cannot be traded off without forcing someone to trade off one dimension of self-determination for another. Thomas Isaac provides an analysis of *Campbell* that is illuminating in this regard. The case involved a *Charter* challenge to an election code created by the Nisga'a Government. One of the arguments raised by the plaintiffs was that the provisions of the Treaty that prevented non-Nisga'a from voting in Nisga'a elections violated section 3 of the *Charter*. The Court determined the Nisga'a government falls within the scope of section 25 because it operates under the authority of the Nisga'a Treaty, which states *inter alia* that the Nisga'a Nation has the "right to self-government."[89] The reasoning of Williamson J. of the BCSC in dismissing the challenge reflects may of the themes in the scholarly debate discussed above:

> One must keep in mind that the *communal* nature of aboriginal rights is on the face of it at odds with the European/North American concept of *individual* rights articulated in the *Charter.* **[…]** the purpose of [section 25] is to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*.[90]

Williamson J. continued that section 25 offers protection to the Nisga'a Treaty in its entirety from limitations imposed by the *Charter*.[91] In other words, section 25 means the Treaty has immunity, beyond just the power to make election codes that is outlines. All valid laws enacted by the Nisga'a Government should be shielded from *Charter* scrutiny.[92]

Thus, in the *Campbell* case, it seems as if the Court adopted a strong shield application of section 25, and this might be a predictor for how the courts would deal with a claim against a government based on inherency rights. However, as Joshua Nichols points out, in the *Chief Mountain*[93] case the BCCA decided that the governance provisions in the Nisga'a Treaty amount to delegated authority.[94] Thus, the same logic underpins this decision as *Delgamuukw*: Aboriginal claims to land are based in a right of occupancy and a diminished

89 *Campbell, supra* note 22.
90 *Ibid* at paras 155, 158.
91 See Isaac, *supra* note 33 at 444.
92 *Ibid* at 450.
93 *Sga'nism Sim'augit (Chief Mountain) v Canada (AG),* 2013 BCCA 49 [*Chief Mountain*].
94 Joshua Nichols, "A Reconciliation without Recollection? *Chief Mountain* and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

right of self-government, not true jurisdiction.[95] External protection was at stake in *Campbell*. There is still no judicial pronouncement on how section 25 would function in the case of a true internal restriction.[96]

What if, under terms similar to those in the Nisga'a Treaty, an Indigenous government enacted a statute that violated the individual rights of a member of the community, who then brought a challenge against the law under the *Charter*? This fact scenario arose to some degree in *Thomas v Norris*.[97] The case involved an initiation ceremony that allegedly saw the assault of a community member. As the case was between private parties, the *Charter* was not applicable. However, there is potential conflict if the initiation ceremony was authorized by a law of a governmental entity falling within the scope of section 25, which also clearly authorized those responsible for the ceremony to induct others into it against their will.[98] A challenge could then be launched under section 7 and section 25 would be triggered. Would a court apply section 25 as a shield provision in the same way as in *Campbell* and suggested in *Kapp*?[99]

Alternately, if section 25 were applied as favoured by Milward the result could be a culturally sensitive interpretation of *Charter* rights and freedoms — an option that some find unacceptable because it implies the creation of two sets of *Charter* rights and/or because it repeats the colonial gesture of imposing legal structures. Under the shield application advanced by Arbour, however, the community member's *Charter* right would be protected only to the extent that it does not abrogate or derogate from the right of the Nisga'a government to make laws within its jurisdiction. If a court determined the scenario presented above actually conflicts with individual rights, would that court feel comfortable disregarding the section 7 rights of community members in this way? At the same time, to interpret section 25 merely as justificatory provision once again reproduces a settler-colonial legal hierarchy where sovereignty is presumed to adhere in the crown. These issues show how the current section

95 *Ibid*.

96 One might think of the *Corbiere* case as potentially representing a challenge to an internal restriction by an indigenous government, but that case involved a band council that was understood by the Court as a form of delegated authority (akin to an administrative body) and in this sense the membership restrictions at stake in the case are properly understood as external protections because they derive from the authority of the *Indian Act*.

97 *Thomas v Norris*, *supra* note 26.

98 In the absence of clear language authorizing the action, a Canadian court would likely seek to interpret the hypothetical law (that simply authorized the ceremony but did not specify it could be conducted without consent) in accordance with *Charter* values.

99 See Isaac, *supra* note 33 at 432. Isaac warns, "Caution, however, must be exercised in treaty negotiations and other judicial interpretation of section 25, so as not to allow the individual rights and freedoms of aboriginal people to become overshadowed by their collective rights."

25 framework is incoherent when considered in the context of Indigenous governments conceived as having jurisdiction, not just delegated authority. What is to be done?

Aboriginal and Indigenous Governments as Delegated Authority

Before attempting to answer the question above, it is important to understand a distinction made by the courts in cases involving *Charter* challenges and Indigenous governments, which is whether the government entity can be regarded as a delegated federal authority stemming from the *Indian Act* and section 91(24) of the *Constitution Act*. Above, it was noted the distinction is relevant as it determines whether the *Charter* will apply without having to make recourse to section 25. Now I wish to address how it also represents two very different types of constitutional status. Understood as administrative entities, Indigenous governments (e.g. band councils) have no constitutional status or inherent jurisdiction. Legally speaking, they are creatures of the federal power.

For example, in *Orr v Peerless Trout First Nation*,[100] the Alberta Court of Queen's Bench dismissed a claim by a member of the Peerless Trout First Nation (PTFN) alleging that the Nation's *Customary Election Regulations* were unconstitutional. The court described PTFN as "a self-governed First Nation" in the Treaty 8 Territory of Northern Alberta that operates under section 74(1) of the *Indian Act*.[101] The court assumed without deciding the *Charter* applied to the actions of the PTFN by virtue of the fact the PTFN's government was constituted under the *Indian Act*.[102] Section 25 was not addressed because there were no Aboriginal or treaty rights at issue. The Indigenous government involved was an *Indian Act* band council, and therefore a delegated federal power. In its decision, the Court noted *Taypotat v Taypotat*, a Federal Court of Appeal decision that held that while a First Nation is "clearly a *sui generis* government

100 *Orr v Peerless Trout First Nation*, 2015 ABQB 5 [*Orr*].

101 *Ibid* at 4.

102 Other cases involving judicial review of band council actions have followed the same logic. See *Lafond v Muskeg Lake First Nation,* 2008 FC 726 at para 17. In *Lafond v Muskeg First Nation*, the Muskeg Lake Cree Nation Band Council had been removed from conducting its election under s. 74(1) of the *Indian Act* and reverted to a local customary electoral system. The court held even if elections for a band council are carried out pursuant to an election code created outside the Indian Act, it still amounts to a form of federal authority. The court cited jurisprudence that "has consistently found Councils to be acting as a "federal board[s], commission[s] or other tribunal[s], and thus subject to judicial review" pursuant to s. 2 of the *Federal Courts Act*; *See also Minde v Ermineskin Cree Nation,* 2006 FC 1311*; See also ibid*.

entity," it "exercises government authority within the sphere of federal jurisdiction under the *Indian Act* and other federal legislation."[103]

In the factual matrix of the *Orr* case, the court did not review the reasons for applying the *Charter*, instead assuming the holding from *Taypotat*. *Taypotat* concerns the Kahkewistahaw First Nation in Saskatchewan and a community election code for the positions of Chief and Band Councillor adopted by the band council under section 74(1) of the *Indian Act*. In the code, eligibility for the positions was restricted to persons who had at least a Grade 12 education or equivalent. This excluded 74-year-old Louis Taypotat, who had only attended residential school until grade 10, though he had previously served as Chief for a total of 27 years.

Taypotat challenged the eligibility provision and recent election results under section 15(1) of the *Charter*. At the Federal Court hearing, *Taypotat* argued the election code discriminated on the basis of education, which it held to be analogous to race and age.[104] He argued the education requirement adversely impacted older band members and residential school survivors. The Federal Court rejected these arguments, finding education requirements to relate to "merit and capacities" and "deal with personal attributes rather than characteristics based on association with a group."[105] However, the Federal Court of Appeal applied the test for discrimination from *Kapp* and found while the education requirement did not directly engage a protected ground under section 15(1), it resulted in adverse effects that were discriminatory based on age and Aboriginality-residence.[106] The Court of Appeal declared the eligibility provision was unconstitutional, and ordered new elections without the education requirement.[107] The Supreme Court reversed this decision, however, in a unanimous judgment that held that the adverse effects claim in *Taypotat* was not established by the evidence.[108]

Though the Supreme Court did not comment on section 25 in *Taypotat*, the Federal Court and Court of Appeal did. Once again, the courts applied the *Charter* without deciding the question based on the facts of the cases before them. In *Taypotat,* the courts referred to *Crow v Blood Band*, a case from 1996 in which the federal court was asked to decide whether section 3 applied to cus-

103 *Taypotat v Taypotat*, 2013 FCA 192 at para 36 [*Taypotat*].
104 *Taypotat v Taypotat* 2012 FC 1036 at para 54 [*Taypotat*].
105 *Ibid* at para 59.
106 *Taypotat*, *supra* note 103 at para 45.
107 *Ibid* at para 66.
108 *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].

tomary band election procedures that were implemented outside of the *Indian Act*. Heald D.J. avoided directly deciding by resolving the complaint without recourse to section 25:

> This is a complex matter which involves, *inter alia*, the application of section 32 of the *Charter* as well as the interpretation and possible application of section25 the *Charter*. However, given the conclusion that I have reached with respect to the infringement of the Plaintiff's *Charter* rights in this case, it is unnecessary for me to reach a conclusion on this issue. Accordingly, for the purposes of the ensuing discussion, I have assumed, without deciding, that the *Charter* does apply to the Band's Custom Election Bylaw.[109]

This is *Taypotat*'s earliest cited decision on the issue of the application of the *Charter* to Indigenous governments. It also assumes without deciding that the *Charter* applies to the government in question. Thus, all of the case law has assumed that since band councils are created by federal legislation, the Indigenous government authority within that framework is merely delegated federal authority falling within the domain of administrative law. It would seem that, so far, no Canadian court has actually broached the question of the application of the *Charter* to Indigenous governments as "*sui generis*" government entities, in any context.[110] Connectedly, if a law or action of an Indigenous government can be interpreted as a form of delegated federal authority, the *Charter* can be applied without the need to consider section 25.[111]

Here, it is useful to consider the Government of Canada's current policy regarding Indigenous governments, which is framed in terms of the existence an inherent right to self-government.[112] This sounds consistent with the 1983 report of the Penner Committee on Indian Self-Government, which interprets the *Royal Proclamation of 1763* as acknowledging that Aboriginal societies were self-governing.[113] The Penner Report found that the *Royal Proclamation* established a nation-to-nation relationship between the Crown and First Nations,

109 *Crow v Blood Band*, 1996 CarswellNat 53 at para 20, FCJ No 119 (FCTD).

110 Kent McNeil has argued that the *Charter* would not apply even to *Indian Act* bands that choose their councils in accordance with band custom.

111 While it is possible that *Indian Act* bands have other section 35 rights that could attract the protection of section 25, if the only relevant kind of aboriginal right in a given instance is a self-government right, this is likely the outcome.

112 See Senate, *First Nations Elections: The Choice is Entirely Theirs: Report of the Standing Senate Committee on Aboriginal Peoples* (May 2010) at 39 (Chair: Gerry St. Germain).This is defined practically as the "establishment of governing structures, internal constitutions, elections, [and] leadership selection processes."

113 House of Commons, *Minutes of Proceedings of the Special committee on Indian Self-Government*, 32-1 No 40 (20 October 1983) (Chair: Keith Penner).

and recommended the acknowledgement of Indigenous governments as a distinct order of government within the federation.[114] Similarly, the Charlottetown Accord of the early 1990s proposed a constitutional amendment to acknowledge an inherent right of self-government of Indigenous peoples in Canada. In the wake of the failure of that Accord, the federal government began to take various measures to move from direct administration of 'Aboriginal affairs' to a more indirect and hands-off approach. This involves creating delegated self-government arrangements and agreements with Indigenous communities. For example, section 74 of the *Indian Act* provides the Minister of Indigenous and Northern Affairs the discretion to impose an election system on band council governments.

However, under section 74(1), this order can be rescinded so that a band government may "revert" to a custom code for electing its Chief and members of the Council. Even so, it is not as though the band council can just choose to opt out of section 74. They do not have that unilateral discretion; it is the within the Minister's power to order the alternative after imposing section 74.[115] Moreover, federal policy controls the process through the "Conversion to Community Election System Policy,"[116] which sets a basic framework for acceptable "custom" election and leadership selection processes. This arrangement clearly falls short of the true constitutional jurisdiction the Penner Report envisioned. At best, these governments are regarded as forms of delegated federal authority and have a constitutional status akin to municipal governments, which is effectively none.[117]

The legal status of Indigenous governments as delegated federal authority, akin to administrative bodies, is reflected in case law where courts have deliberated on whether the *Charter* applies to band council decisions and custom

114 *Ibid* at 3.

115 Canadian Human Rights Commission, *Section 1.2 of the* Canadian Human Rights Act: *Balancing Collective and Individual Rights and the Principle of Gender Equality*, (Prepared by the Native Women's Association of Canada, July 2010) at 14; See also Wayne Daughtery & Dennis Madill, *Indian Government Under* Indian Act *Legislation, 1868-1951* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980); See also Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples*, vol 1 (Ottawa: Communication Group, 1996) at ch 9 (Chairs: René Dussault & Georges Erasmus); See also Vic Satzewich & Linda Mahood, "Indian Affairs and Band Governance: Deposing Indian Chiefs in Western Canada, 1896-1911" (1994) 26:1 Can Ethn Stud 40.

116 Indigenous Services Canada, "Conversion to Community Election System Policy" (last modified 1 June 2015), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1433166668652/1565371689997>.

117 For an analysis of how the right to self-government has been "read down" to a municipal model see Nichols, *supra* note 84.

election codes created under section 74(1). For instance, in *Corbière,* the Court was asked to review section 77(1) of the *Indian Act*, which denies voting rights to members who live off-reserve.[118] The criteria requires electors to be "ordinarily resident of the band." The Court determined that this provision discriminated against non-residents under section 15 of the *Charter*, and ordered the Government of Canada to rectify the situation by amending the *Indian Act*. No arguments were presented regarding whether the provision was saved by section 25, and the Court did not rule on whether the *Charter* applied to the Batchewana band as a *sui generis* government entity.

This logic is apparent in several other cases. In *Scrimbitt v Sakimay Indian Band Council,*[119] Scrimbitt was denied the right to vote in a band election because she was a Bill C-31 Indian and not considered a member of the community according to the election code. A Federal Court found the actions of the band violated section 15 of the *Charter*. However, it did so on the basis of the link to the *Indian Act* and did not consider if the *Charter* would apply if the government was an expression of an inherent right. Similarly, in *Horse Lake First Nation v Horseman,*[120] when a group of women occupied a local band office and the band applied for a court order to evict them, the Alberta Queen's Bench held the *Charter* should apply to the decision of the band because it was a creature of federal statute. In these lower court decisions, the bands did not argue their actions were protected by section 25 and the courts did not comment on the matter.

The reason? Despite Patricia Monture-Angus' arguments about inherency discussed above, once it is accepted that an entity is exercising statutory or delegated federal authority, it follows almost necessarily that the courts are going to find its authority is subject to the *Charter*. This administrative law end route means there is no case law on the question of the relationship between the *Charter* and Indigenous governments as *sui generis* governments exercising jurisdiction. From a certain perspective, this is not all bad. While the absence is a symptom of the settler-colonial foundations of law in Canada, it also means there is space to articulate a new approach.

Governments and Peoples

It is argued that if the *Charter* is unilaterally applied to Indigenous governments as *sui generis* entities it would continue the settler colonial power rela-

118 *Corbiere, supra* note 81.

119 *Scrimbitt v Sakimay Indian Band Council,* 1999 CarswellNat 2176, FCJ No 1606 (FCTD).

120 *Horse Lake First Nation v Horseman,* 2003 ABQB 152.

tionship, thus compromising the principles of equity and fairness upon which the *Charter* is based.[121] Several authors have also pointed to the potential of *Charter* challenges to undermine Indigenous difference, such as challenges to clan-based leadership selection practices,[122] limitations on mobility rights, and limits on the individual right to sell land.[123] Some critics frame *Charter* rights and values as inherently culturally incompatible with Indigenous legal cultures. Mary-Ellen Turpel argues the text of the *Charter* and surrounding case law embody cultural values that are "too individualistic and European"[124] to deliver responses that reflect the needs of Indigenous peoples.[125] The discourse of *Charter* right can be "elitist and culturally-specific" and the court system "adversarial and impersonal;" these legal and political structures are "unknown among Aboriginal peoples."[126]

Patricia Monture-Angus shares Turpel's sentiments, calling the *Charter* a "narrow instrument" that is incapable of addressing the "discrimination within discrimination" faced by Indigenous women.[127] She argues for a set of legal rights like those found in the *Charter* "may actually result in harm and reinforce injustice and inequality when applied to a system, which operates on different assumptions."[128] Scholars such as Henderson, McNeil, and Wilkins also emphasize the normative incommensurability at stake. The basic problem with settler colonialism is the foundational yet illegitimate assertion of sover-

121 See Will Kymlicka, *Liberalism Community and Culture,* (New York: Oxford University Press, 1989) at 152.

122 See Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada,* (Vancouver, British Columbia: UBC Press, 2000) at 104. Section 3 of the *Charter* provides that every individual has a right to vote or stand for public office. Although embodying a basic democratic right from a western perspective, it is possible that if section 3 were applied to an Aboriginal government it would constitute "an attack on the clan system."

123 Kymlicka, *supra* note 121 at 149-50.

124 Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6:1 Can Hum Rts YB 3.

125 Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in Caroline Andrew & Sandra Rodgers, eds, *Women and the Canadian State*, (Montréal & Kingston: McGill-Queen's University Press, 1997) 64; See also Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) 10:2 Can Woman Stud 149.

126 The *Charter* operates within a "conceptual framework of rights derived from the theory of a natural right to private property." Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Difference" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto, Ontario: Emond Montgomery Publications, 1991) 503 at 513.

127 Monture-Angus, *supra* note 85; See also Patricia Monture-Angus, *Thunder in my Soul - A Mohawk Woman Speaks,* (Halifax, Nova Scotia: Fernwood Publishing, 1995) at 142-145.

128 Patricia Monture-Angus, *Community Governance and Nation (Re)Building: Centering Indigenous Learning and Research,* (Vancouver, British Columbia: National Centre for First Nations Governance, 2004) at 35.

eignty over territory based on the assumption of Indigenous inferiority. While Indigenous peoples never consented to being subjects of the Crown in this sense, this led to a government policy towards Indigenous peoples that assumed them as such. If the courts were to impose the *Charter* on Indigenous governments today, it would represent a similar colonial gesture.

My question is: Is there another way to think of the relationship between Indigenous governments and the *Charter*, and can section 25 help us to do so? To answer, it is necessary to take a step outside of the realm of legal discourse and draw on some relevant sociological concepts. For instance, one question that comes to mind is whether it is fair to say applying the *Charter* to contemporary Indigenous governments is the same as imposing it on Indigenous peoples. Governments and peoples are not the same and at times might be quite distinct and in tension. Arguably, such distance is at its greatest when the actions of a government infringe the rights of some community members.

For instance, Green and Napoleon discuss how Indigenous women's interests tend to be invisible to male political leadership. This exclusion stems from "the difference between male and female experience in relation to oppression."[129] In other words, there are some differences in how settler colonialism in Canada affects Indigenous people depending on their sex. As Joanne Barker writes, "although there was certainly much violence and discrimination directed at Indian men within Canada," Indigenous women suffered additional sex-specific harm in that "the social roles and responsibilities of heterosexual Indian men within bands and on the reserves was systematically elevated over that of women and nonheterosexuals by the institutions of Christianity, capitalism, sexism, and homophobia."[130] For example, the assimilationist goals of the *Indian Act* involved sexist provisions that targeted female persons and their descendants over generations in ways that established and entrenched sex-based inequality within some communities.

129 Joyce Green & Val Napoleon, "Seeking Measures of Justice: Aboriginal Women's Rights Claims, Legal Orders, and Politics" (Paper delivered at the Meeting of the Canadian Political Science Association, 2007), [unpublished] at 3.

130 Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians 127 at 133; See Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood,* (Toronto,: Sumach Press, 2000); See also Joyce Green, ed, *Making Space for Indigenous Feminism,* (Black Point, Nova Scotia: Fernwood Publishing, 2007); See also Renya Ramirez, "Race, Tribal Nation, and Gender: A Native Feminist Approach to Belonging" (2007) 7:2 Meridians 22; See also Sylvia Van Kirk, "Toward a Feminist Perspective in Native History" (Papers of the Eighteenth Algonquian Conference delivered at Carleton University, Ottawa, 1986) 377.

The differences in how the colonial legal regime positioned male and female bodies has meant the interests of Indigenous women are not always front and centre in the agendas of some contemporary Indigenous governments. Green and Napoleon point out that many band council governments did not oppose the disenfranchisement of women by the *Indian Act*,[131] and various forms of internal restriction continue today.[132] They criticize the final report of the Royal Commission on Aboriginal Peoples for its failure to incorporate how both external *and* internal restrictions have shaped Indigenous women's experiences of colonization. They note the discussion of indigenous women's issues focuses "on women as survivors of subordination through the *Indian Act*," but does not address:

> the powerful and important interventions by individuals and organisations who spoke of the vicious reprisals inflicted on Aboriginal women who are politically active as women, or who contest male power, or who identify as feminist.[133]

They continue:

> This is unfortunate, as it avoids documenting or critiquing the extent to which patriarchal power is used to subordinate contemporary indigenous women, and the ways in which Aboriginal organisations, governments, and the colonial state support these processes. It suggests rather that the existing power relations in Aboriginal politics are unconflicted; are about resistance to the oppressor state and responsiveness to the consequences of colonialism. This avoids looking at the fundamentalist and oppressive practices that subordinate women as women, and further dignifies these practices as beyond critique because they are expressions of Aboriginal traditions.[134]

These quotes convey the sense that some Indigenous women face internal restrictions within their communities. Some have also used the *Charter* (and

131 Green & Napoleon, *supra* note 129 at 4; See also Lilianne Krosenbrink-Gelissen, "The Canadian Constitution, the *Charter* and Aboriginal Women's Rights: Conflicts and Dilemmas" (1993) 7-8:1 207 at 208. Liliane Krosenbrink-Gelissen writes: "The Canadian Constitution and the *Charter* have vitally affected aboriginal women as a group. However, aboriginal women's experiences as well as their political concerns have been largely neglected in academic and political discourse on both aboriginal rights and women's rights. Aboriginal rights demands largely reflect the interests of aboriginal men, while women's rights demands, until very recently, have largely reflected the interests of white, middle-class women. In both cases, aboriginal women's distinct perceptions are ignored."

132 Bill Rafoss, *The Application of the Canadian Charter of Rights and Freedoms to First Nations' Jurisdiction: An Analysis of the Debate* (MA Thesis, University of Saskatchewan, 2005) [unpublished], n 119. Based on national consultations and a study of Aboriginal women in British Columbia, the Native Women's Association of Canada found continuing "evidence of Band discrimination against Bill C-31 reinstatees and their families, including exclusion from membership, not permitting residency on reserve, discrimination in housing and in education and health funding."

133 Green & Napoleon, *supra* note 129 at 10.

134 *Ibid* at 10-11.

human rights legislation) to try to advance their equality rights, both when they are violated by the settler state and by band council governments. The Native Women's Association of Canada (NWAC)'s use of the *Charter* are cases in point.[135] During the Charlottetown Accord discussions, NWAC initiated two court cases using section 15 to try to gain what it saw as equal participation in the negotiations. One case sought funding and equal participation in the constitutional talks, and the other to stop the referendum on the Accord until a guarantee of equality for Aboriginal women was secured.[136] The controversy surrounding NWAC's action continues to echo in the contemporary debate within Indigenous communities about how they wish to relate to the Canadian government.[137] NWAC has called for the *Charter* to apply to all forms of Indigenous governments, including those based on treaties and inherency.[138] More recently, it lobbied to have provisions in the *Human Rights Act* that exempted Indigenous governments repealed for similar reasons.

NWAC's legal actions did not receive support in parts of the Indigenous political community. Yet, John Borrows has argued its actions had a positive role in helping to highlight the sex-based inequality Indigenous women may face within their communities.[139] Furthermore, Borrows suggests the case

135 Canadian Human Rights Comission, *supra* note 115. NWAC supported the repeal of the exemption for Band governments from the *Canadian Human Rights Act*.

136 See Kerry Wilkins, "Take Your Time And Do It Right: *Delgamuukw,* Self-Government Rights And The Pragmatics of Advocacy" (1999-2000) 27:2 Man LJ 241 at 236-7. Kerry Wilkins describes how this conflict played out: "it became clear that many aboriginal women simply did not believe that male aboriginal leaders, armed with constitutionally protected rights of self- government, could be trusted, left to their own devices, to respond fairly and respectfully to the women's interests or to give sufficient priority to their need for protection from abuse. The Native Women's Association of Canada ("NWAC") has insisted that mainstream human rights standards, and mainstream courts, remain available for the protection of aboriginal women in communities acting pursuant to rights of self- government. It considered these protections so crucial to the safety and well-being of Canada's aboriginal women, and so different from the positions being taken by the four aboriginal organizations participating officially in the Charlottetown negotiations, that it brought legal proceedings seeking independent representation at those negotiations."

137 See Barker, *supra* note 130 at 138. Joanne Barker explains: "If bands did indeed possess "sacred rights," then Canada dared not play, even in jest, with the only law that preserved them. Indian women, by implication, were likewise put on notice. By challenging the Indian Act, they were undermining not only the rights of bands but also the sacred character of bands as sovereigns."

138 Native Women's Association of Canada, *Statement on the Canada Package* (Ottawa, Ontario: Native Women's Association of Canada, 1992); See also Canadian Human Rights Commission, *supra* note 115; See also Quebec Native Women's Association, "Brief Presented by the Quebec Native Women's Association to the Royal commission on Aboriginal Peoples: Taking Our Rightful Place" (May 1993), online (pdf): <data2.archives.ca/rcap/pdf/rcap-539.pdf>. The Quebec Native Women's Association also rejected the availability of section 33 to Aboriginal governments.

139 John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nations Politics" (1994) 43:1 UNBLJ 19 at 44. Borrows writes: "While I am aware that NWAC was not representative of all Aboriginal women, and their tactics pose significant challenges to the consensus

shows the *Charter* may be a useful tool in partially enhancing Indigenous freedom. Sharon McIvor agrees, arguing the strategic use of *Charter* litigation by Indigenous women has led to limited positive changes, even when they lost in court.[140] For McIvor, this is linked to self-determination in that any form of self-government requires as a precondition that ability of all people to participate equally in the political and social life of the community. According to Teressa Nahanee, Indigenous women have benefited from the *Charter,* as its enactment led to reduced sexual discrimination in band membership entitlement provisions through the 1985 amendments to the *Indian Act*.[141] For Borrows, this shows there can be "intersections" between the *Charter* and Indigenous self-determination, and that the *Charter* may at times provide a mechanism for Indigenous communities to recapture the strength of legal principles past colonial government interference had eroded.[142] My point in discussing these debates is to show how the meaning of section 25 is not only a legal question, but an example of the intersection of law and politics. I think taking notice of this is important for the topic at hand because it reflects the fact that governments are not immediate representations of peoples.[143]

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and public support needed to facilitate self-government, at the bottom of my assessment of their actions is an appreciation that a discrete and specific group of people were suffering and that their leaders were being ignored by those with greater access to power and resources. While it would have been my wish that "rights" discourse could have had a more political, rather than legal, impact, as was the case with the Constitutional and *Indian Act* amendments, I cannot dispute with these people for pressing their claims in the courts. Again, it is no different than what other First Nations have done in combatting Crown failures to consider and protect their lands and culture. Why should this group of First Nations women be prevented from exercising the same liberties that other First Nations organizations regularly utilize?"

140 Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16:1 CJWL 106 at 111.

141 Teressa Nahanee, "Indian Women, Sex Equality and the *Charter*" in Andrew & Rodgers, *supra* note 125 at 89.

142 John Borrows, *Freedom and Indigenous Constitutionalism*, (Toronto, Ontario: University of Toronto Press, 2016).

143 At the Charlottetown Accord, NWAC stated:

> The Native Women's Association of Canada supports individual rights. These rights are so fundamental that, once removed, you no longer have a human being. Aboriginal Women are human beings and we have rights which cannot be denied or removed at the whim of any government. These views are in conflict with many Aboriginal leaders and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is their unwavering view of the Aboriginal male leadership that the "collective" comes first, and that it will decide the rights of individuals…. Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, Aboriginal women have a tremendous struggle to regain their social position. We want the *Canadian Charter of Rights and Freedoms* to apply to Aboriginal governments. Karena Shaw, *Indigeneity and Political Theory: Sovereignty and The Limits of the Political* (New York, New York: Routledge, 2008) at 94.

Given this reality, what can be said about the role of section 25? One thing is certain — given the current constitutional framework it seems hard to imagine a way of applying section 25 that does not create a hierarchy between legal cultures. I think part of the reason for this is the underlying assumption that imposing the *Charter* on Indigenous governments means an oppression of Indigenous peoples. This assumption collapses the category of governments and peoples, and in so doing reduces self-determination to the concept of self-government. The reality of the equation is not so tidy. Can it be said the *Charter* is being imposed on Indigenous nations when there is case law of Indigenous women using the *Charter* to fight for their rights within their communities?

Moreover, as Green and Napoleon point out, international human rights law has evolved with the understanding that self-determination is expressed through collective and individual rights in tandem — most recently articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*.[144] Collective self-determination requires individual community members be able to fully participate in the social and political life of their community. Thus, contemporary political discourses of Aboriginal self-government in Canada must involve a developed perspective of individual self-determination. Drawing on this idea makes it possible to integrate the difference between a government and a people(s) into the current legal debate over section 25. The goal is to contribute to developing a framework that does not instantiate a hierarchy, but instead allows for communication between legal cultures. In this sense, the gap in the jurisprudence on the application of section 25 to the Indigenous governments identified above means there is room for the courts to use a different application of section 25 in light of *UNDRIP*. The next section begins to develop such an approach.

Section 25 as a Reversed Cognizability Requirement

The goal of the rest of the paper is to contribute to developing a section 25 framework that does not instantiate a hierarchy of rights, but instead allows for communication between legal cultures. So far, this paper analysed section 25 with a focus on situations involving challenges to internal restrictions of Indigenous governments. It found the jurisprudence provides little guidance on how the *Charter* would operate in such a scenario. The limits of the current framework coincide with a view of Indigenous "government authority" that is delegated by the federal crown. Through defining an Indigenous government as

144 Val Napoleon, "Aboriginal Self Determination: Individual Self and Collective Selves" (2005) 29:2 Atlantis 31 at 31.

a form of delegated authority, the courts are able to apply the *Charter* without truly deciding if it applies. There is a tendency in scholarship to criticize this juridical approach, but this work tends to collapse the concepts of government and peoples. The controversy over the use of the *Charter* by some Indigenous women shows the relationship is not as straightforward as some of this legal scholarship has assumed.

I suggest all of these issues can be addressed by developing *Charter* interpretations that are cognizable with Indigenous legal cultures and Canada's nation-to-nation relationship with Indigenous peoples. This requires a structure for communication across and within legal cultures. I believe section 25 can be an anchor for Indigenous jurisdiction in the *Charter*. Thus, sections 25, 35 and 91(24) should be understood together as offering the possibility for a basic framework of a reimagined federation. In this sense, section 25 puts the foundation of the settler state on the table and offers some potential for constitutional reconciliation.

I would like to conclude by exploring an approach I think fits the purpose of section 25 as articulated above. I suggest section 25 can be understood as a reversed duty of cognizability, which means the courts would be required to arrive at constitutional interpretations cognizable within Indigenous legal cultures. This duty would redress the hierarchy forced on Indigenous people that haunts the current jurisprudence, while also acknowledging the jurisdiction of Indigenous nations.[145] Under this interpretation, section 25 intervenes at the level of jurisdiction.

What I am proposing is different from the idea of "translation" McLaughlin C.J. proposed in *R v Marshall; R v Bernard* and that Brian Slattery rejected as being an exercise of hierarchical extinguishment — i.e. if the common law cannot understand it, then it does not exist. Nor am I am suggesting there needs to be a kind of unitary constitutional Esperanto. Rather, section 25 could be understood as an occasion to develop a framework for communication across legal cultures. This is consistent with the approaches of some legal scholars who have argued for a federal or treaty paradigm of constitutionalism in which sover-

145 See John Borrows, *Canada's Indigenous Constitution*, (Toronto, Ontario: University of Toronto Press, 2010) at 152-3. "[T]he failure to recognize the existence of Indigenous legal traditions as a part of Canadian law is in itself discriminatory. Indigenous peoples have constantly adjusted their laws to take into account the common law or civil law, but Canadian judges and lawmakers have rarely done the same when it comes to Indigenous legal traditions. With one side resisting adjustment to their legal relationships, and thus preventing further harmonization, it might be said that the resistant party is the one who is engaging in discrimination. Equality is not well served by denying Indigenous societies equal participation in the ongoing formulation of Canada's legal system."

eignty is not absolute or unitary, but relational and divided between a plurality of jurisdictions.[146] A section 25 requirement of cognizability within Indigenous legal orders would direct courts according to the context of *Charter*. This jurisdiction is not the same as the immunity interpretations discussed above, which argue for a limit to the *Charter*. Rather, under my proposal the jurisdiction would not occupy a separate space but would be woven into the entire framework, effectively creating a plurinational *Charter*.

Aboriginal Charter Courts

One could ask: is it safe to assume that all *Charter* rights are cognizable in terms of Indigenous legal traditions? And if certain ones turn out not to be, what then? Can the Canadian courts ever be trusted to truly engage with Indigenous legal traditions in a way that makes them truly on par with Canadian *Charter* precedents? Admittedly, what I describe below is underdeveloped, but I hope to show that Indigenous justice systems are consistent with Canadian federalism. While others have argued for Aboriginal legal jurisdiction in different areas, for instance over (at least some) criminal matters,[147] I think, fundamentally, to focus on an area law without addressing the root of the jurisdiction's anchoring in the constitution can only carve out a piece of the settler legal system and tentatively clear a delimited space. It remains, in essence, a form of delegated authority.[148] My contribution to this conversation is to suggest section 25 means a plurinational understanding of the *Charter*.

The plurinational *Charter* would involve the creation of a system of Aboriginal Charter Courts with jurisdiction in all *Charter* matters. Practically speaking, the system of Aboriginal Charter Courts (ACCs) would be regionally-based. The territory covered by an ACC could be linked to territories of Indigenous nations. Each individual nation could create an individual ACC and have jurisdiction over their land. Since courts are not proportionally representative political institutions, the fact different nations encompass different sized land areas and populations is not a problem, unlike when thinking about possible self-government arrangements. A fused ACC could be created in cases

146 See Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990); See also Borrows, *ibid*; See also James Tully, *Strange Multiplicity*: *Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); See also Nichols, *supra* note 84.

147 See John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 Osgoode Hall LJ 699; See also Milward, *supra* note 31.

148 See McNeil, *supra* note 80. Scholars have also looked to the United States and its model of internal sovereignty and system of tribal courts and assessed the strengths and weaknesses of such a system for Canada.

of contested jurisdiction, or there could the option to have a case heard in an ACC of either nation. Not all nations would need to establish courts at the same time or establish courts with the same scope. A more patchwork development process could be available where nations who are equipped can move ahead, and those that need time to develop capacity can access resources and move to occupy their jurisdiction more slowly.

Sex-based discrimination would be the only exception to the jurisdiction of the ACCs. This exception is tied to section 34 of the *Constitution Act*, which states that Aboriginal rights cannot undermine sex-based equality. Thus, Indigenous women have recourse to possible self-government arrangements that remain consistent with section 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982,* which specifies that "the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."[149] As Kent McNeil suggests "[t]his provision, which was added by an amendment agreed to by four national Aboriginal organizations in 1983,[150] complements section 28 of the *Charter* which provides that, '[n]otwithstanding anything in this *Charter,* the rights and freedoms referred to in it are guaranteed equally to male and female persons.'"[151] On the question of what Indigenous laws the ACCs would apply, I think it makes sense to base it on the jurisdictions involved, similar to how provincial law may vary depending on which territory one is in. When hearing cases, the ACCs could look at the legal traditions of the Indigenous nation(s) on whose territory the court has jurisdiction — in addition to precedent from Navajo Courts in the USA, international law including *UNDRIP*, as well as existing *Charter* jurisprudence. The decisions of these courts could be appealed to appeal courts based on larger regional units comprising multiple national ACCs.

Part of my idea involves adjusting the Supreme Court of Canada so it would be in a position to hear cases coming from an ACC system. There are various options to be explored. One idea is drawing four justices from the ACC system for addition to the Supreme Court, for a total of 13 members of the

149 See Kent McNeil, "Aboriginal Governments and the *Charter*: Lessons from the United States" (2002) 17:2 CJLS 73 at 103. This is consistent with Kent McNeil's arguments that legal sex equality would not be threatened if the *Charter* did not apply to Aboriginal governments under section 35 because of subsection 35(4).

150 *Ibid*. McNeil is referring to the *Constitutional Amendment Proclamation,* 1983, SI/84-102. The four organizations were the Assembly of First Nations, the Inuit Committee on National Issues, the Metis National Council, and the Native Council of Canada.

151 *Ibid*. Scholars have cited this section to argue that indigenous nations should be able to claim jurisdiction over the issue of violence against women (Borrows) and well as to argue that Aboriginal self-government rights are subject to sex equality mandated by section 35(4) (McNeil).

Supreme Court of Canada. Cases coming through the ACC system and the traditional Canadian courts could be heard by this plurinational Supreme Court of Canada. The idea of a fused Supreme Court avoids the production of two sets of *Charter* rights and ensures precedent-setting decisions will represent reasoning cognizable with Indigenous legal cultures. These decisions would carry weight for lower courts in Canadian and Aboriginal courts. Courts in both jurisdictions would draw on these decisions as precedents.

Conclusion

The idea of creating Aboriginal Charter Courts might seem far-fetched, and I can hear the objection that the judiciary is not at all equipped to interpret and apply Indigenous laws in the way my proposal would require. Admittedly, it would require considerable expertise in relevant Indigenous legal traditions not many current benchers have. This would be a challenge institutionally, at least for a while. However, I think it is overly pessimistic to discount the idea on this basis alone. There are individuals right now who could serve on ACCs, including Sakej Henderson, John Borrows, and Val Napoleon, as well as many more junior lawyers and legal scholars who are now being trained and joining law faculties.

In addition, law schools in Canada will have to intensify the efforts already underway to develop local Indigenous legal traditions. There is already a growing number of scholars in Canada doing this, and capacity and expertise will develop over time. The University of Victoria now offers a joint law degree in common law and Indigenous legal orders.[152] The Wahkohtowin Law and Governance Lodge[153] is an interdisciplinary initiative in the Faculty of Law at the University of Alberta supporting community-led research of Indigenous laws and governance principles. There are examples from other jurisdictions that we can look to for guidance as well, including the USA and New Zealand.[154] Thus, while I share the pessimism about the ability of the Canadian Courts at this moment in history to integrate Indigenous jurisdiction at the

152 University of Victoria, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID" (2019), online: *University of Victoria Law* <www.uvic.ca/law/about/indigenous/jid/index.php>.

153 University of Alberta, "Wahkohtowin Law and Governance Lodge" (2019), online: *University of Alberta Faculty of Law* <www.ualberta.ca/law/faculty-and-research/wahkohtowin-law-and-governance-lodge>.

154 See Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, (Minneapolis, Minnesota: University of Minnesota Press, 2009); See also Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (Vancouver, British Columbia: UBC Press, 2016).

constitutional level, I also believe the creation of Aboriginal Charter Courts is practical over time and occasioned by the *Charter* itself in section 25. It also fits a broader change in the orientation of law schools, the judiciary, and the legal profession in Canada.

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

Ryan Beaton*

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.

Book Review

*Nigel Bankes**

Review of John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (Centre for International Governance Innovation (CIGI), 2019). 236pp + a Preface (ix-xvi).

This is the latest in a series of volumes or reports from the Centre for International Governance Innovation (CIGI)[1] dealing with Indigenous normative orders and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration).[2] This volume comprises a preface by three of the four editors (Larry Chartrand, Oonagh Fitzgerald and Risa Schwartz), an introduction by the fourth editor, John Borrows, and then an additional 23 chapters grouped in four parts. The four parts are: I) International Law Perspectives, II) Indigenous Law Perspectives, III) Domestic Law Perspectives, and IV) Concluding Thoughts. The cover of this volume is graced by the art of Christi Belcourt and Isaac Murdoch, and additional images by Ningiukulu Teevee, Kim Hunter, Ernest Swanson, and Anna Heffernan accompany each of the four parts of the volume; an image of a sweetgrass braid by Peter Pomart is featured on each of the individual chapter pages. The latter reflects both the title of the volume as well as an important theme. Of the 18 authors and editors (some authors have multiple contributions), 11 identify as

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1 John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, Ontario: Centre for International Governance Innovation Press, 2019). The other volumes are Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, Special Report (Waterloo, Ontario: Centre for International Governance Innovation Press, 2017); Centre for International Governance Innovation, *UNDRIP Implementation: More Reflections on the Braiding International Domestic and Indigenous Laws*, Special Report (Waterloo, Ontario: Centre for International Governance Innovation Press, 2018). I have not read these earlier reports but I note that some of the chapters in the current volume have titles that are identical to those in the 2018 volume. For information on CIGI see CIGI's website <https://www.cigionline.org/>.

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

Indigenous. The essays are all relatively short (between 6 and 16 pages), but they are weighty in terms of content.

The occasion for the volume is the ongoing debate in Canada over the implementation of the Declaration. Adopted by the United Nations General Assembly in 2007 by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand, and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), the Declaration consists of a substantial preamble and 46 articles. At a conceptual level, it is best to think of the Declaration as translating and applying general rules and principles of international human rights law (such as the right to self-determination, the right to equality and the right to be free of discrimination) to the particular situation of Indigenous peoples. The Declaration does not create new rights. Rather, it seeks to address the particular history of colonization experienced by Indigenous peoples.

As is well known (and as recorded above), Canada dissented from the adoption of the Declaration. It has since moved on from that position through several steps — beginning with a lukewarm endorsement of the Declaration as an aspirational document by the Harper Government in 2010. In 2016, then Minister Carolyn Bennett of the Trudeau Government announced at the UN Permanent Forum that Canada was now a "full supporter of the Declaration without qualification" and that the government intended "nothing less than to adopt and implement the declaration in accordance with the Canadian constitution."[3] In the same speech, Minister Bennett indicated that "[b]y adopting and implementing the Declaration … we are breathing new life into Section 35 [of the *Constitution Act, 1982*] and recognizing it now as a full box of rights for Indigenous peoples in Canada."[4] The Trudeau government did not propose specific legislative measures to implement the Declaration but instead announced in November 2017 that it would support the adoption of Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*.[5] This was a private member's bill introduced by NDP MP Romeo Saganash. With government support,

3 Carolyn Bennett, Speech Delivered at the United Nations Permanent Forum on Indigenous Issues, New York (10 May 2016), online: *Indigenous and Northern Affairs Canada* <www.canada.ca/en/indigenous-nothern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html>.

4 *Ibid.*

5 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous People,* 1st Sess, 42nd Parl, 2016 (third reading in the House of Commons 30 May 2018, reported out of the Standing Senate Committee on Aboriginal Peoples, 11 June 2019).

the Bill passed the House of Commons May 30, 2018, and it then went on to the Senate. The Senate failed to adopt the Bill before Parliament dissolved on September 11, 2019.

Section 3 of the Bill would have enacted that the Declaration is "hereby affirmed as a universal international human rights instrument with application in Canadian law."[6] Sections 4-6 were more process-oriented. Section 4 instructed the Government of Canada, in consultation and cooperation with Indigenous peoples, to "take all measures necessary to ensure that the laws of Canada are consistent with" the Declaration.[7] Section 5 instructed the Government of Canada, again in consultation and cooperation with Indigenous Peoples, to develop and implement a national action plan "to achieve the objectives" of the Declaration.[8] Finally, section 6 required the Minister to submit a report to the House and the Senate on the implementation of the government's obligations under sections 4 and 5 for each of the next 20 years, and specifically to report on the "measures" referred to in section 4 and the action plan referred to in section 5. [9]

The Preface to the volume sets out much of this background and describes the origins of CIGI's engagement with the issue. It also introduces the concept or image of braiding sweetgrass as follows:

> The braiding of sweetgrass indicates strength and drawing together power and healing. A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous peoples' own laws allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship encompassing these different legal traditions might mean.[10]

The Preface also explains that the book focuses less on the legal character of the Declaration and more on "the normative content of its principles". Borrows' introduction provides a summary of the individual chapters.

It is always a challenge in a book review of an edited volume to do justice to a disparate set of essays and to deal even-handedly with the many different

6 *Ibid*, s 3.
7 *Ibid*, s 4.
8 *Ibid,* s 5.
9 *Ibid*, s 6. I have set out my views on Bill C-262 here Nigel Bankes, "Implementing UNDRIP: some reflections on Bill C-262" (27 November 2018), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf>.
10 Preface in Borrows et al, *supra* note 1 at xiii.

contributions. In what follows, I have elected to provide a listing of the different chapters or 'parts' so that the reader has at least some sense of the coverage offered in the four different parts of the volume. I then identify and discuss what seem to me to be some of most significant themes that emerge.

Part I of the volume, "International Law Perspectives", is comprised of six essays: Sa'ke'j Henderson, "The Art of Braiding Indigenous Peoples' Inherent Human Rights into the Law of Nation-States"[11]; Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples"[12]; John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges"[13]; Joshua Nichols "'We have never been domestic': State Legitimacy and the Indigenous Question"[14]; Gordon Christie, "Legal Orders, Canadian Law and UNDRIP"[15] and Brenda Gunn, "Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples"[16]. While some of these essays certainly discuss the international legal aspects of the Declaration, others are much more focused on domestic and indeed Indigenous legal orders. This is particularly true, for example, of Christie's essay as its title might imply.

Part II, "Indigenous Law Perspectives", also comprises six essays: Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult"[17]; Larry Chartrand, "Mapping the Meaning of Reconciliation in Canada: Implications for Métis-Canada Memoranda of Understanding"[18]; Lorena Sekwan Fontaine, "Our Languages Are Sacred: Indigenous Language Rights in Canada"[19]; Aimée Craft, "Navigating Our

11 James (Sa'ke'j) Youngblood Henderson, "The Art of Braiding Indigenous Peoples' Inherent Human Rights into the Law of Nation-States" in Borrows et al, *supra* note 1 at 13 - 19.

12 Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in Borrows et al, *supra* note 1 at 21-28.

13 John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges" in Borrows et al, *supra* note 1 at 29 -36.

14 Joshua Nichols, ""We have never been domestic": State Legitimacy and the Indigenous Question" in Borrows et al, *supra* note 1 at 39 - 44..

15 Gordon Christie, "Legal Orders, Canadian Law and UNDRIP" in Borrows et al, *supra* note 1 at 47 - 53..

16 Brenda Gunn, "Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples" in Borrows et al, *supra* note 1 at 55 - 61.

17 Sarah Morales, "Braiding the incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Borrows et al, *supra* note 1 at 63 - 81.

18 Larry Chartrand, "Mapping the Meaning of Reconciliation in Canada: Implications for Métis-Canada Memoranda of Understanding on Reconciliation Negotiations" in Borrows et al, *supra* note 1 at 83 - 91.

19 Lorena Sekwan Fontaine, "Our Languages Are sacred: Indigenous Language Rights in Canada" in Borrows et al, *supra* note 1 at 93 - 100.

Ongoing Sacred Legal Relationship with *Nibi* (Water)"[20]; Cheryl Knockwood, "Rebuilding Relationships and Nations: A Mi'kmaw Perspective of the Path to Reconciliation,"[21] and Sarah Morales (in a second contribution) "Canary in a Coal Mine: Indigenous Women and Extractive Industries in Canada"[22].

Part III, "Domestic Law Perspectives", begins with a second contribution from Brenda Gunn entitled "Beyond *Van der Peet:* Bringing Together International, Indigenous and Constitutional Law"[23]. This is followed by Joshua Nichols (again, a second contribution), "UNDRIP and the Move to the Nation-to-Nation Relationship"[24], Jeffrey Hewitt, "Options for Implementing UNDRIP without Creating Another Empty Box"[25], Robert Hamilton, "Asserted vs Established Rights and the Promise of UNDRIP"[26], Ryan Beaton "Article 27 and 46(2): UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35"[27], Kerry Wilkins, "Strategizing UNDRIP Implementation: Some Fundamentals"[28] and Hannah Askew, "UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders"[29].

Part IV, "Concluding Thoughts," comprises four essays, all second or even third contributions to the volume from their authors: Gordon Christie, "Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges"[30]; Joshua Nichols and Robert Hamilton, "Conflicts or Complementarity with Domestic Systems? UNDRIP, Aboriginal Law

20 Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with *Nibi* (Water)" in Borrows et al, *supra* note 1 at 101 - 110.

21 Cheryl Knockwood, "Rebuilding Relationships and Nations: A Mi'kmaw Perspective of the Path to Reconciliation" in Borrows et al, *supra* note 1 at 111- 118.

22 Sarah Morales, "Canary in a Coal Mine: Indigenous Women and Extractive Industries in Canada" in Borrows et al, *supra* note 1 at 119 - 131.

23 Brenda Gunn, "Beyond *Van der Peet:* Bringing Together International, Indigenous and Constitutional Law" in Borrows et al, *supra* note 1 at 135 - 144..

24 Joshua Nichols, "UNDRIP and the Move to the Nation-to-Nation Relationship" in Borrows et al, *supra* note 1 at 145 - 151.

25 Jeffrey Hewitt, "Options for Implementing UNDRIP without Creating Another Empty Box" in Borrows et al, *supra* note 1 at 153 - 157.

26 Robert Hamilton, "Asserted vs Established Rights and the Promise of UNDRIP" in Borrows et al, *supra* note 1 at 159 - 165.

27 Ryan Beaton, "Article 27 and 46(2): UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35" in Borrows et al, *supra* note 1 at 167 - 175.

28 Kerry Wilkins, "Strategizing UNDRIP Implementation: Some Fundamentals" in Borrows et al, *supra* note 1 at 177 - 187.

29 Hannah Askew, "UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders" in Borrows et al, *supra* note 1 at 189 - 196.

30 Gordon Christie, "Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges" in Borrows et al, *supra* note 1 at 199- 206.

and the Future of International Norms in Canada"[31]; Cheryl Knockwood, "UNDRIP as a Catalyst for Aboriginal and Treaty Rights Implementation and Reconciliation"[32] and Sa'ke'j Henderson, "The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems"[33].

This is a very rich collection of essays from a diverse range of authors and I strongly recommend it. The volume deserves to be read by both practitioners and academics and especially by those who have any responsibility — and perhaps that is all of us — for implementing the Declaration in Canada. I now turn to some of the important themes that emerged from my reading of these essays.

The most obvious and most explicit theme is that of braiding. It provides a powerful image but it is also strongly connected with ideas of pluralism which in turn are connected to the need to abandon unilateralism if we are to successfully decolonize our settler space. The authors remind us that the unilateralism of the settler state takes many forms. Even the normative weight of the Declaration in Canadian law turns on the State insofar as UNDRIP "will be enforceable against the Crown in Canada only if, and only when, the Crown and/or relevant legislative bodies agree… to be bound by it."[34] Similarly, Hamilton emphasizes that we "should reject a unilateral determination of asserted and established rights" and replace it with negotiated resolutions since, "(w)hen multiple forms of legal authority are functioning in the same space pluralism requires that authority be negotiated through dialogue."[35] Hewitt similarly argues that we must revisit the unilateralism of the *Sparrow*[36] infringement test which serves to set the terms on which Canada engages with Indigenous peoples "exclusively on Canada's terms, favouring itself." Beaton's position is similar, and in their concluding essay, Nichols and Hamilton sug-

31 Joshua Nichols & Robert Hamilton, "Conflicts or Complementarity with Domestic Systems? UNDRIP, Aboriginal Law and the Future of International Norms in Canada" in Borrows et al, *supra* note 1 at 2017 - 214.

32 Cheryl Knockwood, "UNDRIP as a Catalyst for Aboriginal and Treaty Rights Implementation and Reconciliation" in Borrows et al, *supra* note 1 at 215 - 221.

33 James (Sa'ke'j) Youngblood Henderson, "The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems" in Borrows at al, *supra* note 1 at 223 - 228.

34 Wilkins, *supra* note 28 at 178. This perhaps goes too far as does Hewitt's statement at 153 to the effect that "UNDRIP is an international declaration and therefore non-binding on Canadian courts." The better view is that those provisions of the Declaration that represent customary international law (or come over time to represent customary international law) become part of the common law without the need for statutory incorporation (as recognized in the Preface at xiii). Hewitt, *supra* note 25 at 153.

35 Hamilton, *supra* note 26 at 163-164.

36 Hewitt, *supra* note 25 at 156; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

gest that "the single most important step in giving life to the legal pluralism envisioned in UNDRIP is to ensure that contested claims between the parties are subject to negotiation."[37]

As a concrete and positive example of how we might move forward in a pluralist world, several authors mention the experience of the Haida Nation. The Haida have been able to negotiate several agreements with both the province of British Columbia and Canada with respect to Haida Gwaii and the surrounding marine areas based upon ideas of co-jurisdiction in which each party maintains its own view of the legal basis for its authority.[38] Another way forward according to Nichols and Hamilton is to re-interpret section 35 as jurisdictional in nature rather than reflecting "a sovereign-to-subjects model of contingent rights."[39]

Another important theme is that of the relationship between the duty to consult and accommodate doctrine of Canada's section 35 jurisprudence (combined with the justifiable infringement doctrine for an infringement of an established right) and the free, prior informed consent language of the Declaration. This was a significant issue for many parliamentarians in both Houses during the Committee debates on Bill C-262. While the tension between these two approaches is referenced by a number of the authors, Beaton's treatment of the issue is particularly illuminating. Beaton points out that the Declaration contains its own justifiable infringement test in Article 46(2)[40] and that this opens the door to a possible argument that Article 46(2) could be read as endorsing the existing jurisprudence of the Supreme Court of Canada. Beaton rejects that argument principally because the unilateral structure of the current Canadian test is inconsistent with the overall structure of Declaration and in particular Article 27.[41] This leads Beaton to propose that the Crown

37 Nichols & Hamilton, *supra* note 31 at 213.

38 See Christie, *supra* note 15 at 49; see also Chartrand, *supra* note 18 at 89; see also Hamilton, *supra* note 26 at 164.

39 Nichols & Hamilton, *supra* note 31 at 212, 214.

40 Article 46(2) provides that:

> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

41 Article 27 provides that:

> 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

needs to work collaboratively with Indigenous peoples to establish a process or body with Crown and Indigenous representatives that could resolve cases of disagreement between section 35 rights holders and the Crown in cases where a proposed project or activity "could infringe or adversely impact section 35 rights." Furthermore, the onus would be on the Crown to make its case to such a body "before the Crown is allowed to pursue that action".[42] This is an important idea that deserves further exploration.

Another subject (if not a theme) that several authors discuss is the nature of Canada's commitment to implementing the Declaration. Borrows notes that this is a "solemn commitment" which attracts the honour of the Crown and from which there can be no backsliding.[43] Knockwood emphasizes the focus on implementation: "(w)e do not need more broken promises — we need action".[44] Other authors carefully examine the terms of Canada's latest endorsement of the Declaration and in particular the references to implementing the Declaration "in accordance with the Constitution" and breathing life into "Section 35." For some, this a red flag. Chartrand, for example, drawing on an illuminating table comparing key elements of the Declaration with the jurisprudence of the Supreme Court of Canada on the same issue, suggests that not much could be achieved if we were to implement the Declaration in accordance with the Constitution.[45]

It follows from such a concern that the relationship between the Constitution and the Declaration should be inverted and that the Declaration should be used to re-interpret the Constitution and key decisions of the Supreme Court of Canada. For example, both Borrows[46] and Gunn[47] make the case that implementing the Declaration will require the Supreme Court to revisit the distinction that it made in *Van der Peet*[48] and *Pamajewon*[49] between pre-contact and post-contact cultural practices and the narrow definition of constitutionally protected rights that emerged from those two decisions. In its place, the Court should accord greater weight to Indigenous normative orders

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which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

42 Beaton, *supra* note 27 at 172.

43 Borrows, *supra* note 13 at 32.

44 Knockwood, *supra* note 21 at 117.

45 Chartrand, *supra* note 18 at 87.

46 Borrows, *supra* note 13 at 30-31.

47 Gunn, *supra* note 23 at 136-138.

48 *R v Van der Peet,* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]

49 *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*].

and recognize "that Indigenous peoples' rights are based in Indigenous peoples' own legal traditions".[50]

The emphasis on Indigenous legal traditions has certain implications for all of us. For example, Craft emphasizes the importance of revitalizing Indigenous languages as part of revitalizing Indigenous laws in recognition of the reality that "[a]ny non-Indigenous language articulation or Western mechanism of law making will compromise Anishnaabe inaakonigewin (law)".[51] Fundamental to that law are ideas of collective well-being (*mino-biimaadiiziiwin*) and relationality (*inendiwin*).[52] Fontaine also emphasizes the importance of language rights and the need for Canada to fully acknowledge the right of Indigenous people to transmit their languages and laws from generation to generation and to provide the necessary funding to support those languages.[53] It also has important implications for those of us who are not steeped in one or more Indigenous legal traditions. While Indigenous people must take the lead on many key issues associated with implementation of the Declaration, as Wilkins reminds us (the Who, Where and How questions[54]), if the task that we face is to braid international, domestic, and Indigenous law then we who lack capacity in Indigenous law may, as Askew suggests,[55] have a "Duty to Learn" Indigenous law. Legal academics may have a particular responsibility to ponder the implications of this question for the law school curriculum.

This book is well presented and carefully edited, and the artwork adds a rich dimension. An index would have made the volume yet more useful. I also think that the editors could have done more to pull together the themes of the volume, perhaps through an opening or closing integrative essay or through short concluding chapters for each of the four main parts of the volume. As it is, each chapter stands on its own. But these are quibbles. In sum, this is an important volume of essays on an important issue and it deserves (and perhaps needs) to reach a wide audience.

50 Gunn, *supra* note 23 at 138.
51 Craft, *supra* note 20 at 104.
52 *Ibid* at 110.
53 Fontaine, *supra* note 19 at 99.
54 Wilkins, *supra* note 28 at 180-185.
55 Askew, *supra* note 29 at 190.

Book Review

*Ferdinand Gemoh**

Review of John Borrows, *Law's Indigenous Ethics,* (University of Toronto Press, April 2019), 392 pp.

John Borrows' new book, *Law's Indigenous Ethics*, is an ambitious and provocative addition to the Indigenous rights literature and examines the important relationship between Indigenous law and the Canadian State. The main thrust of the book is an attempt to show that Indigenous peoples' own legal thought and practice contains potentially valuable legal principles that could help create better Indigenous-government relationships. Borrows' book serves as an introduction to Indigenous legal reasoning as well as a reminder that the nature and scope of Canadian jurisprudence cannot merely be identified with its "Western" legal frames. Borrows stresses that there is a strong case for the recognition of Indigenous legal orders based on section 35(1) of Canada's Constitution which proclaims that "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed".[1] He argues that Indigenous legal orders have even greater legal standing because the Supreme Court of Canada has interpreted section 35(1) to be inclusive of both Aboriginal and non-Aboriginal legal perspectives.

Borrows' arguments are developed within a specific Indigenous lens — an Anishinaabe lens. The Anishinaabe are one of the largest Indigenous nations in Canada. However, Borrows is careful to stress that this book does *not* intend to speak for all Indigenous legal traditions in Canada and makes no claims that Anishinaabe legal traditions have any priority over other Indigenous legal traditions. According to Borrows, his "ideas are presented from one group's perspective in order to open doors to alternative possibilities in Canadian law".[2] The Seven Grandmother/Grandfather Teachings of the Anishinaabe — love, truth, bravery, humility, wisdom, honesty and respect — form the cultural framework through which Borrows develops insights in Indigenous legal reasoning

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1 John Borrows, *Law's Indigenous Ethics* (Toronto, Ontario: University of Toronto Press, 2019) at 17.

2 Borrows, *ibid* at 15.

that can help us to shape the law in new ways and improve Indigenous peoples' relationship with the Canadian state.

The argument is set out in seven chapters. In each chapter, Borrows provides the context of the teaching in Anishinaabe law and sets firmly the case for the inclusion of each of these teachings in contemporary Canadian law. The introduction sets out the cultural context that informs the subsequent themes developed in the book in a method that is characteristic of Indigenous epistemology: storytelling. This method runs throughout the text and reflects the central place stories occupy in Indigenous societies. As Borrows observes, "instead of laws that are guidelines, our ancestors made up stories to guide us along on the right course".[3] The opening story ends with the presentation of the Seven Grandmother/Grandfather gifts. In Anishinaabe territory, these teachings are found in constitutions, by-laws, teacher guides, schools, and other places.[4]

The first chapter explores the role of love in Anishinaabe law and Canada's treaty history. A main point of the chapter is the idea that love featured prominently in Canada's treaty history and it is, therefore, reasonable to reinstate love as a legal principle in the interpretation of Aboriginal treaties. Borrows strongly argues that love, as a treaty principle in Canada, has significant potential for regulation and conflict resolution within Canadian law.

In the second chapter, Borrows explores the meaning of truth in Canadian law in relation to law's sources and force. Using Canada's and New Zealand's treaty history, Borrows argues that Canadian courts and Parliament cling to an idea of truth that is opposed to its Indigenous understanding. Borrows criticizes what he calls an "essentialized thinking" of treaties. This thinking is based solely on metaphysical first principles but devoid of historical context. The chapter cites cases such as the *Ktunaxa* case[5] and landmark treaty events to challenge the Crown's supremacy and default authority in the interpretation of treaties. For Borrows, treaty interpretation by the Crown is modelled after five principles of traditional metaphysics identified by the British philosopher Kit Fine. These principles are: aprioricity of methods, generality of subject-matter, transparency or non-opacity of concepts, eidicity or concern with the nature of things, and its role as foundation of what there is.[6] Against this approach, Borrows is of the view that legal interpretation should be guided by the differ-

3 *Ibid* at 5.

4 *Ibid* at 14.

5 *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa*].

6 Borrows, *supra* note 1 at 57.

ent sources of authority and understanding of the law that both the Crown and Indigenous peoples bring to the table. "A more contextualized understanding of the law," according to Borrows, "should challenge us to be more fully aware of law's metaphysics".[7] That is to say, any constructive approach to treaty interpretation must move beyond the limitations of traditional Western views of law and incorporate Indigenous perspectives.

The third chapter sees Borrows outlining the role of bravery in law in dealing with Aboriginal title in Canada. Examining the *Tsilhqot'in Nation v British Columbia* decision,[8] Borrows argues that the decision's attempt to reject *terra nullius* (the notion that no one owned the land prior to European declaration of sovereignty) is inconsistent with its continued affirmation of Crown title to all land in the province. If it is to provide a bold and brave new satisfactory framework for understanding indigenous rights, in Borrows' view, the *Tsilhqot'in* decision cannot deny *terra nullius,* and at the same time defend the view that "at the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province".[9] Accordingly, Indigenous peoples should approach the decision with scepticism.

The fourth chapter "explores the Constitution's potential for both protecting and attenuating so-called private interests in land in the face of a declaration of Aboriginal title"[10]. The chapter identifies potential obstacles between Aboriginal title and private property, an important question that the *Tsilhqot'in* decision did not address. Borrows demonstrates that both the common law and Indigenous law contain practices to address this relation. According to Borrows, humility and entanglement are two useful ideas to define Aboriginal title-private property relationship.

The fifth chapter examines the place of wisdom in Canadian legal reasoning in relation to land. It challenges present-day, classroom-based legal education and advocates for land-based education. The latter identifies opportunities for law schools to broaden students' experiences of the law and Indigenous societies.

In the sixth chapter, Borrows moves on to examine how honesty could assist in acknowledging the syncretic nature of Canadian law. The chapter con-

7 *Ibid* at 87.
8 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.
9 *Ibid* at 69.
10 Borrows, *supra* note 1 at 121.

tains suggestions for making sense of the mélange and provides ideas for the organization and teaching of Indigenous law.

The final chapter examines the role of respect and four views for and against addressing historic wrongdoings to Indigenous people — with a special focus to harms caused by residential schools. Borrows recognises that there are significant obstacles relating to scope, cost, fairness and relevant questions about the appropriateness of such programs. Borrows suggests that we can always find ways of building friendship. Concluding with what he calls "respectful responsibility",[11] Borrows presents Indigenous legal resources on how to deal with historical issues like residential schools. It is his view that humans make mistakes and should be bold to take responsibility for their errors. This includes responsibility for harms caused by residential schools.

Let it be said that this is another great work from John Borrows. However, there are, I think, certain tensions in his project, and I will mention some of these. My first worry has to do with the practicality of Borrows' project, which is, among other things, the search for a Canadian Constitution representative of Indigenous legal traditions. Is it really possible to produce a Canadian Constitution that is capable of encompassing the normative principles, values, and different epistemologies of the Indigenous laws of all Indigenous nations in Canada? The blending of long-established Indigenous cultural mores and legal traditions within the Canadian Constitution is probably a step that could make Indigenous people feel content to be part of the Canadian mosaic.

However, it is not clear how this can be realized, and Borrows is not unaware of the challenge. He admits, "there are still huge questions about how to best accomplish our task".[12] It is also reasonable to question the extent to which Indigenous peoples remain committed to their cultural norms and legal frameworks in today's Canada as long as Indigenous peoples continue to be raised in government educational systems. There are good grounds to suspect that an educational system founded and structured on Western values, devoid of Grandmother Teachings and the essence of Indigenous cultural traditions, can produce a people versed in their own historical traditions. I think that the lack of Indigenous worldview and thinking orientations in the Canadian educational system adds to the problems of teaching Indigenous law in law schools that Borrows identifies in chapter six.

11 *Ibid* at 235.
12 *Ibid* at 183.

Taken as a whole, Borrows' work comes closer to a natural law theory with respect to the relationship between Indigenous morality and the law. But any proposal for incorporation would require that proposed ideas be historically scrutinised for accuracy and pre-colonial understanding. Identifying pre-colonial moral traditions places another burden on Indigenous groups that requires a lot of historical digging; that is certainly no easy process. While it may be hard to see why some of the teachings should be incorporated into Canadian law, it must not be forgotten that Borrows' overall project is an effort for us to see law in a new light. The book is written in the belief that Indigenous legal traditions provide an alternative legal perspective. These traditions are important in Indigenous peoples' understandings of the law, and it is Borrows'belief that incorporating these Indigenous moral and legal traditions allows us to see, from a new vantage point, many of the issues and dilemmas that face our contemporary Canadian legal system.

Even though the central legal questions that Borrows deals with are complex and contextualized within the Canadian Indigenous cultures and societies, the book articulates the critical concerns of many Indigenous peoples around the world. It is therefore hoped that the book will have application not only in its Canadian context but equally in different national and cultural settings.