

The Unwritten Constitution and the More-than-Human World

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Despite textual silence regarding relations with the more-than-human world, Canada's constitutional order houses an unstated commitment to anthropocentric exploitation. This commitment places Canadian state constitutionalism in substantial tension with Indigenous constitutional commitments, which often embrace more equitable and reciprocal legal relations with the more-than-human world. Accordingly, the Canadian state's exploitative posture towards the more-than-human world is linked to another unstated (and, in fact, sometimes explicitly rejected) commitment that nonetheless remains operative within Canadian state constitutionalism: the subordination of Indigenous legal orders to Canadian state law. This article explores these ignominious commitments – to anthropocentric exploitation and the subordination of Indigenous legal orders – as instances of Canada's "shadow" Constitution: a body of interlaced commitments which are stable, core, and binding elements of the unwritten Constitution, even though they are often ignored, denied, or even repudiated by actors within the system. These shadow commitments shape constitutional jurisprudence alongside and in similar fashion to the Supreme Court's proudly proclaimed "unwritten constitutional principles," such as rule of law and minority protection. The

Malgré le silence textuel concernant les relations avec le monde plus qu'humain, l'ordre constitutionnel du Canada démontre un engagement envers l'exploitation anthropocentrique. Cet engagement place le constitutionnalisme de l'État canadien en tension substantielle avec les engagements constitutionnels autochtones, qui adoptent souvent des relations juridiques plus équitables et réciproques avec le monde plus qu'humain. Par conséquent, l'attitude d'exploitation de l'État canadien envers le monde plus qu'humain est liée à un autre engagement non déclaré (et, en fait, parfois explicitement rejeté) qui reste néanmoins opérationnel dans le constitutionnalisme de l'État canadien: la subordination des ordres juridiques autochtones au droit de l'État canadien. Cet article prend ces engagements ignominieux – à l'exploitation anthropocentrique et à la subordination des ordres juridiques autochtones – comme des exemples de la Constitution « ombré » du Canada: un ensemble d'engagements entrelacés qui sont des éléments stables, centraux et contraignants de la Constitution non écrite, même s'ils sont ignorés, niés, ou même répudiés par les acteurs du système. Ces engagements ombrés formulent la jurisprudence constitutionnelle à côté de et de manière semblable des « principes constitutionnels non écrits » fièrement proclamés

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portrait of the legal order that emerges is thus one of “polyvalent constitutionalism,” within which distinct and even apparently contrasting commitments can co-exist and interact as stable, core, and binding elements of the same legal order. Recognizing the polyvalence of the unwritten constitution helps to illuminate the importance of advocacy projects that press against shadow commitments, and the depth of the challenges they face.

par la Cour suprême, tels que la primauté du droit et la protection des minorités. L’image de l’ordre juridique qui se dégage est ainsi celui d’un « constitutionnalisme polyvalente » où les engagements distincts – et même apparemment opposés – peuvent coexister et interagir comme des éléments stables, centraux et contraignants du même ordre juridique. Reconnaître la polyvalence de la Constitution non écrite aide à éclairer l’importance des projets de la défense des droits qui s’appuient contre les engagements ombrés, ainsi que la mesure des défis auxquels ils sont confrontés.

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I. Introduction

Human communities are necessarily enabled through relations with the more-than-human world, including plants, animals, rivers, and ecosystems.¹ Social and political agreements respecting the collective pursuit of these relations are foundational to human political life² and, accordingly, constitutionalism.³ Yet many constitutional texts are silent as to the terms of these essential collective engagements. While the centrality of human-earth relations is openly embraced within diverse strands of Indigenous constitutional theory,⁴ relationships with the more-than-human world are often left implicit (or recognized only emergently and haltingly) within state constitutional orders, including Canada's.⁵ This difference in the visibility of human-earth relations within state and Indigenous legal orders is matched by important differences in the substance of the commitments embraced across these interlaced constitutional jurisdictions.⁶ These tensions between state and Indigenous constitutional approaches to the more-than-human world have produced a fraught jurisprudential landscape in which unanswered questions respecting Indigenous sovereignty, Aboriginal rights, and the place of the more-than-human world often circle back to one another.

Despite textual silence regarding our relations with the more-than-human world, Canada's constitutional order carries the imprint of a particular commit-

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- 1 The term "more-than-human" here embraces elements of the living world without committing to a particular scale or unit of concern. See Lindsay Borrows & Jessica Eisen, "Our More-than-Human Constitutions" (2025) 29:2 Rev Const Stud 173. Ultimately, the interconnected nature of earth and life means that questions of how and when to engage at any particular scale (i.e. an individual deer, a species, a forest) are best understood as provisional and political choices. Cf. Christopher D Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45:2 S Cal L Rev 450 at 456, n 26.
 - 2 By "agreement," I do not mean to imply that these arrangements are uncontested. Constitutional agreements are often partial and disputed, even where they furnish shared terms of political engagement. Cf. generally Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven: Yale University Press, 2001).
 - 3 Cf. Lynda M Collins, "The Unwritten Constitutional Principle of Ecological Sustainability: A Solution to the Pipelines Puzzle" (2020) 70 UNBLJ 30 at 42 [Collins, "Pipelines"]: "Though we frequently forget it, our legal system is in reality composed of biological beings with certain inescapable environmental needs."
 - 4 See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 [A Mills, "Lifeworlds"] (describing "rooted constitutionalism" as characteristic of many Indigenous legal orders).
 - 5 Cf. Collins, "Pipelines", *supra* note 3 at 41 (noting that the Canadian Constitution is "silent" on the matter of "ecological sustainability"); see also Jessica Eisen, "Animals in the Constitutional State" (2017) 15:4 Int'l J Const L 909 [Eisen, "Animals in the Constitutional State"] (on the relatively recent emergence of animal protection provisions in state constitutions globally).
 - 6 See A Mills, "Lifeworlds", *supra* note 4 at 862–68.

ment to anthropocentric exploitation of animals and the earth. By “anthropocentric exploitation,” I do not mean merely the fact of “taking” from the earth, or the fact that human legal orders are shaped by human perception and experience (each of which is, in some form, inevitable).⁷ Instead, I mean here to invoke a particular dynamic of extraction that is premised on a hierarchy of human over other, and a denial of reciprocal obligation to nonhumans.⁸ Significantly, this unwritten commitment to exploitative relations with other animals and the earth places Canadian state constitutionalism in substantial tension with Indigenous constitutional commitments, which often embrace more equitable and reciprocal legal relations with the more-than-human world.⁹ Accordingly, the state’s exploitative posture toward the more-than-human world is linked to another unstated (and, in fact, sometimes explicitly rejected) commitment that nonetheless remains operative within Canadian state constitutionalism: the subordination of Indigenous legal orders to Canadian state law.¹⁰

The notion that constitutions include “unwritten” commitments — assumptions that shape outcomes even where they are “invisible” to constitutional actors — is not new.¹¹ A growing body of jurisprudence and scholarship recognizes such unwritten commitments as offering both “descriptive” power

7 Cf. Ben Mylius, “Three Types of Anthropocentrism” (2018) 15:2 *Environmental Philosophy* 159 (distinguishing between “perceptual,” “descriptive,” and “normative” anthropocentrism).

8 See Jessica Eisen, “Constitutional Animal Protection: Written Provisions and Unwritten Principles” in Anne Peters, Kristen Stilt & Saskia Stucki, eds, *Oxford Handbook of Global Animal Law* [forthcoming].

9 This is not to presuppose a unified or idealized image of Indigenous legal orders, but to acknowledge that, despite complexity and diversity on all sides, there are important disunities that can and have been observed between state and Indigenous constitutionalism in relation to the more-than-human world. See John C Mohawk, “Review of *The Ecological Indian: Myth and History* by Shepard Krech III” (2001) 11:1 *Great Plains Research* 183 at 184 (observing that despite complexity and counter-examples, “[t]here is compelling evidence that traditional Indian cultures view nature very differently from western culture”); Sarah Morales, “Qat’muk: Ktunaxa and the Religious Freedom of Indigenous Canadians” in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis Canada, 2016) 295 at 297 (“Although I am not suggesting that all Indigenous people have the same relationship to land or spiritual beliefs, it has been acknowledged that the interconnection between the spiritual and physical realms is a defining characteristic of many Indigenous ideologies ... giv[ing] rise to different understandings of human rights and responsibilities in relation to the natural world and what people are permitted and restricted from doing with it — distinct legal traditions” [citations omitted]). See also Borrows & Eisen, *supra* note 1. On the hazards of pan-Indigenous generalizations respecting Indigenous peoples as uniformly responsible stewards of the earth, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 33.

10 A rich body of existing scholarship demonstrates Canadian courts’ tendency to presume Crown sovereignty and to subordinate Indigenous legal orders (see sources cited in Part III of this article). As far as I am aware, this is the first sustained exploration of this aspect of the Canadian legal order as an instance of Canada’s “unwritten” or “invisible” Constitution.

11 See Rosalind Dixon & Adrienne Stone, “The Invisible Constitution in Comparative Perspective” in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 3.

and “normative” force.¹² On the orthodox account, however, the unwritten Constitution is comprised of principles that are advanced as good, just, and egalitarian in nature, such as the rule of law, democracy, minority protection, and the Crown’s honourable dealing with Indigenous peoples.¹³ I propose here that this orthodox account of the unwritten Constitution is descriptively incomplete, and that a fuller portrait of Canada’s unwritten Constitution emerges where we recognize a profound polyvalence at the heart of Canada’s legal order: that the Court’s proclaimed unwritten principles operate alongside a matrix of “shadow” commitments that function in ways similar to the canonical principles, shaping constitutional praxis even as they are ignored, denied, or repudiated by actors within the system.¹⁴ Like the Court’s most proudly vaunted unwritten constitutional principles, these shadow commitments are stable,

12 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 54 [*Secession Reference*]. For recent surveys, see Vanessa A MacDonnell, “Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making” (2019) 65:2 McGill LJ 175; Vanessa MacDonnell & Philippe Lagasse, “Investigating the Legal and Political Contours of Unwritten Constitution Principles after *City of Toronto*” (2023) 110 SCLR 2(d) 51.

13 See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 49, 164 [*City of Toronto*]. Of course, each of these principles has attracted its own set of debates respecting the content of their demands and their relationship to power and hierarchy. See e.g. Maneesha Deckha, “Animals, Colonialism, and the Rule of Law” (2025) 29:3 Rev Const Stud 523 [Deckha, “Rule of Law”].

14 This use of the term “shadow” is loosely based on Carl Jung’s theory that individual and collective psychologies include a “shadow,” defined as “the ‘negative’ side of the personality, the sum of all those unpleasant qualities we like to hide, together with the insufficiently developed functions and the contents of the personal unconscious”: Gerhard Adler et al, eds, *The Collected Works of CG Jung: Revised and Expanded Complete Digital Edition* (Princeton: Princeton University Press, 2023) vol 7 at 110. As Connie Zweig and Jeremiah Abrams explain, the Jungian shadow may also be understood as a “disowned self” or “lower self” or, in Freudian terms, the “id”: Connie Zweig & Jeremiah Abrams, eds, *Meeting the Shadow: The Hidden Power of the Dark Side of Human Nature* (Los Angeles: Jeremy P Tascher, 1991) at 3. It is not my intention here to wade into debates within the field of psychology as to the validity and applications of Jungian theory. See Collin O’Connor Udell, “Parading the Saurian Tail: Projection, Jung, and the Law” (2000) 42:3 Ariz L Rev 731 at 735; Daniel Boscaljon, “Seeing Jung’s Shadow in a New Light: Decolonizing the Undisciplined Depths” (2024) 15:12 Religions 1553. Without commenting on the broader implications and structure of Jungian shadow theory, I find this notion of a repressed and repudiated shadow helpful in describing durable aspects of the constitutional order that, although disreputable and denied, in fact shape the interpretation and application of the constitution. I note that my use of “shadow” also does not intend to invoke or engage the many quite distinct uses of metaphorical shadows and penumbras in other corners of constitutional theory. See e.g. *Griswold v Connecticut*, 381 US 479 (1965); Stephen Menendian, “The Shadow Constitution: Rescuing Our Inheritance from Neglect and Disuse” (2024) 26:2 U PA J Const L 339. My thanks to Angela Lee and MH Tse for proposing, at different points in the development of this project, this use of the term shadow to capture this concept. I note also that, while this article was in press, Nathan Hume published a blog post offering a related use of the Jungian “shadow” in connection with Canada’s unwritten constitutional principles — see Nathan Hume, “The Shadow Constitution” (28 December 2024), online: <<https://www.nathanhume.com/2024/12/28/the-shadow-constitution/>>. My thanks to Debra Haak for bringing this instance of independent creation to my attention.

core, and binding — enduring over long time horizons, making the legal order what it is, and demarcating the outer limits of interpretive possibility.¹⁵

The Court's articulations of canonical unwritten constitutional principles have engaged sweeping generalizations which have rightly been accused of selective treatment of the historical record and minimization of counter-currents.¹⁶ And yet, I believe that the Court captures something *true* about Canada's constitutional polity when it identifies “rule of law” and “democracy,” among others, as core, stable, and binding commitments of the legal order. In this moment, where these values are under threat around the world, I think it particularly important to affirm the worth and centrality of these commitments within Canada's Constitution.¹⁷ I add, however, that the true “descriptive” or explanatory promise of these principles can be realized only through recognition of *equally true* shadow commitments of the Canadian state: commitments that quietly shape legal outcomes even though, when named, they strike many actors within the system as embarrassing or disreputable. Identifying these shadow commitments within the unwritten Constitution will necessarily depend on accounts that are similarly incomplete and selective as a historical document, insofar as these shadow commitments can only ever provide a partial account of a more complex system of values.¹⁸ Nonetheless, I propose that these shadow commitments can equally capture something *descriptively true* about Canada's unwritten Constitution, particularly when considered to-

15 This analysis builds on an approach to unwritten constitutional principles further developed in Jessica Eisen, “Economic Inequality and Canada's Shadow Constitution” [forthcoming]. As will be explored in this forthcoming piece, shadow commitments relating to anthropocentric exploitation and the subordination of Indigenous legal orders are further entangled with a third body of shadow commitments relating to economic inequality and market capitalism.

16 See e.g. Howard Kislowicz, “Law, Faith, and Canada's Unwritten Constitution” (2020) 25:1 Rev Const Stud 19 at 37; R Blake Brown, “One Version of History: The Supreme Court of Canada's Use of History in the *Quebec Secession Reference*” in Dimitry Anastakis & PE Bryden, eds, *Framing Canadian Federalism: Historical Essays in Honour of John T Saywell* (Toronto: University of Toronto Press, 2009) 15; Dale Gibson, “Constitutional Vibes: Reflections on the Secession Reference and the Unwritten Constitution” (2000) 11:1 NJCL 49; Robert Hamilton & Joshua Nichols, “Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*” (2021) 52:2 Ottawa L Rev 205 at 234 [Hamilton & Nichols, “Reconciliation and the Straitjacket”]; Connor Meeker, “Honoured in the Breach: The Honour of the Crown, Presentism, and *Canada v. Jim Shot Both Sides*” [forthcoming]; Jean Leclair, “Canada's Unfathomable Unwritten Constitutional Principles” (2002) 27:2 Queen's LJ 389 [Leclair, “Unfathomable”].

17 Tom Gerald Daly, “Democratic Decay: Conceptualising an Emerging Research Field” (2019) 11 Hague Journal on the Rule of Law 9.

18 See e.g. 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 at 18 [J Borrows, “Canada's Colonial Constitution”] (describing “unvarnished” accounts of the Canadian state as founded on “[d]iscrimination, coercion, and inequality” as “a lie” that ignores “other stories which lay at the heart of our nation ... [that] appeal to a better way of living”).

gether with the existing canonical unwritten principles. The resulting account of Canada's unwritten Constitution is more polyvalent, dynamic, and open to contestation than the orthodox view allows.

Part II of this article will argue that Canada's Constitution includes an unwritten shadow commitment to anthropocentric exploitation of animals and the earth. Part III introduces the conflict between this exploitative commitment and the commitments within many Indigenous constitutional orders to relations of kinship and reciprocity with the more-than-human world. Drawing on existing research in Aboriginal law, this section will demonstrate that the Canadian shadow commitment to anthropocentric exploitation is interlaced with a shadow commitment to the subordination of Indigenous law.¹⁹

Part IV will step back and describe the legal order that emerges through recognition of shadow commitments operating alongside canonical commitments as one of "polyvalent constitutionalism." Under Canada's polyvalent Constitution, distinct and even apparently contrasting commitments can co-exist and interact as stable, core, and binding elements of the same legal order. Observing the Supreme Court of Canada's treatment of canonical principles as existing in "symbiotic" relationship with each other, this Part notes that symbiosis alone is an incomplete metaphor of biologic engagement. Part V then offers a more comprehensive exploration of the relationship between shadow and canonical commitments within Canada's unwritten Constitution, taking the *Ktunaxa* litigation as a case study.²⁰

Part VI, finally, reflects on the possibilities for hope and activism in the face of these shadow commitments within Canada's Constitution. This Part of the article notes that most scholarship seeking to use the unwritten Constitution to advance the causes of Indigenous sovereignty or reformed relations with the more-than-human-world fits into the canonical frame, treating the unwritten Constitution as a source of good and just principle. Nonetheless, this Part will argue that the proposed identification of a polyvalent legal order is not hostile to such projects, but instead reinforces their importance. Far from a prescription for apathy, recognition of shadow principles in fact allows legal actors to name, understand, and combat persistent hierarchies within the legal order.

19 By "Aboriginal law," I mean Canadian state law addressing the rights and status of Indigenous peoples. "Indigenous law," by contrast, refers to Indigenous peoples' own laws. See Jim Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* (Vancouver: Purich Books, 2018) at 174–76.

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

II. Shadow Commitments and the More-than-Human

What place does the more-than-human world occupy within Canadian constitutionalism? Canada's constitutional texts do not include any "rights" for animals or natural objects,²¹ nor any "directive principles"²² setting out obligations flowing from the state toward the more-than-human world. Rights-conferring provisions of the *Constitution Act, 1982* — particularly the *Charter of Rights and Freedoms* ("Charter") and the *Rights of the Aboriginal Peoples of Canada* — have sometimes been construed by courts and litigants in ways that offer indirect protections to the more-than-human world, but these interpretations do not clearly flow from the constitutional texts themselves, and any protective impact on the natural world appears to be incidental to the protection of human interests.²³ Canadian courts have famously taken the "living tree" as the Constitution's central interpretive metaphor,²⁴ but this symbolic deployment is not typically understood to convey anything about our relationships or obligations to actual living trees.²⁵ Lynda Collins has described Canada's constitutional texts as "silent" on the matter of "ecological sustainability."²⁶ And yet, the interpretive tools honed in the jurisprudence of "unwritten constitutional principles" — attending to text, context, and interpretive history, to determine deeper commitments — suggest that this textual silence is not the end of the matter.²⁷

21 See Rachel Garrett & Stepan Wood, "Rights of Nature Legislation for British Columbia: Issues and Options" (2020) Centre for Law & the Environment, Working Paper No 1/2020 at 5, online: <<https://allard.ubc.ca/sites/default/files/2020-08/RON%20Legislation%20Working%20Paper%20-%20FINAL%20-%2019%20August%202020.pdf>> [<https://perma.cc/PA8X-HLRZ>].

22 On "directive" or "contrajudicative" principles relating to the environment in other jurisdictions, see Lael K Weiss, "Environmental Constitutionalism: Aspiration or Transformation?" (2018) 16:3 *International Journal of Constitutional Law* 836.

23 Garrett & Wood, *supra* note 21 at 5.

24 See *Edwards v Canada (Attorney General)*, [1930] AC 124 at 136, 1929 UKPC 86.

25 My thanks to Lindsay Borrows for inspiring my thinking on this point, in response to her own treatment of the "living tree" metaphor in *The Land is Our Casebook: Revitalizing Indigenous Law in Relation with the Living World* (LLM Thesis, University of Alberta, 2021) [unpublished]. Borrows identifies her introduction to the living tree metaphor in law school as one of "only a few moments in my common law training where we looked to the more-than-human world for guidance in our legal work." See also Borrows & Eisen, *supra* note 1; Collins, "Pipelines", *supra* note 3 at 42, n 76 (observing the "recurrence of biological language" in the Court's treatment of unwritten constitutional principles — e.g. "lifeblood," "symbiosis," and the "living tree" metaphor — arguing that these might be taken as "an unconscious acknowledgment that all our human structures depend on our biological survival"); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 151–52 (identifying a "resembl[ance]" between "[l]iving-tree constitutionalism" and the use of "analogies to the natural world" as "one significant source of Indigenous law"); and A Mills, "Lifeworlds", *supra* note 4.

26 Collins, "Pipelines", *supra* note 3 at 41.

27 *Secession Reference*, *supra* note 12 at para 32.

As with canonical unwritten constitutional principles such as democracy or federalism, Canada's constitutional texts are rife with structural features and textual tips-of-icebergs indicative of a deep and consistent constitutional posture of anthropocentric exploitation toward the more-than-human world.²⁸ The Canadian Constitution creates legal boundaries along the surface of the earth²⁹ and accordingly assigns jurisdiction over natural entities as resources to be exploited rather than beings to whom duties might be owed.³⁰ The land is positioned as a repository of "natural resources" and "forestry resources,"³¹ rather than a sphere of life giving rise to reciprocal relations. Trees and forests are expressly identified as commodities, with provincial authority specified over "Management and Sale of the Public Lands ... and of the Timber and Wood thereon."³² The only non-human animals to explicitly appear in the *Constitution Acts, 1867* and *1982* are fish — and they appear only obliquely in the establishment of federal jurisdiction over "fisheries," again implying an extractive relationship.³³ Provincial power over "property" has been the primary locus of provincial authority to regulate in respect of domesticated animals,³⁴ whose most specific mention would appear to be the assignment of shared jurisdiction over "agriculture," a mode of human-earth engagement that has been interpreted as the cultivation of life for the purposes of human

28 Although not explicitly set out in constitutional documents, unwritten principles are often acknowledged to have varying degrees of "textual hook." See Vanessa MacDonnell & Philippe Lagasse, "Investigating the Legal and Political Contours of Unwritten Constitution Principles after *City of Toronto*" (2023) 110 SCLR (2d) 51 at para 6, n 9. The most general such hook is the preambular commitment to "a Constitution similar in Principle to that of the United Kingdom." For a study of the interpretation of this phrase over time, see Peter C Oliver, "A Constitution Similar in Principle to That of the United Kingdom": The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 207.

29 See e.g. *The Ontario Boundaries Extension Act*, SC 1912, c 40; *The Quebec Boundaries Extension Act*, SC 1912, c 45; *The Manitoba Boundaries Extension Act*, 1912, SC 1912, c 32; *The Manitoba Boundaries Extension Act*, 1930, SC 1930, c 28.

30 See e.g. the *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, s 1, reprinted in RSC 1985, Appendix 11, No 5, s 92A.

31 See e.g. *Constitution Act, 1867*, *ibid*, s 92A.

32 *Ibid*, s 92(5).

33 *Ibid*, s 91(12).

34 *Ibid*, s 92(13). See Rebecca Kauffman, "Threatened Jurisdiction: Species at Risk and the Constitution" (Edmonton: Environmental Law Centre, February 2023), also noting ss 92(5), 92(16), and 109 as sources of provincial authority over wildlife. Authority over migratory birds has been attributed to the federal government through the operation of its s 91 authority over the "Peace, Order and Good Government of Canada" (*R v JD Irving Ltd* (2008), 37 CELR (3d) 200 at para 9 (NBPC) [*JD Irving*]) and, insofar as migratory birds are addressed by Imperial treaty, s 132 of the *Constitution Act, 1867*, *supra* note 30 (see *JD Irving*, *ibid* at paras 10–16; *Reference re Impact Assessment Act*, 2023 SCC 23 at paras 202–203 [Wagner CJ for the majority] and 343–45 [Karakatsanis and Jamal JJ, dissenting in part, though not on this point]).

commodification, trade, and consumption.³⁵ These textual references are individually indicative of an extractive orientation toward the earth, and functionally work together to establish a state “architecture” significantly devoted to the projects of anthropocentric exploitation.³⁶

Although not proudly proclaimed, and arguably disreputable or denied, this shadow commitment to anthropocentric exploitation is stable, core, and binding. While more normatively contested, this shadow commitment functions as a descriptive matter in ways that echo the functioning of canonical unwritten constitutional principles such as democracy or rule of law.³⁷ The balance of this section addresses three descriptive features of the unwritten Constitution in turn, demonstrating how each maps onto the shadow commitment to anthropocentric exploitation of animals and the earth.

A. Stable

Like the canonical unwritten constitutional principles, the shadow commitment to anthropocentric exploitation of animals and the earth is a *stable* feature of the constitutional order, although its precise expression and emphasis has varied over time.³⁸ In their survey of the place of wildlife under the Canadian Constitution, for example, Priscilla Kennedy and John

35 *Constitution Act, 1867*, *supra* note 30, s 95. Interpretations of s 95 are not uniform as to whether marketing and other aspects of “the industry of agriculture” are included in the scope of this provision. See Halsbury’s Laws of Canada (online), *Agriculture*, “Assessing the Constitutional Framework for Agriculture Law: The Shared Agriculture Power — Section 95 of the *Constitution Act, 1867*: Meaning of ‘Laws in relation to Agriculture’: Judicial Interpretation of ‘Agriculture’ and ‘Laws in relation to Agriculture’” (II.2(2)(c)) at HAG-10 (2022 Reissue) [Halsbury’s, *Agriculture*]. Even narrower definitions that exclude the commodification and trade of plants and animals from the constitutional definition of “agriculture” nonetheless presume that this is what will indeed happen to agricultural products. See e.g. *R v Manitoba Grain Co.*, (1922) 66 DLR 406 at 416 (MBCA) (holding that “agriculture” includes “practical husbandry and tillage, the growing of crops, the planting and care of fruit trees, the rearing of domestic animals, the sciences applied to or bearing upon these subjects and perhaps the disposition of the products by the producer; but I do not think it would apply to these products when they have left his hands and *become articles of ordinary merchandise*” [emphasis added]).

36 See *Secession Reference*, *supra* note 12 at paras 50–51 (deploying the metaphor of “internal architecture” to describe the form and function of unwritten constitutional principles).

37 See Eisen, “Economic Inequality and Canada’s Shadow Constitution”, *supra* note 15.

38 Variation in the expression and emphasis on canonical unwritten constitutional principles has been recognized by the Court and is similarly characteristic of shadow commitments. See e.g. *Secession Reference*, *supra* note 12 at para 81 (describing the principle of minority protection as becoming “more prominent in recent years”) and para 63 (describing the principle of democracy as evolving over time with the expansion of the franchise); see also Eisen, “Economic Inequality and Canada’s Shadow Constitution”, *supra* note 15.

Donihee summarize that, for the framers of Canada's 1867 constitutional document, "the ethos of the day called for the wilderness to be subdued,"³⁹ so as to "exploit until depleted" with the aim of replacing the so-called wild with more controlled interspecies relations of exploitation that characterized "agriculture."⁴⁰ Indeed, the "agriculturalist thesis" — by which Indigenous engagements with the earth were found to be insufficiently intensive or extractive to rise to "property" relations or to jurisdiction — was a core logic of colonial expansion.⁴¹ Even where early Canadian state laws did aim to maintain a population of wild animals, the purpose was clearly linked to their availability for anthropocentric exploitation, with courts finding their constitutional characterization in relation to the "supply of game."⁴² Over time, ordinary law has come to include substantive protections that might be understood as protective of the interests of animals⁴³ or other natural entities.⁴⁴ The Constitution, however, has never been revised or interpreted to include any commitment to "conservation, sustainable use and equitable

39 Priscilla Kennedy & John Donihee, "Wildlife and the Canadian Constitution" (2006) Canadian Institute of Resources Law, Paper No 4 at 1, online: <<https://prism.ucalgary.ca/server/api/core/bitstreams/a9d76f96-e619-4131-92a8-a4632d124c58/content>>. Consistent with my suggestion that this view sits in tension with core tenets of many Indigenous legal orders, the authors note one exception to state inattention to wildlife preservation in the founding era: the post-Confederation treaties between the Crown and Indigenous nations (*ibid* at 1).

40 *Ibid* at 1. For historical accounts of colonial ambitions to replace Indigenous earth and animal relations with European-style agriculture in the US context, see Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (Oxford: Oxford University Press, 2004); William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, 1st revised ed (New York: Hill and Wang, 2003); Deborah Valenze, *Milk: A Local and Global History* (New Haven: Yale University Press, 2011) at 138–50; Jeremy Rifkin, *Beyond Beef: The Rise and Fall of the Cattle Culture* (New York: Dutton, 1992) at 77–78; John Ryan Fischer, *Cattle Colonialism: An Environmental History of the Conquest of California and Hawai'i* (Chapel Hill: University of North Carolina Press, 2015). On the constitutional definition of "agriculture," see *supra* note 35.

41 See Robert Hamilton, "Legal Pluralism and Hybridity in Mi'kma'ki and Wylstukwik, 1604-1779: A Case Study in Legal Histories, Legal Geographies, and Common Law Aboriginal Rights" (PhD Dissertation, University of Victoria, 2021) at 38–77 [unpublished].

42 *R v Robertson* (1886), 3 Man R 613 at 620 (MBQB). See also the more recent characterization of wildlife law as relating to "protection and conservation of game" in *R v Chiasson* (1982), 27 CR (3d) 361 at para 9 (NBCA).

43 See e.g. *R v DLW*, 2016 SCC 22 at paras 69 (per Cromwell J) and 140 (per Abella J, dissenting) (suggesting that the criminal law has evolved to incorporate concerns over animal wellbeing); Kennedy & Donihee, *supra* note 39 at 2 (saying that "wildlife law" has "developed" to include substantive protections for animals). But also see Gary Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995), arguing that such "legal welfarism" is often truly motivated by human interests in the efficient exploitation of animals rather than being concerned with animals' own interests.

44 See e.g. Justine Townsend et al, "Why the first river in Canada to become a legal person signals a boon for Indigenous rights" (11 June 2021), online: *The Narwhal* <<https://thenarwhal.ca/opinion-muteshek-au-shipu-magpie-river-personhood/>> [<https://perma.cc/EM76-YWUE>].

sharing” of more-than-human entities,⁴⁵ let alone commitments to animals or environments themselves.⁴⁶

Regarding farmed animals, this long-standing orientation toward anthropocentric exploitation is clearly and consistently expressed in constitutional jurisprudence.⁴⁷ A thicket of constitutional litigation in Canada has addressed the precise contours of legislative jurisdiction over the manufacture and trade of living beings, their bodies, and their reproductive materials.⁴⁸ The focus of this litigation has most often been on whether a given sphere of activity and regulation is best understood through the lens of production (a matter of “property” and thus provincial jurisdiction) or interprovincial trade (a matter of federal jurisdiction).⁴⁹ The animals whose lives are shaped by this regime are rarely mentioned, but the extractive relationship is plain. The products of these animals’ bodies are consistently understood as objects of exchange and consumption: “Eggs are a commodity ... and they are treated in trade as fungible things.”⁵⁰ Across the many cases concerning the jurisdictional treatment of farmed animals and their bodily materials, the Supreme Court itself has defined its consistent animating value as the facilitation of “orderly and efficient production and marketing.”⁵¹

The underlying justifications for this anthropocentric exploitation have (when offered at all) seemingly shifted over time. Earlier explicit references to farmed animals as occupying an inherently “subordinate” status to that of “man”⁵² have given way to an emphasis on animals’ legal status as property.⁵³

45 Ian Attridge, *Biodiversity Law & Policy in Canada: Review and Recommendations* (Toronto: Canadian Institute for Environmental Law & Policy, 1996) at 468.

46 Garrett & Wood, *supra* note 21 at 5.

47 For a similar claim specific to dairying, advanced in the US context, see Mathilde Cohen, “Of Milk and the Constitution” (2017) 40:1 Harv J L & Gender 115.

48 See Halsbury’s, *Agriculture*, *supra* note 35.

49 *Ibid.*

50 *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1295 [*Agricultural Products Reference*]; see also *R v Horning* (1904), 8 CCC 268 at para 5 (Ont Div Ct) (“By the Ontario legislation as to agricultural societies one of the objects contemplated by their establishment is to encourage improvement by importing and otherwise procuring animals of new and valuable kinds”); *R v Neuman*, 1998 ABCA 261 at para 7 (discussing legislation with respect to dog breeding as being “directed at enhancing the purity of the stock of animals that have a commercial purpose”).

51 *Agricultural Products Reference*, *supra* note 50 at 1296. Plant products, such as grains, are treated as subject to the same rules and values: *ibid.*

52 *R v Menard* (1978), 43 CCC (2d) 458 at 465 (QCCA). My thanks to Will Kymlicka for raising this passage in discussion of the ideas explored here.

53 See e.g. *R v Krajnc*, 2017 ONCJ 281 (affirming that “pigs are ... property” [at para 35] and that their transport to slaughter in conditions that cause them to be “upset/stressed” [at para 47] may nonetheless constitute a lawful “use of ... property” [at para 55]). But see also recent *dicta* averring that, in the con-

Similarly, since the environmental movement of the 1960s and 1970s we see an increasingly “robust body of *dicta*” affirming the importance of environmental protection values⁵⁴ — although this shift in language has not manifested in a substantive shift away from treating environmental entities in anthropocentrically exploitative terms. Indeed, in the *Canadian Forest Products* case, perhaps the Supreme Court of Canada case most commonly cited for its environmentally protective *dicta*, the central disagreement between majority and dissent centres on how best to calculate the economic damages owed to the Crown by a private corporation responsible for a forest fire. Both of the competing options for damage calculation focus on value to human persons: either by analogy to provable economic damages that would be owed to a private “owner” of that forest⁵⁵ or as determined pursuant to a broader definition of “commercial value” that might embrace the impact of “loss of amenity, aesthetic value and environmental value” on the “property value of the land in question.”⁵⁶ Despite the dissenting justices’ framing of the latter, broader quantum as embracing the “intrinsic value” of trees,⁵⁷ no members of the Court treat the actual interests or wellbeing of trees, forests, or animals therein as legally cognizable. The legal question before the Court, and indeed the entire legal order in which it operates, is simply not structured to receive a claim of this kind. Thus, despite the judiciary’s shifting rhetorical posture toward the more-than-human world, the commitment to facilitating human dominion over an exploitable earth remains undisturbed.⁵⁸ As with such canonical unwritten principles as democracy or minority protection, shifting emphasis and expression over time is consistent with a fundamental *stability* of the shadow commitment to anthropocentric exploitation of animals and the earth that concurrently operates at the heart of the legal order.

text of a sentencing decision, “[a]nimals feel pain and suffer; they are not merely property and deserve protection under the criminal law”: *R v Chen*, 2021 ABCA 382 at para 39.

54 Lynda M Collins & Lorne Sossin, “In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada” (2019) 52:1 UBC L Rev 293 at 322; see also Stepan Wood, Georgia Tanner & Benjamin J Richardson, “What Ever Happened to Canadian Environmental Law?” (2010) 37 Ecology LQ 981 at 994 (describing the 1960s and 1970s as “heady days for environmental law advocacy in Canada”).

55 *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at paras 82–83.

56 *Ibid* at para 224.

57 *Ibid* at para 217.

58 This is arguably an instance of what Reva Siegel has termed “preservation-through-transformation.” As Siegel explains: “The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric. ... In short, status-enforcing state action evolves in form as it is contested.” Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action” (1997) 49:5 Stan L Rev 1111 at 1113.

B. Core

In addition to being stable over long time horizons, the Canadian constitutional commitment to anthropocentric exploitation of the earth and animals has also been *core* to the project of the Canadian constitutional state. Territorial acquisition⁵⁹ and allocation of regulatory power, ownership, and profits from the more-than-human world⁶⁰ have been central questions of Canadian statehood at every stage in the life of the polity. In some moments, conflicts over the particular contours of this anthropocentric exploitation and how best to manage it have been prominent on the Supreme Court of Canada's docket.⁶¹ In other moments, federal allocations of authority have more quietly operated to manage and support these same practices of anthropocentric exploitation.⁶²

This claim that a commitment to anthropocentric exploitation of the earth is core to Canada's legal order is distinct from the more general claim that all legal orders must engage in some way with the more-than-human world. While it is true that human life depends upon engagements with the more-than-human world, this biological reality does not answer the question of how (i.e. according to what principles and commitments) any particular legal order has pursued this engagement. We might, for example, say broadly that every legal order has some *theory of legitimacy*, without saying that every legal order

59 See e.g. *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 4–5 (noting that “expanding the country across the West was one of the primary goals of Confederation,” and linking that objective to the assignment of federal authority over “Indians, and Lands Reserved for the Indians” in s 91(24) of the *Constitution Act, 1867*, *supra* note 30).

60 See e.g. s 91(12) (assigning federal authority over “fisheries”); s 92(5) (assigning provincial authority over “Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon”); s 92A (assigning provincial authority over, *inter alia*, extraction and taxation of “non-renewable natural resources” and “forestry resources”); and s 95 (assigning concurrent provincial and federal jurisdiction over “agriculture”); s 109 (establishing that “All Lands, Mines, Minerals, and Royalties” within specified provinces “shall belong” to those provinces).

61 Consider the contemporary moment in which leading federalism cases often explicitly consider questions of environmental management and protection. See e.g. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *Reference re Impact Assessment Act*, 2023 SCC 23. See also the resource disputes of the late 1970s, culminating in a textual amendment to the Canadian Constitution: Robert D Cairns, Marsha A Chandler & William D Moull, “The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism” (1985) 23:2 Osgoode Hall LJ 253. See also the chicken-and-egg wars cases, discussed in Jodey Nurse & Bruce Muirhead, “A Crisis in National Unity? The Chicken and Egg War, 1970–1971” (2022) 56:1 J Can Stud 124.

62 See e.g. Cairns, Chandler & Moull, *supra* note 61 at 256 (noting that “before the 1970s, the management and control of the resource industries, including petroleum, produced little conflict as there was a shared objective among private producers, the provincial governments and the federal government to encourage exploitation of resources through private exploration and development”).

is committed to *democracy* as a core principle defining legitimacy.⁶³ While legitimacy may emerge across legal orders as a collectivity-defining question, the answers to this question may vary tremendously. In similar fashion, we may say that every legal order requires some principles of engagement with the more-than-human world while leaving open further inquiry into the substance and scope of the particular commitments that shape each legal order. In asking whether relations of anthropocentric exploitation are *core* to Canadian constitutionalism, the question is not simply whether human-earth relations are necessary to sustain life (and therefore, by extension, the Constitution).⁶⁴ This preliminary question, necessarily answered in the affirmative, merely sets the context for a deeper set of questions: what is Canada's chosen orientation toward the more-than-human world, and in what ways might a different orientation toward the earth make Canada's constitutional order *other* than what it is.⁶⁵

The fundamental "otherness" of Canada's constitutional order, if it were imagined somehow stripped of its current commitment to anthropocentric exploitation, is supported by the literature on Indigenous constitutionalism. Within this body of research, an extractive or "earth-alienated" orientation emerges as a key distinguishing feature of "liberal" or state constitutionalism, in contrast to the constitutionalisms associated with Indigenous legal orders.⁶⁶ The "otherness" of an imagined Canadian legal order stripped of its anthropocentric premises is further apparent in scholarly efforts to envision a Canadian polity defined by interspecies equality, or reciprocal relations with the earth, or human service to animals or ecosystems. As Andrew Ambers explains of his own proposal to engage both state and Indigenous legal principles to grant personhood to rivers, the proposed reforms would "challenge some of the fundamental assumptions that underpin Western notions of rights, persons, and

63 Cf. Turkuler Isiksel, "Non-Democratic Constitutionalism in the European Union" (paper presented at APSA Annual Meeting in Washington DC, 31 August 2014), online: <<https://cgt.columbia.edu/wp-content/uploads/2016/03/Non-Democratic-Constitutionalism.pdf>> [<https://perma.cc/6CBP-FM-JA>] [unpublished].

64 Cf. Mark Mancini, "Environmental Sustainability is not an Unwritten Constitutional Principle" (7 June 2019), online (blog): *Double Aspect* <<https://doubleaspect.blog/2019/06/07/environmental-sustainability-is-not-an-unwritten-constitutional-principle/>> (refuting the view that human reliance on the earth is sufficient to ground an unwritten constitutional principle of ecological sustainability, in response to Lynda Collins — while also conceding that this simple version of the argument "never appears as a full-fledged contention" in Collins's work).

65 Cf. *Secession Reference*, *supra* note 12 at paras 49 and 54 (describing unwritten constitutional principles as "vital unstated assumption upon which the text is based" and elaborating that "it would be impossible to conceive of our constitutional structure without them").

66 See e.g. A Mills, "Lifeworlds", *supra* note 4 (contrasting "rooted constitutionalism" and "liberal constitutionalism").

constitutional protections.”⁶⁷ Consider, further, Maneesha Deckha’s “other worlding” imagination of a Canadian legal order committed to animals as “legal beings” with rights and legal interests meeting and exceeding those presently attributed to personhood.⁶⁸ This imagined other world entails a state committed to the establishment of vast sanctuaries for previously-farmed animals and their successive generations of progeny, ongoing consultation with animals as to their needs and priorities, and more.⁶⁹ This “other world” is, I think, a different legal order than the one Canadians presently inhabit, despite Deckha’s view that steps in this direction can be achieved within the bounds of Canada’s present constitutional order.⁷⁰ In short, if Canada’s constitutional order came to treat the earth or animals as rights-bearers, or even as entities owed meaningful obligations or reciprocity, the polity would have arrived at a fundamentally different answer to a core, collectivity-defining question: *how do we live together with the more-than-human world?*⁷¹ It would amount to a change in the “vital, unstated assumptions” upon which the Canadian Constitution is based.⁷²

C. Binding

In addition to being core to the Canadian Constitution, and stable over long time horizons, the unwritten shadow commitment to exploitative relations with the earth and animals is “binding” in the sense that it operates to shape the outer limits of constitutional interpretation.⁷³ Among canonical unwritten constitutional principles, this “binding” quality has been relied upon to

67 Andrew Ambers, “The River’s Legal Personhood: A Branch Growing on Canada’s Multi-Juridical Living Tree” (2022) 13:1 *Arbutus Review* 4 at 13.

68 Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021) at 98 [Deckha, *Animals as Legal Beings*], citing Donna Haraway, *When Species Meet* (Minneapolis: University of Minnesota Press, 2008); Kelly Oliver, *Earth and World: Philosophy after the Apollo Missions* (New York: Columbia University Press, 2015).

69 Deckha, *Animals as Legal Beings*, *supra* note 68 at 163–80.

70 *Ibid* at 167–70.

71 *Cf.* Cairns, Chandler & Moull, *supra* note 61 at 991 (positing that meaningful progress on environmental protection would require “an entirely different ... political system”).

72 *Cf. Secession Reference*, *supra* note 12 at para 49.

73 *Cf. City of Toronto*, *supra* note 13 at paras 67–69, citing *Secession Reference*, *supra* note 12 at para 54. The manner in which unwritten constitutional principles are “binding” attracted renewed debate following *City of Toronto*: see e.g. Vincent Kazmierski, “‘Untethered’: How the Majority Decision in *Toronto (City) v Ontario* Tries (but Fails) to Break Away from the Supreme Court of Canada’s Unwritten Constitutional Principle Jurisprudence” (2023) 54:2 *Ottawa L Rev* 197. At a minimum, these principles are understood to shape interpretation of the constitutional text and fill “gaps” in the text (*City of Toronto* at paras 55–56). At the most “binding” end of the spectrum, the Court has left open the possibility that the unwritten principle of the honour of the Crown might be relied upon to strike otherwise duly enacted legislation (*City of Toronto* at para 62).

foreclose otherwise-available interpretations of the Constitution that would undermine, for example, the rule of law.⁷⁴ In analogous fashion, otherwise-available constitutional interpretations that would substantially interfere with anthropocentric exploitation of animals or the earth are foreclosed by Canada's unstated shadow commitment to such exploitation.

Consider, for example, section 7 of the *Charter* (offering protection of life, liberty, and security of the person)⁷⁵ — the *Charter* provision that has been most consistently taken up as a potential constitutional resource for environmental protection.⁷⁶ Debates pertaining to section 7's potential in this respect have focused on whether the protection of "life" guarantees human beings some level of environmental quality,⁷⁷ the scope and possibility of positive state obligations that such recognition might impose,⁷⁸ and whether such recognition would enhance environmental protections in practice.⁷⁹ The Court has explicitly confined the protection of section 7 to "human beings,"⁸⁰ and the few proposals that the "everyone" deserving of protection under section 7 might include animals or ecosystems are generally couched in concessions

74 See e.g. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 [BC Trial Lawyers].

75 *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*]: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

76 See e.g. Lauren Worstman, "'Greening' the *Charter*: Section 7 and the Right to a Healthy Environment" (2019) 28 Dal J Leg Stud 1; Catherine Jean Archibald, "What Kind of Life? Why the Canadian *Charter's* Guarantees of Life and Security of the Person Should Include the Right to a Healthy Environment" (2013) 22:1 Tul J Int'l & Comp L 1; Dayna Nadine Scott, "The Environment, Federalism, and the *Charter*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 493 at 509; Lynda M Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2nd) 519 [Collins, "Longue Durée"]; Andrew Gage, "Public Health Hazards and Section 7 of the *Charter*" (2003) 13 J Envtl L & Prac 1; Avnish Nanda, "Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the *Charter* in the Environmental Realm" (2015) 27 J Envtl L & Prac 109.

77 See e.g. Worstman, *supra* note 76 at 250–51; Archibald, *supra* note 76 at 12–16; Collins, "Longue Durée", *supra* note 76 at 529–31; Gage, *supra* note 76 at 5–20; Nanda, *supra* note 76 at 123–27.

78 Worstman, *supra* note 76 at 269–79; Archibald, *supra* note 76 at 20–22; Gage, *supra* note 76 at 36–45.

79 See e.g. Worstman, *supra* note 76 at 256–68; David R Boyd & Emmett Macfarlane, "Should environmental rights be in the constitution?" (3 March 2014), online: *Policy Options* <<https://www.policy-options.irpp.org/fr/magazines/second-regard/boyd-macfarlane>> [<https://perma.cc/A8LS-X2PP>]; Scott, *supra* note 76 at 513 ("The greatest strike against the argument for constitutionalizing a right to a healthy environment might be that it will effect little practical change").

80 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 13 (specifying that s 7 "was intended to confer protection on a singularly human level" and that "only human beings can enjoy these rights"). The specific exclusion in this case was "corporations and other artificial entities incapable of enjoying life, liberty or security of the person," seeming to leave some interpretative space for arguments respecting sentient animals in particular.

that such an interpretation would require a dramatic reconfiguration of the assumptions governing Canada's constitutional order.⁸¹ Such proposals are likely to be received within Canada's current judicial order as "off-the-wall"⁸² or as examples of "ideal constitutionalism" unmoored from the ordinary bounds of legal interpretation, informed instead by the proponents' own sense of "what is just."⁸³ While courts and other legal actors might not consciously understand the interpretive scope of section 7 as being limited in this way, one way of explaining the limited sphere of available interpretations of section 7 is to conceive of the constitutional text as constrained by an unwritten — yet stable and core — shadow commitment to the anthropocentric exploitation of animals and natural entities.

The same might be said of the interpretation of the words "[e]very individual" in section 15(1) of the *Charter*, which provides equality guarantees to "[e]very individual."⁸⁴ It is certainly an available interpretation of the word "individual" that it might include individual animals or other more-than-human entities. Indeed, a similar set of protections is expressly offered to more-than-human beings in the recently codified *Deshkan Zibiing Anishinaabe Aki Chi-Inaakonigewin* (Constitution), which holds that "[e]very citizen/member, including the fish, rocks, plants, flyers, crawlers and four-legged beings, is equal before and under the laws of Deshkan Zibiing Anishinaabe Aki without discrimination or prejudice."⁸⁵ The notion that animals in particular are entitled to "equal consideration" has also been prominent in many strands of animal rights activism and moral theory.⁸⁶ It has been consistently emphasized in these

81 See Ambers, *supra* note 67 at 13 and Samantha Skinner, "Animals & Section 7: How Early *Charter* Jurisprudence Supports Protections for Animals" (2021) 9 Global J Animal L [np] (offering an "admittedly highly aspirational" argument that sentient animals be included in the term "everyone" in s 7 of the *Charter*). But see one significant exception: Caitlyn Gowriluk, "Southern Chiefs ask courts to give Lake Winnipeg *Charter* rights to life, liberty, security" (19 September 2024), online: *CBC News* <<https://www.cbc.ca/news/canada/manitoba/southern-chiefs-organization-lake-winnipeg-charter-challenge-1.7328001>> [<https://perma.cc/35N2-BQ4S>].

82 JM Balkin, "Agreements with Hell and Other Objects of Our Faith" (1997) 65:4 Fordham L Rev 1703.

83 *Ibid* at 1709.

84 *Charter*, *supra* note 75, s 15: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

85 Chippewas of the Thames First Nation, *Deshkan Zibiing Anishinaabe Aki Chi-Inaakonigewin*, (11 August 2018), s 10.4, online: <<https://www.cottfn.com/wp-content/uploads/2016/09/Deshkan-Zibiing-Chi-Inaakonigewin-FINAL-7.24.18-WO-Crop-Marks.pdf>> [<https://perma.cc/94YW-DNMH>]. See discussion of this provision in relation to plants in Lindsay Borrows, "Learning Law from Plants" (2025) 29:3 Rev Const Stud 435 [L Borrows, "Learning Law from Plants"].

86 See e.g. Peter Singer, "All Animals are Equal" in Tom Regan & Peter Singer, eds, *Animal Rights and Human Obligations*, 2nd ed (Englewood Cliffs, NJ: Prentice-Hall, 1989) 73; Animal Equality, online:

discursive communities that the equality called for does not amount to “identical treatment,” but rather equal consideration of equivalent interests, where they exist, as between admittedly very different human and non-human beings: “equal consideration for different beings may lead to different treatment and different rights.”⁸⁷ This understanding of equality echoes the basic approach the Supreme Court of Canada has adopted in defining the demands of equality rights under section 15: the constitutional promise does not demand “identical treatment,” but rather “substantive equality,” which is responsive to the needs, capacities, and circumstances of the groups and individuals involved.⁸⁸ And yet, there is no serious suggestion in Canadian jurisprudence that the equality protected by section 15 might be extended to animals or other more-than-human entities.⁸⁹ The only oblique connection between animal interests and equality rights before the Canadian courts has concerned claimed protections of the dietary choices of ethical vegetarians.⁹⁰

Judges and other actors within the constitutional system may not be aware that a commitment to anthropocentric exploitation is foreclosing interpretations that might protect earth or animals under sections 7 or 15. It may instead simply appear to them that the foreclosed interpretations are silly or absurd. But this shared “common sense” as to the range of plausible or “grammatical” meanings⁹¹ of these provisions is precisely what defines an unwritten constitu-

<<https://www.animalequality.org/>> [<https://perma.cc/7JC2-48E9>].

87 Singer, *supra* note 86.

88 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 25, 30. Notably, the referenced discussion of “substantive equality” invokes the concept of “human dignity” as a core value underlying s 15. Whether and to what extent “dignity” is a concept hospitable to meaningful protection of animal interests is a distinct, and debated, question: see Eisen, “Animals in the Constitutional State”, *supra* note 5 at 934–35.

89 In the US context, Pat Andriola has advanced the claim that the US Constitution’s equal protection clause should be interpreted to include “nonhuman animals”; the author concedes in developing this thought experiment that “a mainstream court would not seriously consider constitutionally including animals in the near future.” Pat Andriola, “Equal Protection for Animals” (2016) 6 *Envl & Earth LJ* 50 at 51.

90 See e.g. *Maurice v Canada (Attorney General)*, 2002 FCT 69 (applying the *Charter*’s protections for freedom of conscience, rather than equality rights specifically, in finding that the choices of ethical vegetarians are constitutionally protected); and *Knauff v Ontario (Natural Resources and Forestry)*, 2023 HRTO 1729 (finding that veganism does not constitute a “creed” entitled to protection against discrimination under the Ontario Human Rights Code). For discussions of discrimination claims relating to ethical veganism in the US context, see Sarah Soifer, “Vegan Discrimination: An Emerging and Difficult Dilemma” (2003) 36 *Loy LA L Rev* 1709.

91 See Ehud Ben Zvi, *Social Memory among the Literati of Yehud* (Berlin: De Gruyter, 2019) at 234: “[A]lthough separate texts might be idiosyncratic and seemingly contradictory, all together shape and attest to a system, a mnemonic system. This system, like all systems, is governed by some underlying grammar, even if complex and in itself a set of interrelated simpler grammars. This grammar carries preferences, dispreferences and is above all generative.”

tional principle. It is plainly obvious to those fluent in Canada's state constitutional order that the earth and its elements are not among the "everyone" who are promised their lives, the freedom to pursue their own self-development, or their security — indeed it is widely presupposed that they have no "person" to secure.⁹² It is equally presumed that the "every individual" owed substantive equality under section 15 does not include individual animals, let alone any other more-than-human entity (a rock, a mountain, a range) that might be defined as an "individual" by those operating under a different set of interpretive assumptions.⁹³

The commitments to treat earth and animals as subordinate and exploitable are so obvious within Canada's constitutional system that they need not be stated — so pervasively assumed that (as the Court said of "democracy"), it would have seemed "redundant, even silly" to commit them to the text.⁹⁴ And yet (also like democracy), these commitments bind constitutional actors to a particular world of interpretive possibility.⁹⁵ The core distinction is not one of centrality, stability, or force, but rather that democracy is a proud anchor of the Court's declared "constitutional identity,"⁹⁶ while the commitment to anthropocentric exploitation is left unstated and sometimes even disavowed.⁹⁷ The orthodox slate of judicially pronounced unwritten constitutional principles thus sits alongside shadow commitments — unwritten and undeclared, yet operative in Canadian jurisprudence. And as the following section will argue, the shadow commitment to anthropocentric exploitation is not free-standing, but instead operates in close relationship to another disreputable shadow commitment: the subordination of Indigenous legal orders to state law.

92 These presuppositions have been the target of the many scholarly and advocacy efforts calling for recognition of the personhood of animals or natural elements. See e.g. Stone, *supra* note 1; Steven M Wise, "Legal Personhood and the Nonhuman Rights Project" (2010) 17:1 Animal L 1; Ambers, *supra* note 67. For a critique of "personhood" as an objective in the animal protection context, see Deckha, *Animals as Legal Beings*, *supra* note 68.

93 Cf. Ambers, *supra* note 67; Margaret Robinson, "Animal Personhood in Mi'kmaq Perspective" (2014) 4:4 Societies 672.

94 *Secession Reference*, *supra* note 12 at para 62.

95 The classic examples in the democracy context are the "implied bill of rights cases." See e.g. *Reference re Alberta Statutes*, [1938] SCR 100; *Switzman v Elbling*, [1957] SCR 285.

96 See Eric Adams, "Canadian Constitutional Identities" (2015) 38:2 Dal LJ 311.

97 Gary Jacobsohn, a leading scholar of the phenomenon of "constitutional identity," has affirmed a "dis-harmonic dynamic that is fundamental to constitutional identity rightly understood." Gary Jeffrey Jacobsohn, "How to Think about the Reach of Constitutional Identity" (2023) 1:1 Comp Const Stud 6 at 7–8.

III. Shadow Commitments and Indigenous Legal Orders

The above review of Canadian constitutional commitments respecting the more-than-human world has been deliberately limited to the place of earth and animals within Canadian *state* law, rather than the Indigenous legal orders which concurrently govern within Canada's claimed territorial jurisdiction. This implied account of state law and Indigenous law as distinct spheres is admittedly somewhat misleading. Indigenous law is increasingly recognized by those within the state legal system as relevant to their own interpretive and governance projects.⁹⁸ Indigenous law is also increasingly expressed and codified through tools of state law.⁹⁹ Treaties, which are products of the intersection of Indigenous and state law,¹⁰⁰ are now expressly recognized in the Canadian state Constitution,¹⁰¹ and increasingly adopted as templates for ongoing multi-jural governance.¹⁰² Yet, we capture something *descriptively true* about Canada's legal order when we recognize that Canadian state constitutionalism embraces a distinct shadow commitment to animal and earth exploitation, and that this shadow commitment sets the stage for discord with Indigenous legal orders, which often house quite a different set of commitments respecting the more-than-human world.¹⁰³

As suggested at the outset, Indigenous legal orders have developed, and continue to develop, their own diverse approaches to defining constitutional dimensions of human relationships to the more-than-human world. The work of defining, debating, institutionalizing, and enforcing these Indigenous constitutional commitments continues to require many hands, and several of the essays in the present collection contribute to this meta-project across academic

98 See Naomi Metallic, "Aboriginal Rights, Legislative Reconciliation and Constitutionalism" (2023) 27:2 Rev Const Stud 1 [Metallic, "Legislative Reconciliation"]; Kent McNeil, "Indigenous Law and the Common Law" (15 March 2021) [unpublished], online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3829&context=scholarly_works> [<https://perma.cc/RW98-8JPM>]; see also A Mills, "Lifeworlds", *supra* note 4 at 856: "It's becoming part of the orthodoxy of legal education in Canada *that* Canadian law needs to relate with Indigenous legal orders. The centre of the dialogue on that relationship is thus now beginning to shift to *how* they ought to relate with one another."

99 See Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 at 11–12; see also Naomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211.

100 See 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 21–22.

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

102 See e.g. John Borrows & Michael Coyle, "Introduction", in Borrows & Coyle, eds, *supra* note 18, 3 at 13.

103 See *supra* note 9.

disciplines and Indigenous legal orders.¹⁰⁴ Despite the diversity and internal complexity of these Indigenous legal traditions, including respecting their commitments to the more-than-human world,¹⁰⁵ there is reasonable basis to conclude that, individually and collectively, Indigenous legal traditions often operate in tension with Canadian state law's unwritten commitment to one-sided, hierarchical, and exploitative human relations with earth and animals.¹⁰⁶

While relations with the more-than-human world are not always understood in constitutional terms within Canadian state law,¹⁰⁷ scholarship within the field of Indigenous law consistently affirms the constitutional nature of this rupture between state and Indigenous approaches to the more-than-human. Aaron Mills, for example, identifies “rooted constitutionalism” — an approach most prevalent in Indigenous legal orders whereby “rooted peoples constitute themselves in and through Earth” — as different in “kind” from liberal constitutionalism.¹⁰⁸ John Borrows, while advocating for more meaningful multijuralism in Canadian state law, observes that few Canadian state “legal practitioners talk to the Earth, study her character, and expect to re-

104 See e.g. John Borrows, “Learning Anishinaabe Law from the Earth” (2025) 29:2 Rev Const Stud 209; L Borrows, “Learning Law from Plants”, *supra* note 85; Darcy Lindberg, “Néhiyaw Pimatisiwin and Regenerative Constitutionalism” (2025) 29:2 Rev Const Stud 281; Rebeca Macias Gimenez, “Learning about Treaties with the Animal People: Lessons for Treaty 8” (2025) 29:3 Rev Const Stud 491; Pamela Spalding, “Making Space for Indigenous Legal Relationships with Plants in Aboriginal Law” (2025) 29:3 Rev Const Stud 403.

105 See John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 49 at 49–50, urging against homogenizing or romanticizing stereotypes of Indigenous people as “natural environmentalists.” See also Benjamin J Richardson & Donna Craig, “Indigenous Peoples, Law and the Environment” in Benjamin J Richardson & Stepan Wood, eds, *Environmental Law for Sustainability: A Reader* (Portland, OR: Hart Publishing, 2006) 195 at 200 (cautioning against “naïve” constructions of “all traditional indigenous cultures as reflecting some kind of golden age, devoid of environmental degradation”) and David Chandler & Julian Reid, *Becoming Indigenous: Governing Imaginaries in the Anthropocene* (London: Rowman & Littlefield International, 2019) (arguing that settler colonial reliance on tropes of Indigenous “alternatives” to state governmentality instrumentalizes and further marginalizes Indigenous people and political struggles).

106 See e.g. John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47:4 UTLJ 417; Nancy J Turner & Pamela Spalding, “Learning from the Earth, Learning from Each Other: Ethnoecology, Responsibility, and Reciprocity” in Asch, J Borrows & Tully, eds, *supra* note 105, 265; James Tully, “Reconciliation Here on Earth” in Asch, J Borrows & Tully, *supra* note 105, 83; Darcy Lindberg, “Transforming Buffalo: Plains Cree Constitutionalism and Food Sovereignty” in Angela Lee, Heather McLeod-Kilmurray & Natalie Chalifour, eds, *Food Law and Policy in Canada* (Toronto: Carswell, 2019) 37; Hadley Friedland et al, “Porcupine and Other Stories: Legal Relations in Secwépemcūlecw” (2018) 48:1 RGD 153 at 172–73.

107 See *supra* note 5 and accompanying text.

108 Aaron Mills, “A Preliminary Sketch of Anishnaabe (a Species of Rooted) Constitutionalism” (2012) 1:1 Rooted 2 at 4.

ceive responses by observing her behaviour,” with the effect that the Earth’s position within Anishinabek law “probably propels Canadian constitutional law beyond its informing commitments.”¹⁰⁹ Darcy Lindberg observes a related distinction between colonial and Plains Cree constitutionalism, explaining that “[t]he imposition of Eurocentric legal reasoning upon *nēhiyaw āskiy* has subverted kinship relationships with non-human beings and things to create merely property or commodity relationships, or to deny the existence of relationships entirely.”¹¹⁰

The tensions between Indigenous and Canadian constitutional commitments respecting the more-than-human world frequently occupy centre stage in litigation and political conflicts over the scope of Indigenous rights and jurisdiction.¹¹¹ Some commentators have accordingly suggested that reconciliation between Indigenous and non-Indigenous peoples will be possible only through “reconciling our way of life with the living earth,” proposing deep links between these two sets of “crisis-ridden relationship.”¹¹² By identifying these recurrent tensions, we can see that the maintenance of a posture of anthropocentric exploitation within Canadian state constitutionalism has implications for the place that Indigenous law can and does play in Canadian constitutional law. More specifically, this commitment to anthropocentric exploitation is enabled, in part, by an ignominious shadow commitment to the subordination of Indigenous legal orders to Canadian state law. Significantly, this shadow commitment sits in tension with the Court’s express fealty to an unwritten constitutional principle of the “honour of the Crown” in its dealings with Indigenous peoples — a tension which exemplifies the constitutional polyvalence that we can begin to perceive once we acknowledge the operation of shadow commitments alongside declared constitutional principles within the unwritten Constitution.

109 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 249.

110 Darcy Lindberg, “Excerpts from *Nēhiyaw Áskiy Wiyasiwēwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation*” (2021) 1:1 Rooted 10 at 13.

111 See e.g. the leading s 35 cases of *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot’in*], *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*], *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*], and *R v Marshall*, [1999] 3 SCR 456 [*Marshall No 1*], all of which engage questions of authority and access in relation to more-than-human entities. See also Richardson & Craig, *supra* note 105 at 196 (observing that across many global jurisdictions “[t]he quest for [Indigenous] self-government is increasingly intertwined with demand for more voice in environmental management”).

112 Tully, *supra* note 106 at 84. See also Maneesha Deckha, “Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood” (2020) 41:1 *Journal of Intercultural Studies* 77.

In exploring the Canadian state's unwritten commitments respecting earth and animals, we confronted the pervasive invisibility of the constitutional relationships at issue: there is simply an absence of direct attention to the commitments guiding legal relations with the more-than-human world within Canadian constitutional text and jurisprudence. In contrast, the Supreme Court of Canada has now openly and repeatedly affirmed the constitutional character of Crown-Indigenous relations.¹¹³ More recently, the Court has even situated its flagship articulation of the Canadian state's commitments in this sphere — the “honour of the Crown” — in the terminology of “unwritten constitutional principles.”¹¹⁴ The orthodox account of unwritten constitutional principles, then, posits the existence of unwritten constitutional commitments shaping the Canadian state's relations with Indigenous peoples and legal orders, and defines these commitments in terms of the promise that “[i]n all its dealings with Aboriginal peoples”¹¹⁵ the Crown's conduct shall be honourable, embracing an obligation to treat Indigenous peoples “fairly” while “protect[ing] them from exploitation.”¹¹⁶ The question here is not, then, whether the relationships in question are of constitutional character, but rather whether the honour of the Crown is adequately descriptive of the unwritten constitutional commitments shaping these relationships.

Existing scholarship has thoroughly and painstakingly detailed the shortcomings of the honour of the Crown as an accurate descriptor of the Canadian state's treatment of Indigenous peoples and legal orders. Mariana Valverde puts the point sharply: the “honour of the Crown” supposed in the Court's duty to consult jurisprudence “is not a story made up of any facts, or even of law, in the black-letter sense: it is rather a wholly magical invocation of the Crown's inherent virtues.”¹¹⁷ While Valverde's “skewering” of the concept has been understood to fall on the more “skeptical” end of the spectrum,¹¹⁸ the Court itself often seems to concede her descriptive conclusion that the honour

113 See e.g. *Haida Nation*, *supra* note 111 at para 32; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10 [*Beckman*].

114 *City of Toronto*, *supra* note 13 at para 62. Although the honour of the Crown and related fiduciary obligations toward Indigenous peoples are long-standing in Canadian law, the articulation of this concept as an “unwritten constitutional principle” is newer, seeming to originate in the concurring reasons of Deschamps J in *Beckman*, *supra* note 113 at para 97.

115 *Haida Nation*, *supra* note 111 at para 50.

116 *Mitchell v MNR*, 2001 SCC 33 at para 9.

117 Mariana Valverde, “The Honour of the Crown is at Stake: Aboriginal Land Claims, Litigation and the Epistemology of Sovereignty” (2011) 1:3 UC Irvine L Rev 955 at 957.

118 Thomas McMorrow, “Upholding the Honour of the Crown” (2018) 35 Windsor YB Access Just 311 at 316. McMorrow's more optimistic account of the principle is more focused on the principle's forward-looking potential than on any disagreement with Valverde's historical account.

of the Crown is essentially fictional or aspirational. In *Sparrow*, for example, the Court remarks that the state's obligations to Indigenous people were, in fact, "often honoured in the breach,"¹¹⁹ and that this is a history that the Court "cannot recount with much pride."¹²⁰ The principle of the Crown's honourable dealings with Indigenous people does not, therefore, seem to offer an adequate descriptive portrait of the Canadian state's unwritten constitutional posture toward Indigenous peoples.

The divergence between promised honour and practiced commitments is particularly sharp in contexts where honourable dealing would demand respect for Indigenous law and jurisdiction.¹²¹ Criticisms of the Court's approach to Indigenous legal orders persistently revisit two durable interlocking features of Canadian constitutional jurisprudence: 1) a judicial reluctance to interrogate Crown sovereignty; and 2) a judicial reluctance to acknowledge the full scope of claims to Indigenous sovereignty. Robert Hamilton and Joshua Nichols, among others, have critiqued the Court's insistence that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."¹²² This denial of "doubt" evidences the Court's consistent unwillingness to meaningfully engage with the reality that Crown sovereignty has been quite seriously and consistently doubted by Indigenous peoples.¹²³ As Nichols writes elsewhere, "as soon as we begin to question the basis of this undoubted claim, we find nothing but the barricades of the past (i.e. *terra nullius*, discovery, the civilization thesis,

119 *Sparrow*, *supra* note 111 at 1103. The British Columbia Court of Appeal similarly acknowledges "the historical reality that the Crown in fact has not always dealt honourably with Indigenous peoples": *West Moberly First Nations v British Columbia*, 2020 BCCA 138 at para 416.

120 *Sparrow*, *supra* note 111, quoting with approval *Pasco v Canadian National Railway Co*, [1986] 1 CNLR 35 at 37 (BC SC).

121 Cf. John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 725 [J Borrows, "Durability"], describing the presumption of Crown sovereignty and failure to recognize Indigenous governing authority in the *Tsilhqot'in* case as depending upon a "discriminatory denigration of Indigenous peoples' laws and ways of life."

122 Hamilton & Nichols, "Reconciliation and the Straitjacket", *supra* note 16 at 223–24, quoting *Sparrow*, *supra* note 111; see also Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L Rev 498 at 507.

123 See e.g. Patrick Macklem, *Indigenous Difference and the Canadian Constitution* (Toronto: University of Toronto Press, 2018) at 115 (observing that, despite objections to Crown authority by Indigenous litigants, "[n]owhere in the jurisprudence devoted to the distribution of internal sovereignty ... is there any sustained examination of the legitimacy of the assertion of Canadian sovereignty over Aboriginal people in Canada"). See also Hamilton & Nichols, "Reconciliation and the Straitjacket", *supra* note 16 at 227 ("In the mid-18th century, for example, the Blackfoot were at the peak of their power and influence, and there was no non-Indigenous presence in what is now Alberta. The notion that the Blackfoot would have accepted — without doubt — that the Crown held sovereignty and legislative power in relation to their territory is fanciful").

etc.).¹²⁴ Remarkably, even as the Court has formally repudiated these colonial doctrines, it persists in affirming a constitutional structure whereby Crown sovereignty is presumed and Indigenous sovereignty (in the more constrained and fragmented form of “rights” under Canadian law) must be proven on a case-by-case basis.¹²⁵ In effect, the Court retreats from the justificatory logic of these colonial doctrines, but does not retreat from their substance, leaving what John Borrows terms “an emptiness at the heart” of the Court’s reasoning on Crown sovereignty.¹²⁶

Thus, although the Court has not proudly announced a principled commitment to subordinating Indigenous legal orders to Crown sovereignty, the substance of the jurisprudence in this area confirms that this is part of what Canada’s state Constitution *says without saying* in respect of Indigenous legal orders.¹²⁷ In an analytic move hospitable to my own framing of this durable legal current as a shadow element of Canada’s unwritten Constitution, Hamilton and Nichols identify a “colonial pillar” within Canadian law that operates alongside such pillars as “legality” and “legitimacy” — concepts that substantially overlap with the canonical unwritten principles of the rule of law and democracy.¹²⁸ This identification of a “colonial pillar” at the heart of Canada’s

124 Joshua Nichols, *A Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020) at 352.

125 See e.g. *Tsilhqot’in*, *supra* note 111 at para 69. See also Friedland et al, *supra* note 106 at 172–73 (observing that despite the Supreme Court’s explicit repudiation of *terra nullius* in *Tsilhqot’in*, “the original, unlawful assertion of sovereignty seamlessly persists in the language woven through colonial law,” especially in respect of human-earth relations). On the preservation of underlying status hierarchies despite formal changes in rules and justificatory rhetoric, see Siegel, *supra* note 58.

126 See J Borrows, “Durability”, *supra* note 121 at 703. See also Robert Hamilton & Joshua Nichols, “The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult” (2019) 56:3 *Alta L Rev* 729 at 741 [Hamilton & Nichols, “Tin Ear”] (observing that the Supreme Court’s rhetorical retreat from “colonial legal fictions” has left “an explanatory gap in the judicio-historical narrative that grounds Crown sovereignty”); Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where Do Laws Meet” (2014) 29:2 *Can J L & Soc* 145; Russel Lawrence Brash & James Youngblood Henderson, “The Supreme Court’s *Van Der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42:4 *McGill LJ* 993.

127 The insight that Canadian state law consistently subordinates Indigenous legal orders is not novel, and has been amply demonstrated in critical literature, particularly addressing judicial interpretation of s 35 of the *Constitution Act, 1982*, *supra* note 101. See e.g. Patricia Monture-Angus, “Standing Against Canadian Law: Naming Omissions of Race, Culture and Gender” (1998) 2 *YB NZ Juris* 7; J Borrows, “Durability”, *supra* note 121; Bruce McIvor, *Standoff: Why Reconciliation Fails Indigenous People and How to Fix It* (Gibsons, BC: Nightwood Editions, 2021). As noted above, my contribution seeks to bridge these existing critiques with a conversation about unwritten constitutional principles that has often failed to tangle with the implications of these analyses for the project of articulating the Canadian state’s foundational commitments.

128 See Hamilton & Nichols, “Reconciliation and the Straitjacket”, *supra* note 16 at 229–33. See also the *Secession Reference*, *supra* note 12 at para 67: “To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and account-

constitutional order finds support in research identifying colonial expansion and the displacement and assimilation of Indigenous persons as core projects of the Canadian state from its inception.¹²⁹ Elsewhere, Hamilton and Nichols suggest that this colonial pillar emerges in the Supreme Court of Canada's perpetual dependence upon "an unstated background presumption that Aboriginal peoples are subjects of the Canadian sovereign," allowing persistent questions as to the legitimacy of Crown sovereignty to "recede[] from view" in a "kind of magical disappearing act."¹³⁰ A rigorous line of scholarship has thus amply demonstrated that the subordination of Indigenous law and sovereignty is a core, stable, and binding feature of Canadian constitutionalism — despite the fact that this subordination is "unstated" or invisible ("disappear[ed]" or out of "view") to many actors in the system, and even seemingly *repudiated* through claimed commitments to honourable dealing. Our understanding of the place of Indigenous legal orders in Canada's unwritten Constitution will remain incomplete and misdescriptive without attention to a shadow commitment to subordination operating alongside the Court's declared principles.

The Court's shadow commitment to the subordination of Indigenous legal orders to Crown sovereignty shares the core descriptive qualities that I have suggested define elements of the unwritten Constitution. This shadow commitment is plainly stable over long time horizons, even as its force and relationship to other principles may wax and wane.¹³¹ It is undeniably constitutional,

ability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle."

129 Government of Canada, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018>> [<https://perma.cc/F7KG-Q9PF>]: "Our central conclusion can be summarized simply: *The main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong.* Successive governments have tried — sometimes intentionally, sometimes in ignorance — to absorb Aboriginal people into Canadian society, thus eliminating them as distinct peoples. Policies pursued over the decades have undermined — and almost erased — Aboriginal cultures and identities" (emphasis in the original). I note briefly here that John Borrows has rightly resisted simplistic accounts of Canada's formation and engagement with Indigenous peoples as "a simple horror story." See J Borrows, "Canada's Colonial Constitution", *supra* note 18 at 19. I will return in the final section to how I see the present account as promising a more nuanced and dynamic understanding of Canadian constitutionalism, rather than replacing the overly sanguine canonical account of unwritten constitutional principles with an equally simplistic bleak or nihilistic vision.

130 Hamilton & Nichols, "Tin Ear", *supra* note 126 at 738.

131 Borrows, for example, emphasizes that, despite the "emptiness at the heart" of the Court's articulation of Crown sovereignty in *Tsilhqot'in*, *supra* note 111 (J Borrows, "Durability", *supra* note 121 at 703), the decision represents a "significant step in the road to decolonization" (J Borrows, "Durability", *ibid* at 741). For a case explicitly grappling with the place of honour of the Crown in relation to other un-

not only because the Court has affirmed that Crown-Indigenous relations are constitutional in character,¹³² but also in the special sense I have suggested: the presumption of Crown sovereignty (and attendant refusal or minimization of Indigenous sovereignty) has been core or foundational to the Canadian constitutional enterprise. Indeed, “parliamentary sovereignty” (arguably a close relation of Crown sovereignty) has been recognized by the Court as a canonical unwritten constitutional principle that may at times sit in tension with constitutional commitments to honourable dealings with Indigenous peoples, ultimately favouring parliamentary sovereignty in the face of such conflict.¹³³

Finally, the Court’s jurisprudence leaves little doubt that the hierarchical positioning of Crown sovereignty over Indigenous sovereignty binds the outer limits of acceptable interpretation within Canadian state law. Without serious discussion or interrogation, the Court’s “division of powers” jurisprudence has presumed the division in question is between federal and provincial Crowns — a jurisprudence which Patrick Macklem has described as shaped by an “unspoken assumption that Aboriginal sovereignty is not an interest that warrants constitutional protection,” despite the fact that “nothing in the text of the *Constitution Act, 1867* dictates the conclusion that Canada possesses jurisdiction to pass laws affecting its Aboriginal population without that population’s consent.”¹³⁴ In a similar vein, the Court’s interpretation of section 35 has been thoroughly critiqued for its narrow and static conceptualization of protected rights as arising from specific, proven pre-contact Indigenous practices,¹³⁵ or narrowly defined claims to land title,¹³⁶ foreclos-

written constitutional principles, see *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree*].

132 See *supra* notes 113–114 and accompanying text.

133 *Mikisew Cree*, *supra* note 131. See also John Borrows, *Law’s Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 82 [J Borrows, *Law’s Indigenous Ethics*] (observing that the Supreme Court of Canada “does not see itself as having to defer to Indigenous political authority ... as it often does to parliamentary or legislative power”).

134 Macklem, *supra* note 123 at 117–18.

135 See e.g. Brash & Youngblood Henderson, *supra* note 126; John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22:1 *Am Indian L Rev* 37; Michael Asch, “The Judicial Conceptualization of Culture after *Delgamuukw* and *Van Der Peet*” (2000) 5:2 *Rev Const Stud* 119; Avigail Eisenberg, “Reasoning about Identity: Canada’s Distinctive Culture Test” in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 34; Brian Slattery, “The Generative Structure of Aboriginal Rights” in John Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) 20 at 22 [Slattery, “Generative Structure”] (noting that judicial focus on pre-contact practices “tends to yield rights that have a limited ability to serve the modern needs of Aboriginal peoples and may also fit uneasily with third-party and broader societal interests”).

136 Title claims, which would appear to offer the most promising avenue for developing jurisdiction, are available only to those Indigenous nations who are able to prove sufficient, continuous, and exclu-

ing more robust or generalizable claims of Indigenous sovereignty.¹³⁷ In *Pamajewon*, for example, the Supreme Court of Canada narrowed a claimed right to “self-government” or self-regulation of economic activities to a more “piece-meal”¹³⁸ right to “participate in, and to regulate, gambling activities on their respective reserve lands” before going on to reject even that more narrow claim.¹³⁹ The Court, in other words, did not just reject the asserted claim of Indigenous sovereignty in *Pamajewon*, it treated the claim as fundamentally illegible as a matter of Canadian state law — as outside the universe of available interpretive manoeuvres.¹⁴⁰

This does not mean that the “honour of the Crown” is entirely farce or façade; but it does mean that, on its own, the honour of the Crown provides an incomplete and misleading account of the Canadian Constitution’s unwritten commitments respecting Indigenous peoples and legal orders. Meaningful inroads have been made in section 35 jurisprudence in recent years, particularly respecting the recognition of Aboriginal title¹⁴¹ and the “duty to consult

sive occupation of their territory: Brian Slattery, “The Constitutional Dimensions of Aboriginal Title” (2015) 71 SCLR (2nd) 45 [Slattery, “Constitutional Dimensions”]. Even in cases where Aboriginal title might be proven, it remains open to the Crown to intrude on proven rights in proportionate pursuit of a range of objectives. See *Tsilhqot’in*, *supra* note 111. Such justified infringements are also permissible with respect to treaty rights (see *Marshall No 1*, *supra* note 111 and *R v Marshall*, [1999] 3 SCR 533) and practice-based rights (see *Lax Kw’alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56).

137 See Bradford W Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1997) 42:4 McGill LJ 1011; Eisenberg, *supra* note 135 at 49 (observing that the Court’s approach has been critiqued as “unjust because it serves as a convenient way for the courts to avoid the larger issue of self-determination”).

138 Kent McNeil, “The Inherent Right of Indigenous Governance” (paper presented at Think Tank, Carleton University, Ottawa, 3 October 2017) [unpublished], online: <https://www.digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1327&context=all_papers> [<https://perma.cc/Q5NN-EH7T>].

139 *R v Pamajewon*, [1996] 2 SCR 821 at para 26 [*Pamajewon*]. For a critique of the Court’s practice of narrowing asserted s 35 claims, see Kerry Wilkins, “Whose Claim Is It, Anyway? *Lax Kw’alaams Indian Band v. Canada (A.G.)*, 2011 SCC 56, [2011] 3 SCR 535” (2012) 11:1 Indigenous LJ 73.

140 Some scholars have suggested that *Pamajewon* may no longer be good law, given the Court’s subsequent *dicta* respecting the importance of Indigenous sovereignty to the project of reconciliation. See e.g. Richard Stacey, “Honour in Sovereignty: Can Crown Consultation with Indigenous People’s Erase Canada’s Sovereignty Deficit?” (2018) 68:3 U Toronto LJ 405 at 427; M Nickason, “The *Tsilhqot’in* Decision: Lock, Stock and Barrel, Plus Self-Government” (2016) 48:3 UBC L Rev 1061 at 1072; Slattery, “Generative Structure”, *supra* note 135 at 27. See also *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at paras 56–66, affirming a supportive relationship between parliamentary sovereignty, Indigenous self-government, and the honour of the Crown. It remains the case, however, that the Court has never recognized a s 35 right that positions Indigenous jurisdiction at an equal or superior plane *vis-a-vis* state law. See generally Hamilton & Nichols, “Tin Ear”, *supra* note 126, emphasizing the Court’s consistent tendency to treat s 35 as conferring “*Charter*-like rights” subject to state limitation rather than creating or recognizing the coordinate jurisdiction of Indigenous legal orders.

141 See J Borrows, “Durability”, *supra* note 121 at 703–705.

and accommodate” Indigenous peoples whenever contemplated Crown action threatens to disrupt enjoyment of claimed rights.¹⁴² The duty to consult and accommodate is explicitly anchored in the canonical unwritten principle of the honour of the Crown.¹⁴³ This principle and its associated jurisprudence have in turn supported modern treaty processes and the development of legislation giving further effect to the rights of Indigenous people, including rights with jurisdictional qualities.¹⁴⁴ We may endorse these significant practical and doctrinal developments even as we recognize the descriptive limits of the honour of the Crown as a portrait of the key commitments of Canada’s legal order. The unwritten constitutional commitment to the Crown’s honourable dealings with Indigenous people is more completely understood as sitting in tension with a countervailing shadow commitment to the subordination of Indigenous legal orders — a commitment that is a stable, core, and binding feature of Canadian constitutionalism despite being unnamed and even (at times) seemingly repudiated by the Court.¹⁴⁵ This shadow commitment shapes the outer limit of interpretive possibilities, and constrains the scope of the Court’s recognized canonical commitment to the honour of the Crown. But so too is the reverse true: that the proclaimed honour of the Crown, along with other canonical unwritten principles, can function as a counterweight to the durable hierarchies of the shadow Constitution.¹⁴⁶

IV. Beyond Symbiosis: Polyvalent Constitutionalism

The Supreme Court has affirmed that the canonical unwritten constitutional principles are not defined “in isolation,” but rather operate in “symbiosis” with other principles.¹⁴⁷ The canonical unwritten principle of democracy, for example, is administrable only through rule of law.¹⁴⁸ And federalism, in the Court’s view, works hand in hand with the principle of minority protection.¹⁴⁹ The interconnections between anthropocentric exploitation and the subordination of Indigenous legal orders reveal that similar dynamics of symbiosis

142 See Hamilton & Nichols, “Tin Ear”, *supra* note 126 at 733. But see also Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2013) 22:1 Const Forum Const 63.

143 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19.

144 See Metallic, “Legislative Reconciliation”, *supra* note 98.

145 See *supra* notes 125–26 and accompanying text.

146 Cf. Hamilton & Nichols, “Reconciliation and the Straitjacket”, *supra* note 16 at 229–33 (discussing “legality” and “legitimacy” as pillars of the Canadian legal order that sit in tension with a “colonial” pillar).

147 *Secession Reference*, *supra* note 12 at para 49.

148 *Ibid* at para 47.

149 *Ibid* at para 59. For a more nuanced account of the tensions and synergies between federalism and minority protection in Canadian constitutional law, see Johanne Poirier & Colleen Sheppard, “Rights and Federalism: Rethinking the Connections” (2022) 26:2 Rev Const Stud 249.

emerge amongst shadow elements of the unwritten Constitution. But symbiosis alone cannot capture the full complexity of the unwritten Constitution once shadow commitments are recognized as operating alongside judicially proclaimed unwritten principles. The relationship between declared principles and shadow commitments within the unwritten Constitution is more aptly described in terms of polyvalence and contest. Under this vision of the unwritten Constitution, legal actors share responsibility for refining and defending the commitments they wish to uphold; identifying when values that are repudiated or ignored in fact shape legal outcomes; and admitting and confronting the intertwined contests through which constitutional power is expressed.

As a biological metaphor, symbiosis offers an incomplete portrait of the many diverse forms of organic interactions. In fact, living things do not always work together in harmonious communities of mutual benefit. Relations of symbiosis (or “mutualism”) certainly exist, but so do relations of parasitism (where one entity benefits while another is harmed), commensalism (where one entity benefits and another is unaffected), amensalism (where one entity is harmed and another is unaffected), competition, and predation. These interactions, moreover, do not happen in one-to-one isolation, but are parts of complex webs of relationship that unfurl over multiple scales of space and time. While these relations may “sustain life” in “virtuous life systems,” they may also destroy some or all of their own participants in “vicious life systems.”¹⁵⁰ Just as symbiosis, envisioned in isolation from other forms of biologic interaction, offers an incomplete portrait of the living world, so too is the symbiosis between canonical constitutional principles more descriptively useful when supplemented by a more complex, interactive, and occasionally antagonistic portrait of the state’s uncelebrated shadow commitments.¹⁵¹

In fact, although their explicit biological metaphor is limited to symbiosis, the Supreme Court and commentators operating in the orthodox tradition of

150 Tully, *supra* note 106 at 99, citing Stephen Harding, *Animate Earth: Science, Intuition and Gaia* (White River Junction, VT: Chelsea Green Pub Co, 2006).

151 For a related critique of reductive and incomplete biological metaphors at the Supreme Court of Canada, see Aaron Mills’s discussion of the Supreme Court of Canada’s “living tree” metaphor: a “presumption of earth-alienation is the condition of possibility for Canadians having as constitutional image a lone freestanding tree — free even from the earth beneath it.” A Mills, “Lifeworlds”, *supra* note 4 at 864. Joshua Nichols is currently developing a framework of “constitutional ecology” which seeks to correct this tendency by deepening attention to conflict, disharmony, and interaction within and across legal orders, particularly building upon the work of HLA Hart. My sincere thanks to Joshua for sharing his excellent draft and allowing me to cite it at this early stage. See Joshua Nichols, “Constitutional Ecologies: Process, Pathology, and the Life of Legal Systems” (manuscript on file with the author). I understand Nichols’s concept of “constitutional ecologies” to be in substantial harmony with the framework of “polyvalent constitutionalism” advanced in the present article.

unwritten constitutional principles have frequently acknowledged tensions and trade-offs even between the canonical principles. Parliamentary sovereignty has, for example, been identified as a principle that must be “balanced against” the honour of the Crown.¹⁵² Democracy and rule of law (particularly in its expression as “constitutionalism”) sit in famously uneasy relation to each other.¹⁵³ Moreover, the demands of the canonical unwritten principles in particular cases are often sources of dispute between members of the Court.¹⁵⁴ Acknowledging the presence of unwritten shadow commitments brings the conflicting currents underlying the constitutional order into even sharper relief, revealing that the true depths (and stakes) of constitutional disagreement run deeper than debates as to the meaning, weight, and application of canonical unwritten principles. Shadow constitutionalism, and the polyvalent Constitution of which it forms a part, offers a framework through which to name and explore deep-seated constitutional commitments that can and do run up against one another, sometimes revealing value conflicts that can only be managed, never resolved, within a given constitutional order.

The orthodox approach to unwritten constitutional principles is frequently characterized by concessions of the imperfect history of these principles’ realization. The Court acknowledges, for example, that “Canada’s record of upholding the rights of minorities is not a spotless one,” while nonetheless maintaining that the protection of minorities is a “goal ... towards which Canadians have been striving since Confederation, and the process has not been without success.”¹⁵⁵ And, as noted above, the Court has conceded that Canada’s history of engagements with Indigenous peoples is not one that the Court can “recount with much pride.”¹⁵⁶ These concessions of imperfect aspiration are necessitated by the orthodox framing of all unwritten constitutional principles as good and just: if the foundations of the legal order are found only in the state’s most respectable traditions, the state’s disresponsible traditions are only conceivable as

152 *Mikisew Cree*, *supra* note 131 at 91 (per Abella J, concurring).

153 *Secession Reference*, *supra* note 12 at paras 76–78, acknowledging but dismissing as “erroneous” the view that democracy and constitutionalism are incompatible; see also *Canada (Attorney General) v Power*, 2024 SCC 26 at paras 47–57, 79. For classic texts in the US iteration of this dispute, see Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) and John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980).

154 See e.g. *Mikisew Cree*, *supra* note 131 (for conflicting judicial conclusions as to the demands of parliamentary sovereignty and honour of the Crown); *BC Trial Lawyers*, *supra* note 74 (for conflicting judicial conclusions as to the demands of democracy and rule of law). See also Leclair, “Unfathomable”, *supra* note 16 at 417–26 (identifying “conflicting principles” and unresolved “problems of weight and priority” in the Supreme Court’s jurisprudence of unwritten constitutional principles).

155 *Secession Reference*, *supra* note 12 at para 81.

156 *Sparrow*, *supra* note 111 at 1103.

lapses. Persistent, pernicious, and predictable hierarchies within Canadian law are thus cast as mere “spot[s]” on a “record.”¹⁵⁷

As a corrective, the recognition of constitutional shadow commitments creates space for articulating patterns of hierarchy as systematic and durable, rather than as mere missteps or aberrations. Importantly, recognizing the depth and durability of unjust legal and social relations is not inimical to their remediation. Instead, deep critique and practical advocacy projects have often gone hand in hand. Mari Matsuda has described this fraught pairing of transformative and critical projects:

There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand inside the courtroom and say “this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.” Sometimes, as Angela Davis did, there is a need to make both speeches in one day.¹⁵⁸

In fact, accounts that minimize the systemic and persistent nature of social hierarchies can be hostile to effective advocacy for meaningful change. Where harms are viewed as products of bad apples or “spot[s]” on a “record,” prospects for transformation are blunted, and those victimized are denied a language that describes their experiences of life at “the bottom.”¹⁵⁹ Often, these experiences produce a deep skepticism of law.¹⁶⁰ We see this skepticism emerge in many critical accounts of law and the liberal state — as irredeemably colonial,¹⁶¹ as anchored in racial hierarchy,¹⁶² as tools of sex inequality,¹⁶³ as a vehicle for entrenching economic inequality,¹⁶⁴ and more. Descriptive (and normative) accounts of law are stronger when they can engage meaningfully with this skep-

157 *Secession Reference*, *supra* note 12 at para 81. See also Gibson, *supra* note 16 at 63.

158 Mari J Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11:1 *Women’s Rts L Rep* 7 at 8.

159 Cf. Mari J Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22:2 *Harv CR-CLL Rev* 323.

160 See Jessica Eisen, “Multiple Consciousness as Philosophical Method” (2024) 63:1 *Dialogue: Canadian Philosophical Review* 59.

161 See e.g. Monture-Angus, *supra* note 127. See also scholarship in *Third World Approaches to International Law* (“TWAIL”), e.g. Makau Mutua, “What is TWAIL?” (2000) 94 *Am Soc’y Int’l L Proceedings* 31. For an analysis of TWAIL critiques in relation to Canadian state engagement with Indigenous people, see Amar Bhatia, “The South of the North” (2012) 14:1 *Or Rev Int’l L* 131.

162 See e.g. Charles W Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997).

163 See e.g. Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989).

164 See e.g. Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).

ticism — when they hold space to recognize that these “outsider” intellectual traditions carry important truths about law and its relationship to hierarchy, even as there are also important truths about law within the intellectual traditions that have forged the canonical unwritten principles.¹⁶⁵ Simple stories of the Canadian state as pure good or pure evil elide the messier truth of Canada’s Constitution, and excuse us from the ongoing work of defining and defending values within a polyvalent legal order that has tremendous power to harm or to heal.¹⁶⁶

The orthodox treatment of Canada’s unwritten Constitution as basically good and just, with a few stumbles along the way, fails to meaningfully confront the reality that inequality and exploitation are also durable features of the polity. Recognition that shadow commitments bind the constitutional order to denied or repudiated values does not require that salutary accounts of “democracy” or “rule of law” be dismissed as pure fantasy.¹⁶⁷ But it does require that these proud Canadian legal imaginaries exist in honest conversation with equally true accounts of the Canadian state that emphasize its histories of violence, disrespect, and dispossession. This polyvalent portrait of the Canadian Constitution allows for deeper accounts of the history, impact, and contested future of the polity. It allows for the naming of forces that exert undeclared power over our legal and political futures, and for deeper collective reckoning over what the legal order is and what we wish it to be.

V. *Ktunaxa Nation*: A Case Study in Polyvalent Constitutionalism

The *Ktunaxa Nation* case offers an example of the interconnections between the shadow commitments to anthropocentric exploitation and the subordination of Indigenous legal orders — and the relationship between these shadow commitments and the Court’s proclaimed unwritten constitutional principles, particularly the honour of the Crown.¹⁶⁸ This decision thus demonstrates not only the symbiotic interaction between shadow commitments, but also the ways that the unwritten Constitution is better described by polyvalence than

165 On the importance of moving between law’s own self-identity and the perspectives developed through “outsider jurisprudence,” see Mari Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story” (1989) 87:8 Mich L Rev 2320.

166 J Borrows, “Canada’s Colonial Constitution”, *supra* note 18 at 19, 38.

167 The rule of law, in particular, has been identified in critical scholarship as a value primarily aimed at sustaining unjust hierarchies and justifying the use of violence to sustain the colonial state at the expense of Indigenous legal orders. Cf. Deckha, “Rule of Law”, *supra* note 13.

168 *Ktunaxa Nation* SCC, *supra* note 20.

by symbiosis alone. This case illustrates the significant challenges facing legal claims that press against shadow commitments, while also pointing to the scope for hope and advocacy in the face of such headwinds. It demonstrates that in contests engaging the unwritten Constitution in its diverse shadow and canonical elements, victory and defeat are rarely clear and never final.¹⁶⁹

In *Ktunaxa Nation*, the Supreme Court of Canada was called upon to review an administrative decision to allow the construction of a ski resort in Qat'muk, within the traditional territory of the Ktunaxa Nation. The Ktunaxa people hold Qat'muk to be a sacred site, home to Kławła Tukłutakʔis (Grizzly Bear Spirit),¹⁷⁰ who would have been driven out by the proposed resort.¹⁷¹ As one Ktunaxa affiant explained, “when you wreck the land, you wreck the spiritual connection.”¹⁷² Significantly, the Grizzly Bear Spirit is not conceived in the disembodied terms associated with many Western spiritual traditions. Instead, the spirit, and the Ktunaxa people's connection to it, are embodied in the specific land in question, and in the specific population of actual grizzly bears living on and with that land.¹⁷³ The Ktunaxa Nation's relationships with this land, these bears, and this spirit, are characterized by postures of mutual care and obligation.¹⁷⁴ As the Ktunaxa Nation proclaimed in its 2010 Qat'muk Declaration: “Qat'muk's importance for the Grizzly Bear Spirit is *inextricably interlinked with its importance for living grizzly bears* now and in the future. The Ktunaxa have a *stewardship obligation* and *duty* to the Grizzly Bear Spirit and Qat'muk.”¹⁷⁵

The Qat'muk Declaration was not framed by the Ktunaxa Nation as a document of protest or as a purely spiritual edict, but rather as an exercise of le-

169 Cf. Adams, *supra* note 96 at 318 (explaining that a constitution, “like the background assumptions and relationships upon which it is based, can shift and transform over time; a constitution that perpetually exists in a state of becoming”).

170 *Ktunaxa Nation SCC*, *supra* note 20 (Factum of the Appellants at para 9) [Appellants' Factum].

171 *Ktunaxa Nation SCC*, *supra* note 20 (Affidavit No 1 of Joseph Pierre, sworn November 23, 2011 at paras 46–47) [Pierre Affidavit]; see also Pierre Affidavit, *ibid* at paras 45, 48–60 (cited in Appellants' Factum, *supra* note 170 at para 22). For an analysis of implicit skepticism and failure to comprehend the nature of this claim in media accounts and judicial reasoning, see Michael P Carroll, “What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us about Indigenous ‘Religion’ and Indigenous Rights” (2020) 49:1 *Studies in Religion* 32.

172 *Ktunaxa Nation SCC*, *supra* note 20 (Affidavit No 1 of Mary Jimmy, sworn October 15, 2012 at para 33) [Jimmy Affidavit]; see also Jimmy Affidavit, *ibid* at paras 21–32 (cited in Appellants' Factum, *supra* note 170 at para 22).

173 *Ktunaxa Nation SCC*, *supra* note 20 at para 5.

174 Morales, *supra* note 9 at 297: “As the Ktunaxa example illustrates, animals, plants and land are imbued with spirits, and these spirits also inhabit the people and look after them.”

175 Ktunaxa Nation, “Qat'muk Declaration” (15 November 2010), online: <<https://www.ktunaxa.org/wp-content/uploads/Declaration.pdf>> [<https://perma.cc/FKN3-DRWH>] [emphasis added].

gal jurisdiction. In particular, through this Declaration, the Ktunaxa Nation asserts that “our Law, ʔaknumuɕtitiṭ, requires the protection of our sacred places,” and proclaims Qat’muk to fall within a “refuge area,” protected by a “buffer area,” in which any land use must comply with the Ktunaxa’s own stewardship principles and management plan.¹⁷⁶ The effect of this Declaration was to prohibit, under Ktunaxa law, the proposed ski development.¹⁷⁷ This exercise of jurisdiction is animated by a substantive commitment to reciprocity and obligation to the more-than-human world, with the aim that “the Grizzly Bear Spirit, as well as grizzly bears, can thrive within and around Qat’muk.”¹⁷⁸ In contrast to this legal imperative under ʔaknumuɕtitiṭ, the Canadian state posture toward Qat’muk was economic and extractive, with available constitutional limits on that extraction defined only by a limited conception of human interests (or, in other words, ways human beings might want to use or extract from the land).¹⁷⁹ The interests of the land and its more-than-human inhabitants were visible to Canadian courts as constitutional concerns only to the extent that those interests fell within the scope of the Ktunaxa people’s constitutionally protected rights (which, ultimately, the Court found they did not).¹⁸⁰

To form a cognizable legal claim before Canadian courts, the Ktunaxa claims were redefined from those expressed in the Qat’muk Declaration in two important ways.¹⁸¹ First, the jurisdictional claim — that ʔaknumuɕtitiṭ prohibits the development and that this should end the matter — is transformed into a claim for Crown consultation and accommodation respecting anticipated impact on narrower “Aboriginal rights” arising from specific prac-

176 *Ibid.*

177 *Ktunaxa Nation SCC*, *supra* note 20 at para 38: “This amounted to saying that the resort could not proceed, as the proposed resort was partially within the refuge area and its access road ran through the buffer area.”

178 *Ibid.*

179 See e.g. the Supreme Court’s conclusion that the Minister properly weighted the Ktunaxa Nation’s interest in exercising Aboriginal rights as “balanced against the societal benefits of the project (\$900 million in capital investment and 750 to 800 permanent, direct jobs).” *Ktunaxa Nation SCC*, *ibid* at para 48.

180 *Ibid.*

181 For a similar argument, see Sonia Sikka, “Religious Freedom and Sacred Lands” (2024) 39:1 *JL & Religion* 116 at 117: “the legal frame of religious freedom is inapt for Indigenous claims over sacred lands, leading courts to omit the most crucial considerations, including recognition of indigenous sovereignty and a relation to land that Ktunaxa representatives articulated cogently during the proceedings.” For a discussion of a similar dynamic in the context of Secwépemc legal engagements with the Canadian state, see Friedland et al, *supra* note 106 at 177, describing the “double erasure” of Secwépemc “legal authority” respecting “lands and resources” and the “imposition of legal decisions that often apply a set of values that are counter-intuitive and, at times, diametrically opposed to Secwépemc legal value and principles.”

tices, traditions, and customs.¹⁸² As Robert Hamilton and Joshua Nichols explain, “in order for their claim to even be considered [by the Supreme Court of Canada], they must fit themselves into a view of the constitutional order *that they are in fact contesting*.”¹⁸³ Second, the interests of the land itself, and the grizzly bear population within it, are not advanced in the Canadian court claim as entities entitled to direct legal protection and obligation as expressed in the Qat’muk declaration and under ʔaknumuʔtitit. Instead, to achieve their objectives and fulfil their own legal obligations to protect these lands and animals, the Ktunaxa claimants were compelled to cast their Canadian legal claims in terms of humanist interests: in spiritual practice as defined under the *Charter*’s freedom of religion provision (section 2(a))¹⁸⁴ and in consultation and accommodation owed by the Crown in view of contemplated impacts on Aboriginal rights grounded in pre-contact practices, traditions, or customs (section 35).¹⁸⁵

These two reconfigurations (from jurisdiction to rights and from human obligation to human interest) are necessitated by the Canadian Constitution’s intertwined shadow commitments. The shadow commitments to anthropocentric exploitation, on the one hand, and to the subordination of Indigenous legal orders, on the other, operate in “symbiosis” to shape the scope of legal questions and answers that might hope for recognition under Canadian state constitutional law.¹⁸⁶ It is equally inconceivable to the Court

182 See Hamilton & Nichols, “Tin Ear”, *supra* note 126 at 731, 745: “[T]he Aboriginal claimants [in *Ktunaxa*] attempted to articulate jurisdictional claims over territory that they hold to be sacred within a procedural framework that requires them to adapt their claim to the language of contingent rights.” This sort of distortion is characteristic of s 35 cases since “in each case that appears before the Supreme Court the work of aligning the facts to fit [the Court’s presumption of Crown sovereignty] requires feats of jurisprudential acrobatics.”

183 *Ibid* at 739 [emphasis in original].

184 *Charter*, *supra* note 75, s 2(a).

185 *Constitution Act, 1982*, *supra* note 101, s 35. The Ktunaxa Nation also had outstanding land claims in the Qat’muk region at the time. It was, in theory, open to the Ktunaxa Nation to have included an Aboriginal Title claim in their challenge. A finding of Aboriginal Title would have given the Ktunaxa authority to refuse the development (subject to the Crown’s ability to infringe their title if they were able to prove justification to do so). On the jurisdictional qualities of title claims, see Slattery, “Constitutional Dimensions”, *supra* note 136. Commentators have speculated that the Ktunaxa Nation may have decided not to pursue a title claim in this litigation because of the prohibitive costs associated with proving title, and because the first Supreme Court of Canada case finding in favour of a title claimant (*Tsilhqot’in*) had not yet been decided. See Dwight Newman, “Implications of the *Ktunaxa Nation/Jumbo Valley* Case for Religious Freedom Jurisprudence” in Newman, ed, *supra* note 9, 313 at 313–14. Similarly, expense and burdensome doctrinal requirements may have motivated the framing of the claim in terms of duty to consult and accommodate rather than as a substantive rights claim arising from pre-contact practice. See Hamilton & Nichols, “Tin Ear”, *supra* note 126 at 748.

186 John Borrows critiques the *Ktunaxa Nation* decision as revealing “the Court’s own metaphysics” or “articles of faith” under which “recreation (skiing) and the making of money” takes priority over In-

that ʔaknumuʔtitit might bind ministerial authority¹⁸⁷ as it is that land or bears might themselves be owed constitutional protections that would limit statutorily conferred discretion.¹⁸⁸ The unstated outer limits of interpretation imposed by these unwritten constitutional shadow commitments are interlaced and mutually reinforcing. Together, they operate to reconfigure a conflict about Ktunaxa legal commitments to the more-than-human world into a conflict about competing human rights and interests. ʔaknumuʔtitit, described in the Qat'muk Declaration as "Law," is comprehensible to the Court only as "belief" or "practice," with earth, animals, and their associated spirits recast not as entities to whom legal duties are owed, but as mere "object[s] of beliefs."¹⁸⁹

The Court's ultimate conclusion that such "object[s] of beliefs" are not entitled to constitutional protection under section 2(a) is a final doctrinal insult, carving out an exception to the *Charter's* protection of sincerely held beliefs that seems tailor-made to exclude Indigenous peoples and their beliefs,

digenous spiritual commitments. Borrow's reflections on *metaphysics* might equally be cast in terms of the Court's unstated *constitutional* principles: the decision "discloses their devotion to a principle that assumes the Crown is pre-eminent." J Borrow, *Law's Indigenous Ethics*, *supra* note 133 at 80–83. On the relationship between law and religion in Borrow's own analysis, see *ibid* at 67–77. For an extension of the religious analogy to unwritten constitutional principles specifically, see Kislowicz, *supra* note 16.

187 On the Court's undefended presumption of ministerial authority over Ktunaxa land, see J Borrow, *Law's Indigenous Ethics*, *supra* note 133 at 81.

188 For proposals that such land and spiritual protections might have been effected through statutory law (rather than through constitutional commitments), see David Laidlaw, "Silencing the Qat'muk Grizzly Bear Spirit" (6 November 2017), online (blog): *ABLawg* <<https://www.ablawg.ca/2017/11/06/silencing-the-qatmuk-grizzly-bear-spirit/>> [<https://perma.cc/D3JR-QK3J>]; Brenda Heelan Powell, "The Qat'muk Grizzly Bear Spirit, the Jumbo Valley Ski Resort, and the Protection of Sacred Lands in New Zealand" (15 November 2017), online (blog): *Environmental Law Centre Blog* <<https://www.elc.ab.ca/qatmuk-grizzly-bear-spirit-jumbo-valley-ski-resort-protection-sacred-lands-new-zealand/>> [<https://perma.cc/3SAZ-NBZF>].

189 *Ktunaxa Nation SCC*, *supra* note 20 at para 71. This phrase "object of beliefs" creates an artificial level of generality around a carve-out from s 2(a) that is in fact particular to land-based spirituality. The concrete implications of the exemption were more explicit in the BCSC opinion, wherein the equivalent exclusion was described as relating to "otherwise lawful use of land": *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at paras 296, 299 [emphasis added]. Linguistically, this shift objectifies land; in terms of legal theory, the positioning of land as an "object of beliefs" is an act of mystification that conceals the interpretive choice to exclude a significant swath of Indigenous spiritual belief and practice from the scope of s 2(a) of the *Charter*. See e.g. Howard Kislowicz & Benjamin L Berger, "Religion, Public Law, and the Refuge of Formalism" (2022) 73 UNBLJ 67 at 84 (arguing that the Court's exclusion of "object of beliefs" from the protection of s 2(a) is "presented as a matter of abstract and structural logic when, in fact, it has a substantively disparate impact on Indigenous religion and spirituality"); Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History and Indigenous Religious Freedom" (2019) 88 SCLR (2d) 205 at 218; Jeremy Patzer & Kiera Ladner, "Charting Unknown Waters: Indigenous Rights and the *Charter* at Forty" (2022) 26:2 Rev Const Stud 15 at 32 (describing the exclusion of "object of beliefs" as "absurd casuistry").

bound as they often are to these living and life-giving “objects.”¹⁹⁰ Similarly, the Court’s conclusion that consultation and accommodation of protected practices were sufficient to allow the Minister to approve the project over the Ktunaxa Nation’s objections further underlines the shadow commitments that required the narrowing of the Ktunaxa’s legal position before the Canadian courts from that expressed in the Qat’muk Declaration. Under Canadian law, the Crown’s sovereignty is presumed;¹⁹¹ Indigenous sovereignty, even where obliquely acknowledged, remains subordinate;¹⁹² human interests prevail; and constitutional obligations towards more-than-human others are inconceivable.

And yet, while true, this portrait of a Court ruled by symbiotic shadow principles does not fully capture the polyvalent Constitution at work. The honour of the Crown gave rise in this case to enforced procedural obligations to engage with the Ktunaxa during the development of the resort project.¹⁹³ This explicit constitutional commitment to honourable dealings with Indigenous people meant that, in view of pending rights claims (distorted as they may have been from their origins in ʔaknumuʕtiit̓), the Ktunaxa had opportunities to build their arguments and coalitions inside and outside the courtroom. And ultimately, after losing their claim in court, the Ktunaxa Nation’s activism to protect Qat’muk and the bears within it succeeded in another forum, with state governments agreeing to provide funding and legal imprimatur to the creation of an “Indigenous Protected and Conserved Area.”¹⁹⁴ The ski resort’s permission to build was terminated under Canadian law, and the Ktunaxa Nation now works with public and private partners to maintain and protect Qat’muk in accordance with ʔaknumuʕtiit̓.¹⁹⁵ It is

190 See Morales, *supra* note 9 at 307 (describing the Court of Appeal’s approach in *Ktunaxa Nation*, subsequently followed by the SCC, as “an interpretation of section 2(a) that virtually excludes any aspect of spirituality or religion which would require the exclusion of land from development”). See also sources cited *supra* note 189.

191 Hamilton & Nichols, “Tin Ear”, *supra* note 126 at 731, n 10, 738 (observing the “non-justiciability of Crown sovereignty”); see also J Borrows, *Law’s Indigenous Ethics*, *supra* note 133 at 81.

192 Cf. Hamilton & Nichols, “Tin Ear”, *ibid* at 732, 749, 752 (noting that the current approach to the duty to consult and accommodate “places the Crown in a superior position vis-à-vis Aboriginal peoples” and creates a “hierarchical ordering of legal systems and peoples that has reduced Aboriginal claims to contingent ... rights”). Even in treaty or title cases in which Indigenous authority over land is recognized, that authority is subject to unilateral infringement by the Crown in honourable pursuit of a wide range of governmental objectives, including resource development. See Shin Imai, “Treaty Lands and Crown Obligations: The ‘Tracts’ Taken Up” (2001) 27:1 Queen’s LJ 1 at 18–19 (on the expanding list of government objectives that the Supreme Court has affirmed might justify infringements of s 35 rights).

193 *Ktunaxa Nation SCC*, *supra* note 20 at para 78.

194 See Sikka, *supra* note 181 at 120.

195 The Ktunaxa Nation notes in its public statement on the creation of the Indigenous Protected and Conserved Area that the arrangement “is distinguished by Indigenous creation and founded on the Indigenous relationship to land.” Ktunaxa Nation, “Jumbo Valley to remain wild through permanent

important not to overstate this political success, particularly as a matter of constitutional law. In jurisprudential terms, neither the inherent jurisdiction of the Ktunaxa Nation nor the associated legal obligations to the more-than-human world have been recognized under Canadian law. But it is also important not to understate the impact that the honour of the Crown, enforced at least in its procedural dimensions, played in shaping a material shift in governing authority over this land.

The Court's expressed commitment to the unwritten principle of the honour of the Crown is significant to this history inside and outside the courtroom. Indeed, it is possible to tell this story in terms of the canonical unwritten principles at work: the honour of the Crown and rule of law, working in symbiosis, creating meaningful opportunities for voice and participation, with democracy setting the terms of the statutory discretion by which state decision-makers were guided. And the fact that litigation defeat was followed by substantial negotiated achievement for the Ktunaxa Nation makes this account, perhaps, more palatable for those who share commitments to greater recognition of Indigenous sovereignty and more robust commitments to the more-than-human world. But this traditional framework of unwritten constitutionalism leaves so many important parts of the story untold and untellable. The Court's incapacity to receive the deeper sovereignty claims of the Ktunaxa can be described only as a failure of "minority protection"¹⁹⁶ — or a success of fealty to democracy and parliamentary sovereignty — with all available options accepting the Court's own account of its animating values. The durability, centrality, and force of the courts' subordination of Indigenous legal orders remains unspoken and unspeakable. So too does the symbiotic shadow commitment to the anthropocentric exploitation of earth and animals as a matter of non-reciprocal hierarchy. These shadow commitments that in fact reliably shape questions asked and answers given under the Canadian Constitution are not, on this traditional account, acknowledged as stable, core, and binding features of Canadian law; they are instead treated as something other than law, as part of a flawed world external to an unwritten Constitution that is permitted to maintain its veneer of "innocence."¹⁹⁷

retirement of development rights" (18 January 2020), online: *Our Trust* <<https://ourtrust.org/wp-content/uploads/downloads/Jumbo-Qatmuk-IPCA-MR-January-20-2020-final.pdf>> [<https://perma.cc/MEJ8-LJ9L>]. See also Sikka, *supra* note 181.

196 On the problematic casting of Indigenous rights as a matter of "race" or "minority protection," see Sonia Lawrence, "*R v Kapp*" (2018) 30:2 CJWL 268.

197 Eve Tuck & K Wayne Yang, "Decolonization is not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1.

The idea of the polyvalent constitution — embracing not only canonical unwritten principles, but also shadow commitments with equal durability, centrality, and force — lets us tangle more honestly with the deep constitutional currents animating the *Ktunaxa Nation* case and others. The unwritten constitutional principles of democracy, honour of the Crown, and minority (religious) protection are plainly at stake. Each principle was an acknowledged anchor for both administrative decision-making and judicial review,¹⁹⁸ and each echoed outside the courtroom when litigation defeat turned to negotiated success for the Ktunaxa Nation.¹⁹⁹ But it is also true that the legal position expressed in the Qat'muk Declaration was shrunk and thwarted by equally stable, core, and binding features of Canadian constitutional law — an anthropocentric exploitative posture toward the earth, and a subordinating posture toward Indigenous law and jurisdiction. The commitment of resources and energy required of the Ktunaxa to achieve the jurisdiction-like features of the Indigenous Protected and Conserved Area reflects the shadow Constitution's presumption of Crown sovereignty — as does the legal reality that the protected area is a provisional agreement, not a constitutionally protected title right (and that even recognized title rights may be overridden upon Crown proof of “justified limitation”).²⁰⁰

For those who seek to describe the operation of constitutional law, it is misleading to take the Court's self-image as an authoritative guide to the unwritten forces shaping constitutional jurisprudence. Where we find patterns that, although extra-textual, are stable, core, and binding features of the Constitution, we can and should name them. Where these truths are painful, enraging, embarrassing, ignored, or denied, the metaphor of the shadow can help us understand how they may nonetheless have shaped a constitutional jurisprudence with declared allegiance to more reputable principles.²⁰¹

This is not a prescription for apathy. Indeed, as the *Ktunaxa Nation* case shows, elements of the unwritten Constitution are given life by actors in the system who press their own interpretations of the good, and persuade others (inside and outside courtrooms) to see the Constitution through their eyes. Even “off-the-wall” interpretations, seemingly foreclosed by shadow or proclaimed elements of the unwritten Constitution, can, through advocacy and

198 See e.g. *Ktunaxa Nation SCC*, *supra* note 20 at paras 83 (per McLachlin CJ and Rowe J) and 140 (per Moldaver J, concurring).

199 Cf. Robert N Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88:5 Yale LJ 950.

200 See also J Borrows, “Durability”, *supra* note 121.

201 See Jung, *supra* note 14 at 110.

persistence, come to seem “on-the-wall” as the balance at the centre of the polyvalent Constitution shifts.²⁰²

VI. Hope, Activism, and the Shadow Constitution

Most existing work on Canada’s unwritten Constitution in relation to Indigenous sovereignty and human-earth relations fits roughly into the orthodox frame — either seeking to deploy existing canonical principles or advocating for the recognition of novel principles that ought to guide legal actors. Scholarship in this vein seeks to identify and promote unwritten constitutional elements that are presented as good and just, and to argue that decision-makers can and should be bound by these core, stable, and binding features of Canada’s Constitution.²⁰³ Where new principles are proposed, this scholarship emphasises progress where it can be found and *dicta* suggestive of hope for future changes. Lynda Collins, for example, urges recognition of a novel unwritten constitutional principle of “ecological sustainability,” pointing to various examples of “environmentally progressive *dicta*” from the Supreme Court of Canada to establish the principle’s foundations in Canadian law.²⁰⁴ In previous work, I too have urged recognition of an emergent constitutional animal protection value across a number of state jurisdic-

202 Jack M Balkin, “From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream” (4 June 2012), online: *The Atlantic* <<https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>> [https://perma.cc/C53Y-FWD2].

203 See Collins, “Pipelines”, *supra* note 3 at 1.

204 *Ibid* at 45. See also Lynda M Collins, “Constitutional Eco-Literacy in Canada: Environmental Rights and Obligations in the Canadian Constitution” (2022) 26:2 Rev Const Stud 227, 243–48; Collins & Sossin, *supra* note 54; Collins, “Longue Durée”, *supra* note 76. For related arguments, see Jean Leclair, “Invisibility, Wilful Blindness, and Impending Doom: The Future (if Any) of Canadian Federalism” in Carolyn Hughes Tuohy et al, eds, *Policy Transformation in Canada: Is the Past Prologue* (Toronto: University of Toronto Press, 2019) 106 (proposing “the protection of the nonhuman natural world and ... of future generations” as an unwritten constitutional principle); Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed (New York: Routledge, 2017) at 158–59 (“The relationship between human rights and the natural environment can be acknowledged in different ways, including a human right to a healthy environment, nature’s rights or a combination of human rights and responsibilities. Each way has its strengths and weaknesses, but they are not mutually exclusive and can be pursued simultaneously. What matters is a continued and intensified discourse about the ecological context that all human rights operate within”); Rakhyun E Kim & Klaus Bosselmann, “Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law” (2015) 24:2 RECIEL 194 at 205 (arguing for promoting a “new commitment to safeguarding the integrity of Earth’s life-support systems ... as a basic norm or *grundnorm* of international law”); Dustin W Klaudt, “Can Canada’s ‘Living Tree’ Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?” (2018) 31:3 J Envtl L & Prac 185 at 234, n 249 (“unwritten principles or values regarding the environment might be elevated to receive some form of constitutionalized status”).

tions, even where these jurisdictions have not adopted textual recognition of animal interests.²⁰⁵

In addition to such arguments in favour of the development of novel principles, others have urged the deployment of canonical principles to advance Indigenous sovereignty or protections for the more-than-human world. Again, in these works, the emphasis is generally on ways that the basic commitments of the constitutional state are (or can be) friendly to the interests of Indigenous sovereignty and the more-than-human world. Maneesha Deckha, for example, identifies the “rule of law” as a juridical vehicle for advancing the interests of animals, given this principle’s promise to restrain arbitrary or illegitimate exercises of power.²⁰⁶ Hamilton and Nichols suggest that the removal of the “colonial pillar” they identify in Canadian state law is supported by such canonical unwritten constitutional principles as the rule of law, federalism, and democracy.²⁰⁷ And, of course, there is a rich and extensive body of literature calling for interpretations of the canonical principle of the “honour of the Crown” that support Indigenous sovereignty.²⁰⁸ In each of these projects, the unwritten Constitution is called into service of Indigenous sovereignty or reconstructed relations with the more-than-human world. And in each, the unwritten Constitution emerges as a site of hope and as a tool for change, rather than as an anchor that entrenches worldviews and legal infrastructure inimical to their respective aims.

And yet, despite this difference in orientation toward unwritten principles, I do not see my descriptive account of the polyvalent Constitution (and its included recognition of disreputable shadow commitments) as hostile to these projects. Instead, it is my hope to acknowledge the depth of resistance that these transformative projects are destined to face — a fact that underlines rath-

205 Eisen, “Animals in the Constitutional State”, *supra* note 5.

206 Deckha, “Rule of Law”, *supra* note 13. See also John Adenitire, “The Rule of Law for All Sentient Animals” (2022) 35:1 Can JL & Jur 1; MB Rodriguez Ferrere, “Animal Welfare Underenforcement as a Rule of Law Problem” (2022) 12:11 Animals 1411; Dinesh Wadiwel, “Animals and the Concept of the Rule of Law” (Presentation at the 2024 Australasian Animal Law Teachers’ and Researchers’ Association Symposium, 28 November 2024) [unpublished]. Another vein of scholarship has explored ways that democratic principles might be deployed in service of animal interests. See e.g. Will Kymlicka & Sue Donaldson, “Animals and the Frontiers of Citizenship” (2014) 34:2 Oxford J Leg Stud 201.

207 Hamilton & Nichols, “Reconciliation and the Straitjacket”, *supra* note 16 at 247.

208 See e.g. Frank Cassidy & Robert L Bish, *Indian Government: Its Meaning in Practice* (Halifax: Institute for Research on Public Policy, 1991); David C Hawkes, *Aboriginal Self-Government: What Does It Mean?* (Kingston, ON: Institute of Intergovernmental Relations, 1985); Stacey, *supra* note 140 at 416; see also John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right” (2005) 38:2 UBC L Rev 285 at 311–12 (describing links drawn between Indigenous sovereignty and the canonical principle of minority protection).

er than undermines their importance. Indeed, even as the authors advancing such projects sometimes seem to adopt an orthodox posture that casts counter currents as spots-on-a-record, they also commonly articulate their projects in terms of the need for wholesale transformation, rather than tweaking or minor correction. In arguing for recognition of an unwritten constitutional principle of “ecological sustainability,” for example, Lynda Collins concedes a long history of exploitative environmental relations, beginning with “Canada’s founding documents,” which, she explains, “were drafted by political thinkers steeped in a colonial capitalist paradigm that viewed Canada’s environment as a treasure trove of resources and/or a wilderness in need of civilizing.”²⁰⁹ At times, this durable posture of exploitation emerges in Collins’s account as an aberration from the state’s true orientation: Canada has a “core mandate of environmental protection,” from which it has sometimes strayed “under the pressure of multiple distractions.”²¹⁰ At other moments, however, it is clear that Collins is deeply attentive to the centrality of this impulse toward anthropocentric exploitation within Canada’s constitutional order. Indeed, she describes her own proposed principle as an element of a “new paradigm,” justified by the imperative that “our legal orders need to be re-oriented.”²¹¹ Similarly, Nichols and Hamilton hopefully propose that the “colonial pillar” might be removed from Canada’s Constitution, with the pillars of legality and legitimacy remaining as key features of Canada’s constitutional architecture.²¹² Hamilton and Nichols, too, however, emphasize that a constitutional order stripped of colonial commitments would be *other* from the constitutional order Canada now has, requiring not only “remapping Canadian federalism” but also “re-building an operating constitutional order.”²¹³ In each case, the depth of the transformation advocated by these scholars is well described by a framework that acknowledges contest and disunity at the heart of the Canadian state. Acknowledging shadow commitments that are *descriptively* present at the core of the legal order, but *normatively* repugnant or contestable, illuminates the stakes of these projects and the depth of transformation for which they call.

Moreover, naming some stable, core, and binding features of the legal order as wrong or contestable illuminates deep value conflicts that might otherwise be left unnamed — breaking a silence which often favours the force and persistence of shadow commitments. Collins’s call for recognition of a constitutional principle of ecological sustainability, for example, has been contested

209 Collins, “Pipelines”, *supra* note 3 at 40.

210 *Ibid* at 35.

211 *Ibid* at 37.

212 Hamilton & Nichols, “Reconciliation and the Straitjacket”, *supra* note 16 at 447–53.

213 Hamilton & Nichols, “Tin Ear”, *supra* note 126 at 732, 752.

on the grounds that it impermissibly imports policy preferences into the project of constitutional interpretation: tongue in cheek, one commentator replies “[h]ow would the people who believe in environmental sustainability like it if those on the opposite side of the spectrum sought to impose a principle of ‘resource development’ in the Constitution, tying it to tenuous constitutional signals like the fact that the federal government has the power under s.91(2) to regulate trade and commerce? The question needs no answer.”²¹⁴ This rebuke of Collins’s project depends upon the assumption that all core commitments of the legal order must be equally deserving of interpretive solicitude — and that the work of constitutional praxis is somehow possible without debate over values. The framework of the shadow Constitution allows us to recognize that “resource development” (or what I have called a commitment to anthropocentric exploitation) *is in fact* a core commitment of the state, while also allowing for the argument that it *should be* repudiated and countered by principled commitments to ecological sustainability. The question of how extractive and sustainable commitments may relate to one another antagonistically within the Canadian state is not one that “needs no answer” — and leaving the question unasked and unanswered leaves our Constitution’s shadow commitments to operate unexamined. Leaving these commitments unexamined, moreover, feeds the false assumption that these *status quo* relations do not themselves depend upon value orientations (or “policy preference”) — a false assumption that has long been deployed by those opposing transformation of status hierarchies.²¹⁵

Recognizing persistent and pernicious hierarchies as *part of* Canada’s unwritten Constitution, alongside the Court’s proclaimed unwritten principles, simply acknowledges conflicts at the heart of the constitutional order that are already ongoing. Far from giving reason to shy away from these conflicts, naming and confronting the shadow Constitution shows the urgency of these conflicts, and brings them into daylight — removing the shadow’s capacity to masquerade as neutrality, non-law, or aberration. Such attention to the need for deep critique even in connection with the most hopeful practical advocacy

214 Mancini, *supra* note 64.

215 For influential challenges to law’s claimed neutrality as deployed in opposition to racial justice and feminist projects, see e.g. Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991); MacKinnon, *supra* note 163. Notably, the most oft-cited defence of neutrality in the US constitutional context, Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73:1 Harv L Rev 1, was penned as a critique of the Supreme Court of the United States’ finding that public school segregation on the basis of race violated the equal protection clause. For an analysis of this often-overlooked substantive context of Wechsler’s argument, see Pamela Karlan, “What Can *Brown* Do For You: Neutral Principles and the Struggle over the Equal Protection Clause” (2009) 58:6 Duke LJ 1049.

projects is already characteristic of scholarship and advocacy addressing the Canadian constitutional status of Indigenous sovereignty. Works at the intersection of hope and critique abound in this theoretical and advocacy space. John Borrows's influential analysis refuses the implication that critique forecloses hope, or hope critique. Instead, he proposes that "Canada is simultaneously a good and bad place with contested foundations, though severe power imbalances make it much better for some people from others."²¹⁶ "Darkness," he insists, "marks Canada's constitutional narrative"; and yet, equally, "this is not uniformly so," "nothing is inevitable," and "power can be turned to either better or worse purposes."²¹⁷ This is a vision of a polyvalent Constitution, with deep and abiding currents that run in many, sometimes opposing directions; in which symbiosis is just one of the many interactive relationships between deep commitments; and in which advocates may find both resources and obstacles within the same multi-faceted legal order.

VII. Conclusion

Who or what, then, is the more-than-human in Canada's constitutional order? The animals living in forests and in cages; the plants growing wild and in tilled fields; the mountains and lakes, both pristine and dying, are parts of Canada's legal and political community. The legal order's core, durable, and binding commitments respecting collective engagements with the more-than-human world are part the Constitution; and, when left unstated or implicit as they are in Canada, they can be detected and described in the language of the unwritten Constitution. But to tell the full story of Canada's unwritten Constitution we must move beyond the orthodox account of canonical unwritten principles shaping a just and internally coherent legal order. The full story must account for the Canadian state's shadow commitment to human-earth relations defined by exploitation, absent reciprocity, and justified through hierarchy of human over other. This commitment in turn intermingles with a shadow commitment regarding the diverse Indigenous legal orders operative within the claimed territorial jurisdiction of the Canadian state: in particular, that these legal orders are to be treated as subordinate to the presumed sovereignty of the Crown.

Many have pointed out the interlaced nature of projects of reconciliation between Indigenous and non-Indigenous people and reconciliation of our broader collectivities with the earth.²¹⁸ The recognition of shadow commit-

216 J Borrows, "Canada's Colonial Constitution", *supra* note 18 at 19.

217 *Ibid* at 38.

218 See e.g. Tully, *supra* note 106.

ments provides a language for articulating the deep constitutional transformations required to meaningfully address these challenges: that the deepest calls for change in these spheres are in fact calling not only for a shift in emphasis, but for a different constitutional arrangement; and that even more modest calls for change are made in the face of powerful constitutional countercurrents. The framework of a polyvalent constitution, including shadow commitments, moreover, disrupts orthodox narratives that posit obstacles to transformation in these spheres as sporadic or incidental to the political order — or that treat constitutionalism as a sphere of pretended neutrality in which value orientations need not be named or defended. The polyvalent Constitution allows us to make the “implicit” structure of the Constitution “explicit,” and so “in a Socratic spirit, call all of us to responsibility for the care and feeding of our legal concepts.”²¹⁹

Recognizing shadow commitments at the heart of a polyvalent constitutional order also underlines why projects of deep transformation may be necessary. It allows for an honest accounting of the fact that Canada’s most important justice traditions have been defined not only by stories of enlightened pursuit (as the Court argues of democracy, rule of law, and others) but also by more painful stories of denial (as I have suggested of Indigenous sovereignty and reciprocal human-earth relations). When the unwritten Constitution is recognized as a field of contest and argument, where power is allocated and losers may suffer, and where unwritten commitments run in many directions, the imperatives of constitutionalism shift. We are not, as constitutionalists, tasked with defending and adhering to a just order where the answers are reliably found in long practice; instead we are tasked with untangling and naming the many praxes that run through our constitutional story, and defending those we do pursue.

219 Email from Josh Nichols (19 October 2024) [communicated to author in response to an earlier draft of this article].

