

Histories that Bind:  
Doctrinal Productivity and Legal Governance in Canadian  
Aboriginal Law

by

Jeremy Patzer

A thesis submitted to the Faculty of Graduate and Postdoctoral Affairs in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in

Sociology

Carleton University  
Ottawa, Ontario

©2016, Jeremy Patzer

## **Abstract**

This work applies a sociological lens to juridical practice in order to illustrate the tendency of law to lag behind extra-juridical historical phenomena, and to examine how this has influenced both the occurrence of, and the nature of, moments of doctrinal productivity in Aboriginal law. In effect, historical practices of colonization in the common law world have more often than not outpaced the law which would sometimes be called upon to adjudicate their legitimacy. The result is that the juridical field has been caught in legal-normative binds and left to accommodate history through doctrinally creative means. Using other common law jurisdictions as a springboard for an examination of Aboriginal law in Canada, I argue that the judiciary has made use of the unacknowledged elasticity in the law to manage such dilemmas, and it has done so in a manner which presents this juridical work as fundamentally grounded and self-evident.

In Canada, a bind developed in the late twentieth century because the law's largely unsympathetic legal positivist approach to Aboriginal title and rights became socio-normatively anachronistic. Available jurisprudential adaptations for the resolution of this, however, were just as risk-laden as the bind itself. The jurisprudence presented as offering a new justice was thus also oriented toward managing risk. Two concepts that help conceptualize how that doctrinal productivity has allowed the juridical field to manage risk and navigate historical binds are *injusticiability*, the rendering of something unavailable for adjudication by articulating it as a political question rather than a legal question, and *incommensurability*, the inscribing of difference upon the Aboriginal legal

subject in order to accommodate exigent circumstances with novel forms of justice. With the aid of these techniques, the SCC has tempered rights and title by deducing for them inherent limitations and implicit overrides, and this in a fashion which preserves the juridical field's ability to maintain rights and title as objects of continuing legal governance. The profound ambivalence of contemporary Aboriginal law, however, is that rights and title *can* be won under the new jurisprudence—but only with the tacit acceptance of these limitations as the self-evident manifestations of justice.

## **Acknowledgements**

I would like to express my gratitude to my supervisory committee, consisting of Alan Hunt, William Walters, and Jane Dickson, for having extended to me the considerable autonomy I assumed in pursuing this research, while still always according their time and consideration when I sought it.

My thanks also goes to my family, above, alongside, and below: Ed, Arlene, Tori, Noah, and Elise. Without their support and patience this project would not have been possible.

My doctoral endeavours have been generously supported by the Joseph-Armand Bombardier CGS Doctoral Scholarship and the Michael Smith Foreign Study Supplement granted by the Social Science and Humanities Research Council of Canada, as well as various doctoral scholarships contributed by the Faculty of Graduate and Postdoctoral Affairs and the Department of Sociology and Anthropology at Carleton University.

## Table of Contents

Abstract.....	i
Acknowledgements .....	iii
Table of Contents .....	iv
Preface: A Duck, and Other Motivations .....	1
1. The Lag and Latency of Law .....	6
Terra Nullius and Australia's History Wars.....	7
Whither Terra Nullius?.....	20
The Historical Bind and Doctrinal Productivity .....	32
2. An Unsettling Settlement.....	41
Early Relationships.....	44
After the Seven Years' War.....	55
Treaty-Making in an Age of Shifting Relationships .....	66
A Stable Foundation? .....	82
In Retrospect .....	97
3. Early Jurisprudence .....	102
The Marshall Court and the Invention of Indian Title .....	104
The <i>St. Catherine's Milling</i> Case: Indian Title Comes to Canada .....	133
4. The Legal Positivist Era .....	147
Legislation and the Indian Civilization Program.....	152
Case Law and Court Action.....	162
Treaties: <i>R. v. Syliboy</i> .....	178
Self-Government and Sovereignty: <i>Logan v. Styres</i> .....	187
Aboriginal Law in the Legal Positivist Era .....	193
5. The New Era of Inherence .....	198
Treaty Jurisprudence at Mid-Century .....	202
The Modern Principles of Treaty Jurisprudence.....	207
The Installation of Inherence: <i>Calder, The Constitution Act, 1982, and Sparrow</i> .....	217
Reconciling the Law's Irreconcilabilities.....	238
6. Taming Inherence and the Constitution .....	242
Another Look at the Installation of Inherence.....	243
Objects of Continuing Legal Governance: Extinguishment and Infringement .....	274
The Duty to Consult: Under the New Legal Ethics, a Profound Ambivalence .....	292

<b>The Managerial Ethic</b>	311
<b>7. The Aboriginal Cultural-Legal Subject</b>	314
<b>Creating Cultural Rights</b>	317
<b>The Casuistry of Culture: The Arbitrary, the Specific, and the Indeterminate</b>	337
<b>Culture in Title and Treaty Jurisprudence</b>	361
<b>Looking Back at Culture</b>	371
<b>8. Aboriginality and the Symbolic Order of the Liberal Settler State</b>	376
<i>Horse and Badger: Private Property and Treaty Rights</i>	377
<b>Commercial Aboriginal Rights</b>	384
<b>Commercial Treaty Rights</b>	402
<b>Liberal State, Illiberal Doctrines</b>	416
<b>9. The Moral Authority of the Dispossessed</b>	419
<b>Bibliography</b>	434
<b>Legislation</b>	434
<b>Jurisprudence</b>	435
<b>Works Cited</b>	440

## Preface: A Duck, and Other Motivations

While there are more than eighty cases which figure in this critical history of Canadian Aboriginal law, there is at least one pivotal case which goes uncited. In our youth, my cousin and I were charged with the illegal hunting of a duck on one of the lakes adjacent to our family farm. The farm is on the outskirts of Lake Manitoba First Nation, in the western portion of the Interlake region of Manitoba, and has been for all my life a joint venture between my grandparents, parents, uncles, and aunts. It still is for those still living.

Spences, Monkmans, Pottingers, and Dumas—the maternal side of my family has roots that run deep in the region, reaching back to before Manitoba or Canada were created. Each of these family lines had signed Métis scrip in the nineteenth century, after Manitoba was brought into existence through negotiations between the Red River Métis and the Crown in right of the Dominion of Canada. (As per Nicole St-Onge’s suggestion, however, we would do well to be mindful of the diversity, complexity, and fluidity of Métis identity and history. Many of the Métis in the region of Lake Manitoba and Lake Winnipegosis had close ties to the Saulteaux or Cree populations and often shared with them both language and lifestyle<sup>1</sup>—to this I would even add a number of shared surnames and portions of family trees. Our Spences and Monkmans, for their part, were speakers of Saulteaux, or Anishinaabemowin.)

The region is somewhat northern for farming, boasting at times more forest, lake, or wetlands than open prairie or meadow. No cash crops are sown, it is mostly wild hay

---

<sup>1</sup> Nicole St-Onge, “Variations in Red River: The Traders and Freemen Métis of Saint-Laurent, Manitoba,” *Canadian Ethnic Studies* 24, no. 2 (1992).

and grasses harvested in order to sustain a herd of cattle over the winters. And even for those First Nations and Métis who sought to make a go of it farming in what was a relatively isolated area, it was normal for families to continue to also rely on game and fish for full sustenance. For generations, however, so many families *who often shared surnames and family lineage* were divided along a seemingly arbitrary line: those whose direct ancestor found themselves on a band roll through treaty were able to hunt, trap, and fish as they needed, while those whose ancestor had later signed Métis scrip were not. A number of years after my cousin and I had been charged, then, it was of great interest to me when the Supreme Court of Canada rendered its judgment in *R. v. Powley*.<sup>2</sup> For the first time, the Court recognized that a Métis community in Canada should have the constitutional right to hunt for its own sustenance, and put in place the criteria and method by which such rights determinations would be made for future litigation concerning other Métis communities.

Despite a number of legal victories such as this in the contemporary era, however, the purportedly revolutionary new forms of justice offered to Indigenous peoples by the judiciary require more critical scrutiny. In an era self-consciously styled by courts and governments alike as one of reconciliation, one of the most fundamental questions underlying my doctoral project might be, *what is justice after colonial dispossession?* Put another way, to what extent is the juridical field willing to problematize colonial history, and how does it go about finding solutions to those problems? In short, what I offer is an examination of the juridical practices employed to resolve conflicts between Indigenous peoples and the state in the wake of colonial dispossession, with particular attention paid

---

<sup>2</sup> 2003 SCC 43, [2003] 2 S.C.R. 207 [*Powley*].

to how the juridical field has faced compromising binds and, in response, has creatively ushered in conciliatory change—but change which is paced, managed, limited, unwieldy, and deeply ambivalent. I will expand upon this synopsis in more detail in my introductory chapter.

My underlying motivations for performing a sociologically informed analysis of Aboriginal law are several. At base, however, I seek to dethrone the law. By this, I mean to challenge the juridical field’s pretension to being the sole source of unassailable expert knowledge for framing colonial conflicts and determining their resolution. In doing so, I continue the critical work of denaturalizing, or “making strange,” the forms of legal resolution imposed by the juridical field and of calling into question its efforts at disqualifying non-juridical perspectives and ways of knowing.<sup>3</sup> In this way I want to highlight the forms of limitation, risk management, and ongoing dispossession which are embedded in the new justice, and which are insufficiently problematized by many observers.

Before beginning the analysis in earnest, there are two key points I would like to leave the reader with, in order to clarify how this work might be situated. Firstly, it is in the very nature of this type of work—namely, pushing for a corrective reappraisal of an important phenomenon or institution—that one is at risk of being perceived as overcompensating. In other words, is the kinder, gentler, and more conciliatory jurisprudence of contemporary Aboriginal law really *that bad* for Indigenous groups in Canada? To be clear, I present here a critical examination of that which is problematic in

---

<sup>3</sup> This sociological work of denaturalizing Western forms of justice—in essence, recognizing these casuistic bodies of expertise as forms of metaphysics, or that “the emperor has no clothes”—involves making a critical perceptual leap which generations of Indigenous advocates have already made.

the juridical practices of justice in the wake of colonial dispossession, but I do so with a full appreciation of the fact that, in the region of my family’s farm and a number of other regions in Canada, Métis harvester such as I now benefit from rights to hunt, fish, and gather. This is why I preserve and emphasize a sense of the profound *ambivalence* of contemporary Aboriginal law for Indigenous claimants.

Secondly, some might question why I do not present more elaborate discussions of Indigenous notions of justice, Indigenous legal traditions, Indigenous cultures, or even Indigenous peoples’ perspectives on their own cultural practices. My most immediate response is that this, simply put, is not the area to which I would like to direct my critical scrutiny. With this doctoral research, I call into question the workings of the common law, an English legal tradition inherited by the Canadian settler state. I present a critical sociological examination of the practices of Western legal justice in a settler state context, precisely because the juridical field possesses a near monopoly on discursively framing and resolving disputes between the colonizer and the colonized. A further response, the reasons for which will become abundantly clear in the later chapters, is that I purposely seek to avoid the kinds of “culture talk” about Indigenous peoples which have become so prevalent in contemporary settler states such as Canada and Australia. Indigenous subjectivities—what it is, and what it means, to be Métis, Inuit, or Anishinaabe, for example—are increasingly imperiled in Western settler states by the majority society’s tendency to romanticize Indigenous cultures and tradition while simultaneously finding contemporary, existing Indigenous people wanting in comparison. As Elizabeth Povinelli has observed in her research on Australia, Indigenous people are “called on to perform an authentic difference in exchange for the good feelings of the

nation and the reparative legislation of the state.”<sup>4</sup> But the fact of the matter is that the claims of the colonized against dispossession are valid regardless of the cultural specifics of the group in question, in the past or in the present. My perspective is that Indigenous peoples must intensify their efforts to countermand the creeping power of subjectification in settler society, and recognizing that claims against colonization and dispossession are not contingent on culture talk or on the ability to embody an ideal of “Indigeneity” is a key premise of this. With that said, I now turn to another key aspect in which the colonial experience in Australia can be illuminating for the North American context.

---

<sup>4</sup> Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002), 6.

# 1. The Lag and Latency of Law

In 1992, the High Court of Australia's decision in *Mabo v. Queensland (No 2)* purportedly heeded the call for a revolutionary new justice for Australia's Indigenous inhabitants.<sup>1</sup> For the first time in Australian case law, a form of Aboriginal title over land was recognized for one of its colonized peoples.<sup>2</sup> The majority justices of the High Court of Australia recognized that the Meriam people "are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer" in the Torres Strait.<sup>3</sup> To be sure, the *Mabo* decision was ground-breaking in the sense that Australian courts had not previously recognized any Aboriginal group's title to its traditional lands, despite the fact that the country had been settled by the British without the Crown negotiating land cession or land sharing treaties with its original inhabitants.<sup>4</sup> Much of the published fanfare, however, characterized the *Mabo* decision as dismantling the two century reign of *terra nullius*, thought of by many as a justificatory legal principle that provided the legal framework to allow the colonizing British to assume sovereignty and possession of already inhabited lands through simple settlement. Indeed, the *Mabo* decision itself even makes reference to the concept of *terra nullius*. A complicating factor for these legal

---

<sup>1</sup> [1992] HCA 23, 175 C.L.R. 1 [*Mabo* (No 2)].

<sup>2</sup> The reader may have already noticed that I use the term Indigenous and Aboriginal interchangeably when describing those groups colonized and dispossessed within former British colonies such as Australia, Canada, and the United States. There is generally a distinction, however, when employing these terms as adjectives to describe types of law. I offer in this work a critique of *Aboriginal law*, a body of common law jurisprudence which engages with and purports to resolve the controversies and conflicts that arise between colonizer and the colonized in the settler state. Indigenous law, on the other hand, is often used to refer to customs, institutions, and systems of regulation within Indigenous societies which are analogous in function to the Western concept of law yet culturally distinct in their specific manifestations.

<sup>3</sup> *Ibid.*, at para 97.

<sup>4</sup> However, it should be noted, and will be discussed below, that no title claims were directly litigated by an Aboriginal plaintiff until the 1970s. The earlier history of Aboriginal rights and title jurisprudence in former British colonies contains numerous examples of the legal-political fate of Aboriginal peoples being radically altered by the *obiter dicta* and *rationes decidendi* of someone else's litigation.

histories, however, as Richard Bartlett states rather succinctly, is that “*terra nullius* is not a concept of the common law, and it had never been referred to in any case prior to *Mabo* as justifying a denial of native title.”<sup>5</sup> If this is the case, and *it is*, a number of questions might come to mind, foremost amongst them: how did the High Court of Australia come to “dismantle” *terra nullius* if it was not a concept that existed in its legal tradition? And, even more fundamental, how did Australia come to be settled by Europeans if the legal framework credited with underwriting colonization was not actually in force?

For a work that is meant to centre on the evolution of Aboriginal rights, title, and treaty law in Canada, beginning with an examination of two centuries of Australian legal history might seem counterintuitive—but I do so because of its instructive potential. As with the description of *terra nullius* given above, there is a tendency to think of such legal concepts, and indeed the law itself, as an always fully formed and pre-existing framework which has framed, overseen, and legitimated colonization and which thereby offers a full explanation for the state of contemporary colonial legal-politics. Coming to terms with the fact that the concept of *terra nullius* did not exist—or, at least, that it did not exist in the way many have been led to assume it existed—is therefore helpful in recalibrating our view of the law and how it has operated through centuries of colonization.

## **Terra Nullius and Australia’s History Wars**

Indeed, the concept of *terra nullius* has been vilified extensively, and this is particularly so in the Australian context. For Stuart Banner, *terra nullius* is “a basic and well-known fact in Australian history.” Not shying away from the categorical, Banner claims that

---

<sup>5</sup> Richard Bartlett, *The Mabo Decision* (Sydney: Butterworths, 1993), ix.

“The British treated Australia as terra nullius—as unowned land. Under British colonial law, Aboriginal Australians had no property rights in the land, and colonization accordingly vested ownership of the entire continent in the British government. The doctrine of terra nullius remained the law in Australia throughout the colonial period, and indeed right up to 1992.”<sup>6</sup>

As alluded to above, critical histories that reify terra nullius to this extent and invoke it as the key to explaining the legal dimensions of colonization encounter certain difficulties. Primarily, any notion that there was a *pre-existing legal doctrine* permitting the assumption of sovereignty over lands inhabited by Indigenous peoples through simple settlement is not without its challenges. In fact, the explorer Captain James Cook, prior to a first voyage to the Pacific Ocean that would bring him to circumnavigate New Zealand and “discover” the eastern coastline of Australia for Britain, was specifically instructed to respect the title of any local Indigenous inhabitants. Cook had, in a sense, two masters. His voyage was commissioned by King George III, and its primary stated object was to transport scientific observers to the Pacific in order to observe the 1769 transit of Venus across the sun. Cook received two sets of instructions: one from the Royal Society, and the other—given in secret—from the British Admiralty. His instructions concerning the transit of Venus mission, from James Douglas, Earl of Morton and president of the Royal Society, directed him as follows insofar as Indigenous inhabitants were concerned:

To exercise the utmost patience and forbearance with respect to the Natives of the several Lands where the Ship may touch.

---

<sup>6</sup> Stuart Banner, “Why Terra Nullius? Anthropology and Property Law in Early Australia,” *Law and History Review* 23, no. 1 (2005): 95.

To check the petulance of the Sailors, and restrain the wanton use of Fire Arms.

To have it still in view that shedding the blood of those people is a crime of the highest nature:—They are human creatures, the work of the same omnipotent Author, equally under his care with the most polished European; perhaps being less offensive, more entitled to his favor.

They are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit.

No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent.

Conquest over such people can give no just title; because they could never be the Aggressors.<sup>7</sup>

It was after reaching Tahiti and observing the transit of Venus that Cook continued exploring to the south and then west. The government had funded his trip and they wanted Cook to find the unknown but conjectured southern continent.<sup>8</sup> In Cook's secret instruction book, the Admiralty Commissioners of the British Admiralty indicated the following concerning possible encounters with Indigenous inhabitants:

You are likewise to observe the genius, temper, disposition and number of the natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them, making them presents of such trifles as they may value, inviting them to traffick, and shewing them every kind of civility and

---

<sup>7</sup> J.C. Beaglehole, ed., *The Journals of Captain James Cook on His Voyages of Discovery: The Voyage of the Endeavour, 1768-1771* (London: Cambridge University Press, 1955), 514.

<sup>8</sup> Banner, "Why Terra Nullius?", 97.

regard; taking care however not to suffer yourself to be surprized by them, but to be always on your guard against any accident.

You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.<sup>9</sup>

In short, though they had starkly differing objectives in mind for Cook's voyage, both sets of instructions either acknowledge Indigenous inhabitants as legal possessors of the land upon which they lived or consent as the method through which inhabited territory should be acquired.

None of this is to say, however, that the concept of terra nullius is complete myth. At its origins, the legal concept of terra nullius and the doctrine of its application were real, but perhaps more narrow than most would assume. The first challenge is that terra nullius is not a concept of the common law of England. Under the ancient Roman doctrine of “*occupatio*,” an object that was “*res nullius*,” or ownerless, and that was susceptible to being owned privately, could be taken as property by the first person to take possession of it. “At international law in post-Renaissance Europe,” according to David Ritter, “this doctrine was conveniently and analogously applied to the acquisition of territory by states. Territory that was ‘*res nullius*’ could be lawfully acquired by a state through simple occupation and was described to that effect as ‘*terra nullius*.’”<sup>10</sup> Thus, to be clear, terra nullius applied specifically to lands that were quite literally unoccupied.

---

<sup>9</sup> J.M. Bennet and Alex C. Castles eds., *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Sydney: The Law Book Company, 1979), 253–254.

<sup>10</sup> David Ritter, “The ‘Rejection of Terra Nullius’ in *Mabo*: A Critical Analysis,” *Sydney Law Review* 18, no. 1 (1996): 7 (emphasis in original).

While the concept of terra nullius is not of the English common law, the latter does inherit principles from these sources to produce a common law analogue. William Blackstone, the influential eighteenth century jurist, asserted in his seminal *Commentaries on the Laws of England* that “occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property.”<sup>11</sup> Natural reason suggested, according to Blackstone, “that he who could first declare his intention of appropriating any thing to his own use; and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognised by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur.*”<sup>12</sup> Extended to political territory, the common law equivalent was the concept of colonial acquisition *by settlement*, in contradistinction to conquest or cession. While Blackstone recognized that the empire’s distant colonies could be acquired by any of these three means, claiming a colony by right of simple occupancy (or settlement) could only be done “by finding them *desert* and uncultivated, and peopling them from the mother-country.”<sup>13</sup> For those who would read Blackstone’s use of the term “uncultivated” as perhaps justifying the appropriation of territory inhabited by hunter-gatherers through simple settlement, only several lines later he explicitly uses the term “uninhabited country” to once again refer to lands that could be acquired by this means, and even goes on to claim that England’s

---

<sup>11</sup> William Blackstone, *Commentaries on the Laws of England* (1765-1769), Book 2 (Philadelphia: J.B. Lippincott Company, 1893), 2:257.

<sup>12</sup> Ibid. “That which belongs to no one, is by natural reason granted to the occupant” (emphasis in original).

<sup>13</sup> William Blackstone, *Commentaries on the Laws of England* (1765-1769), Book 1 (Philadelphia: J.B. Lippincott Company, 1893), 1:106 (emphasis mine).

American plantations belong principally to the conquered and ceded categories of acquisition.<sup>14</sup>

In the nineteenth century, the common law distinction between settled, conquered, and ceded colonies became a point of law that would be seen to have consequences for Aboriginal title in Australia. As with so many early and influential decisions, the 1889 case of *Cooper v. Stuart* concerned litigants that were not Aboriginal.<sup>15</sup> In 1823, the Governor of the colony of New South Wales made a land grant of 1,400 acres to William Hutchinson with the condition that, in the future, the Crown would be able to acquire timber fit for naval purposes, land for one or more highways, and up to ten acres for other public purposes. In 1882, the then governor of the colony gave notice of the repossession of ten acres of the original 1,400 to be used for a public park. William Cooper, the successor in title to Hutchinson, claimed that the original reservation on the grant should be invalid based on the common law's rule against perpetuities—or, stated otherwise, that such a condition could not be justly applied in perpetuity because to grant property is to relinquish control of it. Colonial Secretary Alexander Stuart, the defendant for the case as it was being heard in the late nineteenth century, argued that the law against perpetuities

---

<sup>14</sup> Ibid., 107. Relatedly, Blackstone shows himself to be at a bit of a loss in determining a just basis in natural law for the conquering of Indigenous lands in the New World: "Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives, (with what natural justice I shall not at present inquire,) or by treaties." Ibid., 107.

Later, in Book 2, Blackstone outlines a broad historical progression of humanity from nomadic to agrarian societies, and then the development of a right of migration and settlement of new lands as mother countries became overpopulated and lands were taken up. Here again he suggests that there is no just basis in natural law to seize lands already peopled: "And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind." *Commentaries*, Book 2, 7.

<sup>15</sup> *Cooper v. Stuart* (1889), 14 App Cas 286.

was not part of the law of New South Wales in 1823, thereby rendering the former governor's condition on the grant actionable. As the case climbed to the highest court for the colony—the Judicial Committee of the Privy Council (JCPC) in London—the point of law at issue became when and to what extent the laws of England were received by the colony of New South Wales. Underlying this was the question of the classification of the colony, for even in the previous century Blackstone had asserted that English law was immediately in force in a settled colony. As for conquered or ceded countries, however, because there would be original inhabitants “that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain...”<sup>16</sup> Yet, with neither discussion nor direct mention of the continent’s original inhabitants, the JCPC affirmed that New South Wales was a *settled* colony whose new inhabitants brought with them English law on their first arrival. Indeed, the decision, delivered by Lord Watson, abandons the reader to inference insofar as Aboriginal Australians are concerned with its oblique claim that “there is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory *practically unoccupied, without settled inhabitants or settled law*, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.”<sup>17</sup> Lord Watson goes on to state that “there was no land law or tenure existing in the Colony at the time of its annexation to the Crown...”<sup>18</sup>

---

<sup>16</sup> Blackstone, *Commentaries*, Book 1, 107.

<sup>17</sup> *Cooper v. Stuart*, at 291 (emphasis mine). Many contemporary authors would no doubt challenge Lord Watson’s contention that Britain’s annexation of the Australian continent was “peaceful.” See, for example, Henry Reynolds, *Why Weren’t We Told?* (Ringwood, Australia: Penguin, 2000).

<sup>18</sup> *Cooper v. Stuart*, at 292.

The JCPC did not find in favour of the landowner, William Cooper, however. Rather, it cites a caveat from Blackstone that the immediate import of English law comes with “very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony...”<sup>19</sup> In the estimation of the JCPC, the impossibility of foreseeing what lands would be required for public use before the arrival of the bulk of immigrants who would one day constitute that public meant that the importation of the rule against perpetuities would not have been at all suitable to the condition of the infant colony of New South Wales in 1823. New South Wales was able to retain its ten acre public park.

To clarify, there were earlier lower court decisions which asserted that New South Wales was a settled colony.<sup>20</sup> But *Cooper v. Stuart* is remarkable in Australian case law in that it is a decision of the highest court (at that time) that stands in contrast to so many instances of policy, practice, and case law of the same colonial power that had successfully spread over so much of North America as well as into a number of other continents. Yet its desire not to speak directly of Aboriginal Australians amounts to an overwhelmingly awkward silence that speaks volumes. Aboriginal title not even being the central question at issue in the case, it “appeared to have been blown away by a sidewind, without thought.”<sup>21</sup>

---

<sup>19</sup> Blackstone, *Commentaries*, Book 1, 107.

<sup>20</sup> See Merete Borch, “Rethinking the Origins of Terra Nullius,” *Australian Historical Studies* 32, no.117 (2001): 236-237; Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Annandale, NSW: The Federation Press, 1996), 2-4; Bruce Kercher, “Native Title in the Shadows: The Origin of the Myth of *Terra Nullius* in Early New South Wales Courts,” in *Colonialism and the Modern World: Selected Studies*, eds. Gregory Blue, Martin Bunton, and Ralph Croizier (Armonk, NY: M.E. Sharpe, 2002), 100-119.

<sup>21</sup> Kercher, “Native Title in the Shadows,” 101.

It was not until 1971, with the case of *Milirrpum v. Nabalco Pty. Ltd.*,<sup>22</sup> that the question of Aboriginal Australians having legally enforceable rights to their own lands was entertained directly—although by a single trial judge in a territorial court. Aboriginal litigants from the Gove Peninsula in Arnhem Land sued both the Commonwealth of Australia and the Nabalco mining company after the former had leased mineral rights for the area to the latter. Tensions had been high through the late 1950s and 1960s due to prospecting and mining interests in a region which formed one of the largest Aboriginal reserves in Australia. In 1963, after learning of the leases, the Yolngu people of the Gove Peninsula presented a petition framed by traditional painted bark to the Australian House of Representatives. The Australian government struck a committee, which ultimately recommended a compensation scheme for the Yolngu, but even those recommendations for compensation were ignored as the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968*<sup>23</sup> was unilaterally enacted and the area of interest was excised from the reserve. Challenging these developments in the Supreme Court of the Northern Territory, the plaintiffs "contended, as 'the doctrine of communal native title', that at common law the rights under native law or custom of native communities to land within territory acquired by the Crown... were rights which persisted and must be respected by the Crown itself and by its colonizing subjects unless and until they were validly terminated."<sup>24</sup> According to David Ritter, Justice Richard Blackburn faced a conundrum in that "in terms of domestic Australian jurisprudence, he was adjudicating in a near vacuum. Although the stark realities of Australian history demonstrated that, in practice,

---

<sup>22</sup> *Milirrpum v. Nabalco Pty. Ltd.*, (1971) 17 F.L.R. 141 (N.T.S.C.) [*Milirrpum*]. This case is also often referred to as the *Gove Land Rights* case.

<sup>23</sup> *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (N.T.).

<sup>24</sup> *Milirrpum*, at 142.

Aboriginal land rights had not been recognised, there was no judicial authority of any sort that provided a doctrinal explanation for why there had been no such recognition.”<sup>25</sup> Put another way, Ritter admits that the Australian colonies were classified as settled colonies, and “Aboriginal people were apparently treated as having no common law right to their traditional lands,” but “there was no judicial decision that created a nexus between the former legal proposition and the latter historical fact. That is, no early Australian or English case ever stated that because Australia was ‘*terra nullius*’ or ‘desert and uncultivated’, Aboriginal people possessed no common law right to their tribal lands.”<sup>26</sup>

Legal vacuum or not, Blackburn found against the Yolngu plaintiffs. Among his many reasons, he stated that the Yolngu had not established, on a balance of probabilities, that their ancestral predecessors had “the same links to the same areas of land as those claimed by the natives.”<sup>27</sup> In addition, he determined that the “doctrine of communal native title contended for by the natives did not form, and never had formed, part of the law of any part of Australia. Such a doctrine has no place in a settled colony except under express statutory provisions.”<sup>28</sup> In other words, according to this latter assertion, the only Aboriginal land rights that would exist in Australia are those legislated and thus expressly created by the government—and what had seemed a quiet and questionable side effect of the *Cooper* decision had now become articulated law one century later. And after two centuries, the continuing disregard for the Aboriginal possession of land in Australia was taking on Orwellian proportions, but the late twentieth century zeitgeist was perhaps also becoming increasingly uncomfortable with it. Justice Blackburn penned a confidential

---

<sup>25</sup> Ritter, “Rejection of Terra Nullius,” 13.

<sup>26</sup> Ibid., 9.

<sup>27</sup> *Milirrpum*, at 142.

<sup>28</sup> Ibid., at 143.

memorandum to both the government and the opposition of the day pressing the need for a system of Aboriginal land rights, and concluded his judgment for *Milirrpum* with the awkwardly understated admission that “I cannot help being specially conscious that for the plaintiffs it is a matter in which their personal feelings are involved.”<sup>29</sup> The government set up the *Aboriginal Land Rights Commission*, also known as the *Woodward Royal Commission*, and eventually passed the 1976 *Aboriginal Land Rights Act*,<sup>30</sup> agreeing to hear title claims from Aboriginal groups in the Northern Territory who could prove historical ties to vacant Crown land within the territory. Applying only to vacant Crown land within the one remote and sparsely populated territory within the Commonwealth of Australia, however, this minor recompense still left much of the country’s Aboriginal peoples without recognition of their possession of traditional lands.

Though this is only a cursory outline, it is within the context of this Australian legal history that, in 1992, the High Court of Australia pronounced somewhat fervently in favour of the Torres Strait islanders in *Mabo (No 2)*. Six out of seven justices had decided, at that moment, that the Australian common law “recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in accordance with their laws or customs, to their traditional lands...”<sup>31</sup> But therein lies the rub: while the *Milirrpum* decision denied that the Yolngu possessed any form of title over their traditional lands, and the later *Mabo* decision does make use of the term “terra nullius” in its critique of Australia’s historical dispossession of Aboriginal peoples, Bartlett’s and Ritter’s claims that no decision prior to *Mabo* has

---

<sup>29</sup> Ibid., at 293.

<sup>30</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (N.T.)

<sup>31</sup> *Mabo (No 2)*, at para. 2.

explicitly referenced terra nullius as justifying a denial of Aboriginal title still stands.<sup>32</sup>

This then begs a number of questions, chief among them: with James Cook's instructions concerning Aboriginal land rights and the need for consent, how did it even happen that Australia came to be settled by Europeans without the benefit of land-cession or land-sharing agreements?

Indeed, in his journals, Cook does report to have taken "possession" of the east coast of what is now Australia and the islands off the coast of contemporary Queensland.<sup>33</sup> The English name of the island at which he did this is now known as Possession Island. Historians are apt to speculate as to why in Australia colonization continued on without even the pretence of Aboriginal consent. Stuart Banner, for his part, puts forth his arguments in some detail. Banner points out that in the reports from James Cook and Joseph Banks, the naturalist who accompanied Cook on his voyage, Australia is portrayed as a continent with an unparalleled sparseness of population.<sup>34</sup> Aboriginal Australians were also noted as being less technologically advanced than other Indigenous peoples that the British had encountered,<sup>35</sup> and both Cook and Banks reassured the British government that the Aborigines could offer up little resistance to the occupation of the continent. More importantly, it would seem, British government interests were such that they broached this question with the explorers.<sup>36</sup> Banner also notes the early observations concerning the Aborigines' lack of interest in British wares, with Banks concluding that the impossibility of trade would preclude being able to purchase land

---

<sup>32</sup> Bartlett, *The Mabo Decision*, ix; Ritter, "Rejection of Terra Nullius," 9.

<sup>33</sup> Beaglehole, *Journals of Captain James Cook, 1768-1771*, 387-388.

<sup>34</sup> Ibid., 100.

<sup>35</sup> Ibid., 100.

<sup>36</sup> Ibid., 103.

from them.<sup>37</sup> Lastly, and most deplorable, even after the empire had the benefit of meeting culturally distinct Indigenous populations the world over, “there was something close to a consensus among the early British residents of Australia that the Aborigines were the least civilized human beings they had ever seen—as Cunningham put it, they were ‘at the very zero of civilization.’”<sup>38</sup> These are all possible factors contributing to the dispossession of Aboriginal Australians. Yet how incontrovertible much of this information was, even at that time, is open to question. According to Bruce Kercher, “soon after, the falsity of the factual assumptions underlying *terra nullius* became apparent to anyone who cared to notice. Colonists knew that the land around Sydney was not sparsely populated, that there were clear boundaries between native groups, and that fixed rights went with their land. They also knew some Aborigines fought to protect their land.”<sup>39</sup>

Historians may debate, then, what factors were at play in guiding Australia down its particular historical path. But more so than the motives and mindsets of explorers and colonial administrators, it is the law itself that is the object of my study, and the most edifying sociological analysis of Aboriginal law begins with extra-juridical history *as a given*. In other words, rather than ask *why*, I begin with the simple premise that Europeans *did* settle the Australian continent—with neither the benefit of land cession treaties, land sharing treaties, nor even a pre-existing legal doctrine that would legitimate (for the purposes of the common law) the establishment of the colonies—and examine the responses of the juridical field to the complexities that arise from this.

---

<sup>37</sup> Ibid., 103.

<sup>38</sup> Ibid., 110.

<sup>39</sup> Kercher, “Native Title in the Shadows,” 102 (emphasis in original).

## Whither Terra Nullius?

My reason for a brief survey of the settlement of Australia is that its remarkable legal history—though still somewhat unique—has an underlying commonality with other common law countries, notably the United States and Canada, which helps bring the shared phenomenon itself into starker relief. That common element is the law’s ability to find itself caught in historical binds, and a consequence of being caught in historical binds is that the law will sometimes be obliged to stray from the rote application of precedent and make use of its undeclared capacity for creativity. New doctrines, concepts, and casuistic turns of logic can find their origins here.

It is my contention that, despite what proponents of traditional formalist jurisprudence might imply, or even what many legal scholars critical of colonialism and dispossession might imply, *practice*—simply put, that which is done<sup>40</sup>—has been more the engine of the history of early colonization than legal or theoretical principles have been. In effect, historical practices of colonization have more often than not outpaced the law that would sometimes be called upon to adjudicate their legitimacy. Colonialism is complex and multifaceted, and it proceeds through history replete with contradictions, inconsistencies, and fragmentation. This makes it a difficult and unwieldy phenomenon to order and accommodate juridically. And yet, according to Douzinas, Warrington, and McVeigh, jurisprudence seeks to construct “theories that portray the law as a coherent body of rules and principles, or of intentions and expressions of a sovereign will.

---

<sup>40</sup> See Paul Veyne, “Foucault Revolutionizes History,” in *Foucault and His Interlocutors*, ed. Arnold I. Davidson (Chicago: University of Chicago Press, 1997), 153-154. Veyne discusses this simple definition of practice and its epistemological ramifications.

Jurisprudence is obsessed with the self-confessed and well-documented desire to dress the exercise of political power in legitimacy. Its predominant strategy is to try and weave the legal texts into a single, seamless veil in which authorised and symmetrical patterns are endlessly produced, circulated and repeated.”<sup>41</sup> The attempts to weave that seamless veil over the idiosyncrasies of colonial history—the political, economic, administrative, and militaristic practices of colonization—has meant that the law has often been left to catch up, dodge crises, and extricate itself from legal-normative binds. Ultimately, taking a sociological lens to juridical practice helps to suss out how the tendency of the law to actually lag behind the practice of colonization itself has informed both the occurrence of, and the nature of, moments of great doctrinal productivity in Aboriginal law. It is for these reasons that Aboriginal law, when one is examining and questioning the dispossessions and despoilments of colonialism, *requires* explanation more than it is able to furnish it.

In the case of *Mabo (No 2)*, weaving a single, seamless veil was less of an option for the High Court than authoring a moral-legal rupture—portraying a break with the past that realigned Australian law with the normative exigencies of the present. In this case, even though *terra nullius* had not existed as an established and received common law principle, erecting it allowed the High Court of Australia to hold in the nation’s view an object that would explain two centuries of otherwise inexplicable juridical disengagement in the face of Aboriginal dispossession. In effect, having such an object to dismantle provides for a much less equivocal and existentially threatening rupture than attributing Australia’s legal history to a simple judicial indifference to the plight of dispossessed

---

<sup>41</sup> Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991), ix-x.

Aboriginal peoples, and provides for a more concrete element from the past to be proscribed from the future.

Several authors are variously in tune with those aspects of the law's operation that I am identifying here—the normative bind, the law's quiet anxiety, and the creative doctrinal productivity that ensues—though their work has centered largely on the Australian context. In terms of the *Mabo* decision, Robert Van Krieken uses the concept of *moral entrepreneurship* to suggest that “perhaps the moral tale of the slaying of *terra nullius* has been a story told a little too well.”<sup>42</sup> For David Ritter, *terra nullius* was “a stage edifice that was demolished so that the good name of the Australian legal system could be redeemed.”<sup>43</sup> Jeremy Webber uses his notion of the *jurisprudence of regret* to highlight a “creative dimension” to *Mabo* and illustrate “the fact that it did not merely ‘apply the law’, but dramatically revised it.”<sup>44</sup> For Webber, the difficulty that legal commentators have in explaining this is a common problem in our discussions of the common law. He perceptively observes that “descriptions of how that law works—indeed the very terms in which lawyers frame their arguments—tend to be good at showing how precedent can be marshalled, but they are much less adept at explaining how judge-made law necessarily changes, evolves, and transforms itself. Instead, they fall back, at crucial times, upon vague catch-phrases about ‘policy’ or about principles supposedly latent in the law but hitherto undiscovered.”<sup>45</sup> The very idea of undiscovered principles lying dormant in the law—the law being a phenomenon of our own creation, no less—is

---

<sup>42</sup> Robert Van Krieken, “From *Milirrpum* to *Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship,” *University of New South Wales Law Journal* 23, no. 1 (2000): 65.

<sup>43</sup> Ritter, “Rejection of *Terra Nullius*,” 7.

<sup>44</sup> Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*,” *Sydney Law Review* 17, no. 5 (1995): 6.

<sup>45</sup> *Ibid.*

reminiscent of the “transcendental nonsense” that legal realist Felix S. Cohen objected to in 1935.<sup>46</sup> In essence, when circumstances demand it, the law is apt to deal in questions and solutions that are not subject to being “answered by empirical observation,” as well as in objects “identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, ‘How many angels can stand on the point of a needle?’”<sup>47</sup> In the Australian case law under consideration here, with the Australian judiciary reflecting upon its own disreputable complicity in a history of dispossession, it is the doctrine of *terra nullius* itself, *qua doctrine*, which is not very susceptible to empirical observation.

So how is it that there is in the literature and commentary so much lamenting of *terra nullius* as an established legal principle responsible for Britain’s dispossession and marginalization of Indigenous peoples? Why is it that the *Mabo* decision added that creative element, a doctrine that is neither of the common law nor mentioned in any previous Australian jurisprudence? Perhaps for what critics and commentators alike see as its purported explanatory power and its ability to encapsulate a Eurocentric arrogance

---

<sup>46</sup> Felix S. Cohen, “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35, no. 6 (1935): 810. Cohen’s prime example of legal-metaphysical absurdity was a 1917 case brought before the New York Court of Appeals, in which a complainant sought to sue, in New York, a corporation that had been chartered by the state of Pennsylvania. A pivotal question of law was provoked, however, when the corporation raised the objection that, because it had been chartered in Pennsylvania, it could not be sued in New York. Cohen’s contention is that the most sensible way forward for a court faced with such a dilemma would have been a practical, consequentialist inquiry into the likely benefits and burdens of either option: “It might have considered the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation. It might have balanced, against such difficulties, the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants. On the basis of *facts* revealed by such an inquiry, and on the basis of certain political or ethical *value judgments* as to the propriety of putting financial burdens upon corporations, a competent legislature would have attempted to formulate some rule as to when a foreign corporation should be subject to suit.” Rather than do this, however, the New York Court of Appeals simply addressed the question of *where a corporation is* purely in the metaphysical abstract.

<sup>47</sup> Ibid.

and sense of entitlement to be railed against. A contemporary sensibility might look upon two centuries of disregard for Aboriginal Australians and seek out something that could help to order, accommodate, and understand that history.<sup>48</sup> Just as the performative utterances of legal decisions metaphysically order and recast the phenomena brought before the courts,<sup>49</sup> so too do many legal critiques in their effort to name, understand, or criticize. Many writers thus suffer from an unrecognized equivocality concerning the ontological status of *terra nullius* that is typical of the entire debate. Bruce Kercher, for example, argues that no one in the colony of New South Wales with formal legal training “in judicial office in the first twenty-five years considered the legal position of Aborigines at any length,” and that “to lawyers and judges, native land rights were beneath notice.”<sup>50</sup> Yet Kercher simultaneously refers to “the application of the doctrine of *terra nullius*,”<sup>51</sup> its embedding into Australian case law, its firm establishment with *Cooper v. Stuart*, and its duration thereafter for another century.<sup>52</sup> These two groups of assertions highlight an internal contradiction: namely, that which lies beneath notice should not require a legal doctrine for its obviation. David Ritter thus asserts that “the

---

<sup>48</sup> Merete Borch cites Alan Frost as stating that “eastern New Holland was *terra nullius*” to Cook and his contemporaries, to which she responds that there is “little evidence to support the view that any legal notions influenced the observations made by Cook and Banks about the Aborigines nor, as has been shown above, that land inhabited by hunters and gatherers was viewed in the way indicated by Frost at the time of Cook’s voyage.” Merete Borch, *Conciliation, Compulsion, Conversion: British Attitudes Towards Indigenous Peoples 1763-1814* (New York: Editions Rodopi, 2004), 229-230.

<sup>49</sup> The performative utterance originates in John Langshaw Austin’s speech acts theory as a category of utterance that is neither true nor false, neither just saying nor describing something, but rather that changes the social reality that it is describing. The concept was taken up by Pierre Bourdieu for its striking utility in describing the particular social power with which a judicial judgment is imbued: “These performative utterances, substantive—as opposed to procedural—decisions publicly formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized. They thus succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.” Bourdieu, “Force of Law,” 838.

<sup>50</sup> Kercher, “Native Title in the Shadows,” 102.

<sup>51</sup> Ibid., 100.

<sup>52</sup> Ibid., 101.

colonists required no legal doctrine to explain why Aboriginal people’s land rights were not to be recognized under law because no doctrine was required for what was axiomatic.”<sup>53</sup>

To criticize the presumptuousness and the arrogance of the European assumption of sovereignty over the New World is valid and indeed called for, but there is one corrective of typical approaches to such critique that the reader should keep in mind—the notion of the law as always already established and as an edifying source of explanation for such historical controversies, and the notion of *terra nullius* as a legal concept *ab initio*. In effect, when it comes to colonialism, many of the pertinent juridical phenomena—legal theories, concepts, and decisions—that endeavour to “explain” to us the complex legalities supposedly operating underneath the history of colonization did not precede the practice of colonization itself. Rather, they were subsequent to it. Thus, when it comes to vast and complex histories such as that of colonization, the law should be seen as *requiring* explanation more than providing it, and Merete Borch’s meticulous reassessment of the origins of *terra nullius* bears this out. Borch argues that “neither law nor policy in eighteenth-century Britain nor even international law at that time supported

---

<sup>53</sup> Ritter, “Rejection of Terra Nullius,” 6. A further nuance should perhaps be introduced. Ritter’s argument that *terra nullius* needed not exist as a legal doctrine because the disregard of Australian Aboriginal land rights was axiomatic is most helpful in ironing out the ontological inconsistencies in the common uses of the doctrine. Yet, his adoption of Robert Williams’s use of *discourses of power* and *law as a tool of empire* (as will be discussed below) risks creating too blunt an instrument when it comes to sussing out the law’s contradictions and incoherency. Much of the historical work of the law may be as much in the role of *apologist* as in the role of *swordsman*, attempting to reorder and accommodate after the fact those compromising histories that were not always faithful to prior principles. And while Ritter’s analysis is cogent, the ease with which he identifies the imputed nineteenth century justification of Aboriginal dispossession as axiomatic risks eliding the compromised predicaments that the juridical field, with its intimations of a privileged relation to justice, can find itself in. The notion of the axiomatic, in this case, should perhaps not be interpreted as those practices which were beyond any and all question, but rather those which were apt to avoid open legal problematization. Indeed, for Aboriginal dispossession to be truly axiomatic in the former sense would be to close history to all equivocality, multivocality, contradiction, and dissent.

the proposition that inhabited land could be dealt with as if it was uninhabited or *terra nullius*.<sup>54</sup> Indeed, Borch is even emphatic that so many legal thinkers, some of whom have been famously associated with the development and propagation of *terra nullius*—from Francisco de Vitoria, Hugo Grotius, William Blackstone, Samuel Pufendorf , and Emerich de Vattel to John Locke—did not argue, in the way that many now take for granted, that Aboriginal land was there for the taking because it “should or could be equated with *terra nullius*.<sup>55</sup> Rather, Borch does find that an “extended doctrine” of *terra nullius* that would apply to the land inhabited by hunters and gatherers did develop and spread in *nineteenth century* legal thinking,<sup>56</sup> similar to what Lindley’s 1926 survey of a wide historical swath of jurists found:

Comparing these three schools of thought, we see that, extending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have

---

<sup>54</sup> Borch, “Rethinking Origins of Terra Nullius,” 238.

<sup>55</sup> Ibid., 235.

<sup>56</sup> Ibid., 238.

become recognized as members of the Family of Nations before they can be allowed such rights.<sup>57</sup>

Borch even suggests that the idiosyncratic nature of the settlement of New South Wales played an important role in the *post hoc* creation of such an extended doctrine.<sup>58</sup> In effect, “since it is of vital importance for the common law system to appear firmly rooted in past practices and not to be subject to whimsical change,” she suggests, “legal writers went to great lengths to find precedents” for the practice and “eighteenth century and earlier legal perceptions were reformulated and reinterpreted in important ways, as illustrated, for example, by the changing understanding of Blackstone’s categorisation of the colonies.”<sup>59</sup> In short, legal principle had a crisis of conformity with real world practice. The dispossession of Aboriginal Australians came first, legal thinkers moulding a concept of terra nullius that would explain it soon followed, but the explicit invocation of a doctrine of terra nullius in the case law was never to come—except to the extent that lower courts in nineteenth century Australia vaguely suggested that the country had been acquired as a settled colony, and were confirmed by the Judicial Committee of the Privy Council’s 1889 decision in *Cooper v. Stuart*. Nineteenth and early twentieth century authorities that interpret common law jurisprudence as a whole as denying title to hunters and gatherers (or colonized peoples more broadly) should thus be seen less as authoritative descriptions of established law and more as historical-legal interventions whose descriptions simultaneously seek to constitute a received vision of the legitimate

---

<sup>57</sup> M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being A Treatise on the Law and Practice Relating to Colonial Expansion* (New York: Negro Universities Press, 1969), 20.

<sup>58</sup> Borch, “Rethinking Origins of Terra Nullius,” 238.

<sup>59</sup> Ibid., 239.

modes of dispossession of Aboriginal peoples. In the juridical field, the prime vector for the metaphysical—Cohen’s “transcendental nonsense”—is the attempt at performative utterances, considered successful if they manage “to make themselves universally recognized.”<sup>60</sup> A practice of dispossession may be difficult to reconcile with existing legal principles, until a revised legal basis can be shaped to the particularities at hand.

The distinction between being able to provide explanation and, conversely, requiring explanation is meant to provide a subtle but important critique to both sides of a colonial legal divide. On the one hand, it is a critique of a traditional formalist jurisprudence that sees the law as grounded purely in its own internal dynamic, that is largely blind (wilfully or not) to the contradictions, inconsistencies, and limitations of its management of colonial relations, and that asserts its particular brand of social power most saliently in its dismissal of the “naïve intuitions of fairness” that the layperson directs at colonial conflict.<sup>61</sup> In effect the juridical field’s hermetic form of expertise and its insistence on the law’s grounding in its own internal dynamic help constituents of the juridical field to neutralize larger questions surrounding the justness of colonial political relations, reduce the moral purchase outsiders can hold on instances of legal reasoning, and dismiss broader questions and forms of argumentation as simply being improperly versed in the workings of the law. In short, juridical expertise can always instruct the layperson on “what the law says,” within the conventions of its particular legal-discursive framing of colonial conflicts, but it needs to be held to a deeper account that probes its underlying limits and exigencies.

---

<sup>60</sup> Bourdieu, “Force of Law,” 838.

<sup>61</sup> Ibid., 817.

On the other hand, the distinction is also meant to provide a corrective to *critical* approaches which, in a manner mirroring yet opposed to conventional formalist jurisprudence, still also see the law as providing all the explanation needed to assess colonial history. These are the instrumentalist critical perspectives which share a family resemblance with the condemnation of *terra nullius*. From such perspectives, legal history is seen as forming an unequivocal unity of signification, offering a nefarious prior legitimization for the entire history of colonization. Leslie C. Green, in his portion of *The Law of Nations and the New World*, seemingly leaves no room for fragmentation or equivocality of legal knowledge in his history of colonization. Though he is concerned with sovereignty more so than with title or possession of territory, every historical element adds up to the same unified and invariable conclusion:

Analysis of the practice of the explorers, of the rulers who commissioned them, of the treaties made between those rulers, of the administrations appointed by those rulers, both in their everyday practices and in the so-called treaties signed with the Indians; as well as the decisions of the courts called upon to deal with Indian rights, especially as alleged to exist under the Proclamation of 1763 and by way of conquest either of the Indians or the former French sovereign, all confirm that whatever title the Indians were acknowledged as having in the land, they certainly did not and do not possess anything similar to sovereignty.<sup>62</sup>

In the sweeping legal history of *The American Indian in Western Legal Thought*, Robert A. Williams Jr. encapsulates his book with the statement that “law and legal discourse were the perfect instruments of empire for Spain, England, and the United States in their

---

<sup>62</sup> Leslie C. Green, “Claims to Territory in Colonial America,” in *The Law of Nations and the New World*, eds. Leslie C. Green & Olive P. Dickason (Edmonton: University of Alberta Press, 1989), 125.

colonizing histories.”<sup>63</sup> While here I only deal with the common law of England, with an ultimate goal of analysing its evolution in Canada, I would suggest that any notion of law as a *perfect* instrument of empire will encounter difficulties.

For a final note on Australia, I should clarify that, just as the concept of *terra nullius* is not a complete myth, neither are those who use it to conceptualize colonial dispossession necessarily committing the gross fraud that right-wing commentators in the Australian history wars suggest they are. Relying simply on the fact that the term *terra nullius* cannot be found in eighteenth century documents, Michael Connor has set about portraying a conspiracy that frames himself as the outsider speaking truth to the power and the vested interests of “careerist academia” and the “History Warlords.”<sup>64</sup> Prominent historian Henry Reynolds, long credited with bringing the issue of *terra nullius* to the forefront in Australia,<sup>65</sup> has been a prime target of Connor. Reynolds’s response to Connor went some way to clarifying the ontology of scholarly concepts such as *terra nullius*, with his claim that “the use of new terms for past events and concepts is inseparable from intellectual life. All disciplines and all areas of study can produce examples of the practice. It is rarely necessary to remind readers that a term is more recent than the reality to which it refers.”<sup>66</sup> In defence of the High Court of Australia as well, the 1992 *Mabo* decision seems to recognize at least implicitly the difficulty in

---

<sup>63</sup> Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 8.

<sup>64</sup> Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Sydney: Macleay Press, 2005), <http://quadrant.org.au/opinion/history-wars/2005/12/the-invention-of-terra-nullius/>.

<sup>65</sup> See Henry Reynolds, *The Law of the Land*, 3<sup>rd</sup> ed. (Ringwood, Australia: Penguin, 2003).

<sup>66</sup> Henry Reynolds, “A New Historical Landscape? A Response to Michael Connor’s ‘The Invention of Terra Nullius,’” *The Monthly: Australian Politics, Society & Culture*, May 2006, <http://www.themonthly.com.au/books-henry-reynolds-new-historical-landscape-responce-michael-connor039s-039the-invention-terra-nul>.

mobilizing a doctrine that is neither of the common law nor accurate to its original conception. In line with the observations of both Borch and Lindley, it therefore specifically references an *enlarging* of the concept of terra nullius prior to applying the term to Australian case law.<sup>67</sup>

In fact, there is some significant common ground between my analysis and the critical historical work of the likes of Henry Reynolds, Stuart Banner, and Bruce Kercher, in that they seek *to put a name to something* that is at play in the interaction between the common law and colonization that ultimately amounted to Aboriginal dispossession. I, too, would like to name it, examine it, and call attention to it; and obsessively policing terminology risks becoming pedantic if it is to no particular end. However, I am reticent to use the term terra nullius because, as we have already seen, it references and reifies a legal doctrine in such a way as to overlook its confused origin, chronology, and application, and misleads readers into believing that a set legal doctrine was definitively in place in order to legally regulate the dispossession of Indigenous peoples in the colonial encounter. This, as we have seen, has consequences for the way in which we perceive the role of the law in colonial history. Lastly, the critique of terra nullius is often a moral tale conceptually limited to the moment of encounter, the initial usurpation of territory and sovereignty, whereas the phenomenon that I would like to describe is more pervasive, persistent, and continuing than the use of a legal doctrine for land acquisition might otherwise suggest.

---

<sup>67</sup> *Mabo (No 2)*, at para. 34 and 36.

## The Historical Bind and Doctrinal Productivity

As I suggested above, colonial history has placed the common law in legal-normative binds elsewhere and at other times, and Canadian Aboriginal law beginning in the latter half of the twentieth century offers one of the most striking examples. But this work is about much more than the juridical field finding itself in a socio-normative dilemma. It is about the subsequent burst of doctrinal productivity engendered by the need to extricate itself from between a metaphorical rock and a hard place, and it is about offering a critical analysis of the new legal era that these jurisprudential changes have ushered in. In effect, in the twentieth century Canadian courts found themselves in a situation of having to introduce and elaborate a “revolutionary” new justice for the age of “reconciliation.”

The Supreme Court of Canada (SCC) has almost exclusively helmed this project, but it has done so while still quietly preserving certain core infamies of colonial dispossession, and while embedding within the jurisprudence certain limitations and mechanisms which ensure continuing forms of legal governance over Indigenous anti-colonial aspirations.

The judiciary, though, in its singular position as an institution with a particularly commanding form of social power, is eminently susceptible to experiencing a Heideggerian anxiety when its new, unique, or controversial inventions have the potential to attract critical scrutiny.<sup>68</sup> In these situations, the juridical field in practice and

---

<sup>68</sup> As Hubert Dreyfus notes, German philosopher Martin Heidegger postulated that what Heidegger termed *Dasein*—our “being there,” presence, or existence—is “dimly aware that the way the world is is ungrounded.” Hubert Dreyfus and Bryan Magee, “Husserl, Heidegger and Modern Existentialism.” In *The Great Philosophers*, ed. Bryan Magee (Oxford: Oxford University Press, 1987), 267. Heidegger’s monumental philosophical influence can be found in the work of many of his successors, including in Jacques Derrida’s discussions of metaphysics and logocentrism, Pierre Bourdieu’s concepts of symbolic violence and doxa/orthodoxy, as well as in the works of Michel Foucault.

discourse is also eminently capable of intimating that the law benefits from a privileged relationship to Justice, construing its determinations as inevitably grounded in the latter.

For this analysis, then, the first step—taken in the second chapter—is to survey the history of British colonization in North America and the settlement of Canada in order to develop an appreciation for the legal-normative bind that would eventually take hold of Aboriginal law in Canada. Such a survey finds that the historical narrative of Canada’s founding through a fair, equal, and informed treaty process is easily challenged with counternarratives of sharp dealing, dishonesty, and coercion. And yet, even if the land cession treaties signed with First Nations were to be accepted as legitimate transfers of sovereignty and territory, this only further underscores the irreconcilability of the fact that the Crown signed such treaties with some Indigenous peoples, but not with others. In short, I argue that the historical settlement and establishment of Canada left it with what was, or at least what would become, a fundamentally *unsettled* political and legal landscape.

I begin the third chapter by examining how the Supreme Court of a young, independent United States encountered its own significant legal-normative bind in the early nineteenth century. This spawned some of the most formative and foundational precedents in the common law legal tradition shared by Britain and its colonies, including the invention of a new legal concept called *Indian title*. It is also in this chapter that I begin to expound two concepts that help to critically conceptualize how judiciaries have creatively navigated their way through the compromising aftermath of colonial dispossession. *Incommensurability* is the concept to which I allude at the end of the previous section, a concept which offers a more nuanced alternative to the troubled

doctrine of terra nullius. It is the inscribing of difference upon the Aboriginal legal subject in order to be able to accommodate exigent historical circumstances with novel forms of justice. In effect, unique and self-serving principles of justice are imposed upon, and made inherent to, the Aboriginal legal subject—and the legal concept of Indian or Aboriginal title is itself a prime example of this. *Injusticiability* is the rendering of something unavailable for adjudication by articulating it as a political question rather than a legal question, thereby eliminating the moral-legal hold that a circumstance might otherwise have over the juridical field. Whereas incommensurability can be malleable and creative, *injusticiability* is rigid and silent. It is most often used in the sheltering of the original violence of dispossession, and of the founding act of the settler state. It is the kernel of colonial instrumentality that must be preserved in the jurisprudence, the silence that is “walled up in the violent structure of the founding act.”<sup>69</sup> The third chapter then ends with an account of the importation of this new and incommensurable concept of Indian title into Canadian jurisprudence in the late nineteenth century.

In chapter four, I outline some of the ways in which both the political-bureaucratic and juridical fields of the nineteenth century and first half of the twentieth century were among the least sympathetic to the sovereignty, self-determination, and territorial possessions of Indigenous peoples in Canada. In this era one finds a legal formalist tendency of the courts to mobilize *injusticiability*, arguing that there exists no basis in law to forcibly uphold treaty promises or protect Indigenous land and self-determination. Still, there are indications during this period that the prospect of

---

<sup>69</sup> Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” in *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (New York: Routledge, 1992), 14.

Indigenous claims could still put political leaders and bureaucrats ill at ease, given the concerted efforts to preclude certain issues from being litigated in the courts in the first place. But I argue that the strategic deferral of disputes such as Aboriginal title claims would only increase the pressure latent underneath Canada's unsettled political landscape.

In chapter five, I outline the period in which the pressures underlying the courts' anachronistic approach to rights and title built up sufficiently to compel jurisprudential change in these areas. This marks the moment in history when the law is less characterized by lag and latency, and finds itself at the unpredictable and challenging forefront of change in the colonial relationship. This began later in the twentieth century with the development of the modern principles of treaty interpretation, and then with the historical decisions of the Supreme Court of Canada to recognize Aboriginal title and Aboriginal rights as *inherent*—in other words, as existing independently of royal proclamation or legislative enactment.

The types of disputes that can arise from Aboriginal law are quite varied. The three categories which garner the most attention in this work are treaty rights, Aboriginal rights, and Aboriginal title. Treaty rights are those rights to a variety of practices or activities which gain the recognition of the courts precisely because they were first agreed to, with the intent to create mutually binding obligations, in a solemn engagement between an Indigenous group and the Crown. Aboriginal rights, on the other hand, are rooted in inherence. They are essentially a right claimed by an Indigenous group based upon their prior occupation, their traditional practices, and an assertion that the right has never been extinguished by the Crown. Aboriginal title is categorized by the

contemporary courts as a form of Aboriginal right, but it is the greatest of Aboriginal rights. Those groups who have never surrendered their territory to the Crown by way of treaty can seek to establish their right to the exclusive occupation of their lands before the courts or in modern land claims negotiations.

In their efforts to resolve the troubling incongruities and legal-ethical liabilities of colonial dispossession, and to the extent that they do so with the introduction of new principles geared toward this end, the various doctrines of Aboriginal law take on an air of jurisprudential ethics—systematized jurisprudential solutions arising where the law has heretofore failed Indigenous peoples to a degree that offends contemporary sensibilities and thus strives to adapt to socio-normative change. But I conclude chapter five with the argument that inherence, as a mechanism for introducing progressive jurisprudential change, is inherently risky for the colonial settler state.

In effect, I begin chapter six by expanding upon the elements of risk underlying the principles of change in Aboriginal jurisprudence of the late twentieth century. Inherence, I argue, is in its essence risk-laden and adverse to control because it is something for which the terms are not pre-set or known in advance. In its purest form, inherence simply begs the recognition that unceded Aboriginal land and sovereignty still belong to Indigenous peoples—something the courts have not been able to accept—and thus is not ready-made for the integration of unruly nationalities into the liberal settler state. And because inherence created the possibility of establishing rights outside of the context of treaty promises, it opened up the conceptual floodgates to having groups with virtually no rights regime whatsoever—such as Métis peoples—pursue recognition before the courts.

Beyond inherence, however, there are other aspects of the positive change instigated in the latter half of the twentieth century that introduced elements of risk. For the modern principles of treaty interpretation, the idea of being obliged to the myriad promises of Crown representatives who traversed so many frontiers over a span of centuries could be daunting for a judiciary and a state who would like to see rights remain stable and controlled. In addition, the constitutionalization of Aboriginal and treaty rights—the moment when they were recognized and affirmed for First Nation, Inuit, and Métis peoples in the *Constitution Act, 1982*<sup>70</sup>—elevated the new forms of rights and title with constitutional protection and emboldened the Supreme Court of Canada’s development of a body of law to protect rights and title in some form. Due to the idiosyncrasies of political and constitutional history, however, those rights recognized and protected by the *Constitution Act, 1982* remained undefined by it as well, thereby leaving open another source of uncontrolled eventuality. In the face of the elements of risk innate in these sources of positive change, what one finds are corresponding forms of management and limitation. In effect, inherence and constitutionalization, in the very moment of their juridical inception, arrive in an already managed and circumscribed form. With the aid of incommensurability and injusticiability, the Supreme Court of Canada has sought to temper rights and title by deducing for them inherent limitations and implicit overrides—such as legally justified infringement, leaving open the possibility of retrospectively finding that rights or title had been extinguished prior to 1982, and the ability to continue to infringe rights and title during the long wait to have them recognized—and these mechanisms are elaborated in a fashion that preserves the

---

<sup>70</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

juridical field's ability to maintain rights and title as objects of perpetual legal governance.

Chapters seven and eight continue to examine the limitations and forms of legal governance embedded in contemporary Aboriginal law, but does so aggregated around two specific and significant themes. Chapter seven looks at the development of the contemporary Aboriginal cultural-legal subject, and, in essence, how incommensurable forms of justice premised on juridical and settler society notions of Aboriginal culture(s) condition an entire, complex corpus of Aboriginal law. In essence, Canadian Aboriginal law has constructed an Aboriginal cultural-legal subjectivity as a key operative in the deployment of incommensurability. The Aboriginal legal subject mobilized within these types of legal-political disputes has largely been conceived, delimited, and invoked in terms of the majority society's limited notions of Indigeneity/Aboriginality. This tends to put Aboriginality in a particularly detrimental relationship with things such as time and cultural change, replaces any notion of Aboriginal polities with Aboriginal cultures, and thereby exorcises out of these legal equations any debate about self-government and self-determination. The contemporary cultural rights approach also aids in the juridical management of the risks presented by Aboriginal claims by introducing arbitrary time thresholds for the definition of rights, allowing the diminution of the potential scope of rights claims through a constricting specificity, and preserving an unacknowledged discretion in the determination of rights through concepts that introduce elements of indeterminacy in the cultural rights test.

Relatedly, chapter eight examines contemporary cases that centre on rights claims that are most unpalatable to the symbolic order of the liberal settler state. Indeed, at base

claims to communal rights suffer a certain *ressentiment* for their perceived deviation from the universalized individualism underpinning liberalist political ideals. Yet I would suggest that there are certain types of Aboriginal and treaty rights assertions which elicit a particularly acute unease from non-Indigenous governments, organizations, and the courts alike. Of this category, the two most prominent types are claims that conflict with private property rights and claims that assert communal Aboriginal or treaty rights to partake in commercial activities. There has been a reticence to recognize such rights, and, in those instances where the case for recognition seems compelling, the SCC has not surprisingly deduced novel forms of limitation for them.

I share a number of final thoughts in the concluding chapter, including the concession that the recognition of treaty rights, Aboriginal rights, and even Aboriginal title over unceded territory can all be won under the new jurisprudence. This is the profound ambivalence of contemporary Aboriginal law: the SCC has demonstrated that it is willing to protect Aboriginal practices and Aboriginal interests in land, but in doing so uses the casuistry of legal deliberation to discover limitations and overrides to keep them in check. The infamies protected by *injusticiability* seem to attest to a trade-off implicit in the benefits of modern Aboriginal law: accept the violence and raw instrumentality of the original act of colonial dispossession, and there will be the opportunity to improve treaty recognition, the possibility of having a form of title over land recognized, or the chance to have rights to certain practices respected—but only within certain limits.

I end off with a final argument about the role of juridical expertise in resolving the historical wrongs of colonial dispossession in this purported age of reconciliation. The metaphysics of juridical practice amount to a claim that the law can remedy the

removal of sovereignty and the appropriation of land from the once sovereign possessors of that land, and in most cases without giving either that sovereignty nor the land back.

This juridical practice also implicitly claims that the anti-colonial demands of Indigenous peoples can be integrated into the framework of the liberal settler state, without of course owning up to the ways in which it reduces, redirects, and depoliticizes those demands.

Despite the numerous legal gains made by Indigenous groups, Aboriginal law is in this way also the saviour for the foundational act of colonial dispossession. This, too, strikes at the heart of its ambivalence. There is therefore a profound problem with the pretension that the juridical field possesses the unique expertise to stand as the final arbiter in determining the path of reconciliation after colonial dispossession. In the interests of reopening possibilities foreclosed by juridical discourse (and by Crown intransigence), I argue that after an injustice such as dispossession, the greatest moral authority to indicate the path to repair and reconciliation lies with those who have been wronged themselves.

If Canada indeed seeks reconciliation after its dispossession of Indigenous peoples, then governments and the courts must be emphatically reminded that the Crown's past status as transgressor equates with a current position as supplicant in discussions about repair. Negotiations concerning the Indigenous possession of land, Indigenous peoples' activities on the land, and possible new ways of living together after the colonial encounter should therefore take place under this ethical-relational balance.

## 2. An Unsettling Settlement

With the previous winter of Idle No More inspired protests, marches, and hunger strikes having succeeded in capturing the attention of mainstream media in Canada, the summer of 2013 was foreordained by movement organizers as *Sovereignty Summer*. Idle No More representatives, their social media presence, and their website mention omnibus Bill C-45<sup>1</sup> as a major spark that set off the Indigenous protest movement in December, 2012—particularly the bill's revamping of the *Navigable Waters Protection Act*<sup>2</sup> into a new *Navigation Protection Act*<sup>3</sup> that was to see the removal of federal protection from thousands of waterways across the country.<sup>4</sup> There is thus an element of Idle No More that is very contemporary, demonstrating a late modern environmental consciousness that is married to notions of Indigenous stewardship and concern for the land, mixed in with a variety of other contemporary social issues of great importance to Indigenous communities in Canada such as poverty, education, and housing. But there is also something very retrospective about Idle No More. As with so many protests, appeals, and political movements that came prior to it, its proponents are expressing dissatisfaction with what has become of the relationship between Indigenous groups and the Crown, citing a need to reframe a proper nation-to-nation relationship,<sup>5</sup> respect Indigenous

---

<sup>1</sup> *Jobs and Growth Act, 2012*, S.C. 2012, c. 31.

<sup>2</sup> *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.

<sup>3</sup> See *Jobs and Growth Act, 2012*, S.C. 2012, c. 31, ss. 316-350

<sup>4</sup> "Idle No More: Calls for Change," accessed July 24, 2013, [http://www.idlenomore.ca/calls\\_for\\_change](http://www.idlenomore.ca/calls_for_change), and "Idle No More: The Story," accessed July 24, 2013, <http://www.idlenomore.ca/story>.

<sup>5</sup> In keeping with the very notion of respecting nationhood in a people, it would perhaps be more accurate to allude to nation-to-nation relationships in the plural, given the multiplicity of Aboriginal groups in Canada. For the sake of simplicity, however, I invoke an archetypal standard in the singular—as do so many Aboriginal rights advocates.

sovereignty, and realize the original spirit and intent of the engagements made through historical treaties.

This chapter explores the contours of this historical relationship, though the object is not to provide a comprehensive, definitive reading of history that has heretofore been lacking and that will put all debate to rest. (As Keith Thor Carlson has observed, “inevitably, history is regarded as the principal arbiter of contemporary Native-newcomer conflicts.”<sup>6</sup>) Such debates can be left to the historians. Rather, to put it bluntly, my burden of proof for this chapter is a lesser one. Ultimately, with this volume, I want to examine the operation of the judiciary and its creative management of profoundly self-compromising situations through the lens of Canadian Aboriginal law. As a precursor to such an analysis, this chapter is centred on an examination of the evolving legal-historical relationship between the Crown and Aboriginal peoples and the multiple, competing discourses on the dynamic of that relationship as it relates to the settlement of Canada. Simply put, I want to establish that the historical settlement and establishment of Canada left it with what was, or at least what would become, a fundamentally *unsettled* political and legal landscape.

It may be somewhat obvious to some that Canada is a country, like so many colonial settler states, often disquieted by intergroup conflict that persists along the settler/Indigenous divide. But what is often lacking in the lay societal discourse is recognition of the genuine challenges that Aboriginal claims have been able to launch at the political and legal-constitutional confidence of the Canadian state: claims that the Crown has breached the terms of its historical agreements with Aboriginal peoples on the

---

<sup>6</sup> Keith Thor Carlson, “Rethinking Dialogue and History: The King’s Promise and the 1906 Aboriginal Delegation to London,” *Native Studies Review* 16, no. 2 (2005): 4.

one end, to claims of outright dispossession of Aboriginal lands and illegitimate usurpation of sovereignty on the other. Consequently, those with an abiding faith in the legitimacy of the liberal settler state are apt to dismiss such claims as contemptible attempts at “*special* privileges and *special* rights for *special* groups” contrasted against the unproblematised backdrop of a “white unmarked Canadian identity.”<sup>7</sup> On and off throughout our history, however, the courts have been left to examine and respond to many of the difficult questions posed by Aboriginal claims. How they have responded has changed with history, but they have always had controversies to dispense with in one way or another.

At base, there is a source of controversy in what Brian Slattery euphemistically refers to as “divergent streams of state practice” on the part of British colonial administration—in other words, two different faces and two different ways of speaking about Crown interests in the lands possessed by Aboriginal peoples.<sup>8</sup> Engaging in nation-to-nation diplomacy that recognized Indigenous sovereignty and possession of lands on the one hand, while undermining these same conventions in Crown interactions with competing European powers and also in the surreptitiously written texts of the treaties it signed with First Nations, demonstrates a duality of state practice that leaves the historical narrative of Canada’s founding eminently open to dispute with Indigenous counter-narratives about sovereignty, self-determination, and continuing claims to territory. Further, even if one does accept the written text of treaties as unproblematically authoritative over the competing narratives offered by First Nations in Canada, there still

---

<sup>7</sup> Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (Toronto: University of Toronto Press, 2002), 105. Emphasis in original.

<sup>8</sup> Brian Slattery, “Aboriginal Sovereignty and Imperial Claims,” *Osgoode Hall Law Journal* 29, no. 4 (1991): 689.

remains the overwhelming irreconcilability produced by an unfinished treaty process. In short, the Crown that used treaties to recognize Aboriginal possession of land, to preserve its honour through fair dealing with Aboriginal peoples,<sup>9</sup> and to purportedly create a new country under the gloss of Aboriginal consent, did so with only some groups and not with others.

## Early Relationships

As I outlined in the introductory chapter, and contrary to some critical retellings of colonial history, an established legal concept of *terra nullius*—the notion that Indigenous lands were considered legally vacant and therefore ripe for the taking through simple discovery (and perhaps settlement)—was not the hubristic lynchpin that held together the entire colonization of the New World.<sup>10</sup> In effect, the problem encountered in this claim is not only the untenability of it, but also the very desire to look to the law and find a definitive, seamless design of prior principles that would fully explain five hundred years of inconsistent, even contradictory, practices of colonization.<sup>11</sup> In fact, Brian Slattery's historical research suggests that “the French and English Crowns recognised that most of

---

<sup>9</sup> George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1. The *Royal Proclamation of 1763* set forth the parameters by which land would thereafter be acquired from First Nations in order to prevent the “great Frauds and Abuses” that had been previously committed in the purchasing of Indian lands, “to the End that the Indians may be convinced of Our Justice.”

<sup>10</sup> L. C. Green and Olive Patricia Dickason, eds., *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989) offer a contemporary example along the lines of this disputed perspective.

<sup>11</sup> Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991), ix-x, discuss modernist jurisprudence’s obsession with preserving the law’s legitimacy by always portraying it as a coherent body of rules and principles.

North America was in the possession of indigenous peoples and that this possession had juridical dimensions.”<sup>12</sup>

Certainly, the relationships between the French and English Crowns on the one hand and the many First Nations throughout North America on the other did shift, suffer reversals, and evolve over the centuries—sometimes in dramatic fashion—and a history that espouses *terra nullius* as its unique driving force would have much difficulty accommodating for such variability. In contrast, contemporary historian James Rodger Miller examines the changing nature of treaty making in Canada as a function of the shifting balance of “the relative strengths of indigenous and immigrant peoples”<sup>13</sup>—a cue taken from Miller and some of his contemporaries by the era-defining *Report of the Royal Commission on Aboriginal Peoples* of the 1990s.<sup>14</sup> Such historical studies are not without their sociological analogues. Taking up Norbert Elias’s notion of functional interdependence, Christopher Powell utilizes his own concept of *impunity-interdependence*—expressing a continuum of possible balances of power between differing groups—to examine the variable role of violence and genocide in historical civilizing processes.<sup>15</sup> The Eliasian notion of interdependence need not imply some idealized sense of harmoniousness to relations between groups, either. Applying his

---

<sup>12</sup> Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America,” in *Despotic Dominion: Property Rights in British Settler Societies*, eds. John McLaren, A.R. Buck and Nancy E. Wright (Vancouver: UBC Press, 2005), 72.

<sup>13</sup> James Rodger Miller, *Compact, Contract, Covenant: Canada’s Treaty-Making Tradition* (Saskatoon, SK: St. Thomas More College, 2007), 4. This 2007 publication is based on a Michael Keenan Memorial Lecture given by Miller at St. Thomas More College, University of Saskatchewan. Miller also published a monograph in 2009 with a remarkably similar title, thus I have elected to maintain a distinction between the two by including the year of publication with the title in subsequent short form citations.

<sup>14</sup> *Report of the Royal Commission on Aboriginal Peoples: Volume 1, Looking Forward, Looking Back*, (Ottawa: Supply and Services Canada, 1996), hereafter cited as *RCAP*, vol. 1. See especially the periodization of the historical relationship between the Crown and Aboriginal peoples in volume one: separate worlds, contact and co-operation, then displacement and assimilation.

<sup>15</sup> Christopher Powell, *Barbaric Civilization* (Montreal & Kingston: McGill-Queen’s University Press, 2011).

category to enemies just as readily as allies, Norbert Elias defines *functional* in the sense that “people or groups which have functions for each other exercise constraint over each other.”<sup>16</sup> For Powell, then, a relationship between two groups in which one no longer holds any function for, or constraint over, the other—that is to say, a relation that strays away from interdependence and toward impunity—is one in which violence becomes more conceivable. Similarly, American historian Richard White, one of the pioneers of the “new western history” movement, developed his concept of *the middle ground*—a common ground of intercultural meaning-making and convention cultivated between European and Aboriginal—as something contingent on mutual constraint, dependent “on the inability of both sides to gain their ends through force.”<sup>17</sup>

It is precisely the case that early relations between Europeans and First Nations were established in a context of mutual interest and mutual constraint. To begin with, First Nations were greater in number and superior “in terms of their knowledge of the land and how to survive in it.”<sup>18</sup> In effect, they possessed knowledge and skills that were critically useful to the survival and success of the new arrivals. Yet they also saw benefit and thus willingly participated in trade relationships with Europeans, seeking out their technology and wares. First Nations and Europeans thus found themselves implicated in a functional interdependence of the sort elaborated by Elias.

This early relationship, then, characterized by the Royal Commission on Aboriginal Peoples as the era of “contact and co-operation,” was far from a relationship

---

<sup>16</sup> Norbert Elias, *What is Sociology?*, trans. Stephen Mennell and Grace Morrissey (New York: Columbia University Press, 1978), 78.

<sup>17</sup> Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, 20th anniversary edition (Cambridge: Cambridge University Press, 2011), 52.

<sup>18</sup> RCAP, vol. 1, 100.

of impunity over First Nations. In addition to their relatively substantial numbers and their valuable knowledge, the inter-societal commercial links that were established “did not interfere in a major way with longstanding Aboriginal patterns of pursuing their livelihood and actually tended to build on Aboriginal strengths.”<sup>19</sup> In effect, the role of Aboriginal peoples in the fur trade, at base, made it in the best interests of the European powers to have many of the former actually remain in possession of land.<sup>20</sup> Thus, contrary to what many Canadians might assume, most historical treaties did not centre on the cession of land. Early pre-confederation treaties mostly involved smaller groups of settlers, smaller geographical areas, and concerned “such matters as trade and commerce, law, peace, alliance and friendship, and the extradition and exchange of prisoners.”<sup>21</sup>

These earlier treaties and the relationships they represented were largely well tended to and cared for. Outwardly, nation-to-nation relations based in mutual respect promoted efforts at mutual intelligibility. In 1670, King Charles II granted a charter to the Hudson’s Bay Company, giving it a trade monopoly over the vast watershed that drained into Hudson Bay. The area became known as Rupert’s Land because the company was a venture instigated in part by the king’s first cousin, Prince Rupert of the Rhine, first governor of the Hudson’s Bay Company (HBC). In 1680, still during Prince Rupert’s twelve year tenure as governor, he and the HBC Committee sent instructions on treating with Indigenous inhabitants to their principal agent in James Bay:

---

<sup>19</sup> Ibid., 101.

<sup>20</sup> As suggested above, however, generalizations about co-operation must not venture so far as to suggest a broad, universal harmoniousness to early colonization efforts in North America. The very notion of a treaty of alliance can involve the merging of interests *and* enmities, be it in war, trade competition, or both.

<sup>21</sup> *RACP*, vol. 1, 122.

There is another thing, if it may be done, that wee judge would be much for the interest & safety of the Company, That is, In the severall places, *where you are or shall settle*, you contrive to make compact wth. the Captns. or chiefs of the respective Rivers & places, where by it might be understood by them that you had purchased both the lands & rivers of them, and that they had transferred the absolute propriety to you, or at least the only freedome of trade, And that you should cause them to do some act. Wch. by the Religion or Custome of their Country should be thought most sacred & obliging to them for the confirmation of such Agreements.<sup>22</sup>

There are two interesting observations to be drawn from the above passage. Firstly, it seems evident that, although securing ownership of Indigenous lands through treaty and purchase was entertained as a perfectly desirable option for the new company, this was simply one possible means to the more essential goal of establishing profitable and exclusive trade interests. The other means to this end that is suggested is the negotiation and making of compacts that would help the company secure trade monopolies with the Indigenous inhabitants. Secondly, in the interests of striking compacts that would be firm and binding between the two parties, the principal agent of James Bay is specifically encouraged to make use of any of the Indigenous inhabitants' religious and cultural customs that would make the nature of the agreement cognizable, sacred, and obliging to the latter.

By the mid-eighteenth century, trade between First Nations trappers and HBC posts became an incredibly elaborate ceremony. Arthur Ray, James Miller, and Frank

---

<sup>22</sup> Cited in Miller, *Compact, Contract, Covenant* (2007), 6. Emphasis not mine.

Tough use the documentary records from two company officers at York Factory to illustrate, over five pages, the visit of a trading party to the post. It details an elaborate, ceremonious ritualism beginning with the far from spontaneous arrival of a fleet of First Nations' canoes adorned with St. George or Union Jack flags, welcomed with canon salutes from the fort. The arrival is followed by a protocol of introductions and addresses, the smoking of the pipe, the presentation of coats for the First Nations "captain" and his "lieutenants," a pre-trade gift-exchange, a smoking of the calumet, amongst a host of other details—and all prior to actual trading.<sup>23</sup> HBC traders needed to sustain positive relations with their Aboriginal trading partners, and, if they did, the trading captain elected to leave his calumet at the fort—signaling his intent to return next year and thereby expressing approval of his treatment by the company officers. Retrieving his pipe upon departure, on the other hand, signaled a rupture in the relationship.<sup>24</sup> Miller states that a simple, businesslike barter transaction was not possible, because trade interactions and alliances generally required Aboriginal peoples "to be in some sort of kin-like relationship," be it "blood, marital, or fictive," even if with strangers from a vastly different culture.<sup>25</sup>

These efforts at mutual intelligibility, shared meaning, and reverence for friendship and alliance were not unique to HBC trade activities. Colonial officials and military leaders also participated readily. Despite stark cultural differences, the French and the British "found no difficulty adapting to Aboriginal protocols in North America. They learned to make condolence before a conference with the Six Nations, to give and

---

<sup>23</sup> Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000), 5-10.

<sup>24</sup> Ray, Miller, and Tough, *Bounty and Benevolence*, 9; Miller, *Compact, Contract, Covenant* (2007), 7.

<sup>25</sup> Miller, *Compact, Contract, Covenant* (2007), 8.

receive wampum, to smoke the pipe of peace on the prairies, to speak in terms of ‘brothers’ (kinship relations), not ‘terms and conditions’ (contract relations).”<sup>26</sup>

According to John Borrows and Leonard Rotman, “various European powers transacted treaties with the Iroquois in accordance with Haudenosaunee legal traditions. The French entered into treaties with Aboriginal peoples of the northern Great Lakes using Anishinabek ideas and ceremonies. The British Crown secured Peace and Friendship agreements with the Mi’kmaq, Maliseet and Passamaquody Nations in what is now Atlantic Canada by following Indigenous protocols, procedures and practices.”<sup>27</sup>

The first formal alliance between the British Crown and Aboriginal peoples in North America came with the Treaty of Albany, 1664, which was struck with Iroquois groups who had previously been allied with the Dutch after the British acquired New Netherland from the latter and renamed it New York. From the Iroquois perspective, the Treaty of Albany marked the beginning of Britain’s participation in the Covenant Chain alliance. The alliance, initially between the Dutch and the First Nations in the Hudson River region, became an alliance between the British and the Iroquois Confederacy and later extended to include additional First Nations.<sup>28</sup> The Covenant Chain alliance went on to encompass many treaties, numerous regular public meetings, and even times of strain amongst the various parties. Richard Haan indicates that, earlier on in the region, the English metaphor of the chain and the Iroquois metaphor of clasped hands applied to any of a number of alliances of friendship. It was not until after some years that the symbol of the silver covenant chain came to represent a larger, more particular relationship between

---

<sup>26</sup> RCAP, vol. 1, 130 (parentheses in the original).

<sup>27</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed. (Markham: LexisNexis Canada, 2012), 294-295.

<sup>28</sup> Ibid., 16.

Britain and its allies.<sup>29</sup> While the metaphor of a silver chain interlinking peoples in peace, friendship, and respect was meant to express the values of permanency and steadfastness, Borrows and Rotman affirm that it was normal to the Aboriginal peoples involved that the alliance required regular renewal—to reaffirm the alliance, but also to modify and adapt it based on changing circumstances and needs. The process of renewal—“which was often described as ‘polishing the chain’—was designed to remind the parties of the solemn compact that they had entered into. When the chain was neglected through a lack of renewed commitment, it was described as ‘tarnished’ or ‘rusted.’”<sup>30</sup>

However, despite these nation-to-nation diplomacies and the reaffirmations that were so often necessary, there were underlying incongruities—much of them to do with deep-seated and often unspoken differences about sovereignty and possession of the land:

It appears that European and Aboriginal interpretations of their agreements, whether written or not, differed on some key issues. The two principal ones were possessory rights to the land and the authority of European monarchs or their representatives over Aboriginal peoples. In general, the European understanding—or at least the one that was committed to paper—was that the monarch had, or acquired through treaty or alliance, sovereignty over the land and the people on it. The Aboriginal understanding, however, recognized neither European title to the land nor Aboriginal submission to a European monarch.<sup>31</sup>

---

<sup>29</sup> Richard L. Haan, “Covenant and Consensus: Iroquois and English, 1676-1760,” in *Beyond the Covenant Chain: The Iroquois and their Neighbours in Indian North America, 1600-1800*, eds. Daniel K. Richter and James H. Merrell (New York: Syracuse University Press, 2003).

<sup>30</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 17.

<sup>31</sup> RCAP, vol. 1, 125.

The Royal Commission on Aboriginal Peoples surmises that one reason why fundamentally different perspectives could co-exist without creating conflict was precisely “because they were so fundamental and so different,” and thus went unexpressed—except perhaps in the legalese of written treaties that could not be read by the First Nations leaders that signed them: “Europeans may have been literally unable to conceive of the possibility that they were not discoverers who brought light into a dark place, faith into a heathen place, law into a lawless place. Indigenous nations equally could not conceive that their nationhood or their rights to territory could be called into question. They naturally had no concept that their land had been ‘undiscovered’ before Europeans found their way to it.”<sup>32</sup>

Perhaps this is the case to a certain extent, but any attempt to attribute a lack of rupture in European-Aboriginal relations purely to a general untranslatability of worldview should be troubled by the European tendency to tailor state discourse to the ears that would hear it. At base, there is what Brian Slattery has called “divergent streams of state practice, one inter-European, the other European-Aboriginal.”<sup>33</sup> Slattery points out this divergence while discussing the tenuousness of the argument that a pure doctrine of discovery—the notion that discovery alone gave the discovering European nation sovereignty and title over territory in the New World—existed as a justificatory legal principle underlying British and French colonization.<sup>34</sup> In effect, the historical record does not offer much evidence in favour of according discovery such legal significance,

---

<sup>32</sup> Ibid., 126.

<sup>33</sup> Slattery, “Aboriginal Sovereignty and Imperial Claims,” 689.

<sup>34</sup> If such a doctrine did exist, then, it would serve as a common law analogue to *terra nullius*. Note also that this original, simple doctrine of discovery differs somewhat from the modified version that would be posited by the Supreme Court of the United States in the nineteenth century under Chief Justice John Marshall. The Marshall Court case law will be examined in the following chapter.

especially given the myriad mentions by British authorities of Indian title, Indian lands, Indian possession of lands, and the use of treaties to extinguish Indian title. In a later piece, Slattery suggests that many of the more ostentatious claims to territory, when employed by the British or French Crowns, were a later development which came about under the duress of heightened competition amongst the European colonial powers. In short, “while rejecting the monopolistic claims of the Iberian powers, the French and English Crowns eventually began playing a similar game, claiming exclusive spheres of operation in the New World *as against other European powers.*”<sup>35</sup> Slattery’s notion of divergence, then, is about the development of two different, yet concurrent and complementary, sets of practices for securing interests in land: on the one hand, negotiating or treating with Indigenous allies as possessors of the land, and, on the other hand, seeking to establish amongst a cohort of colonizing nations one’s *exclusive* right to do so over a certain territory.<sup>36</sup>

But, as alluded to above, this divergence of state practice intersects with a considerable duplicity in ways of talking about European interests, marking a major contrast between the understandings often conveyed to First Nations and what was expressed in official communications and in the text of many treaties. For Andrée Lajoie and Pierre Verville, French pretensions to sovereignty over land and people were

---

<sup>35</sup> Brian Slattery, “Paper Empires,” 72 (emphasis added). Slattery suggests that French and British assertions of exclusive rights of colonization over designated but still unprocured lands began, respectively, with a 1603 commission by which King Henry IV granted to Pierre Du Gua de Monts the exclusive right of colonization between forty and sixty degrees latitude in North America, and the Virginia Charters of 1606 and 1609 in which British companies are granted exclusive territorial rights that extend inland from initial coastal settlements.

<sup>36</sup> As will be examined in the next chapter, the idea of claiming exclusive territory as against other European powers, but that was still burdened with the interest in land of the Indigenous populations, became the basis of the modified doctrine of discovery devised by the United States Supreme Court in the eighteenth century. See *supra* n34.

“confined to their discourse, a discourse destined for their European competitors, recorded only in the accounts and petitions they sent to their principals in the mother country and that they took good care to withhold from the Aboriginal people. Nor was it revealed in their practices.”<sup>37</sup> While the present-day evaluation of seventeenth and eighteenth century treaties is complicated by the dearth of records detailing anything concerning the treaty negotiations themselves and the oral reassurances transmitted to First Nations signatories, historians have been able to raise serious questions about British diplomatic practices with Indigenous North Americans. William Wicken, for example, finds it unlikely that the Mi’kmaq and Wuastukwiuk (Maliseet) representatives would have willingly recognized the British Crown’s “dominion” over their territories in eastern North America, or themselves as its subjects, in a series of treaties they signed with the Crown during the eighteenth century.<sup>38</sup> In fact, there are records of Mi’kmaq leaders’ expressions to the contrary, and the British had little military influence in the region until late in the eighteenth century. In addition, Wicken looks to contemporaneous treaties that the British signed with the Penobscot people and the Abenaki people nearby. Concerning the former, Loron, the speaker of the Penobscot, sent a letter to the Lieutenant-Governor of Massachusetts after the fact stating that, “Having hear’d the Acts read which you have given me I have found the Articles entirely differing from what we have said in presence of one another, ‘tis therefore to disown them that I write this letter unto you.” Loron goes on to specify, in reference to the treaty articles that purportedly had them declare themselves subjects of King George, that “when you have ask’d me if I

---

<sup>37</sup> Andrée Lajoie and Pierre Verville, *Treaties of Alliance between the French and the First Nations under the French Regime*, (Ottawa: Royal Commission on Aboriginal Peoples, 1993), quoted in RCAP, vol. 1, 127.

<sup>38</sup> William Wicken, “The Mi’kmaq and Wuastukwiuk Treaties,” *University of New Brunswick Law Journal* 43 (1994): 250.

acknowledg'd Him for King I answer'd yes butt att the same time have made you take notice that I did not understand to acknowledge Him for my king butt only that I own'd that He was king his [*sic*] kingdom as the King of France is king in His.”<sup>39</sup> Similarly, French speakers present at the signing of the treaty at Casco Bay on behalf of the Abenaki wrote that the articles read aloud to the Indians had not included references to submitting to the King, accepting responsibility for beginning hostilities with the English, or submitting to English law—despite the inclusion of these in the written text of the treaty.<sup>40</sup>

## After the Seven Years’ War

The British defeat of the French in the Seven Years’ War saw the French Crown cede the vast majority of its North American territorial interests to Great Britain in the 1763 Treaty of Paris. Britain also secured the colony of Florida, which then encompassed several modern day American states, from Spain. But the Seven Years’ War was a world war fought on multiple continents and on many seas. The North American theatre of the Seven Years’ War—often referred to by American historians as the French and Indian War—had largely come to an end by 1760, three years before the end of the larger war and the signing of the Treaty of Paris. The Treaty in 1763 was therefore largely a delayed substantiation of what had been established three years earlier in North America: a shift in the fundamental balance of power on the continent, tipping the scales significantly in favour of the British.

---

<sup>39</sup> Cited in Wicken, “Mi’kmaq and Wuastukwiuk Treaties,” 251.

<sup>40</sup> Wicken, “Mi’kmaq and Wuastukwiuk Treaties,” 251.

The victory would make for a difficult balance for the British Crown, however, to the extent that keeping First Nations content was largely at odds with any triumphalist assertion of sovereignty and dominion over much of North America. While the Iroquois Confederacy had long been allied with the British, many of the Algonquian speaking peoples in the regions ceded by France had allied themselves and traded with the French. In 1761, the Ojibwa chief Minavavana told English trader Alexander Henry, as recorded by Henry, “Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none.”<sup>41</sup> Thus, as 1763 was approaching, tensions were already rising quite high between British North America and many First Nations:

Englishmen celebrated 1763 as a victory for liberty, but Indians saw Britain’s victory as a threat to freedom. Most of the territory that changed hands at the Peace of Paris was Indian land. Indians were stunned by the news that France had handed over their lands to Britain without even consulting them: they were undefeated and the French had no right to give up their country to anyone. Having fought for their sovereignty and autonomy in the war, Indians were not likely to acquiesce in a peace that subjected their lands and lives to British imperial authority.

---

<sup>41</sup> Cited in John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 157.

Indians had never regarded the French presence and alliance as constituting any kind of dominion over them.<sup>42</sup>

According to British officials who dealt with First Nations as part of their office, the British victory was sufficient to make even their allies uncomfortable. In a letter to the Lords of Trade, 8 June 1764, George Croghan, Deputy Superintendent of Indian Affairs for the northern colonies, wrote about the changing disposition of the Iroquois, Shawnee, and Delaware First Nations:

The Indians, before the late war or the conquest of Quebec, considered us in the light of a counterpoise to the power of the French, their ancient enemies, and were steady friends of the English on that account; but since the reduction of Canada, they consider us in a very different and less favourable light, as they are now become exceedingly jealous of our growing power in that country... we know them now to be a very jealous people, and to have the highest notions of liberty of any people on earth, and a people, who will never consider consequences when they think their liberty likely to be invaded, though it may end in their ruin...<sup>43</sup>

There were differing opinions at the time as to how much caution was warranted, however. Some scholars personify the equivocality of Britain's Aboriginal policy in this period with differences in approach between Superintendent of Indian Affairs for the northern colonies William Johnson and Deputy Superintendent George Croghan on the one hand, and their military counterparts on the other:

---

<sup>42</sup> Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America*, (New York: Oxford University Press, 2006), 66.

<sup>43</sup> Cited in David Mills, *A Report on the Boundaries of the Province of Ontario*, (Toronto: Hunter, Rose & Co., 1873), 17.

After the conquest of New France, there was a rift in British attitudes towards the Aboriginal peoples. On the one hand, military leaders such as [General Thomas] Gage and General Jeffrey Amherst thought that Britain could now unilaterally dictate the future course of British-Aboriginal relations... However, Sir William Johnson and his right-hand man, George Croghan, believed that British relations with the Aboriginal peoples should continue as they had prior to the conquest. They contended that any change in the *status quo* would lead to Aboriginal revolt that would be costly to Britain's colonial desires. This split between Britain's diplomatic and military representatives in North America was responsible for an ensuing inconsistency in British attitudes towards the Aboriginal peoples. This inconsistency was most apparent in the years between the conquest of New France and the release of the *Royal Proclamation of 1763*...<sup>44</sup>

Indeed, Richard White cites General Amherst as confiding in his officers that Croghan and Johnson tended to make the mistake of thinking the First Nations "of more consequence than they really are."<sup>45</sup> Amherst's vision of the *pays d'en haut*—the French descriptor for the Great Lakes region—"was a simple one," according to White: "the British were conquerors; the Indians were subjects. It was a view that abolished the middle ground."<sup>46</sup>

White's trademark concept of the *middle ground* represented a sort of mutual accommodation between different cultures, one with misunderstandings, but also shared

---

<sup>44</sup> Leonard Rotman, *Fiduciary Law*, (Toronto: Thomson/Carswell, 2005), cited in Borrows and Rotman, *Aboriginal Legal Issues*, 21-22.

<sup>45</sup> Cited in Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, 20th anniversary edition (Cambridge: Cambridge University Press, 2011), 256.

<sup>46</sup> White, *The Middle Ground*, 256.

meanings and practices<sup>47</sup>—a concept that would seem to include the elaborate and ritualistic syncretism evidenced in early HBC trade practices. It was a route taken by the French in their relations with First Nations of the *pays d'en haut*, maintaining Aboriginal-European relationships according to the established protocols of nation-to-nation treaty-making and gift-giving. It was the route the continuance of which was sought by William Johnson and George Croghan, now that Britain was the ascending colonial power in North America, but General Jeffery Amherst and General Thomas Gage would not have it. According to Gage, “all North America in the hands of a single power robs them of their Consequence, presents, & pay.”<sup>48</sup>

It is possible to make too much of these conventional contrasts, however—a danger one runs when searching for tidy historical narratives with characters devoid of any moral ambiguity. While the historical record displays clearly General Amherst’s abhorrence for the First Nations that had caused him trouble,<sup>49</sup> the budget restraints and the postwar decision not to withdraw military personnel from trading posts in the Great Lakes and Ohio Valley region originated in London, not with Amherst himself.<sup>50</sup> The decision to eliminate presents to First Nations was his, but was a means of implementing London’s new financial austerity on the heels of its most expensive war ever. The Irishman General Gage, while he sought to wage war in the woods as effectively as possible, had deeper roots in North America and had at least expressed an understanding

---

<sup>47</sup> See White, *The Middle Ground*, 50-52.

<sup>48</sup> Cited in White, *The Middle Ground*, 256.

<sup>49</sup> Amherst is at the centre of an historical controversy that has taken on legendary proportions; namely, the suggestion to one of his colonels in the field, Henry Bouquet, that Bouquet use blankets infected with smallpox as a gift to First Nations adversaries: “You will Do well to try to Innoculate the Indians by means of Blanketts, as well as to try Every other method that can serve to Extirpate this Execrable Race.” Cited in Elizabeth Fenn, “Biological Warfare in Eighteenth-Century North America: Beyond Jeffery Amherst,” *Journal of American History* 86, no. 4 (2000): 1556-1557.

<sup>50</sup> White, *The Middle Ground*, 259.

of the reasoning of those First Nations who had risen up.<sup>51</sup> William Johnson, oft cited for his recognition of Aboriginal peoples as autonomous nations, was a man who used the advantages of his office to enrich himself enormously with First Nations' land.<sup>52</sup> He did not necessarily foresee an alternative future to Amherst, but rather saw a different, more pragmatic route to it. While Johnson and Croghan did question the discontinuation of gift-giving and restrictions in the trade of gunpowder with First Nations, they "did not seriously question most British measures; they only criticized the speed with which they were taken and the failure to negotiate them according to the diplomatic procedures of the middle ground."<sup>53</sup>

Indeed, in addition to respect for nation-to-nation relations, the giving and receiving of gifts was critical to the protocols of the middle ground—critical to the creation, maintenance, and restoration of intergroup relations. According to Colin Calloway, "withholding gifts and sending in troops sent a clear message, reinforced by the language of British officers: Britain intended to 'reduce' the Indians to submission and take over their land... They were convinced the redcoats intended to wage war on them—why else would they stop selling them powder and lead? The Indians interpreted Amherst's postwar frugality as preparation for war."<sup>54</sup> The same year that saw the Treaty of Paris thus also saw the breakout of another war. In Pontiac's War, a loose alliance of many First Nations sought to drive out the British from their territories and restore the

---

<sup>51</sup> Richard Middleton, *Pontiac's War: Its Causes, Course and Consequences* (New York: Routledge, 2007), 129.

<sup>52</sup> See James Rodger Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*, (Toronto: University of Toronto Press, 2009), 66; Fintan O'Toole, *White Savage: William Johnson and the Invention of America*, (New York: Farrar, Straus and Giroux, 2005).

<sup>53</sup> White, *The Middle Ground*, 259.

<sup>54</sup> Calloway, *The Scratch of a Pen*, 68-69.

balance that had been lost. The efforts of the belligerent First Nations were sufficient to force British policy to adjust. It is in this sense that contemporary historians such as Richard White challenge the older notion that Pontiac's War was an unqualified defeat for Pontiac and his allies. The premise of White's *The Middle Ground* is that Britain, with Jeffery Amherst held responsible for the uprising and recalled to London, was compelled to restore the middle ground. Employing the Algonquian kinship metaphor that often described the king of France as a father, White claims that Pontiac "rose against the British to restore his French father and created a British father instead."<sup>55</sup>

The *Royal Proclamation of 1763* was issued in London on 7 October 1763.<sup>56</sup> Although it was not inspired solely by Pontiac's War, which had begun the previous spring, James Miller suggests that the bloody conflict did lend the *Proclamation* some urgency. It established boundaries and administrations for the British Crown's new possessions in the New World by creating the governments of Quebec, East Florida, West Florida, and Granada. Having benefited from alliances with certain First Nations, and having brought the territories of groups that had been allied with France under his purview, King George sought to offer assurances in the *Proclamation* that would placate them. Sometimes dubbed the "Indian Magna Carta" or "Indian Bill of Rights," the *Royal Proclamation* did offer certain reassurances that First Nations' land would remain in their hands and that they would not be swindled by speculators or land-hungry settlers. Lands falling to the west of the sources of any rivers draining into the Atlantic Ocean, and which did not fall within the limits of the three new continental territories or within the limits of the lands granted to the Hudson's Bay Company, were reserved to their

---

<sup>55</sup> White, *The Middle Ground*, 268.

<sup>56</sup> George R., *Proclamation*, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

Indigenous inhabitants. British subjects were forbidden from purchasing, settling on, or taking possession of any lands in the reserved territory without licence from the Crown, and those already on such lands were to remove themselves immediately. In order to prevent the discontent stemming from “Frauds and Abuses” committed by Europeans in the purchase of First Nations’ lands, such lands could forthwith only be purchased by the Crown at a public assembly convened for that purpose, in the territory concerned, and with the Indigenous inhabitants present. Any persons wishing to trade with First Nations were also required to obtain a licence from the pertinent colonial administration, as well as pay a security deposit which would be forfeited should the trader fail to respect colonial trade regulations.<sup>57</sup> Working out the finer details of the placement of the line between the colonies and “Indian territory” would be a delicate operation, however. Sir William Johnson wrote to the Lords of Trade in London on 8 October 1764 that negotiating a boundary line “is a very necessary, but a delicate point... I must beg to observe, that the Six Nations,<sup>58</sup> Western Indians, etc., having never been conquered, either by the English or the French, nor subject to their Laws, consider themselves as a free people. I am therefore induced to think it will require a good deal of caution to point out any boundary, that shall appear to circumscribe too far.”<sup>59</sup>

The *Proclamation* certainly did not bring about an immediate cessation to the violence, for the treaties that quelled conflict with the various First Nations involved in Pontiac’s War stretched from the summer of 1764 to the summer of 1766. The first was signed in August 1764 by William Johnson and a large delegation of First Nations at Fort

---

<sup>57</sup> George R., *Proclamation*, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

<sup>58</sup> The “Six Nations” refers to the six nations that comprised the Iroquois Confederacy.

<sup>59</sup> Cited in Robert A. Williams Jr, *The American Indian in Western Legal Thought: Discourses of Conquest*, (New York: Oxford University Press, 1990), 240.

Niagara. Later that month, Colonel John Bradstreet—exceeding his authority—signed a treaty with First Nations congregated at Fort Detroit. Bradstreet's dubious claim was that the First Nations in question submitted to British sovereignty.<sup>60</sup> When it came to his attention, William Johnson was incredulous and penned a letter to the Lords of Trade in London, dated 30 October 1764:

I have just received from Genl Gage a copy of a Treaty lately made at Detroit by Coll. Bradstreet with the Hurons and some Ottawas & Missisagaes; these people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some other mistake; for I am well convinced, they never mean or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment etc, defined, it might produce infinite harm, but could answer no purpose whatever... I am impatient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles...<sup>61</sup>

From this period, it is the *Royal Proclamation* that has come to be regarded as singularly influential to Canadian Aboriginal law. But there are some profound ambiguities in how the *Proclamation* talks about First Nations and their lands. It is

---

<sup>60</sup> White, *The Middle Ground*, 294.

<sup>61</sup> Cited in Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence," *University of New Brunswick Law Journal* 46, (1997): 14.

perhaps fitting that such an influential yet vague document is sourced from a period in which British policy and practice has been deemed so inconsistent. The *Proclamation* certainly announced a new era in land cession treaty-making and formalized several core characteristics of it, but what are we to make of its view of the Aboriginal peoples' relationship to their lands, especially in this historical context? Aboriginal rights advocates often want to see in the *Royal Proclamation* the recognition of Aboriginal groups as “nations” and autonomous peoples, as well as a guarantee to protect them and their lands.<sup>62</sup> But any reading of the document also has to contend with its profoundly presumptuous tone of Crown authority. The *Proclamation* seeks to reassure First Nations of the Crown’s justice by reserving a swath of territory for them, but by what justice does the Crown purport to be in its right to reorder in any way lands that belonged to First Nations?

In effect, there is a momentous equivocality to the *Royal Proclamation*, if not so much in the sense of being of two minds, then more so in the sense of trying to have it both ways. The Crown repeatedly makes use of the presumptuous language of dominion that has so often been slipped into the written text of treaties. First Nations are referred to as being in possession of “Parts of Our dominions and territories” and colonial administrators as being prevented from surveying and distributing to European interests those lands reserved for the Indians “until Our further pleasure be known.” In effect, the lands are merely reserved “under Our sovereignty, protection, and dominion, for the Use of the said Indians...”<sup>63</sup> D. N. Sprague notes that blatantly assimilationist aspects of the

---

<sup>62</sup> See Rotman, “Canons of Treaty Interpretation,” 15; Rotman, *Fiduciary Law*, cited in Borrows and Rotman, *Aboriginal Legal Issues*, 22; *RCAP*, vol. 1, 116.

<sup>63</sup> George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

*Royal Proclamation* concerning the governing of Quebec were soon repudiated and replaced with other arrangements, but this was never the case for the key aspects of Aboriginal-colonial relations outlined in the document.<sup>64</sup> Perhaps it is due to this that Leonard Rotman clarifies that, in extracting more optimistic and progressive interpretations for Aboriginal peoples in the *Proclamation*, he does not mean “to suggest that the document did not sow the seeds for the onslaught of colonialism that ultimately become [*sic*] the dominant characteristic of Crown-Aboriginal relations.”<sup>65</sup> John Borrows is also very mindful of the equivocality:

In placing these divergent notions within the Proclamation, the British were trying to convince Native people that there was nothing to fear from the colonists, while at the same time trying to increase political and economic power relative to First Nations and other European powers. The British perceptively realized that alleviating First Nations’ “discontent” required that Native people believe that their jurisdiction and territory were protected; however, the British also realized that the colonial enterprise required an expansion of the Crown’s sovereignty and dominion over the “Indian” lands. Thus, while the Proclamation seemingly reinforced First Nation preferences that First Nation territories remain free from European settlement or imposition, it also opened the door to the erosion of these same preferences.<sup>66</sup>

---

<sup>64</sup> D. N. Sprague, “Canada’s Treaties with Aboriginal Peoples,” *Manitoba Law Journal* 23 (1995): 341-342. Though he does not specify, Sprague is likely referring to the *Quebec Act* of 1774, which is discussed below.

<sup>65</sup> Rotman, *Fiduciary Law*, cited in Borrows and Rotman, *Aboriginal Legal Issues*, 23.

<sup>66</sup> Borrows, “Wampum at Niagara,” 160.

Indeed, if the Royal Commission on Aboriginal Peoples is correct in characterizing many of the *earlier* British and French ventures in North America as a “paradoxical blend of imperial pretension and cautious realism”<sup>67</sup>—due to the Europeans’ pragmatic dependence on trading partners and military allies—then a somewhat cynical reading can find the *Royal Proclamation* guilty of haughty pretension on two counts: the assumption of imperial dominion over Aboriginal lands on the one hand and, bestowed through that dominion, the affectation of being benevolent protector of First Nations on the other.

## Treaty-Making in an Age of Shifting Relationships

The province of Quebec was divided into the provinces of Upper Canada and Lower Canada by Great Britain on 26 December 1791, with Upper Canada being located to the west of the Ottawa River, along what is now southern Ontario. For a number of decades after the *Royal Proclamation of 1763*, it was this latter region that served as the incubator for a first generation of *Proclamation* styled treaties known thereafter as the Upper Canada treaties or Upper Canada land surrenders—a partial and minor anachronism given that some of the treaties predate the province itself.

A major impetus for procuring land north of Lake Erie, Lake Ontario, and the St. Lawrence from the Mississauga First Nations came from the American Revolution. J.R. Miller avers that the rebellion of the thirteen American colonies against Great Britain was at least “partially incited” by British Aboriginal policy.<sup>68</sup> The *Quebec Act* of 1774 offered protection for the Catholic faith in the province, restored French civil law for private

---

<sup>67</sup> RCAP, vol. 1, 111.

<sup>68</sup> James Rodger Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, 3rd ed. (Toronto: University of Toronto Press, 2000), 93.

matters, and amalgamated a large swath of land reserved for First Nations west of the Thirteen Colonies into Quebec.<sup>69</sup> All three of these aspects of the *Quebec Act* were seen as an affront by the protestant colonies, but the third, in particular, frustrated their expansionist ambitions. According to Miller, “It was still the Americans who were trying to expand their agricultural frontier into what the Royal Proclamation had termed Indian ‘hunting grounds,’ and it was still the British who resisted that expansion.”<sup>70</sup> In effect, the *Quebec Act* was dubbed by American rebels as one of the “Intolerable Acts” that justified their revolutionary war. The success of the Thirteen Colonies in the American Revolutionary War brought about the 1783 Treaty of Versailles, according to which Great Britain surrendered lands south of the Great Lakes that had been held by the British, French Canadians, or even First Nations allies. Just as when the French had handed its North American interests over to the British two decades earlier, the inter-European treaty was a glimpse at the imperialist pretensions often concealed from Aboriginal observers. Seeing their land purportedly given away by those who did not own it left one Mohawk chief stunned and embittered: “The King surely would not pretend to give the Americans that which was not his to give; and would not believe that the Americans would accept that which the King had not power to give. They were allies of the King, not subjects; and would not submit to such treatment... If England had done so it was an act of cruelty and injustice and capable only of *Christians*.<sup>71</sup> Feeling the intensity of First Nations anger, Britain soon began negotiating with the Mississauga north of the lower Great Lakes and the St. Lawrence in order to make land available for

---

<sup>69</sup> *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2.

<sup>70</sup> Miller, *Skyscrapers Hide the Heavens*, 95.

<sup>71</sup> Cited in Miller, *Skyscrapers Hide the Heavens*, 97 (emphasis in original).

Loyalist refugees—First Nations and Euro-American alike. This was followed by a wave of “Late Loyalists” in the 1790s and 1800s that Miller characterizes as “really just land-hungry American farmers.”<sup>72</sup>

D. N. Sprague refers to the land procurement on behalf of Loyalist refugees as “the first large-scale application of the treaty-making requirement enunciated in 1763.”<sup>73</sup> Indeed, by 1806, treaties between the Crown and the Mississauga had accounted for the waterfront lands from Windsor through to the Ottawa River.<sup>74</sup> Yet, by later standards, many of the early Upper Canada treaties covered relatively small stretches of territory. They were somewhat simple agreements, involving only one time lump-sum payments for the land—and sometimes paltry payments at that. Miller thus speculates as to whether the vast tracts of unsettled land available, set against the limited stretches ceded for early newcomers, made it seem to resident First Nations as though “giving up these lands in return for material benefits might have seemed an attractive proposition with very little downside.”<sup>75</sup>

Beginning in 1818, in another frugal era—this one following the War of 1812 against the United States—a new system of land surrender treaties which foresaw annual payments to First Nations, or annuities, was put in place. One might expect that, over the long term, such a system would be more costly to the Crown, but this was not the case. Land procured by treaty was to be sold to settlers who would only need to make a down payment of ten per cent in order to purchase a parcel. The remainder of the purchase price would be mortgaged, with the mortgagor only expected to pay the annual interest,

---

<sup>72</sup> Miller, *Skyscrapers Hide the Heavens*, 116.

<sup>73</sup> Sprague, “Canada’s Treaties with Aboriginal Peoples,” 342.

<sup>74</sup> Miller, *Compact, Contract, Covenant* (2007), 15.

<sup>75</sup> Ibid., 16.

and not the principal. The Crown, in turn, would use these revenues to pay the smaller annuities to the First Nations signatories. According to J. R. Miller, this practice had multiple advantages for the British:

...it eliminated most of the large expenditures on land surrenders; and the Indians indirectly funded most of the purchase price of their land through instalment payments made from revenues derived from the land. To the Indians such payments probably seemed familiar and welcome, resembling as they did the annual presents that many of them had been accustomed to receive from the British in the days when military alliance had been important, and that some of them continued to receive in the decades after the War of 1812. In this way, during the fifteen years after the war, vast areas of Indian lands in Upper Canada were transferred to agricultural settlers in seven land treaties.<sup>76</sup>

There was more than just frugality underlying the historical changes that were developing, however. Certainly, France's cession of the vast majority of its North American interests to Britain altered the dynamic in Crown-Aboriginal relations, for First Nations "could no longer occupy the enviable position of holding the balance of power between Britain and France."<sup>77</sup> But if this event marked the turning of a tide, the transition continued to gain momentum to the disadvantage of First Nations, especially in the eastern third of the continent that comprised much of the theatre of intergroup relations in the late eighteenth century and the first half of the nineteenth century.<sup>78</sup> Historians have highlighted several factors underlying this change.

---

<sup>76</sup> Miller, *Skyscrapers Hide the Heavens*, 117-118.

<sup>77</sup> Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), 37.

<sup>78</sup> Miller, *Skyscrapers Hide the Heavens*, 103.

Firstly, in terms of demographics, while Aboriginal populations had been decimated by disease, the non-Aboriginal population would see dramatic increases. The Loyalists after the American Revolution, the “Late Loyalists” of the 1790s and 1800s, and a wave of migration from the British Isles from the 1820s onward swung the demographic pendulum even further. The number of new settlers was sufficient to have Upper Canada’s population increase from 95,000 at the end of the War of 1812 to 952,000 during the 1851 census. Between 1821 and 1851, the total population of British North America increased from approximately 750,000 to 2.3 million.<sup>79</sup> It is estimated that, by 1812 in Upper Canada, “the non-Aboriginal population of that colony outnumbered the Aboriginal population by as much as 10 to 1, with the ratio increasing further in the ensuing decades.”<sup>80</sup> This increasing ratio meant that the First Nations population of Upper Canada was reduced to “demographic insignificance” relatively quickly during the first half of the nineteenth century.<sup>81</sup>

Secondly, significant markers of the fur trade’s decline occurred in the nineteenth century. Montreal’s North West Company amalgamated with the Hudson’s Bay Company in 1821, a change which brought a halt to fur trade operations out of Montreal, and which greatly diminished commercial relations between First Nations in the east and Europeans.<sup>82</sup> Monopoly conditions, of course, also meant that Hudson’s Bay Company traders felt a diminished need to lavish gift-giving and status recognition upon their Indigenous partners.<sup>83</sup> The fur trade, for its part, would rise and fall in different regions of

---

<sup>79</sup> Ibid., 116.

<sup>80</sup> RCAP, vol. 1, 137.

<sup>81</sup> Miller, *Skyscrapers Hide the Heavens*, 117.

<sup>82</sup> Ibid., 103; RCAP, vol.1, 138.

<sup>83</sup> John Long, “‘No Basis for Argument’: The Signing of Treaty Nine in Northern Ontario, 1905-1906,” *Native Studies Review* 5, no. 2 (1989): 23.

the continent at different times, but its inevitable decline would foster a sense of incompatibility between the respective economies of settlers and Aboriginal peoples. Rather than capitalizing on the knowledge and skills of Aboriginal people on the land, settlers wanted the land itself for agriculture, timber, fish, and other resources.<sup>84</sup> To this one can add the damage to Aboriginal economies that was caused over time by the loss of land, declining game populations, and disease. According to the Royal Commission on Aboriginal Peoples, “relief payments to alleviate the threat of starvation became a regular feature of colonial financial administration. In short order, formerly autonomous Aboriginal nations came to be viewed, by prosperous and expanding Crown colonies, as little more than an unproductive drain on the public purse.”<sup>85</sup>

While the increasing incompatibility of the two economies was one modality of a major shift in European-Indigenous relations, *peace* was the other. In effect, the prospect of a lasting peace itself was to the strategic detriment of First Nations. If General Thomas Gage’s observation that Britain’s victory over France meant that First Nations were thereafter of less “consequence,”<sup>86</sup> this became all the more the case after the War of 1812, which was followed by a period of relative peace that largely eliminated Britain’s need for military alliances with Indigenous peoples.<sup>87</sup> Normalization of relations between Britain and its former North American colonies—which were now the United States of America—occurred first in the Maritimes and then later in Lower and Upper Canada.

---

<sup>84</sup> RCAP, vol.1, 138.

<sup>85</sup> Ibid.

<sup>86</sup> Cited in White, *The Middle Ground*, 256.

<sup>87</sup> Jennifer Llewellyn, “Dealing with the Legacy of Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice,” *University of Toronto Law Journal* 52, no. 3 (2002): 256; RCAP, vol.1, 138.

With the threat from the south removed, so was “the military significance of Indians in the eyes of British planners.”<sup>88</sup>

What is significant about these historical changes, then, is how the shift away from a functional interdependence between First Nations and newcomer saw a parallel shift in how the Aboriginal subject would be cast in European light: in essence, it was a shift from ally or adversary to simple obstacle, and from trading partner to social problem. Tellingly, the once “quasi-diplomatic” responsibility of Indian affairs in both Upper and Lower Canada was transferred from military to civil authorities by 1830.<sup>89</sup> By contrast, it is somewhat indicative of the more violent history that would play out south of the border that, at the same time, the United States transferred that responsibility to its War Department.<sup>90</sup>

In 1841, Upper and Lower Canada were joined together as the Province of Canada. Due to the success of American mining operations on the upper Michigan Peninsula south of Lake Huron and Lake Superior—particularly the location of copper deposits—entrepreneurs on the Canadian side were hopeful that similar discoveries could be exploited on the north shore. By May 1846, thirty-four licences for mining exploration on the north shore of Lake Superior had been issued to companies<sup>91</sup> without the benefit of treaties with the resident Ojibwa groups, despite the requirements of the *Royal Proclamation*. More than just incursions on rarely used backcountry, some of the sixty-eight shoreline tracts awarded by the government along the upper Great Lakes actually

---

<sup>88</sup> Miller, *Skyscrapers Hide the Heavens*, 103.

<sup>89</sup> RCAP, vol.1, 138; see also Miller, *Skyscrapers Hide the Heavens*, 118.

<sup>90</sup> Miller, *Skyscrapers Hide the Heavens*, 118.

<sup>91</sup> Robert Surtees, *Treaty Research Report: The Robinson Treaties (1850)*, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986).

posed a threat to Ojibwa and Métis lakeshore settlements.<sup>92</sup> Needless to say, this was a source of great tension. Regional First Nations leaders such as Chief Shingwaukonse and Chief Nebenagoching lobbied the government heavily for a treaty to spell out terms for a mutual accommodation: “Can you lay claim to our land? If so, by what right? Have you conquered it from us? You have not... Have you purchased it from us, or have we surrendered it to you? If so when? and how? and where are the treaties?”<sup>93</sup>

According to Ray, Miller, and Tough, the Ojibwa of the region were well familiar with the concepts of leasing out land and granting mining leases, and even had experience doing so themselves.<sup>94</sup> Janet Chute’s historical work also shows that, thanks to the information passed on to them by the lawyer and mining entrepreneur Allan Macdonell, they also likely had an accurate representation of how much the government had been paid and was meant to be paid for the mining concessions.<sup>95</sup> They had also observed the results of signing treaties with inflexible, fixed annuities, as had happened to their close relations on the American side of the Great Lakes.<sup>96</sup> In short, the Crown was dealing with an inconveniently informed and discerning assemblage of Indigenous groups north of the upper Great Lakes. What they sought to offer was the cession of mineral and timber rights in exchange for royalties proportional to the revenue the government was able to earn from them—in essence, a direct share of resource revenues from their land. It was a vision of Ojibwa interest in land remarkable in its

---

<sup>92</sup> Ray, Miller, and Tough, *Bounty and Benevolence*, 36.

<sup>93</sup> RCAP, vol.1, 158.

<sup>94</sup> Ray, Miller, and Tough, *Bounty and Benevolence*, 35-36.

<sup>95</sup> Janet Chute, “Moving on Up: The Rationale for, and Consequences of, the Escalation Clause in the Robinson Treaties,” *Native Studies Review* 18, no. 1 (2009): 57. Both Chute and Ray, Miller, and Tough in the above note touch upon the extent to which Crown representatives came to detest Macdonell’s meddling, and refused to recognize him as legal representative of the negotiating First Nations, though the latter desired it.

<sup>96</sup> Ibid., 60.

commensurability with the interest Europeans sought to hold in their lands: Indigenous lands should bring economic viability for Indigenous peoples, without having to sell off those lands entirely. In the 1840s Ojibwa bands had even guided mining entrepreneurs to deposits and brought specimens to Indian agents, all the while seeking to have their possession of the land recognized, in the hopes of finding for their people “a secure and valued place in Canadian society.”<sup>97</sup> Shingwaukonse was clear that he desired to remain at Garden River and that he expected “a share of what is found on my lands.”<sup>98</sup> Early suggestions from the Crown—that the Ojibwa were immigrants from south of the Great Lakes and therefore could not claim rights to land that was not theirs,<sup>99</sup> that any treaty should only cover a narrow strip of land along the shore,<sup>100</sup> or that the value of the treaty should reflect that Indigenous peoples could really only cede hunting, fishing, and gathering rights<sup>101</sup>—demonstrated a considerable distance between the two sides that goes some way toward explaining the rise in hostility over the period from 1845 to 1849. This culminated, in November 1849, with the two chiefs leading a contingent of Ojibwa and Métis to occupy and shut down a copper mine at Mica Bay, north of Sault Ste. Marie. This spurred the treaty-making process.

---

<sup>97</sup> Janet Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership*, (Toronto: University of Toronto Press, 1998), 110.

<sup>98</sup> Cited in Chute, *Legacy of Shingwaukonse*, 110.

<sup>99</sup> Chute, “Moving on Up,” 55-56n2. Chute explains that this initial claim from Crown Lands Commissioner D. B. Papineau created a terribly compromising situation for the Indian Commissioner, Thomas Anderson, who dealt with the upper Great Lakes Ojibwa. For years Shingwaukonse had been a valued ally of the British who had fought courageously in the War of 1812 and rallied Aboriginal support for the British across a wide territory. It was therefore agents of the “old order” such as Anderson that had actively supported inviting American side Ojibwa “who remained loyal to Britain to share in British bounty” north of the Great Lakes. To turn against them in this way because of their call to share in the wealth of the Canadian Shield “seemed to Anderson an act of pernicious betrayal.” To remove him from those “nagging perplexities,” Thomas Anderson was demoted from the position.

<sup>100</sup> Ray, Miller, and Tough, *Bounty and Benevolence*, 38.

<sup>101</sup> Chute, “Moving on Up,” 56.

William Robinson was selected to finalize a treaty with the Ojibwa of the upper Great Lakes. The original negotiating commissioner, Thomas Anderson, was seen as too sympathetic to the Ojibwa cause, while the second, Alexander Vidal, had been too hostile to it and had inspired Aboriginal resistance and hostility.<sup>102</sup> Due to the reluctance of Shingwaukonse and Nebenagoching to accept Robinson's terms on behalf of the Lake Huron peoples—they continued to press for a larger base annuity of ten dollars per person and land grants for their Métis compatriots—Robinson signed a treaty with the contingent from north of Lake Superior first and then another when the contingent from north and east of Lake Huron conceded two days later. The Robinson Superior and Robinson Huron treaties of 1850, while they do not specifically provide for an annuity of ten dollars per person, did demonstrate several innovations as far as treaties are concerned. In the written agreements, Robinson indicates that certain areas of land where the groups reside will be maintained as Indian *reserves*, and the signatory groups will benefit from continued rights to hunt, fish, and trap on public lands throughout the entire territory—two elements that had not been regular features of prior treaty-making.<sup>103</sup> If anything, however, the circumstances surrounding these treaties highlight the underlying context of a shifting balance of power and the increasing tendency to conceive of Aboriginal peoples as mere obstacles to development and a drain on the public purse. In the report to his superiors, Robinson himself justified the new elements by arguing that

---

<sup>102</sup> Ibid., 55.

<sup>103</sup> Miller, *Compact, Contract, Covenant* (2007), 19. Miller notes that there was nothing written specifically about reserves and hunting guarantees in the Upper Canada treaties, but that this did not mean that reserves did not exist. In New France, missionary bodies had often established reserves with the co-operation of the colonial government. Upper Canada and eastern British North America also had some such reserves established independently of treaties. Beginning with the Indian Department's "civilization policy" in the 1830s, the government began participating more in establishing reserves for groups who had none in order to help convert First Nations to sedentary agriculture, as the land was being taken up with alarming speed and the forests cleared for farming.

they would help pre-empt future Ojibwa justifications for seeking further support from the Crown:

In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation, and by securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence and therefore have no claims for support, which they no doubt would have preferred, had this not been done.<sup>104</sup>

The other innovation in the Robinson treaties was one that had been proposed by the previous Indian commissioner, Alexander Vidal, as a last resort only, and William Robinson's instructions were largely based on his predecessor's report.<sup>105</sup> That last resort was an escalation clause that allowed for the possible rise of annuity payments in the future, contingent on adequate Crown revenues from developing the land. It may indeed have been a situation in which Robinson felt he needed to take what, for the government, might have been considered an extreme measure. Dividing to less than one dollar per person, the sum offered by Robinson for their annuity was much less than the ten dollars per person Shingwaukonse had hoped for.<sup>106</sup> The mining entrepreneur and lawyer-advocate for the Ojibwa, Allan Macdonell, had argued forcefully in the print media that the Ojibwa had full title to their land and was even set to test the matter in the courts.<sup>107</sup> It

---

<sup>104</sup> Cited in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-west Territories*, (Toronto: Belfords, Clarke & Co., 1880), 19.

<sup>105</sup> Chute, "Moving on Up," 55.

<sup>106</sup> Morris, *Treaties of Canada*, 18n.

<sup>107</sup> Chute, *Legacy of Shingwaukonse*, 138.

was Macdonell, of course, seen as the most perfidious of troublemakers by the government agents, who had signed earlier lease agreements directly with the Ojibwa, and with whom the Ojibwa were considering dealing once again.<sup>108</sup> Robinson therefore inserted the escalation clause in order to placate the Ojibwa leaders. The legalese of the written text shows the promise of increasing revenues for the Ojibwa to be remarkably circumscribed, however, with Robinson promising “that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province without incurring loss to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order...”<sup>109</sup> The escalation clause in the Robinson treaties thus carried a ceiling of four dollars per individual, still less than half what Shingwaukonse had demanded, and the possibility of receiving anything more than this would forever be at the whim of the Crown—regardless of the amount of wealth extracted from Ojibwa land. Janet Chute avers that the Ojibwa “likely saw the clause as a sincere response to their interests on the part of the Crown, unaware of the ambiguity within.”<sup>110</sup> In essence, “the Ojibwa viewed the treaty’s annuity payments as ongoing shares in the beneficience of the Creator’s bounty, to be distributed proportionately to the wealth of the land, not to

---

<sup>108</sup> Chute, “Moving on Up,” 60-61. A direct lease agreement between Macdonell and the Ojibwa, of course, would have difficulty squaring against the terms of the *Royal Proclamation*.

<sup>109</sup> Cited in Morris, *Treaties of Canada*, 303.

<sup>110</sup> Chute, “Moving on Up,” 61.

be unilaterally capped by an artificial determinant over which the Ojibwa had no control.”<sup>111</sup>

As with many treaties in Canada’s history, controversies quickly arose—concerning such things as unfulfilled oral promises of clothing, the desire for gift distributions closer to the Fort William band’s place of residence, or the fact that reserve lands had been surveyed in miles rather than French leagues, as had been stated in Ojibwa translations.<sup>112</sup> More fundamentally, however, the treaties state that the Ojibwa “freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described,”<sup>113</sup> while the Ojibwa understood that they were ceding “only a limited use of their land for purposes of exploiting subsurface rights where minerals were discovered.”<sup>114</sup> As for the monetary compensation given as annuity, the Ojibwa expressed their discontent almost immediately. In a report prepared in 1858, two special Indian commissioners regretted that so much land had “been wrung from the Indians for a comparatively nominal sum.”<sup>115</sup> Despite this, no further action was taken at the time. By 1873, Simon J. Dawson, the member of the Ontario Legislature for Algoma, had taken up the Ojibwa’s cause. The annuities thus rose to four dollars per person in 1875, with the Crown never having been “graciously pleased to order” anything beyond this since.<sup>116</sup>

---

<sup>111</sup> Ibid., 62-63.

<sup>112</sup> Ibid., 61-62.

<sup>113</sup> Cited in Morris, *Treaties of Canada*, 303.

<sup>114</sup> RCAP, vol.1, 158-59.

<sup>115</sup> Cited in Chute, “Moving on Up,” 62.

<sup>116</sup> Cited in Morris, *Treaties of Canada*, 303. Morris mentions the rise in annuity at 18n; RCAP, vol.1, 158 laments the federal government’s reliance on the same clause.

Canada's expansion to the west and northwest followed a similar pattern to that of the upper Great Lakes region: non-Aboriginal incursion into Aboriginal lands occurred when economic opportunity presented itself, only to be met with Aboriginal resistance and demands for mutually agreeable terms of co-existence through treaty. Thus, when he published an important historical paper in 1983, John Tobias wanted to not only counter the idealized image of Canada's honourable and just dealings with First Nations that had been portrayed in expansionist literature since the late nineteenth century, he also wanted to do away with the illusion that the Crown was far-sighted enough to even have *a plan* for the integration of Aboriginal peoples into their economic vision:

...the fact remains that in 1871 Canada had no plan on how to deal with the Indians and the negotiation of treaties was not at the initiative of the Canadian government, but at the insistence of the Ojibwa Indians of the North-West Angle and the Saulteaux of the tiny province of Manitoba. What is ignored by the traditional interpretation is that the treaty process only started after Yellow Quill's band of Saulteaux turned back settlers who tried to go west of Portage La Prairie, and after other Saulteaux leaders insisted upon enforcement of the Selkirk Treaty or, more often, insisted upon making a new treaty. Also ignored is the fact that the Ojibwa of the North-West Angle demanded rents, and created the fear of violence against prospective settlers who crossed their land or made use of their territory, if Ojibwa rights to their lands were not recognized. This pressure and fear of resulting violence is what motivated the government to begin the treaty-making process.<sup>117</sup>

---

<sup>117</sup> John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885," *Canadian Historical Review* 64, no. 4 (1983): 520. Tobias mentions the Selkirk Treaty, which was somewhat anomalous in that it was

D.J. Hall has suggested that Tobias's claims go "too far," and that "there is little doubt that the Canadian government fully intended to extend its established system of Indian administration to Rupert's Land when it became part of Canada in 1870, though the details had been given little attention."<sup>118</sup> The underlying point is nevertheless the same: just as with the Robinson Treaties, resistance was mounted because settlers, traders, or Crown agents established interest in the land without Aboriginal consent, and that resistance—both First Nations and Métis—spurred the treaty process. In this sense, contemporary historians have become increasingly wary of the danger of erasing Aboriginal agency and portraying treaty history as something that simply *happened to* Aboriginal peoples.<sup>119</sup> Treaties One through Seven were signed in relatively quick succession from 1871 to 1877, opening up the region stretching from northwestern Ontario across the southern halves of what is now Manitoba, Saskatchewan, and Alberta. The new Dominion of Canada sought to expand into the West with European agricultural settlers and, with the entry of British Columbia into Confederation in 1871, had also committed to connecting that province to the rest of Canada by rail within ten years. First Nations pushed for treaties sometimes as a means to protect themselves and their way of life from encroachment, or even in recognition of imminent, inevitable change and a desire to best position themselves to be able to navigate that change. Robinson's use of a

---

signed quite early for a region that far west. In fact, in the eyes of Britain Rupert's Land still belonged to the HBC. The Earl of Selkirk thus bought the area of the Selkirk Settlement from the Company in 1811 and later signed a treaty with several Ojibwa Chiefs and an eastern branch of the Cree. Come the time of Confederation and the transfer of Rupert's Land to Canada, however, questions arose as to the adequacy of the Selkirk Treaty given its terms, given some controversy over which individuals signed on behalf of First Nations, and given that other Aboriginal peoples, not signatory to the treaty, made use of the same territory.

<sup>118</sup> D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited," *Canadian Journal of Native Studies* 4, no. 2 (1984): 322.

<sup>119</sup> See Derek Whitehouse, "The Numbered Treaties: Similar Means to Dichotomous Ends," *Past Imperfect* 3, (1994).

payment upon signing, annuities thereafter, and an area of reserved land for the First Nations became the template used for the numbered treaties,<sup>120</sup> but Crown agents also generally agreed to provide such things as:

...agricultural and economic assistance, schools and teachers, and other goods and benefits depending on the particular group they were negotiating with.

Ammunition and gunpowder (for hunting), twine (for fishing nets), agricultural implements (ploughs) and livestock (horses and cattle) were offered, should the Indian nations wish to take up agriculture as a way of life, although they were not compelled to do so. Treaty 6 included the promise of assistance in the event of famine and health care, in the form of a “medicine chest”.<sup>121</sup>

A necessary condition to impel treaty-making, however, was always the Crown’s interest in the lands upon which Aboriginal peoples lived. Due to the limited agricultural potential of the North, treaties signed in the northern regions of Ontario, the Prairie Provinces, and a little bit into the Yukon Territories and the Northwest Territories occurred later and at a slower pace. Treaties Eight through Eleven were signed from 1899 to 1921, with additional adhesions to Treaty Nine in the far north of Ontario taking place as late as 1929 and 1930. In fact, it was not uncommon for the government to receive and rebuff requests to treat with northern Aboriginal groups, be they directly from the Aboriginal peoples themselves or from missionaries and local government agents making appeals on their behalf. More often than not, it was the potential for mineral and fossil

---

<sup>120</sup> One subtle difference is that the numbered treaties expressed that the First Nations were ceding title to the entirety of the treaty territory, with the Crown holding in reserve a set amount of land for their exclusive use—rather than Robinson’s wording which held that title to the reserved portion of the territory was not surrendered. See *RCAP*, vol.1, 160.

<sup>121</sup> *RCAP*, vol.1, 160.

fuel extraction that ultimately compelled the government to negotiate treaties with northern groups, such as when oil was struck in the Mackenzie Valley prior to the signing of Treaty Eleven in 1921.<sup>122</sup>

## A Stable Foundation?

While the numbered treaties of the West have become somewhat emblematic of treaty-making in Canada, the tone that the first of them set was less than positive. In fact, Treaty Three spanning what would become northwestern Ontario and a small portion of southeastern Manitoba was meant to be the first of the group of treaties, but Crown representatives moved on to the area of the Red River Settlement after negotiations with Aboriginal leaders at Fort Frances had failed. Issues at Red River were also pressing: after skirmishes with Métis and the negotiation of the new province of Manitoba into Canadian Confederation, tensions were rising as traders and settlers drew to the region and no treaties had been struck with the Saulteaux and Cree.<sup>123</sup> In the summer of 1871, government negotiators came to Lower Fort Garry for Treaty One and the western shore of Lake Manitoba for Treaty Two with the typical offer of reserves and annuities, but the First Nations demanded and secured promises to other things—such as agricultural implements and livestock—which later became known as the “outside promises,” since the Crown representatives failed to include them in the written text of the treaties. In 1875, after several years of grievance and controversy over these unfulfilled promises,

---

<sup>122</sup> See Kenneth Coates and William Morrison, *Treaty Research Report: Treaty No. 11 (1921)*, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986); Ken Coates, “Best Left as Indians: The Federal Government and the Indians of the Yukon, 1894-1950,” *Canadian Journal of Native Studies* 4, no. 2 (1984).

<sup>123</sup> Sheldon Krasowski, “Mediating the Numbered Treaties: Eyewitness Accounts of Treaties Between the Crown and Indigenous Peoples, 1871-1876” (PhD dissertation, University of Regina, 2011), 60.

the federal government authorized their settlement according to a written memorandum based on the Crown representatives' recollections of the treaty negotiations.

Unfortunately, the outside promises controversy would be an indication of the problems that would plague treaty-making in Canada for the foreseeable future. Failure to provide the promised assistance in converting to an agrarian way of life was an issue in later numbered treaties as well,<sup>124</sup> but other issues with the post-Confederation treaties were even more fundamental—such as promises concerning land itself. D. N. Sprague conceptually divides the Crown's "sequence of accommodation" for First Nations into three stages: the negotiation of treaties, surveys to assess the land for expected development, and the administrative confirmation of reserves and original settler claims so that all other lands could be opened for development. "In theory," according to Sprague, "no conflicts could arise between competing claims of Native peoples and succeeding waves of European newcomers because such claims would be known and accommodated in advance of granting any grants of resources to incoming companies or individuals. In practice, however, major shortcomings and failures at every procedural stage of the process and in every geographical locale developed where treaty activity occurred between 1871 and 1921, the first and last years of Canadian treaties with Native peoples after Confederation."<sup>125</sup>

A major source of these shortcomings, according to Sprague, has been stalemates between the federal government and the provinces allowed by the idiosyncrasies of Canadian federalism. For the four provinces that joined Canadian Confederation in 1867,

---

<sup>124</sup> Tobias, "Canada's Subjugation of the Plains Cree," 525. Tobias discusses primarily the regions of Treaties Four and Six, extending across the southern half of Saskatchewan and central Alberta.

<sup>125</sup> Sprague, "Canada's Treaties with Aboriginal Peoples," 345.

the beneficial interest of the Crown in public lands, with certain exceptions, was vested in them by the *Constitution Act, 1867*.<sup>126</sup> The *Act*, however, also vested responsibility for “Indians, and Lands reserved for the Indians” in the federal government.<sup>127</sup> Thus as the federal government signed Treaty Three in 1873 and the shifting borders of the young country soon revealed the majority of that territory to fall within Ontario, allocating the lands promised in the Treaty required obtaining their relinquishment from the province. Canada and the Treaty Three First Nations arrived at mutually acceptable selections of land, but Ontario stonewalled the process for decades, frequently because the land was too close to hydroelectric development or was deemed simply too valuable for First Nations due to its agricultural, timber, or mining potential.<sup>128</sup> It was not until 1915 that Ontario agreed to reserve selections for the Treaty Three area.

From 1870 on, as provinces west of Ontario were joining Confederation, Crown lands remained under the control of the Dominion of Canada in order to insure the fulfillment of Dominion purposes. Sprague indicates that, as late as the 1920s, treaty land obligations were still unfulfilled, the slowness of the federal government mainly due to cost. To apparently avoid the repetition of the Ontario experience, the federal government transferred lands and resources to the western provinces with a series of *Natural Resources Transfer Agreements* scheduled to the *Constitution Act, 1930* with the proviso that additional lands would need to be transferred back to the federal government from time to time for the fulfillment of Canada’s treaty obligations.<sup>129</sup> The stipulation that land

---

<sup>126</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (*British North America Act, 1867*).

<sup>127</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>128</sup> Sprague, “Canada’s Treaties with Aboriginal Peoples,” 347.

<sup>129</sup> *Constitution Act, 1930*, (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26.

was to be transferred *upon agreement with the provinces*, however, meant that the same experience would in fact be repeated:

...a Saskatchewan band sought a reserve on Candle Lake in 1931, Canada approved, the province vetoed the selection in 1933. It preferred to see the site developed as a resort area, and a mutually acceptable alternative was not found until 1951. In Alberta, a band agreed to a reserve in a remote northern part of the province in 1937, but the provincial Minister of Mines and Resources insisted on retention of mineral rights and provincial intransigence consumed seventeen years of negotiation before confirmation of that reserve in 1954. In Manitoba the blanket obstacle was retention of riparian, river-bank rights to facilitate hydroelectric development. As late as 1974, when Canada finally created an Office of Native Claims to catalogue outstanding entitlements and other matters arising from defective administration of the treaties, literally millions of acres came into consideration; but federal-provincial wrangling continues to block settlement of most such matters in 1995.<sup>130</sup>

In fact, these matters continue to drag on. The contemporary treaty land entitlement process, designed to work toward the settlement of outstanding land debts to First Nations, has had to engage with dozens of First Nations bands—ninety per cent of which are in Manitoba or Saskatchewan.<sup>131</sup> As of March 2013, the specific claims process, set

---

<sup>130</sup> Sprague, “Canada’s Treaties with Aboriginal Peoples,” 348-49.

<sup>131</sup> “Treaty Land Entitlement,” Aboriginal Affairs and Northern Development Canada, last modified September 15, 2010, accessed September 12, 2013, <http://www.aadnc-aandc.gc.ca/eng/1100100034822/1100100034823>.

up by the federal government to resolve other outstanding obligations, had 106 claims under assessment and 231 claims in negotiation.<sup>132</sup>

Even beyond the more blatant and acknowledged breaches of their terms, many “land surrender” treaties between the Crown and Aboriginal peoples raise a number of more broadly moral-philosophical questions. While acknowledging that a treaty is not exactly the same thing as a contract and that the limited Canadian jurisprudence on treaties characterizes them as unique agreements “created and enforced in accordance with *sui generis* principles,”<sup>133</sup> Michael Coyle nevertheless explores how long established common law concepts such as *duress* and *undue influence* can contribute to treaty jurisprudence—an area of Canadian law that self-consciously confesses a desire to preserve the “honour of the Crown” and avoid any appearance of “sharp dealing.”<sup>134</sup> Indeed, treaties, like contracts, imply an agreement based in the free consent of two parties. Both alike should ideally “reflect the autonomous choices of the parties,” void of any “misrepresentation, threats or improper pressure.”<sup>135</sup> As such, the political arrangements flowing from Canada’s treaties purport to benefit from a legitimacy enshrined in Aboriginal consent.

What one finds in examining the later history of land cession treaties, however, is that it is replete with sharp practice, coercion, and the elimination of reasonable alternatives to the point of vitiating consent. The example Coyle uses for his analysis is

---

<sup>132</sup> Aboriginal Affairs and Northern Development Canada, *Progress Report – Specific Claims, 2012-2013*, (Ottawa: Aboriginal Affairs and Northern Development Canada, 2013), accessed September 12, 2013, <http://www.aadnc-aandc.gc.ca/eng/1339507365950/1339507443870>.

<sup>133</sup> Michael Coyle, “Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties,” *Manitoba Law Journal* 32, no. 2 (2009): 37. Emphasis in original.

<sup>134</sup> *R. v. Badger* [1996] 1 S.C.R. 771 at 794 [Badger].

<sup>135</sup> Coyle, “Marginalized by Sui Generis,” 37. Coyle uses this language in describing common law courts’ approach to contract law, thus the explicit suggestion here that these principles should apply to treaties is mine.

the Manitoulin Treaty, or the Saugeen Tract Agreement, of 1836. On a trip to Manitoulin Island in August 1836 for information gathering and to attend the annual distribution of presents, Lieutenant Governor Sir Francis Bond Head gave speeches to First Nations from two areas. To those occupying the Manitoulin Islands, he suggested that they give their land to the Crown so that the latter could set them apart for their protection and for the use of any First Nations the Crown might allow to settle on them. To the Saugeen Ojibwa on the mainland, Bond Head suggested that they give up their lands south of the Saugeen River and move further north onto the Bruce Peninsula to receive protection from the Crown and assistance in becoming “civilized.”<sup>136</sup> In a striking departure from the legal protocols of treaty-making from both before and after the 1836 treaty, Bond Head simply had the speeches transcribed as memoranda and then had leaders from the two groups sign them. Despite the irregularities, the Colonial Secretary and the British Treasury approved the memoranda as land surrenders, eager to carve out more space by congregating First Nations into one place. Several chiefs later protested that they had not signed the documents and were therefore not bound by them, and also claimed that the others were compelled to sign because Bond Head had repeatedly warned them that, if they did not sign, the whites would come and take their land *anyway*. Indeed, illegal encroachment on First Nations land and fisheries was already a concern in the region, and the Methodist Reverend James Evans, present at the gathering, reported Bond Head’s warnings to the Saugeen that “he could not protect them in the possession of their land;—that the white man *would* settle on it; and if they did not give it up they would *lose* it”—despite the assurances of the *Royal Proclamation* that the Crown would protect First

---

<sup>136</sup> Robert Surtees, *Treaty Research Report: Manitoulin Island Treaties*, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986).

Nations in their lands. On their return from the Manitoulin Island meeting the Saugeen told Evans that “they were ruined, but it was no use to say anything more, as their Great Father was determined to have their land,—that they were poor and weak and must submit, and that if they did not let him have it his own way, they would lose it altogether.”<sup>137</sup>

Several decades later, after Canadian Confederation, similar tactics were used in negotiations for the numbered treaties. After participating in the negotiations for Treaties One and Two, Sir Adams G. Archibald, the first Lieutenant Governor of Manitoba, wrote to his superior in Ottawa about the negotiating strategies he and Indian Commissioner Wemyss Simpson used in the face of Aboriginal demands for much more land than the Crown was willing to reserve for them. Upon explaining what the government had in mind concerning reserve size, they then warned the First Nations “that whether they wished it or not, immigrants would come in and fill up the country; that every year from this one twice as many in number as their whole people there assembled would pour into the Province, and in a little while would spread all over it, and that now was the time for them to come to an arrangement that would secure homes and annuities for themselves and their children.”<sup>138</sup> Indeed, by the terms of the *Royal Proclamation*, and by the very nature of consent in treaty-making, the reality should have been that *no* immigrants would come if the First Nations did not wish it. According to D. J. Hall, however, Ay-ee-ta-pe-pe-tung, one of the First Nations spokesmen, “saw no willingness on the part of the

---

<sup>137</sup> Cited in Donald B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians*, 2nd ed. (Toronto: University of Toronto Press, 2013), 37. Emphasis in original. Smith states that Sir Francis Bond Head knew nothing of established treaty procedures and had not even read the *Royal Proclamation of 1763* prior to the meeting at Manitoulin Island.

<sup>138</sup> Cited in Morris, *Treaties of Canada*, 34.

government representatives to bargain” and felt he “could not stop the whites from ‘robbing’ him of the land.”<sup>139</sup>

Subsequent treaties across the Plains were simultaneous with the sharp decline of the bison. If starvation was not happening already, the menace of it was still a significant factor hanging over First Nations leaders and figured prominently in their deliberations over the question of taking treaty. During negotiations for Treaty Six in August 1876, Plains Cree leaders held a private caucus to which Peter Erasmus, their Métis interpreter, was invited. Mistawasis was the first to speak:

I have heard my brothers speak, complaining of the hardships endured by our people. Some have bewailed the poverty and suffering that has come to Indians because of the destruction of the buffalo as the chief source of our living, the loss of the ancient glory of our forefathers’ and with all that I agree, in the silence of my teepee and on the broad prairies where once our fathers could not pass for the great number of those animals that blocked their way; and even in our day, we have had to choose carefully our campground for fear of being trampled in our teepees. With all these things, I think and feel intensely the sorrow my brothers express.

I speak directly to Poundmaker and the Badger, and those others who object to signing this treaty. Have you anything better to offer our people? I ask, again, can you suggest anything that will bring these things back for tomorrow and all the tomorrows that face our people?<sup>140</sup>

---

<sup>139</sup> Hall, “A Serene Atmosphere,” 326.

<sup>140</sup> Cited in Miller, *Compact, Contract, Covenant* (2007), 24-25.

While treaties on the Plains in both Canada and the United States were meant to feature provisions for regulating bison hunting, Tasha Hubbard's writing on what she terms *buffalo genocide* examines government and military practices in both countries that actually endorsed their slaughter by hide hunters, with the effect of removing Plains peoples from the land and their hunting-based economy.<sup>141</sup> In the fall of 1879, Commissioner of Indian Affairs for the North-West Territory, Edgar Dewdney, announced that food rations for the starving Cree and Assiniboine would only be available to those who had taken treaty and that he would recognize as chief of a new band any adult male Cree who could compel one hundred or more persons to follow him. Within this handful of years, the dire situation for the Plains peoples was having the desired effect for the government. After several years resisting a treaty that he saw as allowing Canadian law to intrude upon the lives of the Cree people and as insufficient in safeguarding the bison and the Cree way of life, Minahikosis (Little Pine) was convinced by his people to adhere to Treaty Six in 1879 in order to obtain rations. Mistahimaskwa (Big Bear) still refused at that point, only to have almost half of his people join other leaders to form new bands.<sup>142</sup>

The next strategy of the Cree and Assiniboine who had taken treaty was to seek a concentration of reserves in the area of the Cypress Hills, in order to carve out a larger First Nations territory that might grant them more *de facto* autonomy and agency. At first the government agreed, but in 1881 Commissioner of Indian Affairs Edgar Dewdney and

---

<sup>141</sup> Tasha Hubbard, "'Kill, Skin and Sell': Buffalo Genocide," in *Colonial Genocide and Indigenous North America*, eds. Andrew Woolford, Jeff Benvenuto, and Alexander Hinton (Durham: Duke University Press, 2014).

<sup>142</sup> Tobias, "Canada's Subjugation of the Plains Cree," 527. Big Bear did not adhere to Treaty Six until December 1882.

other government officials realized the threat a large Cree and Assiniboine territory could pose to Crown control, and so Dewdney recommended increasing the Mounted Police presence and closing Fort Walsh and other government facilities in the Cypress Hills. In effect, Dewdney decided to “remove all sources of sustenance” in the hope “that starvation would drive them from the Fort Walsh area and thus end the concentration of their force.” He did so “fully aware that what he was doing was a violation not only of the promises made to the Cypress Hills Indians in 1880 and 1881, but also that by refusing to grant reserves on the sites the Indians had selected, he was violating the promises made to the Cree by the Treaty Commissions in 1874 and 1876, and in the written treaties.”<sup>143</sup>

Yet, for all the questions that contextual histories of struggle and coercion raise about the “moral foundations” of some treaties, or even of the establishment of Canada itself,<sup>144</sup> one of the most persistent and challenging critiques stems from the text of the treaties itself. Much in line with the controversies highlighted in many pre-Confederation agreements—even those that do not deal with the purported cession of territory—trenchant questions remain about the incongruity between what was written in the numbered treaties and the understandings conveyed to First Nations. According to the Royal Commission on Aboriginal Peoples, it is “doubtful in many cases that the First Nations participating in the numbered treaties knew that the written texts they signed differed from the oral agreements they concluded,” and “the possibility that the party recording the oral agreements and preparing the written text took advantage of the other

---

<sup>143</sup> Ibid., 530.

<sup>144</sup> Neal McLeod, “Rethinking Treaty Six in the Spirit of Mistahi Maskwa (Big Bear),” *Canadian Journal of Native Studies* 19, no. 1 (1999): 70.

party's lack of understanding of the legal implications of written texts, or that those implications were not communicated to the party that did not read or write, is disturbing.”<sup>145</sup>

The most notable discrepancy strikes at the heart of the land cession agreement itself, namely the claim that First Nations “do hereby cede, release, surrender, and yield up to Her Majesty the Queen, and her successors for ever, all the lands included within” the limits outlined by each land surrender treaty.<sup>146</sup> As the Royal Commission on Aboriginal Peoples notes, such terms “appear in the written text of the treaties, but discussion of the meaning of these concepts is not found anywhere in the records of treaty negotiations.”<sup>147</sup> Rather, according to RCAP, reports of the treaty commissioners reveal that discussions during treaty negotiations centred largely on First Nations’ concerns about retaining land and protecting their way of life and traditional economies, on the one hand, and reassurances from Crown representatives that their way of life would not change unless that was what they wanted and chose.<sup>148</sup> While each treaty was made in its own historical and geographical context, RCAP asserts that First Nations generally understood that they would be able to maintain their own governance, laws, and customs, and would receive compensation for their agreement to share the land.<sup>149</sup> Sheldon Krasowski’s historical research looks to the differing interpretations of the numbered treaties, including that of Treaty One:

---

<sup>145</sup> RCAP, vol.1, 173-74.

<sup>146</sup> Cited in Morris, *Treaties of Canada*, 314. This particular wording is taken from Treaty One. Treaty Three and the treaties thereafter added some words, stating that they were ceding forever all “their rights, titles and privileges whatsoever to” the lands included within the limits defined by the treaty.

<sup>147</sup> RCAP, vol.1, 175.

<sup>148</sup> Ibid., 159-60.

<sup>149</sup> Ibid., 174.

What is not clear is the extent to which the surrender clause was communicated to the Saulteaux and Cree Chiefs during the Treaty One negotiations. The Selkirk Treaty included the transfer of a specific parcel of land from the Saulteaux and Cree to Lord Selkirk in exchange for an annual payment of “one hundred pounds of good and merchantable tobacco” each. It did not include a surrender clause. When Lord Selkirk died in 1820, the annuity payments ceased and the land reverted back to the Cree and Saulteaux. Based on the precedent of the Selkirk Treaty and the language of the Treaty One negotiations it is unlikely that the Cree and Saulteaux peoples agreed to cede or surrender their lands. The language of the treaty commissioners during the negotiations emphasized sharing the land and ensured that a large section of the country will not be “inhabited by white settlers.” Simpson claimed that he was “not purchasing from them land of great value” but rather giving them a “present” for the use of the land. Archibald assured the chiefs that after the settlers take up the land “there will still be plenty of land that is neither tilled nor occupied ....” The commissioner’s speeches emphasized land-sharing rather than surrender and an assurance that their livelihood would not be affected. Those who chose to farm on reserve lands would be protected from white settlers and those who chose to hunt would have access to unsettled lands. At no point in the verbal negotiations do the commissioners mention the surrender of lands or surrender of Indigenous rights.<sup>150</sup>

---

<sup>150</sup> Krasowski, “Mediating the Numbered Treaties,” 83-84.

Krasowski comes to the same conclusion concerning the failure to mention the surrender clause for all the numbered treaties that he examines, up to and including Treaty Six.<sup>151</sup>

In line with the late twentieth century academic push to restore the agency of First Nations in Canadian history, Derek Whitehouse discusses the numbered treaty process in terms of the parties' dichotomous ends: on the one hand, First Nations seeking to ensure their cultural survival in the face of the disappearing bison and the encroaching whites and, on the other, Canada seeking to achieve the assimilation of First Nations.<sup>152</sup> Yet, while assigning an active role to Aboriginal groups that was previously denied them is laudable, there is also a danger in attributing much of what happened in the treaty negotiations process to simple *cultural misunderstanding*, especially given British colonization's centuries of preoccupation with versing itself in Aboriginal protocols and establishing mutual intelligibility. This is the balance that Krasowski's recent research is attempting to shift once again. His examination of underutilized eyewitness accounts leads him to the conclusion that Euro-Canadian negotiators and eyewitnesses understood clearly the obligations that were undertaken with First Nations. Confusion and conflict ensued in the years following Treaty Three because of the limitations the Crown was placing on Aboriginal rights, and Krasowski maintains that "it is important to note that these limitations did not arise because of cultural misunderstandings. The commissioners purposely neglected to discuss the surrender clause during the negotiations, choosing instead to emphasize treaty provisions that benefitted the Anishnabeg peoples."<sup>153</sup>

---

<sup>151</sup> Ibid., 283.

<sup>152</sup> Whitehouse, "Similar Means to Dichotomous Ends."

<sup>153</sup> Krasowski, "Mediating the Numbered Treaties," 141.

This fundamental incongruity of perspectives on issues of land and sovereignty continues to haunt the treaty relationship in Canada. Documentary research and interviews with elders have brought to the fore strikingly different claims about what was agreed to in oral negotiations of Treaties Seven and Eight.<sup>154</sup> As will be seen in a later chapter, contemporary courts have thus had to deal with compromising cases such as *R. v. Badger*, in which three Aboriginal hunters from northern Alberta were charged with hunting illegally on private land. In this case, the reason that the defendants made it as far as the Supreme Court of Canada was precisely because it was established definitively by reference to the Treaty Eight commissioner's report to his superiors that, at the end of the nineteenth century, Treaty Eight First Nations were solemnly assured by him and the other Crown representatives "that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."<sup>155</sup>

Indeed, as cautious and circumscribed as it is, even the federal government's treaty guide concerning Treaty Eleven in the northern territories makes reference to the unfortunate lengths to which the Crown representative, H. A. Conroy, went in order to placate the signatory First Nations. He and his party were "determined to secure Native adherence to Treaty Eleven, but were less concerned about the niceties of actual negotiations," and, while he succeeded in having most bands sign on fairly quickly in 1921, "he was much less successful in explaining the significance of the document or making the Native people true partners in the process."<sup>156</sup> In the late 1950s, a government commission reported on the difficulty it had had in explaining to First Nations along the

---

<sup>154</sup> Richard Price, *The Spirit of the Alberta Indian Treaties*, rev. ed. (Edmonton: University of Alberta Press, 1999).

<sup>155</sup> *Badger*, at 793 (emphasis belongs to Cory J.).

<sup>156</sup> Coates and Morrison, *Treaty 11 Research Report*, 21.

Mackenzie River a fact that it readily took for granted—namely, that the land was not theirs.<sup>157</sup> During his early anthropological research in 1969 and 1970, Michael Asch was able to interview Julian Yendo, a Dene chief who had signed Treaty Eleven in 1921, as well as Philip Moses, the son of an elder who had advised Yendo. According to Philip Moses, on the issue of the land:

The old man heard these rumors about treaties, that people had a hard time after that. Old man wanted to see if they were after land or something. But they said no.

Nothing about land was said at the treaty. That's what the old man was trying to make sure.

If something were said, they wouldn't accept the treaty. Government officials made false reports that the Indians gave their land away.

The Commissioner must be a good liar because he told the Indians a good lie.

He told a lie to the King too.<sup>158</sup>

Asch goes on to explain that the Roman Catholic Bishop Breynat, who had accompanied the treaty party, encouraging the Dene to sign and vouching for the honour of the Crown, was “so incensed” at the written version of the treaty that he swore out an affidavit outlining the specific promises that it omitted.<sup>159</sup> For the Dene, the treaty they signed “was seen as an opening up of a political relationship with Canada, beginning with a

---

<sup>157</sup> Ibid., 36-37.

<sup>158</sup> Cited in Michael Asch, “From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution,” *Canadian Journal of Law and Society* 17, no. 2 (2002): 32.

<sup>159</sup> Ibid., 32.

Peace and Friendship treaty that allowed for non-Dene settlement in Dene territory.”<sup>160</sup> It was not at all about the surrender of territory.

## In Retrospect

With the coercive social relations between the parties and the fundamentally incongruent communication about the nature of the written agreements, many of Canada’s later land surrender treaties should be controversial on even the most mundane legal terms cognizable to any common law jurisdiction. To add to this, the post-Confederation chronology of the numbered treaties indicates that the treaty relationship was being sold to First Nations at a time shortly after Canada began the statutory installation of a plenary bureaucratic power over every aspect of their lives. This aspect of the history is significant because “First Nations were assured orally that their way of life would not change unless they wished it to. They understood that their governing structures and authorities would continue undisturbed by the treaty relationship.”<sup>161</sup> From the perspective of First Nations, there was nothing in the formation of the nation to nation relations, or in the promises made in treaty negotiations, that would vest ultimate title to land and sovereignty in the Crown, but not in them. And there was certainly nothing that would envisage or legitimate the invasive, assimilative, and paternalistic approach of nineteenth and twentieth century Indian policy. The *Gradual Enfranchisement Act*, enacted two years after Confederation, permitted interference with tribal self-government, the latter being seen as a main impediment to the formal goal of

---

<sup>160</sup> Ibid., 33.

<sup>161</sup> RCAP, vol.1, 174.

assimilation. The original *Indian Act* of 1876 coalesced and retained much of the assimilative policies that had been enacted up until that point, and future amendments only continued further in the same direction with, amongst other things, the forcible enfranchisement of certain categories of Indian—such as those who acquired a certain amount of education,—prohibitions on certain cultural practices, artifacts, and dress, and the prohibition of raising funds to pursue issues of rights and title in the courts. The apex of government efforts at control and cultural assimilation, of course, would be the residential schooling system.

How are the contradictory accounts of treaties—documents foundational to the establishment of Canada—and the contentious history of Canada to be reconciled? For all intents and purposes, it must be considered that the “divergent streams of state practice” identified by Brian Slattery in British North America’s earlier colonial history persisted in some form right up until the numbered treaties were signed.<sup>162</sup> This equivocality—duplicity, even—are manifested powerfully in the language of the *Royal Proclamation*. With Canada having recently marked the 250<sup>th</sup> anniversary of the *Proclamation*, it is peculiar that the websites of both the Canadian Broadcasting Corporation and the Idle No More movement encapsulate it simply as an "historic document that legally mandated Canada to recognize Indigenous land rights."<sup>163</sup> To be sure, it is also an historic assertion, and presumption, of unexplained and indefensible sovereignty. Contrary to those who

---

<sup>162</sup> Slattery, “Aboriginal Sovereignty and Imperial Claims,” 689.

<sup>163</sup> “Idle No More Global Day of Action, #Oct7Proclaim 55 Actions in Canada, United States, United Kingdom, and across the Planet,” Idle No More, accessed October 7, 2013, [http://www.idlenomore.ca/idlenomore\\_global\\_day\\_of\\_action\\_oct7proclaim](http://www.idlenomore.ca/idlenomore_global_day_of_action_oct7proclaim), and “Idle No More protests mark proclamation's 250th anniversary,” CBC News, last modified October 7, 2013, accessed October 8, 2013, <http://www.cbc.ca/news/politics/idle-no-more-protests-mark-proclamation-s-250th-anniversary-1.1928276>.

would like to use the *Proclamation* as a standard by which Canadian governments should be held to account, Mi'kmaw lawyer and professor Pamela Palmater does well to question the *Proclamation* itself and Aboriginal invocations of it: "While some argue that the Proclamation recognized Nationhood status of Indigenous peoples; partially protected Indigenous lands; and partially recognized Indigenous land rights; there are others who point out that Indigenous peoples were already living as strong, independent sovereign Nations prior to contact and did not need a British edict to declare partial recognition of land rights. The very essence of sovereignty is that it is lived, asserted, protected and defended every day - it cannot be granted or gifted by another sovereign."<sup>164</sup>

Undoubtedly, the Crown's inconsistent and contradictory dealings with Aboriginal peoples leave Canadian history eminently open to Aboriginal nationalist counternarratives. A cornerstone of these counternationalisms is the vehement rejection of "the idea that the meaning and content of a treaty are found only in the government's version of the agreement."<sup>165</sup> As for the *Royal Proclamation*, Aboriginal legal scholar John Borrows has suggested that it too should be regarded as a treaty, in order to open it up and expose it to Aboriginal interpretation. As a document foundational to the regulation of Aboriginal-European relations and the treaty process, Borrows advocates a rereading of the *Proclamation* that indelibly links it to a subsequent treaty at Niagara in 1764.<sup>166</sup> According to Borrows, the treaty at Niagara "was regarded as 'the most widely

---

<sup>164</sup> Pamela Palmater, "October 7th Day of Action, The Royal Proclamation and Idle No More: Wading Through the Hype," *Indigenous Nationhood* (blog), October 7, 2013, <http://indigenousnationhood.blogspot.ca/search?updated-max=2013-10-08T14:58:00-07:00&max-results=1>.

<sup>165</sup> Miller, *Compact, Contract, Covenant* (2007), 30.

<sup>166</sup> Cited in Rotman, "Canons of Treaty Interpretation," 14. In fact, it was the same treaty signed by William Johnson and that Johnson had referenced in his letter to the Lords of Trade, warning them of the risky mistake that must have been made in another treaty in which First Nations were purported to have made "expressions of subjection."

representative gathering of American Indians ever assembled,’ as approximately two thousand chiefs attended the negotiations. There were over twenty-four Nations gathered with ‘representative nations as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay.’ It is also possible that representatives from even further afield participated in the treaty as some records indicate that the Cree and Lakota (Sioux) nations were also present at this event.”<sup>167</sup> At Niagara, Johnson read the terms of the *Royal Proclamation*, made a promise of peace and mutual non-interference, and secured First Nations’ agreement to it. In essence, according to James Miller, “what these events did was convert the Proclamation from a unilateral Crown document, as important as such an instrument was in its own right, to a treaty.”<sup>168</sup> And, for Borrows, “since the wording of the Proclamation is unclear about the autonomy and jurisdiction of First Nations, and since the Proclamation was drafted under the control and preference of the colonial power, the spirit and intent of the Royal Proclamation can best be discerned by reference to” the treaty at Niagara—a spirit and intent that encompasses Johnson’s promises of self-government, mutual non-interference, and respect for the Aboriginal possession of land.<sup>169</sup>

These controversies aside, however, the most striking difficulty for Canadian Aboriginal law would be a sort of non-event: the incompleteness of the treaty process itself. A critical aspect of understanding Aboriginal law in Canada, then, is understanding how it would attempt to accommodate over the years the glaring contradiction of having treated with some groups for land cession and not with others. If treaties that purport to

---

<sup>167</sup> Borrows, “Wampum at Niagara,” 163.

<sup>168</sup> Miller, *Compact, Contract, Covenant* (2007), 14.

<sup>169</sup> Borrows, “Wampum at Niagara,” 161.

have arranged for the surrender of Aboriginal land and sovereignty, despite all their problems, could give the Crown the veneer of legitimacy for its assumption of sovereignty over territory, Canada was still left with the problem that much of British Columbia and the North were claimed, settled and controlled by the Crown without the benefit of treaty—not to mention large portions of the eastern third of the country whose earlier treaties were not land surrender agreements.<sup>170</sup> This, more than anything, would guarantee the continued un settlement of the Canadian political-legal landscape over the coming century. This stark inconsistency would also provide the legal conundrum that would later spur the modern treaty-making process, or comprehensive land claims agreements—but there is much legal history prior to the modern land claims process to examine.

---

<sup>170</sup> In those portions of Canada that were at one point held by France, according to common legal theoretical accounts, Britain's title was not *original*, but rather was *derivative*, thereby deferring the question of the legitimate acquisition of title and sovereignty to France's original acquisition. See Slattery, "Aboriginal Sovereignty and Imperial Claims," 687-88. While the Attorney General of Quebec claimed that no sort of Aboriginal title or rights could have survived French sovereignty, thereby hoping to excuse itself from many of the outstanding issues faced in other regions of Canada, the Supreme Court of Canada outlined a number of reasons why it did not agree with this claim in *R. v. Côté*, [1996] 3 S.C.R. 139 at 168-175.

### 3. Early Jurisprudence

Tensions between conflicting colonial interests and imperatives were certainly at play in the latter half of the seventeenth and the first half of the eighteenth century in North America. In the lead up to the American Revolutionary War, the *Royal Proclamation's* protection of lands to the west of the Thirteen Colonies as a large Indian reserve provoked resentment from the colonies. Closing the region to settlement and forbidding entrepreneurial purchases of First Nations' lands was meant to prevent clashes between First Nations and the Anglo-Americans.<sup>1</sup> In his history of Appalachia—employing a larger, more inclusive concept of the region than some historians have used—Richard Drake states that the reaction of the colonists toward the *Proclamation* “was universally and immediately hostile. To the Westerner—whether speculator, settler, hunter, or trader—the whole reason for the war with the French had been to win the trans-Appalachian area for themselves. Now that victory had been won, the action of the home government seemed to deny them the spoils of their success. Indeed, the Proclamation of 1763 can be considered as a first incident in a decade and a half of increasing misunderstandings between London and her colonial subjects that led the colonials to seek their independence from Great Britain.”<sup>2</sup>

This antipathy was only to be compounded by the *Quebec Act* of 1774, which integrated part of the Indian reserve into the territory of Quebec and promised to the French the freedom to practise Catholicism and the restoration of French civil law for

---

<sup>1</sup> James Rodger Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, 3rd ed. (Toronto: University of Toronto Press, 2000), 93.

<sup>2</sup> Richard B. Drake, *A History of Appalachia* (Lexington: University Press of Kentucky, 2001), 59-60.

private matters.<sup>3</sup> The *Quebec Act* was a confirmation of a prior policy change brought about in order to keep the interior First Nations content: namely, encouraging the resumption of the fur trade out of Montreal and the continued commercial activities of the *Canadiens* in the southwest interior. According to J.R. Miller, this policy “proved that the French had enjoyed better relations with the Indian nations than had the British and the Anglo-Americans, not because they were French, but because they were merchants and soldiers who did not threaten Indians and Indian lands as the Americans did.”<sup>4</sup> The *Quebec Act*, however, was received by the American rebels as one of the “Intolerable Acts” that justified the American Revolutionary War.<sup>5</sup>

For Anthony Hall, unpopular policy like that of the *Royal Proclamation* was indicative of the imperial authority’s need to consider broader interests over the long term. “Where elected officials in the local colonial legislatures almost invariably demanded the unrestricted right to exploit Aboriginal resources,” he writes, “representatives of Imperial authority had larger interests to regulate. The conduct of relations with Aboriginal people was often an important strategic element in broad considerations of foreign, military and commercial policy. Hence there were frequently sound motives of pure self-interest for officials of the central government to intervene as defenders of Aboriginal people against the hostile encroachment of local governments.”<sup>6</sup>

---

<sup>3</sup> *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2.

<sup>4</sup> Miller, *Skyscrapers Hide the Heavens*, 93.

<sup>5</sup> *Ibid.*

<sup>6</sup> Anthony J. Hall, “The St. Catherine’s Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada,” in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, eds. Kerry Abel and Jean Friesen (Winnipeg: University of Manitoba Press, 1991), 278.

With the controversial and equivocal history of British colonization in North America outlined in the previous chapter, it is to the early instances of the complicated legal management of these competing interests that I now turn. In the early nineteenth century, after the Americans had won independence from the British Crown, the responsibility of managing “larger interests” was inherited by the federal government and, in a handful of influential early precedents, by the Supreme Court of the United States under Chief Justice John Marshall. Here I examine how the navigation through a historical bind spawned some of the most formative and foundational precedents in the common law legal tradition shared by Britain and its colonies, including the invention of a new legal concept called Indian title. In looking at this early American case law, I also begin to elaborate two concepts—injusticiability and incommensurability—which help to conceptualize how judiciaries have creatively navigated their way through the compromising legalities of colonial dispossession. The chapter then ends with an account of the importation of this new and novel concept of Indian title into Canadian jurisprudence in the late nineteenth century.

## The Marshall Court and the Invention of Indian Title

With land speculation rife after the American Revolutionary War, the controversy at issue in the 1810 case of *Fletcher v. Peck* stemmed from a 1795 purchase, from the State of Georgia, of tens of millions of acres of land by four land speculation companies.<sup>7</sup> The land, to the west of the modern borders of the state, was part of its *claimed* territory, covering portions of what is now Alabama and Mississippi, and was sold at an unusually

---

<sup>7</sup> 10 U.S. (6 Cranch) 87 (1810).

low price—low even for that era. The reason for the bargain pricing was that “the act authorizing the sale was the product of widespread corruption. When a preliminary sale bill passed in December 1794, for example, only one of the legislators voting for it had not been bribed.”<sup>8</sup> When word of the corrupt deal got out, there was widespread condemnation and outrage. A newly elected Georgia legislature enacted a statute in 1796 nullifying the transactions and then resold the lands at much greater profit. “So complete was this repudiation,” according to Lindsay Robertson, “that all records of the grants were ordered excised from Georgia’s public records and the original act of sale was burned in the public square at Louisville, where the legislature had convened. The act of immolation was accomplished by magnifying glass, in order to bring the destroying flame down from God.”<sup>9</sup> With the resale having created competing claims to the same lands, the Yazoo land scandal was such a thorny problem for Georgia that in 1802 the state actually ceded all of its claims to the lands west of its current border to the federal government for US\$1.25 million and a commitment from the federal government that it would assume all liability in the ongoing resolution of claims related to the land grant.<sup>10</sup>

Robert Fletcher had originally bought a tract of the Yazoo lands from John Peck while the 1795 act legitimating the original sale was still in force. Later, after controversy had erupted and the newly elected officials had sought to annul the original Yazoo land sales, Fletcher brought suit against Peck alleging that Peck had not had clear title to the tract of land when he sold it. But the suit has been widely regarded as feigned. Justice

---

<sup>8</sup> Lindsay G. Robertson, “‘A Mere Feigned Case’: Rethinking the *Fletcher v. Peck* Conspiracy and Early Republican Legal Culture,” *Utah Law Review* no. 2 (2000): 250.

<sup>9</sup> *Ibid.*, 251.

<sup>10</sup> As part of the agreement, Georgia also exacted from the federal government the promise that the latter would see to the process of extinguishing Indian title to all lands held by First Nations within the state.

Johnson even alludes to this possibility at the end of his dissenting opinion,<sup>11</sup> and the suspicion is bolstered by how thoroughly the contract of sale and the pleadings of the parties in the case “litigate all possible issues that lent ambiguity to land titles under the original Georgia conveyance.”<sup>12</sup> In effect, the parties in *Fletcher v. Peck* sought to sort out definitively before the Supreme Court whether the original sale (and thus any resales succeeding it) was binding and legitimate, or whether the state actually had the power to abrogate retroactively those contracts. In all likelihood, they both wanted the original Yazoo land conveyance to be validated, and Georgia’s subsequent nullification of it declared unconstitutional, as they were both speculators with property interests flowing from the original sale.

The sensitivities at play in this dispute were multiple. For the highest court of a very young country, the desire to establish a strong respect for the sanctity of contract was faced with a newly elected state legislature buoyed by the resounding indignation at the corruption behind the Yazoo land conveyance. To add to the complexity, the largely uncolonized but claimed lands to the west of the colonies had been a profoundly contentious issue for the union in its early days. Some of the original colonies forming the United States laid claim to lands lying further to the western interior, with these claims often relating back to the original royal charters and letters patent that purported to grant various companies and interests the right to colonize regions of the New World. However, as mentioned in the previous chapter, there was a profound inconsistency in these charters. As competition between European monarchs heightened, so too did the

---

<sup>11</sup> 10 U.S. (6 Cranch) 87 at 147-148 (1810).

<sup>12</sup> Howard R. Berman, “The Concept of Aboriginal Rights in the Early Legal History of the United States,” *Buffalo Law Review* 27, no. 4 (1978): 638-639.

pretentiousness of the grants embodied in the charters.<sup>13</sup> Kent McNeil thus specifies that, in so far as the decisions of the Marshall Court are concerned, “the charters which concern us here are those issued by James I and his successors that purported to actually grant lands, not the earlier ‘speculative’ ones that simply authorized future acquisition of lands by the grantees...”<sup>14</sup> As the United States was gaining independence, the young country was faced with the task of finding a resolution for competing claims between states to uncolonized lands, differing visions between the federal and state governments as to which level of government should have jurisdiction over those lands, as well as for concerns that, especially given the potential of some of the claims rooted in royal charters, some states were poised to dwarf others in the new union. These earliest issues of claims to uncolonized lands had largely been ironed out in the last two decades of the eighteenth century, with the states agreeing to cede the lands to the federal government. Georgia’s claim, in fact, had been the last of these original state cessions in 1802, after the Yazoo land scandal. All of this had been a volatile issue for the new country and Justice Marshall had no desire to see it reopened: “The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has now been compromised, and the compromise is not now to be disturbed.”<sup>15</sup>

---

<sup>13</sup> See Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America,” in *Despotic Dominion: Property Rights in British Settler Societies*, eds. John McLaren, A.R. Buck and Nancy E. Wright (Vancouver: UBC Press, 2005).

<sup>14</sup> Kent McNeil, *Common Law Aboriginal Title* (New York: Clarendon Press, 1989), 236n160.

<sup>15</sup> *Fletcher v. Peck* 10 U.S. (6 Cranch) 87 at 142 (1810).

Despite the fact that a new administration in Georgia had sought to annul the original Yazoo land sales (and thus all succeeding transfers of title), Chief Justice John Marshall, “always sensitive to the political currents of his time, saw the primary issue as a potential conflict between the United States and Georgia over jurisdiction of the lands.”<sup>16</sup> This may sound counterintuitive, given that the subsequent Georgia administration wanted its own land sale nullified and ultimately ceded its claim to the territory. In order for this to make sense, one has to account for the multiple issues at stake. The Supreme Court of the United States wished to protect the sanctity of contract in the new union and so would declare the Georgia legislature’s subsequent attempts at nullification of the Yazoo sale in contravention of the Contract Clause of the United States Constitution,<sup>17</sup> but this still left open the question as to who had had a title to convey at the moment of the Yazoo land conveyance—land that had been up till then largely uncolonized and in the possession of First Nations. In effect, even if the Court was about to declare the succeeding Georgia legislature’s attempts to nullify the original Yazoo sales unconstitutional, the validity of that conveyance of title as well as its succeeding conveyances were still dependent upon the State of Georgia having jurisdiction over the lands in question at the time of the original conveyance. This thorny issue not only conjured up the recent conflicts between states and the federal government over the status of claimed lands after independence, but also raised the question of how a state could purport to convey title to land that had still been in the possession of its Aboriginal inhabitants. Though it was concerning a different region of the fledgling United States, Felix Cohen refers to that country’s national Indian policy as being “firmly

---

<sup>16</sup> Berman, “Concept of Aboriginal Rights,” 640.

<sup>17</sup> U.S. Const. art. I, § 10, cl. 1.

established in the first great act of our Congress, the Northwest Ordinance of July 13, 1787.”<sup>18</sup> The Ordinance had declared that “the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress...”<sup>19</sup> For the lands west of Georgia, there was neither war nor treaty that could explain away a complete absence of Aboriginal title.

Fletcher, the purchaser, was suing Peck because their deed of sale included a number of covenants, one of which was an assurance from Peck that the State of Georgia had had legal title to the land at the time of the original Yazoo land conveyance. Fletcher’s charge in court was that this was not the case, but rather that the United States had had title. However, employing the same feudal term for possession and title of real property as the Marshall Court does, Kent McNeil points out that “a finding that either had been seised of the soil necessarily involved a denial that the Indians living on the lands in question had seisin.”<sup>20</sup> Fundamental questions surrounding Aboriginal title were thus at stake in what is widely seen as feigned litigation between two Anglo-American land speculators—both of whom likely wanted to see the Supreme Court of the United States declare that Georgia, rather than the United States, had held title to the Yazoo

---

<sup>18</sup> Felix Cohen, “Original Indian Title,” *Minnesota Law Review* 32, no. 1 (1947): 41.

<sup>19</sup> An ordinance for the government of the territory of the United States, North-west of the river Ohio, art. 3 (New York: s.n., 1787) [Northwest Ordinance].

<sup>20</sup> McNeil, *Common Law Aboriginal Title*, 251.

lands prior to 1802, and both of whom clearly argued that any notion of Indian title should not be an encumbrance to their ability to claim title to land in the region.<sup>21</sup>

Testament to the heightening competition in the race to colonize the New World more than a century prior to *Fletcher v. Peck*, the shifting and inconsistent language and policies embedded in royal charters greatly complicated things for the Court. “In the minds of judges who have had to grapple with the complexities of aboriginal land rights in North America the existence of these charters seems to have presented a serious dilemma. Since the charters purported to grant lands that the Indians occupied, judges might have concluded either that the Indians were not owners, or that the charters (and hence all titles derived from them) were invalid in so far as those lands were concerned.”<sup>22</sup> Indeed, given that generally exclusive forms of title cannot vest in separate titleholders at the same time, this is what one might have expected to be the only two realms of possibility for the law at that juncture: either the Aboriginal occupants had held title to the land, or one of the Anglo-American interests had held title to the land. But both parties had pleaded in the dispute that “the fee simple title to the lands existed apart from and *compatible with* the Indian title, either in the State of Georgia or in the United States.”<sup>23</sup> Such a proposition was without precedent and could prove complicated, given that fee simple was, in lay terms, the full and highest form of ownership of real property in the common law. Justice Marshall states in the majority opinion that “some difficulty was produced by the language of the covenant and of the pleadings. It was doubted

---

<sup>21</sup> Berman, “Concept of Aboriginal Rights,” 639. Berman outlines some of the arguments put forth by legal advocates involved in the case and states that both sides sought to obviate Indian title as an obstacle to their Anglo-American common law title.

<sup>22</sup> McNeil, *Common Law Aboriginal Title*, 236.

<sup>23</sup> Berman, “Concept of Aboriginal Rights,” 639 (emphasis mine).

whether a State can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them notwithstanding that title.”<sup>24</sup> In other words, the common law has mechanisms by which the owner of a fee simple interest in property who does not have possession of it can move to gain actual possession. If the states were declared to have title to uncolonized lands in the possession of Aboriginal inhabitants, would that mean that the states could pursue legal means to have them removed—despite the fact that the responsibility for treaties and the extinguishment of Indian title was the sole domain of the federal government? Given that the majority of the Justices were set to decide that title to the Yazoo lands at the time of the original conveyances was with the State of Georgia, the compatibility that Fletcher and Peck were both advocating for seemed a dangerous and nebulous one. And yet, Justice Marshall, in writing the decision for the majority, ultimately accepts some notion of compatibility or overlap of title: “The majority of the Court is of the opinion that the nature of the Indian title, which is certainly to be respected by all Courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State.”<sup>25</sup> Howard Berman’s encapsulation of this pivotal statement is that, “remarkably, in this one phrase, Marshall was able to recognize the existence of the Indian title, reaffirm the role of the United States as the sovereign entity empowered to extinguish that title, and give the paramount property right to the lands in question to the State of Georgia. The Court thus validated the disputed covenant of the land conveyance, but at the expense of any

---

<sup>24</sup> 10 U.S. (6 Cranch) 87 at 142 (1810).

<sup>25</sup> Ibid., at 142-143.

clear definition of the nature of Indian title...”<sup>26</sup> Indeed, the qualification so remarkably consequential for Aboriginal title was also remarkably vague and terse. The above two sentences quoted from *Fletcher v. Peck* form the last two substantive statements of the majority opinion, with no further explanation or elaboration.

But what is compatibility in the case of *Fletcher v. Peck*? As positive and encouraging as the notion of compatibility might sound, using the law to protect the property rights of Aboriginal peoples—as the common law had ostensibly done for other property owners for centuries—would have required a recognition of the mutual *incompatibility* of the title claims involved in the case. Those lands, still in the possession of their Aboriginal inhabitants, belonged to no one else. It should be noted, as Christian McMillen does, that the legal concept of “Indian title” at that time was a legal neologism.<sup>27</sup> Although still germinal and inchoate, the suggestion of compatibility in this decision is the planting of the seed of *incommensurability*, the inscribing of difference upon the Aboriginal legal subject in order to be able to accommodate exigent historical circumstances with novel forms of justice.<sup>28</sup>

---

<sup>26</sup> “Concept of Aboriginal Rights,” 641.

<sup>27</sup> Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven: Yale University Press, 2007), 88.

<sup>28</sup> The concept of incommensurability shares commonalities with Felix Cohen’s legal realist “menagerie theory” of Indian title in that his concept is also largely premised on the inscribing of difference, though his conception of it is more historically situated and may owe something to the harshness of the century or so of legal and political history that preceded his writing. For Cohen, the menagerie theory of Indian title is “the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined.” The menagerie theory is also conceptually less precise in that, after giving legal examples such as the feudal doctrine “that ultimate dominion over land rests in the sovereign” and the doctrine that “taking land from another nation by sword creates no justiciable rights,” he moves on to simple yet deep-seated forms of racism that he claims find expression less in legal briefs and more in public administration. “One of the most insidious of these is the doctrine that the only good Indian is a dead Indian, whence it follows, by frontier logic, that the only good Indian title is one that has been extinguished, through transfer to a white man or a white man’s government.” Cohen, “Original Indian Title,” 58.

Remarkably, the first criticism of the incommensurability<sup>29</sup> that was imposed by the Marshall Court was one that came concomitantly. More specifically, it came in the *Fletcher v. Peck* decision itself in the form of the sole dissenting opinion, offered by Justice William Johnson. For Johnson, the independence, the self-government, and the right of soil of the tribes to the west of Georgia was more than evident, and he was unprepared to follow his colleagues down a creative path toward something called “Indian title”:

We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seised of a fee simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs...<sup>30</sup>

This being the case, Johnson asserted that the only interest that could be held by a colonizing government was a right of conquest or a right of purchase, to the exclusion of other European sovereigns. The only restrictions upon Indian sovereignty, then, would be

---

<sup>29</sup> I considered for a time expressing this concept as (in)commensurability, for the simple reason of its elasticity and reversibility. It can be imposed, yet it need not be imposed if the situation suits it—indeed, as we will see in later chapters, on the rare occasion the judiciary has even imposed an unexpected *commensurability* when it was convenient. It is an axis of judicial practice that expresses two poles, though by far the pole with the most significance in Aboriginal law has been that of the creative, the *incommensurable*—in other words, novel forms of justice unique to the Aboriginal legal subject.

<sup>30</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 at 146-147 (1810).

the limitation of their market to sell their lands and the right of states to hold the power of government over non-Aboriginal people who are found on Aboriginal land:

In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the States in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to-wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians amount only to an exclusion of all competitors from their markets, and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.<sup>31</sup>

Johnson thus concludes that the “mere possibility” of purchasing land does not amount to ownership, and Georgia’s aspirations were certainly reduced to a mere possibility when the states ceded the power of extinguishing Indian title to the federal government:

If the interest in Georgia was nothing more than a preemptive right, how could that be called a fee simple which was nothing more than a power to acquire a fee simple by purchase, when the proprietors should be pleased to sell? And if this ever was any thing more than a mere possibility, it certainly was reduced to that state when the State of Georgia ceded to the United States, by the Constitution, both the power of preemption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.<sup>32</sup>

---

<sup>31</sup> Ibid., at 147.

<sup>32</sup> Ibid.

In addition, Justice Johnson's mention of the awkwardness of applying the concept of fee simple title to the interests of a nation touches upon an issue that would remain insufficiently explored in the jurisprudence. With the concept of fee simple title having already been well-established in the law of real property, Howard Berman argues that the Marshall Court's validation of the covenant in the land conveyance between Fletcher and Peck came at the expense of clarity about what fee simple was intended to mean in that context—because it was surely not in line with the traditional definition.<sup>33</sup> Rather than signifying ownership, the term seems to have been used to stand in for a right of pre-emption, since it was used by the litigants “to define a relationship to the land that was largely inchoate and dependent on the extinguishing of the Indian title by the federal government.”<sup>34</sup> Kent McNeil, in an exhaustive work whose aim was to survey common law jurisprudence and explore how it perhaps should have accommodated the Aboriginal possession of land, has suggested that the conceptual “failure to distinguish clearly between the Crown’s seisin in demesne of its lordship (which is part of its seisin of a whole territory as a composite unit) and indigenous seisin in demesne of land has resulted in some confusion when the doctrine of tenures has been applied in the colonies.”<sup>35</sup> The doctrine of tenures, which concerns feudal relations between the sovereign and its subjects, the latter of whom undoubtedly have the ability to own property, had long employed a doctrine of continuity according to which prior inhabitants of newly acquired

---

<sup>33</sup> Berman, “Concept of Aboriginal Rights,” 641.

<sup>34</sup> Ibid., 640.

<sup>35</sup> McNeil, *Common Law Aboriginal Title*, 220-221. McNeil’s volume as a whole is a fascinating exercise in the application of commensurability—that is to say it offers a thorough re-evaluation of English common law in order to argue for the most likely way it would or should protect the Aboriginal possession of land. In the process, McNeil reveals the many inconsistencies and contradictions in centuries of common law jurisprudence that have inscribed upon Aboriginal peoples different and novel forms of law that seek to dispossess.

territories remained in possession of their property while the Crown simply gained a paramount lordship over them:<sup>36</sup>

The moment the Crown acquired sovereignty over a territory by settlement, possession of and title to vacant lands would vest in the Crown by virtue of its occupancy of the territory as a whole. Possession of and title to lands that were occupied by indigenous people would vest in the [indigenous] occupiers, giving them lawful fee simple estates. At the same time, the doctrine of tenures would apply to give the Crown a paramount lordship over those occupied lands, with the result that the indigenous occupiers would become tenants in fee simple of the Crown.<sup>37</sup>

From such a perspective, if there is a fee simple claim to inhabited land, it should not apply to the interests of the colonizing sovereign. Rather, it would be applied to the interests of the Indigenous inhabitants of the land, and the incoming sovereign, as it assumes a paramount lordship, would simply be obliged to recognize their property interests as its new subjects. Even if a treaty were conceived and intended as a means to have Aboriginal inhabitants cede both lordship over the lands as well as ownership of them, it nevertheless remains an oddity of nineteenth century jurisprudence to conflate the colonial sovereign's *pretreaty* interests with the concept of fee simple ownership.

While Justice Johnson's dissenting opinion does not explore in depth the odd distortions of real property concepts, it does demonstrate a remarkable respect of Aboriginal land rights and sovereignty and offers a strong argument for commensurable protection before the law. But his was the lone dissenting opinion. In the majority's

---

<sup>36</sup> Ibid., 171-174.

<sup>37</sup> Ibid., 221.

opinion there was “a definite recognition of something called ‘Indian title,’” and “Marshall’s concept that this title is compatible with an interest in the same lands by another sovereign would eventually be used to form a hierarchy of land rights.”<sup>38</sup>

It would be thirteen years before Chief Justice John Marshall and the Supreme Court of the United States would rule on a major case concerning Aboriginal title again. In fact, while *Fletcher v. Peck* was seen as dealing more with issues of contract law and state-federal jurisdiction, giving only a vague observation about the nature of Aboriginal title in the process, the 1823 case of *Johnson v. McIntosh* inhabited much more squarely the entire question of Aboriginal title.<sup>39</sup> As with so many of these earlier cases, neither of the litigants were the original Aboriginal possessors of the land.

The case concerned disputed title to lands within an area that had originally been claimed by the Virginia Colony by virtue of letters patent issued by King James I in 1609, but were later ceded by the state to the federal government after independence. In 1773 and 1775, just before the Colony of Virginia sought to assert its independence from the British Crown, land speculators purchased land in this territory directly from the Illinois and Piankeshaw First Nations—a transaction that, under British rule, would have been forbidden by the decree in the *Royal Proclamation* which stated that Aboriginal land could only be ceded to the Crown. The same territory was later ceded by the First Nations to the United States through treaty, and the United States later granted a portion of those lands to William McIntosh. The original grantees through the direct purchase were unable to obtain actual possession and, after the disruption of the American Revolutionary War, began petitioning Congress for a number of years, without success,

---

<sup>38</sup> Berman, “Concept of Aboriginal Rights,” 642.

<sup>39</sup> *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson v. McIntosh*].

to acknowledge and confirm their title. In this case, the litigants Joshua Johnson and Thomas Graham were the son and grandson of, and successors in title to, one of the original purchasers, Thomas Johnson. Since Johnson and Graham were challenging the later title acquisition of William McIntosh, Chief Justice Marshall, who authored the opinion of the Court, characterized the main inquiry as pertaining to “the power of the Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.”<sup>40</sup> While in the *Fletcher* decision Marshall only needed to suggest some form of compatibility between state and Indian title in order to render a decision, this case compelled him to elaborate further on the legal dimensions of the Aboriginal possession of land. He expanded upon the concept of Indian title that *Fletcher v. Peck* had only hinted at, and examined how colonizing sovereigns had purportedly obtained title to Aboriginal lands.

In the first portion of the decision, Marshall concentrates heavily on the letters patent and royal charters upon which Britain’s first colonizing ventures were premised. It was a continuance of the same dilemma Marshall encountered in *Fletcher v. Peck*, since “upholding the validity of the charters was one of Chief Justice Marshall’s main concerns in *Johnson v. M’Intosh*. At the same time he was not willing to deny that the Indians had a legal right to the lands occupied by them.”<sup>41</sup> The historical narrative is somewhat odd for a legal decision, however. Howard Berman notes other sources from which Marshall could have easily and more likely drawn legal principles for questions of title: an extant literature on the rights of non-European peoples written by international law jurists, or

---

<sup>40</sup> Ibid., at 572.

<sup>41</sup> McNeil, *Common Law Aboriginal Title*, 236.

even from the legal documents of the treaties themselves.<sup>42</sup> What, in essence, Marshall sought to do was ratify as legal principle that which he regarded as the pertinent historical conventions pertaining to the colonial acquisition of land and sovereignty—(“Those relations which were to exist between the discoverer and the natives were to be regulated by themselves.”<sup>43</sup>)—and thus he set about definitively reauthoring history in such a way as to “rationalize the origin of land titles in the United States.”<sup>44</sup> Still maintaining the puzzling premise of according title to those without possession, the core assertion of *Johnson v. McIntosh* was that history illustrates the principle “that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”<sup>45</sup> This is the core of what would be termed *the doctrine of discovery*. Title rested with the European sovereign discovering that portion of the New World—though, yet to be consummated, it was “a perfectable entitlement rather than an already perfect title.”<sup>46</sup> Berman’s commentary on a right of pre-emption masquerading as a form of title still seems accurate, in that Marshall characterizes the discoverer’s title as “the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented.”<sup>47</sup>

---

<sup>42</sup> Berman, “Concept of Aboriginal Rights,” 646-647.

<sup>43</sup> *Johnson v. McIntosh*, at 573 (1823).

<sup>44</sup> Berman, “Concept of Aboriginal Rights,” 643.

<sup>45</sup> *Johnson v. McIntosh*, at 573 (1823).

<sup>46</sup> James Youngblood Henderson, “Unraveling the Riddle of Aboriginal Title,” *American Indian Law Review* 5, no. 1 (1977): 91.

<sup>47</sup> *Johnson v. McIntosh*, at 573.

Part of the difficulty in studying this legal history is that, as Hall notes, "Marshall's judgements are a wonder of judicial ambivalence."<sup>48</sup> Berman refers to portions of *Johnson v. McIntosh* as "confusing" and "occasionally incoherent,"<sup>49</sup> and indeed the decision reads at times like an absurdist paradox. The metaphysical inventiveness of a Supreme Court caught in such a bind made great fodder for a legal realist such as Felix Cohen:

It is perhaps Pickwickian to say that the Federal Government exercised power to make grants of lands still in Indian possession as a consequence of its "dominion" or "title." A realist would say that Federal "dominion" or "title" over land recognized to be in Indian ownership was merely a fiction devised to get around a theoretical difficulty posed by common law concepts. According to the hallowed principles of the common law, a grant by a private person of land belonging to another would convey no title. To apply this rule to the Federal Government would have produced a cruel dilemma: either Indians had no title and no rights or the Federal land grants on which much of our economy rested were void. The Supreme Court would accept neither horn of this dilemma, nor would it say, as a modern realist might say, that the Federal Government is not bound by the limitations of common law doctrine and is free to dispose of property that belongs to Indians or other persons as long as such persons are paid for their interests before their possession is impaired. But such a way of putting the matter would have run contrary to the spirit of the times by claiming for the Federal Government a right to disregard rules of real property law more sacred than the

---

<sup>48</sup> Hall, "Indian Land Rights," 280.

<sup>49</sup> Berman, "Concept of Aboriginal Rights," 647,

Constitution itself. And this theoretical dilemma was neatly solved by Chief Justice Marshall's doctrine that the Federal Government and the Indians both had exclusive title to the same land at the same time.<sup>50</sup>

The Marshall Court's creative solution to legitimating both colonial grants and Aboriginal rights to land has been called both "judicial mythology"<sup>51</sup> and a "brilliant compromise,"<sup>52</sup> but the real problem has been the legacy of ambiguity passed down by "an Indian interest unknown to the common law, the definition of which has understandably eluded judges ever since."<sup>53</sup> Not only are the finer points of the concept of Indian title ambiguous, but there has even been fundamental disagreement on whether Marshall's concept was meant to shore up or erode Aboriginal peoples' property rights. James Youngblood Henderson remains a notable name that put forth a comprehensive argument that the Marshall Court did not in fact seek to weaken the title that Aboriginal peoples could claim over the land, and that much of the consensus since then has been in error. The notion of discovery itself Henderson characterizes as merely "a distributional preference by which the Europeans agreed to divide up entitlements to acquire tribal lands,"<sup>54</sup> and that the majority opinion in *Johnson v. McIntosh* stood for the recognition of unceded *tribal title* as a separate and legitimate land tenurial system as equally valid as either federal or state tenurial systems.<sup>55</sup> Indeed the doctrine of discovery, stated in its most fundamental terms, leaves much to be debated. If the doctrine really were limited to

---

<sup>50</sup> Cohen, "Original Indian Title," 48-49.

<sup>51</sup> Berman, "Concept of Aboriginal Rights," 643.

<sup>52</sup> Neil Jessup Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," *Hastings Law Journal* 31, no. 6 (1990): 1223.

<sup>53</sup> McNeil, *Common Law Aboriginal Title*, 236-237.

<sup>54</sup> Henderson, "Unraveling the Riddle," 90.

<sup>55</sup> *Ibid.*, 87.

according European sovereigns (and their successor independent colonies) a mere right of first refusal as against other European sovereigns in the legitimate acquisition of an Aboriginal group's title—with Aboriginal groups selling at their leisure and until such time maintaining all territorial integrity and self-determination—then one could conceive of Aboriginal sovereignty and territoriality as not being impaired in any significant way.<sup>56</sup> And in searching out a line of argumentation in *Johnson v. McIntosh* that would find that the original private purchasers (and their successors in title) did *not* have the greater claim to the land in question, Marshall does entertain the notion of a private direct purchase from the First Nations amounting to a transfer of title. Marshall argues, however, that those original direct purchasers would have incorporated themselves with the First Nation, holding the title under their protection and under their laws, meaning that they would have no recourse to American courts if the Aboriginal group later decided to cede the lands to the United States by treaty with no reservation or clause protecting the original purchasers' title.<sup>57</sup> There is therefore something to Henderson's argument, for in making this argument against the original purchasers Marshall does

---

<sup>56</sup> See McNeil, *Common Law Aboriginal Title*, 235. McNeil discusses the reputed inalienability of Aboriginal title to anyone but the Crown and the debate over whether purchasers or sellers are in fact constrained by the limitation: "To sum up, the rule that lands held by indigenous people are inalienable to Europeans seems to have originated in some of the Crown's overseas dominions as a matter of policy. Almost invariably, where adopted that policy was implemented by legislation. Judicial attempts to formulate a common law basis for the rule were therefore unnecessary. Moreover, they are probably unsustainable. But even if one accepts the rule as having a non-legislative basis, it would not affect the capacity of indigenous people to acquire lands from one another. Thus, although it may be seen as a limitation on their interests (like a condition restricting alienation of a fee simple), the better view seems to be that it would not affect their interests as such, but simply make them less marketable by excluding (like the rule incapacitating aliens) a large class of potential purchasers."

<sup>57</sup> *Johnson v. McIntosh*, at 593-594. Marshall ultimately does find against the original purchasers, in favour of McIntosh who obtained title later through a grant from the United States, for this reason and several others—including the decree in the *Royal Proclamation* that Aboriginal title could only be alienated to the Crown.

acknowledge another sovereign realm of real property rights akin to Henderson's tribal tenurial system.

Kent McNeil states that, after *Fletcher v. Peck*, there was the chance for Chief Justice Marshall and his colleagues to follow what McNeil sees as the most logical path for the common law to accommodate Aboriginal land rights—giving First Nations fee simple title to their own lands in the process of transferring the paramount lordship over the territory to the Crown. But, with the terms used to describe the Indian title in the decision, McNeil sees Marshall as having closed that door. In *Johnson v. McIntosh* Marshall refers to his opinion in *Fletcher v. Peck*, saying that it “conforms precisely to the principle which has been supposed to be recognized by all European governments from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee than a lease for years, and might as effectually bar an ejection.”<sup>58</sup> In contrast to Henderson, then, McNeil’s interpretation of *Johnson v. McIntosh* is that Marshall held that “the Crown (and hence its successor) thus had seisin in fee of the soil, while the Indians had something akin to leasehold possession.”<sup>59</sup> Indeed, the Court’s opinion in *Johnson v. McIntosh* is replete with passages and turns of phrase that would seem to have the effect of legally diminishing Aboriginal title. It is difficult to avoid reading the “ultimate dominion” of European sovereigns and the “Indian right of occupancy” as anything but a contrast that wishes to express a

---

<sup>58</sup> *Johnson v. McIntosh*, at 592.

<sup>59</sup> McNeil, *Common Law Aboriginal Title*, 252.

fundamental *incommensurability* in how two categories of people are legally related to land:

In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.<sup>60</sup>

Later in the opinion, Marshall restates the doctrine of discovery, but this time with a rhetoric of conquest added to it, an element that Berman concedes “hints at a political standard that would make Indian lands vulnerable to forced extinguishment”<sup>61</sup>: “The United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery

---

<sup>60</sup> *Johnson v. McIntosh*, at 574.

<sup>61</sup> Berman, “Concept of Aboriginal Rights,” 647.

gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.”<sup>62</sup> Implying that the primacy of one form of title entails the inferiority of the other, Marshall goes on to state that the power of the government of the United States to grant lands, inherited from the Crown, “must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.”<sup>63</sup>

But what are we to make of Marshall’s use of history to elucidate the doctrine of discovery? As with the doctrine of terra nullius, the premise of the doctrine of discovery would seem to be neither complete fiction nor complete fact. Brian Slattery researched the many papal bulls, letters patent, and royal charters upon which early colonial ventures were premised in order to scrutinize the validity of both doctrines. His finding is that, while “Marshall’s theory comes closer to the mark than its rival,” neither “is a completely satisfactory account of official French and English attitudes to indigenous territories in North America.”<sup>64</sup> To begin with, collective assent was not a theme as predominant as Marshall suggests. Early on, Spain and Portugal both sought and obtained from the

---

<sup>62</sup> *Johnson v. McIntosh*, at 587 (emphasis mine).

<sup>63</sup> *Ibid.*, at 588.

<sup>64</sup> Slattery, “Paper Empires,” 73.

Catholic Church a series of papal bulls that purported to grant to these nations extensive and exclusive spheres of influence in the New World. Slattery states that “most of the bulls do not make outright grants of territory, as is often assumed. Instead, they extend recognition to past conquests and confer the faculty to make future ones. Moreover, the bulls do not treat infidel lands as *terra nullius*, acquirable by mere discovery or occupation. While presuming that Christians may justly make war on infidels (or at least some of them) and also appropriate their territories, the bulls generally recognise that such territories can only be acquired by conquest or some other method of achieving factual control.”<sup>65</sup>

The English and French Crowns immediately challenged the Iberian powers’ claims to exclusive spheres of control. Letters patent issued in 1502 by Henry VII to a group of explorers invite them to discover, occupy, possess, and subdue new lands—but exclude lands that were first discovered by other princes *and* that were already in their possession, suggesting “that discovery in itself carries no rights without possession.”<sup>66</sup> In 1580, the Spanish ambassador protested the English Crown’s violation of Spain’s asserted sphere of influence, only to have the claims summarily dismissed by Elizabeth I as pertaining to “ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory: acts which cannot confer property.”<sup>67</sup> Elizabeth re-joined that “this donation of what does not belong to the donor and this imaginary right of property ought not to prevent other princes from carrying on commerce in those regions or establishing colonies there in places not inhabited by the

---

<sup>65</sup> Ibid., 54.

<sup>66</sup> Ibid., 66.

<sup>67</sup> Cited in Slattery, “Paper Empires,” 67.

Spaniards. Such action would in no way violate the law of nations, since prescription without possession is not valid.”<sup>68</sup>

As we have seen previously, however, Slattery does state that “while rejecting the monopolistic claims of the Iberian powers, the French and English Crowns eventually began playing a similar game, claiming exclusive spheres of operation in the New World as against other European powers”<sup>69</sup>—claims that stake out designated geographical limits and begin to resemble the characterization given the doctrine of discovery by Marshall in *Johnson v. McIntosh*. Still, Slattery concludes that there is “scant support for the version of the discovery theory espoused by Chief Justice Marshall, which holds that the European powers agreed among themselves that the first state to discover an American territory held exclusive rights of access there... Mere acts of discovery, exploration, and token occupation did not confer exclusive rights, even as among European powers.”<sup>70</sup> Berman, too, recognizes that discovery alone, if it had ever been a sufficient basis for dominion, no longer was by the early nineteenth century.<sup>71</sup> In 1790, the Nootka Sound Controversy between England and Spain had been resolved with the agreement that areas in Northwest North America not actually occupied and in the possession of a European sovereign were open to all. And “in the dispute over the Oregon Territory between the United States and Great Britain, both sides agreed by 1826 that mere discovery could not grant a complete title.”<sup>72</sup>

---

<sup>68</sup> Cited in Berman, “Concept of Aboriginal Rights,” 652.

<sup>69</sup> Slattery, “Paper Empires,” 73.

<sup>70</sup> Ibid., 72.

<sup>71</sup> Berman, “Concept of Aboriginal Rights,” 652.

<sup>72</sup> Ibid., 651.

Yet, it is peculiar to what extent Marshall seeks to exorcise any equivocality and establish an unquestionable universality to the “principles” that purportedly underlay colonization—“The history of America from its discovery to the present day proves, we think, the universal recognition of these principles”<sup>73</sup>—as though over three centuries of competing colonial ventures played out according to a pre-established rulebook that enjoyed universal acceptance. Why should this be the immutable and universal principle upon which the New World was colonized and countries such as the United States founded? The reason likely has to do with the influence of legal positivism that was characteristic of Marshall’s era, for it helped to draw a manageable horizon on the possibilities of justice. Marshall thus states from the outset in his opinion delivered on behalf of the unanimous Court:

As the right of society to prescribe those rules by which property may be acquired and preserved is not and cannot be drawn into question, as the title to lands especially is and must be admitted to depend entirely on the law of the nation in which they lie, it will be necessary in pursuing this inquiry to examine not singly those principles of abstract justice which the Creator of all things has impressed on the mind of his creature man and which are admitted to regulate in a great degree the rights of civilized nations, whose perfect independence is acknowledged, but those principles also which our own government has adopted in the particular case and given us as the rule for our decision.<sup>74</sup>

Marshall is in effect alluding to the two mutually opposing categories of legal thought familiar to the Court in the early nineteenth century—natural law and legal positivism—

---

<sup>73</sup> *Johnson v. McIntosh*, at 574.

<sup>74</sup> *Ibid.*, at 572.

and favouring the latter. Merete Borch's historical work finds that the natural law approach, generally accepted up until the late eighteenth century, and "traced to a concept of justice based on the entitlement of all mankind to certain fundamental rights as prescribed by the law of nature," largely recognized that Indigenous peoples were in possession of the land upon which they lived.<sup>75</sup> The shift in the late eighteenth and early nineteenth century toward positivist legal thinking, however, found notions of natural law "increasingly rejected in favour of a strictly 'scientific' view of the law which separated law and morality, and maintained that the area of concern to the jurist was simply the laws as they were laid down by the sovereign and applied in political entities defined as states."<sup>76</sup> Not surprisingly then, Marshall makes the even less credible claim that "no one of the powers of Europe gave its full assent to this principle more unequivocally than England."<sup>77</sup> Though there is plenty in the history of the common law to dispute the Marshall Court's claims to having its hands tied,<sup>78</sup> Marshall universalizes and essentializes an inchoate practice in order to have it handed down to the judiciary as the unquestionable, non-justiciable rule for the origin of title in the United States. At a certain point, it seems, certain fundamental aspects of the colonial encounter simply need to be

---

<sup>75</sup> Borch, *Conciliation, Compulsion, Conversion*, 231.

<sup>76</sup> Borch, "Rethinking Origins of Terra Nullius," 237.

<sup>77</sup> *Johnson v. McIntosh*, at 576.

<sup>78</sup> Case law does show the sovereign being chided by the juridical field for overstepping its bounds, or even seeking legal opinions in order to know better those limits. In reference to *Johnson v. McIntosh*, Felix Cohen refers to the rules of real property as being "more sacred than the Constitution itself," Cohen, "Original Indian Title," 48. To draw from prior common law legal history concerning limitations on sovereign prerogative, see Williams, *American Indian in Western Legal Thought*, 300-303, for a pertinent discussion of the 1774 Court of King's Bench opinion in *Campbell v. Hall*. It should be noted, however, that this cannot amount to a claim that there exists an ultimate and essential lawfulness that recognizes the Aboriginal possession of land. Indeed, Williams's discussion of *Campbell v. Hall* puts it into context as a post-Glorious Revolution decision that wishes to put behind it an even older period characterized by precedents (notably, Lord Coke's opinion in *Calvin's Case* of 1608) that accorded a more absolute power to the monarch and little in the way of rights to those deemed infidels and barbarians.

ratified, and deploying *injusticiability*—that is to say, rendering something unavailable for adjudication by articulating it as a “political question” rather than a legal question—is the most effective means the juridical field has to do this.<sup>79</sup>

The decision for *Johnson v. McIntosh* is riddled with assertions of *injusticiability*. Marshall even reveals his preference to avoid diminishing the rights of hunter/gatherers through abstract legal principles akin to a theory of terra nullius—a revelation that goes some way toward explaining the vagaries and ambiguity in his discussions of title—but rather attributes the finding of the Court to an obligation of deference to the sovereign: “We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”<sup>80</sup> Marshall even concedes the incongruity of employing the language of conquest to justify Anglo-American sovereignty, given that much of the history of land acquisition was based in treaty and cession: “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”<sup>81</sup> Thus, of the few things that are readily apparent in the case of *Johnson v. McIntosh*, one can say that Chief Justice

---

<sup>79</sup> See Berman, “Concept of Aboriginal Rights,” 647. Berman refers to *Johnson v. McIntosh* as “perhaps the earliest articulation of the ‘political question’ doctrine as applied to the issue of aboriginal rights.”

<sup>80</sup> *Johnson v. McIntosh*, at 588.

<sup>81</sup> *Ibid.*, at 591.

Marshall is clear in his desire to narrate a history that would explain the origin of land titles in the United States thanks to a novel compatibility of titles between the colonizer and the colonized, and to have that history handed down to the judiciary as the unquestionably legitimate basis of the American assumption of sovereignty over Aboriginal lands.

In the telling of that history, though, so much of the language Marshall employs gives the impression of the diminution of Aboriginal sovereignty and land rights. Yet, at the same time, the mechanism of the history he portrays—discovery—is profoundly ambivalent. Despite the discouraging terminology and phrasing throughout the opinion, there is a paucity of concrete indicators of the differences between the title of the Crown and Indian title—other than the original assertion of the exclusive right of the United States to acquire title and the limitation of Aboriginal peoples to alienate that title to only the United States. (This, of course, still leaves open the question as to why the Court would consider a mere right of acquisition as a form of title in and of itself.) Howard Berman thus also seems to want to suggest that the ‘correct’ interpretation of *Johnson v. McIntosh* is that it should not do as much to diminish Aboriginal land tenure as one might think on the first reading:

Although the use of terms such as "absolute title" to describe the rights of the United States, and "occupancy" to describe the rights of the Indian nations seems to indicate a hierarchy of land tenures, a careful reading of the text reveals that these characterizations of property interests did nothing to affect the essential relationships described by Marshall in this case. Whether the Indian interest was termed "title" or "occupancy," it stood as a legal right that was only qualified by a

limitation over which European nations might acquire the interest. The natives "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," and their rights to complete sovereignty were only diminished by the distributional preference of the discovery principle.<sup>82</sup>

On the other hand, the very creation of a neologism such as "Indian title" cannot help but convey a sense of incommensurability. After all, if the possession of lands by the multitude of human societies is given equal footing, then why would a legal concept such as Indian title even come to be invented? Why would the simple possession of land become particularized to a cultural subject, as beheld by the courts of the colonizing society? The novel assertion of compatibility of titles suggests that there would need to be some form of concession on one side or the other, and much of the subsequent case law has tended more toward the consensus that the concession lay in the nature that the Court accorded to Indian title.<sup>83</sup> The ambivalence of the principle of discovery and of the two forms of title aside—or rather, perhaps precisely *because of* the vacuum created by that ambivalence—the language of diminution has often been decisive in the judicial interpretation of the decisions of the Marshall Court. In effect, many of the intimations of incommensurability and injusticiability examined above were seized upon by American judges whose decisions diminished Aboriginal title over the next several generations.<sup>84</sup>

---

<sup>82</sup> Berman, "Concept of Aboriginal Rights," 649.

<sup>83</sup> Berman, Concept of Aboriginal Rights," 643. Berman states that "*Johnson v. McIntosh* has been selected as a significant precedent by courts in the United States and other common law jurisdictions in decisions that have substantially reduced the scope of, or denied entirely, aboriginal rights to land."

<sup>84</sup> For some significant examples in American case law, see *United States v. Kagama*, 118 U.S. 375 (1886), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In *Tee-Hit-Ton Indians*, the majority opinion authored by Justice Reed states that the government's taking of Aboriginal land is not compensable under the Fifth Amendment unless Congress has clearly specified that the group in question was to be entitled to hold the lands permanently—otherwise, Indian title is not

To this repertoire one can also add an infamous metaphor in the Marshall Court's next Aboriginal title case, *Cherokee Nation v. Georgia*.<sup>85</sup> After suggesting that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else," Marshall likens their status to "domestic dependent nations" who have a relationship with the United States akin to "that of a ward to its guardian."<sup>86</sup> A legacy that is in large part detrimental to Aboriginal rights came to be despite the fact that there is also a notable amount of opinion that the next two decisions from the Marshall Court on Aboriginal title came full circle and sought to strengthen or clarify its conception of Indian title as something more in line with Justice Johnson's original dissent in *Fletcher v. Peck*.<sup>87</sup>

### **The *St. Catherine's Milling* Case: Indian Title Comes to Canada**

In late nineteenth century Canadian jurisprudence, a foundational case for Aboriginal land rights climbed to the highest court available at that time—the Judicial Committee of the Privy Council (JCPC) in London, England—and the influence of the Marshall Court is at once silent but fundamental. A testament to the ambivalence of the American precedents, Anthony Hall notes that both parties in *St. Catherine's Milling and Lumber*

---

a constitutionally guaranteed property right, but merely a permissive right of occupancy. In rendering this decision, Reed specifically cites the doctrine of discovery as having given the conquerors sovereignty and ownership over the lands, and invokes Marshall's maxim that *conquest gives a title which courts of the conqueror cannot deny*.

<sup>85</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>86</sup> *Ibid.*, at 16 and 17.

<sup>87</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835). For commentary on this seeming reversal, see Berman, "Concept of Aboriginal Rights," 660-666; McNeil, "Common Law Aboriginal Title," 252-255; McMillen, "Making Indian Law," 90-91.

*Company v. The Queen*<sup>88</sup> cited the Marshall Court’s decisions extensively to support their arguments, and suggests that there is little doubt that Lord Watson of the JCPC also made “ample use” of them in authoring the decision of the Committee.<sup>89</sup> There are some distinct parallels between the *St. Catherine’s Milling* case and the influential early American cases. To begin with, just as in *Fletcher v. Peck* and *Johnson v. McIntosh*, the Indigenous group discussed in *St. Catherine’s Milling* was not actually a party in the dispute. Rather, again in parallel with the American politics of Chief Justice Marshall’s era, it was the nature of Indian title that held the balance in a constitutional dispute between governments—this time between the federal government and the province of Ontario.

For the purposes of the case, the plaintiff was the Attorney-General for Ontario and the defendant was the St. Catherine’s Milling and Lumber Company, with the Attorney-General for the Dominion of Canada intervening on behalf of the company. With the consent of the federal government, the company cut timber in the area of Lake Wabigoon, near the present day community of Dryden, Ontario. This logging activity fell within the area covered by Treaty Three, which the federal government had signed with First Nations in 1873. The federal government had undertaken the numbered treaty process to open up the West because the *Constitution Act, 1867* (then known as the *British North America Act, 1867*) that brought about Confederation had listed “Indians and Lands Reserved for the Indians” as a federal responsibility.<sup>90</sup> Section 109 of the *Constitution Act, 1867* specified, however, that all Crown lands, mines, and minerals

---

<sup>88</sup> *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.) [*St. Catherine’s Milling*].

<sup>89</sup> Hall, “Indian Land Rights,” 280.

<sup>90</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5.

situated within the provinces of Confederation were to belong to those provinces, “subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.”<sup>91</sup> In essence, because Treaty Three had been signed six years after Confederation’s devolution of Crown lands to the provinces, the federal government held that the legal effect of “extinguishing” the Indian title in the region had been “to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.”<sup>92</sup> Ontario contended that, as soon as the treaty took effect, it had received the entire beneficial interest of the lands. A determination on the issue of the felled timber, therefore, required a determination on whether the post-Confederation treaty lands in fact belonged to the Dominion of Canada or the province of Ontario.

The case was first heard in the Chancery Division of the High Court of Ontario, only to be appealed to the Ontario Appeal Court, the Supreme Court of Canada, and ultimately to the Judicial Committee of the Privy Council in England. What is particular about the *St. Catherine’s Milling* case is that, among the myriad lines of inquiry and inference available to the courts, the nature of Indian title was given a central role in determining the issue. This, on initial consideration, seems an unnecessary oddity. In the case of *Fletcher v. Peck* both parties presented arguments to the Supreme Court of the United States on the nature of Indian title—and in fact both presented theories that sought to diminish it in the eyes of the Court—but that is because both parties, in characterizing the true competition of claims as being between state and federal governments, wanted to

---

<sup>91</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 109, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>92</sup> *St. Catherine’s Milling*, at 52.

remove the threat posed by the *unextinguished* Indian title over the lands in question.<sup>93</sup> In the case of *St. Catherine's Milling*, while the Indian title had not been extinguished at the time of Confederation, there would have been no doubt in the minds of any of the parties involved—including the various levels of courts—that the title *had been* extinguished by Treaty Three in 1873.<sup>94</sup> In this sense, such a case might just as well have centered on a debate around what *should* have happened to the treaty lands after extinguishment through deeper inquiry and inference into common law precedent, past policy for comparable situations in the Commonwealth, or the original intent of British Parliament while creating the *British North America Act, 1867*. In fact, Sydney Harring avers that the province did not originally think of the *St. Catherine's Milling* dispute as a case that hinged on the nature of Indian title, at least not until the early 1880s, when Sir John A. Macdonald tipped his hand to what would be the Dominion's strategy.<sup>95</sup>

Just prior to the dispute upon which the *St. Catherine's Milling* case was centered, Ontario and the Dominion of Canada had become embroiled in a boundary dispute concerning the province's northern and western borders. An 1878 Boundary Commission had decided that the province's western border should encompass the majority of the Treaty Three lands, bringing its boundary as far west as the current border with

---

<sup>93</sup> See Berman, "Concept of Aboriginal Rights," 639-640, for an overview of the pleadings and assertions put forth by the parties to *Fletcher v. Peck*.

<sup>94</sup> I use the concept of extinguishment to explain the perceived legal stakes involved in each of the cases, but, in keeping with the critique begun in the previous chapter and the disparity in interpretations of the meaning of the treaties between First Nations and the Crown, this is not to suggest a reification or acceptance of the notion of extinguishment itself.

<sup>95</sup> Sydney Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1998), 133. Harring pinpoints the revelation to a speech Macdonald gave in 1882 in Toronto, but the history drawn up by some of the more recent Treaty Three jurisprudence has Macdonald articulating the Dominion position as early as 1880. See *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801, [2012] 1 C.N.L.R. 13 at para. 975.

Manitoba. Despite the findings of the commission, an 1882 speech Macdonald gave in Toronto showed him to be indignant and reticent to concede the vast swath of territory to Ontario. In fact, even with the JCPC decision in favour of Ontario that was to come with the *Ontario-Manitoba Boundary Dispute* of 1884, resolution would still be elusive because John A. Macdonald was asserting the argument that, while the lands may very well be within the boundaries of Ontario, they were nevertheless still *owned* by the Dominion—precisely because the Dominion was the purchaser from the land's *prior owners*. Even if all that territory were awarded to Ontario, Macdonald claimed:

...there is not one stick of timber, one acre of land, or one lump of lead, iron, or gold that does not belong to the Dominion or to people who purchased from the Dominion Government. So it is absurd to say that Ontario has been robbed; she has not been robbed of a farthing. You know there is Brantford in Ontario, and that there is the township of Onondaga. Mr. Mowat is the head of the Provincial Government, but that township belongs to the Indians; it does not belong either to the Ontario Government or the Dominion Government. In the same way all the country from Lake Superior to Red River belonged to the Indians until it was ceded to the purchaser, and the person who purchased it is known as Queen Victoria, the Queen of the Dominion of Canada.<sup>96</sup>

A key premise to Macdonald's argument, then, was that Treaty Three First Nations had possessed a *full proprietary interest* in their lands. In this way, regardless of what did or did not fall within the boundaries of Ontario, the Dominion of Canada had

---

<sup>96</sup> Cited in Alexander McLagan Ross, *Speech Delivered 21st February, 1884, in the Legislative Assembly of Ontario: On Moving the House Into Committee of Supply* (Toronto: The Grip Printing and Publishing, 1884), 23-24.

acquired that full proprietary interest through purchase. This was one of the more salient facets of the overall portrait of Aboriginal land rights drawn by the Dominion and the company. From their perspective, according to Anthony Hall, the “Lands reserved for the Indians” for which the Dominion government was constitutionally responsible represented “the larger part of the British North American territories that Native people had not ceded to the Crown at the time of Confederation.”<sup>97</sup> And the question of what precisely the First Nations were ceding was deemed important “for by answering it the lawyers representing the Company believed they were describing the legal interest that passed from Aboriginal groups to the Dominion through the medium of Indian treaties.”<sup>98</sup> That interest was full ownership, according to Hall, subject only to the limitation on the alienability of the land—and that limitation on alienability was seen as a claim only against other European nations and not against First Nations themselves.<sup>99</sup> Although the Dominion’s argument was essentially a self-interested one—S. Barry Cottam sees each side as having “manipulated the notion of Indian title in its attempt to win the resources of the disputed territory”<sup>100</sup>—it nevertheless presented a vision of the Aboriginal possession of land strikingly similar to that shared by Justice Johnson in *Fletcher v. Peck*. Dalton McCarthy, Conservative Member of Parliament and legal counsel for the company, argued before the Chancery Division of the High Court of Ontario that “England has always recognized the rights of Indians to possession and occupancy to the exclusion of everyone,” and then before the Supreme Court that “the

---

<sup>97</sup> Hall, “Indian Land Rights,” 272.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> S. Barry Cottam, “Indian Title as a ‘Celestial Institution’: David Mills and the *St. Catherine’s Milling Case*,” in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, eds. Kerry Abel and Jean Friesen (Winnipeg: University of Manitoba Press, 1991), 260.

Indians had a right to occupy the land, to cut the timber and to claim the mines and minerals found on the land, and the land descended to their children; the only restriction upon their title was as to alienation; that might be called a limited or base fee. And was there any thing more vested in the crown than a mere right to the land when the Indian title was extinguished?”<sup>101</sup> To a certain extent, however, this historical detail should not be cast as wildly anomalous. As we have seen thus far, colonial history demonstrates numerous examples of the Aboriginal possession of land commanding respect commensurate with that of European possession. Sydney Herring notes that, “whether or not there was precedent on the Indian title question in English and Canadian law, the term ‘ownership’ was repeatedly used in connection with Indian title from coast to coast in nineteenth-century Canada.”<sup>102</sup> Nevertheless, with the juridical field already on the march deeper and deeper into the era of legal positivism, such a legal argument would perhaps stand as a rare oddity from our contemporary perspective.

As for Ontario’s counter-arguments, Cottam encapsulates them as asserting that “the Indians had no concept of property recognizable in law, and that, whether they did or not, the title to the land of North America lay in the Crown of England by virtue of the processes of discovery, conquest and settlement. If the Indians had any rights at all, they came through the generosity of the Crown.”<sup>103</sup> Even the *Royal Proclamation*, often lauded by conventional legal argument as a guarantee of Aboriginal rights and title granted by the grace of the Crown, was dismissed by the province’s legal team as a mere

---

<sup>101</sup> Ibid., 249.

<sup>102</sup> Herring, *White Man’s Law*, 129.

<sup>103</sup> Cottam, “Celestial Institution,” 248.

temporary emergency measure taken after the acquisition of French territorial interests, only to be superseded by the *Quebec Act* in 1774.

A key member of Ontario’s legal team was David Mills, a Liberal Member of Parliament who had served as Minister of the Interior in the Cabinet of Alexander Mackenzie and who was noted for his command of British constitutional issues, as well as both British and American jurisprudence. Cottam explores the evolution of Mills’s thinking on the issue of Aboriginal title. Earlier on Mills was frustrated with British Columbia’s almost complete lack of progress in settling the issue of Aboriginal title with treaties, asserting in 1881 that both the British Crown and the American Supreme Court “have always recognized a title in the Indians—not a political sovereignty over the country, but a personal right of property in the soil. That title in all other British colonies had been always considered as existing before the Crown undertook to deal with the lands for the purpose of sale or disposal to other parties.”<sup>104</sup> Only four years later, Mills’s characterization of Aboriginal title had undergone a shift. In calling on the government of British Columbia to recognize Aboriginal rights, he asserted that acknowledging title did not mean that the government “maintained that the lands actually belonged to the Indians.” Rather, title and sovereignty were vested in the Crown and it was more “as a matter of public policy, and with the view of conciliating the Indian population, and reconciling them to the occupation of the country by the white population,” that they admitted “the Indians had some interest in the lands of the country.”<sup>105</sup> In papers found posthumously, writings that read like preparations for legal arguments demonstrate a hardening of Mills’s opposition to the notion of Indian title, tempered in evolutionist

---

<sup>104</sup> Cited in Cottam, “Celestial Institution,” 252.

<sup>105</sup> Cited in Cottam, “Celestial Institution,” 253.

argumentation and a profound legal positivism. Of First Nations, Mills had written that “civil institutions could not be said to have had an existence amongst them. There were neither laws nor law givers. Those civil institutions without which there can be no real property, had no existence... The conduct of the Indians no less than their social condition negatives the notion of property in the soil.”<sup>106</sup> And if one were to retort to Mills that the issue should be less about Indigenous notions of land possession and more about the law recognizing the simple fact of the prior occupation and possession of land, one would encounter a strict legal positivism that could only countenance the existence of an Aboriginal title under the express recognition of the sovereign. Anything beyond this, perhaps sourced in natural law, had the quality of a fairy tale for Mills:

Amongst the Indians of North America there was usually no more conception of property in land than in the atmosphere or in the sea. If there is a natural right of property in the soil, to whom does it belong? How is it transmitted? Does it end with the life of the owner? Is it a tenure or an allodial possession? Can the owner part with it? Is his right of transfer absolute or limited? If there is a higher law under which the Indians held & the courts are called upon to administer it is most important to know what the law is... The Court is here called upon to enforce some celestial institution which has not found its way to the Statute book & in regard to which we have not the usual or ordinary information.<sup>107</sup>

In the trial court, Chancellor Boyd of the High Court of Ontario found in favour of Ontario, agreeing with the province that prior occupation bore no title, but rather that any form of Indian title was dependent on the grace of the government. He also agreed

---

<sup>106</sup> Cited in Cottam, “Celestial Institution,” 258-259.

<sup>107</sup> Cited in Cottam, “Celestial Institution,” 259.

with Ontario that the *Royal Proclamation* did not amount to an Indian “bill of rights,” but rather had been pre-empted only eleven years later by the *Quebec Act*. Chancellor Boyd’s decision is also notable for the extent to which it is ensconced in the Darwinian arrogance of the Victorian era. He characterizes the Saulteaux Ojibwa of Treaty Three as “a more than unusually degraded type of Indian,” now living in a reserve system whose goal was their transition from “barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter.”<sup>108</sup>

The upper courts within Canada reinforced Chancellor Boyd’s decision, though two justices from the Supreme Court of Canada offered dissenting opinions. It was before the highest court, the Judicial Committee of the Privy Council, that the *St. Catherine’s Milling* case received its final and most distinctive modification. With the Dominion’s claim to title over the Treaty Three territory being premised on a notion of Indian title as amounting to a full proprietary interest, Lord Watson of the JCPC brought a line of questioning to Edward Blake, a member of Ontario’s legal team, that seemed to suggest that the province need not be dogmatic about establishing Indian title as a complete nullity:

“What difference do you think it makes to your case that the Indian title should be greater or less so long as there is a substantial interest underlying it in the Crown? Does the precise extent or limit of the Indian title matter much... so long as there is left a right in the Crown, a substantial right, not a mere casualty which will

---

<sup>108</sup> Cited in Hall, “Indian Land Rights,” 279.

depend on the Indian title but a substantial title?” Blake was quick to reply: “So long as it is agreed there is such an interest... I care for nothing more.”<sup>109</sup>

The line of argumentation implied in this interlocution is essential to one of the most important precedents in early Canadian Aboriginal law, and is also strongly suggestive of the influence of the Marshall Court upon that body of law. It is an exploration of the possibility of *compatibility* between Indian title and the Crown’s interest in land—a compatibility first suggested by the Supreme Court of the United States decades earlier, and a compatibility dependent by its very nature on the creation of an incommensurate form of possession unique to Indigenous peoples. Lord Watson is suggesting that the Court need not eliminate Aboriginal title altogether, but rather that the mere assertion that the Crown possessed an underlying interest in the land concomitant with the Ojibwa possession of it would indicate that there was a Crown interest in land that passed down to the province with Confederation, prior to the signing of Treaty Three. Blake, cognizant that Lord Watson is suggesting that any form of Indian title that amounts to less than a full and *exclusive* proprietary interest would be sufficient to have Ontario win its case—and gain the vast majority of Treaty Three lands and all their resources—is more than happy to accept the existence of such a form of title.

The JCPC thus found in favour of Ontario, agreeing that the effect of extinguishing the Indian title was to transmit to the province the beneficial interest of the lands in question. However, in contradistinction to Chancellor Boyd’s decision for the High Court of Ontario, it maintained that there was an ongoing interest in land to be attributed to those First Nations who had not ceded their land through treaty. The title

---

<sup>109</sup> Cited in Cottam, “Celestial Institution,” 262n9.

was not independent of Crown sovereignty, however, but existed at the pleasure of the Crown. It was sourced in the *Royal Proclamation*, which was still in effect, and was ascribed to the provisions in the *Proclamation* made “in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.”<sup>110</sup> The decision, delivered by Lord Watson, admits that, had the “Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873,” there could have been precedent “for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown” at the time of Confederation.<sup>111</sup> Essential to the finding in favour of Ontario, then, is the inscribing of difference upon the Aboriginal possession of land and the categorization of “Indian title” as a lesser form of title than that held by non-Aboriginal peoples.

The opinion of the JCPC claims that the Dominion’s assertion that a full proprietary interest remained with those First Nations who had not ceded their lands was “at variance” with the terms of the *Royal Proclamation*, “which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be ‘parts of Our dominions and territories;’ and it is declared to be the will and pleasure of the sovereign that, ‘for the present,’ they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion.”<sup>112</sup> Aboriginal title in Canada had thus been reduced to a right of usufruct—a term from Roman law that Anthony Hall suggests Lord Watson borrowed from Chief Justice John Marshall.<sup>113</sup> It was “a mere burden” on the underlying

---

<sup>110</sup> *St. Catherine’s Milling*, at 54.

<sup>111</sup> *St. Catherine’s Milling*, at 58.

<sup>112</sup> *St. Catherine’s Milling*, at 54-55.

<sup>113</sup> Hall, “Indian Land Rights,” 280.

title of the Crown.<sup>114</sup> There is thus another parallel here with the decisions rendered by the Marshall Court earlier in the century: just as the Supreme Court of the United States contended with the awkward bind of Aboriginal land rights on the one hand and a series of royal charters that overstepped their bounds on the other, we have seen that the *Royal Proclamation* itself oversteps its bounds and operates on the implicit assumption of ultimate dominion acquired over land it did not possess. And once again, a court was able to iron out these wrinkles in the fabric holding together a young, expansionist country by carving out a new form of title particular to Aboriginal peoples. In this way, nineteenth century courts were able to ratify the history implied in the most audacious and untenable expressions of the sovereign will from prior centuries.

With these brief descriptors of a usufructuary right, Lord Watson was able to accord the province of Ontario the wealth of the land promised to it in the *Constitution Act, 1867* and preserve for the federal government the responsibility for treaties and jurisdiction over Aboriginal affairs. This solution would seem to have come at a cost to Aboriginal groups, in that the nature of the title that they could claim in Canada would thereafter be “drastically circumscribed.”<sup>115</sup> Beyond this, however, the decision of the JCPC in the *St. Catherine’s Milling* case explores none of the finer points on this new manifestation of Indian title. For the JCPC, going to such effort was not necessary to make a finding on the primary question of the case. Rather offhandedly, then, Lord Watson states that “there was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to

---

<sup>114</sup> *St. Catherine’s Milling*, at 58.

<sup>115</sup> Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994), 22.

express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.”<sup>116</sup> One thing was clear, however: though the details were lacking, the highest court for the Dominion of Canada had definitively inscribed a legal incommensurability upon Aboriginal peoples’ relationships to the lands that they had possessed since time immemorial.

---

<sup>116</sup> *St. Catherine’s Milling*, at 55.

## 4. The Legal Positivist Era

First Nations leaders and advocates have travelled overseas to petition the British monarchy, and other international bodies perhaps willing to listen to their cause, from as early as the eighteenth century to as recently as the late twentieth century. The early twentieth century transatlantic voyages of Levi General, also known as Deskaheh, hereditary chief of the Cayuga, concerned issues related to the Haudenosaunee Confederacy.<sup>1</sup> According to James Rodger Miller, relations between the Haudenosaunee's Six Nations First Nation and the federal government had become increasingly strained in the period following the First World War. A 1920 amendment to the *Indian Act* "that authorized involuntary enfranchisement at the will of the Indian Affairs minister joined with disputes over governance to provoke a showdown with the Six Nations that quickly expanded into a full-blown confrontation over the issue of Iroquois sovereignty."<sup>2</sup> Deskaheh and some of his associates travelled to London in the summer of 1921 in order to make a direct appeal to King George V. There, Deskaheh also gained much publicity and a sympathetic ear from journalists, much to the chagrin of Indian Affairs back in Canada. This, combined with a change of federal government in Canada, resulted in the repeal of the involuntary enfranchisement amendment from the *Indian Act*.<sup>3</sup> Attempts at negotiating for Haudenosaunee sovereignty, however, continued to bear no fruit.

---

<sup>1</sup> The Cayuga are one of the Six Nations of the Haudenosaunee (Iroquois) Confederacy, along with the Oneida, Mohawk, Onondaga, Seneca, and Tuscarora.

<sup>2</sup> John Rodger Miller, "Petitioning the Great White Mother: First Nations' Organizations and Lobbying in London," in *Canada and the End of Empire*, ed. Phillip Buckner (Vancouver: UBC Press, 2005), 310.

<sup>3</sup> Involuntary enfranchisement was reintroduced in modified form in 1933, however.

Deskaheh broke off talks with Ottawa when the Dutch government agreed to support the Six Nations internationally in an appeal for recognition of their sovereignty.<sup>4</sup> In the summer of 1923 he made his way to Geneva, by way of London first to drum up more publicity and support, in order to make an appeal before the recently established League of Nations. Both Canada and the United Kingdom lobbied against this, however, and the British Foreign Office successfully intimidated the Dutch away from the issue. With no member state requesting that the Haudenosaunee petition be put on the League's agenda, the case would go nowhere. The situation changed once again when, by the spring of 1924, representatives of four small countries that were former or actual colonies themselves—Persia, Estonia, Ireland, and Panama—agreed to support Deskaheh's case. They too, however, were ultimately intimidated away from the issue by the British Foreign Office.<sup>5</sup> By the fall of 1924 Deskaheh was coming to realize that no member state would bring their case before the assembly of the League of Nations, and wrote of his frustrations to his friend, ally, and lawyer in New York State, George Decker.<sup>6</sup> Swiss lawyers who had been working with Deskaheh through the International Office for the Protection of Native Races suggested that negotiations be reopened with Canada concerning a formerly proposed commission of arbitration, but this quickly led to Canada's inflexible reassertion of the same condition that caused the Six Nations' Council to reject the idea the first time around: namely, that the selection of arbiters be limited to Canadian judges. It was Decker's advice that was decisive in having the Confederacy

---

<sup>4</sup> Miller, "Petitioning," 311.

<sup>5</sup> For greater detail on these intrigues, see Andrea Lucille Catapano, "The Rising of the Ongwehonwe: Sovereignty, Identity, and Representation on the Six Nations Reserve" (PhD diss., Stony Brook University, 2007), <http://pqdtopen.proquest.com/doc/304744615.html?FMT=ABS>.

<sup>6</sup> Catapano, "Rising of the Ongwehonwe," 277.

reject this option previously. In a letter to George Decker dated October 4, 1924, Deskaheh's thoughts on putting the fate of the Confederacy in the hands of Canada's judiciary are unambiguous:

...they say they [sic] are nearly two hundred judges in Canada and surely out of that number, the Six Nations Council could find one or two judges [who] will be very sympathetic in their favor. My opinion of their suggestion and their idea, it would be more safer and quicker to find a needle in the strawstack, then to find a judge in Canada, to favour the Six Nation Indians, especially Indians it would be very difficulty [sic] to find even one.<sup>7</sup>

Indeed, for the era in which he found himself, Deskaheh's comment is quite astute, and his pessimism is likely not misplaced. By Deskaheh's time, more than a century's worth of frustrating clashes over Haudenosaunee land and governance were fought in both the political-bureaucratic field and the juridical field. Sydney Harring reports that nearly half of all reported legal cases in nineteenth century Upper Canada involved the Six Nations or their lands in the area of Grand River.<sup>8</sup> To put it bluntly, the nineteenth century and first half of the twentieth century were witness to both political-bureaucratic and juridical landscapes that were among the least sympathetic to the sovereignty, self-determination, and territorial rights of Aboriginal nations.

In this chapter, I will examine important historical developments in both the political and juridical fields through the nineteenth and early twentieth centuries, especially since political and legislative efforts had directly resonant effects on the legal

---

<sup>7</sup> Cited in Catapano, "Rising of the Ongwehonwe," 277.

<sup>8</sup> Sydney Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998), 36.

possibilities for Aboriginal peoples. Still, the titular categorization of the “legal positivist era” should not mislead with the impression that there was one specific legal doctrine against which Aboriginal peoples had to contend. Legal positivism forms a large umbrella, and broad and varied schools of thought such as this defy precise demarcation, both in terms of periodization and in terms of their content. In seeking to arrive at a definition of legal positivism that holds valid for the variety of schools and approaches that fall under the banner, John Gardner posits that legal positivism’s defining characteristic lies in holding to the tenet that “in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.”<sup>9</sup> As we have seen in the previous chapter, Merete Borch offers an applied definition with *the sovereign* named as that valid source of law, when she discusses the historical wane of notions of natural law “in favour of a strictly ‘scientific’ view of the law which separated law and morality, and maintained that the area of concern to the jurist was simply the laws as they were laid down by the sovereign and applied in political entities defined as states.”<sup>10</sup>

There is no unified and cohesive doctrine of Aboriginal rights or title that spans the entirety of this era. If anything thematically related to the above definitions of legal positivism finds common expression in the handful of cases examined, it is in the tendency towards a legal formalism that sheltered the legal resolution of these disputes from a certain moral scrutiny by conceptually separating *law* from *politics*. It is the deployment of injusticiability *par excellence*, and what counts as law and what counts as

---

<sup>9</sup> John Gardner, “Legal Positivism: 5½ Myths,” *The American Journal of Jurisprudence* 46, no. 1 (2001): 199.

<sup>10</sup> Merete Borch, “Rethinking the Origins of Terra Nullius,” *Australian Historical Studies* 32, no. 117 (2001): 237.

politics is at play in the process itself. The commonalities appear just as much tactical as they do technical, then: separating out politics from law and warding off the most difficult—and ethically challenging—questions as essentially political ones. Elements of this are certainly to be found in some of the law I will examine, most notably in the case of giving legal effect to treaty promises. In the nineteenth century, there are instances of case law in which the judiciary construed treaty promises as holding no *legal* obligations over the Crown, but only political ones. By the twentieth century, this evolved into formalist assertions that the treaties required some subsequent recognition or ratification in statute in order to be given full legal recognition, and that the federal government in particular was constitutionally able to derogate from its treaty promises.

The political-bureaucratic field, for its part, plays a significant role in this legal history, to the extent that it sought to preclude certain questions from being posed in the courts in the first place. Indeed, this is one of the reasons there is no directly litigated Aboriginal title case from this era, though many First Nations had never ceased asserting that their territory remained unceded. Despite the era's generally unsympathetic regard for Aboriginal claims concerning treaties, rights, and title, I would suggest that there are indications of a discomfort produced by such claims. The judicial eagerness to pass along the most unseemly aspects of colonial disputes to the political field is one aspect of this, while the persistent efforts at staving off title disputes before they can even become legal questions is another remarkable signal. The staving off of the title question becomes all the more significant, however, when one considers the role—as explored in the previous chapter—that historical binds and quiet crises can play in bringing about bursts of jurisprudential change. Venturing deeper into history without reconciling the fundamental

incongruity of taking land without treaty would only increase the pressure latent underneath this contradiction.

## **Legislation and the Indian Civilization Program**

In the era of nineteenth and early twentieth century nation-building, both government legislation and case law would stand in stark contrast to the discourse of mutual respect and self-determination often used in direct communication with Aboriginal peoples, such as in the negotiation of many treaties. As mentioned in the second chapter, the period that saw a young Canada seek to expand itself over more and more Aboriginal territory also saw the federal government institute in statute a plenary power for itself and its Indian agents over the lives, rights, and identities of First Nations peoples. The institutions put in place, although seen by many as a form of progressivism in their time, were strongly assimilative in their aspirations, and the first laws to this end were actually laid prior to Confederation and the numbered treaties. What we see in broad strokes, then, compared with earlier colonial history, is the maturation of a colony, to become immersed in the *reason of state*—be it the germinal Province of Canada prior to Confederation in 1867, or the young, expansionist Dominion of Canada just after. Rather than being just a faraway bundle of trade interests, an overseas arena of inter-European competition and war fought with the help of courted First Nations allies, Canada under one colonizing power was taking on the condition of a state of its own, something taken as a "natural object" with an unquestioned rationality to reinforce itself.<sup>11</sup> The machinations of its civilizational

---

<sup>11</sup> Michel Foucault, "The Political Technology of Individuals," in *Power*, ed. James D. Faubion. Essential Works of Foucault 1954-1984 (New York: The New Press, 2000), 408. Reference to the rationality of the state and the primary aim of reinforcing the state are found on 407.

projects for First Nations were part and parcel of this rationality, and this would have become only more so the case in 1860 when responsibility for Aboriginal policy and relations was passed from London to the Province of Canada.

In 1857, after Upper Canada and Lower Canada were merged with one parliament into the united Province of Canada, *An Act to encourage the gradual Civilization of the Indian tribes in this Province, and to amend the Laws respecting Indians* was enacted in order “to encourage the progress of Civilization among the Indian Tribes... and the gradual removal of all legal distinctions between them and Her Majesty’s other Canadian subjects.”<sup>12</sup> The *Gradual Civilization Act*, as it is also known, was testament to the growing impatience of colonial authorities with the lack of progress in assimilating First Nations. It allowed for the appointment of “Commissioners for examining Indians” whose job it would be to report to the governor of the Province of Canada “that any such Indian of the male sex, and not under twenty-one years of age, is able to speak, read and write either the english or the french language readily and well, and is sufficiently advanced in the elementary branches of education and is of good moral character and free from debt.” This being done, “it shall be competent to the Governor to cause notice to be given in the Official Gazette of this Province, that such Indian is enfranchised under this Act” such that all provisions and enactments “making any distinction between the legal rights and liabilities of Indians and those of Her Majesty’s other subjects, shall cease to apply to any Indian so declared to be enfranchised, who shall no longer be deemed an Indian within the meaning thereof.”<sup>13</sup> Perhaps appearing even more Eurocentric,

---

<sup>12</sup> *An Act to encourage the gradual Civilization of the Indian tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857 (20 Vict.), c. 26 [*Gradual Civilization Act*].

<sup>13</sup> *Gradual Civilization Act*, S. Prov. C. 1857 (20 Vict.), c. 26, s.3.

condescending, and naïve from a contemporary perspective, the next section of the act allows for a slower, more cautious, and more scrutinized process of enfranchisement for any Indian male who was not able to read or write English or French, but who was able to speak either language and was “of sober and industrious habits, free from debt and sufficiently intelligent to be capable of managing his own affairs.”<sup>14</sup> Approval from the governor placed the man in a three year probation period, at the end of which success would bring enfranchisement.

The 1857 act was thus premised on the idea that First Nations would voluntarily want to “civilize” themselves, in that the commissioners for examining Indians were meant to be available to those First Nations “who may desire to avail themselves of this Act.”<sup>15</sup> At that time, enfranchisement gave the right to vote—a right not available to status Indians. Perhaps another reason why the government presumed a natural efficacy for these voluntary mechanisms was the fact that annuities and lands reserved for the bands would be whittled away to provide economic inducements for those shedding their status as an Indian. Each man enfranchised under the act would be “entitled to have allotted to him by the Superintendent General of Indian Affairs, a piece of land not exceeding fifty acres out of the lands reserved or set apart for the use of his Tribe, and also a sum of money equal to the principal of his share of the annuities and other yearly revenues receivable by or for the use of such tribe.”<sup>16</sup> Since this act effectively removed land reserved for First Nations and converted it to provincial lands in order to be owned in fee simple by an enfranchised person, the Royal Commission on Aboriginal Peoples

---

<sup>14</sup> S.Prov. C. 1857 (20 Vict.), c. 26, s.4.

<sup>15</sup> S.Prov. C. 1857 (20 Vict.), c. 26, s.3.

<sup>16</sup> S.Prov. C. 1857 (20 Vict.), c. 26, s.7.

suggested that it “set the Crown on a course contrary to the procedures set out in the *Royal Proclamation of 1763*.<sup>17</sup> The wife, widow, and descendants of an enfranchised male would also be enfranchised in this same process, and would also be entitled to their respective shares of annuities paid to the band, with the paternalistic exception that their share would be held in trust by the superintendent general of Indian Affairs with the interest paid to them yearly.

Among other pieces of legislation, amendments and additions to these particular policies came in 1859<sup>18</sup> and again, just after Confederation, in 1869. The 1869 *Gradual Enfranchisement Act* added the assimilative proviso that “any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act.”<sup>19</sup> There was no similar consequence for First Nations men who married exogamously. There was more to the discrimination against First Nations women, however. Upon the death of a status Indian man, his possessions passed to his children and not his Indian wife, and an Indian woman who married an Indian man from another tribe automatically lost status to her own band (as did her children as well) and became a member of her husband’s band.

---

<sup>17</sup> *Report of the Royal Commission on Aboriginal Peoples: Volume 1, Looking Forward, Looking Back*, (Ottawa: Supply and Services Canada, 1996), 259. Hereafter cited as RCAP, vol. 1. See also John Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change,” in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), 147-148. Milloy discusses how these governmental strategies were contrary to the promises and protocols set out in the Royal Proclamation of 1763.

<sup>18</sup> *An Act respecting the Civilization and Enfranchisement of certain Indians*, S. Prov. C. 1859 (22 Vict.), c. 9.

<sup>19</sup> *Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42*, S.C. 1869 (32-33 Vict.), c.6, s.6 [*Gradual Enfranchisement Act*].

The voluntary enfranchisement process is notable both for the high hopes that officials held for it as well as the categorical failure it became. The superintendent general of Indian Affairs in the 1850s, Laurence Oliphant, had stated that “the prospect of one day sharing upon equal terms in those rights and liberties which the whole community now enjoy would operate as the highest stimulant to exertion, which could be held out to young Indians.”<sup>20</sup> Between 1857 and 1876, however, only one status Indian was successfully enfranchised: a man named Elias Hill.<sup>21</sup> John Milloy cites one government agent who, as early as 1863, stated about the enfranchisement process first outlined in the *Gradual Civilization Act* that “the object for which the act was passed is not likely to be attained—for all practical purposes, it is a dead letter.”<sup>22</sup> Milloy suggests that the analysis of the failure of enfranchisement came quickly and the blame was laid squarely on First Nations leaders, thus instigating “a general missionary and agent campaign against traditional native government.”<sup>23</sup> Thus, in addition to maintaining the enfranchisement process, the 1869 act also gave the governor general in council (in essence, the cabinet) the power to meddle with Indigenous governance. It allowed the governor general in council to order the replacement of traditional governance models with a chief and band council elected under the provisions of the act. It states that “the Governor may order that the Chiefs of any tribe, band or body of Indians shall be elected by the male members of each Indian Settlement of the full age of twenty-one years at such time and place, and in such manner, as the Superintendent General of Indian Affairs

---

<sup>20</sup> Cited in Milloy, “Early Indian Acts,” 150.

<sup>21</sup> RCAP, vol.1, 250.

<sup>22</sup> Cited in Milloy, “Early Indian Acts,” 150.

<sup>23</sup> Milloy, “Early Indian Acts,” 150.

may direct, and they shall in such case be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, or immorality...”<sup>24</sup>

Having been enacted in 1869, the *Gradual Enfranchisement Act* was put in place at a time when Canada had achieved Confederation of the four original provinces, but had not yet brought into Confederation any provinces west of Ontario and had not yet signed any of the numbered treaties with First Nations in the West. Tobias thus notes that this legislation was designed for eastern First Nations, such as Six Nations, who had had long contact with Europeans and “had received a rudimentary training under earlier legislation and missionaries,” and who were thought to need only a bit further “instruction in Euro-Canadian values.”<sup>25</sup> The elected band councils would be able to enact by-laws over what were mainly minor, municipal-style matters, although even these were subject to confirmation first by the governor general in council.<sup>26</sup>

There are several aspects of note to these provisions. Firstly, the imposition of nineteenth century Crown governance structures on First Nations was poised to remove First Nations women from the leadership and political life of their communities.<sup>27</sup> Secondly, the government inserted in the legislation a vague catch-all basis from which it could eliminate any traditional governance structures it did not wish to maintain. The act goes on to state that chiefs who traditionally serve a lifelong term and who were still alive and serving at that time were allowed to continue on until death or resignation, except

---

<sup>24</sup> *Gradual Enfranchisement Act*, S.C. 1869 (32-33 Vict.), c.6, s.10. The superintendent general of Indian affairs was essentially the minister responsible. After 1867, this was the secretary of state for Canada, and then in 1873 it was turned over to the minister of the department of the interior.

<sup>25</sup> John Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy,” in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), 131.

<sup>26</sup> S.C. 1869 (32-33 Vict.), c.6, s.12.

<sup>27</sup> This would remain the case until the 1951 *Indian Act*, when women were given the right to vote in band elections.

once again with the important caveat that they too could be deposed for dishonesty, intemperance, or immorality. What could qualify as dishonesty, intemperance, or immorality—on a level that would merit being deposed—is not indicated in any way in the act, leaving John Milloy to suggest that “clearly, the problematic independent authority of the chiefs was to be circumscribed.”<sup>28</sup> Lastly, setting aside the minor scale of interventions embodied in the legislated form of band governance, the Royal Commission on Aboriginal Peoples has also noted that the scale of the elective council system itself was not representative at all of the nations or tribes that existed in the larger sense, and that were referred to in the *Royal Proclamation of 1763*. In effect, despite the legislation’s reference to the “Tribe in Council,” the First Nations elective council system “was restricted to individual reserves and to the inhabitants of individual reserves—a group that would be described in the later Indian Act of 1876 as a band. There was simply no provision for traditional groupings going beyond the individual band level. In fact, the goal of the measures was specifically to undermine nation-level governance systems and the broader nation-level associations of Indians more generally.”<sup>29</sup>

In 1873 the post of secretary of state for the provinces was replaced with the post of minister of the interior, the latter becoming responsible for federal land management, Indian affairs, and natural resources.<sup>30</sup> It was not until 1876, nine years after Confederation and also after Treaty No.1 through Treaty No.6 were signed—and after British Columbia, Manitoba, and the Northwest Territories were joined to Canada—that

---

<sup>28</sup> Milloy, “Early Indian Acts,” 151.

<sup>29</sup> RCAP, vol.1, 253.

<sup>30</sup> It would not be until 1936 that the minister of the interior post would be broken down into other constituent positions, including the minister of Indian Affairs and Northern Development. John A. Macdonald, under his own prime ministership, would actually serve as minister of the interior from October, 1878 until October, 1887.

*An Act to amend and consolidate the laws respecting Indians* was passed, modifying and consolidating much of the former legislation into Canada's first incarnation of the *Indian Act*.<sup>31</sup> Containing one hundred sections, “it touched on all aspects of Indian reserve life.”<sup>32</sup> The annual report of the department of the interior for 1876 stated outright that “our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. …the true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.”<sup>33</sup> Thus, according to the Royal Commission on Aboriginal Peoples, “the transition from tribal nation in the tripartite imperial system to legal incompetent in the bilateral federal/provincial system was now complete.”<sup>34</sup>

In order to encourage the civilizational conversion envisaged by the 1876 *Indian Act*, status Indians under the new act would undergo *compulsory* enfranchisement if they were to earn a university degree or become a doctor, lawyer, or member of the clergy. In addition, this first *Indian Act* even allowed (and aspired) for the voluntary enfranchisement of entire bands. John Tobias refers to the Indian reserve, as it is conceived within the 1876 *Indian Act*, as a “laboratory” of civilizational conversion where “the Indian as a distinct cultural group” was to disappear.<sup>35</sup> The *location ticket* was

---

<sup>31</sup> *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876 (39 Vict.), c. 18 [*Indian Act*].

<sup>32</sup> John Leslie, “The Indian Act: An Historical Perspective,” *Canadian Parliamentary Review* 25, no. 2 (2002): 25.

<sup>33</sup> Cited in *RCAP*, vol.1, 255.

<sup>34</sup> *RCAP*, vol.1, 255.

<sup>35</sup> Tobias, “Protection, Civilization, Assimilation,” 132-133.

an innovation of the new *Indian Act* that was meant to help make this happen. The act authorized the superintendent general to have surveys made of reserves in order to have entire reserves, or any portion thereof, subdivided into lots, as the assignment of such lots to band members made for a more deliberate preparation for the probationary path to enfranchisement. After expiration of the three year probationary period—or longer if the person's conduct was not satisfactory—the government could enfranchise the individual and grant to him or her fee simple title to the same parcel of land that had been allotted by location ticket. It was theoretically feasible, then, if history were to progress as the federal government had envisaged and desired it, for all reserves to be subdivided into location ticket lots and, through the civilizational processes of enfranchisement, the entirety of any given reserve to be eroded away into private, fee simple lots held by owners with no Indian status. Interestingly, since First Nations to the east of Lake Superior were seen as further along the path toward civilization than those in the West, sections 86 to 93 of the 1876 *Indian Act* that pertained to location tickets and enfranchisement were to apply to those eastern First Nations directly, while for the time being they would apply to the First Nations of Manitoba, British Columbia, the Territory of Keewatin (northwestern Ontario), and the Northwest Territories only by proclamation of the governor-general.<sup>36</sup>

The 1876 *Indian Act* offered an additional basis upon which the governor in council could order the removal of chiefs—both traditional and those elected under the elective band council system—this time citing “dishonesty, intemperance, immorality, or

---

<sup>36</sup> *Indian Act*, S.C. 1876 (39 Vict.), c. 18, s.94.

incompetency” as possible grounds.<sup>37</sup> It also still allowed the governor in council to impose the elective band council system, providing it with a similar set of municipal style responsibilities to that which was enumerated in the 1869 act.<sup>38</sup> The dictates of the elective system, the ineffectual powers it granted, and the meddling supervision of the superintendent general (or his agent) meant that the elective system had little allure for First Nations. Tobias suggests that First Nations rejected it because “they knew that if they adopted the elective system, the superintendent general would not only have supervisory and veto power over band decisions, but also, according to other provisions of the act, he could force the band council to concern itself with issues with which it did not wish to deal. Many eastern bands clearly stated that they would never request an elected band council because they did not wish to be governed and managed by the government of Canada.”<sup>39</sup>

These pieces of legislation, then, form the broad strokes of the early legislative history concerning First Nations in Canada. Quite purposely, the federal government had no intention of including the other categories of Aboriginal people—the Inuit and the Métis—in this framework, but rather preferred to assume no particular responsibility for them.<sup>40</sup> Between the first *Indian Act* and the one that exists today, there have been many

---

<sup>37</sup> S.C. 1876 (39 Vict.), c. 18, s.62. The Royal Commission on Aboriginal Peoples states that bands of the West were excluded from the provisions relating to the elective band council system because they were considered insufficiently advanced. However, while there is a section in the act that clearly excludes western First Nations from the enfranchisement process, there is no analogous clause that explicitly exempts western First Nations from the provisions related to band elections. Thus any exclusion from the band governance provisions would likely have been more a matter of policy than legislation, given that s.97 of the act allows that the governor in council could exempt, by proclamation, any band from the operation of any sections of the act, as well as remove such exemption. See *RCAP*, vol.1, 257.

<sup>38</sup> S.C. 1876 (39 Vict.), c. 18, s.63.

<sup>39</sup> Tobias, “Protection, Civilization, Assimilation,” 133.

<sup>40</sup> The federal government’s repudiation of jurisdiction and responsibility for the Inuit would change with a reference put before the Supreme Court of Canada in 1939. See *In The Matter of a Reference as To Whether The Term “Indians” in Head 24 of Section 91 of The British North America Act, 1867, Includes*

amendments—some to the detriment of First Nations, and some positive changes in response to the controversies that arose. Even though the *Indian Act* of today is not the same as the one first consolidated in 1876, John Borrows and Leonard Rotman still consider it to be a major obstacle in maintaining Aboriginal governmental diversity and autonomy, given that its “provisions narrowly define and heavily regulate their citizenship, land rights, succession rules, political organization, economic opportunities, fiscal management, educational patterns and attainment.”<sup>41</sup>

## Case Law and Court Action

One might be forgiven for thinking that the entirety of nineteenth century Aboriginal law in Canada consists of the single case of *St. Catherine’s Milling and Lumber Company v. The Queen*.<sup>42</sup> Even the previous chapter in this work does little to offer up much of a contrast to this. There are reasons for this, nevertheless. History would suggest that, for many Aboriginal groups, extreme marginalization during stretches of both the nineteenth and twentieth centuries may have meant that other, more fundamental concerns took priority over organizing complex and expensive legal campaigns. Although the incompleteness of the western treaty process left Aboriginal title as a looming question over almost the entirety of British Columbia, Hamar Foster notes that First Nations at the turn of the century would have had to “raise a great deal of money in order to argue their case

---

*Eskimo Inhabitants of The Province of Quebec*, [1939] S.C.R. 104, 2 D.L.R. 417 [*Reference Re Eskimos*]; a similar decision was made concerning the Métis with *Daniels v. Canada*, (2014) FCA 101, 371 D.L.R. (4th) 725, although in the fall of 2014 the Supreme Court of Canada granted the federal government’s request for leave to appeal.

<sup>41</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed. (Markham: LexisNexis), 47.

<sup>42</sup> *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.) [*St. Catherine’s Milling*].

through three and probably four levels of court” in order to make it to the Judicial Committee of the Privy Council in London. “Money was raised—dollar by dollar, from individuals and tribes who had little if any to spare—but not enough to finance a case such as this.”<sup>43</sup> Foster also notes that it was not until the twentieth century that British Columbian First Nations found a generation of leaders, educated in Euro-Canadian schools, who had “not only improved their English but also made contacts and became more aware of what non-Aboriginal society was all about.”<sup>44</sup> To this one can add the need to garner the attention of sympathetic lawyers to spearhead such a campaign,<sup>45</sup> as well as the distinct political climate that saw the active suppression of Aboriginal claims, which we will examine shortly. Factors such as this make it less surprising that the Aboriginal case law often reviewed and cited by scholars—especially for those conflicts that struck at the heart of the legal-politics of colonization—seems somewhat sparse in the nineteenth and early twentieth centuries.

On the other hand, there is also the fact that many cases that were heard have not withstood the test of time. There may be any number of cases that did not venture beyond a localized court of first instance, or that do not appear in a published court reporter, and thus have fallen into obscurity and ultimately exercise little influence over Canadian case law. Also, the juridical field tends to sculpt a specific body of law into a self-referential canon of meaning-making by weaving a narrative of precedents through time—and legal decision-making is meant to be predicated on understanding that canon. Certain

---

<sup>43</sup> Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908-28,” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, eds. Hamar Foster, Heather Raven, and Jeremy Webber (Vancouver: UBC Press, 2007), 70.

<sup>44</sup> Ibid., 64.

<sup>45</sup> Ibid.

decisions, or elements of them, become integral parts of this narrative, while others do not. Thus the cases that become lost to history may also be those that do not fit the long term narrative arc and that are not seen to hold any continuing *doctrinal importance* for the present.

Interestingly, Sydney Herring has conducted a comprehensive examination of nineteenth century Aboriginal law in Canada, one that goes beyond the one or two cases often cited. Of particular interest are a series of cases that arose involving those of the Haudenosaunee Confederacy who came from American territory and settled on what would become the Six Nations reserve on the Grand River—in what was then Upper Canada, and would later become Ontario. This is, in fact, precisely the same set of historical conflicts that would carry over into the time of Deskaheh. The conflicts, in their origin, are striking for the complex internal politics on both sides of the Aboriginal and non-Aboriginal divide, and the sometimes counterintuitive interplay of assertions of commensurability and incommensurability deployed throughout.

The situation of the Six Nations reserve is a bit particular in that the land they were granted was secured for them through the extinguishment of Indian title—not their own, but rather that of the Indigenous Mississauga. After the American Revolutionary War, the Haudenosaunee were recognized as faithful allies of the British. In line with the promises Chief Joseph Brant had sought from the Crown in the lead up to the war, British General Frederick Haldimand compensated them for dispossessions suffered south of the border, and to simply invite those who preferred to remain with the British to settle north of the border. In the grant that Haldimand wrote up in 1784, he states that he has purchased from the Mississauga, for “*His Majesty’s faithful allies*,” a stretch of land

running along the Grand River from its source to its mouth at Lake Erie, stretching out six miles deep from each side of the river, “which them and their posterity are to enjoy for ever.”<sup>46</sup> It was a notable amount of land, although the number of First Nations loyalists that came to settle with Brant was not insignificant as well, and included people representing all six nations of the Haudenosaunee Confederacy as well as some people from other First Nations groups. (Six Nations remains to this day the largest First Nation by population in Canada.) The Grand River, and thus the original twelve mile wide stretch of land running along it, runs through present day Brantford, Cambridge, and Kitchener/Waterloo, Ontario. It was then, just as it is now, land known to be of great value.

From the beginning, the Six Nations claimed a status, not as *subjects* of the British Crown, but as *allies*. They also asserted that they held their land under a title commensurate with that of European settlers:

The grant... consisted of land that the Mississauga had surrendered to the British by treaty. Thus, while the lands of the other Indians in Upper Canada were subject to the common law of aboriginal title and to the Royal Proclamation of 1763, the lands of the Six Nations had been purchased by the British from the Mississauga and, argued the Six Nations, granted them in fee simple for services rendered as allies in the Revolutionary War. The Six Nations' title was not an “Indian” title but involved lands on which the Mississauga Indian title had been extinguished under existing colonial law... they believed that they held their lands in fee simple on the same basis as European settlers and American Loyalists.<sup>47</sup>

---

<sup>46</sup> Cited in *Logan v. Styres*, [1959] 20 D.L.R. (2d) 416 at 419 (Ont. H.C.J.). Emphasis not mine.

<sup>47</sup> Harring, *White Man’s Law*, 36-37.

In effect, Harring notes that much of Upper Canada was settled by Loyalists who had migrated from the United States after the American Revolution, and they received land to be held in fee simple. This was the historical basis upon which the Six Nations based their claim, since they “fell precisely in that category,” although with one apparently ineffaceable exception: “they were Indian.”<sup>48</sup> The parallel between Loyalists and the Haudenosaunee makes the contrast all the more striking: just as the Loyalists, members of the Six Nations fought with the British as allies, were subsequently invited north of the Great Lakes to take up land as recompense, and had to take up land upon which the original Indian title had been “extinguished” in order to do so. And yet, it seemed as though the British were set to impose incommensurability upon the Six Nations’ legal relationship to their new lands regardless, making their habitation of it equivalent to Indian title for all intents and purposes.

Joseph Brant had protested to the Crown when he learned that perhaps the Haldimand grant was not considered to have bestowed upon the Six Nations full title to the land, stating in a letter that “we have understood... from some White People here, that it does not appear from this grant, that we are entitled to call these Lands on the Grand River our own. In consequence of this we applied to His Excellency Lieut. Governor Simcoe for a new Grant, he having upon his arrival promised to settle this Matter agreeable to our Wish.”<sup>49</sup> For their part, government officials had also discovered in the early 1790s that the description of territory originally outlined in the document did not match the actual Mississauga cession of 1784. The error was in the northern boundary

---

<sup>48</sup> Harring, *White Man’s Law*, 36.

<sup>49</sup> Cited in Donald Bourgeois, “The Six Nations: A Neglected Aspect of Canadian Legal History,” *Canadian Journal of Native Studies* 6, no. 2 (1986): 259.

of the tract, and so the second grant that was requested by Brant, the Simcoe Patent, outlines a more circumscribed stretch of territory and attempts to define it in more detail.<sup>50</sup> The patent states that, “being desirous of showing Our Approbation” and “in recompense of the Losses they may have sustained,” the Crown grants to the Six Nations and their heirs forever “the full and entire possession, use, benefit and advantage of the said district or territory, to be held and enjoyed by them in the most free and ample manner, and according to the several customs and usages of them.”<sup>51</sup> However, the patent then goes on to outline familiar limitations to their “free and ample” possession of the land, stating that “no transfer, alienation, conveyance, sale, gift, exchange, lease, property or possession, shall at any time be had, made, or given of the said district or territory, or any part or parcel thereof,” unless the land is first surrendered to the Crown at a public meeting expressly for that purpose.<sup>52</sup> In essence, the Simcoe Patent enacted the same procedural protections and limitations for Six Nations land that the Royal Proclamation provided for other First Nation lands—the exact opposite of what Chief Joseph Brant had demanded and desired.

And this is where the story of Six Nations land draws a certain unexpected contrast with the historical narrative typically associated with First Nations land. While over time the Six Nations did lose the majority of the land granted to them, some of that loss stemmed from the fact that Six Nations members themselves granted, leased, and sold parts of their lands to settlers. Harring suggests that those in favour of ceding land to outsiders were “an accommodationist faction led first by Brant and then by a larger group

---

<sup>50</sup> See Bourgeois, “Six Nations,” 259-260.

<sup>51</sup> Cited in *Logan v. Styres*, at 420-421.

<sup>52</sup> Cited in *Logan v. Styres*, at 421.

that included his son, John,” and that the reasons behind these actions “are complex and included Brant’s personal egotism as well as his desire to live among European settlers, a belief that money from these land sales could be used to improve the Six Nations’ living conditions, and even corruption.”<sup>53</sup> In essence, the Brants and their faction insisted on having a title to Grand River lands that was commensurate with the Euro-Canadian ownership of land precisely so that they could lease or sell the land as they chose, as “the right to alienate these lands was a measure of their sovereignty, a recognition of their status as ‘allies’ of the crown and of the equality of the rights of Indians with those of settlers.”<sup>54</sup>

This was not the only source of Six Nations land attrition, however. The illegal occupation of First Nations land by squatters was also a serious issue, and, as Harring notes, in the fifty years between 1800 and 1851, Upper Canada gained nearly one million inhabitants.<sup>55</sup> The government professed itself unable to prevent squatting, but, in pointing out that an 1840 count showed that the Grand River lands had a squatter population roughly as large as the First Nations population, Harring argues that surely the squatters “could not have been difficult to find and punish.” But, of course, “the political repercussions of such a massive forcible expulsion of squatters in the Upper Canada of the 1840s would have been a quite different matter.”<sup>56</sup> Paul McHugh remarks of nineteenth century Upper Canada:

Settlers and speculators were all too aware that the security and, in a highly cyclical boom-bust colonial economy, transmissibility of their title depended upon

---

<sup>53</sup> Harring, *White Man’s Law*, 37.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., 41.

<sup>56</sup> Ibid., 42.

the benediction of Crown patent. Nevertheless such was the thirst and competition for land that frequently they rolled sleeves and took matters into their own hands. Squatting on tribal land, direct purchasing, and “leasing” were unlawful encroachments devised by settlers calculatingly to force the official hand which they were confident—rightly and arrogantly—would always prefer them over savage. This pushiness and its constant infractions were compounded by stock trespass, unauthorised lumbering, hunting and foraging on tribal lands, booze-running and aggravations of inter- and intra-tribal rivalries.<sup>57</sup>

In effect, if the government held itself to the policies spelled out in the Simcoe Patent, (and, by proxy, the Royal Proclamation), neither unpermitted alienations nor losses to squatters should have occurred without subsequent, contrary action.<sup>58</sup> By the early nineteenth century, Six Nations chiefs were actively complaining to government officials about settler depredations on their land and lobbied to have squatters removed. By 1841 Indian superintendent Samuel Peters Jarvis was insisting that nothing could be done to protect the entirety of Six Nations land, and instead communicated a proposal from the lieutenant-governor that the Six Nations surrender the majority of their remaining land to be sold to settlers for their benefit, and thereafter occupy a smaller tract of land “together as a concentrated body” in order to better keep away intruders.<sup>59</sup> The initial reaction from many of the Six Nations chiefs was less than positive. Jarvis exacted

---

<sup>57</sup> Paul McHugh, “Politics of Historiography and the Taxonomies of the Colonial Past,” in *Making Legal History: Approaches and Methodology*, eds. Anthony Musson and Chantal Stebbings (Cambridge: Cambridge University Press, 2012), 188.

<sup>58</sup> In *Logan v. Styres*, Justice King cites a submission that the Six Nations made to the United Nations in San Francisco, CA on April 13, 1945. In that submission they mention Joseph Brant “using an alleged power of attorney from the Six Nations Indians” in order to make leases and alienations of large sections of the territory to white people—transactions which the submitters claim were illegal and from which no revenue accrued to the Six Nations people themselves. See *Logan v. Styres*, at 423.

<sup>59</sup> Cited in Harring, *White Man’s Law*, 51.

further pressure, threatening that the government would take the management of Six Nations affairs into their own hands, but also incited and capitalized on the divisions within Six Nations society by characterizing the remnants of Brant's faction as "the most intelligent and industrious and worthy of the Indians," while suggesting that those opposed to surrendering Six Nations land would ultimately sacrifice it for their "avarice and rapacity."<sup>60</sup> Three days after this last menacing letter from Jarvis, the Six Nations surrendered the large portion of land in question.

It was amid this controversy of illegal squatters and illegal alienations that Six Nations land became a substantial source of legal conflict in the nineteenth century, and a significant vein of work in the expansive judicial career of John Beverley Robinson. Having first served as solicitor general, attorney general, and member of the Legislative Assembly, Robinson served as chief justice of Upper Canada from 1829 to 1862. Sydney Harring thus notes that, during his judicial career, John Robinson was witness to three commissions investigating Indian affairs in Upper Canada, the first major pieces of Indian legislation that presaged the *Indian Act*, as well as the transfer of responsibility for Indian affairs from London to the colony.<sup>61</sup> Robinson's thirteen Indian law opinions that appeared in published court reporters spanned from 1835 to 1862, all prior to the *St. Catherine's Milling* case and thus at a time when "the legal status of Indians and Indian lands was not established in Upper Canadian courts."<sup>62</sup> Yet, if there was not an abundance of established and published common law available to an Upper Canadian judge, and if, as Harring suggests, matters of Indian affairs had largely been handled by

---

<sup>60</sup> Cited in Harring, *White Man's Law*, 52-53.

<sup>61</sup> Harring, *White Man's Law*, 84. John Robinson was the brother of William Robinson, the commissioner who negotiated the Robinson treaties of 1850, north of Lake Huron and Lake Superior.

<sup>62</sup> *Ibid.*, 64.

the executive and legislative branches since the Royal Proclamation of 1763, one might expect Justice Robinson to simply defer to the prevailing Indian policy of the day, but Harring's research finds otherwise:

Given that a substantial portion of Robinson's jurisprudence expressed deference to the authority of the crown as represented by local political authorities, it seems logical to assume that Robinson as judge would defer to political authorities in Indian matters. This would have been consistent with English jurisprudence, which was marked by a broad deferral to parliament in developing policy areas, a deference partially necessitated by the structural difficulties of ordered change in a precedent-based jurisprudence: if judges could not broadly interpret the common law to take account of social and political change, then they deferred to a legislative body which could do so by statute.

Yet Robinson did not give this deference to the legislature in Indian matters. As often as he supported the Legislative Assembly on matters of Indian policy, he substituted his own policy judgment, even if it undermined a crown policy.<sup>63</sup> Many of Robinson's decisions were similar in effect to other decisions in this era that we will examine, in that he essentially sought to deny "that Six Nations title had ever existed in law as distinguished from politics."<sup>64</sup> What is somewhat distinct about Robinson's work is that he even did so as against the Crown itself on several occasions when the government decided to take up the defence of Six Nations land against illegal squatting.<sup>65</sup>

---

<sup>63</sup> Ibid., 84.

<sup>64</sup> Ibid., 85.

<sup>65</sup> See McHugh, "Politics of Historiography," 189. McHugh notes of nineteenth century Upper Canada that "Tribes were not recognised as legal entities or as having any capacity in the colonial legal system. They could not sue on their collective title. Instead, that capacity was exercised by the governor on their behalf as part of his prerogative relationship with them and technical 'owner' of their (ungranted) lands."

Harring suggests that Robinson maintained this deference for the rights of squatters at the expense of the rights of First Nations—“rights that native people held under an existing common law that Robinson refused to cite”—because at the core of his jurisprudence “was the rejection of any aboriginal right that would impede the orderly settlement of Upper Canada.”<sup>66</sup> Interestingly, one might have expected these pivotal early nineteenth century cases to have established the beginnings of a body of Canadian Aboriginal law that offered some coherence to colonial issues related to treaty and title—whether beneficial for Aboriginal peoples or not. Yet Harring explains that in Robinson’s considerations of Upper Canadian Indian law, Robinson “went out of his way to craft narrow judgments, basing many of his holdings on legal issues or procedural technicalities having nothing to do with native rights.”<sup>67</sup> It is because of this that Robinson was able to avoid working toward any coherent doctrine concerning Aboriginal rights or title, and his opinions in this sense are no longer of any doctrinal importance.<sup>68</sup>

Nevertheless, the Six Nations did not cease protesting their loss of land, or encroachments upon their sovereignty. And, as we know, by the 1920s Deskaheh was travelling to London and Geneva in order to advocate on this latter issue. John Borrows and Leonard Rotman suggest that, through his international advocacy efforts, Deskaheh was able to create considerable anxiety within the Canadian government. Indeed, the reaction of the federal government seems to support this conclusion, as it opted for one of the most acutely interventionist measures in its legislated arsenal of powers. “As a result,” according to Borrows and Rotman, “the deputy superintendent general of Indian

---

<sup>66</sup> Harring, *White Man’s Law*, 90.

<sup>67</sup> *Ibid.*, 64.

<sup>68</sup> *Ibid.*, 87, 36.

Affairs, Duncan Campbell Scott, secured approval from the federal Cabinet to displace the [Haudenosaunee] confederacy council and replace it with an elected one under the *Indian Act*. Without prior notice to the chiefs, they were removed from office by an order-in-council on the morning of October 7, 1924. The Royal Canadian Mounted Police seized the wampum used to sanction council proceedings, and posted a proclamation on the doors of the council house announcing the date and procedures for an elected government on the Six Nations reserve.”<sup>69</sup>

Perhaps even more telling, after decades of retooling the same legislative ensemble of assimilative strategies, a 1927 amendment to the *Indian Act* brought a unique element, a proscription that heretofore had not been put into written law. As Keith Smith explains it, “following the growth of organized resistance and the parallel increase in the understanding of Canadian legal and political structures by Indigenous activists in the early part of the twentieth century, the Canadian government grew increasingly concerned that Indigenous grievances would find their way into Canadian courts and ultimately be presented to the Judicial Committee of the Privy Council.”<sup>70</sup> But, as Smith notes, court actions require financial support, thus section 141 of the 1927 *Indian Act* reads:

Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising

---

<sup>69</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 38. As for Deskaheh himself, Borrows and Rotman indicate that upon his return to Canada he felt that his freedom was threatened, and so lived the rest of his days in exile in the United States. He gave his now famous last speech against the actions of colonial governments (and inaction of the British Crown) over the radio from Rochester, New York in March, 1925.

<sup>70</sup> Keith Smith, ed., *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1876* (Toronto: University of Toronto Press, 2014), 149.

a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment of any term not exceeding two months.<sup>71</sup>

Simply put, it became illegal to raise funds for the benefit of First Nations who sought to pursue claims against the Crown in court. Yet, by the time this section of the *Indian Act* was added, it was not the only existing legal obstacle that would serve to stave off Aboriginal claims even before they came to be. A 1906 amendment to the *Criminal Code* had “provided that it was an offence to incite or ‘stir up’ Indians to riotous or disorderly behaviour. Indeed, it was even an offence to incite them ‘to make any request or demand of government in a disorderly manner.’”<sup>72</sup> Hamar Foster reports that by 1908 the superintendent of the British Columbia Provincial Police considered Squamish Chief Joe Capilano a “dangerous man” and wanted him arrested for his land claims work.<sup>73</sup>

In addition, the doctrine of sovereign immunity prevented anyone from suing the Crown unless first obtaining permission—or a *fiat*—from the Crown itself. This applied, in differing timeframes, to both the federal government and various provincial governments, depending upon when each decided to remove the requirement from its law. Notably, it was one of the factors at play in the absence of title cases in the British

---

<sup>71</sup> Cited in Smith, *Strange Visitors*, 149.

<sup>72</sup> Cited in Foster, “O’Meara’s Children,” 65.

<sup>73</sup> Foster, “O’Meara’s Children,” 65.

Columbian context, as this requirement was not removed from provincial law until as late as 1974.<sup>74</sup> This little known history of the avoidance of the title question in British Columbia also serves as a reminder that the politics behind the “Indian land question” were more complex than is often assumed. In actuality, British Columbia, prior to and after joining Confederation, had the question of unextinguished Aboriginal title being raised as a troubling issue on multiple occasions—both internally and by the Dominion of Canada. Hamar Foster and Alan Grove have outlined some of the current historical theories as to why colonial officials—and Governor James Douglas in particular—discontinued treaty-making after the Douglas treaties of the 1850s, as these latter only accounted for only a small portion of Vancouver Island.<sup>75</sup> Indeed, in 1860 the Chief Justice of the Crown Colony of British Columbia, Matthew Baillie Begbie, reproached Douglas, asserting that the issue of extinguishing Indian title had to be resolved.<sup>76</sup> Foster and Grove, along with others, have also pointed out that by 1861 Douglas attempted unsuccessfully to secure funds from the imperial treasury in Britain to go towards more land cession treaties with First Nations.<sup>77</sup> And by the time of the colony’s entry into Confederation in 1871, the “continuing refusal to acknowledge Aboriginal land rights... clearly surprised the Dominion government”<sup>78</sup> which was just beginning the process of treaty-making across the rest of Western Canada—so much so that in 1875 the federal

---

<sup>74</sup> Ibid., 71.

<sup>75</sup> See Hamar Foster and Alan Grove, “‘Trespassers on the Soil’: *United States v. Tom* and a New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia,” *BC Studies*, no.138/139 (2003).

<sup>76</sup> Ibid., 52.

<sup>77</sup> Ibid., 54. Foster and Grove point out that, in 1859, title to Vancouver Island reverted from HBC to the Crown, and it could not have helped Douglas’s case that he failed to sign any treaties between 1854 and 1859, precisely when HBC was meant to be financially responsible for the “extinction” of Indian title.

<sup>78</sup> Ibid., 57.

government temporarily disallowed the province's *Crown Lands Act*, under which it sought to consolidate its public land laws.<sup>79</sup>

Indeed, even though in the *St. Catherine's Milling* case of 1888 the Judicial Committee of the Privy Council had imposed incommensurability upon Aboriginal groups by characterizing their legal relationship to their territory as akin to a mere right of usufruct, it still offered a description of the Crown acquisition of (and beneficial interest in) land that was predicated on resolving the issue of Indian title—as opposed to ignoring it. In that case, one of the federal government's arguments was that the constitutional classification of Indians and Indian lands as a federal head of power meant that an 1873 treaty essentially released Indian land in Ontario to its jurisdiction.

Disagreeing with this, the decision of the JCPC claimed that “the fact that the power of legislating for Indians, and for lands which are reserved for their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, *available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.*”<sup>80</sup> Hamar Foster has seized upon the significance of this last line, as its inverse would entail that lands which have not been properly disencumbered of Aboriginal title would not be available to the province as a source of revenue.<sup>81</sup>

---

<sup>79</sup> Hamar Foster, “Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* ‘Invented Law’?,” *The Advocate* 56, no. 2 (1998): 221. On p.222 Foster quotes an Indian Affairs official in British Columbia, W.E. Ditchburn, who said in 1925 that “One of the outstanding features of [the land] question which is to be regretted is the fact that the Dominion Government did not continue... its disallowance of the B.C. laws affecting Crown lands until some provision had been made for the cession of the Indian title.”

<sup>80</sup> *St. Catherine's Milling*, at 59. Emphasis mine.

<sup>81</sup> Foster, “Invented Law,” 221.

By the early twentieth century First Nations from the province were petitioning Ottawa and London directly, and Prime Minister Wilfred Laurier assured a delegation of chiefs in 1908 that their rights would be protected. In 1909, the Laurier government commissioned the lawyer T.R.E. MacInnes to “investigate and report upon the nature and present status of... Indian title... in Canada, with special reference to Indian Lands in British Columbia.”<sup>82</sup> Amongst MacInnes’s conclusions were that “Indian title, although it can be surrendered only to the Crown, includes ‘all the ancient essential incidents of ownership,’” and that neither the province nor the federal government could extinguish Indian title without Aboriginal consent, as it was protected by imperial law.<sup>83</sup>

Prime Minister Laurier was also of the perspective that recourse to the courts should be made available when matters concerning disputes over title arose. But in a 1910 draft letter addressed to Laurier, Premier McBride explains why British Columbia could never countenance offering a fiat to allow a lawsuit to be launched against it. In essence, McBride’s insistence is that the risks were simply too great, for a decision in favour of First Nations...:

...would affect the title to all the land on the mainland... and more than half of the land... on Vancouver Island, and would have a most disastrous effect on our financial standing and would jeopardize the very large sums of money already invested in this province by English and other investors. I think you will agree with me that this is too serious a matter to be submitted to the determination of any court, *however competent from a legal point of view*. In other words, the considerations involved in this are *political considerations and not legal*

---

<sup>82</sup> Cited in Hamar Foster, “Invented Law,” 223.

<sup>83</sup> Ibid., 223.

*questions... The Government of British Columbia therefore cannot agree to submit to a determination even by the Privy Council [of] a question of policy of such importance.*<sup>84</sup>

Subsequently, the federal government considered the possibility of bringing a reference question concerning Aboriginal title directly before the Supreme Court of Canada, but the provinces insisted that not even this could be done without provincial consent.<sup>85</sup> The Judicial Committee of the Privy Council ruled in 1912 that provincial consent was not required for such a reference, but by that time the Laurier government had been voted out and the new federal Conservative government, under the leadership of Prime Minister Robert Borden, held a perspective on Aboriginal title very similar to that of Premier McBride.<sup>86</sup>

But while legal-political developments such as these offer a glimpse as to why the issue of unceded title was not directly engaged by Canadian courts in the early twentieth century, this does not mean that other important streams of Aboriginal law did not find their way to the courts—albeit in limited fashion.

### Treaties: *R. v. Syliboy*

As outlined in the second chapter, the vast majority of land surrender treaties were signed in the nineteenth century and early twentieth century. The various Upper Canada land surrenders—including the Mississauga cession that was to provide land for the Haudenosaunee of Six Nations—took place in the late eighteenth and early nineteenth

---

<sup>84</sup> Cited in Foster, “O’Meara’s Children,” 71. Emphasis not mine.

<sup>85</sup> Ibid., 72.

<sup>86</sup> Ibid., 73.

centuries in what is now southern Ontario. The Robinson-Huron and Robinson-Superior Treaties of 1850 extended further westward, along the northern shores of their respective Great Lakes. With the rush to open up the West for Confederation and for the building of a railroad out to British Columbia, the first of the Numbered Treaties occurred in quick succession. Treaty One through Treaty Seven were signed from 1871 to 1877. Extending further northward, where Euro-Canadian interest in the land was not so pressing, Treaty Eight was not signed until 1899 and Treaties Nine through Eleven were signed in the early twentieth century. To this one can add adhesions on prior treaties, such as the extension of Treaty Five to the far reaches of northern Manitoba in 1908 and Treaty Nine to the rest of northern Ontario in 1929 and 1930. Due to anxieties about irregularities in eighteenth century Upper Canada treaty-making in certain regions stretching north from Lake Ontario—and, as one historian has suggested, perhaps even due to “anger over the unjust situation in British Columbia” where land had been taken without the benefit of treaties<sup>87</sup>—a series of treaties called the Williams Treaties were once again signed with Mississaugas and Chippewas in southern Ontario in 1923.

Simultaneous to some of the most important treaty-making involved in the creation of Canada, then, is a remarkable judicial disregard for the commitments made by the Crown in those agreements. Rendering treaty promises as injusticiable political considerations would have devastating effects for those Aboriginal groups relying on treaty promises as security for their lifeways. What counts as a valid source of law for a nineteenth or early twentieth century judge becomes of critical importance for peoples whose ancestors had simply and rightfully assumed that the promises of a foreign

---

<sup>87</sup> Cited in Robert Surtees, *Treaty Research Report: The Williams Treaties*, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), 15.

sovereign were to be solemnly kept—be that sovereign a faraway monarch, his or her vested representatives, or the federal government. Positivist judicial formalism for this era, though, commonly held that claimed treaty rights were “simple promises existing at the sufferance of the Crown”<sup>88</sup>—falling in the domain of political obligation, but not legal obligation.

In his official capacity as attorney general of Upper Canada, and prior to becoming chief justice of Upper Canada, John Beverley Robinson wrote to Wilmot Horton, under-secretary of state for the colonies, stating that “to talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts in Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke Street or with the French emigrants who have settled in England.”<sup>89</sup> It is a telling attack on any claim to a special relationship between Aboriginal peoples and the Crown, indicative of the sentiment that Aboriginal rights should not stand in the way of the orderly settlement of the colony. After Confederation, the juridical reduction of treaty obligations to mere promises found expression in an 1897 decision of the Judicial Committee of the Privy Council, before the process of signing all of the numbered treaties across the West had even finished. The JCPC stated in the dispute between Ontario and Canada that “their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities,

---

<sup>88</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 300.

<sup>89</sup> Cited in Herring, *White Man’s Law*, 83.

whether original or augmented, beyond a promise and an agreement, which was nothing more than a personal obligation by its governor.”<sup>90</sup>

In the early twentieth century, the judge in the Nova Scotian case of *R. v. Syliboy* expressed a more formalist and technical version of this same legalistic disregard for the treaties: notably, that any treaties with First Nations would have needed to be ratified by government in statute in order to be legally effective and cognizable to the courts.<sup>91</sup> In the *Syliboy* case, a Mi’kmaq chief had been caught with fourteen muskrat and one fox pelt during the season closed to hunting and was charged with unlawful possession of furs under the provincial *Lands and Forests Act*. Syliboy had already been found guilty before a magistrate and was now appealing the conviction before Justice Patterson of the Nova Scotia County Court. The question of hunting and trapping as a treaty right in 1928 Nova Scotia is so far from mind that Patterson approaches Syliboy’s defence as a rare curiosity, stating that “he made no attempt to deny having the pelts, indeed frankly admits having them, but claims that as an Indian he is not bound by the provisions of the Act, but has by Treaty the right to hunt and trap at all times. Every now and then for a number of years one has heard that our Indians were making these claims but, so far as I know, the matter has never been before a Court.”<sup>92</sup>

Since this case concerns a Maritime province, the treaty that Syliboy invokes is not a land cession treaty in the style of the numbered treaties, but rather was a much older

---

<sup>90</sup> *Attorney-General of Ontario v. Attorney-General of Canada: Re Indian Claims*, [1897] A.C. 199 at 213 (P.C.). Justice Johnson, who authored the decision for *R. v. Sikyea*, (1964), 43 D.L.R. (2d) 150 at 154 (N.W.T. C.A.), aff’d [1964] S.C.R. 642, said of this passage from the *Re Indian Claims* decision: “While this refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing.”

<sup>91</sup> *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 312 (NS Co.Ct.) [*Syliboy*].

<sup>92</sup> *Syliboy*, at 307.

treaty of peace and friendship. It was made in 1752 between Governor Hopson of Nova Scotia and a Mi'kmaq chief, Major Jean Baptiste Cope, along with several other Mi'kmaq delegates. Article four of the treaty stated that "it is agreed that the said Tribe of Indians shall not be hindered from but have free liberty to hunt and fish as usual."<sup>93</sup> Perhaps not surprisingly, Justice Patterson's opinion finds against Syliboy and upholds the conviction. What is also remarkable, however, is the litany of supplementary arguments and reasons that Patterson offers up against Syliboy's claims. In addition to the non-binding nature of the treaty, some of the reasons Patterson asserts are that the treaty did not apply to Cape Breton and did not apply to all Mi'kmaq; that the *Royal Proclamation* did not apply to Nova Scotia; that later statutes conflicted with and thereby would have superseded the treaty; that the First Nations of Nova Scotia were not a civilized and independent power and thus did not have the status to enter into a treaty; and that Governor Hopson himself did not have the authority to make a treaty. To this Patterson adds that the Treaty of 1752, in his estimation, was not a treaty at all, and with this wraps up his exhaustive performance of reasons with a nod to the injusticiable, political concerns raised by the case:

Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities—representations which if there is nothing else in the way of the Indians could hardly fail to be successful.<sup>94</sup>

---

<sup>93</sup> *Syliboy*, at 308.

<sup>94</sup> *Syliboy*, at 314.

The barrage of reasons that Justice Patterson launches against the Mi'kmaq of Cape Breton is quite remarkable. But it, too, begs the question as to why it was not sufficient to simply provide the lone reason that no treaty promises had been written into statutory law. One is left to question whether the *Syliboy* decision really needed so many reasons as to why the Mi'kmaq had no treaty right to hunt, or if the presiding justice was all too conscious of the moral dissonance between two differing perspectives on how history should weigh on the present. Essentially telling the Mi'kmaq chief that history does not matter may be where the task of neutralizing the layperson's "naïve intuitions of fairness"<sup>95</sup> can weigh quite heavily on the legal practitioner—the judge's certainty that the Mi'kmaq of Cape Breton should have no legal claim against the state notwithstanding. Encapsulated within the very assertion of the juridical view is a necessary acknowledgement of the Mi'kmaq view—rejection itself entails a form of acknowledgement. But to the extent that this question ponders the mindset of a Nova Scotian judge in 1929, it is unfortunately unanswerable. Yet, even if one cannot establish definitively that Justice Patterson was haunted by a moral dissonance back then, certainly the *Syliboy* decision itself is haunted thusly now.

The issue of treaties not being cognizable to the courts was unfortunately not a localized one, and neither was it limited to older and more obscure treaties.<sup>96</sup> As Michael

---

<sup>95</sup> Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38, no. 5 (1987): 817.

<sup>96</sup> Interestingly, *R. v. Wesley*, [1932], 4 D.L.R. 774 (Alta. C.A.) is an Alberta case in which a treaty hunting right was successfully litigated at the appeal court level. The difference here was the process by which the province entered into Confederation and the undeniable imprint that the treaties were able to make in statute because of it. In contradistinction to the four original provinces, Manitoba, Saskatchewan, and Alberta had not been given control over their crown lands and natural resources as they first entered Confederation. This was done in order to aid the federal government in taking up what land was needed for Dominion purposes first, such as fulfilling treaty obligations. Although Canada transferred the lands and resources to these provinces before all treaty land obligations were fulfilled, guaranteeing that treaty land disputes would continue on for generations, the Natural Resources Transfer Agreements that the

Coyle has described in a report for Ontario's Ipperwash Inquiry, "it does not appear to have occurred to the federal and provincial governments to legislate to protect treaty rights to hunt, fish, and trap. Instead, federal and provincial game and fish laws were drafted as if the treaty promises did not exist, and Aboriginal people in Ontario were regularly prosecuted and convicted in the lower courts when they attempted to enforce their treaty rights."<sup>97</sup> This became an issue litigated in the Northwest Territories as well, though the more contemporary timeframe and the striking dissonance between the spirit of a treaty promise and its legal reality perhaps explain the discomfort expressed by the territorial court of appeal in its written decision. In the 1964 case of *R. v. Sikyea*,<sup>98</sup> a member of a Treaty Eleven First Nation was charged with killing a duck just outside of Yellowknife during a closed season, and thus in contravention of regulations made under the *Migratory Birds Convention Act*.<sup>99</sup> Sikyea was first convicted by a magistrate at Yellowknife, then won an appeal before the territorial court, only to have the Crown bring the case to the territorial court of appeal.

There are two details about the *Sikyea* case that are quite particular. Firstly, the claimant was in the position of arguing for a treaty right to hunt as against a piece of *federal* legislation, as opposed to coming into conflict with the more common provincial/territorial acts concerning wildlife, hunting, and fishing. Secondly, the 1917 *Migratory Birds Convention Act* cited in the case was itself a piece of legislation that enacted the terms of a 1916 convention between Great Britain (acting on behalf of the

---

Dominion signed with the Prairie Provinces, and which were enacted under their respective *Natural Resources Acts*, did contain clauses pertaining to First Nations rights to hunting, fishing, and trapping.

<sup>97</sup> Michael Coyle, *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*, (Toronto: Ipperwash Inquiry, 2005), 21.

<sup>98</sup> *R. v. Sikyea*, (1964), 43 D.L.R. (2d) 150 (N.W.T. C.A.), aff'd [1964] S.C.R. 642 [*Sikyea*].

<sup>99</sup> *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

Dominion of Canada) and the United States, in order to ensure the conservation of migratory birds whose territories were shared between the two countries. This means that the very legislation used to charge Sikyea was enacted a handful of years *prior* to Treaty Eleven. By this timeline of events, and by the admission of the court of appeal, the federal government thus enacted legislation that would restrict the right of hunters—ostensibly including treaty First Nations—to hunt migratory fowl to approximately one and a half months per year, and then several years later it signed a treaty with the area First Nations in which they were promised the right to continue with their “usual vocations of hunting, trapping and fishing” as livelihood.<sup>100</sup> For a court ruling that finds against the Aboriginal claimant, the *Sikyea* decision spends a large amount of its time highlighting a long history of reassurance and recognition of rights offered by the Crown to First Nations, as well as emphasizing the apparent duplicity of the Crown in this particular situation. It states that “these Indians, as well as all others, would have been surprised indeed if in the face of such assurances, the clause in their treaty which purported to continue their rights to hunt and fish could be used to restrict their right to shoot game birds to one and a half months each year.”<sup>101</sup> The authoring judge, Justice Johnson, goes on to write that “it is difficult to understand why these treaties were not kept in mind when the Migratory Birds Convention was negotiated and when its terms were implemented, by the *Migratory Birds Convention Act...* and the Regulations made under that Act.”<sup>102</sup> Given that the rationale behind the convention was the protection of migratory birds “from indiscriminate slaughter,” Justice Johnson states that this surely

---

<sup>100</sup> Cited in *Sikyea*, at 153.

<sup>101</sup> *Sikyea*, at 154.

<sup>102</sup> *Sikyea*, at 155.

“would have allowed for exceptions or reservations in favour of the Indians, for there can be no doubt that the amount of game birds taken by the Indians for food during the close season would not have resulted in ‘indiscriminate slaughter’ of birds nor would the preservation of those birds have been threatened.”<sup>103</sup>

The Court of Appeal for the Northwest Territories refers to the act and regulations concerning migratory birds as a “breach of faith” in regards to the treaties with First Nations, but then attributes it to an oversight on the part of the federal government—“a case of the left hand having forgotten what the right hand had done.”<sup>104</sup> But ultimately, with expressions of regret, it upholds the conviction, because a treaty promise “can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act*, from doing so.”<sup>105</sup> To accentuate the regret, Johnson ends his written reasons with a quote from *R. v. Wesley*,<sup>106</sup> in which the appellate division of the Alberta Supreme Court did find *in favour* of a treaty right to hunt thanks to clear statutory recognition of treaty rights and a decision to prioritize the treaty over the provincial game act. Lamenting the contrast between the two cases, Justice Johnson cites from the *Wesley* decision Justice McGillivray’s celebratory invocation of the Royal Proclamation in which he proclaims that “it is satisfactory to be able to come to this conclusion and not to have to decide that ‘the Queen's promises’ have not been fulfilled. It is satisfactory to think that legislators have not so enacted but

---

<sup>103</sup> *Sikyea*, at 156.

<sup>104</sup> *Sikyea*, at 158.

<sup>105</sup> *Sikyea*, at 154. Interestingly, a 1951 amendment to the *Indian Act*, which I will discuss in the next chapter, stated that provincial laws of general application would apply to First Nations as well, *subject to the terms of any treaty*. Remember that in the *Sikyea* case, however, the Aboriginal claimant was at odds with a *federal act* and the court of appeal for the Northwest Territories held that it was within the right of parliament to abrogate the terms of the treaties.

<sup>106</sup> *R. v. Wesley*, [1932], 4 D.L.R. 774 (Alta. C.A.) [*Wesley*].

that the Indians may still be ‘convinced of our justice and determined resolution to remove all reasonable cause of discontent.’”<sup>107</sup>

### **Self-Government and Sovereignty: *Logan v. Styres***

One case that did make it before the courts, and which is often referenced as an example of the juridical field’s early twentieth century approach to Aboriginal sovereignty and governance, relates specifically to the Haudenosaunee Confederacy again. It effectively marks the extension into the legal field of the same dispute between Deskaheh and the Canadian government from the 1920s. But the roots of the conflict run even deeper than this, as Haudenosaunee resistance was always contemporaneous to any encroachments on their sovereignty. In 1876, the same year the first consolidated *Indian Act* was passed, thirty-three Onondaga chiefs wrote a letter to the superintendent of Indian Affairs:

...we thought it is fit and proper to bring a certain thing under your Notice which is a very great hindrance and grievance in our council for we believe in this part it is your duty to take it into consideration with your government to have this great hindrance and grievance to be removed in our council and it is this, one says we are subjects to the British Government and ought to be controlled under those Laws which was past in the Dominion Parliament by your Government you personally and the others (That is us) says we are not subjects but we are Allies to the British Government; and to your Honourable our Brother we will now inform you and your Government, personally, that we will not deny to be Allies but we will be Allies to the British Government as our forefathers were; we will further

---

<sup>107</sup> Wesley, at 790.

inform your Honourable our Brother and to your Government that we do now seprate [sic] from them henceforth we will have nothing to do with them anymore as they like to be controlled under your Laws we now let them go to become as your own people, but us we will follow our Ancient Laws and Rules, and we will not depart from it.<sup>108</sup>

The 1959 case of *Logan v. Styres* centred on the same underlying dispute of governance and sovereignty, but the substantive issue that triggered this episode was the potential surrender of 3.05 acres of Six Nations reserve land to the Crown, in order to be sold to Cockshutt Farm Equipment Ltd. for the sum of \$25,000.<sup>109</sup> By this time, due to the 1924 actions of the federal government acting under authority of the *Indian Act*, the hereditary chieftainship system had been forcibly displaced by an elective council, and this had left a cleavage in the community since a significant portion of Six Nations members refused to recognize the elective council as legitimate.<sup>110</sup> When the question of surrendering the land to the Crown for the purposes of selling it to Cockshutt arose, the elective council put it to a vote within the community. Fifty-four people voted in the plebiscite, with thirty-seven voting for the surrender and sixteen voting against it. Unfortunately for the elective council, this was out of a total of approximately 3,600

---

<sup>108</sup> Cited in Borrows and Rotman, *Aboriginal Legal Issues*, 37-38.

<sup>109</sup> *Logan v. Styres*, [1959] 20 D.L.R. (2d) 416 (Ont. H.C.J.).

<sup>110</sup> J.R. Miller suggests that the cleavages within the Six Nations community have existed for a long time, and exist along multiple axes: between religious traditionalists and Christians, and also between Haudenosaunee sovereigntists and those “who preferred to work within the framework of Canadian law.” Miller goes on to say that “although there was not exact congruence between religious traditionalists and supporters of hereditary government or Iroquois sovereignty, there was a high degree of correlation.” See Miller, “Petitioning,” 309-310.

eligible voters at that time.<sup>111</sup> A second vote was thus held, this time with a turnout of only fifty-three, with thirty voters in favour of the surrender and twenty-three against it.

The case was brought before the Ontario High Court, as it was then called, with the plaintiff Logan representing the hereditary chiefs of the Six Nations reserve on the Grand River.<sup>112</sup> The defendants were Clifford Styres, chief councillor of the Six Nations elected council, and R.J. Stallwood, the Indian Affairs functionary who was the superintendent of the Six Nations Indian agency at Brantford, Ontario. The specific actions requested by the plaintiff were an injunction stopping the defendants from surrendering the several acres of land, as well as declarations that two past Privy Council orders in council were *ultra vires*, or beyond the powers of the Governor General of Canada acting with the advice and consent of the Privy Council. The first order in council, from thirty-five years prior, was very same order secured by Duncan Campbell Scott that resulted in the RCMP seizing the wampum used to sanction the hereditary council's proceedings and forcibly imposing the *Indian Act* elective council. The second order in council from November, 1951 superseded the first but had very much the same effect, except this time in reference to the *Indian Act* of the early 1950s which still had a provision allowing for the imposition of *Indian Act* elective band councils.

In making the case for the hereditary chiefs, the arguments put forward by the plaintiff in the late 1950s were still very much consistent with assertions that the Haudenosaunee have been making for centuries. It was claimed that the Six Nations were

---

<sup>111</sup> Six Nations states that it is the largest First Nation in Canada, with a 2013 total population (both on- and off-reserve) of 25,660. See "Community Profile," Six Nations Elected Council, 2013, accessed June 1, 2015, <http://www.sixnations.ca/CommunityProfile.htm>.

<sup>112</sup> Perhaps a testament to the era in which it was written, the judgment does not give the plaintiff's entire name, but does give the name of her husband, Joseph Logan Jr., who was one of the hereditary chiefs.

faithful allies of the British Crown in the eighteenth century, and continued to be faithful allies, but that they had never been and still were not *subjects* of the Crown.<sup>113</sup> As such, Logan maintained, it was “*ultra vires* the powers of the Parliament of the United Kingdom to enact section 91(24) of the *B.N.A. Act*, whereby the legislative authority of the Parliament of Canada is made to extend to all matters coming within the classification ‘Indians, and Lands reserved for the Indians’ insofar as the said Six Nations Indians are concerned” and then was subsequently “*ultra vires* the powers of the Parliament of Canada to enact the *Indian Act*, R.S.C. 1952, c. 149 insofar as the said Six Nations Indians are concerned and that likewise the Orders in Council already referred to and made pursuant to the *Indian Act* are likewise *ultra vires* insofar as the Six Nations Indians are concerned.”<sup>114</sup> In short, the argument offered a complete refutation of any asserted Crown authority over Six Nations, taking issue with parliament’s alleged legislative authority over First Nations, the *Indian Act*, and the orders in council that removed the traditional Haudenosaunee government. The hereditary chiefs were therefore not only asking the court for an injunction stopping the land surrender, but were also effectively seeking to have the imposition of the *Indian Act* elective council delegitimized.

The beginning of Justice King’s decision for *Logan v. Styres* betrays at once a certain sympathy for the plaintiff and a foreboding about his ultimate determination, stating that “if the plaintiff is able to establish the above then I am of the opinion that judgment should be given for the relief asked but of course it is a formidable task that the plaintiff has undertaken.”<sup>115</sup> The judge’s sympathy for the Six Nations traditionalists

---

<sup>113</sup> *Logan v. Styres*, at 417.

<sup>114</sup> *Logan v. Styres*, at 417.

<sup>115</sup> *Logan v. Styres*, at 417.

finds subtle expression here and there, along with a certain regret that this has come to be an issue found before the courts, but that sympathy seems to stem more from the impending surrender of reserve land than from the more sweeping historical and political claims of the plaintiff. Perhaps still hoping for a political solution to the dispute, Justice King thus suggestively reminds the parties involved that “the Indian Act provides in ss. 39 and 40 that the Governor in Council may accept or refuse a surrender of land so that it is still quite possible for the Governor in Council to take the position that the surrender of the land in question in this action should be refused. From the evidence given at the trial it is difficult to see what advantage would accrue to the Six Nations Indians by surrendering the land in question.”<sup>116</sup>

Only nine years prior, the Supreme Court of Canada heard a case that was similar to the extent that it concerned a controversial lease of reserve lands. Likely borrowing from the influential nineteenth century Indian title cases heard in the Supreme Court of the United States under Chief Justice Marshall, in *St. Ann's Island Shooting and Fishing Club v. The King* the SCC declared the accepted view to be “that these aborigines are, in effect, wards of State, whose care and welfare are a political trust of the highest obligation.”<sup>117</sup> Rather than simply citing this diminished status of “ward” as given law, however, Justice King looks to the Haldimand Proclamation and Simcoe Patent<sup>118</sup> that brought the Six Nations to be settled in southern Ontario. It is notable in reviewing the text of these documents that the Haldimand Proclamation does characterize these First

---

<sup>116</sup> *Logan v. Sytres*, at 418.

<sup>117</sup> *St. Ann's Island and Fishing Club v. The King*, [1950] S.C.R. 211 at 219.

<sup>118</sup> The Haldimand Proclamation is also alternatively referred to as a deed, grant, or even treaty. In his written reasons, Justice King takes issue with the latter characterization. The Simcoe Patent is also referred to as the Simcoe Deed.

Nations as *allies*, and neither document gives specific reference to them as subjects. Justice King, however, invests significant meaning into the fact that both documents state that the land was being granted to the Six Nations “under our protection” or, in reference to the king, “under his protection,” thereby concluding that “those of the Six Nations settling on such lands, together with their posterity, by accepting the protection of the Crown then owed allegiance to the Crown and thus became subjects of the Crown. Thus, the said Six Nations Indians from having been faithful allies of the Crown became, instead, loyal subjects of the Crown.”<sup>119</sup>

What is interesting about the *Logan v. Styres* case is that a legal positivist approach in a more pure form might simply assert the founding documents of the country and the authority of the sovereign as unquestioningly legitimate and thus bestow upon the succeeding events—the *Indian Act* and then the two orders in council—an easy and unquestionable legitimacy. In this case, however, Justice King seeks out some sort of logical rationale that would make it so in perhaps a less cynically instrumental fashion—namely, the tenuous suggestion that the Haldimand Proclamation and the Simcoe Patent demonstrate that the Six Nations *legally opted* for subjection to the Crown in accepting the land on the Grand River. Needless to say, both approaches have the equivalent effect of shrinking the horizon of justice and rendering certain moral conundrums injusticiable. Justice King is able to express a certain amount of regret over the plight of the Six Nations, but for him the issues of their self-determination and the surrender of reserve land raise entirely political—and not legal—questions:

---

<sup>119</sup> *Logan v. Styres*, at 422.

From the evidence before me, however, it would appear the strongest case for the Six Nations Indians should be based upon the submission that Parliament should not make the Order in Council to which objection is taken applicable to the Six Nations Indians rather than that Parliament cannot make such Orders in Council applicable. It seems to me much might be said on that score.

I am of the opinion that the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time are subject to such laws. While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein, and that Privy Council Order P.C. 6015 is not *ultra vires*.<sup>120</sup>

## Aboriginal Law in the Legal Positivist Era

Generally speaking, the nineteenth century and the first half of the twentieth century were juridically unfavourable for Aboriginal peoples, yet it stood as such without always having a unified and developed body of Aboriginal law. None was established in the first portion of nineteenth century in Upper Canada, despite the fact that narrow technical judgments like those of John Beverley Robinson prioritised the European settlement of Upper Canada over the rights and territory of First Nations—even when the Crown itself sought to defend First Nations land. Sydney Harring thus avers that “jurisprudence, in itself, does not explain the course of Indian law in Upper Canada,” characterizing legal

---

<sup>120</sup> *Logan v. Styrles*, at 424.

decision-making as the unfettered domain of a small elite of judges who were also the political, economic, and social leaders in the colony with various extra-legal interests.<sup>121</sup>

What does come out of the sometimes sparse patterning in the legal history, however, is the tendency to create a distinction between law and politics that renders certain aspects of the colonial relation injusticiable. It is notable that, before the Judicial Committee of the Privy Council heard the *St. Catherine's Milling* case in London, the opinion of Justice Taschereau of the Supreme Court of Canada for that same dispute engaged with “the numerous quotations… from philosophers, publicists, economists and historians, and from official reports and despatches” recognizing “a legal Indian title as against the crown.”<sup>122</sup> Taschereau’s response to such claims was that:

The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.<sup>123</sup>

---

<sup>121</sup> Herring, *White Man's Law*, 65.

<sup>122</sup> *St. Catherine's Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577 at 649.

<sup>123</sup> [1887] 13 S.C.R. 577 at 649.

The JCPC's final ruling on the *St. Catherine's Milling* case in 1888 was altogether vague and cursory in its suggestion that Indian title was akin to a mere right of usufruct, and it did little to bolster Aboriginal title in the eyes of judges or politicians. Hamar Foster's extrapolation of the JCPC decision for *St. Catherine's Milling*—that lands which have not been properly disencumbered of Aboriginal title should not be available to the province as a source of revenue<sup>124</sup>—did not become policy in those regions of Canada that failed to extinguish Aboriginal title.

Less than a decade after the *St. Catherine's Milling* case, the JCPC declared in another case between Ontario and Canada that First Nations did not have a legally protected right to their treaty annuities, but rather such promises were simply personal obligations taken on by the Crown representatives making them.<sup>125</sup> This categorization of treaty promises as political concerns which can be broken without legal consequence is something one does see in several variations in the case law: broadly, from brief assertions of impunity in the nineteenth century to more technical suggestions in the twentieth century that treaties needed substantiation in statute in order to gain legal protection.<sup>126</sup> It is a fascinating notion to have the legal declare something as extra-legal,

---

<sup>124</sup> Foster, "Invented Law," 221.

<sup>125</sup> *Attorney-General of Ontario v. Attorney-General of Canada: Re Indian Claims*, [1897] A.C. 199 at 213 (P.C.).

<sup>126</sup> For those who would assert that surely the terms of a treaty do not become domestic law until essentially imported by statute, there are several complicating factors worthy of note. Firstly, the creation of the land cession treaty process was established by the Royal Proclamation of 1763, which, given for a colonial possession that had no representative legislative assembly at that time, was meant to have the force of statute. See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 170-171; David Elliot, "Aboriginal Title," in *Aboriginal Peoples and the Law*, ed. Bradford Morse (Ottawa: Carleton University Press, 1985), 56; Sydney Harring, *White Man's Law*, 69. Thus if the creation of the process merits this kind of legal force, it does not seem too far a stretch to suggest that the outcomes of the process can and should as well. Although, for a questioning as to whether the Royal Proclamation has always been construed by legal actors in this way, see McHugh, "Politics of Historiography," 173; Harring, *White Man's Law*, 69.

for the act of defining in this case is itself legal and juridical through and through. For a field that so often wants to see to the promulgation of its norms, protocols, and worldview through the ongoing conversion of social conflicts into legal disputes, the seeming desire to define something as outside of the law is an interesting phenomenon indeed. In this case, sheltering the more instrumental (and even duplicitous) plays of colonial power in the domain of politics has the convenient effect of categorizing the most sordid affairs, by definition, as extra-legal, non-juridical questions.

Despite such claims, the cases that fall deeper into the twentieth century are decided by judges who make those determinations while evincing a certain amount of discomfort. But if the judges authoring decisions in the mid-twentieth century, such as for *Logan v. Styres* and *R. v. Sikyea*, tend to frame the situation as one in which their hands are tied, it should be said that in the juridical *longue durée* this state of affairs was itself an act of gradual juridical and executive invention concomitant with the creation of the settler states of North America. Disregarding the doctrine of tenures and conflating lordship with ownership,<sup>127</sup> shifting the conceptions of Aboriginal land tenure and sovereignty through time, and forging profound disparities in the treaty relationship between what is said, what is written, and what is done: as it turns out, novel forms of territorial acquisition and possession are fraught with legal complications.

Yet, perhaps the most important aspect of this legal history is that which is not voiced openly in the case law—namely, the relative judicial silence on Aboriginal title

---

Secondly, some of the treaties and executive actions of Crown representatives discussed in these cases, such as *R. v. Syliboy* and *Logan v. Styres*, are essentially contemporaneous with this same period in which British North America was a colony without representative legislative assembly. Thirdly, one need only read on to the next chapter to find the moment when the Supreme Court of Canada clearly decides to break the self-imposed barrier of limiting the horizons of justice to the will/statutes of the sovereign.

<sup>127</sup> See Kent McNeil, *Common Law Aboriginal Title* (New York: Clarendon Press, 1989), 171-174, 220-221.

for almost a century. The legal-politics of colonization venture deeper and deeper into history without reconciling the fundamental incongruity of taking land without the necessary formalities that would purportedly legitimize such acquisitions. Given the thematic of the previous chapter—the lag of law, the historical bind, and the subsequent jurisprudential productivity—it is critically important to recognize that underlying the case law’s silence on unceded Aboriginal title was an ongoing anxiety and problematization of this state of affairs both politically and socially. More than anything, this period should be recalled for its efforts to stave off the issue of Aboriginal title, because damming something up by its very nature creates pressure.

## 5. The New Era of Inherence

The political field and the juridical field are two different, yet connected, fields of practice. Resolution of the controversies and disputes generated by colonization could readily, and by many accounts more fittingly, be achieved within the political field. The Supreme Court of Canada itself has encouraged such a relocation on multiple occasions.<sup>1</sup> Perhaps at certain points in their histories, however, provincial and federal governments have found the stakes too high or the obligations more onerous than they were willing to accept—such as indicated in 1910 by British Columbia premier Richard McBride when he wrote that the recognition of Aboriginal title “would have a most disastrous effect on our financial standing and would jeopardize the very large sums of money already invested in this province by English and other investors.”<sup>2</sup> Whatever the reasons for the general political reluctance to negotiate resolutions, it has in large part not gone away, leaving, as a former president of the Native Council of Canada describes it,<sup>3</sup> Aboriginal peoples “asking the courts to do what the politicians would not.”<sup>4</sup> This does not mean that change has not been accomplished in the past fifty years. On the contrary, significant changes have occurred. The model for change in Canada, however, has most often followed something similar to what Paul Chartrand has described: incremental legislative

---

<sup>1</sup> See, for instance, *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1105; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at 1123.

<sup>2</sup> Cited in Hamar Foster, “Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* ‘Invented Law’?,” *The Advocate* 56, no. 2 (1998): 223.

<sup>3</sup> The NCC was the precursor to today’s CAP, the Congress of Aboriginal Peoples, which formerly represented both Métis and non-status (unrecognized or unregistered) Indians. The Métis of Western Canada broke away at one point to form the Métis National Council, which also encompasses the various provincial Métis organizations. Today, CAP claims to have extended its constituency to off-reserve status and non-status Indians, Métis, and Southern Inuit peoples.

<sup>4</sup> Harry Daniels, “Foreward,” in *Who Are Canada’s Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, ed. Paul L.A.H. Chartrand (Saskatoon: Purich Publishing, 2002), 13.

and policy reform initiated in reaction to case-by-case decisions of the Supreme Court of Canada, or of lower courts following its guidance.<sup>5</sup>

The cases in this early contemporary era, from the mid-twentieth to late twentieth century, are brought face to face with colonialism's contradictions, inconsistencies, incongruities, and histories of bad faith. The legal arguments brought to countermand the claims of Aboriginal peoples likely represent in and of themselves some of the more complete legal positivist doctrines of Aboriginal law, since a legal basis for the continued disregard of rights or title was finally required for presentation to the courts. In these positivist interpretations of colonial legal history, there is an emphasis on justice as being sourced in the expression of a sovereign will.<sup>6</sup> In essence, if justice amounts to doing the sovereign's bidding, and the sovereign willed two different ways of colonizing, then there is no need for controversy. Thus if it were inferred that the Crown had intended a particular group's title be extinguished without treaty, then their title was seen as effectively and lawfully extinguished. This allowed for a jurisprudential conceptualization of implicit title extinguishment as a post-hoc legal justification for the colonization of those lands unceded by treaty. But the legal positivist arguments levelled against Aboriginal claimants were only "doctrines-in-waiting," seeking the acceptance and ratification of the courts. In the latter half of the twentieth century, however, these legalistic "fixes" for the incongruities of colonialism left the burgeoning socio-normative and legal-ethical controversies surrounding colonization unresolved, and thus we see the

---

<sup>5</sup> See Paul L.A.H. Chartrand, "Introduction," in *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, ed. Paul L.A.H. Chartrand (Saskatoon: Purich Publishing, 2002), 17.

<sup>6</sup> cf. Costas Douzinas, Ronnie Warrington, and Shaun McVeigh. *Postmodern Jurisprudence: The Law of Text in the Texts of Law*. New York: Routledge (1991): p.ix-x.

first contemporary judicial opinions for a more substantive change in approach to treaties, rights, and title.

Thus if the predominant characteristic of earlier colonial law has been, as I have argued, a lag and latency that saw it chronically in need of *catching up* to the practices of colonization, the contemporary era can be characterized by the concerted efforts of the juridical field to find a way to in fact “catch up.” But if the historical settlement and establishment of Canada left it with what would become a fundamentally unsettled political and legal landscape, how would the juridical field eventually encounter that impending crisis? How would it iron out the wrinkles represented by those incongruities and histories of bad faith? I pose these questions mindful of Jeremy Webber’s observation that jurists “tend to be good at showing how precedent can be marshalled, but they are much less adept at explaining how judge-made law necessarily changes, evolves, and transforms itself. Instead, they fall back, at crucial times, upon vague catch-phrases about ‘policy’ or about principles supposedly latent in the law but hitherto undiscovered.”<sup>7</sup>

This chapter therefore examines the early stages of a turn toward a jurisprudence that is more sympathetic to Aboriginal claims: first, with the development of the modern principles of treaty interpretation, and then with the historical decisions of the Supreme Court of Canada to recognize Aboriginal title and Aboriginal rights as inherent—in other words, as existing independently of the Royal Proclamation or legislative enactment. Much of this is actually indebted to principles taken from American case law from the nineteenth and twentieth centuries. (The flexibility of legal interpretation, though, is such

---

<sup>7</sup> Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*,” *Sydney Law Review* 17, no. 5 (1995): 6.

that judges both for and against rights and title have marshalled them to their cause.) Two major observations come out of this.

Firstly, attempting to resolve certain contradictions and legal-ethical liabilities in the colonial legal landscape, that which is now often termed the *modern principles of treaty interpretation* stand as one of the first efforts of the contemporary era to reconcile the irreconcilabilities of colonization. To the extent that it is a systematized set of “solutions” or principles geared to this end, a jurisprudence of reconciliation thus begets a form of *jurisprudential ethics*. In the case of Aboriginal law, forms of jurisprudential ethics arise where the law has heretofore failed Aboriginal peoples to a degree that offends contemporary sensibilities—and the law strives to adapt to socio-normative change. The first sign of this was in treaty law, but it is not the only form of Aboriginal jurisprudential ethics to develop.

Secondly, another primary mechanism the SCC employed for introducing much of the monumental positive change was the installation of *inherence* in its interpretation of Aboriginal rights and title. Inherence is distinct from the positivist model in that, as opposed to making Aboriginal rights and title dependent upon positive recognition in statute laid down by the colonizing sovereign, forms of rights and title are simply recognized as pre-existing and accorded some fashion of legal-ethical priority over the caprices of the colonial settler state. I end with the suggestion, however, that inherence is risky; it is adverse to control. It is something for which the terms are not pre-set. In its purest form, the notion of inherence would simply beg the recognition that unceded Aboriginal land and sovereignty still belong to Aboriginal peoples, and thus is not ready-made for integrating unruly Indigenous nationalisms into the liberal settler state.

## Treaty Jurisprudence at Mid-Century

As noted in the last chapter, there is precedent for the successful recognition of treaty rights in the early twentieth century, the more notable being the 1932 case of *R. v. Wesley* in the province of Alberta.<sup>8</sup> The particularity in this Albertan case—a condition which also held true for Manitoba and Saskatchewan—was the process by which the province entered into Confederation and the undeniable imprint that the treaties were able to make in written law because of it. In contradistinction to the four original provinces of Confederation, the Prairie Provinces had not been given control over their crown lands and natural resources as they joined the Dominion of Canada. Devolution of public lands to Manitoba, Saskatchewan, and Alberta was delayed in order to aid the federal government in taking up what land was needed for Dominion purposes first, such as fulfilling treaty obligations.<sup>9</sup> Unfortunately Canada transferred the lands and resources to these provinces before all treaty obligations were fulfilled, thereby guaranteeing that treaty land disputes would continue on for generations.<sup>10</sup> As part of that process of devolution, however, the Natural Resources Transfer Agreements that the Dominion signed with those provinces, and whose terms were enshrined under the provinces' respective and subsequent natural resources legislation, did contain a clause pertaining to First Nations rights to hunting, fishing, and trapping.

A similar case that followed the *Wesley* precedent made it to the Supreme Court of Canada in 1964. *Prince and Myron v. The Queen*<sup>11</sup> concerned several treaty hunters

---

<sup>8</sup> [1932] 4 D.L.R. 774 (Alta. C.A.).

<sup>9</sup> In British Columbia, only limited portions of land were set aside for the Dominion in order to aid the latter in the construction of a transcontinental railway.

<sup>10</sup> See D. N. Sprague, "Canada's Treaties with Aboriginal Peoples," *Manitoba Law Journal* 23 (1995).

<sup>11</sup> [1964] S.C.R. 81, [1963] 41 C.R. 403, 46 W.W.R. 121.

charged with hunting contrary to Manitoba's *Game and Fisheries Act*.<sup>12</sup> The defence argued that the *Manitoba Natural Resources Act*—spawned from the Natural Resources Transfer Agreement signed with the federal government, and which specifically assured the province's First Nations of “hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access”<sup>13</sup>—meant that their right to hunt was not subject to the limitations of the *Game and Fisheries Act*. In its written reasons, the SCC unanimously agrees with the Aboriginal claimants on this issue and specifically cites the *Wesley* case from Alberta in doing so.

At mid-century, legislative changes of significant—if undetermined—potential came about. In the 1951 installment of the *Indian Act*, the discretionary powers held by the minister responsible were reduced in number,<sup>14</sup> chiefs and band councils received more powers—including over the spending of band revenues—and two prohibitions had been lifted. The first was the ban on traditional dances and ceremonies, and the second, notably, was the ban on raising funds for claims against the Crown.<sup>15</sup> Significantly as well, the federal government added s.87 to the *Indian Act*, which stated that:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law

---

<sup>12</sup> R.S.M. 1964, c. 94.

<sup>13</sup> *Manitoba Natural Resources Act*, R.S.M. 1954, c. 180, s.13.

<sup>14</sup> From 1950 to 1965, the Indian Affairs portfolio was actually managed by the Minister of Citizenship and Immigration.

<sup>15</sup> John Leslie, “The Indian Act: An Historical Perspective,” *Canadian Parliamentary Review* 25, no. 2 (2002): 26.

made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.<sup>16</sup>

The new legislation could be read as a double-edged sword for First Nations, especially those with sovereigntist inclinations. It is likely that the general objective of the section was to eliminate any possible notion of Indians or Indian reserves as enclaves of federal jurisdiction that might claim immunity to provincial laws altogether. In this sense, ensuring that First Nations were subject to even more external laws from yet another level of government contributed to the erosion of their sovereignty. At the same time, the initial qualification that the application of provincial laws to First Nations were “subject to the terms of any treaty” should have meant that there was from then on, across the country, a recognition in statute of any and all treaty obligations—not just rights to hunting and fishing in three provinces thanks to a few Natural Resources Transfer Agreements. How the courts would interpret and apply the new section of the *Indian Act* remained to be seen.

To begin with, in *Cardinal v. Alberta (Attorney General)*,<sup>17</sup> the Supreme Court of Canada clearly elected for an application of the section that avoided any sort of enclave interpretation for reserve lands under the division of powers enumerated in the *Constitution Act, 1867*. As Charlie Cardinal, a treaty Indian, had been charged with selling moose meat to a non-Indian from his home on reserve, the SCC clarified that the

---

<sup>16</sup> *Indian Act*, R.S.C. 1952, c. 149, s. 87. The contemporary version of this clause is found at s.88 of the *Indian Act*. The 1951 *Indian Act* also conceived of a whole new system for managing Indian status, with the notion of Indian *blood* replaced by that of *registration* in a new central Indian registry at Indian branch headquarters, and a continuing regime of involuntary status removal and enfranchisement that—just as it had been since the nineteenth century—was particularly discriminatory toward First Nation women and their children in situations of exogamous marriage.

<sup>17</sup> [1974] S.C.R. 695.

provincial *Wildlife Act* applied both on and off reserve and the statutory protection of hunting rights through the province's Natural Resources Transfer Agreement with Canada would only apply to hunting for one's own sustenance. In addition, the new section of course provided no help to those Aboriginal groups who had not signed a court-recognized treaty. The case of *Kruger v. The Queen*, decided by the SCC in 1978, concerned hunters of the Penticton Band in British Columbia who had shot several deer for food during the closed season. Even though the closed seasons and bag limits of the province's *Wildlife Act* would have enormous detrimental effects on claimants who might rely on hunting, fishing, and trapping for their ongoing, year-round subsistence, the SCC found that the act had a uniform territorial operation in the province and thus found that it was not in any particular way aimed at Indians, and therefore characterized it as a law of "general application" that would apply to First Nation hunters in the absence of treaty protection.<sup>18</sup>

There is also an entire family of cases that follow in the footsteps of *R. v. Sikyea* in establishing the paramountcy of *federal* legislation over the terms of any treaty.<sup>19</sup> In cases such as *R. v. George*<sup>20</sup> from Ontario, and *Daniels v. White and The Queen*<sup>21</sup> from Manitoba, the SCC found it within the legislative competence of the federal Parliament, under s.91(24) of the *Constitution Act, 1867*, to derogate from the terms of treaties made with First Nations. This federal paramountcy held in the *Daniels* case despite the fact that

---

<sup>18</sup> *Kruger v. The Queen* [1978] 1 S.C.R. 104. Interestingly, in the lower courts the *Kruger* case was also disputed on the grounds that the claimants' hunting rights fell within the protection of the Royal Proclamation, 1763, but this argument was not specifically employed in the hearing before the SCC and so the unanimous Court elected not to entertain the question.

<sup>19</sup> [1964] 43 D.L.R. (2d) 150 (N.W.T. C.A.), aff'd [1964] S.C.R. 642.

<sup>20</sup> [1966] S.C.R. 267.

<sup>21</sup> [1968] S.C.R. 517.

the terms of Manitoba's Natural Resources Transfer Agreement had been incorporated into both provincial legislation *and* Canada's *Constitution Act, 1930*.<sup>22</sup> In all three cases of *Sikyea, George, and Daniels*, treaty hunters were charged with hunting or possessing fowl contrary to the *Migratory Birds Convention Act*<sup>23</sup>—an act distinct from many other game and natural resources acts faced by Aboriginal claimants in that it was federal, and not provincial.

Furthermore, the appeal division of the New Brunswick Supreme Court extended this paramountcy over treaties to provincial regulations enacted under the authority of federal legislation. In this circumstance, the 1969 case of *R. v. Francis*<sup>24</sup> concerned a Mi'kmaq man who had fished for salmon with a net, without a licence, contrary to provincial fishery regulations. Given that this case concerned assertions of treaty rights from the Mi'kmaq in the Maritimes, the courts were again faced with having to consider the much older and more disputed treaties of peace and friendship signed by the British in the latter half of the eighteenth century—one of which was the treaty considered in the *Syliboy* case in 1929. The unanimous decision of the appellate court was that the treaties of 1725 and 1752 did not apply to the tribes living in the Richibucto area of New Brunswick, and that the final treaty considered—that of 1779—did apply to the claimant but did not confer any hunting or fishing rights. For an added layer of insurance, however, the *Francis* decision states that, since the provincial fisheries regulations of the day had been made pursuant to and passed under the authority of the federal *Fisheries Act*,<sup>25</sup> section 87 of the *Indian Act* did not apply and “even if the appellant had

---

<sup>22</sup> *Constitution Act, 1930* (U.K.), 20 & 21 George V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26..

<sup>23</sup> R.S.C. 1952, c. 179.

<sup>24</sup> [1969] 10 D.L.R. (3d) 189.

<sup>25</sup> R.S.C. 1952, c. 119.

established that a right to fish salmon in the Richibucto River had been conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence to the charge on which he was convicted.”<sup>26</sup>

## The Modern Principles of Treaty Jurisprudence

Another case in which a disputed treaty came under the scrutiny of the courts was that of *R. v. White and Bob* in 1964.<sup>27</sup> The 1854 agreement between the Saalequun (Snuneymuxw) of Vancouver Island and James Douglas, chief factor for HBC and governor of the Colony of Vancouver Island, was atypical, to be sure. To wit, the document was blank. Douglas signed a series of fourteen agreements in this manner on Vancouver Island, covering a relatively small 930 square kilometres of land. Apparently, for want of a template to help him in crafting a legal agreement, Douglas had the men of the tribe each sign an “X” to a blank piece of paper, with the intent of copying the language of the conveyance to it after the fact. He indicates as much about his treaty-making process in a letter written to the colonial secretary on May 16, 1850:

I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.

I attached the signatures of the native Chief's and others who subscribed the deed of purchase to a blank sheet on which will be copied the contract or Deed of

---

<sup>26</sup> *R. v. Francis*, at 195. A similar decision affirming federal paramountcy through the *Fisheries Act* was rendered by the SCC—this time in the NRTA province of Manitoba—in *Elk v. The Queen*, [1980] 2 S.C.R. 166.

<sup>27</sup> [1964] 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd [1965] 52 D.L.R. (2d) 481 (S.C.C.) [*White and Bob*].

conveyance, as soon as we receive a proper form, which I beg may be sent out by return Post. The other matters referred to in your letter will be duly attended to.<sup>28</sup>

Just over a century later, Clifford White and David Bob of the Saalequun (Snuneymuxw) were charged with hunting deer during the closed season, contrary to British Columbia's *Game Act*.<sup>29</sup> Although certain blocks of land on the British Columbian mainland were held for a time by the Dominion government in order to aid in the construction of a transcontinental railway, and were later transferred back to the province, there was not anything akin to a clause concretized in statute (as in the other western NRTAs) pertaining to rights of hunting, fishing, and trapping across the province. And, as the reader will recall, most of the province of British Columbia was taken without the benefit of treaties to begin with. The claimants in this case, however, were one of the few groups in the province who had signed an historical agreement with a Crown representative, so the case largely pivoted on the weight of section 87 of the *Indian Act*. What has garnered the *White and Bob* case more historical attention, however, is its approach to the issue of treaty interpretation itself.

White and Bob were initially convicted of having deer carcasses during the closed season by a police magistrate, and then were acquitted on an appeal before the county court. The Crown therefore appealed that decision to the B.C. Court of Appeal. The Saalequun claimants argued that the 1854 agreement between their ancestors and James Douglas gave them the right to hunt for food over the land in question. Alternatively, they also argued that they possessed the *Aboriginal right* to hunt for food over

---

<sup>28</sup> Cited in *White and Bob*, at 651.

<sup>29</sup> R.S.B.C. 1960, c. 160.

unoccupied land within their ancient tribal hunting grounds.<sup>30</sup> Thus one argument put forward by the claimants is for a right to hunt that is sourced in, and would flow from, a treaty, and the other argument is for an inherent right. The inherent right approach argues that, regardless of statute or treaty, Aboriginal people have the right to hunt within their traditional territory as they have done since time immemorial. The idea that such rights exist inherently, irrespective of whether they have been enshrined in treaties or through laws laid down by the sovereign, countmands the positivist demand for rights to be positively expressed and recognized by the sovereign in statute.

The Crown's argument was that the agreement signed with Douglas conferred no hunting rights and that, if it did, those rights were extinguished by section 87 of the *Indian Act*, which it argued would have extended the provisions of the provincial game act to the claimants.<sup>31</sup> Of course this would seem somewhat counterintuitive, since the section of the *Indian Act* which extends provincial laws of general application to Indians begins with the clause “subject to the terms of any treaty,” meaning that provincial laws should not override the terms of a treaty.<sup>32</sup> The Crown's argument was that the agreement between the Saalequun and James Douglas was *not* a treaty for the purposes of the saving clause in section 87 of the *Indian Act*, but rather was simply a document recognizing “pre-existing privileges” that could be, and were, subsequently extinguished by provincial game legislation. In essence, the Crown seemed to offer up its own notion of a pre-existing Aboriginal right, but one that was weak and easily extinguished by

---

<sup>30</sup> *White and Bob*, at 615.

<sup>31</sup> This section is s.88 in the contemporary versions of the *Indian Act*.

<sup>32</sup> *Indian Act*, R.S.C. 1952, c. 149, s. 87.

legislation inconsistent with the continued exercise of the right—in order to place the rights mentioned by Douglas in that category.

The appellate court decision for *White and Bob* is somewhat unique for the number of justices who felt compelled to author their own opinions on the case, both for and against the Saalequun claimants. The majority of the justices found in favour of White and Bob, accepting that the agreement between James Douglas and the Saalequun was in fact a treaty within the meaning of section 87 and affirming that the treaty's terms included hunting and fishing rights. In the reasons he authored, Justice Norris emphasized that “the unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a ‘Treaty.’”<sup>33</sup> The claimants’ right to hunt was therefore protected against derogating provincial legislation. The Crown appealed the case to the Supreme Court of Canada, but the majority decision of the B.C. Court of Appeal was expeditiously and unanimously affirmed by the SCC.<sup>34</sup>

*R. v. White and Bob* has often been characterized as the beginning of a new path in treaty interpretation.<sup>35</sup> And, in a sense, it can be perceived that way—but it is an observation that would be tempered, of course, by the fact that a number of the disadvantageous treaty rights decisions I have mentioned above were actually subsequent to it. Nevertheless, the case is important in that it does mark the first in a series of decisions that would embody significant change in the judiciary’s approach to treaty

---

<sup>33</sup> *White and Bob*, at 649.

<sup>34</sup> *R. v. White and Bob* [1965] 52 D.L.R. (2d) 481 (S.C.C.).

<sup>35</sup> Borrows and Rotman use *White and Bob* as the first case in their section of “Modern Canadian Treaty Jurisprudence — Beginning a New Process of Interpretation.” See John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed. (Markham: LexisNexis, 2012), 329.

rights in Canada. It laid the first in a body of principles to which legal commentators now refer as the principles or canons of treaty interpretation. This first principle can probably be summed up with Justice Norris's insistence that the word "Treaty" not become a casuistic "word of art," but rather that "the word of the white man" should simply continue to carry the sanctity it did at the time the engagements were made.<sup>36</sup>

The judicial notice that the majority justices in *White and Bob* take of the varied historical circumstances and protocols through which the Crown sought to procure its colonial advantages demonstrates the case's departure from the dismissive approach to treaty claims represented by cases such as *R. v. Syliboy*.<sup>37</sup> It was only fitting then that the treaty of 1752 between the Mi'kmaq and the British—the very same treaty that was roundly disregarded by Judge Patterson in the *Syliboy* case—was considered once again in *Simon v. The Queen*.<sup>38</sup> In order to determine whether a section 88 (formerly section 87) defence for treaty hunting rights should be recognized for James Simon, the initial and fundamental question posed by the court was whether Governor Hopson of Nova Scotia and the Mi'kmaq *had the capacity* to enter into a treaty. The Crown had raised the issue of capacity, invoking an "historical legal context" which called the validity of treaties with First Nations into question. That historical legal context outlined in the Crown's factum, as explained by the unanimous court decision in *Simon v. The Queen*, consisted primarily of the *Syliboy* decision written by an acting county court judge in 1929. Judge Patterson had written in 1929 that "'Treaties are unconstrained Acts of independent powers.' But the Indians were never regarded as an independent power. A

---

<sup>36</sup> *White and Bob*, at 649.

<sup>37</sup> [1929] 1 D.L.R. 307 [*Syliboy*].

<sup>38</sup> [1985] 2 S.C.R. 387 [*Simon*].

civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized.”<sup>39</sup> The unanimous finding of the SCC in *Simon* was that the treaty of 1752 was validly created by competent parties and, through section 88 of the *Indian Act*, constituted a positive source of protection against infringements on hunting rights. The reasons delivered by Chief Justice Dickson on behalf of the entire Court, however, also contained this unqualified rebuke of our legal history:

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.<sup>40</sup>

Similarly, but two decades prior, Justice Norris of the B.C. Court of Appeal had stated in *White and Bob*:

In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with modern day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced

---

<sup>39</sup> *Syliboy*, at 313. Also cited in *Simon*, at 399.

<sup>40</sup> *Simon*, at 399.

civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law.<sup>41</sup>

Indeed, Canadian Aboriginal law of the contemporary era—as portended so presciently by Justice Norris as early as 1964 and recognized by the SCC in *Simon* and other cases since—is distinct in its efforts to find a more “enlightened” justice appropriate for the late colonial era. Attempting to resolve certain contradictions and legal-ethical liabilities in the colonial legal landscape, the modern principles of treaty interpretation stand as one of the first efforts of the contemporary era to reconcile the irreconcilabilities of colonization. To the extent that it is a systematized set of “solutions” or principles geared to this end, this reconciliatory jurisprudence essentially amounts to a form of *jurisprudential ethics*. In the case of Aboriginal law, forms of jurisprudential ethics arise where the law is seen to have failed Aboriginal peoples to a degree that offends contemporary sensibilities, and the juridical field moves to adapt the law to this underlying socio-normative change. The first sign of this was in treaty law, but it is not the only form of Aboriginal jurisprudential ethics to develop. The contemporary principles of treaty interpretation seemingly want to exorcise the demons of the colonial past that arose from the often duplicitous legalist agreements through which the Crown obtained diplomatic and military advantage, and ultimately assumed sovereignty and title over the land. Not only this, but they also seek to do penance for the failings of the law between the era of treaty-making and today.

Thus, beginning in 1964, one finds a number of such principles laid down in the establishment of a canon of legal-ethical precepts now regularly cited. Although, it is

---

<sup>41</sup> *White and Bob*, at 649.

remarkable that some of these precepts find their origins over a century earlier in American case law. Justice Norris in *R. v. White and Bob* cited the Supreme Court of the United States in the 1832 case of *Worcester v. State of Georgia*, with the quote that “the language used in treaties with the Indians should never be construed to their prejudice.”<sup>42</sup> Subsequently, in the 1981 case of *R. v. Taylor and Williams*, the judgment of the Ontario Court of Appeal unanimously found in favour of two treaty hunting claimants and took inspiration from both *Worcester* and *White and Bob*, asserting that “if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.”<sup>43</sup> In his written reasons for the unanimous court in *Taylor and Williams*, Justice MacKinnon then goes on to cite Justice Cartwright’s *dissenting* argument in *R. v. George*,<sup>44</sup> emphasizing that in approaching the terms of a treaty “the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.”<sup>45</sup> Finally, Justice MacKinnon adds, seemingly of his own initiative, that “if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken

---

<sup>42</sup> *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 at 582 (1832). Also cited in *White and Bob*, at 652.

<sup>43</sup> *R. v. Taylor and Williams*, [1981] 62 C.C.C. (2d) 227 at 236, [1982] 34 O.R. (2d) 360 (On. C.A.) [*Taylor and Williams* cited to C.C.C.].

<sup>44</sup> [1966] S.C.R. 267.

<sup>45</sup> *Taylor and Williams*, at 235.

of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.”<sup>46</sup>

In 1983, the principle of liberal interpretation was affirmed and expanded by the SCC in *Nowegijick v. The Queen*, with Puisne Justice Dickson (as he then was) authoring the court’s decision under the principle that both “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”<sup>47</sup> Dickson as Chief Justice then delivered the judgment for the court in *Simon v. The Queen*, which I have already outlined above, but with the additional caution that, “Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises.”<sup>48</sup> This, too, was taken from an American precedent of some vintage—namely, the 1941 case of *United States v. Santa Fe Pacific Railroad Company*.<sup>49</sup>

Lastly, for the modern principles of treaty interpretation, the 1990 case of *R. v. Sioui* merits mention.<sup>50</sup> The case involved members of the Huron (Wendat) band on Wendake First Nation (then called the Lorette Indian reserve) in the area of Quebec City. They were charged with cutting down trees, making fires in non-designated areas, and camping against regulations in a provincial park. The claimants stated that they were practising Huron customs and rites pursuant to their treaty rights, as protected by section 88 of the *Indian Act*. They relied on a document signed by the British General Murray in

---

<sup>46</sup> *Taylor and Williams*, at 236. MacKinnon even states that consideration should be given to the oral traditions of the tribe concerned.

<sup>47</sup> [1983] 1 S.C.R. 29 at 36 [*Nowegijick*].

<sup>48</sup> *Simon*, at 405-406.

<sup>49</sup> 314 U.S. 339 (1941). Justice Douglas, at 354: “extinguishment cannot be lightly implied.”

<sup>50</sup> [1990] 1 S.C.R. 1025 [*Sioui*].

1760 that granted to them, in exchange for their surrender (as former allies of the French), British protection and the free exercise of their religion, customs, and trade with the British. This case, as with *White and Bob* and *Simon* before it, thus centred on a question of whether the document in question was a treaty within the meaning of section 88. The judgment of the court, delivered by Puisne Justice Lamer (as he then was), draws from the *Simon* decision in maintaining that “there is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the *Indian Act*.<sup>51</sup> Also drawing from *Simon*, Lamer goes on to describe a treaty as characterized by “the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”<sup>52</sup>

The modern principles of treaty interpretation undoubtedly represent a monumental change in the juridical field’s approach to treaty rights in Canada. It was a relatively rapid shift, guided by the country’s highest courts, which betrayed a significant concern over the state of Aboriginal law and its potential for conflict with the changing socio-normative notions of justice in the late colonial era. But there is another, more fundamental shift that I am attentive to, and it arrived in this same era. It is to that shift that I now turn.

---

<sup>51</sup> *Sioui*, at 1043. See also *Simon*, at 410.

<sup>52</sup> *Sioui*, at 1044. See also *Simon*, at 401 and 410.

## **The Installation of Inherence: *Calder*, *The Constitution Act, 1982*, and *Sparrow***

The reader will recall that the *White and Bob* claimants put forth two arguments—one based on a treaty right and the other based on an argument for an “Aboriginal right” to simply hunt as they had always done. Such multi-prong forms of argumentation are not uncommon—indeed the counsel for the Crown, for their part, would often put together a multiplicity of contingent reasons as to why an Aboriginal litigant’s claims should *not* be recognized by a court—and deciding a certain way on one question can often provide the court a means to overlook another question. Justice Davey took this approach for the *White and Bob* judgment, writing in his reasons for the judgment that, because he finds that the claimants have a treaty right to hunt that is protected by the *Indian Act*, “It becomes unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents’ counsel.”<sup>53</sup> In short, he did not want to deal with the issue of whether the Aboriginal right in question could or did exist independent of a treaty—be it through the Royal Proclamation or some other source. Sullivan, who also found in favour of White and Bob, declines to engage any such issue as well and simply concurs with the reasons given by Davey.

Sheppard, in his dissenting opinion, does not hesitate to consider the question of whether White and Bob could have rights sourced in the Royal Proclamation. His opinion, with which Justice Lord concurs, is that the Proclamation does not apply to Vancouver Island.<sup>54</sup> He does not engage at all, on the other hand, with the question of

---

<sup>53</sup> *White and Bob*, at 619.

<sup>54</sup> *White and Bob*, at 620.

whether the Saalequun claimants' right to hunt could exist independent of the Proclamation *and* independent of a valid treaty (working, of course, in conjunction with what was then section 87 of the *Indian Act*). Sheppard's omission becomes all the more noticeable when he quotes a passage from the lower court's decision in the case. In that passage, Judge Swencisky of the county court states "that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the Proclamation of 1763, has never been abrogated or extinguished and is still in full force and effect."<sup>55</sup> The county court judge's choice of the word "confirmed" is an interesting one, as it suggests the possibility that the Royal Proclamation merely recognized pre-existing rights.

Justice Norris, in his written reasons in favour of White and Bob, did not hesitate "to deal specifically with the matter of aboriginal rights and the applicability of the *Royal Proclamation of 1763*."<sup>56</sup> In fact, Norris delves deeper into colonial history and covers more depth and breadth of Commonwealth and American case law than any other justice authoring an opinion for *White and Bob*. Among his many conclusions, including the fact that the agreement in question was a treaty for the purposes of section 87, Norris finds that "aboriginal rights existed in favour of Indians from time immemorial," that the right "to hunt and fish on unoccupied lands was such a right," and that "the *Royal Proclamation of 1763* confirming such Indian rights applied to the territories claimed by the British with the exception mentioned in the *Proclamation* and applied in particular to Vancouver Island."<sup>57</sup> It seems clear that Norris's conception of the claimants' rights to

---

<sup>55</sup> Cited in *White and Bob*, at 619.

<sup>56</sup> *White and Bob*, at 629.

<sup>57</sup> *White and Bob*, at 663-664.

hunt and to fish is that they exist independently of any treaties, statutes, or proclamations which might shore them up. He refers to those rights as “affirmed by the *Proclamation of 1763* and recognized by the Treaty.”<sup>58</sup> Norris then goes on to quote Justice John Sissons of the Territorial Court of the Northwest Territories, who himself became a judicial figure of historical note in Canada for his impassioned defences of Aboriginal rights. The passage that Norris takes is from Sissons’s judgment the prior year in *R. v. Koonungnak*, stating that “this proclamation has been spoken of as the ‘Charter of Indian Rights.’ Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and Eskimos had their aboriginal rights and English law has always recognized these rights.”<sup>59</sup> In fact, in his *Koonungnak* decision, Sissons goes on to state outright that “Indian and Eskimo hunting rights are not dependent on Indian treaty or even on the Royal Proclamation.”<sup>60</sup>

As to the Crown’s appeal of *White and Bob* to the Supreme Court of Canada, Justice Cartwright delivered a brief oral judgment on behalf of the entire court, stating that the majority of the B.C. Court of Appeal were correct in their conclusion regarding the Douglas agreement being a treaty within the meaning of section 87 of the *Indian Act*.<sup>61</sup> The SCC, then, failed at this juncture to consider the issue of the existence of Aboriginal rights independent of treaties. As for the work of Justice John Sissons in the Northwest Territories, it met with a concerted resistance that might be expected for a judge who, as former Yellowknife Crown attorney David Searle confessed some years

---

<sup>58</sup> *White and Bob*, at 647.

<sup>59</sup> *R. v. Koonungnak* [1963] 42 C.R. 143 at 160, 45 W.W.R. 282 (N.W.T. Terr. Ct.) [*Koonungnak* cited to C.R.]. Cited in *White and Bob*, at 647.

<sup>60</sup> *Koonungnak*, at 160.

<sup>61</sup> *R. v. White and Bob* [1965] 52 D.L.R. (2d) 481 (S.C.C.).

later, “was probably thirty years before his time.”<sup>62</sup> Pursuant to Sissons’s 1959 judgment in defence of an Inuit claimant’s hunting rights in *R. v. Kogogolak*, which was premised on the applicability and continuing protection of the Royal Proclamation,<sup>63</sup> but which also nevertheless recognized the power of Parliament to extinguish or abridge such rights, the Department of Northern Affairs elected for legislative subterfuge over having the Crown appeal the decision.<sup>64</sup> Amendments were made by Parliament to the *Northwest Territories Act* affirming that laws of general application in force in the Northwest Territories were applicable to the Inuit, and that First Nations and Inuit would not be restricted from hunting for food on unoccupied Crown lands—with the exception of game declared by the Governor in Council to be in danger of becoming extinct. Shortly thereafter, in an Order in Council dated September 14, 1960, the Governor in Council was “pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct.”<sup>65</sup> The test case to follow this change was *Sigearreak v. The Queen*, in which an Inuit hunter was charged with killing barren-ground caribou and abandoning meat that was fit for consumption.<sup>66</sup> Sissons still insisted on finding in favour of the Inuit defendant, but the unanimous decision later rendered by the SCC stated that the territorial *Game Ordinance* did apply to the Inuit, and then also made the notable effort to expound two other declarations: namely, that the Royal Proclamation had no application in the region where the offence took place, and that two other noted cases

---

<sup>62</sup> Cited in Dorothy Eber, *Images of Justice: A Legal History of the Northwest Territories and Nunavut as Traced Through the Yellowknife Courthouse Collection of Inuit Sculpture* (Montreal/Kingston: McGill-Queen’s University Press, 1997), 91.

<sup>63</sup> *R. v. Kogogolak*, [1959] 31 C.R. 12, 28 W.W.R. 376 (N.W.T. Terr. Ct.).

<sup>64</sup> See Peter Kulchyski and Frank Tester, *Kiumajut (Talking Back): Game Management and Inuit Rights, 1900-70* (Vancouver: UBC Press, 2007), 99-100.

<sup>65</sup> Cited in *Sigearreak v. The Queen*, [1966] S.C.R. 645 at 648.

<sup>66</sup> [1966] S.C.R. 645 [*Sigearreak*].

decided by Sissons—*R. v. Kallooar*<sup>67</sup> and *R. v. Kogogolak*—were “not good law and must be taken as having been overruled.”<sup>68</sup> It is interesting to note, however, that the SCC’s judgment for *Sigearak* at no point engages Sisson’s claim, as we have read in his decision for *Koonungnak*, that Aboriginal rights were dependent on neither treaty nor the Royal Proclamation.<sup>69</sup>

Indeed, the recognition of *inherence* by Canada’s highest court—that great shift in Aboriginal law that would help break down the monopoly held by treaties, statutes, and proclamations—did not begin until 1973. Inherence represents a distinct shift away from the legal-positivist model in that, as opposed to making Aboriginal rights and title dependent upon positive recognition in something laid down by the colonizing sovereign, the courts become capable of recognizing rights and title on their own. The landmark case did not concern a right to hunt or fish, however. Rather, what was at stake in *Calder v. British Columbia (Attorney General)*<sup>70</sup> was the recognition of the Nisga’a people’s very title over their traditional territory.

Tribal councillors from the four bands who make up the Nisga’a nation, situated in northwestern British Columbia, brought suit against the province seeking “a declaration that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory hereinbefore described, has never before been lawfully extinguished.”<sup>71</sup> The claim, therefore, was predicated on the notion that the Aboriginal title simply existed and had not been taken away. The Nisga’a’s case had made its way,

---

<sup>67</sup> [1964] 50 W.W.R. 602 (N.W.T. Terr. Ct.).

<sup>68</sup> *Sigearak*, at 652.

<sup>69</sup> See *Koonungnak*, at 160.

<sup>70</sup> [1973] S.C.R. 313 [*Calder*].

<sup>71</sup> *Calder*, at 345.

unsuccessfully, through the British Columbia courts to the Supreme Court of Canada. It was monumental that such a question was finally being posed before the SCC. At the very least, it was a major turn in a very long road for the Nisga'a, who had been steadfast and vocal on the issue for over a century. David Mackay, speaking for the Nisga'a before a royal commission in 1888, stated:

What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations.<sup>72</sup>

At a second royal commission held in 1915—the McKenna-McBride Commission—

Gideon Minesque spoke on behalf of the Nisga'a:

We haven't got any ill feelings in our hearts but we are just waiting for this thing to be settled and we have been waiting for the last five years—we have been living here from time immemorial—it has been handed down in legends from the old people and that is what hurts us very much because the white people have

---

<sup>72</sup> *Calder*, at 358.

come along and taken this land away from us... We have heard that some white men, it must have been in Ottawa; this white man said that they must be dreaming when they say they own the land upon which they live. It is not a dream—we are certain that this land belongs to us. Right up to this day the government never made any treaty, not even to our grandfathers or our great-grandfathers.<sup>73</sup>

Gideon Minesque was correct on the facts of history, and the courts had to admit as much. No treaty had ever been signed with the Crown directly, or with the Hudson's Bay Company as intermediary for the Crown. With the installation of federal Indian legislation and the status system came the creation of reserves—even in British Columbia, though the vast majority of the province was not accounted for by treaties. In fact, the reserves created in British Columbia were notoriously small compared to many other regions of Canada. Much in line with David Mackay's quote, the SCC even accepted the fact that the Nisga'a at no time accepted the creation of these reserves.<sup>74</sup>

The Nisga'a put forward a series of contingent arguments. First they argued that "their title arises out of aboriginal occupation; that recognition of such a title is a concept well embedded in English law; that it is not dependent on treaty, executive order or legislative enactment."<sup>75</sup> Alternatively, if the SCC refused to accept this concept of inherent title, they argued that "if executive or legislative recognition ever was needed, it is to be found in the Royal Proclamation of 1763, in Imperial Statutes acknowledging that what is now British Columbia was 'Indian Territory', and in Royal instructions to the

---

<sup>73</sup> *Calder*, at 359.

<sup>74</sup> *Calder*, at 318.

<sup>75</sup> *Calder*, at 318. There are more details on the nature of this Indian title offered up by the Nisga'a, but this will form a topic of discussion in the following chapter.

Governor of British Columbia.”<sup>76</sup> Their last argument, of consequence for both of these two alternatives, was that their title had never been extinguished.

The province, similarly, responded with a series of contingent arguments. Their position was “that there never was any right or title to extinguish, and alternatively, that if any such right or title did exist it was extinguished in the period between 1858 and Confederation in 1871. The respondent admits that nothing has been done since Confederation to extinguish the right or title.” There are a couple observations to be made of these first legal arguments against the notion of Aboriginal title that a Canadian government has ever had to make before the contemporary courts. Firstly, much in line with my prior observations of Aboriginal law—such as its tendency to find itself in a state of lag behind the practices of colonization, and the lack of a fully articulated doctrine of Aboriginal title in the positivist era<sup>77</sup>—one could argue that the most complete expressions of what might be termed a “positivist doctrine” of Aboriginal rights and title tend to be found in the arguments the Crown levels against these concepts. This is because justification of the status quo—a legal basis for the continued disregard of Aboriginal title—was finally required for presentation to the courts. In essence, the argument was that Aboriginal rights and title do not exist unless the sovereign specifically and purposely brings them into existence; barring this, the argument has often been that it is within the unquestioned and injusticiable powers of the Crown to abrogate or extinguish Aboriginal rights and title. Secondly, it is not surprising that the

---

<sup>76</sup> *Calder*, at 318.

<sup>77</sup> The reader will recall that, in the 1888 case of *St. Catherine’s Milling and Lumber Company v. The Queen*, the Judicial Committee of the Privy Council purposely kept the definition and description of Indian title quite vague, stating only so much of its nature as was required for the finding in favour of Ontario—namely, that Indian title was a lesser title that formed a burden on the underlying, radical title of the Crown.

province would admit that nothing has been done since Confederation to extinguish the Nisga'a title if it did exist, since by the late 20<sup>th</sup> century it was well established that only the federal Parliament could abrogate the rights of First Nations. Thus, once the colony of British Columbia entered Confederation to become a province of Canada, it would have effectively ceded the power to extinguish rights or title to the Dominion.

Because of the many years that Aboriginal law remained inchoate, the indeterminacy and potential flexibility of interpretation that was contained within the body of case law is significant—especially when judges begin to draw from Commonwealth jurisprudence outside of Canada and, in particular, from some very idiosyncratic American case law.<sup>78</sup> In pivotal cases such as *Calder* and *White and Bob*, it is striking the degree to which authoring judges pull from the same case law but to differing ends. Principles and turns of phrase are found and interpreted to support vastly differing results, sometimes even from the same precedent. For the SCC, the major questions that arose in the *Calder* case were whether the protections offered to Indigenous peoples in the Royal Proclamation, 1763 applied to the Nisga'a, or, alternatively, whether the common law would, could, or did recognize an Indian title independent of statute or proclamation. Debate would also ensue about what was required to extinguish Aboriginal title.

Justice Hall, writing an opinion on behalf of himself and Justices Spence and Laskin, approached the issue relating to the Royal Proclamation by offering an in depth examination of the history of European exploration and colonization in western North

---

<sup>78</sup> Due to the anomalies that developed in American Aboriginal law, Kent McNeil has suggested that one should not assume that American decisions are generally applicable in other jurisdictions. See McNeil, *Common Law Aboriginal Title* (New York: Clarendon Press, 1989), 245.

America, as well as of the recent treatments that were given the question in cases such as *White and Bob* and *Sikyea*. He did so because, in creating the territory reserved and protected for First Nations, the Royal Proclamation delineated the region by stating that it included all the land that was *not* within the limits of the three governments that the Proclamation had just created (Quebec, East Florida, and West Florida), that was *not* within the limits of the territory that had been granted to the Hudson's Bay Company, and that was "lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."<sup>79</sup> This last clause essentially reserved the eastern watershed of North America from being proclaimed Indian territory, since this is where the original British colonies had been planted. In the way it is stated, however, there are no prescribed western limits to the territory reserved for First Nations—unless, of course, as has been surmised by the courts over the years, the limit is taken to be the western limits of what was the British Crown's "Dominions and Territories" at that time. Justice Hall's analysis of the historical context leads him to conclude that "the wording of the Proclamation itself seems quite clear that it was intended to include the lands west of the Rocky Mountains," thereby suggesting that the Nisga'a would indeed benefit from an Aboriginal title rooted in the protections offered by the Proclamation.<sup>80</sup>

Further, Hall argues that Aboriginal title is inherent—that it "does not depend on treaty, executive order or legislative enactment."<sup>81</sup> His most fundamental argument to this end is that "possession is of itself at common law proof of ownership," and

---

<sup>79</sup> George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

<sup>80</sup> Calider, at 398. On p.397, Hall argues that Justice Norris, in *R. v. White and Bob*, was correct in maintaining that the Proclamation applied to Vancouver Island.

<sup>81</sup> Calder, at 390.

“unchallenged possession is admitted here.”<sup>82</sup> Beyond this more foundational and theoretical argument, however, Hall tallied “a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands.”<sup>83</sup> Among these were American, Canadian, and Commonwealth cases that span the 18<sup>th</sup>, 19<sup>th</sup>, and 20<sup>th</sup> centuries and that were pertinent to jurisdictions in North America, the Caribbean, and Africa. An essential interpretation that he makes of the *St. Catherine’s Milling* case—both at the level of the Supreme Court of Canada and the Judicial Committee of the Privy Council—was that *of course* there has been a concept of inherent Aboriginal title recognized at common law, since it was admitted on multiple occasions that there was an Aboriginal interest in land that needed to be extinguished before the Crown’s title over it could become a *plenum dominium*.<sup>84</sup> In the end, for Justices Hall, Spence, and Laskin, “the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer... is wholly wrong as the mass of authorities previously cited... establishes.”<sup>85</sup>

Hall’s opinion in the *Calder* case, sensitive to the irreconcilabilities underlying Canada’s legal landscape, manifests both the socio-normative and legal-ethical difficulty that colonial history can pose for the Canadian conscience. The largest of those looming irreconcilabilities is the incongruity of the Crown having signed treaties with some

---

<sup>82</sup> *Calder*, at 369. It was likely helpful for the Nisga’a that they live in a sparsely populated area of the province and there were relatively few outsider settlements to challenge their possession—and the few that there were, they intentionally chose not to challenge.

<sup>83</sup> *Calder*, at 376.

<sup>84</sup> See *Calder*, at 376-380. See also Hamar Foster, “Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* ‘Invented Law’?,” *The Advocate* 56, no. 2 (1998): 221.

<sup>85</sup> *Calder*, at 416.

Aboriginal groups, but not with others. And, for Hall, the land cession treaties themselves are the surest indication of the Crown's past acknowledgement of Aboriginal title:

Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.<sup>86</sup>

Awkwardly underscoring this incongruity is the fact that treaties were in fact made with some First Nations in British Columbia. In addition to the peculiar Douglas treaties signed on Vancouver Island, one of the series of historical numbered treaties extends its reach into British Columbia. Treaty Eight, signed in 1899—twenty-eight years after the province joined Confederation—covers an enormous territory stretching from northwest Saskatchewan to northeast British Columbia, and into the Northwest Territories. Such a chronology poses a challenge to the Crown argument that any title or rights that may have existed were extinguished prior to British Columbia's confederation with Canada in 1871. Justice Hall thus poses the question, "If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?"<sup>87</sup> And just as Treaty Eight was negotiated by Crown representatives and ratified by the Queen's Privy Council in Canada, Hall also suggests that, back in London, the Imperial Government itself did not seem to have it in mind that First Nations did not have anything to cede:

A further observation in respect of the Letter of Instructions of July 31, 1858, must be made of the phrase, "Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the Natives for the cession of

---

<sup>86</sup> *Calder*, at 394.

<sup>87</sup> *Calder*, at 394.

land possessed by them ...” Having in mind the use of the word “cession” in this context, how can it logically be said that the Imperial Government was not at the time recognizing that the natives had something to cede?<sup>88</sup>

Justice Judson, with Justices Martland and Ritchie concurring, penned the opposing opinion arguing that the Nisga’a appeal should be dismissed. Not surprisingly, he held that the lower courts were correct in their assessment that the whole of the province of British Columbia was outside of the scope of the Royal Proclamation and thus the protections offered by it were not applicable.<sup>89</sup> What was surprising and momentous about Judson’s written reasons, however, was his admission that title was not dependent on the Royal Proclamation—even though the Proclamation had been characterized as the source of Indian title by the JCPC in the *St. Catherine’s Milling* case almost 100 years prior:

There can be no doubt that the Privy Council found that the Proclamation of 1763 was the origin of the Indian title “Their possession, such as it was, can only be ascribed to the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.”

I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title.<sup>90</sup>

Judson offered only one other key passage pertaining to Aboriginal title sourced outside of the Royal Proclamation and legislative enactments, but it was enough to foreshadow

---

<sup>88</sup> *Calder*, at 413-414.

<sup>89</sup> *Calder*, at 323-325.

<sup>90</sup> *Calder*, at 322.

what would later be defined as the source of this common law Aboriginal title: prior occupation.

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right.” What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was “dependent on the goodwill of the Sovereign.”<sup>91</sup>

The question of extinguishment, however, served as another point of contention between the two groups of justices. Hall drew from both Commonwealth and American case law to argue that that once Aboriginal title is established, “it is presumed to continue until the contrary is proven,”<sup>92</sup> and that, on the question of its extinguishment, “the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be ‘clear and plain’.”<sup>93</sup> More specifically, Hall’s assertion was that once the Nisga’a came under British sovereignty, their legal right of title “could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.”<sup>94</sup> In Hall’s estimation, since neither of

---

<sup>91</sup> *Calder*, at 328.

<sup>92</sup> *Calder*, at 401.

<sup>93</sup> *Calder*, at 404.

<sup>94</sup> *Calder*, at 402.

these eventualities had taken place, the Nisga'a people's title to their traditional territory remained unextinguished.

Justice Judson and his concurring colleagues, however, agreed with the trial judge in finding that a number of pieces of legislation enacted by the Colony of British Columbia prior to Confederation revealed "a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to 'aboriginal title, otherwise known as the Indian title'..."<sup>95</sup> Such a finding would amount to a fundamentally consequential choice in the institution of a jurisprudential ethics around unceded Aboriginal title. Both sides of the Court were willing to admit that this form of inherent title existed, but they were not in agreement on the level of protection that would be accorded it as a result. Justice Judson, along with Justices Martland and Ritchie, were prepared to simply *infer* that the Crown in right of the Colony of British Columbia extinguished the Nisga'a title based on its historical disregard for that title.

The disagreements on the substantive issues of the case—the scope of the Royal Proclamation, and whether the Nisga'a title had been extinguished—pitted three Supreme Court justices against an equal amount of colleagues. This peculiar circumstance is at the root of another reason why *Calder* was historically unique: the Nisga'a actually had their appeal dismissed on a technicality, but managed to have six out of seven justices of the Supreme Court of Canada agree that the common law recognized an inherent Aboriginal title, changing the path of Aboriginal rights and title jurisprudence henceforth.<sup>96</sup> Justice

---

<sup>95</sup> Cited in *Calder*, at 333.

<sup>96</sup> The even split on the issue of extinguishment meant that the *Calder* decision was not determinative on this issue, but later jurisprudence and constitutional change would see Justice Hall's vision applied.

Pigeon, the seventh SCC justice who had heard the case, voted to dismiss the Nisga'a appeal based on reasons completely apart from the substantive issues discussed above. The requirement of the doctrine of sovereign immunity—which prevented parties from suing the Crown unless first obtaining permission in the form of a *fiat*, and which B.C. premier Richard McBride had insisted in 1910 could not be lifted for the very reason of the unresolved question of Aboriginal title—had not been removed.<sup>97</sup> Justice Hall's opinion offers elaborate arguments to the effect that the doctrine was not, and should not be, an obstacle to the litigation at hand, but Justice Pigeon argued that the Court had no jurisdiction without such a fiat. “Deeply conscious of the hardship involved,” and noting that Crown immunity from suit had by then been removed at the federal level and in most provinces, Justice Pigeon nevertheless tipped the balance in favour of dismissing the Nisga'a appeal without making any findings on the substantive issues of the case.

Due to the complex interweaving of agreement and disagreement between three sets of SCC justices on multiple issues—both substantive and technical—a first reading of *Calder* can find the decision to be somewhat abstruse and its effect ambiguous. The significance lies in the relatively brief passage authored by Justice Judson, agreeing with the opposing justices that Aboriginal title can exist independent of proclamations and legislative enactments. A decade later, the British Columbia Court of Appeal, who seemed to have understood the Supreme Court's ruling in *Calder* well enough, expressed some exasperation over the inability of the lower courts in that province to properly interpret and apply the SCC decision.<sup>98</sup>

---

<sup>97</sup> See the discussion of this in the previous chapter.

<sup>98</sup> See *R. v. Sparrow* [1986] 36 D.L.R. (4<sup>th</sup>) 246, 9 B.C.L.R. (2d) 300 (B.C.C.A.). The B.C.C.A. laments the fact that the lower courts were treating the B.C.C.A. ruling on *Calder* as definitively supporting the claim that

But this is not to say that the *Calder* decision was not recognized as historic in its moment. Indeed, it was. It fell just a few years after the federal government, under Pierre Trudeau's Liberal Party, had introduced and retracted the highly controversial White Paper that envisaged a drastic five year plan of assimilation and equality-through-sameness by removing the *Indian Act*, dissolving the department of Indian Affairs, eliminating Indian status, handing over reserve land to the bands and effectively converting First Nations to municipalities subject to all the same laws as other Canadians. The White Paper itself incited enormous political organization and resistance from First Nations, but the *Calder* decision meant that in a few short years the government's policy plans had to undergo even more of a reversal. Seven months after the *Calder* decision, the Government of Canada announced its new land claims negotiation policy. The newly developed Indian Claims Commission, in one of its early publications, even spoke of Prime Minister Pierre Trudeau's subsequent conversion:

The decision not to pursue the issue further through the courts seems to have been chiefly a result of a change of attitude by the Government. The Prime Minister, speaking to a delegation from the Union of British Columbia Indian Chiefs immediately after the Supreme Court decision, told them that the judgment had led him to modify his views. He appeared to be impressed with the minority judgment and remarked, "Perhaps you have more legal rights than we thought you had when we did the White Paper."<sup>99</sup>

---

rights or title could not exist without a supporting treaty or proclamation, despite the fact that a majority of SCC justices had declared this not to be the case concerning that particular substantive issue.

<sup>99</sup> Indian Claims Commission, *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings* (Ottawa: Research Resource Centre, Indian Claims Commission, 1975), 25.

As for *Calder*'s subsequent take-up beyond the B.C. courts, a first timorous finding of inherent Aboriginal title occurred in the 1979 case of *Baker Lake (Hamlet) v. Canada (Minister of Indians Affairs and Northern Development)*.<sup>100</sup> Though the *Calder* judgment offered little detail on the nature of Aboriginal title, the federal court judge found in favour of the Inuit in the area of Baker Lake, concluding that a portion of their claimed traditional lands was "subject to the aboriginal right and title of the Inuit to hunt and fish thereon."<sup>101</sup> Justice Mahoney, who also had no practical guidance on how to approach assessing title claims—from the *Calder* judgment or from any SCC decision since—did so in a rather retrograde fashion by borrowing from a 1919 JCPC judgment pertaining to southern Africa, and which spoke of Indigenous peoples in outdated social evolutionist terms.<sup>102</sup> Justice Mahoney himself wrote of the Inuit in rather unflattering terms in his judgment.<sup>103</sup> A few years later, in the 1984 case of *Guerin v. The Queen*, a majority of the SCC reiterated that First Nations' "interest in their land is a pre-existing legal right not created by the Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."<sup>104</sup> In view of the *Guerin* case's reinforcement of what was agreed on by a majority of justices in *Calder*, legal commentators such as John Hurley were affirming shortly thereafter that "this position must be regarded as settled law in Canada."<sup>105</sup>

---

<sup>100</sup> [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (F.C.T.D.) [*Baker Lake*].

<sup>101</sup> *Baker Lake*, at 524.

<sup>102</sup> *In re Southern Rhodesia*, [1919] A.C. 210 (P.C.).

<sup>103</sup> *Baker Lake*, at 559.

<sup>104</sup> *Guerin v. The Queen* [1984] 2 S.C.R. 335 at 379 [*Guerin*]. At 352, an opinion representing a sizeable minority of justices made mention of Aboriginal title's legal basis as being independent of section 18(1) of the *Indian Act* concerning reserves.

<sup>105</sup> John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*," *McGill Law Journal* 30, no. 3 (1985): 569.

The transformation instigated by the *Calder* case only marked the beginning of the installation of inherence, however, as significant change came with the constitutional reform of the early 1980s. Harry Daniels, former president of the Native Council of Canada,<sup>106</sup> wrote of his experience negotiating with the federal government during the latter's efforts to repatriate the Constitution, introduce a domestic amendment formula to it, and add a *Charter of Rights and Freedoms*. Likely encouraged by the growing Aboriginal political organization and the sea-change begun by *Calder*, the federal government stated in January, 1981 that it was prepared to introduce a provision in the Constitution stating that "the aboriginal rights of the aboriginal peoples of Canada are hereby recognized and confirmed."<sup>107</sup> While the president of the National Indian Brotherhood (NIB) stated that his organization found the provision acceptable, Daniels and the NCC held firm that the new provision must state clearly that the term "aboriginal peoples" included Indians, Inuit, and Métis—otherwise, the NCC would not support the repatriation of the Constitution. Ultimately, section 35(1) of the *Constitution Act, 1982* came to state that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."<sup>108</sup> Section 35(2) goes on to specify that, "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."<sup>109</sup>

The *Constitution Act, 1982* reinforced the burgeoning importance of inherence in the juridical notion of Aboriginal rights and title in several ways. Its reference to

---

<sup>106</sup> The NCC was the precursor to today's CAP, the Congress of Aboriginal Peoples, which at that time represented both Métis and non-status (unrecognized or unregistered) Indians.

<sup>107</sup> Harry Daniels, "Foreward," 12.

<sup>108</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>109</sup> Ibid.

“existing” rights and its conceptual distinction between aboriginal and treaty rights doubly allude to the fact that rights exist independently of what is stipulated in treaties and subsequently recognized in statute. Also, it explicitly names three categories of Aboriginal peoples, two of which were not managed, regulated, or recognized to the same extent as First Nations were by regimes of treaties, statute, or prior constitutional enactments—namely, the Inuit and the Métis. Lastly, constitutional affirmation itself is more robust than simple legislation, the latter being more susceptible to being changed according to the caprices of the federal government of the day.

The Supreme Court of Canada’s first significant assessment of this constitutional change came with *R. v. Sparrow* in 1990.<sup>110</sup> Reginald Sparrow, of the Musqueam First Nation in British Columbia, found his case ascend to the SCC after being charged with fishing with a drift net longer than was allowed under his band’s food fishing licence. The Musqueam were not a First Nation with whom the Crown had signed an historic treaty, although regulations made under authority of the *Fisheries Act* meant that the Musqueam were issued regulated and controlled food fishing licences—the one under which Reginald Sparrow was fishing in 1984 having been set for a duration of one year. Sparrow admitted to fishing with the net in question, although he defended himself “on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band’s licence was invalid in that it was inconsistent with s. 35(1) of the *Constitution Act, 1982*.<sup>111</sup>

At base, Sparrow’s right to fish was indeed construed by the SCC as an Aboriginal right under section 35(1). In essence, inherence was to be extended to

---

<sup>110</sup> [1990] 1 S.C.R. 1075 [*Sparrow*].

<sup>111</sup> *Ibid.*, at 1083.

practices that were categorized as Aboriginal rights—not just Aboriginal title—for both the notions of rights and title were emblematic of the Aboriginal *interest in the land* that exists independently of treaties, legislation, or the Royal Proclamation. The Court explicitly used the *Sparrow* case to explore “for the first time the scope of s. 35(1) of the Constitution Act, 1982” in order to “indicate its strength as a promise to the aboriginal peoples of Canada.”<sup>112</sup> Ultimately, the decision coauthored by Chief Justice Dickson and Justice La Forest on behalf of the entire Court states that the constitutional recognition of section 35(1) “affords aboriginal peoples constitutional protection against provincial legislative power,” and also places more complex limits on federal power over Aboriginal rights that will be explored in the following chapter.<sup>113</sup>

The *Sparrow* judgment that the two justices wrote for the Court also runs, at times, self-consciously critical of the law’s history. It states that “for many years, the rights of the Indians to their aboriginal lands—certainly as legal rights—were virtually ignored... By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.”<sup>114</sup> But if there is a *soupçon* of repentance in the SCC’s *Sparrow* judgment, there are also elements of the self-congratulatory and the self-exculpatory. The judgment goes on to discuss the White Paper and the subsequent influence on history exercised by the *Calder* case.<sup>115</sup> The justices then quote an article by legal scholar Noel Lyon on the significance and meaning of section 35, in which Lyon asserts that “the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section

---

<sup>112</sup> *Ibid.*, at 1082-1083.

<sup>113</sup> *Ibid.*, at 1105.

<sup>114</sup> *Ibid.*, at 1103. Emphasis in original.

<sup>115</sup> *Ibid.*, at 1103-1104.

35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law *and denied those courts the authority to question sovereign claims made by the Crown.*<sup>116</sup> Beyond that statement cited by the Court in *Sparrow*, Lyon goes on to claim in even more categorical terms that “those courts were bound to legitimize every sovereign act of suppression of aboriginal cultures.”<sup>117</sup> I have noted elsewhere, however, that claims of the moral impotence of the courts prior to the *Constitution Act, 1982* would seem to find a natural challenge in cases such as *Calder*, decided almost a decade *prior* to the repatriation of the Constitution. Perhaps even more damning would be the *Calder* judgment’s heavy reliance on American case law from the early nineteenth and twentieth centuries, implying that country’s adoption of its own version of a common law doctrine of Aboriginal title some 150 years in advance of *Calder*.<sup>118</sup>

## Reconciling the Law’s Irreconcilabilities

A jurisprudence of reconciliation does not necessarily have to denote repair and harmony—although the court may want to intimate this in its performance and suggest that a form of closure has been found, with each new precedent, for some controversial aspect of the ongoing colonial relationship. The body of case law often cited as representing the modern principles of treaty interpretation offers a good example of this kind of performance of reconciliation, in that this jurisprudence lends itself well to

---

<sup>116</sup> Noel Lyon, “An Essay on Constitutional Interpretation,” *Osgoode Hall Law Journal* 26, no. 1 (1988): 100. Emphasis added. Also cited in *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1106.

<sup>117</sup> Lyon, “Constitutional Interpretation,” 100.

<sup>118</sup> Jeremy Patzer, “Legitimate Concerns: Aboriginal Rights and the Limits of Canadian Justice,” in *Thinking About Justice: A Book of Readings*, eds. Kelly Gorkoff and Richard Jochelson (Black Point, NS: Fernwood Publishing, 2012).

encapsulation almost exclusively in sympathetic maxims. But a jurisprudence of reconciliation is not solely about repairing a relationship between Aboriginal and non-Aboriginal, or between the colonizer and the colonized, to the extent that it also centres on the need or the pursuit of rendering the difficult irreconcilabilities in colonial Aboriginal law legally congruent and internally consistent in some way. As we have seen with the opposing legal opinions in the *Calder* case, ironing out those wrinkles can take drastically different forms.

For Justice Judson and his two concurring colleagues, reconciling the legal incongruities of colonization meant recognizing the existence of Aboriginal title with the left hand while conveniently deducing with the right that it had been injusticiable extinguished by the Crown. This is a positivist resolution to colonization's contradictions *par excellence*, and it was much in keeping with arguments levelled against "Indian title" for at least a century. In these positivist strains of law, there is an emphasis on justice as being sourced in the expression of a sovereign will. In essence, if justice amounts to doing the sovereign's bidding, and the sovereign willed two different ways of colonizing, then there is no need for controversy. Thus if it were inferred that the Crown had intended a particular group's title be extinguished without treaty, then their title was seen as effectively and lawfully extinguished. This allowed for a jurisprudential conceptualization of implicit title extinguishment as a post-hoc legal justification for the colonization of those lands unceded by treaty. Treating with Indigenous populations was in this sense the choice and sole domain of the Crown, but it was not an obligation. Many of the legal arguments launched against treaties, rights, and title until the late 20<sup>th</sup> century thus amounted to two seemingly paradoxical conclusions: Aboriginal peoples'

occupation of land does have juridical dimensions, yet all of this is for naught should the Crown act otherwise.

The opposing judgment in *Calder*, offered by Justice Hall and his concurring colleagues, embodies an approach similar to that seen in *R. v. White and Bob* and *Simon v. The Queen* in that they are self-consciously aware of how these legalistic “fixes” leave the larger socio-normative and legal-ethical controversies of colonization unresolved. Although, in this instance, this is not to say that Hall resorts to “judicial activism” and “invention” while Judson plays the cautious jurist. Rather, Hall is readily able to find an abundance of precedents and historical circumstances that shore up his arguments in favour of the continued existence of the Aboriginal title of the Nisga’a. Some of these are inconvenient enough that Judson has to ignore them, such as when he conspicuously takes from *United States v. Santa Fe Pacific R. Co.* the assertion that the power of the sovereign to extinguish title is supreme, while ignoring its immediately subsequent assertions that such acts should be “clear and plain” and “extinction cannot be lightly implied.”<sup>119</sup> Such is the source of the law’s rich elasticity and indeterminacy.

Ultimately, though, the legal-ethically anxious positions in *White and Bob* and *Calder* won the day, and the systematized methods gradually developed in order to perform the reconciliation of the law’s various irreconcilabilities form the contemporary jurisprudence of Aboriginal law. In other words, the courts’ responses to the often unspoken question—‘How will this incongruity of history be reconciled?’—are reflected in the various doctrines of contemporary Aboriginal case law.

---

<sup>119</sup> 314 U.S. 339 at 353 and 354 (1941). For Judson’s selective use of this case, see *Calder*, at 334-335.

For a final observation on these developments in Aboriginal law: the result of the vast majority of SCC justices in *Calder* acquiescing to the independence of Aboriginal title from treaty, statute, or proclamation is that Canadian Aboriginal law found itself on the threshold of bestowing inherence upon Aboriginal title. This change was reified and further concretized with the advent of the *Constitution Act, 1982*, as well as the *Sparrow* decision. This had the potential to bring about significant change in Aboriginal law. As I have suggested, however, inherence is in its essence risky; it is adverse to control. It is something for which the terms are not pre-set, known in advance, or written in the heavens. Inherence in its purest form would simply beg the recognition that unceded Aboriginal land and sovereignty still belong to Aboriginal peoples (and consequently not to Canada)—and thus is not ready-made for the accommodation of Indigenous nationalisms, sovereigntist movements, or anti-colonial aspirations into the liberal settler state. And because the juridical opening created by inherence is complicating and unwieldy, from the perspective of the judiciary it demands management and governance.

## 6. Taming Inherence and the Constitution

I begin this chapter with a deeper examination of the exciting promise that was witnessed in late twentieth century Aboriginal law: on the one hand, an influential combination, established by the juridical field, of the new principles of treaty interpretation and the establishment of inherence, and on the other hand a major development in the political field which brought about the constitutional recognition of these legal changes and the affirmation of Aboriginal and treaty rights. What it demonstrates is that these historical changes, taken together in their elemental form, contained a latent potentiality to open upon a revolutionarily post-colonial transformation, and thus were risk-laden for the settler state. This underlying risk was made all the more acute in that the major constitutional change of 1982 which recognized Aboriginal and treaty rights was also intended to define and delineate those rights, but through historical political idiosyncrasy left them open-ended and undefined.

In the face of this underlying risk potential, and in the very moment of their *juridical* conceptualization, one therefore finds that inherence and constitutionalization arrive in an already managed and circumscribed form. They are governed with certain limitations on what justice can offer colonized peoples, but just as importantly with an approach led by the Supreme Court of Canada that conditions the various areas of Aboriginal law such that the anti-colonial struggles of Indigenous peoples remain objects of ongoing, indefinite legal governance. Among the mechanisms I examine here are legally justified infringements of rights and title, preserving the possibility of retrospectively finding that rights or title had been extinguished prior to the constitutional

protections of 1982, and the ability to continue to infringe rights and title during the long wait to have them recognized.

Yet, one of the sources of complexity in contemporary Aboriginal law lies in its ambivalence—the difficulty in categorizing it as purely advantageous or disadvantageous for dispossessed Indigenous peoples. In effect, for every advancement of Indigenous rights offered by the various strains of Aboriginal law, one finds the entrenchment of novel forms of enduring management. It is resolution without finality, or, as Kerry Wilkins has described it, a jurisprudence “to keep the ball in play.”<sup>1</sup>

## **Another Look at the Installation of Inherence**

As we have seen in the prior chapter, Canadian Aboriginal law of the late twentieth century underwent significant changes, many of which were to the relative advantage of Aboriginal groups desirous to claim rights over land, or rights on the land. With the development of the modern principles of treaty interpretation, not only would proven treaty promises be recognized and vest legally enforceable rights, but the judiciary’s manner of interpreting treaties saw a significant shift. After this area of case law had been developing for several decades, the 1996 Supreme Court case of *R. v. Badger* prompted Justice Cory, in the reasons he wrote on behalf of the majority of the Court, to enumerate the principles of treaty interpretation:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement

---

<sup>1</sup> Kerry Wilkins, “*R. v. Morris*: A Shot in the Dark and Its Repercussions,” *Indigenous Law Journal* 7, no. 1 (2008): 31.

whose nature is sacred... Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed... Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.<sup>2</sup>

Of course, the landmark case of *Calder v. British Columbia* represented for many the tidal shift in a sea-change for Aboriginal law in Canada.<sup>3</sup> Though the Nisga'a lost that case due to a technicality, six out of seven justices of the Supreme Court of Canada agreed that the common law recognized an inherent Aboriginal title that existed independently of treaty, executive order, or legislative enactment.<sup>4</sup>

But really, the *Calder* case was not the only source of influence in late twentieth century law. Perhaps pushed in part by the *Calder* case, and after intensive lobbying, advocacy, and negotiation on the part of Aboriginal groups, the *Constitution Act, 1982*

---

<sup>2</sup> *R. v. Badger* [1996] 1 S.C.R. 771 at 793-794 [*Badger*].

<sup>3</sup> [1973] S.C.R. 313 [*Calder*].

<sup>4</sup> Of course, while the justices claimed that the common law recognizes an inherent, pre-existing Aboriginal title, the nature of the performative power of the judiciary is such that this title does not come to exist in any practical, legal sense until the courts elect to recognize it.

was passed. In it, section 35(1) states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>5</sup> Section 35(2) goes on to specify that, “In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.”<sup>6</sup>

To have constitutional recognition makes Aboriginal and treaty rights that much more robust. It would purportedly mark the end of the era, the juridical expression of which we have seen in the prior chapter, in which simple (and sometimes apparently inadvertent) legislative changes made by the federal government could ride roughshod over rights and title. But the oft overlooked significance of this contemporary constitutional history lies in the inadvertently open-ended, undefined nature of the rights that were recognized and affirmed by the *Constitution Act, 1982*. In fact, the *Constitution Act, 1982* specified that a constitutional conference would be held in order to iron out through negotiation a number of details, including what was meant by “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.” According to Harry Daniels, former president of the Native Council of Canada and its successor, the Congress of Aboriginal Peoples—as well as participant in those constitutional negotiations—this “promise to hold a First Ministers’ conference to further elaborate the Aboriginal rights provision” is what “became section 37 of the *Constitution Act, 1982*.”

In effect, section 37(1) of the act had specified that “a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into

---

<sup>5</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>6</sup> *Ibid.*

force.”<sup>7</sup> Section 37(2) went on to state that “the conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.”<sup>8</sup> The act actually provided for the repeal of Part IV (section 37), pertaining to the constitutional conference, after one year. But then a Part IV.1, representing section 37.1, had called for at least two additional constitutional conferences with the same specifications, the first being held within three years after April 17, 1982, and the second within five years after that date, leaving a repeal date for this section in April, 1987. In actuality, a total of four conferences were held between 1983 and 1987, with none of them resulting in a political consensus amongst the many representatives involved.

Then came the era of the Meech Lake Accord. The negotiations, completed in 1987 between the prime minister and ten provincial premiers, marked a complete disregard for the unresolved Aboriginal issues in the *Constitution Act, 1982* and a choice to concentrate solely on the country’s relationship with the hold-out province of Quebec, which had not endorsed the act. Aboriginal leaders pushed back. As Harry Daniels expresses it, the Meech Lake Accord “was a reminder to Aboriginal people that what really concerned these national attempts at constitutional reform was the Quebec separatist agenda.”<sup>9</sup> But the Meech Lake Accord itself required unanimous ratification by

---

<sup>7</sup> *Constitution Act, 1982*, s. 37, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (now repealed).

<sup>8</sup> Ibid.

<sup>9</sup> Harry Daniels, “Foreward,” in *Who Are Canada’s Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, ed. Paul L.A.H. Chartrand (Saskatoon: Purich Publishing, 2002), 13.

parliament and all ten provincial legislatures. Because of the failure to consult and negotiate with Aboriginal peoples, Elijah Harper, an Oji-Cree member of Manitoba's Legislative Assembly, voted eight times against a motion that would allow the provincial assembly to hold a vote to ratify the accord. Once Elijah Harper was able to delay the vote beyond the 23 June, 1990 deadline for the Meech Lake Accord, the accord was effectively dead.

The Charlottetown Accord of 1992 was to follow, and the governments involved had seemingly learned from the mistakes made at Meech Lake. In addition to attempting to resolve the constitutional issues with Quebec, it also included an agreement on senate reform and an agreement on Aboriginal self-government. This time, the negotiations benefited from the participation of the Métis National Council, the Assembly of First Nations, the Native Council of Canada, and the Inuit Tapirisat of Canada. There was even a subset Métis Nation Accord negotiated between the Métis National Council (created in 1983 after a split with the Native Council of Canada), the federal government, and all the provinces from Ontario westward.<sup>10</sup> After criticisms about the controversial Meech Lake Accord having been negotiated between a small handful of leaders, however, the Charlottetown Accord was to earn ratification after succeeding in a national referendum, which it failed to do. Although these amendments had the potential to give significant substance to the mentions of Aboriginal and treaty rights in the *Constitution Act, 1982*, they went down with the accord as a whole—the irony of fate being that many historians attribute the Charlottetown Accord's failure to French-English tensions in that era rather than to relations between Aboriginal and non-Aboriginal societies.

---

<sup>10</sup> Ibid.

This, in brief, is the contemporary constitutional history that found the protection of Aboriginal and treaty rights solidified in the constitution, but with the contours and nature of said rights unpredictably open-ended and undefined. The uncertain and unsettled nature of this source of rights was accentuated by the fact that there were three categories of Aboriginal peoples listed in the act—Indian, Inuit, and Métis peoples—each with varying levels of treaty interrelation with the Crown, and varying levels of legislative regulation already set upon them by the Crown. Of the three categories, there was much more historical legislation and case law surrounding First Nations, unsurprisingly, given the extensive history of treaty-making and the application of the *Indian Act* to all recognized bands, including those with whom the Crown had not signed treaties. The Inuit and the Métis, however, had distinctly different legal histories.

Unfortunately, the legal status of the Métis prior to 1982 can be summed up all too easily: the idea of Métis rights or title was largely a non-starter, a question that would not even make it to the courts. The historical record shows the beginnings of this “oversight” to be far from unintentional. Exasperated by the resistance put up by the Métis when the Dominion of Canada was preparing to annex the Red River Colony, Sir John A. MacDonald, Canada’s first prime minister and first father of Confederation, wrote in personal correspondence in 1870 of his desire to have the Métis lost in an expanding Canada, suggesting that the “impulsive half-breeds have got spoilt by this émeute, and must be kept down by a strong hand until they are swamped by the influx of settlers.”<sup>11</sup> After crushing the second Métis resistance in the West—the North-West Resistance that took place in what is now Saskatchewan—and prior to the execution of

---

<sup>11</sup> Joseph Pope, ed., *Correspondence of Sir John Macdonald* (Toronto: Doubleday, Page & Company, 1921), 128.

Louis Riel, MacDonald made it clear that he had no intention of recognizing and respecting a distinct Métis people, stating in the House of Commons that “if they are Indians, they go with the tribe; if they are half-breeds they are whites, and they stand in exactly the same relation to the Hudson Bay Company and Canada as if they were altogether white.”<sup>12</sup> The agreement that had been struck between Louis Riel’s provisional government in the Red River Colony and the Dominion of Canada would bring about the *Manitoba Act* of 1870. It saw to the entry of the colony into Confederation as the fifth province—the first after the original four of Confederation—and guaranteed, amongst other things, official language status for French and English, publicly funded denominational schools, and land for the Métis. The moment the Crown took control of the new province (and sent in the North-West Mounted Police) coincided with a significant outward migration of many Métis, however. Historian Gerald Friesen states that this was due in part to the disappearance of the bison, but was “also the result of the poisonous atmosphere in Red River itself.”<sup>13</sup> Fred Shore has characterized the period after 1870 as one of dispossession, dispersal, and a “reign of terror.”<sup>14</sup> The combined immigration of European settlers and emigration of Métis was sufficient to cause a complete shift in demographic balance. While Lieutenant-Governor A.G. Archibald’s 1870 census showed the Métis as comprising 83 per cent of Manitoba’s population, by 1886 this was reduced to a mere 7 per cent.<sup>15</sup> In the early twentieth century, French was

---

<sup>12</sup> *Official Report of the Debates of the House of Commons of the Dominion of Canada*, Vol. 20 (6 July 1885) at 3113 (John A. MacDonald).

<sup>13</sup> Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), 196.

<sup>14</sup> Fred Shore, “The Emergence of the Metis Nation in Manitoba,” in *Metis Legacy: A Metis Historiography and Annotated Bibliography*, eds. Lawrence J. Barkwell, Leah Dorion and Darren R. Préfontaine (Winnipeg: Pemmican Publications, 2001), 75.

<sup>15</sup> Auguste Henri De Trémaudan, *Histoire de la Nation Métisse dans l’Ouest Canadien* (Winnipeg: Éditions des Plaines, 1984), 250.

removed as an official language and denominational schools were defunded by the provincial government.<sup>16</sup> The severely mismanaged system of land distribution for the Métis—the system of Métis scrip—became a source of historical controversy that would eventually be examined and condemned by the Supreme Court of Canada, but not until 2013.<sup>17</sup>

The relative disregard of Métis peoples that followed the *Manitoba Act* and the North-West Resistance—especially concerning issues of rights or title—would continue for well over a century. If it were not for the vicissitudes of history, it may well have continued on that way. According to Harry Daniels's account, the original idea for the section 35 clause of the *Constitution Act, 1982* proposed by the federal government was “The aboriginal rights of the aboriginal peoples of Canada are hereby recognized and confirmed”—with no mention of the Métis as being included amongst Canada’s Aboriginal peoples.<sup>18</sup> The representative of the National Indian Brotherhood was purportedly satisfied with this clause and did not agree with changing it, but Daniels insisted “that for the purposes of clarity, it must be stated that ‘aboriginal peoples’ includes Indians, Inuit, and Métis, and that the term not be left open to interpretation at a later date.”<sup>19</sup> Jean Chretien, who was minister of Justice at that time and negotiator for the federal government, stated that he could not support this—to which Daniels responded that he would mobilize his people in protest. After conferring with other

---

<sup>16</sup> Though legally they were two separate issues, the status of French and the funding of denominational schools were nevertheless closely related, since the separation between Protestant and Roman Catholic education largely followed linguistic lines as well. Within a relatively short period of history, then, Francophone Manitobans witnessed the removal of French as an official language, the defunding of (French-)Catholic public schools, and their demographic diminution with the arrival of many non-Francophones from outside of the province.

<sup>17</sup> *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.

<sup>18</sup> Daniels, “Forward,” 12.

<sup>19</sup> Ibid.

federal politicians on the committee and with Prime Minister Trudeau, Chretien stated later that day that the subsection enumerating the three categories of Aboriginal peoples would go into the act.<sup>20</sup>

Historically, there was no similar claim for the non-existence of the Inuit. It was largely a matter of geography that they remained far from mind for colonial powers until relatively late in history. They were the subject of a pivotal dispute between the federal government and the province of Quebec in the 1930s, however, as neither government wanted to assume responsibility for issues pertaining to the Inuit living in the far north of Quebec. The province maintained that Parliament's jurisdiction over "Indians, and lands reserved for the Indians" outlined in section 91(24) of the *Constitution Act, 1867* should be interpreted as including the Inuit, while, of course, the federal government argued for a more literalist interpretation that did not add the Inuit to its list of responsibilities. The two governments brought the *Reference Re Eskimos* case before the Supreme Court of Canada, and as a result the Inuit were declared to be, for the purposes of section 91(24) of the *Constitution Act, 1867*, Indians.<sup>21</sup> To be clear, the Inuit were neither incorporated into the *Indian Act* nor into the system of treaty-making. Rather, they were simply declared by the SCC to be a matter of federal jurisdiction and concern.<sup>22</sup> How the federal government

---

<sup>20</sup> Ibid., 13.

<sup>21</sup> *In The Matter of a Reference as To Whether The Term "Indians" in Head 24 of Section 91 of The British North America Act, 1867, Includes Eskimo Inhabitants of The Province of Quebec*, [1939] S.C.R. 104, 2 D.L.R. 417 [*Reference Re Eskimos*].

<sup>22</sup> This need for clarification about the technical meaning of the *Reference Re Eskimos* case finds a parallel today in the case of *Daniels v. Canada*, (2014) FCA 101, 371 D.L.R. (4th) 725. The *Daniels* case, launched by Harry Daniels, the Congress of Aboriginal Peoples, and several others sought to have the courts declare, as had been done for the Inuit, that Métis and non-status Indians were to be identified as "Indians" insofar as section 91(24) of the *Constitution Act, 1867* was concerned. That is to say that the claimants were seeking a declaration that Métis and non-status Indians were a matter of federal jurisdiction and concern—an obligation that the federal government wanted to avoid having concretized in law. Originally, Justice Phelan of the Federal Court, 2013 FC 6, [2013] 2 F.C.R. 268, did find in favour of both Métis and non-status Indians, but the Federal Court of Appeal overturned the trial judge on the point concerning

went about managing relations with the Inuit from that historical moment on differed significantly from the burdensome *Indian Act* system that had been developed for First Nations in the nineteenth century. But if one seeks explanation as to how in the mid-twentieth century the nature and resilience of Inuit rights could merit consideration by the courts—as we have seen with several of the cases outlined in the previous chapter—while Métis rights did not manage to achieve even this, there are perhaps several factors that are worth consideration. Firstly, the fact that the most major instance of historical treaty-making with Métis was funneled into an assimilative project of liberal government creation with individualized fee simple land entitlements for the Aboriginal signatories contrasted with the fact that the Inuit were clearly given recognition from early on as an Aboriginal people whose title—if any were to be recognized—would be communal in nature.<sup>23</sup> Secondly, it is arguable that the Métis were particular in the degree of Anglo-Canadian and Crown enmity they earned in their late nineteenth century struggles against an expansionist dominion government.

Relatedly, it is worthwhile understanding the conceptual difference between Aboriginal and treaty rights, for they are separate yet interrelated bodies of jurisprudence.

---

non-status Indians, arguing that the reasons for not recognizing status in those who claimed to be Indians varies greatly and thus the issue would require assessment on a case by case basis. Nevertheless, after both judgments there was broad misunderstanding as to what was actually being determined, with some accounts reporting that the Métis had been accorded Indian status and/or had been brought within the purview of the *Indian Act*, which is not at all the case. At time of writing, the *Daniels* case has been heard by the Supreme Court of Canada, but the Court has not yet delivered its judgment.

<sup>23</sup> None of this is to suggest that Métis peoples are beneficiaries of an Aboriginality invented in late modernity. As we have seen in prior chapters, there are historical instances in which the close relations between First Nations and Métis peoples were well in evidence, such as in the era and the region of the Robinson treaties examined in Chapter Two. There are also historical instances of persons shifting between the options of taking an Indian treaty or Métis scrip. To this one can add numerous historical references made by Crown representatives to the ‘Indian title’ of the Métis. For an (albeit dated) examination of some of the sources of Métis rights, see *Report of the Royal Commission on Aboriginal Peoples: Volume 4, Perspectives and Realities*, (Ottawa: Supply and Services Canada, 1996).

Treaty rights, simply enough, are rights to practices or activities that are sourced in treaties made with the Crown. Conventional legal perspective had traditionally held that those First Nations who signed “land cession” treaties with the Crown ceded their Aboriginal title over the land (and the Aboriginal rights that would accompany this), with the promise of certain rights agreed to in the treaty—such as the right to hunt, fish, and trap on land where they have a right of access throughout the territory ceded.<sup>24</sup> Thus those rights sourced in the treaty agreement are treaty rights. Aboriginal rights, like the notion of Aboriginal title that flowed from the *Calder* case, are rooted in inherence in the sense that they are based on Aboriginal peoples’ prior interest in the land that in the post-*Calder* era is recognized as continuing to exist independently of treaties, legislation, or the Royal Proclamation. Existing practices or activities of Aboriginal peoples can thus be asserted as Aboriginal rights in the juridical field and recognized by the judiciary as such. One might expect, then, that Aboriginal rights are deemed by the courts to exist only in those cases concerning Aboriginal groups who have not signed historical land cession treaties with the Crown, but this is not the case. The courts now operate on the assumption that Aboriginal rights disputes can arise either with those Aboriginal groups who do not have any treaties or treaty rights recognized—such as with Métis peoples—or even with treaty Aboriginal groups who wish to assert an Aboriginal right whose nature goes beyond the terms of an historical treaty.<sup>25</sup>

---

<sup>24</sup> The question of treaty rights in Manitoba, Saskatchewan, and Alberta, where Natural Resources Transfer Agreements were signed with the federal government, were complicated by the existence of clauses related to such rights in both the NRTAs and the subsequent natural resources acts enacted by those provinces. In essence, the terms in which the NRTAs describe hunting rights tend to differ from the original treaties. For the SCC’s interpretation of how the Alberta NRTA changed Treaty 8 hunting rights within the province, see *R. v. Badger*, [1996] 1 S.C.R. 771.

<sup>25</sup> See, for instance, *R. v. Pamajewon*, [1996] 2 S.C.R. 821. This case concerned two Ontario First Nations—one belonging to Treaty 3 and the other to the Robinson Huron Treaty of 1850—who asserted an inherent

As touched upon in the prior chapter, Aboriginal rights came to the fore with the 1990 case of *R. v. Sparrow*.<sup>26</sup> The unanimous judgment of the Supreme Court of Canada was directed at exploring “for the first time the scope of s. 35(1) of the Constitution Act, 1982” in order to “indicate its strength as a promise to the aboriginal peoples of Canada.”<sup>27</sup> The Supreme Court acknowledged that “history has shown, unfortunately all too well, that Canada’s aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests.”<sup>28</sup> If earlier courts had a tendency to allow statute—especially federal statute—to override and even extinguish rights prior to 1982, the SCC declared with the *Sparrow* decision that the constitutional status of Aboriginal rights enshrined in section 35 “suggests that a different approach must be taken.”<sup>29</sup> Through the Court’s interpretation of the *Constitution Act*’s recognition and affirmation of “existing” Aboriginal and treaty rights, the date that the 1982 constitution was enacted becomes an historical fulcrum with rights obtaining constitutional protection from that date on, but with no added retroactive protection of rights from prior to that date, and no revival of rights that may have been extinguished prior to its enactment.<sup>30</sup> Given that the Musqueam’s fishing activities had been regulated and restricted for years under the *Fisheries Act*, and the fact that the Crown put forth the argument that the pre-1982 regulatory regime was necessarily inconsistent with the continued existence of the

---

right of self-government in one case and an Aboriginal right to be self-regulating in its economic activities in the other. As will be discussed in the next chapter, the SCC did not find in their favour.

<sup>26</sup> [1990] 1 S.C.R. 1075 [*Sparrow*].

<sup>27</sup> *Ibid.*, at 1082-1083.

<sup>28</sup> *Ibid.*, at 1110.

<sup>29</sup> *Ibid.*, at 1111.

<sup>30</sup> *Ibid.*, at 1091.

Aboriginal right,<sup>31</sup> the SCC did have to deal with some finer points on the question of both regulation and extinguishment. The SCC's judgment for *Sparrow* affirms that regulation does not amount to extinguishment,<sup>32</sup> and favours Justice Hall's reasoning in the *Calder* case by reiterating his argument that the sovereign's intention to extinguish an Aboriginal right must be clear and plain<sup>33</sup>—thereby determining that Reginald Sparrow's Aboriginal right to fish had not been extinguished.<sup>34</sup>

Yet, while treaties, rights, and title form three of the more significant areas of transformation in contemporary Aboriginal law, there was the genesis of another related body of law which followed in the footsteps of *Calder* and the *Constitution Act, 1982*. It is the beginning of the development of *Crown obligations*: systematized sets of jurisprudential ethics—similar to the modern principles of treaty interpretation in that they are rooted in the notion of the *honour of the Crown*—to be imposed upon the Crown in its dealings with Aboriginal peoples in the new era of inherence. *Guerin v. The Queen*, although not decided by the Supreme Court of Canada until 1984, concerned a deal to lease out 162 acres of the Musqueam Indian Band's reserve land to the Shaughnessy Heights Golf Club, the negotiations for which began in the 1950s.<sup>35</sup> A Coast Salish group, the Musqueam's traditional territory is located on the lower mainland of British Columbia, in the Fraser River estuary, meaning that it coincides greatly with what is now known as the Greater Vancouver area. With this particular Musqueam reserve situated

---

<sup>31</sup> *Ibid.*, at 1097.

<sup>32</sup> *Ibid.*, at 1097-1098.

<sup>33</sup> *Ibid.*, at 1099.

<sup>34</sup> As we will see, though, this was only one determination made in a series of analyses in the SCC's decision, and so does not indicate that Reginald Sparrow won his case. Ultimately, the case was sent back to trial in order to be determined according to the new parameters set out by the SCC in its judgment.

<sup>35</sup> *Guerin v. The Queen* [1984] 2 S.C.R. 335 [*Guerin*].

within the City of Vancouver itself, it was described in 1955 by Mr. Anfield, the person in charge of the Indian Affairs branch in Vancouver at the time, as “undoubtedly the most potentially valuable 400 acres in Vancouver today.”<sup>36</sup>

The band agreed in principle with the idea of leasing out surplus land for the economic benefit of the First Nation, and thus authorized and paid for an appraisal of the land. (The band was not given a copy of the appraiser’s report, however.) Anfield began discussions with the Shaughnessy Heights Golf Club in 1956. Legally, and in line with Crown policy since the Royal Proclamation of 1763, the 162 acres needed to be “surrendered” to the Crown in order for it to be leased out on behalf of the Musqueam. At band meetings, the Musqueam had laid out for Indian Affairs the terms and conditions they would want met by any possible lease, but the surrender document created by the federal government made no reference to the proposed terms of a lease to the golf club. The lease that Anfield negotiated with the golf club was on much less favourable terms than that stipulated by the band, and the change in terms was made without seeking the band’s consent and without notifying them. The band council therefore ultimately voted in favour of a surrender to the Crown for the purposes of a lease agreement that had been changed behind their backs. In fact, the band was not given a copy of the lease until 1970, twelve years after the lease was signed.

The *Guerin* case began as an action against the Crown, launched by the Musqueam Indian Band, for breach of trust. The lower courts thus debated the issue of whether a true legal trust—a specific legal arrangement in which property is managed by one party for the benefit of another, and which creates an “equitable obligation

---

<sup>36</sup> Cited in *Guerin*, at 342. This quote is taken from a report Mr. Anfield submitted to the Indian Commissioner for British Columbia in 1955.

enforceable in a court of law”—existed in this situation.<sup>37</sup> Section 18(1) of the *Indian Act* became one of the elements that was pivotal to the case—especially the interpretation of the twice written turn of phrase “for the use and benefit of”—for it states that “reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.”<sup>38</sup> The trial court judge felt that it was a case of breach of trust, while the appeal court found in favour of the Crown’s argument that it was not, asserting that any obligation on the Crown was “political only and unenforceable in courts of equity.”<sup>39</sup> In other words, the appellate court deemed it an issue injusticiable in the courts.

When the case finally ascended to the Supreme Court, it was heard by eight SCC justices and generated three different opinions. Justice Dickson authored a judgment on behalf of himself and three other justices, arguing that the obligation of the Crown did not “amount to a trust in the private law sense.”<sup>40</sup> His reasoning was that the “law of trusts is a highly developed, specialized branch of the law. An express trust requires a settler, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here.”<sup>41</sup> But Justice Dickson’s judgment also argues that, while “the existence of an equitable obligation is the *sine qua non* for

---

<sup>37</sup> *Guerin*, at 373.

<sup>38</sup> *Indian Act*, R.S.C. 1985, c. I-5, s. 18(1).

<sup>39</sup> *Guerin*, at 350.

<sup>40</sup> *Ibid.*, at 376. There is an underlying distinction here that further complicated the Musqueam’s case, in that trust law is an aspect of private law, the latter being a fundamental category of law that regulates relationships between individuals, as opposed to public law, which deals with relations between persons (both natural and artificial) and the state. Justice Dickson examines this further at p.385.

<sup>41</sup> *Ibid.*, at 386.

liability,” such an obligation “is not, however, limited to relationships which can be strictly defined as ‘trusts’.”<sup>42</sup> His written reasons thus turn toward a consideration of “the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land.”<sup>43</sup> In particular, Dickson focuses on the fact that Aboriginal title, (as it came to be shaped by colonial policy and then the common law,) though surrenderable to the Crown, is otherwise inalienable. According to Kent McNeil, this restriction was an occasional policy in the earlier histories of the North American colonies—one largely aimed at pacifying First Nations and protecting them from unscrupulous speculators—and became *de rigueur* with the Royal Proclamation of 1763.<sup>44</sup> The statutory scheme to which Dickson refers reflects the fact that the policy was later concretized in the *Indian Act*, leading to a situation where the Musqueam were only able to benefit economically from leasing their surplus land by first surrendering the land to the Crown and relying on the latter to make the necessary arrangements on their behalf. Far from the Crown’s claim that its duty to act in the best interests of the Musqueam was a political issue, injusticiable for the courts, the judgment of Dickson and his concurring colleagues states that “where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary’s strict standard of conduct.”<sup>45</sup> For Dickson, then, “the surrender requirement, and the responsibility it entails, are the

---

<sup>42</sup> Ibid., at 375.

<sup>43</sup> Ibid., at 376.

<sup>44</sup> Kent McNeil, *Common Law Aboriginal Title* (New York: Clarendon Press, 1989), 221-224.

<sup>45</sup> Guerin, at 384.

source of a distinct fiduciary obligation owed by the Crown to the Indians.”<sup>46</sup> And though the fiduciary duty does not amount to a trust in the private law sense, it does put in place an equitable obligation enforceable by the courts such that, if breached, the Crown “will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.”<sup>47</sup> In short, though the four justices determined that a legal trust did not exist in this case, they opted for the recognition—the *creation*, in essence—of a fiduciary duty that had a remarkable resemblance to trust law in this case and produced an identical effect.

Another judgment in the *Guerin* case, written by Justice Wilson on behalf of herself and two other SCC justices, also held that the Crown owed a fiduciary duty to the band. According to Wilson this duty arose from the Crown’s control over the uses to which reserve lands could be put, and thus the fiduciary duty, although *recognized by* s.18(1) of the Indian Act, exists independently of it. But it is not a case of the Crown holding the land *in trust* for First Nation bands, because, in line with the conceptual limitations put on “Indian title” since the nineteenth century, “the Bands do not have the fee in the lands; their interest is a limited one.”<sup>48</sup> In essence, for Wilson it was not a circumstance indicative of a legal trustee-beneficiary relationship because, according to the conventional perspective at Canadian law, First Nations do not *own* their reserve land—ultimate title resides in the Crown and those lands are set apart for the benefit of the band. The judgment of Justice Wilson and her two colleagues does go further than that of Justice Dickson, however, in that she finds that “the Crown became a full-blown

---

<sup>46</sup> Ibid., at 376.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., at 349.

trustee by virtue of the surrender” and that “the fiduciary duty which existed at large under the section [18] to hold the land in the reserve for the use and benefit of the Band crystallized upon the surrender into an express trust of specific land for a specific purpose.”<sup>49</sup>

The disagreement on the particularities of trusteeship aside, the key here is that between these two sets of written reasons for the *Guerin* case, seven out of eight SCC justices affirmed the existence of a fiduciary duty toward First Nations. As alluded to above, the fiduciary duty that was instilled by the SCC in the *Guerin* case belongs to a strain of contemporary Aboriginal law that has come to be known by some as *Crown obligations*<sup>50</sup>—as indeed, there are other similar guidelines for Crown behaviour that have been established by the judiciary in the post-*Calder* era. They are precepts of what is becoming an increasingly systematized set of Aboriginal jurisprudential ethics meant to guide resolution in the era of inherence. In essence, with the *Guerin* case it was established as a Canadian common law principle that the Crown, when assuming a role as fiduciary, was to act *in the best interests* of First Nations, and that the relationship is trust-like rather than adversarial.

Given that the facts of the *Guerin* case applied specifically to the leasing of reserve land, questions arose as to the scope of the fiduciary duty. Would the applicability of the doctrine be limited to only those situations concerning financial ventures related to reserve land? On the contrary, the scope of the duty began to broaden with the SCC’s *Sparrow* decision six years later. The reader will recall that *Sparrow* did not involve

---

<sup>49</sup> Ibid., at 355.

<sup>50</sup> See John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed. (Markham: LexisNexis, 2012), 437.

financial dealings or issues pertaining to reserve land itself, but rather concerned how section 35 of the *Constitution Act, 1982* would be interpreted in Reginald Sparrow's assertion of an Aboriginal right to fish with a certain net forbidden by his Indian food fishing licence. In the unanimous *Sparrow* decision, the Court states that it would ground its general guiding principle for section 35 in principles enunciated in two key precedents. The first is the treaty case of *R. v. Taylor and Williams*, the judgment for which stated that, in approaching the terms of a treaty, "the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."<sup>51</sup> The second precedent was that of *Guerin* and the fiduciary duty. Because of its application as a "general guiding principle" in the *Sparrow* case and on section 35 writ large, John Borrows and Leonard Rotman draw the conclusion that "the Crown's fiduciary obligations to Aboriginal peoples extended beyond the surrender of Aboriginal lands to Crown-Native relations more generally and that those obligations were constitutionally entrenched in section 35(1) of the *Constitution Act, 1982*."<sup>52</sup> They also suggest that, "since fiduciary law does not require the existence of a legally recognizable property interest, there is no doctrinal difficulty in having hunting, trapping or fishing rights be the subject of a Crown fiduciary obligation to an Aboriginal group." In this sense, fiduciary law is now "capable of applying to a wider range of claims against the Crown than trust law."<sup>53</sup>

In the end, the Borrows and Rotman statement suggesting the applicability of the fiduciary duty to hunting, fishing, and trapping rights would likely find easier acceptance

---

<sup>51</sup> [1981] 62 C.C.C. (2d) 227 at 235, [1982] 34 O.R. (2d) 360 (On. C.A.) [*Taylor and Williams* cited to C.C.C.].

<sup>52</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 466.

<sup>53</sup> *Ibid.*, 463.

than their application of it “to Crown-Native relations more generally.” The Canadian courts faced a wave of litigation alleging breaches of the fiduciary duty, some varied examples of which were listed by the SCC as a cautious lesson in *Wewaykum Indian Band v. Canada*.<sup>54</sup> The *Wewaykum* judgment challenged the idea of the fiduciary duty “as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship,” stating that “this overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.”<sup>55</sup> More specifically, the Court applied the fiduciary duty concept to situations where the Crown’s role brings it to assume *discretionary control* over specific Aboriginal interests.

In the late twentieth century, then, the beginnings of the jurisprudential creation of Crown obligations rooted in the honour of the Crown accompanied the recognition of a larger set of Aboriginal peoples, some of whom had little in the way of a predefined rights regime through either case law or legislation, with a constitutional affirmation and protection of their Aboriginal and treaty rights, though much of those rights also remained undefined due to historical idiosyncrasy. This introduced an element of latent potentiality in both rights and title, with risk to the colonial settler state manifested in both the multiplicity of places that rights or title assertions could arise, and also in their inchoate and undetermined nature. This was the destabilizing and risk-laden potentiality of Aboriginal rights and title in that critical era, and Aboriginal title and Aboriginal rights, because they remained undefined through the processes of negotiation and constitutional wrangling from the late 1970s to the early 1990s, had been left to the courts to delineate.

---

<sup>54</sup> *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at 287-288 [*Wewaykum*].

<sup>55</sup> *Wewaykum*, at 286.

Inherence is a mechanism fundamental enough to express a basic commonality between both rights and title. It is, in essence, the recognition of an interest of some sort that continues, simply because it remains unceded and is recognized as such. The nature of the dispute that arises—whether it be over a discrete activity on the land such as hunting, or the claim that the land itself still belongs to an Indigenous people—dictates whether a case concerns rights or title, but the underlying insistence on the recognition of a continuing, unceded interest remains the same. For the liberal settler state, however, the legal controversies surrounding modern treaty law pose similar risks as inherent Aboriginal rights and title—in the sense that treaty law is surrounded at all borders by Aboriginal rights (because treaty First Nations can still launch Aboriginal rights cases), but also in the sense that an innate risk came to permeate the promise offered by the modern principles of treaty interpretation. Indeed, the idea of being obliged to the myriad promises of Crown representatives who traversed so many frontiers over a span of centuries could be daunting within a liberal settler state, where governments and various non-Aboriginal interests might prefer to recognize no collective obligations to Aboriginal peoples at all. The stakes could only have been raised with the elevation of these rights—both established rights and rights yet to be proven—to constitutional status. The dynamic of having this overt commitment to hold true to centuries of promises elevated to constitutional status makes it all the more inviting for the juridical field to implicitly condition treaty jurisprudence—like the other strains of Aboriginal law—such that it remains a continuing object of legal governance.

In effect, I ended the previous chapter with the premise that inherence, by its very nature, is risky. Such an observation is especially true of, and made in the light of,

inherence as an unconditional purity—that is to say, an inherence that amounts to an epiphanic *prise de conscience* and acknowledgement that title unceded is title untransferred, and that acquisitions premised on illegitimate treaties suffer the same fate as though no accord had been signed at all. Pure inherence offers a glimpse of illegitimacy, allowing one to see the insufficiently acknowledged backdrop of colonial politics for what it is: the raw instrumentalities of dispossession and usurpation, the duplicitous legalisms, the evaded questions, and the half-measures of resolution.

Inherence as an unconditional purity is not the inherence one encounters in contemporary Aboriginal law, however. This epiphanic version of inherence—one that would amount to complete historical rupture—exists only as a potentiality, as an unspoken haunting and anxiety, and, for both the political and juridical orders of the liberal settler state and the pragmatic practices that they are willing to put in place, as an impossibility.

There is a parallel here with Jacques Derrida's examination of the concept of forgiveness in what he calls the Abrahamic religious heritage—an examination he undertakes because of the underlying influence of the concept in contemporary practices of transitional justice and national reconciliation.<sup>56</sup> Derrida identifies an equivocation in the tradition of the three monotheistic religions of the Book, describing two competing, irreconcilable notions of forgiveness that are at the same time inseparable. One is forgiveness as an unconditional purity—"a gracious gift, without exchange and without condition"<sup>57</sup>—and the other is forgiveness under the "*conditional* logic of the *exchange*,"<sup>58</sup> with "calculated transactions, with conditions, and, as Kant would say, with

---

<sup>56</sup> Jacques Derrida, *On Cosmopolitanism and Forgiveness* (New York: Routledge, 2001).

<sup>57</sup> Ibid., 44.

<sup>58</sup> Ibid., 34 (emphasis in original).

hypothetical imperatives,”<sup>59</sup> all “at the service of determined finalities.”<sup>60</sup> It is this pragmatic order of conditions, so heterogeneous to the epiphanic madness of unconditional forgiveness—yet indissociable from it—which allows forgiveness “to inscribe itself in history, law, politics, existence itself,”<sup>61</sup> for “there is a sort of ‘madness’ which the juridico-political cannot approach, much less appropriate.”<sup>62</sup> In the end, observes Derrida, “it is always the same concern: to see to it that the nation survives its discords, that the traumatisms give way to the work of mourning, and that the Nation-State not be overcome by paralysis.”<sup>63</sup>

Just as with forgiveness in transitional justice, so too with inherence in Aboriginal law. Inherence *as an unconditional purity* serves as a mere haunting of the pragmatic inherence that is actually deployed in the workings of the law, this latter being an inherence that exists within *the order of conditions*. What I did not explain in the prior chapter, then, is that as inherence surfaces in late twentieth century Aboriginal law, it has already taken a juridically managed and circumscribed form. It is governed from its very inception, with the inscription of certain limitations on what justice can offer colonized peoples, but also with legal formulae that condition the various sites of legal conflict between Aboriginal peoples and the Crown such that they remain continuing objects of legal governance.

Take, for instance, the 1973 *Calder* case’s ground-breaking recognition of title for the Nisga’a, a B.C. First Nation which had never ceded either land or autonomy through

---

<sup>59</sup> Ibid., 39.

<sup>60</sup> Ibid., 31.

<sup>61</sup> Ibid., 44.

<sup>62</sup> Ibid., 55.

<sup>63</sup> Ibid., 41.

treaty with the Crown. Justice Hall, in his written opinion in favour of the Nisga'a, writes that, “When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants described it as ‘an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada.’”<sup>64</sup> Far from asserting that the Crown has no title or sovereignty over unceded Nisga'a territory, this description of Aboriginal title asserts that the Crown has a radical, underlying, and ultimate title. It is also a far cry from Kent McNeil's explanation of the doctrine of tenures in English common law, which suggests that when the Crown acquires sovereignty over a territory, title to *unoccupied land* would vest in the Crown, but *full ownership* (fee simple estates) would be accorded to the prior inhabitants over those lands that they occupied.<sup>65</sup>

For all its momentousness, then, the *Calder* decision began conceiving of the Nisga'a's continuing possession of their *unceded* territory in terms limited to the conventions of late nineteenth century jurisprudence. It was still merely a right of usage layered over the Crown's purported underlying title. It was a strict imposition of both incommensurability and injusticiability—in that the legal relationship that Aboriginal peoples had with their land was cast as lesser than other forms of title, and in that there was no explanation as to how the Crown legitimately acquired a radical, underlying title

---

<sup>64</sup> *Calder*, at 352.

<sup>65</sup> See McNeil, *Common Law Aboriginal Title*, 171-174, 220-221. In other words, the acquisition of sovereignty concerns the transfer of a paramount lordship, not the transfer of title to all lands. As new subjects of the Crown, Aboriginal peoples would have been granted *full ownership* of the lands that they occupied. McNeil also explores the different ways as to how ownership of lands could have been (or could be) accorded to Aboriginal peoples, given that some peoples possessed the land communally while others recognized forms of property rights amongst themselves.

to the land when there existed no historical instance of either conquest or cession. It was also, however, the notion of title put forth by the claimants themselves. This is another unfortunate limitation of Aboriginal law—and of common law systems in general. The principle of *stare decisis*—the respect of precedent, especially precedent set by higher courts—dictates the basis on which subsequent disputes are obliged to premise themselves. The manner in which these questions of justice are framed, the limitations placed on their resolution as well as the notions of Aboriginality contained within them are all established by the courts. The conditionalities that allow the nation to survive its discords, to borrow Derrida's terminology, form obligatory passage points that claimants must tacitly accept in order to pursue the recognition of rights or title within the juridical field. In this way the courts effectively limit how we perceive, characterize, and pursue legal resolution in the settler colonial context. Major rights and title cases in the decades that ensued have reiterated, repeatedly but ever so briefly, that kernel of injusticiable colonial instrumentality that guards the legitimacy of Crown sovereignty from being questioned. Concerning a region of Canada ungraced by treaty and unencumbered by conquest, the *Sparrow* judgment still reiterates 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.”<sup>66</sup>

Although *Calder* was not the final word on defining Aboriginal title, the next definition to be dealt with was that of Aboriginal rights—more than two decades after *Calder*. As I touched upon above, by the 1980s and 1990s the unwieldy and risky potentiality underlying Aboriginal rights jurisprudence lay in the fact that section 35 the

---

<sup>66</sup> *Sparrow*, at 1103.

*Constitution Act, 1982* recognized and affirmed both treaty and Aboriginal rights for First Nations, Inuit, and Métis peoples, which would have suggested section 35 rights jurisprudence as a possible avenue for even those groups who had been most overlooked by treaty-making, legislation, or government policy. Of course, the idiosyncrasies of political and constitutional history meant that those Aboriginal rights remained wholly undefined. In effect, the complete silence of section 35 on the definition of Aboriginal rights only accentuated the challenge that the SCC was facing when it heard the case of *R. v. Van der Peet*.<sup>67</sup> The case made its way to the Supreme Court of Canada by 1996, with the substance of the charges being that Dorothy Van der Peet, a member of the Sto:lo First Nation in British Columbia, had sold ten fish caught under the authority of an Indian food fish licence which prohibited the sale or barter of any fish caught. These facts were not contested by Van der Peet. Rather, her defence was based on the assertion that she was exercising an existing Aboriginal right *to sell* fish.—a commercial form of Aboriginal right that often renders governments, courts, and the majority society ill at ease. The *Van der Peet* case also suggests that the opening created by the field of Aboriginal rights, while it was still undefined, had the potential to be attractive to groups with sovereigntist inclinations seeking to establish their autonomy and self-sufficiency through key rights assertions in the courts. Given Canada's treaty history, it would be of no surprise to anyone if activities such as hunting, fishing, and trapping were to be defined as Aboriginal rights, but why stop there? In earlier colonial history, the Crown outwardly acknowledged the independence and self-determination of Aboriginal peoples on their land—this was the vision implied in the metaphor of the two row wampum—and

---

<sup>67</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

trade existed both before and after the arrival of Europeans. And what objective, pre-existing principle was there to delineate what was, and what was not, an Aboriginal right? In effect, Chris Andersen maintains that the SCC, in that post-*Sparrow* juridical moment, could have opted to protect Aboriginal autonomy and self-determination.<sup>68</sup> Not surprisingly, this it did not do.

Ultimately, the majority judgment authored by Chief Justice Lamer specifies that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>69</sup> This has come to be known as the *Van der Peet* test, embodying the cultural rights approach to determining Aboriginal rights. For the Court, however, the “distinctive culture” of Aboriginal peoples refers exclusively to their pre-contact societies. Aboriginal rights therefore consist of those integral practices, customs, and traditions that have continuity with practices that existed prior to contact with European society—a convenient definition that has the overall effect, despite claims to the contrary by the SCC, of keeping the inherent and otherwise unpredictable rights of Canada’s Aboriginal peoples somewhat quaint and controlled. In the following chapter, I will examine in further detail some of the more salient problems with the juridical development of what I call the *Aboriginal cultural-legal subject* that is implicit in contemporary jurisprudence. For now, suffice it to say that this increasingly pervasive and prevalent subjectivity has a distinctly problematic relationship to time, cultural change, and cultural adaptation—despite the fact that Aboriginal cultures continue to exist and evolve in the present. In

---

<sup>68</sup> Chris Andersen, “Residual Tensions of Empire: Contemporary Métis Communities and the Canadian Judicial Imagination,” in *Reconfiguring Aboriginal-State Relations. Canada: The State of the Federation 2003*, ed. Michael Murphy (Montreal and Kingston: McGill-Queen’s University Press, 2005).

<sup>69</sup> *Van der Peet*, at 549.

addition, this type of rights jurisprudence has enormous difficulty speaking to the issues facing Aboriginal peoples as self-determining *polities*. But, relatedly, so do the courts.

One year later, in 1997, the Supreme Court of Canada was brought to consider the topic of Aboriginal title once again with the case of *Delgamuukw v. British Columbia*.<sup>70</sup> The *Delgamuukw* decision gave more substance and definition to the concept of Aboriginal title—a concept which had been merely suggested, and its character not entirely agreed upon, in the 1973 *Calder* decision. It affirmed definitively the existence of Aboriginal title, and actually offered a conception of title that was more robust than the suggestions that were offered in the *Calder* case. The Crown had continued to argue for a definition of title that was akin to the right of usufruct that had been around since the nineteenth century, with the contemporary adaptation that the uses to which the land could be put were exemplified by the quaint cultural rights that could be established through the *Van der Peet* test. Aboriginal title in this sense would simply amount to a bundle of Aboriginal rights, but with no right to exclusive *occupation* of the land. Barring that, it argued that a definition of Aboriginal title that did include exclusive occupation of land should still be limited to those activities which are deemed Aboriginal rights through the cultural rights formula.<sup>71</sup> Chief Justice Lamer, who authored the majority judgment in *Delgamuukw*, found against the Crown's arguments and offered this as the content of Aboriginal title:

Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and

---

<sup>70</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

<sup>71</sup> *Ibid.*, at 1080.

occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>72</sup>

Still, the *Delgamuukw* decision uses a term that has become the watchword for the juridical imposition of incommensurability upon Aboriginal rights and title, referring to it is a *sui generis* interest in land. In the contemporary era, the Latin term *sui generis*—meaning *of its own kind* or *unique*—is the watchword of Aboriginal law and the prime signifier of incommensurability. All strains and doctrines of Aboriginal law have now found themselves affixed with the label of *sui generis*: *Guerin v. The Queen* first invoked it concerning Aboriginal title,<sup>73</sup> *Simon v. The Queen* for treaty law,<sup>74</sup> *R. v. Sparrow* for Aboriginal rights,<sup>75</sup> along with nearly every major rights, title, or treaty case to follow in their wake. There are several reasons why Aboriginal title is not commensurable with conventional full ownership: notably, because the Crown is still seen as possessing a radical, underlying title to the land, and because, in addition to its own cultural restriction of sorts that I will examine further below, it is held communally and can only be alienated to the Crown.

What is most striking about *Delgamuukw* is that “aboriginal title also encompass [sic] mineral rights” and that “lands held pursuant to aboriginal title should be capable of exploitation in the same way.”<sup>76</sup> This brings it into stark contrast with the legal situation

---

<sup>72</sup> *Ibid.*, at 1083.

<sup>73</sup> *Guerin*, at 382, 385, and 387.

<sup>74</sup> [1985] 2 S.C.R. 387 at 404 [*Simon*].

<sup>75</sup> *Sparrow*, at 1112.

<sup>76</sup> *Delgamuukw*, at 1015.

of First Nations who have signed historical treaties with the Crown. As I outlined in chapter two, even those First Nations who in the nineteenth century negotiated hard for a share of the wealth that their land offered were legalistically swindled of such benefits. In the 1840s, Ojibwa bands in what is now Ontario even brought mining entrepreneurs to mineral and metal deposits and showed samples to Indian agents. They knew the value of these commodities to Europeans and hoped to partner in the development of a resource in order to find “a secure and valued place in Canadian society.”<sup>77</sup> The conventional legal perspective, however, has been that those historic land surrender treaties completely extinguished their Aboriginal title to the land, leaving only the limited treaty rights—such as hunting, fishing, and trapping—enumerated in the treaties themselves. With the recognition of mineral rights in modern Aboriginal title, then, there is a sharp division between two categories of Aboriginal group and the types of economic opportunity presented to them. Those whose Aboriginal title is seen as having been extinguished by an historic treaty or agreement—such as the western Métis and many First Nations from Ontario through to Alberta—are often left with little in the way of economic viability as they are forced to watch non-Aboriginal interests exploit the resources of their traditional territories. On the other hand, those groups who have a *prima facie* case for demonstrating an unceded Aboriginal title are poised to be able to benefit from the wealth that their lands have to offer—albeit after a long and arduous process of having that title recognized in the courts or through a modern treaty/land claims process. It is a glaring

---

<sup>77</sup> Janet Chute, *The Legacy of Shingwaukonsé: A Century of Native Leadership*, (Toronto: University of Toronto Press, 1998), 110.

disparity with a distinctly legal foundation at its root that attracts insufficient attention,<sup>78</sup> although there has been some limited debate on the idea of resource revenue sharing with Aboriginal peoples<sup>79</sup>—something which the governments of Alberta and Saskatchewan have recently said they are unwilling to consider.<sup>80</sup>

The majority's judgment for *Delgamuukw* argues that Aboriginal title can compete on an equal footing with full private ownership, but is in its own category situated somewhere between full title and a right of use. It is impossible to know with certainty why or how the majority of the Court's justices decided on a definition of Aboriginal title that is much more flexible and permissive than just the exclusive occupation of land for purposes of hunting, fishing, and trapping. It is interesting to note, however, that if the quainter version of title limited to traditional activities had been put into law, it would create the potential for the majority of the province of British Columbia (and numerous other regions of Canada) to be essentially locked away from resource extraction and industrial development in perpetuity. With a concept of Aboriginal title that can encompass resource development, the recognition of Aboriginal title does not necessarily preclude the economic development so valued by the liberal settler state, even if it may now have to take place in partnership with Indigenous title holders. Indeed, in the historical moment of crisis a new justice is offered, but for every significant

---

<sup>78</sup> For a notable exception, see Nancy Kleer and Judith Rae, "Divided We Fall: Tsilhqot'in and the Historic Treaties," *OKT Law* (blog), July 11, 2014, <http://www.oktlaw.com/blog/divided-we-fall-tsilhqotin-and-the-historic-treaties/>.

<sup>79</sup> See Ken Coates, *Sharing the Wealth: How Resource Revenue Agreements can Honour Treaties, Improve Communities, and Facilitate Canadian Development*, Aboriginal Canada and the Natural Resources Economy Series (Ottawa: Macdonald-Laurier Institute, 2015).

<sup>80</sup> Gary Mason, "Aboriginal revenue sharing is an idea whose time has come," *The Globe and Mail*, January 23, 2015. Although there has been no clear signal of policy change as of yet, several months after the article Alberta elected a new provincial NDP government, ending decades of Progressive Conservative rule.

advancement the ensconce<sup>ment</sup> of implicit forms of management. There are thus some important aspects of these and other limitations that I will examine below.

## **Objects of Continuing Legal Governance: Extinguishment and Infringement**

In looking at the details of the *Sparrow* case on Aboriginal rights, there is an indication here as well that the juridical field's management of inherence was concomitant with its very inception. As we have already seen, the SCC's interpretation of the reference to "existing" Aboriginal rights in the *Constitution Act, 1982* was that the only rights which are constitutionally protected are those that were still in existence on April 17, 1982. Although the SCC also adopted the standard of requiring clear and plain evidence of rights extinguishment, this nevertheless means that there remains the ever-present possibility of retrospectively "discovering" that a claimed right has simply never existed, or even that a right has already been extinguished in the pre-1982 era.<sup>81</sup> This holds true for Aboriginal title and treaty rights as well—the past essentially becomes hazardous terrain over which the Crown and Aboriginal groups dispute whether a right continues to exist. In this sense, by predication Aboriginal rights and title jurisprudence on a pervasive

---

<sup>81</sup> Since *Sparrow* was meant to determine the strength of section 35 as a promise to Aboriginal peoples, many assume that it is in this decision that the SCC declared extinguishment dead in the post-1982 era. If one reads the language closely, however, the SCC was surprisingly evasive on the issue. Chief Justice Lamer enigmatically states that the constitutionalization of Aboriginal rights "suggests that a different approach must be taken," *Sparrow*, at 1111. It was not until *Van der Peet* that Lamer states that "Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by the Court in Sparrow..." See *Van der Peet*, at 538.

uncertainty over the initial existence of a right, extinguishment in the post-1982 era has essentially returned through the back door.<sup>82</sup>

But if the Supreme Court opened the back door, it opened a window as well. While the Court did not accept the Crown's argument that past regulation of Aboriginal practices should be interpreted as an intention to extinguish a right, it also simultaneously determined that the recognition and affirmation of Aboriginal rights in the *Constitution Act, 1982* would allow for the continuing regulation and legal restriction of those rights.<sup>83</sup> This is so despite the fact that section 52(1) of the act indicates that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect,"<sup>84</sup> and despite the fact that section 35(1) even supersedes section 1 of the *Charter of Rights and Freedoms*. According to the *Sparrow* decision, while section 35(1) offers Aboriginal peoples constitutional protection against provincial legislative power,<sup>85</sup> "Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*."<sup>86</sup> Thus, although the *Sparrow* case was much celebrated as a significant coup for rights protection, it also introduced the now essential Aboriginal law doctrine of *infringement* and saw to it that the Crown would forevermore have a certain degree of control over them.

---

<sup>82</sup> See Jeremy Patzer, "Legitimate Concerns: Aboriginal Rights and the Limits of Canadian Justice," in *Thinking About Justice: A Book of Readings*, eds. Kelly Gorkoff and Richard Jochelson (Black Point, NS: Fernwood Publishing, 2012); and Jeremy Patzer, "Even When We're Winning, Are We Losing? Métis Rights in Canadian Courts," in *Métis in Canada: History, Identity, Law and Politics*, eds. Christopher Adams, Gregg Dahl and Ian Peach (Edmonton: University of Alberta Press, 2013).

<sup>83</sup> *Sparrow*, at 1109.

<sup>84</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>85</sup> *Sparrow*, at 1105.

<sup>86</sup> *Ibid.*, at 1109.

In effect, the SCC asserted that section 52 of the *Constitution Act, 1982* will not automatically render laws and regulations that infringe upon Aboriginal rights of no force or effect. Rather, a rights-infringing piece of legislation or regulatory regime “will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).”<sup>87</sup> The *Sparrow* judgment has thus become prominent for the justificatory test it provided for the analysis of potential infringements of Aboriginal rights. It is an interesting foray that the Court leads with the *Sparrow* test, to be sure, for it admits freely that “section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights.”<sup>88</sup> This is an odd way to frame the issue, for, as we have seen, a plain interpretation of section 52(1) of the *Constitution Act, 1982*, which gives the entire act its vigour, is that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>89</sup> I would counter the SCC’s framing of the issue by pointing out that what the *Constitution Act, 1982* lacks is any explicit authorization for the development of a basis from which the constitutional protection of Aboriginal and treaty rights may be circumvented or abrogated.<sup>90</sup> Nevertheless, the Court developed justifiable infringement as a new area of Aboriginal law as the installation of inherence and a constitutionalization without defined parameters were poised to make rights and title within the liberal settler state unmanageable.

---

<sup>87</sup> Ibid., at 1109.

<sup>88</sup> Ibid., at 1077.

<sup>89</sup> *Constitution Act, 1982*, s. 52, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<sup>90</sup> While the *Canadian Charter of Rights and Freedoms* states that it is “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” it must be remembered that section 35 Aboriginal and treaty rights are not *Charter* rights. In fact, they supersede the *Charter of Rights and Freedoms*. There is no mention of limits in section 52, which gives the entire act and section 35 their vigour.

Broadly, the test put forth in *Sparrow* consists in answering the following questions in sequence:

- Is there a *prima facie* infringement of an existing s. 35(1) Aboriginal right?<sup>91</sup>
- If so, is the infringement of the Aboriginal right justified?<sup>92</sup>

The first question is not dealt with in great detail in the Sparrow judgment, given that fishing for food was readily assumed to be an Aboriginal right of the Musqueam, and given that the regulations in question did effectively limit Reginald Sparrow's exercise of that right. The second issue was the more pivotal one for the Court, and so the *Sparrow* judgment does offer some underlying principles that the courts should keep in mind in assessing whether an infringement of an Aboriginal right is justified. These principles include the assertion that the honour of the Crown is at stake in its dealings with Aboriginal peoples,<sup>93</sup> the notion that the Aboriginal right should be given a priority allocation over non-Aboriginal fishing,<sup>94</sup> as well as evaluative sub-questions such as whether there has been as little infringement of the right as possible, whether fair compensation has been made available to the Aboriginal rights holders, and whether the Aboriginal group in question has been consulted with respect to any infringing measures being implemented.<sup>95</sup> In this vein, the SCC also suggests that infringing legislative objectives which aim at conservation and natural resource management would be valid, as would preventing the exercise of rights "that would cause harm to the general populace

---

<sup>91</sup> *Sparrow*, at 1111.

<sup>92</sup> *Ibid.*, at 1113.

<sup>93</sup> *Sparrow*, at 1114. The *Sparrow* judgment attributes the principle of the honour of the Crown to the 1981 case of *Taylor and Williams*. It then goes on to cite *Guerin* in invoking "the special trust relationship and the responsibility of the government vis-à-vis aborigines."

<sup>94</sup> *Sparrow*, at 1114-1116.

<sup>95</sup> *Ibid.*, at 1119.

or to aboriginal peoples themselves.”<sup>96</sup> It also states that the justification of something as being “in the public interest” is “so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”<sup>97</sup> But beyond these few guidelines, and as with so much in the reconciliatory legal-ethics of contemporary Aboriginal law, one might be inclined to ask whether *Sparrow*’s justificatory test offers anything of an empirically exacting nature, or merely the appearance of one which is in fact underpinned with a veiled elasticity.<sup>98</sup>

This mechanism of infringement has endured and proliferated beyond *Sparrow* and Aboriginal rights case law. It has come to tame the risks inherent in contemporary treaty jurisprudence as well. This importation occurred in 1997 with the Alberta case of *R. v. Badger*. The *Badger* case will be examined in the next chapter for the problematic bind that the issue of exercising treaty hunting rights on privately owned land posed for the courts, but in this case the Supreme Court of Canada also had to decide on the issue of whether three Treaty 8 hunters should be subject to sections 26(1) and 27(1) of Alberta’s *Wildlife Act*—the first requiring a hunting licence, and the second establishing hunting seasons. Even though the Court admits that the Crown led no evidence pertaining to a justification based on conservation,<sup>99</sup> both the majority decision and the dissenting opinion written for the case conclude unquestioningly that, in general, the *Sparrow* test should be adopted for justifying the infringement of constitutionally protected treaty rights as well.<sup>100</sup>

---

<sup>96</sup> *Ibid.*, at 1113.

<sup>97</sup> *Ibid.*

<sup>98</sup> The issue of indeterminacy in contemporary Aboriginal law is a significant and recurring one, and will be examined more thoroughly in the next chapter.

<sup>99</sup> *Badger*, at 822.

<sup>100</sup> See *Badger*, at 820, for the argument of the majority judgment.

This is so despite the fact that there are troubling inconsistencies and unanswered questions underlying the Supreme Court’s proliferation of infringement jurisprudence. With the *Sparrow* case, part of what the SCC attempted to do was resolve two aspects of the Canadian Constitution: the recognition and affirmation of inherent Aboriginal rights in the *Constitution Act, 1982* on the one hand, and the federal head of power to legislate in respect of “Indians, and Lands reserved for the Indians” in the *Constitution Act, 1867* on the other.<sup>101</sup> In *Sparrow*, of course, the conflict was between Reginald Sparrow’s assertion of an Aboriginal right to fish (with the particular net that he had used) and regulations made under the federal *Fisheries Act*. But in *Badger*, the treaty rights of the claimants were pitted against a *provincial* wildlife act, after the Court had already stated in *Sparrow* that section 35 accorded constitutional protection of rights against provincial legislative power.<sup>102</sup> As Kent McNeil has pointed out, however, the rationale that the *Badger* decision used to bring the concept of infringement into the provincial domain (and, as it so happens, into treaty rights) concerned constitutional documents particular to Alberta, Saskatchewan, and Manitoba: namely, the Natural Resources Transfer Agreements, which “gave the prairie provinces limited constitutional jurisdiction over Indian hunting.”<sup>103</sup> Problematically, however, the *Badger* case’s geographically limited justification of the idea of provincial infringement was indiscriminately applied in *R. v. Côté*, a rights case which arose in Quebec, outside the context of the NRTAs.<sup>104</sup> Indeed, the *Côté* decision glosses over entirely the specifics of the rationale that allowed the

---

<sup>101</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>102</sup> *Sparrow*, at 1105.

<sup>103</sup> Kent McNeil, “Culturally Modified Trees, Indian Reserves and the Crown’s Fiduciary Obligations,” *Supreme Court Law Review* 21, no. 2 (2003): 113.

<sup>104</sup> *Ibid.*, 113-114.

Court to entertain the idea of the Prairie Provinces having the power to infringe treaty rights:

It should be noted that the test in *Sparrow* was originally elucidated in the context of a federal regulation which allegedly infringed an aboriginal right. The majority of recent cases which have subsequently invoked the *Sparrow* framework have similarly done so against the backdrop of a federal statute or regulation... But it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified:

*Badger, supra*, at para. 85 (application of *Sparrow* test to provincial statute which violated a treaty right). The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.<sup>105</sup>

Both precedents—*Sparrow* for federal infringement of Aboriginal rights and *Côté* for provincial infringement of Aboriginal *and* treaty rights—were unsurprisingly cited in the *Delgamuukw* case concerning Aboriginal title.<sup>106</sup> Thus the *Delgamuukw* decision brings the concept of infringement to Aboriginal title as well. Once a *prima facie* infringement of title has been found to exist, Chief Justice Lamer’s reformulation of the test of justification holds that the infringement “must be in furtherance of a legislative objective that is compelling and substantial,”<sup>107</sup> and, secondly, must be “consistent with

---

<sup>105</sup> *R. v. Côté*, [1996] 3 S.C.R. 139 at 185 [*Côté*]. For an argument against the Court’s proliferation of infringement and its seeming contradiction of Canada’s constitutional division of powers and the interjurisdictional immunity it creates, see Kent McNeil, “Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*,” *Supreme Court Law Review* 29, (2005); Kerry Wilkins, “Of Provinces and Section 35 Rights,” *Dalhousie Law Journal* 22, (1999); and, most recently, Kerry Wilkins, “Dancing in the Dark: Of Provinces and Section 35 Rights After 2010,” *Supreme Court Law Review* 54, (2011).

<sup>106</sup> *Delgamuukw*, at 1107.

<sup>107</sup> *Ibid.*

the special fiduciary relationship between the Crown and aboriginal peoples.”<sup>108</sup> It is somewhat telling that, concomitant with the juridical creation of a form of right that was unparalleled in its stature—amounting to the exclusive occupation of land—the possibilities for infringement were growing, and also meriting specific hypothetical mention in the SCC’s reasoning:

...the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community”... In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.<sup>109</sup>

As the *Delgamuukw* case had suffered procedural complications in its ascent through the courts—notably because claims had been altered along the way without having formal amendments made to the claimants’ pleadings—the justices of the Supreme Court were all in agreement that a new trial was necessary, under the guidance of the principles laid down in the Court’s decision. In the long and sparse history of inherent Aboriginal title, then, the 1973 *Calder* case stood as the moment when the SCC

---

<sup>108</sup> Ibid., at 1108. This fiduciary relationship will be discussed further below.

<sup>109</sup> Ibid., at 1111 (emphasis in original).

recognized the existence of an inherent title at common law, while more than two decades later, the 1997 *Delgamuukw* case offered a definition of that title. It was not until the 2014 case of *Tsilhqot'in Nation v. British Columbia* that the Supreme Court of Canada finally awarded Aboriginal title to a First Nation,<sup>110</sup> citing of course the list of possible bases for infringement given in *Delgamuukw*.

Although the SCC adopted the new doctrine of justified infringement with zeal and soon had it encompassing the three categories of rights (Aboriginal, treaty, & title), questions about the coherence and rationale of the doctrine arose just as quickly. In addition to the tenuous line of reasoning that saw it pass from *Sparrow* to *Badger* to *Côté*, confusion and critique arose from the fact that there were already other jurisprudential frameworks that dealt with the issue of infringement—and with more attention paid to the constitutional division of powers between provincial and federal governments. Indeed, in a federal system of government a constitutional division of powers, written neatly on paper, can easily find areas of overlap and create jurisdictional conflict in reality. Having the federal government responsible for “Indians, and Lands reserved for the Indians” on the one hand, and the provinces responsible for legislating in respect of hunting and wildlife on the other, can create just such a situation. Things became that much more muddy in Canada after the addition of section 87 to the *Indian Act* (now section 88),<sup>111</sup> for if status Indians or their lands were at one time considered a purely federal matter, this amendment stated that all provincial laws of general application would apply to them “subject to the terms of any treaty and any other Act of the Parliament of Canada.”<sup>112</sup> In

---

<sup>110</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 [*Tsilhqot'in*].

<sup>111</sup> See the discussion of this amendment to the *Indian Act* in chapter five.

<sup>112</sup> *Indian Act*, R.S.C. 1952, c. 149, s. 87 (now s. 88).

Canada, then, there was definitely a complex overlap of federal and provincial law that applied to or had an effect on First Nations—with the exception, as I outlined in the previous chapter, of provincial law that was seen as contrary to any treaty or federal law made in respect of status Indians. The courts developed over a number of years a jurisprudential methodology for sorting through any complications to arise from this complex division of powers.

Traditionally, as Kerry Wilkins explains it, “in ascertaining the primary subject matter of legislation –what it is really about—the courts, as necessary, look past the form of the statute at its effects in order ‘to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose’ and to satisfy themselves whether the provincial legislature (or, in its turn, the federal Parliament) is seeking ‘to do indirectly what could not be done directly.’”<sup>113</sup> In the case of a clear and direct conflict, a court could apply the doctrine of paramountcy, according to which valid federal legislation prevails over valid provincial legislation. But with the provinces entitled to pass legislation on wildlife and hunting, and the tendency for there to be no conflicting federal legislation directly on these matters, this doctrine is generally not seen by the courts as the proper one to apply.<sup>114</sup> Barring this, there is the doctrine of interjurisdictional immunity. “Pared to its essence,” states Wilkins, “interjurisdictional immunity protects what is truly exclusive about federal legislative authority from the effects of otherwise valid provincial legislation by precluding provincial legislatures from accomplishing inadvertently what they would not have been permitted to accomplish advertently.”<sup>115</sup> In

---

<sup>113</sup> Kerry Wilkins, “Shot in the Dark,” 11.

<sup>114</sup> See, for example, *R. v. Morris*, 2006 SCC 59, [2006] S.C.R. 915 at 948, McLachlin C.J.C. dissenting on other grounds [*Morris*].

<sup>115</sup> Kerry Wilkins, “Shot in the Dark,” 12.

this situation, “the relevant provincial law continues to apply full strength *except* when and as its effect is to regulate core federal matters.”<sup>116</sup> In cases that fit this problematic, the courts would sometimes refer to “reading down” the provincial legislation to confine it within its jurisdictional limits and remove any conflict.<sup>117</sup> Given that section 91(24) of the *Constitution Act, 1867* simply states that “Indians, and Lands reserved for the Indians” are within the purview of the federal government,<sup>118</sup> but the provinces are otherwise entitled to make laws of general application pertaining to hunting, wildlife, or any number of other subject areas that could affect status Indians, the courts developed the habit of applying the doctrine of interjurisdictional immunity by attempting to detect whether a provincial law was truly one of general application, or one that relates “to Indians, quâ Indians,”<sup>119</sup> “Indians as Indians, or Indians in their Indianness,”<sup>120</sup> or even the “core of Indianness.”<sup>121</sup>

As one can plainly see, complications arose for the SCC with the advent of the *Sparrow* test for justifying infringement, and its exuberant proliferation through the rights, title, and treaty case law, because it provided an avenue of justification for both the federal *and* provincial interference with these rights. This would seem to be in blatant contradiction to at least several decades of Aboriginal case law that attempted to define and protect the “core of Indianness” that should fall under the purview of the federal government, as indicated in the *Constitution Act, 1867*. The creation of the concept of

---

<sup>116</sup> Kerry Wilkins, “Shot in the Dark,” 12-13.

<sup>117</sup> For an example from Aboriginal case law, see *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at 296.

<sup>118</sup> It should also be kept in mind, as I noted above, that Canadian courts have declared the jurisdictional reference in section 91(24) to “Indians” to apply to the Inuit and Métis as well.

<sup>119</sup> *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695 at 706.

<sup>120</sup> *Dick v. The Queen*, [1985] 2 S.C.R. 309 at 321.

<sup>121</sup> *Ibid.*, at 315.

justified infringement did not amount to an inexplicable jurisprudential switch, however, so much as it amounted to an inexplicable tally of contradictions in the post-*Sparrow* case law. In 2011, Kerry Wilkins noted that, even in quite recent case law, “several Supreme Court of Canada decisions have espoused or supported the view that provinces may infringe Aboriginal rights if they can justify the infringement; several Supreme Court of Canada decisions—including some of those same decisions—have held that Aboriginal and treaty rights lie within a core of exclusive federal legislative authority and that provincial law may not impair or intrude upon such matters, even inadvertently.”<sup>122</sup> As for cases allowing the possibility of provincial infringement, we have already seen that the *Badger* case first brought infringement to treaty rights in the Prairie Provinces because of a peculiar constitutional situation: namely, their Natural Resources Transfer Agreements, which mentioned provincial regulation of treaty hunting, became constitutional documents. This, however, was generalized quickly and indiscriminately in the *Côté* decision, which dealt with a claim to Aboriginal *and* treaty rights in Quebec, when Chief Justice Lamer states that “it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified...”<sup>123</sup>

A particularly remarkable example in the contrary case law came with *R. v. Morris*, a decade after *Badger*, *Côté*, and *Delgamuukw*. The majority opinion in this 2006 case states:

...where a valid provincial law impairs “an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians”..., it will be

---

<sup>122</sup> Kerry Wilkins, “Dancing in the Dark,” 533.

<sup>123</sup> *Côté*, at 185.

inapplicable to the extent of the impairment. Thus, provincial laws of general application are precluded from impairing “Indianness.”

Treaty rights to hunt lie squarely within federal jurisdiction over “Indians, and Lands reserved for the Indians.”<sup>124</sup>

In essence, the majority judgment invoked the longstanding doctrine of interjurisdictional immunity to state that the provinces are constitutionally barred from impairing “Indianness,” and treaty rights lie firmly within that sphere of “Indianness”—a statement that stands in direct contradiction to the same Court’s assertions that the provinces could infringe treaty rights if justified under the *Sparrow* (or, in this case, *Badger*) test. The dissenting opinion in Morris, remarkably, made the same assertion, with the added proviso that Aboriginal rights (outside of a treaty) *also* fall within the protected core of federal jurisdiction:

Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects “core Indianness” from provincial intrusion... Valid provincial legislation which does not touch on “core Indianness” applies *ex proprio vigore*. If a law does go to “core Indianness” the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.

Indian treaty rights and aboriginal rights have been held to fall within the protected core of federal jurisdiction.... It follows that provincial laws of general

---

<sup>124</sup> *Morris*, at 934.

application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by a treaty.<sup>125</sup>

“In just this much space,” notes Kerry Wilkins, “as though the answer ought to have been obvious to anyone, the Court concluded unanimously that the regular constitution gives the provinces, acting as such, no power to infringe Indians’ treaty rights.”<sup>126</sup>

The most striking contradiction, however, comes within the *Delgamuukw* case itself, and *in the same written opinion*, no less. In this case, the contradictory arguments are applied both to Aboriginal title and Aboriginal rights. On the one hand, the judgment written by Chief Justice Lamer states that “the aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.”<sup>127</sup> Later in that same majority judgment, Lamer writes:

As I explain below, the Court has held that s. 91(24) protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative

---

<sup>125</sup> *Ibid.*, at 948.

<sup>126</sup> Wilkins, “Shot in the Dark,” 16.

<sup>127</sup> *Delgamuukw*, at 1107.

competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land... But those rights also encompass practices, customs and traditions which are not tied to land as well... Provincial governments are prevented from legislating in relation to both types of aboriginal rights.<sup>128</sup>

Chronologically amongst the above cases, the last word on this subject was offered in *Morris*, and its pronouncement that provinces did not have the constitutional authority to infringe rights—found in both the majority opinion *and* the dissenting opinion—was fairly categorical. It seemed as though the Court was removing not only a certain amount of legislative and regulatory power from the provinces, but a significant portion of its own discretion and flexibility in managing the jurisprudence from then on. It did not seem to be in keeping with the Court’s tendency to integrate into the jurisprudence a need for case by case assessment, and thus an unspoken but suitable portion of elasticity and discretion. Wilkins is amongst those legal scholars who share this more sociological sensibility about the workings of the courts, and after 2006 the *Morris* decision seemed to him perplexing for these same reasons:

It has long been my impression that the Supreme Court’s approach to treaty and Aboriginal rights cases, at least since such rights have received explicit constitutional protection, has been, doctrinally speaking, to keep the ball in play: to take care to preserve sufficient flexibility in the jurisprudence to permit it to reach, in each case, the result it considered most appropriate. This flexibility gives

---

<sup>128</sup> *Ibid.*, at 1119.

the Court the freedom, and the doctrinal means by which, to discipline the aspirations of Aboriginal claimants it considers to be overreaching and the presumptions of governments it considers to be acting insensitive or imperious.

*Morris*, in my judgment, bespeaks a departure from this pattern, closing the door, decisively and deliberately, on certain doctrinal options.<sup>129</sup>

After *Morris*, the one thing left that might theoretically serve “to keep the ball in play,” so to speak, was the development that had begun in *Côté*, and continued with *Morris*, of a new category of rights disturbance—namely, the “insignificant interference.” In this category could be found forms of regulation which the Court considers as so minor that they do not amount to a “meaningful diminution,” or a *prima facie* infringement, of a right.<sup>130</sup> Still, the insignificant interference did not seem to amount to the same level of rights disturbance as the concept of infringement. The example dealt with in *Côté* was the obligation of Algonquin hunters to pay a small fee, as non-Aboriginal hunters and fishers were obliged, to be able to gain vehicular access to a certain managed wildlife zone. Nevertheless, if the *Morris* decision left it an open question as to whether the SCC was closing at least some doors on the governmental infringement of the inherent and constitutionally recognized rights of Aboriginal peoples, eventually the Court made a point of eliminating the ambiguity on the matter.

Indeed, academic and legal commentators did not fail to point out the glaring contradictions between the two visions of rights infringement in Canadian case law, and so in the *Tsilhqot'in* decision of 2014 the SCC owned up to the fact that the “ambiguous

---

<sup>129</sup> Wilkins, “Shot in the Dark,” 31-32.

<sup>130</sup> See *Morris*, at 938.

state of the jurisprudence has created unpredictability,”<sup>131</sup> stating that “it is clear that where valid federal law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law’s applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right.”<sup>132</sup> The SCC sought to clear up the issue, and it did so with a resounding preference for the section 35 based justificatory test for infringement that was first modelled in *Sparrow*—a test that would apply to, and therefore leave open the possibility of, infringements laid by both provincial and federal Crowns:

To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.<sup>133</sup>

The unanimous decision that Chief Justice McLachlin authored for the Court goes on to state that the doctrine of interjurisdictional immunity should not be applied in Aboriginal title cases, and that “Provincial laws of general application, including the *Forest Act*,

---

<sup>131</sup> *Tsilhqot'in*, at 313.

<sup>132</sup> *Ibid.*, at 313-314.

<sup>133</sup> *Ibid.*, at 318.

should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above.”<sup>134</sup> Needless to say, this clear choice of a broader base for infringement through the *Sparrow* justificatory framework did not purge the jurisprudence of its contradictions and inconsistencies—not in the least. In essence, it chose a path that abides a convenient contradiction. Of the many questions that will surely flow from the issue of infringement in the *Tsilhqot'in* case, a primary one may just be that which has been posed by Nigel Bankes and Jennifer Koshan: “...just what is left, if anything, at the core of s.91(24)?”<sup>135</sup> In effect, what does it mean to have the *Constitution Act, 1867* state that “Indians, and Lands reserved for the Indians” are under the sole jurisdiction of the federal government, when coupled with the proliferation of the new doctrine of justified infringement? As Bankes and Koshan point out, the SCC has chosen “calibration and uncertainty at the expense of a bright line and certainty.”<sup>136</sup> But really, that “calibration and uncertainty” is certainty for the Supreme Court of Canada: certainty of discretion, certainty of keeping the ball in play, and certainty of preserving the ability to manage flexibly this most challenging and high stakes body of jurisprudence.

Indeed, with so few completed title cases, it is no surprise that Canada has not yet seen a test case in which the Crown actively seeks to justify the infringement of an established Aboriginal title. Nevertheless, as robust as Aboriginal title sounds—

---

<sup>134</sup> Ibid.

<sup>135</sup> Nigel Bankes and Jennifer Koshan, “The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands,” *ABlawg: The University of Calgary Faculty of Law Blog*, October 28, 2014, <http://ablawg.ca/2014/10/28/the-uncertain-status-of-the-doctrine-of-interjurisdictional-immunity-on-reserve-lands/>.

<sup>136</sup> Ibid.

especially in comparison to the paltry rights to benefit from the wealth of the land that were accorded First Nations who signed historical treaties—the more pessimistic might interpret the laundry list of possible justifications for infringement as an avenue for future governments to ignore an Aboriginal people’s constitutionally protected possession of its unceded territory, if it deems the reason to be “compelling.” In *Delgamuukw*, the Chief Justice’s judgment states that “whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.”<sup>137</sup>

## **The Duty to Consult: Under the New Legal Ethics, a Profound Ambivalence**

In twenty-first century Aboriginal case law, the Supreme Court of Canada invoked the honour of the Crown to create another form of Crown obligation, one which found favour and quickly transcended the rationale of its initial application as well. In the case of *Haida Nation v. British Columbia (Minister of Forests)*,<sup>138</sup> the Council of the Haida Nation and Guujaaw were objecting to a series of logging licences—known as “Tree Farm Licences,” or T.F.L.s—granted to forestry firms over a period of decades. While the forests of Haida Gwaii, once known as the Queen Charlotte Islands, have been logged since before the First World War, the Haida have never ceded their land or sovereignty, and in fact have been insisting upon their title to all the lands of Haida Gwaii and the surrounding waters for more than a century. The T.F.L.s in question pertained to a block

---

<sup>137</sup> *Delgamuukw*, at 1111.

<sup>138</sup> 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*].

of forest acquired by MacMillan Bloedel in 1961, replacement T.F.L.s subsequently granted in 1981, 1995, and 2000, as well as a transfer of the T.F.L. for the same region to Weyerhaeuser Company in 1999.<sup>139</sup> Both Weyerhaeuser and the Crown in right of British Columbia were thus named as defendants in the case.

The comprehensive claims process—or modern treaty process—has been in existence since shortly after the *Calder* decision in 1973. In 1993, a treaty process specific to B.C. was launched—and the B.C. Treaty Commission was created—from an agreement between the federal and provincial governments and the B.C. First Nations Summit. Unfortunately, the process of negotiating a modern treaty requires an enormous amount of resources and time. At the time the SCC heard the *Haida Nation* appeal, this process was still underway for the Haida, though the SCC’s unanimous decision admitted that their title claim was strong. The worry of the Haida was that, in the years it would take to complete the comprehensive claims process, their forests would be “irretrievably despoiled.”<sup>140</sup> But until they won a title case or completed the claims process, the legal perspective of the Court was that the provincial government held legal title to the land.<sup>141</sup> For its part, the provincial government argued that “it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.”<sup>142</sup> This is why, amongst the several claims launched by the Haida in the case, one was to invoke breach of fiduciary duty. It seemed a logical step for the Haida, since the fiduciary duty holds that the Crown must act in an

---

<sup>139</sup> Ibid., at 518.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid., at 518.

<sup>142</sup> Ibid., at 519.

Aboriginal group's best interests when it is in a position of exercising discretionary control over their interests. Having watched companies deforest their unceded land for decades under the aegis of government-issued licences, the Haida were certainly of the perspective that their interests were not being protected.

The difficulty according to the Supreme Court, however, was that in this case "Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title."<sup>143</sup> Another possible option for the Haida, which the Court noted in this case, was to seek an interlocutory injunction once a statement of claim had been filed.<sup>144</sup> Indeed, if the SCC was not going to permit the fiduciary duty obligation to be used to stop resource extraction on land subject to title claims, this would probably have created an incentive for Aboriginal groups to pursue this option. As is so common in Aboriginal law, however, the Court developed a novel third option.

Nigel Bankes suggests that the SCC developed yet another alternative, steering these disputes away from any reliance on injunctions, in part because it was sensitive to the fact that it "can be an expensive and time-consuming process and there is no guarantee of success given the applicable standards for obtaining interlocutory relief."<sup>145</sup> This may be true, but in my view this is only one part of the equation. (And, as an aside,

---

<sup>143</sup> Ibid., at 524.

<sup>144</sup> Ibid., at 520-521.

<sup>145</sup> Nigel Bankes, "The Implications of Tsilhqot'in (William) and Grassy Narrows (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries," *Journal of Energy and Natural Resources Law* 33, no. 3 (2015): 194-195.

the underlying travesty is really the time and expense required for establishing title in either the courts or at the negotiation table.) What makes the strategy of interlocutory injunctive relief ill-suited to the SCC's modern approach to Aboriginal law is its somewhat categorical nature. Refusing an injunction essentially endorses the Crown's assertion that no legal obligation is owed to claimant First Nations, regardless of the clarity of their claim to the land, and sanctions the plundering of their land by industry in the meantime. On the other hand, granting an injunction amounts to ordering the forced stoppage of any number of non-Aboriginal activities on the land, with all the economic and political repercussions this could entail.

In fact, First Nations had obtained several significant successes in securing injunctions in British Columbia in the mid-1980s,<sup>146</sup> such as in the dispute between MacMillan Bloedel and two Nuu-chah-nulth bands (Clayoquot and Ahousaht) on the west coast of Vancouver Island. Members of the First Nations and other protesters had at one point blocked MacMillan Bloedel from accessing the area of its T.F.L. on Meares Island. The Nuu-Chah-Nulth Tribal Council had already initiated a land claim and it had been accepted by the federal government for negotiation. The two bands thus sought a declaration that their Aboriginal title over the lands were unextinguished, as well as an injunction against MacMillan Bloedel preventing them from logging or trespassing in derogation of that title. MacMillan Bloedel, with the support of the Attorney General of British Columbia as intervenor, applied for an order restraining the protestors and anyone else from interfering with their logging activities. The rulings of two levels of court split

---

<sup>146</sup> Lawrence and Macklem suggest that from the late 1980s onwards, however, lower courts became much more reticent to order interlocutory injunctions. See Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," *Canadian Bar Review* 29 (2000): 275.

between these mutually opposing imperatives. Judge Gibbs of the B.C. Supreme Court ominously portended an opening of the floodgates if he were to grant the Nuu-chah-nulth's request for an injunction, claiming that it "would represent, and be interpreted as, some recognition, even though only pending trial, of an overriding aboriginal title. It would be looked upon as a precedent and would spawn a rash of similar applications throughout the province. I do not regard that as being in any sense an exaggerated expectation."<sup>147</sup> Similarly, he worried that the flood of other requests for interlocutory relief "would not necessarily be restricted to proposed logging operations... similar challenges could be made to any resource or wild life harvesting authorized by the provincial Crown in the land claim areas. It is the prospect of the havoc which wholesale challenges would create in the financial, business and public activities in this province which has led me to conclude that it is urgent and imperative that I reach a decision based upon the relative strength of each party's case and grant one or other of the applications."<sup>148</sup> Not surprisingly, Judge Gibbs granted the application of MacMillan Bloedel, and not that of the Nuu-chah-nulth and protestors. Exceptionally, an appeal of this was heard before the B.C. Court of Appeal. The majority of the court granted the Nuu-chah-nulth their injunction, with Justice Seaton stating:

There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.

I test my conclusion by asking this question: If the Indians wished to do something that had the effect of making the area unusable by MacMillan Bloedel,

---

<sup>147</sup> *MacMillan Bloedel v Mullin*, [1985] 2 W.W.R. 722; [1985] 2 C.N.L.R. 26 at para. 27 (B.C.S.C.).

<sup>148</sup> Ibid.

would we let them, or would we preserve the forest in its present state? I think that we would preserve the forest. I think we should do that for either party.<sup>149</sup>

With the Haida Nation’s suit against Weyerhaeuser, then, the SCC seized the opportunity to spearhead a novel, new body of jurisprudence particular again to Aboriginal law and the “unproven” right. Coyly, the unanimous decision penned by Chief Justice McLachlin states that “it is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies.”<sup>150</sup> Indeed, *Sparrow* and *Delgamuukw* had mentioned the importance of consultation when it comes to justificatory tests for infringement, and cases since then had dealt with disputes concerning consultation as well.<sup>151</sup> Thus in *Haida Nation* the Court built upon this germinal foundation to develop and reify the doctrine of *the duty to consult*, a duty which “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”<sup>152</sup> From that moment, then, the SCC declared the duty to consult to apply to both potential Aboriginal rights and potential Aboriginal title. In essence, it would apply to cases of potential infringement where the pertinent right or title was not yet proven or established. The nature or content of that duty would vary along a scale. “Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a

---

<sup>149</sup> *MacMillan Bloedel Ltd. v. Mullin*, [1985] 61 B.C.L.R. 145; [1985] 2 C.N.L.R. 58 at para. 78-79 (B.C.C.A.).

<sup>150</sup> *Haida Nation*, at 521.

<sup>151</sup> See, for example, *R. v. Nikal*, [1996] 1 S.C.R. 1013.

<sup>152</sup> *Haida Nation*, at 529.

preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”<sup>153</sup>

When the *Haida* case was being heard by the SCC, both the province and Weyerhaeuser were the appellants, as the appeal court below had found in favour of the Haida on their allegations of breach of fiduciary duty against both the company and the government. The SCC decided that the provincial Crown’s appeal should be dismissed, since it found that the province had failed to fulfil its obligation to consult the Haida meaningfully on the exploitation of Haida Gwaii’s resources. Weyerhaeuser’s appeal was allowed, however, as the Court determined that third parties cannot be liable for a failure to discharge a duty that ultimately rests with the Crown. In effect, while procedural aspects of the consultation process can be delegated to industry proponents, as already happens in some environmental assessment processes, “the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.”<sup>154</sup>

What is one to make of the duty to consult? Just like contemporary Aboriginal law as a whole, the duty to consult is suffused with ambivalence. On the one hand, rooted in the notion of the honour of the Crown just as the fiduciary duty is, it clearly represents the advent of another form of Crown obligation—those strains of post-colonization jurisprudential ethics that are meant to guide the relationship between governments and Aboriginal peoples, and guide it in a direction that does not always come naturally to the former. In that sense, it also likely represents a significant advancement in the protection

---

<sup>153</sup> Ibid., at 531.

<sup>154</sup> Ibid., at 537.

of Aboriginal interests over the state of affairs that existed through the nineteenth and twentieth centuries. And if the eagerness to use the doctrine is any indication, one is left to assume that it is often seen by Indigenous groups as a tool with real potential to protect and stave off threats to their interests.

On the other hand, in *Haida Nation* the SCC states that “there is no duty to agree; rather, the commitment is to a meaningful process of consultation,”<sup>155</sup> and *perhaps* accommodation. This means that governments and the third party interests that they license can continue to exploit Indigenous lands that are subject to Aboriginal title claims, or that are integral to the exercise of constitutionally protected Aboriginal rights, as long as the courts have deemed the amount of consultation to be *adequate*. Indeed, the *Haida Nation* case was heard concurrently with another duty to consult case—*Taku River Tlingit v. British Columbia*.<sup>156</sup> In *Taku River*, the Taku River Tlingit First Nation was seeking to have the Court quash the province’s decision to approve a project in which Redfern Resources would reopen an old mine and build a road through Tlingit territory. The SCC did not find in favour of the First Nation, despite the Court’s admission that their land claim case “is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process.”<sup>157</sup> While the proposed road was purportedly to take up a small portion of their territory, the Court also acquiesced that “the potential for negative derivative impacts on the TRTFN’s claims is high.”<sup>158</sup>

---

<sup>155</sup> *Ibid.*, at 532.

<sup>156</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku River*].

<sup>157</sup> *Ibid.*, at 567.

<sup>158</sup> *Ibid.*

Nevertheless, in the end, the SCC deemed that the provincial government's efforts toward consultation were "adequate."<sup>159</sup>

Critical to the outward legitimacy of the duty to consult is a heavy reliance on the juridical manufacture of a pervasive uncertainty over the initial existence of rights or title. In effect, this was the SCC's entire reasoning behind creating the duty to consult: the Court stated that it could not justify enforcing the fiduciary obligation on the Crown in a situation where rights or title were not yet proven. As I stated earlier in the chapter, the juridical deployment of pervasive uncertainty in regular rights and title jurisprudence essentially makes a legal battleground of history, sometimes allowing courts to discover that an Aboriginal right has never existed, or that it once existed but was extinguished prior to 1982. In this way, Aboriginal rights and title jurisprudence has allowed extinguishment to return through the back door. What becomes all the more evident with the duty to consult, however, is that juridically manufactured uncertainty serves as the justificatory foundation for the reversed burden of proof that characterizes rights and title jurisprudence in its entirety. Indeed, Kent McNeil has pointedly asked in relation to title, a body of case law that has come to exist precisely because of the indisputable *prior occupation* of Aboriginal peoples, "why the onus is on Aboriginal peoples to prove their own title as against the European colonizers when we all know that they were here occupying lands when the newcomers arrived."<sup>160</sup> The same question can be asked concerning rights disputes as well. Concerning the duty to consult, then, the deployment of uncertainty and the reverse onus of establishing rights and title are fundamental to

---

<sup>159</sup> Ibid., at 573.

<sup>160</sup> Kent McNeil, "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance," *American Review of Canadian Studies* 31, no. 1-2 (2001): 324.

creating an opening for non-Aboriginal interests to continue to exploit Aboriginal land during the long while of satisfying the courts or the land claims negotiating table. Thus, when set within a critical legal epistemology that recognizes the illegitimacy of the Crown’s ultimate title over unceded land, it becomes apparent that the duty to consult is, in actuality, fundamentally continuous with the concept of infringement, in that it is a form of jurisprudential governance based upon enabling an override of the inherent and the constitutional<sup>161</sup>—even if, in this case, the inherent and the constitutional is cast by the juridical field as tentative and undefined.

The SCC offers up in *Haida Nation* a casuistic defence of the duty to consult approach in comparison to the former practice of seeking interlocutory injunctions against outside (and largely extractive) activities on Indigenous land. It argues that interlocutory injunctions themselves “may offer only partial imperfect relief,” suggesting that “they may not capture the full obligation on the government,” that “they typically represent an all-or-nothing solution” in that the project either goes ahead or it halts, and that with such injunctions “the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to ‘lose’ outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns.”<sup>162</sup> Lastly, the Court points out that interlocutory injunctions are meant to be a stop-gap remedy pending litigation of the underlying issue—in other words, an Aboriginal title or Aboriginal rights case—and that litigation can require years, even decades, to complete. In this situation, according to the

---

<sup>161</sup> Of course, describing the Indigenous possession of land and Indigenous practices on that land as “rights” or as “constitutionally protected” is indicative of these things having already become objects within the colonial juridical field.

<sup>162</sup> *Haida Nation*, at 521.

SCC, an injunction “over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests.”<sup>163</sup>

There is something disingenuous in the Supreme Court’s recitation of these “pragmatic” realities that cast interlocutory relief in a less favourable light for Indigenous claimants who want to protect their land pending the establishment of rights or title. Indeed, these limitations—such as a balance of convenience test that favours protecting jobs and revenue over respecting another group’s greater claim to the land—are juridically instituted conventions in and of themselves. Yet the SCC, being the court of last resort that sets the standards for all the other courts to follow, has in recent years demonstrated *par excellence* its ability for adaptation and change, and for creativity in finding a legal basis for these changes. In effect, there was nothing to stop the SCC from simply developing a form of interlocutory relief for rights and title claims that, in effect, captures “the full obligation on the government” and recalibrates the balance of convenience toward protecting Aboriginal land and rights.

The Supreme Court’s exaltation of compromise in this context is also questionable. I would agree that in the case of mutually opposing imperatives—an antimony of power and intransigence—negotiation and compromise are desirable. But in the case of colonial dispossession, at the heart of the resolution is a need for *repair*, a concept that would in fact find better doctrinal company with the fiduciary duty that was established by the SCC twenty years before the duty to consult. Unfortunately, the Crown

---

<sup>163</sup> Ibid.

in right of the federal government has demonstrated in the late twentieth and early twenty-first centuries that it would prefer to stand alongside the provincial governments in the courtroom and oppose the recognition of Aboriginal rights, title, and the protection thereof—the very opposite actions one would expect from a fiduciary with constitutional jurisdiction over the Crown relationship with Aboriginal peoples. As for the SCC, it seems that integral to the conceptualization of the duty to consult is a tacit affirmation that the Indigenous position must be weakened through jurisprudential chicanery—in essence, the creation of a last resort override button for inherent possession and rights—prior to negotiation. Thus, from a more cynical vantage point, the duty to consult can operate as Orwellian doublespeak, for it is a duty owed to Aboriginal peoples, but at the same time it is a pressure release valve in the high stakes field of legally resolving colonial dispossession. In effect, the duty to consult and justified infringement both reduce the volatility of legal reconciliation for the settler state by leaving open a path to exploiting the unceded lands and resources of Aboriginal peoples—one during the excruciatingly long wait to have title or rights negotiated or proven, and the other even after this has been accomplished.

The ambivalent nature of the duty to consult is also reflected in the contentious discursive divide between Indigenous advocates who argue for free, prior, and informed consent on the one hand and non-Indigenous critics who invoke the menace of an “Aboriginal veto” over economic development and resource projects on the other hand. And yet the SCC was clear from the beginning, stating in *Haida Nation* that the duty to consult “does not give Aboriginal groups a veto over what can be done with land pending

final proof of the claim.”<sup>164</sup> Referencing the concept of infringement that existed in the case law already, the SCC in fact goes on to state that Aboriginal groups do not even have an ultimate veto over what happens concerning *established* rights and title lands. As for the notion of free, prior, and informed consent, it gained traction with the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted in 2007. In it, article 32 affirms that “states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>165</sup> Canada was amongst the four countries who originally refused to vote in favour of the declaration. In 2010, the federal government gave the declaration a qualified recognition, endorsing it as an “aspirational document.” In 2014, upon the release of the outcome document of the United Nations World Conference on Indigenous Peoples, which built upon the declaration, the Canadian government stated that “free, prior and informed consent, as it is considered in paragraphs 3 and 20 of the WCIP Outcome Document, could be interpreted as providing a veto to Aboriginal groups and in that regard, cannot be reconciled with Canadian law, as it exists.”<sup>166</sup> Yet if one can perceive of unceded land as being the possession of an Indigenous people, this in turn begs the question as to why

---

<sup>164</sup> *Haida Nation*, at 535.

<sup>165</sup> United Nations General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples,” September 13, 2007, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>166</sup> Permanent Mission of Canada to the United Nations, “Canada’s Statement on the World Conference on Indigenous Peoples Outcome Document,” news release, September 22, 2014, [http://www.canadainternational.gc.ca/prmny-mponu/canada\\_un-canada\\_onu/statements-declarations/other-autres/2014-09-22\\_WCIPD-PADD.aspx?lang=eng](http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng).

such groups cannot draw a bottom line—the “all” version of the “all or nothing solution” so disparaged in *Haida Nation*—and remove consent to outside exploitation of their unceded lands. Indeed, from the perspective of Indigenous inhabitants, the prospect of losing a forest or having a watershed harmed *can* be experienced as stakes raised to a dangerous all-or-nothing game of economic colonization. The challenge perhaps lies in the premise itself: that one side of the discursive divide cannot, or will not, perceive of unceded territory as being the possession of its Indigenous inhabitants. A culture of injusticiability, signaled by the inability or unwillingness to see that the colonial appropriation of unceded and unconquered land delegitimizes Crown title and sovereignty, thus continues to foster menacing debating points about the “chill” and “uncertainty” that Aboriginal court victories create for economic development and investment,<sup>167</sup> with no hint of a suggestion that certainty could once again be found by fully recognizing rights and title and earnestly negotiating mutually beneficial agreements with Indigenous peoples.

The devil is in the details, so to speak, as the process of maturation for the duty to consult case law will perhaps give a better sense of how much the requirement to accommodate strong *prima facie* claims of title will be able to serve as a bottom line form of protection for Indigenous lands. Such a devil-is-in-the-details situation demonstrates, however, that what we are dealing with yet again is a creative jurisprudence that serves

---

<sup>167</sup> In *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto*, 2015 BCCA 154, two B.C. First Nations secured a recent victory in that the B.C. Court of Appeal allowed them to continue their claim against Rio Tinto Alcan for nuisance and breach of riparian rights resulting from the Kenney Dam and Alcan Reservoir—despite the fact that their Aboriginal title has not yet been legally established. In October 2015, the SCC refused Rio Tinto Alcan's application for leave to appeal. For a characteristically foreboding warning about the economic implications of this case, see Ravina Bains, *Economic Development Projects in Jeopardy? Implications of the Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Decision*, Fraser Research Bulletin (Vancouver: Fraser Institute, November 2015).

the purposes of ongoing, indefinite, case by case management. This ability to design, calibrate, and readjust the overall jurisprudential formula, manage its application to individual disputes on a case by case basis if so desired, and keep in reserve the power to override and infringe title and rights altogether, to borrow Wilkins's terminology, all have the effect of *perpetually keeping the ball in play*. And just as with the concept of infringement, the duty to consult has proven essential enough to the needs of Aboriginal law that it has broken its moorings and experienced a proliferation beyond what the original rationale for its application would logically allow.

The case of *Mikisew Cree Nation v. Canada* centered on a dispute with the federal government over a 118 kilometre winter road through Wood Buffalo National Park in northeastern Alberta that, as it was originally conceived, would run through one of the First Nation's reserve in the park.<sup>168</sup> The government did not consult the Mikisew Cree about the construction or placement of the road, and so the First Nation protested. The government then changed the route of the road to run along the border of the reserve, again without consultation—a modification with which the First Nation was not satisfied as the road would run through the traplines and hunting grounds of some of its members. The fact that there may have been confusion concerning the lineage and applicability of the different forms of Crown obligation is apparent, as the First Nation's original claim in the *Mikisew Cree* case was a combination of the two, arguing that the minister owed "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road."<sup>169</sup>

---

<sup>168</sup> *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 [*Mikisew*].

<sup>169</sup> *Ibid.*, at 398.

The main distinction between *Mikisew Cree Nation* on the one hand and *Haida Nation* and *Taku River Tlingit* on the other, however, lies in the fact that the Mikisew Cree are signatory to Treaty 8 of 1899 and thus the case “contemplates rights already demonstrated to exist rather than those only alleged to exist and the rights it considers are treaty rights rather than Aboriginal rights.”<sup>170</sup> Nevertheless, the SCC elected to use the doctrine of the duty to consult as the framework of assessment, rather than the concept of the fiduciary duty that had been established in *Guerin*. This is notable precisely because the justificatory premise for establishing the duty to consult was based on the fact that *unproven* title or rights were insufficiently specific to trigger the fiduciary duty.

Without much in the way of explanation, the unanimous decision of the Supreme Court of Canada states that “the duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court as a treaty obligation as far back as 1895, four years before Treaty 8 was concluded...”<sup>171</sup> Some have taken the Court to task, however, on the unclear distinctions and interrelations between the concepts used to crystallize the Crown’s honourable obligations toward Aboriginal peoples. According to John Borrows and Leonard Rotman, “A failure of the *Mikisew Cree* case is the Supreme Court’s inability, or unwillingness, to clarify the distinction between the duty to consult and the Crown’s fiduciary duty created by *Haida Nation* and *Taku River*. So, while Justice Binnie indicates that, for the purposes of the *Mikisew Cree* decision, it is not necessary to invoke fiduciary duties, but only the duty to consult, he offers no suggestions as to why this is so,

---

<sup>170</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 543-544.

<sup>171</sup> *Mikisew*, at 415.

nor what is truly different about these duties.”<sup>172</sup> In effect, the 2010 duty to consult case of *Beckman v. Little Salmon/Carmacks First Nation* also dealt with a treaty issue—this one falling under the auspices of a modern comprehensive land claim treaty with Yukon First Nations.<sup>173</sup> In her minority judgment, agreeing in the result with the majority, Justice Deschamps states that the fiduciary duty had paternalistic overtones and that the Court replaced it, over time, with the principle of the honour of the Crown.<sup>174</sup> It is true that in the *Wewaykum* decision the Court narrowed the application of the fiduciary duty, or even, as Borrows and Rotman term it, “marginalized” it.<sup>175</sup> (B & R, 4<sup>th</sup>, 579). But the juridical notion of the honour of the Crown itself has been in existence since before the 1984 case of *Guerin v. The Queen* established the fiduciary duty in Aboriginal law,<sup>176</sup> and has often been connected to the Royal Proclamation’s desire “to remove all reasonable Cause of Discontent” and have the Indians “convinced of Our Justice.”<sup>177</sup> Such a history left open the assumption that the honour of the Crown was a fundamental principle underlying the various forms of Crown obligation that came into existence, the fiduciary duty and the duty to consult included. Borrows and Rotman thus question what jurisprudence Justice Deschamps is relying on for her statement in *Beckman*, for “the Court has never indicated that the Crown’s fiduciary duty has been replaced by the ‘honour of the Crown’. Indeed, as indicated above, the ‘honour of the Crown’ is a fundamental element of the Crown’s fiduciary obligations. However, as indicated in this section, the honour of the Crown also gives rise to the lesser Crown duty to consult. What

---

<sup>172</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 544.

<sup>173</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 [*Beckman*].

<sup>174</sup> *Ibid.*, at 154.

<sup>175</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 579.

<sup>176</sup> See, for instance, *Taylor and Williams*, at 235.

<sup>177</sup> George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

still remains to be considered by the Supreme Court is where the Crown's fiduciary duties and duty to consult respective lie on the spectrum of Crown obligations to Aboriginal peoples and how or to what extent they interact with each other.”<sup>178</sup>

To attempt to work through the Court's inconsistencies and contradictions in this respect—just as in the case of infringement and interjurisdictional immunity—is likely an exercise in “transcendental nonsense” that will not give a satisfactory result.<sup>179</sup> A more fruitful avenue of analysis would be one that recognizes the immanent practicalities in the juridical management of colonization. With the rise of inherence and constitutionalization, it seems that the contemporary SCC is less interested in requiring the federal Crown to act in the best interests of Indigenous peoples (under the fiduciary duty), and more interested in enabling both the federal and provincial Crowns to act *in their own interests* with a less categorical and more context-specific legal-ethical scheme to govern colonial relations. In short, it just does not suit colonization to prescribe that the Crown act in the best interests of Aboriginal peoples. Indeed, the very idea of it would expose a contradiction within the purportedly conciliatory legal politics of late modernity: in essence, the concept of the fiduciary duty is at odds with the very purpose and function of the land surrender treaties themselves. From the colonial legal perspective, these treaties spelled out the legal surrender of land which would progressively be taken up by non-Aboriginal interests as the need arose. To have the very purpose of a treaty subject to accusations of contravening a fiduciary duty—precisely because of its negative effect on treaty activities such as hunting and trapping—could

---

<sup>178</sup> Borrows and Rotman, *Aboriginal Legal Issues*, 579.

<sup>179</sup> Felix S. Cohen, “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35, no. 6 (1935): 810.

create an unworkable legal-ethical bind for courts who need to be seen as finding a just legal resolution in these disputes. Under the duty to consult framework, however, taking up land pursuant to a treaty could be placed under the same moderate and flexible scrutiny as acts of infringement were under the *Sparrow* and *Badger* tests. When the Crown seeks to take up land pursuant to a treaty, the duty to consult then becomes a form of procedural protection for First Nations: the taking up of land is performed pursuant to the treaty, but must be done so with the respect of first consulting with the Indigenous group concerned. In addition, the *Beckman* case confirmed that, even though modern comprehensive land claims agreements often have certain provisions around specific consultation requirements already enumerated within them, the common law duty to consult could still apply “to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.”<sup>180</sup>

There is something very *a propos* in Justice Binnie’s word choice in the majority judgment for *Beckman* when he writes of employing the duty to consult “to help manage the important ongoing relationship between the government and the Aboriginal community.”<sup>181</sup> The inconsistent rationale underlying the proliferation of the duty to consult belies the SCC’s original basis for the doctrine offered in *Haida Nation*. The Court’s reasoning against employing the fiduciary duty—and for expounding the duty to consult—was that unproven rights were not specific enough an interest to merit invoking the former. With *Mikisew Cree Nation*, we see the Court employing the doctrine of the duty to consult in a case concerning the undeniably specific and proven interests that are

---

<sup>180</sup> *Beckman*, at 142.

<sup>181</sup> *Ibid.*

the treaty rights of the Mikisew Cree First Nation. What the SCC has all but demonstrated, then—parallel with the replacement of the doctrine of interjurisdictional immunity with the section 35 justificatory test—is that a more likely basis for the establishment of the duty to consult is the judiciary’s immanent need to promulgate into all corners of Aboriginal law a jurisprudential ethics for the respect of rights and title that will also manage and tame, when necessary, the more demanding aspects of those same claims.

## **The Managerial Ethic**

Certainly, one can get a sense of the fact that the Supreme Court of Canada’s struggle to surmount the historical bind it faced in the late twentieth century brought it into the most doctrinally challenging and productive era for Aboriginal law that it has ever seen. As I have outlined, the installation of inherence, coupled with major constitutional change—and some idiosyncrasies of history—meant that the revolutionarily positive changes in Aboriginal law of the late twentieth century contained a latent potential that could be difficult to control, and thus were risk-laden for the settler state. Thus, within a relatively short span after the installation of inherence and the constitutionalization of Aboriginal rights, treaty rights, and Aboriginal title, the Supreme Court of Canada determined that these rights were not absolute, that extinguishment in the past could still be discovered retrospectively today, that forms of infringement could occur both before and after the establishment of such rights, and that both the provincial and federal levels of government would now possess such powers of infringement. It only adds to the complexity of Aboriginal law that these determinations all came on the heels of, or

concomitant with, some of the most important gains made by Aboriginal peoples before the courts. In this sense the various strains of Aboriginal law are both jurisprudential ethics of reconciliation and forms of management. This is the essence of what ambivalence means: the incapability of categorizing contemporary Aboriginal law jurisprudence as purely advantageous or purely disadvantageous. But it also speaks to the machinations in this juridical work that maintain Aboriginal demands and their legal resolutions as a manageable and governable field.

Indeed, the fact that legal benefits bring with them the persistence of certain colonial instrumentalities demonstrates the profound ambivalence of contemporary Aboriginal law, defying categorization into purely positive or negative terms. That ambivalence is crafted with the complex interweaving of both injusticiability and incommensurability. Some of these elements are old. The preservation of certain raw colonial instrumentalities under these schemas speaks to the continuing essential role of injusticiability in Aboriginal law. Indeed, if the age of inherence was instilled in managed and circumscribed form, it came with the paradoxical yet unquestioned *grundnorm* enunciated in *Sparrow* and paraphrased in other cases that, even in the case of those who had never signed a treaty and had ceded neither sovereignty nor territory, “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.”<sup>182</sup> As I have noted elsewhere, “rather than being the object of question in Aboriginal rights and title case law, the Crown’s paramount sovereignty serves as a... central assumption from which the rest of the

---

<sup>182</sup> *Sparrow*, at 1103.

jurisprudence flows.”<sup>183</sup> It is the most guarded limitation of common law justice in the settler state, one which cannot be questioned or debated.

The fact that unique and novel forms of justice are deployed in order to bring together and manage both these benefits and these instrumentalities also demonstrates the essential role of incommensurability in Aboriginal law. Beginning with the nineteenth century assertion that the Indigenous possession of land was distinct and somehow lesser than the European possession of land, the inscribing of incommensurability has now become ubiquitous. The Latin term *sui generis* has become its proxy, and is the byword of contemporary Aboriginal law. To underscore the true nature of ambivalence, the invocation of the *sui generis* nature of Indian treaties in the *Simon* case was actually used to shelter the Mi’kmaq Treaty of 1752 from the Crown’s argument that international treaty law suggests that hostilities subsequent to 1752 would have terminated the treaty and any of the Crown’s obligations under it. In other words, in that case the SCC used the notion of the *sui generis* nature of treaties with Aboriginal peoples to assert that the Crown’s solemn engagements with the Mi’kmaq still applied, despite skirmishes that occurred after its signing. But more often than not, however, the uniqueness of Aboriginal law and its oddities and particularities do not lend themselves to the anti-colonial aspirations of Indigenous groups. It is a critique of such limitations in Aboriginal law, largely centered on the ways in which Aboriginal law is made to be unique, particular, and of its own kind, that I turn to next.

---

<sup>183</sup> Patzer, “Even When We’re Winning,” 328. See also Patzer, “Legitimate Concerns,” 96.

## 7. The Aboriginal Cultural-Legal Subject

In law we have already seen legal meditations on Indigenous cultural difference offered in nineteenth century cases before the Supreme Court of the United States and the Supreme Court of Canada. At that time, cultural differences were often used to argue that Indigenous peoples should not have any title to their lands recognized by the law. John Quincy Adams, counsel for John Peck in the 1810 case of *Fletcher v. Peck*, opined before the Supreme Court of the United States that Indian title was “a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited.”<sup>1</sup> Later in the nineteenth century, David Mills, federal politician and member of Ontario’s legal team in the *St. Catherine’s Milling* case, wrote of Canada’s Indigenous peoples that “civil institutions could not be said to have had an existence amongst them. There were neither laws nor law givers. Those civil institutions without which there can be no real property, had no existence.”<sup>2</sup>

As I suggest in the third chapter, although *terra nullius* did not exist as a doctrine of the common law and as an explicit, pre-existing justificatory framework for the dispossession of Indigenous peoples by British interests, it still offers a certain fundamental commonality with the historical analysis that I present in that, in both cases, novel and self-serving principles of justice are imposed upon colonized peoples. This is what I attempt to seize upon with the notion of incommensurability, which can be defined as the inscribing of difference upon the Aboriginal legal subject in order to accommodate

---

<sup>1</sup> 10 U.S. (6 Cranch) 87 at 121 (1810).

<sup>2</sup> Cited in S. Barry Cottam, “Indian Title as a ‘Celestial Institution’: David Mills and the *St. Catherine’s Milling Case*,” in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Winnipeg: University of Manitoba Press, 1991), 258.

exigent historical circumstances with novel forms of justice. The difference is that incommensurability is conceptually more fundamental, and therefore more flexible and appropriate to the legal history of Canada, than terra nullius. Terra nullius, if it ever were to have been in place and used as a colonial power's legal justification for dispossession, would simply amount to one of the most cynical and extreme impositions of legal incommensurability upon an Indigenous people.

In this chapter, I examine in more depth a key vessel of incommensurable justice in the contemporary era: culture. Or, to be more specific, non-Indigenous perceptions and invocations of Indigenous cultures. If the brief history mentioned above is any indication, the Aboriginal legal subject mobilized within the types of legal-political disputes I examine has often been conceived, delimited, and invoked *in terms of its culture*, and for quite some time. At base, this is still the situation today, and it has been challenged extensively by the troubled concerns of anthropologists and legal scholars alike. Constance MacIntosh, describing her experience of entering law school after completing graduate work in anthropology, confesses:

I was both intrigued and troubled by how notions of culture were deployed in legal reasoning about Aboriginal peoples. I was surprised to read that decisions could turn on whether a person was living an "Indian mode of life," and wondered how such a concept could be intelligible, much less legally relevant. My experiences with Aboriginal rights claims after law school augmented my concerns, as many of these claims turned on whether certain practices were deemed integral to an Aboriginal people's culture. The idea of lawyers making arguments about such matters in a courtroom, and a judge then determining the

core features of an Aboriginal people's culture, seemed to be an extreme exercise in colonialism.<sup>3</sup>

In essence, Indigenous peoples are so strongly associated with cultural notions, it is arguable that they are not seen as *having a culture*—like other peoples—but rather are seen as *being a culture*. Indeed, this is an issue so pervasive that it exists beyond the limits of the juridical field and is commonly encountered in the larger societal discourse. But if the juridical field could once be accused of merely importing culturalist notions of Aboriginality into its legal determinations, this pervasiveness of their legal use has expanded to the point where the judiciary can now be seen at the forefront of the culturalist push.

In the late modern era, as we will see, this tends to put Aboriginality in a particularly detrimental relationship with things such as time and cultural change, reducing the conceptualization of rights to the quaint and the traditional and exercising limitations on the possibilities for title. In effect, the Supreme Court's contemporary cultural rights approach replaces any notion of Aboriginal polities with Aboriginal culture and thereby removes from the debate any discussion of self-government and self-determination. I also identify the cultural rights approach as the prime vector for the introduction of several other mechanisms key to the judiciary's management of Indigenous claims—in this case, the installation of arbitrary time thresholds for the definition of rights, the diminution of the potential scope of rights claims through a constricting specificity, and an unacknowledged discretion in the determination of rights through concepts that introduce elements of indeterminacy in the cultural rights test.

---

<sup>3</sup> Constance MacIntosh, "From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life,'" *Osgoode Hall Law Journal* 47, no. 3 (2009): 400.

## Creating Cultural Rights

Although incommensurability has been woven throughout Aboriginal law, it is arguably most salient in the contemporary form that Aboriginal rights jurisprudence has taken. The placement of the Aboriginal cultural-legal subject at the forefront of Aboriginal law has been most prominent in the post-*Sparrow* case law, and this was instigated in earnest with the case of *R. v. Van der Peet*.<sup>4</sup> As I outlined briefly in chapter six, Dorothy Van der Peet, a member of the Sto:lo First Nation in British Columbia, had sold ten fish caught under the authority of an Indian food fish licence which prohibited the sale or barter of any fish caught. She admitted to doing so, but argued that she was exercising an Aboriginal right to sell fish. Building upon the *Sparrow* decision, Chief Justice Lamer's written reasons for the majority identified the following multi-step process as necessary to determining Dorothy Van der Peet's fate: "First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified."<sup>5</sup>

According to the Chief Justice Lamer's judgment in *Van der Peet*, the *Sparrow* decision had outlined how to approach the last three of these questions. Where *Sparrow* fell short of offering full guidance in the *Van der Peet* case was in responding to the first question—whether a claimant was acting pursuant to an Aboriginal right—simply because the SCC did not doubt the idea that Reginald Sparrow and the Musqueam

---

<sup>4</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

<sup>5</sup> *Van der Peet*, at 526.

benefited from an Aboriginal right to fish for food. In the case of Dorothy Van der Peet, then, the Court had to deal with “the question of how the rights recognized and affirmed by s. 35(1) are to be defined,”<sup>6</sup> and in particular the question of whether the Sto:lo possess an Aboriginal right to sell fish.

Upon deeper examination, *Van der Peet* makes for a striking and curious judgment. It is amongst the longest and most exhaustive of Aboriginal law decisions, and at its core is a casuistic conflation of a legal-philosophical argument *for the existence* of inherent Aboriginal rights with an argument *about the nature* of those rights. When the SCC justices writing the *Calder* judgments argued for the recognition of an inherent Aboriginal title, it was a title rooted in *prior occupation*—in essence, the plain and simple assertion that the Indigenous peoples of Canada were here first, and occupied and possessed their lands prior to the arrival of the Europeans. This is because, simply enough, “at common law occupation is *prima-facie* proof of possession, from which title is presumed. This presumptive title can, of course, be rebutted, but only by proof of a better title in another, traced from earlier possession.”<sup>7</sup> The oft invoked notion of Indigenous peoples having inhabited their lands since “time immemorial,” therefore, has embedded within it the legal-philosophical argument that there is no better title than that which stretches back to before the dawn of known history. This is why the assertion that Aboriginal peoples should have title to their unceded lands should really require *less defence* than the proposition that the Crown somehow acquired an underlying title and sovereignty over the entirety of Canada. But this issue aside (and rendered injusticiable by the courts), the simple, undeniable fact of unceded prior occupation is the reason why

---

<sup>6</sup> *Ibid.*

<sup>7</sup> Kent McNeil, *Common Law Aboriginal Title* (New York: Clarendon Press, 1989), 241.

a troubled twentieth century judicial branch of the Canadian state came to deal with the issue of Aboriginal title and Aboriginal rights in the first place. Accordingly, in *Calder*, Justice Hall wrote in his dissenting opinion that “possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial...”<sup>8</sup> Justice Judson, in his written reasons, stated that “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a ‘personal or usufructuary right’.”<sup>9</sup>

What one finds in the majority judgment for *Van der Peet*, on the other hand, is that any and every mention of, nod to, or sourcing of legal knowledge in prior occupation is converted to or conflated with an invocation of *prior social organization*, in order to be able to claim that “Aboriginal rights arise from the prior occupation of land, *but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land*. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant’s distinctive culture and society.”<sup>10</sup> The exhaustive nature of the *Van der Peet* decision comes across as a sublimated anxiety around presenting historical Aboriginal social organization—in other words, traditional Aboriginal culture(s)—as the inevitable and unquestionable guide in

---

<sup>8</sup> *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 375 [*Calder*].

<sup>9</sup> *Calder*, at 328.

<sup>10</sup> *Van der Peet*, at 562 (emphasis mine). One also finds nearly meaningless tautologies such as, at 534: “Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.” (emphasis in original).

determining what is and what is not an Aboriginal right. Given that section 35 did not provide specific guidance, Chief Justice Lamer’s written reasons for the majority engage in what he calls a “purposive analysis” of the section, attempting to surmise from a virtual vacuum what the *Constitution Act, 1982* means for the definition of Aboriginal rights. The judgment grafts onto any reference to culture, social organization, tradition, or the past that can be found in case law or academic commentary. Lamer even compares the English and French translations of section 35, and refers to dictionary definitions of the words chosen.<sup>11</sup> The *Van der Peet* decision amounts to quite an edifice built upon an arbitrary foundation, and Chief Justice Lamer’s judgment centres wholeheartedly on embellishing the simple and inert legal concept of prior occupation with heavy culturalist connotations. In this edifice, the notion of prior occupation is expressed in awkward and conspicuous turns of phrase such as “the pre-existence of distinctive aboriginal societies occupying the land.”<sup>12</sup> In the *Van der Peet* decision, then, recognizing and affirming Aboriginal rights centres on assessing traditional Aboriginal culture. In fact, this is an assumption adopted effortlessly and without further examination by so many both within and without the juridical field. It is arguable that in *Sparrow* the Court was already operating on the tacit assumption that the question of Aboriginal rights was a cultural, or so-called anthropological, question, for it states in the 1990 judgment that “the anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted *an integral part of their distinctive culture*. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The

---

<sup>11</sup> Ibid., at 539.

<sup>12</sup> Ibid., at 547.

Musqueam have always fished for reasons connected to their cultural and physical survival.”<sup>13</sup> Justification of this as legal doctrine, however, is more difficult, for it was one brief turn of phrase—an observation in passing—without the doctrinal foundation that the Court would want to project upon it. Nevertheless, it would be seized upon and made the centrepiece for the doctrine of Aboriginal rights expounded in *Van der Peet*.

The elaborate edifice of interpretation that is built upon the one sentence of section 35(1)—“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”<sup>14</sup>—rests on two foundations. The first identifies the purpose of the section as “the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions,” while the second claims the means of achieving that purpose lies in “identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.”<sup>15</sup> Ultimately, the Chief Justice specifies that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>16</sup> This has come to be known as the *Van der Peet* test, embodying the cultural rights approach to determining Aboriginal rights. The SCC thus forged a distinct Aboriginal cultural-legal subjectivity and brought it to the determinative forefront of Aboriginal law.

---

<sup>13</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099 [*Sparrow*] (emphasis mine).

<sup>14</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>15</sup> *Van der Peet*, at 548.

<sup>16</sup> *Ibid.*, at 549.

For the Court, however, the “distinctive culture” of Aboriginal peoples refers exclusively to their pre-contact societies. According to the majority judgment of the SCC in the *Van der Peet* case, then, Aboriginal rights therefore consist of those integral practices, customs, and traditions that have continuity with practices that existed prior to contact with European society. There are two broad difficulties with this. Firstly, the Aboriginal cultural-legal subject has a distinct and problematic relationship to time, in that it is unquestioningly imprisoned in the past—despite the fact that Aboriginal cultures continue to exist and evolve in the present. Secondly, cultural rights have difficulty speaking to the issues facing Aboriginal peoples as *polities*, and, indeed, so do the courts. Given this, it becomes readily apparent that premising Aboriginal rights on this type of subjectivity provides for inherent limitations on Aboriginal groups’ aspirations for self-determination.

The same year that the Supreme Court decided the *Van der Peet* case, it also heard *R. v. Pamajewon*,<sup>17</sup> the case of two First Nations that had passed their own by-laws regulating lotteries on reserve. Neither by-law was within the powers of council outlined in the *Indian Act*, nor had either First Nation obtained a provincial licence authorizing gambling operations. Members of both First Nations were ultimately charged with *Criminal Code* infractions related to the subsequent gambling activities. In their defence, the Shawanaga First Nation asserted an inherent right to self-government and the Eagle Lake First Nation claimed the right to be self-regulating in its economic activities. The two judgments for *Pamajewon* came to the same conclusion, finding that the gambling activities should not be considered an Aboriginal right protected by section 35. The

---

<sup>17</sup> [1996], 2 S.C.R. 821 [*Pamajewon*].

majority judgment authored by Chief Justice Lamer also discussed one witness's evidence concerning historical gaming played by the Ojibwa, stating that "his account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal."<sup>18</sup> The Chief Justice also agrees with the trial judge from the original trial of one of the appellants, quoting the provincial court judge's observation that "commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized."<sup>19</sup> Indigenous legal scholar John Borrows takes issue with the Chief Justice's finding, arguing that "not many activities in any society, prior to this century, took place on a twentieth-century scale," and asking "what would it be like for Canadians to have their fundamental rights defined by what *was* integral to European people's distinctive culture prior to their arrival in North America?"<sup>20</sup> Kent McNeil warns that such approaches, if carried to the extreme, could "condemn Aboriginal societies to extinction, as cultures which cannot adapt to changing conditions are bound to disappear."<sup>21</sup>

Thus the pre-contact time threshold for these cultural rights ensures that the types of practices and activities that could qualify will tend towards the quaint and modest, despite the fact that the majority judgment in *Van der Peet* claims, and reiterates from

---

<sup>18</sup> Ibid., at 835.

<sup>19</sup> Cited in *Van der Peet*, at 835.

<sup>20</sup> John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *American Indian Law Review* 22, no. 1 (1997): 54.

<sup>21</sup> Kent McNeil, "The Meaning of Aboriginal Title," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch, (Vancouver: University of British Columbia Press, 1997), 151.

*Sparrow*, that the Supreme Court does not intend for Canadian courts to take a “frozen rights” approach to Aboriginal rights, stating that rights can evolve over time and take on a modern form.<sup>22</sup> The problem still remains, though, as so many of these conflicts find their way into the courts, that Canadian judges are now the sole anthropological arbiters over these distinctions, and there has been no shortage of criticism over this from anthropologists and legal scholars. Ronald Niezen laments that, while the judiciary’s foray into cultural analysis brings it into a territory traditionally navigated by the social sciences, its perspectives on culture as a concept have not kept pace with contemporary social scientific theories that view culture as something unstable, as contested (even within a cultural group), and as more of a process than a thing.<sup>23</sup> Indeed, Norbert Elias began developing his figural sociology—also known as process sociology—as early as the 1930s, and by the 1970s was arguing that change is so integral to the nature of culture that to conceive of culture as something static is to conceive of a river as something that does not flow, or of wind as something that does not blow.<sup>24</sup> Chilwen Chienhan Cheng’s concern is that the metaphor most appropriate for the juridical conception of Aboriginal culture is that of *the museum artefact*, and that “the court is in danger of reducing Aboriginality to a package of anthropological curiosities rather than manifestations of an Aboriginal right to occupation, sovereignty and self-government.”<sup>25</sup> Similarly, Niezen argues that the judicial hostility to changes in Aboriginal subsistence practices “would also apply to innovative responses to dire necessity brought about by

---

<sup>22</sup> *Van der Peet*, at 556-557.

<sup>23</sup> Ronald Niezen, “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada,” *Canadian Journal of Law and Society* 18, no. 2 (2003).

<sup>24</sup> Norbert Elias, *What is Sociology?* (New York: Columbia University Press, 1978), 112.

<sup>25</sup> Chilwen Chienhan Cheng, “Touring the Museum: A Comment on *R. v. Van der Peet*,” *University of Toronto Faculty of Law Review* 55, no. 2 (1997): 432.

the dwindling of their resource base as a result of European encroachment,”<sup>26</sup> and that regardless of the SCC’s lip service to avoiding a “frozen rights” approach, the cultural rights approach “minimizes, overlooks or excludes the fact that all human societies innovate and adapt practices from others (including dominant societies), while retaining their essential distinctiveness. Making rights conditional upon basic continuity with pre-contact practices is an onerous requirement inconsistent with the rapid pace of change experienced today by all human societies.”<sup>27</sup>

Without a doubt, the judiciary’s conception of Indigeneity has an inherent difficulty accommodating change, adaptation, variability, fluidity, or—not to be forgotten—*internal contestation*, as no other contemporary groups have been honour-bound to represent a unanimous, singular, and doxic representation of the collective self as Indigenous peoples have:

The extent to which political, bureaucratic and legal authority seek to shape the contours of Aboriginal identity in Canada is worrisome, not only because of the outmoded conceptions of Aboriginal culture these institutions maintain, but also because these conceptions are increasingly incapable of accommodating any fluidity or variability in manifestations of Aboriginal culture and identity. This creates a situation in which change, adaptation and evolution are apt to be discursively framed as cultural erosion, Europeanization or inauthenticity. It also creates a situation in which complex and variable identities tend to be cemented rigidly into a few prevalent historico-narrative tropes.<sup>28</sup>

---

<sup>26</sup> Niezen, “Culture and the Judiciary,” 9.

<sup>27</sup> Ibid., 10.

<sup>28</sup> Jeremy Patzer, “Even When We’re Winning, Are We Losing? Métis Rights in Canadian Courts,” in *Métis in Canada: History, Identity, Law and Politics* (Edmonton: University of Alberta Press, 2013), 322.

In effect, it is an *essentialized cultural difference* within Aboriginality that is prioritized above all else. Implicit in the juridical gaze is an exoticization of the authentic *Other*. The majority judgment in *Van der Peet* stated:

To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).<sup>29</sup>

However, although still essentialized, there has been a conceptual reversal of sorts within the twentieth century alone in how the Aboriginal Other is perceived. Often cited to demonstrate the overtly racist underpinnings of historical common law jurisprudence, the 1919 case of *In re Southern Rhodesia* exemplifies a time when being distinctly Aboriginal was not to a group's advantage. *Southern Rhodesia*, like *St. Catherine's Milling*, actually revolved around a dispute between two bodies other than the Indigenous inhabitants of the land in question. The Legislative Council of Southern Rhodesia claimed that title to as yet unalienated lands in the region resided in the Crown, while the British South Africa Company, which had conquered the territory of Southern Rhodesia on behalf of the Crown, claimed title to these lands. Aboriginal title became an issue,

---

<sup>29</sup> *Van der Peet*, at 553 (emphasis in original).

however, because sympathetic legal representatives intervened on behalf of the Indigenous inhabitants of the region to argue that *they* still had title to their land. The question of Southern Rhodesia actually posed a somewhat vexing problem for the Judicial Committee of the Privy Council in London, in that no express intention of the Crown could be found to indicate who had title over the lands in question. (Given its deep ensconce within the legal positivist era, the will of the sovereign is essentially all the JCPC desired in order to make the determination, and its displeasure at the absence of any indication is tangible in the decision: “In matters of business reticences and reserves sooner or later come home to roost. In 1894 a single sentence, either in an Order in Council or in a simple agreement, would have resolved the questions which have for so many years given rise to conflicting opinions in Southern Rhodesia...”)<sup>30</sup> In the end, the JCPC agreed that ultimate title still resided with the Crown. While this is perhaps not surprising, the decision handed down by the committee in this case has still become somewhat notorious in Aboriginal rights scholarship. Much of this is due to the overtly evolutionist and racist tone adopted by Lord Sumner as his judgment sought to deal with the claims made on behalf of the Indigenous inhabitants:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

---

<sup>30</sup> *In re Southern Rhodesia*, [1919] A.C. 210 at 248 (P.C.) [Southern Rhodesia].

In the present case it would make each and every person by a fictional inheritance a landed proprietor “richer than all his tribe.” On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.<sup>31</sup>

At the height of the era of eugenics,<sup>32</sup> then, this is where the term *social organization* finds its entry into common law jurisprudence,<sup>33</sup> essentially arguing that some colonized peoples are so uncivilized that their notions of property cannot be translated into rights under the common law.

Now, however, rather than being scrutinized for its divergences from Eurocentric standards of civilization, “authentic” Aboriginality is projected as an idealized, romanticized standard that is meant *to differ* from the majority society. As Ronald Niezen describes it, whereas British colonial courts would once typically favour a colonized

---

<sup>31</sup> *Southern Rhodesia*, at 233-234.

<sup>32</sup> The *Southern Rhodesia* case actually took place between the First International Eugenics Congress and the Second International Eugenics Congress. The first was held in London with luminaries from politics, the military, and the judiciary in attendance.

<sup>33</sup> As mentioned in chapter five, *Southern Rhodesia*’s concept of social organization found its way into Canadian case law with the first Aboriginal title case to follow *Calder*, namely with the case of *Baker Lake (Hamlet) v. Canada (Minister of Indians Affairs and Northern Development)* [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (F.C.T.D.). Having little guidance from *Calder* as to how to assess a title claim, Justice Mahoney of the Federal Court looked through historical case law for guidance in devising his own test. The first criteria for his test therefore involved determining whether the claimants and their ancestors belonged to an “organized society”—an absurdly racist and evolutionist question that would likely be ridiculed today if it were posed in a legal decision. For commentary on this, see Michael Asch, “The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*,” *Review of Constitutional Studies* 5, no.2 (2000).

people's claim to distinct rights by virtue of the "advancement" of their social organization prior to contact, current jurisprudence implicitly tends toward the opposite: "simple subsistence economies, comparatively simple technologies, rudimentary social organization, in other words, those qualities that make them 'distinct' from the dominant society."<sup>34</sup> Although idealizing and romanticizing Aboriginality may sound like a positive development, it has a significant downside. Notably, this same discursive framework also has a tendency to be mobilized by a cultural backlash that casts "really existing" Aboriginal peoples as wanting in comparison, construing them as "culturally contaminated, corrupted descendants of their putatively spiritual ancestors rather than their spiritual heirs."<sup>35</sup> It is a distinctively late modern phenomenon that is neither limited to Canada nor to the juridical field. Based on her research in Australia, Elizabeth Povinelli's observation is that Indigenous people are "called on to perform an authentic difference in exchange for the good feelings of the nation and the reparative legislation of the state."<sup>36</sup> John Sharp, an anthropologist in South Africa, argues that the cultural essentialism integral to a politics of difference creates a paralyzing bind for Indigenous groups:

It follows that when the leaders of indigenous minorities within these states enter into dialogue with the consciousness, and the consciences, of the general public, they *must* assert an identity of fundamental cultural difference, of absolute primordial continuity with the precolonial past. If they did not do this, their claims

---

<sup>34</sup> Niezen, "Culture and the Judiciary," 7.

<sup>35</sup> Bruce G. Miller, "Culture as Cultural Defense: An American Indian Sacred Site in Court," *American Indian Quarterly* 22, no. 1 & 2 (1998): 89.

<sup>36</sup> Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002), 6.

for restoration of their dignity, for social justice, and for restitution for past dispossession would simply not be seen as legitimate. The unspoken rule is that those who make claims and demands on the basis of difference had better be *really* different. One is looking at a form of cultural relativism that deals, paradoxically, in absolutes: real difference resides in being, and in having always been, essentially different. Real difference is not seen as a precipitate of the divergent experiences that flow from differential positioning in processes of historical change.<sup>37</sup>

This scrutinizing of Indigenous peoples for authenticity, especially when cultural difference is invoked, is particularly pervasive in colonial settler societies, and the juridical field offers no exception. In the case of Aboriginal rights, however, claimants have no choice *but* to invoke culture as the source of their rights, creating a situation in which Crown counsel, non-Aboriginal organizations with intervenor status, and trial judges alike can cast aspersions and pass judgment on the cultural purity of Aboriginal Canadians.

In writing about his experiences as both researcher and expert witness in Canada and the United States, anthropologist Bruce Miller sees the accusatory backlash—against “faked culture” and “invented Indians”—as one of the responses to the use of culture and the sacred in the defence of Aboriginal interests. Miller notes that some observers in British Columbia coined the term “transistor radio fallacy” because “the trial judge in the Delgamuukw case observed that Indians employ modern technology and eat

---

<sup>37</sup> John Sharp, “Ethnogenesis and Ethnic Mobilization: A Comparative Perspective on a South African Dilemma,” in *The Politics of Difference: Ethnic Premises in a World of Power*, eds. Edwin N. Wilmsen and Patrick McAllister (Chicago: University of Chicago Press, 1996), 91–92 (emphasis in original).

contemporary foods.”<sup>38</sup> Arthur Ray makes reference to the “‘pizza Indian’ doctrine,”<sup>39</sup> and Christopher Roth explains that the notion of Aboriginal continuity was “grievously under assault in *Delgamuukw*, with the Crown’s lawyers continually probing Gitksan and Wet’suwet’en witnesses on whether they ever ate pizza, where they earned their money, and how much time they actually spent on the land.”<sup>40</sup> As I have argued elsewhere, the very idea of having the courts convert questions that try to root out a primordial, authentic Aboriginality into a legal test is eminently subjectifying:

The mechanism of the test introduces a specific dynamic: it entails a sort of modern trial by ordeal for which Aboriginal Canadians must shape and present themselves as claimants who might “qualify” or “pass,” and it implies the ever-present possibility of failure. This shapes the Aboriginal rights trial, invariably and undeniably, into a test of Aboriginal *authenticity*. In developed settler states, questions of Aboriginal authenticity currently stand as one of the most insidious forms of subjectification of Aboriginal peoples, or, put another way, one of the most penetrating incursions of power and power relations into the very meaning and being of Aboriginality. While the subjectification of colonized peoples is as old as the colonial relationship itself, the juridical field in Canada has intensified the effects of its subjectifying power with the cultural rights approach, because this foray into culture talk represents a further infiltration of legal-bureaucratic categorization into the lives and self-perceptions of Aboriginal Canadians.

---

<sup>38</sup> Miller, “Culture as Cultural Defense,” 89.

<sup>39</sup> Arthur Ray, “Aboriginal Title and Treaty Rights Research: A Comparative Look at Australia, Canada, New Zealand and the United States,” *New Zealand Journal of History* 37, no. 1 (2003): 10.

<sup>40</sup> Christopher Roth, “Without Treaty, Without Conquest: Indigenous Sovereignty in Post-*Delgamuukw* British Columbia,” *Wicazo Sa Review* 17, no. 2 (2002): 154-155.

Hinging Aboriginal peoples' aspirations to restore lost self-determination on the successful performance of the colonizer's restrictive notions of Aboriginality is contradictory in itself, and it further imperils what remains of an Aboriginal agency and sense of self-assuredness in their own processes of debating and defining what it means to be Métis, First Nations, or Inuit, from the national to the community level.<sup>41</sup>

In Canadian case law, the legal fetishism of the culturally distinctive perhaps found its apex with the 2001 decision for *Mitchell v. M.N.R.*,<sup>42</sup> a case in which the SCC deliberated on a right asserted by Grand Chief Michael Mitchell of the Akwesasne reserve—a right that the Court characterized as “the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade.”<sup>43</sup> In the *Mitchell* case, the majority judgment authored by Chief Justice McLachlin—one of the SCC justices who had originally dissented against the cultural rights approach in *Van der Peet*—cobbled together a series of strong turns of phrase from *Van der Peet* to describe an Aboriginal right as a traditional practice that must go to the “core” of a people’s cultural identity:

The practice, custom or tradition must have been “integral to the distinctive culture” of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples’ identity. It must be a “defining feature” of the aboriginal society, such that the culture would be “fundamentally altered” without it. It must be a feature of “central

---

<sup>41</sup> Patzer, “Even When We’re Winning,” 321.

<sup>42</sup> 2001 SCC 33, [2001] 1 S.C.R. 911 [*Mitchell*].

<sup>43</sup> *Ibid.*, at 931.

significance” to the peoples’ culture, one that “truly made the society what it was”... This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society’s cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.<sup>44</sup>

The likely lesson from the fallout of *Mitchell v. M.N.R.* is that exoticized and romanticized views of Aboriginal culture quickly eclipse those practices that may be mundane but are nevertheless fundamental to the way of life, the survival, or even the economic viability a people. This was recognized five years later, when the SCC heard twinned cases in which several Maliseet and Mi’kmaq claimants were charged with harvesting timber for personal use on Crown land. The defendants argued that harvesting trees to fulfil domestic needs was an integral part of their peoples’ distinctive cultures, while the Crown argued that *activities that went towards basic survival were essentially not distinctive enough*. According to the majority judgment, authored by Justice Bastarache, the Crown submitted “that the evidence of wood usage in pre-contact Maliseet and Mi’kmaq societies was primarily a reference to the need for harvesting wood on a daily basis in order to survive. In the Crown’s submission, this is not sufficient to establish a defining practice, custom or tradition that truly made the society what it was.”<sup>45</sup> The trial judge who had heard the case of two of the defendants, Sappier and Polchies, had essentially determined the same:

The practice of using wood to construct shelters, irrespective of whether they were wigwams or wooden building [*sic*] or of using wood to make furniture, was

---

<sup>44</sup> Ibid., at 928 (emphasis in original).

<sup>45</sup> *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at 689 [*Sappier and Gray*].

not in any way integral to the distinctive culture of the ancestors of the Woodstock First Nation in pre-European times. From the evidence adduced it is clear that they used wood or wood products from the forest in which they lived to construct shelters, implements of husbandry and perhaps in the construction of what might be called rude furnishings. Any humane [sic] society who would have been living on the same lands in New Brunswick at the same time would have used wood and wood products for the same purpose.<sup>46</sup>

The Supreme Court justices were unanimous that the Mi'kmaq and Maliseet claimants should have the Aboriginal right to harvest timber for personal use, and the judgment written by Justice Bastarache—on behalf of eight of the nine SCC justices—delves into an extended reflection on the cultural rights approach and the difficulties it had encountered. Bastarache admits that, “Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a ‘core identity’ may have unintentionally resulted in a heightened threshold for establishing an aboriginal right.”<sup>47</sup> Reflectively, he admits that “culture, let alone ‘distinctive culture’, has proven to be a difficult concept to grasp for Canadian courts.”<sup>48</sup> But if the *Sappier* and *Gray* decision offers an expression of regret in the wake of so much criticism and controversy, it is a regret that seems to want to attribute problems to a misunderstanding of the *Van der Peet* test, rather than admitting to the problematic nature of the test itself. In fact, well matched with the culturalist rarefaction that would reach a fever pitch in the *Mitchell* decision, the majority judgment in *Van der Peet* had stated that “...a claim to an aboriginal right

---

<sup>46</sup> Cited in *Sappier and Gray*, at 707.

<sup>47</sup> *Ibid.*, at 710.

<sup>48</sup> *Ibid.*, at 712.

*cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question.* The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group.”<sup>49</sup> And although some academic commentators were optimistic with the expression of a new, less rarefied vision of Aboriginal cultural practices in the *Sappier* and *Gray* decision, the formula at base is still premised on the same foundation. As favourable a development as *Sappier* and *Gray* may have been, Justice Bastarache still writes that the doctrine of Aboriginal rights is centered on practices which were integral to the distinctive pre-contact culture of an Aboriginal people, and *not* the importance of a resource (such as wood) to that people:

The difficulty in the present cases is that the practice relied upon to found the claims as characterized by the respondents was the object of very little evidence at trial. Instead, the respondents led most of their evidence about the importance of wood in Maliseet and Mi’kmaq cultures and the many uses to which it was put. This is unusual because the jurisprudence of this Court establishes the central importance of the actual practice in founding a claim for an aboriginal right. Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. They are not generally founded upon the importance of a particular resource. In fact, an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right. In

---

<sup>49</sup> *Van der Peet*, at 564 (emphasis mine).

characterizing aboriginal rights as *sui generis* this Court has rejected the application of traditional common law property concepts to such rights.<sup>50</sup>

And yet, how one can logically parse out and make such a distinction between these two issues—the practice of using wood and the importance of it as a resource to the Mi’kmaq and Maliseet—remains a mystery. The resources that a people use, the importance of those resources to them, and the ways in which they are used, are all questions of culture. It seems that the *sui generis* nature of Aboriginal rights is simply mobilized here in an effort to ward off the notion that Aboriginal rights might be akin to common law property rights or resource rights. Justice Bastarache argues that the pre-contact practice is central to the Van der Peet test for two reasons. The first is for the Court to understand how a “resource was harvested, extracted and utilized,” for this forms “the necessary ‘aboriginal’ component in aboriginal rights.”<sup>51</sup> This, as one sees time and again in the Aboriginal rights case law, is testament to the accusation that the Canadian judiciary has imprisoned Aboriginality in the past. On the other hand, always wary of accusations surrounding the “frozen rights approach,” Justice Bastarache states that the second reason is to know the practice upon which a claim is founded “in order to consider how it might have evolved to its present-day form.”<sup>52</sup> Despite this, a significant problem for the cultural rights approach remains the fact that the lofty and idealized nature of its stated goals are at odds with the foundation that has been established for it. As such, I would argue that the regret expressed in *Sappier* and *Gray* has less to do with a fundamental change concerning Aboriginal rights and more with making some effort to face the rising

---

<sup>50</sup> *Sappier and Gray*, at 699-700.

<sup>51</sup> *Ibid.*, at 700.

<sup>52</sup> *Ibid.*, at 701.

tenor of commentary and critique over the use of such unstable and disadvantageous concepts.

## **The Casuistry of Culture: The Arbitrary, the Specific, and the Indeterminate**

If the SCC insists that Aboriginal rights are not to be frozen in time, then this begs the question as to why it mobilizes a conception of Aboriginal culture, or Aboriginality itself, as something *that is found in the past*. And if its goals are not management, limitation, or circumscription, one has to question the rationale of setting their time threshold so far in the past, prior to the arrival of Europeans. According to Brian Slattery, the British legal tradition puts no legal significance in the historical moment of contact at all:

We may observe that the Court's choice of threshold date is somewhat puzzling.

In British imperial law, the simple fact of “contact” between the Crown and indigenous peoples had no legal significance. Contact did not give indigenous peoples any rights in British law; nor did it have any legal impact on indigenous systems of law and rights. Contact was a legally innocent event. It was only when the Crown acquired jurisdiction over a territory that the issue of the rights of the local inhabitants arose in British law. Only at this point could the doctrine of aboriginal rights come into play. So, while it would not be impossible for the doctrine to recognize only customary rights that existed at some prior date of “contact,” in practice this would be a strange and inconvenient way for the doctrine to operate. It would have made it virtually impossible for British officials on the spot at the time to know which asserted aboriginal rights they should

respect, without a battery of historians and anthropologists at their elbows. Not surprisingly, there seems to be no historical evidence that imperial law actually functioned in this manner.<sup>53</sup>

But the casuistry of erudite juridical work disguises the ungrounded nature of these formulae, including the issue of the time threshold, and the unwieldy nature of attempting to calibrate such tests and formulae to manage a prospective future of rights and title claims is evident in the odd discrepancies they manifest. Comparing the time thresholds adopted in rights and title jurisprudence provides a particularly fitting example of this and demonstrates the restrictive burden of proof put on Aboriginal rights. In effect, because the law does not conceive of Aboriginal title as being entirely *other* to Crown title, but rather is a distinct form of title oddly compatible and synchronous with the latter, Aboriginal title as a juridical creation becomes something that crystallizes precisely *at the assertion of Crown sovereignty*. In the *Delgamuukw* case, then, the SCC decided that the historical threshold which it must look to in deciding Aboriginal title claims is the moment of the Crown's assumption of sovereignty over the territory in question, and not the pre-contact time period. Given this, Slattery uses the following scenario to illustrate potential idiosyncrasies between title and rights:

Suppose that an aboriginal group of hunters moved into a certain area after the date of contact but substantially before the date of Crown sovereignty. Under current law, the group would apparently be precluded from showing an aboriginal right to hunt in the area; however, paradoxically, it might be able to establish aboriginal title there, despite the fact that aboriginal title would include hunting

---

<sup>53</sup> Brian Slattery, "Making Sense of Aboriginal and Treaty Rights." *Canadian Bar Review* 79, no. 2 (2000):217.

rights. In effect, the test for the lesser right is more onerous than for the greater right. The anomaly is compounded where Group A occupied the area at the time of contact but had been displaced by Group B by the time of sovereignty. Here, Group A could show a specific aboriginal right to hunt in the area but not aboriginal title. By contrast, Group B could show aboriginal title but not a specific right to hunt.<sup>54</sup>

Another quirk was that a pre-contact rights threshold simply could not obtain for Métis peoples, of course, since they are descended from Aboriginal-European miscegenation that often occurred in areas outside the locus of control of colonial authorities. In the majority judgment for *Van der Peet*, Chief Justice Lamer was thus conscious of the fact that the time threshold would have to be adjusted for a future Métis rights dispute. This occurred with the 2003 case of *R. v. Powley*.<sup>55</sup> Steve and Roddy Powley had been charged with shooting a moose in the area of Sault Ste Marie, and their defence argued that the *Van der Peet* test should be adjusted so that Métis rights are sourced in the pre-contact practices of their First Nations ancestors. This model might have provided for a certain degree of equivalence of rights among a number of First Nations and Métis groups, but the SCC unanimously opted for another threshold. Rather, because it did not want to “deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1),” the Court decided that Métis peoples would be accommodated best by adapting the *Van der Peet* test to focus “on the period after a particular Métis community arose and

---

<sup>54</sup> Ibid., 217-218.

<sup>55</sup> 2003 SCC 43, [2003] 2 S.C.R. 207 [*Powley*].

before it came under the effective control of European laws and customs.”<sup>56</sup> The difficulty with this is that, for many Métis in what is now Western Canada, the assertion of the Crown’s effective control of a region often came simultaneous to a great amount of flux for Métis families and communities as a whole. In the case of the Red River Colony entering into Confederation as the province of Manitoba, the era in which the Crown took control of the new province (and sent in the North-West Mounted Police) coincided with a significant outward migration of many Métis. As I cited in a previous chapter, historian Gerald Friesen attributes this both to the disappearance of the bison and also to “the poisonous atmosphere in Red River itself.”<sup>57</sup> Fred Shore, for his part, characterizes the period after 1870 as one of dispossession, dispersal, and a “reign of terror.”<sup>58</sup> The immigration of European settlers to the province—which John A. Macdonald had admittedly intended to use to drown out the Métis—combined with the emigration of Métis from the province, was sufficient to cause a significant demographic reversal in the province. Lieutenant-Governor A.G. Archibald’s 1870 census had shown the Métis as comprising 83 per cent of Manitoba’s population, but by 1886 this had been reduced to seven per cent.<sup>59</sup>

With a quick reconsideration of the arguments around the source of Métis rights in the *Powley* case, one realizes that, in a sense, the Aboriginal rights of the Métis would have actually been much better protected under the regime suggested by the Métis

---

<sup>56</sup> *Powley*, at 227.

<sup>57</sup> Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), 196.

<sup>58</sup> Fred Shore, “The Emergence of the Metis Nation in Manitoba,” in *Metis Legacy: A Metis Historiography and Annotated Bibliography*, eds. Lawrence J. Barkwell, Leah Dorion and Darren R. Préfontaine (Winnipeg: Pemmican Publications, 2001), 75.

<sup>59</sup> Auguste Henri De Trémaudan, *Histoire de la Nation Métisse dans l’Ouest Canadien* (Winnipeg: Éditions des Plaines, 1984), 250.

claimants themselves. With a sourcing of rights in First Nations ancestors, there is no threshold and no historical deadline for settlement of a community. With the doublespeak of not wanting to “deny to Métis their full status as distinctive rights-bearing peoples,” the SCC essentially preserved a retroactive threshold for a community to take hold and anchor rights in a specific geographic location, a deadline that many itinerant Métis were unwittingly unable to make. In other words, the seemingly innocent question of *what practices did you engage in prior to the threshold date* has for some groups been effectively converted to the question *was there a community established in this area by the threshold date*. Judges across the country serve as the ultimate arbiters between competing claims concerning geography and chronology, and entire communities of people who were once nomadic or semi-nomadic can find themselves with no discernible rights since they do not reach back beyond the imposed threshold date for that specific geographical area.

To get an acute sense of the absurdities that the enforcement of the arbitrary can lead to, one need only look at the case of *R. v. Langan*.<sup>60</sup> Eugene Langan, a Métis man from the village of San Clara, Manitoba, was charged with fishing without a licence on Lake of the Prairies, a lake that straddles the Manitoba-Saskatchewan border. Langan was charged just inside the Saskatchewan border and tried in the provincial court of that province. Judge Green’s findings of fact agreed with the claims of the Crown in this case, suggesting that the Métis families of San Clara did not homestead the area until around 1906. The judge even notes that one of Eugene Langan’s ancestors, Louis Lafontaine Sr., was one of a group of nineteenth century Métis who had fled the region as refugees to

---

<sup>60</sup> 2011 SKPC 125, aff’d 2013 SKQB 256 [*Langan*].

North Dakota after the defeat of Louis Riel's army at Batoche,<sup>61</sup> thus explaining their resettlement in Manitoba in the early years of the twentieth century. Judge Green also asserts that a series of events and activities from the 1870s through to the 1890s led him to conclude that effective control of the area was exercised by the Crown by 1885.<sup>62</sup> Thus the Métis community in and around the border town of San Clara, Manitoba—in the very province brought into Confederation by the Métis—was declared a non-rights bearing community by the Provincial Court of Saskatchewan. Eugene Langan's charge was upheld simply because his ancestors were considered to be twenty years late in settling down, a tardiness due to the fact that they had originally been displaced and dispossessed by conflict with a Crown desirous to expand across the West. To further accentuate the absurdity, the government of Manitoba had by the time of Langan's trial recognized the Métis as having section 35 rights to hunting and fishing in the area of Lake of the Prairies, meaning that it was legal for Eugene Langan to fish without a licence on approximately 75 per cent of the lake. Métis anglers in the area will therefore do well to avoid having their boats drift too far west.

Needless to say, there is another issue underlying the limitations on inherent rights, and interacting with arbitrary time thresholds, which further closes the door on opportunities for recognition. It is the judicial imposition of *specificity*, the consistent narrowing of the law and its applicability. Pierre Bourdieu has used the concept of “*restrictio* (narrowing), a procedure necessary to avoid applying a law which, literally understood, ought to be applied” as one of “a whole series of techniques... which tend to

---

<sup>61</sup> Ibid., at para. 35.

<sup>62</sup> Ibid., at para. 39.

maximize the law's elasticity, and even its contradictions, ambiguities, and lacunae.”<sup>63</sup>

Although it is a useful concept,<sup>64</sup> the devices and techniques the juridical field can employ in the service of narrowing are much more multifaceted. The most apparent consequence of imposed specificity in Aboriginal law is the narrow delimitation of rights by geography and community, but it also surfaces in how rights claims are characterized, or the questions that the courts are willing to pose and to answer. In fact, the use of specificity and narrowing in the management of anti-colonial claims need not be limited to Aboriginal rights alone, for the courts have demonstrated a reticence to have beneficial claims concerning treaty rights or Aboriginal title generalize beyond that which is absolutely necessary as well. In this sense there is not one uniform package of treaty rights extended to the historical treaty First Nations in Canada, and if First Nations within a certain treaty territory can convince the courts to recognize a particular treaty promise or condition that has hitherto been unrecognized, that successful rights advancement will remain unrecognized for First Nations in other treaty territories until they make the same case successfully before the courts.

The reticence to generalize beneficial recognition is intimately tied to the juridical field’s creation of pervasive uncertainty and the subsequent, though counterintuitive, placement of the burden of proof upon Aboriginal claimants. Thus, with the advent of *Calder*, title was not automatically granted to all Aboriginal peoples who had not signed a “land cession” treaty, but rather remained something that is fought for on a case by case basis. This became an issue in the earlier years of the *Delgamuukw* case, with the British

---

<sup>63</sup> Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *Hastings Law Journal* 38, no. 5 (1987): 827.

<sup>64</sup> Granted, some may accuse the turn of phrase as harbouring an implicit essentialism, seemingly implying that there is a fundamental lawfulness existing within the law that need only be followed.

Columbia Court of Appeal asserting that a global argument for a province-wide recognition of Aboriginal title could not be made. The appeal court heard a number of issues pertaining to the developing case, amongst them an appeal of a decision of the Chief Justice of the British Columbia Superior Court to allow the amalgamation of a series of title claims, comprising those of the Gitksan, the Wet'suwet'en, the Clayoquot, the Ahousaht, as well as 36 bands who were located along the Fraser and Thompson Rivers and their estuaries. The ruling issued *per curiam* by the court of appeal states that "It seems to us as well that the Chief Justice was not informed, as we were, that aboriginal title cannot be determined on a global or province-wide basis, but must be determined on a case-by-case basis. Thus proof that the plaintiffs in the Gitksan action had aboriginal title would not necessarily be proof that the plaintiffs in the Martin action had aboriginal title. In Kruger and Manuel v. The Queen... Dickson J. (as he then was) confirmed the necessity of considering the question of aboriginal title on the facts pertinent to the particular band in question."<sup>65</sup>

Beyond this, however, it is of course the Aboriginal rights jurisprudence that demonstrates the most avid use of specificity. In *Van der Peet*, with little to offer as a basis for it, the SCC simply declares that Aboriginal rights are *specific rights*, and "the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right."<sup>66</sup> Parallel to RCAP's criticism of the *Indian Act* imposition of the elective band council system,<sup>67</sup> the scale of the Court's notion of the Aboriginal right is not at all representative of the

---

<sup>65</sup> *Delgamuukw (Uukw) v. British Columbia*, 1986 CanLII 1221 at para. 28 (B.C.C.A.) (emphasis in original).

<sup>66</sup> *Van der Peet*, at 559 (emphasis in original).

<sup>67</sup> See *Report of the Royal Commission on Aboriginal Peoples: Volume 1, Looking Forward, Looking Back*, (Ottawa: Supply and Services Canada, 1996), 253, hereafter cited as *RCAP*, vol. 1.

nations or tribes of Indigenous peoples that have existed in the larger sense. Preoccupied with the hazards of rights contagion, the *Van der Peet* judgment insists that “Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.”<sup>68</sup> This specificity not only means that potential rights are tethered to culture, to arbitrary time thresholds, and to smaller scale populations, but also to tight delimitations on geography. This issue came up, along with another more fundamental question about the relationship of Aboriginal rights to Aboriginal title, in the SCC judgments of *R. v. Adams*<sup>69</sup> and *R. v. Côté*,<sup>70</sup> delivered simultaneously in October, 1996.

The puzzle that the Court was dealing with immediately after the advent of the specific right was that it was still unclear whether Aboriginal rights were a subset of Aboriginal title, or the reverse. The layperson might think this problem akin to *how many angels can dance on the head of a pin*, but for the judiciary it was a serious question in the *Adams* case since the Crown had argued, and the majority of the Court of Appeal for Quebec agreed, “that aboriginal fishing rights could not exist where there was no aboriginal title.”<sup>71</sup> In practical terms for groups that had not had any collective title to land recognized and that probably would have great difficulty gaining such recognition—such as the Métis, for instance—having title as a mere subset of Aboriginal rights would

---

<sup>68</sup> *Van der Peet*, at 559.

<sup>69</sup> *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*].

<sup>70</sup> *R. v. Côté*, [1996] 3 S.C.R. 139 [*Côté*].

<sup>71</sup> *Adams*, at 116.

mean that they would be able to argue for hunting rights independent of title claims. If it were the opposite, a claim of any Aboriginal right would require proving a prior fundamental claim to full Aboriginal title—an onerous hurdle to simply securing the right to hunt. But, in both *Adams* and *Côté*, the SCC ruled that Aboriginal rights could exist independently of Aboriginal title.

There were some other key points that Chief Justice Lamer, who authored the majority judgments for *Adams* and *Côté*, wanted to come out of this case law. The first is that allowing rights to exist independent of established and onerous claims of Aboriginal title does not mean that Aboriginal rights exist in the abstract and are not tied to land. Rather, “even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land . . . . A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.”<sup>72</sup> Thus, the specificity of rights-bearing community in Aboriginal rights jurisprudence is also tied to a tightly delimited specificity of geography.

On the other hand, a year later in the *Delgamuukw* judgment that defined Aboriginal title and discussed the onerous standards for proving a claim, Chief Justice Lamer was quick to point out that “although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity.”<sup>73</sup> When held in light of the fact that early legal scholarship in Canada

---

<sup>72</sup> *Adams*, at 119 (emphasis in original).

<sup>73</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1094 [*Delgamuukw*].

largely assumed that Aboriginal rights *do* derive from, and fall under the larger umbrella of, Aboriginal title—the opposite of what the SCC had just declared in *Adams* and *Côté*—it is interesting to behold this enticement in the *Delgamuukw* decision. While making rights claims feasible independently of title claims is a conceptual declaration that is largely perceived, even by the Court itself, as charitable to those groups who would have little chance of establishing a claim to Aboriginal title over any territory—and indeed, it does preserve options for groups such as this—it also represents a sort of pressure relief valve for Aboriginal title disputes. In effect, for the Court, locking the possibility of gaining rights to certain practices into the precondition of making out a successful claim of Aboriginal title would have the undesirable effect of raising the stakes, and, essentially, encouraging more groups to launch burdensome and infinitely more controversial title claims. In this sense, the very existence of specific Aboriginal rights speaks to the management of the challenges of inherence, for the invention of an entire rights jurisprudence that is meant to co-exist with settler colonialism—and which also parses out discrete cultural practices from what was formerly a larger grammar of sovereignty and self-determination—can serve to steal some oxygen from the flames of Aboriginal title.

As we have already had an indication of, the fact that Aboriginal rights are specific to community and geography means that the interaction of the historical threshold with the geographical displacement of people can have the effect of categorizing entire communities as non-rights-bearing. This risk is especially acute for Métis communities who were once quite itinerant. After the 2003 *Powley* decision in which the Supreme Court recognized hunting rights for a Métis community for the first

time, this formed, in fact, the strictly limited concessions of the first Métis hunting rights policy attempt of the Manitoba government. By the province's measure, there were only eleven contemporary Métis communities that passed the test of having continuity with a settled, historic Métis community that existed prior to effective control of the Crown, and that had harvesting activities such as hunting and fishing integral to their distinctive culture. The province's initial plan was therefore to recognize harvesting rights for only those Métis hunters living in and around the eleven towns and villages—with those harvesting rights being limited, of course, to the area in and around their respective communities as well.<sup>74</sup> In the *Hirsekorn* Métis rights case from southern Alberta, this localization of historical rights allowed Thomas Rothwell, attorney for Alberta Justice, to declare to the media that “you may be Metis but you may not be part of a rights-bearing community.”<sup>75</sup> Indeed, arbitrary thresholds and geographical limitations allow Canadian justice to readily tell some Aboriginal communities in their entirety the same thing: *you may be Aboriginal, but you may not necessarily be a rights-bearing Aboriginal community.* The gravity of this is all the more acute for Métis groups and those whose Indian or Inuit status has heretofore not been recognized. Groups such as these were particular for their relatively complete absence of rights recognition prior to the

---

<sup>74</sup> Manitoba Metis Federation, Department of Natural Resources, personal communication, 2007. Through several successful court cases and ongoing negotiations with the province, the MMF has since managed to have Métis harvesting rights recognized over a larger area of the province. In 2012, the two governments also signed a Métis Harvesting Agreement which outlined “collaborative processes for examining Métis harvesting right claims in regions of the province outside of the designated Métis Natural Resource Harvesting Zone and for establishing a working group to monitor and address issues relating to Métis rights-based natural resource harvesting.” Manitoba Metis Federation, “Province Partners with Manitoba Metis Federation to Uphold Métis Harvesting Rights, Natural Resource Conservation,” news release, September 29, 2012,

<http://www.mmf.mb.ca/docs/MMF%20Harvesting%20Rights%20Media%20Release.pdf>.

<sup>75</sup> Cited in Alex McCuaig, “Trial Begins for Three Métis Men Accused of Breaching Hunting Rules,” *Medicine Hat News*, May 4, 2009.

development of inherent Aboriginal rights. As I have sought to underscore previously for the Métis, they are “not building upon a pre-existing rights regime, such as with claimants from other Aboriginal groups who have fought in court to fish with a certain type of net or to sell some of their catch. Rather, the Métis struggle is to achieve basic recognition of the right to carry on practices important to Métis people. The prospect of building a complex checkerboard of varying rights through a patchwork of court decisions—despite the fact that the *Sparrow* judgement specifically identified the need to avoid this—certainly looks like an arduous and never-ending task.”<sup>76</sup>

Another sort of specificity that one encounters in the jurisprudence is the judiciary’s penchant for narrowing the claims put forth by Indigenous people. Claims are often recharacterized into narrower, more innocuous or more controlled forms of rights. With the SCC’s decision in the twin cases of *Sappier* and *Gray*, for instance, the practice that the claimants had engaged in was the harvesting of wood on public land. Naming the generic practice alone, however, was insufficiently specific for the Court and so the claimants sought the recognition of the right to harvest word *for personal uses*. In the judgment he authored, Justice Bastarache whittled the description of the right down even more:

“I find this characterization to be too general as well. As previously explained, it is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community. The claimed right should then be delineated in accordance with that practice... The way of life of the Maliseet and of the Mi’kmaq during the pre-contact period is that of a migratory

---

<sup>76</sup> Patzer, “Even When We’re Winning,” 320.

people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. Thus, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life.<sup>77</sup>

The most egregious example of recharacterizing a rights claim to a narrower, more palatable form was in the case discussed earlier, *R. v. Pamajewon*, in which two Ontario First Nations asserted an inherent right of self-government in one case, and an Aboriginal right to be self-regulating in its economic activities in the other, in their defence for having passed their own by-laws regulating lotteries on reserve. They did so with the aim of spurring economic development through the construction of gaming halls and a hotel. While these were the claims put before the Supreme Court—an assertion of a right to self-government and of a right to be economically self-regulating—these were not the questions answered by the Court. In one of his articles, John Borrows uses the character of the trickster from the intellectual traditions of a number of First Nations to critique the SCC's approach to Aboriginal rights. Describing the development taking place along the highway, Borrows writes of Chief Justice Lamer metaphorically taking “a thirty-two paragraph stroll around the place,” with *Van der Peet* as his companion.<sup>78</sup> The Chief Justice, Borrows states tongue in cheek, “will tell us the character of Aboriginal rights. Once again he gets to decide character traits. He will define not just the character of an Aboriginal, he will define the character of an entire Aboriginal community. How is he going to do this? Can he identify the character of another culture? He consults his companion. *Van der Peet* has some words of advice: change the characterization of what

---

<sup>77</sup> *Sappier and Gray*, at 701-702.

<sup>78</sup> John Borrows, “The Trickster: Integral to a Distinctive Culture,” *Constitutional Forum* 8, no. 2 (1997): 29.

the Aboriginal people are claiming. The Chief Justice agrees; that should make it easier.”<sup>79</sup>

Indeed, in the majority judgment for *Pamajewon*, Chief Justice Lamer remarks that “the appellants themselves would have this Court characterize their claim as to ‘a broad right to manage the use of their reserve lands’. To so characterize the appellants’ claim would be to cast the Court’s inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.”<sup>80</sup> Thus clearly, in the SCC’s mind, broad rights for once independent and self-determining Indigenous polities to manage their own affairs come at a level of “excessive generality” for the requirements of the cultural rights approach. Abiding by the demands of specificity brings Lamer to the conclusion that “the most accurate characterization of the appellants’ claim is that they are asserting that s. 35(1) recognized and affirms the rights of the Shawanaga and Eagle Lake Nations to participate in, and to regulate, gambling activities on their respective reserve lands.”<sup>81</sup> Perceptively, John Borrows notes that judicial discussions of the proper characterization of Aboriginal rights claims lack any references to “large, liberal and generous” interpretations or “sensitivity to the ‘aboriginal perspective on the meaning of the rights at stake’” bandied about so freely in other areas of rights case law.<sup>82</sup> The Court’s determination—a result in which all SCC justices concurred—was that the two

---

<sup>79</sup> Ibid.

<sup>80</sup> *Pamajewon*, at 834.

<sup>81</sup> Ibid. Justice L’Heureux-Dubé authored separate reasons for *Pamajewon*, agreeing that the claimants’ characterization of their claims was overly broad, while offering a characterization of the right that differed slightly from the majority judgment.

<sup>82</sup> Borrows, “The Trickster,” 29-30.

First Nations did not make out their case that this was a practice integral to their distinctive pre-contact culture. As far as its effect on the jurisprudence is concerned, Kent McNeil suggested that if this narrow approach to identifying and characterizing rights were applied to all self-government claims, it would “effectively close the door to broadly-based Aboriginal jurisdiction over a range of activities in a modern-day context. Inherent self-government rights, even if accepted by the Court, will have to be established on an item-by-item basis, in accordance with the claimant group’s specific history and culture.”<sup>83</sup>

Relatedly, the courts often have a preference to move in a cautious and measured manner and thus seek, when they can, to minimize the number of sweeping pronouncements that must be made when deciding a case. Although contemporary Aboriginal law has been characterized by a stunning amount of doctrinal productivity (and creativity) in a relatively short amount of time, this has largely been out of necessity due to the compelling need to shift from one legal-ethical era to another. The “cautious jurist” approach which safely minimizes the number of issues decided and doctrinal pronouncements made is, however, a common tack taken in the juridical field, especially in cases that involve politically charged issues. In addition to recharacterization of the right, they can do this by paring down the number of issues that need to be dealt with in a case, often by finding their way to a decision before a declaration on another issue becomes a logical necessity. In essence, it is a form of narrowing of a line of deliberation that purportedly renders it unnecessary to consider other aspects broached in the various claims and arguments. It occurred in the seminal case of *R. v. White and Bob*, prior to

---

<sup>83</sup> Kent McNeil, “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty,” *Tulsa Journal of Comparative and International Law* 5, no. 2 (1997-1998): 282.

*Calder* and the recognition of inherence, with Justice Davey of the British Columbia Court of Appeal recognizing an agreement between James Douglas and the Saalequun (Snuneymuxw) of Vancouver Island as a treaty. In recognizing that the claimants had a treaty right to hunt, it became “unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents’ counsel”<sup>84</sup>—namely, the as yet dangerous and uncharted territory of their claim that they simply had an inherent Aboriginal right to hunt as they always had done.

This rendering of collateral determinations unnecessary is another manner in which larger, more controversial issues such as self-government are sometimes avoided. The Supreme Court’s avoidance of the question of self-government—made legendary in the *Pamajewon* case—should be, by definition, even more conspicuous in the Aboriginal title case law. It is conspicuous precisely because of the peculiar contradiction that this lack of juridical recognition has entailed. Canada now has a concept of Aboriginal title that encompasses a variety of choices about the uses to which title land is put, but without acknowledging the existence of a political structure implicated in making those decisions.<sup>85</sup> Indeed, how can one have a broad title over territory recognized without being capable of self-governing on some level?<sup>86</sup>

In *Delgamuukw*, the original claims made by the Gitksan and Wet’suwet’en were for *ownership and jurisdiction* over their lands, but this was changed to claims for

---

<sup>84</sup> *R. v. White and Bob* [1964] 50 D.L.R. (2d) 613 at 619 (B.C.C.A.) [*White and Bob*]. See chapter five for more discussion of *White and Bob*.

<sup>85</sup> In *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 at 30, 189 D.L.R. (4th) 333 (B.C.S.C.), Judge Williamson acknowledges this incongruity in suggesting that title should logically entail a right to a political structure that makes decisions about using and managing the land, but no majority or unanimous decision of the SCC has made such an assertion.

<sup>86</sup> Kent McNeil also used this incongruity to argue that Aboriginal title has to entail a right of self-government. See McNeil, “From Title to Land,” 286.

Aboriginal title and self-government before the appeal court. But in the SCC's treatment of *Delgamuukw*, we see both techniques—recharacterizing toward the narrow, and sidestepping to avoid the issue altogether—employed. Chief Justice Lamer invokes *Pamajewon* in his brief discussion of the issue of self-government in *Delgamuukw*, stating that “there, I held that rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet’suwet’en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).”<sup>87</sup> The insinuation that section 35 requires self-government claims to be framed in specific terms amenable to the *Pamajewon* approach, even for a concept of Aboriginal title that is not meant to have the same historical-cultural limitations as Aboriginal rights, is approaching absurdity. In order for the Indigenous management of title lands to be workable, the very breadth of the concept of title requires a concept of self-government that is just as broad in its terms. In the end, however, Lamer’s allusion to *Pamajewon* did not serve as the rationale for a decision. In fact, there was no decision at all on whether self-government could be a claimed right within the context of Aboriginal title. With all SCC justices in substantial agreement on the point, Chief Justice Lamer simply declared that “the errors of fact made by the trial judge, and the resultant need for a new trial, made it impossible for this Court to determine whether the claim to self-government had been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation.”<sup>88</sup> Nor was the *Tsilhqot'in* case, it would seem, as the SCC makes no mention of self-

---

<sup>87</sup> *Delgamuukw*, at 1114-1115.

<sup>88</sup> *Ibid.*, at 1114.

government in that decision on Aboriginal title, though it was delivered almost two decades later.

In addition to Aboriginal law's institution of the arbitrary, and its management through specificity, another characteristic of Aboriginal law in particular is the often unacknowledged indeterminacy and elasticity underlying its operation. Indeterminacy and elasticity are not exclusive to Aboriginal law, however, they are the open secrets of the law writ large. According to Pierre Bourdieu, the judicial act of interpretation "causes a historicization of the norm by adapting sources to new circumstances, by discovering new possibilities within them, and by eliminating what has been superseded or become obsolete. Given the extraordinary elasticity of texts, which can go as far as complete indeterminacy or ambiguity, the hermeneutic operation of the declaratio (judgment) benefits from considerable freedom."<sup>89</sup> But that freedom and flexibility in judgment is not an overt and outspoken freedom, for that would present the position of judge as too cynical and arbitrary a source of social power. The deliberative and interpretative ritualism of the juridical field—erudite argumentation parsing out multiple premises rooted in a complex yet malleable amalgam of precedent, statute, and elegant logics—suggests an appeal to transcendental norms. They imply that the solution to a question of justice is an essence that pre-exists the question. It is not created or invented; it is somewhere out there, waiting to be found by those with the technical competence to locate it. It is in this way that the juridical field "tends to confer the appearance of a

---

<sup>89</sup> Bourdieu, "Force of Law," 826-827.

transcendental basis on the historical forms of legal reason”<sup>90</sup> and that the trial is constructed “as an ordered progression toward truth.”<sup>91</sup>

In their examination of Aboriginal rights, Michael Asch and Catherine Bell argue that, “Adopting interpretive strategies, a judge chooses one precedent in favour of another, appearing to find, rather than create law. The appearance of finding is important because it deflects charges of result-oriented reasoning and judicial legislation. It also absolves judges of personal responsibility for what they decide. M.R. Cohen explains it this way: ‘To speak of finding the law seems to connote that law exists before the decision, and thus tends to minimize the importance of the judicial contribution to the law or the *arbitrium judicium* and the factors that determine it.’”<sup>92</sup> We have seen how the courts in Canada, especially the Supreme Court of Canada, was able to marshal precedents from across the common law world which were decades—sometimes centuries—old and which had long been ignored by Canadian courts, all in the service of renewing Canadian jurisprudence with a more progressive Aboriginal law. Still, it was not only the newly principled interpretations of venerated legal texts that brought in the new era, it was also the truly creative extrapolation of ever more elaborate forms of *sui generis* and incommensurable forms of justice deduced as self-evident conclusions flowing from an Aboriginal legal subjectivity created by the courts. Such an unparalleled doctrinal productivity relies heavily on a strongly hierarchical court structure which ensures that the “coexistence of a multitude of juridical norms in competition with each

---

<sup>90</sup> Ibid., 819.

<sup>91</sup> Ibid., 830.

<sup>92</sup> Michael Asch and Catherine Bell, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 40-41.

other is by definition excluded from the juridical order,”<sup>93</sup> and that, essentially, the lower courts will follow the Supreme Court of Canada dutifully into uncharted waters.

The new path of doctrinal productivity, however, still has a need for that appearance of a transcendental basis on its new, creative forms of legal reason. Characteristic of contemporary Aboriginal law, then, is a particular reliance on tests, scales, formulae, all of which give the jurisprudence an air of empirical precision and an air of inevitability. They serve to mask processes which benefit from a core of elasticity and announce themselves as exacting in nature, and therefore as independently objective, valid, reliable. But the casuistry of these legal devices is still *metaphysical* in nature, implying that an essential Justice needs only the properly calibrated mechanism in order to be located. Having a judicial decision graced with the air of inevitability, the false sense of empirical precision, and the feeling of a transcendental basis—to take Bourdieu’s term, but for Derrida, a metaphysics of presence, or logocentrism—is crucial for the juridical field, for they obscure the ungrounded nature of law and the managerial discretion which indeterminacy and elasticity embed within the jurisprudence. (Mariana Valverde thus notes that one of the most interesting questions for deconstructive criminology is “how a robbery could be equal to two years.”<sup>94</sup> The answer, perhaps, is that it isn’t, at least until a judge says that it is.<sup>95</sup>)

Law in general desires to have its actions cloaked in the air of inevitability, but decisions straining for a legal foundation, such as *Van der Peet*, especially have that need. In the forging of a new era, these key disputes and the means to resolve them were

---

<sup>93</sup> Bourdieu, “Force of Law,” 818.

<sup>94</sup> Mariana Valverde, “Deconstructive Marxism,” *Labour/Le Travail* 36 (1995): 339.

<sup>95</sup> For Bourdieu’s discussion of the performative power of a court’s judgment, see “Force of Law,” 838.

open and equivocal. But once a decision is made, any equivocality and undecidability must be quickly erased to make way for the certainty of Truth and Justice. Unfortunately, for the cultural rights approach, if the historical threshold used to define Aboriginal rights hints at the arbitrariness that underlies them, then so does the battery of indeterminate concepts used in their calculation. And in a rare moment when a dissenting opinion proves to be so prescient as to live a life as long and meaningful as the decision itself, Justice Beverley McLachlin’s dissenting opinion in the *Van der Peet* case said of the cultural rights test that “different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms.”<sup>96</sup>

But measures, tests, formulae, and scales are the prevailing new mechanisms for Aboriginal law, they are tools that suggest objectivity and validity. In a sense, the “test” itself became necessary and somewhat inevitable when the judiciary instituted a pervasive uncertainty over the existence of rights and title and laid the onus of proving them on Indigenous groups themselves. Such devices now exist for determining the existence of Aboriginal rights and title, for justifying the infringement of Aboriginal rights, treaty rights, and Aboriginal title, and now, if Côté and Morris are to be followed, for determining if a minor rights disturbance amounts to an “insignificant interference” such that it does not even register as a *prima facie* infringement of a right.<sup>97</sup> The duty to

---

<sup>96</sup> *Van der Peet*, at 639. It was Justice McLachlin who would later become the Chief Justice and, in a twist of fate, write the judgment for *Mitchell v. M.N.R.* that rarefied the conceptualization of the ‘integral to a distinctive culture’ test in a way that implicitly heightened the burden of proof for Aboriginal claimants, only to be corrected later in *R. v. Sappier; R. v. Gray*.

<sup>97</sup> See *R. v. Morris*, 2006 SCC 59, [2006] S.C.R. 915 at 938 [*Morris*].

consult offers a formula akin to a sliding scale, the content of which “varies with the circumstances” and will be determined “as the case law in this emerging area develops.”<sup>98</sup> Beyond this, there are many more.<sup>99</sup> And yet, in the wake of all of this case law, one still has to ask—as Justice McLachlin (as she then was) did—what really counts as integral, distinctive, or continuous? And what does not? Although the issue of indeterminacy came to the forefront with the *Van der Peet* test and its aftermath, it is not limited to Aboriginal rights by any means. It applies for Aboriginal title, treaty rights, and Crown obligations also. Where is the line between Indigenous historical usage of land that is sufficient to establish title and usage that is insufficient? When is a liberal and generous interpretation of a treaty too liberal and too generous? How much consultation is enough consultation? In reality, as Bourdieu would suggest, the many forms of measure designed for the juridical toolkit, just like the interpretation and application of precedent (indeed, that is where these tests and measures are established—in precedent), benefit from ample portions of indeterminacy. These are issues which do not have as bright a line bisecting them as many jurists wish to believe, and which are almost invariably decided by non-Indigenous judges in a professional field that seeks to obscure the all too human element behind its deliberations.

A mechanism one commonly finds in the service of presenting decisions as eminently reasoned and balanced is the indeterminate dichotomous contrast. In referencing the Court’s approach to the modern principles of treaty interpretation, Justice

---

<sup>98</sup> *Haida Nation*, 2004 SCC 73, [2004] 3 S.C.R. 511 at 531 [*Haida Nation*].

<sup>99</sup> Of these, I would cite the test of “visible, incompatible land use” in *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*], for deciding if a Treaty 8 hunter has a right of access to hunt on private land without permission (to be discussed in chapter eight), as well as the “reasonably incidental” test, in *Simon v. The Queen*, [1985] 2 S.C.R. 387 and *R. v Sundown*, [1999] 1 S.C.R. 393, for determining activities that should be protected because they are reasonably related to the exercise of a treaty right.

Binnie expressed that “‘Generous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse.”<sup>100</sup> In *Mitchell v. M.N.R.*, Chief Justice McLachlin concedes that the Supreme Court “has not attempted to set out ‘precise rules’ or ‘absolute principles’ governing the interpretation or weighing of evidence in aboriginal claims.”<sup>101</sup>

Shortly after this, in a case in which all the SCC justices agreed that the Mohawks of Akwesasne do not have the Aboriginal right to bring goods across the Canada-U.S. border for trade, Chief Justice McLachlin expressed that evidentiary standards must be sensitively applied to Aboriginal claims, but neither should evidence “be artificially strained to carry more weight than it can reasonably support.”<sup>102</sup> The problem here is that the dichotomous contrast is particularly insidious in that its value-laden polarities create an air of resolute common sense about it. Who would deny that a vague sense of after-the-fact largesse is a poor approach to legal deliberation, or that straining evidentiary principles beyond reason is not the ideal way to evaluate a claim? This air of common sense, however, tends to obscure the fact that such contrasts provide no content or objective measure in and of themselves, and therefore are utterly meaningless.<sup>103</sup>

And yet they can be used, and are sometimes used, to dismiss claims as unfounded, frivolous, or straining the limits of some form of reasoned approach that must be preserved by the courts. The fundamental underlying indeterminacy of these measures begs the question of whether the SCC has simply built up a repertoire of legal avenues for

---

<sup>100</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 at 474 [*Marshall No. 1*].

<sup>101</sup> *Mitchell*, at 938.

<sup>102</sup> *Ibid.*, at 940.

<sup>103</sup> The majority judgment in *Van der Peet*, as well, emphasized that the courts must take into account the perspective of Aboriginal peoples in assessing claims for the existence of rights, but “that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.” *Van der Peet*, at 550.

the disregard of Indigenous aspirations whenever the majority society—or a presiding judge—simply have enough desire for it, especially for those claims that shock the liberal colonial conscience a bit too much. The worry is that, if need be, grounds can always be found to refuse, limit, or recharacterize a right. In this way, indeterminacy is intimately related with the arbitrary, but neither of these should be equated purely with randomness. It is just as much about unacknowledged discretion. For Michael Asch the threat of an arbitrary judicial power over the determination of Aboriginal rights also carries with it the menace of “capricious decisions.”<sup>104</sup> Fae Korsmo has suggested the possibility that “the more state-like the Aboriginal claim...the less likely the Aboriginal claimants are to convince courts of their claim.”<sup>105</sup> Granted, as much as the SCC sought to present what seemed at first blush empirically satisfying formulae for the calculation of rights, as well as of their circumvention, the insistence on devising an elastic, case-by-case, micromanaging regime out of it clashed with the complexity of human sociality and the unpredictability of putting those determinations into the hands of so many provincial judges. There is an element of the unwieldy and the unpredictable in the attempt to devise these formulae and then set them upon the world.

## Culture in Title and Treaty Jurisprudence

When the infamous *Delgamuukw* case rose to its attention, the SCC’s decision was actually celebrated for the stance that it took on evidentiary standards and the difficulties they pose for Aboriginal oral histories at trial. The rules of evidence became a contested

---

<sup>104</sup> Michael Asch, “The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*,” *Review of Constitutional Studies* 5, no.2 (2000): 120.

<sup>105</sup> Fae Korsmo, “Claiming Memory in British Columbia: Aboriginal Rights and the State,” *American Indian Culture and Research Journal* 20, no. 4 (1996): 73.

issue in *Delgamuukw* because the trial judge, Chief Justice McEachern of the British Columbia Supreme Court, had dismissed the testimony of two anthropologists (sympathetic to the Aboriginal claimants' case) who had served as expert witnesses with the finding that they were not credible. McEachern also refused to give the oral histories and laws of the Gitksan and Wet'suwet'en any independent weight. In short, his finding was that the *adaawk* and the *kungax*—sacred, official recitations passed down from generation to generation, repeated at ceremonial gatherings, and which attested to the use, occupation, and significance of the land to the First Nations and offered proof of a system of land tenure and internal laws<sup>106</sup>—“could not serve ‘as evidence of detailed history, or land ownership, or occupation’.”<sup>107</sup> Although there must be a compelling reason for a higher court to overturn a trial judge's findings of fact, Chief Justice Lamer's majority judgment for the SCC did take issue with this. Citing the injunction, first set out in *Sparrow* and *Van der Peet*, that the courts take into consideration Aboriginal peoples' perspectives on the rights in question,<sup>108</sup> Lamer's written reasons state that “the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with types of historical evidence that courts are familiar with, which largely consists of historical records.”<sup>109</sup>

It is when the *Delgamuukw* decision turns to exploring how historical “physical occupation” of the land can be proven, however, that anthropologist Michael Asch worries that proof of Aboriginal title still, in significant ways, rests on a comparative

---

<sup>106</sup> See *Delgamuukw*, at 1072.

<sup>107</sup> *Delgamuukw*, at 1073.

<sup>108</sup> *Sparrow*, at 1112; *Van der Peet*, at 550.

<sup>109</sup> *Dalgamuukw*, at 1069. The Chief Justice concedes, however, that the trial judge in *Delgamuukw* did not yet have the benefit of the SCC's rulings on *Sparrow* and *Van der Peet*.

framework that has not changed much over the course of the last century.<sup>110</sup> On proof of possession, Chief Justice Lamer suggests that “physical occupation may be established in a variety of ways, ranging from the construction of dwellings though cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources... In considering whether occupation sufficient to ground title is established, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed...”<sup>111</sup> Asch argues that “among the difficulties with the approach outlined in *Delgamuukw* is that the determination of Aboriginal title relies on ethnocentric logic. That is, the test to establish such a title is to prove some form of exclusive holding, as well as the presence of certain forms of law (or at least evidence of cultivation, settlement and/or intense land use). The courts are relying on the discovery of institutions similar to those in Western society, or to practices akin to the way property is held elsewhere in the world in order to establish a claim to Aboriginal title.”<sup>112</sup>

Michael Asch’s concerns were not unfounded, it seems, as the debate over the type of use and occupation required to establish title remained an overriding point of contention until the most recent title case, decided by the Supreme Court in 2014. In *Tsilhqot'in Nation v. British Columbia*—mentioned in the previous chapter for its reiteration of the possible justifications for title infringement—the trial judge had originally employed a more flexible proof-of-title methodology that led him to conclude “that the Tsilhqot'in had established title not only to village sites and areas maintained for

---

<sup>110</sup> Asch, “Judicial Conceptualization,” 126.

<sup>111</sup> *Delgamuukw*, at 1101.

<sup>112</sup> Asch, “Judicial Conceptualization,” 132.

the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.”<sup>113</sup> The British Columbia Court of Appeal overturned this, however, and applied a narrower test based on site-specific occupation. “It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.”<sup>114</sup> For a semi-nomadic people like the Tsilhqot’in, the Court of Appeal’s approach would have led to a finding of Aboriginal title that differed little from the contemporary status quo: small islands of title land, similar to the current reserve system, surrounded by larger territories where the group could possess discrete Aboriginal rights to practice traditional activities. The unanimous decision of the SCC, delivered by Chief Justice McLachlin, argued that “to sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.”<sup>115</sup> In a coup for the Tsilhqot’in, the Court’s application of this principle followed the interpretation of the trial judge, stating that “the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group’s purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the

---

<sup>113</sup> *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 at 278.

<sup>114</sup> Ibid., (emphasis in original).

<sup>115</sup> Ibid., at 280.

Aboriginal people, including those who were nomadic or seminomadic.”<sup>116</sup> Yet this more flexible ruling, adjusted for nomadic and semi-nomadic lifestyles, would probably come as little comfort to the Métis Nation of Alberta, who since the *Hirsekorn* case had been fighting for the more modest right to hunt in southern Alberta. The year prior to the SCC’s *Tsilhqot’in* decision, the Alberta Court of Appeal heard the *Hirsekorn* case, reviewed the expert historical evidence about the nomadic hunting lifestyles of the Plains Métis bringing them further and further across the plains as the bison population decreased, and acquiesced to the difficulties of establishing a community-based Aboriginal right based upon a history of nomadism.<sup>117</sup> Nevertheless, the appellate court found that the Métis did not merit a section 35 right to hunt in the Cypress Hills area of southeastern Alberta, and, six months prior to releasing its decision for *Tsilhqot’in*, the Supreme Court refused Hirsekorn’s request for leave to appeal.

Evidentiary standards aside, as far as the *definition* of Aboriginal title is concerned, we have already had an indication that one of its primary limitations is still a cultural one. At first glance it might seem that the opposite is the case, since the majority judgment authored by Chief Justice Lamer in the *Delgamuukw* case goes out of its way to differentiate title from the extremely culturalist approach of Aboriginal rights case law. In effect, Lamer writes that the uses to which land subject to Aboriginal title can be put “need not be aspects of those aboriginal practices, customs and traditions which are

---

<sup>116</sup> Ibid., at 281. Title jurisprudence still has difficulty adapting itself the variety of possible ways in which land was occupied and used by Indigenous peoples, and so the preoccupation of Canadian courts with exclusivity of occupation has left open the question of how they would handle a claim (or claims) for land used by more than one Indigenous group. Still, it should be noted that the SCC’s *Delgamuukw* decision leaves open the possibility of joint title being established in certain contexts. See *Delgamuukw*, at 1105-1106.

<sup>117</sup> *R. v. Hirsekorn*, 2013 ABCA 242.

integral to distinctive aboriginal cultures.”<sup>118</sup> At the same time, however, Chief Justice Lamer states “that those protected uses must not be irreconcilable with the nature of the group’s attachment to that land”<sup>119</sup>—an attachment which, in the Court’s view, proves to be eminently cultural:

If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g. by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g. by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).<sup>120</sup>

Setting aside the question as to how colonial courts purport to put intrinsic limitations on the Aboriginal possession of land, which has come to be recognized precisely because neither sovereignty nor the land itself were ever ceded to the Crown, there are myriad other questions to be asked. To begin with, why is it that the Court invariably turns to talk of special bonds, cultural significance, or attachment, rather than the plain, unmitigated concept of *possession* that is at the heart of the common law’s recognition of property? If

---

<sup>118</sup> *Delgamuukw*, at 1083.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Delgamuukw*, at 1089.

there really are cultural limitations on what an Indigenous group can do with its own land, shouldn't those limitations exist internally, be debated internally, and be enforced internally within the group? Perhaps the Court does conceptualize of a legal-cultural boundary precisely because it *is* a source for potential limitation, one that puts in place vague parameters that can serve a future use for management. It is interesting to note that the other limitations placed upon Aboriginal title—such as the assertion that Aboriginal title is alienable only to the Crown—are generally derived from historical policy and practice that have become legal custom. (Although they, too, have been naturalized into a unified concept of Aboriginal title that has been incommensurably grafted onto the Aboriginal legal subject.) The SCC's cultural limitation on title, however, is one that it conjured with little prior basis in law. It is, as the SCC characterizes it, an *inherent* limitation—one that can be logically deduced to exist because of the very nature of Aboriginality itself and its interaction with the law. It is derived, of course, by the Court's own admission, from the incommensurable, *sui generis* nature of Aboriginal title.

As for treaty law, some might argue that the modern principles of treaty interpretation are characterized more by advantages than disadvantages. For example, in *Simon v. The Queen*, the Mi'kmaq hunter James Matthew Simon argued for a treaty right to hunt based on a 1752 treaty of peace and friendship with the British Crown.<sup>121</sup> The Crown argued for an extreme form of cultural incommensurability in attempting to have the contemporary SCC follow the profoundly ethnocentric judgment of *R. v. Syliboy*, in which Judge Patterson found that the Mi'kmaq were not a competent party to enter into a treaty with the British Crown, despite what the “untutored mind of the defendant” might

---

<sup>121</sup> *Simon v. The Queen*, [1985] 2 S.C.R. 387 [*Simon*].

think.<sup>122</sup> Barring this, if the SCC determined the 1752 treaty to be a valid one, the Crown argued that the treaty's reference to the Mi'kmaq's liberty to hunt and fish "as usual" should be read to mean that Simon should be "limited to hunting for purposes and by methods usual in 1752."<sup>123</sup> The unanimous decision of the SCC in *Simon*, authored by Chief Justice Dickson, disagreed with all the assertions made by the Crown. But while it is true that the *sui generis* incommensurability that is so often affixed to bodies of Aboriginal law can bring with it advantages and victories, there are indications that the cultural-legal subjectivity can place upon Indigenous claimants certain implicit conditionalities that can put those benefits at risk.

Although the underlying rationale of the modern principles of treaty interpretation does not receive a large amount of open air in the case law, a driving force behind the sympathetic changes in treaty interpretation was not only the Kafkaesque disregard for treaty promises throughout the positivist era, but also the guilty conscience of colonial history due to suggestions of coercion, "sharp dealing," and outright dishonesty that have haunted the treaties ever since their signing. To take one example, shortly after the signing of Treaty 6, Father Constantine Scollen, Catholic priest with the Oblates of Mary Immaculate and witness to the meetings leading to the treaty, wrote a humble and obsequious letter to Major A.G. Irvine about those negotiations. Troubled by what he had seen, Scollen writes that "in the van of my statements stands this all important question, which to my mind is the pivot on which all others revolve: Did these Indians, or do they now, understand the real nature of the treaty made between the Government and themselves in 1877? My answer to this question is unhesitatingly negative, and I stand

---

<sup>122</sup> *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 315 (NS Co.Ct.) [*Syliboy*].

<sup>123</sup> *Simon*, at 402.

prepared to substantiate this proposition.”<sup>124</sup> Father Scollen’s letter goes on to rhetorically engage questions he imagines would be posed of him in this situation, stating that the Indians signed a treaty that they did not understand because previous to then “they had always been kindly dealt with by the Authorities.”<sup>125</sup> Even more sensitive is the question of why the Indians were in a situation of not understanding the treaty, for this touches upon the accusations of dishonesty and sharp dealing that history has leveled at the treaty process. Scollen, who characterizes himself as someone who has “always abstained from meddling,” and who does not have “some private end in view,”<sup>126</sup> maintains a diplomacy and deference to the authorities as he proceeds. He gives as the immediate cause the lack of competent interpreters, “although they could have been procured, and I myself did recommend some long before the treaty.”<sup>127</sup> “The remote causes,” according to Father Scollen, “were many,” upon which he offers one in particular, namely “the dullness of the Indian mind &c which cannot comprehend a thing until after many repetitions.”<sup>128</sup>

The notion of the “dullness of the Indian mind” mentioned by Father Scollen, or of “the untutored mind” cited by Judge Patterson in *R. v. Syliboy*,<sup>129</sup> is, of course, the product of a profound Eurocentrism that conditions how they perceive cultural difference—and colonial history is replete with these condescensions. The composition of that Eurocentric objectification can range from one of pure disdain, which has no sense

---

<sup>124</sup> Keith Smith, ed., *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1870* (Toronto: University of Toronto Press, 2014), 40.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid., 39.

<sup>127</sup> Ibid., 40.

<sup>128</sup> Ibid.

<sup>129</sup> *Syliboy*, at 315.

of moral obligation toward the colonized, to a conception of Indigenous peoples as being in a “state of pupilage” or as a “ward to his guardian,”<sup>130</sup> and to whom a certain fiduciary duty is owed. In the case of the quiet logic underlying the new legal ethics of contemporary treaty law, the implicit notion of the untutored mind can serve both as a call to responsibility toward the helpless and hapless ward, and as a circumstance that implies at least some degree of moral exculpation for the Crown: *we signed treaties with them, but they simply did not understand the implications of it all.*

There is a distinctly contemporary sense of moral obligation that is embedded in the modern principles of treaty interpretation, one which embodies a search for atonement for colonial history through edicts such as “resolve ambiguities in favour of the Indians.” However, the corollary of this new sense of moral obligation is that, for contemporary Aboriginal people, the benefits of the kinder, gentler jurisprudence can find themselves contingent on the posthumous ability of historical Aboriginal signatories to remain unquestioningly faithful to this image of “the untutored mind.” In this sense, the Aboriginal as victim of colonial dispossession has demonstrated cultural limitations as well. The most striking instance of this is the 1994 case of *R. v. Howard*, in which a member of the Hiawatha First Nation in Ontario was charged with unlawfully fishing in the Otonabee River during a prohibited period.<sup>131</sup> The treaty rights (or lack thereof) of the band were somewhat particular in that the written terms of their 1923 treaty purported to fully extinguish their Aboriginal right to hunt and fish in the Otonabee River area. Indeed, it could be seen as atypical for an Aboriginal treaty in Canada not to offer the recognition of a continued right to hunt and fish, so much so that the reader may recall

---

<sup>130</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17 (1831).

<sup>131</sup> *R. v. Howard*, [1994] 2 S.C.R. 299.

that in *White and Bob* the justices of the British Columbia Court of Appeal unanimously read the Douglas Treaty with the Saalequun (Snuneymuxw) tribe as though it had such a clause—even though, by their own admission, the clause was not present in their particular treaty.<sup>132</sup> In the *Howard* case, however, the unanimous judgment of the Supreme Court was that the 1923 treaty should *not* be interpreted as an ambiguity to be resolved in favour of the Aboriginal claimant, since “the 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties. The 1923 Treaty concerned lands in close proximity to the urbanized Ontario of the day. *The Hiawatha signatories were businessmen, a civil servant and all were literate.*”<sup>133</sup> In effect, the Supreme Court of Canada rescinded from George Howard, the contemporary Aboriginal claimant, the allowance of ambiguity and the benefit of the doubt that might flow from it, for the reason that his ancestors strayed too far from an Aboriginal legal subjectivity characterized by primitive simplicity.

## Looking Back at Culture

Because of the significant changes to rights, title, and treaty law that were constitutionalized in 1982, much of my discussion of the Aboriginal cultural-legal subject has centered on section 35 related jurisprudence. Limiting my discussion to these streams of Aboriginal law, however, risks concealing just how pervasive and ubiquitous the juridical recourse to problematic notions of Aboriginality has been. In effect, although the

---

<sup>132</sup> *White and Bob*, at 615.

<sup>133</sup> *Ibid.*, at 306 (emphasis mine).

cultural subject may have found its greatest expression in the Court's interpretation and implementation of section 35, this is not the only area in which it is deployed. Constance MacIntosh has conducted research that focuses specifically on "ways in which Aboriginal individuals' rights and obligations—outside of the section 35(1) context—have been, and continue to be, determined by an assessment of whether a person is living an Aboriginal culture, 'lifestyle,' or 'mode of life.'"<sup>134</sup> The main thrust of her research is taxation law and the ways in which the common law has perpetuated the use of evaluations of Aboriginality long after similar legislative provisions have been repealed, but her survey of the issue found that:

Historically, these assessments have arisen in the law of enfranchisement and in policies about whether a child of both Aboriginal and non-Aboriginal heritage had to attend residential schools. The assessments have also arisen expressly in contemporary decisions, including those regarding who has the rights of an "Indian" for the purpose of interpreting certain agreements between the Prairie provinces and Canada. The assessments have also arisen in the interpretation of the taxation provisions in the *Indian Act*, in decisions about the best interests of Aboriginal children in child welfare cases (as discussed in the late Marlee Kline's work), and in sentencing decisions for Aboriginal persons, pursuant to the *Criminal Code's* requirement that sentencing judges give "particular attention to the circumstances of aboriginal offenders."<sup>135</sup>

To this growing list one can also add decades of case law based on section 88 of the *Indian Act*, the section that states that provincial laws of general application will apply to

---

<sup>134</sup> MacIntosh, "Judging Culture," 403.

<sup>135</sup> Ibid.

First Nations—a category of people meant to be of federal jurisdiction. For years it created a complex situation in which the courts had to parse out whether a provincial law should or should not be applicable to First Nations depending upon whether it “strikes at the core of Indianness”<sup>136</sup> or relates “to Indians, *quâ* Indians.”<sup>137</sup>

My concern is that the mobilization of Aboriginality as a source of *sui generis*, incommensurable forms of justice is limited only by the judiciary’s creativity. In *Musqueam Indian Band v. Glass*,<sup>138</sup> non-Aboriginal leaseholders of reserve land in Vancouver opposed large increases in their rents, despite the fact that their lease agreements provided for an increase based on current land value after thirty years at smaller fixed rates. The band maintained that it was a simple private contract matter—there was nothing distinctly or remotely Aboriginal about raising the rent according to the mutually agreed upon and binding terms of a lease agreement. The SCC, on the other hand, imposed incommensurability and re-inscribed Aboriginal difference by creating a *sui generis* legal category of “leasehold reserve land” with a prescribed reduction in market valuation. Fixating on the inalienable and communal nature of Aboriginal title to reserve land—itself a nineteenth century creation of the judiciary—the Court felt that this unique form of land tenure justified a *fifty percent reduction* from what would otherwise be its value on the open market. In essence, the Supreme Court of Canada identified reserve lands to be leased as inherently different from any other lands in Vancouver that might be leased, and acted as the “free hand” of the market by forcibly devaluing by half

---

<sup>136</sup> *Dick v. The Queen*, [1985] 2 S.C.R. 309 at 315.

<sup>137</sup> *Cardinal v. Alberta (Attorney General)*, S.C.R. 695 at 706.

<sup>138</sup> *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633.

the amount that the Musqueam First Nation could charge—despite what the non-Aboriginal lessees had originally agreed to in their contracts.

Indeed, it is worrying that the contemporary judiciary finds quite often that the solutions to ongoing colonial political problems can be deduced as self-evident conclusions flowing from Aboriginality itself—especially given that the *sui generis* forms of justice this produces are not always to the benefit of Aboriginal claimants. As I have suggested elsewhere, “translating the political struggles of Aboriginal peoples into formulae based on cultural difference will always encounter the problem of power imbalance. In essence, Aboriginal groups themselves have little or no say in what counts as difference, or in how that difference is mobilized.”<sup>139</sup> This reflects the potential for the management of colonial political problems through juridical invocations of Aboriginality, which should serve as a warning to Indigenous groups who are faced with having to invest in juridical processes that use cultural difference as a basis for their standing before the law. For contemporary jurisprudence, it was a crisis stemming from outmoded and unpalatable practices of justice that brought the SCC to create a new source of rights and title for Aboriginal groups, and a new brand of justice flowing from the Aboriginal legal subject itself. Yet, as Michael Asch argues, there is nothing inherent to these political disputes that would make it inevitable that their resolution be framed as a cultural issue.<sup>140</sup> The contemporary submersion of the Aboriginal legal subject in cultural difference, and the potential and limits of justice being contingent upon it, looks set to achieve a high water mark for the continuing management of colonial political problems through juridical invocations of Aboriginality, and the juridical field’s concept of the

---

<sup>139</sup> Patzer, “Even When We’re Winning,” 323.

<sup>140</sup> Asch, “Judicial Conceptualization,” 133.

Aboriginal speaks more to limitation and circumscription than it does to protection, decolonization, or self-determination.

## **8. Aboriginality and the Symbolic Order of the Liberal Settler State**

For centuries, colonial policy and Indigenous-European interrelations actively worked to broaden or shift the range of activities in which Indigenous peoples engaged—be it for the benefit of the massive commercial fur trade, or for the sake of later civilizing projects. Now, with the romantic shift in the perception of Indigeneity, the Aboriginal legal-cultural subjectivity instituted and mobilized by the juridical field sources Aboriginal rights in the judiciary’s perceptions of the group’s pre-contact traditions. For many Indigenous groups, this leap backwards glosses over centuries of significant historical change and adaptation which are as much a part of their history and culture as so many other elements taken by the courts to be “integral” and “distinctive.” Yet, despite this severely limiting time threshold, some Indigenous peoples still have an historical-cultural basis on which to assert Aboriginal rights that do not marry well with the majority society’s notions of what an Aboriginal right should be. In addition, some commitments and assurances made by Crown representatives over centuries of diplomatic treaty relations with Indigenous groups also have the potential to shock the liberal consciences of contemporary settler society. What one finds, then, is that where historical fact does not fuse well with the script written for Indigeneity, there is jurisprudential friction.

At base, I would argue that all forms of Aboriginal right are to some extent unpalatable to the symbolic order of the liberal settler state, insofar as claims to communal rights suffer a certain *ressentiment* for their perceived heresy against the universalized and decontextualized individualism underpinning liberalist ideals, and thus

have a tendency to be disdained as “*special* privileges and *special* rights for *special* groups.”<sup>1</sup> Yet, the patterning in the case law suggests that there are certain types of Aboriginal and treaty rights assertions that elicit a particularly acute unease in both the courts and non-Aboriginal governments and organizations alike.<sup>2</sup> Of this category, the two most prominent types are claims that conflict with private property rights and claims that assert communal Aboriginal or treaty rights to partake in commercial activities. There has been a reticence to recognize such rights, and, in those cases where the case for recognition seems compelling, the SCC has not surprisingly deduced novel forms of limitation for them.

### ***Horse and Badger: Private Property and Treaty Rights***

That the sanctity of private property and the exclusiveness of its occupation and use are values held dear in Western society is beyond dispute. William Blackstone, in his eighteenth century compendium *Commentaries on the Laws of England*, specified that “For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner’s leave, and especially if contrary to his express order, is a trespass or

---

<sup>1</sup> Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (Toronto: University of Toronto Press, 2002), 105 (emphasis in original). Attesting to this would be the extensive lists of federal government, provincial governments, and non-Aboriginal organizations commonly seeking intervenor status to argue against the recognition of Aboriginal rights in cases to which they would otherwise not be a party.

<sup>2</sup> While one can only speculate as to why the modern definition of Aboriginal title grants a much wider agency to exploit the land, I would reiterate my observation from the chapter six that not granting it that capacity would have had the inadvertent effect of potentially precluding the possibility of resource development across vast swaths of the country.

transgression.”<sup>3</sup> This sanctity was ostensibly put at risk in Treaty 6 territory when eight First Nation hunters were charged under the Saskatchewan *Wildlife Act* for hunting with a spotlight and for hunting on privately owned land without permission. A primary question that the SCC sought to resolve in the 1988 case of *R. v. Horse* stemmed from the appellants’ assertion that they *did* have a right of access to the lands in question.<sup>4</sup> The appellants argued for a right of access in several ways: through an interpretation of certain statutes in the Saskatchewan’s *Wildlife Act*, through an assertion that a right of access arose by custom and usage, and under the terms of Treaty 6 and its protection under the NRTA, the *Constitution Act, 1982*, and section 88 of the *Indian Act*. The judgment of the Court summarily finds that the first two arguments fail—though the second only because it was a point of law that should have been given an agreed statement of facts and suitable evidence with which to litigate the question.

As for the third argument, the unanimous decision of the SCC allows that the NRTA for the province constitutionally guaranteed the appellants the right “of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.”<sup>5</sup> Given that these were not unoccupied lands, the question of whether the lands in question qualified as the “any other lands” category became key. The SCC also allows the premise behind the principles of treaty interpretation, stating that “the paragraph must be given a broad and liberal construction with any ambiguity in the phrase ‘right of

---

<sup>3</sup> William Blackstone, *Commentaries on the Laws of England* (1765-1769), Book 3 (Philadelphia: J.B. Lippincott Company, 1893), 2:209.

<sup>4</sup> *R. v. Horse*, [1988] 1 S.C.R. 187 [*Horse*].

<sup>5</sup> *Horse*, at 192 (emphasis belongs to Estey, J.).

access' being resolved in favour of the Indians."<sup>6</sup> The appellants thus sought to establish the ambiguity in the terms of the treaty that the courts would be obliged, through the modern principles of treaty interpretation, to resolve in their favour. The appellants' interpretation of the terms of Treaty 6 was that it was signed under a joint use framework, through which treaty First Nations "were free to hunt over such land subject to the interests of the property holder in his or her land and with regard to the safety of others."<sup>7</sup> The appellants offered up the Crown representative Alexander Morris's own records of his many treaty negotiations published in his 1880 tome. From it, the *Horse* decision cites:

[Chief Tee-Tee-Quay-Say said at p. 215:] We want to be at liberty to hunt on any place as usual.

...

[Lieutenant Governor Morris replied at p. 218:] You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt.<sup>8</sup>

In this quote, specific to the negotiations of Treaty 6, written by the representative who negotiated it on behalf of the Crown, Morris clearly does not tell the First Nation signatories that they would be forbidden from hunting on private land. Rather, he states that they are not to destroy anyone's crops—even those which are sown by Indians and Half-breeds—while engaging in the hunt.

---

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., at 201.

<sup>8</sup> Ibid.

With the admitted responsibility to resolve ambiguities in favour of the appellants, and to look at the treaty in the sense it would have been understood by the Indigenous signatories,<sup>9</sup> the only response from the unanimous judgment of the SCC was to refuse to recognize any ambiguity at all. Justice Estey’s decision first expresses reservations about using the Morris text, arguing the legal principle that extraneous materials should only be used when there is an actual ambiguity in the written terms of a treaty instrument, and that the written text of Treaty 6 showed no such ambiguity. It then goes on to charitably accept consideration of the Morris text, only to cite a series of passages and statements written by Morris about the specific terms of *other treaties*, and about the ultimate goal of a successful conversion to agriculture for the First Nations, but nothing directly engaging the passage in which Morris himself recites his injunction not to destroy crops as they engaged in their vocation of hunting.<sup>10</sup> In the estimation of Justice Estey, and in contradiction to critical histories written over the years, the terms of the treaty “were explained to the Indians and assented to by them,” and “it is clear that the right to hunt was not extended to land that became occupied by settlers.”<sup>11</sup> With the Court’s refusal to admit any ambiguity in the oral terms communicated to Treaty 6 First Nations, the accused lost their case.

In *R. v. Badger*,<sup>12</sup> the Supreme Court was faced with a strikingly similar issue in Treaty 8 territory. It was only eight years after the *Horse* decision, but the promises of Crown representatives—and their own written accounts of these promises—were

---

<sup>9</sup> *Ibid.*, at 203.

<sup>10</sup> Patrick Macklem writes that “Estey J. studiously ignored the evidence supportive of the appellants’ case and concentrated instead on parole evidence that related to the other treaties.” Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 149.

<sup>11</sup> *Horse*, at 208.

<sup>12</sup> *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*].

becoming more difficult to ignore. In this case, several treaty hunters in separate incidents in northern Alberta had been caught hunting on privately owned lands without permission, contrary to the province's *Wildlife Act*. The courts had their trials and appeals proceed together. In arguing for a right of access on private lands sourced in the treaty, the appellants cited the Crown representatives' written account of the negotiations:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges...

We pointed out... that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them...

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.<sup>13</sup>

---

<sup>13</sup> Cited in *Badger*, at 792-793 (emphasis belongs to Cory J.).

To add to the ambiguity, the Court noted that Treaty 8 does not contain an express provision with respect to hunting on private land, stating instead that hunting would be excepted from “such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”<sup>14</sup>

Although the statements of Alexander Morris cited in *Horse* brought ambiguity to the oral terms of Treaty 6 as well, the Court quickly sought to distinguish the *Badger* case from *Horse*, stating that *Horse* considered whether Treaty 6 First Nations were entitled to hunt on *occupied private land* (since the land was sown to hay and grain), whereas the question in *Badger* was whether Treaty 8 “protected a right of access to unoccupied private lands—private lands which had not been taken up for settlement or other purposes.”<sup>15</sup> This was a question which, in the Court’s estimation, had been left unresolved. There is some casuistic deflection in framing the issue in this way. The *Horse* decision was premised on the refusal of ambiguity in the terms of the treaty, not on a distinction between occupied and unoccupied private lands. And for both Treaty 6 and Treaty 8 First Nations, the issue has always been the Crown’s fidelity to the promises made in the treaty negotiations, including the promise that they would be able to continue on hunting as before. The decision in *Horse* was questionable in its insistence that there existed no ambiguity in Treaty 6, and now as the dissonance between the promises and the law was becoming too pronounced, the Court was prepared to separate the two cases by suggesting that the distinguishing point of law was invariably the question of right of access to occupied versus unoccupied private land.

---

<sup>14</sup> Cited in *Badger*, at 798.

<sup>15</sup> *Badger*, at 806.

Distinguishing the two cases was perhaps becoming necessary because the majority of the Court, in assessing a case in the more northern territory of Treaty 8 that was comparatively less suited to agriculture than the Treaty 6 territory of *Horse*,<sup>16</sup> was preparing to accept that Treaty 8 hunters could have a treaty right to hunt on private land. This is, in fact, what happened, but only to a limited extent. Following the modern principles of treaty interpretation, Justice Cory's judgment affirms that "it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted."<sup>17</sup> Here, despite having three treaty First Nation appellants present to several levels of court, through their counsel, their actual understanding of the rights secured to them by virtue of Treaty 8, SCC justices took it upon themselves to assume the worldview, the experience, and the hence understanding of the Aboriginal legal subject of 1899. This exercise led the majority of the Court to the conclusion that "the Treaty No. 8 Indians would have understood that land had been 'required or taken up' when it was being put to a use which was incompatible with the exercise of the right to hunt,"<sup>18</sup> and that the contemporary geographical restrictions on Treaty 8 hunting rights should be based on this same "visible, incompatible land use" approach. This approach, concludes Justice Cory, "is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier

---

<sup>16</sup> Ibid., at 801: "Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area."

<sup>17</sup> Ibid., at 799.

<sup>18</sup> Ibid.

case law and with the provisions of the Alberta *Wildlife Act* itself.”<sup>19</sup> Of course, for the Court, the question of how “unoccupied” any lands in question are is an issue that will hereinafter “have to be explored on a case by case basis.”<sup>20</sup>

For the three appellants whose cases were before the Court at the time, the justices were unanimous in the result that two of them had been hunting on land with signs of visible, incompatible land use—in this case, buildings within the general area—and so their appeals were dismissed and their convictions restored. The third appellant, Ernest Ominayak, had been hunting on uncleared muskeg with no fences, signs, or buildings in the vicinity. Having demonstrated a treaty right to hunt on that parcel of privately owned land, his appeal was allowed. A new trial was directed, however, in order to properly litigate the issue of justification of the infringement created by Alberta’s *Wildlife Act* and any regulations passed pursuant to it. The Court therefore left it open to the Crown to present evidence in a new trial that an infringement preventing Treaty 8 hunters from hunting on all privately owned land was justified according to the standards set out in *Sparrow*—this case thus also representing the moment when the SCC chose to import the concept of infringement to treaty law—but the Crown elected to stay its action against Mr. Ominayak.<sup>21</sup>

## Commercial Aboriginal Rights

As I explained previously, it was the 1990 *Sparrow* case which developed the first test for the new Aboriginal rights jurisprudence. In broad strokes, the test essentially asks if there

---

<sup>19</sup> *Ibid.*, at 800.

<sup>20</sup> *Ibid.*

<sup>21</sup> Catherine Bell, “*R. v. Badger: One Step Forward And Two Steps Back?*,” *Constitutional Forum* 8, no. 2 (1997): 21n4.

is a *prima facie* infringement of an existing section 35 right, and, if so, if that infringement is justified. For Reginald Sparrow, then, it was unquestioningly assumed that fishing for food was an Aboriginal right. Interestingly, however, six years later and just a bit further inland from the Musqueam, the case of Dorothy Van der Peet became much more complex and problematic. Now the Court felt compelled to add a prior component to its Aboriginal rights test, seeking out a method for determining whether a practice *is* an Aboriginal right in the first place. What was different about the Van der Peet case? Tellingly, Dorothy Van der Peet argued that it was her Aboriginal right *to sell* the ten fish she had been caught selling. It was, simply put, the assertion of a *commercial* Aboriginal right which caused the Supreme Court of Canada to take a step back and develop a prior stage of inquiry.

The *Sparrow* judgment also offered a certain element of inspiration, if only inadvertently, for the *Van der Peet* judgment's restrictive cultural rights approach to defining Aboriginal rights. In the unanimous *Sparrow* decision, Chief Justice Dickson and Justice La Forest coauthored the judgment which mentioned in passing that, "for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture."<sup>22</sup> This is the only time that the concept of "distinctive culture" appears in *Sparrow*. *Van der Peet* then began building an enormously elaborate doctrinal edifice upon what would otherwise not have been perceived as foundational to the *Sparrow* judgment's contribution to Aboriginal law.

*Van der Peet* was actually one of three Aboriginal rights cases heard by the SCC at the same time, and whose judgments were later delivered together as well. These

---

<sup>22</sup> *Sparrow*, at 1099.

became known as the *Van der Peet* trilogy. Given the pivotal moment that the *Van der Peet* case marked—establishing for itself, for the two cases accompanying it, and for the doctrine of Aboriginal rights as a whole what *could* count as a constitutionally protected right—it remains an open question as to what role the controversial nature of the *commercial* rights being claimed in all three cases played in the development of the innate cultural-historical limitations of the cultural rights approach. Indeed, in *Van der Peet*, Chief Justice Lamer sought to introduce Aboriginal rights as something unabashedly cultural and sourced in the past, and despite all the talk about giving due regard to the Aboriginal perspective in these situations, his judgment stated outright that “a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question.”<sup>23</sup> And, as I have suggested, Canadian (and Commonwealth) courts have a tendency to move effortlessly toward the assumption that all things “Aboriginal”—to borrow a phrase from Justice L’Heureux-Dubé’s prescient dissent in *Van der Peet*—are defined “as that which is left over after features of non-aboriginal cultures have been taken away.”<sup>24</sup> Hence the association of the pre-contact era with “authentic” Aboriginality, and the correlative assumption that Aboriginality itself can only erode and fade in the presence of Western modernity. In the provincial court decision for *Van der Peet*, one can see the operation of an implicit assumption that the term “Aboriginal” inherently refers not so much to a category of peoples who still exist but rather to the pre-contact era itself, and that the practices that were carried out prior to contact were the “aboriginal activity.” The SCC’s decision for *Van der Peet* cites the trial judge’s original decision as stating that “at Fort

---

<sup>23</sup> *Van der Peet*, at 564.

<sup>24</sup> *Van der Peet*, at 592.

Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity *from aboriginal activity*,” and “...no regularized trade in salmon existed *in aboriginal times*.<sup>25</sup> Needless to say, the anthropological character of the SCC’s decision for *Van der Peet* did not stray too far from that of the trial judge.

The two cases which accompanied *Van der Peet*—*R. v. N.T.C. Smokehouse Ltd.*<sup>26</sup> and *R. v. Gladstone*<sup>27</sup>—also contained majority judgments authored by Chief Justice Lamer and dealt with commercial activities that were on a scale even larger than Dorothy Van der Peet’s sale of ten fish. Two issues become salient when examining the trilogy as an ensemble. Firstly, as hinted at in *Van der Peet*, there is an unexplained move towards a graduated taxonomy according to the magnitude of the right, and filtering rights claims along that scale. Secondly, the greater the right claimed, the more onerous the burden of proof and the more specific the characterization.

In effect, Chief Justice Lamer’s majority judgment in *Van der Peet* tempered the potential of Dorothy Van der Peet’s claim by making a distinction between the scale of her sales and that of a true “commercial” enterprise. Since she had only been caught selling ten fish, and there was no evidence of any further or larger scale sales, the Court in its typical fashion characterized the right for her as something inherently more modest than a right on the scale of commercial fishing. Lamer states that selling ten salmon for fifty dollars “cannot be said to constitute a sale on a ‘commercial’ or market basis,” and that Van der Peet’s “actions are instead best characterized in the simple terms of an

---

<sup>25</sup> Cited in *Van der Peet*, at 567.

<sup>26</sup> [1996] 2 S.C.R. 672 [*N.T.C. Smokehouse*].

<sup>27</sup> [1996] 2 S.C.R. 723 [*Gladstone*].

exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.”<sup>28</sup> This seems a hair-splitting piece of casuistry, for what do the terms *commerce* or *market* indicate, other than the trading or exchanging of goods or services for some like benefit? The scale of the affair is not inherent to the term. But the Court, evidently, wanted to make it inherent to the right.

In *N.T.C. Smokehouse*, a food processing company had purchased fish caught under the authority of Indian food fishing licences and then resold the fish on the commercial market. It was charged with purchasing and selling fish not caught under the authority of a commercial fishing licence and with purchasing and selling fish caught under the authority of an Indian food fish licence. The case was therefore somewhat unique in that a non-Aboriginal entity was permitted to launch an Aboriginal rights based defence—essentially arguing that the regulations against the sale of fish were in violation of the Aboriginal rights of the two First Nations in question—since *N.T.C. Smokehouse*’s conviction hinged on the premise that the First Nations’ sale of fish was illegal. The *Smokehouse* case involved multiple purchases of salmon, caught by a number of fishers from the two First Nations, and which amounted to large quantities of fish purchased and resold. This invariably distinguished it from the case of Dorothy Van der Peet. The Chief Justice, who authored the majority decision, therfore admits that this suggests “that the claim being made by the appellant is, in fact, that the Sheshaht and Opetchesaht have the aboriginal right to fish commercially.”<sup>29</sup> In the *Gladstone* case, Donald and William

---

<sup>28</sup> *Van der Peet*, at 563.

<sup>29</sup> *N.T.C. Smokehouse*, at 687.

Gladstone of the Heiltsuk First Nation had attempted to sell herring spawn on kelp to Seaborn Enterprises Ltd. The proprietor did not purchase any herring spawn from the Gladstones, but they were under surveillance by fisheries officers at the time. The amount that they had shipped from Bella Bella to Richmond, a suburb of Vancouver, in the hopes of making some sales, was also deemed to be on a larger commercial scale.

Lamer brings up the issue of burden of proof openly in his written reasons for N.T.C. Smokehouse, stating that:

The claim to an aboriginal right to exchange fish commercially places a more onerous burden on the appellant than a claim to an aboriginal right to exchange fish for money or other goods: to support the latter claim the appellant needs only to show that exchange of fish for money or other goods was integral to the distinctive cultures of the Sheshaht and Opetchesaht, while to support the former claim the appellant needs to demonstrate that the exchange of fish for money or other goods on a scale best characterized as commercial, was an integral part of the distinctive cultures of the Sheshaht and Opetchesaht peoples.<sup>30</sup>

There are several problems with this argument. Firstly, the logic of an increasingly onerous burden on proving rights of so-called greater magnitude in Lamer's judgment is unquestioned, unexplained, and not likely a sound one. As fraught with problems as the cultural rights approach is, the burden of proof is the same, regardless of right, for it is that the practice be "integral to the distinctive culture" of the group in question. If evidence exists that an Indigenous group traded and exchanged on a scale that the Court would deem to be large scale commercial trade, then there should not be anything more

---

<sup>30</sup> Ibid., at 687 (emphasis in original).

onerous for them in making their case. Indigenous groups across Canada vary widely in tradition, and their traditional practices and the kinship relations that accompany them were just as distinct, complex, and varied—in scope and in nature. Secondly, the reification of this graduated scale of rights involving exchange or trade—in other words, the splitting of these activities into separate, distinct rights claims—is another form of freezing Aboriginal rights in time, just as with the controversy over gaming on a twentieth century scale in *Pamajewon*. All three of the cases in this trilogy could just as easily have been characterized with one genre of right—*the trade and exchange of fish for money and other goods*, for example—that was allowed to evolve and find a modern expression. Indeed, this would have been more respectful of the Court’s assurances in *Sparrow* about avoiding a frozen rights approach. Rather, the *Van der Peet* trilogy characterizes them as discrete classes of rights, making it an impossibility that forms of trade and exchange on another scale in the pre-contact era could have evolved into something more typical of the twentieth century. As per John Borrows’s critique of *Pamajewon*, this is a benefit of centuries of change and adaptation which, of course, non-Aboriginal society has been able to claim unquestioningly. (And as instinctively hostile as many Canadians might be to the idea of an Aboriginal right also being a commercial right, I will examine later in this section how the Court has acknowledged that the early conception of treaty rights in the NRTA provinces of Manitoba, Saskatchewan, and Alberta had a commercial rights component to it.)

As I suggested above, the *N.T.C. Smokehouse* and *Gladstone* decisions also want to analyze the traditions and customs of the respective First Nations through the lens of *both* scales of right, in a sequential fashion from lesser right to greater right:

Demonstrating that the exchange of fish occurred on a commercial scale would, necessarily, also demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht and Opetchesaht; because of this relationship between the two claims, should the appellant fail to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht, it will also have failed to demonstrate that the exchange of fish on a commercial basis was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht.

This judgment will thus characterize, at the outset, the claim of the appellant as a claim that the Sheshaht and the Opetchesaht have the right to exchange fish for money or other goods. It will turn to the claim that the Sheshaht and the Opetchesaht have the right to fish commercially only if the first claim to a right to exchange fish for money or other goods has been established.<sup>31</sup>

Chief Justice Lamer opts to take this multi-stage route of testing against possible scales of right despite the fact that in both cases the right claimed was the larger scale, more commercial or market-based right. In managing these claims that put the courts, governments, and non-Aboriginal society so ill at ease, then, the Supreme Court seems to integrate into the *Van der Peet* trilogy an implicit trade off with its multi-step proof of graduated commercial rights: claims for communal Aboriginal rights to activities that the majority society instinctively feels are the most inappropriate to their romanticized Aboriginal subjectivity receive an onerous burden of proof, but in exchange for this there

---

<sup>31</sup> *N.T.C. Smokehouse*, at 687-688. In *Gladstone*, Chief Justice Lamer's judgment specifies the same approach at 744.

remains the ever present possibility of qualifying for a mid-range, fallback right of small scale exchange.

Dorothy Van der Peet and N.T.C. Smokehouse both lost—Van der Peet on her quainter, small scale exchange standard and N.T.C. Smokehouse on both the small scale exchange standard and the commercial trade standard. Since the First Nations in both cases could attest to a tradition of trade and exchange of some sort in their history, the SCC’s flexible distinction between that which is integral and that which is incidental played a key role in denying them rights of a commercial nature. The majority judgment decreed in *Van der Peet*:

...a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.<sup>32</sup>

The majority judgment in *Van der Peet* relied heavily on the findings of fact of the provincial court judge in the original trial, such as the assertions that “no regularized trade in salmon existed in aboriginal times,” that the trade that did take place “was either

---

<sup>32</sup> *Van der Peet*, at 560.

for ceremonial purposes or opportunistic exchanges taking place on a casual basis.”<sup>33</sup>

Delving once again into the issue of social organization, Chief Justice Lamer’s arguments also cite the provincial court judge’s observations “that the Sto:lo were at a band level of social organization rather than at a tribal level,” invariably meaning for the Court that there would be no specialization of labour that would create the basis for something akin to a market, which would in turn attest to the centrality of the exchange of fish to Sto:lo culture.<sup>34</sup> Michael Asch, on the other hand, has criticized this reasoning, and its search for a market in the contemporary sense, as profoundly ethnocentric and discusses how anthropological research from decades past had already explored ways in which an important link between kinship and exchange can exist in many societies. Asch counters that it is “not possible to assert that the mere fact that an institution exists as an occupational specialization (rather than being accomplished through kinship) is an indication of the importance of the practice, custom or tradition to that culture.”<sup>35</sup>

Given that the trilogy cases were heard and decided simultaneously, the *Van der Peet* decision’s warning against incidental customs latching onto integral customs without being “independently significant” is just as much aimed at the Sheshaht and Opetchesaht claims which were carried through the *N.T.C. Smokehouse* case. In their case, ceremonial gatherings such as the Potlatch were accorded central significance, but trade and exchange were deemed to be activities only incidental to that other right. According to Lamer, “exchanges of fish at potlatches and at ceremonial occasions, because incidental to those events, do not have the independent significance necessary to

---

<sup>33</sup> Ibid., at 567.

<sup>34</sup> Ibid., at 570-571.

<sup>35</sup> Michael Asch, “The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*,” *Review of Constitutional Studies* 5, no.2 (2000): 131.

constitute an aboriginal right. Potlatches and other ceremonial occasions may well be integral features of the Sheshaht and Opetchesaht cultures and, as such, recognized and affirmed as aboriginal rights under s. 35(1); however, the exchange of fish incidental to these occasions is not, itself, a sufficiently central, significant or defining feature of these societies so as to be recognized as an aboriginal right under s. 35(1)."<sup>36</sup>

What the Court began to demonstrate with *Van der Peet* and *N.T.C. Smokehouse*, then, was a preference to keep in check Indigenous demands for far reaching and more significant rights with the deployment of the always flexible distinction between the integral and the incidental. Indeed, the integral/incidental mechanism is eminently malleable in these cases precisely because the tendency toward less differentiated, more culturally holistic organization in Indigenous societies means that practices such as trade will often have a notable amount of overlap and convergence with institutions such as kinship and the Potlatch. As such, it seems likely that this distinction will remain central to the management of claims the Court at least implicitly feels are overzealous. This seems to have been the case fifteen years later. In *Lax Kw'alaams Indian Band v. Canada*, the band whose traditional territory stretches along the northwest coast of British Columbia made a claim to the right to harvest and sell commercially all the species of fish within their waters.<sup>37</sup> The trial judge had acknowledged that the Coast Tsimshian sustained themselves by an extensive fishery, but as for a right to trade in such products, she found that only the trade in the grease derived from the eulachon species was significant and integral to their distinctive culture, with the trade in all other products

---

<sup>36</sup> *N.T.C. Smokehouse*, at 690.

<sup>37</sup> *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535 [*Lax Kw'alaams*].

described as “low volume, opportunistic, irregular… and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlach and ranked society.”<sup>38</sup> The finding against the Lax Kw’alaams Band is therefore similar in nature to the findings against the First Nations concerned in *Van der Peet* and *N.T.C. Smokehouse*: trading existed, but was largely dismissed by the courts as incidental.

The *Gladstone* case, for its part, is distinctly instructive in that there was clear historical and anthropological evidence that the Heiltsuk did in fact engage in regular, large scale trade in the pre-contact era. In *Gladstone* it seems to have at least implicitly helped that evidence supporting the Heiltsuk claim came from the *European* historical record, in the form of journals from explorers and fur traders. In his written reasons for *Gladstone*, Chief Justice Lamer cites the trial judge’s findings about a larger scale inter-tribal trade practice, with the trial judge having stated that “the Crown conceded that there may have been some incidental local trade but questions its extent and importance. The very fact that early explorers and visitors to the Bella Bella region noted this trading has to enhance its significance. All the various descriptions of this trading activity are in accord with common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting.”<sup>39</sup>

There is yet another reason why *Gladstone* is so instructive, however: in a case in which the evidence is in and even cultural limitations cannot preclude commercial trade, new forms of limitation and management creep their way in to the jurisprudence. In this

---

<sup>38</sup> *Lax Kw’alaams*, at 542.

<sup>39</sup> *Gladstone*, at 745. The emphasis in the quote is Lamer’s, but it underlines the very commentary that I wish to emphasize, albeit for differing reasons: more legitimacy is granted to the posthumous testimony of European explorers and traders, when they are saying the very same thing that the Heiltsuk have insisted on all along.

sense, if the majority judgments of the *Van der Peet* trilogy do seek to structure a managerial trade-off between scale of right and the burden of proof, with a possible consolation prize of a smaller scale right for those who do not establish large scale commercial rights, not all terms of this unilaterally imposed deal are overt. The first adaptation in Gladstone, though unexplained and unaddressed, is a differing application of specificity to the right. In characterizing both the *Van der Peet* and *NTC Smokehouse* claims, the Court was content to convert the sale of *salmon* into the exchange of *fish* for goods or money. It was not species specific. Indeed, this is on par with numerous other rights claims that would come in the Aboriginal rights case law, especially those that limit themselves to the quaint right of harvesting for personal subsistence or ceremonial purposes. In the *Powley* case that recognized a Métis right to hunt for the first time, the SCC stated outright that “the relevant right is not to hunt moose but to hunt for food in the designated territory.”<sup>40</sup> Thus rights to subsistence harvesting and rights to small scale exchange (especially when the case is going to be lost anyway) do not seem to raise the spectre of bundling or “piggybacking” which was proscribed in *Van der Peet*. In *Gladstone*, on the other hand—the only of the *Van der Peet* trilogy to present what the Court found to be definitive evidence of large scale “commercial” trade that was integral to the First Nation’s distinctive pre-contact culture—the right that the Court considers is only ever in regards to herring spawn on kelp. And yet the majority judgment in *Gladstone* quotes, from the journal of the explorer Alexander Mackenzie, an entry from 1793 attesting to their regular trade of a variety of goods including various foods, metals, wood materials, and crafts. Mackenzie wrote that “the Indians who had caused us so

---

<sup>40</sup> *Powley*, at 219.

much alarm, we now discovered to be inhabitants of the islands, and traders in various articles, such as cedar-bark, prepared to be wove [sic] into mats, fish-spawn, copper, iron, and beads, the latter of which they get on their own coast. For these they receive in exchange roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries.”<sup>41</sup> Yet, after citing all the goods in which the Heiltsuk regularly traded, the conclusion of the Chief Justice is that “the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial”—and nothing more.<sup>43</sup> *Gladstone* is thus one of the cases that Ronald Niezen specifically cites in decrying the limited species-by-species approach to rights toward which the Court had apparently been moving.<sup>44</sup>

As the Heiltsuk won the right for commercial scale trade in herring spawn on kelp, though, a significant shift in Chief Justice Lamer’s approach to infringement and justification became evident. In a fascinating parallel to the contrast between use value and exchange value in Marxian economics, Lamer’s claim is that the dynamic is different

---

<sup>41</sup> Cited in *Gladstone*, at 746 (emphasis and interpolation of “sic” belong to Lamer C.J.C.).

<sup>42</sup> *Gladstone*, at 747.

<sup>43</sup> In *Lax Kw’alaams*, the claimants argued for a right to fish commercially multiple species of fish in their claimed territories. The unanimous judgment of the Court, authored by Justice Binnie, frames this as an issue of continuity—one of the key concepts in the *Van der Peet* test—between the pre-contact practice and the contemporary asserted right. According to Binnie, “A general commercial fishery would represent an outcome qualitatively different from the pre-contact activity on which it would ostensibly be based, and out of all proportion to its original importance to the pre-contact Tsimshian economy” (at 563). Binnie’s judgment for the Court does not address the glaring contradiction that other categories of Aboriginal harvesting rights are not limited on a species by species basis, and that nowhere in *Gladstone* does it establish why such a limitation should be placed on commercial Aboriginal rights. It is also neither surprising nor helpful that Justice Binnie’s judgment declares that “The ‘species-specific’ debate will generally turn on the facts of a particular case” (at 563).

<sup>44</sup> Ronald Niezen, “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada,” *Canadian Journal of Law and Society* 18, no. 2 (2003): 9. On the same page, Niezen’s expresses his suspicion about what underlies such an approach—namely, that “Judicial resistance to cultural change in aboriginal societies appears to be a result of limitations on the exercise of economic and political sovereignty. The Court, for example, is not at all friendly toward aboriginal management and control of their subsistence activities.”

precisely because there is no *internal limitation* inherent to a commercial Aboriginal right. In the case of subsistence rights, the “food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited—at a certain point the band will have sufficient fish to meet these needs.”<sup>45</sup> In the case of commercial rights, however, the sale of herring spawn on kelp “has no such internal limitation; the only limits on the Heiltsuk’s need for herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource.”<sup>46</sup> This changed, according to the *Gladstone* decision, the balance of considerations to be factored into the *Sparrow* test if the government were in a situation of having to consider rights infringement for conservation purposes. In dealing with a non-commercial right, the *Sparrow* decision had held that Aboriginal rights holders should be accorded priority over non-Aboriginal commercial fishing, with non-Aboriginal sports fishing following behind both of these.<sup>47</sup> Under the *Sparrow* model of priority allocation, then, years in which fish stocks (or the supply of any other resource, for that matter) were particularly low could hypothetically see non-Aboriginal commercial fishing and non-Aboriginal sports fishing temporarily banned, leaving only Aboriginal rights holders to fish.<sup>48</sup> In other words, the principle that *Sparrow* stands for is that Aboriginal rights holders should be the last group to see their allocation diminished or removed. This standard, according to Lamer, could no longer be applicable:

---

<sup>45</sup> *Gladstone*, at 764.

<sup>46</sup> Ibid.

<sup>47</sup> See *Sparrow*, at 1116.

<sup>48</sup> This is a hypothetical situation that the SCC presents in the *Sparrow* judgment, but it should also be recalled that the SCC has been clear that conservation is a valid justification for the infringement of Aboriginal rights themselves. Indeed, due to a severe drop in population in several regions, Manitoba recently banned moose hunting in those areas for both sports hunters and Aboriginal rights holders alike.

Where the aboriginal right has no internal limitation, however, what is described in *Sparrow* as an exceptional situation becomes the ordinary: in the circumstance where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one. Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in *Sparrow* would be to give the rightholder exclusivity over any person not having an aboriginal right to participate in the herring spawn on kelp fishery.<sup>49</sup>

The doctrine of priority was therefore refined for *Gladstone* and other commercial rights cases, requiring “that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.” The content of this priority would amount to “something less than exclusivity but which nonetheless gives priority to the aboriginal right,” but “must remain somewhat vague pending consideration of the government’s actions in specific cases.”<sup>50</sup> Lamer does specify that the standard of priority applicable, if the courts are called on to scrutinize a conservation infringement against such a right, is one of *reasonableness*, and not an insistence on *minimal impairment* of the Aboriginal right.<sup>51</sup>

---

<sup>49</sup> *Gladstone*, at 765.

<sup>50</sup> *Ibid.*, at 767.

<sup>51</sup> *Ibid.*

The significance of Chief Justice Lamer's shift on infringement and justification becomes even more apparent as the majority judgment takes up, as section 35 based jurisprudence has so often done since *Sparrow*, the theme of *reconciliation*:

Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.<sup>52</sup>

In effect, because the majority's approach in the *Van der Peet* trilogy emphasizes that the answers to questions of Aboriginal rights are already contained within the historical pre-contact culture itself—and the Heiltsuk seem to have, for all intents and purposes, surprised the non-Aboriginal justices of the Supreme Court of Canada with the diversity and scale of some of those pre-contact practices—the majority under the authorship of Chief Justice Lamer quickly began adapting the Court's idealized notion of reconciliation in such a way that it enabled the retrenchment of rights just granted on grounds that are subtly, yet fundamentally, political:

---

<sup>52</sup> Ibid., at 774-775 (emphasis in original).

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*<sup>53</sup>

While a fuller critique of the majority's approach in the *Van der Peet* trilogy is beyond the scope of this chapter alone—and, indeed, I will take up the concept of reconciliation in greater detail in the final chapter—I will note that once again the most trenchant critique of the germinal cultural rights approach comes from the dissent given by SCC justices themselves. Given that the three cases were heard and judged together, puisne Justice McLachlin (as she then was) criticizes the majority judgment of *Gladstone*, with a candour and perceptiveness rare for judicial discourse, in her dissent for *Van der Peet*. Mindful of the unwieldy and unpredictable machinations of Chief Justice Lamer's approach, she states that, "Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony."<sup>54</sup> According to Justice McLachlin, the approach suggested by the Chief Justice:

---

<sup>53</sup> Ibid., at 775 (emphasis in original).

<sup>54</sup> *Van der Peet*, at 658-659.

...is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. “In the right circumstances,” themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While “account” must be taken of the native interest and the Crown’s fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed.<sup>55</sup>

## Commercial Treaty Rights

The politics of commercial rights for colonized peoples came to rear its ugly head in a particularly volatile way only several years later—and this time for treaty rights, on the opposite coast of the country. Before delving into the case of *R. v. Marshall*, however, I will point out that there likely would have been a much broader set of commercial treaty rights disputes across Canada, had the SCC not declared commercial treaty rights extinguished across the Prairie Provinces. Indeed, given that common notions of Indigeneity place it in direct opposition to commercial activities, many Canadians might not realize that a number of treaties that guaranteed rights to hunting, fishing, and trapping often included in those rights an aspect of trade or barter—the numbered treaties

---

<sup>55</sup> Ibid. at 663.

included. And yet, with the long history of the fur trade and the desire of colonial administrations to have Indigenous peoples be able to earn their own livelihood, this should not be so surprising. In the Alberta case of *R. v. Horseman*, in which a Treaty 8 hunter was charged with selling the hide of a bear he had shot, the majority decision of the SCC, as well as the dissenting minority, both acquiesce to the premise that “an examination’ of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based upon those hunting rights.”<sup>56</sup> The difference between the majority and the minority judgments of the Court lies in the interpretation of the effect of the constitutional provision that came out of Natural Resources Transfer Agreements, the twelfth paragraph of which reads as follows:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.<sup>57</sup>

---

<sup>56</sup> *R. v. Horseman*, [1990] 1 S.C.R. 901 at 928, Cory J., [*Horseman*].

<sup>57</sup> Cited in *Horseman*, at 930 (emphasis belongs to Cory J.).

The majority judgment authored by Justice Cory interprets paragraph twelve of the NRTA as extinguishing commercial hunting rights, while simultaneously compensating treaty Indians in two ways. The first is with an extended, province-wide territory in which to harvest game and fish for personal subsistence, rather than just the original treaty territory, and the second is by placing their means of hunting beyond the control of the provinces due to the fact that it was a constitutional provision.<sup>58</sup> (This last observation about protection from provincial control must now be tempered by the fact that this decision for *Horseman* was delivered prior to the Court's most recent determinations that rights and title can be infringed by both levels of government.<sup>59</sup>) The NRTA does make reference to hunting, fishing, and trapping for support, for subsistence, and for food, but there is nothing on the face of the NRTA that unambiguously spells out such an elaborate *quid pro quo* by specifying that the previous commercial rights had been rescinded. Nevertheless, this was the inference that the majority of the Court gave it.

Justice Wilson, for the minority, states that, while it is obvious that the NRTA extends the treaty right to hunt, fish, and trap for personal subsistence to any lands across the province to which they have a right of access, "one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also designed to place serious and invidious restrictions on the range of hunting, fishing and trapping related activities that Treaty 8 Indian could continue to engage in."<sup>60</sup> Frank Tough has since performed some detailed historical research that reinforces the minority's dissenting arguments in *Horseman*. According to Tough, a 1926 transfer

---

<sup>58</sup> Ibid., at 933.

<sup>59</sup> See *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 at 318 [*Tsilhqot'in*].

<sup>60</sup> *Horseman*, at 916.

agreement originally negotiated between Alberta and the federal government, but which eventually failed, “intended to secure treaty livelihood rights”<sup>61</sup>—Tough’s term for trade-based commercial rights—and “provided the basis for many of the terms of the final agreement.”<sup>62</sup> In fact, Tough’s research in the Hudson’s Bay Canada Archives finds that David Laird, solicitor for HBC, monitored the negotiations and lobbied for the company, given that it was concerned about maintaining First Nations’ access to Crown lands for livelihood purposes. Laird specifically states that he requested that trapping be included in the NRTA along with hunting and fishing, and he seems to have done so simply because those participating in the negotiations and drafting of the agreements saw “para. 12 of the final agreement as an assurance of treaty rights. He did not indicate any derogation of the original treaty rights nor that commercial rights had been extinguished; in fact, he suggested that the intent was to assure existing rights. As a third party participant, Laird’s records provide no support for the notion that rights were reduced. As compared to the 1926 Alberta agreement, para. 12 better reflected the mixed aspects of the traditional economy.”<sup>63</sup> With the 1996 case of *R. v. Badger* the SCC reaffirmed the *Horseman* conclusions concerning the NRTA, however, with Justice Cory for the majority stating that “I might add that *Horseman, supra*, is a recent decision which should be accepted as resolving the issues which it considered. The decisions of this Court confirm that para. 12 of the *NRTA* did, to the extent that its intent is clear, modify and alter the right to hunt for food provided in Treaty No. 8.”<sup>64</sup>

---

<sup>61</sup> Frank Tough, “The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933,” *Alberta Law Review* 41, no. 4 (2004): 1025.

<sup>62</sup> Tough, “Forgotten Constitution,” 1034.

<sup>63</sup> *Ibid.*, 1034.

<sup>64</sup> *Badger*, at 796.

Although the Court tends to use the term “modify” in reference to the effect that the Natural Resources Transfer Agreements had on treaty rights, with the *Horseman* and *Badger* decisions the SCC essentially made a unilateral declaration that commercial treaty rights were *extinguished* in the Prairie Provinces. It did so based upon inference, and without a clear and plain assertion from the Crown of that period that this was its intention. Nevertheless, this still left open centuries of idiosyncratic and sometimes obscure treaty histories from other provinces. (Obscure perhaps to governments and authorities who had long forgotten about the promises, but not so much to Indigenous groups for whom treaties were an important source of reassurance of their place in a rapidly changing political and economic landscape.) As I alluded to above, the fact that this was the case came to the fore in a way that it never had with the 1999 case of *R. v. Marshall*.<sup>65</sup>

Donald Marshall Jr., a Mi’kmaq from Nova Scotia and son of a former Grand Chief of the Mi’kmaq Nation, made Canadian legal history more than once in Canada. Long before any dispute on treaty rights, a much younger Donald Marshall Jr. was given a life sentence for the murder of a friend, Sandy Seale. The police quickly passed over the actual killer, Roy Ebsary, and decided that Marshall must have killed his own friend in an unexplained fit of rage. Marshall was convicted wrongfully and spent eleven years in prison before being acquitted. His treatment at the hands of the justice system, both before and after his conviction, became an enormous source of controversy that brought accusations of racism and a subsequent royal commission of inquiry into his prosecution. His wrongful conviction also led to a change in Canadian criminal law, namely the

---

<sup>65</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall No.1*].

requirement that *all* evidence obtained in criminal investigations be disclosed to the defence during the pre-trial phase of discovery, or disclosure.

Years later, in August, 1993, an older Donald Marshall and a friend went fishing in Pomquet Harbour, Nova Scotia for eels. They caught 463 pounds without a licence and sold them for \$787.10. Marshall was arrested and prosecuted. His defence did not rely on an assertion of Aboriginal right, but rather rested solely on treaties of peace and friendship signed between British and Mi'kmaq leaders in 1760 and 1761. As Justice Binnie's judgment for the majority characterizes it, the treaties were signed in a period when both the British and the Mi'kmaq sought "reconciliation and mutual advantage," for the Mi'kmaq had long been allies of the French and the two European powers were still engaged in the Seven Years War.<sup>66</sup> The British had almost completed the process of expelling the Acadians from Nova Scotia, and only a few years prior to the treaties the British governor of the colony had issued a proclamation "offering rewards for the killing and capturing of Mi'kmaq throughout Nova Scotia, which then included New Brunswick."<sup>67</sup>

The treaties from this region and this era are a bit particular for several reasons. To begin with, the British signed a number of them with individual Mi'kmaq communities in view of having them consolidated into one comprehensive Mi'kmaq treaty—a consolidation which never happened. As it was on the heels of a period of hostilities, with the French power in the region on the wane, many of the commitments in the treaties revolve heavily around ensuring peace and co-operation between the British and the Mi'kmaq. Lastly, because of the nature of the commitments sought, the treaties

---

<sup>66</sup> Marshall No.1, at 466.

<sup>67</sup> Ibid.

also tend to frame their various clauses in negative terms just as much as positive terms, such as promising *not to* “molest any of His Majesty’s subjects or their dependents,” *not to* take “any private satisfaction or Revenge” if a quarrel arises between Mi’kmaq and British individuals, and *not to* “hold any manner of Commerce traffick nor intercourse” with the enemies of King George—in other words, with the French.<sup>68</sup> The trade clause at the centre of the contemporary legal dispute stated, from the perspective of Mi’kmaq chief Paul Laurent, that “I do further engage that we will not traffic, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.”<sup>69</sup>

The point of controversy at dispute in the case, then, was the interpretation of this last clause—often referred to as the “trade clause” or the “truckhouse clause.” The Crown, of course, argued that a commitment framed in negative terms as a restraint on trade—a commitment not to trade with anyone but British posts established for that purpose—is not the same as a grant of a positive treaty right to trade. The defence, on the other hand, asserted that the negative restraint on trade reflected, and necessarily entailed, the existence of a positive right for the Mi’kmaq to hunt, fish, and trap and to trade the products of those vocations. Justice Binnie states that the trial judge determined that there existed “a *right* to bring fish to the truckhouse to trade, but he declined to find a treaty right to fish and hunt to obtain the wherewithal to trade, and concluded that the right to trade expired along with the truckhouses,”<sup>70</sup> while the appeal court took an even narrower

---

<sup>68</sup> Ibid., at 468.

<sup>69</sup> Ibid. (Binnie J.’s emphasis removed from entirety of quote.)

<sup>70</sup> Ibid., at 490.

approach, arguing that “the trade clause represented a ‘mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British’. When the truckhouses disappeared, said the court, so did any vestiges of the restriction or entitlement, and that was the end of it.”<sup>71</sup> The appeal court’s narrow reading of the treaty was derived from its refusal to look at extrinsic evidence for a better understanding of how the parties understood the treaty at the time that it was made. It cited the case of *R. v. Horse*, discussed earlier in this section, where Justice Estey of the SCC had argued against making use of extrinsic materials unless there was already an ambiguity in the written terms of a treaty.<sup>72</sup> It is likely that an approach such as that advocated by Justice Estey in *Horse* would almost always result in a decisions unfavourable for Aboriginal claimants, since the ambiguities and inconsistencies of Crown-Aboriginal treaties exist most often in the controversial transcription of oral promises to written terms, and not so much in the written terms themselves. Justice Binnie’s judgment for the Marshall case observes that the appeal court’s choice to apply the *Horse* decision overlooks subsequent cases, such as *Sioui* and *Badger*, in which the SCC had sought to re-establish the importance of the modern principles of treaty interpretation and to distance itself from such a rigid approach.<sup>73</sup>

Reviewing a plethora of evidence heard by the trial judge—examinations of a number of other treaties negotiated with Maritime First Nations in that period, written communications between various parties, as well as contemporaneous reports and minutes of meetings—Justice Binnie finds that “the Nova Scotia judgments erred in

---

<sup>71</sup> Ibid., at 469-470.

<sup>72</sup> *R. v. Horse*, [1988] 1 S.C.R. 187.

<sup>73</sup> *Marshall No.1*, at 473.

concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760,” and asserts that “the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi’kmaq people. It is their common intention in 1760—not just the terms of the March 10, 1760 document—to which effect must be given.”<sup>74</sup> Justice Binnie’s view “is that the surviving substance of the treaty is... a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test.”<sup>75</sup>

It was a significant, momentous decision to have the Supreme Court of Canada at the close of the twentieth century recognize a treaty from 240 years prior as guaranteeing commercial rights of trade for an Indigenous people. The fear expressed by the Crown in the *Marshall* case, of course, was that a constitutionally protected treaty right with a trading aspect “would open the floodgates to uncontrollable and excessive exploitation of the natural resources.”<sup>76</sup> Justice Binnie’s judgment was clear from the outset of his declaration, however, that the Mi’kmaq right to sell the products of its traditional activities was a treaty right like any other, in that it could be infringed upon so long as these infringements pass the justificatory test originating in *Sparrow* and adapted to treaty rights in *Badger*.

Beyond infringement, however, the majority judgment for *Marshall* seized upon a morsel within the mounds of extrinsic historical evidence examined, a passing mention that could import to the Mi’kmaq right a limitation much more inherent. Historical

---

<sup>74</sup> Ibid., at 491.

<sup>75</sup> Ibid., at 500-501.

<sup>76</sup> Ibid., at 501.

research had uncovered that Governor Charles Lawrence, who was the Crown representative treating with the First Nations in Nova Scotia at the time, had previously treated with the Maliseet and Passamaquody First Nations on the same terms as with the Mi'kmaq. The governor's secretary had prepared minutes of a meeting between the governor and the Maliseet and Passamaquody chiefs, and those minutes specify that at one point in the negotiations "His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessities in Exchange for their Peltry..."<sup>77</sup> The limited scope of the treaty right hinged upon one key term from these minutes—minutes which were written by a British functionary for a meeting with First Nations that were not Mi'kmaq. That key term was "necessaries."

Necessaries in this case is alleged to represent what the Maliseet and Passamaquody First Nations desired to earn with their trading, and thus transitively the same is held for the Mi'kmaq. It is a term imbued with a quality of humble moderation and temperance. In finding a contemporary legal equivalent to the concept of "necessaries," the majority judgment in Marshall took recourse to the opinion of Justice Lambert, of the British Columbia Court of Appeal, in *R. v. Van der Peet*. Lambert had offered a minority dissenting opinion favouring the recognition of Dorothy Van der Peet's right to sell fish, an opinion which was rejected by his appeal court colleagues and by the SCC in its decision for *Van der Peet*. His argument was that fishing was a means

---

<sup>77</sup> Ibid., at 484 (emphasis belongs to Binnie J.).

by which the Sto:lo had provided themselves with a *moderate livelihood*, and that the section 35 right of the Sto:lo should to be to catch, and, if they wish, to sell salmon sufficient to provide themselves with a moderate livelihood.<sup>78</sup> Thus, even though the recognition of more humble and limited rights of trade was refused in both *Van der Peet* and *N.T.C. Smokehouse*, Justice Lambert's concept of the moderate livelihood was revived and lived on in the commercial treaty rights case law. Citing *Gladstone*, Justice Binnie's description of a moderate livelihood is that it "includes such basics as 'food, clothing and housing, supplemented by a few amenities', but not the accumulation of wealth. It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today."<sup>79</sup> Justice Binnie then offers the reassurance that "catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard."<sup>80</sup> The treaty protected commercial fishing rights of Donald Marshall and the Mi'kmaq would therefore be easily regulated without even provoking a section 35 based analysis of justification.

The *Marshall* case was one of the most contentious and controversial Aboriginal or treaty rights cases in contemporary history. Mi'kmaq fishers and the federal government could not come to an agreement on what constituted fair and equitable regulations that would lead to establishing the moderate livelihood invoked by the

---

<sup>78</sup> See *R. v. Van der Peet*, [1993] 80 B.C.L.R. (2d) 75 at para. 145 (B.C.C.A.), Lambert J.A., dissenting, aff'd [1996] 2 S.C.R. 507.

<sup>79</sup> *Marshall No.1*, at 502.

<sup>80</sup> *Ibid.*, at 503.

Supreme Court of Canada. Violent clashes between Indigenous and non-Indigenous fishers broke out, property was damaged, hundreds of Mi'kmaq lobster traps were either seized or destroyed by both non-Indigenous fishers and the Department of Fisheries and Oceans, and eventually DFO boats were used to run Mi'kmaq boats under the surface and their fishers into the water.<sup>81</sup> Not surprisingly, there were also fervent accusations of judicial activism from the non-Aboriginal Canadians.<sup>82</sup> Later that same year the West Nova Fishermen's Coalition, an intervener in the *Marshall* case which represented non-Aboriginal fishery interests in the region, applied for a rehearing of the appeal and, if that motion was granted, a stay of the existing *Marshall* judgment pending completion of the rehearing. The Supreme Court thus had its controversial decision served back to it in short order and it had become a highly politicized powder keg in that small amount of time. The case name for this motion became known informally as *Marshall No.2*.<sup>83</sup>

In *Marshall No.2*, the motion for a rehearing and stay of the judgment is dismissed, and the Court offers a ruling that defends its original decision by clearing up some “misconceptions” about *Marshall No.1*. Interestingly, even though Justices McLachlin and Gonthier had dissented to the decision in *Marshall No.1*, the SCC’s judgment in *Marshall No.2* was unanimous and delivered *per curiam*. The circumstances in which the SCC found itself were most certainly unique, as the clarifications it sought to offer amount to an oddly candid listing of the narrow limitations it places on rights in Aboriginal law. It argues that it “did not hold that the Mi'kmaq treaty right cannot be

---

<sup>81</sup> For dramatic documentary coverage of some of these events, see *Is the Crown at War with Us?*, directed by Alanis Obomsawin (Ottawa: National Film Board, 2002), DVD.

<sup>82</sup> See, for instance, Alex M. Cameron, *Power Without Law: The Supreme Court of Canada, the Marshall Decisions and the Failure of Judicial Activism* (Montreal and Kingston: McGill-Queen's University Press, 2009).

<sup>83</sup> *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall No.2*].

regulated or that the Mi'kmaq are guaranteed an open season in the fisheries.”<sup>84</sup> In addition, the “majority judgment did not rule that the appellant had established a treaty right ‘to gather’ anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower.”<sup>85</sup> *Marshall No.2* insists that the treaty right itself is a limited right which allows for regulation without invoking the justificatory test under the *Badger* standard.<sup>86</sup> Other limitations include “the local nature of treaties, the communal nature of a treaty right, and the fact it was only hunting and fishing resource to which access was affirmed, together with traditionally gathered things like wild fruit and berries.”<sup>87</sup> To further accentuate the limitations on the Mi'kmaq rights, the SCC seems to indicate that their newly recognized treaty rights lack the priority allocation standard in the same way that the Heiltsuk rights in *Gladstone* lacked it, even though the rationale for that in *Gladstone* was that the Heiltsuk had established an Aboriginal right on a large commercial scale—i.e. without an “internal limitation”<sup>88</sup>—something which the original *Marshall* decision did not grant the Mi'kmaq.<sup>89</sup> The Court states that the Mi'kmaq treaty right to hunt, fish, and trade “is not now, any more than it was in 1760, a *commercial* hunt that must be satisfied before non-natives have access to the same resources for recreational or commercial purposes.”<sup>90</sup> The emphasis of the Court is merely on ensuring equitable access to certain resources in the interests of earning a moderate living, and its rationale for this lower standard for allocation seems to

---

<sup>84</sup> *Marshall No.2*, at 537.

<sup>85</sup> *Ibid.*, at 548.

<sup>86</sup> *Ibid.*, at 559.

<sup>87</sup> *Ibid.*, at 560.

<sup>88</sup> *Gladstone*, at 766-767.

<sup>89</sup> Kent McNeil has also noted this. See “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin,” *Indigenous Law Journal* 2 (2003): 22.

<sup>90</sup> *Marshall No.2*, at 561.

be precisely because it is a treaty right and not an Aboriginal right, for “a treaty right differs from an aboriginal right which in its origin, by definition, was *exclusively* exercised by aboriginal people prior to contact with Europeans.”<sup>91</sup> The Court also states in *Marshall No.2* that “the federal and provincial governments have the authority within their respective legislative fields to regulate the exercise of a treaty right where justified on conservation or other grounds”<sup>92</sup>—a statement which contributed to the confusion surrounding the seeming conflict, as discussed in the previous chapter, between the doctrine of interjurisdictional immunity (applied against provincial powers) on the one hand and the emerging desire for section 35 to provide for a uniform ability for both provinces and the federal government to infringe upon rights and title on the other.<sup>93</sup> Perhaps most salient to the politically charged climate of the *Marshall* cases is the fact that the Court in *Marshall No.2* invokes the *Gladstone* recalibration of justification by emphasizing to the parties that “*the Minister’s authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.*”<sup>94</sup>

Soon after the *Marshall* cases, two other cases concerning a Mi’kmaq assertion of commercial treaty rights found their way into the courts. One involved a number of

---

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, at 551-552.

<sup>93</sup> The confusion heightened with *R. v. Morris* in 2006, which seemed to return to the doctrine of interjurisdictional immunity by stating that s.88 of the *Indian Act* protects treaty rights against infringement at the hands of provincial governments. To reduce contradiction, the SCC claimed in *Morris* that the exception is commercial treaty rights in situations where the resource being harvested is a provincially regulated resource. As I outline in chapter six, however, the SCC rendered this a moot point in the 2014 case of *Tsilhqot’in Nation v. British Columbia* by overturning *Morris* and opting definitively for a broad based uniform ability to infringe under section 35 and disdaining the older doctrine of interjurisdictional immunity.

<sup>94</sup> *Marshall No.2*, at 562.

defendants from Nova Scotia, the other a single Mi'kmaq man from New Brunswick, and in both cases the claimants asserted the right to engage in logging for commercial purposes on Crown land. The SCC ultimately heard them together, as the twin cases of *R. v. Marshall; R. v. Bernard*.<sup>95</sup> The Mi'kmaq claim was rooted in both an argument for Aboriginal title over the lands that they logged, and alternatively in the same treaty right to trade accorded in the 1999 *Marshall* decisions. While the SCC justices offered a split decision in the sense of having authored two sets of written reasons that debated the finer points of the case, both agreed on the end result: the Aboriginal title claim was summarily dismissed, and the treaty claim was also dismissed as it was determined that logging was not one of the trading activities that were in the contemplation of the British and the Mi'kmaq at the time their eighteenth century treaties of peace and friendship were made. As it currently stands, the decisive judgment against the Mi'kmaq claimants in *R. v. Marshall; R. v. Bernard* remains the curt punctuation on a controversial moment of Canadian legal history.

## **Liberal State, Illiberal Doctrines**

The Aboriginal cultural-legal subject examined in the previous chapter casts a shadow over many of the controversies and conflicts covered in this chapter. This is particularly true of commercial rights for Aboriginal peoples, be it by treaty or by inherent right. An unquestioned opposition to the idea of Indigenous groups carving out their share of benefit from the land and the waters is closely tied to notions of Aboriginality sourced in an authentic, primordial past that is untainted by the cultural erosion purportedly inherent

---

<sup>95</sup> *R. v. Marshall; R. v. Bernard* 2005 SCC 43, [2005] 2 S.C.R. 220 [*Marshall and Bernard*].

in the exposure to Western culture and modernity. Despite their physical presence in Canadian society, Canadian society wants Aboriginal peoples to remain in the past. Parallel with the conceptual reversal of the Indigenous subject from the uncivilized primitive to a romanticized ideal, colonial governments went from centuries of encouraging Aboriginal peoples into commerce, trade, and the earning of livelihoods, to insisting that it was inauthentic, un-Indigenous, and illegal to do so. It is almost an innate expectation from majority society that Aboriginal rights not only need to be quaint, but also docile, geographically circumscribed, unprofitable, and *non-competitive* with non-Aboriginal commercial interests. Indeed, hostility to Aboriginal commercial activity can also be due to self-interest, a certain resentment over the perceived special advantages granted to another group when they seek to take a share of the resources that they have never ceded—the sad irony being that the groups accused of special advantage often happen to be among the most disadvantaged in Canadian society.

These are the challenges for the juridical field in the age of inherence and constitutionalization: discovering that Aboriginal practices prior to arbitrary thresholds are more diverse and complex than the majority society would have expected or desired, and being held to centuries of solemn engagements with a commitment to a kinder, gentler treaty jurisprudence. Thus the challenge for the judiciary has also been to manage this particularly unwieldy aspect of the transformation to a post-inherence juridical order, and it has done so in its typical manner: reducing the number of cases that would qualify for these rights, discovering inherent limitations to these rights, and when the poorly calibrated cultural rights test produces rights greater than the limits of tolerance for the judiciary and settler society, add to the arsenal of infringement a lower standard for

justification and greater leeway for management and regulation—all in the interests of “fairness” and “reconciliation.” “In other words,” Kent McNeil opines, “past violations of Aboriginal rights by non-Aboriginal persons apparently can be used to justify continuing infringements of those rights today. The reason why this is permissible appears to be that ‘successful attainment’ of reconciliation ‘may well depend’ on this kind of balancing of rights and interests. In this context, reconciliation appears to relate more to the maintenance of established economic interests than to the protection of constitutional rights.”<sup>96</sup> Indeed, these conflicts and controversies also speak to the limitations and shortcomings of the law itself and its unenviable project of reconciling dispossessed Indigenous groups and the modern settler state’s Western liberalism.

---

<sup>96</sup> Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin,” *Indigenous Law Journal* 2 (2003):9.

## 9. The Moral Authority of the Dispossessed

Though neither the theme nor the word figure in any significant way in more than two centuries of case law for North America, *risk*, and its management, have been quietly pivotal to Aboriginal law. The Supreme Court of the United States under Chief Justice Marshall was attempting to walk a fine line when preserving some notion of Indian possession of land while acquiescing to the rapacious states their claims over Indian land, just as the SCC has attempted to walk a fine line in introducing the inherent recognition of rights and title within the tolerance thresholds of a liberal settler state that has had little desire to allow communal land rights and unruly nationalisms to propagate within its borders. Why has risk and its management been so important? It is because of the juridical field's compelling need, at certain points in history, to introduce difficult change—and, along with it, a significant jurisprudential basis for that change—in a common law system that is “much less adept at explaining how judge-made law necessarily changes, evolves, and transforms itself.”<sup>1</sup>

The need for jurisprudential adaptation has stemmed from the fact that the law has found itself in significant historical binds, with these occurring precisely because, historically, the juridical field was *not* at the vanguard of English colonization—certainly not in the sense of having provided a pre-existing framework which conceived of, oversaw, and legitimated its execution. Contrary to the way we tend to conceive of the workings of the law in histories such as this, I have argued that practice—simply put, that which is done—has been more the engine of the history of colonization than ideational

---

<sup>1</sup> Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*,” *Sydney Law Review* 17, no. 5 (1995): 6.

legal frameworks have been—until recently. We are misled on this question, however, by the attempts of proponents of formalist jurisprudence to weave a “seamless veil” over the idiosyncrasies of colonial history and have the law simply explain everything.<sup>2</sup> The juridical field’s lag behind the political-diplomatic, the economic, the military, and the administrative fields in the history of colonialism has meant that the law has often been left to catch up, dodge crises, and extricate itself from legal-ethical dilemmas. This is why, I have argued, Aboriginal law requires explanation more than it is able to furnish it.

Because it has engendered binds from which the juridical field has had to extricate itself, this hysteresis, lag, or latency of the law has ultimately spurred historical episodes of doctrinal productivity. In view of this, critiques of Aboriginal law made by anthropologists and critical legal scholars have been valuable. So many have seized upon the limitations, the inconsistencies, the contradictions, and the problematic politics that are manifest in the contemporary juridical management of colonial relations. Nevertheless, I would emphasize that to obtain a broader understanding of the law and its role in colonization, one must look beyond the forms of argumentation ordered within the confines of formalist jurisprudence and recognize the immanent necessities and compromising predicaments that underlie juridical work in the colonial context. A sociologically informed vision of juridical practice must help to develop a broader understanding which underscores how the Supreme Court of Canada, as the highest court in country, has sought to accommodate and work through the country’s historical liabilities, all the while attending to certain underlying immanent necessities. Namely, it has sought to put on display the positive change promised in the contemporary era with

---

<sup>2</sup> See Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991), x.

the institution of the modern principles of treaty interpretation, the installation of inherence, and its interpretation of the constitutionalization of rights and title. In this way contemporary Aboriginal law announces itself as a new jurisprudential ethics bringing a renewed justice to Aboriginal peoples. But these foundations for positive change also carried with them a risky potentiality, and thus the Court has sought to control such risk by deducing for them inherent limitations and implicit overrides, and this in a fashion that preserves the juridical field's ability to maintain rights and title as objects of an ongoing, perpetual legal governance.

Simultaneously, as the juridical field is wont to do, the SCC has presented these far-reaching, inventive new doctrines as being delivered from a position of fundamental groundedness. This appeal to transcendental norms, criticized in its own way by Martin Heidegger, Jacques Derrida, Pierre Bourdieu, or Michel Foucault, is what works after the fact to present the legal judgment as inevitable, the law as providing its own foundation, and “the appearance of a transcendental basis on the historical forms of legal reason and on the belief in the ordered vision of the social whole that they produce.”<sup>3</sup> This fundamental groundedness—what Derrida, for his part, sometimes referred to as the metaphysics of presence, or even *logocentrism*—can be intimated by the juridical field through erudite logical deductions and claims to self-evident principles. Taking this up, Douzinas, Warrington, and McVeigh in turn argued that their critical project of postmodern jurisprudence was intended “to deconstruct *logonomocentrism* in the texts of the law,” because dominant jurisprudence has always linked its claims to a unified and

---

<sup>3</sup> Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *Hastings Law Journal* 38, no. 5 (1987): 819.

coherent body of truth “with the legitimization of power. Power is legitimate if it follows the law, *nomos*, and if *nomos* follows *logos*, reason.”<sup>4</sup>

But the justificatory bases that can be mobilized in juridical work are richer, more shifting, and more varied than just making appeals to casuistic logic and reason. Similar to the observations made by Luc Boltanski and Laurent Thévenot about human individuals in general,<sup>5</sup> agents of the juridical field can and do appeal to differing principles at different times in order to have their assertions command respect. Thus, one also encounters the classic appeal to venerated texts and the authority of precedent (*stare decisis*), or through a rhetoric of universality encouraged by the hierarchical structure of the juridical field itself, by definition excluding from the juridical order “the coexistence of a multitude of juridical norms in competition with each other.”<sup>6</sup> Yet, of course, maintained as always within the law is a significant portion of elasticity and indeterminacy.

Two concepts that help critically conceptualize how that doctrinal productivity has allowed the juridical field to navigate its way through and out of those historical binds are *injusticiability* and *incommensurability*. Injusticiability was integral to Chief Justice Marshall’s installation of his version of a doctrine of discovery in nineteenth century American jurisprudence, and indeed Marshall himself wrote that “however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of

---

<sup>4</sup> Douzinas, Warrington and McVeigh, *Postmodern Jurisprudence*, 27.

<sup>5</sup> Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth*, trans. Catherine Porter (Princeton, NJ: Princeton University Press, 2006).

<sup>6</sup> Bourdieu, “Force of Law,” 818.

the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”<sup>7</sup> Injusticiability proved fundamental to Aboriginal law in Canada when in *Sparrow* Chief Justice Dickson and Justice La Forest wrote 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”—despite the fact that Aboriginal rights and title is premised on the fact that the Musqueam had never ceded “such lands” and such sovereignty to the Crown.<sup>8</sup> Questioning the legitimacy of the Crown’s sovereignty and ultimate title has never been, and never will be, entertained by the courts—except in the partial, unwieldy, and indirectly sublimated fashion that it has been with the significant doctrinal changes since the late twentieth century.

The form of incommensurability most fundamentally axiomatic to Aboriginal law was developed by the Supreme Court of the United States in the nineteenth century as well, when one considers that its legal concept of “Indian title” itself was a neologism.<sup>9</sup> Justice Marshall, in writing the decision for the majority in *Fletcher v. Peck*, cast the Indigenous possession of land as something distinct and lesser than the European possession of land, thereby allowing some new form of compatibility or overlap of title between First Nations residing on the land and the state governments that desired to lay claim to their land. For Felix Cohen, this “was merely a fiction devised to get around a theoretical difficulty posed by common law concepts. According to the hallowed principles of the common law, a grant by a private person of land belonging to another would convey no title. To apply this rule to the Federal Government would have

---

<sup>7</sup> *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 at 591 (1823).

<sup>8</sup> *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1103.

<sup>9</sup> Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven: Yale University Press, 2007), 88.

produced a cruel dilemma: either Indians had no title and no rights or the Federal land grants on which much of our economy rested were void.”<sup>10</sup> Incommensurability in Canadian Aboriginal law has been manifold and pervasive and has in many ways surfaced in multiple chapters in this work. Indian title was imported into Canadian jurisprudence with the late nineteenth century case of *St. Catherine’s Milling and Lumber Company v. The Queen*.<sup>11</sup> A number of deleterious nineteenth century characterizations of this unique form of title were preserved in the contemporary era, and Aboriginality itself—especially romanticized cultural notions of it—continues to be instrumental in the operation of (and limitations on) the case law related to treaty rights, Aboriginal rights, and Aboriginal title.

The casuistry of Aboriginal law crafted with the aid of injusticiability and incommensurability not only conditions the legal struggle for recognition of rights and title, it also naturalizes the terribly skewed nature of the novel processes and standards brought to bear on them. All of this is suffused with ambivalence, however, because at the same time the SCC has demonstrated that it is willing to protect Aboriginal practices and Aboriginal interests in land—to a certain extent. The infamies protected by injusticiability attest to a bargain implicit in the jurisprudential ethics of modern Aboriginal law: accept the violence and raw instrumentality of the original act of colonial dispossession, and there will be the opportunity to improve treaty recognition, the possibility of having title over land recognized, or the chance to have rights to certain practices respected—within certain limits. Because of this ambivalence, and its spectrum of grays, where the jurisprudence for Aboriginal rights, treaty rights, and Aboriginal title

---

<sup>10</sup> Felix Cohen, “Original Indian Title,” *Minnesota Law Review* 32, no. 1 (1947): 48.

<sup>11</sup> *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.).

(and the related Crown obligations) fit on a scale from positive to negative for Indigenous peoples is somewhat indeterminate and subjective in and of itself. There are, however, several critical points to keep in mind.

Firstly, the jurisprudence within the streams of Aboriginal law that I have examined here, and its intimations of *presence* or a fundamental groundedness in the justice it doles out, is itself akin to a claim about the resolvability of these issues. Aboriginal law implicitly claims that it can remedy the removal of sovereignty and the appropriation of land from the once sovereign possessors of that land, and in most cases with giving neither sovereignty nor the land back. It also implicitly claims that the anti-colonial demands of Indigenous peoples can be integrated into the framework of the liberal settler state, without of course owning up to the ways in which it reduces, redirects, and depoliticizes those demands. Despite the numerous legal gains made by Aboriginal groups, Aboriginal law is in this way also the saviour for the foundational act of colonial dispossession. This is the heart of its ambivalence.

Secondly, because of the easy and often unquestioned legitimacy that non-Indigenous society readily accords the modern liberal state, it is clear that it is Indigenous peoples themselves who are uniquely positioned to see and feel the cynical exercise of power and instrumentality behind those determinations of “justice” that disallow their practices, their possession of land, or the protection of either from outside interests. This is why I have encouraged the reader in past chapters to attempt to look at the complexities of contemporary rights and title from a backdrop or context that acknowledges the unspoken illegitimacy of Crown sovereignty—the same illegitimacy

which is so often refused and unacknowledged in conventional treatments of Aboriginal law.

Thirdly, there are limitations on what the courts are willing to accord Aboriginal peoples, and the jurisprudence has been elaborately arranged to attend to the underlying *political liabilities* of acceding rights and title more than anything. This is integral to the risk management invoked above: inherence and constitutionalization announce themselves as epiphanic, revolutionary jurisprudential changes for the benefit of Aboriginal peoples, but from the beginning the case law takes on the difficult and unwieldy task of instilling a controlled moderation of those beneficial changes. Thus Kent McNeil has even proffered a warning to Indigenous Canadians and Australians, as well as their advocates:

The lesson to be learned from the decisions examined in this article can, I think, be summed up like this: regardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far the courts in Australia and Canada are willing to go to correct the injustices caused by colonialism and dispossession. Despite what judges may say about maintaining legal principle, at the end of the day what really seems to determine the outcome in these kinds of cases is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure. I think this is a reality that Indigenous peoples need to take into account when deciding whether courts are the best places to obtain redress for historical wrongs and recognition of present-day rights. It may be advantageous to formulate

strategic approaches that avoid surrendering too much power to the judicial branch of the Australian and Canadian state.<sup>12</sup>

Finally, I would emphasize that judicial decisions that are not in favour of Indigenous claimants—especially for the recognition of basic rights that have heretofore been refused them, such as with many Métis claimants—are themselves damaging acts of colonial dispossession and assimilation, but they are all the more distressing because, being decided within the juridical field, they are dressed up in a rhetoric of objectivity, universality, and *justice*. They also come with a daunting finality. It is clear that Indigenous groups in Canada have tried to negotiate mutually agreeable arrangements with governments for generations, only to find none willing to compromise in any meaningful way. This is why Paul Chartrand suggests that change will now largely come through incremental legislative and policy reform initiated in reaction to case-by-case decisions of the Supreme Court of Canada, or of lower courts following its guidance.<sup>13</sup> Should an Aboriginal group lose a case before the courts, however, it is also quite clear that from then on no amount of political lobbying would ever persuade a provincial or federal government that that particular right should be accorded it.<sup>14</sup>

These are troubling observations concerning the new Aboriginal jurisprudence meant to bring about “reconciliation” after colonial dispossession. And, indeed, there is something revealing in the Supreme Court of Canada’s conception of reconciliation as it has evolved in the case law. Tellingly, in *Van der Peet* the SCC did not refer to

---

<sup>12</sup> Kent McNeil, “The Vulnerability of Indigenous Land Rights in Australia and Canada,” *Osgoode Hall Law Journal* 42, no. 2 (2004): 300-301.

<sup>13</sup> See Paul L.A.H. Chartrand, “Introduction,” in *Who Are Canada’s Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, ed. Paul L.A.H. Chartrand (Saskatoon: Purich Publishing, 2002), 17.

<sup>14</sup> See Jeremy Patzer, “Even When We’re Winning, Are We Losing? Métis Rights in Canadian Courts,” in *Métis in Canada: History, Identity, Law and Politics* (Edmonton: University of Alberta Press, 2013).

reconciliation *per se*, but rather referred to section 35 of the *Constitution Act, 1982* as the framework through which the prior occupation of Aboriginal peoples “is acknowledged and reconciled with the sovereignty of the Crown.”<sup>15</sup> In this framework, as I have suggested elsewhere, the sovereignty of the Crown seems to be openly cast as the invariable in this equation, something to remain unquestioned and immobile while Aboriginal rights and title are reconciled *to it*.<sup>16</sup> This is the notion of reconciliation mobilized in the early Aboriginal rights and title jurisprudence, with the addendum that in *Gladstone*—a unique case in which an Indigenous group succeeded in passing the cultural rights test to establish large scale commercial rights to trade in herring spawn on kelp—the noble ideal of reconciliation between Aboriginal and non-Aboriginal peoples is suggested, not surprisingly, in the context of justifying infringements and limitations of the Heiltsuk’s fishing activities.<sup>17</sup>

Later case law, in a time of increasing global attention to forms of transitional justice and an emphasis on reconciliation arising from the Indian Residential Schools Settlement Agreement and the IRS Truth and Reconciliation Commission, the SCC tended away from the image of *reconciling* one thing *to* another and began framing its ultimate goal as a larger, more generalized, and more idealized, *reconciliation*. In effect, the Supreme Court did not speak of a broader concept of reconciliation, in the sense of the “building or rebuilding of relationships today that are not haunted by the conflicts and

---

<sup>15</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 539 (emphasis mine).

<sup>16</sup> See Jeremy Patzer, “Legitimate Concerns: Aboriginal Rights and the Limits of Canadian Justice,” in *Thinking About Justice: A Book of Readings*, eds. Kelly Gorkoff and Richard Jochelson (Black Point, NS: Fernwood Publishing, 2012), 96.

<sup>17</sup> See *R. v. Gladstone*, 1996 2 S.C.R. 723 at 774-775.

hatreds of yesterday,”<sup>18</sup> until the 2004 decision of *Haida Nation*, which formalized the duty to consult. Interestingly, the Court perhaps took its cue from Sonia Lawrence and Patrick Macklem, who had authored a prescient article, cited in *Haida Nation*, which tied the SCC’s early mentions concerning the importance of consultation in the *Sparrow* test to the need for a broader reconciliation between peoples.<sup>19</sup>

Even still, I argue that there are several problems that remain with the Court’s notion of reconciliation. Firstly, the more appropriate goal that the SCC and Canadian governments should be pursuing is that of *repair*. The reciprocity and mutuality of obligation and debt implied in reconciliation belies and elides the undeniably asymmetrical relations of power and harm that came out of colonization.<sup>20</sup> Colonial dispossession, the removal of sovereignty and self-determination, as well as cultural genocidal projects of assimilation such as residential schooling are all intimately related and stand as wrongs in need of repair.<sup>21</sup> If there is any need for reconciliation, the demands of repair remain ethically prior and must be pursued in the interests of an ultimate reconciliation. It brings to mind a story told by Reverend Mxolisi Mpambani:

There were two friends, Peter and John. One day Peter steals John’s bicycle. Then, after a period of some months, he goes up to John with outstretched hand and says “Let’s talk about reconciliation.”

John says, “No, let’s talk about my bicycle.”

---

<sup>18</sup> Priscilla Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions*, (New York: Routledge, 2002), 161.

<sup>19</sup> See Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult,” *Canadian Bar Review* 29 (2000).

<sup>20</sup> My thanks to Heather Lash for her thoughts on this issue.

<sup>21</sup> See Jeremy Patzer, “Residential School Harm and Colonial Dispossession,” in *Colonial Genocide in Indigenous North America* (Durham, NC: Duke University Press, 2014).

“Forget about the bicycle for now,” says Peter. “Let’s talk about reconciliation.”

“No,” says John. “We cannot talk about reconciliation until you return my bicycle.”<sup>22</sup>

Reverend Mpambani uses the story to offer an illustration of “cheap reconciliation.” With Peter insisting that John forget about his bicycle and reconcile with him, and John insisting that they must resolve the issue of the bicycle prior to any reconciliation, there is a fundamental disagreement between these two on the way forward. According to Andrew Rigby, it is Peter who is offering cheap reconciliation, because “he is attempting to end the conflict and restore the relationship, but without restitution,” and thus “the victim is being asked to become reconciled to loss, and this is no basis for a sustainable settlement.”<sup>23</sup> Neither is, I would suggest, the mere possibility of having a court recognize a limited right or limited form of title after unjustified dispossession and decades, perhaps centuries, of supplication and litigation.

The second problem with the SCC’s employment of the notion of reconciliation is that there has been no change in the jurisprudence underlying the change in terminology. Reconciliation, as opposed to the old notion of “reconciling,” boasts a much more idealized tone, as though the Court and therefore the Crown were prepared to make greater sacrifices in the interests of finding an amenable path toward living together with Indigenous peoples. Unfortunately, however, the same edifices of injusticiability still stand at the core of Aboriginal law: to begin with, the unquestionable legitimacy of land

---

<sup>22</sup> Cited in Andrew Rigby, *Justice and Reconciliation: After the Violence* (Boulder: Lynne Rienner Publishers, 2001), 142.

<sup>23</sup> Ibid.

surrender treaties, and the unquestionable legitimacy of the Crown’s assumption of sovereignty and acquisition of ultimate title over the entirety of Canada, regardless of treaty.

Finally, there is a profound problem with the pretension of nine Supreme Court Justices, and by proxy hundreds of judges who preside in the courts below them, to possess the unique expertise to determine the path of reconciliation in these situations. Despite the Court’s emphasis on the virtues of negotiating settlements and the need to consider the Aboriginal perspective on their own rights—the latter of these two being a principle demonstrably weak thus far in practice—when these disputes find their way before the courts the judiciary stands as the sole and final arbiter on the requirements of reconciliation and justice. Indeed, with so much talk of injusticiability and illegitimacy, some might accuse me of being an irredentist, of advocating the recovery and absolute sovereign occupation of independent territory by Indigenous peoples. This is not the case. Such a form of bogeyman is often invoked by opponents of Aboriginal rights and title that manipulate non-Aboriginal prejudices concerning sovereignty, ethnic nationalisms, and an “Aboriginal veto” on development in order to ultimately characterize Indigenous demands and aspirations as absurd and disproportionate.<sup>24</sup> But by demystifying legal governance and exposing the unaddressed challenges to the Crown’s legitimacy, I seek to reopen possibilities and perceptions of different ways of living together, ways which

---

<sup>24</sup> Reacting to the rise of the Idle No More movement, the housing and infrastructure crisis on Attawapiskat First Nation, and the apparent audacity of its chief to demand a meeting with the prime minister, Globe and Mail columnist Jeffery Simpson’s ridiculing assessment was that “large elements of aboriginal Canada live intellectually in a dream palace,” inside of which “there are self-reliant, self-sustaining communities—‘nations,’ indeed—with the full panoply of sovereign capacities and the ‘rights’ that go with sovereignty.” Jeffery Simpson, “Too many first nations people live in a dream palace,” *The Globe and Mail*, January 5, 2013.

could allow Aboriginal peoples to be able to better their lot in Canada. Aboriginal claims have consistently represented alternative ways of co-existing that have been conceptually foreclosed and dismissed by governments and courts for years. It is critical to bring this political and legal history into sharp relief, since it suggests how we might inform a counter-ethics of reconciliation to that created by the juridical field in Canada. My objective in this work has been to examine and interrogate Aboriginal law, a distinct body of Western law that mobilizes novel principles and techniques for delivering a managed and overly limited justice in the settler state context. However, I will end with an assertion which I believe, when stated in the abstract and stripped of the particularities of the politics to which it is applied, would resonate with the intuitions of fairness of most Indigenous and non-Indigenous persons alike. It is that, after an injustice—even and *especially if* it amounts to a wrong that can never be fully repaired—the greatest moral authority to indicate the path to repair and reconciliation lies with those who have been wronged themselves. If Canada indeed seeks reconciliation after its dispossession of Aboriginal peoples, then governments and the courts must be emphatically reminded that the Crown’s past status as transgressor equates with a current position as supplicant in discussions about repair. Negotiations concerning the nature of rights and title, and what benefits they can bring to Aboriginal peoples, should take place under this ethical-relational balance. As Pierre Bourdieu has asserted against that peculiar yet formidable social power that he terms juridical capital, “Nothing is less ‘natural’ than the ‘need for the law’ or, to put it differently, than the impression of an injustice which leads to someone to appeal to the services of a professional.”<sup>25</sup> This tenet is only clouded and

---

<sup>25</sup> Bourdieu, “Force of Law,” 833.

obscured by juridical “expertise” and its implicit claims to the unique ability to resolve social conflict and to find the path to justice after colonial dispossession. If the epiphanic madness of justice, atonement, and forgiveness that Jacques Derrida claims as an impossibility actually did exist, perhaps in the late twentieth century the Supreme Court of Canada would have begun by asking Indigenous peoples what justice should look like, rather than telling them.

# Bibliography

## Legislation

*Aboriginal Land Rights (Northern Territory) Act 1976* (N.T.) (Australia).

*Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31<sup>st</sup> Victoria, Chapter 42, S.C. 1869* (32-33 Vict.), c.6, s.6 [*Gradual Enfranchisement Act*].

*An Act respecting the Civilization and Enfranchisement of certain Indians*, S. Prov. C. 1859 (22 Vict.), c. 9.

*An Act to amend and consolidate the laws respecting Indians*, S.C. 1876 (39 Vict.), c. 18 [*Indian Act*].

*An Act to encourage the gradual Civilization of the Indian tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857 (20 Vict.), c. 26 [*Gradual Civilization Act*].

*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (*British North America Act, 1867*).

*Constitution Act, 1930*, (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26.

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

*Fisheries Act*, R.S.C. 1952, c. 119.

*Game Act*, R.S.B.C. 1960, c. 160.

George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

*Indian Act*, R.S.C. 1952, c. 149.

*Indian Act*, R.S.C. 1985, c. I-5.

*Jobs and Growth Act, 2012*, S.C. 2012, c. 31.

*Manitoba Game and Fisheries Act*, R.S.M. 1964, c. 94.

*Manitoba Natural Resources Act*, R.S.M. 1954, c. 180.

*Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (N.T.) (Australia).

*Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.

*Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2.

*The Northwest Ordinance*, art. 3 (New York: s.n., 1787) (U.S.).

*U.S. Const.*, art. I, § 10, cl. 1.

## **Jurisprudence**

*Attorney-General of Ontario v. Attorney-General of Canada: Re Indian Claims*, [1897]

A.C. 199 (P.C.).

*Baker Lake (Hamlet) v. Canada (Minister of Indians Affairs and Northern Development)*,

[1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (F.C.T.D.).

*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

*Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313.

*Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 at 30, 189 D.L.R. (4th) 333

(B.C.S.C.).

*Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695.

*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

*Cooper v. Stuart* (1889), 14 App Cas 286.

*Daniels v. Canada*, 2013 FC 6, [2013] 2 F.C.R. 268.

*Daniels v. Canada*, 2014 FCA 101, [2014] 371 D.L.R. (4th) 725.

*Daniels v. White and the Queen*, [1968] S.C.R. 517.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

*Delgamuukw (Uukw) v. British Columbia*, 1986 CanLII 1221 (B.C.C.A.).

*Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at 296.

*Dick v. The Queen*, [1985] 2 S.C.R. 309.

*Elk v. The Queen*, [1980] 2 S.C.R. 166.

*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

*Guerin v. The Queen*, [1984] 2 S.C.R. 335.

*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

*In re Southern Rhodesia*, [1919] A.C. 210 (P.C.).

*In The Matter of a Reference as To Whether The Term “Indians” in Head 24 of Section 91 of The British North America Act, 1867, Includes Eskimo Inhabitants of The Province of Quebec*, [1939] S.C.R. 104, 2 D.L.R. 417 [Reference Re Eskimos].

*Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

*Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801, [2012] 1 C.N.L.R. 13.

*Kruger v. The Queen*, [1978] 1 S.C.R. 104.

*Lax Kw’alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535.

*Logan v. Styres*, [1959] 20 D.L.R. (2d) 416 (Ont. H.C.J.).

*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

*Mabo v. Queensland (No 2)*, [1992] HCA 23, 175 C.L.R. 1.

*MacMillan Bloedel Ltd. v Mullin*, [1985] 2 W.W.R. 722; [1985] 2 C.N.L.R. 26  
(B.C.S.C.).

*MacMillan Bloedel Ltd. v. Mullin*, [1985] 61 B.C.L.R. 145; [1985] 2 C.N.L.R. 58  
(B.C.C.A.).

*Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.

*Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.

*Milirrpum v. Nabalco Pty. Ltd.*, (1971) 17 F.L.R. 141 (N.T.S.C.).

*Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835).

*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911.

*Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633.

*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

*Prince and Myron v. The Queen*, [1964] S.C.R. 81, [1963] 41 C.R. 403, 46 W.W.R. 121.

*R. v. Adams*, [1996] 3 S.C.R. 101.

*R. v. Badger*, [1996] 1 S.C.R. 771.

*R. v. Côté*, [1996] 3 S.C.R. 139.

*R. v. Francis*, [1969] 10 D.L.R. (3d) 189.

*R. v. George*, [1966] S.C.R. 267.

*R. v. Gladstone*, [1996] 2 S.C.R. 723.

*R. v. Hirsekorn*, 2013 ABCA 242.

- R. v. Horse*, [1988] 1 S.C.R. 187.
- R. v. Horseman*, [1990] 1 S.C.R. 901.
- R. v. Howard*, [1994] 2 S.C.R. 299.
- R. v. Kallooar*, [1964] 50 W.W.R. 602 (N.W.T. Terr. Ct.).
- R. v. Kogogolak*, [1959] 31 C.R. 12, 28 W.W.R. 376 (N.W.T. Terr. Ct.).
- R. v. Koonungnak*, [1963] 42 C.R. 143 at 160, 45 W.W.R. 282 (N.W.T. Terr. Ct.).
- R. v. Langan*, 2011 SKPC 125, aff'd 2013 SKQB 256.
- R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall No.1*].
- R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall No.2*].
- R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220.
- R. v. Morris*, 2006 SCC 59, [2006] S.C.R. 915.
- R. v. Nikal*, [1996] 1 S.C.R. 1013.
- R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672.
- R. v. Pamajewon*, [1996] 2 S.C.R. 821.
- R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207.
- R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686.
- R. v. Sikyea*, (1964), 43 D.L.R. (2d) 150 at 154 (N.W.T. C.A.).
- R. v. Sioui*, [1990] 1 S.C.R. 1025.
- R. v. Sparrow*, [1986] 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300 (B.C.C.A.).
- R. v. Sparrow*, [1990] 1 S.C.R. 1075.
- R. v Sundown*, [1999] 1 S.C.R. 393.
- R. v. Syliboy*, [1929] 1 D.L.R. 307 (NS Co.Ct.).

*R. v. Taylor and Williams*, [1981] 62 C.C.C. (2d) 227, [1982] 34 O.R. (2d) 360 (On. C.A.).

*R. v. Van der Peet*, [1993] 80 B.C.L.R. (2d) 75 (B.C.C.A.).

*R. v. Van der Peet*, [1996] 2 S.C.R. 507.

*R. v. Wesley*, [1932], 4 D.L.R. 774 (Alta. C.A.).

*R. v. White and Bob*, [1964] 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd [1965] 52 D.L.R. (2d) 481 (S.C.C.).

*Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto*, 2015 BCCA 154.

*St. Ann's Island and Fishing Club v. The King*, [1950] S.C.R. 211.

*St. Catherine's Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577.

*St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.).

*Sigearreak v. The Queen*, [1966] S.C.R. 645.

*Simon v. The Queen*, [1985] 2 S.C.R. 387.

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550.

*Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257.

*United States v. Kagama*, 118 U.S. 375 (1886).

*United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339 (1941).

*Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245.

*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

## Works Cited

- Andersen, Chris. "Residual Tensions of Empire: Contemporary Métis Communities and the Canadian Judicial Imagination." In *Reconfiguring Aboriginal-State Relations. Canada: The State of the Federation 2003*, edited by Michael Murphy, 295-325. Montreal and Kingston: McGill-Queen's University Press, 2005.
- Asch, Michael. "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution." *Canadian Journal of Law and Society* 17, no. 2 (2002): 23-39.
- Asch, Michael. "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*." *Review of Constitutional Studies* 5, no.2 (2000): 119-37.
- Asch, Michael and Catherine Bell. "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation." In *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch, 38-74. Vancouver: UBC Press, 1997.
- Bains, Ravina. *Economic Development Projects in Jeopardy? Implications of the Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Decision*. Vancouver: Fraser Institute, November 2015.
- Bankes, Nigel. "The Implications of Tsilhqot'in (William) and Grassy Narrows (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries." *Journal of Energy and Natural Resources Law* 33, no. 3 (2015): 188-217.
- Banner, Stuart. "Why *Terra Nullius*? Anthropology and Property Law in Early Australia." *Law and History Review* 23, no. 1 (2005): 95-131.

- Bartlett, Richard. *The Mabo Decision*. Sydney: Butterworths, 1993.
- Beaglehole, J.C., ed. *The Journals of Captain James Cook on His Voyages of Discovery: The Voyage of the Endeavour, 1768-1771*. London: Cambridge University Press, 1955.
- Bell, Catherine. "R. v. Badger: One Step Forward And Two Steps Back?" *Constitutional Forum* 8, no. 2 (1997): 21-26.
- Bennet, J.M. and Alex C. Castles, eds. *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries*. Sydney: The Law Book Company, 1979.
- Berman, Howard R. "The Concept of Aboriginal Rights in the Early Legal History of the United States." *Buffalo Law Review* 27, no. 4 (1978): 637-667.
- Blackstone, William. *Commentaries on the Laws of England (1765-1769)*. Philadelphia: J.B. Lippincott Company, 1893.
- Boltanski, Luc and Laurent Thévenot. *On Justification: Economies of Worth*. Translated by Catherine Porter. Princeton, NJ: Princeton University Press, 2006.
- Borch, Merete. *Conciliation, Compulsion, Conversion: British Attitudes Towards Indigenous Peoples 1763-1814*. New York: Editions Rodopi, 2004.
- Borch, Merete. "Rethinking the Origins of Terra Nullius." *Australian Historical Studies* 32, no. 117 (2001): 222-39.
- Borrows, John. "Frozen Rights in Canada: Constitutional Interpretation and the Trickster." *American Indian Law Review* 22, no. 1 (1997): 37-64.
- Borrows, John. "The Trickster: Integral to a Distinctive Culture." *Constitutional Forum* 8, no. 2 (1997): 27-32.

Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government." In *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, edited by Michael Asch, 155-72.

Vancouver: UBC Press, 1997.

Borrows, John and Leonard Rotman. *Aboriginal Legal Issues: Cases, Materials & Commentary*. 4th ed. Markham: LexisNexis Canada, 2012.

Bourdieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38, no. 5 (1987): 814-853.

Bourgeois, Donald. "The Six Nations: A Neglected Aspect of Canadian Legal History." *Canadian Journal of Native Studies* 6, no. 2 (1986): 253-270.

Calloway, Colin G. *The Scratch of a Pen: 1763 and the Transformation of North America*. New York: Oxford University Press, 2006.

Cameron, Alex M. *Power without Law: The Supreme Court of Canada, the Marshall Decisions and the Failure of Judicial Activism*. Montreal and Kingston: McGill-Queen's University Press, 2009.

Canada. *Report of the Royal Commission on Aboriginal Peoples: Volume 1, Looking Forward, Looking Back*. Ottawa: Supply and Services Canada, 1996.

Canada. *Report of the Royal Commission on Aboriginal Peoples: Volume 4, Perspectives and Realities*. Ottawa: Supply and Services Canada, 1996.

Carlson, Keith Thor. "Rethinking Dialogue and History: The King's Promise and the 1906 Aboriginal Delegation to London." *Native Studies Review* 16, no. 2 (2005): 1-38.

Catapano, Andrea Lucille. "The Rising of the Ongwehonwe: Sovereignty, Identity, and Representation on the Six Nations Reserve." PhD diss., Stony Brook University, 2007. <http://pqdtopen.proquest.com/doc/304744615.html?FMT=ABS>.

Chartrand, Paul L. A. H. Introduction to *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, edited by Paul L. A. H. Chartrand, 15-26. Saskatoon: Purich Publishing, 2002.

Cheng, Chilwen Chienhan. "Touring the Museum: A Comment on *R. v. Van der Peet*." *University of Toronto Faculty of Law Review* 55, no. 2 (1997): 419-434.

Chute, Janet. *The Legacy of Shingwaukonse: A Century of Native Leadership*. Toronto: University of Toronto Press, 1998.

Chute, Janet. "Moving on Up: The Rationale for, and Consequences of, the Escalation Clause in the Robinson Treaties." *Native Studies Review* 18, no. 1 (2009): 53-65.

Coates, Ken. "Best Left as Indians: The Federal Government and the Indians of the Yukon, 1894-1950." *Canadian Journal of Native Studies* 4, no. 2 (1984): 179-204.

Coates, Kenneth and William Morrison. *Treaty Research Report: Treaty No. 11 (1921)*. Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986.

Cohen, Felix. "Original Indian Title." *Minnesota Law Review* 32, no. 1 (1947): 28-59.

Cohen, Felix. "Transcendental Nonsense and the Functional Approach." *Columbia Law Review* 35, no. 6 (1935): 809-849.

Connor, Michael. *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia*. Sydney: Macleay Press, 2005.

- Cottam, S. Barry. "Indian Title as a 'Celestial Institution': David Mills and the *St. Catherine's Milling Case*." In *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, edited by Kerry Abel and Jean Friesen, 247-266. Winnipeg: University of Manitoba Press, 1991.
- Coyle, Michael. *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*. Toronto: Ipperwash Inquiry, 2005.
- Coyle, Michael. "Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties." *Manitoba Law Journal* 32, no. 2 (2009): 34-64.
- Daniels, Harry. Foreword to *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, edited by Paul L. A. H. Chartrand, 11-14. Saskatoon: Purich Publishing, 2002.
- Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority.'" In *Deconstruction and the Possibility of Justice*, edited by Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, 3-67. New York: Routledge, 1992.
- Derrida, Jacques. *On Cosmopolitanism and Forgiveness*. New York: Routledge, 2001.
- De Trémaudan, Auguste Henri. *Histoire de la Nation Métisse dans l'Ouest Canadien*. Winnipeg: Éditions des Plaines, 1984.
- Douzinas, Costas, Ronnie Warrington and Shaun McVeigh. *Postmodern Jurisprudence: The Law of Text in the Texts of Law*. London: Routledge, 1991.
- Drake, Richard B. *A History of Appalachia*. Lexington: University Press of Kentucky, 2001.

Dreyfus, Hubert and Bryan Magee. "Husserl, Heidegger and Modern Existentialism." In *The Great Philosophers*, edited by Bryan Magee, 252-277. Oxford: Oxford University Press, 1987.

Eber, Dorothy. *Images of Justice: A Legal History of the Northwest Territories and Nunavut as Traced through the Yellowknife Courthouse Collection of Inuit Sculpture*. Montreal/Kingston: McGill-Queen's University Press, 1997.

Elias, Norbert. *What is Sociology?* Translated by Stephen Mennell and Grace Morrissey. New York: Columbia University Press, 1978.

Elliot, David. "Aboriginal Title." In *Aboriginal Peoples and the Law*, edited by Bradford Morse, 48-121. Ottawa: Carleton University Press, 1985.

Fenn, Elizabeth. "Biological Warfare in Eighteenth-Century North America: Beyond Jeffery Amherst." *Journal of American History* 86, no. 4 (2000): 1552-1580.

Foster, Hamar. "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* 'Invented Law'?" *The Advocate* 56, no. 2 (1998): 221-231.

Foster, Hamar. "We Are Not O'Meara's Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908-28." In *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, edited by Hamar Foster, Heather Raven, and Jeremy Webber, 61-84. Vancouver: UBC Press, 2007.

Foster, Hamar and Alan Grove. "'Trespassers on the Soil': *United States v. Tom* and a New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia." *BC Studies*, no. 138/139 (2003): 51-84.

Foucault, Michel. "The Political Technology of Individuals." In *Power*, edited by James D. Faubion, 403-417. Essential Works of Foucault 1954-1984. New York: The New Press, 2000.

Friesen, Gerald. *The Canadian Prairies: A History*. Toronto: University of Toronto Press, 1987.

Gardner, John. "Legal Positivism: 5½ Myths." *The American Journal of Jurisprudence* 46, no. 1 (2001): 199-227.

Green, L. C. "Claims to Territory in Colonial America." In *The Law of Nations and the New World*, edited by Leslie C. Green & Olive P. Dickason, 1-140. Edmonton: University of Alberta Press, 1989.

Green, L. C. and Olive Patricia Dickason, eds. *The Law of Nations and the New World*. Edmonton: University of Alberta Press, 1989.

Haan, Richard L. "Covenant and Consensus: Iroquois and English, 1676-1760." In *Beyond the Covenant Chain: The Iroquois and their Neighbours in Indian North America, 1600-1800*, edited by Daniel K. Richter and James H. Merrell, 41-57. New York: Syracuse University Press, 2003.

Hall, Anthony J. "The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada." In *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, edited by Kerry Abel and Jean Friesen, 267-286. Winnipeg: University of Manitoba Press, 1991.

Hall, D.J. "'A Serene Atmosphere'? Treaty 1 Revisited." *Canadian Journal of Native Studies* 4, no. 2 (1984): 321-358.

- Harring, Sydney. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1998.
- Hayner, Priscilla. *Unspeakable Truths: Facing the Challenges of Truth Commissions*. New York: Routledge, 2002.
- Henderson, James Youngblood. "Unraveling the Riddle of Aboriginal Title." *American Indian Law Review* 5, no. 1 (1977): 75-137.
- Hubbard, Tasha. "'Kill, Skin and Sell': Buffalo Genocide." In *Colonial Genocide and Indigenous North America*, edited by Andrew Woolford, Jeff Benvenuto, and Alexander Hinton, 292-305. Durham, NC: Duke University Press, 2014.
- Hurley, John. "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*." *McGill Law Journal* 30, no. 3 (1985): 559-602.
- Indian Claims Commission. *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings*. Ottawa: Research Resource Centre, Indian Claims Commission, 1975.
- Kercher, Bruce. *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales*. Annandale, NSW: The Federation Press, 1996.
- Kercher, Bruce. "Native Title in the Shadows: The Origin of the Myth of *Terra Nullius* in Early New South Wales Courts." In *Colonialism and the Modern World: Selected Studies*, edited by Gregory Blue, Martin Bunton, and Ralph Croizier, 100-119. Armonk, NY: M.E. Sharpe, 2002.
- Korsmo, Fae. "Claiming Memory in British Columbia: Aboriginal Rights and the State." *American Indian Culture and Research Journal* 20, no. 4 (1996): 71-90.

Krasowski, Sheldon. "Mediating the Numbered Treaties: Eyewitness Accounts of Treaties between the Crown and Indigenous Peoples, 1871-1876." PhD diss., University of Regina, 2011.

Kulchyski, Peter. *Unjust Relations: Aboriginal Rights in Canadian Courts*. Toronto: Oxford University Press, 1994.

Kulchyski, Peter and Frank Tester. *Kiumajut (Talking Back): Game Management and Inuit Rights, 1900-70*. Vancouver: UBC Press, 2007.

Lajoie, Andrée and Pierre Verville. Lajoie, Andrée, and P. Verville. *Treaties of Alliance between the French and the First Nations under the French Regime*. Ottawa: Royal Commission on Aboriginal Peoples, 1993.

Lawrence, Sonia and Patrick Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult." *Canadian Bar Review* 29 (2000): 252-279.

Leslie, John. "The Indian Act: An Historical Perspective." *Canadian Parliamentary Review* 25, no. 2 (2002): 23-27.

Lindley, M. F. *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion*. New York: Negro Universities Press, 1969.

Llewellyn, Jennifer. "Dealing with the Legacy of Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice." *University of Toronto Law Journal* 52, no. 3 (2002): 253-300.

Long, John, "'No Basis for Argument': The Signing of Treaty Nine in Northern Ontario, 1905-1906." *Native Studies Review* 5, no. 2 (1989): 19-54.

Lyon, Noel. "An Essay on Constitutional Interpretation." *Osgoode Hall Law Journal* 26, no. 1 (1988): 95-126.

MacIntosh, Constance. "From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life.'" *Osgoode Hall Law Journal* 47, no. 3 (2009): 399-437.

Mackey, Eva. *The House of Difference: Cultural Politics and National Identity in Canada*. Toronto: University of Toronto Press, 2002.

Macklem, Patrick. *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001.

McHugh, Paul. "Politics of Historiography and the Taxonomies of the Colonial Past." In *Making Legal History: Approaches and Methodology*, edited by Anthony Musson and Chantal Stebbings, 164-195. Cambridge: Cambridge University Press, 2012.

McLeod, Neal. "Rethinking Treaty Six in the Spirit of Mistahi Maskwa (Big Bear)." *Canadian Journal of Native Studies* 19, no. 1 (1999): 69-89.

McMillen, Christian W. *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory*. New Haven: Yale University Press, 2007.

McNeil, Kent. "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty." *Tulsa Journal of Comparative and International Law* 5, no. 2 (1997-1998): 253-298.

McNeil, Kent. "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance." *American Review of Canadian Studies* 31, no. 1-2 (2001): 317-329.

McNeil, Kent. "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*." *Supreme Court Law Review* 29, (2005): 447-460.

McNeil, Kent. *Common Law Aboriginal Title*. New York: Clarendon Press, 1989.

McNeil, Kent. "Culturally Modified Trees, Indian Reserves and the Crown's Fiduciary Obligations." *Supreme Court Law Review* 21, no. 2 (2003): 105-138.

McNeil, Kent. "The Meaning of Aboriginal Title." In *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch, 135-154. Vancouver: University of British Columbia Press, 1997.

McNeil, Kent. "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin." *Indigenous Law Journal* 2 (2003): 1-25.

McNeil, Kent. "The Vulnerability of Indigenous Land Rights in Australia and Canada." *Osgoode Hall Law Journal* 42, no. 2 (2004): 271-301.

Middleton, Richard. *Pontiac's War: Its Causes, Course and Consequences*. New York: Routledge, 2007.

Miller, Bruce G. "Culture as Cultural Defense: An American Indian Sacred Site in Court." *American Indian Quarterly* 22, no. 1 & 2 (1998): 83-97.

Miller, J. R. *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*. Toronto: University of Toronto Press, 2009.

Miller, J. R. *Compact, Contract, Covenant: Canada's Treaty-Making Tradition*. Saskatoon: St. Thomas More College, 2007.

Miller, J. R. "Petitioning the Great White Mother: First Nations' Organizations and Lobbying in London." In *Canada and the End of Empire*, edited by Phillip Buckner, 299-318. Vancouver: UBC Press, 2005.

Miller, J. R. *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*. 3rd ed. Toronto: University of Toronto Press, 2000.

Milloy, John. "The Early Indian Acts: Developmental Strategy and Constitutional Change." In *Sweet Promises: A Reader on Indian-White Relations in Canada*, edited by J.R. Miller, 145-154. Toronto: University of Toronto Press, 1991.

Mills, David. *A Report on the Boundaries of the Province of Ontario*. Toronto: Hunter, Rose & Co., 1873.

Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories*. Toronto: Belfords, Clarke & Co., 1880.

Newton, Neil Jessup. "At the Whim of the Sovereign: Aboriginal Title Reconsidered." *Hastings Law Journal* 31, no. 6 (1990): 1215-1285.

Niezen, Ronald. "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada." *Canadian Journal of Law and Society* 18, no. 2 (2003): 1-26.

*Official Report of the Debates of the House of Commons of the Dominion of Canada*, Vol. 20 (6 July 1885).

O'Toole, Fintan. *White Savage: William Johnson and the Invention of America*. New York: Farrar, Straus and Giroux, 2005.

Patzer, Jeremy. "Even When We're Winning, Are We Losing? Métis Rights in Canadian Courts." In *Métis in Canada: History, Identity, Law and Politics*, edited by

- Christopher Adams, Gregg Dahl and Ian Peach, 307-336. Edmonton: University of Alberta Press, 2013.
- Patzer, Jeremy. "Legitimate Concerns: Aboriginal Rights and the Limits of Canadian Justice." In *Thinking About Justice: A Book of Readings*, edited by Kelly Gorkoff and Richard Jochelson, 83-100. Black Point, NS: Fernwood Publishing, 2012.
- Patzer, Jeremy. "Residential School Harm and Colonial Dispossession." In *Colonial Genocide and Indigenous North America*, 166-185. Durham, NC: Duke University Press, 2014.
- Pope, Joseph, ed. *Correspondence of Sir John Macdonald*. Toronto: Doubleday, Page & Company, 1921.
- Povinelli, Elizabeth. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*. Durham, NC: Duke University Press, 2002.
- Powell, Christopher. *Barbaric Civilization*. Montreal and Kingston: McGill-Queen's University Press, 2011.
- Price, Richard. *The Spirit of the Alberta Indian Treaties*. Revised ed. Edmonton: University of Alberta Press, 1999.
- Ray, Arthur. "Aboriginal Title and Treaty Rights Research: A Comparative Look at Australia, Canada, New Zealand and the United States." *New Zealand Journal of History* 37, no. 1 (2003): 5-21.
- Ray, Arthur, Jim Miller, and Frank J. Tough. *Bounty and Benevolence: A History of Saskatchewan Treaties*. Montreal and Kingston: McGill-Queen's University Press, 2000.
- Reynolds, Henry. *The Law of the Land*. 3rd ed. Ringwood, Australia: Penguin, 2003.

Reynolds, Henry. "A New Historical Landscape? A Response to Michael Connor's 'The Invention of Terra Nullius.'" *The Monthly: Australian Politics, Society & Culture*, May 2006, <http://www.themonthly.com.au/books-henry-reynolds-new-historical-landscape-responce-michael-connor039s-039the-invention-terra-nul>.

Reynolds, Henry. *Why Weren't We Told?* Ringwood, Australia: Penguin, 2000.

Rigby, Andrew. *Justice and Reconciliation: After the Violence*. Boulder: Lynne Rienner Publishers, 2001.

Ritter, David. "The 'Rejection of Terra Nullius' in *Mabo*: A Critical Analysis." *Sydney Law Review* 18, no. 1 (1996): 5-33.

Robertson, Lindsay G. "'A Mere Feigned Case': Rethinking the *Fletcher v. Peck* Conspiracy and Early Republican Legal Culture." *Utah Law Review* no. 2 (2000): 249-265.

Ross, Alexander McLagan. *Speech Delivered 21st February, 1884, in the Legislative Assembly of Ontario: On Moving the House Into Committee of Supply*. Toronto: The Grip Printing and Publishing, 1884.

Roth, Christopher. "Without Treaty, Without Conquest: Indigenous Sovereignty in Post-*Delgamuukw* British Columbia." *Wicazo Sa Review* 17, no. 2 (2002): 143-165.

Rotman, Leonard. *Fiduciary Law*. Toronto: Thomson/Carswell, 2005.

Rotman, Leonard. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*. Toronto: University of Toronto Press, 1996.

Rotman, Leonard. "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence." *University of New Brunswick Law Journal* 46, (1997): 11-50.

- Sharp, John. "Ethnogenesis and Ethnic Mobilization: A Comparative Perspective on a South African Dilemma." In *The Politics of Difference: Ethnic Premises in a World of Power*, edited by Edwin N. Wilmsen and Patrick McAllister, 85-103. Chicago: University of Chicago Press, 1996.
- Shore, Fred. "The Emergence of the Metis Nation in Manitoba." In *Metis Legacy: A Metis Historiography and Annotated Bibliography*, edited by Lawrence J. Barkwell, Leah Dorion and Darren R. Préfontaine, 71-78. Winnipeg: Pemmican Publications, 2001.
- Slattery, Brian. "Aboriginal Sovereignty and Imperial Claims." *Osgoode Hall Law Journal* 29, no. 4 (1991): 681-703.
- Slattery, Brian. "Making Sense of Aboriginal and Treaty Rights." *Canadian Bar Review* 79, no. 2 (2000): 196-224.
- Slattery, Brian. "Paper Empires: The Legal Dimensions of French and English Ventures in North America." In *Despotic Dominion: Property Rights in British Settler Societies*, edited by John McLaren, A.R. Buck and Nancy E. Wright, 50-78. Vancouver: UBC Press, 2005.
- Smith, Donald B. *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians*. 2nd ed. Toronto: University of Toronto Press, 2013.
- Smith, Keith, ed. *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1876*. Toronto: University of Toronto Press, 2014.
- Sprague, D.N. "Canada's Treaties with Aboriginal Peoples." *Manitoba Law Journal* 23 (1995): 341-351.

- St-Onge, Nicole. "Variations in Red River: The Traders and Freemen Métis of Saint-Laurent, Manitoba." *Canadian Ethnic Studies* 24, no. 2 (1992): 1-21.
- Surtees, Robert. *Treaty Research Report: Manitoulin Island Treaties*. Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986.
- Surtees, Robert. *Treaty Research Report: The Robinson Treaties (1850)*. Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986.
- Surtees, Robert. *Treaty Research Report: The Williams Treaties*. Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986.
- Tobias, John. "Canada's Subjugation of the Plains Cree, 1879-1885." *Canadian Historical Review* 64, no. 4 (1983): 519-548.
- Tobias, John. "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy." In *Sweet Promises: A Reader on Indian-White Relations in Canada*, edited by J.R. Miller, 127-144. Toronto: University of Toronto Press, 1991.
- Tough, Frank. "The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933." *Alberta Law Review* 41, no. 4 (2004): 999-1048.
- Valverde, Mariana. "Deconstructive Marxism." *Labour/Le Travail* 36 (1995): 329-340.
- Van Krieken, Robert. "From *Milirrpum* to *Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship." *University of New South Wales Law Journal* 23, no. 1 (2000): 63-77.

Veyne, Paul. "Foucault Revolutionizes History." In *Foucault and His Interlocutors*, edited by Arnold I. Davidson, 146-82. Chicago: University of Chicago Press, 1997.

Webber, Jeremy. "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*." *Sydney Law Review* 17, no. 5 (1995): 5-28.

White, Richard. *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*. 20th anniversary ed. Cambridge: Cambridge University Press, 2011.

Whitehouse, Derek. "The Numbered Treaties: Similar Means to Dichotomous Ends." *Past Imperfect* 3, (1994): 25-45.

Wicken, William. "The Mi'kmaq and Wuastukwiuk Treaties." *University of New Brunswick Law Journal* 43 (1994): 241-253.

Wilkins, Kerry. "Dancing in the Dark: Of Provinces and Section 35 Rights After 2010." *Supreme Court Law Review* 54, (2011): 529-562.

Wilkins, Kerry. "Of Provinces and Section 35 Rights." *Dalhousie Law Journal* 22, (1999): 185-235.

Wilkins, Kerry. "*R. v. Morris*: A Shot in the Dark and Its Repercussions." *Indigenous Law Journal* 7, no. 1 (2008): 1-37.

Williams Jr., Robert A. *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford University Press, 1990.