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Article Submissions
Patricia Paradis
Managing Editor
Faculty of Law, Room 448E
University of Alberta
Edmonton, AB T6G 2H5

pparadis@ualberta.ca
Phone: (780) 492-8281

Book Review Submissions
Dwight Newman, Professor
College of Law
University of Saskatchewan
15 Campus Drive
Saskatoon, SK S7N 5A6

dwight.newman@usask.ca
Phone: (306) 966-4847

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The Constitution as Muse? Four Poets Respond (Tacitly) to the World-View of *The British North America Act (1867)*

George Elliott Clarke*

Although no less an authority than the classical Greek philosopher Plato inveighed against poets as being too dreamy to be trusted with philosophy and political science, poets are citizens, and so Canadian poets have responded, tacitly, to the fundamental law of the nation, that is I say, originally, the BNA Act. *This paper asserts that poet Duncan Campbell Scott, understanding that, as a federal bureaucrat, he ranked above mere "Indians," could advocate for and institutionalize the culturally genocidal Residential Schools program. Then, realizing that the* BNA Act *prefers Anglophones to Francophones, Scott could also romanticize the silencing of Francophones. For her part, E. Pauline Johnson responds to Scott by advocating for Indigenous peoples as constituting nations who have a right to repel Canuck Caucasian imperialism. But she also analyzes the way in*

Bien que non moins d'une autorité que le philosophe classique grec Platon invectivât contre les poètes comme étant trop rêveurs pour qu'on leur confie la philosophie et la science politique, les poètes sont des citoyens, ainsi les poètes canadiens ont réagi, tacitement, à la loi fondamentale de la nation, c'est-à-dire, à l'origine, l'Acte de l'Amérique du Nord britannique. L'auteur de ce résumé soutient que le poète Duncan Campbell Scott, comprenant que, en sa qualité de bureaucrate au niveau fédéral, il fut supérieur aux simples « Indiens », il pouvait préconiser et institutionnaliser le programme des pensionnats indiens, génocidaire sur le plan culturel. Et puis, se rendant compte que l'Acte de l'Amérique du Nord britannique préfère les anglophones aux francophones, Scott pouvait également romancer le fait qu'on fait taire les francophones. Pour sa part, E. Pauline

* Inaugural EJ Pratt Professor of Canadian Literature at the University of Toronto. Parliamentary Poet Laureate (2016-2017). Officer of the Order of Canada. This paper is based on three invited lectures: 1) "Poets Re-Visioning the Constitution: Duncan Campbell Scott, F.R. Scott, E. Pauline Johnson, and A.M. Klein," Plenary Address, Association of Canadian College and University Teachers of English (Ryerson University, Toronto, ON, May 28, 2017); 2) "Opposing Plato: A Poet Proposes Constitutional Amendments for Canada's Monarchical 'Republic,'" Peter Wall Institute for Advanced Studies, The University of British Columbia (Vancouver, BC, November 8, 2017); and 3) "Toward the Next Round of Constitutional Talks: Revising The *Constitution Act, 1982*," 29th Annual McDonald Lecture in Human Rights, Centre for Constitutional Studies, Faculty of Law, University of Alberta (Edmonton, AB, November 23, 2017). I am thankful to all three audiences for their questions and observations that served to sharpen my thinking.

which white authors, in concert with Scott's perspective, limn a "tragic" Indigeous woman whose only escape from broken love affairs with white males is suicide. A.M. Klein, a Jewish-Canadian poet from Montreal, envisions a multicultural Canada, prophetic of the Charter of Rights and Freedoms*, in his poetry, that also offers a defense of First Nations. Finally, Anglo-Québecois poet F.R. Scott, in his role as a professor of constitutional law and through his mentorship of Pierre Elliott Trudeau, became one of the architects and proponents of the* Charter of Rights and Freedoms*, whose necessity his poetry foresees.*

concert avec le point de vue de Scott, esquissent une femme autochtone « tragique » dont la seule façon d'échapper aux liaisons amoureuses brisées avec des hommes blancs est le suicide. A.M. Klein, un poète canadien juif de Montréal, imagine un Canada multiculturel, prophétique de la Charte canadienne des droits et libertés, dans sa poésie, qui présente aussi une défense des Premières Nations. Enfin, le poète québécois anglophone F.R. Scott, dans son rôle de professeur de droit constitutionnel et par le biais de son mentorat de Pierre Elliott Trudeau, est devenu un des architectes et partisans de la charte des droits et libertés, dont la nécessité est prévue dans sa poésie.

Although Socrates seems categorical about restricting poets' roles in *The Republic*, banishing them from his ideal state,[1] and though poets have not been summoned to Ottawa to help carve out constitutional amendments or broker agreements,[2] it is naïve to think that Canadian poets have not responded to the foundational law of the nation-state. Indeed, there can be no "Canada," in European terms, if there is no Constitution. Thus, on July 1, 1867, this new nation began to coalesce, under governance provided by a quaintly prosaic document: The *British North America Act*.[3] Admittedly, this founding law of the new nation lacks the elevated, philosophical poetry of the American equivalent. It's practically lacklustre, a workaday, compromise document, intended to enable three once-distinct, self-governing colonies — Canada, Nova Scotia, and New Brunswick — to surrender their colonial sovereignty (their independent relationships to Great Britain) to a new, domestic, central, and supra — empowered government. Such clauses as that awarding provinces jurisdiction over "The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions …, other than Marine Hospitals,"[4] are, clearly, impervious to poetry. In staid opposition to the American sum-

1 Plato, *The Republic and Other Works*, translated by B Jowett (New York, NY: Anchor Books 1973).

2 One must make a slight exception for F.R. Scott (1899-1985), who Prime Minister Pierre Elliott Trudeau asked, in 1978, to write a draft version of what became The *Canadian Charter of Rights and Freedoms*: Sandra Djwa, *The Politics of the Imagination: A Life of E.R. Scott* (Toronto: McClelland and Steward, 1987) at 434.

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

4 *Ibid,* s 92.7.

mons to promote "Life, Liberty, and the pursuit of Happiness,"[5] the *BNA Act* states merely that the Canadian legislatures will "make Laws for the Peace, Order, and good Government" of the realm.[6] Bearing in mind that "Peace" and "Order" were lofty ideals to espouse on a continent where the U.S. Civil War (1861-65) had just been fought to free the Republic of the scourge of Slavery, one may deem these abstractions implicitly poetic. Even so, the bias of the language of the *BNA Act* is toward sober — if not sombre — realism, an insistence on fail-safe, Enlightenment clarity as opposed to visionary fancy: more Burke than Shelley; more Milton than Blake.

Yet, the society that came into being between 1867 and 1982 (the moment of the promulgation of The *Canadian Charter of Rights and Freedoms*[7]) represented the fleshing out — both positively and negatively — of the *BNA Act*, legal arguments over it, and Canadian Supreme Court or British Privy Council interpretations and/or decisions. Moreover, poets, being citizens, responded to the evolution of Canadian mores and values, as the basic law came to be interpreted and reinterpreted, in flux with shifting attitudes and principles. Thus, poets did, from time to time, offer their own assessments of the world-views and State-ideals maintained by the *BNA Act*, if only tacitly.

An immediate example is a 1911 poem by the now persuasively maligned Duncan Campbell Scott (1862-1947), entitled, "Fragment of an Ode to Canada."[8] The poem is an odd one for him, for his stock-in-trade was pseudo-Darwinian ditties about Métis and First Nations peoples scheduled to disappear from Canada before long due to their unchristian beliefs and supposedly primitive behaviours.[9] Though Scott's patriotic poem is Romantic, Victorian gushiness, lyricizing "fruit, fine-flavoured with the frost" (a prophecy of ice wine, perhaps) and rivers, "Straining incessant everyway to the sea,"[10] it turns at times, with foreboding, to world affairs. Thus, one reads the poet's prayer to that "Power, that 'stablishest the Nation"[11] to teach Canadians "That freedom brings the deepest obligation"[12]: Aye, so that we "lead the van of Peace,"

5 *Declaration of Independence*, (1776).

6 *BNA Act*, *supra* note 3, s 91.

7 Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

8 Duncan Campbell Scott, "Fragment of an Odd to Canada" in *The Poems of Duncan Campbell Scott* (Toronto: McLelland & Stewart, 1926) 11 [Scott, "Fragment of an Odd to Canada"].

9 Arguably, Scott exploited "Indians" for material as much as William Henry Drummond (1854-1907) made use of French Canadian "Habitants" — peasants — in his popular, rollicking, Dixie-style, minstrel-English poetry.

10 Scott, "Fragment of an Odd to Canada," *supra* note 8 at 11.

11 *Ibid* at 12.

12 *Ibid*.

or, "in some day of terror for the world, / When all the flags of the Furies are unfurled, / When Truth and Justice … / Shall turn for help to this young, radiant land,"[13] we will make war.

Though Scott doesn't name God as the "Power, that 'stablishest the Nation" nor Great Britain as the guardian of "Truth and Justice," the fact is, these entities are interchangeable. After all, the "Power" that brought Canada into being was not "God" *per se*, but the British Raj in its North American power-play to frustrate American "Manifest Destiny." Similarly, "Truth and Justice" belong to God or, rather, His Britannic, mortal ambassador, who would be, in 1911, none other than George V, King of the Dominion of Canada and Emperor of India, etc. In any event, what makes this pairing of abstractions adamant, and determinative of Canada's purported role in preserving "Peace" or defending "Truth and Justice," is the preamble to the *BNA Act*. Certainly, the preamble's first paragraph affirms that Canada, New Brunswick, and Nova Scotia are to be "federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland"; the next paragraph clarifies that the new "Dominion" would "conduce to the welfare of the Provinces and promote the Interests of the British Empire."[14] In other words, Canada is engineered, in part, to further British geopolitical and economic arrangements. In this sense, Scott was right in 1911 to admonish his readers to pray for peace but prepare for war, for such would be inevitable if Britain — our parent "Power" — deemed it necessary to sally forth and crush the alleged foes of "Truth and Justice."

Scott is mindful of British imperialism. He tells Canucks that we possess "the consciousness that we inherit / What built the Empire out of blood and fire"[15]: Canadians, being British subjects, hold a warrior heritage: the guts and backbone, the spunk and spirit to "smite" foes "in passion and with ire."[16] Nevertheless, Scott seems to feel that Canadians have not been respecting this heritage, for he also prays to God — or Great Britain — to "Give [us] great Ideals to bridge the sordid rift / Between our heritage and our use of it."[17] Given that the poem was written in August 1911, it was likely occasioned by the bitter debate among: those Canadians who wanted a navy to assist Great Britain to confront a Germany building its own battleships; those others — principally Québécois — who eyed a Canadian navy warily as being a cat's paw for British

13 *Ibid*.
14 *BNA Act*, *supra* note 3, Preamble.
15 Scott, "Fragment of an Odd to Canada," *supra* note 8 at 12.
16 *Ibid* at 12.
17 *Ibid*.

imperialism; and, those who didn't want a domestic navy, but were British imperialists. In addition, Scott was anticipating the pro-imperialist propaganda of scribes like Sir Rudyard Kipling:

> On September 7 [1911], the Montreal *Star* published a front-page story with an appeal to all Canadians from the imperial poet and novelist Rudyard Kipling. "It is her own soul that Canada risks today," he wrote. "Once that soul is pawned for any consideration, Canada must inevitably conform to the commercial, legal, financial, social and ethical standards which will be imposed on her by the sheer admitted weight of the United States."[18]

Not only does "Fragment of an Ode to Canada" summon English-Canadians to back the Empire, "our" heritage, so does it erase the presence of Indigenous people in tidy, settler fashion. The "glory of the gift" of Canada was supposedly granted to Canucks by God (and/or Britain); and this nation is a "young, radiant land."[19] However, it can only be truly "young" in conception if the multi-millennial, Aboriginal presence is evacuated. In any event, section 91(24) of the *BNA Act* which classifies First Nations peoples as "Indians" living on "Lands reserved for the Indians," aids Scott in effecting an erasure. Almost an afterthought, this clause follows "Copyrights"[20] and precedes "Naturalization and Aliens".[21] Also preceding is a clause allowing the Federal Parliament authority over "the fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada."[22] If he took his lead from the *BNA Act*, Scott would have been correct in thinking that, as a Federal Civil Servant — the first actual persons named in the catalogue of Federal powers — his authority, backed by the purse of the Treasury and the produce of the Royal Canadian Mint, gave him jurisdiction over mere "Indians."[23] As Commissioner of Indian Affairs, 1913-1932, Scott became a constitutionally recognized Civil Servant with the power to oversee "Indians," who were also a constitutional category, but merely as a responsibility: a ward of the Federal government. As his righteously savage critics have alleged, Scott was a Final-Solution-type bureaucrat, advocating the assimilation or cultural genocide of Indigenous peoples, most effectively through the institution of the residential school system, which was his creation.

18 Patrice Dutil & David MacKenzie, *Canada 1911: The Decisive Election that Shaped the Country*, (Toronto: Dundurn, 2011) at 211.

19 Scott, "Fragment of an Odd to Canada," *supra* note 8 at 12.

20 *BNA Act*, *supra* note 3, s 91(24).

21 *Ibid*.

22 *Ibid*.

23 *Ibid*.

In his consideration of Scott, John Coldwell Adams insists, "The Canadian government's Indian policy had already been set before Scott was in a position to influence it, but he never saw any reason to question its assumption that the 'red' man ought to become just like the 'white' man."[24] Scott himself opined, "I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone… Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department…"[25] I iterate that Scott's perspective, objectionable though it is, is grounded in the ethos of the *BNA Act* and its division of powers that ranks Dominion Civil Servants above "Indians" and classes Indigenous people as practically chattel, of less immediate import than "Beacons, Buoys, Lighthouses, and Sable Island."[26]

Nevertheless, the critical view that Scott is conflicted, or that his poetry voices a red-man Romanticism that the buttoned-down bureaucrat eschews, cannot be credible. Rather, the so-called "Indian poems" depict an othered race that verges on extinction, or is already moribund, dislocated, degenerate. Thus, the opening line of "Indian Place-Names" asserts, "The race has waned and left but tales of ghosts"[27]. Assuredly, "gone are the dusky folk," and "their vaunted prowess" at fishing and hunting and tracking: "all is gone."[28] Instead, "all the land is murmurous with the call / Of their wild names that haunt the lovely glens / Where lonely water falls, or where the street / Sounds all day with the tramp of myriad feet."[29] European colonization of Aboriginal Canada has hollowed out their original habitations, leaving a façade of First Nations presence, after virtually eradicating Indigenous cultures. In this sense, place-names like Toronto or Ottawa or Kamouraska or Saskatchewan or Manitoba all become sign-posts of successful, European implantation and a concomitant process of Indigenous die-off by cannon, gun, pen, and penis. Scott's poem is superficially Romantic; it is actually Gothic.

24 John Coldwell Adams, "Confederation Voices: Seven Canadian Poets" (2007), Canadian Poetry Press (blog), online: <http://www.canadianpoetry.ca/confederation/John%20Coldwell%20Adams/Confederation%20Voices/preface.html>.

25 Testimony of Duncan Campell Scott (1920) to the Special Parliamentary Committee of the House of Commons, online: <https://tc2.ca/sourcedocs/uploads/images/HD%20Sources%20(text%20thumbs)/Aboriginal%20History/Residential%20Schools/Residential-Schools%2010.pdf>.

26 *BNA Act*, supra note 3, s 91(9).

27 Duncan Campbell Scott, "Indian Place-Names" in *The Poems of Duncan Campbell Scott*, *supra* note 8, 22 at 22.

28 *Ibid*.

29 *Ibid*.

Yet, the process of cultural erasure was mandated, in theory, by the promulgation of the Dominion of Canada as a North American palimpsest of "the United Kingdom of Great Britain and Ireland."[30] Politically, Canada erected an "Indian" façade for its ongoing project of British and European, anti-American, anti-republican, kingdom-building across the northern reaches of North America, while herding Indigenous peoples onto reserves, from which they were intended, in due course, to disappear. Given this perspective, it is sensible that Scott's 1916 poem, "The Height of Land," declares, "Now the Indian guides are dead asleep,"[31] an image that links organic narcosis to full-body necrosis. Furthermore, the poem's speaker deems "uncouth" the "pictograph / Scratched on the cave side by the cave-dweller," at least for "us of the Christ-time."[32] The line collapses together traces of primitive humans and the art of Indigenous peoples, but this effect occurs just after we read, "The presage of extinction glows on [stars'] crests."[33] True: The poem gestures toward mysticism, or Transcendentalism, perhaps as a means of voiding the unending carnage of supposedly civilized nations gassing each others' soldiers across wastes of the No-Man's-Land battlefields of Belgium and France. However, allusions to DNA-degenerate races and a cave-man teleology accent grim preoccupations.[34] Yes, Scott's speaker is on a would-be Thoreauvian venture to the "height of land" — or the division between two drainage basins. The journey is one-part introspection, one-part adventure. However, the paddling and/or portaging poet smells "pungent fume / Of charred earth burnt to the bone" and dreads "the fatal shore" of "bush fire," while the "lakelet" breeds "weedy growths / And slimy viscid things" — images of death, destruction, decay.[35] "The Height of Land" reads more like Conrad's *Heart of Darkness*[36] than it does Thoreau's *Walden*.[37] Incipiently extinct are Indigenous peoples, more or less, but a similar fate may await globe-ruling Europeans, who are presently, wantonly, slaughtering each other.

Scott worries the theme of a Native die-off, not only in poems about toponyms and topography, but in notorious lyrics that view *métissage* as a Canadian

30 *BNA Act*, *supra* note 3, Preamble.

31 Duncan Campbell Scott, "The Height of Land" in *The Poems of Duncan Campbell Scott*, *supra* note8, [Scott, "The Height of Land"] at 46.

32 *Ibid* at 50.

33 *Ibid* at 50.

34 Cf Oswald Spengler, *Der Untergang des Abendlandes*, (Munchen: Deutscher Taschenbuch Verlag, 1918). Later published in English as *Decline of the West,* translated by Charles Francis Atkinson (New York: Oxford University Press, 1932).

35 Scott, "The Height of Land," *supra* note 31 at 49.

36 Joseph Conrad, (Portland: Tin House Books, 1899).

37 Henry David Thoreau, *Walden, or Life in the Woods*, (Boston: Ticknor & Fields, 1854)

form of what racist Americans labelled *miscegenation*: race-mixing. So, "The Onondaga Madonna"[38] (1898) pictures a new mother, unwed, Indigenous, who represents "a weird and waning race,"[39] and who has given birth to a wan baby, who is "The latest promise of her nation's doom," being "Paler than she," and a putative, Darwinian throwback as a "primal warrior."[40] When Scott's speaker wagers this pagan Madonna incarnates "[t]he tragic savage,"[41] he parrots American critics, black and white, attendant to the spectre of the Tragic Mulatto,[42] a stock figure in Dixie racial melodrama, whom, being part-black and part-white, is distrusted and/or rejected by all. The poem does not tell us the circumstances of this Onondaga woman's impregnation by a Caucasian, but rape is a distinct possibility. Certainly, if the Métis boy's father was the woman's lover, he is now long gone. In any event, his siring of a half-breed bastard foretells doom for the Onondaga nation — *not* the usurping power of Europeanized Canada. Surely, the *BNA Act* spells this fact out: not only in its blunt presentation of the Dominion of Canada as an appendage of Great Britain, but also in its relegation of "Indians" to a position tantamount to being considered "Crown lands" as opposed to independent states sharing sovereignty by treaty.

To turn to Scott's "The Half-Breed Girl" is to find a prophecy for what happens to the Métis child once she, in this case, matures.[43] This girl is "free of the trap and the paddle,"[44] so she is presumably ripe for reeducation in one of Scott's Residential Schools. Despite being tutored somewhat in Caucasian Christendom, the girl still has "savage life" and "Shadows trouble her breast."[45] Apparently, she is caught between her father's Scottish heritage of "The gleam of lock and shealing, / The mist on the moor"[46] and the fact of her "stifling wigwam," where the overhead stars — or "dying embers" — resemble "the eyes of dead souls."[47] This girl is, as is usual for Scott's Indigenous characters,

38 Duncan Campbell Scott, "The Onondaga Madonna" in *The Poems of Duncan Campbell Scott*, *supra* note 8, 230.
39 *Ibid* at 230.
40 *Ibid*.
41 *Ibid*.
42 See Johanna L Grimes-Williams, "Character Types" in William Andrews, Frances Smith Foster & Trudier Harris, eds, *Oxford Companion to African American Literature* (New York: Oxford University Press, 1997) 127.
43 Duncan Campbell Scott, "The Half-Breed Girl" in *The Poems of Duncan Campbell Scott*, *supra* note 9, 55 [Scott, "The Half-Breed Girl"].
44 *Ibid* at 55.
45 *Ibid*.
46 *Ibid*.
47 *Ibid* at 56.

on the verge of the grave. In fact, the penultimate stanza suggests the girl is contemplating self-murder:

> A voice calls from the rapids,
> Deep, careless and free,
> A voice that is larger than her life
> Or than her death shall be.[48]

In addition to this conditional summons to suicide, we learn that the girl's "fierce soul hates her breath,"[49] a statement that also seems to posit self-destruction as a resolution to her plangent alienation. "The Half-Breed Girl" was published in 1906, the year after Scott became "one of the Treaty Commissioners sent to negotiate Treaty No. 9 in Northern Ontario."[50] Scott's thought seems to be that Indigenous people will perish via bureaucratized genocide or despair-prompted suicide, unless Caucasian Christian charity is invoked. Scott's gambit was the Residential School System. Yet, more than a century after Scott's poem appeared, Canada is gripped by a double epidemic: Suicide among First Nations' peoples (the young) and the unsolved homicides and disappearances of Indigenous women and girls. One set of statistics is stunning, alarmingly so:

> According to a 2000 report by the Canadian Institute of Health, the rate of suicide among First Nation males was 126 per 100,000 (compared to 24 per 100,000 non-Indigenous males), while it was 35 per 100,000 for females (compared to 5 per 100,000 non-Indigenous females).[51]

The count of murdered and missing Aboriginal women and girls in Canada, though disputed, is also appalling. Amnesty International Canada cites a 2014 Royal Canadian Mounted Police report that declares, "1,017 women and girls identified as Indigenous were murdered between 1980 and 2012 — a homicide rate roughly 4.5 times higher than that of all other women in Canada."[52] Scott's "Half-Breed Girl" is a case-study of an at-risk Indigenous youth. She is at risk of suicide and, as a Métis woman, she is at risk of being sucked into street life

48 *Ibid*.

49 *Ibid*.

50 Dean Neu & Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Black Point, NS & New York, NY: Fernwood Publishing & Zed Books, 2003) at 91. See also John F Leslie, "Treaty 9" (15 June 2016) *Historica Canada* (blog), online: <https://www.thecanadianencyclopedia.ca/en/article/treaty-9/>.

51 Allison Crawford, "Suicide Among Indigenous Peoples in Canada" (22 September 2016) Historica Canada (blog), online: <https://www.thecanadianencyclopedia.ca/en/article/suicide-among-indigenous-peoples-in-canada/>.

52 Jackie Hansen, "Missing and Murdered Indigenous Women and Girls: Understanding the Numbers" Amnesty International (blog), <https://www.amnesty.ca/blog/missing-and-murdered-indigenous-women-and-girls-understanding-the-numbers>.

and its dangers: namely, homelessness (or exposure to the elements), substance abuse, sexual assault, battery, and homicide. Scott's depiction of "The Half-Breed Girl" spells out that her in-between status imperils her life. This poem is a precursor to George Ryga's tragic play about a Native woman, *The Ecstasy of Rita Joe*.[53] In constitutional terms, too, in the *BNA Act*, the Métis people merit no recognition. Thus, should the "Half-Breed Girl" choose her Native heritage over her Scottish lineage, she becomes a disappeared person. Yet, to assert her Scottish heritage is also to repress her Indigenous culture. Given these mutually unpalatable fates, is suicide itself so unpalatable?

Scott's apocalyptic racialism (*not* Romanticism) is palpable, but one other female portrait is relevant here, and it is Scott's "Portrait of Mrs. Clarence Gagnon,"[54] which was penned at Sainte-Pétronille, Québec, near Ville de Québec, on July 25, 1919. Presuming that Mrs. Clarence Gagnon was a very live, Caucasian Québécoise, and most likely Lucile Rodier, the newlywed wife of the Québécois artist, Clarence Gagnon (1881-1942), who fraternized with D.C. Scott, the poet extends to a French Canadian the same aura of incipient decay that he cites in his female, Native characters: "Beauty is ambushed in … her / Gold hair" where light "slides"; "A glow is ever in her tangled eyes, / Surprise is settling in them"; "Her curvèd mouth is tremulous yet still, / Her will holds it in check…."[55] *La belle* Québécoise, this sylph-like MILF, is portrayed as having suffered some form of disturbance. We cannot know what it is. Could it be the news of a death, or an attempt at seduction? Married on June 10, 1919, Lucile Rodier was still a newlywed, and still honeymooning, when Scott attempted his word-portrait. [56] Still, all her beauty is at risk of vanishing if she allows herself to speak. In that case, "Words would brim over in a wild betrayal" and beauty itself would desert the world, save for "Some vestige of a vanished loveliness."[57] (220).

The French-Canadian woman is not as "at risk" as Indigenous women are, but even she, though married, is subject to loss: of beauty, perhaps of youth, perhaps of reputation. She is a Francophone woman married to a bilingual Québécois painter, but her title is Anglicized, "Mrs.," and her gender is masculinized as "Clarence Gagnon." Thus, the salient possibility is that Mrs.

53 George Ryga, *The Ecstasy of Rita Joe*, (Vancouver: Talonbooks, 1970).

54 Duncan Campbell Scott, "Portrait of Mrs. Clarence Gagnon" in *The Poems of Duncan Campbell Scott*, *supra* note 8, 219 [Scott, "Portrait of Mrs. Clarence Gagnon"].

55 *Ibid* at 219-220.

56 The most direct possibility here is that Scott is describing a Gagnon painting of his wife, Lucille Rodier. See, for instance, Gagnon's 1919 canvas, *Lucille Rodier Gagnon, Olive and Edna Pretty, at Saint-Petronille, Isle D'Orléans* (Gagnon).

57 Scott, "Portrait of Mrs. Clarence Gagnon," *supra* note 54 at 220.

Gagnon represents the suppression of Francophones, the effect of being muted, of not being readily permitted speech. Although the *BNA Act* allows "[e]ither the English or the French Language" to be used in the Parliament of Canada and in the Legislature of Québec,[58] in reality, French was suppressed, even within Québec, at least until the onset of the Quiet Revolution in the 1960s. According to sociologist John Porter, although "the French participated in Confederation, Canada's political and economic leaders were British and were prepared to create a British North America,"[59] just as the original title of our 1867 Constitution verifies. Nevertheless, the *Québec Act* of 1774, [60] passed by the British Parliament, granting French Canadians complete religious freedom and restoring the French form of civil law, established the basis for two official, language-based cultures of the (nascent) Canadian state. Theoretically, at least, the *Québec Act* enthrones aspects of French civilization, just as constitutional recognition of the nominally WASP Monarch, presents the Anglo Monarch as the "natural" ruler of the state. If we read the *Official Languages Act* of 1969 alongside the notion of "two founding peoples," what is posited, really, is the *de facto* presence of two linguistically-anchored, ethnically-composed societies, both presented as naturally empowered and decisive in their respective jurisdictions in defining who may be "Canadian" and even what employs they should be expected to take up.[61]

Nevertheless, at the moment that "Portrait of Mrs. Clarence Gagnon" is penned, the *Official Languages Act* is still fifty years ahead; and, despite some vital, constitutional provisions, French Canadians are also considered a secondary population after the enthroned power of WASP Canadians. Recall that Daniel Coleman has pointed out "the privileged, normative status of British whiteness in English Canada,"[62] exploring the ways in which various authors have advanced a British/Scottish/Nordic/European vision of Canada as the Christian "white man's country," loyal to Crown values/virtues, and superior to the American rabble's "turbulent" republicanism. In tracing the anxious desire of White, "British"-identified, Canadian intellectuals to establish their modernity, their liberality, their "Christian" goodness, and their claims to "civilization," entitlement, prestige, property, and power, Coleman urges, "the

58 *BNA Act*, *supra* note 3, s 133.

59 John Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada*, (Toronto: University of Toronto Press, 1965) [Porter, *The Vertical Mosaic,* (1965)] at 62.

60 *Québec Act*, *1774* (UK), online: <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/collections1/collections1/Québec-act/>.

61 *Official Languages Act,* SC 1969, c 54.

62 Daniel Coleman, *White Civility: The Literary Project of English Canada* (Toronto: University of Toronto Press, 1961) at 6-7.

example [of dominant-group oppression] most fundamental to the constitution of Canadian settler culture is surely the treatment of First Nations people throughout Canadian history."[63] We have Duncan Campbell Scott's poetry to ponder in relation to this coast-to-coast-to-coast-to-coast chronicle of *a priori* crimes.

Turning to the work of E. Pauline Johnson (1861-1913), who also utilized her Mohawk name, Tekahionwake, one encounters the antithesis to Duncan Campbell Scott and the antidote to his pernicious, yet constitutionally astute, views. Whether consciously or unconsciously, Johnson positions herself as the spokeswoman for First Nations versus the British imperial offshoot that is Canada. Johnson's editors, Carole Gerson and Veronica Strong-Boag, reprint an 1890 letter in which Johnson declares one of her literary motives to be "to upset the Indian Extermination and noneducation theory — in fact to stand by my blood and my race,"[64] a statement that reveals her consciousness of — and opposition to — the constitutional thought and stance of men like Duncan Campbell Scott. Even so, Gerson and Strong-Boag opine that Johnson "should be understood as a patriot who regarded the dominion as the rightful heir of a powerful empire. Her ideal Canada and Britain were high-minded and fair-dealing, forming an inclusive international community that valued both Natives and Europeans."[65] In 1903, as Gerson and Strong-Boag divulge, Johnson took a kind of Martin Luther King perspective, appealing to her "pale-face compatriot" and her "dear Red brother" to credit that "White Race and Red are one if they are but Canadian born."[66]

Yes, that was the sentiment, the ideal, the hope. But Johnson's verse, lofty in aspiration though it is, has to keep addressing Machiavellian, malevolent, sadistic statecraft. An early poem, "A Cry from an Indian Wife,"[67] sets down bluntly — if melodramatically — this disjuncture. The speaker in this dramatic monologue is reluctantly seeing her husband off to war against the shock troops enforcing Sir John A. Macdonald's suppression of the 1885 Northwest Rebellion and its desperate sponsors: the Plains First Nations and Métis. Johnson's speaker is clear that her husband, the "Forest Brave" and "Red-skin

63 *Ibid* at 13.

64 Carole Gerson & Veronica Strong-Boag, "Introduction: 'The Firm Handiwork of Will'" in Carole Gerson & Veronica Strong-Boag, eds, *E. Pauline Johnson, Tekahionwake: Collected Poems and Selected Prose* (Toronto: University of Toronto Press, 2002) xiii [Gerson & Strong-Boag, "Introduction"] at xvi.

65 *Ibid* at xviii.

66 *Ibid* at xix.

67 E Pauline Johnson, Tekahionwake, "A Cry from an Indian Wife" in Gerson & Strong-Boag, *supra* note 64, 14 [Johnson, "A Cry from an Indian Wife"].

love" and his allied, "little band"[68] will make war as a "nation" — albeit "our poor nation lying low"[69] — against "the ranks that Canada sends out"[70], "a soldier host."[71]

Here, the Native wife appreciates the august majesty of the Crown, the State that monopolizes military power.[72] Thus, the Indigenous men are not so much in rebellion as they are undertaking a defensive, guerrilla war. Their weapons tell the tale. The wife hands her husband a knife, and he picks up a "tomahawk."[73] But the Métis, Cree, and Assiniboine must brave cavalry, cannon, and machine-gun. They may be nations contesting imperialist Canada, but the latter fields the firepower: Artillery, and even a steamboat, versus the hand-to-hand-combat blades and the face-to-face-combat rifles of the Indigenous opposition. Johnson's speaker is under no illusion that this will be a fair fight: she knows that her husband will be "Endangered by a thousand rifle balls."[74] The native wife describes the Canadian troops as a "stripling pack / Of white-faced warriors, marching West to quell / Our fallen tribe that rises to rebel."[75] The Canuck stormtroopers campaign "from the East / To be our chiefs — to make our nation least / That breathes the air of this vast continent."[76] Their duty is to bring Saskatchewan under the absolute jurisdiction of the Federal government, which was obligated constitutionally to support the interests of the British Empire, which has, globally, been intent on subjugation of all local opposition. (Consider the Indian Rebellion of 1857-58; and the failed attempt to pacify Zulus at Isandlwana, South Africa, in 1879.) Johnson's poem is riven by Du Boisian double-consciousness:[77] The wife urges her husband

68 *Ibid* at 14.
69 *Ibid* at 15.
70 *Ibid*.
71 *Ibid* at 14.
72 *BNA Act*, *supra* note 3, s 91(7).
73 Johnson, "A Cry from an Indian Wife," *supra* note 67 at 15.
74 *Ibid*.
75 *Ibid* at 14.
76 *Ibid*.
77 WE Burghardt Du Bois, *The Souls of Black Folk: Essays and Sketches* (Chicago: AC McLurg & Co, 1903):

> It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness — an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder at 5.

This famous passage formulates "double consciousness." Johnson's similar mentality lets her see herself as simultaneously Mohawk and conservationist of her race, yet also attuned to the British and the Canadian — and the modern.

to "go to war," not "bend to greed of white men's hands," for, "By right, by birth we Indians own these lands"[78], and she imagines that his tomahawk "will drink" the "best blood"[79] of an unlucky, chalk-faced Canuck. She reflects that Canadian governance has brought only "wars and graves," and she bids her husband "strike for liberty and life, / And bring back honour to your Indian wife."[80]

Simultaneously, however, the "Indian wife" commands her spouse, "Revolt not at the Union Jack."[81] (14). Part of her accepts that Canada is the spawn of Britain and that ultimate "Authority" here is "vested in the Queen."[82] Thus, to go to war with Federal emissaries massing "toward the North-West wild" is also to rebel against the Monarch and the Union Jack. The transcendent explanation for this unsettling state of affairs, that First Nations are "starved, crushed, plundered, … low …"[83] is that "Perhaps the white man's God has willed it so."[84] The only way for the Indian wife to both urge her husband into a likely defensive, bloody battle — kamikaze, guerrilla warfare — while, simultaneously, attempting to uphold the sanctity of the British Empire is to consider that this ungodly situation is the doing of a Caucasian deity strictly inimical to Indigenous survival as proud, equal nations. In a sense, Johnson ends up echoing Duncan Campbell Scott's accidental alliance between divine "Power" and the down-and-dirty, secular British in his "Fragment of an Ode to Canada."[85]

Johnson allows a similarly dismal, if patriotic, resolution in her poem, "'Brant,' A Memorial Ode."[86] Herein the speaker accepts the D.C. Scott thesis that Indians are dying out. In the "new era" presently dawning for "Young Canada," the sun will "only shine upon / [Canada's] Indian graves…"[87] Indeed, now "fades the race / That unto Might and therefore Right gives place…"[88] The speaker so celebrates the rise of Canada that the vanquishing — vanishing — of Indigenous people seems cheered on. Yet, no sooner does the speaker endorse Caucasian Canadian settler triumphalism that she pulls back, somewhat, to argue that Canada's "plumes" and "glories" are indebted to "thy Indian son"

78 Johnson, "A Cry from an Indian Wife," *supra* note 67 at 15.
79 *Ibid*.
80 *Ibid* at 14.
81 *Ibid*.
82 *BNA Act*, *supra* note 3, s 9.
83 Johnson, "A Cry from an Indian Wife," *supra* note 67 at 15.
84 *Ibid*.
85 Scott, "Fragment of an Odd to Canada," *supra* note 8.
86 E Pauline Johnson, Tekahionwake, "'Brant,' A Memorial Ode" in Gerson & Strong-Boag, *supra* note 65, 21.
87 *Ibid* at 21.
88 *Ibid*.

and also, specifically, "the Mohawk's [military] arm"[89] as represented by Brant, "who linked his own [name], with Britain's fame"[90] as a Loyalist ally during the American Revolutionary War. Johnson's persona reads Brant's alliance with Britain as a precursor to "common Brotherhood," so that, even if decadent, Indigenous peoples may "love the land where waves the Union Jack," even "though that home [is] no longer ours."[91] Native dispossession and marginalization is salved by the loyalty of "The Six Red Nations" to "their Canada," which is guaranteed by "a woman's hand": Empress Victoria's, which is "firm and strong / Enough to guard us from all fear of wrong."[92]

In her tortuous and torturous effort to praise Brant, rue the dissipation of Indigenous power if not Indigenous presence, recognize Canada as a conqueror, and appeal to fraternal sentiments about British justice, Johnson acts as if she could vomit her cake and eat it too. In a sense, her dissent is her surrender; her Indigenous descent is her resistance. She can be patriotic to the Empire, yet contradictorily elegiac for Indigenous peoples. By taking this double-consciousness approach,[93] Johnson is able to intercede in the White Supremacist, doomed-Native narrative, positing that, though Aboriginal people have been forced to accept white-settler government, a Caucasian-headed Christianity, and an oppressive school system, they are loyal subjects to a Crown that promises justice. If that Imperial, treaty-verified justice was ever realized, then Indigenous people could become full and equal (British) citizens.

One must turn to Johnson's prose to find her most radical defence of racial identity. Her essay, "A Strong Race Opinion: On the Indian Girl in Modern Fiction,"[94] recoils against the cliché — a version of the Tragic Mulatto trope in American literature — that the "book-made Indian"[95] girl always pursues a white boy who spurns her or toys with her; is so enraptured with the cad that she is "treacherous to her own people" and makes herself "detestable and dishonourable;"[96]; is "retiring, reticent, non-committal;"[97]; is always named

89 *Ibid*.
90 *Ibid*.
91 *Ibid*.
92 *Ibid* at 21-22.
93 Johnson notes that a "double motive" compels her verse: To resist genocidal policies, yes, but also to prosper as a writer, a fact which suggests her willingness to cooperate somewhat with British/Canuck imperialism: just enough so as to secure enough fame and fortune to allow her to travel — in style — to The Holy Land, for instance (Gerson & Strong-Boag, "Introduction," *supra* note 64 at xvi).
94 E Pauline Johnson, Tekahionwake, "A Strong Race Opinion: On the Indian Girl in Modern Fiction" in Gerson & Strong-Boag, *supra* note 65, 177 [Johnson, "A Strong Race Opinion"].
95 *Ibid* at 179.
96 *Ibid*.
97 *Ibid*.

"Winona" but is "surnameless;"[98]; is "too unhealthy and too unnatural to live."[99] In fact, these heroines, penned by white authors, are "possessed with a suicidal mania."[100] Johnson scourges these paleface-crafted, "Indian" or Métis female characters as "all fawn eyed, unnatural, unmaidenly idiots,"[101] whose role is to assist foppish white boys to wed and bed white girls, while pining themselves away to the point of becoming skeletons. Johnson rightly rejects this depiction, for it accords too readily with the dominant, Darwinian narrative, extolled by Duncan Scott and others, that Indigenous peoples are moribund, retrograde, and can only persist as a residual strain of Caucasian and Amerindian admixture. One recalls that Scott's "Half-Breed Girl" is tempted to drown herself, rather than live on as a two-faced, racial contradiction.[102]

To refute this constitutional politics of assimilationism and/or cultural genocide and/or "the real thing," Johnson insists that, classically, Indigenous "self-destruction was unheard of."[103] Even now, "suicide is an evil positively unknown among Indians," save for "rare instances where a man crazed by liquor might destroy his own life."[104] One wonders how Johnson would respond to today's abysmal statistics, and how much blame she would place upon Scott's Residential School option or upon the Church-and-Crown collusion in teaching Indigenous peoples that either they or their cultures (civilizations) must disappear. However, if Johnson is too categorical in denying the existence of suicide among "'real live' Indian"[105] girls or people, she rejects this trope that pleasures in the spectacle of Ophelia-esque suicides of "book Indians,"[106] for it vitiates the actual historical narrative wherein "many girls … have placed dainty red feet figuratively upon the white man's neck."[107] Johnson pleads with white writers to realize "the Redman has lost enough, has suffered enough"[108] in reality, in history. They need not endure "additional losses and sorrows being heaped upon him in romance," that is to say, in fiction.[109]

Johnson understands that supposedly innocent tales of love serve pernicious purposes: to accent defeatism, to promote a quiet disappearance of Aboriginal

98 *Ibid*.
99 *Ibid* at 178.
100 *Ibid* at 179.
101 *Ibid* at 182.
102 Scott, "The Half-Breed Girl," *supra* note 43.
103 Johnson, "A Strong Race Opinion," *supra* note 94 at 179.
104 *Ibid*.
105 *Ibid* at 178.
106 *Ibid* at 181.
107 *Ibid* at 183.
108 *Ibid* at 183.
109 *Ibid* at 183.

peoples, either through miscegenation or suicide. Why else, Johnson asks, "should the Indian always get beaten in the battles of romances, or the Indian girl get inevitably the cold shoulder in the wars of love?"[110] Canadian creative writing must take its cue from the structures of the State, the Crown, which recognizes, federally, constitutionally, its military and bureaucratic suzerainty over First Nations' peoples. For our purposes, in our own time, we might even collapse together the military and bureaucratic powers of Canada as mutually intertwined in failing to provide necessities to reserves (clerically) and failing to protect (police-wise) the lives of Indigenous people, particularly girls and women. Seen from this perspective, the Royal Canadian Mounted Police operates in tandem with Indigenous and Northern Affairs — the quasi-military police plus the colonialist bureaucracy — to maintain Canadian regulation of Indigenous peoples as Crown-law mandated. We should interpret E. Pauline Johnson's poetry and prose, especially where she opts for the directly political mode over the indirectly pastoral, as articulating resentment for this constitutional arrangement.[111]

In the same article, "A Strong Race Opinion," Johnson opines that white writers have no excuse for creating such self-homicidal, stock, female Native caricatures, for there were, she notes in 1892, 122,000 Indigenous "souls" in Canada. She argues that white authors could tap "this huge revenue of character" to create well-rounded, "flesh-and-blood" characters.[112] That term *revenue* is not "neutral" for me because it also connects to the constitutional authority of the Federal government to raise "Money by any Mode or System of Taxation."[113] Given its authority over "Indians, and Lands reserved for the Indians,"[114] the Crown derives monetary revenue from this flesh-and-blood "revenue," particularly when it has dealt away lands or resources on those lands to private interests, its own interests, or to non-Indigenous Canadians.

110 *Ibid* at 183.

111 After all, the current (September 2016 debuted), Federal-government-mandated National Inquiry into Missing and Murdered Indigenous Women and Girls may pose a paralyzing collision between the Federal bureaucracy and the Federal — and local — police, who may be understandably reluctant to stand accused of institutional (let's say, "constitutional") racism due to their failures to investigate and prosecute those responsible for homicides against First Nations women. The salient example is the Helen Betty Osborne murder in The Pas, Manitoba, in 1971, which went unprosecuted for some 15 years.

112 Johnson, "A Strong Race Opinion," *supra* note 94 at 178.

113 *BNA Act*, *supra* note 3, s 91(3).

114 *Ibid,* s 91(24).

In a sense, Johnson indicates that the "revenue" of Indigeneity contributes to the profitability, so to speak, of Canadian identity as "sold" in tourist commodities or packaged in the national imaginary. She does herself wonder whether the white Canadian use of Native characters is an attempt "to lend a dash of vivid colouring to an otherwise tame and sombre picture of colonial life."[115] In other words, the revenue — the cultural capital of Indigeneity — helps offset (circa 1892) the apparent deficits — particularly in Anglo-Canadian identity — *vis-à-vis* the more culturally prestigious and globally robust American and British self-projections.[116] The utilization of the cultural capital of Indigeneity is the only certain way that Canadians may demarcate Canada from the United States and Britain, or, for that matter, France and Europe.[117] Thus, Johnson addresses yet one more exploitation of Indigenous peoples by a culturally insecure (English) Canada,[118] and the actual raising of substantial revenue by issuing stamps, postcards, collectibles, souvenir booklets, coins, and paper money inscribed with Indigenous-related images: not to mention the multitude of novels and poems (including Duncan Campbell Scott's) that have exploited the "local-colour" of the so-called Red Indian; also not to mention the cultural industries based on merchandising inukshuks, moccasins, Hudson Bay blankets, soapstone carvings, and even the little, plastic Indian and Inuit dolls.[119] Johnson seeks the creation of characters that indicate the evolution of "individuality ungoverned by nationalisms,"[120] by which she means presumably ethnic or race-based stereotypes.

Yet, Johnson herself got marketed or sold as "a Canadian Boadicea and a Mohawk Princess," say Gerson and Strong-Boag.[121] Her stage costume, in the first part of her public recitals, "was embellished with visible symbols of Native culture, including fur pelts, Iroquois silver medallions, wampum belts, and her father's hunting knife."[122] In the second half of her performances, she would wear "an elegant evening gown," signaling her "hybrid inheritance of Canada

115 Johnson, "A Strong Race Opinion," *supra* note 94 at 183.

116 The Yanks have jazz; the Brits have Shakespeare; and we have Anne of Green Gables.

117 Note that France hosts an Indigenous North American nation, the Mi'kmaw, on its Basque-settled *outre-mer* territory of Saint-Pierre-et-Miquelon.

118 French Canada — Québec, Acadie, etc. — seems far more assured of its "right" to exist and its history and cultural achievements.

119 Recent furors over "cultural appropriation" might be *profitably* read as the constitutional insistence of white Canucks to raise revenue by exploiting "Indians, and Lands reserved for the Indians": *BNA Act, supra* note 3, s 91(24).

120 Johnson, "A Strong Race Opinion," *supra* note 94 at 177.

121 Gerson & Strong-Boag, "Introduction," *supra* note 64 at xvii.

122 *Ibid*.

and the British Empire."[123] No matter: Johnson is herself following the example set by the Crown and Constitution. If the Government of Canada has the right to "raise Money" (revenue) off the backs of Indigenous peoples, why should not Johnson be able to rightly prosper from the public proclamation of her heritage? Also of importance in Johnson's performance of her heritage is that she continues to individually resist the erasure of Indigeneity that national, or tribal, surrender to white Authority otherwise seems to entail. To go further, one may theorize that every non-Indigenous assumption of constitutional or governmental *Authority* is a kind of masquerade, wherein the cultural capital of Indigenous people is used to buttress the legitimacy of the settler-state….

The next poet to consider is Abraham Moses Klein (1909-72), a Jewish-Canadian whose work engages with an aspect of the *BNA Act* that is only implicit. Klein refers to a concept that will only become explicit in the *Constitution Act* of 1982, [124] once the Constitution is patriated from the United Kingdom, with an entrenched Amending formula and The *Canadian Charter of Rights and Freedoms*.[125] I refer here to multiculturalism, which is one of the pillars of a particularly English Canadian identity — alongside the presence of major Francophone populations, the vivacity of Indigenous cultures, and the fetish of cops on studs. It is included in the *Constitution Act* as section 27 of the *Charter*: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This sentence suggests that, while multiculturalism is now inscribed within the Constitution, it has always existed as a "heritage of Canadians."[126] Of course, that multiculturalism has always been a feature of Canada does not mean it has always been accepted as such; nor does it mean that various racialized and ethnic groups have not been suppressed due to their perceived ethnic, racial, or religious difference. It is this actual history of contestation that A.M. Klein's poetry engages, challenging both French Canadian ethnocentrists and English Canadian bigots. Before I read a few of his poems, however, I want to review the *BNA Act*'s presentation of a feeble, yet hierarchical, multiculturalism.

The *British North America Act* was nearly a century old when John Porter revolutionized the study of Canada by establishing in his *The Vertical Mosaic* (1965) that the supposedly classless "Peaceable Kingdom" is actually "a steeply

123 *Ibid*.
124 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
125 *Supra* note 8.
126 *Ibid* at s 27.

hierarchical patchwork of classes and ethnic groups."[127] In the Foreword to the 2015-issued, 50th Anniversary edition of Porter's classic, Wallace Clement and Rick Helmes-Hayes explain that Porter's stratified mosaic is based on individuals and peoples possessing variously valued "heritage" attributes, including "race, ethnicity, immigrant status, language, region, and religion."[128] According to Porter's research of 55 years ago, the dominant group in Canada was, essentially, ABC: Anglican, British, and Caucasian. Canadians belonging to this so-called charter group, or "founding people," (have)[129] dominated business, politics, mass media, universities, law establishment, clergy, and most opinion-forming, legislative-proposing, policy-enacting, justice-enforcing, wealth-accumulating, and taxation/governmental-distributing regimens. They (have) achieved their power and influence through hobnobbing within interlocking networks of law schools, boards of directors, kinship ties, golf and social clubs, and *via* specific religious and ethnic affiliations. Porter also found that "French Canadians" (mainly Québécois) were very secondary — actually second-class — wielders of political authority and cultural influence. According to his sensibility, French Canadians are inhibited by their ascription to Catholicism and classicism as opposed to capitalism and modernism.[130] In Porter's view, most other groups — meaning, mainly, European ethnicities, First Nations, and Asians — are perpetual outsiders, marginal, add-ons, mainly valued, enriched, and empowered insofar as they assimilate into the "Anglo" mainstream norms especially, or accept ethnically-identified occupations. He accounts for this process as such:

> A given ethnic group [such as British Canadians] appropriates particular roles and designates other ethnic groups for the less preferred ones. Often the low status group accepts its inferior position. Through time the relative status positions, reinforced by stereotypes and social images … harden and become perpetuated….[131]

Notably, Porter has little to say about gender — perhaps because 1960s Canada was so entrenched in patriarchy. Asians, too, are similarly invisible in Porter's analysis. He gives them short-shrift as a West Coast-situated minority who built the railway and then were declared unwelcome, and he seems not

127 John Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada*, 50th Anniversary ed (Toronto: University of Toronto Press, 2015) [Porter, *The Vertical Mosaic,* (2015)] at x (Forward by Wallace Clement & Rick Helmes-Hayes).

128 *Ibid* at x.

129 In describing evidently empowered ethnicities, I gesture toward using the present-perfect (or past-perfect) tense, for I doubt that such bastions of privilege and banks of capital have eroded significantly enough to permit un-self-conscious deployment of the past tense.

130 Porter, *The Vertical Mosaic,* (1965), *supra* note 59 at 92-99.

131 *Ibid* at 63.

to know that African-Canadians have a presence that goes back to the era of slavery and of abolition.[132] Despite his analytical shortcomings, however, Porter nonetheless effectively assesses the Canada constructed out of the *BNA Act*, which produced a hierarchical multiculturalism with three major components.

First, the Constitution and governments are modelled on, or are "similar in Principle to that of the United Kingdom,"[133] and executive power is "vested in the Queen."[134] These provisions literally enthrone White Anglo-Saxon Protestant Christianity at the summit of the State. By virtue of this clause alone, white, British-descended Canadians enjoy a privileged status, for that is their *relation* who holds forever the symbolic supreme power as Monarch. Secondly, the Constitution confers distinct recognition upon Catholics and Protestants, to ensure that different Christian denominations may offer schooling congruent with their doctrines, which is the entire concern of section 93. Thirdly, although there is no distinct constitutional recognition of English and French as official languages and as minority languages until 1982, section 133 of the *BNA Act* states expressly that English and French may be used in the Parliament of Canada and in the legislature of Québec and in Canadian and Québécois courts. Fourthly, there is explicit recognition of "Indians" in section 91.24.

Taken together, these provisions (have) had the effect — despite racism and classism — of institutionalizing the multifaceted stance of the state *vis-à-vis* discrete configurations of Canadians: British, French, and First Nations by group; English and French linguistically; white and First Nations "racially"; and Protestant and Catholic in terms of religion. These different recognitions (have) had the effect of legitimizing, as Canadian, the existence of disparate groups, such as, let us say, Francophone Iroquois Catholics versus Anglophone Irish Baptists. Add to these differences the fact of regional variations, and, the different slants of the immigration system, favouring different groups at different times over others, and suddenly, Canada is — *naturally* — a hodgepodge of cultural groups, but all showing very different rates of ascription to either leisure-class or labour-class categories.

I do not argue here that racialized minorities have ever enjoyed anything approximating real equality in the colonial and post-Confederation periods. Indeed, so long as there persists a metaphysical symbiosis between a WASP Monarchy and WASP ascendancy in Canada (with some Gallic/Catholic and

132 *Ibid* at 69.
133 *BNA Act*, *supra* note 3, Preamble.
134 *Ibid,* s 9.

other ethnicities allowed an associate affiliation), so will there be a sense that "the country's two charter groups — the British/English and French" strive still "to preserve their dominant status and influence over Canadian society."[135] They uphold a cultural, political, and economic hegemony dating back to "the French and British colonization of the pre-existing Aboriginal population."[136]

Klein was the major mid-twentieth-century, Canadian poet aware of these disjunctures, partly because he was a lawyer and could see the divide between ideals and realities. But also because he was Jewish, and could perceive the threat, viscerally, of empowered racialism. His *Hitleriad*[137] is a preface to the liberal multiculturalism, cosmopolitanism, of the poems issued in *The Rocking Chair*.[138] Indeed, Klein's critique of the Hitlerian formula, "Blood, Honour, Soil,"[139] attests that, for the Nazis, worship is due "the blood, in Aryans veined, / And in all others, preferably uncontained."[140] Similarly, "as for Soil," there's "a simple ratio: / Nazis above, all others deep below!"[141] Klein appreciates that this racist nationalism (or imperialism) has its local expression too, namely, in the anti-Conscription speeches of Montréal mayor, Camillien Houde. Klein's poem, "Political Meeting," is dedicated, cheekily, to Houde. In the poem, an "Orator," in the speaker's view, plays a jocular "country uncle with sunflower seeds in his pockets,"[142] who then stirs his audience's mood to shift from pleasure to anger, asking, "*Where are your sons*?"[143] The question suggests that "the clever English"[144] are scheming to ask French Canadian men to sacrifice themselves for the sake of British imperialism. In reaction to this insinuation, "The whole street wears one face"[145]: Critical individuality or individual criticality disappears as citizens become a mass animated by a violence-prone emotion. Thus faces, once resembling "flower[s],"[146] now become singular, and this visage is "shadowed and grim."[147]

135 Porter, *The Vertical Mosaic,* (2015), *supra* note 127 at xvii (Introductory Essay by Jack Jedwab & Vic Satzewich).
136 *Ibid*.
137 AM Klein, *The Hitleriad* (New York, NY: New Direction, 1944) [Klein, *The Hitleriad*].
138 AM Klein, *The Rocking Chair and other Poems* (Toronto: Ryerson Press, 1948) [Klein, *The Rocking Chair*].
139 Klein, *The Hitleriad*, *supra* note 137 at 13.
140 *Ibid*.
141 *Ibid* at 14.
142 AM Klein, "Political Meeting" in Klein, *The Rocking Chair, supra* note 138, 15 at 15.
143 *Ibid* at 16.
144 *Ibid*.
145 *Ibid*.
146 *Ibid* at 15.
147 *Ibid* at 16.

Worse, the massed *hoi polloi*, while "the darkness rises," becomes more animalistic, exuding a rank smell that signals an atmosphere of anti-intellectualism, namely, "the body-odour of race."[148] "Political Meeting" domesticates Klein's earlier satirical attack on the Nazi slogan of "Blood, Honour, Soil," in *The Hitleriad*. Instead of Hitlerians worshipping the blood, we witness the Houde-like, Québécois politico hectoring his audience on the basis of shared blood. The "body-odour of race" is augured by the idea that Nazi sloganeering about "Honour" is "modified / By the dear temperature of one's own hide."[149] In both instances, citizens are made equivalent to animals. Similarly, just as "The bearded Hebrew cosmopolitan" becomes a "scapegoat" for the Hitlerites,[150] now the English are the villains in "Political Meeting." In these two related poems, Klein exposes the dangers of ethnocentrism, especially that which enjoys state licence, whether the Nazism of the Third Reich or the municipal and provincial-animated herding or stampeding of anti-Conscription Québécois in that province, whose Francophone majority also perceive of themselves as a "nation."[151] As a religious minority-group member, and as a Jew whose fellows and sisters have not only been persecuted, but have endured outright genocide, Klein rails against ethnocentrism in *The Hitleriad* and warns against it in "Political Meeting." Arguably, he is also exposing and countering the subtle racialism of the *BNA Act* itself, whose preferred Canadians — élite Canadians — are British and French, Caucasian and Christian, European and royalist/imperialist. The reality of this constitutional, hierarchical arrangement of Canadians meant the promulgation of racist and/or anti-Semitic laws.

In his scholarly review of Canadian racist practices and anti-racist mobilization, *"Race," Rights and the Law in the Supreme Court of Canada*, James W. St. G. Walker states that, in 1938, when Nazi Germany "sought advice on the introduction and implementation of racially discriminatory legislation," one of the places "they turned to was Canada."[152] While the Canadian government reacted to the German inquiry with a "not entirely candid" response, emphasizing, "'that the laws of the Dominion and of the provinces do not make

148 *Ibid* at 16.

149 Klein, *The Hitleriad*, *supra* note 137 at 14.

150 *Ibid*.

151 A major proponent of this view was Lionel Groulx, a priest and historian, who, says James Walker, presented "Canadian history as a contest between 'races': on the one side 'a stock that is more princely than any on earth. We are of a divine race, we are the sons of God'; on the other 'barbarians,' aliens, the forces of cosmopolitanism and 'hermaphroditism'": James W St G Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Canada: Osgood Society for Canadian Legal History & Wilfrid Laurier University Press, 1997) at 141.

152 *Ibid* at 23.

the race of a person a factor of legal consequence,'"[153] "race" was "an inherent logic connecting federal and provincial legislation."[154] Under the *BNA Act*, Walker points out, "civil rights were a provincial concern, whereas aliens and naturalization were federal matters."[155] The impact of this division meant that provinces could enact laws "in explicitly racial terms" to apply all those within their jurisdictions; it also meant that the Federal government could apply racist restrictions in "immigration, military service and the franchise," sometimes in response to "regional interests."[156] Thus, Walker confirms, "the BC legislature in 1872 disfranchised Chinese in the province, adding Japanese and East Indians in 1895 and 1907, respectively"; "Saskatchewan followed BC's example and disfranchised Chinese residents in 1908."[157] Saskatchewan also banned the employment of white women by Chinese Canadian men in 1912;[158] Ontario enacted a similar law in 1927.[159] Provincial legislation in Ontario and Nova Scotia, in effect for a century and more, up to the Diefenbaker premierships, urged segregated education for African-Canadian pupils. Walker's history also alerts us that "Residential separation" clauses, intended to restrict Jews, African-Canadians, and Asians to, or away from, particular neighbourhoods were perpetuated by provincial enforcement of "racial[ly] restrictive" covenants.[160] As Walker notes, "In Nova Scotia covenants were most often directed against blacks, in British Columbia against Asians"; in central Canada, Ontario and Québec, "covenants usually specified Jews…"[161]

Given the provincial role in enacting and enforcing racially-tinted laws affecting access to dining, education, employment, entertainment events, housing, and even voting, Klein's decision to celebrate multiculturalism in his fine volume, *The Rocking Chair*, even at the level of blending languages into more-or-less English neologisms, is a lawyerly rebuke to provincialist histories of racism and anti-Semitism. Not only that, but poems in the volume anticipate, not only multiculturalism as a rejection of the ethnocentrism inherent in the *BNA Act* itself, but anticipate an instrument like the *Canadian Charter of Rights and Freedoms* to override and undercut the ethnic biases in the 1867 Constitution. So, Klein foresees the entrenchment of section 27 of the *Charter*, endorsing

153 *Ibid* at 24 (quoting a letter from OD Skelton of External Affairs to the Germans).
154 *Ibid* at 24.
155 *Ibid*.
156 *Ibid*.
157 *Ibid* at 25.
158 *Ibid* at 51.
159 *Ibid* at 114.
160 *Ibid* at 190.
161 *Ibid* at 190.

multiculturalism. Yet, his poems, especially "Montreal," project the mingling of tongues (and thus cultures) that is finally verified and guaranteed by section 22 of the *Charter*, which reads: "Nothing in sections 16 to 20 [guaranteeing the equality of French and English federally and in New Brunswick/Nouveau-Brunswick] abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French." The effect of section 22 is to permit the *continued* use of "non-official" languages in daily life, in broadcast media as well as in print, on street signs and in song, thus promoting a polyphonous, Canuck context for art and culture, as well as in commerce, and, of course, in poetry, which Klein's "Montreal" exemplifies:

> O city metropole, isle riverain!
> Your ancient pavages and sainted routs
> Traverse my spirit's conjured avenues!
> Splendour erablic of your promenades
> Foliates there, and there your maisonry
> Of pendant balcon and escalier'd march,
> Unique midst English habitat,
> Is vivid Normandy![162]

This first stanza of the great poem also indicates that multiculturalism flowers linguistically out of bilingualism. So, the English *city* is modified by the French *métropole*, which is a word used in Parisian French to distinguish Paris from provincial and colonial cities. In other words, Klein is indicating, in 1948, that Montreal is the commercial and cultural (if not outright political) capital of Canada — including English Canada, a fact that he slyly disguises by spelling *métropole* as if it were an English word. Similarly, "riverain" is an English word denoting habitation on a riverbank, but it looks French, and if *rive* is isolated within it, one sees Montreal as a city abutting several riverbanks. The notion of "sainted routs" merits unpacking, for the word suggests both defeats, such as the conquest of Nouvelle-France by the British (or, for that matter, of First Nations by settlers), but also the fact that these defeats are remembered as in the nationalist slogan, "Je me souviens." But "routs" also looks a lot like *routes*, and we soon read of Montreal's maple-treed promenades and its unique architecture of "maisonry" — houses, sometimes of stone (given that the neologism combines *maison* and *masonry*) — that also boast balconies and twisting staircases, all importing aspects of Normandy, into a city that otherwise resembles an Anglo "habitat." The multicultural context of bilingualism is further unfurled in the fourth stanza, where one reads of "multiple / The lexicons

162 AM Klein, "Montreal" in Klein, *The Rocking Chair, supra* note 138, 29 at 29.

uncargo'd at your quays, / Sonnant though strange to me."[163] Even so, of chief import that the speaker cherishes, is the "Joined double-melodied vocabulaire / Where English vocable and roll Ecossic, / Mollified by the parle of French / Bilinguefact your air."[164]

Despite this beautiful love song to Montreal, discord and discrimination are present, as signified by the image of "the Indian, plumed" whose locomotion through the city is clandestine, a fact signalled by the neologism, "furtivate." Indeed, so downpressed is the Indigenous person that he seems a "phantom, aquiline," who must "Genuflect, moccasin'd," ironically, "behind / His statue in the square."[165] This singular image revisits E. Pauline Johnson's suggestion that Indigenous peoples are tapped as cultural capital — "revenue of character" — at the same time that they are relegated to the periphery of citizenship. Klein's image is itself prophetic of the eventual Indigenous rising, *via* protest, unreserved, to become central, pivotal, to the civic and national imaginary. Klein also indicates, well before the anti-racist discourse of African-Canadian poet M. NourbeSe Philip and others, that the celebration of multiculturalism cannot contain or abridge histories of racism, exploitation, marginalization, and toxic oppression. These spectres of the oppressed will continue to haunt our legislatures, theatres, courts, and markets until past wrongs have been… not reconciled, but *corrected*.

Klein's poem, "Indian Reservation: Caughnawaga," proffers a similar point, but far more distressingly.[166] The speaker recalls his romantic childhood fascination with figures that E. Pauline Johnson would describe as "book-made Indians"[167]: "Childhood, that wished me Indian, hoped that / one afterschool I'd leave the classroom chalk, / … to join the clean outdoors and the Iroquois track."[168] There stood waiting, in fantasy, "always … / … that chief, with arms akimbo, waiting / the runaway mascot paddling to his shore."[169] However, the childhood fancy has yielded to adult recognition of the actual degradation of actual, Indigenous peoples:

> With French names …,
> their bronze, like their nobility expunged, —

163 *Ibid* at 30.
164 *Ibid*.
165 *Ibid* at 29.
166 AM Klein, "Indian Reservation: Caughnawaga" in Klein, *The Rocking Chair, supra* note 138, 11 [Klein, "Indian Reservation: Caughnawaga"].
167 Johnson, "A Strong Race Opinion," *supra* note 94 at 179.
168 Klein, "Indian Reservation: Caughnawaga," *supra* note 166 at 11.
169 *Ibid*.

> the men…[;]
> while for the tourist's
> brown pennies scattered at the old church door,
> the ragged papooses jump, and bite the dust.
>
> Their past is sold in a shop ….
>
> This is a grassy ghetto, and no home.[170]

Klein registers the results of dispossession and the usurpation of Indigenous culture and status by Caucasian politicians — a bunch of Grey Owl wannabes — as well as by the tourist-trade exploiters. Duncan Campbell Scott's implicit diatribes against miscegenation are here reformulated by Klein as Métis whose "living bones" are "bleached," while dead white settlers observe this *dégringolade* as "pious prosperous ghosts."[171] Certainly, Klein's portrait of Indigenous degeneration confirms that multiculturalism is no balm for the wrongs that First Nations (or other racialized groups) have endured. There is a hint of this fact in The *Canadian Charter of Rights and Freedoms*, wherein section 25 affirms that Aboriginal rights and freedoms are not nullified by rights and freedoms accorded to all Canadians. Specifically, their protected liberties include "(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." In other words, the rights and freedoms of First Nations are not impinged upon by any privileges or protections offered multicultural-heritage Canadians.

Although Klein is cognizant of the settler crimes that cramp and cripple Indigenous cultures, he seeks still to uphold the liberal discourse of multiculturalism — as an antidote to the *BNA Act*-sanctioned ethnocentrism of Briton and Gaul, Caucasian and Christian. So, "The Provinces" concludes by uniting Prairie Slav, northern "albino,"[172] Ontario Anglo and Francophone Québec, and BC "the hunchback with the poet's face"[173] as picturing "unity / in the family feature, the not unsimilar face."[174] Elsewhere, a Prairie grain elevator occasions the use of Hebrew imagery and "Arabian" fantasy, references to "white Caucasian" rivers and "the grains, Mongolian and crowded," and the grain elevator itself, its contents being essential for bread, comes then to repre-

170 *Ibid* at 11-12.
171 *Ibid* at 12.
172 *Ibid* at 2.
173 *Ibid.*
174 *Ibid* at 3.

sent "all the coloured faces of mankind." [175] Then again, "The Québec Liquor Commission Store" inspires references to "Ali Baba," Aladdin, and Ishmael — a figure both Hebraic and Islamic.[176] Likewise, in "Pawnshop," the business may boast "bankrupt bricabrac," but it is also a Greek-like "parthenon," an Egyptian-like "pyramid," a medieval-styled "cathedral," a "platonic cave," and even "our childhood's house that Jack built."[177] It is a repository of collected and priced woes — familial and financial, personal and pecuniary. But these sorrows transcend biographies and histories, refuting any claim of ultimate, cultural difference. Arguably, the pawn shop evolves, metaphysically, out of the Pandora's Box of household, economic crises.

If Klein extends E.P. Johnson's critique of the *BNA Act*, condemning Anglo and Franco ethnocentrism, provincialist racialism, and oppression of Indigenous peoples, F.R. Scott (1899-1985) represents the final inversion of Duncan Campbell Scott, in poetry, prior to the promulgation of the *Canadian Charter of Rights and Freedoms*. Crucially, Scott's personal struggles with authoritarianism and legislated prejudice in Québec led him, as a professor of constitutional law, to suggest much of the reasoning and language that his intellectual ally and protégé, Prime Minister Pierre Elliott Trudeau, saw transferred later to The *Canadian Charter of Rights and Freedoms*.[178] It's unlikely that F.R. Scott's *Collected Poems*,[179] published in the very year that the *Charter* was drafted, had any presence in the debates that swirled around gender equality, the place of First Nations and Québec, and the necessity of the civil rights-opt-out, "notwithstanding clause."[180] However, it is a fine, poetic coincidence that Scott's ultimate verse collection iterates ideals and opinions that he had hoped would be realized in the patriated Constitution of 1982. Sandra Djwa registers that, as far back as 1948, F.R. Scott had insisted that "a Bill of Rights should be entrenched in [the patriated Constitution] because a mere statute could easily be repealed by the government of the day."[181] Djwa sets down the "intriguing question [as to] the extent to which Scott, through his friendship with Trudeau and other key individuals involved in constitutional reform, and indirectly through the publication of articles…, specifically influenced debates

175 AM Klein, "Grain Elevator" in Klein, *The Rocking Chair, supra* note 138, 7 at 7.
176 AM Klein, "Québec Liquor Commission Store" in Klein, *The Rocking Chair, supra* note 138, 27 at 27.
177 AM Klein, "Pawnshop" in Klein, *The Rocking Chair, supra* note 138, 22 at 22-23.
178 Djwa, *supra* note 2 at 431-432.
179 FR Scott, *The Collected Poems of FR Scott* (Toronto: McClelland and Stewart, 1981).
180 *Charter, supra* note 7, s 33.
181 *Supra* note 2 at 431.

in the seventies."[182] As far as Djwa is concerned, "the historical evidence is persuasive."[183]

In her excellent biography, *The Politics of the Imagination: A Life of F.R. Scott*, Djwa quotes F.R. as once quipping, "politics is the art of making constitutions."[184] Her "Brief Chronology" on Frank Scott also reveals the Constitution to have been, for him, an obsession. Throughout the "1930s," F.R. published "numerous essays" on subjects including "constitutional law [and] civil liberties."[185] In 1940-41, a Guggenheim Fellowship took F.R. to Harvard where he planned to write "[a] book on [the] *BNA* Act."[186] In 1961, after championing civil liberties in two major Supreme Court of Canada-heard cases, F.R. Scott made an "around-the-world trip on [a] Canada Council grant to study the making of constitutions in parliamentary democracies."[187] In 1978, F.R. won the Governor General's Award for Non-Fiction for his *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977). As important as these occasions were for his scholarly/social activist interests, F.R. was also an influential teacher, serving as a constitutional law mentor to Pierre Trudeau, especially during a momentous, 1956 trip they made down the Mackenzie River.[188]

It is striking to realize that the Constitution that Scott wrestled with (namely, the *BNA Act*) was also one that he admired. Djwa observes that Scott "believed, in the widest sense" that the *BNA Act* "defined the form of an independent, just, and socially responsible Canada."[189] A democratic socialist in politics and a conservative modernist in poetry (given his predilection for rhyme), Scott acted on his belief that the *BNA Act*, far from being outmoded, could be reinterpreted and amended to suit modern, Canadian society. Djwa asserts that the main problem with the *BNA Act*, as Scott saw it, "was that Canada needed the approval of the British Parliament to alter the *BNA Act* in ways that would allow moderate social changes."[190] To prime Canadians to accept cogent reinterpretations and amendments, Scott issued a 1934 pamphlet entitled, "Social Reconstruction and the BNA Act."[191] Herein, Scott maintained that a clause

182 *Ibid* at 430.
183 *Ibid*.
184 *Ibid* at 120.
185 *Ibid* at VIII.
186 *Ibid*.
187 *Ibid*.
188 *Ibid* at IX.
189 *Ibid* at 120.
190 *Ibid* at 149.
191 *Ibid*.

granting emergency powers to the Federal government could be reinterpreted to apply even to the economic emergency that was the Great Depression.[192] Djwa's scholarship establishes that Conservative Prime Minister R.B. Bennett "borrowed Scott's pamphlet from the library in External Affairs, [and] did not return it, and Scott's arguments soon appeared in Bennett's text of his [1935] New Deal."[193] Further on in his career as a law-based, social activist and legal scholar, Scott "introduced to Canadian constitutional law," writes Djwa, "a concept based less on technicalities than on the history of British government and parliamentary democracy."[194] Djwa continues on to explain that, while most Canadian constitutional law pedagogy centered on the division of powers (*BNA Act,* sections 91 and 92), Scott elaborated a continuity between "the theory of the British constitution — the narrow escape from an absolute monarchy and the evolution of the English practice in Parliament and responsible government."[195]

By this approach, and thanks to his grounding in "both English Common Law and the Québec Civil Code,"[196] Scott was able to infer or detect in the *BNA Act* restraints on governmental authority *vis-à-vis* the individual citizen: in other words, the presence of guaranteed civil liberties, though never expressly stated. However, as an Anglo-Québecer socialist who believed that a strong, central government was preferable to a "balkanized" Confederation, Scott was sideswiped and sidelined by *La Révolution tranquille*, wherein progressive, Québec nationalists insisted that a wholesale transfer of powers from Ottawa to Québec City was the only way to ensure Québec's modern development within Confederation.[197] Djwa alerts us to the fact that "Scott was well aware of the grievances of Québecers, but his solution was based on British political traditions, especially those relating to civil liberties."[198] This put Scott on a collision course with Québécois who believed that their province-as-nation required greater autonomy, while Scott interpreted the possibility of enhanced, French-majority autonomy as an existential threat to Anglo-Québecers' minority language rights.[199] Although Scott celebrated the patriation of the Constitution in 1982, he deplored both the presence of the *Charter*'s "notwithstanding

192 *Ibid*.
193 *Ibid* at 150.
194 *Ibid* at 316.
195 *Ibid* at 316-17.
196 *Ibid* at 317.
197 *Ibid* at 402-03.
198 *Ibid* at 396.
199 *Ibid* at 397.

clause"[200] and also the April 17, 1982, Parliament Hill signing ceremony itself which utilized no English names.[201]

Djwa recognizes that, when Scott faced political stresses, he "turned back to his old love — poetry."[202] In my view, Scott was always a poet, but one of a Confucian bent; that is to say, he was interested in the connections between government and creativity — citizenship and art. Crucially, he is a poet who does issue direct constitutional critique. See, for instance, "Some Privy Counsel."[203] The context of this 1950 poem seems to be the Depression-era insistence of the Judicial Committee of the British Privy Council to rule Government of Canada remedial legislation — such as The *Employment and Social Insurance Act* — as "*ultra vires*" or outside the constitutional authority of the Federal government. According to the British Privy Council, these Government of Canada measures to provide relief to the poor, the unemployed, the exploited, and the elderly conflicted with imperial treaties and/or "provincial jurisdiction over 'property and civil rights'."[204] Frustratingly, the Government of Canada, elected by the people to serve their needs, could not do so because of imperial British legal interference. As a socialist and patriot, Francis Reginald Scott could only read these nullifying judgements as cold-hearted, capitalist brutalism. "Some Privy Counsel" is an autobiographical restatement of Scott's arguments to the Brits and their insistent plumping for do-nothingism:

> Are we not surrounded by emergencies?
> The rent of a house, the cost of food, pensions and health, the unemployed [….]"
> But the only answer was "Property and Civil Rights" [….]
> "Please, please," I entreated, "look at my problem….
> Can provincial fractions govern the complex whole? [….]"[205]

The stymying of progressive, economic, and popular, democratic action, due to imperial, legal obstructionism, and the resulting frustration, would be enough to prompt revolutionary disturbance. I am reminded of Pierre Elliott Trudeau's Lockean formulation, perhaps derived from F.R.'s experience, that "Society is made for man; if it serves him badly he is entitled to overthrow it."[206] Clearly, something had to be done to rid Canada of the colonial subservience to British

200 *Supra* note 7, s 33.
201 Djwa, *supra* note 2 at 436. Scott somehow ignored The Queen's signature - yet hers is the #1 English name!
202 *Ibid* at 437.
203 See e.g. FR Scott, "Some Privy Counsel" in FR Scott, *The Collected Poems, supra* note 179, 80.
204 Djwa, *supra* note 2 at 151.
205 *Supra* note 203 at 80.
206 Pierre Elliott Trudeau, *Approaches to Politics* (Toronto: Oxford University Press, 2010) at 34.

— i.e., foreign — interference in our domestic politics. Otherwise, Canadian voters could not ever effect change domestically, thus rendering our democracy a sham. This poem iterates the need for patriation of the Constitution and the entrenchment of the Charter as a liberal, constitutional answer to the limits of the *BNA Act* and its overseas interpretation. No wonder, then, that when the Trudeau Liberal-dominated Government of Canada requested that the Parliament of the United Kingdom pass The *Canada Act 1982* the preamble makes two political assertions:

> … WHEREAS it is in accord with the status of Canada as an independent state that Canada be able to amend their Constitution in Canada in all respects;
>
> AND WHEREAS it is also desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to that Constitution….[207]

There is the shade of Scott here, protesting the imperial domination of Canada's "colonial" institutions, as well as the overseas, conservative nullification of Canadian, domestic legislation. This point is also expressed in "Ode to a Politician," wherein a Canuck colonial "learns the three Canadian things: / Obedience, Loyalty, and Love of Kings,"[208] then progresses to helm the nation as a Tory prime minister. "Once in the [P.M.] saddle, swift the whip he cracks. / The Mounties spring like thistles in his tracks."[209] Ultimately, his Fanonian, comprador status is made clear: "He ends the [career] journey — as a British peer."[210]

Although F.R. Scott came to see the need to update the *BNA Act* by bringing it home to Canada, and by entrenching civil liberties, he never abandoned its view that Canada is the home of two European "races" — French and English[211] — though he was also anti-racist in considering the treatment of multicultural others and Indigenous peoples. His famous critique of E.J. Pratt's epic poem, *Toward the Last Spike* (1952), entitled, "All the Spikes but the Last," reminds "Ned" Pratt and his readership of the poet's unconscionable omission of the Chinese labourers who actually constructed the national railway:

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207 *Canada Act 1982* (UK), 1982, c 11. Preamble.

208 FR Scott, "Ode to a Politician" in FR Scott, *The Collected Poems, supra* note 179, 68 at 68.

209 *Ibid* at 69.

210 *Ibid* at 70.

211 Thus, F.R. was pissed off when Prime Minister P.E. Trudeau's public, signing ceremony for the patriated Constitution, included "no *English* names": Scott was "indignant at the omission of his own racial past" (Djwa, *supra* note 2 at 436). I note again that The Queen's is a pretty significant English name on the document.

> Where are the coolies in your poem, Ned?
> Where are the thousands from China who swung their picks with bare hands
> at forty below? [….]
>
> Did they get one of the 25,000,000 CPR acres?[212]

The poem concludes wickedly: "Is all Canada has to say to them written in the Chinese Immigration Act?"[213] Scott thus registers the capitalist and racist exploitation of Chinese Canadian labour, and then the racist attempt to exclude Chinese people as potential immigrants to Canada.[214] All of these ills were possible under the *BNA Act*, due to its erection of a clear, yet subtle, racial hierarchy.

Scott's 1956 poem, "Fort Smith," revisits the *BNA Act*'s section 91 *de facto* hierarchy ranking Caucasian civil servants above "Indians." On a visit to the Northwest Territories village (which became a town in 1966), Scott's speaker observes the Canadian imperial-Indigenous colonial arrangement of the settlement:

> We drove on sandy streets.
> No names yet, except "Axe-handle Road."
> There was the "native quarter,"
> Shacks at every angle
> For Slave Indians and half-breeds,
> And overlooking the [Mackenzie] river
> The trim houses of the civil servants
> With little lawns and gardens
> And tents for children to play Indian in.[215]

This portrait ventures beyond A.M. Klein's account of Indigenous degradation as a socio-political blot on an otherwise positive multiculturalism, to picture, instead, the placid, polite, bourgeois rule of pale faced bureaucrats over impoverished Indigenous peoples and Métis.[216] A more explicit poem of anti-racist

212 FR Scott, "All the Spikes but the Last" in FR Scott, *The Collected Poems, supra* note 179, 194 at 194.

213 *Ibid*.

214 See Walker, *supra* note 151 at 27.

215 FR Scott, "Fort Smith" in FR Scott, *The Collected Poems, supra* note 179, 226 at 226-27.

216 *Ibid* at 227 (intriguingly, the poem ends with an image of "Pierre" — Trudeau — "Stripped," amid rapids, "Firming his feet against rock / Standing white, in white water…, / A man testing his strength / Against the strength of his country" at 227). Scott echoes here the last stanza of A.J.M. Smith's 1926 poem, "The Lonely Land," (The Fortnighly Reivew) which envisions, in the landscape, "the beauty / of strength / broken by strength / and still strong" at 428. More importantly, it gives Trudeau the stance of a racialized-French-"white" Colossus, an individual Apollo, among the racialized "superstitious" (says the Anglican minister), Indigenous inhabitants of "Canada's colony" (*Ibid* at 226-227).

protest is, in fact, a found poem, taken "From inscriptions found in different rooms at the Indians of Canada Pavilion, EXPO '67."[217] The poem, entitled, "The Indians Speak at Expo '67," makes the point that the first Europeans — "the White Man" — to land in Canada depended upon "Indian" assistance for survival: "They could not have lived / Or moved / Without Indian friends."[218] However, with the intrusion upon Indigenous peoples of Christianity — and/or their acceptance of the alien faith, plus "White Men [fighting] each other for our land" and the embroiling of Aboriginal peoples in "the White Man's wars,"[219] there came this hellish outcome: "The wars ended in treaties / And our lands / Passed into the White Man's hands."[220] Scott's found poem is an iteration of the protest voiced in E. Pauline Johnson's "The Cry of the Indian Wife," save that Scott feels no need to mouth Loyalist bromides to the British Empire. Pointedly, this re-arrangement of "Indian"-writ critique highlights "race" as the salient reason for Native dispossession, with cries of "paganism" and "savagery" serving as mere rationalizations for the self-serving, European exploitation of "Indians, and Lands reserved for the Indians."[221] Similarly, in Scott's critique of E.J. Pratt's other epic poem, namely, *Brébeuf and His Brethren*,[222] F.R. stresses that whatever horrors Iroquois visited upon French missionaries to Nouvelle-France, the Catholic Church was just as nasty toward supposed "heretics" in Europe. Scott's persona asks, "is priest savage, or Red Indian priest?"[223] The poem eviscerates the Caucasian, European propaganda versus Indigenous Canadians.

Scott's efforts to reach out to Francophones, especially Québécois (his constitutional, European brethren and sistren) did bear fruit, given his tutelage of Pierre Trudeau and his numerous translations of Francophone poetry into English.[224] Yet, Djwa alerts us that F.R. was unhappy that patriation was achieved without "an English-Canadian name on the official document recording the event."[225] I think this resentment stems from Scott's ultimate sense that the British/Canadian monarchy was worthwhile, despite his own cogent critiques of the institution. Thus, in his 1953 poem, "Monarchy," he expresses

217 FR Scott, "The Indians Speak at the Expo '67" in FR Scott, *The Collected Poems, supra* note 179, 277 at 277 n 1.
218 *Ibid* at 277.
219 *Ibid*.
220 *Ibid*.
221 *BNA Act*, *supra* note 3, s 91(24).
222 EJ Pratt, *Brébeuf and his Brethren* (Toronto: The Macmillan Company of Canada, 1940).
223 FR Scott, "Brébeuf and his Brethren" in FR Scott, *The Collected Poems, supra* note 179, 189 at 189.
224 Djwa notes that F.R. published two books of his English translations of French-Canadian poetry in 1962 and 1977: *supra* note 2 at VIII-IX.
225 *Ibid* at 436 citing FRS to Rosemary Walters (Cartwright), letter, 30 October 1982.

this ambivalence. The two-stanza poem dedicates the first stanza to questioning the value of a monarchy, "all the makebelieve around [it] thrown," and wonders about the value of "our bonnie Prince" whom "we raise / Over all equals."[226] However, the next and last stanza eyes the throne as the single unifier of "plural … multitudes."[227] From this perspective, the Canadian "Crown is round and without end or start / As each is universe though only part."[228] Finally, the English-Canadian, Anglo-Québécois, social democrat, anti-imperialist, anti-racist, anti-censorship, pro-civil-rights agitator ends up rallying to the Anglocentric pinnacle of the Canadian Constitution: The British — or, let's say, Canadian — Monarchy. In the end, then, ethnicity trumps reason, even for that arch-rationalist, Dr. Scott. This fact also signals, for me, the bankruptcy of the pretense that the Monarch — Anglo-Saxon, Anglican, Caucasian — is the embodiment of all Canadian citizens, especially if we register the historical practice of racist oppression conducted by the State — in the very excellent name of the Crown.

To move toward a conclusion, I hope I have demonstrated that the notion that the political structures of the State are meaningless Jabberwocky for the artist, the poet, whose inspirations are allegedly other-worldly (or magic-thinking or dream), is, in actuality, a ridiculous myth. Even the abstract entity that is a constitution is, simultaneously, the fount of the socio-political, economic, legal, and even cultural manifestations of the people, both for good and ill. As such, a constitution serves to sponsor modes or models of citizenship, including varieties of allegiance and protest. So, the American Constitution yields Walt Whitman and the Canadian gives us John McCrae.[229] I posit that the poems of Duncan Campbell Scott, Elizabeth Pauline Johnson, Abraham Moses Klein, and Francis Reginald Scott are, themselves, commentaries on the racial, linguistic, and gendered underpinnings of the Canadian Crown and State, despite the refusal of 75% of this quartet to ever name the *BNA Act* as a subtle intercourse with their intellects. Moreover, I want to suggest that most Canadian poets can be read productively, with our Constitution — including the Charter — as a touchstone. See, for instance, most pertinently, Dennis Lee and his *Civil Elegies*.[230]

226 FR Scott, "Monarchy" in FR Scott, *The Collected Poems, supra* note 1179, 177 at 177.
227 *Ibid*.
228 *Ibid*.
229 *Leaves of Grass* (Auckland, New Zealand: Floating Press, 1855) versus the poppies of "In Flanders Fields" in *In Flanders Fields, and Other Poems* (Toronto: Ryerson Press, 1920).
230 Dennis Lee, *Civil Elegies and Other Poems* (Toronto: Anansi 1972).

Nor is the struggle for a proper Constitution concluded. By that, I mean, the search for one that will promote equality as much as "justice." The single, but great, impediment is exactly what Porter saw 50 years ago: "elites feel that systems should operate as they, the present elite, have operated them. They see themselves as the guardians of institutional systems."[231] Moreover, Porter avers, "Canada is a capitalist oriented society. All its elite groups accept the capitalist rules of the game."[232] Their power and class privilege is affirmed by several estates, especially lawyers,[233] private school networks,[234] upper-class-congregation churches,[235] engineering schools,[236] and, of course, boards of directors, whether of corporations, universities, or charities, not to mention the more-or-less shared, cordial competition permitted in both politics and sports. In mass media, the punditocracy consists of the same related networks of "humanists, historians, economists,"[237] and columnists, editorialists, and talking heads, who offer prognostications as well as insights into "the values of tradition or rational expediency, and thus [produce] … conventional wisdom, a catalogue of the correct things to do."[238] Our governing, managerial class consists of "lawyers and businessmen with university degrees."[239]

Well, section 91 of the BNA Act bade Parliament famously to "make Laws for the Peace, Order, and good Government of Canada." I close by suggesting that this is unlikely unless Porter's vertical mosaic becomes a horizontal, warm, cozy, patchwork quilt clasping all of our constitutive identities, all of them accepted as "Canadian," and all of our legislation provably attentive to this fact. However, it is the poets who champion the enactment of such a revolution.

231 Porter, *The Vertical Mosaic,* (1965), *supra* note 59 at 265.
232 *Ibid* at 270.
233 *Ibid* at 278.
234 *Ibid* at 285.
235 *Ibid* at 288.
236 *Ibid* at 304.
237 *Ibid* at 461.
238 *Ibid* at 461.
239 *Ibid* at 396.

Appendix: *The Results of a Sesquicentennial Constitutional Assembly — a Few Modest Amendments*

As Canada's 7th Parliamentary Poet Laureate (1/1/2016-31/12/2017), I never accepted Plato's notion that poets should not be entrusted with any say over statecraft. Nor have I ever been satisfied with Percy Shelley's idea that poets are "unacknowledged legislators." What if we could be "acknowledged," eh?

Being a poet who has — to quote Shakespeare's Othello, "done the State some service," I want now to provoke some thought about what might yet be done to improve the Constitution.

In my role as a visiting Artist-in-Residence in November 2017 at the Peter Wall Institute for Advanced Studies (PWIAS) at the University of British Columbia (UBC), I was privileged to convene a "Constitutional Assembly," attended by approximately 20 UBC professors and students from Anthropology, Creative Writing, English, Environmental Sciences, and Law.

I got tasked with typing up the recommendations. (Admittedly, the most whimsical notions are my own.)

They demonstrate that matters are not settled! There is work to be done to flesh out the promise of 1982's patriation.

Bearing in mind that the PWIAS and UBC cannot accept either responsibility or credit for the ideas put forward, it remains my duty to report that the Constitutional Assembly produced the following amendments.

On Indigeneity

- Recognize Indigeneity as the fundamental characteristic of Canada and interpret the Constitution in this light.
- Relocate sovereignty to a plurality of legal representations — in a plurinational state — inspired by Indigenous peoples and cultures.
- Recognize Indigenous languages as official languages.
- Add a fourth-level of government that acknowledges Indigenous self-government and self-determination.

- Dedicate 1% of all taxes collected to Indigenous peoples/First Nations as a perpetual "rent."
- Transfer underlined title from the Crown to Indigenous trusteehood and stewardship and guardianship, according to Indigenous conceptions of citizen relationships to the land.
- Recognize Indigenous autonomy in regards to managing traditional and ancestral lands.
- Incorporate into the public education system the promotion of Indigenous mind-sets and ideologies.
- The Government of Canada must negotiate in good faith with Indigenous peoples, the administration of the National Capital Region.

On "Good"-to-Better Governance

- Enshrine Proportional Representation as our electoral system.
- Designate major municipalities — of plus-500,000 population — as city-states, empowered to collect revenues and exercise autonomy over deployment of said resources.
- Devolve — with adequate funding — greater authority to municipalities.
- To ensure participatory democracy and supplementary, deliberative democracy, mandate greater use of referenda; plus, make voting mandatory.
- Abolish the Monarchy.
- Domesticate the Monarchy, by allowing the appointment of a new Royal Canadian Family, every decade, chosen by a lottery available to every adult citizen, save those who have criminal records or who have been hospitalized due to mental illness.
- Ban omnibus bills as unconstitutional (for they tend to decrease parliamentary oversight).
- Ban fixed election dates as unconstitutional (for they tend to increase the role of capital in influencing policy).
- Create a Constitutional Court for Canada.
- Establish an Independent Public Prosecutor.

On the Environment

- Create a Canadian Charter of Environmental Rights and Responsibilities.
- Recognize the fundamental right to live in a healthy and sustainable environment.
- Include the "Rights of Nature" — to preserve, protect, and restore Nature's beauty, diversity, and integrity.
- Protect — from "development" — at least half of Canada's terrestrial and marine area.
- Establish an Office of the Public Advocate charged with preservation of the environment, ecosystem, and natural resources, to report annually to Parliament, and derive its funding from a 20% tax on all resource extraction activities in Canada.
- Provinces shall ensure that both public and private primary and secondary education programs dedicate at least 5% of class time to the study of environmental preservation.
- Public education curricula must foster positive relationships between citizens and Nature, with an emphasis on the morality of the inclusion of Nature in civil society.
- Abolish capitalism.

On New Charter Rights

- Enshrine a right to health care (including publicly funded dental, vision, prescription drugs [including marijuana], family planning, and fertility treatments).
- Recognize the right to clean water as a human right.
- Recognize a right to public transportation.
- Recognize a right to public control of broadcasting.

On Multiculturalism

- To break down or dissolve fiefdoms of privilege, legislate more affirmative action and/or employment equity programs targeting "visible minorities."

- Instruct political parties to offer diverse lists of potential candidates, truly reflective of the diversity of the Canadian people.
- Recognize "third-languages" as official where numbers warrant; recognize Canada as a multilingual nation.

On Foreign Affairs

- Identify Canada as a pacifist, demilitarized nation.
- Amend Section 146 to allow for the admission of new provinces, including territories not presently part of the territorial limits of Canada.
- Invest powers over declaration of war or negotiation of peace with the prime minister, subject to parliamentary oversight.

On Poetics

- Establish a Ministry of Dreams that will guarantee every Canadian the right to access, experience, and enjoy creativity (including inventive engineering), aesthetics, and the arts.
- Commit all governments to preserve, promote, and support the creativity and innovative capacity of Canadians.

The Story of Constitutions, Constitutionalism and Reconciliation: A Work of Prose? Poetry? Or Both?

*Jean Leclair**

A great variety of normative conceptions of constitutionalism have been proposed in order to mend Canada's broken relationship with Turtle Island's Indigenous peoples. Many are rooted in deeply aspirational perspectives orbiting around the idea of a dialogic democracy according to which, if we could collectively construct a new vocabulary and a more embracing kind of shared understanding, a non-imperialist form of constitutionalism would eventually blossom. I call this poetic constitutionalism. Some dismiss such normative approaches by claiming a more realist conception of constitutionalism. They argue that, if looked at from a bottom-up perspective, rather than the top-down perspective of normativists, constitutionalism as a form of government has only allowed for legally limited government when and where it served the dominant political elites. I call this prosaic constitutionalism. My claim is that both the poets and the prosaists are partly right. I argue that, although fragile and reversible, a form of imperfect, diffuse and reflexive constitutionalism has grown out of Canada's non-Indigenous constitutional tradition. One that, under certain circumstances and conditions, has the potential for helping Indigenous peoples obtain greater self-governing powers than our constitutional structure now allows.

Un grand nombre de conceptions normatives du constitutionnalisme ont été proposées afin de réparer les relations entre le Canada et les peuples autochtones qui le composent. Plusieurs d'entre elles sont enracinées dans des perspectives ambitieuses gravitant autour de l'idée d'une démocratie dialogique qui, si seulement nous pouvions construire collectivement un vocabulaire plus inclusif fondé sur une compréhension plus partagée, pourrait donner naissance à une forme non impérialiste de constitutionnalisme. L'auteur appelle cette approche le « constitutionnalisme poétique ». Certains écartent ces approches normatives en revendiquant une conception plus réaliste du constitutionnalisme. Ils soutiennent que, si on le considère d'un point de vue empirique, plutôt que du point de vue des normativistes, le constitutionnalisme, entendu comme une forme de gouvernement limité, n'a historiquement vu le jour que là où il fut mis au service des élites politiques dominantes. L'auteur appelle cette approche le « constitutionnalisme prosaïque ». Il soutient que les poètes, tout comme les prosateurs, ont raison en partie. Il est d'avis que la tradition constitutionnelle non autochtone canadienne a donné le jour à une forme de constitutionnalisme imparfaite, diffuse et réflexive. Une forme de constitutionnalisme qui, bien que fragile et réversible, pourrait, dans certaines circonstances et conditions, aider les peuples autochtones à obtenir davantage d'autonomie que ne le prévoit actuellement notre structure constitutionnelle.

* Jean Leclair, Professor, Faculté de droit, Université de Montréal. Keynote address delivered at the *Reconciliation:* Wahkohtowin *Conference* organized by the Centre for Constitutional Studies & the Faculties of Law and Native Studies, University of Alberta, Edmonton, September 21-23, 2017. I wish to thank Michel Morin, John Borrows, Daniel Jutras, Johanne Poirier, Hugo Tremblay and Elizabeth Steyn for their comments on an earlier version of this paper. All errors are mine.

Reconciliation is a profoundly political matter; politics has to do with power and so does true reconciliation. First, reconciliation relates to the constitution of power. In the famous words of Harold Lasswell: "Who gets what, when, and how?"[1] Second, inasmuch as reconciliation is generally associated with claims for greater participation in a State's political arrangements or for greater autonomy within the State, it raises the question of how the power of dominant social and political elites can be limited.[2]

These are precisely the questions that constitutions and constitutionalism have been designed to address. The study of constitutions and constitutionalism (i.e., the business of constituting and limiting power) has a very long history.[3] In the non-Indigenous universe, however, constitutionalism, understood as legally limited government, is the rather recent by-product of the historical evolution of (some) polities.

A great variety of normative conceptions of constitutionalism have been proposed in order to mend Canada's broken relationship with Turtle Island's Indigenous peoples. These normative conceptions of constitutionalism form the cornerstone of reconciliation. Many are rooted in deeply aspirational perspectives orbiting around the idea of a dialogic democracy according to which, if we could collectively construct a new vocabulary and a more embracing kind of shared understanding, a non-imperialist form of constitutionalism would eventually blossom.[4] I call this constitutional idealism or poetic constitutionalism, because it is not so much concerned with constitutionalism and democracy as *forms of government* (i.e., as a means of organizing power), as it is with constitutionalism and democracy as *values*[5] (i.e., broadly speaking, their relation to the Good).[6]

1 Harold Lasswell, *Politics: Who Gets What, When, and How* (Cleveland: Meridian, 1958).

2 For the purpose of this discussion, I will confine myself to an examination of constitutions and constitutionalism in the context of liberal-democratic States, it being understood that even authoritarian regimes have constitutions and that some do find it expedient, in particular circumstances, to limit their own power in minimal ways.

3 For a classic study, see Charles H McIlwain, *Constitutionalism*: *Ancient and Modern* (Ithaca, NY: Cornell University Press, 1947).

4 The most famous example of such an approach is James Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

5 I borrow this distinction between constitutionalism as a mode of government and as a value from John Dunn, who applied it to democracy in *Setting the People Free: The Story of Democracy* (London: Atlantic Books, 2005) at 173.

6 There is plenty to admire in James Tully's book. However, since constitutionalism is about limiting power, one is struck by the lack of discussion about how the elites' capacity to broadcast power over people and territory radically transformed itself over time. In other words, while much is said about the different normative discourses relating to the setting-up and the limitation of power, next to nothing is mentioned about the practical dimension of constitutionalism, i.e., how, in very

Some dismiss such normative approaches by asserting a more "realist" conception of constitutionalism. They argue that, if looked at from a bottom-up perspective, rather than the top-down perspective of normativists, constitutionalism as a form of government has only allowed for legally limited government when and where it served the dominant political elites[7] (I use the word in a neutral manner as opposed to a praising one). I call this constitutional realism or prosaic constitutionalism, because it generally explains the advent of legally limited government (constitutionalism), as the product of compromise measures, *unsupported by aspirational principles*, adopted by dominant political elites in order to reinforce, rather than limit, their own power.

My claim is that both the poets and the prosaists are partly right. In what follows, I will argue that a form of imperfect, diffuse and reflexive constitutionalism, however fragile and reversible, has grown out of Canada's non-Indigenous constitutional tradition. Under certain circumstances and conditions, this reflexive constitutionalism has the potential of helping Indigenous peoples obtain greater self-governing powers than our constitutional structure currently allows for.

I refer to Canada's non-Indigenous constitutional tradition, because, as I will endeavour to demonstrate, I agree with the realists when they imply that, if

concrete terms, individuals and communities succeeded in taming brute power over the course of time. Reading Tully, I can't help recalling Charles H McIlwain's comment (*supra* note 3 at 93): "Looking backward at this struggle [between the legal rights of the subject and the arbitrary will of the prince] one is amazed by its desperate character, the slowness and the lateness of the victory of law over will, the tremendous cost in blood and treasure, and the constitutional revolution required to incorporate the final results in the fabric of modern constitutionalism." Furthermore, there is, again, much to be said about Tully's understanding of constitutionalism as based on on-going forms of intercultural dialogues, where citizens "are always willing to listen to the voices of doubt and dissent within and reconsider their present arrangement, just as *The spirit of Haida Gwaii* asks us to listen to the voices of cultural dissent around the world": Tully, *supra* note 4 at 27. Nonetheless, to paraphrase Chantal Mouffe, if one wishes to study constitutionalism, one should "acknowledg[e] [at least minimally] the ambivalent character of human sociability and the fact that reciprocity and hostility cannot be dissociated": Chantal Mouffe, *On the Political* (London: Routledge, 2005) at 3. And finally, it would have been interesting to learn more about the conditions under which we can stop dialoguing and ultimately make a decision. Constitutions and constitutionalism are certainly about dialogue, but they are also concerned with decision-making, and decisions, as well underlined by Jeremy Webber, are always made against a background of disagreement: "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 at 195; see also Jean Leclair, "Nanabush, Lon Fuller and Historical Treaties: The Potentialities and Limits of Adjudication" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 325.

7 See for instance, Stephen Holmes, "Constitutions and Constitutionalism" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 189.

reconciliation is to happen, it will have to happen within the larger realm of the dominant Western-based notion of constitutionalism. As beautiful as it might be, Indigenous constitutionalism will not, in and of itself, by the simple force of its appeal, transform the dominant understanding of constitutionalism.[8]

However, I believe that the realists downplay the importance of normative discourses in the mobilization of the political forces that have slowly, painfully, and not yet completely, pried open the realm of the dominant political elites. And, as I will argue, normative discourses mobilized nowadays in the quest for reconciliation and greater autonomy for Indigenous polities can certainly themselves be influenced by Indigenous normative understandings that would benefit us all.

What I assert, in short, is that our understanding of constitutionalism must conjugate, rather than separate, constitutionalism both as a value and as a form of government. When thinking in terms of values, the questions arise: what is constitutionalism from the point of view of the ethical and the desirable? In what way is it related to ideas of democracy, liberty and equality, or to Indigenous ideas of consensus and interrelatedness? When considering constitutionalism as a form of government, we might also ask: how did legally limited government historically come to be within both Indigenous and non-Indigenous polities? How is it operationalized and institutionalized in this messy world of ours where power is unevenly distributed?

To lay the groundwork for my argument, I must describe some of the basic premises of Western-based constitutionalism. Some of these premises are irreconcilable with many Indigenous constitutional tenets based on the idea that, in pre-colonial times, authority was "diffuse and persuasive, not centralized and coercive."[9] In other words, power understood as the capacity to make others act against their personal interests appears to have been unknown in pre-Columbian times; consensus-seeking and the willing deference of the people were, it is argued, the sole foundational pillars of authority.[10]

8 For an eloquent examination of Anishinaabe "rooted constitutionalism", see Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847. See also John Borrows, *Canada's Indigenous Constitution* (Toronto: Toronto University Press, 2010); and John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: Toronto University Press, 2016).

9 Mills, *ibid* at 851, n 7.

10 Such might have been true in small, face-to-face societies where individual survival was dependent on strong family ties and willing deference to communal authority, but what of modern contexts where greater numbers of people (including Indigenous people) that do not know one another as intimately as before are involved? Is seeking the consensus of all still possible? And if not, isn't the recourse to some form of representation inevitable? And if consensus-seeking is applicable among these representatives of the people, is it synonymous with a truly consensual decision-making pro-

The constitutionalism of which I will speak is not strictly understood as limited government through dialogue and consensus, but rather as the pursuit of limited government in contexts where consensus is precisely not always possible or is simply unattainable.

Contemporary Western-based constitutionalism is premised on five key ideas: 1) individuals certainly have the potential to be good, but, as James Madison puts it: "[…] there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust."[11] 2) Power within large polities has always been, is always, and will always be unequally divided. 3) Because of radical transformations of the social and political orders during the 17th and 18th centuries, the State's legitimacy is no longer thought to be derived from a transcendental or traditional source, but from the immanent power of the people.[12] However, in large polities, democracy does not mean that power is exercised by the people; rather, it refers very generally, in the words of philosopher Tom Christiano, "to a method of group decision-making characterized by a kind of equality among the participants at an essential stage of the collective decision-making";[13] and that is so because 4) power, in large polities, has always been, is always, and will always be exercised by the few and not the

cess or with the recognition of every representative's right to express him or herself before a majority decision is taken? Discussing the "consensus style" parliamentary government of the Government of Nunavut in "Traditional Aboriginal Values in a Westminster Parliament: The Legislative Assembly of Nunavut" (2006) 12:1 J Legislative Studies 8 at 21, Graham White provides a good example of what consensus might mean in a contemporary environment: "On the question of what 'consensus' entails in reaching a decision, the overwhelming view was that it did not mean unanimity or near-unanimity. It did mean respectful exchange of ideas and open-mindedness but, assuming that an open and extensive discussion had taken place, MLAs were prepared to accept the majority opinion. One minister commented that consensus government must work in terms of a clear majority: 'you never get all 19 to agree… at some point the ministers have to make decisions', adding that this is an elemental fact of government life but not all MLAs understand it."

11 James Madison, "The Federalist No 55" in Alexander Hamilton, James Madison & John Jay, *The Federalist* (Pennsylvania: Franklin Center, The Franklin Library, 1977) 399 at 405 [*The Federalist*] ; see also James Madison, "The Federalist No 10" in *The Federalist*, *ibid*, 61 at 63-64: "So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts"; See also James Madison, "The Federalist No 51" in *The Federalist*, *ibid*, 372 at 374: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

12 Jean Leclair, "L'avènement du constitutionnalisme en Occident : fondements philosophiques et contingence historique" (2011) 41 RDUS 159.

13 Tom Christiano, "Democracy", *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N Zalta, ed, online: <https://plato.stanford.edu/archives/spr2015/entries/democracy/>.

many; this is what I call the oligarchic fact of politics. The 17th and 18th century revolutions did not change that reality. Finally, the Western constitutionalism tradition came to life not because it embraced what Filippo Buonarroti famously described in 1828 as "the Order of Equality"; on the contrary, it harnessed itself, at least in part, to "the Order of Egoism", or in the words of Buonarroti, a "system… [where] the … spring to sentiments and actions is the selfish one of mere personal interest, without any regard whatever to the general good."[14] A more generous and, I believe, more accurate description was given by Benjamin Constant, who argued in 1819 that, because of the intellectual and political upheavals of the 18th century, "the Liberty of the Moderns" had displaced "the Liberty of the Ancients."[15] "The aim of the moderns," he said, "is the enjoyment of security in private pleasures; and they call liberty the guarantees accorded by institutions to these pleasures,"[16] whereas for the Ancients, liberty "consisted in exercising collectively, [and] directly, several parts of the complete sovereignty. … But," Constant stresses, "if this was what the ancients called liberty, they admitted as compatible with this collective freedom the complete subjection of the individual to the authority of the community."[17] In other words, Western constitutionalism and democracy arose from a wish to reconcile the desire for collective freedom with the enjoyment of private pleasure.

One might ask how democratic institutions could have grown out of such uninviting grounds? How could normative discourses about democracy and equality even emerge, let alone influence such an apparently dystopian universe? Be that as it may, however imperfect and however incomplete they might be, democratic institutions and limited government *did* grow out of Western civilization's tormented historical trajectory.

Why? First, let us recall why political communities in the West chose to adopt constitutions (which for the most part were unwritten until the end of the 18th century). They mostly chose to adopt binding rules to make collective action more efficient so as to ensure their collective survival.[18] They therefore

14 Phillippo Buonarroti, *History of Babeuf's Conspiracy for Equality* (translation from the French by Bronterre), (London: H Hetherington, 1836) at 10, n ‡. The work was originally published under the title *Histoire de la Conspiration pour l'Égalité dite de Babeuf* (Bruxelles: La Librairie Romantique, 1828) at 9 ("*ordre d'égalité*" et "*ordre d'égoïsme* ou d'*aristocratie*").

15 Benjamin Constant, "The Liberty of the Ancients and the Moderns" (1819) in Robert Leroux & David M Hart, eds, *French Liberalism in the 19th Century: An Anthology* (New York, Routledge, 2012) 68.

16 *Ibid* at 74.

17 *Ibid* at 70.

18 Holmes, *supra* note 7 at 194-96. The link between constitutions, power, and collective survival is an old one. For instance, during the Second Century BCE, the Greek historian Polybius sought to determine "…how it was and by virtue of what peculiar political institutions that in less than

set up power in order to better defend themselves against their foes. This appears to hold true just as much in the case of Indigenous peoples.

For instance, according to Haudenosaunee tradition, when the Tree of Great Peace (or, the Tree of the Great Long Leaves) was planted in Onondaga territory, an eagle was placed atop it, invested with the task of warning the people of the League if it saw any danger threatening in the distance.[19] The idea of uniting the five Haudenosaunee nations together under the Gayanashagowa (Great Law of Peace) was therefore closely tied to that of collective survival. And one of Peacemaker Deganawida's arguments to convince the members of the League to unite in a Confederacy and to live according to the principles of the Great Law of Peace was to take out an arrow and split it easily in two and then to bring out five arrows and show how much more difficult it was to break them.[20]

In non-Indigenous contexts, war (and revenue seeking to make war possible) has always played a role in the advent of constitutions, as well as in their evolution and their overthrow. These phenomena are also entwined with the eventual growth of limited government. Constitutionalism in the West came about with the advent of the State as we know it today. War, economic transitions, the rise of trade, and ideology all played a role in this complicated

fifty-three years nearly the whole world was overcome and fell under the single dominion of Rome, a thing the like of which had never happened before": Polybius, *The Histories*: *Books 5 - 8*, translated by WR Paton, vol 3, ed by FW Walkbank & Christian Habicht (Cambridge, MA: Loeb Classical Library, 2011) at 293, online: <https://www.loebclassics.com/view/LCL138/2011/volume.xml>. He found the answer in the strength and stability provided by Rome's mixed constitution (*ibid* at 329, 331). According to him (*ibid* at 295): "…the chief cause of success or the reverse in all matters is the form of a state's constitution; for springing from this, as from a fountain head, all designs and plans of action not only originate, but reach their consummation." Polybius claimed that the superiority of Rome's constitution had to do with the Romans having learned to value Lycurgus' wisdom, the latter being the first to have elaborated a constitution that was not "simple and uniform", but that, on the contrary, "united in it all the good and distinctive features of the best governments, so that none of the principles should grow unduly and be perverted into its allied evil, but that, the force of each being neutralized by that of the others, neither of them should prevail and outbalance another…": *ibid* at 317. On Polybius and his understanding of the Roman Republican Constitution, see Jean Leclair, "Les silences de Polybe et le Renvoi sur la sécession du Québec" in Jacques Boisneau, ed, *Personne et Res Publicam*, vol 2 (Paris: L'Harmattan, 2008) 135.

It also comes as no surprise then that one of the very first issues of the *Federalist Papers* is dedicated to examining "whether the people are not right in their opinion that a cordial Union, under an efficient national government, affords them the best security that can be devised against *hostilities* from abroad": John Jay, "The Federalist No 3" in *The Federalist, supra* note 11, 14 at 15.

19 Beverly Jacobs, *International Law/The Great Law of Peace*, LL.M. thesis, University of Saskatoon, 2000, at 26, online: <www.collectionscanada.gc.ca/obj/s4/f2/dsk3/SSU/TC-SSU-07042007083651.pdf>.

20 *Ibid* at 167.

story.[21] As Stephen Holmes bluntly puts it, prosaic constitutionalists (as he is himself), argue that "…the most 'democratic' reason why elites have proved willing to impose limits on themselves is that such limits help to mobilize the voluntary cooperation of non-elites in the pursuit of the elite's most highly prized objectives, especially revenue extraction and victory in war, but also information gathering and the timely correction of potentially fatal errors of judgment."[22] Holmes continues: "Full-fledged democracy has always been and will always remain more an aspiration than a reality; but genuinely democratic episodes occur when powerful actors discover, as they sometimes do, a palpable advantage in popular participation, government transparency, protections for minorities, and uncensored debate."[23]

In short, constitutionalism was the product of the following paradox: "limited power generates more power." For instance, the English Parliament was born, not as the result of a spontaneous self-realization of the Order of Equality, but out of an act of royal will.[24] Parliament was created because it served the King's interests. In the 16th century, the English Parliament did not suffer the fate of its continental counterparts because it *assisted* rather than opposed Henry VIII in his quest to undo the medieval privileges constraining the exercise of his royal authority.[25] Parliament also proved essential in the financing of the ever more expensive wars in which the King was embroiled. Kings realized that allowing a measure of political representation in Parliament to those who produced wealth was an astute political investment, much more efficient than predation. By protecting the interests of the wealth-producers and letting them have a say in the political arena, kings were able, in exchange, to obtain the producer's consent to the taxation that generated the revenue stream they needed to consolidate their power.[26]

The paradox according to which "limited power generates more power" also explains why, in June 1755, Chief Justice Belcher of Nova Scotia found no

21 See Hendrik Spruyt, "War, Trade, and State Formation" in Robert E Goodin, ed, *The Oxford Handbook of Political Science* (Oxford: Oxford University Press, 2011) 567; Charles Tilly, *Coercion, Capital and European States, A.D. 990 - 1992* (Oxford: Wiley-Blackwell, 1992); Robert H Bates, *Prosperity & Violence: The Political Economy of Development*, 2nd ed (New York: WW Norton & Company, 2010).

22 Holmes, *supra* note 7 at 191.

23 *Ibid*.

24 Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013) at 46.

25 *Ibid* at 47-48.

26 Douglass C North, *Structure and Change in Economic History* (New York: WW Norton, 1981); Spruyt, *supra* note 21; Bates, *supra* note 21.

difficulty in declaring perfectly legal the deportation of thousands of Acadians,[27] whereas, both James Murray[28] and Guy Carleton[29] refused to implement the *Royal Proclamation of 1763* requiring them to introduce the entirety of English law in the Province of Québec. Frederick Haldimand would later be severely reprimanded by London for having disobeyed the secret instructions ordering him to give the most restrictive interpretation possible to the *Quebec Act*.[30]

27 Reproduced by the Honourable Michel Bastarache in "The Opinion of the Chief Justice of Nova Scotia Regarding the Deportation of the Acadians" (2011) 42:2 Ottawa L Rev 261 at 264-68.

28 In an ordinance enacted on 17 September 1764, while Governor James Murray did introduce English law in the Province of Québec, he allowed for the application of the law of New France in the newly created Court of Common Pleas, justifying this decision in the following terms: "[N]ot to admit of such [application of the law of New France] until they [the Canadians] can be supposed to know something of our Laws and Methods of procuring Justice in our Courts, would be like sending a Ship to sea without a Compass; indeed it would be more cruel — the ship might escape, Chance might drive her into some hospitable Harbour, but the poor Canadians could never shun the Attempts of designing Men; and the Voracity of hungry Practitioners in the Law; they must be undone during the First Months of their Ignorance; if any escaped, their Affections must be alienated and disgusted with our Government and Laws" (Explanatory observations of James Murray on *Ordinance Establishing Civil* Courts (17 September 1764), reproduced in Adam Shortt & Arthur G Doughty, *Documents relating to the Constitutional History of Canada (1759-1791)*, vol 1, (Ottawa: J de L Taché, printer to the King's Most excellent Majesty, 1918) at 206, n 4 [Shortt & Doughty, *Documents* vol 1]). See also Ann McManus, *Governor James Murray's Views on the Problems of Canada During his Administration, 1760-1766*, Thesis, Master of Arts, Department of History, University of Ottawa, 1966, at 43.

29 In a letter dated 24 December 1767 to Lord Shelburne, after having underlined that the "Laws and Customs [of New France] were widely Different from those of England, but founded on natural Justice and Equity, as well as these", Lieutenant-Governor Guy Carleton (who had replaced James Murray in April 1766) stated the following: "This System of Laws established Subordination, from the first to the lowest, which preserved the internal Harmony, they enjoyed until our Arrival, and secured Obedience to the Supreme Seat of Government from a very distant Province. All this Arrangement, in one Hour, We overturned, by the Ordinance of the Seventeenth of September One Thousand Seven hundred and sixty four, and Laws, ill adapted to the Genius of the Canadians, to the Situation of the Province, and to the Interests of Great Britain, unknown, and unpublished were introduced in their Stead; A Sort of Severity, if I remember right, never before practiced by any Conqueror, even where the People, without Capitulation, submitted to His will and Discretion. How far this Change of Laws, which Deprives such Numbers of their Honors, Privileges, Profits and Property, […] is agreeable to the natural Rights of Mankind, I humbly submit; This much is certain, that it cannot long remain in Force, without a General Confusion and Discontent": Letter from Guy Carleton to Lord Shelburne (24 Dec 1767) in Shortt & Doughty, *Documents* vol 1*, ibid* at 288-89; see further Arnaud Decroix, David Gilles & Michel Morin, *Les tribunaux et l'arbitrage en Nouvelle-France et au Québec de 1740 à 1784* (Montreal: Éditions Thémis, 2012). Notice that when Carleton refers to "their Honors, Privileges, Profits and Property" he refers to the landed *seigneurs* and clergy and not to the general population.

30 "The Lords of Trade and Plantations to Haldimand", Letter to Frederick Haldimand (10 April 1781) in Adam Shortt & Arthur G Doughty, *Documents relating to the Constitutional History of Canada (1759-1791)*, vol 2, (Ottawa: J de L Taché, printer to the King's Most excellent Majesty, 1918) 722 at 724 [Shortt & Doughty, *Documents* vol 2]: "The instructions in question were founded upon the most convincing necessity, and his Majesty's Pleasure was conveyed in terms so peremptory and express, that we are at a loss to conceive, how it was possible for you to hesitate upon an instant obedience to them."

In the case of the Acadians' deportation, since troops were available to handle the job and the British Fleet was in Halifax harbour, the political elites had no need to concede anything or limit their own power. However, in the Province of Québec, about 65,000 French-speaking, Catholic *Canadiens* coexisted for many years with approximately 2,000 English-speaking Protestant "old subjects." Military considerations, not least of which were the revolutionary convulsions slowly bubbling up to the surface in the thirteen colonies, made concessions to what London believed to be the conquered dominant social elites, the *seigneurs* and the clergy, absolutely essential.[31] The tithe and the *Coutume de Paris* which respectively were the legal basis of the clergy's and of the *seigneurs*' access to revenue were therefore reintroduced by the *Quebec Act*.[32]

Hence, there is some undeniable truth in the realists' depiction of the advent of constitutionalism as the realization by dominant political elites that limits to their own power helped them in "mobiliz[ing] the voluntary cooperation of non-elites in the pursuit of [their] most highly prized objectives, especially revenue extraction and victory in war [and their holding on to power]."[33] In the words of Hamilton and Madison, "[e]xperience is the oracle of truth"[34] and we should not ignore what lessons it can teach us.

However, the story of constitutionalism is one that intermingles human *purposes* aimed at this or that result (the wish of the rulers to remain in power and gain revenue) and the mostly *unintended* consequences of human *actions* actually taken to fulfil these purposes. In other words, brute power might unknowingly be the source of limited power and it might be the triggering device for the advent of new and powerful normative discourses about limited government, democracy, liberty, and equality.

31 G P Browne, "Carleton, Guy, 1st Baron Dorchester," in *Dictionary of Canadian Biography*, vol 5, University of Toronto/Université Laval, 1983, online: <www.biographi.ca/en/bio/carleton_guy_5E.html>. In a letter dated October 25th, 1780 to Lord Germain — a letter which sparked the strong rebuke evoked in footnote 29 — Governor Haldimand (who replaced Carleton in 1777) had underlined that "…the Quebec act alone has prevented or Can in any Degree prevent the Emissaries of France and the Rebellious Colonies from Succeeding in their Efforts to withdraw the Canadian Clergy & Noblesse from their Allegiance to the Crown of Great Britain. For this Reason amongst many others, this is not the time for Innovations and it Cannot be Sufficiently inculcated on the part of Government that the Quebec Act is a Sacred Charter, granted by the King in Parliament to the Canadians as a Security for their Religion, Laws and Property": Letter from Governor Haldimand to Lord German (25 Oct 1780) in Shortt & Doughty, *Documents* vol 2, *ibid*, 711 at 720.

32 *Quebec Act, 1774*, 14 Geo III, c 83 (UK), s 5, 8. Under section 7, a new oath of allegiance was introduced enabling Catholics to assume public duties.

33 Holmes, *supra* note 7 at 191.

34 Alexander Hamilton & James Madison, "The Federalist No 20" in *The Federalist, supra* note 11, 134 at 139; see also Alexander Hamilton, "The Federalist No 15" in *The Federalist*, *supra* note 11, 96 at 103.

For instance, even though the English kings' purpose in allowing Parliament to endure was only aimed at securing greater revenue, the unintended consequences flowing from this decision was a transformation of the institution itself over time and the rise of new normative discourses about sovereignty, democracy, equality, and liberty. It even led to the decapitation of the ruler himself at the hands of parliamentarians.

My point here is to stress that, although the purpose of kings might have been devoid of principle, the consequence of their actions was the establishment of an institution that eventually claimed more and more power for itself — Parliament. And it did so, not simply by force of arms, but by harnessing its demands to powerful new normative discourses claiming that sovereignty no longer stemmed from a heteronomous source, but from the people itself.

In turn, this discourse would provide the basis for further political collective action initiated by the non-elites still excluded from prevailing definitions of "the people." And this would lead to more institutional changes (the extension of the franchise for example). Constitutionalism as a value and constitutionalism as a form of government therefore actually reinforce one another in a diffuse and *reflexive* manner.[35]

The history of Canada's evolution prior to 1867 provides another good example of the interplay of these two facets of constitutionalism. It is true that the *Royal Proclamation of 1763* and even imperial statutes (think of the *Union Act* of 1840) were often used to deny any collective freedom to the *Canadiens*. It is equally true that, as I explained, the concessions made by London were inspired by a desire to co-opt the conquered elites in order to better maintain the metropole's hold on the colony.

Be that as it may, some among the discarded social elites of the *Canadiens* discovered a number of unknown normative treasures inherent in the British legal tradition: the right to petition, the right to be secure in their seigneurial property and the right to seek representative institutions and eventually responsible government. When reading the works of my colleague Michel Morin[36]

35 I have explored this idea in Jean Leclair, "Michael Oakeshott ou la recherche d'une politique dépourvue d'abstractions", online : (2014) 12 *Jus politicum. Revue de droit politique* <juspoliticum.com/article/Michael-Oakeshott-ou-la-recherche-d-une-politique-depourvue-d-abstractions-881.html>.

36 "The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774", (2013) 36:2 Dal LJ 581; "Les revendications des nouveaux sujets, francophones et catholiques, de la Province de Québec, 1764-1774", in G Blaine Baker & Donald Fyson, eds, *Essays in the History of Canadian Law: Quebec and the Canadas* (Toronto: Osgoode Society, 2013) 131; "La découverte du droit constitutionnel britannique dans une colonie francophone : la Gazette de Québec, 1764-1774",

and of historian of ideas Yvan Lamonde,[37] one realizes that the *Canadiens* cunningly constructed a normative discourse inspired by the tenets of the British Constitution to secure rights granted to "old subjects." In doing so, they were piggy-backing on the victories obtained by the British themselves after their civil war.

The British constitution helped these *Canadien* non-elites, with the help of non-elites of British stock, to build the political capital needed to advance their cause and to secure representative government and, eventually, responsible government.

Let us not exaggerate. If circumstances had been different, the *Canadiens* might have suffered the fate of the Acadians or a less dismal one, that of the French inhabitants of Grenada, the other French colony subjected to the *Royal Proclamation of 1763*.[38] And even if they have not suffered that fate, their gains were the result of a hard struggle during which the first reflex of the British authorities was always to systematically deny to the *Canadiens* the democracy they boasted they had established in 1688. After describing what democracy meant in the Province of Canada prior to 1867, Yvan Lamonde himself concludes that it was "a democracy based on the power of the stronger, the colonizer."[39]

This might be so. However, by mixing political action, strategic alliances, and normative discourses about equality and liberty, the *Canadien* elite helped bring about a political reconciliation in the form of limited autonomy within a federal regime in 1867. Even though some might radically disagree with me, it seems that the federal solution achieved in 1867, modified by further struggles that led to changes to the material (although not to the formal) Constitution,

(2013) 47:2 RJTUM 319; and "Blackstone and the Birth of Quebec's Distinct Legal Culture, 1765-1867", in Wilfrid Prest, ed, *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Oxford: Hart Publishing, 2014) 105.

37 Yvan Lamonde, *The Social History of Ideas in Quebec, 1760-1896* (Montreal: McGill-Queen's University Press, 2013).

38 Let us not forget historian Hilda Neatby's conclusion about *The Quebec Act* of 1774: "In short, if the Act and all the instructions are read together and thought of as equally expressing the policy of the ministry, that policy can be seen only as one of gentle but steady and determined anglicization. The recognition of 'the liberty of non-English people to be themselves' as an imperial principle was discovered by historians in the Quebec Act after this principle had necessarily been developed by Britain in relation to the other and truly alien peoples which were to become part to the empire during the next century. If this principle is in the Quebec Act, it got in without the knowledge of the men who framed it": Hilda Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland and Stewart Limited, 1966) at 140.

39 Lamonde, *supra* note 37 at 424.

still succeeds in preventing a large majority of Quebecers from wishing a complete exit from the Canadian constitutional fold.

After 1867, more and more non-elite groups conscripted the normative vocabulary of democracy, equality, and liberty to claim their share in the exercise of political power. This was not the result of a well-thought-out plan or a mystically propelled evolution, but rather the result of a diffuse constitutionalism, where the latter is in part the result of the unintended consequences of human actions that are not necessarily designed to do good.

If the wielders of power did make concessions to a growing number of people over time, it is also because every victory made in the name of equality prepared the terrain for the next one. And, it was difficult to deny to newcomers on the political field what had been granted to their predecessors. As more non-elites gradually got to participate in the exercise of political power, new normative discourses were generated promoting the creation of new types of shared understandings concerning political arrangements. These new beliefs, in their turn, fed into the political struggles leading to new transformations of our democratic form of governance. Hence, my use of the qualifiers *diffuse* and *reflexive* constitutionalism.

What lessons can be learned from this where Indigenous peoples are concerned? First, I believe that Stephen Holmes is right when he claims that "If you wish a constitutional norm to govern the way politicians behave, you need to organize politically to give ruling groups an incentive to pay attention and accept restraints on their own discretion for their benefit and yours."[40]

The Crees of Northern Québec had success at negotiating the *James Bay Agreement* and the *Paix des Braves* because of: their ability to remain united; their political acumen (during the *Paix des Braves* negotiations, they played the PQ government like a master violinist plays his instrument); and, their masterful use of normative discourses on the international plane as a means to pressure the dominant political elites. But, they also succeeded in convincing those elites that true political autonomy for them might mean better policies for their people and hence, less responsibility for the Québec and Federal governments and maybe, just maybe, less resentment towards them by the Cree people.

Building the political clout necessary to give ruling groups an incentive to pay attention is a difficult task for Indigenous peoples since they only make up 4% of the population and they do not all sit on billions of dollars of hydro-

40 Holmes, *supra* note 7 at 215.

electricity. However, as Indigenous peoples, they benefit from an ever-growing capital of sympathy that provides them with considerable power. These last years, many Canadians woke up to the atrocious reality of residential schools and are more aware of the manner in which Canada's Indigenous collective and individual lives where crushed during the last 200 years and how Indigenous peoples are still suffering from the aftershock of the cultural genocide that took place during the 20th century.[41] The urban-based, women-initiated *Idle No More* movement has also demonstrated the vibrancy of the modern Indigenous civil society and its determination to be heard. In addition, legal instruments such as the *UN Declaration on the Rights of Indigenous Peoples* serve as powerful levers in the Indigenous peoples' political struggle for greater autonomy. More and more extractive project proponents realize the financial and reputational benefits they could garner from supporting a "free, prior and informed consent" regime in Canada and elsewhere. Finally, the Supreme Court is getting more and more entangled in its own conceptual nets. By recognizing aboriginal rights and titles as collective rights allowing their bearers to take decisions as to "who gets what, when, and how?", it is bound to eventually recognize a generic right to self-government to Indigenous communities over their internal affairs.[42]

It is in this context that normative discourses stand a chance of influencing the evolution of Canadian constitutionalism. They can provide the ideas necessary to make mobilization possible. Once they permeate the public discourse, they become powerful tools in the Indigenous peoples' political struggle for greater autonomy. And it is my claim that normative discourses mobilized in the quest for reconciliation and greater autonomy for Indigenous polities can certainly themselves be influenced by Indigenous normative understandings that would benefit us all; normative understandings such as the need to set up power in a less anthropocentric manner so that our interconnectedness with other living beings be truly acknowledged.[43]

41 See *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Toronto: James Lorimer & Co, 2015).

42 For more on this, see Jean Leclair & Michel Morin, *Peuples autochtones et droit constitutionnel*, in Stéphane Beaulac & Jean-François Gaudreault-Desbiens, eds, *JurisClasseur Québec — Collection Droit public — Droit constitutionnel* (Montréal : LexisNexis, 2014) (loose-leaf 2017 edition) ch 15, no 64.

43 For an attempt at resorting to Indigenous epistemologies in the interpretation of constitutional law, i.e., envisaging "constitutions" as verbs rather than nouns, as metaphors for relationships rather than as abstract entities, see Jean Leclair, "Invisibility, Wilful Blindness and Impending Doom: The Future (If Any) of Canadian Federalism" in Peter John Loewen, Carolyn Hughes Tuohy, Andrew Potter & Sophie Borwein, eds, *Canada and its Centennial and Sesquicentennial: Transformative Policy Then and Now* (Toronto: University of Toronto Press, forthcoming in 2018).

However, for these normative discourses about reconciliation to better convince the dominant political elites that it is to everyone's advantage that Indigenous peoples be recognized as having greater autonomy, they must address constitutionalism, not just as a value, but as a form of government. And not just as a form of government from the State's perspective, but as a form of government for contemporary Indigenous communities themselves.

Many Indigenous and non-Indigenous intellectuals are doing just that. I'm thinking for instance of the extensive literature written about the fundamental role played by treaties in Canada's constitutional tradition. I have in mind John Borrows, Val Napoleon, Hadley Friedland, and many others who search for means of revitalizing Indigenous legal traditions and, in doing so, reveal their relevance for solving contemporary problems.[44] I am also thinking of Emily Snider, whose work, in cooperation with John Borrows and Val Napoleon, on violence against Indigenous women focuses on Indigenous ways of tackling this issue.[45] I have in mind the University of Victoria's proposed joint degree in Canadian Common Law and Indigenous Legal Orders.[46] I am also thinking of initiatives such as the Kahnawà:ke Community Decision Making Process developed under the aegis of the Kahnawà:ke Legislative Coordinating Commission in 2005. This initiative might not have bred all the success as hoped for, but it was a courageous attempt at revitalizing traditional forms of governance.[47] All these initiatives are more than just *assertions* of the Indigenous peoples' right to self-government, but demonstrations of their capacity to address the challenge, sometimes with very limited resources, of actually *exercising* that right.

All these initiatives, and similar ones in Québec, indirectly and directly played a part, for instance, in the adoption last August of section 543.1 of the *Civil Code of Quebec* which states that, "conditions of adoption under any Québec Aboriginal custom that is in harmony with the principles of the interest of the child, respect for the child's rights and the consent of the persons

44 John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 222; Val Napoleon "Thinking About Indigenous Legal Orders" (2007), Research paper prepared for the National Centre for First Nations Governance, online: <fngovernance.org/ncfng_research/val_napoleon.pdf>; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725. For more on this, see Michael Coyle, "Indigenous Legal Orders in Canada - A Literature Review" (2017) Western University Law Publications 92, online: <ir.lib.uwo.ca/lawpub/92>.

45 Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593.

46 See University of Victoria, "Dual Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID", online: <https://www.uvic.ca/law/about/indigenous/jid/index.php>.

47 Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process" (2013) 18:1 Rev Const Stud 111.

concerned may be substituted for conditions prescribed by law." This small opening by the Québec State apparatus might bring forth unexpected results. As such, it is an encouragement for those nations who wish to do so to address the task of identifying their own customary adoption rules. But, more importantly, it might also constitute an incentive to extend these inquiries to fields other than adoption.

This is how constitutionalism operates: in a diffuse and reflexive fashion. It was and still remains a struggle between the values and ideals it embodies and the forms of government that instantiate them. No doubt, the latter always fails to meet the standard fixed by the former. However, in this constant struggle, "the ideal feeds the real and the real the ideal" in the sense that normative discourses provide the ideas around which non-elites can ally themselves to one another — and to willing members of the elite, so as to exert on dominant political elites the pressure required for something like reconciliation to happen. In other words, poetic and prosaic constitutionalisms must always be conjugated if any real change is to ever happen.

* * *

This might sound like a depressing conclusion and, in some ways, it is, especially for those who, legitimately outraged by the snail-paced process of change, seek the immediate fulfilment of their desire to obtain as much autonomy as possible. The thoughts expressed here might sound equally irrelevant to those who think that there is nothing to learn from the Western tradition. However, the West — whatever that word encompasses today — is too often depicted as a monolithic block that sprung out fully armed, like Athena from Zeus' head, with the sole mission of crushing the rest of the world under its heel. That *is* certainly a part of Western history, but not the whole of it.[48]

I thought it would be worthwhile to underline that the Western constitutional tradition itself was born out of the struggle of generations of European non-elites, including a lot of women, who shed rivers of blood to achieve the imperfect form of limited government that is now ours. In other words, not everyone is all powerful in "the Western world." There are alliances to be made between Indigenous peoples and other Canadians who seek a world where "being" is of more import than "having." These alliances are worth nurturing, if we wish to learn from one another and achieve reconciliation.

48 For some thoughts about Indigeneity and Modernity, see Jean Leclair, "Envisaging Canada in a Disenchanted World: Reflections on Federalism, Nationalism, and Distinctive Indigenous Identity" (2016) 25:1 Constitutional Forum constitutionnel 15 at 18-19.

One last word; anyone, be they Indigenous or non-Indigenous, who witnesses what is happening today in the USA or in Turkey should think twice before wishing the Western constitutional tradition away.

The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150

Mark D. Walters* [1]

In the case of Connolly v Woolrich*, decided by the Québec Superior Court within ten days of Canadian Confederation in 1867, a judge upheld the validity of a marriage conducted according to Cree customary law in what is now northern Alberta. In doing so, the judge advanced a complex and far-reaching theory of legal pluralism and multi-layered governance within territories under the "joint occupation" of Europeans and Aboriginal peoples — territories that would soon become part of the new Dominion of Canada. Canada thus began its life with a constitutional vision that was inclusive and respectful of Indigenous legal traditions. However, that vision was quickly lost. For over one hundred years, the case of* Connolly v Woolrich *was forgotten. Only in recent years has the case found its way back into mainstream legal discourse. Indeed, it is now often feted as a model for a multi-juridical legal reality in Canada. But could this old case really provide a way forward for acknowledging Indigenous legal traditions in Canada today? There are good reasons to doubt this possibility, given the colonial legal sensibilities that informed the reasoning*

Dans l'affaire Connolly c Woolrich*, jugée par la Cour supérieure du Québec dix jours après la fédération canadienne en 1867, un juge confirma la validité d'un mariage conduit selon le droit coutumier cri dans l'actuel nord de l'Alberta. Ce faisant, le juge avança une théorie complexe et ambitieuse du pluralisme juridique et la gouvernance à multiples couches à l'intérieur de territoires sous « l'occupation commune » de peuples européens et autochtones — des territoires qui allaient bientôt faire partie du nouveau Dominion du Canada. Le Canada naquit ainsi avec une vision constitutionnelle inclusive et respectueuse des traditions juridiques autochtones. Cependant, cette vision fut vite perdue. Pendant plus de cent ans, l'affaire* Connolly c Woolrich *fut oubliée. Ce n'est que dernièrement que l'affaire est réapparue dans le discours juridique dominant. En fait, elle est maintenant souvent fêtée comme un modèle pour une réalité juridique multi-juridique au Canada. Se pourrait-il que cette vieille affaire offre véritablement une voie à suivre pour reconnaître les traditions juridiques autochtones au Canada aujourd'hui? Il y a de bonnes raisons*

* F.R. Scott Professor of Public and Constitutional Law, McGill University.

1 This essay is a revised version of a presentation that I gave at the "Wahkohtowin – Reconciliation" conference organized by the Centre for Constitutional Studies and the Faculties of Law and Native Studies, University of Alberta, held 21-23 September 2017. The conference was held within the territory of the Enoch Cree Nation and within the larger Treaty 6 territory. I wish to thank the Elders, both Cree and Métis, present on the occasion for their wisdom and insight. I am grateful also for comments from Hadley Friedland, John Borrows, and Robert Leckey on earlier drafts of this paper. I am also grateful for the many observations and comments offered by my students over the years, generally of course, but in relation to the case of *Connolly v Woolrich* in particular. Finally, I wish to acknowledge the funding assistance for my research provided by the Social Sciences and Humanities Research Council of Canada.

that the judge employed. However, after considering three readings of Connolly v Woolrich*, the incorporative, assimilationist, and reconciliatory readings, the author argues that, yes, properly interpreted,* Connolly v Woolrich *may indeed provide effective insights into the status of Indigenous legal traditions in Canadian law today. The case of* Connolly v Woolrich *may well be worth celebrating 150 years or so after it was decided.*

de douter de cette éventualité, étant donné la susceptibilité juridique coloniale qui influença le raisonnement employé par le juge. Toutefois, après avoir examiné trois interprétations de Connolly c Woolrich*, les interprétations d'incorporation, assimilationniste et conciliatoire, l'auteur soutient que, en effet,* Connolly c Woolrich *peut effectivement, si elle est correctement interprétée, apporter des perspectives qui ont de l'effet sur le statut des traditions juridiques autochtones dans le droit canadien aujourd'hui. L'affaire* Connolly c Woolrich *mériterait bien d'être fêtée, environ 150 ans après qu'elle fût jugée.*

I.

On the first day of July, 1867, the *British North America Act* was proclaimed in force and the Dominion of Canada came into existence.[2] On the ninth day of July, 1867, a Canadian judge ruled that a Roman Catholic marriage that had been celebrated between William Connolly and Julia Woolrich within the province of Lower Canada/Québec was a nullity because Connolly had married a Cree woman years before under the laws and customs of the Cree people, and he had still been at the relevant time married to her.[3] In reaching this conclusion, the judge, Justice Samuel Cornwallis Monk of the Québec Superior Court, not only recognized and applied the marriage laws of an Indigenous nation, but he accepted that Indigenous laws and governments generally — "the laws of the Aborigines" as he called them — remained in force, at least in certain circumstances, within territories claimed by the Crown that would soon become part of the new Dominion of Canada.[4] It could be said, then, that Canada began its life 150 years ago with a multi-juridical identity that embraced not only the common law and civilian legal traditions inherited from its English and French founders, but also the laws, customs, and traditions of the Cree and other Indigenous peoples whose territories the new country would encompass.[5]

2 *British North America Act, 1867* (UK) 30 & 31 Vict, c 3. Now *Constitution Act, 1867*(UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix I, No 5.

3 *Connolly v Woolrich and Johnson* (1867), 1 CNLC 70 (Que Sup Ct), [1867] QJ No 1 (QL) [*Connolly*, cited to QL], aff'd *Johnstone c Connolly* (1869), 1 RL 253, [1869] JQ No 1 (QL) (Que CA).

4 *Ibid* at para 24.

5 John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 159–160.

Yes, this *could* be said — but is it worth saying now? As we gather to reflect upon the state of the Canadian confederation after 150 years, as we confront the challenge of reconciliation between Indigenous and non-Indigenous peoples in Canada, and as we begin to think about the role that Indigenous legal traditions, including the Cree idea of *wahkohtowin*, might play in this process, we would do well to face the realities of our past directly and honestly. A true sense of reconciliation demands no less. One reality is that, in the years that followed confederation, Indigenous legal traditions were *not* generally recognized in Canadian law but were largely ignored or even suppressed. The case of *Connolly v Woolrich* is perhaps just a misleading outlier. Indeed, it may not even merit this status. Upon closer examination, it is clear that the case is a product of its time. Justice Monk's reasons offer a window into the mid-nineteenth century juridical mind, and what we see is far from edifying. In short, the prospects of finding insight, let alone inspiration, for the cause of reconciliation today by looking to a dusty old case are not good.

Although the prospects are not good, I still think the project is worth pursuing. There remains something oddly compelling about the *Connolly* case. It has been described as the "boldest and most creative common law decision on Indian rights in nineteenth-century Canada."[6] In the judge's reasoning, there are flashes of promise. It is true that a wide distance, temporally and culturally, separates us from Justice Monk, and as a result, his language is often troubling; however, his analysis has one advantage that only this distance can give: it is untainted by the hard legal history of the intervening 150 years. We might not agree with all of his answers, but we might learn something from him simply because his views about Indigenous law were not obstructed by the knowledge of what would happen to Indigenous peoples in Canada during the next century and a half.

I teach the *Connolly* case to my constitutional law students each year. Like many complex texts, whether in law, literature, or religion, it yields different meanings on different readings. I can now see that I have drawn from the case at least three meanings or messages that parallel my own evolving thoughts about the meeting of Indigenous and non-Indigenous legal cultures in North America. I will try to summarize these readings through reference to three general themes, which I will call incorporation, assimilation, and reconciliation. I will also suggest that the shift from the incorporation to the reconciliation reading involves a shift in conceptions about what law generally is, from

6 Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 169.

a linear or positivist to a more circular or interpretive jurisprudence. After a brief account of the facts of the case, my plan is to say a few words about each reading of *Connolly v Woolrich*, with emphasis on the last reading, the reading about reconciliation.

II.

The story behind the case of *Connolly v Woolrich* began in 1803 near a fur-trading post at *Rivière-aux-Rats*.[7] Justice Monk located the post on the northwest shore of Lake Athabaska in what is now northern Alberta, outside of the Hudson's Bay Company territories or Rupert's Land.[8] However, historians have concluded that the relevant post was located near Nelson House in what is now northern Manitoba, within Rupert's Land.[9] The central characters in the story were "the daughter of an Indian chief of the Cree nation, named Susanne *Pas-de-nom*" (as Justice Monk described her), who was then about fifteen years old, and William Connolly, born in Lachine, Québec/Lower Canada, a descendant of French-Canadians and loyalist settlers of Irish heritage, who was then a seventeen-year old clerk at the post.[10] Like thousands of other young Indigenous women and young Euro-Canadian men engaged in the fur trade over the course of the seventeenth, eighteenth, and nineteenth centuries, they married. But under what law? Although the French and then British Crowns claimed the massive northwest fur-trading country, there was during these years little if any evidence (even within Rupert's Land) of European laws, institutions, or officials beyond the isolated posts or settlements that dotted the region. As it happened, in the year that Susanne and William were married, the United Kingdom Parliament tried to address this situation by extending the jurisdiction of the courts of Upper and Lower Canada over crimes committed within "Indian Territories" located beyond any local colonial jurisdiction, a statutory move that only seemed to confirm the absence of any meaningful or *de facto* imperial or colonial legal presence in the northwest that

7 For a detailed overview of the story, see Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991) at 9–22.

8 Monk J wrote: "The Rat River locality is, so near as I can ascertain, situate in latitude 58 degrees north and longitude west from Greenwich about 111 [degrees]. It is on the north shore of the lake [Lake Athabaska]" *Connolly*, *supra* note 3 at para 21.

9 Bruce Peel, "Connolly, William" in *Dictionary of Canadian Biography*, vol 7 (University of Toronto/Université Laval, 2003), online: <www.biographi.ca/bio/connolly_william_7E.html> [Peel, "Connolly, William"].

10 *Connolly*, *supra* note 3 at paras 2, 8; Peel, "Connolly, William", *supra* note 9; Bruce Peel, "Connolly, Suzanne" in *Dictionary of Canadian Biography*, vol 9 (University of Toronto/Université Laval, 2003), online: <http://www.biographi.ca/bio/connolly_suzanne_9E.html>.

could support the Crown's sweeping claims of sovereignty.[11] Young people like Susanne and William therefore married "*en façon du pays*" or by the "custom of the country."[12] The evidence led in the case suggests that William likely approached Susanne's parents with a gift to seek their consent to the marriage, and with this consent, and hers, their marriage began — or, as Justice Monk would conclude many years later, "he had married her according to the laws and customs of the Cree Indians."[13]

Susanne and William lived together for the next 28 years and had at least six children. William rose in the ranks of the North West and then Hudson's Bay Companies to become the chief factor, the highest-ranking company official, in what is now British Columbia — and a wealthy man. When he, Susanne, and most of their children moved to Lower Canada in 1831, Susanne was initially introduced within Montreal society as "Mrs. Connolly."[14] At this point, however, the story took its tragic turn.[15] Within the year, William left Susanne and married his second cousin, Julia Woolrich, the daughter of a wealthy merchant, in a Roman Catholic ceremony, a decision that appears to have surprised, among others, the governor of the Hudson's Bay Company, George Simpson.[16] William and Julia would raise three of the children from

11 See *An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Upper and Lower Canada, to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces, 1803* (UK), 43 Geo III, c 138. See generally Hamar Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 Am J Leg Hist 1.

12 For reference to marriage by the "custom (or customs) of the country" or "*la façon du pays*" in Monk J's reasons, see *Connolly*, *supra* note 3 at paras 8, 85, 87, 88, 91, 99, 104, 116. Relationships like this were ubiquitous within the fur-trading country. See Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Winnipeg: Watson and Dwyer, 1980); Sylvia Van Kirk, "The Role of Native Women in the Fur Trade Society of Western Canada, 1670-1830" (1984) 7:3 Frontiers: A Journal of Women Studies 9; Jennifer SH Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980); Jennifer SH Brown, "Partial Truths: A Closer Look at Fur Trade Marriage" in Theodore Binnema, Gerhard J Ens & RC Macleod, eds, *From Rupert's Land to Canada* (Edmonton: University of Alberta Press, 2001), at 59–80; Jennifer SH Brown, *An Ethnohistorian in Rupert's Land: Unfinished Conversations* (Edmonton: AU Press, 2017) [Brown, *An Ethnohistorian in Rupert's Land*].

13 *Connolly*, *supra* note 3 at para 179.

14 *Connolly*, *supra* note 3 at para 8.

15 For the details of the story after 1831, see John Adams, *Old Square-toes and his Lady: The Life of James and Amelia Douglas* (Victoria: Touchwood Editions, 2011), 39–41, 71–73; Adele Perry, *Colonial Relations: The Douglas-Connolly Family and the Nineteenth-Century Imperial World* (Cambridge, UK: Cambridge University Press, 2015) at 84–85 [Perry]

16 "You would have heard of Connolly's Marriage — he was one of those who considered it a most unnatural proceeding 'to desert the mother of his children' and marry another; this is all very fine, very Sentimental and very kind-hearted 3000 miles from the Civilized world but is lost sight of even by Friend Connolly when a proper opportunity offers." George Simpson to John G. McTavish, December 2, 1832. Perry, *supra* note 15 at 82, 84.

his relationship with Susanne and have two children of their own. They spent much of the next decade at the fur-trading post at Tadoussac, though William supported Susanne who remained in Montreal. When William and Julia returned to Montreal in the early-1840s, Susanne and two of her daughters from her relationship with William decided to move back west. Susanne may have intended to go to British Columbia to live with their eldest daughter, Amelia, who was by then Lady Douglas, wife of the first governor of the province, Sir James Douglas. However, when their youngest daughter, Marguerite, began religious training with the Grey Nuns in the Red River colony, Susanne decided to settle there, living in the Grey Nuns convent at St. Boniface until her death in 1862. William supported her financially, but upon his own death in 1849 he left his estate to his second "wife" Julia. Julia continued to provide Susanne some financial support; indeed, upon her death, her will directed an annual payment to "Suzanne (Sauvagesse)."[17] Social ties and responsibilities then were perhaps more flexible than we would now think.

The question, however, was whether Julia really was William's "wife." The plaintiff in *Connolly v Woolrich* was John, one of Susanne and William's children, who argued that the second marriage was a nullity and so upon William's death half of his estate should have gone to Susanne, as his surviving wife, and then her heirs, under Lower Canada's community of property regime. The courts in Québec agreed — not just Justice Monk but four of five Québec Court of Appeal judges as well. The case was appealed to the Judicial Committee of the Privy Council, but the parties reached an out-of-court settlement before the appeal was argued, a compromise that may have been encouraged by the most publicly prominent of the Connolly children, Amelia, and, in this respect, she may have been influenced by her husband, the governor of British Columbia.[18] As a result, a ruling on the question of the status of Indigenous law in Canada from the high court of the British empire was averted. I have often wondered whether the history of Indigenous peoples and Aboriginal rights in Canada might have been different had the Judicial Committee of the Privy Council considered and upheld Justice Monk's conclusions on Cree marriage custom. There is at least some reason to think that it might have been. Justice Monk's decision went well beyond the law of marriage. He was prepared to recognize Indigenous systems of law and governance generally.

As it was, the *Connolly* case became a sort of footnote to the legal history of Indigenous peoples in Canada. True, it was followed in several subsequent

17 Perry, *supra* note 15 at 85.
18 *Ibid* at 105–106.

decisions. Significantly, its principles were extended to recognize the validity of Indigenous customary marriages conducted within the Northwest Territories *after* English law and local governmental and judicial institutions were explicitly introduced.[19] However, it was distinguished or rejected by other courts, including those in Québec.[20] It received some attention from legal commentators and textbook writers early on — mostly as a case about the conflict of laws.[21] But its broader potential concerning the affirmation of Indigenous legal orders in Canada became, in effect, a "forgotten argument,"[22] a possibility that was "lost on all courts."[23]

Due to several related events, however, this somewhat obscure case was propelled back into the spotlight. First, starting in the 1970s, a new wave of academic writing on Indigenous legal issues emerged, and writers began to reference the *Connolly* case.[24] Second, the first volume of *Canadian Native Law Cases* appeared in 1980, and it included the trial and appellate judgements in the case.[25] Before the days when case law became digital and searchable online, this collection of cases involving Indigenous peoples and the law in Canada, many of which were previously buried in relatively inaccessible nineteenth-century case reports, was an invaluable resource. It revealed a hidden legal

19 *The Queen v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211 (NWTSC), 1889 CarswellNWT 14 at para 8; *Re Noah Estate* (1961), 32 DLR (2d) 185 (NWT Terr Ct) at 200, 36 WWR 577.

20 *Fraser v Pouliot et al* (1881), 7 QLR 149 (Que Sup Ct); *Fraser v Pouliot*(1884), 13 RLOS 1 (Que Sup Ct); *Fraser v Pouliot*(1885) 13 RLOS 520 (Que QB); *Robb v Robb* (1891) 20 OR 591 (Ont H Ct J (CP Div), [1891] OJ no 135 (QL); *Re Sheran* (1899), 4 Terr LR 83 (NWTSC), 1899 CarswellNWT 20.

21 Friedrich Carl von Savigny, *A Treatise on The Conflict of Laws: The Limits of Their Operation in Respect of Place and Time*, translated by William Guthrie (London: Stevens & Sons, 1869) at 26, 37; Alexander Leith & James Frederick Smith, *Commentaries on the Laws of England Applicable to Real Property by Sir William Blackstone*, 2nd ed (Toronto: Rowsell & Hutchison, 1880) at139; PE Lafontaine, "Le Domicile" (1881-82) 3 Themis - Revue de Legislation, de Droit et de Jurisprudence 289 at 297; "Pagan Marriages" (1888) 8 Can L Times 132; Howard W Elphinstone, "Notes on the English Law of Marriage" (1889) 5 L Q Rev 44 at 58–59; WHP Clement, *The Law of the Canadian Constitution* (Toronto: Carswell Co, 1892) at 581; AV Dicey and ABerriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws*, 4th ed (London: Stevens & Sons Sweet & Maxwell, 1927) at 827; Walter S Johnson, "Domicille in Its Legal Aspects" (1929), 7 Can Bar Rev 356 at 365; Joseph H Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis & Co, 1935) at 677; J G Castel, "Canadian Private International Law Rules Relating to Domestic Relations" (1958), 5 McGill L J 1 at 3.

22 Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992), 21 Man LJ 343 at 361.

23 Mary Ellen Turpel, "Home/Land" (1991) 10 Can J Fam L 17 at 24.

24 See e.g., LC Green, "Civilized Law and Primitive Peoples" (1975), 13 Osgoode Hall L J 233 at 244; Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill LJ 656 at 660–661; Bradford W Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 Am Indian L Rev 199 at 222–225.

25 Brian Slattery & David Knoll, eds *Canadian Native Law Cases*, vol 1 (1763-1869) (Saskatoon: University of Saskatchewan, Native Law Centre, 1980).

past. Third, in the same year, Sylvia Van Kirk and Jennifer Brown published their ground-breaking books on women and the fur trade, both referencing the *Connolly* case.[26] Fourth, in the wake of the patriation of the Canadian constitution and the constitutional recognition and affirmation of "existing aboriginal and treaty rights" in 1982, legal academics turned to the question of Indigenous laws in Canada in a more focused way. An influential early piece in this line of scholarship was Norman Zlotkin's 1984 article, "Judicial Recognition of Aboriginal Customary Law in Canada," which explored the legacy of the *Connolly* case.[27]

From this point forward, academic references to the case proliferate, a notable example being the now-classic 1987 article, "Understanding Aboriginal Rights" by Brian Slattery in which the *Connolly* case was invoked to illustrate "the theoretical basis for the survival of native customary law in Canada, a phenomenon long recognized (but not always well understood) in our courts."[28] Several years later, the case received detailed attention in the Royal Commission on Aboriginal Peoples publication *Partners in Confederation*.[29] It then re-entered the modern judicial narrative in Canada. It was invoked by courts in British Columbia as a basis for understanding Indigenous customary norms and the residual and inherent legislative authority of Indigenous nations.[30] In legal-academic work, it has been consistently cited over the course of the last twenty-five years and references to the case continue today.[31]

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26 *Supra* note 12.

27 Norman Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" (1984), 4 CNLR 1.

28 Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 738. See also Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am J Comp L 361 at 367; James O'Reilly, "La Loi Constitutionnelle de 1982, Droit des Autochtones" (1984) 25 Cahiers de Droit 125 at 128; Chantal Bernier, "Les droits territoriaux des Inuit au large des côtes et le droit international" (1986) 24 Can YB Intl L 314 at 331; Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 13-19; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*" (1992) 17:2 Queen's LJ 350 at 379-85.

29 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993).

30 *Casimel v Insurance Corp of British Columbia*; 106 DLR (4th) 720; 82 BCLR (2d) 387 (CA); *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123; 189 DLR (4th) 333.

31 See e.g. Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peoples autochtones" (1995) 36:3 C de D 669 at 710-11; John Borrows & Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36:1 Alta L Rev 9 at 16-17; Michel Morin, *L'usurpation de la souveraineté autochtone* (Montréal: Boréal, 1997) at 197-200; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79:2 Can Bar Rev 196 at 201-202; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 5-6; Michel Morin, "La coexistence des systems de droit autochtones, de droit civil et de common law au Canada" in Louis

Strangely, however, *Connolly v Woolrich* still seems to occupy a precarious place within Canadian legal discourse. It seems always to be just on the edges, but never quite within the mainstream, of legal thought — "a well-known but judicially-neglected case."[32] Part of the problem, in my view, is the inexplicable and indefensible turn in the mid-1990s by the Supreme Court of Canada from recognizing living and complete Indigenous normative systems or orders to a limited form of constitutional recognition for pre-contact and culturally-integral *fragments* of Indigenous orders — a rejection, I think, of the spirit of the *Connolly* case and the adoption of a rule not previously recognized within the common law tradition.[33] Despite the attention that it has received, then, the *Connolly* case still exists within the strange world of the alternative legal universe, a legal world that could have been but never was — at least not yet. I said to my students this year, after we discussed the case, what I say to my students every year: *Connolly v Woolrich* suggests that, in Canada, we have three sets of legal traditions: the common law tradition, the civilian legal tradition, and Indigenous legal traditions. But the place of this last set of traditions, at least from the general perspective of *Canadian* law, has been shadowy and aspirational rather than practical or real. However, perhaps this is about to change.

III.

I turn now to the three readings of the case. The first reading is about *incorporation* — by which I mean the incorporation of one legal tradition or set of laws by another legal tradition or set of laws, or, more specifically, the incorporation of Indigenous law into the common law of the British Empire and thus into the common law of Canada.

Perret and Alain-François Bisson, eds, *The Evolution of Legal Systems, Bijuralism and International Trade* (Montréal: Wilson Lafleur, 2003) 159 at 165; Sébastien Grammond , "L'appartenance aux communautés inuit du Nunavik: Un cas de réception de l'ordre juridique inuit?" (2008) 23:1-2 CJLS 93 at 94; Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009-2010) 41:1Ottawa L Rev 101; Jeffery G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 SCLR (2d) 259; M Nickason, "The *Tsilhqot'in* Decision: Lock, Stock and Barrel, Plus Self-Government" (2016) 49:3 UBC L Rev 1061 at 1067; John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 814; Robert Leckey, "L'adoption coutumière autochtone en droit civil québécois," (2018) 59:4 C de D (forthcoming).

32 Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5:2 Tulsa J Comp & Int'l L 253 at 297.

33 Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44:3 McGill LJ 711 [Walters, "Golden Thread"]. See also Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v Pamajewon*" (1997) 42:4 McGill LJ 1011 at 1031.

I first read *Connolly v Woolrich* carefully in the early 1990s when I was a doctoral student. I had been struck at the time by the difference between American and Canadian judicial responses to Indigenous peoples. In a series of now-famous decisions from the 1820s and 1830s, the Chief Justice of the United States, John Marshall, examined English/British Crown practice regarding Indian peoples prior to American independence. He concluded that although the Crown had acquired underlying title to North America by discovery, the Indians retained a right of occupancy and diminished but meaningful rights of internal sovereignty and self-government; that, in other words, their legal orders remained more or less intact.[34] These early decisions would provide the basis for the doctrine of tribal sovereignty that still dominates federal Indian law in the United States today.[35] Why, I wondered, had Canadian judges not drawn similar conclusions given the history of colonial law and Crown practice that Canada and the United States shared?[36] Where was the equivalent Canadian doctrine of Indigenous self-government and sovereignty?

Given my interest in this question, the thing about Justice Monk's reasons in the *Connolly* case that leapt off the pages for me at this time was that he accepted the American legal interpretation of Crown practice. In developing his argument in favour of recognizing Cree marriage custom, Justice Monk quoted a long passage from the leading American case, *Georgia v Worcester*, including Chief Justice Marshall's observation that "history furnishes no example…of any attempt on the part of the crown to interfere with the internal affairs of the Indians" or to interfere with "their self-government, so far as respected themselves only."[37] Whether this was a completely accurate statement of Crown practice in pre-revolutionary America is, of course, a good question — though I think it does capture a basic truth about treaty relations between the Crown and Indigenous nations during the relevant time.[38] Did it capture a legal truth about Crown practice in the northwest fur-trading country as the eighteenth century gave way to the nineteenth century? Justice

34 *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823) [*Johnson*]; *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 U.S. (6 Pet) 515 (1832) [*Worcester*].

35 David E Wilkins & K Tsianina Lomawaima, *Uneven Grounds: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).

36 Canadian courts have relied upon the *Marshall* decisions in concluding that Aboriginal title burdens the Crown's underlying legal title, but have ignored them in relation to the question of Aboriginal sovereignty and self-government, without realizing that the two parts to *Marshall*'s reasoning were intimately connected. See Mark D Walters, "The Morality of Aboriginal Law" (2006) 31:2 Queen's LJ 470 at 507-510.

37 *Worcester*, *supra* note 34 at 546-547, quoted in *Connolly*, *supra* note 3 at para 23.

38 Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24:1 Dalhousie LJ 75.

Monk thought that it did. Of course, Justice Monk's vision of things was, as I mentioned at the outset, unobscured by the realities that would follow in the decades to come. For Justice Monk, the American Chief Justice's analysis rang true: "Though speaking more particularly of Indian lands and territories, yet the opinion of the Court [*i.e.*, the Supreme Court of the United States in *Worcester*] as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment…admit of no doubt."[39]

Justice Monk proceeded to quote several other sources, including British parliamentary debates in which Charles Fox insisted that it would be "ridiculous" to impose English law on Hindus and Muslims in British India,[40] and then he concluded: "I have no hesitation in saying that, adopting these views of the question under consideration…the Indian political and territorial right, laws, and usages remained in full force — both at Athabaska and in the Hudson Bay region."[41] In other words, no matter where within the Crown's domains Susanne and William were married, i.e., whether within or outside the Hudson's Bay Company territory known as Rupert's Land, Cree laws remained in force within Cree territories and communities and the marriage was valid according to those laws.

When I first read these statements in the early 1990s, they struck me as truly remarkable. There was simply nothing like them that I had seen elsewhere in Canadian law. However, I also came to see that Justice Monk did not really understand the full nature of Chief Justice Marshall's position. In the 1823 case of *Johnson v M'Intosh*, the American Chief Justice had asked the following question: what if a settler went into the territory of an Indian nation on his own and purchased land from that nation? Would he have obtained a property right cognizable in American law and enforceable by American courts? Answering his own question, Chief Justice Marshall said, *no*, the settler would not have acquired a property title cognizable in American law, for the land would still have been "part of their territory," i.e. the territory of the relevant Indian nation, and held by the settler "under their protection and subject to their laws," and therefore no American court could have "interpose[d] for the protection of that title" if the Indian nation later repossessed the land.[42]

39 *Connolly*, *supra* note 3 at para 24.
40 *Ibid* at paras 27-28.
41 *Ibid* at para 28.
42 *Johnson*, *supra* note 34 at 593.

There was, in other words, a firm line drawn between the American legal system (and presumably the British legal regime before American independence) on the one hand, and the legal systems of Indigenous nations on the other hand. Although Chief Justice Marshall did not consider Indian nations as *internationally* sovereign, he did think that they remained, in an important sense, *foreign* nations, a point reflected in the fact that, in American law at this time, Indians were considered as *aliens* against whom acts of *war* could be (and were) committed, as peoples who might "still be conquered" as Chief Justice Marshall put it, rather than as subjects or citizens protected by the rule of law.[43] Indigenous laws and rights of governance were acknowledged by American judges, but these laws and rights did not form part of *American* law during this early period.

Justice Monk came to a very different conclusion. Of course, the Cree law in the territory where Susanne and William were married was, in respect of Justice Monk's jurisdiction, *i.e.*, the province of Québec, a *foreign* law, in the sense that it was a law of a different jurisdiction, and hence it was a law that could be recognized in his court, if at all, only through the principles of private international law, or the conflict of laws, and in particular through the principle that the validity of a marriage is determined by the *lex loci contractus* or the local law of the place of solemnization. Justice Monk accepted this point explicitly.[44] However, he also thought that the Cree law in this case was in some sense a *British* law because the relevant Cree territory where the marriage was conducted fell within territories over which the Crown claimed, in some overarching sense at least, sovereignty. And, on this logic, the Cree law would have become a part of *Canadian* law just a few years later, when Rupert's Land and the Northwest Territories were transferred to Canada.

It is worth examining Justice Monk's reasoning on this point more closely. First, he concluded that both France and England claimed parts of the northwest in the seventeenth century "by discovery and occupancy" and that by the relevant "principle of public law" the laws of the "parent states" were "immediately and *ipso facto* in force" once these territorial claims by discovery and occupancy were established.[45] Or at least this would have been the case within the

43 *Ibid*.

44 *Connolly*, *supra* note 3 at paras 131-32.

45 *Ibid* at para 21. No authorities were cited for this point, but many could have been. See e.g. *Blankard v Galdy* (1693), 4 Mod 215, 91 ER 356 (KB) [*Blankard*]; *Dutton v Howell* (1693), Show 24 at 31 (*per* counsel), 1 ER 17 (HL) [*Dutton*]; *Anonymous* (1722), 2 P Wms 75 (PC); *Roberdeau v Rous* (1738), 1 Atk 543, 26 ER 342 (Ch); W Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769) I at 106-107.

French or English posts or settlements where traders and settlers were found. But what was the state of the law outside these isolated posts or settlements? Justice Monk quickly saw the weakness of the so-called discovery doctrine. The difficulty, he said, was that the discoverers had discovered a land that was held "by aboriginal nations" which had been in their possession "for ages."[46] Justice Monk continued:

> [W]ill it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated — that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not — that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives.[47]

Although he concluded that the Royal Charter granting the Hudson's Bay watershed (or Rupert's Land) to the Hudson's Bay Company in 1670 introduced English law into parts of the northwest, Justice Monk also concluded that the introduction of English law under this Royal Charter "did not apply to the Indians" and "nor were the native laws or customs abolished or modified"; on the contrary, he continued, "[i]t is easy to conceive, in the case of *joint occupation* of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail," and, indeed, "the dominions of the British Crown exhibit [many] cases of that kind."[48] Justice Monk no doubt had in mind the legal pluralism of British India, for he had already cited Fox's statement on this point. The analysis appears to have assumed, then, that the Crown did indeed gain some kind of sovereignty over lands in North America by discovery and occupation; however, it also assumed that Indigenous laws and governments continued within the territories possessed by Indigenous peoples but located beyond British posts or settlements, even in Rupert's Land where a Royal Charter seemed to contemplate the introduction of English law.

As noted, Justice Monk concluded that the Athabaska district where Susanne and William were married fell *outside* Rupert's Land; it was part of the territories claimed by France by discovery and occupation and then ceded to Britain by the Treaty of Paris in 1763. But this did not affect his ultimate conclusion on the status of Indigenous law. He insisted that during the French regime Indigenous laws and governments were left in place, and that upon

46 *Connolly*, *supra* note 3 at para 22.
47 *Ibid* at para 23.
48 *Ibid* at para 41.

obtaining sovereignty over the territory the British Crown did nothing to alter this state of affairs. In support of this conclusion, Justice Monk quoted the famous passage from the Royal Proclamation of 1763 by which the Crown recognized the territorial rights of Indians living "under Our Sovereignty, Protection and Dominion."[49]

We are now in a position to draw the various strands of Justice Monk's reasoning together. First, he stated that the Cree marriage law in this case was a foreign law for his jurisdiction. "I am clearly of opinion," he wrote, "that this case comes under the operation of the general rule of the *lex loci contractus* referred to," meaning the rule of private international law, or conflict of laws, according to which the courts of one jurisdiction recognize marriages that are valid under the laws of the jurisdictions in which they are conducted.[50] It is worth observing that American courts also recognized Indigenous laws pursuant to these principles of private international law.[51] Second, Justice Monk offered *another* reason for why he had to recognize Cree marriage laws, in departure from the early American approach (whether he knew it or not). He continued:

> There is besides, one answer to all this, and a very plain one. The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it, and 2nd, The sovereign power in these matters, by proclamation [of 1763], has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them. This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent; it has been competent during the last hundred years, for the parliament of Great British to abrogate these Indian laws, and to substitute others for them has not thought proper to do so, and I shall not.[52]

This is, I think, one of the most remarkable passages ever written on Canadian constitutional law. In saying that it is remarkable, I do not wish to suggest that it is necessarily correct or without problems. It is remarkable because it sets forth a theory about the status of Indigenous laws in Canada

49 *Ibid* at para 43.

50 *Ibid* at para 142.

51 *Holland v Pack* (1823), 7 Tenn 157 (CA); *Morgan v M'Ghee* (1844), 24 Tenn 5 (Sup Ct) at 6-7; *Johnson v Johnson's Administrator* (1860), 77 Am Dec 598 (Mo Sup Ct) at 603; *Earl v Godley* (1890), 44 NW 254, 42 Minn 361 (Sup Ct); *McBean v McBean* (1900), 61 Pac 418, 37 Or 195 (Sup Ct). See also Felix S Cohen, "Indian Rights and the Federal Courts" (1940) 24 Minn L Rev 145 at 178.

52 *Connolly, supra* note 3 at paras 143-44.

that draws upon the early American cases but ultimately departs from them by insisting that, in the British half of North America, these laws were implicitly sanctioned by the Crown and could thus be said (for reasons developed below) to be incorporated within the broader common law of the British empire so as to become elements of British law that a British court was bound to recognize and enforce. And, to reiterate a point already made, within three years of this judgement the Northwest Territories would be transferred to Canada, and so on this account these "British" Indigenous laws would then have become "Canadian" Indigenous laws.

On this reading, then, there would have been a broad analogy between the status of Indigenous laws and the status of the French-based civilian law on property and civil rights that had become part of the law of the British province of Québec in the early 1760s and, by extension, part of the law of the new Canadian state established in 1867. It will be recalled that provisions within the Royal Proclamation of 1763 seemed to introduce English law into the province of Québec, but that in the early years of the British regime French-Canadian law was applied at least in relation to matters of private law. This pragmatic compromise was then given a legal explanation. It was argued that the relevant provisions in the Royal Proclamation of 1763 could not have been intended to displace the "*Maxim* of the *Common Law*," that local laws are generally presumed to continue in force in the Crown's newly-acquired territories.[53] To read the Proclamation as "importing English laws into a country already settled, and habitually governed by other laws" would have been to assume "an act of the grossest and absurdest and cruelest tyranny."[54] The *Connolly* case thus supports the conclusion that Indigenous laws were similarly incorporated by virtue of the imperial common law into British and later Canadian law.

Still, how this happened legally is left unclear by the decision. Although he referred vaguely to the experiences of legal pluralism elsewhere in the British empire, Justice Monk did not cite British cases on point. There was certainly judicial authority for the proposition that after the Crown asserted sovereignty over a territory by conquest or cession the local laws of the place were acknowledged and incorporated by the common law and continued in force so long as

53 C Yorke & Wm de Grey, "Report of Attorney and Solicitor General Regarding the Civil Government of Québec" in Adam Shortt & Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa: SE Dawson, 1907) 251 at 255-256.

54 Sir Henry Cavendish, *Debates of the House of Commons in the Year 1774, on the Bill for Making More Effectual Provision for the Government of the Province of Québec* (London, Ridgway, Piccadilly: J Wright, 1839) at 29. Doubts on whether French-Canadian law survived within Québec persisted, however, and they were only resolved by the *Québec Act* (UK), 14 Geo III, c. 83, s 8.

they were consistent with basic principles of humanity and Crown sovereignty and, of course, to the extent that they were not altered by royal or parliamentary legislation.[55] Indeed, this was precisely the maxim of the common law that had been invoked to explain the continuity of French-Canadian law in his own province. The difficulty, which is one that he may have perceived, is that in the case of Indigenous nations in the northwest, there was no conquest or cession. He slid from the idea of "joint occupation" of territories to the idea that the Cree were under "the supreme authority of the empire" with no real explanation. Somehow, Cree peoples and territories became part of the empire and Cree laws were incorporated within the imperial common law. The incorporation thesis implies the subsuming of an inferior legal system within a larger one — an "inclusive" rather than an "exclusive" form of continuity.[56] The *Connolly* case shows, in other words, how Indigenous law may be seen to have been "received into Canadian law."[57]

A second difficulty with Justice Monk's reasoning on this point is the emphasis on implied royal sanction. Indeed, one might be forgiven for thinking that Justice Monk had just finished reading John Austin's work on jurisprudence, which was at this time becoming the dominant theory of law within the English-speaking legal world.[58] In restating the theory of legal positivism, Austin insisted that law is the command of the sovereign, the un-commanded commander, and customary, unwritten, or common law is law only insofar as one can say that it is impliedly or tacitly commanded by the sovereign; on this positivist view, all law must be traced back in linear fashion to one sovereign root. Was Justice Monk adopting an Austinian explanation that Cree law was "law" merely because the Crown impliedly sanctioned it? What about other justifications suggested by the common law, such as the injustice or cruelty of imposing strange laws upon distinct peoples? His view certainly appears premised upon the assumption, no doubt encouraged by legal positivism, that

55 *Calvin's Case* (1608), 7 Co Rep 1a at 17b, 77 ER 377 (KB); *Case of Tanistry* (1608), Davis 28 at 30 (*per* plaintiff), 80 ER 516; *Craw v Ramsey* (1669), 2 Vent 1 at 4, 86 ER 273; *Witrong v Blany* (1674), 3 Keb 401 at 402, 84 ER 789; *Dawes v Painter* (1674), 1 Freem 175 at 176, 89 ER 126; *Dutton*, supra note 45 at 31 (*per* plaintiff); *Blankard*, *supra* note 45 at 225-26; *Anonymous*, *supra* note 45; *Campbell v Hall* (1774) Lofft 655, 98 ER 848 (KB) at 741.

56 Walters, "Golden Thread," *supra* note 33 at 716-718.

57 John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629 at 632, n 7. See also Sébastien Grammond, "The Reception of Indigenous Legal Systems in Canada" in Albert Breton et al, eds, *Multijuralism: Manifestations, Causes, and Consequences* (Farnham: Ashgate, 2009) 45 (distinguishing between "soft" or "intra-state" pluralism at 47 and "hard" or "extra-state" pluralism at 49).

58 Largely ignored when first published in 1832, Austin's work in jurisprudence would have a profound impact on legal thinking throughout the common law world after its re-publication in 1861: John Austin, *The Province of Jurisprudence Determined,* 2nd ed (London: John Murray, 1861).

determining the status of a law involves an either/or choice — that Indigenous law is either outside and alien (the American approach articulated by Marshall) or inside and domesticated (the Canadian approach that he articulated). The latter approach seems to deny the sovereign separateness that the former approach accepts, but it gives Indigenous law a meaningful foothold in the law of the state.

I raise these various questions and queries about the case without answering them, though perhaps good answers can be developed. My main point, at this stage, is simply to observe that, for me, as a doctoral student in the early 1990s, at a time when there was virtually no acknowledgement within mainstream Canadian judicial discourse of Indigenous legal traditions, the abovementioned passages from the *Connolly* case were like gold. I was captivated by the idea that the immemorial laws, customs, and traditions of governance that gave normative shape to communities that were Indigenous to the lands that Canada encompassed could be seen as valid, integral and important parts of Canadian law, and that this incorporation of Indigenous law by Canadian law could be understood as largely the result of common law principles. In fact, the incorporation thesis was a central theme within my doctoral dissertation, submitted twenty-two years ago, with the rather awkward title: "The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada."[59]

IV.

I now turn to the second reading of *Connolly v Woolrich* — the *assimilation* reading. Since the submission of my doctoral thesis, I have learned more about Indigenous legal traditions than I knew then. Of course, I must acknowledge that whatever I have learned about Indigenous law is, at most, the tip of an iceberg, an iceberg that I know I will never really fully see or understand. I know just enough, however, to see that my early enthusiasm for the *Connolly* case was and is deeply problematic. There are serious difficulties associated with the incorporative approach to the continuity of Indigenous law. Looking at the arguments made in the case may shed some light on why.

The lawyers for the defendants in the *Connolly* case argued that "the usages and customs of marriage observed by uncivilized and pagan nations, such

59 Mark D Walters, *The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada, 1760-1860* (PhD Thesis, Oxford University Faculty of Law, 1995) [unpublished].

as the Crees were, cannot [be] recognised by this Court as giving validity to a marriage even between the Indians themselves, and more particularly, and much less, between a Christian and one of the natives…[for] there can be no legal marriage between two parties so situated under the infidel laws and usages of barbarians."[60] This argument reflects a line of thought offensive to our sensibilities today, but in its time, it was very powerful for judges and for public officials generally. Just several years earlier, the Chief Justice of the neighbouring province, Upper Canada, stated: "We cannot recognize any peculiar law of real property applying to the Indians — the common law is not part savage and part civilized."[61] The common law cannot, in other words, accommodate Indigenous legal ideas. Justice Monk rejected this line of reasoning — in part. He recognized Cree law. However, he was not immune from the societal attitudes of his day.

In considering his position, it is worth pausing to ask who Justice Monk was. Samuel Cornwallis Monk (1814-1885) was born in Nova Scotia, the son of loyalists who left Boston upon the outbreak of the American war of independence. His great grandfather had been an attorney general in the province, and his grandfather had been a provincial judge, and one of his uncles, Sir James Monk, was a Queen's Bench judge in Montreal. He was admitted to the bar in Lower Canada in 1837 and appointed to the Superior Court of Lower Canada in Montreal in 1859.[62] He was perfectly fluent in English and French, and he gained a reputation for being a scholarly and thoughtful judge — a reputation confirmed by his reasons in the *Connolly* case which ranged from Roman law, to medieval law, to canon law, to modern civilian and common law, and, of course, to Cree law.[63] He was the sort of judge who wrote poetry (including a 237-page poem on the Norman Conquest).[64] The journal kept by his daughter, Amelia, which she started writing in 1867, the year of the *Connolly* judgement, reveals a father who was extremely religious and also dedicated to his family

60 *Connolly*, *supra* note 3 at para 12.

61 *Doe dem Sheldon v Ramsay*(1851), [1852] 9 UCQB 105, [1851] OJ No 82 (QL) at 123 Robinson CJ.

62 Reverend J Douglas Borthwick, *History and Biographical Gazetteer of Montreal to the Year 1892* (Montreal: John Lovell & Son, 1892) at 218-19.

63 George Maclean Rose (ed), *A Cyclopædia of Canadian Biography: Being Chiefly Men of the Time; A Collection of Persons Distinguished in Professional and Political Life; Leaders in the Commerce and Industry of Canada, and Successful Pioneers* (Toronto: Rose Publishing, 1888) at 537: "His natural talents, united to his vast knowledge and graceful elocution, have made him one of the most instructive and agreeable persons to listen to whenever he has a judgment to deliver."

64 [Samuel Cornwallis Monk], *The Norman Conquest* (Montreal: 1870); [Samuel Cornwallis Monk], *The Saguenay: an unpublished poem* (Montreal: John Lovell, 1860).

and his children.[65] Monk came from an Anglican family, but his wife, Rosalie Caroline Debartzch, was a Roman Catholic of French-Polish background, and it seems that he came to identify as a devout Roman Catholic.[66]

What we know of Monk is consistent with the impression left by his reasons in the *Connolly* case — that he felt a powerful need for moral and religious reasons to ensure that relationships between Indigenous women and non-Indigenous men in the northwest were not sinful or evil but were true marriages. Whether he realized it or not, however, in the process of responding to the general sentiment, noted above, that the customs of uncivilized peoples could not be recognized, he assimilated Cree norms concerning intimate family relations into a Christian mould. The evidence in the case on Indigenous marriage customs suggested that divorce at will and polygamy were both permitted. However, Justice Monk stripped away any aspect of Indigenous law that he regarded as offensive to leave a core conception of marriage that he could recognize. He wrote:

> This law or custom of the Indian nations is not found recorded in the solemn pages of human commentaries, but it is written in the great volume of nature as one of the social necessities — one of moral obligations of our race — through all time and under all circumstances, binding, essential, and [inevitable] and without which neither man, not even barbarism itself, could exist [upon]earth. It is…an existing and immemorial usage…It exacts the solemn consent of parents, and that of the parties who choose each other, for; good or for evil, as husband and wife — it recognizes the tie and some of the sacred obligations of married life; and it would be mere cant and hypocrisy, it [would] be sheer legal pedantry and pretension, for any man, or for any tribunal, to disregard this Indian custom of marriage, inspired and taught, as it must have been by the law and the religion of nature among barbarians, who, in this essential element of a moral life, approach so near to the holy inculcations of Christianity.[67]

Justice Monk did not try to understand Cree legal tradition on its own terms, but reformulated it so that it resembled something that he could recognize and accept. Cree marriage custom could be enforced because it approximated the Christian ideal of marriage.[68] This is the *assimilationist* reading of the case. It shows the dangers associated with the incorporative approach to Indigenous

65 Jessica L Brettler Vandervort, *Faith, Family, Female Education and Friendship:* Retelling *Louise Amelia Monk's Adolescence in Bourgeois Montreal, 1867-1871*, MA Thesis, Concordia University Department of History, (Ann Arbor, Mich: ProQuest Dissertations Publishing, 2003) at 3-5.

66 *Ibid* at 12.

67 *Connolly*, *supra* note 3 at para 93.

68 See Grammond, *supra* note 57 at 55: "Judge Monk today passes for a particularly enlightened spirit for his time. However, one can criticize the fact that he sees indigenous law as a copy of Western law."

law: through incorporation into another law it is assimilated and transformed by a different legal culture. Of course, a modern non-Indigenous judge sensitive to cultural difference might do a better job than a nineteenth-century judge of curbing this assimilationist inclination. Still, I wonder whether non-Indigenous judges, and indeed non-Indigenous lawyers and non-Indigenous legal academics, myself included, might, despite their best intentions, *still* conceptualize Indigenous law using assumptions drawn from the common law or civilian legal traditions.[69]

The problem runs deeper than just unconscious interpretive bias. There may be good reason to think that Indigenous legal traditions, though diverse and varied, share a set of basic structural features that make their judicial enforcement difficult or even impossible. To appreciate this point, perhaps we can try to imagine the normative culture practiced within Cree societies in 1803. This is, of course, perhaps as impossible a task for me to perform as it was for Justice Monk. However, we have additional resources and perspectives that Justice Monk did not have, and so the attempt, though bound in some sense to fail, may still be helpful.

We may start with Susanne herself. She appears in the judgement and in the many accounts of the case as "Susanne *Pas-de-nom*." However, this was not the name of the fifteen-year old girl whom William married in 1803. Susanne was a name that she was given or adopted upon her baptism many years later. Indeed, Susanne may well have been a name that she wanted to use. However, the failure to acknowledge that she had a Cree name is one way of many in which the vast cultural differences that existed between her society and William's was diminished or even erased by judicial and legal interpretations of her life with William. In fact, her Cree name was *Miyo Nipay* — which in the Cree language means "Beautiful Leaf."[70]

For Miyo Nipay and her people, what was marriage? What was law? Consider the following account of Cree legal traditions from a report of the

69 See, for example, the difficulties that the trial judge had in understanding the Gitksan and Wet'suwet'en legal traditions known as *adaawk* and *kungax*: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 89-108, 153 DLR (4th) 193. See also *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 where the Supreme Court of Canada itself has struggled with Indigenous perspectives, suggesting that judges should "translate" Indigenous land uses into "common law" categories at para 51, an approach that could not help, as LeBel and Fish JJ, concurring, observed, to lead to deep misunderstandings and misapplications of "aboriginal customary laws relating to land":, at para 128.

70 Sylvia Van Kirk, "Tracing the Fortunes of Five Founding Families of Victoria" (1997/98) 115/116 BC Studies 149 at 152; Adams, *supra* note 15 at 3; Perry, *supra* note 15 at 2, 33.

University of Victoria Indigenous Law Research Unit based on interviews conducted with members of the Aseniwuche Winewak Cree Nation:

> At a general, cosmological level, one community member explained his belief that the Cree legal tradition needs to be understood as existing fundamentally within larger relationships. He argues that even the term, "law", can be a misleading term for Cree people, if they associate it only with the Canadian model of law, which assumes a Canadian-style judiciary. Instead, he explained his understanding that Cree law relies on "protocols" — the proper conduct for ceremony, hunting, address of others, life generally, or "everything." Underlying the importance of protocols, on this view, is the foundational importance of relationship between individuals and Creator, other humans, the land, and "nature."…Everything is seen as related parts of one whole…This worldview, with its emphasis on relationships and the interconnection of all aspects of life, is reflected throughout the stories and interviews. In particular, spirituality is not separated or elevated beyond other life realms…In general, relationships, between actions and consequences, between people and peoples, and between humans and the rest of the world, are assumed and permeate legal decision-making at many levels.[71]

This account reveals the contours of a complex understanding of legality that is extremely difficult for anyone from outside the Cree culture to comprehend fully today (let alone in 1867). It may involve norms that simply cannot be enforced by a court — or if these norms are enforced by a court perhaps they will invariably become in the process something else.

With respect to customary norms governing marriage, Jennifer Brown has recently observed that the word for marriage in the Cree language — *wikihtowin* — simply means "living together" and it invoked a very different set of expectations and ideals than the European and Christian conception of marriage; indeed, she observes that once missionaries arrived at fur-trading posts and tried to formalize marriages between Indigenous women and European men, the Cree began to distinguish between *wikihtowin* and *kihci-wikihtowin* or the "big living-together."[72] Although Justice Monk's description of Cree marriage makes it seem like a perfunctory transaction, it has been argued that Miyo Nipay's relations would have engaged in a fairly elaborate ceremony upon her marriage to William.[73] In their research on women in the fur trade,

71 Accessing Justice and Reconciliation Project, "Accessing Justice and Reconciliation: Cree Legal Summary", by Hadley Friedland (Victoria: Indigenous Law Research Unit, 2012) at 44. See, in more general terms, Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ16.

72 Brown, *An Ethnohistorian in Rupert's Land*, *supra* note 12 at166-167.

73 Backhouse, *supra* note 7 at 10-11.

Van Kirk and Brown suggest that fur traders were drawn, in many cases unwittingly, into the complex normative worlds of the Cree, Anishinaabe and other Indigenous nations in which social structures and expectations, especially those surrounding kinship relations, were fundamentally different from European ideas about the status of marriage and the roles of men and women. Within these normative worlds, the exchange of material goods, political alliances, spiritual bonds, family and kinship relations — the public and the private, the political and the commercial, the community and the individual — were not sharply divided. Men might have several wives, but usually because of a sense of reciprocal responsibilities, a sense that men should care as hunters for widows of friends or brothers and that women in this position should contribute as skilled artisans to the well-being of their relations. The sense of duty that came with entering into a kinship relationship, of providing where possible for the extended network of relations that one gained, was powerful, but it was also voluntarily assumed and maintained. In societies without coercive state institutions, people were free to extract themselves from relationships that were not working, marriage included. Normative order, at the personal, family, and larger political levels — ultimately the norms that governed these different levels of organization blended — was something that was always in a state of motion, a fluid web of interlocking benefits and responsibilities in which personal liberty and community solidarity had to be worked out on an on-going basis.[74]

The Cree word *wikihtowin* or marriage appears very similar to the Cree word *wahkohtowin*, which, as I understand it, implies a more general legal norm or practice. In this respect, it is perhaps worth noting that a Cree-English dictionary published in 1865, just a few years before the *Connolly* case, defined the word *wekètoowin* as meaning "marriage," but it also defined another Cree word, *wechātoowin*, as meaning "fellowship" or "unity."[75] This second expression seems to track the idea of *wahkohtowin* that has more recently been described as "the overarching law governing all relations" within Cree societies, a normative ordering within which individuals and families and larger networks of kinship relations seek a mutual and reciprocal sense of balance within the natural and spiritual world around them, or, in other words, a distinctive form

74 See generally Van Kirk, *supra* note 12; Brown, *supra* note 12. See also Sarah A Carter, "Creating 'Semi-Widows' and 'Supernumerary Wives': Prohibiting Polygamy in Prairie Canada's Aboriginal Communities to 1900" in Katie Pickles & Myra Rutherdale, eds, *Contact Zones: Aboriginal and Settler Women in Canada's Colonial Past* (Vancouver: UBC Press, 2005) at 131.

75 EA Watkins, *A Dictionary of the Cree Language: as Spoken by the Indians of the Hudson's Bay Company's Territories* (London: Society for Promoting Christian Knowledge, 1865) at 443, 445.

of "Indigenous constitutionalism."[76] As Hadley Friedland writes, *wahkohtowin* describes "the centrality and importance of relationships and building relationships in Cree legal thought," and in this sense it "represents an essential background narrative or meta-principle for Cree laws."[77]

I wonder, then, whether Cree *wikihtowin* or marriage is, in the end, inseparable from Cree *wahkohtowin* or constitutionalism generally speaking. The author of the 1865 dictionary may have picked up on subtle differences in tone, emphasis, or inflection among Cree speakers when distinguishing slightly different words for marriage and a more general idea of normative unity. However, the similarity in words is probably significant. The recent work on Cree legal traditions referred to above confirms that sharp conceptual lines between kinds of kinship relations are not drawn within Cree societies. It suggests that differences between relations between spouses, parents and children, brothers and sisters, cousins, two-related villages, even entire nations, are differences in degree not kind, and that emphasis is placed not upon determining a fixed status for a person, an office, or even a community, but rather on the attitudes and actions needed to instantiate healthy relationships; in other words, that each relationship manifests in slightly different ways the general "background narrative" of *wahkohtowin*.

For a judge to identify one norm from this set of complex and shifting normative narratives and practices and enforce it with the crispness of a common law rule, in effect detaching it from the structures of governance out of which it emerges, may do far more damage than good. On the assimilationist reading of the case, I began to wonder whether it wasn't just as well that *Connolly v Woolrich* had become only a footnote to the legal history of Indigenous peoples in Canada. Perhaps it was best that Indigenous legal traditions have persisted during the last 150 years under the (Canadian) legal radar. As Aaron Mills has written, "what we call law exists as such only within its own lifeworld," and one "can't simply translate law across distinct constitutional contexts and expect it to retain its integrity and thus its functionality."[78]

76 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 84-85. See also John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada" in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 13.

77 Hadley Louise Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation, University of Alberta Faculty of Law, 2016) [unpublished] at 192–193.

78 Aaron Mills (Waabishki Ma'iingan), "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 854-55.

The assimilationist reading of the case forces us to consider what it means for a norm, custom or practice to be part of "Canadian law." If Indigenous laws are incorporated within and form part of Canadian law, does it follow that they have to be judicially enforced in ordinary courts? We could imagine special Indigenous tribunals.[79] But would there need to be a link to the Canadian legal order — an appeal or judicial review in the general courts? Even (or especially) as Indigenous legal traditions gain better recognition from Canadian law, it will no doubt remain important for them to continue, as they have done all along, to operate within their own distinctive jurisdictional domains. There will, however, be times when it is necessary to vindicate Aboriginal rights for general courts to consider Indigenous law. On these occasions, Mills writes, "there are very serious questions, to be taken up in considering whether we may safely move law between constitutional contexts," or, in other words, whether we may move Indigenous law "out of its own lifeworld and into another."[80] We have only just begun to think about both the damaging and the restorative potentials of this prospect.

V.

I turn now to the third reading of *Connolly v Woolrich* — the reconciliation reading. I have read the case many times over the years, but the reconciliation reading is one that has only gradually emerged in my thinking about it. It is a kind of redemptive reading of the old text, an example, perhaps, of what Robert Cover once called "redemptive constitutionalism."[81] It is an account of the case that may seem at first to reflect all of the admirable and objectionable features of a "common law mind" struggling to craft a normative reality that honours a past that only barely evidences the kind of honour that the ideal of legality implies. Indeed, I cannot deny that it is partly that.[82] But of course if it is to be a reading of reconciliation it must be more than just that. I think it is clear that legality is a distinct value of political morality that must be treasured and nurtured if diverse peoples are to live together peacefully. But I am also drawn to the view that legality must, in effect, make its stand on the narrow ledge of a

79 Ghislain Otis, "La Protection Constitutionnelle de la Pluralité Juridique: Le Cas de l'Adoption Coutumière Autochtone au Québec" (2011) 41:2 RDG 567 at 604.

80 Mills, *supra* note 78 at 857.

81 Robert M Cover, "The Supreme Court 1982 Term Foreword: *Nomos* and Narrative" (1982) 97:4 Harv L Rev 4 at 33–35.

82 See generally Mark D Walters, "Histories of Colonialism, Legality and Aboriginality" (2007) 57 UTLJ 819. My friend, Paul McHugh, says I am a "common law seminarian": PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011) at 308. I doubt this was meant as a compliment — but I take it that way.

distinctive style of legal interpretation evidenced, but hardly monopolized, by a certain view of common law method.

The reconciliation reading is not an obvious one; it does not draw upon Justice Monk's reasoning directly, but rather on assumptions and ideas that are implied by his reasons. Perhaps the best way to explain this reading is to recall the dilemma faced by Samuel Monk. Monk, a deeply religious man who appears to have accepted Roman Catholicism, had to decide whether a Cree marriage between a man and a Cree woman was valid or whether the subsequent Roman Catholic marriage between that man and a Euro-Canadian woman was valid. Although William and Julia had both by this time died, the implications for the surviving members of the families were profound. No matter which side Justice Monk favoured, one of William's relationships would be held to be illicit and the children of that relationship illegitimate. The impact for that side to the dispute would, by the standards of the time, have been one of moral and social disgrace.

Justice Monk described the plaintiff, John Connolly, as the "obscure and stigmatized offspring" of William and Susanne who came forward "to vindicate his mother's memory and honor, and his own rights."[83] However, Justice Monk may have been aware that the result in the case would also impact the other members of the family, including John's sisters, one being a nun in the Red River colony and the other being Lady Amelia Douglas, the wife of the governor of British Columbia. Although Amelia declined to join as a party to the case, the litigation had drawn public attention to her own status and caused her considerable anxiety; she appears to have withdrawn from public life in a state of depression between the trial and appeal decisions in the case.[84] Of course, William and Julia's children would presumably have felt the very same kind of anxiety. Indeed, given the judge's own religious and social views, we might have expected him to side with Julia's memory, honour, and family over Susanne's memory, honour, and family. But he did not. Why?

There is no indication in his reasons that Monk sought to save the social standing of a nun in Red River or a governor's wife in British Columbia; but there is some evidence of his broader concern about the practice of so-called country marriages. The relationship between William and Susanne was not

83 *Connolly*, *supra* note 3 at para 168.

84 Marion B Smith, "The Lady Nobody Knows" in Reginald Eyre Watters, ed, *British Columbia: A Centennial Anthology* (Vancouver: McClelland and Stewart, 1958) 472 at 479-80. See also Sylvia M Van Kirk, *The Role of Women in the Fur Trade Society of the Canadian West, 1700-1850* (PhD Dissertation, Queen Mary College, University of London, 1975) at 305 [unpublished].

an isolated event. This kind of relationship defined the reality for a segment of British North American society that had developed over the previous century and a half or more. If fur traders were to abandon their "country wives," as they were called, on the grounds that they were not really "wives," what did that say about the moral character of Canadian society? It would mean that thousands of relationships, sexual relationships that produced children, were extramarital. This, Monk could not contemplate. In an important passage he wrote:

> The evidence shows conclusively that [Susanne's] status was that of a lawful wife, and not that of a harlot…The status of the Indian was not that of his concubine. I am not here to give expressions to loose social views of relationships such as these among which the [defendant] seeks to class Connolly's marriage to the Indian. … I am called upon to administer the law, and not to enforce popular views on these subjects… This [is] one way of doing things [referring here to the assumption by some fur traders that they could simply abandon women and families]! but the sooner this is checked the better; and the sooner these men understand that such outrages upon law and religion will not be sanctioned by our Courts, the more probability there is that such irregular practices will be discontinued.[85]

Victorian morality could not contemplate a section of society living outside the accepted norms of human behaviour. True, Monk accepted that country marriages might be repudiated in the northwest; after all, the custom of the country would define both the formation and the termination of such relationships.[86] But ending a lawful marriage is very different from leaving an unmarried partner. Furthermore, if a fur trader re-entered Canadian society without first ending a country marriage, his marriage would be acknowledged in Canadian law. "[I]t was not competent…for Mr. Connolly to carry with him th[e] common law of England to Rat River in his knapsack," wrote Justice Monk, "and much less could he bring back to Lower Canada the [Cree] law of repudiation in a bark canoe."[87] His basic point was that these marriages were *lawful* marriages in the place where they were celebrated *and* wherever the spouses moved, but they could be dissolved only according to the law of the place where the dissolution was desired. In this way, the judge could maintain the moral standards of his own society.[88] It was no doubt painful for Justice

85 *Connolly*, *supra* note 3 at para. 162.

86 *Connolly*, *supra* note 3 at para 159: "If this Cree marriage was dissolvable at pleasure, Mr. Connolly could perhaps have repudiated his Indian wife, had he done so while residing among the Crees, or where such a barbarous usage prevailed. He might have done so then, if he could do so at all--but when he came to Canada, that right ceased."

87 *Connolly*, *supra* note 3 at para 44.

88 *Cf* Bethany Ruth Berger, "After Pocahontas: Indian Women and the Law, 1830 to 1934" (1997) 21 Am Indian L Rev 1 at 43: "Justice Monk…was unique in placing the impact of this clash of cultures on the member of the insider culture rather than on the outsider. He recognized that marriage to an

Monk to rule that Julia's relationship with William was extra-marital. He did his best to explain that this conclusion did not reflect badly upon her character. He paid tribute "to the cultivated intellect and feminine virtues of the amiable lady whose name and position figure so conspicuously in this unhappy case."[89]

The base of the decision, then, is a *moral* vision about human relationships, one that insists upon the presence of a *normative* structure for the formation, development, and dissolution of these relationships, and, indeed, one that insists that this normative structure be a *legal* structure. Implicit within Justice Monk's reasoning, in other words, is the view that *morality* demands *legality*. True, the specific moral vision here is a decidedly Victorian vision of gender, marriage, family, sex, and sin, a moral vision that may be difficult to understand or appreciate completely today. For that matter, one must concede that this moral vision seems to offer very infertile ground for a *redemptive* reading of the law that would somehow further the ideals of reconciliation. Where, then, is my promised reconciliation interpretation of the case?

It is, I think, staring at us. Justice Monk is saying, in effect, that the moral integrity of human relationships (not just marriages or families but relationships generally) demands a social bond secured through law, and that social and political realities may be such that the only law capable of meeting this moral necessity is the law of a local community; in this case, an Indigenous people or nation. True, the social and political reality that led him to conclude that Cree law structured relationships in Athabaska in 1803 was the reality that no other law was actually capable of serving this function. "There were then," he wrote, "no houses except within the forts, no villages, no colonies, no plantations, no civilized settlements, no political or municipal limits, circumscription or institutions, in most of these places; there were no Courts of law, and pearcely any law, except the will of the trader, *and the native customs and usages of the Indians*."[90] The native customs and usages of the Indians supplied the law that the moral imperative for normative order required.

In time, alternative laws would be introduced into the northwest, as they already had been in other parts of Canada, that were *effective*, in the sense that there were officials and courts on the ground ready and able to impose them on Indigenous peoples. The question, then, is whether the principle underlying the *Connolly* case, the principle that the moral integrity of human relation-

Indian woman did not absolve the white man from the moral obligations which underlie the legal obligation not to simply abandon a wife of thirty two years."

89 *Connolly*, *supra* note 3 at para 168.

90 *Connolly*, *supra* note 3 at para 174 [emphasis added].

ships demands normative order through law, is a principle that can be satisfied through just any law that is, in this narrow sense, effective, or whether it means something more. I think it means something more. What did Charles Fox mean when, in the debates Justice Monk quoted, he said that it would be "ridiculous" to apply English law to Muslims and Hindus in British India? He meant, I think, that even if British authorities had the capacity to enforce English law, it would be wrong for them to try. Judicial statements in relation to India reveal why: it would be inappropriate to extend to one set of distinctive cultures the law of another culture.[91] The language used in relation to French-Canadian law in Québec, noted above, is equally instructive. It would have been *absurd* and *tyrannical* to impose a new law upon a people with an established law. It would, in other words, introduce a degree of irrationality and arbitrariness inconsistent with the basic demands of normative order that we now associate with the rule of law. Respect for the rule of law in a culturally diverse setting will mean respect for some form of legal pluralism. This is a simple idea that can be seen to animate at least some judicial interpretations of the *Connolly* case. It would be "monstrous," one judge said, to interpret legislation introducing English law into the northwest as extending to marriages between Indians so long as they remained "unchristianized" and "adhere to their own peculiar marriage custom and usages."[92] If the principle that the moral integrity of human relationships demands normative order through law is to be meaningful at all, it must be honoured equally for all peoples.[93] The rule of law cannot be selectively honoured.

But the forced imposition of alien laws upon Indigenous peoples in Canada did occur, and the effects have indeed been monstrous. It is beyond the scope of this essay to say how this wrong should be addressed. It is certainly not my contention that the answer will be found in the *Connolly* case. However, some general lines of thought that might guide us on this question have emerged from the discussion so far. Our consideration of the relationship between the Cree ideas of *wikihtowin* and *wahkohtowin* suggests that if the principle concerning the moral imperative of normative order means that Indigenous law

91 *The "Indian Chief"* (1801), 3 C Robinson 12 (as English law was "not applicable to the religious or civil habits of the Mohamedan or Hindoo natives" in India, they were "allowed to remain under their own laws" at para 31), 165 ER 367 (HC Admiralty); see also, *Freeman v Fairlie*, [1828] UKPC 2, 1 Moo Ind App 306 at 324-325; *Advocate General (Bengal) v Ranee* (1863), 2 Moo PCNS 22 at 60, 15 ER 811.

92 *R v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211 at 215, 1889 CarswellNWT 14 (WL Can).

93 *Cf* Gregg Strauss, "The Positive Right to Marry" (2016) 102 Va L Rev 1691 (there is a fundamental or inherent legal right to marry "because only law can create a system of equal intimate liberty" at 1765).

must be recognized in certain situations, then it is not laws or sets of legal rules or norms as such that must be respected but the interpretive practice or what Mills calls the "lifeworld" through which normative community is experienced that must be respected. Jeremy Webber has expressed this point clearly: "We should not aim to protect a predetermined body of norms…We should respect that order's practices of normative deliberation and decision making — the processes by which normative claims are discussed, disagreement adjudicated…and the resultant norms interpreted and elaborated."[94] Law is, as Webber observes, simply the interpretive practice of critical reflection and discourse about what normative traditions, practices, or customs really mean. To understand the potential for and character of "normative dialogue across legal orders," Webber continues, requires that we adopt a stance of humility and accept that different cultures will engage in the interpretive practices that instantiate law in markedly different ways.[95]

How might someone schooled in common law method do this? In thinking about inter-cultural legal dialogue, we should not discount entirely the value of resources found within particular traditions that might be shared by other traditions. Common law concepts like "crown", "state" and "sovereignty" may obscure deeper common law practices of interpretive discourse that may offer a richer sense of constitutionalism — an "ancient constitutionalism"[96] or a "humanist" constitutionalism.[97] These interpretive practices may suggest, in particular, that instead of assuming that law's authority emanates from some extra- or supra-legal source, like a sovereign person or body, we may see law as generated from within its own distinctive styles of explanation and justification. On this view, law's authority is something that we must demonstrate to each other by showing how the various legal rules, principles, values, institutions and arrangements that have developed, including distinct legal traditions valued by the different communities that find themselves, for better or worse, connected with each other, can be understood to be more than just an arbitrary jumble of contingent facts — even if this means an on-going attempt at refining the specific or concrete rules or institutions we accept and refining the general account of moral principle we think they instantiate to show some kind of balance or equilibrium. On this jurisprudential view, then, we would see law's authority as established through an explanation or interpretation about

94 Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 at 170.

95 *Ibid*. Also on dialogue between legal cultures, see Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579 at 593.

96 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

97 Mark D Walters, "Legal Humanism and Law-as-Integrity" (2008) 67:2 Cambridge LJ 352.

relationships that reveals a sense of coherence within or between the various and distinctive aspects of normative order that a pluralistic society must acknowledge. This explanation would seek to show that these aspects of order cohere in light of a more general value of legality premised upon the equal respect due amongst and between communities as to the moral imperative of normative order. This is, of course, a circular interpretive process of discourse and justification — but the circle is, we may say, a "virtuous" one.[98]

One advantage of seeing law in this circular or interpretive sense is that it is released from the imperialistic impulse to locate a sovereign root for law's existence.[99] Indigenous law is acknowledged not because it has been incorporated within another law, or because it has been impliedly (or expressly) accepted or sanctioned by a sovereign king or parliament, but rather because it is one of many bodies of law that can be shown to fit together in a manner that best reflects the equal moral imperative for normative order. Though Webber may hesitate on this point, I think that it is possible, in this way, to see how laws can be reconciled, or at least reconcilable, despite deep cultural differences, to reveal a unified constitutional structure. Indigenous law matters not because it can be traced back in linear fashion to some (non-Indigenous) constitutional foundation, but rather because it emerges within a network of interlocking and connected legal domains that secure equally for each related community the moral imperative of normative order. Different legal traditions can fit together in this way, but on this view normative unity is understood in a circular or interpretive sense rather than in a linear or positivist sense and, in this distinctive way, legal unity and pluralism are reconciled.

I appreciate that this third reading of the old case of *Connolly v Woolrich* is only sketched here in general terms, and that its soundness will be open to many questions and doubts by others. I offer the reconciliation reading, then,

98 As Nelson Goodman observed in relation to coherence theories of moral reasoning, which are related to legal coherence theories: "This looks flagrantly circular…But this circle is a virtuous one." Nelson Goodman, *Fact, Fiction, and Forecast* (Cambridge: Harvard University Press, 1954) 63-64. For more detailed discussions, see Mark D Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thorburn eds, *The Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) at 33; Mark D Walters, "Deliberating about Constitutionalism" in Ron Levy et al eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) at 167.

99 Mark D Walters, "'Looking for a Knot in a Bulrush': Reflections on Aboriginal and Crown Sovereignty" in Patrick Macklem & Douglas Sanderson, eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 35. It may be an approach that offers one way to "decolonize law": Sheri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145 at 60.

as a suggestion about one possible perspective that might be developed in our on-going efforts to imagine reconciliation between the fundamentally distinct legal cultures that exist in Canada. Of course, even if plausible, this legalistic reconciliation can only be one part of the ideal of reconciliation towards which Indigenous and non-Indigenous peoples in Canada continue to work. I will close, then, simply by saying that when the old case of *Connolly v Woolrich* is re-read in a way that captures a spirit of legality that might attract allegiance from diverse peoples, its 150th anniversary may be worth celebrating — and, indeed, perhaps it gives us one more small but important reason to celebrate Canada's 150th anniversary.

Unpacking "Reconciliation": Contested Meanings of a Constitutional Norm

*Hannah Wyile**

While the concept of reconciliation has become ubiquitous in contemporary Canadian politics, its importation into the political sphere is still a relatively recent phenomenon and is complicated by the ambiguity that surrounds the term as a result of its multifaceted etymology. Reconciliation is widely critiqued for being ambiguous, tinged with religious meanings, and susceptible to political manipulation. While many scholars have critically analysed how the term has been used by the Canadian government in recent years, this work has yet to be complemented by a genealogical analysis that asks when, why, and how reconciliation was brought into discussions of political relationships between Canada and Indigenous peoples in the first place. This article sketches out the beginning of a genealogy of reconciliation in relations between Indigenous peoples and Canada through 1) an examination of the concept as it was introduced in decisions of the Supreme Court and the work of the Royal Commission on Aboriginal Peoples, and 2) an investigation of how the concept came to be included in these key texts. By exploring these deployments of the term, and the conceptual confusion that has surrounded them, this article aims to shed some light on the foundations upon which contemporary debates over reconciliation rest and to offer some tools for assessing rhetorical deployments of the term.

Bien que le concept de la réconciliation soit devenu omniprésent en politique canadienne contemporaine, son importation dans le domaine politique est encore un phénomène relativement récent et elle est compliquée par l'ambiguïté qui entoure le terme résultant de son étymologie à multiples facettes. La réconciliation est largement critiquée comme étant ambiguë, teintée de significations religieuses et prédisposée aux manœuvres politiques. Quoique de nombreux chercheurs aient analysé d'un œil critique la façon dont le terme a été utilisé par le gouvernement canadien au cours des dernières années, ce travail n'a pas encore été complété par une analyse généalogique qui demande quand, pourquoi et comment la réconciliation fut introduite dans des discussions sur les rapports politiques entre le Canada et les peuples autochtones. Dans cet article, l'auteure dessine les grandes lignes d'un début d'une généalogie de la réconciliation dans les rapports entre les peuples autochtones et le Canada par 1) un examen du concept tel qu'il fut introduit dans les décisions de la Cour suprême et le travail de la Commission royale sur les peuples autochtones et 2) une enquête de la manière dont le concept en est venu à être inclus dans ces textes fondamentaux. En examinant ces utilisations du terme, ainsi que la confusion conceptuelle qui les entoure, cet article vise à éclairer les bases sur lesquelles reposent les débats contemporains portant sur la réconciliation et suggérer quelques outils pour évaluer les utilisations purement rhétoriques du terme.

* PhD Candidate, School of Political Studies, University of Ottawa. I am grateful to Kiera Ladner, Steven Orr and Andrea Schwenke Wyile for feedback on earlier versions of this piece, to Peter Carver for his editorial magic, and to the *Reconciliation/Wahkohtowin* conference organizers for inviting me to participate. I am also grateful for funding support from the Social Sciences and Humanities Research Council of Canada, the Ontario Graduate Scholarship, and the University of Ottawa.

Introduction

While the concept of reconciliation has become ubiquitous in contemporary Canadian politics, its importation into the political sphere is still a relatively recent phenomenon and is complicated by the ambiguity that surrounds the term as a result of its multifaceted etymology. Reconciliation is widely critiqued by political theorists and transitional justice scholars for being ambiguous, tinged with religious meanings, and susceptible to political manipulation. While many scholars have critically analysed how the term has been used by the Canadian government in recent years, this work has yet to be complemented by a genealogical analysis asking when, why, and how reconciliation was first brought into discussions of political relationships between Canada and Indigenous peoples. This article seeks to remedy this gap in historical understanding by sketching out the beginning of a genealogy of reconciliation through 1) an examination of the concept as it was introduced in decisions of the Supreme Court and the work of the Royal Commission on Aboriginal Peoples, and 2) an inquiry into how the concept came to be included in these key texts. By exploring these early deployments of the term and considering how they are reflected in the scholarship on constitutional reconciliation, I hope to shed some light on the foundations of contemporary debates over reconciliation.

The paper is comprised of three main sections. The first grapples with the concept of reconciliation, explores various definitions of the concept and debates over its use in politics, and presents a variety of distinctions drawn from the literature that are useful for parsing the differing rhetorical deployments of reconciliation as a political concept. The second section explores the invocations of reconciliation in the Aboriginal rights jurisprudence of the Supreme Court of Canada and the work of the Royal Commission on Aboriginal Peoples and considers how these conceptions of reconciliation can be understood in the light of the definitional distinctions. The third section explores how the conceptual variation between different invocations of this contested term is also reflected in some of the scholarship on constitutional reconciliation that has emerged in response to the Supreme Court's Aboriginal rights jurisprudence. The paper concludes with some reflections on what can be gleaned from this exercise of tracing the beginnings of a genealogy of reconciliation in Indigenous — non-Indigenous relations in Canada and on the implications of the conceptual confusion that has surrounded the use of the language of reconciliation in this context since its emergence.

I. Reconciliation: Engaging with a Multifaceted and Contested Concept

The concept of reconciliation has given rise to many debates about its meaning and practice — abstract and theoretical as well as practical and contextually specific. As Erin Daly and Jeremy Sarkin remark, "[i]t is certainly ironic that a word that is fundamentally about cohesion can have so many different and at times competing meanings."[1] Yet, the most widespread consensus that seems to exist about reconciliation is that the concept is rife with an excess of meanings, to the point where some argue this leaves it devoid of meaning.[2] Many authors raise concerns about this multiplicity of meanings, fearing it leaves the concept open to exploitation.[3] This ambiguity around the concept of reconciliation points to how critical it is to investigate the use of the term in order to understand its effects in Canadian politics. Indeed, Erik Doxtader suggests that reconciliation can be understood as a rhetorical concept in the sense that the idea of reconciliation cannot be divorced from the practice of reconciliation; its meaning is embodied in and created through its mobilization in discourse.[4]

A. Dimensions of Reconciliation

1. Definitions

The concept of reconciliation is rooted in several places outside the political sphere — in family law, finance, and theology, for instance. Its many meanings turn around a common core linked to the notion of harmony; its most general sense is "[t]he action of restoring estranged people or parties to friendship."[5] In law, this is applied as "[t]he settlement of differences after an estrangement," [6] or as "[t]he renewal of amicable relations between two persons who had been at enmity or variance; usually implying forgiveness of injuries on one or both sides."[7] In family law in particular it refers to the "[v]oluntary

1 Erin Daly & Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007) at 181.

2 See e.g. Jens Meierhenrich, "Varieties of Reconciliation" (2008) 33:1 Law & Soc Inquiry 195 at 196; Jonathan VanAntwerpen, "Reconciliation Reconceived: Religion, Secularism, and the Language of Transition" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 25 at 46.

3 Daly & Sarkin, *supra* note 1 at 12; Erik Doxtader, "Reconciliation — A Rhetorical Concept/ion" (2003) 89:4 QJ Speech 267 at 268.

4 Doxtader, *supra* note 3 at 286.

5 *The Oxford English Dictionary*, 2nd ed, *sub verbo* "reconciliation."

6 *Pocket Dictionary of Canadian Law*, 3rd ed, *sub verbo* "reconciliation."

7 *Black's Law Dictionary*, 4th ed, *sub verbo* "reconciliation."

resumption, after a separation, of full marital relations between spouses."[8] In financial accounting, the type of harmony implied is that of consistency or sameness rather than amicability; there, reconciliation refers to "the process of comparing information that exists in two systems or locations, analyzing differences and making corrections so that the information is accurate, complete and consistent in both locations."[9] In Christian theological understandings, the harmony in question pertains to the relationship between a person and God or the Church, where reconciliation refers to "[t]he action of restoring humanity to God's favour, esp. as through the sacrifice of Christ; the fact or condition of a person's or humanity's being reconciled with God."[10] This takes particular form in the Catholic Church in the Sacrament of Reconciliation, where a person who has sinned undertakes a process of confession, penance, and absolution to re-establish the relationship that was previously established with God and the Church "through the contracts of Baptism, Confirmation, and Communion."[11]

While "harmony" runs through differing instantiations of the concept of reconciliation, its implications vary. The power relations that surround what is being reconciled, who is doing the reconciling, how reconciliation is pursued, and the nature of the desired outcome of reconciliation are not at all the same in the different contexts where the concept is used. Further complicating the discussion, "reconciliation" can refer to a process or to an outcome. Finally, there is another way of understanding reconciliation that is not so harmony-centred: as Paulette Regan notes, "*Webster's Dictionary* defines 'reconcile' in two ways: 'to restore to friendship or harmony' or 'to cause to submit to or accept something unpleasant'."[12] The stark difference between these understandings, more so than the nuances between the other definitions, highlights how much the implications can differ depending on how, when, and why the concept is used.

2. Contested Meanings

Many difficulties arise in taking the concept of reconciliation out of these definitional contexts and seeking to apply it in politics. Resolving interpersonal disputes between two people — reconciliation between formerly estranged

8 *Black's Law Dictionary*, 10th ed, *sub verbo* "reconciliation."

9 University of Minnesota "Administrative Procedure: Reconciliation of Balance Sheet Accounts", *University Policy Library*, online: <policy.umn.edu/finance/reconciliation-proc03>.

10 *The Oxford English Dictionary*, *supra* note 5.

11 David Garneau, "Imaginary Spaces of Conciliation and Reconciliation" (2012) 46:2 West Coast Line 28 at 36.

12 Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010) at 60.

spouses, for instance — is one thing, but it cannot be equated with resolving disputes between large groups of people. This is particularly the case as groups cannot be assumed to be internally homogeneous or mutually exclusive, so it is not as simple as saying the difference lies in reconciling two sets of interests rather than two people. If one were trying to transpose the financial conception of reconciliation to politics, there would be a host of factors regarding relations of power to take into account. Finally, though not all scholars agree,[13] some take issue with making room for religion in political reconciliation, and question whether reconciliation is even appropriate for politics. This stems from concerns that a religious understanding of reconciliation rests on a sense of submissiveness, penance, or pre-emptive harmony,[14] and more broadly that it violates the separation of religion and politics.[15] Discomfort over the religious associations have led some to push for secularizing political reconciliation.[16]

Reconciliation as a political concept has been further challenged for being a tool of political manipulation wielded in the service of power to legitimize the status quo. While reconciliation may be constructively linked to legitimization in the establishment of a new democratic regime following civil conflict, it can have problematic implications in non-transitional polities characterized by large disparities in political power between the victims and perpetrators of historical injustice. There, reconciliation discourse may be deployed to legitimize the existing structure of power by dissociating it from the injustices of the past and the colonial foundations of the state.[17]

This is indeed one of several concerns raised in recent years regarding the use of the concept of reconciliation in the Canadian context, which effectively pits the state's desire for closure against Indigenous peoples' desire for justice.

13 Susan Dwyer, "Reconciliation for Realists" (1999) 13:1 Ethics & Intl Affairs 81 at 82-83, 97; Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012).

14 Meierhenrich, *supra* note 2 at 203; Brandon Hamber & Gráinne Kelly, "Beyond Coexistence: Towards a Working Definition of Reconciliation" in Joanna R Quinn, ed, *Reconciliation(s): Transitional Justice in Postconflict Societies* (Montreal: McGill-Queen's University Press, 2009) 286 at 287.

15 Darrel Moellendorf, "Reconciliation as a Political Value" (2007) 38:2 J Social Philosophy 205 at 213; VanAntwerpen, *supra* note 2.

16 VanAntwerpen, *supra* note 2 at 45.

17 Brenna Bhandar, "Anxious Reconciliation(s): Unsettling Foundations and Spatializing History" (2004) 22 Environment & Planning D: Society & Space 831; Michael McCrossan, "Contaminating and Collapsing Indigenous Space: Judicial Narratives of Canadian Territoriality" (2015) 5:1 Settler Colonial Studies 20 [McCrossan, "Indigenous Space"]; Paul Muldoon & Andrew Schaap, "Aboriginal Sovereignty and the Politics of Reconciliation: the Constituent Power of the Aboriginal Embassy in Australia" (2012) 30 Environment & Planning D: Society & Space 534.

There are many, inter-related elements to this critique of the use of reconciliation with respect to relations between Indigenous peoples and the state. Talk of reconciliation has been criticized for being overly and narrowly focused on redress for the residential schools policy to the exclusion of addressing the broader scope and structures of colonial injustice.[18] It has also been criticized for imposing an unwarranted sense of closure,[19] eliding a proper acknowledgement and understanding of past injustices and continued wrongdoing,[20] and avoiding the need for material reparations and structural transformation.[21] A key example is the notion that state apology discursively manufactures temporal boundaries that separate contemporary Canadian society from its past colonial injustices. In the process, the state erases links between historical and contemporary colonial violence and the continuing harms, benefits, and responsibilities that stem from that violence, and produces a narrative of Canadian progress and benevolence.[22] The result, Pauline Wakeham argues, is that "an emerging dominant formulation of reconciliation works to secure a belief in a national imaginary of Canadian civility that overwrites ongoing power asymmetries and gross inequities."[23]

A further concern is that discourses of reconciliation delegitimize contemporary and future Indigenous resistance to state actions,[24] while challenging and reframing these discourses drains time and energy that could be spent on rebuilding and resurgence within Indigenous communities.[25] Also, there is contestation of the "re" in reconciliation, as some argue that conciliation must precede reconciliation and that this has never truly taken place in the

18 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 108-109; Jennifer Henderson & Pauline Wakeham, "Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada" (2009) 35:1 English Studies in Can 1 at 2, 4 [Henderson & Wakeham, "Colonial Reckoning"].

19 Penelope Edmonds, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Hampshire, UK: Palgrave Macmillan, 2016) at 17; Henderson & Wakeham, "Colonial Reckoning", *supra* note 18 at 7; Leanne Simpson, *Dancing On Our Turtle's Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: ARP Books, 2011) at 22.

20 Simpson, *supra* note 19 at 21.

21 Coulthard, *supra* note 18 at 120; Pauline Wakeham, "The Cunning of Reconciliation: Reinventing White Civility in the 'Age of Apology'" in Smaro Kamboureli & Robert Zacharias, eds, *Shifting the Ground of Canadian Literary Studies* (Waterloo: Wilfrid Laurier University Press, 2012) 209 at 211.

22 Eva Mackey, "The Apologizers' Apology" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013) 47 [Henderson & Wakeham, *Reconciling Canada*]; Wakeham, *supra* note 21 at 209.

23 Wakeham, *supra* note 21 at 210.

24 Edmonds, *supra* note 19 at 17; Simpson, *supra* note 19 at 22.

25 Simpson, *supra* note 19 at 24.

Canadian context.[26] Many scholars have pointed out that reconciliation seems to come at the expense of a meaningful recognition of Indigenous sovereignty and autonomy.[27] Not wholly unlike concerns about religious articulations of reconciliation, this suggests that where both Canadian state and Indigenous sovereignties are at stake, reconciliation rests on a requirement of submission.

The discussion above highlights how fraught the term "reconciliation" can be depending on how, why, and in which context it is used. So, why start using reconciliation with respect to relationships between Indigenous peoples and the Canadian state in the first place? To understand that, we need to know who started using that term, and when and how, before we can work to understand the discursive life the concept has taken on in the Canadian political landscape.

B. Unpacking Reconciliation: Some Analytical Tools

1. Resignation, Consistency, or Relationship?

Legal scholar Mark Walters suggests that reconciliation can be understood as broadly having three main meanings: "reconciliation as resignation," "reconciliation as consistency," and "reconciliation as relationship." All three involve some form of striving for harmony, but differ in being more or less one-sided.[28] The first, which refers to "people being reconciled to their fate, in the sense of accepting or being resigned to a certain state of affairs that is unwelcome but beyond their control," is necessarily an asymmetrical form of reconciliation.[29] Reconciliation as consistency refers to the process of "reconciling propositions, facts, ideas, statements, interests, or rights, rather than people,"[30] exemplified in the form involved in financial accounting. This can be symmetrical or asymmetrical, depending on whether adjustments or compromises are made on one or both sides.[31] This form thus entails "rendering inconsistencies consistent."[32] Contrary to the first two forms, "reconciliation as relationship," which refers to the restoration of amicable relations between people or communities, must

26 Garneau, *supra* note 11 at 35. On conciliation and reconciliation as concepts for framing political relationships in Canada, see Hannah Wyile, "Lost in Translation? Conciliation and Reconciliation in Canadian Constitutional Conflicts" (2016) 54 *Intl J Can Studies* 83.

27 Coulthard, *supra* note 18 at 127; Dale Turner, "On the Idea of Reconciliation in Contemporary Aboriginal Politics" in Henderson & Wakeham, *Reconciling Canada*, *supra* note 22, 100 at 110-111 [Turner, "Idea of Reconciliation"].

28 Mark D Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Kymlicka & Bashir, *supra* note 2, 165 at 167.

29 *Ibid* at 167.

30 *Ibid* at 168.

31 *Ibid* at 167.

32 *Ibid* at 167.

to some extent be symmetrical or reciprocal, for relations cannot be restored without the parties agreeing the conflict has been resolved.[33]

The distinctions drawn by Walters are similar to those developed by Daly and Sarkin.[34] Religious understandings of reconciliation, "which demand[] change from one side — the penitent — to permit embrace by the other side,"[35] could signify resignation or consistency; reconciliation may speak to an individual's relationship with God or the church, but the form in question is not reciprocal or symmetrical. Daly and Sarkin refer to what Walters calls reconciliation as consistency as "[r]econciliation as unity," also pointing to the example of financial accounting, where "[t]he goal here is to match the two items and to eliminate the difference between the two" out of which results an equal balance, a "perfect unity."[36] When this kind of reconciliatory logic is applied to a group of people, the result of the adjustments required to address conflict is that "the boundaries between the different groups erode and their distinctive qualities meld together" — a prospect that may not be palatable to conflicting groups in diverse societies.[37] Daly and Sarkin point to family law for examples of what Walters calls reconciliation as relationship, a form that requires compromises on both sides and yet "does not require the two sides to give up their identity."[38] Lastly, Daly and Sarkin introduce a fourth mode of reconciling inconsistencies, drawn from the theory of cognitive dissonance, that involves seeking to "find some overarching theory that allows both to flourish as they are," such that "[t]he reconciliation is the overarching idea that accommodates both: while the items have not changed, the disjunction — the source of the conflict — has disappeared because the new principle suits both comfortably."[39] This approach might be understood as another form of reconciliation as relationship which rather than making adjustments to one or both sides, reframes the nature of the relationship between them.

Walters makes a further distinction between his three forms: while reconciliation as consistency "is a process that can take place independently of the attitudes of people who might be affected (although those people may or may not accept the results)…[r]econciliation as either resignation or relationship cannot be imposed from without; it is a condition at which people arrive themselves."[40]

33 *Ibid* at 168.
34 *Supra* note 1.
35 *Ibid* at 182.
36 *Ibid* at 181.
37 *Ibid* at 182.
38 *Ibid* at 182.
39 *Ibid* at 187.
40 Walters, *supra* note 28 at 168.

Walters notes that reconciliation may be deployed as either an empirical or a normative concept:

> It may be possible to say of two former adversaries that they came to an agreement and are now, as a matter of fact, reconciled. But it may also be possible to say that good relations between two peoples with opposing cultural traditions necessitate an indefinite search for reconciliation, so that reconciliation in this case is not a fact as much as a normative principle that guides decision-making on an ongoing basis.[41]

Of the three forms, Walters describes reconciliation as relationship as "a morally rich sense of reconciliation."[42]

2. Relations of Opposition and Relations of Oppression

Bert van Roermund explains that to understand the meaning of reconciliation, we must consider the context in which it is being used, specifically, whether the concept is being applied within "a relation of *opposition*" or a "relation of *oppression*."[43] He presents "reconciling contradictory statements," "reconciling seemingly unbridgeable positions in negotiations," and "reconciliation between former friends who became alienated" as constituting examples of reconciliation in relations of opposition.[44] These all differ in nature from relations of oppression, which are characterized by the exercise of power.[45] Van Roermund further distinguishes between two types of oppression: criminal oppression, where an offender exercises power over a victim, which might be addressed through a form of social reconciliation; and political oppression, characterized by a claim "to further the *whole* of … a polity by oppressing *part* of it. In politics, oppression is accompanied invariably by the claim that it occurs *on behalf of* the public order or the general interest."[46] Van Roermund writes:

> political oppression operates at the level of representation. It relies on ideology to legitimise its action. It addresses itself to the oppressed as subjects of law, only to deny them their very status as legal subjects. Political oppression, therefore, is cynical on the part of the perpetrators and humiliating for their victims.[47]

41 *Ibid* at 169.
42 *Ibid* at 168.
43 Bert van Roermund, "Rubbing Off and Rubbing On: The Grammar of Reconciliation" in Emilios Christodoulidis & Scott Veitch, eds, *Lethe's Law: Justice, Law and Ethics in Reconciliation* (London, UK: Hart Publishing, 2001) 175 at 175 [emphasis in original], DOI: <10.5040/9781472562326.ch-010>.
44 *Ibid* at 175.
45 *Ibid* at 175.
46 *Ibid* at 175-176 [emphasis in original].
47 *Ibid* at 176.

As distinct from both the social reconciliation in contexts of criminal oppression and the forms of reconciliation relevant to relations of opposition, relations of political oppression require a political form of reconciliation that address all the components that characterize it — not only the injustices in question but the ideologies that justified it and the "cynicism and humiliation" to which it has given rise.[48]

3. Political Reconciliation vs. Ideological Reconciliation

Andrew Schaap offers further insight regarding the relation between political reconciliation and the workings of ideology, elucidating how reconciliation itself can be wielded as an ideological tool. Schaap sees the promise of reconciliation in the possibility that

> in contesting the significance of the social world according to the conflicting perspectives brought to bear on it, that world might become more common to those engaged in struggle. When brought to bear on political relations between indigenous and settler societies in Australia, for instance, the distributive, reparative and constitutional conceptions of reconciliation might intersect to reveal what is at stake in coming to terms with the legacy of colonization.[49]

This is only one form that reconciliation may take in the political realm. Enabling this political variety requires engaging in resistance to the ways reconciliation may instead manifest in more ideological forms. For Schaap, a single, united, socially harmonious political community cannot be taken for granted, and approaches that conceive of reconciliation as "'settling accounts', 'healing nations' and 'restoring community'" [50] belie an ideological tendency towards re-inscribing assumed commonality, which constitutes an injustice towards those who have not consented to the polity's terms of association.[51] In distinguishing between ideological reconciliation that reinforces the status quo and political reconciliation that challenges it, we must be attentive to the ways in which

> reconciliation often becomes ideological precisely to the extent that it domesticates or elides those antagonistic social relations that are constituted through material relations of power. Politicization depends on contesting the political unity in which

48 *Ibid* at 176.

49 Andrew Schaap, "Reconciliation as Ideology and Politics" (2008) 15:2 Constellations 249 at 251 [Schaap, "Reconciliation"].

50 Andrew Schaap, "Agonism in Divided Societies" (2006) 32:2 Philosophy & Social Criticism 255 at 258.

51 *Ibid*; Schaap, "Reconciliation", *supra* note 49 at 259.

> the terms of recognition are inscribed, the possibility of making visible a rival image of the common.[52]

Understanding the nature of claims of reconciliation thus requires analyzing their orientation towards both the symbolic and material dimensions of power and whether they seek to reify unity within a singular political community or allow for contestation of the terms of political association.

II. Reconciliation in Indigenous — Settler Relations in Canada

Many of the critiques of reconciliation in the Canadian context were elaborated in response to political debate focused on redress for the residential schools policy, under which more than 150, 000 Indigenous children were removed from their families, communities and lifeways and sent to state-funded, church-run boarding schools to be assimilated into Christian and European ways of being. Debate centred on the 2006 Indian Residential Schools Settlement Agreement and the redress measures that stemmed therefrom, including the establishment of the Truth and Reconciliation Commission (TRC). The turn to reconciliation within the movement for redress came as calls for a public inquiry into residential schools were met with political intransigence, and grassroots organizers were increasingly influenced by the proceedings of the South African TRC in the mid-1990s.[53] However, use of the concept also predates the establishment of the South African TRC, which tells us that the South African influence cannot be wholly responsible for the advent of reconciliation discourse in Canada. Indigenous people remind us that "reconciliation is not new": Leanne Simpson notes that "Indigenous Peoples attempted to reconcile our differences in countless treaty negotiations, which categorically have not produced the kinds of relationships Indigenous Peoples intended,"[54] and in an interview with Rosemary Nagy, Kwakwaka'wakw Hereditary Chief Robert Joseph explains that "Aboriginal people, throughout time, have known and practiced reconciliation, long before the experts ever came, long before the truth commissions were ever set up. Through the millennia we have had ceremonies and rituals

52 Paul Muldoon & Andrew Schaap, "Confounded by Recognition: The Apology, the High Court and the Aboriginal Embassy in Australia" in Alexander Keller Hirsch, ed, *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair* (London: Routledge 2012) 184 at 193.

53 Rosemary Nagy, "The Truth and Reconciliation Commission of Canada: Genesis and Design" (2014) 29:2 CJLS 199 at 209-210.

54 Simpson, *supra* note 19 at 21.

that attempt to bring about that reconciliation."[55] Of course, such practices engaged in by Indigenous peoples over the millennia were not called "reconciliation," but had their own names in Indigenous languages and thus did not come with the same etymological baggage that surrounds what we are calling reconciliation today. So, where do we look to understand how this conversation about reconciliation, that is taking place in the languages of the European colonizers, took shape?

The scholarship on reconciliation with Indigenous peoples in Canada points to two main sources for contemporary use of the term: the Supreme Court of Canada's jurisprudence on Aboriginal rights,[56] and the Royal Commission on Aboriginal Peoples (RCAP).[57] In both cases, the development of a conception of reconciliation can be traced to the early 1990s. The significance of these developments can be seen in the central place that reconciliation has come to occupy in Aboriginal rights jurisprudence, and in the fact that a key component of the government's response to the RCAP final report was issuing a Statement of Reconciliation, following which the term "reconciliation" has appeared year after year in the previously-titled Department of Indian Affairs and Northern Development's departmental plans.[58]

A. The Supreme Court of Canada, Section 35 and Reconciliation

A search of the Supreme Court of Canada's decisions pertaining to Aboriginal rights and title reveals that the two earliest instances where the Court invoked the concept of reconciliation came in *R v Sparrow* in 1990 and in *R v Van der Peet* in 1996.[59] While the latter more clearly highlights reconciliation as a nor-

55 Nagy, *supra* note 53 at 213. On Haudenosaunee traditions of reconciliation from before contact with Europeans, see Walters, *supra* note 28 at 170-171.

56 See e.g. Bhandar, *supra* note 17; Dwight G Newman, "Reconciliation: Legal Conception(s) and Faces of Justice" in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) 80; Turner, "Idea of Reconciliation", *supra* note 27 at 106-108.

57 Coulthard, *supra* note 18 at 108; Turner, "Idea of Reconciliation", *supra* note 27 at 102-106.

58 Government of Canada, "Departmental Plans and Results Reports for Indigenous and Northern Affairs Canada" (9 November 2017), *Indigenous and Northern Affairs Canada*, online: <aadnc-aandc.gc.ca/eng/1359569600624/1359569658365>.

59 Given the genealogical focus of this article on understanding where reconciliation first came from, the analysis here is limited to these earliest cases. The Court has extended, shifted and elaborated on the reconciliation doctrine in many subsequent cases. For analyses of more recent uses, see John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17; Constance MacIntosh, "The Reconciliation Doctrine in the McLachlin Court: From a 'Final Legal Remedy' to a 'Just and Lasting Process'" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 201 [MacIntosh, "The Reconciliation Doctrine"]; Constance MacIntosh, "*Tsilhqot'in Nation v*

mative goal, scholarship has addressed both cases in analysing Court doctrine on reconciliation.[60]

1. R v Sparrow (1990)

Aboriginal and treaty rights were enshrined in section 35 of the *Constitution Act, 1982*; however, the document did not provide a substantive definition of these rights. A series of First Ministers' Conferences aimed at elucidating the details of section 35 ended in failed negotiations in 1987.[61] Indigenous nations then turned to litigation, and it was left to the courts to interpret the meaning of section 35. The Supreme Court's first decision on the matter came in 1990 in *R v Sparrow*.[62] The passage from the decision that deals with reconciliation reads:

> Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[63]

Where exactly the term reconciliation, and where the meaning given by the Court, comes from is unclear. There is no mention of reconciliation in the earlier 1986 decision of the BC Court of Appeal in *R v Sparrow*.[64] The term ap-

BC: Reconfiguring Aboriginal Title in the Name of Reconciliation" (2014) 47:1 UBC L Rev 167 [MacIntosh, "Reconfiguring Aboriginal Title"]; Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation': Geographic Commitments Underpinning Aboriginal Rights Decisions" (2013) 31 Windsor YB Access to Just 155 [McCrossan, "Shifting Judicial Conceptions"]; McCrossan, "Indigenous Space", *supra* note 17; Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2:1 Indigenous LJ 1; Newman, *supra* note 56.

60 Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993; Brian Bird, "Federal Power and Federal Duty: Reconciling Sections 91(24) and 35(1) of the Canadian Constitution" (2011) 16 Appeal 3; McCrossan, "Shifting Judicial Conceptions", *supra* note 59; McNeil, *supra* note 59; Newman, *supra* note 56.

61 Gina Cosentino & Paul LAH Chartrand, "Dream Catching Mulroney Style: Aboriginal Policy and Politics in the Era of Brian Mulroney" in Raymond B Blake, ed, *Transforming the Nation: Canada and Brian Mulroney* (Montreal: McGill-Queen's University Press, 2007) 294 at 297-298.

62 [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* SCC cited to SCR]. See generally Bird, *supra* note 60 at 8.

63 *Ibid* at 1077.

64 *R v Sparrow* (1986), 26 DLR (4th) 246, [1987] 2 WWR 557 (BCCA).

pears three times in the Supreme Court hearing transcript, but in none of these instances is it used in the same fashion as in the decision. One is a question about consistency, with Justice Sopinka querying a lawyer about how two arguments in his submissions could be reconciled.[65] The other uses refer to the reconciliation of interests: the lawyer for the National Indian Brotherhood, an intervenor in the case, referred to the reconciliation of the interests of Indigenous peoples and the interests of others,[66] and the lawyer for the Attorney General of Québec spoke of reconciliation by federal fisheries officials of the interests of Indigenous and non-Indigenous fishers.[67]

The version of reconciliation put forth by the Supreme Court in *Sparrow* presents a formulation that "functions as a restraint on governmental action."[68] It is rooted in an approach to section 35 that is analogous to the justification test for section 1 of the *Charter*, inspired by the scholarship of Brian Slattery,[69] and reflected the shift in the balance between parliamentary supremacy and judicial review embodied generally by the 1982 constitutional changes.[70] While this reconciliation requirement in *Sparrow* mitigated the impacts of parliamentary supremacy on Aboriginal rights, it did not eradicate them entirely. Reading the passage about reconciliation with sections of the decision that renounce the "old rules of the game" in relations between Canada and Indigenous peoples, on one side, and sections that pronounce sovereignty to be vested in the Crown on the other, has led to questions about the transformative potential of the vision of reconciliation in *Sparrow*. Some suggest that even though the Court maintained colonialist attitudes about sovereignty, "the decision nevertheless provides an opening to question the legitimacy of Crown sovereignty over Aboriginal peoples."[71] For Minnawaanagogiizhigook, though, this still falls far short of a reconciliation shaped by the goal of engagement between Canadian law and Indigenous legal orders in their own right, as it only initiates a shift within a form of Canadian law that continues to subjugate Indigenous legal orders.[72]

65 *R v Sparrow*, [1990] 1 SCR 1075 (Transcript, 3 November 1988, at 101).

66 *Ibid* at 48.

67 *Ibid* at 130-131.

68 Newman, *supra* note 56 at 82; McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 155.

69 McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 166; Newman, *supra* note 56 at 81.

70 McNeil, *supra* note 59 at 2-3.

71 Kiera L Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 263 at 272.

72 Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions*

Recalling Walters's different forms, then, the reconciliation advanced in *Sparrow* appears to be reconciliation as consistency, where the exercise of federal power must be consistent with federal duty, the two being in a relation of opposition. As Minnawaanagogiizhigook's critique highlights, *Sparrow's* reconciliation as consistency is not a form of reconciliation that meaningfully and substantively engages with the relations of oppression between Indigenous peoples and the Canadian state,[73] even if, as McCrossan writes, *Sparrow* "presents a vision of reconciliation that is underscored by federal duty (and responsibility) to protect the interests of Aboriginal people."[74]

2. R v Van der Peet (1996)

Six years later, reconciliation was given a different, more central place in the Court's interpretation of section 35 in *R v Van der Peet*.[75] The term appears many more times in this decision, with key passages stating:

> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[76]
>
> …
>
> The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.[77]

As with *Sparrow*, the meaning reconciliation is given in the Supreme Court's decision is not foreshadowed in the lower court decision, wherein the only ref-

(Vancouver: UBC Press, 2007) 77 at 84. The limitations of the vision in *Sparrow* cannot necessarily be merely attributed to attitudes held by the Court however, as McCrossan has shown in his analysis of the hearing transcripts in "Shilfting Judicial Conceptions", supra note 59 at 165, "it would appear that Sparrow's own lawyer, in his submissions to the judiciary, unwittingly opened the door to the continuation of governmental regulatory regimes."

73 *Supra* note 72 at 80.

74 McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 160.

75 [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR].

76 *Ibid* at para 31.

77 *Ibid* at para. 49.

erence to reconciliation is a direct quotation of the passage from *Sparrow*,[78] nor in the Supreme Court hearing transcripts, where the term does not appear at all.[79] Rather, this conception of reconciliation appears to be drawn from scholarship and jurisprudence in Canada, the United States, and Australia.[80] Chief Justice Lamer (as he then was) referred to the French text of section 35, *Calder v Attorney-General of British Columbia*, *Guerin v The Queen*, and the academic writings of Brian Slattery, David Elliot, Patrick Macklem, William Pentney, and Mark Walters in Canada; to the decisions of Chief Justice Marshall (as he then was) in *Johnson v M'Intosh* and *Worcester v Georgia* in the US; and to *Mabo v Queensland (No 2)* and statutory fishing rights in Australia.[81] Interestingly, none of these sources used the term "reconciliation," except for an excerpt from *Mabo* regarding the reconciling of customary rights with Western law and institutions.[82]

Thus, it seems to be largely an understanding of the exercise of reconciliation rather than the word itself that has been drawn from these sources. The use of reconciliation in *Van der Peet* represents a shift from *Sparrow*, "a changed emphasis on who must undertake accommodations to enable … reconciliation,"[83] which scholars have explained in varying ways. Jonathan Rudin argues that "the decision in *Van der Peet* is best understood as a reaction to the federal government's rejection of the Court's invitation to enter into substantive negotiations with Aboriginal people contained in *Sparrow*,"[84] suggesting that the institutional limitations on the role of the courts are such that "if the Court sees that the government will not even come to the table after they have managed to deal the Aboriginal players a bigger hand [to play at the negotiating table], then the pressure rises on the Court to retrench when the Aboriginal litigants return for even better cards."[85] Michael McCrossan, conversely, points to internal rather than external limitations on the Court's role, arguing that the shift is a reaction to the introduction of Indigenous territorial claims. He writes, "it is at the very moment in which Aboriginal rights … are linked to alternate conceptions of territorial space … that a majority of the Court shifts its understanding

78 *R v Van der Peet*, [1993] 5 WWR 459 at para 74, 80 BCLR (2d) 75 (CA), citing *Sparrow, supra* note 62 at 1109.

79 *R v Van der Peet*, [1996] 2 SCR 507 (Transcription of Tapes, 27 November 1995).

80 *Van der Peet*, *supra* note 75 at para 43; McNeil, *supra* note 59 at 5.

81 *Van der Peet*, *supra* note 75 at paras 32-42.

82 *Supra* note 75 at para 40, citing *Mabo v Queensland (No 2)* (1992), 175 CLR 1, 107 ALR 1 (HCA).

83 MacIntosh, "The Reconciliation Doctrine", *supra* note 59 at 205.

84 Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R v Sparrow*, *R v Van der Peet* and *Delgamuuku v British Columbia*" (1998) 13 JL & Soc Pol'y 67 at 68.

85 *Ibid* at 86.

of reconciliation, offering instead a unified vision of sovereignty which ensnares Aboriginal peoples within 'Canadian' territorial and social space."[86]

The vision of reconciliation in *Van der Peet* is rife with assumptions about the nature of sovereignty, the right of the Crown to claim it, and the requirements of temporality that surround such claims.[87] A common concern is that, as Michael Asch argues, "the political rights of Indigenous peoples already existed at the time that Crown sovereignty was asserted and, therefore, it is the question of how the Crown gained sovereignty that requires reconciliation with the pre-existence of Indigenous societies and not the other way around."[88] In applying his analysis of different forms of reconciliation to *Van der Peet*, Walters concludes the Court implied reconciliation as consistency rather than as relationship, or even, "[t]o the extent that people are implicitly involved, … the formulation may suggest reconciliation as resignation [to Crown sovereignty]."[89] This too, in failing to grapple meaningfully with the issues that stem from the relations of oppression between Indigenous peoples and Canada, can be understood as an ideological form of reconciliation that reinforces a unitary political community rather than allowing for substantive contestation of the terms of association.

B. The Royal Commission on Aboriginal Peoples

Called in 1991 following the conflict at Kanehsatake and the collapse of the Meech Lake Accord, the work of the RCAP took place during the period between *Sparrow* and *Van der Peet*. The word "reconciliation" occupies a fairly prominent place in the final report issued in 1996, appearing over a hundred times. The term appears in some form in twenty-one supporting documents over the course of the Commission's mandate, including hearing transcripts, commissioned research studies, and publications issued by the Commission.[90] While these may have had an impact on the focus on reconciliation in its final

86 McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 157.

87 Bhandar, *supra* note 17; Coulthard, *supra* note 18 at 106-107; Ladner & McCrossan, *supra* note 71; McCrossan, "Shifting Judicial Conceptions", *supra* note 59; McNeil, *supra* note 59.

88 Michael Asch, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 11.

89 Walters, *supra* note 28 at 178.

90 This includes some duplicates due to translation. The documents containing references to reconciliation are items 103, 118, 200, 203, 219, 278, 279, 299, 303, 306, 332, 380, 468, 481, 504, 509, 517, 529, 530, 539, and 579 in the RCAP database available through Library and Archives Canada: Government of Canada, "Royal Commission on Aboriginal Peoples" (2 November 2016), *Library and Archives Canada*, online: <bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/introduction.aspx>.

report, it is also significant that the concept was present from the outset in the Commission's mandate.

The mandate was based on a report presented to Prime Minister Brian Mulroney by former Supreme Court Chief Justice Brian Dickson, who was appointed to consult on the terms of reference and membership of the Commission. In his report, Dickson notes that he "firmly believe[s] the proposed Royal Commission has the potential to be an important instrument of education and reconciliation,"[91] and says the proposed commissioners "share a common determination to make this Royal Commission a positive force for change and reconciliation."[92] The proposed terms of reference, which were adopted verbatim as the Commission's mandate, stated:

> the Commission may make recommendations promoting reconciliation between aboriginal peoples and Canadian society as a whole, and may suggest means by which aboriginal spirituality, history and ceremony can be better integrated into the public and ceremonial life of the country.[93]

Several references in the transcripts from public hearings and in RCAP publications suggest that the Commission embraced reconciliation from the outset, as pointed to in Dickson's report, and sought guidance on the topic from those who made submissions. For instance, during one hearing, Commissioner Mary Sillett stated, "[w]e are in the business of reconciliation, so I was wondering if you could offer any advice on public education or what can be done to address the different types of understanding that exist, particularly with the non-Aboriginal people, on these kinds of issues."[94] A year earlier, RCAP Co-Chair René Dussault said in opening remarks that:

> The Commission's primary objective is, in essence, to attempt to achieve a reconciliation but also to ensure that a much more adult and mature, a much more enlightened, relationship or vision is created between the aboriginal population, the aboriginal peoples and Canadians and the governments of this country that will

91 Canada, *Report of the Special Representative Respecting the Royal Commission on Aboriginal Peoples*, by Brian Dickson, *The Mandate Royal Commission on Aboriginal Peoples: Background Documents* (Ottawa, 1991) at 29.

92 *Ibid* at 20-21.

93 *Ibid* at 11.

94 Canada, Royal Commission on Aboriginal Peoples, Hearing Transcript (English Translation) 29 November 1993-3 December 1993 vol 1 (Le Nouvel Hôtel, Montreal, Québec: StenoTran, 1993), online: <data2.archives.ca/rcap/pdf/rcap-411.pdf> at 903.

> ensure that government policies are good policies rather than bad policies such as have, unfortunately, been all too common in the past.[95]

A discussion paper issued by the Commission in 1993 stated that "reconciliation between Aboriginal and non-Aboriginal people is at the heart of the mandate of the Royal Commission."[96] The document includes a chapter entitled "The Relationship" with a subsection called "The Goal: Equality, Respect and Reconciliation" in which the Commission discusses various aspirations and challenges linked to reconciliation.[97] Concluding with a series of questions for consideration at the next round of hearings, the discussion paper asserts that "[t]he goal for change is twofold: transformation in Aboriginal lives and reconciliation with non-Aboriginal people."[98]

This embrace of the concept of reconciliation did not go wholly unquestioned. Several concerns similar to those discussed above were raised by Commissioner Paul Chartrand in a question to representatives of the Christian Reformed Church in Canada:

> My last question has to do with […] a proposed need for reconciliation between Aboriginal peoples and other peoples. I confess nervousness with the idea and, before I can defend it with conviction, I would like to invite people's views about it.
>
> I am worried that the idea of reconciliation might be a second-best, perhaps second-best to a notion of true justice.
>
> I noted that in Australia, for example, some years ago there was a proposal for a national treaty […] that wasn't accepted by the government, purportedly on their view of what the country was prepared to accept. Instead, they established a Council for Reconciliation.
>
> When I see those sorts of things and when I am reminded that one scholar said, "Reconciliation means that one party has all the power, and the other side had better reconcile itself to that," I wonder if there might be a touchstone that might be more appealing. It […] is the notion of justice.[99]

95 Canada, Royal Commission on Aboriginal Peoples, Hearing Transcript 17 November 1992 vol 1, (Wendake, Québec City, Québec: StenoTran 1992), online: <data2.archives.ca/rcap/pdf/rcap-284.pdf> at 31-32.

96 Canada, Royal Commission on Aboriginal Peoples, *Focusing the Dialogue: Discussion Paper 2,* Public Hearings (Ottawa, Communications Group, 1993), online: <data2.archives.ca/rcap/pdf/rcap-445.pdf> at 18.

97 *Ibid* at 5.

98 *Ibid* at 63.

99 Canada, Royal Commission on Aboriginal Peoples, Hearing Transcript 15 November 1993 vol 1 (Chateau Granville, Vancouver, British Columbia: Stenotran 1993), online: <data2.archives.ca/rcap/pdf/rcap-399.pdf> at 86-88.

We can see from this and other statements made over the course of the Commission's mandate, that its conceptions of reconciliation were more attentive to critiques of the term, and also significantly more attentive to questions of relationality. This is borne out in the final report as well, which speaks of the importance of recognizing historical and ongoing injustices against Indigenous peoples and promising that they will not be continued or repeated.[100] The RCAP's vision of reconciliation is rooted in treaty relations and highlights the responsibilities of both Indigenous and non-Indigenous people for enacting reconciliation.[101] Foundational to this understanding of reconciliation are the principles of sharing and mutual respect.[102] Compared to the conceptions of reconciliation put forward by the Supreme Court, RCAP's vision is significantly more one of reconciliation as relationship, as it aims to enable a transformation of structural relations that brings about justice for Indigenous peoples and improves the relationship between Indigenous and non-Indigenous people.

III. Conceptual Confusion and Constitutional Reconciliation

Reconciliation can mean many different things to different people, and thus be used in different ways to serve varying political purposes. In the Canadian context, this is demonstrated by the way these two different visions of reconciliation, RCAP's and the Supreme Court's, appeared in discourse about Indigenous-Settler relations around the same time. The scholarship on Aboriginal rights and constitutional reconciliation is illustrative of this, as it employs the term in various ways, perhaps partly a reflection of the fact that the jurisprudence of the Supreme Court on reconciliation and Aboriginal rights[103] has shifted over the last three decades. Some scholars have adopted the phrase "constitutional reconciliation" as a general label for this jurisprudence, enveloping the Court's shifts within this label. For example, Jaime Battiste identifies constitutional

100 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Communication Group, 1996), online: <data2.archives.ca/e/e448/e011188230-01.pdf > at 7, 603.

101 *Ibid* at 7; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Communication Group, 1996), online: <data2.archives.ca/e/e448/e011188230-02.pdf> at 17 [Canada, *Report of the RCAP*, vol 2].

102 *Supra,* Canada, *Report of the RCAP,* vol 2, note 101 at 430; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Communication Group, 1996), online: <data2.archives.ca/e/e448/e011188230-05.pdf> at 93.

103 McNeil, *supra* note 59; Newman, *supra* note 56; D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29:1 Windsor YB Access Just 55.

reconciliation, for the Court, as "a political process involving fair negotiations between holders of constitutional rights and powers, rather than constituting a final judicial remedy,"[104] a process that requires "understanding and respecting aboriginal rights and the search for a positive, durable, and living constitutional relationship."[105] In Battiste's assessment, the Court has provided ample guidance on this; the onus is on the Crown to fulfill its obligation to pursue constitutional reconciliation.[106]

James (Sákéj) Youngblood Henderson also draws attention to constitutional reconciliation as something that has been mandated through the entrenchment of Aboriginal and treaty rights in section 35. He describes it as follows:

> It is an ongoing constitutional process that involves converging different overlapping constitutional regimes with distinct epistemologies and legal traditions, to establish an enduring postcolonial constitutional relationship between the Aboriginal peoples and the divided Crown of the federal and provincial governments that corrects past wrongs. … [C]onstitutional reconciliation — literally, the reconciling of Canadian law with the Aboriginal and treaty rights entrenched within it — is an integral starting point for the overarching political, social, cultural, and economic process of reconciliation between Aboriginal peoples and the Canadian state.[107]

This take is grounded in a very particular reading of section 35. When Henderson writes of treaties reconciling "pre-existing Indigenous sovereignty with assumed Crown sovereignty" and refers to the reconciliation of Indigenous rights with constitutional supremacy, he is clear that section 35 constitutionalized the rights of Indigenous peoples but did not *create* them.[108] Henderson sees promise for a form of *sui generis* and treaty citizenship recognized through the embedding of Aboriginal and treaty rights in the Constitution,[109] but is not uncritical of the Court's approach to reconciliation, noting that it has at times wielded the concept in "strange and contradictory ways,"[110] because "[n]o consensus exists between the Crown and Aboriginal peoples" regarding meanings of reconciliation, and that the case law on Aboriginal and treaty rights reveals

104 Jaime Battiste, "Understanding the Progression of Mi'kmaw Law" (2008) 31 Dal LJ 311 at 346.
105 *Ibid* at 344.
106 *Ibid* at 346-347.
107 James (Sa'ke'j) Youngblood Henderson, "Incomprehensible Canada" in Henderson & Wakeham, *Reconciling Canada*, *supra* note 22, 115 at 115.
108 James (Sa'ke'j) Youngblood Henderson, "O Canada: 'A country cannot be built on a living lie'" in Kiera L Ladner & Myra J Tait, eds, *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal*, (Winnipeg: ARP Books, 2017) 277 at 284.
109 James (Sákéj) Youngblood Henderson, "*Sui Generis* and Treaty Citizenship" (2002) 6:4 Citizenship Studies 415.
110 *Supra* note 107 at 118.

significant limitations in the Court's interpretation.[111] Henderson calls for "a more radical transformation" that requires stepping outside Eurocentric and colonial epistemologies, conventions, practices, and institutions.[112] The insufficiency of narrow interpretations of section 35 is clear in his statement that "[c]onstitutional reconciliation requires more than an ex post facto assessment of the constitutionality of legislative action or the Crown's justified interest based on some contrived superiority."[113]

Kiera Ladner, though critical of the Court's interpretation of reconciliation, concurs with the reading in Battiste and Henderson's work that, as she puts it, "the courts have opened the door in making reconciliation a constitutional requirement,"[114] but adds the caveat that this is not currently reflected in state practice. Ladner challenges the notion that "culturally grounded Aboriginal rights claims have already been reconciled with the sovereignty of the state and have, thus, fortified the ultimate sovereignty of the Crown,"[115] and presents criteria for a more transformative understanding of reconciliation rooted in revitalizing original treaty relationships founded on principles of sharing, mutual respect, and mutual benefit that requires non-Indigenous people to acknowledge the violent foundations of the status quo and to give up privileges obtained through the violence of colonialism.[116] Reconciliation holds potential as a principle of legal interpretation applied alongside the interpretive principle of the honour of the Crown, but only if the aim is the implementation of treaty constitutionalism and the refusal of "the Court-spun Canadian fantasy of reconciliation known as merging the remnants of Indigenous sovereignty under the sovereignty of the Crown."[117] Ladner also draws a distinction between different forms of reconciliation, suggesting that reconciliation as a legal interpretive framework is a precursor to a broader process of political reconciliation, which she envisions as the "implementation [of treaty constitutionalism] without the limitations imposed by the standard interpretation of Section 35 or the defense of absolute Canadian sovereignty (de facto or de jure)."[118]

111 *Ibid* at 119.

112 *Ibid* at 119, 121, 123.

113 *Ibid* at 122.

114 Kiera L Ladner, "Take 35: Reconciling Constitutional Orders" in Annis May Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 279 at 295.

115 Kiera L Ladner, "150 Years and Waiting: Will Canada Become an Honourable Nation?" in Ladner & Tait, *supra* note 108, 398 at 405-406.

116 *Ibid* at 407.

117 *Ibid* at 408. See also *ibid* at 410.

118 *Ibid* at 410.

Dale Turner provides a complementary analysis to Ladner's, challenging *Van der Peet*'s conception of Aboriginal rights as tied to distinctive cultures. He emphasizes that the differences between Canadian and Indigenous societies "are cultural *and* political," and that constitutional reconciliation must situate Indigenous cultural practices within Indigenous epistemologies and political practices.[119] He also challenges the Court's requirement that Indigenous claims be presented in terms cognizable to the common law, emphasizing that "characterizing Aboriginal rights as a form of reconciliation between pre-contact Aboriginal cultures and the unilateral assertion of state sovereignty *is not cognizable to Aboriginal ways of understanding the world*."[120] Thus, Henderson, Ladner, and Turner all seize on the Court's concept of constitutional reconciliation, but are critical of its particular vision of reconciliation. Emerging from their analyses are visions of constitutional reconciliation that foreground Indigenous philosophies and political systems and are much more transformative than the approaches of the Court or the Crown.

D'Arcy Vermette presents an account that is similarly critical of the Court's use of reconciliation, but uses the phrase "constitutional reconciliation" in a different fashion.[121] To him, "constitutional reconciliation" is the first of three components of the Court's reconciliation doctrine. He associates this with the form of reconciliation presented in *Sparrow*, calling it "constitutional reconciliation" because of its focus on federal powers and duties.[122] The other two forms he calls "historical reconciliation" and "contemporary reconciliation," which he associates with *Van der Peet* and *R v Gladstone* respectively, referencing the focus on the historical relationship between the Crown and Indigenous nations and the distinctive culture test in the former, and the contemporary relationship with non-Indigenous Canadian society in the latter.[123] Vermette is discernibly skeptical about the Court's approach, which he suggests merely puts a sheen on continuing to undermine Indigenous rights:[124]

> While reconciliation is undoubtedly a nice, attractive word, no reconciliation is actually taking place or being built as a result of or in relation to Canada's laws concerning the rights of Aboriginal peoples. … Canada's courts have created and interpreted

119 Dale Turner, "Indigenous Knowledge and the Reconciliation of Section 35(1)" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 164 at 175 [emphasis in original].

120 *Ibid* at 178 [emphasis in original].

121 Vermette, *supra* note 103.

122 *Ibid* at 58-59.

123 *Ibid* at 58, 60, 61-62.

124 *Ibid* at 71.

> a principle of reconciliation which embodies (some) nice language but offers little reconciling substance.[125]

In making this assessment, Vermette engages with Walters's description of the three forms of reconciliation. He argues that the emphasis on harmony in Walters's account "does not reflect the content found in the practice of the Supreme Court of Canada. Indeed, little harmony is brought […] through the Supreme Court's use of the principle of reconciliation."[126] While Vermette's overall point about the ramifications of the Court's approach may hold true, his etymological analysis is indicative of how deeply conceptual confusion pervades the conversation around reconciliation, as his point assumes a particular understanding of the idea of harmony.

The three forms of reconciliation that Walters outlines can be understood as each being geared at different meanings of harmony: in reconciliation as resignation, harmony is the absence of conflict, as choosing to reconcile oneself to a situation entails choosing not to contest or challenge it. Reconciliation as consistency is geared towards harmony as unity, identity, sameness, embodied in the image of columns of numbers tallying up to an identical result. Reconciliation as relationship, conversely, rests on a very different kind of harmony embodied in the unique way parties to a relationship seek a balanced way to live together amid their differences. This form of harmony does not necessitate sameness nor agreement in perpetuity. A more apt metaphor might be the form of harmony found in music, whereby two or more different notes pair to create sound that is both composed of and more than the sum of its parts. On this understanding, it is not the case that there is *no* rendering of harmony to be found in the Court's doctrines. Instead, there is a *particular* understanding of harmony advanced through a *particular* form of reconciliation — a substantively different form of harmony than we might find in Indigenous epistemologies, for example,[127] advanced through a process that conflicts with other understandings and practices of reconciliation.[128] The kind of harmony implied in any given invocation is of significant import. Vermette raises critical questions on this front, including why the Court invokes reconciliation with respect to the infringement of Aboriginal rights but does not do so with respect to non-Aboriginal rights.[129]

125 *Ibid* at 56.

126 *Ibid* at 58.

127 See e.g. Aaron Mills / Waabishki Ma'iingan, "What Is a Treaty? On Contract and Mutual Aid" in Borrows & Coyle, *supra* note 59, 208 at 236.

128 Coulthard, *supra* note 18 at 107.

129 *Supra* note 103 at 67.

Within this scholarship, then, we see varying uses of the concept of "constitutional reconciliation." It serves as a label for Court doctrine on Aboriginal and treaty rights, or for a segment of this doctrine, as in Vermette's work, but is also applied in countervailing ways that challenge Court doctrine and promote much more transformative visions of Indigenous-Settler relations. As such, Henderson seems quite right in suggesting that "it is clearer what constitutional reconciliation is not than what it will become."[130] Indeed, reconciliation discourse gets used to promote visions as widely divergent as, on the one hand, a reorientation towards a holistic order of treaty relationships that recognizes relationality and responsibility not just between all humans but between all beings,[131] and on the other, the mere invitation to Indigenous communities to sign agreements allowing them to participate in resource extraction within existing economic relations.[132] There is a distinct risk of reconciliation discourse allowing more powerful parties to claim changes are happening even though actual substantive transformations in relationships are not taking place. Amidst this political and conceptual murkiness, the work of these Indigenous scholars is emphatic about certain clear requirements for a just transformation of relationships. Their analyses are critical in considering political mobilizations of reconciliation discourse to determine whether they constitute political reconciliation of the kind described by Schaap and van Roermund, or the relational variety described by Walters, or are instead ideological efforts to protect the power relations of the status quo.

Conclusion

This initial foray into the early days of the emergence of reconciliation discourses in Canada shows that the concept's political life in this context has always been multifaceted. As Wakeham writes, "[d]espite the fact that the dominant discourse of reconciliation is framed as the product of a united national vision, the question of what reconciliation putatively means and what it wants is, in fact, deeply contested terrain."[133] Reconciliation can mean many different things and be put to many different uses, as is highlighted in the contrast between the pursuit of consistency embodied in Supreme Court jurisprudence and the more transformative relational vision put forward by the Royal

130 Henderson, *supra* note 107 at 122.

131 Mills, *supra* note 127 at 242; Simpson, *supra* note 19 at 109.

132 Guillaume Peterson St-Laurent & Philippe Le Billon, "Staking Claims and Shaking Hands: Impact and Benefit Agreements as a Technology of Government in the Mining Sector" (2015) 2 Extractive Industries & Society 590. For more on the encounter between these differing perspectives, see Coulthard, *supra* note 18 at ch 2.

133 Wakeham, *supra* note 21 at 211.

Commission. The former might be understood as more ideological, seeking to reinforce a pre-existing notion of a united political community.[134] The latter is more political in pushing back against this vision, highlighting the need for justice and structural transformation. This divergence of visions is also reflected in the scholarship around these political and legal developments, where constitutional reconciliation has become both a label for the Supreme Court's position on Indigenous-Crown relations and a banner for counter-visions that challenge Court doctrine and state practice.

With the relationship between Indigenous peoples and Canada, we are undeniably dealing with relations of oppression, and reconciliation in such a context, van Roermund reminds us, must address the power structures in which those relations are framed and the ideological justifications of violence that hold them in place. This is not a simple challenge. It requires building and maintaining political relationships, and also fighting back against ideological uses of reconciliation. These contradictory impulses have both shaped the rise of reconciliation discourses in Canada from early on, and have promoted using the same concept. Developing a better understanding of how, when and why "reconciliation" was drawn into the political sphere by various actors for different purposes will allow us to reflect on "what could be done with it that could not be done in its absence,"[135] to consider how reconciliation as a political concept both enables and limits our ability to transform relations between Indigenous and non-Indigenous peoples, and to understand the work of political contestation in challenging ideology oriented towards maintaining relations of oppression. In the meantime, considering the confusion that surrounds reconciliation and the varying ways it is deployed in Canadian constitutional law and politics, it is incumbent on those of us engaging with the concept to be attentive, self-reflexive, and specific in the ways we use the language of reconciliation.

134 Despite indications of a potentially promising shift away from the *Van der Peet* approach to reconciliation during the early years of Chief Justice McLachlin's (as she then was) tenure (see MacIntosh, "The Reconciliation Doctrine," *supra* note 59), assessments of recent judgements demonstrate reason for continued concern about the Crown and the Court seeking to fortify the supremacy of Crown sovereignty (see Borrows, *supra* note 59 at 20-21, 28-30, 33, 37; MacIntosh, "Reconfiguring Aboriginal Title", *supra* note 59 at 173-175).

135 Quentin Skinner, *Visions of Politics: Regarding Method*, vol 1 (Cambridge: Cambridge University Press, 2002) at 178.

Should Paramountcy Protect Secured Creditor Rights? *Saskatchewan v Lemare Lake Logging* in Historical Context

*Virginia Torrie**

This paper offers a critical and historical analysis of the 2015 Supreme Court of Canada case Saskatchewan v Lemare Lake Logging.[1] *It draws on the history and development of Canadian insolvency law within a federalist framework and the influence of secured creditors in law-making in order to offer a textured socio-legal analysis of this decision.*

The constitutional issue in this case was whether or not receivership provisions applicable to farmer-debtors under the Saskatchewan Farm Security Act, 1988 *conflicted with the general receivership provision added to the federal* Bankruptcy and Insolvency Act in 2009.[2] *The Majority found no conflict, whereas Justice Côté (in dissent) found the provincial legislation frustrated an implicit purpose of the federal receivership provisions. This paper argues — contrary to the Majority's disposition — the decision may actually curtail provincial jurisdiction over receiverships in the future. Although the Majority found no conflict, its reasoning implies that provincial legislation could frustrate the federal provisions if the federal law included an express "efficiency"*

L'auteure de cet article propose une analyse critique et historique d'une affaire entendue à la Cour suprême du Canada en 2015 : Saskatchewan c. Lemare Lake Logging.[1] *Elle puise dans l'histoire et le développement du droit de l'insolvabilité canadien à l'intérieur d'un cadre fédéraliste et l'influence des créanciers garantis sur le processus législatif afin de présenter une analyse sociologique et juridique texturée de cette décision.*

La question constitutionnelle de cette affaire fut de savoir si les dispositions relatives aux mises sous séquestre applicables aux fermiers débiteurs en vertu de la Saskatchewan Farm Security Act, 1988 *étaient en conflit avec la disposition générale relative aux mises sous séquestre ajoutée à la* Loi sur la faillite et l'insolvabilité *fédérale en 2009.[2] La majorité reconnut aucun conflit, tandis que le juge Côté (étant en dissidence) trouva que la loi provinciale entrava un des objets implicites des dispositions fédérales relatives aux mises sous séquestre. L'auteure soutient que — contraire à la disposition de la majorité — la décision pourrait en fait restreindre la compétence*

* Assistant Professor, Faculty of Law, University of Manitoba. The excellent research assistance of Samuel Thomson, Adam Gingera, Kelsey MacKay, Kelly MacWilliam and Samantha Holloway, as well as the financial support of the Legal Research Institute of Manitoba and the Manitoba Law Foundation are gratefully acknowledged. I also wish to thank Hester Lessard and Gerald Heckman for fruitful discussions during the early stages of this project. I am grateful to Thomas GW Telfer, Peter Carver and anonymous reviewers for the *Review of Constitutional Studies* for comments on an earlier draft. A version of this paper was presented at the Constitution 150 conference, The Canadian Confederation: Past, Present, and Future (Université de Montréal, 16-18 May 2017).

1 *Saskatchewan (AG) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419 [*Lemare Lake*].

2 *Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [*SFSA*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

purpose. To secured creditors, the Majority's decision is likely to read like a blueprint for federal law reform in order to trigger the paramountcy doctrine in a future case, and thus avoid provincial receivership regimes that provide leniency for debtors. The paper further argues that Justice Côté's dissenting judgement implicitly accepted forum shopping by the secured creditor, which would lead to the strange result whereby paramountcy could be used to protect secured creditor rights.

provinciale sur les séquestres à l'avenir. Bien que la majorité reconnût aucun conflit, son raisonnement laisse entendre que la loi provinciale pourrait entraver les dispositions fédérales si la loi fédérale comprit un objectif « d'efficacité » délibéré. Pour les créanciers garantis, il est probable que la décision de la majorité sera interprétée comme un projet de réforme du droit fédéral afin de provoquer la doctrine de la prépondérance dans un cas éventuel et ainsi éviter des régimes provinciaux relatifs aux séquestres qui se montrent cléments envers les débiteurs. De plus, l'auteure soutient que le jugement dissident du juge Côté accepta implicitement la recherche de commissaires plus accommodants par le créancier garanti, ce qui aurait occasionné le résultat étrange par quoi la prépondérance pourrait être utilisée pour sauvegarder les droits de créanciers garantis.

1. Introduction

In Canada, legislative jurisdiction to regulate credit and debt is divided between the federal government and the provinces. Depending on the specific type of regulation in question, matters related to credit and debt potentially fall under one or more federal or provincial heads of power under sections 91 and 92 of *The Constitution Act, 1867*.[3] The federal heads of power include the public debt,[4] banking,[5] interest,[6] bankruptcy and insolvency,[7] and criminal law.[8] Provincial heads of power used to legislate in respect of debtor-creditor issues include jurisdiction over municipal institutions and local works and undertakings,[9] property and civil rights,[10] and generally all matters of a merely local or private nature in the province.[11]

3 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].
4 *Ibid*, s 91(1A).
5 *Ibid*, s 91(15).
6 *Ibid*, s 91(19).
7 *Ibid*, s 91(21).
8 *Ibid*, s 91(27).
9 *Ibid*, ss 92(8), 92(10). See e.g. *The City of Windsor (Amalgamation) Act*, SO 1935, c 74; *Ladore v Bennett*, [1939] UKPC 33, [1939] AC 468.
10 *Constitution Act, supra* note 3, s 92(13).
11 *Ibid*, s 92(16). See e.g. *An Act to relieve L'Union St. Jacques de Montreal*, SQ 1870, c 58; *Union St Jacques de Montreal v Belisle*, [1874] UKPC 53, 6 LR PC 31.

Since Confederation, various federal heads of power have bumped up against areas of provincial jurisdiction and vice versa. In the area of bankruptcy and insolvency law, contemporary thinking tends to frame the constitutional question as a contest between section 91(21) "bankruptcy and insolvency" and section 92(13) "property and civil rights." This perspective is informed by the past 60 or so years of case law, which has generally adopted this constitutional frame in the area of bankruptcy and insolvency law. More broadly, this perspective is reinforced by a longstanding theme in Canadian division of powers disputes in which the provinces' section 92(13) jurisdiction has challenged a number of different federal heads of power.

In contemporary constitutional jurisprudence, the 1978 Supreme Court of Canada's (SCC) decision in *Robinson v Countrywide Factors Ltd* marked a turning point in the Court's approach to resolving conflicts between provincial statutes and federal bankruptcy and insolvency law.[12] In that case, a 5-4 Majority upheld the validity of provincial legislation that dealt with certain private law rights on the occasion of insolvency as within the province's jurisdiction under section 92(13). Since then, the Court has tended to resolve constitutional disputes under the paramountcy rule.[13] The SCC affirmed this new approach by applying the paramountcy rule to resolve conflicts between provincial law and federal bankruptcy and insolvency law in a quintet of cases decided shortly after *Robinson v Countrywide Factors Ltd.*[14] These developments track a broader trend in constitutional jurisprudence over this time period, in which the SCC moved away from doctrines like interjurisdictional immunity and "watertight compartments" and toward "pith and substance" and paramountcy.[15]

12 *Robinson v Countrywide Factors Ltd*, [1978] 1 SRC 753, 72 DLR (3d) 500. See generally Roderick J Wood, "The Incremental Evolution of National Receivership Law and the Elusive Search for Federal Purpose" (2017) 26:1 Const Forum Const 1 [Wood, "Incremental Evolution"] at 1.

13 Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58 Can Bus LJ 27 [Wood, "The Paramountcy Principle"].

14 *Deputy Minister of Revenue v Rainville*, [1980] 1 SCR 35, 105 DLR (3d) 270; *Deloitte Haskins and Sells Ltd v Workers' Compensation Board*, [1985] 1 SCR 785, 19 DLR (4th) 577; *Federal Business Development Bank v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 1061, 50 DLR (4th) 577; *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24, 59 DLR (4th) 726; *Worker' Compensation Board v Husky Oil Operations Ltd*, [1995] 3 SCR 453, 128 DLR (4th) 1.

15 See e.g. Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill LJ 308 [Ryder, "The Demise and Rise of Federalism"]; *Ontario Public Service Employees' Union v Ontario (AG)*, [1987] 2 SCR 2 at 17-18, 59 OR (2d) 671 [*OPSEU*], cited in *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 36-37, where the court also cited Paul Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U Toronto LJ 307 at 308:

> the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to

Parliament's slow, and often piecemeal, approach to exercising its jurisdiction over bankruptcy and insolvency has helped to solidify this constitutional frame. During the period in which there was no federal bankruptcy or insolvency law (e.g., 1880-1919), provincial legislatures were left as the only law-making bodies that regulated debtor-creditor relations. The provinces accordingly addressed different social, commercial, and legal issues stemming from overindebtedness. Thus, from an historical standpoint, there is actually a longer tradition of provincial regulation of overindebtedness under section 92(13), than of federal regulation of bankruptcy and insolvency under section 91(21).

As a result, provincial law plays an important role within the current federal bankruptcy regime and in scholarly discourse on the subject.[16] For instance, provincial law helps determine which of the debtor's property is "exempt" from bankruptcy (i.e., what property the debtor gets to keep).[17] As Thomas Telfer notes, the contemporary provincial exemptions in bankruptcy remain consistent with the original, nineteenth-century legislation by which they were established.[18] Another example is the parallel provincial and federal regimes governing preferences. A "preference" is a payment by an insolvent debtor to a creditor in which the creditor receives more money than it would under a bankruptcy distribution. Under current law, a bankruptcy trustee has a choice between using the *Bankruptcy and Insolvency Act* (*BIA*) preference provision or provincial preferences law to attack these transactions.[19]

Although the prevailing constitutional frame is partly attributable to the lack of a federal bankruptcy and insolvency law during a period of Canadian history, it also reflects the malleability of legal interpretations of sections 91(21)

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the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.

16 See e.g. *BIA*, *supra* note 2, ss 67(1)(b) (stating that property which is exempt from seizure under provincial law does not form part of the debtor's property divisible amongst creditors in bankruptcy), 95 (dealing with preferences).

17 There are also federal exemptions set out in *BIA*, *supra* note 2, s 67(1).

18 See Thomas GW Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867-1919: The Triumph of the Provincial Model" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2007* (Toronto: Thomson & Carswell 2008) 577.

19 The *vires* of provincial legislation to impeach preferential transactions in bankruptcy proceedings was affirmed in *Robinson v Countrywide Factors Ltd*, *supra* note 12. See also Saskatchewan, Law Reform Commission of Saskatchewan, "Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part II: Preferential Transfers", by Tamara M Buckwold (Saskatoon: Uniform Law Conference of Canada Civil Law Section, August 2008) at paras 4, 7-18, excerpted in Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015) at 265-268.

and 92(13). The dividing line between these two heads of power has shifted over time.

Using *Saskatchewan v Lemare Lake Logging* as a case study, this article argues that a by-product of Canada's historically impermanent and piecemeal approach to bankruptcy law-making is that it has tended to diminish constitutional scrutiny of new exercises of Parliament's section 91(21) power. Over the past 60 years, lawyers, scholars, and judges have increasingly tended to accept the constitutional validity of *any* addition to federal bankruptcy and insolvency law because it is tacitly seen as part of Parliament's protracted approach to bankruptcy law-making and law reform.[20] This tacit assumption obscures the fact that prevailing conceptions of the terms "bankruptcy and insolvency" have actually changed over time. This article then considers the significance of the *Lemare Lake* case in light of the division of powers jurisprudence and its potential impact on provincial autonomy.

The rest of this paper is arranged as follows: Section 2 provides an overview of the legal constitutional background. It adopts an historical perspective that is sensitive to the way bankruptcy and insolvency law has operated in practice.[21] Section 3 summarizes the SCC's decision in *Lemare Lake*. Section 4 analyzes the *Lemare Lake* case in light of broader historical trends in bankruptcy and

20 This phenomenon might help explain why Canada's highest court has never declared a federal bankruptcy law *ultra vires*. See Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, 2014) at 95 [Telfer, *Ruin and Redemption*], where the author notes that he found only one instance of an *ultra vires* ruling (a dissent) concerning federal bankruptcy and insolvency law. See *McLeod v Wright* (1877), 17 NBR 68, 1877 CarswellNB 20 (WL Can) (SC) at paras 149-151, Wetmore J, dissenting.

The *Lemare Lake* decision is somewhat anomalous in this respect because although the Dissent accepted a characterization of receivership as part of a system of insolvency law, the Majority stopped short of doing so. See Wood, "Incremental Evolution", *supra* note 12.

21 This approach is similar to that used by constitutional law scholars such as Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2011) 19:2 Const Forum Const 93. It also draws on socio-legal approaches to understanding bankruptcy law developments and history, such as those employed by e.g. Telfer, *Ruin and Redemption*, *supra* note 20; Thomas GW Telfer, "Rediscovering the Bankruptcy and Insolvency Power: Political and Constitutional Challenges to the Canadian *Bankruptcy Act*, 1919-1929" (2017) 80 Sask L Rev 37; Virginia Erica Torrie, "Protagonists of Company Reorganisation: A History of the *Companies' Creditors Arrangement Act (Canada)* and the Role of Large Secured Creditors" (PhD Dissertation, Kent Law School, 2016) [unpublished] [Torrie, "Company Reorganisation"]; David A Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton, NJ: Princeton University Press, 2004); Bruce G Carruthers & Terence C Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Oxford: Clarendon Press, 1998); Terence C Halliday & Bruce G Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009); Terence C Halliday & Bruce G Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes" (2007) 112:4 American J Sociology 1135.

insolvency law and their impact on constitutional analyses, highlighting some of the broader questions the decision raises about how the court has interpreted section 91(21). Section 5 provides a conclusion.

2. Background

A "secured creditor" is a creditor that has been granted a property interest in collateral ("security") as part of the terms of a lending agreement. With a few notable exceptions, the giving and taking of security, as well as the rules governing secured lending, fall under section 92(13) as "property rights".[22] The appointment of a receiver (or "receiver and manager") is a creditor remedy known as "receivership," and is often employed in cases of default by a corporate debtor.[23] Until 2009, receivers were generally appointed and regulated by provincial law, as an extension of the provinces' jurisdiction over secured creditor rights.[24] Yet despite Parliament's novel exercise of its "bankruptcy and insolvency" jurisdiction by adding section 243 to the *BIA* in 2009, there appears to have been no constitutional controversy (or even scrutiny) concerning this new provision. This is remarkable in light of the fact that it is only in the past 30 years or so that the application of federal insolvency law to secured creditors gained widespread acceptance in Canada.

It is a longstanding tradition under Canadian bankruptcy law that secured creditors can continue to exercise their rights and remedies as secured creditors (including receivership) irrespective of a debtor's bankruptcy. In other words, the legal process of bankruptcy (i.e., liquidating the debtor's assets, distributing the proceeds to creditors, and discharging the remaining debt) only applies to creditors that have *not* taken security (unsecured creditors).[25] This tradition continues to be reflected in the current *BIA* bankruptcy provisions. Rather than resort to bankruptcy, secured creditors usually enforce debts by seizing and selling collateral or placing the debtor in receivership, which are activities governed by provincial law.

22 One exception is security taken by banks pursuant to *Bank Act*, SC 1991, c 46, s 427.

23 Receivership is usually used by secured creditors, but is occasionally used by unsecured creditors.

24 There are some exceptions, *Bank Act*, *supra* note 22.

25 Secured creditors can "opt in" to bankruptcy proceedings but are not compelled to participate. See *BIA*, *supra* note 2, ss 69.3 (stating that the bankruptcy stay of proceedings does not apply to secured creditors' efforts to enforce their security), 71 (the property of the debtor which vests in the bankruptcy trustee does not include property which is the subject of a security interest), 72(1) (the *BIA* does not abrogate or supersede the provisions of any other law relating to property and civil rights which is not in conflict with the Act), 121 (including secured claims in the definition of claims provable under the *BIA* in order to facilitate secured creditor's ability to "opt in" to bankruptcy proceedings).

Until the 1930s, the prevailing interpretation of section 92(13) vis-à-vis section 91(21) held that secured creditor rights remained within provincial jurisdiction irrespective of a debtor's bankruptcy or insolvency.[26] In other words, Parliament's bankruptcy and insolvency jurisdiction was implicitly circumscribed by the province's exclusive jurisdiction over property and civil rights. Two federal statutes enacted during the Great Depression fundamentally changed this interpretation. The *Companies' Creditors Arrangement Act, 1933* (*CCAA*) and *Farmers' Creditors Arrangement Act, 1934* (*FCAA*) both provided for the possibility that secured creditors could be compulsorily bound by federal insolvency law.[27] Both Acts were designed to help facilitate debt restructuring (a debt compromise between a debtor and its creditors) as opposed to bankruptcy proceedings, which are concerned with liquidating the debtor's assets and discharging debts.

At the time that these statutes were passed, the Canadian legal community widely regarded both as *ultra vires* Parliament for trenching on the provinces' exclusive jurisdiction over property and civil rights, and existing practices for facilitating debt compromises. To the astonishment of many commentators, both statutes were upheld in constitutional references.[28] Unfortunately, however, neither decision engaged in a fulsome analysis of provincial jurisdiction over secured creditor rights, despite this being the main reason for seeking the references.[29] The *CCAA* and *FCAA* remained the only federal insolvency stat-

26 See e.g. HE Manning, "Companies Reorganization and the Judicature Amendment Act 1935" (1935-1936) 5 Fortnightly LJ 23 at 23:

> [secured creditor rights] being property of creditors duly conveyed to them and established under Provincial law, no *ex post facto* event … could deprive such property owners of their vested rights and those rights were not property of the debtor divisible amongst his creditors and were not subject to the legislative interference of Parliament under the head of Bankruptcy and Insolvency.

See discussion in Torrie , "Company Reorganisation", *supra* note 21 at 108-111.

27 *Companies' Creditors Arrangement Act*, SC 1933, c 36 [*CCAA*]; *Farmers' Creditors Arrangement Act*, SC 1934, c 53 [*FCAA*]. See discussion in Torrie, "Company Reorganisation", *supra* note 21 at 87-127. See also Stephanie Ben-Ishai & Virginia Torrie, "Farm Insolvency in Canada" (2013) 2 J Insolvency Can 33.

28 *Reference Re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75 [*CCAA Reference*]; *Reference Re Farmers' Creditors Arrangement Act (Canada)*, [1937] AC 391, [1937] 1 DLR 695 (JCPC) [*FCAA Reference*].

29 *CCAA Reference, ibid* (Factum of the Attorney-General for Quebec, Ottawa: King's Printer, 1934) Ottawa, Supreme Court of Canada Records Centre [*CCAA Reference,* (Factum of AG of Québec)]; *CCAA Reference, ibid* (Factum of the Attorney-General for Canada, Ottawa: King's Printer, 1934) Ottawa, Supreme Court of Canada Records Centre [*CCAA Reference* (Factum of AG of Canada)]; *CCAA Reference*, *ibid*; see discussion in Torrie, "Company Reorganisation", *supra* note 21.

*FCAA Reference, ibid (*Factum of the Attorney-General for British Columbia Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada Records Centre; *FCAA Reference, ibid* (Factum of the Attorney-General for Québec, Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada

utes that could compulsorily bind secured creditors until 1992. In that year, Parliament added provisions which could compulsorily bind secured creditors to restructuring proceedings under the *BIA*.

The 1992 amendments also added a new Part XI to the *BIA* titled "Secured Creditors and Receivers."[30] This marked the first time that the federal government purported to legislate receivership through bankruptcy and insolvency law. This initial receivership provision was intended to facilitate interim (read: temporary) receivership appointments. However, it came to be used much more broadly, to carry out receiverships generally, under a national appointment.[31] This presented a problem because the federal regulatory provisions applicable to receivers did not extend to interim receivers. Parliament addressed this issue as part of the 2005/2007 insolvency law amendments by ensuring that interim receiverships could only be used as a temporary measure, as originally intended. Parliament also added a new section 243 to facilitate national receiverships. Section 243, which came into force in 2009, provides that "on application by a secured creditor, a court may appoint a receiver." This receivership provision can only be invoked in cases where the debtor is "insolvent" within the meaning of the *BIA*, and the commonly relied upon definition for this purpose is the inability to pay one's debts as they become due.[32] *Saskatchewan v Lemare Lake Logging Ltd* is the first case to consider the potential conflict between the national receivership provision in the *BIA* and provincial receivership law.

3. Saskatchewan v Lemare Lake Logging[33]

Saskatchewan v Lemare Lake Logging arose out of an application by Lemare Lake Logging Ltd (Lemare) to the Saskatchewan Court of Queen's Bench

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Records Centre; *FCAA Reference, ibid* (Factum of the Attorney-General for Ontario, Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada Records Centre; *FCAA Reference, ibid* (Factum of the Attorney-General for Canada, Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada Records Centre; *Reference Re Farmers' Creditors Arrangement Act*, [1936] SCR 384, 17 CBR 359.

The JCPC upheld the Majority SCC decision declaring the *FCAA intra vires*. The materials filed in connection with the appeal are much briefer and do not flesh out the constitutional arguments as fully as those filed with the SCC. The materials filed with the JCPC, including the factums filed by British Columbia, Ontario, and Canada are available at: "The Judicial Committee of the Privy Council Decisions" online: BAILII <www.bailii.org/uk/cases/UKPC/1937/1937_10.html>.

30 *BIA*, *supra* note 2, Part XI Secured Creditors and Receivers, s 243, as amended by RSC 1992, c 27, s 89; SC 2005, c 47, s 115; SC 2007, c 36, s 58.

31 See discussion in Roderick J Wood, "The Regulation of Receiverships" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2009* (Toronto: Carswell 2010) 243.

32 *BIA*, *supra* note 2, s 2, "insolvent person."

33 This section draws on Virginia Torrie, "*Saskatchewan (AG) v Lemare Lake Logging Ltd"*, Case Comment, (2016) 31:2 BFLR 403.

(SKQB) for the appointment of a receiver and manager of 3 L Cattle Company Ltd (3 L Cattle), pursuant to section 243 of the *BIA*. Unlike receivers appointed under provincial law, a receiver appointed under the *BIA* has authority to operate nationally. In addition, a secured creditor must give the debtor 10 days' notice before the court will appoint a receiver under the *BIA*.[34] From the secured creditor's perspective, the relatively short notice period before making an application, and the national scope of *BIA* receivership orders, are key advantages of this regime.[35]

Saskatchewan has a special receivership regime to help protect farmers from losing their farms. This regime has been in place since 1988. (Manitoba is the only other province with a similar statutory regime).[36] The *Saskatchewan Farm Security Act* imposes a 150-day notice requirement before a secured creditor can have a receiver appointed in respect of a farmer.[37] The *SFSA* also requires that the secured creditor and debtor engage in a debt mediation process.[38]

The secured creditor in the *Lemare Lake* case held a mortgage over the debtor's assets. The debtor defaulted on its mortgage, and the secured creditor subsequently made an application to the court for the appointment of a receiver under the *BIA*. The debtor contended that in making its application, the secured creditor had failed to comply with Part II of the *SFSA* by not first acquiring leave from the court before making the application. The debtor argued that doing so was a precondition for the appointment of a receiver under the *BIA*, and as a result of this omission the application for a receiver was a nullity.[39]

The parties agreed that the two statutes were valid. However, the secured creditor pleaded that sections 9 and 11 of Part II of the *SFSA* were constitutionally inoperable due to the doctrine of federal paramountcy. The secured creditor argued that there was an irresolvable conflict between the provincial

34 *BIA*, *supra* note 2, s 244.

35 See e.g. Michael W Milani, "Corralling the Ability to Appoint National Receivers: A Commentary on 3L Cattle Company" (2015) 4 J Insolvency Can 6 [Milani, "Commentary on 3L Cattle Company"]; Christian Lachance & Hugo Babos-Marchand, "The 'Impractical Effect' of *Lemare Lake Logging Ltd* in the Enforcement of Security in Quebec" (2016) 28:3 Commercial Insolvency Reporter 25; Jonathan Milani, "Frustrating the Purpose of the Receivership Remedy: Federal Paramountcy in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*" (2017) 80 Sask L Rev 253; Jeffrey M Lee, "'The Glorious Uncertainty of the Law': Taking and Enforcing Security in Saskatchewan" in Janis P Sarra, ed, *Annual Review of Insolvency Law*: *2017* (Toronto: Thomson Reuters 2018) 983.

36 *SFSA, supra* note 2; *Family Farm Protection Act*, SM 1986-87, c 6, CCSM c F15.

37 *SFSA*, *supra* note 2, s 9.

38 *Ibid*.

39 *Lemare Lake Logging Ltd v 3 L Cattle Company Ltd*, 2013 SKQB 278 at paras 1-2, [2013] 12 WWR 176.

and federal legislation, rendering the provincial statute inoperative with respect to its stipulation of a mandatory 150-day waiting period following a service of intention upon a debtor.[40]

The trial judge found no conflict between the two statutes, holding for the debtor, and resulting in the application for a receiver being a nullity.[41] The secured creditor appealed to the Saskatchewan Court of Appeal (SKCA), which reversed the determination of the constitutional issue. The SKCA found the *SFSA* frustrated the purpose of the *BIA* receivership provisions.[42] However, in considering the application on its merits, the SKCA decided against granting the application for a receiver under the *BIA*. Following the SKCA decision, the secured creditor and the debtor settled their dispute.[43] The Attorney General for Saskatchewan appealed the decision to the SCC for a determination of the constitutional issue. The SCC appointed former counsel for the secured creditor as *amicus curiae* to respond to the submissions of the Attorney General.[44] The Attorneys General for British Columbia and Ontario were interveners at the SCC. Neither the Superintendent of Bankruptcy, nor the Attorney General for Canada intervened.

The issue before the SCC was whether or not Part II of the *SFSA* conflicts with section 243(1) of the *BIA*. There are two branches of the paramountcy test for finding a conflict, either of which will render the provincial statute inoperative to the extent of the conflict. The first type of conflict is an "operational conflict," which refers to a situation where it is impossible to comply with both the federal and provincial statutes.[45] The second is a "frustration of purpose" conflict, in which the provincial statute frustrates the purpose of the federal statute.[46]

The SCC followed both lower courts in holding that there was no operational conflict between the federal and provincial legislation in issue. Six of the seven presiding justices also held that there was no conflict on the "frustration of purpose" basis. Justice Côté dissented and would have found a frustration of the purpose of the federal provision.

40 *Ibid.*
41 *Ibid.*
42 *Lemare Lake Logging Ltd v 3 L Cattle Company Ltd*, 2014 SKCA 35, 371 DLR (4th) 663.
43 *Lemare Lake*, *supra* note 1 at para 13.
44 *Ibid.*
45 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1.
46 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 73, [2007] 2 SCR 3; *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361.

Writing for the Majority, Justices Abella and Gascon found that the purpose of the *BIA* receivership provision was to create a regime for appointing a national receiver, thereby making it simpler for businesses that conduct operations in multiple provinces. The main effect of this provision is to impose a 10-day waiting period on the creditor. The Majority found the purpose of Part II of the *SFSA* was to help protect Saskatchewan farmers from the loss of farmland in the event of insolvency, with the main effect being the imposition of a 150-day waiting period on creditors.

The Majority concluded that the purpose of the federal provision was not frustrated by compliance with the provincial one. They viewed the 10-day waiting period contained in the federal statute as a minimum and permissive — secured creditors may wait much longer to make an application for the appointment of a receiver. The Majority declined to draw an inference from the comparatively short waiting period that Parliament's purpose had been to ensure promptness or timeliness in such proceedings. The Majority found no other evidence upon which to construe the purpose of the federal provision more broadly.

In Justice Côté's dissent, she accepted the opposite position — that the purpose of the federal provision was frustrated. She conceived that the purpose of the federal legislation included an emphasis on the timely resolution of insolvency issues for secured creditors. In her view, compelling a secured creditor in Saskatchewan to wait 150 days for the appointment of a receiver over an insolvent farmer's land is inconsistent with this purpose.

4. Analysis

Lemare Lake illustrates that one's understanding of the purpose of a federal provision or statute significantly influences one's determination of a paramountcy issue in the field of bankruptcy and insolvency law. While the trial court and the Majority of the SCC found a narrow purpose and no frustration, the SKCA and Justice Côté found a broader purpose and frustration. Yet, neither the courts nor the parties questioned whether federal bankruptcy and insolvency law should apply to receiverships in the first place. The paramountcy analysis instead rested on an implicit view of section 91(21) that actually represents a *break* with the traditional interpretation of that provision. The traditional interpretation held that federal bankruptcy and insolvency law could not adjust secured creditor rights. The *Lemare Lake* case has effectively redrawn the constitutional boundary between sections 91(21) and 92(13) without addressing one of the main constitutional issues. Interestingly, this

echoes the performance of the high courts in the *CCAA* and *FCAA* Reference decisions of the 1930s.

The risk that relying on the paramountcy doctrine poses to an appropriate balancing of federal and provincial powers with respect to insolvency, and the related balance between the interests of secured creditors and debtors, is clearly demonstrated by considering the implications of the decision of the SKCA and the dissenting opinion of Justice Côté at the SCC. Both effectively would have used the doctrine of federal paramountcy to help protect secured creditor rights. This is an odd outcome from both a constitutional and historical perspective, because secured creditor remedies are generally matters of exclusive provincial jurisdiction under section 92(13), even when the debtor is insolvent.[47] Writing about the federal receivership provisions, Justice Côté stated:

> … I see a federal purpose drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime — which, by this Court's jurisprudence, is paramount in cases of conflict — then it must do so in a manner consistent with that purpose. If the province does so, its regime will dovetail seamlessly with the federal regime and produce no frustration.[48]

The effect of Justice Côté's reasoning is that provincial receivership legislation must be at least as "creditor friendly" as the *BIA* receivership provisions. This would significantly limit a province's ability to adopt policies aimed at doing anything besides promoting secured creditor rights, such as helping protect the property and civil rights of debtors. Should a province fail to offer receivership legislation that is as "creditor friendly" as the *BIA*, Justice Côté's approach would encourage "forum shopping" on the part of creditors in opting for receivership under federal legislation.

Although it upheld the *SFSA*, the Majority's decision in *Lemare Lake* does not go much further in safeguarding provincial jurisdiction. Their reasoning implies that "timeliness" is an acceptable purpose of federal receivership provisions. To secured creditors and their representatives, which are likely to be dissatisfied with the SCC's decision,[49] this reads like a blueprint for law re-

47 Most secured credit is regulated by the provinces under *PPSA*s, see e.g. *Personal Property Security Act*, SM 1993, c 14. Secured creditors do not have to participate in *BIA* bankruptcies, see *BIA, supra* note 2, ss 71, 121.

48 *Lemare Lake, supra* note 1 at para 114, Côté J, dissenting.

49 See e.g. Milani, "Commentary on 3L Cattle Company", *supra* note 35 ("[i]f the Court of Appeal's decision is overturned on appeal, then other provincial legislation may be brandished by debtors seeking to avoid the appointment of a receiver under section 243(1) of the *BIA*" at 6).

form when Parliament conducts its next review of bankruptcy and insolvency legislation. The Majority decision in *Lemare Lake* implies that if Parliament amends the *BIA* to make it clear that the receivership provisions are intended to facilitate timely receivership proceedings, the *SFSA* receivership regime will frustrate this federal purpose. The likely result of such a conflict is that the *SFSA* will be inoperable to the extent that it conflicts with the *BIA* receivership regime.

It is hard to reconcile the SCC's tacit acceptance of timeliness and efficiency concerns as potentially valid purposes of a federal receivership regime with the Court's express circumspection of these same principles when it comes to other federal legislation that overlaps with section 92(13). For example, in the *Securities Reference* the Court found that the main thrust of the federal legislation went beyond Parliament's legislative jurisdiction under section 91(2) "trade and commerce."[50] The court acknowledged that there might be room for federal regulation of the securities market which was "qualitatively different from what the provinces can do."[51] But the court went on to say that the policy concerns raised by the federal government did not "justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation."[52]

Applying this reasoning to the constitutional issue in the *Lemare Lake* case, federally appointed receivers enjoy a national appointment, enabling them to operate in multiple provinces and territories, which is something that the provinces cannot do. However, there is no condition in the *Act* which limits the applicability of *BIA* receiverships to cases where a receiver needs to operate in multiple jurisdictions (e.g., because the debtor's assets are located in two or more provinces). In other words, a secured creditor can apply for a *BIA* receiver, instead of a provincially appointed receiver, even if there is no jurisdictional reason for seeking a federal appointment. This is different from the "cooperative approach" proposed by the SCC in the *Securities Reference* which would permit "a scheme that recognizes the essentially provincial nature of securities regulation [or receivership] while allowing Parliament to deal with genuinely national concerns …"[53]

On the other hand, integrating timeliness and efficiency as policy objectives of receivership regimes is within provincial jurisdiction under section

50 *Reference Re Securities Act*, 2011 SCC 66 at paras 128-129, [2011] 3 SCR 837.
51 *Ibid* at para 128.
52 *Ibid*.
53 *Ibid* at para 130.

92(13). In this regard, the federal receivership provisions are not qualitatively different from what the provinces *can* do; they are qualitatively different from what two provinces — Saskatchewan and Manitoba — *are doing*. This reflects a difference in policy, not legislative ability, between the provinces and federal government.

In the extreme, timeliness and efficiency can amount to arguments against federalism and in favour of a single law-making body. This is at odds with the modern paradigm's view of "interplay and … overlap" [54] as the "ultimate in harmony"[55] in a federal state. Thus, the principle of federalism requires that federal policy objectives that are inherently geared toward greater centralization, such as timeliness and efficiency, be weighed carefully against the importance of giving effect to the broader scheme of the Division of Legislative Powers in general, and provincial heads of power in particular.

Since Parliament only added a national receivership provision to the *BIA* in 2009 — *after* Saskatchewan enacted the *SFSA* — it is noteworthy that the validity of the *BIA* provisions has never been raised as a constitutional issue, or even attracted controversy. The constitutional issue in *Lemare Lake* only arose because of this novel exercise of Parliament's jurisdiction under section 91(21). From an historical perspective, it is paradoxical that the main reason that Parliament historically avoided regulating receiverships through insolvency law until this point was because this was regarded as *ultra vires* its section 91(21) power.[56] Until relatively recently, prevailing interpretations of the Division of Powers held that the "pith and substance" of secured creditor rights fell almost exclusively under the provinces' section 92(13) jurisdiction. So the *BIA* receivership provisions represent a fairly recent, novel exercise of Parliament's section 91(21) jurisdiction; one which rests on an expanded definition of bankruptcy and insolvency than that which had prevailed earlier in Canadian history.[57] Now, "insolvency" is seen as a dividing line between much provincial and federal jurisdiction concerning the regulation of credit and debt, but historically this notional line carried much less constitutional significance.

Contemporary scholars reflect the shift toward construing bankruptcy as dealing with the debtor's insolvency when critiquing some of the oldest provi-

54 *OPSEU*, *supra* note 15 at 18, Dickson CJC, quoted in Ryder, *supra* note 15 at 309, 311-313, 334-335.

55 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 188, 138 DLR (3d) 1, Dickson J, citing Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell Company, 1977) at 110. See WR Lederman, "Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill LJ 185 at 195. See also Ryder 1991, *supra* note 15 at 325.

56 *CCAA Reference*, *supra* note 28; *FCAA Reference*, *supra* note 28.

57 "Company Reorganisation", *supra* note 21 at 108.

sions of federal bankruptcy and insolvency laws. For example, when reviewing the "Acts of Bankruptcy" contained in the *BIA*, Roderick J Wood and David J Bryan remarked that

> Canadian bankruptcy law … contemplates that a solvent debtor may be forced into bankruptcy by the creditors. This seems out of step with the objectives of modern bankruptcy law which is primarily concerned with insolvent debtors.[58]

Conceptions of bankruptcy have changed since these provisions were introduced to the *BIA* in 1919, and the lack of comprehensive bankruptcy reforms underscores this point. Evolving views of Canadian bankruptcy are related to changing interpretations of section 91(21), which have significantly redrawn the lines dividing provincial and federal jurisdiction. As a result, one could argue that the "Acts of Bankruptcy" that were necessary to bring proceedings against a debtor in 1919 are now *ultra vires* Parliament because they extend to solvent debtors.[59] But this sort of argument is unlikely to come up because these provisions of the *BIA* are almost never used in practice. Nevertheless, this hypothetical example illustrates that the shift in conceptualizations of bankruptcy may profoundly affect constitutional interpretation and analyses.

On the other hand, arguments to extend bankruptcy and insolvency law into areas of provincial jurisdiction under section 92(13) come up fairly routinely. For example, in 2003 the Standing Senate Committee on Banking, Trade and Commerce wrote:

> There should be a uniform system nationwide for the examination of fraudulent and reviewable transactions in situations of insolvency. At present, there is a lack of fairness, uniformity and predictability by virtue of both federal and provincial/territorial legislation addressing fraudulent and reviewable transactions. We feel that a national standard is needed … Provincial/territorial legislation would continue to exist for transactions not occurring in the context of insolvency.[60]

It is hard to imagine a situation outside of insolvency where a preference issue would arise, and therefore preserving provincial jurisdiction over solvent

58 Roderick J Wood & David J Bryan, "Creeping Statutory Obsolescence in Bankruptcy Law" (2014) 3 J Insolvency Can 1 at 3, citing *Century Services Inc v Canada (AG)*, 2010 SCC 60, [2010] 3 SCR 379.

59 At the time they were introduced it appears no one challenged the "Acts of Bankruptcy" provisions on the constitutional ground that they could be applied to solvent debtors. See Telfer, *Ruin and Redemption*, *supra* note 20.

60 Canada, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Catalogue No YC11-0/372-15E-PDF (Ottawa: November 2003) at 122.

preferences law is probably meaningless in practice.[61] Thus, although this recommendation appears to leave some jurisdiction to the provinces, the effect of its implementation would likely be the replacement of provincial preferences law with federal preferences law.

These types of arguments are often raised in favour of comprehensive reform and modernization of Canadian bankruptcy and insolvency laws, which would create more uniformity by imposing a single national standard.[62] Underpinning this argument is a keen awareness of Parliament's historically impermanent and piecemeal approach to exercising its section 91(21) jurisdiction. Due to a confluence of factors, including a lack of political will, Parliament continues to let comprehensive bankruptcy and insolvency law reform languish.[63] But, stalled reform efforts obscure the fact that conceptions of what can constitute federal bankruptcy and insolvency law are changing. In some cases, the reason that certain components of "modern" bankruptcy and insolvency law were "missing" from earlier statutes is that they did not used to be considered part of bankruptcy and insolvency law. Receivership is a case in point. Hence, part of the reason that Parliament did not historically exercise its section 91(21) jurisdiction over some matters which are now considered "bankruptcy and insolvency" is because doing so would have been *ultra vires*.

The combination of piecemeal reforms and changing ideas about bankruptcy and insolvency has tended to lend implicit *vires* to any exercise of Parliamentary jurisdiction under section 91(21). This helps to explain why receivership, an area of longstanding and exclusive provincial jurisdiction, was added to federal bankruptcy and insolvency law without any constitutional controversy. We need to avoid the tendency to let "pith and substance" drop

61 Some provincial preferences legislation includes an express insolvency requirement. See e.g. *Assignments and Preferences Act*, RSO 1990, c A.33, s 4(2). See also *Fraudulent Conveyances Act*, RSM 1987 c F160, s 2 (which does not include an insolvency requirement).

62 Report of the Standing Senate Committee on Banking, Trade and Commerce, *supra* note 60 at 122, cited in Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015) at 269. See further, Tamara M Buckwold, "Reforming the Law of Fraudulent Conveyances and Fraudulent Preferences" (2012) 52 Can Bus LJ 333.

63 See discussion in Jacob Ziegel, "Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26:1 BFLR 63; Thomas GW Telfer, "Canadian Insolvency Law Reform and 'Our Bankrupt Legislative Process'" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2010* (Toronto: Carswell, 2011) 583; Ben-Ishai & Duggan, *supra* note 62. In 2005, Parliament added a provision requiring a review of the *BIA* in five years' time: *BIA*, *supra* note 2, as amended by SC 2005, c 47, s 122, adding Part XIV "Review of Act." The statutorily mandated review was carried out in 2014. (The delay was due to a time lag between the date that the amendments received Royal Asset and the date that they came into force). There is no indication of when the next review of bankruptcy and insolvency law might occur.

out of constitutional analyses. The potential for federal dominance inherent in the constitution necessitates scrutiny of new exercises of Parliamentary jurisdiction, including under section 91(21). Greater centralization may be necessary to a certain extent in order to give effect to modern ideas about bankruptcy and insolvency, but we should be mindful that it is likely to be a one-way street in favour of more federal jurisdiction. Thus, it must be balanced with the need to preserve real and meaningful jurisdiction for the provinces under section 92, and give effect to the Division of Legislative Powers as a whole.

It is worth briefly reflecting on a few of the ways that greater centralization of law-making authority under section 91(21) has played out in practice, and the impact it has had on provincial jurisdiction under section 92(13). For instance, the SCC's decision in *Re Validity of Orderly Payment of Debts Act, 1959 (Alberta)*[64] essentially reversed the Judicial Committee of the Privy Council's (JCPC) earlier holding in *Reference Re: An Act respecting Assignments and Preferences by Insolvent Persons (Ontario)*.[65] As a result, the provinces are unable to legislate in respect of voluntary schemes of debt compromises, and these were subsequently incorporated into the *BIA*.[66] In the *CCAA Reference*[67] the SCC upheld the validity of a federal scheme for restructuring secured debts, despite the prevailing view that the statute was *ultra vires* for purporting to adjust secured creditor rights. By upholding the validity of the *CCAA*, the SCC limited similar provincial receivership legislation to "solvent" restructurings and significantly limited their usefulness in practice.[68] The JCPC's ruling in the *FCAA Reference* that federal farm insolvency law — including unilateral adjustment of secured creditor rights — was *intra vires* limited the scope of

64 [1960] SCR 571, 23 DLR (2d) 449.

65 [1894] AC 189, 11 CRAC 13 [*Voluntary Assignments Reference*].

66 See *BIA*, *supra* note 2, Part III, Division II Consumer Proposals, and Part X "Orderly Payment of Debts."

67 *CCAA Reference* (Factum of AG of Québec), *supra* note 29; *CCAA Reference* (Factum of AG of Canada), *supra* note 29. See discussion in "Company Reorganisation", *supra* note 21 at 118-127.

68 As a corollary of the SCC's 1934 decision upholding the constitutional validity of the *CCAA* to adjust secured creditor rights in cases of insolvency, the JCPC, in effect, affirmed that provincial legislation that provided for receivership-restructurings was limited to cases in which the debtor was technically "solvent." Curtailing receivership restructuring to cases where the debtor was solvent significantly limited the usefulness of these provincial regimes in practice. In the case of Abitibi Power & Paper Co. the debtor company was insolvent by the time it came for court approval of the restructuring plan under Ontario legislation. Since the debtor company was insolvent, the court held that the Ontario legislation could not be used, since insolvent restructurings now fell within the purview of the *CCAA*. The restructuring had to be re-done under the *CCAA*, which took several more years. Abitibi Power & Paper Co was in receivership for 14 years, due in part to the constitutional uncertainty around the jurisdictional issue of adjusting secured claims in insolvency; an issue which was ultimately resolved by the JCPC in 1943. See *Judicature Act*, RSO 1914, c 56, s 16 as amended by *Statute Law Amendment Act*, SO 1917, c 27, s 17; *Judicature Amendment Act*, SO 1935,

the provinces' jurisdiction to legislate in respect of matters such as foreclosure and debt adjustment. This loss of jurisdiction was felt particularly acutely in Manitoba after Parliament amended the *FCAA* to make it non-applicable throughout Canada except in Alberta and Saskatchewan.[69] Under the classic paradigm of constitutional analysis that prevailed at the time, the practical effect of passing this restrictive amendment was that Parliament "covered the field" by creating a vacuum. It is hard to imagine a worse outcome from the standpoint of provincial autonomy! The Premier of Manitoba's only recourse was to lobby Parliament to have the *FCAA* reinstated in the province.[70]

The constitutional case law bears out a pattern of expanding interpretations of bankruptcy and insolvency, facilitated in part by little substantive discussion of what bankruptcy and insolvency law actually means.[71] Instead, tacit ideas about bankruptcy and insolvency have often carried the day, demonstrating their malleability when discussed in the abstract, even though the extent to which they have changed attests to how embedded in social context they also are. Thus, the most significant impact of the *Lemare Lake* case is unlikely to be the ratio of the Majority's decision, but rather the open door it leaves for greater centralization of law-making under section 91(21).[72]

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c 32; *Montreal Trust Company v Abitibi Power and Paper Company Ltd*, [1943] UKPC 37, [1943] 2 All ER 311; Torrie, "Company Reorganisation", *supra* note 21 at 58-87.

The restructuring of federal companies under the *Canada Business Corporations Act*, RSC 1985, c C-44, s 192, on the other hand, is an area of contemporary interest with respect to the notion of solvent restructuring regimes. This section of the *CBCA* makes no mention of a solvency or insolvency requirement, although there is some debate over whether insolvent companies should be required to use the *CCAA*. The division of powers issue around "insolvency" as a potential dividing line is more muted between these two regimes because both are areas of federal jurisdiction. See Martin McGregor & Paul Casey, "*CBCA* Section 192 Restructurings: A Streamlined Restructuring Tool of a Statutory Loophole?" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2013* (Toronto: Carswell 2014) 683.

69 *An Act to Amend the Farmers' Creditors Arrangement Act, 1934*, SC 1938, c 47, s 9. See discussion in Ben-Ishai & Torrie, *supra* note 27 at 45-47.

70 Letter to the Prime Minister and Members of the Federal Government from the Premiers of Alberta, Saskatchewan, and Manitoba (1942) and Unanimous Resolution of the Inter-Provincial Debt Conference, Saskatoon (30 June 1942) in "Adjustment and Settlement of Farm Debts" United Farmers of Alberta, 1905-1966 (Glenbow Archives, Calgary: M-1749-34).

The *FCAA* was repealed and replaced with a new statute with the same name in 1943. The new *FCAA* applied in Alberta, Saskatchewan, and Manitoba. See *Farmers' Creditors Arrangement Act*, RSC 1952, c 111, Preamble, s 7. See discussion in Ben-Ishai & Torrie, *supra* note 27 at 46-47.

71 See discussion in Anna J Lund, "Lousy Dentists, Bad Drivers and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80:1 Sask L Rev 157 at 169-173.

72 Wood, "Incremental Evolution", *supra* note 12 at 5-6, noting the likelihood that receivership will be codified in federal insolvency law in the future.

The forum of law-making is not neutral to policy development in the area of insolvency law. Greater centralization of receivership law is likely to benefit secured creditors, both because creditors are an organized interest group in insolvency law-making (unlike most debtors), and because federal politicians and political parties tend to be less concerned with debtor interests and regional constituencies (e.g., Prairie farmers) than their provincial counterparts. Furthermore, "timeliness" and "efficiency" are not neutral policy objectives in the area of receivership law. They are inherently geared toward advancing the interests of secured creditors over those of debtors, just as they inherently promote greater exercises of federal jurisdiction. The potential for more centralization of bankruptcy and insolvency law is compounded by the SCC's tendency to decide jurisdictional disputes through the doctrine of federal paramountcy. If "timeliness" and "efficiency" are accepted as purposes of federal bankruptcy and insolvency law, then much provincial legislation seems likely to conflict with these objectives.[73] Efficiency and timeliness alone provide insufficient reasons to undermine provincial jurisdiction and autonomy over policy choices. In this sense, paramountcy should not protect secured creditor rights.

The reasoning of the SKCA and Justice Côté is particularly noteworthy in this regard. In their decisions, these justices used the doctrine of federal paramountcy effectively to protect secured creditor rights. The main reason that the secured creditor in *Lemare Lake* relied on the *BIA* receivership provisions was in order *to avoid* the applicable provincial law, and the reasoning of the SKCA and Justice Côté implicitly accepted this "forum shopping."

Justice Côté suggested that the federal purpose she identified in the receivership provisions of the *BIA* "leaves a wide legislative space open to the provinces,"[74] but this rings hollow for two reasons. First, a federal receivership regime — even one that is limited to insolvent debtors — encroaches on an area that was (formerly) within the exclusive jurisdiction of the provinces. Therefore, the provinces are actually left with *less* legislative space than they had before the introduction of *BIA* receiverships. If some secured creditors opt for federal receivership, as opposed to provincial receivership, the *BIA* receivership provisions will reduce provincial jurisdiction in practice as well.

73 See Janis Sarra, "The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments" (2011) 50 Can Bus LJ 211 at 213-214; Wade K Wright, "Courts as Facilitators of Intergovernmental Dialogue: Cooperative Federalism and Judicial Review" (2016) 72 SCLR (2d) 365 at 411, both cited in Lund, *supra* note 71 at 173.

74 *Ibid* at para 116, Côté J, dissenting.

In order to maintain provincial jurisdiction over receivership in practice, provinces must "compete" with federal receivership provisions. However, the constitutional playing field for this kind of legislative competition is uneven. For instance, a federally appointed receiver can operate nationally, but provincially appointed receivers can only operate within the province of their appointment. Secured creditors see the national appointment as a key advantage of *BIA* receiverships. Thus, one of the most attractive features of a federally-appointed receiver from a secured creditor's standpoint is something which provincial receivership regimes cannot offer.

Second, the federal receivership provisions constrain the policy of provincial legislation due to the operation of the doctrine of federal paramountcy. Provincial receivership legislation must replicate or dovetail with the policy of the *BIA* receivership provisions to a significant extent so that it does not frustrate the purpose of federal legislation. This diminishes provincial autonomy over policy choices. This phenomenon may be especially pronounced in "zero-sum" situations such as insolvency, where helping one group (e.g., debtors) tends to come at a direct cost to another group (e.g., creditors). As a result, the more controversial the policy debate, the more constrained provincial autonomy over policy choices is likely to be. For example, one of the reasons that the secured creditor in *Lemare Lake* preferred to rely on the *BIA* receivership provisions was that the process was less onerous for creditors than the process under the *SFSA*. The process of appointing a receiver under the *SFSA*, on the other hand, is more favourable from the perspective of farmer-debtors.

Bruce Ryder's framework for promoting provincial autonomy sheds light on the mechanisms by which the modern paradigm of constitutional interpretation can diminish provincial jurisdiction.[75] Ryder suggests that the "interplay and overlap" advanced by the modern paradigm can pose a threat to provincial autonomy when federal jurisdiction is interpreted broadly so as to overlap with provincial jurisdiction.[76] This poses a threat to provincial autonomy because it extends the potential for federal dominance, which is already inherent in the paramountcy rule. In other words, since any conflict is decided in favour of Parliamentary legislation, broad interpretations of federal heads of power that overlap with provincial heads of power can render provincial jurisdiction meaningless in practice. Ryder notes that, in the extreme, this phenomenon

75 Ryder, "The Demise and Rise of Federalism", *supra* note 15. See further, Bruce Ryder, "Equal Autonomy In Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 566.

76 Ryder, "The Demise and Rise of Federalism", *ibid* note 15 at 313, 314, 358-359.

has the potential to make a mockery of provincial autonomy.[77] In the area of bankruptcy and insolvency, Roderick J Wood notes that the continually expanding scope of federal law greatly increases the prospect of further constitutional challenges of provincial legislation; disputes which are likely to be decided through the paramountcy rule.[78]

Applying Ryder's framework to the *Lemare Lake* case, Justice Côté's approach to division of powers analysis seems to undermine provincial jurisdiction in deed, if not word, because it leaves little room for the provinces to legislate in a way that conforms with the Constitution. Provinces are unable to "compete" effectively with federal legislation because some of the key advantages of federal legislation are *ultra vires* provincial jurisdiction. In addition, provincial policy choices are largely restricted to replicating federal legislation. Taken together, these constraints mean the "best" a province may offer is a geographically bounded version of the federal law. This essentially makes provincial law a less powerful version of the federal law. Furthermore, if the provincial law essentially parallels the federal law, then the substance of the underlying policy — and resulting "law" — has been established by Parliament, rather than provincial legislatures.

Thus, one effect of this approach to division of powers analysis is that much of the policy- and law-making authority shifts to Ottawa, not only in the current round of law-making, but for subsequent rounds as well. This is a fundamental point of distinction between Parliament regulating receiverships through insolvency law and the provinces regulating secured transactions under *Personal Property Security Act*s (*PPSA*s), for example. Although most provinces have *PPSA*s which are substantially similar, each province had a choice over whether or not to adopt such a statute and whether and how to modify it in light of province-specific policy considerations and constituencies.[79] Since *PPSAs* were enacted (or not) provincially, each province maintains the autonomy to repeal or amend its *PPSA* in the future. Although there may be forum shopping, "competition" between provincial secured transactions regimes is on

77 Ryder, "The Demise and Rise of Federalism", *ibid* note 15 at 313-314, 355-356.

78 Wood, "The Paramountcy Principle", *supra* note 13.

79 Québec did not adopt a PPSA, and relies instead on the *Civil Code of Quebec*, CQLR c CCQ-1991. See discussion in Aline Grenon, "Major Differences between PPSA Legislation and Security over Movables in Quebec under the New Civil Code" (1996) 26 Can Bus LJ 391; Ontario's and Yukon's *PPSA*s were based on a different model than those of the other provinces and territories, and thus these statutes remain somewhat "unharmonized" with other *PPSA*s. There are also a number of more minor differences between provincial *PPSA*s, see discussion in Ronald CC Cumming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law,* 2nd ed (Toronto: Irwin Law, 2012) at 64-70.

a more level playing field because it is between one province and another province, not between a province and Parliament. As a result, a constitutionally valid secured transaction regime is not in danger of being declared inoperable to the extent it differs from that of a neighbouring province. Forum shopping is also curtailed by the fact that the geographic boundaries of a province serve as jurisdictional boundaries as well.

The differences between the *BIA* receivership provisions and the *SFSA* suggest that the law-making forum can significantly affect the substance of receivership law. The *SFSA* was enacted during the farm debt crisis of the 1980s by a Saskatchewan government that was proximate to Prairie farming and sensitive to the concerns of its farmer constituents. On the other hand, the 2009 amendments to the *BIA* do not reflect concern for farmers, nor debtors generally. This suggests that the forum of law-making can be a significant factor in terms of the influence of different interest groups and the relative importance of certain policies in law-making. With the exception of farmers, debtors tend not to be an organized interest group (unlike creditors) and this amplifies the power imbalance between debtors and creditors in terms of law-making and law reform.[80] In political terms, a wider variety of political parties have formed provincial governments, some of which have been especially sensitive to debtor rights.[81] On balance, it appears that debtors' interests and rights are more likely to be taken into account in provincial, as opposed to federal, law-making. Thus, the shift of more *de facto* policy making to Ottawa has the effect of reducing debtors' impact as a constituency as well as narrowing the spectrum of policy choices in a way that also tends to benefit of creditors.

5. Conclusion

Lemare Lake raises important questions about the "purposes" of bankruptcy and insolvency law, and their relationship to judicial interpretations of Parliamentary jurisdiction under section 91(21). Drawing on the history of Canadian bankruptcy and insolvency legislation, this article has offered some

80 See e.g. Iain DC Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003) 53 UTLJ 379; Anna Lund, "Engaging Canadians in Commercial Law Reform: Insights and Lessons from the 2014 Industry Canada Consultation on insolvency Legislation" (2016) 58 Can Bus LJ 123.

81 See e.g. New Democratic Party, United Farmers of Alberta, Social Credit, Co-operative Commonwealth Federation, Saskatchewan Party. The Social Credit and the United Farmers of Alberta were especially sensitive to debtor rights. For instance, the United Farmers of Alberta government introduced debt adjustment legislation in the 1920s, which the JCPC later struck down as *ultra vires*: *The Debt Adjustment Act*, SA 1937, c 9; *Re Debt Adjustment Act (Alberta)*, [1943] UKPC 5, [1943] AC 356.

preliminary thoughts as to how temporary legislation and piecemeal reforms in this area of law may have contributed to implicit changes in prevailing views of section 91(21) over time. By situating *Lemare Lake* in historical context, it has shown that this decision rests on an interpretation of section 91(21) vis-à-vis section 92(13), which is broader than the interpretation that prevailed earlier in Canadian history. This case accordingly affirms a significant shift in Canadian understandings of federal bankruptcy and insolvency law relative to provincial jurisdiction over property and civil rights and opens the door to greater exercises of Parliament's section 91(21) jurisdiction in the future.

This shift carries significant ramifications in terms of provincial autonomy and the relative ability of different groups to engage in the law-making process. Like other SCC decisions, *Lemare Lake* is a reflection of the highest court's interpretation of Canadian federalism. Its precedential value, and the reasoning on which it is based, has the potential to impact law-making and adjudication at every level. Based on the Court's analysis and decision in *Lemare Lake*, this article has argued that this decision is likely to serve as a blueprint for federal reforms which will trigger the paramountcy doctrine in a future case, and thereby circumvent provincial receivership regimes which are less "creditor friendly." In effect, this would diminish provincial autonomy over both law and policy concerning "property and civil rights", and lead to the strange result whereby paramountcy is used to protect the rights of secured creditors. The strangeness of this outcome from a constitutional perspective should prompt us to be more critical in scrutinizing novel exercises of federal jurisdiction, particularly under section 91(21), and not allow "pith and substance" to drop out of our constitutional analyses.

Book Review

*Nnaemeka Ezeani**

Dimitrios Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (Vancouver: UBC Press, 2016).

Discussion on the implications of the Aboriginal and treaty rights clause in section 35 of the *Constitution Act, 1982* is far from over. In his book, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada,* political science professor Dimitrios Panagos approaches the scope of section 35 from a distinctive perspective combining considerations from politics, philosophy, and the law. The book examines the different conceptualizations of *Aboriginality*. He argues that the Supreme Court of Canada's (SCC) approach to the meaning of *Aboriginality* has led to what he would identify as the misrecognition of Aboriginal peoples in Canada.

Panagos's overview of the historical and legal framework of section 35 lays the foundation for the book. He gives an account of how judicial perspectives on Aboriginal rights shifted from skepticism to a still-vague constitutional recognition in 1982. However, he suggests that the vagueness of section 35 was intentional, as it was the only way that the proponents of the section could have succeeded in including it in the Constitution.[1] Consequently, Canadians remained in the dark about the nature and scope of Aboriginal rights until the 1990s, when the Supreme Court of Canada began to interpret section 35.[2]

In his examination of the Court's cases on section 35, Panagos finds that Aboriginal rights as embedded in the *Constitution Act, 1982* interpret a central concept of *Aboriginality*, concerned with the protection of the collective identity of Aboriginal peoples.[3] Panagos recognizes two competing scholarly

* LLM student, University of Saskatchewan

1 Dimitrios Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (Vancouver: UBC Press, 2016) at 6.

2 *Ibid* at 19-20.

3 *Ibid* at 36. See also *R v Sparrow*, [1990] 1 SCR 1075, 111 NR 241; *R v Van der Peet*, [1996] 2 SCR 507, 200 NR 1; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 220 NR 161; *Haida Nation*

approaches to the conceptualization of *Aboriginality*: *Trait-Based* and *Relational*. The former deals with the collective characteristics that the members of a group share, while the latter conceptualizes identity around what Panagos refers to as *a set of relations*.[4] He defines *a set of relations* as either bonds of attachment that groups feel for themselves or the differences between groups in terms of resources, power, and opportunity.[5] After an examination of the pros and cons of both approaches, the author follows scholars like Schouls,[6] Dick,[7] and Barcham[8] in adopting the *Relational* approach as the superior conceptualization of Aboriginality.

Panagos goes on to construct three theoretical versions of *Aboriginality* using the *Relational* approach. These versions are *Nation-to-Nation*, *Colonial*, and *Citizen-State*. The *Nation-to-Nation* approach reflects the political interaction between Aboriginals and Europeans in the pre-colonial era, which is driven by cooperation and the pursuit of group-specific interests.[9] Within this account, Aboriginal nations created a mutual relationship with Europeans to gain advantages like military alliances and access to European goods.[10] The Europeans also had their motives for establishing and maintaining cooperative interactions with Aboriginal nations.[11] Panagos contends that a *Nation-to-Nation* era facilitated Aboriginal self-government and self-definition.[12]

In contrast, the *Colonial* theoretical approach shows disrespect towards the culture and values of Aboriginal peoples by the European colonizers.[13] Here, there is no cooperative interaction between the colonial powers and the Aboriginal nations; the initial interaction between these groups is marked by a lack of consent.[14] Thus, *Aboriginality* within the *Colonial* approach denotes

v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511; and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

4 *Ibid* at 35, 41.

5 *Ibid* at 41.

6 Tim Schouls, *Shifting Boundries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003).

7 Caroline Dick, "Politics of Intragroup Difference: First Nations' Women and the *Sawridge* Dispute" (2006) 39 Canadian Journal of Political Science 97.

8 Manuhuia Barchvarova, "(De) Constructing the Politics of Indigeneity" in Duncan Ivison, Paul Patton and Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).

9 Panagos, *supra* note 1 at 60.

10 *Ibid* at 60. See also Robert A Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press) at 21.

11 Panagos, *ibid* at 62.

12 *Ibid* at 62.

13 *Ibid* at 63.

14 *Ibid* at 63.

a collective identity made by foreigners who subjected Aboriginal nations to their laws.[15]

Lastly, under the *Citizen-State* approach, Aboriginals are theorized to enjoy the same rights as non-Aboriginals, as well as another special bundle of rights granted just for them.[16] In this approach, the special rights held by Aboriginals proceed from the sovereignty of the Canadian Crown and the same sovereignty protects those rights.[17]

After consideration of these approaches to Aboriginality, Panagos argues that Section 35 can best be interpreted through the *Citizen-State* approach. Besides his consideration of these three approaches, Panagos also examines submissions on *Aboriginality* in the Supreme Court of Canada by claimant Aboriginal communities and federal and provincial governments. He also considers the Court's decisions in this area. While the submission of Aboriginals links self-government to Aboriginal culture and identity (*Nation-to-Nation* approach), the submissions of governments tend to continue to tilt towards the *Colonial* approach.[18] The Court itself has tended to try to strike a balance between the attachments of Aboriginals and the sovereignty of the Crown. This permits justifiable infringements of Aboriginal rights for a "greater good" (as understood through the *Citizen-State* approach).[19]

In his last chapter, Panagos argues that the approach of the Supreme Court of Canada to Aboriginality is unfairly prejudicial to Aboriginal peoples in Canada. In his view, a jurisprudential gap exists because the SCC has failed to give reasons for adopting the *Citizen-State* approach of *Aboriginality* over the *Nation-to-Nation* approach. He contends that there can only be a justification for this gap if an alternative like the *Nation-to-Nation* approach is unworkable.[20] Thus, he concludes that the linking of section 35 to the *Citizen-State* approach has led to the harms of misrecognition and unfair treatment of Aboriginal peoples in Canada. He aligns himself with Professor Charles Margrave Taylor, whose recognition theory can be used to argue that the misrecognition of Aboriginal peoples is a form of injustice because it results in

15 *Ibid* at 65. See also Robert Blauner, "Internal Colonialism and Ghetto Revolt" (1969) 16:4 Social Problems 393 at 396, Online: <https://www.jstor.org/stable/799949>.

16 Panagos, i*bid* at 66.

17 *Ibid* at 67. See also Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 157.

18 Panagos, *ibid* at 76.

19 *Ibid* at 86.

20 *Ibid* at 112.

inequality and exploitation.[21] Therefore, the Court's approach results in the unfair treatment of Aboriginal peoples in Canada.[22]

As mentioned above, Panagos's arguments centre on the meaning of *Aboriginality*. However, he opts for the more uncertain *Relational* approach towards defining that concept. The *Relational* approach, as he points out, is a conceptualization of collective identity built around *a set of relations*.[23] This set of relations seem largely idealistic and unclear. Panagos downplays the relevance of the *Traits-Based* approach, which is arguably indispensable in defining *Aboriginality*. Beyond the concept of *Aboriginality*, one can sensibly argue that the *Trait-Based* approach is the best approach for defining identity. There have been arguments along such lines in the context of African identities, for example, framed around the very foundational idea that every being is distinct from others based on that being's traits.[24] This principle arguably also extends to the identities of communities and nations. The traits to be considered are by no means limited to physical traits but also include culture, descent, language, values, shared practices, attachment to the land, and so on.[25] This alternative remains more plausible than Panagos's assumption. This is because the first step for the identification of a group of people should ordinarily be to consider their traits; such theories deserve ongoing attention.

I do not suggest in any way that the *Trait-Based* approach to community identity is flawless, but Panagos's full reliance on the *Relational* approach seems to jettison the *Trait-Based* approach, and this decision may prove to be problematic. Arguably, the *Relational* approach makes the concept of *Aboriginality* vaguer than it already appears to be. The *set of relations* which the *Rational* approach deals with are less obvious and arguably less reliable than the traits of a group. On Panagos's account, the set of relations includes bonds of attachment a group of people feel for themselves and the differences between groups in terms of resources, power, and opportunity.[26] First, it may be difficult to ascertain the kind of bonds of attachment a group may feel for themselves. Assuming that these bonds can be ascertained, Panagos does not show how or why those bonds would override the identification of Aboriginal peoples

21 *Ibid* at 113. See also Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) at 64.

22 Panagos, *ibid* at 114.

23 *Ibid* at 41.

24 Frank Okenna Ndubuisi, "The Philosophical Paradigm of African Identity and Development" (2013) 3:1 Open Journal of Philosophy 222 at 223.

25 Panagos, *supra* note 1 at 36.

26 *Ibid* at 41.

by their traits, including their attachment to land, culture, descent, language, values, shared practices, and so on.[27]

Finally, Panagos recognizes the legal challenges in his contention that, if section 35 should be connected to *Aboriginality*, Aboriginal rights should be made to uphold the *Nation-to-Nation* approach.[28] The challenge is that the nature and scope of the sovereignty of the Crown and title still exist.[29] No matter the approach adopted for section 35, the rights provided therein flow from the honour of the Crown.[30] Hence, it is arguable that the *Nation-to-Nation* approach as Panagos illustrates may not be legally attainable in Canada today.

This book adds to the existing literature on the need for the Supreme Court of Canada to be more proactive about and clear on the implication of section 35. In order to illustrate the harm that arises from the connection of Aboriginal rights to *Aboriginality* within the decisions of the Supreme Court of Canada, Panagos's analysis brings together scholarship on law, philosophy, and Aboriginal politics.[31] The book is particularly important because of the need to keep examining the Supreme Court of Canada case law on the protection of the rights of Aboriginal peoples. Even if one has ongoing questions on the theoretical approach adopted, the book effectively analyses a number of the Court's decisions to show its misconception and misrecognition of *Aboriginality*, which has consequently led to the unfair treatment of Aboriginal peoples in Canada. The themes at issue will warrant ongoing attention, but this book makes important contributions to discourses surrounding Reconciliation in Canada today.

27 *Ibid* at 36.
28 *Ibid* at 125.
29 *Ibid* at 125.
30 Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29:1 SCLR 543 at 544.
31 Panagos, *supra* note 1 at 124.