

Beyond Crown Sovereignty: A doctrinal and comparative analysis of Canadian and Anishinaabe political ontologies

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Abstract

In employing a doctrinal analysis of foundational cases that define Aboriginal and treaty rights under s.35 of the Canadian constitution, this thesis illustrates how the Canadian judiciary disregards the legal properties within Indigenous oral traditions to uphold the legal fictions of Crown sovereignty in what I label a 'juridical logic of elimination'. This leads to the question: why are the narratives that inform the concept of sovereignty within the common law tradition taken as a legitimate source of law whereas Indigenous peoples' stories are not?

One answer is found in elucidating the secularized elements of theological absolutism and universality embedded in Eurocentric political discourses that conceptualized sovereignty as the only condition of possibility and intelligibility. However, a critical comparison of European and Anishinaabe political ontologies shows that political power need not follow the same trajectory as the 'modern state' but can be developed through alternative modes of knowing and being.

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INTRODUCTION

I. THE CANADIAN CONSTITUTION, INDIGENOUS PEOPLES & STORIES

The year 2022 marks the 40th anniversary of the entrenchment of Aboriginal and treaty rights in the Canadian constitution. Section 35(1) of the *Constitution Act, 1982* states “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”¹ As aspirational as the inclusion of s. 35(1) may have been in 1982, the full identification of Aboriginal and treaty rights was never solidified by political measures. When political debates failed to define “existing aboriginal and treaty rights” and what it meant to have those rights “recognized and affirmed”, the Canadian judiciary was asked to provide meaning through a series of court cases. *R v. Sparrow*² was the first attempt by the Supreme Court of Canada to delineate Aboriginal and treaty rights as they “existed” within the framework of the Canadian constitution. Since then, the Court has further defined Aboriginal and treaty rights under section 35(1). However, the quest for recognition has not fared particularly well for those who claimed various Aboriginal and treaty rights. While there has been some acknowledgement by the Canadian judiciary, it has been suggested that the Supreme Court of Canada’s attention on Aboriginal rights

¹ “Aboriginal peoples”, as written in the constitution, make up three distinct Indigenous groups in Canada: First Nations, Inuit, and Métis. While this thesis largely focuses on First Nations, it will use “Indigenous peoples” when referencing First Nations, Inuit, and Métis peoples as grouped together by the Canadian state. Where the discussion focuses on a particular First Nation, this thesis will use the Nation’s name(s) as individuals from that Nation regard themselves. The term ‘Aboriginal’ will only be used to explain the rights that are recognized under section 35(1). See, *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c.11 [*Constitution Act*].

² *R. v. Sparrow* [1990] 1 SCR 1075 [*Sparrow*].

appears to be more focused on the limitation of section 35(1) rather than promoting their protection.³

This is largely due to the Court's acceptance of the Crown's assertion to territorial sovereignty⁴ in what is currently called Canada and the disqualification of Indigenous cultures, legal systems, and societies. In *Sparrow*, the Court stated 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".⁵ Numerous lawyers and legal scholars have problematized this assertion for *inter alia*, the racist international doctrines it rests upon,⁶ its logical leaps in justifying the expropriation of lands,⁷ and placing First Nations, Inuit, and Métis people in a subordinate relationship with the Crown.⁸ My thesis will touch upon these themes to explore the legal history of Indigenous-Crown relations as it informs the Canadian judiciary's interpretation of Aboriginal and treaty rights in Canada. However, the critique that is most interesting and deserving of more attention is the idea that Canadian sovereignty rests upon a legal fiction. As Anishinaabe Legal scholar John Borrows⁹ notes,

³ John Borrows & Leonard Rotman, *Aboriginal Legal Issues Cases, Materials and Commentary*, 5th ed (Markham, ON: NexisLexis, 2018) at 94.

⁴ See, Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims" (2014) *Can JL & Jur* 27(1) 225 for 231-235 for an explanation of how sovereignty creates the context in which territorial disputes are judged and resolved. While this may help contextualize the Canadian judiciary's interpretations of s.35(1), the concept of sovereignty will be problematized in the third chapter.

⁵ *Sparrow*, *supra* note 2 at 1103.

⁶ Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton, BC: Theytus Books, 1999); Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal rights with the Canadian Constitution, (2002) *Can LJ* 17(2) 22.

⁷ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995); Lisa Dufraimont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) *U Toronto Fac L Rev* 58(1) 1.

⁸ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

⁹ John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

Canadian sovereignty is premised on a set of falsehoods that do not consider the relationships between Indigenous peoples and the Crown.

To suggest that the concept of sovereignty that the Canadian Courts rely upon to interpret Aboriginal and treaty rights is based on a legal fiction is not a far fetch; there are plenty of examples that show how fictional narratives and foundational concepts of sovereignty are intertwined.¹⁰ A prime example of such occurrences can be found in Thomas Hobbes' *Leviathan*, which depicts a fictional entity symbolizing the absolute power of a sovereign, whose domination is justified by the alleged consent of the governed via a hypothetical social contract designed to put an end to an otherwise state of anarchy. Similarly, stories that could be conceived as fictional inform the laws of Indigenous peoples albeit in different ways.¹¹ For instance, the complex and sometimes contradictory nature of Nenabozho,¹² one of the central figures in Anishinaabeg stories, serve as a guide as to how people should relate to and interact with one another. Yet as this thesis will outline, the stories within Indigenous peoples' oral traditions and histories, are oftentimes disregarded or denigrated by the Supreme Court of Canada rather than accepting them as

¹⁰ In legal scholarship, stories and narratives are often used interchangeably but are understood as playing a vital role in determining and justifying the legal rules that make up 'the law'. See, Stephen Paskey "The Law is Made of Stories: Erasing the False Dichotomy between Stories and Legal Rules" (2014) *Leg Comm & Rhetoric: JALWD* 11(1) 51; Linda Edwards, "Speaking of Stories and Law" (2016) *Leg Comm & Rhetoric: JALWD* 13(1) 157 ; Paul Gewirtz, "Narrative and Rhetoric in Law" in Peter Brooks & Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 2016) 2 at 2; Mary I Coombs, "Outsider Scholarship: The law reviews stories" (1992) *U Colo L Rev* 63(1) 683.

¹¹ Heidi Kiiwetinepinesiik Stark "Transforming the Trickster: Federal Indian law encounters Anishinaabe diplomacy" in Jill Doerfler, Heidi Kiiwetinepinesiik Stark & Niiganwewidam James Sinclair, eds, *Centering Anishinaabe Studies: Understanding the world through stories* (Winnipeg: University of Winnipeg Press, 2013) 257 ; Drew Mildon, "A Bad Connection: First Nations Oral Histories in the Canadian Courts" in Renée Hulan & Renate Eigenbrod, eds, *Aboriginal Oral Traditions: Theory, practice, ethics* (New York: Fernwood Publishing, 2008) 79; Emily Snyder *Gender, Power, and Representations of Cree Law* (Vancouver, UBC Press, 2018).

¹² There are plenty of spellings and pronunciations for the Anishinaabeg trickster. I use the spelling and pronunciation according to how each storyteller I reviewed within this thesis has spelled or pronounced him.

a source of pre-existing and autonomous legal orders.¹³ As a result, the legal properties within Indigenous oral histories, traditions, and stories (which I collectively label ‘Indigenous oral legalities’) are often relegated as myth, symbols, or metaphors as they are subjected to Western standards of evidence and other legal tests. This leads to the questions this thesis wishes to examine; namely, why are the narratives that inform the concept of Crown sovereignty within the common law tradition taken as legitimate source of law whereas Indigenous peoples’ stories are not? What are the legal and political impacts on the interpretation of Aboriginal and treaty rights in Canada when the Canadian courts delegitimize the legal properties of Indigenous peoples’ oral traditions and histories?

Springing from these questions, my thesis challenges the set of core assumptions informing the concept of sovereignty as held by Canadian courts. More specifically, I suggest that these assumptions are secularized and historicized remnants of theological absolutism and universality¹⁴ that are inherent to a very particular ontological orientation, that in many ways justifies itself as the only condition of political possibility and intelligibility. In other words, the discursive elements that conditioned the Eurocentric and anthropocentric narratives regarding sovereignty did so in a way that resulted in an assumed hierarchical supremacy over other political and juristic orders – especially if those orders did not ‘develop’ along the same trajectory as the Modern State. While this explains why Indigenous oral legalities are disregarded by the Canadian judiciary, I assert further

¹³ See, Val Napoleon, *Thinking About Indigenous Legal Orders* (June 2007) *National Centre for First Nations Governance*, online: <https://www.law.utoronto.ca/sites/default/files/documents/hewitt-napoleon_on_thinking_about_indigenous_legal_orders.pdf> for the distinction between ‘legal orders’ and ‘legal systems’.

¹⁴ This thesis acknowledges that, quite arguably, a secularized concept of ‘universalism’ may not contain the same problematic features of its religious foundations. I nevertheless problematize the weaponization of the concept against Indigenous Peoples in Canada to advance certain state interests. See, Susan Buck-Morss, “Hegel & Haiti” (Summer 2000) *Critical Inquiry* 26(4) 821.

that an analysis into the metaphysical ‘building blocks’ of other ontological orientations can delineate alternative political and legal orders, which may be further built upon to produce new avenues of political possibility and intelligibility through a type of storied practice.

To highlight this, this thesis will first explore the exclusion of Indigenous perspectives within the legal history of Indigenous-Crown relations in the first chapter through the legal framework set out in *Calder et al v British Columbia (AG)*.¹⁵ The second chapter will explore a series of landmark Aboriginal rights cases to outline the Court’s unquestioned acceptance of Crown sovereignty, resulting in the mischaracterization of Aboriginal rights which justifies all types of State activities to infringe on Aboriginal and treaty rights, which I label ‘the juridical logic of elimination’. Both these chapter employ a doctrinal analysis of Supreme Court decisions where I make visible the logic deployed by the Canadian judiciary when it comes to their reliance on Canadian sovereignty, as well as the subjugating interpretations they deploy when engaging with Indigenous accounts of account giving and other oral traditions as mere evidence within the edifice of the Common Law.

To get at the problem of sovereignty as it relates to Aboriginal and treaty rights in Canada, this the third chapter employs an interdisciplinary critical comparative analysis based on the insights which the concept of political ontology makes available. More precisely, I shall argue that the Canadian judiciary’s reliance on the absolutist and totalizing elements embedded in the concept of sovereignty rests on specific Western cultural, theological, and ontological assumptions which are not ineluctable or even necessary. After

¹⁵ *Calder et al v Attorney General of British Columbia* [1973] SCR 313.

discussing the concept of political ontology, I will further explore the works of Carl Schmitt¹⁶ and Jen Bartelson¹⁷ to show how the secularization of key theological elements derived from monotheistic and Christian beliefs have informed the supremacist assumptions shaping the concept of Canadian sovereignty. It is my hypothesis that the contingent and culturally informed origins of Canadian sovereignty become even more apparent when we contrast it with Anishinaabeg legal traditions inherited from oral traditions bearing in different values and teachings on law, responsibilities, rights, and conflict resolution.

In fact, an analysis of Anishinaabe *aadizookaanag* or sacred stories, illustrate a prioritization of a shared internal continuity with all living things, whether human or otherwise. In following the anthropological works of Phillippe Descola,¹⁸ I illustrate that this ‘animist ontology’ renders intelligible what others would call supernatural elements or metamorphic abilities of characters found in Anishinaabeg stories. These characteristics are the foundation for an ‘ecology of relations’ that creates a complex web of kinship ties (that Descola would call a totemic system), wherein power is dispersed consubstantially through the reciprocal actions of many human and nonhuman actors. Rather than the absolutist and anthropocentric form of authority inherent in the concept of sovereignty, Anishinaabeg societies are governed by legal responsibilities and obligations to almost all things inhabiting the natural world and affirmed through treaty making procedures. This will be further substantiated by examining the stories of Anishinaabe storyteller Basil

¹⁶ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005); Carl Schmitt, *The Concept of the Political: Expanded Edition* (Chicago: University of Chicago Press, 2007).

¹⁷ Jens Bartelson, *A Genealogy of Sovereignty* (New York, NY: Cambridge University Press, 1995).

¹⁸ Phillippe Descola, *Beyond Culture and Nature* (Chicago: University of Chicago Press, 2013).

Johnston.¹⁹ As such, the third chapter will conclude with the assertion that political power and authority need not follow Western trajectories of sovereignty but can be developed through alternative modes of knowing and being.

¹⁹ Basil Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976); Basil Johnston, *The Manitous: The supernatural world of the Ojibway* (Toronto: Key Porter, 1995).

CHAPTER 1: THE FOUNDATIONS OF ABORIGINAL AND TREATY RIGHTS IN CANADA

I. INTRODUCTION

Since 1982, Aboriginal and treaty rights have been ‘recognized’ and ‘affirmed’ under s.35 of the *Constitution Act, 1982*.¹ Further protections under s.25 of the *Canadian Charter of Rights and Freedoms*² ensure that s.35 cannot be abrogated or derogated by any other right established in the Charter. The entrenchment of these rights is the result of the various political and legal strategies employed by several national Indigenous organizations throughout the 1970s and 1980s to assert their inherent rights pursuant to their own legal orders. While initially excluded from constitutional negotiations, Indigenous organizations were ultimately successful in their lobbying efforts to formally include Aboriginal and treaty rights in the Constitution. However, these rights as they were ‘recognized and affirmed’ under s.35(1) were never defined through political measures. In fact, political unwillingness by Canadian governments to properly define Aboriginal and treaty rights meant that the task of delineating the scope and nature of s.35(1) was left to the Canadian courts. While analyzing the juridical methods utilized by the Supreme Court of Canada to interpret Aboriginal and treaty rights will be left to the second chapter, this chapter explores the legal history of Indigenous-Crown relations to help contextualize the precedent set for the interpretation of Aboriginal rights after their constitutionalization.

¹ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11 [*Constitution Act*].

² *Canadian Charter of Rights and Freedoms*, s2, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11. [*Charter*].

This is done through an examination of the legal framework established in *Calder et al. v Attorney-General of British Columbia*.³

The *Calder* decision is known for its acknowledgement of Aboriginal title for the first time in Canadian legal history. The framework established *Calder* relied heavily on Crown interpretations of a unique and exclusive relationship established through what Brian Slattery⁴ calls ‘historical process’ between Indigenous nations and the British Crown that evolved from centuries of engagement and negotiation between each party. While there is no doubt that such a legal relationship existed, the Court’s representation of this relationship is thrown into question given the exclusion of First Nation perspectives on the matter. Like all other societies, Indigenous nations had and still have fully functioning legal orders which serve as a source of their political autonomy. However, eighteenth-century American and British jurisprudence that the *Calder* case rested upon accepted only a limited view of Indigenous law, refusing to acknowledge Indigenous legal orders on the same level as the common law. Further, as enunciated in what is called the Marshall trilogy, Courts upheld an assumption that Indigenous peoples political and legal autonomy were subsumed under the authority of the Crown. Accordingly, this chapter addresses two primary questions. First, in what ways were the legal perspectives of specifically First Nations excluded in the legal framework established in *Calder*? Secondly, what impacts would the exclusion impact future Aboriginal and treaty right decisions?

The framework in *Calder* established a hierarchical legal relationship based on the principle of Suzerainty, which diminished the political and legal autonomy of First Nations despite the principles of non-interference affirmed between parties in various treaty

³ *Calder et al. v. Attorney-General of British Columbia* [1973] SCR 313 [*Calder*].

⁴ Brian Slattery, “Making Sense of Aboriginal Rights” (2000) 79 *Can Bar R* 196.

processes and protocols. Since First Nation perspectives on treaty making were not given due consideration in the legal framework established in *Calder*, the Supreme Court cannot help but take Canadian sovereignty for granted in subsequent Aboriginal rights cases while simultaneously denying Indigenous peoples their autonomy. To explain this argument, I first outline the current constitutional regime as it relates to Aboriginal and treaty rights, under the Canadian Charter and constitution. Secondly, I examine the legal framework that guided the Supreme Court's decision in *Calder* regarding Aboriginal title before analyzing First Nation peoples' perspectives on the legal relationship with the Crown and the land. This will illustrate the inability of the Court to reconcile Crown sovereignty with Indigenous peoples pre-existing legal orders as outlined in the second chapter. This juridical incommensurability suggests the Supreme Court's non-recognition of various modes of expression and account-giving within Indigenous oral traditions, histories that I collectively label as Indigenous oral legalities. Finally, I conclude with some considerations regarding the dubious claims on which Canadian sovereignty rests. This sets the direction for the second chapter, which advances the argument that a similar hierarchical legal relationship reinforced by the Canadian courts has resulted in the juridical elimination of Indigenous peoples' oral legalities to uphold state sovereignty.

II. THE ORIGINS OF ABORIGINAL AND TREATY RIGHTS IN CANADA

Prior to the patriation of the *Constitution Act, 1982*⁵ little attention was given to affording individuals rights to people through a written constitutional document. The framers of the original Constitution were more concerned with delineating the

⁵ *Constitution Act, supra* note 1.

jurisdictional divide between provincial and federal powers. Furthermore, Aboriginal and treaty rights in Canada were virtually ignored beyond what was written in s.91(24) of the *British North America Act, 1867*.⁶ However, the political mobilization efforts from national Indigenous organizations ensured Aboriginal rights remained in constitutional amendment talks throughout the 1970s and 1980s despite concerns regarding the Crown's fiduciary responsibilities to Indigenous peoples. This section reviews the evolution of the Canadian Constitution and the *Charter* to highlight the nominal inclusion of Aboriginal and treaty rights before examining the *Calder* case, which was fundamental to how the Court interpreted the rights within section 35(1). Again, this will provide context for the next section which takes a more critical look at how the Supreme Court interprets so-called Crown sovereignty in relation to Indigenous legal orders and their associated cultural practices.

a. The Evolution of the Constitution

According to Wright et. al.,⁷ the source of Canada's constitutional law is largely imported from legal systems foreign to North America. The reception of both French civil law and English common law introduced foreign laws within colonial territories but also often interacted with Indigenous legal orders. One example of this is *Connolly v. Woolrich*,⁸ which recognized Cree customary laws pertaining to the marriage of a Northwest Company employee and a Cree woman. However, as imperial power and authority expanded across the North American continent, Indigenous peoples' legal traditions, customs, and practices were increasingly neglected despite attempts by

⁶ *British North America Act, 1867*, 30-31 Vict, c.3 (UK) [*BNA Act*]

⁷ Barry Wright et al, *Looking at Law: Canada's legal system*, 7th ed. (Toronto: LexisNexis, 2019) at 24.

⁸ *Connolly v Woolrich* [1867] 17 RJRQ 75, 11 Low Can Jur 197

Indigenous leaders to maintain the legal relationship established primarily through treaty-making protocols and procedures. Such neglectful actions were eventually embedded in colonial legislation and reinforced with the passing of the *BNA Act* by the UK parliament. While the *BNA Act*, now referred to as the *Constitution Act, 1867*, united the provinces of Canada, Nova Scotia, and New Brunswick under the Dominion of Canada, the Act was less concerned with protecting Indigenous nations than it was with establishing the contours of the new federation for the influx of settlers. For instance, s.91(24) granted the federal government the authority to legislate unilaterally over “Indians and Lands Reserved for Indians”.⁹ Accordingly, the Constitution offered little to no protections for the rights of Indigenous peoples or their land despite the acknowledgment of pre-existing legal traditions, customs, and laws.

In regard to constitutional matters, the role of the Canadian judiciary, as it was at the time, was to make rulings on the division of powers between federal and provincial governments as set out under ss.91-95 of the *BNA Act*. The principle of parliamentary supremacy ensured that politicians enjoyed the exclusive power to create, amend, or repeal legislation as per the limitation of such divisional powers.¹⁰ For instance, the Supreme Court could declare a law to be *ultra vires* when one level of government brought a case against another. Rarely did citizen’s rights in terms of guaranteed freedoms and protection against the government apply. As McIvor states, “[f]ew private individuals could afford to seek judicial recognition of their common law rights”.¹¹ When individuals did bring matters before the Court to assert their rights, the argument was often framed as a matter of

⁹ *BNA Act*, *supra* note 6 at s. 91(24)

¹⁰ Heather MacIvor, *Canadian Politics and Governments in the Charter Era* (Ontario: Oxford University Press, 2013) at 22.

¹¹ *Ibid* at 24.

divisional powers rather than a human rights issue as was the case in *Cunningham v Tomey Homma*,¹² in which a Japanese-born Canadian was denied the right to vote under British Columbia's electoral law. Despite the obviously discriminatory nature of the provision in question, the issue was one of jurisdiction.

Even after the 1960 introduction of the *Canadian Bill of Rights*,¹³ the first iteration of Canadian civil rights legislation, the principle of parliamentary supremacy still curtailed many of the Bill's rights. The first two sections 'recognized and declared' a set of rights that could not be infringed upon or abrogated by an Act of Parliament unless expressly declared.¹⁴ However, the language in s.2 posed problems for Canada's legislative and judiciary systems since courts were not explicitly authorized to strike down laws that infringed on the freedoms and rights set out in the *Bill of Rights*. Judges generally treated s.2 as an interpretative rule that could not render legislation invalid and maintained this stance in all cases on the matter except in *R v. Drybones*.¹⁵ According to Heather MacIvor,¹⁶ the *Bill of Rights* was viewed as a failure in securing rights of individuals, but the shortcomings therein gave rise to a growing campaign for a fully entrenched and judicially enforceable charter of rights. This, of course, would require a constitutional amendment but given the ill-defined amendment formula in the *Constitution Act, 1867*, the task would prove extremely difficult to achieve.

¹² The Judicial Committee of the Privy Council in the UK, Canada's highest court at the time, held that while the privileges attached to naturalization were independent of nationality, the province's electoral law remained *intra vires*. See, *Cunningham v Tomey Homma* [1902] UKPC 60, [1903] 9 AC 151, CCS 45 (17 Dec 1902), PC (on appeal from British Columbia).

¹³ *Canadian Bill of Rights*, SC, 1960 c.44.

¹⁴ *Ibid* at ss. 1 - 2.

¹⁵ In this case, Joe Drybones, a status Indian, was found intoxicated in a Yellowknife hotel, a violation of s.94(b) of the *Indian Act*. The majority found that s.2 of the *Bill of Rights* could not be viewed as an interpretative clause, thus rendering the relevant provision of the *Indian Act* inoperable. The Court restricted the decision to "the particular circumstances of the case" to avoid fully empowering courts to strike down federal legislation. See, *R v Drybones* [1970] SRC 282. See also, MacIvor *supra* note 10 at 36-7

¹⁶ MacIvor *ibid* at 37.

The main issue for Canada was that constitutional amendments required British Parliamentary consent. Even after the *Statute of Westminster, 1931*,¹⁷ which gave Canada greater independence from Britain, no domestic amending formula existed for the Constitution. Prior attempts at constitutional reform throughout the 1930s into the 1960s were considered incomplete when it came to the notion of Canada's constitutional independence from Britain.¹⁸ In 1971, a tentative agreement called the Victoria Charter led by Pierre Trudeau was reached between the federal and provincial governments, but ultimately broke down due to changes in leadership and Quebec's concern over provisions regarding income security.¹⁹ Indigenous peoples were excluded from the Victoria Charter as they were in all other attempts to amend the Constitution. By 1978, constitutional debates were once again at the forefront of Canadian political discourse but the resistance against Trudeau's 1969 White Paper²⁰ had a significant influence on the mobilization efforts to include Aboriginal and treaty rights in constitutional negotiations.

a. (1) *Indigenous activism and constitutional inclusion*

The lobbying efforts to ensure the recognition of Aboriginal rights in the Constitution were primarily led by national Indigenous organizations. For example, as Mildred C. Poplar²¹ notes, the Union of British Columbia Indian Chiefs (UBCIC) hired

¹⁷ *Statute of Westminster 1931* (UK) 22-23 George R, c.4.

¹⁸ John Borrows & Leonard Rotman, *Aboriginal Legal Issues Cases, Materials and Commentary*, 5th ed (Markham, ON: NexisLexis, 2018) at 95

¹⁹ *Ibid.*

²⁰ The 1969 White Paper is considered "the signal most powerful catalyst of the Indian nationalist movement", which enabled the institutionalization of many First Nations, Inuit, and Metis organizations and the mass mobilization of Indigenous movements necessary for the recognition of s.35(1). See, RJ Miller, *Skyscrapers Hide the Heavens: A history of Indian-white relations in Canada*, 3rd ed. (Toronto: University of Toronto Press, 2000) at 336-63. See also, Sally Weaver, *Making Canadian Indian Policy: The hidden agenda* (Toronto: University of Toronto Press, 1981) at 171; Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & MacIntyre, University of Washington Press, 1969).

²¹ Mildred C. Poplar. "We Were Fighting for Nationhood not Section 35" in Ardith Walkem and Halie Bruce (eds.) *Box of Treasures or Empty Box? Twenty years of section 35* (British Columbia: Theytus Books, 2003) 23.

two trains to travel to First Nation communities and raise awareness regarding the 1978 proposed constitutional amendments. The main concern for the UBCIC was that the introduction of the Charter would mean the removal of s.91(24) of the *BNA Act* and the erasure of the Crown's fiduciary duty towards Indigenous peoples.²² The organizing efforts of the UBCIC brought 500 participants to Ottawa at the same time that the National Indian Brotherhood (NIB), the predecessor organization of the Assembly of First Nations, presented a *Declaration of the First Nations* to the Governor General as an assertion of their inherent rights.²³ Although the overall objective for Indigenous organizations was the recognition of their rights, the views on how to achieve the objective differed. According to Poplar, there were those who desired independence from Canada as sovereign Nations, and those who believed working within the Canadian state was the most practical strategy.²⁴ The NIB was also working in similar circumstances which allowed space for other Indigenous organizations to lobby the government.

RJ Miller²⁵ explains that although the NIB sought to assert their role as another branch of the Canadian government, they did not want to push for the full inclusion of Aboriginal and treaty rights without the full support of its members. As such, smaller Indigenous organizations with varying legal strategies took the lead on the matter. Many First Nations and Inuit organizations allied under the banner of the Aboriginal Rights Council (ARC) to push for the inclusion of Aboriginal rights in constitutional talks.²⁶ Meanwhile, UBCIC and other prairie province Indigenous organizations launched a suit

²² *Ibid* at 23.

²³ Borrows & Rotman *supra* note 18 at 96.

²⁴ Poplar, *supra* note 21 at 27.

²⁵ Miller, *supra* note 20 at 348.

²⁶ Borrows & Rotman *supra* note 18 at 95.

before the Courts in the UK to dispute the eroded nation-to-nation relationship Indigenous peoples once held with the British Crown. The campaign was ultimately unsuccessful however, as Lord Denning M.R rejected the argument put forth by Indigenous organizations that the Crown never transferred responsibilities for Indians to Canada. In *R v. Secretary of State for Foreign and Commonwealth Affairs*,²⁷ the JCPC ruled that the Crown had become divisible according to each of its “self-governing dominion or province or territory” and therefore, any obligations bound to the Crown were confined to the territories to which they relate. The JCPC thus dismissed the case, effectively washing their hands of any obligations they once held to Indigenous nations.

While First Nation peoples were fighting for recognition internationally and at home, the federal government in Canada asked the Supreme Court whether provincial consent was needed for the patriation of the Constitution due to the mounting tensions especially between Québec and the federal government. In *Reference re Amendment of the Constitution Act of Canada*,²⁸ the majority of the Court held that while a unilateral patriation of Canadian constitution by the federal government was legal and did not threaten Canadian federalism, provincial consent was required to a “substantial degree”. The ruling forced the federal government, who previously attempted to circumvent provincial consent, back to the constitutional negotiation table with vested parties. When the negotiations resumed, Aboriginal and treaty rights were dropped from the agenda due to pressure from prairie province Premiers.²⁹ As a result, numerous protests arose until Aboriginal rights were finally reintroduced into the negotiation process.

²⁷ *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and Others* [1982] 2 All E.R 118 at 128

²⁸ *Reference re Amendment of the Constitution Act of Canada* [1981] SCR 753 at 779, [1982] SCJ No 58.

²⁹ Miller, *supra* note 20 at 350.

b. Aboriginal and Treaty Rights

On April 17, 1982, Aboriginal and treaty rights became fully entrenched in the Canadian constitution. Section 35 in Part II of the *Constitution Act, 1982* initially came into force as written:

- (1) The existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.³⁰

Further, s.25 of the *Charter* was intended to substantiate Aboriginal and treaty rights and provide context in which section 35 was to be interpreted, especially if in conflict with other Charter rights.³¹ The statute declared that no other Charter right could detract from or repeal Aboriginal rights under s.35 of the constitution. S.25 is as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

- a) Any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.³²

Section 37 was additionally added to the Charter to ensure a constitutional meeting would take place between the Prime Minister, Indigenous leaders, and provincial ministers to discuss the identification and definition of Aboriginal and treaty rights.³³ When the congregation met in March 1983, various amendments to the constitution were made and

³⁰ *Constitution Act, supra* note 1 ss 35(1)-(2)

³¹ Borrows & Rotman *supra* note 18 at 99.

³² *Charter, supra* note 2 at s.25.

³³ Brian Slattery, “The Hidden Constitution: Aboriginal rights in Canada” (1984) *American J Comparative L* 32(2) 361 at 364; Borrows & Rotman *supra* note 27 at 98-9.

concluded with an agreement to meet again within a year's time. Subsections 35(3) and (4), as well as subsection 25(b) were appended to the *Constitution Act, 1982* to provide greater detail to the guarantee of Aboriginal rights. Section 35 was amended to include a land claim provision and a gender equality clause:

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claim agreements or may be so acquired.

(4) Notwithstanding any other provision of the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.³⁴

Section 25 was also amended to provide an additional shield for Aboriginal rights from any adverse effects from other Charter rights:

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claim settlements.³⁵

Lastly, section 37 was expanded to include two additional constitutional meetings between the federal and provincial governments, and Indigenous organizations:

(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after the date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples

³⁴ *Constitution Act, supra* note 1 at ss. 35(3)-(4).

³⁵ *Charter, supra* note 2 at ss.25(b).

of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussion on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.³⁶

As aspirational as the constitutionalization of Aboriginal and treaty rights may have been in 1982, the full identification of Aboriginal rights never came to full fruition. The failure of the 1987 Meech Lake Accord and the 1992 Charlotte Accord, which both attempted to resolve additional constitutional amendments including Aboriginal rights, left large gaps in the definition of Aboriginal constitutional rights.³⁷ This failure to define section 35(1) through political measures left Indigenous peoples to rely on the courts to interpret their rights. This has generally created further asymmetrical power relations between Indigenous communities and the Canadian state, especially in matters concerning Indigenous political and legal autonomy under their own laws. While this will become evident in the second chapter, in the balance of this chapter, I will critically unpack the legal framework that has guided the Supreme Court in its decisions regarding the scope and nature of section 35(1) rights. This will help to highlight the faulty premise that Crown assertions to sovereignty and exclusive title rest upon, which denies Indigenous peoples their ability to govern themselves according to their oral legalities.

³⁶ *Constitution Act*, *supra* note 2 s.37 as it appeared on 17 April 1982, as cited in Slattery, *supra* note 33 at 49.

³⁷ See in general, Miller, *supra* note 20 at 374-379.

III. CALDER, THE CROWN, AND CONTESTED SOVEREIGNTIES

Following the entrenchment of Aboriginal rights in the Canadian constitution, the Supreme Court has played a significant role in defining Aboriginal and treaty rights in Canada. Although *R. v. Sparrow*³⁸ was the Court's first post-patriation attempt to define these rights, the decision was not without antecedent. In fact, *Calder* is extensively referenced by the Court in *Sparrow*, and is most often regarded as a landmark case for recognizing the existence of Aboriginal title for the first time in Canadian legal history. Prior to *Calder*, Aboriginal title was assumed to be extinguished by the Crown's assertion to sovereignty.³⁹ The decision was instrumental in the construction of a legal framework to interpret s.35(1) that relied on nineteenth century American jurisprudence to establish a unique relationship between the Crown and Indigenous peoples. Although the manifest appearances of this relationship seem to rest on the affirmation and recognition of Indigenous law, a more detailed explanation illustrates the opposite, especially in light of the concerted attack on Indigenous oral legalities via legislation such as the *Indian Act*. This section of the chapter examines the *Calder* and the legal framework that emerged from this decision. By the end, it will be clear that the legal relationship established by the Canadian judiciary has excluded the perspectives from oral traditions and processes that give validity to Indigenous law.

a. *The Calder Decision*

As stated above, the 1973 *Calder* decision was instrumental for the legal framework used to later interpret Aboriginal and treaty rights under section 35(1). Initially launched

³⁸ *R. v. Sparrow* [1990] 1 SCR 1075 [*Sparrow*].

³⁹ Christina Godlewska & Jeremy Webber, "The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga'a" in Hamar Foster et. al (eds.) *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: UBC Press, 2003) 1 at 15.

in 1967 by the Nishga Tribal Council (as it was spelled then), Frank Calder and other elders brought a lawsuit to British Columbia seeking a declaration that Nisga'a's title had never been lawfully extinguished by the province through a treaty or any other legal mechanism.⁴⁰ The Supreme Court of British Columbia held no pre-existing title existed for the Nisga'a prior to the 1763 Royal Proclamation, initially issued by King George III to claim territory to North America after the Seven Years' War, and if such a right did exist, it was extinguished by the Crown upon British Columbia's entrance into confederation subject to the 1867 BNA Act.⁴¹ Upon appeal to the Court of Appeals for British Columbia, a majority upheld the findings of the lower court under the Terms of Union that brought BC into the Canadian confederation.⁴² Further, the Court of Appeals held that an Aboriginal right could not be claimed unless supported by a special treaty, proclamation, contract or other document. Mr. Calder appealed on both cases.

At the Supreme Court, the appellant argued that “[t]he Nishgas[sic] claim 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”.⁴³ Thus, the issue before the Supreme Court in *Calder* was three-fold: 1) whether Aboriginal title existed; 2) whether, in the case of the Nisga'a, such title was extinguished; and 3) whether the Court had jurisdiction to make a declaration on Aboriginal title since Crown immunity from suit without fiat still existed in British Columbia.⁴⁴

⁴⁰ *Calder supra* note 3 at 317

⁴¹ *Calder v. British Columbia (Attorney General)*, 1969 CanLII 713 (BC SC).

⁴² *Calder v. British Columbia (Attorney General)*, 1970 CanLII 766 (BC CA).

⁴³ *Calder supra* note 3 at 319

⁴⁴ *Ibid* at 314.

In regard to the first issue, all but Justice Pigeon acknowledged the existence of Aboriginal title, but they were split evenly on the question of extinguishment. While Justice Judson writing for Justices Martland and Ritchie, agreed that Aboriginal title existed due to the prior occupation of Indigenous societies, Aboriginal title was extinguished by various proclamations and ordinances delivered by Crown representatives before and after British Columbia entered Confederation. For Judson, Indian title was based on the fact that “when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries”.⁴⁵ However, reserves established under s.91(24) of the *BNA Act* in the Nass area where the Nisga’a resided in conjunction with the construction of the railway under the Terms of Union were “inconsistent with the recognition and continued existence of Indian title”.⁴⁶

Meanwhile, Justice Hall writing for Justices Spence and Laskin, dissented with Justice Judson’s ruling. Justice Hall concluded that Nisga’a title continues to exist because “possession is of itself proof of ownership” and is presumed to continue thereafter until explicitly proven otherwise.⁴⁷ For Justice Hall, provisions that were explicit in its intent were required for the extinguishment of Aboriginal title. Further, the ordinances and proclamations used by lower courts to prove extinguishment were considered beyond the powers of the governor who issued them and were therefore *ultra vires*.⁴⁸ Meanwhile, Justice Pigeon focused solely on the third issue, which prevented a resolution to the

⁴⁵ *Ibid* at 328.

⁴⁶ *Ibid* at 337.

⁴⁷ *Ibid* at 368.

⁴⁸ *Ibid* at 406.

extinguishment question.⁴⁹ Given that the split on the matter, the case was ultimately dismissed.

Nevertheless, *Calder* is considered a landmark case for the recognition of Aboriginal title. The legal framework in *Calder* relies extensively on what is known as the Marshall trilogy, a set of American Supreme Court cases deliberated upon by Chief Justice Marshall, dealing with Indian title in the early 19th century. Central to the Marshall Trilogy's outcome is interpretations of the 1763 Royal Proclamation, which is generally considered the foundational document in understanding the recognition of existing Aboriginal rights and title.⁵⁰ Chief Justice Marshall recognized the legal orders of Indigenous peoples but simultaneously disregarded the complex legal realities stemming from Indigenous oral traditions that gave rise to the Royal Proclamation in the first place. This results in a paradoxical characterization of Aboriginal and treaty rights which the Canadian Supreme Court views as existing independently of the state, but also contingent on it. Additionally, the legitimacy of the Crown's assertion to sovereignty is thrown into question when the legal framework of Aboriginal rights is expanded to incorporate pre-existing Indigenous oral legalities. To further explore these points, the Marshall trilogy will be now examined.

b. *The Legal Framework of Indigenous-Crown Relations*

To arrive at their respective decisions in *Calder*, the Supreme Court of Canada relied extensively on the Marshall trilogy, which consists of *Johnson v M'Intosh*,⁵¹

⁴⁹ For Pigeon J., sovereign immunity to suit was not removed from British Columbia legislation and therefore the Court had no jurisdiction to deliberate on the matter. See *ibid* at pp. 422-427.

⁵⁰ Kent McNeil, "The Meaning of Aboriginal Title" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 135 at 147; Godlewska and Webber *supra* note 39 at 4; Miller *supra* note 20 at 87.

⁵¹ *Johnson v M'Intosh* [1823] 21 US 543, 5 L. Ed. 681. [*Johnson*].

Cherokee Nation v. Georgia,⁵² and *Worcester v. Georgia*.⁵³ All three cases considered the legal standing of Indian title within the United States during the early nineteenth century. In *Johnson*, Chief Justice reviewed a 1773 land purchase that took place between a European trader and the Illinois Nation while *Cherokee Nation* challenged Georgia's laws that stripped the Cherokee of all their political rights. *Worcester* further challenged Georgian laws that prevented settlers from residing in Cherokee lands without explicit permission from the state of Georgia. As Crane, et al.⁵⁴ note, each case was brought before the American Supreme Court due to the settler's disdain for the Royal Proclamation.

In *Johnson*, Chief Justice Marshall voided the aforementioned land purchases on the basis that the Illinois nation lacked the natural right to carry out such transactions without the permission and control of European authorities.⁵⁵ In relying on *jus gentium*, Chief Justice Marshall upheld a domestic version of the doctrine of discovery, which presumes that a so-called discovery of lands by a European power gives exclusive title to the 'discoverer'.⁵⁶ While *Johnson* acknowledged Indigenous nations as sovereign, the exclusive nature of title guaranteed that land in question remained under the control of the US since the country "unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold the country".⁵⁷ For Chief Justice Marshall, title could not be held simultaneously by more than one individual or government, and since "[a]ll institutions recognize the absolute title of the Crown, subject only to the Indian right of

⁵² *Cherokee Nation v Georgia* [1831] 30 US 1. [*Cherokee Nation*].

⁵³ *Worcester v Georgia* [1832] 31 US 515. [*Worcester*].

⁵⁴ Brian A Crane, Robert Mainville, & Martin W Mason, *First Nations Governance Law* (Markham: LexisNexis, 2006).

⁵⁵ *Johnson*, *supra* note 51 at 603.

⁵⁶ *Ibid* at 567.

⁵⁷ *Ibid* at 587.

occupancy”,⁵⁸ Indigenous title could only be extinguished by the Crown. In effect, the *Johnson* decision, which placed Indigenous nations in an exclusive relationship with the Crown, subordinated all Indigenous nations under the authority of the United States, despite that the Royal Proclamation explicitly acknowledged the unceded territories of Indigenous nations.

This exclusive and hierarchical legal relationship was further expanded in *Cherokee Nation*, where the political and legal autonomy of Indigenous nations were severely diminished. The case was brought before Chief Justice Marshall after the US legislature restricted the political and economic actions of the Cherokee nation in the 1830s by annulling all Cherokee laws and annexing their land to the Georgian state while depriving them of their rights within the boundaries set out in the Royal Proclamation.⁵⁹ The legislation was challenged by the Cherokees who asserted themselves as a foreign, sovereign state under the third Article of the US Constitution.⁶⁰ The case was dismissed when Chief Justice Marshall ruled that the US Supreme Court did not have the jurisdiction to hear the matter before the court since the Cherokees were not fully sovereign but “domestic dependent nations” whose status as independent nations were severely impaired.⁶¹ Therefore, the Cherokee nation could not petition the US as a foreign state and the state laws that stripped the Cherokees of their rights within their own territories were upheld.

Four years later in the *Worcester* case, the appellant Mr. Worcester, a Christian missionary working with the Cherokee in their territory, was arrested for remaining on

⁵⁸ *Ibid* at 588.

⁵⁹ *Cherokee Nation*, *supra* note 52 at 7.

⁶⁰ *Ibid* at 15-16.

⁶¹ *Ibid* at 17.

Cherokee land without a license from the Governor of Georgia.⁶² Mr. Worcester appealed the charges to the Supreme Court in which Chief Justice Marshall further enunciated his findings in *Johnson*. In allowing the appeal, the Chief Justice confirmed that title by discovery inhibited the rights of the Cherokee but did not completely abrogate them:

[Title by discovery] regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the rights of the possessor to sell.⁶³

As the above passage shows, the Chief Justice asserted that Indigenous nations did not relinquish their right to self-government, but title by discovery restricted it since Indians could only exclusively engage with the European power claiming discovery (i.e., the Crown). As a result, Indigenous nations could retain some semblance of self-governance if only to preserve their rights as original occupants of the land.⁶⁴ Chief Justice Marshall viewed the relationship between Indigenous nations and the British Crown to be “that of a nation claiming and receiving protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of their master”.⁶⁵ The exclusive character of the relationship established in *Worcester* meant that the laws of Georgia were consequently void since “the whole intercourse between the United States and [the Cherokee] nation, is, by [the American] Constitution and laws,

⁶² *Worcester, supra* note 53 at 521.

⁶³ *Ibid* at 516.

⁶⁴ *Ibid* at 520.

⁶⁵ *Ibid* at 555.

vested in the government of the United States”, who had since assumed the role of the Crown.⁶⁶

b. (i) Crown interpretations

The *Marshall* trilogy is central in common law interpretations of Indigenous-Crown relations. The exclusive relationship between Indigenous nations and the US that Chief Justice Marshall characterized envision Indigenous peoples as “domestic dependent nations”, resulting in what Crane et al.⁶⁷ call “the notion of residual Aboriginal sovereignty” in the United States. In Canada, the Marshall trilogy also serves as a ‘constitutional framework’ through which Aboriginal and treaty rights are “acknowledged and reconciled with the sovereignty of the Crown”.⁶⁸ However, the interpretations of this legal relationship as determined by Chief Justice Marshall are also predicated on the 1763 Royal Proclamation. As stated above, the main issue in *Johnston* involved determining whether Indian title within the boundaries set out by the Proclamation was recognized by the American judiciary. Later, when Marshall expanded on his ruling in *Worcester* using international jurisprudence, Indigenous nations had ‘claimed and received’ the protection of the Crown, ultimately, ‘submitting’ themselves to the authority of the discovering European power or the state that subsequently gained authority. The Chief Justice’s claim is tenuous at best as I outline in the next section. Granted, when viewing the textual elements of the Royal Proclamation, the terms for how the Crown viewed its engagement with Indigenous nations is evident. As the Proclamation states:

⁶⁶ *Ibid* at 560.

⁶⁷ Crane et al, *supra* note 54 at 13.

⁶⁸ This phrase which suggests that the purpose of section 35(1) is to reconcile pre-existing Indigenous societies with the Crown gets problematized in the second chapter. See *R. v. Van Der Peet* [1996] 2 SCR 507 at 31.

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and *who live under our Protection* [emphasis added], should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...⁶⁹

In this light, it is possible to read the Royal Proclamation as establishing a legal hierarchy between Indigenous nations and the Crown. For Slattery,⁷⁰ the Royal Proclamation establishes a relationship based on the principle of suzerainty. In other words, under the Proclamation, Indigenous nations are assumed to have become subservient to the Crown which allows a form of self-governance but disallowing any action independent of the Crown itself. The principle of suzerainty establishes a hierarchy that is similar to ancient European and Eastern feudal systems. Although perhaps once loosely associated with vassal states, the meaning of suzerainty was extended in the nineteenth century to include colonial control of foreign territories by European powers.⁷¹ This means that the term transformed from fealty and homage paid to a fief – although it could still involve such interactions – to a protectorate status of the ‘superior state’. Those under protection would have voluntary restrictions placed on their sovereignty as the subordinate state or nation. By the mid-1700s, this understanding was incorporated into the Royal Proclamation to expand colonial control over lands in North America. As Slattery emphasizes, it is understood in common law that “the Crown as ultimate suzerain and protector, held certain fiduciary obligations, and the [A]boriginal party as a protected and partially autonomous

⁶⁹ George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No. 1.

⁷⁰ Slattery *supra* note 4 at 201.

⁷¹ W HH Kilke, “Feudal Systems and Modern Suzerainty” (1896) *L Q Rev* 12(3) 215 at 223.

entity, owed ultimate allegiance to the Crown, but was capable of acting independently within its own sphere of authority”.⁷²

In this context, the Royal Proclamation is assumed to give the Crown ultimate authority in all matters and illustrates the position held in the Marshall trilogy. However, Indigenous peoples’ understanding of this customary relationship differs vastly from the interpretations laid out in nineteenth century jurisprudence. In the section below, I analyze First Nation peoples’ perspective on treaty agreements to showcase that the legal relationship established by the Royal Proclamation was not based on suzerainty nor any hierarchical relationship, but between two equal partners. It should be clear thereafter that the legal foundations of Canadian sovereignty are problematic at best.

b. (ii) Indigenous perspectives

Although the principle of suzerainty was the basis for Crown interpretations of the Royal Proclamation, the Marshall trilogy and within *Calder*, Indigenous nations hold their own understandings. The processes and protocols within treaty arrangements indicate a different type of relationship established between Indigenous nations and various European powers which were respected and abided by for over a century. As will be discussed in this section, pre-confederation treaties illustrate these processes and protocols that included mutual respect for each party’s laws, governance, and sovereignty through the principle of non-interference; gift-giving as an affirmation of continued and on-going agreement; and retaliation and sanctions for treaty violations. A brief analysis of Indigenous perspectives on the ‘numbered treaties’ formed after 1867 further indicate that at no time did First

⁷² Slattery, *supra* note 4 at 199.

Nations agree to terms of surrender, release, or cession of title. In both instances, it was assumed that different terms under the legal systems of First Nations were agreed upon.

The *Treaty of Albany*, the first formal alliance between Indigenous nations and the British Crown, maintained the same type of relationship previously enjoyed by the Haudenosaunee and the Dutch prior to the British' acquisition of New York.⁷³ The agreement also provided for a separation of powers where Indigenous nations would tend to their affairs while the Crown would mind their own. As the written version of the *Treaty of Albany* states:

1. Imprimis. It is agreed that the Indian Princes above named and their subjects, shall have all such wares and commodities from the English for the future, as heretofore they had with the Dutch.
2. That if any English Dutch or Indian (under the proteccôn of the English) do any wrong injury or violence to any of y^e said Princes or their Subjects in any sort whatever, if they complaine to the Governor at New Yorke, or to the Officer in Chiefe at Albany, if the person so offending can be discovered, that person shall receive condigne punishm^t and all due satisfaccôn shall be given; and the like shall be done for all other English Plantations.
3. The if any Indian belonging to any of the Sachims aforesaid do any wrong injury or damage to the English, Dutch or Indian under the proteccôn of the English, if complaint be made to y^e Sachims and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaccôn shall be given to any of His Ma^{ties} subjects in any Colony or other English Pantacôn in America.⁷⁴

⁷³ Borrows & Rotman *supra* note 18 at 12

⁷⁴ See, EB O'Callaghan, ed. *Documents Relative to the Colonial History of the State of New York*, vol 3 (Albany: Weed, Parsons & Co, 1853), as cited in Borrows & Rotman, *supra* note 18 at 12-13

The separation of powers in criminal and other matters were affirmed by Haudenosaunee as evidenced by what became known as the Two-Row Wampum, a purple beaded belt with two white horizontal lines signifying the principles of non-interference between parties to the agreement, while the purple lines separating the two rows signified peace, friendship and respect. This agreement was orally reaffirmed in 1744 with the establishment of the Covenant Chain alliance. According to Borrows and Rotman, the renewal process allowed necessary modifications to the terms of agreement that may have arisen from changing circumstances or needs.⁷⁵

The relationships fostered and maintained by these agreements were also affirmed through various ceremonies. For instance, Francis Jennings⁷⁶ outlines how Haudenosaunee treaty agreements were renewed and strengthened through ceremonial songs and dramas shared by both parties. This means that under Indigenous legal orders, treaties were not static written documents, but ongoing relations based on the oral tradition, subject to continuous renewal through ceremony. The renewal processes undergirding the *Treaty of Albany* were consistent with the legal practices of other Indigenous nations. This is demonstrated by the fact that the 1764 *Treaty of Niagara*, conducted a year after the Royal Proclamation, included approximately two thousand chiefs representing twenty-four different nations to reaffirm the written and unwritten terms of the Proclamation.⁷⁷ The *Treaty of Niagara* emphasizes that First Nations were familiar with, participated in, and

⁷⁵ Borrows & Rotman, *supra* note 18 at 13.

⁷⁶ Francis Jennings, *The History and Culture of Iroquois Diplomacy: An interdisciplinary guide to the treaties of the Six Nations and their League* (Syracuse, NY: University of Syracuse Press, 1995) at 18-21, as cited in John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed. *Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997).

⁷⁷ Borrows, *ibid* at 163.

adhered to treaty processes and protocols, none of which included acquiescing to the principle of suzerainty.

By the time the *Treaty of Niagara* was in effect, the Crown was also familiar with the legal principles of First Nations. This is evidenced by the superintendent of Indian Affairs Sir William Johnson's speech during *Treaty of Niagara*, in which he made references to previous wampum belts and the Covenant Chain to reaffirm prior agreements and to ensure both oral and written elements of the Proclamation were upheld.⁷⁸ Later, when the Proclamation was presented to the two thousand chiefs, promises were explicitly made through oral statements and the exchange of wampum to reaffirm the continuation of Indigenous autonomy, restrict settler encroachment on First Nations territories, and establish free trade and passage within British settlements.⁷⁹ The principles of non-interference reflected in the Two-Row Wampum and other agreements signified that no party ever extinguished their political or legal autonomy in favor of suzerainty. Instead, the processes and protocols that maintained Indigenous sovereignty were fiercely guarded as showcased by the actions taken by various Indigenous leaders when their laws were violated.

For example, in 1760, the Seven Years War ended in North America with Montreal falling to the British. At the time the Royal Proclamation was issued, France fully ceded its North American claims to title, which dramatically changed Indigenous-European relations for those in the Great Lakes area.⁸⁰ Preceding the capitulation of Montreal, First Nations who had long-established economic and military alliances with the French were

⁷⁸ *Ibid* at 162.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at 165.

very much accustomed to the protocol of gift-giving as outlined below. However, when the British terminated gift-giving as part of treaty-making processes, several First Nation leaders became defiant to the Crown's policy change.⁸¹ Odawa leader Pontiac retaliated against the British by taking several western British posts and killing over two thousand settlers.⁸² After making peace with the British, Pontiac maintained that he and his people kept their jurisdiction and title. Another leader, Minavavana similarly reasserted the Anishinaabe autonomy after the British stopped their gift-giving policies. The often-cited speech given by Minavavana is as follows:

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 none... Englishman, our father, the King of France, employed our young men to make war upon your nation. In this warfare, many of them have been killed; and it is our custom to retaliate, until such time as the spirits of the slain are satisfied. But, the spirits of the slain are to be satisfied in either of two ways: the first is the spilling of the blood of the nation by which they fell; the other, by covering the bodies of the dead, thus allaying the resentment of their relations. This is done by making presents. Englishman, your king has not sent us any presents, nor entered into any treaty with us, therefore he and we are still at war.⁸³

The British soon reinstated its gift-giving policy. As the passage above notes, Indigenous nations utilized their autonomous status as nations to uphold the conditions within the legal relationship established between themselves and the British.⁸⁴ At no time

⁸¹ Miller *supra* note 20 at 90.

⁸² *Ibid* at 92.

⁸³ Wilbur R Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748-1763* (Lincoln: University of Nebraska Press, 1966) at 75, as cited by Borrows, *supra* note 76 at 157; Miller, *supra* note 20 at 90.

⁸⁴ Borrows *supra* note 76 at 156.

did they capitulate their political and legal autonomy and remained adamantly vocal about preserving it. The fact that the British adhered to this legal relationship established through treaty-making processes and procedures is indicative that Indigenous nations retained their title, jurisdiction, and sovereignty. Even as the numbered treaties were signed and arguably implemented across Canada from 1871 to 1921, members of Indigenous nations maintained the expectation that their title, jurisdiction, and sovereignty would be respected.⁸⁵

While a full analysis of the numbered treaties is out of the scope of this thesis, First Nation interpretations are relatively consistent across the country. For example, Sharon Venne⁸⁶ notes that certain phrases in the written version of Treaty 6 such as ‘cede, surrender, or forever give up title’ were never mentioned in oral negotiations and therefore never agreed to since such phrases had no equivalent translation in many Indigenous languages. Thus, when the treaty commissioner representing the Crown requested “the use of land to the depth of the plough for the Queen’s subjects to farm” in exchange for treaty money, *inter alia*,⁸⁷ the understanding was that everything else above and below the depth of the plow remained in the possession of Treaty 6 signatories. The agreed upon terms did reflect a cession of jurisdiction or title but was more akin to annual rent payments for land usage. In fact, as alluded to above, the exchange of gifts and other benefits, including treaty money was an important part of diplomacy to First Nations in treaty-making procedures.

⁸⁵ Godlewska & Webber *supra* note 39 at 14

⁸⁶ “Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on law, equality and respect for difference* (Vancouver: UBC Press, 1997) 173 at 192.

⁸⁷ Other items included health care, education, access to water and hunting spots, and annual treaty payments. Things not included, and thus promised to stay within the jurisdiction of treaty 6 signatories included the mountains, birds, and minerals. Other things were promised such as mechanisms to deal with treaty violations, control of citizenship, and the reservation of as much land as needed. *Ibid* at 193-202

Venne's recount of her family's oral tradition in this matter is consistent with the legal traditions and practices outlined in the analysis of Treaty One negotiations by Aimée Craft.⁸⁸ According to Craft, Anishinaabe laws or *inaakonigewin* defined the processes of Treaty One negotiations that included obligations derived from the relationship to land, full participation of all parties, gift-giving and other ceremonies, and respect for the jurisdiction and decision-making authority of each party.⁸⁹ In neither case, whether Treaty 1 or 6, was gifting processes viewed as a transfer of title, jurisdiction, or autonomy.

Thus, the principle of suzerainty was not a primary component of Indigenous-Crown relations under the legal orders of Indigenous nations. When expanding the analysis of this relationship to incorporate Indigenous legal perspectives, one can see that the terms set out in treaty negotiations were between two sovereign and equal parties. While the American and Canadian courts acknowledge an established legal relationship between Indigenous nations and the Crown, the courts fail to accurately portray the relationship in rendering its early decisions regarding Aboriginal title and rights. In fact, the Canadian state even attempted to eradicate Indigenous legal orders via the *Indian Act*.⁹⁰ Although many of the more repressive elements of the Act have now been repealed, the next subsection will briefly outline the impacts of the *Indian Act* on Indigenous peoples' ability to maintain their oral traditions and histories which serve as a source of their legal orders.

c. *The Indian Act*

The introduction of various Canadian legislation regarding First Nations peoples, eventually culminating into the *Indian Act*, undergirded Crown interpretations that First

⁸⁸ Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinaabe understanding of Treaty One* (Saskatoon: Purich Publishing, 2013)

⁸⁹ *Ibid* 78-95.

⁹⁰ *Indian Act*, RSC, 1985, c. I-5

Nations ceded, surrendered, or otherwise forever gave up their title. Whatever type of legal relationship acknowledged by early American and Canadian jurisprudence gave way to a more dominating relationship over First Nations peoples as a demographic shift in the new confederation caused traditional military alliances to be viewed by the state as an impediment to colonial expansion and control.⁹¹ As such, policies were created with the aim to dispossess all Indigenous peoples from their territories. First Nation peoples were eventually restricted to reservations and placed in residential schools with the object to assimilate children into the ‘body politic’.⁹² To achieve these ends, First Nations were required to abandon their way of life including giving up their governance and legal orders. The Canadian state never fully realized their objective since numerous pathways were taken by First Nations to resist the colonizing state. However, the coercive and assimilative policies within the *Indian Act* were still detrimental to Indigenous legal traditions.

The *Gradual Civilization Act, 1857*⁹³ encouraged the termination of Indian status in favor of the set of rights encompassed within Canadian citizenship. The legislative provisions set out to divide the Indians who could speak, read, and write English or French – and be deemed ready for assimilation – from those who still spoke their original language and maintained their social, legal, and political ties with their nation.⁹⁴ The policy known as ‘voluntary enfranchisement’ was a complete failure, however. According to Miller, less than 250 people voluntarily gave up their status.⁹⁵ Subsequently, the *Gradual Enfranchisement Act, 1869*⁹⁶ sought to further divide Indians in three distinct but

⁹¹ Crane et al. *supra* note 54 at 26; Godlewska & Webber *supra* note 39 at 15

⁹² See Miller *supra* note 20 at 281-2 for the reference to the Duncan Campbell Scott quote.

⁹³ *Gradual Civilization Act*, S. Prov. C. 1857, c. 26

⁹⁴ Crane et al. *supra* note 54 at 31.

⁹⁵ Miller, *supra* note 20 at 255

⁹⁶ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 31st Vict., Ch. 2 [*Gradual Enfranchisement Act*]

interrelated ways. First, by increasing state regulations on First Nations identity through ‘blood quantum’, First Nation peoples’ ability to determine their own national citizenship was severely diminished. This impacted First Nations women more adversely since Indian status was entirely dependent on male lineage, meaning a First Nations woman would lose her status if she married a non-Indian.⁹⁷ Secondly, the *Gradual Enfranchisement Act* gave the Superintendent General of Indian Affairs full control over the allotment of reserve lands. This especially delegitimized all land allocations carried out via Indigenous legal orders.⁹⁸ Lastly, the *Graduate Enfranchisement Act* imposed federal control over First Nations governing institutions via the male-dominated band council, composed of one chief and any set of councilors.⁹⁹ The provisions in the *Gradual Civilization Act* and the *Gradual Enfranchisement Act* were consolidated into the *Indian Act, 1876*.

As outlined by Crane, et al., the authority of traditional chiefs was preserved for a short time after the introduction of band councils to ‘ease the changes’ in governance.¹⁰⁰ However, this was short-lived as the 1880 amendments to the *Indian Act* relegated the authority of traditional or hereditary chiefs to purely ceremonial or symbolic roles, while simultaneously granting all powers to the Governor in Council and the Superintendent General to recall any elected leaders. The new amendments were a legislative attempt to

⁹⁷ Prior to 1985, s. 12(1)(b) of the *Indian Act* stated, “a woman who married a person who is not an Indian... [is] not entitled to be registered”. After Sandra Lovelace challenged the provision at the UN, Bill C-31 was passed so that those who lost their status due to s. 12(1)(b) could regain it. Additionally, in 2018, *An Act to Address Gender Inequality in the Indian Act* received royal assent. Whether the objective to eliminate sexism in the *Indian Act* is achieved remains to be seen. See Sharon Venne, *The Indian Act and Amendments 1868-1975 – an indexed collection* (Saskatoon: Saskatoon Law Centre, 1981) for different versions of the Indian Act. See also Shelagh Day, “Equal Status for Indigenous Women -- Sometime, Not Now: The Indian Act and Bill C-3” (Summer-Fall 2018) *Canadian Women Studies* 3(1-2) 174 at 175

⁹⁸ Crane et al. *supra* note 54 at 33.

⁹⁹ *Indian Act* RSC 1985, c. I-5, s. 74.

¹⁰⁰ Crane et al. *supra* note 54 at 37.

circumvent Indigenous political and legal orders, as written in the 1880 version of the *Indian Act*:

Whenever the Governor in Council deems it advisable for the good government of the band to introduce the election system of chiefs, he may by Order in Council provide that the chiefs of any band of Indians shall be elected, as hereinafter provided, at such time and place as the Superintendent General may direct; and they shall, in such case, be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, immorality or incompetency... Provided also, that in the event of His Excellency ordering that the chiefs of a band shall be elected, then and in such case the life [traditional or hereditary] chiefs shall not exercise the powers of chiefs unless elected under such order to the exercise of such powers.¹⁰¹

Further attempts to eradicate First Nations' legal orders were made in 1884 when s. 141 was implemented, effectively banning ceremonial practices.¹⁰² As noted above, ceremony was an integral part to maintaining legal and political relationships under Indigenous laws. What became known as the 'potlatch laws' did little to stop ceremonies except in a crackdown period in 1922-3.¹⁰³ Despite the ineffectiveness of the Canadian state's repressive tendencies, the potlatch laws nevertheless created barriers to transferring the social, political, and legal knowledge of First Nations to the next generation. Justice Alfred Scow, the first Indigenous lawyer and judge appointed to the BC Provincial Court, describes how the Potlatch laws prevented the transference of cultural and legal values, norms, and practices as embedded in oral traditions and histories:

The *Indian Act* did a very destructive thing in outlawing ceremonials. This provision of the *Indian Act* [s. 141] was in place for close to 75 years and

¹⁰¹ *An Act to amend and consolidate the laws respecting Indians*, SC 1880 c. 28, s. 72 [*Indian Act, 1880*]

¹⁰² Miller *supra* note 20 at 262.

¹⁰³ *Ibid.*

what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to this country. We had systems that worked for us. We respected each other. *We had ways of dealing with disputes* [my emphasis added].¹⁰⁴

If law is taken as a way of guiding social relations and managing conflict,¹⁰⁵ then the testimony of Justice Scow is indicative of the oral legalities that existed prior to Crown assertions to sovereignty over North America. However, due to the concerted effort in part by the Canadian state to eradicate Indigenous legal orders, those oral legalities have been profusely affected in negative ways. Although the *Indian Act* was a product of the Canadian state's executive and legislative powers, the judiciary nevertheless upheld many of its provisions.¹⁰⁶ As discussed in the next chapter, the Supreme Court's attempts to redress these adverse effects has only resulted in another form of erasure due to the unquestioned acceptance of Crown sovereignty.

IV. THE MERCURIAL NATURE OF CROWN SOVEREIGNTY

This chapter began by outlining the political origins of Aboriginal and treaty rights in the Canadian constitution before examining the *Calder* decision and its legal framework as outlined in the Marshall trilogy. Such an analysis provides a contextual understanding for how s.35(1) is subsequently interpreted by the Canadian courts since *Calder* was the first decision in which Aboriginal title -- the source of all other Aboriginal rights at

¹⁰⁴ Canada, Royal Commission on Aboriginal Peoples, *Justice Roundtable, Ottawa, ON* (Ottawa: StenoTran, 1992) (Chair: Murray Sinclair) at 340.

¹⁰⁵ Emily Snyder, *Gender, Power, and Representations of Cree Law* (Vancouver: UBC Press, 2018) at 23.

¹⁰⁶ See e.g., *Attorney General of Canada v. Levell* [1974] SCR 1439 which applied the principle of formal equality to s.12 of the *Indian Act* against the claims of sex discrimination by Jannette Levall and Yvonne Bedard. The Supreme Court ruled that no instance of sex discrimination existed because s.12 only applied to status women who married non-status men rather than all status Indian women.

common law -- was recognized. As discussed throughout this chapter, the legal framework in the Marshall trilogy makes it impossible for the Canadian judiciary to conclude otherwise in *Calder* that European claims to sovereignty over North America have prevailed. However, Crown sovereignty stands on tenuous grounds when incorporating the oral processes and protocols of treaty making into the analysis of Indigenous-Crown relations. Yet American and Canadian jurisprudence only contains an interpretation that is undergirded by the principle of suzerainty. Further, the logic employed by these legal systems to validate its jurisdiction over Indigenous territories retain the same elements of political absolutism in the unilateral assertion of Crown sovereignty that previously justified settler-colonialism. Such logic gives Crown sovereignty a mercurial characteristic.

As will be illustrated in the next chapter, the recognition of existing Aboriginal and treaty rights in Canada similarly maintains this logic despite the Supreme Court's initial claim that interpreting section 35(1) requires a "generous and liberal" approach.¹⁰⁷ The unproblematized acceptance of Crown sovereignty results in the sources of Indigenous legalities being mischaracterized by the Supreme Court, which ultimately leads to the justification large-scale infringements on Aboriginal rights. In other words, the seminal cases that helped define Aboriginal and treaty rights in Canada only furthered the same colonial logic wherein Indigenous peoples' legal, political, and spiritual knowledges are dissolved, and thus removes the ability for Indigenous nations to govern their own activities so settler society can further control, regulate, and expropriate unceded Indigenous lands

¹⁰⁷ *Sparrow supra* note 38.

and resources. By building on what Patrick Wolfe¹⁰⁸ has labelled ‘the logic of elimination’, I suggest in the next chapter that the Canadian judiciary’s unproblematized acceptance of Crown sovereignty ultimately leads to a ‘juridical logic of elimination’.

¹⁰⁸ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” (2006) 8(4) *J Genocide Research* 387

CHAPTER 2: INDIGENOUS ORAL LEGALITIES ON TRIAL

I. INTRODUCTION

The first chapter analyzed the *Calder*¹ decision and its legal framework that set the precedent for the juridical definition of Aboriginal and treaty rights in Canada. The American Supreme Court interpreted the unique and exclusive relationship between Indigenous nations and the Crown throughout the nineteenth century without including Indigenous perspectives regarding treaty relations. Ongoing principles of reciprocity, gift-giving, and non-interference for the autonomy and laws of each party, as embedded within the oral traditions of Indigenous treaty-making processes and protocols, were not incorporated into common law decisions. Instead, courts imagined a limited view of Indigenous customary laws, derived from their own jurisprudence, to accept a restrictive version of Aboriginal title subject to Crown assertions to sovereignty. This produced an asymmetrical and hierarchical legal relationship based on a pyramidal scaling principle of suzerainty, placing at its apex the colonizer's assertion of underlying title. As a result, Indigenous peoples' sovereignty and political autonomy were severely and unilaterally diminished as American jurisprudence deemed Indigenous nations as "domestic dependent nations".² In Canada, after centuries of struggle against colonial domination, recognition of the rights of Indigenous peoples culminated in the entrenchment of Aboriginal and treaty rights with the hope for some that the recognition and affirmation of these rights would foster a more equal relationship between Indigenous peoples and the Crown.

¹ *R. v. Calder* [1975] SCR 313 [*Calder*].

² *Cherokee Nation v Georgia* [1831] 30 US 1 [*Cherokee Nation*].

The quest for recognition has not fared particularly well for First Nations. As John Borrows and Leonard Rotman³ point out, the judiciary's attention on Aboriginal rights appears to be more focused on the limitation of section 35(1) rather than facilitating their understanding or protection. Despite the promising framework for interpreting Aboriginal and treaty rights as laid out in *Sparrow*,⁴ the first case to deliberate on the 'recognition and affirmation' of 'existing Aboriginal and treaty rights', the Supreme Court has increasingly eroded the notion of reconciling the original constitutional guarantees of Indigenous peoples in subsequent decisions. This chapter narrows its focus on two ways the Court has de-legitimized Indigenous oral legalities. The first is the mischaracterization of Aboriginal rights through various legal tests insisting on the cultural characteristics of Indigenous societies rather than the political or legal elements. The second is the standard which justifies governmental infringements on Aboriginal and treaty rights. This justificatory standard constructed by the Court permits the economic interest of the Canadian state and its citizens to override the constitutional guarantees of Indigenous peoples, as clearly delineated in the *Gladstone*⁵ and *Delgamuukw*⁶ decisions. These juridical methods ultimately follow what Patrick Wolfe⁷ labels 'the logic of elimination', wherein Indigenous societies are dissolved by removing the ability for self-governance to make way for the expropriation of lands and resources by settler society. In keeping with the central theme of this thesis, this chapter asks how these two juridical methods for interpreting section 35(1) have resulted in the de-legitimization of Indigenous oral legalities?

³ John Borrows & Leonard Rotman, *Aboriginal Legal Issues Cases, Materials and Commentary*, 5th ed (Markham: NexisLexis, 2012) at 94.

⁴ *R v Sparrow* [1990] 1 SCR 1075 [*Sparrow*].

⁵ *R v Gladstone*, [1996] 2 SCR 723 2 [*Gladstone*].

⁶ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [*Delgamuukw*].

⁷ Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8(4) *J Genocide Research* 387

Through the unproblematized acceptance of Crown sovereignty, the Supreme Court has mischaracterized Indigenous oral legalities by compelling existing Aboriginal rights to conform to Western standards of evidence and law, which reduce Indigenous legal reasoning and modes of account-giving to only their cultural aspects and origins. As a result, the large-scale infringements on Indigenous oral legalities are sanctioned by the judiciary via the justificatory standards of so-called valid legislative objectives. This occurrence is often framed by the Court as the reconciliation of the prior occupation of North America by Indigenous peoples with Crown sovereignty. To explore this argument, I will first analyze the interpretive framework in *Sparrow* the Supreme Court established to define s. 35(1) and the standards for justifiable infringements on those rights therein. Next, I will analyze the *Van Der Peet*,⁸ *Gladstone*, and *Delgamuukw* cases to highlight the mischaracterization of Aboriginal rights that distort and dismiss Indigenous oral legalities as well as the expanding ‘public interest’ objective which justifies government infringement on Aboriginal rights and title. Here, I also highlight how ‘public interest’ is synonymous with the continued expropriation of Indigenous lands for the settlement of foreign populations – a basic tenant of settler colonialism and one I call ‘the logic of juridical elimination’. Lastly, the logic of juridical elimination is applied to subsequent cases to suggest that despite the relative optimism expressed by constitutional scholars and experts that the Court may be returning to the more stringent tests in *Sparrow*, the Canadian judiciary continues its colonial logic, eliminating Indigenous oral legalities from the lands and peoples from which they arise.

⁸ *R v Van Der Peet* [1996] 2 SCR 507 [*Van Der Peet*]

II. THE INTERPRETIVE FRAMEWORK FOR SECTION 35

In *Sparrow*, the Supreme Court set out a framework for interpreting Aboriginal and treaty rights “recognized and “affirmed” in section 35(1) of the *Constitution Act, 1982*.⁹ The case before the Court was a challenge to federal fishing regulations as stipulated by the *Fisheries Act, 1970*.¹⁰ Musqueam band member Ronald Sparrow was charged in 1984 with fishing with a drift net that exceeded the regulation length as permitted by his band’s food fishing permit. Mr. Sparrow did not dispute the facts but defended the charge on the basis that the regulations under the *Fisheries Act* was an unjustifiable infringement on his Aboriginal right to fish under section 35(1).¹¹ In fact, the Musqueam relied on fish from the Fraser River Delta for centuries before the *Fisheries Act* regulated the Band’s activities. The lower courts convicted Mr. Sparrow on the opinion that a person could not claim an Aboriginal right unless supported by a treaty, proclamation, or other document, as per the *Calder* Court of Appeals decision.¹² According to the trial judge, Section 35(1) had no application to the Aboriginal right to fish. The British Columbia Court of Appeal found that the courts erred in interpreting *Calder* but since the trial judge did not consider the evidence supporting the Aboriginal right, the Court of Appeals could not overturn his ruling. As a result, the appeal was dismissed.

At the Supreme Court, the primary question was: “Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence... inconsistent with

⁹ *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

¹⁰ There have been numerous amendments made to the 1970s Act. Last amendment made was August 28, 2019. See *Fisheries Act*, RSC, 1985, c. F-14.

¹¹ *Sparrow supra* note 4 at 1083.

¹² The Court of Appeals for the *Sparrow* case expressed the opinion that they were bound by the Court of Appeals decisions since the Supreme Court was divided on the matter as discussed in chapter one. See *Calder v. British Columbia (Attorney General)*, 1970 CanLII 766 (BC CA); *Sparrow supra* note 4 at 1084.

s.35(1) of *Constitution Act, 1982*".¹³ The Crown defendant argued that Aboriginal rights affirmed by the Constitution are defined and delimited by any respecting federal legislation at the time of constitutionalization. In other words, the Crown contended that the existence of Aboriginal rights was contingent on the Crown's fishery regulatory regime. The counsel for Mr. Sparrow maintained its argument regarding unjustified infringement but added that any infringement on Aboriginal rights was invalid unless justified by conservation measures.¹⁴ Writing for a unanimous court, Chief Justice Dickson and Justice La Forest accepted the Crown's assertion to sovereignty, allowing the federal government to exercise legislative authority over Indigenous peoples. The Court additionally held that the exercise of legislative power was to be read in conjunction with section 35(1). Thus, the governmental infringements on Aboriginal rights existing at common law were subject to a stringent test to uphold a high constitutional standard of justification.¹⁵ Even so, the Court was reluctant to apply the standard to the case and ordered a retrial.

a. The Sparrow Framework

The Sparrow test consisted of three parts. First, the test demands the assessment of the existence of the Aboriginal right in question, including whether the right was extinguished by the sovereign's 'clear and plain' intention.¹⁶ Second, it must consider if a *prima facie* infringement on the Aboriginal right had occurred. Finally, in the case of a *prima facie* infringement, it asks whether the interference was justified by a valid legislative objective. The valid objective was also subject to the fiduciary responsibility of

¹³ *Sparrow supra* note 4 at 1086.

¹⁴ *Ibid* at 1087.

¹⁵ Borrows & Rotman, *supra* note 3 at 115.

¹⁶ *Sparrow supra* note 4 at 1099.

the Crown towards Indigenous peoples as enunciated in *Guerin v. The Queen*.¹⁷ In emphasizing the Crown's duty, the Court reinforced the idea that the *sui generis* nature of Aboriginal title and the historic powers and responsibilities of the Crown were what gave rise to the fiduciary responsibility. Thus, contemporary recognition and affirmation of Aboriginal rights in the Constitution needed to be defined accordingly since prior to the *Sparrow* case, Aboriginal and treaty rights bore little to no legal meaning.

In assessing the existing Aboriginal right, the Supreme Court found that the Musqueam's right to fish extended to "food and social and ceremonial purposes".¹⁸ The Court found that an Aboriginal right was not bound by the traditional custom or practice as effected by the Aboriginal group at a certain time in history. Rather than accepting this 'frozen rights' approach, the Court maintained that a practice or custom exercised in a contemporary manner would remain protected under section 35(1). Although the Court emphasized determining an Aboriginal right requires a case-by-case analysis, it nevertheless found "for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture".¹⁹ The decision implied that the Crown could neither extinguish an existing Aboriginal right without an explicit intention nor could it determine the scope or content of an existing right through governmental regulation.

Notwithstanding this definition, the Court also emphasized that Aboriginal rights were not absolute.²⁰ Chief Justice Dickson and Justice La Forest rejected the Appellant's assertion that all infringements, excluding conservation efforts, were unjustifiable. Rather, they held that the federal government's right to legislate with respect to Indians pursuant

¹⁷ *Guerin v The Queen* [1984] 2 SCR 335 [*Guerin*]

¹⁸ *Sparrow supra* note 4 at 1101.

¹⁹ *Ibid* at 1099.

²⁰ *Ibid* at 1109.

to section 91(24) of the *Constitution Act, 1867* remained operable, and therefore Aboriginal rights were subject to governmental infringement. However, the legislative powers to govern Indigenous peoples were to be read together with section 35(1).²¹ Since the Court acknowledged Aboriginal and treaty rights could not be fully protected by the ‘reasonable limits prescribed by law’ as outlined in section 1 of the *Charter*,²² section 35(1) was not subject to the same type of legal test. As such, the Court established additional standards consisting of its own two-part test for infringement and justification. In deliberating on the issue, the Court wrote a set of loose guidelines:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right to their preferred means of exercising that right?²³

A *prima facie* infringement was defined as a governmental interference causing an adverse restriction on the Aboriginal group to exercise their right.²⁴ This part of the test in the context of *Sparrow* involved determining whether the legislative purpose of the net length restriction unnecessarily interfered with the Musqueam’s ability to exercise their right to fish for food. If a *prima facie* infringement was found, the test would move to question whether the infringement had a “valid legislative objective”.²⁵ Here the Court outlined two valid objectives for infringement:

²¹ *Ibid.*

²² *Canadian Charter of Rights and Freedoms*, s2, Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

²³ *Sparrow supra* note 4 at 1112.

²⁴ *Ibid.*

²⁵ *Ibid* at 1113.

An objective aimed at preserving section 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of section 35(1) rights that would cause harm to the general populace or to [A]boriginal peoples themselves or other objectives found to be compelling and substantial.²⁶

Aside from this, the Supreme Court left open what other compelling and substantial objectives would justify a *prima facie* infringement. Crown defendants submitted that public interests such as the reasonable needs of other user groups (i.e., non-Indigenous peoples) was sufficient to override section 35(1). The Court rejected this idea when it stated that ‘public interest’ was “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”.²⁷ To read in specific regulations into the constitution such as the *Fisheries Act*, the Court added, would create a patchwork scheme of Aboriginal rights that would not provide adequate protections for the ninety-one other First Nations who obtained fish from the Fraser River Delta. Further, ‘reasonable’ legislative objectives were insufficient for constitutional recognition and affirmation of Aboriginal rights because attempting to balance social interests with constitutional protected rights could potentially erode Aboriginal rights in favor of the general population.²⁸ The Crown would instead have to prove that state regulations infringing on section 35(1) were compelling and substantial enough to justify a *prima facie* infringement.

If a valid objective was found, then the Sparrow test would proceed to the last part of the justification issue in which the Crown was required to prove that the valid objective

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid* at 1112.

was consistent with its fiduciary duty towards Indigenous peoples. As mentioned above, the *Guerin* decision served as the guiding principle to uphold the honor of the Crown in its interactions with Indigenous peoples. The trust-like relationship and federal government's fiduciary responsibility towards First Nations, Inuit, and Métis, now all recognized as "Indians" for the purpose of section 91(24) of the *BNA Act*, 1867, requires the Crown consider additional factors regarding its legislative powers. The Court set out a non-exhaustive list that included:

Whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the [A]boriginal group in question has been consulted with respect to the conservation measures being implemented.²⁹

The purpose of these considerations was to ensure that the non-Aboriginal use of the resource in question was limited before Aboriginal use. In other words, since the Aboriginal right to fish for food was constitutionally protected, Indigenous peoples holding the right to fish for food and ceremonial purposes were to be given top priority over other activities such as sport or commercial fishing.³⁰

b. Distorting Oral Legalities under the Crown

The Court acknowledged the heavy burden on the Crown to fulfil its duty to prioritize the Aboriginal right to fish for food over the activities of other user groups. Accordingly, the Sparrow doctrine was declared necessary to ensure government regulations protected Aboriginal rights under section 35(1). Since the Court realized that Indigenous peoples' legal rights were virtually ignored for years, section 35(1) required a

²⁹ *Ibid* at 1119.

³⁰ *Ibid* at 1116.

“generous, liberal” interpretation to construct Aboriginal rights purposefully.³¹ As aspirational as the decision was to extend protections to Indigenous peoples, the Sparrow Court’s unquestioned acceptance of Crown sovereignty heavily curtailed the possibility of protecting Indigenous legal orders and the discursive or symbolic elements of Indigenous oral legalities.

As Toby Rollo³² illustrates, the acceptance of the Crown’s assertion to sovereignty predetermines the acceptable conclusions that both Indigenous and non-Indigenous interlocutors can hope to achieve in the Canadian judiciary. For example, Indigenous peoples are considered by the Supreme Court as beneficiaries to the Crown’s fiduciary duty in which it fulfills to maintain its ‘honor’. Under this assumption, Indigenous claims are framed as a ‘burden’ or ‘interest’ of the Crown that it considers at its own discretion. Thus, for Rollo, Indigenous autonomy stemming from their own legal orders will “stand or fall on a fulfillment of the self-imposed duties and honorability of the state”.³³ As a result, Indigenous oral legalities are either outright dismissed or distorted to fit the language of state sovereignty. Over time, such dismissal or distortions lead to a deformation of Indigenous self-identity that has a destructive assimilative effect.³⁴ As Asch and Macklem³⁵ point out, the unquestioned acceptance of Crown sovereignty by the Court relies on two conflicting theories of Aboriginal rights.

One theory is an ‘inherent rights approach’ in which the concept of Indigenous sovereignty encompasses the totality of powers and responsibilities required for the

³¹ *Ibid* at 1103-6.

³² Toby Rollo, “Mandates of the State: Canadian sovereignty, democracy, and Indigenous claims” (2014) *Can JL & Juris* 27(1) 225

³³ *Ibid* at 231.

³⁴ *Ibid* at 230.

³⁵ Michael Asch & Peter Macklem, “Aboriginal Rights and Canadian Sovereignty: An essay on *R. v. Sparrow*” (1991) *Alta. L. Rev.* 95(2) 485

maintenance and reproduction of Indigenous identity and social organization.³⁶ The ability to govern over citizenship and guide social relations is foundational to any legal order. Thus, under an inherent rights approach, Indigenous peoples' ability to maintain their own legal orders predates Canadian settlement and continues to exist in spite of the impositions of the Canadian state. In other words, the legal and governance orders of Indigenous peoples exist independently of Crown assertions to sovereignty. As analyzed in the first chapter, Justice Hall articulated an inherent theory of Aboriginal rights in *Calder*, which relied on the long precedent of acknowledging the prior occupation of lands by Indigenous nations.³⁷ This approach was later reaffirmed in *Guerin* when Justice Dickson asserted that the Musqueam's title was not contingent on the Royal Proclamation of 1763, nor any other executive order or legislative provision including section 18(1) of the *Indian Act*.³⁸

The second theory labelled the 'contingent rights approach' is in direct contradiction with the first. Under a contingent rights theory, the rights of Indigenous peoples are viewed as being dependent on Crown recognition via legislation or executive action.³⁹ It is evident the Court simultaneously adopted this approach when it stated: "...while British policy towards the native population was based on respect for their right to occupy their traditional lands... 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".⁴⁰ Thus, in the words of Asch and Macklem, Aboriginal rights could only exist at common law and was therefore always subject to regulation or extinguishment by the appropriate

³⁶ *Ibid* at 503.

³⁷ *Calder supra* note 1 at 337.

³⁸ *Guerin supra* note 17 at 378.

³⁹ Asch & Macklem, *supra* note 35 at 502.

⁴⁰ *Sparrow supra* note 4 at 1103.

legislative authority.⁴¹ Such reasoning by the Court only begs the question as to how the existence of independent and inherent Aboriginal rights could be considered contingent on the Crown?

Notwithstanding this paradox, the Court utilized the inherent rights approach in *Sparrow* to affirm that the Musqueam right to fish for food was not contingent on the Crown's legislative authority when it stated the rights in question simply exist due to the prior occupation of the Musqueam, and that their fishing practices were "an integral part of their lives and remains so today".⁴² Yet the Court avoided many of the implications of the inherent rights approach, including the existence of Indigenous oral legalities, by accepting Crown sovereignty without question. Instead of focusing on the powers and responsibilities manifested via oral traditions that maintain and reproduce Indigenous identities and social organization, the Court opted to frame section 35(1) as the existence of 'cultural' rights, contingent ultimately on whether the Crown had extinguished them. Thus, the apparent utilization of an inherent rights approach that accepts the existence of Indigenous oral legalities is undermined by the Court's simultaneous use of a contingent rights approach. As Asch and Macklem write:

If Canadian sovereignty was "never in doubt," its assertion likely had the effect of subsuming pre-existing aboriginal sovereignty to the overarching authority of the Canadian state. Thus, unlike other aboriginal rights, the Court appears to accept the proposition that the right to sovereignty, however acceptable under an inherent theory of aboriginal right, is to be excluded *a priori* from the scope of s. 35(1).⁴³

⁴¹ Asch & Macklem, *supra* note 35 at 503.

⁴² *Sparrow*, *supra* note 4 at 1094.

⁴³ Asch & Macklem, *supra* note 35 at 507.

By circumventing the implications of the inherent rights approach in *Sparrow*, Indigenous oral legalities were transformed to fit the language of state sovereignty. As a result, the nature of Aboriginal rights in future cases were subsequently mischaracterized by the Court. For example, in *Van Der Peet*, the Court decided an Indigenous practice, custom, or tradition would only be constitutionally protected if the Indigenous group claiming a right could prove continuity with an activity exercised prior to European contact. In other words, contemporary or other practices considered modern would not be protected if it could not be proven the activity was connected to ancestral cultural practices. As such, the Court ruled out the possibility of recognizing the Sto:lo's right to fish commercially that would otherwise be embedded within Indigenous legal orders. Outlining such mischaracterizations is important because it is indicative of how the Supreme Court treats Indigenous oral legalities. If a society is relegated to an anachronistic period, so too are the modes by which that society governs itself through its own legalities. When this occurs, any state function or activity becomes justified enough to violate the laws therein. This will be explored in the following section.

III. MISCHARACTERIZED RIGHTS & JUSTIFYING INFRINGEMENTS

Following the *Sparrow* decision, the Supreme Court faced a string of cases that further considered the scope and content of Aboriginal rights and title enshrined within section 35(1). *R. v. Van Der Peet*, *R. v. NTC Smokehouse Ltd*, and *R. v. Gladstone* deliberated on the Aboriginal right to fish commercially.⁴⁴ A year later, the Court ruled for

⁴⁴ These three cases are often referred to as the Van Der Peet trilogy due to their simultaneous release by the Court in 1996. See *Van Der Peet*, *supra* note 8; *R v NTC Smokehouse Ltd* [1996] 2 SCR 672; *Gladstone*, *supra* note 5.

the first time on a question regarding Aboriginal title in *Delgamuukw*.⁴⁵ This section will review these cases, except for *Smokehouse*, to illustrate the modifications to the *Sparrow* framework by Chief Justice Lamer. Such changes ultimately lead to the mischaracterization of Indigenous oral legalities in a way that excludes notions of the political and legal autonomy of Indigenous peoples and focuses too narrowly on their cultural aspects. As a result, Indigenous oral legalities are subsumed under the interests of the Crown and other Canadians as any type of state activity overrides constitutional protections initially afforded to Indigenous peoples.

a. *R. v. Van Der Peet*

As stated above, the *Van Der Peet* decision was one part of the trilogy of cases that deliberated on Aboriginal commercial fishing rights. In 1987, Sto:lo nation member Dorothy Van Der Peet was charged under the *Fisheries Act*⁴⁶ with selling fish caught under the authority of an Indian Band food fishing license. Under section 27(5) of the *British Columbia Fishery (General) Regulations*,⁴⁷ the selling, bartering, or offer to sell or barter any fish caught under the fishing license was prohibited. The charges were pressed after the appellant Mrs. Van der Peet sold ten salmon caught by her common law spouse under his Indian Band food fishing license.⁴⁸ She did not contest the facts, defended the charges against her by arguing the restrictions imposed by section 27(5) of the *Regulations* unjustifiably infringed on her existing Aboriginal right to sell fish.

At trial, the judge found that there was no Aboriginal right to sell fish since Indigenous nations did not partake in a “market system of exchange” and only traded on a

⁴⁵ *Delgamuukw*, *supra* note 6.

⁴⁶ *Fisheries Act*, *supra*, note 10.

⁴⁷ *British Columbia Fishery (General) Regulations*, SOR/84-248. [*Regulations*].

⁴⁸ *Van Der Peet*, *supra* note 8 at para 6.

casual basis.⁴⁹ Justice Selbie at the Supreme Court of British Columbia disagreed with the trial judge since Indigenous nations had no prior prohibition on the sale of fish and thus found a right to exchange fish for money.⁵⁰ However, a new trial was ordered on the questions of whether the right was extinguished and to what extent any infringement thereon was justified. At the Court of Appeals, the bench was split on the issue and ultimately dismissed Ms. Van Der Peet's appeal. The majority ruled that although a practice would be protected as an Aboriginal right where it was exercised when the Crown asserted its sovereignty, that practice would not be protected if it arose from European influences.⁵¹ Consequently, the Sto:lo possessed no right to fish commercially. Justice Lambert and Hutcheon dissented on the basis that European influences did not prevent the Sto:lo from trading fish, and therefore the right to fish for a moderate livelihood had not been extinguished by section 27(5) of the Regulations.⁵² Whereas Lambert felt the infringement was unjustified, Hutcheon would have ordered a new trial to determine the justifiability of the infringement.

At the Supreme Court, the following question was stated: "Is s.27(5) of the British Columbia Fishery (General) Regulations... of no force and effect with respect to the appellant in the circumstances of these proceedings... by reason of the [A]boriginal rights within the meaning of s.35 of the Constitution Act, 1982...?"⁵³ The appellant argued that the Court of Appeal erred in its definition of Aboriginal rights and in its application of the test to show that a practice protected under section 35(1) must be devoid of European

⁴⁹ *R v Vanderpeet* 1991 CanLII 1936 (BC CA) at 8, 59 BCLR (2d) 392, [1991] 3 CNLR 161.

⁵⁰ *Ibid* at para 8-9.

⁵¹ *R v Van Der Peet*, 1993 CanLII 4519 (BC CA) at para 21.

⁵² *Ibid* at para 99.

⁵³ *Van Der Peet*, *supra* note 8 at para 13.

influence. Chief Justice Lamer, writing for a majority, concluded the Aboriginal right of the Sto:lo did not include the right to fish commercially since the appellant failed to demonstrate that prior to European contact, the exchange of fish for money was an integral part of the distinctive Sto:lo culture.⁵⁴ The Chief Justice therefore felt it unnecessary to consider the tests for infringement or justification and dismissed the appeal. The dissenting view of Justices L'Heureux-Dubé and McLachlin disagreed with the majority's reliance on non-Aboriginal activities to define section 35(1), which resulted in the crystallization of Aboriginal rights in an arbitrary, pre-contact era.⁵⁵

In arriving at the conclusion, Chief Justice Lamer first had to define Aboriginal rights as they were “recognized and affirmed” in section 35(1). Since *Sparrow* only created a framework to test Aboriginal rights on a case-by-case basis, the Court still had very little guidance in identifying Aboriginal rights. After reiterating the guiding principles for the Crown's fiduciary duty towards Indigenous peoples, the Chief Justice found that the doctrine of Aboriginal rights exists simply because Indigenous nations organized themselves in societies with distinctive cultures prior to the arrival of Europeans in North America.⁵⁶ As discussed in the first chapter, the view that Aboriginal rights exist based on the principle of prior occupation is largely supported by the Marshall trilogy.⁵⁷ Indeed, the Chief Justice recognized the traditional laws and customs of Indigenous peoples, but made note of the vast differences in legal cultures between Indigenous nations and the Crown. He then reasoned the purpose of section 35(1) was to reconcile the integral practices of a

⁵⁴ *Ibid* at para 91.

⁵⁵ *Ibid* at para 165-7.

⁵⁶ *Ibid* at para 30.

⁵⁷ See e.g., *St. Catherine's Milling & Lumber Co.* (1887) 13 SCR 557.

distinctive Indigenous society with the sovereignty of the Crown.⁵⁸ As a result, the Chief Justice outlined a series of considerations for identifying Aboriginal rights that would become known as the ‘Integral to a Distinctive Culture’ test.

This standard established by the Court consists of ten factors. The first takes into consideration the perspectives of Indigenous peoples when outlining the right. This means courts are to adjudicate Aboriginal rights claims with a sensitivity to Indigenous peoples’ perspectives, but only to the extent that such perspectives were “cognizable to the Canadian legal and constitutional structure”.⁵⁹ According to the Court, this is the only fair and just form of reconciling the pre-existence of distinctive Indigenous societies with the Crown. How the Chief Justice presumed Indigenous legal perspectives could fit within the terms of the legal and constitutional structure of Canada, even while underscoring the vast differences in legal cultures, was an issue left untouched by even the dissenting judges. The Chief Justice’s reasoning underpins the colonial distortions of Indigenous oral legalities as described above, but the important implications regarding this factor on Indigenous oral legalities will be explored further in the next section.

The second factor consists of correctly identifying the nature of the claim being made in determining whether the claimant demonstrates the existence of an Aboriginal right. In other words, an applicant claiming an Aboriginal right must produce the proper evidence to prove a practice, custom, or tradition was significant to the Indigenous society.⁶⁰ The majority wrote that the correct characterization of a claim rests on three considerations: “the nature of the action which the applicant is claiming was done pursuant

⁵⁸ *Van Der Peet*, *supra* note 8 at para 31.

⁵⁹ *Ibid* at para 49.

⁶⁰ *Ibid* at para 51.

to an [A]boriginal right; the nature of the governmental regulation, state or action being impugned; and, the practice, custom, or tradition being relied upon to establish the right”.⁶¹ Each claim in question is to be considered at the general level rather than a specific activity. Further, the Court emphasized that the custom, tradition, or practice in question may be exercised in its modern form and therefore courts considering a claim should vary their considerations accordingly to this fact. However, there was no mention by the Court regarding the standards by which the three considerations for the correct characterization of a claim could be measured.

The third factor tests whether the Indigenous activity being claimed as a right is of central significance to the Indigenous society. To the Court, the mere exercise of a custom, practice, or tradition is insufficient to give rise to an Aboriginal right. Instead, the claimant must demonstrate that the activity in question was a “central and significant part of the society’s distinctive culture”.⁶² It is important to note that the justification of this factor was derived from the phrasing in *Sparrow* in which Chief Justice Dickson and Justice La Forest wrote that the “Musqueam right to fish for food has always constituted an *integral part of their distinctive society* [my emphasis added]...”.⁶³ Justice L’Heureux-Dubé criticized the Chief Justice’s interpretation of this passage for misconstruing ‘distinctive culture’ to mean ‘distinct culture’. Whereas the former merely implied distinguishing an activity characteristic to an Indigenous society, the latter entailed differentiating the practice, custom, or tradition from non-Indigenous cultures.⁶⁴ While the Chief Justice did note the difference between the two terms, the use of the term ‘distinctive’ was only applied

⁶¹ *Ibid* at para 52.

⁶² *Ibid* at para 55.

⁶³ *Sparrow*, *supra* note 4 at 1099.

⁶⁴ *Van Der Peet*, *supra* note 8 at para 151.

to the individualized custom, practice, or tradition of an Indigenous group. For Justice L’Heureux-Dubé, the majority’s approach ultimately narrowed the scope of section 35(1) rights by limiting the criterion for protection to what Indigenous peoples have undertaken, or inversely what non-Indigenous peoples have not.⁶⁵ This is also evidenced in the fourth consideration that the Court considered in establishing the Integral to a Distinctive Society test, which determined whether the practice, custom, or traditions supporting the claim to an aboriginal right held continuity with Indigenous activities prior to European contact.⁶⁶

This is arguably the most troublesome aspect to the Van der Peet test for its mischaracterization of Aboriginal rights. Despite emphasizing an approach that would consider the modern exercise of an activity when determining the existence of an Aboriginal right, the Chief Justice decided that an Indigenous activity could only be integral if it existed before the arrival of Europeans. This approach was highly criticized by the dissenting judges for detracting from the objectives established in *Sparrow*. As Justice McLachlin stated, subscribing to the doctrine of continuity with an arbitrary, “magic moment of European contact” inappropriately crystallizes Indigenous practices in their “ancient modes”, thus disabling the activity from adapting to contemporary changes in society.⁶⁷ Justice L’Heureux-Dubé also took exception to the arbitrary nature of the date chosen by the Chief Justice. She asked:

In effect, how would one determine the crucial date of sovereignty for the purpose of s.35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in

⁶⁵ *Ibid* at para 162.

⁶⁶ *Ibid* at para 60.

⁶⁷ *Ibid* at para 240.

1846 – the year in which the Oregon Boundary Treaty, 1846 was concluded
– as held by the Court of Appeals for the purpose of this litigation?⁶⁸

Whatever date decided upon by the Court, Justice L'Heureux-Dubé asserted, would not be consistent with the perspectives of Indigenous peoples regarding the effect of European settlement. In fact, attempting to establish continuity was a near impossible task that overstated the impact of European influences on Indigenous societies.⁶⁹ Certainly, while colonization has profoundly adverse effects on Indigenous peoples, the Crown assertion to sovereignty does not change or negate the fundamental nature of Indigenous laws which is the inherent source of Aboriginal title and other rights. It can thus be argued that Chief Justice Lamer failed to consider this when outlining the fourth factor. Further He seemed to disregard the inherent, dynamic approach to Aboriginal rights outlined and adopted in *Sparrow*.⁷⁰

The next six factors reinforced the principles within the first four considerations in the Integral to a Distinctive Culture test. As outlined in the first factor, only Indigenous perspectives cognizable to the Canadian legal system were to be taken into consideration when determining the nature of an Aboriginal right. As such, the fifth factor emphasizes that courts do not undervalue the evidence submitted by an Aboriginal claimant.⁷¹ As will be discussed below, undervaluing the claimant's evidence is precisely what occurred at the lower courts in *Delgamuukw*.⁷² Regardless, the sixth factor indicated that Aboriginal rights were not universal, but rather specific to the history of the Aboriginal group making a claim.⁷³ An incidental practice could not be considered a specific right nor undergo a

⁶⁸ *Ibid* at para 167.

⁶⁹ *Ibid* at para 166.

⁷⁰ *Sparrow supra* note 4 at 1093.

⁷¹ *Van Der Peet, supra* note 8 at para 68.

⁷² *Delgamuukw, supra* note para 6.

⁷³ *Van Der Peet, supra* note 8 at para 69.

process of ‘piggybacking’ on another society’s integral activity.⁷⁴ No overt reasons were given as to why this restriction was constituted, but it seemed to undergird the next factor which repeated that a distinctive practice could not arise solely from European influence. The last consideration underscored the fact that Aboriginal rights arise from the prior occupation of land, and the practices distinctive to that society. This factor was important because as John Borrows⁷⁵ notes, it reinforced the idea that Aboriginal title need not be proven from the existence of an Aboriginal right.

While this can be considered a positive outcome of *Van der Peet*, Borrows argues that overall, the decision has produced more negative impacts on Aboriginal rights than positive. Most notably, the Integral to a Distinctive Society test applies non-Indigenous characterizations of Indigeneity, evidence and law as the standards to which s. 35(1) rights must be measured.⁷⁶ Consequently, the ‘Aboriginal perspectives’ are not adjudicated upon with any ‘sensitivity’ as they are forced to conform with western formulations of law and evidence to secure the state’s recognition. As a result, Indigenous oral legalities are mischaracterized and reduced to mere cultural practices and origins. When coupled with the next two cases analyzed below, this argument becomes even more salient.

b. Gladstone

In April 1998, Donald and William Gladstone of the Heiltsuk Band in British Columbia were charged by the Department of Fisheries and Oceans for *offering to sell* and *attempting to sell* 4,200 pounds of herring spawn on kelp under s.61(1) of the *Fisheries*

⁷⁴ *Ibid* at para 70.

⁷⁵ John Borrows, *Recovering Canada: The resurgence of Indigenous law* (Toronto: University of Toronto Press, 2002)

⁷⁶ *Ibid* at 66.

*Act*⁷⁷ and s.27(5) of the *British Columbia Fisheries Regulations*.⁷⁸ The charges were laid after a local fish store owner refused to buy Donald and William's catch. The appellants argued the province's fishing regulations violated their Aboriginal right under section 35(1) with the result that both regulations were inoperable. The appellants further argued that conversing with the owner of the fish store did not constitute an "attempt to sell" the herring spawn on kelp under law.⁷⁹

At the provincial court, the argument that Donald and William Gladstone did not attempt to sell herring spawn on kelp was rejected. However, the trial judge affirmed the preexisting Aboriginal right to do so as the Crown failed to demonstrate a clear and plain intent to extinguish the right to fish for commercial purposes. Further, the judge found that the fishing regulations constituted a *prima facie* infringement, as per the *Sparrow* test, but the infringement was justified by the legislative objectives to conserve the fishery.⁸⁰ Upon appeal, the British Columbia Supreme Court upheld the trial judge's rulings but did not find that the appellant violated s. 27(5) of the fishing regulations.⁸¹ Since the Crown did not appeal the s. 27(5) issue, the question at the Court of Appeals was whether the Crown failed to prove that s.20(3) of the *Pacific Herring Fishery Regulations* had been violated and whether a justified infringement occurred on the Heiltsuk's right to fish for commercial reasons. The Court of Appeals was split on both issues.⁸² Accordingly, on March 10, 1994, a leave to appeal was granted at the Supreme Court.

⁷⁷ *Fisheries Act*, *supra* note 10 at s.61(1).

⁷⁸ *British Columbia Fisheries (General) Regulations*, SOR/84-248, s. 27(5) [ad. SOR/85-290, s. 5]

⁷⁹ *Gladstone*, *supra* note 5 at para 6.

⁸⁰ *Ibid* at para 9

⁸¹ *Ibid* at para 10-12

⁸² While Hutchison and McFarlane JJ agreed that both William and Donald Gladstone had violated s. 20(3) of the fishing regulations, they disagreed on the existence of the Aboriginal right to fish commercially. Meanwhile, Lambert J. dissented and found that the Aboriginal right existed and that the regulations

The constitutional question before the bench was whether s. 20(3) of the *Pacific Herring Fishing Regulations* was of no force or effect by reason of section 35(1) of the *Constitution Act, 1982*.⁸³ Ultimately, the appeal was allowed but the Court ordered a retrial directed on the issue of the appellants' guilt or innocence in attempting to sell their catch, as well as whether s.20(3) of the fishing regulations met a justified objective. Chief Justice Lamer, writing for a majority, held that the evidence presented before the Supreme Court regarding s.20(3) regulations was insufficient to determine whether the regulatory scheme was justifiable.⁸⁴ Thus, the retrial was to be conducted in accordance with the framework produced in the decision.

The Court largely relied on the principles within *Sparrow* and *Van Der Peet* to develop their analysis. First, the Court utilized the Integral to a Distinctive Society test to determine whether the appellants' claim to the Aboriginal right was characterized as the right to "exchange of herring spawn on kelp for money or other goods" or "sell herring spawn on kelp to the commercial market".⁸⁵ The difficulty for Chief Justice Lamer in characterizing the right is due to his assertions that prior to European contact, there was no 'true' commercial market. While the assertion begs the questions as to whether 'true' commercial markets existed *anywhere* prior to the end of 15th century will be discussed in the context of *R. v. Pamajewon*,⁸⁶ the Court characterized the claim as a right to exchange herring spawn on kelp for money or other goods. This characterization was largely based

unjustifiably infringed on the Heiltsuk's right to fish herring spawn on kelp for commercial reasons. See *ibid* at paras 13-16.

⁸³ *Ibid* at para 17.

⁸⁴ *Ibid* at para 82.

⁸⁵ *Ibid* at para 24.

⁸⁶ *R v Pamajewon* [1996] 2 SCR 821 [*Pamajewon*].

on anthropologists' accounts that the Heiltsuk harvested herring spawn by the 'tons' as an integral part to their culture.⁸⁷

Next, the Court applied the Sparrow test for extinguishment. The Crown argued that the Aboriginal right to fish commercially was extinguished by early revisions of *Pacific Fishery Regulations* prior to 1982, and further by an 1817 Order-In-Council, both of which had varying effects on the Heiltsuk's ability to fish.⁸⁸ This claim was rejected on the basis that under the regulatory regime, "the government has, at various times, given preference to [A]boriginal commercial fishing", which disproved a clear and plain intention to extinguish the right.⁸⁹ Upon moving to the infringement branch of the *Sparrow* test, Chief Justice Lamer held that the impugned fishery regulations infringed on the rights of the appellants because prior to European contact, the Heiltsuk harvested herring spawn on kelp to the extent of their physical limitations and preserve it according to self-governed conservation practices.⁹⁰ Thus, the Court found a *prima facie* infringement on the Heiltsuk's right to fish for commercial purposes.

Lastly, the Court considered the two-step process for the justification of the infringement, which I problematize as the most troublesome aspect to the *Gladstone* decision. Chief Justice Lamer differentiated the context of *Gladstone* from *Sparrow* on the assertion that the legal and factual contexts of each case varied in two primary ways. First, whereas *Sparrow* affirmed the right to fish for food, social and ceremonial purposes, the issue in *Gladstone* dealt with commercial trading rights. According to the Chief Justice, the difference was regarding a perceived 'inherent limitation' within each practice:

⁸⁷ *Gladstone*, *supra* note 5 at para 27.

⁸⁸ *Ibid* at para 31-35 in general.

⁸⁹ *Ibid* at para 37.

⁹⁰ *Ibid* at para 53.

The food, social and ceremonial needs for fish of any given band of [A]boriginal people are internally limited – at a certain point the band will have sufficient fish to meet these needs. The commercial sale of the herring spawn on kelp, on the other hand, 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.⁹¹

This apparent lack of perceived inherent limitation worried the Chief Justice because if an Aboriginal right had no internal limitation, the priority doctrine as enunciated in *Sparrow* would give Indigenous peoples an exclusive right to fish commercially to the exclusion of other user groups. Kent McNeil⁹² criticizes the Chief Justice’s position for the unlikelihood of the Heiltsuk somehow harvesting *all* herring spawn on kelp after conservation requirements were met. Indeed, why the amount of herring spawn on kelp caught by the Heiltsuk should be indicative of the existence of an Aboriginal right is not clear, but the Chief Justice’s concern illustrates that intent to give Aboriginal rights holders priority over other user groups once conservation efforts were met as laid out in *Sparrow* was virtually ignored in *Gladstone*.

This is further evidenced by the Court ruling that the priority doctrine for Aboriginal rights only requires the government to demonstrate that it allocated the resource in a manner that is “something less than exclusivity but still give[s] priority” to Indigenous peoples.⁹³ For the Chief Justice, this meant using a minimalist impairment approach similar to s.1 of the *Charter* which “scrutinize[s] government action for reasonableness on a case-

⁹¹ *Ibid* at para 57.

⁹² Kent McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) *Const. F.* 8(2) 33 at 38.

⁹³ *Gladstone*, *supra* note 5 at para 63.

by-case basis”.⁹⁴ As noted above, *Sparrow* explicitly rejected this approach to testing the justifiable standards of governmental infringements. In fact, the Sparrow Court understood that attempting to balance Aboriginal rights against the interests of other Canadians could potentially lead to the erosion of the constitutional guarantees of Indigenous peoples.⁹⁵ This is why, according to *Sparrow*, government regulations causing a *prima facie* infringement on Aboriginal rights was required to be ‘compelling and substantial’ enough to justify the impingement.⁹⁶ Yet Chief Justice Lamer these objectives as the second point of variation between *Sparrow* and *Gladstone*.

In *Sparrow*, we remember that the two broad objectives deemed compelling and substantial for justifiable infringement on section 35(1) was: the conservation and management of natural resources, and the preventing the exercise of section 35(1) in a way that could cause harm to others.⁹⁷ Yet since the Heiltsuk’s right to fish commercially was distinguished from the right to fish for food or ceremonial purposes, no definitive statement outlined what is considered a compelling or substantial justification for infringement. With no evidence provided to the Court outlining what objectives under the fishing regulations might justify a *prima facie* infringement, the Chief Justice offered general observations on the matter. He stated:

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* [my emphasis added],

⁹⁴ *Ibid.*

⁹⁵ *Sparrow*, *supra* note 4 at 1112.

⁹⁶ *Ibid* at 1112.

⁹⁷ *Ibid.*

are the type of objectives which can (at least in the right circumstances) satisfy this standard.⁹⁸

In other words, those objectives that were in the economic interest of all Canadians and were directed at the reconciliation of Indigenous societies with the rest of Canada were considered “compelling and substantial” for Chief Justice Lamer. Interestingly, McNeil criticizes the point on two grounds. First by asking “how any law *infringing* on the rights of Aboriginal peoples could ever have the purpose of reconciling the prior occupation of North America by Indigenous peoples?”⁹⁹ This contradictory nature of this observation by the Chief Justice was never addressed in *Gladstone* but it should be noted that Justice McLachlin condemned this point in *Van Der Peet*. She points out the model of reconciliation was traditionally carried out through treaty negotiations and not with a “judicially authorized transfer of the [A]boriginal right to non-Aboriginals without the consent of the [A]boriginal people, without treaty and without compensation.”¹⁰⁰ For McLachlin, it was not up to the Court to suggest more radical methods of reconciliation that potentially erodes Aboriginal rights as the Chief Justice did.

McNeil’s second point of criticism is directed at the ‘economic and regional fairness’ objective, which closely resembles the public interest justification rejected in *Sparrow*.¹⁰¹ By allowing the economic considerations of other Canadians in the distribution of fishery resources to override the constitutional rights of Indigenous peoples, reconciliation as framed by Chief Justice Lamer is merely the unilateral imposition of legislative infringements on section 35(1). For McNeil, this approach mirrors the historic

⁹⁸ *Gladstone* supra note 5 at para 75.

⁹⁹ McNeil, supra note 92 at 35.

¹⁰⁰ *Van Der Peet*, supra note 8 at para 310.

¹⁰¹ McNeil, supra note 92 at 35.

treatment of Indigenous peoples by the Canadian state that Chief Justice Dickson and Justice LaForest paradoxically attempted to rectify in *Sparrow*.¹⁰² Similarly, Justice McLachlin expressed her concerns over the indeterminacy of the Chief Justice's utilization of the term "in the right circumstances" whereby governments could justify infringements on s.35(1) or in a judicial context, the focus would turn to the social justifiability for any legislative measure rather than the guarantee of Aboriginal rights.¹⁰³ Justice McLachlin viewed the Chief Justice's stance on the justification issue as "indeterminate and ultimately more political than legal".¹⁰⁴

As the analysis above shows, although *Gladstone* recognized the Aboriginal right to fish commercially, the decision simultaneously revived the public interest objective to justify infringements on Aboriginal rights as explicitly rejected in *Sparrow*. As Lisa Dufraimont¹⁰⁵ demonstrates in her analysis on the justificatory standard in Aboriginal rights cases, *Delgamuukw* exceedingly expanded on the validation of the public interest objective to grant a wide catalogue of state activities to infringe upon Aboriginal rights that would otherwise be unimaginable in the *Sparrow* test. When analyzing this case, one can see how the vast range of legislative objectives justified by the Supreme Court reinforces the basic tenets of colonialism: to open Indigenous lands for the further settlement of foreign populations,¹⁰⁶ thereby breaking Indigenous law established through treaty-making processes in the first chapter. The next section explores this theme and the blatant disregard for Indigenous oral traditions within the lower courts, which illustrate the challenges the

¹⁰² *Ibid* at 36.

¹⁰³ *Van Der Peet*, *supra* note 8 at para 309.

¹⁰⁴ *Ibid* at para 302.

¹⁰⁵ Lisa Dufraimont, "From Regulation to Recolonization: Justifiable infringement of Aboriginal rights at the Supreme Court of Canada" (2000) *U Toronto Fac L Rev* 58(1) 1

¹⁰⁶ See *Delgamuukw*, *supra* note 6 at para 165 for the explicit usage of the term 'settlement of foreign populations'.

Canadian juridical face in accepting Indigenous oral legalities as legitimate. This is especially clear when the stories that give rise to Indigenous legal orders are subjected to Western forms of evidentiary standards which are unresponsive to the legal properties embedded in the oral tradition.

c. Delgamuukw

*Delgamuukw v British Columbia*¹⁰⁷ was a case regarding the recognition of Aboriginal title brought before the Court by the Gitksan and Wet'suwet'en nations. Hereditary chiefs claimed title to separate portions of 58,000 square kilometers in British Columbia, divided into 133 individual territories between 71 Houses.¹⁰⁸ The case is especially notable for the respective submission of the Gitksan *adaawk* and the Wet'suwet'en *kungax*, which is described by Chief Justice Lamer as follows:

The *adaawk* and *kungax* of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge, at p. 164, as a "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House". The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the *adaawk* and *kungax* is underlined by the fact that they are "repeated, performed and authenticated at important feasts" (at p. 164). At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the *adaawk* and *kungax*.¹⁰⁹

At trial, Chief Justice McEarchen listened to 374 days of testimony from the Hereditary Chiefs, who claimed jurisdiction and ownership over the territories in

¹⁰⁷ *Delgamuukw*, *supra* note 6.

¹⁰⁸ *Ibid* at para 7.

¹⁰⁹ *Ibid* at para 93.

question.¹¹⁰ The trial judge accepted that each Nation organized themselves into societies according to the Baker Lake test¹¹¹ but refused to accept that the Gitksan or Wet'suwet'en possessed any system of governance or uniform custom relating to their lands outside of their villages. Further, the trial judge remained unconvinced that the oral histories, totem poles, and crests submitted as proof of each Nation's laws played a role in the management and allocation of lands.¹¹² In fact, he characterized the Gitksan and Wet'suwet'en legal systems as "so flexible and uncertain that they cannot be classified as laws",¹¹³ and often referred to the stories told by hereditary chiefs as 'myth'. The plaintiff's claims for ownership and jurisdiction were therefore dismissed by McEachern but were granted the use of unoccupied land subject to the general laws of the province.

At the British Columbia Court of Appeals, the primary question was whether the trial judge had erred in ruling that *all* of the plaintiff's Aboriginal rights were extinguished by 1871.¹¹⁴ The treatment of the *adaakw* and *kungax* by Chief Justice McEachern was additionally challenged but the majority refused to conduct a new analysis since they could not introduce its own finding of facts.¹¹⁵ Ultimately, the Court of Appeals held that all of the plaintiffs' Aboriginal rights had not been extinguished but the declaration on the right to ownership and jurisdiction was not granted. According to the majority, the view expressed in *Sparrow* that sovereignty was undoubtedly vested in the Crown, along with the authority granted to the federal government for Indigenous lands and peoples pursuant

¹¹⁰ *Ibid* at para 5-7.

¹¹¹ See, *Hamlet of Baker Lake v Canada (Indian Affairs and Northern Development)*, 1979 CanLii 2560 (FC) at para 80, [1980] 1 FC 518, 107 DLR (3d) 513, [1980] 5 WWR 193, [1979] 3 CNLR 17 for the test that determines the existence of Aboriginal Title.

¹¹² *Delgamuukw*, *supra* note 6 at para 18.

¹¹³ *Ibid*.

¹¹⁴ *Delgamuukw v British Columbia*, 1993 CanLII 4516 (BC CA) at 38, [1993] 5 CNLR 1.

¹¹⁵ *Ibid* at para 227.

to s.91(24) of the BNA Act, denied any jurisdictional or ownership rights for the Gitskan or Wet'suwet'en nations.¹¹⁶ The plaintiffs soon after appealed the decision.

At the Supreme Court, the issue was changed by the appellants from a question regarding jurisdiction and ownership to self-government and Aboriginal title.¹¹⁷ Accordingly, the two questions before the Court were: What is the nature of the protections given to Aboriginal title under section 35(1); and, did the province have the authority to extinguish title after confederation?¹¹⁸ Although the main issue was poised at two primary questions, Chief Justice Lamer addressed them through five points of analysis. They included; 1) whether the appeal from the BC Court of Appeals can be considered by the Supreme Court; 2) what ability did the Court possess to interfere with the finding of facts made by the trial judge; 3) the content of Aboriginal title as protected under section 35(1), and what proof was required to prove title; 4) whether there was a claim to self-government made by the appellants, and; 5) could the province extinguish Aboriginal rights after 1871 under its own jurisdiction or pursuant to s.88 of the *Indian Act*.¹¹⁹ After deliberating on these issues, the Court allowed the appeal in part and ordered a new trial over the treatment of evidence at the lower courts. The first and last two points of analysis will be briefly summarized here before exploring the remainder given the focus of this section thus far has been on the expanding justification for governmental infringements and its impacts on Indigenous oral legalities.

¹¹⁶ *Ibid* at para 173.

¹¹⁷ According to the Chief Justice, the reframing of the question was due mostly due to the ruling in *Guerin* that Aboriginal interest does not amount to beneficial ownership (I.e., ultimate ownership or control). See *ibid* at para 71.

¹¹⁸ *Delgamuukw*, *supra* note 6 at para 72.

¹¹⁹ See *ibid* for the 5 sub-issues laid out in *Delgamuukw*; See also *Indian Act*, RSC, 1985, c. I-5, s.88 which states that general provincial laws are applicable to Indians under various conditions.

In respect to the first point of analysis, the Supreme Court ruled that it could not hear the appeal from the Court of Appeals due to the changing nature of the suit by the appellants. Chief Justice Lamer asserted the reframing of the matter on appeal would prevent the respondents from knowing the nature of the case at hand.¹²⁰ Accordingly, a new trial was ordered in part for this reason. On the fourth point, the Court relied on *Pamajewon* to deny the Wet'suwet'en and Gitksan's claim to self-government.¹²¹ It was reasoned within two short paragraphs that the claim to self-government was too broad to "lay down the legal principles to guide future litigation", and the Court abruptly denied the claim.¹²² In his last point, Chief Justice Lamer rejected the respondent BC Crown's claim that s.88 of the *Indian Act* allowed for the province to extinguish Aboriginal rights simply because there was no clear and plain intent as per *Sparrow*.

In deliberating the second point of analysis regarding whether the Supreme Court was able to interfere with the trial judge's finding of facts, Chief Justice Lamer held that the trial judge gave no independent weight to either the *adaakw* or *kungax*.¹²³ Oral histories were recognized by the Court as encompassing historical communal knowledge which also express integral cultural values that the trial judge failed to take into consideration. Although the Court acknowledged the difficulties in treating the appellants' evidence under evidentiary standards within the common law, Justice McEachern's ruling regarding the oral tradition was overturned on the basis that the evidence at trial constituted an acceptable claim to Aboriginal title under the standards set in *Van Der Peet*. However, the Court

¹²⁰ Delgamuukw, *supra* note 6 at para 76.

¹²¹ As will be discussed below, *R v Pamajewon*, *supra* note 86, questioned the right to self-government under section 35(1) as it related to high stakes gambling,

¹²² Delgamuukw, *supra* note 6 at para 170.

¹²³ *Ibid* at para 96.

refused to establish their own finding of facts for the claim of prior occupation and use of the territory in question given the “enormous complexity of the factual issues at hand”.¹²⁴ Instead, a new trial was ordered to reconsider the matter according to the rules in *Van Der Peet*.

The Court’s conclusions on this point are laudable to the extent that the Supreme Court acknowledged for the first time the significance of the oral traditions in the adjudication of Aboriginal rights. However, as Val Napoleon¹²⁵ points out, the efficacy of Indigenous oral legalities to stand as their own independent legal orders was still undermined since the Court never addressed the asymmetrical dynamics that is upheld when one legal system judges another. As outlined by Napoleon (and indeed the Supreme Court), direct examination at trial revealed that the oral traditions of the Gitksan and Wet’suwet’en were an integral part to their legal orders. However, by forcing the *adaakw* and *kungax* to conform to evidentiary standards of western law rather than treating them as fully operational and freestanding legal systems, the courts reduced Indigenous oral legalities to an “exception to hearsay evidence”.¹²⁶ While Napoleon suggests that such transformations can be expected since judges like McEachern are obligated to operate within the bounds of current laws, it seems that the outcomes of cases determining current laws continue to expand on the justificatory standards for *prima facie* infringements upon Aboriginal rights.

For example, the third point of analysis which considers the content of Aboriginal title as protected under s.35(1), established a three-part test to prove the existence of

¹²⁴ *Ibid* at para 108.

¹²⁵ Val Napoleon, “Delgamuukw: A legal straightjacket for oral histories?” (2005) *Can J Law & Society* 20(2) 123 at 155.

¹²⁶ *Ibid* at 130.

Aboriginal title and a justificatory standard for infringement. First, a claimant must prove occupation prior to the Crown's assertion to sovereignty.¹²⁷ Previously under *Van Der Peet*, the threshold timeline for an Aboriginal rights claim was 'pre-contact'. This claim was justified on the grounds that ...it does not make sense to speak of a burden on the underlying title before that title existed", therefore "[A]boriginal title crystallized at the time that Crown sovereignty was asserted."¹²⁸ Second, claims to title were still required to adhere to the continuity doctrine.¹²⁹ This assertion has already been problematized above for effectively embracing a frozen rights approach that was rejected in *Sparrow*. Lastly, prior occupation at the time that Crown sovereignty was asserted must have been considered exclusive. Although Chief Justice Lamer acknowledged that joint title could exist between Indigenous nations, he decided to "leave it to another day to work out all the complexities and implications of joint title" since no such claim was brought before the Court.¹³⁰ Borrows asks of the Supreme Court's claim that Aboriginal title crystallized at the time of the Crown's assertion to sovereignty, "[h]ow can lands possessed by Aboriginal peoples for centuries be undermined by another's assertion of sovereignty?"¹³¹ Since this question is addressed in the third chapter, I shall continue the exploration into the justificatory standard for infringement as set in *Delgamuukw*.

Although the distinction was made between Aboriginal title and Aboriginal rights, the former was still subject to the two-step standard for justifiable infringements. We remember in *Gladstone*, the first step was relaxed by the Court to allow "the pursuit of

¹²⁷ *Delgamuukw*, *supra* note 6 at para 143.

¹²⁸ *Ibid* at para 145

¹²⁹ *Ibid*.

¹³⁰ *Ibid* at para 158.

¹³¹ Borrows, *supra* note 191 at 94.

economic and regional fairness” in the name of reconciling the prior occupation of Indigenous nations with Crown assertions to sovereignty.¹³² Chief Justice Lamer admitted that the range of ‘compelling and substantial’ legislative objectives set in *Gladstone* was broad, but promptly widened the objectives even more when stating:

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* [my emphasis added], are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.¹³³

In other words, the same actions which have, for over the last 150 years, facilitated the dispossession of Indigenous lands by the state was considered justifiable by the Supreme Court. For Chief Justice Lamer, the reconciliation of the prior occupation of North America by Indigenous peoples with Crown assertions to sovereignty did not mean negotiations leading to treaties as Justice McLachlin pointed out in *Van Der Peet*.¹³⁴ Instead, the Chief Justice viewed reconciliation as the means to maintain the colonial *status quo*. The development of industry and the *settlement of foreign populations* were “compelling and substantial” enough to interfere with the land rights of Indigenous peoples. As Borrows¹³⁵ notes, the settlement of foreign populations to support the expansion of non-Indigenous societies is essentially the basic tenant of colonialism. As he

¹³² *Gladstone*, *supra* note 121 at para 75.

¹³³ *Delgamuukw*, *supra* note 122 at para 159.

¹³⁴ *Van Der Peet*, *supra* note 8 at para 310.

¹³⁵ John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*” (Fall 1999) *Osgood Hall L J* 37(3) 537.

writes: “calling colonialism [an] *infringement* is an understatement of immense proportions”.¹³⁶ But at least Aboriginal title was ‘recognized’.

Dufraimont reminds her readers that *Sparrow* envisioned justifiable infringements as government regulation in the context of resource management rather than satisfying regional or economic interests.¹³⁷ In *Delgamuukw*, however, very little emphasis was placed on resource management regulations. As such, the test for justification shifts from ensuring legislation adheres to the *Sparrow* standard to opening a wide range of allowable infringements on constitutional rights. As stated above, the catalogue of justifiable infringements in *Delgamuukw* ultimately amounts to the continued expropriation of Indigenous lands as Dufraimont exemplifies this in practical terms:

...a government infringing Aboriginal title in pursuit to the legislative objective of ‘the development of... hydroelectric power’ might be expected to flood Aboriginal lands in the construction of a dam. A government working toward ‘the development of... mining’ might infringe Aboriginal title by strip-mining the land. For governments aiming to effect ‘the settlement of foreign populations’, infringement of Aboriginal title would likely take the form of ‘the conferral of fee simples’ over Aboriginal title lands to non-Aboriginals – a possibility that Lamer CJC expressly acknowledges.¹³⁸

Dufraimont’s concern serves as a reminder that the approach to Aboriginal rights taken by the Supreme Court resembles the historical treatment of Indigenous peoples in which their oral legalities were disregarded, their rights denied, and their autonomy diminished.

¹³⁶ *Ibid* at 568.

¹³⁷ Dufraimont, *supra* note 105 at 23.

¹³⁸ *Ibid* at 24.

IV. THE JURIDICAL LOGIC OF ELIMINATION

It could be argued from the analysis above that any Supreme Court decision regarding Aboriginal rights will be premised on a settler-colonial rationality Patrick Wolfe¹³⁹ calls the ‘logic of elimination’. According to Wolfe, ‘elimination’ need not only be referred to as the ‘summary liquidation’ of Indigenous peoples but can also involve the dissolution of native societies.¹⁴⁰ In either instance, the objective of settler society is to destroy and replace what already exists. However, as Wolfe asserts, a conflict emerges with the assertion of settler nationalism and the full erasure of Indigeneity. While settler society requires the practical elimination of Indigenous peoples to establish itself on Indigenous territory, it also requires the symbolic recuperation of Indigenous identity to outwardly express the colonizing state’s difference from its mother country.¹⁴¹ In this lens, the inclusion of Aboriginal rights in the Constitution can in part be viewed as the final step of the Canadian colony to distance itself from its former protectorate. Thus, for Wolfe, settler colonialism does not wholly eliminate Indigenous societies but, “the process of replacement maintains the refractory imprint of the native counterclaim”.¹⁴² What better way to dissolve Indigenous peoples counterclaims to Crown assertion of sovereignty than repackaging Indigenous political and legal autonomy as the recognition of ‘cultural’ rights?

Extending Wolfe’s analysis to the methods taken by the Supreme Court to mischaracterize the Indigenous peoples’ oral legalities as only expressions of cultural activities or practices to uphold state sovereignty is what I label ‘the juridical logic of elimination’. Take for example the *Van Der Peet* decision. The first factor in the Integral

¹³⁹ Wolfe, *supra* note 7.

¹⁴⁰ *Ibid* at 388.

¹⁴¹ *Ibid* at 389.

¹⁴² *Ibid*.

to a Distinctive Culture test requires Indigenous perspectives to remain cognizable to the Canadian constitution and judiciary.¹⁴³ The result of which forces Indigenous legal reasoning and modes of account-giving to fit into evidentiary standards of western law as ‘exceptions to hearsay’ as noted above. However, this is most evident in *Delgamuukw*. Even when the oral traditions of the Gitksan and Wet’suwet’en are acknowledged as integral to their societies, they are nevertheless stripped of their legal properties and used *only* to prove continuity with pre-contact practices or activities. In fact, it can be suggested that the juridical logic of elimination in this context is a process of deconstructing Indigenous oral legalities so settler-colonial society can maintain its various resource extraction schemes on an expropriated land base.¹⁴⁴ Again, this is exemplified by the ‘public interest’ objective revived in *Gladstone* and later expanded on in *Delgamuukw* to justify all types of infringements on Aboriginal rights. Such infringements that allow ‘the settlement of foreign populations’ to support ‘the general economic development’ of Indigenous lands explicitly embodies the juridical logic of elimination.

It should be emphasized that when this thesis speaks to the juridical logic of elimination, it is not a confession that Indigenous peoples’ oral legalities have been eliminated; rather it speaks to the Court’s acts of non-recognition despite the pre-existence and continuance of Indigenous peoples’ legal orders. Nevertheless, this rationality that justifies an *attempt* to break down Indigenous peoples’ political and legal autonomy is also present in subsequent cases following the Van Der Peet trilogy. One such example is *R v Pamajewon*¹⁴⁵ in which members of Shawanaga and Eagle Lake First Nations challenged

¹⁴³ *Van Der Peet*, *supra* note 8 at para 49.

¹⁴⁴ Wolfe *supra* note 7 at 388.

¹⁴⁵ *Pamajewon*, *supra* note 86.

their convictions of operating a common gaming house contra to *Criminal Code*¹⁴⁶ provisions by asserting their rights to self-governance, which they argued were to be protected under s.35(1) of the Canadian constitution. At the Supreme Court, questions regarding self-governance were pushed to the side because the Court held that the appellants' claim to self-government was too broad and any determination on the matter would bring the inquiry to "a level of excessive generality".¹⁴⁷ According to the Court, Aboriginal rights were to be examined under the specific circumstances of each case and within the context of the specific Aboriginal group's culture and history claiming the right. As such, the issue at the Supreme Court was recast to one regarding "the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands",¹⁴⁸ rather than determining the right to self-governance under s.35(1).

The Supreme Court then denied this right by accepting the Provincial Court's findings that high stakes gambling among the Anishinaabeg did not occur on a twentieth century scale prior to European contact, and therefore the right to regulate gambling activities could not be recognized.¹⁴⁹ While the Court accepted that Ojibwa people did gamble prior to European contact, such "small-scale" practices were not of central significance to Anishinabek culture nor were they subject to regulation by the community.¹⁵⁰ Not only does the decision in *Pamajewon* mischaracterize the claim to self-

¹⁴⁶ *Criminal Code*, RSC 1985, c C-46, ss. 201, 206-7;

¹⁴⁷ *Pamajewon*, *supra* note 86 at para 27.

¹⁴⁸ *Ibid* at para 25.

¹⁴⁹ *Ibid* at paras 29-30.

¹⁵⁰ *Ibid* at para 28.

governance as discussed below, but as Borrows points out, the inability to meet the standard of evidence set in this case is hardly surprising:

Not many activities within any society, prior to the twentieth century, took place on a twentieth-century scale. It is a good thing the rights of other Canadians do not depend on whether they were important to them two or three hundred years ago. Would non-Aboriginal Canadians be willing to have their fundamental rights defined by what was integral to European peoples' distinctive cultures prior to their arrival in North America?¹⁵¹

Another instance of the juridical logic of elimination can be found in *Mitchell v. MNR*,¹⁵² where the right to bring goods across the US-Canadian border for the purposes of trade was denied because the oral histories presented to the Court did not clearly demonstrate pre-contact trade by the Haudenosaunee across the St. Lawrence River. This chapter has already problematized the standard for continuity in proving the existence of Aboriginal rights and will spend no more time discussing that issue. However, in *Mitchell*, the main concern for Chief Justice McLachlin was ensuring that the interpretation of Indigenous oral histories did not cross the boundary between “a sensitive application and a complete abandonment of the rules of evidence”.¹⁵³ In upholding the principles laid out in *Van Der Peet*, the Chief Justice reaffirmed that Aboriginal claims still had to demonstrate their validity based on the balance of probabilities. According to McLachlin, this was because oral histories, “like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious”.¹⁵⁴ As Bruce Granville Miller¹⁵⁵ suggests, *Mitchell* was therefore about assuaging the Supreme Court’s deep

¹⁵¹ Borrows *supra* note 191 at 68.

¹⁵² *Mitchell vs MNR (Ministry of Natural Resources)* [2001] 1 SCR 911 [*Mitchell*].

¹⁵³ *Ibid* at para 39.

¹⁵⁴ *Ibid*.

¹⁵⁵ Bruce Granville Miller, *Oral Histories on Trial: Recognizing Aboriginal narratives in the courts* (Vancouver, BC: UBC Press, 2011) at 88.

concerns regarding the perceived incredibility of Indigenous oral legalities by re-invoking the rules of evidence, thereby maintaining the boundaries between western evidentiary standards and their ‘complete abandonment’.

Both *Pamajewon* and *Mitchell* make apparent that the Court’s mischaracterization of Aboriginal rights creates a two-tiered system of constitutional rights in which the interests of Indigenous nations are placed in a subordinated position under the interests of the Crown. As a result, claims to govern economic or trade activities are reduced to cultural practices and origins. In *Pamajewon*, the claim to self-government was first downgraded to a matter of regulating high stakes gambling as per pre-contact activities and then denied. As Borrows and Rotman point out, the recharacterization of the appellants claim to self-governance and how to financially support their nations decontextualized the appropriate resolutions of appellants’ claim and trivialized the importance of the question at hand.¹⁵⁶ In *Mitchell*, the right to bring goods across the US-Canadian border for the purposes of trade was of central to questions of Haudenosaunee nationhood because as the respondent Mr. Mitchell asserted, the Aboriginal right flowed from the Mohawk nation, who have maintained their political and legal autonomy from time immemorial.¹⁵⁷ Yet that right is denied because Chief Justice McLachlin was more concerned with ensuring Indigenous oral histories did not cross the bounds of evidentiary standards.

The problem with categorizing the oral histories of Indigenous peoples as an exception to hearsay – aside from the mischaracterization of Indigenous peoples’ assertions to political and legal autonomy as noted above – is that it effectively eliminates the

¹⁵⁶ Borrows & Rotman, *supra* note 3 at 58.

¹⁵⁷ *Mitchell*, *supra* note 152 at 117.

normative structures and orders that lend themselves to a ‘truth’ about a reality.¹⁵⁸ Anthropologist Julie Cruikshank¹⁵⁹ indicates how knowledge is embedded in both “distinctive paradigms and seminal institutional arrangements”, which get stripped away when it crosses cultural boundaries. In fact, removing oral histories from the contextual reality that gives them meaning and power undermines their historical value, especially when oral histories are placed in a situation where they are evaluated by the rules of another system, as discussed above. Thus, this process of decontextualization is another manifestation of juridical elimination that renders unintelligible many aspects to Indigenous oral histories when they are presented to the Canadian judiciary as mere evidence.

This insight is what makes Napoleon question whether the Canadian legal system can accept the truths within Indigenous peoples’ oral histories. She indicates that the Canadian legal system is only able to if the oral histories are taken as part of complete systems of law and concede that their ‘truths’ are established only within those systems.¹⁶⁰ However, Justice Binnie’s concurring decision in *Mitchell* suggests that even if Indigenous oral traditions are accepted as complete legal systems, any practice or activity that is considered to hinder Crown sovereignty cannot be recognized as an Aboriginal right.¹⁶¹ As the third chapter will explicate, the Supreme Court’s acceptance of sovereignty is conditioned by modes of knowledge and ‘truth’ that assumes supremacy over other modes

¹⁵⁸ Napoleon, *supra* note 125 at 151.

¹⁵⁹ Julie Cruikshank, *The Social Life of Stories: Narrative and knowledge in the Yukon* (Vancouver, BC: UBC Press, 1998) at 52, as cited in Napoleon, *ibid*.

¹⁶⁰ Napoleon, *supra* note 125 at 151.

¹⁶¹ *Mitchell*, *supra* note 152 at 153.

of political governance and related systems of knowledge. It is why Aboriginal and treaty rights cases are, as Napoleon puts it, about one legal system judging another.¹⁶²

V. PERPETUATING COLONIAL LOGICS

This chapter has analyzed the juridical methods utilized by the Supreme Court to eliminate Indigenous peoples claims to political and legal autonomy under their own legal systems rather than genuinely affirm Aboriginal and treaty rights under the Canadian constitution. While there has been a noteworthy shift in *Sparrow* in the way the Supreme Court initially attempted to rectify the historical mistreatment of Indigenous peoples in what is currently called Canada, any advancements have been curtailed by the unproblematized acceptance of Crown assertions to sovereignty and underlying title. The self-imposed burden of the Crown to fulfill its duty towards Indigenous peoples causes Indigenous oral legalities to be outright dismissed or distorted to fit the language of state sovereignty. As such, the claims to Indigenous political and legal autonomy are reduced to cultural practices and origins as analyzed in *Van Der Peet*. Such mischaracterization also allows the Canadian judiciary to justify the basic tenets of colonialism, framed in terms of ‘infringement’ as the Court did in both *Gladstone* and *Delgamuukw*. From these insights, I have also utilized the works of Patrick Wolfe to illustrate that these mischaracterizations and justification for infringement result in a ‘logic of juridical elimination’ which persists in subsequent cases like *R v. Pamejawn* and *Mitchell v MNR*. Regardless, the outcome is the same – the further erosion of Indigenous peoples’ autonomy.

At the same time, there is optimism from various legal scholars that the Courts may be returning to the more stringent tests as laid out in *Sparrow*. For example, Dufraimont

¹⁶² Napoleon, *supra* note 125 at 155.

cautiously expresses hope in the Court's affirmation in *R. v. Marshall* of the Mi'kmaq treaty right to fish for a moderate livelihood.¹⁶³ Similarly, Bruce McIvor¹⁶⁴ shares the same cautious enthusiasm for the outcome of *Grassy Narrows*,¹⁶⁵ which confirms a provincial government's obligation to Aboriginal and treaty rights. However, Bruce Miller outlines the restrictive use of oral traditions in *Benoit v Canada, Lax Kw'alaams Indian Band v Canada (AG)*, and *Samson Indian Nation and Band v. Canada*, which all place tighter boundaries on the acceptability of the oral tradition as evidence -- which is juridical way of stating that the Supreme Court will only tolerate the 'truths' from Indigenous knowledges as it suits the state.¹⁶⁶ As such, the optimism expressed for the 2017 *Grassy Narrows* decision may have been overstated especially since the Court emphasized the provinces' increased role in having to justify a *prima facie* infringement. Indigenous peoples must now deal with both levels of government justifying their 'public interest' objectives. Unless the Supreme Court re-examines its conception and reception of Indigenous oral legalities in Canadian courtrooms in relation to Crown assertions to sovereignty, any decision the Supreme Court makes regarding Aboriginal and treaty rights will only continue to perpetuate the juridical logic of elimination.

¹⁶³ See Dufraimont, *supra* note 105 at 26 for the three reasons for this optimism, which includes embracing the Honor of the Crown in dealing with Aboriginal rights; the majority's tentative acceptance of the findings in *Gladstone* regarding the public interest objective for justificatory standard, and the finding that treaty rights are 'internally limiting'. See also, *R v Marshall* [1999] 3 SCR 456 for the meaning of fishing for a moderate livelihood.

¹⁶⁴ Bruce McIvor, *First Peoples Law: Essays on Canadian law and decolonization*, 3rd ed. (Vancouver, BC: First Peoples Law Corporation, 2018).

¹⁶⁵ *Grassy Narrows v Ontario (Natural Resources)* [2014] 2 SCR 447

¹⁶⁶ Miller, *supra* note 155 at 82-91; See also *Benoit v Canada* (2003) 242 FTR 159, 2003 FCA 236, *Lax Kw'alaams Indian Band v Canada (AG)* [2011] 3 SCR 535, and *Samson Indian Nation and Band v. Canada* [2009] 1 SCR 222.

CHAPTER 3: ALTERNATIVE MODES OF KNOWING AND BEING

I. INTRODUCTION

The first two chapters explicate the juridical methods utilized by the Supreme Court of Canada which delineate and limit the constitutional rights of Indigenous peoples. I have argued that the sum of Canadian jurisprudence de-contextualizes Indigenous oral legalities via the assumption that “there was from the outset never any doubt that sovereignty and legislative power, and indeed underlying title was vested in the Crown”.¹ I have suggested that this approach taken by the Court narrows the interpretation of Aboriginal and treaty rights in part by freezing the oral legalities of Indigenous peoples to their pre-contact cultural origins. As a result, the nature of Aboriginal rights and title are mischaracterized as the Court justifies *prima facie* infringements on section 35(1) in the name of reconciling the prior occupation of Indigenous peoples in North America with ‘public interest’ objectives.² As argued in the second chapter, I have offered a criticism of this interpretation as part of the justifications for settler colonial society to continue its illegal expropriation of Indigenous lands and the erasure of Indigenous legal orders and modes of account-giving through what I identified as ‘the juridical logic of elimination’. Although this thesis has asserted that there is no convincing explanation as to how the Crown successfully laid claim to Indigenous territories given that many Indigenous nations never consented to the written terms of treaties, it has yet to explain why the Crown’s self-assertion to sovereignty assumes the subordination of Aboriginal rights and title, or that they suddenly vanish and are unable to be resurrected upon “surrender” within the settler juridical framework.³

¹ *R v Sparrow* [1990] 1 SCR 1075 [*Sparrow*]

² *R. v Gladstone* [1996] 1 SCR 1933 [*Gladstone*]; *Delgamuukw vs British Columbia* [1997] 1 SCR 942 [*Delgamuukw*]

³ *Smith v. R* [1983] SCJ No 39, [1983] 1 SCR 554

In this chapter, I suggest that the juridical logic of elimination in relation to the affirmation of Canadian sovereignty that is upheld by the Courts can be explained through a comparison of Eurocentric and Anishinaabe political ontologies. Whereas sovereignty justifies the remnants of theological absolutism and universality within a Eurocentric political ontology as a response to an imaginary chaotic and unordered ‘outside’, Anishinaabe political ontologies give rise to an ‘ecology of relations’ in which legal obligations are created between humans, the natural world, and other-than human actors. To outline this comparison, I will first define the concept of ‘political ontology’ through the works of Mario Blaser.⁴ Then, I will consider Carl Schmitt’s work on the notion of political theology prior to utilizing the works of Jens Bartelson⁵ to illustrate that rather than just relating to past theological concepts, sovereignty is a set of epistemic discontinuities within a series of Eurocentric and anthropocentric discourses that came to conceptualize sovereign power as a universal, absolute and individualized condition of political possibility, understood eschatologically as geared toward its reproduction in History as the Alpha and Omega of all political modern institutions. This ‘linear trajectory of sovereignty’ assumes its supremacy over other modes of political governance and related systems of knowledge, which explains the logic of elimination as discussed in the previous chapter. Next, in utilizing analysis of Phillipe Descola⁵ on animist and totemistic ontologies of many Indigenous peoples throughout the globe, I outline some of the characteristics within Anishinaabe *adizookaanag* (stories) that encompass more than just myth and metaphor but a set of relationships that inform the legalities of the Anishinaabeg as articulated through

⁴ Mario Blaser, “Ontology and Indigeneity: On the political ontology of heterogeneous assemblages” (2012) *Cultural Geographies* 21(1) 49.

⁵ Phillipe Descola, *Beyond Culture and Nature* (Chicago: University of Chicago Press, 2013).

kinship ties to the earth and treaty making. I then conclude by reflecting on two stories offered by Anishinaabe philosopher and knowledge keeper Basil Johnston⁶ that undergird these legal articulations.

II. THE LINEAR TRAJECTORY OF SOVEREIGNTY

As stated above, this thesis has yet to examine why the Supreme Court of Canada's acceptance of sovereignty remains unproblematized. The concept of sovereignty is hard to circumscribe – if not for its theoretical and sometimes metaphysical leaping reasonings, then for its elusive conceptual meaning. While Western political and legal theory has attempted to answer the question “what is sovereignty?” with generally inconclusive results, other questions emerge that ask how sovereignty is thought and spoken about. When such inquiries are brought to the forefront, one can better appreciate how sovereignty is intertwined and conditioned by the discursive fields of knowledge generated from a specific political ontology or worldview.⁷ That is, how people's assumptions about what is “real” regarding power and authority influences what knowledge may or may not be included in the construction of a concept like sovereignty.

According to Jan Vasina,⁸ the concept of a worldview “includes the views about the creation of the world, about the kinds of beings that are in it and their taxonomies, on its layout, and on its functioning.” Many times, discussions regarding worldviews lend themselves to philosophical inquiries about the nature of existence (ontology) and the structure/validation of knowledge (epistemology).⁹ Interestingly, Vasina asks his analysis

⁶ Basil Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976); Basil Johnston, *The Manitous: The supernatural world of the Ojibway* (Toronto: Key Porter, 1995).

⁷ Jens Bartelson, *A Genealogy of Sovereignty* (New York, NY: Cambridge University Press, 1995) at 2.

⁸ Jan Vasina, *Oral Tradition as History* (Madison, WI: University of Wisconsin Press, 1985) at 133.

⁹ David Marsh, Selen A. Ercan & Paul Furlong, “A Skin is Not a Sweater: Ontology and epistemology in political science” in Vivian Lowndes, David Marsh & Gerry Stoker (eds.) *Theory and Methods in Political Science, 4th ed.* (London, UK: MacMillian, 2018) 177.

on oral traditions and histories how an outsider can discover a worldview; for which he responds by suggesting one make inquiries into a group's religion or origin stories.¹⁰ This suggestion begs the question as to whether one can simply take inventory of one's religious beliefs or traditions of origin and arrive at a full understanding of an ontology. In the context of Indigenous research, Mario Blaser¹¹ reminds us that taking inventories of ontologies may reproduce on-going colonial relations. This colonization via the concept of ontology would operate by essentializing an 'Other' in ways that homogenizes the West and the rest of the world under the assumption there is only one universal progressive 'reality' toward political and cultural completeness. In other cases where 'culture' is simply switched out for 'ontology', a subject's reality is reduced to an instrument of identity politics which provides no justice for the entirety of their ontology.¹² Scholars have generally responded to these postcolonial critiques by taking multiple ontologies seriously. For example, Descola's¹³ extensive mapping of multiple ontologies refutes the Eurocentric and universalist assumption that there exists only one political reality with multiple perspectives of it. However, for Blaser, this presents yet another problem wherein the totality of all ontologies represents a meta-ontology that posits a replicated universal reality made up of multiple realities.¹⁴ Blaser's solution is in what he calls "worlding." Not to be confused with Martin Heidegger's concept of a similar term, worlding encompasses as a kind of storied practice that must be enacted to *make* reality rather than presuppose it as an

¹⁰ Vasina, *supra* note 7 at 133-4.

¹¹ Mario Blaser "Ontology and Indigeneity: On the political ontology of heterogeneous assemblages" (2012) *Cultural Geographies* 21(1) 49.

¹² *Ibid.*

¹³ Descola, *supra* note 4.

¹⁴ Blaser, *supra* note 10 at 52-3.

externally existing phenomenon. Thus, for Blaser, the reality-making enactment of storied practices is what he calls ‘political ontology’.¹⁵

The implications of this definition of political ontology are as Blaser suggests, “different stories imply different ontologies” and “stories being told cannot be fully grasped without reference to their world-making effects”.¹⁶ This means that in a legal context, territorial sovereignty cannot be determined by one overarching and universal narrative; nor can Indigenous oral legalities fit within the juridical confines of the western legal tradition.

Accordingly, there are always elements of arbitrariness taking shape in leaping metaphysical and ontological assumptions about what is perceived as the reality of politics (or its necessary conditions of possibility). Although there are other points of analysis to discuss the concept of sovereignty, the specific angle I wish to problematize here is the enduring combination of absolutist, universalist, anthropocentric and individualizing modes of understanding in Western canons of sovereignty which subsumed Indigenous understandings of alternative political and legal orderings as inferior and confined to their domestic realms. The set of assumptions and associated worldview I wish to problematize can best be resumed and criticized by examining Carl Schmitt,¹⁷ whose works will be briefly discussed below.

¹⁵ Blaser, *ibid*; See also, Mario Blaser, “Ontological Conflicts and the Stories of Peoples in Spite of Europe: Toward a Conversation on Political Ontology” (Oct 2013) *Current Anthropology* 54(5) 547 at 552-3.

¹⁶ *Ibid*.

¹⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005) [*Political Theology*].

a. *Breaking Borders: Sovereignty as knowledge*

Schmitt defines sovereignty as one “...who decides the exception”.¹⁸ This remark is often considered to be in opposition to constitutional theories on the modern state for its analysis on the liminal aspects of Law. Whereas liberal constitutional theories largely focus on defining the everyday legal norms that bind people to the Law rather than a divine entity or arbitrary power as the source of sovereignty, Schmitt argues that the sovereign is situated outside the application of a society’s legal norm largely because it needs to decide when an exception (or an existential threat to the state and a violation to its normally valid legal system) occurs. To Schmitt, the sovereign stands outside the existing legal system but also belongs to it or else the sovereign would not exist as such.¹⁹ Therefore, any outside force that could potentially change the sovereign or state is considered a threat. This definition of sovereignty, in which a clear boundary is established between the internal legal order and the chaotic outside, moreover, presupposes a ‘friend-enemy distinction’ that Schmitt considers to be the most irreducible unit of analysis for the political.²⁰ In other words, from Schmitt’s perspective, humanity’s political nature inherently causes people to make active decisions about who is a part of their community and who is not. Those considered a part of the group are identified as a friend, while those who are not are identified as an enemy. The dynamic of politics and the relationships therein are thus determined by this decision.

At first glance, applying Schmitt’s theory on Law and state sovereignty to Aboriginal and treaty rights cases may highlight how the Canadian judiciary interprets

¹⁸ *Ibid* at 5.

¹⁹ See also Khan, *Political Theology: Four new chapters on the concept of sovereignty* (New York, NY: Columbia University Press, 2011) at 44 who points out that this logic is premised on an Aristotelian assertion that a thing is “one thing and not the other”.

²⁰ Carl Schmitt, *The Concept of the Political: Expanded edition* (Chicago: University of Chicago Press, 2007) at 26.

sovereignty in relation to the prior occupation of Indigenous peoples in North America. For example, inspired from a Schmittian lens, the concern regarding the exclusivity of the Aboriginal right to fish commercially as deliberated upon in *Van Der Peet*²¹ has less to do with balancing priorities between user-groups than maintaining the subordinary boundaries of the current political and juristic order in stating possible exceptions to rules. To some extent, that may be the case when Chief Justice Lamer held that Indigenous peoples' oral traditions could stand before the court *if it remained cognizable to the Canadian judicial system*.²² Thus, an Aboriginal right with no perceived internal limit as characterized in *R v. Gladstone*²³ cannot be contained within the Canadian legal system and is deemed a threat to the supremacy of Crown sovereignty as the Aboriginal right originates from outside the discretionary power of the State. Consequently, the Canadian judiciary seeks to subordinate Indigenous legal regimes based on its ability conferred to it by the State to delineate the rules of exception. In fact, any Indigenous legal tradition that may be perceived as competing for the claim to decide upon an exception is perceived as an outside threat via a Schmittian "friend-enemy" distinction, and the judiciary's reaction is to circle back the justification of the Crown's absolute power to ensure the State's orderly stability or renewal.

In Schmitt's theory, sovereignty is associated with prior theological concepts associated with the political tradition of absolutism. For example, Schmitt claims that the modern theory of state is merely secularized theological concepts, not just in their historical development but also its systemic structure.²⁴ While this is important to highlight, it does

²¹ *R v Van Der Peet* [1996] 2 SCR 507 [*Van Der Peet*].

²² *Ibid* at 49.

²³ *Gladstone*, *supra* note 2 at para 2.

²⁴ Schmitt, *Political Theology*, *supra* note 16.

not exhaust the discursive elements that could generate the concept of sovereignty, which is important to elucidate because as will be discussed later, the political ontologies we can derive from such the concept of sovereignty cannot be reduced to the absolutist tendencies I am trying to engage as dominating and problematic. We can indeed find a diversity of political and legal strategies employed by First Nations, Inuit, and Métis peoples to articulate and maintain their legal orders as described in the first chapter without the Eurocentric concept of sovereignty. As such, this examination must involve tracing how the western concept of sovereignty is ‘created’ through time within various evolving discursive fields. Useful for pursuing this endeavor is the works of Jens Bartelson.²⁵

Bartelson offers a genealogy of sovereignty by examining three eras of Western history to show the ‘historically open, contingent, unstable’ relationship between the concept of sovereignty and the discursive configurations that make possible how sovereignty is known, thought, and spoken about.²⁶ Rather than giving sovereignty a definitive and absolute meaning, or explaining where it is situated in relation to the law, Bartelson argues that sovereignty and knowledge “implicate each other logically and produce each other historically”.²⁷ This relationship, he asserts, is a *parergonal* function of sovereignty, meaning it is frame-like: it is neither part of the picture nor the environment surrounding it.²⁸ Instead, sovereignty is a discrete delimitation of acceptable truths conditioned by discursive fields of knowledge. The focus for Bartelson is how the boundary is drawn, rather than the boundary itself as a condition of genuine Politics as is the case with Schmitt. Within this context, Bartelson examines the implications for

²⁵ Bartelson, *supra* note 6.

²⁶ *Ibid* at 5.

²⁷ *Ibid*.

²⁸ *Ibid* at 51.

knowledge about the state, power, and various kinds of authority throughout the Renaissance, the Classical Age, and Modernity to describe the volatile battles of interpretations within different logical spaces that give sovereignty its meaning. It is also within this context that I can highlight elements of universality and absolutism (as well as anthropocentricity) inherent in modern theories of sovereignty.

b. *The universalism of sovereignty before and during the Renaissance*

Bartelson begins his genealogy by outlining a general theory of the state that was conceptualized by the ‘logical conditions of possibility’ in theological, legal, and political texts during the Middle Ages and the Renaissance.²⁹ Contrary to popular hypotheses suggesting the international system arose from the Peace of Westphalia, Bartelson proposes that no such ‘system’³⁰ existed since the general theory of the state during the Renaissance could not distinguish what was *within* and *between* states in practice or in theory. Instead, the *Respublika Christiana* was considered a unified whole that did not presuppose an outside beyond an unknown heterogeneity, largely due to the Church understanding itself as the sole authority that determined every aspect of a person’s political and social being.³¹ Therefore, the cultural, ethnic and linguistic differences between groups were a secondary consideration for most philosophers as the ultimate task of the Church was to lead the faithful from their Earthly existence to salvation by seeking unity with the transcendental order. Kingdoms associated with Christian rulers were thus compared through analogies and comparatives but were seen as part of the same overarching Christian “State”. That is

²⁹ *Ibid* at 88.

³⁰ See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2003) at 9 for a definition of a system in the international relations context. Bartelson, *supra* note 6 at 88 argues that such a system did not yet exist until the emergence of a modern theory of sovereignty.

³¹ Bartelson, *supra* note 6 at 91.

not to say difference and identity was unrecognizable at the time; non-Christian societies especially posed a perceived threat to the stability of Christian values as evidenced by the many Crusades against Islamic beliefs in the southern European subcontinent.³² However, identity and difference within the supra-Christian State was in a reciprocal logical relation with the transcendent whole via the use of analogy and allegory within ecclesiastical narratives and stories called *exempla*. This means that the prevalent political ontology and its associate “regimes of truths” were articulated within a universalist framework in which *exempla* were key to the articulation of a deductive type of epistemic principles establishing the conditions of political organization.³³ These principles were solely deduced from theological assumptions established by Christian religious authorities, causing all legitimate power to be perceived as flowing from the Christian God downward.

In such cultural context, Bartelson points out that the conceptual antecedents to sovereignty were very much conditioned by the unresolvable claims to exclusive authority between ecclesiastical and lay power.³⁴ The continual conflict over political and legal axioms between the religious and secular powers eventually transposed theological concepts and symbols into secular ones, resulting in a christomimetic paradigm of rulership that transitioned the authority of God to the King as half human, half divine, and holding power only by the grace of God. Bartelson attributes this change to the reconceptualization of time brought about by the discovery of Aristotelian texts that connected the movement of physical bodies in space with the concept of continuous time.³⁵ Prior to the general

³² Riley-Smith J, “What Were the Crusades?” in *What Were the Crusades?* (Palgrave Macmillan: London, 1977) 11 at 11; Blades, L & Paik, C. “The Impact of Holy Land Crusades on State Formation: War Mobilization, Trade Integration, and Political Development in Medieval Europe”, (2016) *International Organization* 70(3), 551 at 551.

³³ Bartelson, *supra* note 6 at 100.

³⁴ *Ibid* at 92.

³⁵ *Ibid* at 97.

reception of Aristotle's *Physics*, time was bound to human experience as created by God rather than the cosmos, and therefore non-existent in the Eternal realm. As exemplified by Augustine writing in *Confessions*:

Thou hast made all time; and before all times Thou art, nor in any time was there not time... At no time, therefore, hadst Thou not made anything, because Thou hadst made time itself. And no times are co-eternal with Thee, because Thou remainest for ever; but should they continue, they would not be times.³⁶

The incorporation of Aristotle's works eventually caused theologians to split the difference between eternity and human time with the invention of *aeuum*, or sempiternal time which connoted immutability but also continuity.³⁷ The advent of the *aeuum* caused profound effects on western political ontology because concepts and objectives within the transcendent whole that were once previously perceived as transitory could be understood as continuous (or permanent in time). This additionally meant that sovereignty could be embodied in the figure of successive kings:

...the body politic could be accounted for as something ontologically separate from the existence of the ruler within it, yet as something continuous, transcending the life of the ruler in time and space. The symbols, concepts and insignia of rulership and authority could be depersonalized, deprived of momentary liturgical backing, and instead vested with sempiternal existence. The realm or body politic stood thus above the corrosive influence of transitory time; at this point, we witness the first steps toward a theory of inalienability, which implies a set of rights

³⁶ St. Augustine of Hippo, Joseph Green Pilkington, ed, *The Confessions of St. Augustine* (North Charleston, SC: Jazzybee Verlag, 2016.) at 155.

³⁷ Bartelson, *supra* note 6 at 97.

well separated from those of the individual king, and consequently, the notion of an impersonal Crown protected against alienation...³⁸

While sempiternal time separated the ruler from the kingdom, the kingdom was additionally brought down to earth from its heavenly place with an ascending theory of government. Highly influenced by Aristotle's *Politics*,³⁹ in which a political order stemming from natural forces and human reason ensured a ruler could not exist above the law or *polis*, the general theory of the state's source of power was inverted to the *legislator humanus* upward. Of course, this inversion was not without its ontological disputes between the well-established universalist theory and the nominalist newcomer contender. As Bartelson asserts, it is within this discursive space that the line between the inside and outside of the state begins to take shape.⁴⁰

For instance, Quintin Skinner⁴¹ explains how Italian Renaissance philosophers were suddenly faced with an 'outside' as France emerged as an individualized and increasingly homogenized nation-state that laid siege to Florence, Rome, and Milan during the late fifteenth century. Coupled with the so-called discovery of North America and political crises arising from the diminishing power of the Catholic church,⁴² theorists like Machiavelli, More, and Vittoria attempted to find meaning by grappling with what seemed like an irreducible and heterogeneous Otherness. Machiavelli responds by justifying the active de-legitimization of former political institutions to establish new ones;⁴³ More by

³⁸ *Ibid* at 98.

³⁹ Aristotle, *The Politics and the Constitution of Athens*, Stephen Everson, trans, (Cambridge, UK: Cambridge University Press, 1996) at 13.

⁴⁰ Bartelson, *supra* note 6 at 103.

⁴¹ Quintin Skinner, *The Foundations of Modern Political Thought, Vol. 1: The Renaissance* (Cambridge, UK: Cambridge University Press, 1978) at 113.

⁴² *Ibid* at 114.

⁴³ Bartelson, *supra* note 6 at 113; Skinner, *supra* note 40 at 119.

arguing for the isolation of city-states and imposing conformity on its citizens;⁴⁴ and Vittoria with the encirclement and assimilation of Indigenous peoples.⁴⁵ Despite the differences in each theorist's approach, Bartelson illustrates that the overarching preoccupation of these authors was to bring the heterogenous 'outside' into the Christian universal whole. Even so, these attempts failed following the emergence of a theory of sovereignty in which the principles of state individualization and inter-state politics would eventually give rise to the international system.

c. *The classical age and the concept of absolute sovereignty*

As noted above, the discovery of ancient Greek literature and philosophy during the Renaissance stimulated the rise of a universalist and deductive understanding of reality (and politics) guided by transcendental principles ordering the world. The "first principles" (or *Archè*), which were denoted by ancient Greek philosophers like Pythagoras, Plato and Aristotle as the underlying principles or substance of all things, were accessible by the use of proper reason.⁴⁶ The incorporation of Ancient philosophy was a significant epistemic challenge for Christian theologians such as St. Augustine or Thomas Aquinas due to their religious belief that such *Arché* could only be known to God and that only Grace, not reason, led born-sinners to the gift of salvation.⁴⁷ Eternal principles assumed by the ancient Greeks to be perceptible to human reason (i.e. Forms, Numbers) were considered

⁴⁴ Bartelson, *supra* note 6 at 124-5; Skinner, *supra* note 40 at 256.

⁴⁵ See also Antony Anghie, *Imperialism, Sovereignty, and the making of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 22 who frames encirclement and assimilation as the Spanish justification of war against the Indian.

⁴⁶ Frederick Copleston, *A History of Philosophy, vol. 1: Greece and Rome* (London: Burns Oates & Washburne, 1951) at 159. See also David Bostock, *Aristotle Metaphysics: Book Zeta and Eta* (Oxford, UK: Oxford University Press, 1994) for an overview of *Arché* and how Ancient Greeks reasoned they were perceptible via human reason and sense.

⁴⁷ Frederick Copleston, *A History of Philosophy, vol. 2: Medieval Philosophy* (London: Continuum, 2003) at 284-5.

blasphemous and suspiciously pagan in origins since God created all things by virtue of his Will. However, in the sphere of politics, universalist elements derived from the philosophies of mainly Plato and Aristotle were gradually incorporated into the Christian theological doctrines regarding the right constitution of the Christian polis or kingdom as evidenced by the works of Aquinas.⁴⁸ Once these principles were established, the assessment of Christian politics or the right disposition of Christian kingdoms and sovereignty operated along allegory and analogy as best exemplified in medieval *exempla*.

The merging of ancient elements of philosophy, cosmology and politics with Christian worldview created several epistemic transformations and challenges during the Renaissance and beyond. Bartelson offers an interesting example of such an epistemic shift with the emergence of a *mathesis universalis*, or a general science of order based on *Arché* applicable to any and all observable objects (hence the universality of the science).⁴⁹ According to Bartelson, the *mathesis* created an epistemic crisis during the Classical Age between what was conceived during the Renaissance as a consubstantial relationship between an object and its linguistic signifier under God as their ultimate guarantor, and a new understanding of this relationship in which the two are separated and no longer guaranteed by an overarching divine entity.⁵⁰ In other words, language and objects in the observable world no longer belonged to God, but were respectively rearranged into a binary relationship in knowledge as ‘subject’ and ‘object’. This epistemic reorganization in the

⁴⁸ Dino Bigongiari, *The Political Ideas of St. Thomas Aquinas* (New York, NY: The Free Press, 1981) at vii.

⁴⁹ Bartelson, *supra* note 6 at 144; See also Paul Bockstaele, “Between Viète and Descartes: Adriaan van Roomen and the *Mathesis Universalis*” (2009) *Arch Hist Exact Sci* 63 433 for an analysis on the development of the concept of a universal mathematics or science.

⁵⁰ Bartelson, *supra* note 6 at 151.

Classical Age is what Bartelson labels a ‘grid of representation’, due to the analyzing function of language as the representative of things.⁵¹

The artificiality and contingency that characterized the ways in which “reality” was now perceived through linguistic signifiers and not a transcendent deity, forced intellectuals to scramble for a solution to secure not only their apprehension of God, nature, objects, and order, but also the hierarchization of political experience. For example, Thomas Hobbes⁵² asserted that a sign must represent what it signifies to have meaning, and the connection between both is reinforced through speech. For Hobbes, pure thought existed independently of language and the world. This differed from Medieval and Renaissance thought, in which sign and signifier existed outside of knowledge and belonged to God only. However, this Classical reordering created the problem of duplication because according to Bartelson, “the verbal sign must represent [the signifier] but that representation... must be represented within” the sign if language can properly express thought.⁵³ The duplication within the grid of representation posed a dilemma for classical theorists because language not only became the grid through which objects could be analyzed, but language itself had to also be analyzed from the standpoint of its performative and analyzing functions. In other words, within the grid of representation, language simultaneously occupied two positions. First as the grid of analysis, but also the object to be analyzed. This dual occupation was presented to theorists as the classical ‘chicken or egg’ dilemma: did language create understanding or vice versa?

⁵¹ *Ibid* at 145.

⁵² Thomas Hobbes, *Leviathan*, C.B Macpherson, ed, (London: Penguin Books, 1985) at 108-9.

⁵³ Bartelson, *supra* note 6 at 146.

This question posed to classical theorists resulted in two main solutions. The first theoretical option was a contractual solution that presupposed an already agreed upon meaning of things. For example, in his account of speech and obligations, Samuel Pufendorf⁵⁴ asserted that speech was only understood through a tacit agreement between speakers wherein various signifiers were pre-assigned to corresponding words. The second solution posited that the genesis of language was the outcome of a person's agency granted to them by nature and its material preconditions to make signs. As Hans Aarsleff⁵⁵ points out, theorists like Étienne Bonnot de Condillac imagined the construction of language as a natural progression from universal gestures towards a system of particular instituted signs. In Bartelson's view, neither solution addressed the dilemma properly because both resolutions were tacitly premised on a secular principle that reproduces the divine gesture of creation *ex nihilo*, which breaks the chain of causation by leaping to theological dogma.⁵⁶ This reordering of the universal order was required by classical theorists to stabilize the taxonomic classification needed for knowledge production within the *mathesis*. This "quest for epistemic certainty",⁵⁷ as Bartelson puts it, had numerous consequences for concepts such as the state and sovereignty; most notably it generated an individualization of the state within which sovereignty became a secularized deification of absolute authority deemed necessary for orderly politics to be maintained.

This is exemplified in Jean Bodin's theory on sovereignty, which highly influenced the thinking of other political thinkers such as Pufendorf and Hobbes. Bodin characterized

⁵⁴ Samuel Pufendorf, *Law of Nature and Nations: abridg'd from the original*. Vol II at 3.

⁵⁵ Hans Aarsleff, "Pufendorf and Condillac on Law and Language" (2011) *Journal of the Philosophy of History* 5(3) 308 at 317.

⁵⁶ Bartelson, *supra* note 6 at 149-50.

⁵⁷ *Ibid* at 152

the sovereign as “the absolute and perpetual power of the commonwealth”.⁵⁸ For Bodin, the sovereign was the highest form of power bound only to divine and natural laws, whose authority was exclusive only to the ruler. Bodin recognized that sovereignty could embody different forms of government, although he favored an absolute monarchy because according to Julian Franklin,⁵⁹ Bodin hoped that such absolutism could mitigate the religious wars taking place between French Protestants and the Catholics. Nevertheless, authority was not shared with the sovereign’s subjects or any outside agent, and therefore indivisible.⁶⁰ Thus, from Bodin onward, the sovereign was placed *above* the law at the highest point in a hierarchical ordering as the *only* legitimate source of power in the state. For example, Hobbes created a set of indivisible rights for the sovereign that makes its authority inaccessible to its subjects while justifying any means required to secure the peace and defense of the Commonwealth.⁶¹ Meanwhile, Pufendorf consolidated human reason with Divine Law to characterize sovereignty as the ‘sacrosanct and inviolable’ power that determines all moral acts within the state in the interest of its subjects.⁶²

This popularized absolutist mode of thinking certainly echoes German political Theorist Carl Schmitt’s assertion positing that “the monarch is identified with God in the state theory of the seventeenth century” who was postulated as a “personal unit and final creator”.⁶³ More precisely, sovereignty in the Classical Age became identified with the

⁵⁸ Jean Bodin, *Six Books of the Commonwealth*, MJ Tooley, trans. (New York, NY: Barnes & Noble, 1967) at 25.

⁵⁹ Julian H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge, UK: Cambridge University Press, 1973) at 41.

⁶⁰ Preston T King, *The Ideology of Order: A comparative analysis of Jean Bodin and Thomas Hobbes* (London: Allen & Unwin, 1974) at 127.

⁶¹ See generally Thomas Hobbes *supra* note 51, ch. 18.

⁶² David Boucher, “Resurrecting Pufendorf and Capturing the Westphalian Moment” (2001) *Rev Intl Studies* 27(4) 557 at 569; Benjamin Mueser, *Negotiating Territorial Sovereignty: Pufendorf to Vattel* (Political Science, Columbia University, 2021) [unpublished] at 136.

⁶³ Schmitt, *Political Theology*, *supra* note 16 at 20.

individual ruler or King, while also being vested in the “second body” of the State which bears god-like qualities such as omnipotence, immortality and the incapacity to sin. As stated above, the state and sovereign were brought to the utmost hierarchical point, establishing an absolutist form of power and authority, making it both inaccessible to ordinary reason and basically immune to criticism. Interestingly, king Louis XIV’s apocryphal statement ‘*L’etat c’est moi*’, reflects famously the inseparable link between ruler and state in the age of absolutism, while his statement at the end of his life stating: ‘*Je meurs, mais l’État demeurera toujours*’, indicates the continuity of the embodiment of state sovereignty despite his own passing.⁶⁴

Such epistemic rearrangement produced not only an absolutist mode of sovereignty based on Christian theological elements; it moreover generated a new and autonomous field of knowledge with the emergence of an assumed universal mathematics during the Renaissance, which allowed for the calculation the ruler’s capacities (and those of his subjects) in what gradually emerged as *raison d’état*.⁶⁵ In parallel fashion, the generation of political knowledge eventually moved from the art of offering moral and theological advice to Kings (as was the case with Machiavelli, More, and Vittoria), towards an independent “science of states” within a grid of representation which merged its associated individualization with lingering Christian theological assumptions in order to justify both its foundation, supremacy and perennity. From there, the discourse on state consolidation and improvement began to gain traction, which allowed foreign policy to take primacy over

⁶⁴ Although “I am the state” is an apocryphal quote, the Sun King is also known for articulating that the State can do no wrong, which also exemplifies the sovereign’s immunity to criticism. See Lynn, J.A., *The Wars of Louis XIV 1667-1714* (London: Routledge, 2013) at 27; Philippe de Courcillon Dangeau, *Mémoire sur la mort de Louis XIV* (Paris, 1885) at 24.

⁶⁵ Bartelson, *supra* note 6 at 154.

domestic concerns as two separate discursive fields hitherto unknown during the Renaissance. As Bartelson writes:

The domestic sphere is constituted as a ‘part’ of a bigger ‘whole’; a part whose identity must be carefully monitored and safeguarded from outside intrusions. Without a ‘foreign policy’, there can be nothing domestic, since the former has as its task precisely to define the latter by *domesticating* what was initially *foreign* to it [my emphasis added] ... That is, foreign policy is to classical analysis of interest and sovereignty is as much a policy for dealing with a traumatic past, as it is a policy for dealing a spatial outside.⁶⁶

The traumatic past Bartelson refers to is the numerous regional wars waged throughout continental Europe and Britain throughout the late-sixteenth and early-seventeenth centuries between “the forces of secular statecraft embodied in the ideology of Reason of State and the fundamental principles of Christianity”.⁶⁷ These conflicts in need of resolution between Western states moreover emerged with the attempted “domestication” of a spatial outside through imperial conflicts, in which Indigenous societies and nations were gradually incorporated under juridical orders working to subordinate their existences under an extension of such absolutist understanding of sovereignty.

We can later see an example of this logic in the Marshall Trilogy, in which the decision to classify Indigenous peoples as ‘domestic, dependent nations’⁶⁸ can be viewed as echoing the absolutist framework previously discussed. This is especially the situation when Chief Justice Marshall’s reasoning was premised on the assertion that “all institutions

⁶⁶ *Ibid* at 180.

⁶⁷ *Ibid* at 154.

⁶⁸ *Cherokee Nation v Georgia* [1831] 30 US 1 at 17

recognize the *absolute* title of the Crown” despite Indigenous peoples' prior occupation in North America.⁶⁹ Additionally, the argument could be made that the Canadian judiciary also adopted the classical mode of absolute sovereignty in its interpretations of Aboriginal and treaty rights. To some it did by utilizing sovereignty to justify the settlement of foreign populations to satisfy regional or economic interests. As noted in the first two chapters, such justifications presupposed the assumption that Indigenous peoples were inexplicably subsumed under the authority of the Crown. Regardless, it is important to note that the discourse on sovereignty continued to evolve in the modern era which conditioned the possibilities of intelligibility in ways that assume all societies capable of ‘maturing’ take the same ‘evolutionary’ path to statehood once the chaotic ‘outside’ is domesticated. The remainder of this section on sovereignty now problematizes this assertion before examining alternative modes of knowing and being via an Anishinaabe political ontology.

d. *Modern sovereignty and Aboriginal rights*

As noted above, Bartelson suggests that the emergence of a *mathesis universalis* during the Classical Age in part rearranged the conditions of intelligibility pertaining to sovereignty.⁷⁰ Whereas in the Renaissance, the Christian God transcendently unified the relationship between language and the world, sign and signifier were differentiated into a subject-object binary in the Classical Age as a solution to an epistemic crisis regarding the order of the universe. This crisis, spurred by the religious and civil wars following the Reformation, were also exacerbated by the replacement of Renaissance knowledge that rested upon ecclesiastical *exempla* with classical knowledge constructed in a grid of

⁶⁹ Johnson v M’Intosh [1823] 21 US (8 Wheat.) 543 at 588

⁷⁰ Bartelson, *supra* note 6 at 144.

representation.⁷¹ In other words, political discourse shifted in a parallel fashion from the epistemic realm of analogies between Christian kingdoms within an overarching universal Christian state, to a more atomistic theory of sovereignty leading to its ontological breakdown as independent units. Within such a grid of representation, Bartelson argues that intra-state activities could thus be measured and compared to other states. As stated prior, the usage of such a grid would allow independent calculations about state's interests, reinforcing its gradual individualization. Further, the notion of *raison d'état* became associated with the conceptualization of the State as the predominant ordering principle of all states.⁷² Rather than a general theory of a Christian state governed only by the christomimetic ruler (in which "infidels" are the ultimate outcasts), the *mathesis universalis* rearranged political knowledge by merging newly gained itemization capacities with theologically-derived considerations mimicking God of an absolute order wherein the sovereign remained above the law and beyond criticism.

Insofar as the nascent modern state maintained relationships with anything "other" than itself, the negotiation of its sovereignty (both internally and externally) thus operates through the secularization of Christian universality and teleological assumptions about the world and societies via a political ontology that favors European concepts and practices as the yardstick to civilizational progress.⁷³ These assumptions were premised on classical theories on sovereignty that often leapt metaphysically into theological dogma to justify an absolutist mode of authority viewed as guaranteeing order, civilization, political predictability, and continuity. Outside the orderly environment that would give rise to the

⁷¹ *Ibid* at 139.

⁷² *Ibid* at 181.

⁷³ *Ibid* at 187.

modern state, the political landscape is conversely perceived as chaotic, anarchic, and lawless by default, which is assumed to be in need of domestication by the creation of a ‘society of states’.⁷⁴ As for “inside” the civilizational environment, each individualized state would comprise the specific cultural forces in need to be disciplined and geared to become objects of statist governance (via their itemization). The conception of historicization is therefore understood and reinforced through the lens of a statist-political evolutionism wherein the vehicle of modern sovereignty is perceived as the supreme guarantor of cultures and societies found necessarily inside their matrix of intelligibility. In short, the perceived need for totalitarian political structures inherited from absolutist political theories in the Classical era made its own cultural assumptions about power and authority practically invisible (or at least assumed to be self-evident) within the modern state.⁷⁵

As such, the concept of modern sovereignty gradually became both the new *Omnes* (Universal) and *singulatim* (individualizing) organizing principles of modern politics, emerging both as the ultimate condition of possibility for what is conceived as the desirable apex of all “civilized” political life.⁷⁶ In other words, it was assumed that all ‘maturing’

⁷⁴ See Heidi K. Stark, “Criminal Empire: The Making of the Savage in a Lawlessland” (2016) *Theory and Event* 19(4) 1 for how the spaces outside of the ‘civilized’ state were constructed as lawless and savage to justify the dispossession of Indigenous lands in the United States and Canada. See also, William Womack, “Guillaume Raynal and the Eighteenth-Century Cult of the Noble Savage”, (Fall 1972) *Bulletin of the Rocky Mountain Modern Language Association* 26(3), 98 for an explanation as to how early-modern theorists reinforced a dichotomy between civility and savagery by fetishizing African and North American Indigenous peoples as docile but noble.

⁷⁵ Michel Foucault speaks to this in one of his lectures where he elucidates how the politician’s objective in ancient antiquity was to ‘weave the fabrics’ of different virtues and competing temperaments for the sake of unity, which becomes an ‘art’ through the emergence of *raison d’état*. Later, the introduction of the police (as a governmental technology of statist intervention rather than an institution operating within the state) establishes the relations between people based on the operating principles of the state, thus normalizing or invisibilizing them. For Foucault, this is what makes the state simultaneously total (universal) and individual. See Michel Foucault, “Omnes and Singulatim: Towards a Criticism of Political Reason” in S. McMurrin, ed, *The Tanner Lectures on Human Values*, Vol 2, (Utah, USA: University of Utah Press, 1981).

⁷⁶ *Ibid.*

states would inevitably embody an indivisible and atomistic type of sovereignty as the vehicle of collective subjectivity, while disciplining pre-existing societies now made “governable” within individualized states. Once captured, pre-existing societies were subjected to an entrepreneurial governmentality leaving only intact the political vehicle of Modern sovereignty while relegating other political or legal forms of power to the domain of ‘culture’.⁷⁷ Chapter 2 of this thesis is dedicated to illustrating this point. Such a dominant worldview and societal mode of organization also provided the immanent conditions of (de-)justification for *particular* nations or states to join and participate in the realm of the *inter-national*⁷⁸ political system. The experience of historicity is thus increasingly casted through the mold of international relations along an evolutionary continuum that basically divides human societies between those that would have reached such political “maturity” and others not yet there or simply incapable of doing so.⁷⁹ This so-called “maturity” which would circularly be confirmed along the totalitarian capacities of modern states to embody and retain God-like qualities of supreme authority, similar to the absolutism found in the Classical era of sovereignty. This modern version of sovereign power would grant authority over pre-existing societies now designated as the state’s populations, thereby completing its project of domesticating the ‘outside’.

⁷⁷ Entrepreneurial governmentality is the rationality of governments that direct subjectivity and identity towards (neo)liberal ends or objectives to ensure state functions or operations within the global economic system. See, Mitchell Dean, *Governmentality: Power and rule in modern society*, 2nd ed. (Los Angeles, CA: Sage, 2010) at 142; Nikolas Rose, *Powers of Freedom: Reframing political thought* (Cambridge, UK: Cambridge University Press, 2004) at 142.

⁷⁸ A better term for this system might be inter-sovereign rather than ‘inter-national’.

⁷⁹ See e.g., Martti Koskenniemi, *The Gentle Civilizer of Nations: The rise and fall of international law 1870-1960*, (Cambridge, UK: Cambridge Press University, 2009) at 127-132 for an analysis of the Berlin Act played a significant role in distinguishing between non-Europeans the differing degrees of ‘civilization’ to deny the same legal status of statehood to African Indigenous societies. See also, Elizabeth Heath, “Berlin Conference of 1884-1885” in Henry L. Gates and Kwame A. Applah (eds.) *Encyclopedia of Africa* (Oxford, UK: Oxford University Press, 2010) for the political-economic conditions that brought about the Berlin Conference.

From these insights, we are in a better position to appreciate some of the cultural particularities that have shaped the concept of modern sovereignty in reproducing the totalitarian and individualizing God-like qualities we see informing the Statist political configurations since the Renaissance onward. One of the consequences of the propagation and adoption of such political ontology has been to depict all pre-existing political systems as backward, unstable, incomplete, or uncivilized. Societies considered to be ‘uncivilized’ either required the protection of the more civilized states or were unable to possess Title over their own territories. In fact, this dichotomization between civilized and savage states undergirded international doctrines like *Terra Nullius* and the Doctrine of Discovery that justified colonial expansion and settlement in domestic jurisdictions well into the late 19th and early 20th centuries. This is evidenced in *Re: Southern Rhodesia*,⁸⁰ wherein the Privy Council asserted that:

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.

As discussed in the second chapter, the Doctrine of Discovery was domesticated in American jurisprudence to reduce the political and legal autonomy of Indigenous nations in the Marshall trilogy. In Canada, *St. Catherine’s Milling and Lumber Company*⁸¹ was

⁸⁰ *Re Southern Rhodesia* (60) (1919) AC 211 at 233-4.

⁸¹ *St. Catherine’s Milling & Lumber Co.* (1887) 13 SCR 557.

premised on Social Darwinian theories. As Kent McNeil⁸² illustrates, the trial judge in *St. Catherine's* denied the existence of Indian title to the Saulteaux on the basis that Saulteaux societies were perceived to be in the 'wild and primitive' category of the savage-civilized spectrum. Although the Privy Council avoided the racist phrasing of the trial judge, it nevertheless accepted in part the assertion that Indian tribes possessed no underlying legal interest in their lands.⁸³ As these cases indicate, the concept of sovereignty in its modern iteration was in part consequential to the hierarchical scaling of societies between savagery and civilization, which denied the political and legal autonomy of those considered to be on the 'low' category of the spectrum.

By the mid-twentieth century, the doctrines that justified colonial expansion and settlement were eventually rejected internationally and in various domestic jurisdictions. In 1979, *terra nullius* was repudiated by the International Court of Justice.⁸⁴ The Privy Council also distanced themselves from the racist assumptions in Social Darwinism in *Mabo v. Queensland*⁸⁵ by partly rejecting the decision made by Council in *Re: South Rhodesia*. However, as Richard Spaulding⁸⁶ illustrates, although *terra nullius* was never explicitly adopted in Canada, it nevertheless entered Canadian jurisprudence via the doctrine of continuity. For example, *Baker Lake* created a legal standard in which Inuit had to prove their ancestors were organized into distinct societies to make a claim to Indian title, which

⁸² Kent McNeil, "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s" (1999) *JOW* 31(1) 68 at 73.

⁸³ The Privy Council did acknowledge the existence of "a personal and usufructuary right" to Saulteaux lands, but as the term 'usufructuary' indicates, that right was contingent on the Crown's benevolence. No other sources of Indian Title were considered beyond the provisions of the Royal Proclamation. See *ibid* at 77.

⁸⁴ Richard Spaulding, *Doctrines of Dispossession: A critical analysis of four rationales for the denial or extinguishment of Aboriginal rights in Canada* (1996) Prepared for the Royal Commission on Aboriginal Peoples.

⁸⁵ *Mabo v Queensland (No. 2)* [1992] HCA 23, (1992) 171 CLR 1.

⁸⁶ See, Spaulding, *supra* note 83 at 113. See also John Borrows & Leonard Rotman, *Aboriginal Legal Issues Cases, Materials and Commentary*, 5th ed (Markham, ON: NexisLexis, 2018) at 99-100 who discuss the fact that Aboriginal rights remained in place in British law through the Doctrine of Continuity.

was then applied to all First Nations in subsequent cases.⁸⁷ This shows, aside from the insensitivity to the distinction between Indigenous groups in what is currently called Canada, the eventual formal rejections of racist assumptions embedded in previous international and domestic law were mere transformations into new doctrines and legal standards. *Baker Lake* can be viewed as instrumental in adoption of the continuity doctrine in Canadian jurisprudence.⁸⁸ As explained in the second chapter, the doctrine of continuity as utilized in the *Van Der Peet* trilogy contributes to a juridical logic of elimination, reinforced by the Supreme Court of Canada's unproblematic assertions of Crown sovereignty over Indigenous peoples' lands.

Thus, the cultural elements that have informed and shaped the metaphysical and theological assumptions we still find at the concept of Modern sovereignty has the greatest impact on the Canadian judiciary's interpretation of Aboriginal and treaty rights. As we have illustrated in chapter 2, the public interest objectives that justify the *prima facie* infringements on section 35(1) as espoused in the *Van Der Peet* trilogy are epistemically embedded within the modern discourse on sovereignty. Further, the processes of historicization constructs a savage-civilized dichotomy of societies that places Indigenous legal knowledges at an anachronistic point in time, which not only mischaracterizes alternative modes of political relationships and orderings (as explored in the second

⁸⁷ In fact, this test was established based on Justice Hall's phrasing in *Calder et al. v Attorney General (British Columbia)* that "...when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries." See *Hamlet of Baker Lake v Canada (Indian Affairs and Northern Development)*, 1979 CanLii 2560 (FC). See also, David W. Elliot "Baker Lake and the Concept of Aboriginal Title" (Dec 1980) *Osgood L J* 18(4) 653-663.

⁸⁸ This is inherent in the four-step standard established in *Baker Lake*, *supra* note 86. First the plaintiff must show that they and their ancestors were members of an organized society. Second, the organized society occupied the specific territory in question. Third, that occupation must be exclusive to other societies. Lastly, the occupation was an 'established fact' at the time of English assertions to sovereignty. These requirements were already problematized in the second chapter in the review of *Van Der Peet*. See Elliot, *supra* note 86 at 657-8.

chapter) but justifies the Crown's perpetual subjugation of Indigenous legal knowledges. This realization begs the question regarding the impacts that can carry the starting point of different cultural representations; more specifically, the notion such as conflict resolution and the negotiation of authority. In this case, I suggest that exploring the metaphysical elements inherent in Anishinaabe political ontologies and their transmission via storytelling traditions inform what might well be an alternative understanding of the concept of political power.

III. A METAPHYSICS OF ANISHINAABE BEING

The previous section illustrated how the concept of sovereignty on which Canadian Courts rely has been conditioned by a specific epistemic and cultural trajectory based on ontology assumptions premised on a temporally oriented universalism and absolutism. The universalist framework that gave rise to an absolute order of things eventually set the linear trajectory for the historicization of humanity, society, and the state with definitive origin and end points. Such an ontological orientation created clear demarcations between an 'inside' and 'outside' state lines within western discourse, which then has nourished dichotomies like the 'savage-civilized' by which European or White supremacy was then justified. Phillippe Descola,⁸⁹ in his anthropological analysis of the relationship between 'culture' (as the signifier of human activity) and 'nature' (as everything else), shows that not only is the former differentiated from the latter within Western ontology, but this dichotomization is a very recent phenomenon. Instead of existing as a hallmark to human experience, the cultural separation from nature is a kind of variance from the rest of the world that maintains a similar worldview wherein culture and nature are intertwined. From

⁸⁹ Descola, *supra* note 4.

this insight, Descola produces a framework of four ontologies to account for the ways cultural groups around the world – including the Ojibwe of the Great Lakes – relate to nonhuman beings. These ontologies include animism, totemism, naturalism, and analogism.⁹⁰

This section explores both animism and totemism to illustrate how the legal properties within Anishinaabe stories contain more than “an air of reality”,⁹¹ which Justice Lambert in the *Delgamuukw* trial claimed could be the threshold of admissibility for the oral tradition in Aboriginal and treaty rights cases. Animism, if framed as an ontology, can explain two components to Anishinaabeg stories. The first is the relationships Anishinaabeg hold strongly with animals, plants in which humans share an essence inherent in all things, separated ontologically by one’s own corporality.⁹² The second component is the metamorphic ability of animals and medicine men as a way of relating to another being as they see themselves.⁹³ However, instead of positioning totemism as an ontology or cosmology, it can be suggested that totemism also explains the political and juristic orders of the Anishinaabeg which stem from an animist political ontology. This assertion is based on my understanding of Basil Johnston’s teachings in *Ojibwe Heritage*⁹⁴ and other publications. In reconfiguring Descola’s framework, I can position Anishinaabeg stories as the epistemic link between the animist ontology and totemist orders, thereby legitimizing Anishinaabeg stories as a valid source of law.

⁹⁰ See generally, *ibid* at 129 - 231.

⁹¹ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 53; *Delgamuukw v British Columbia*, 1993 CanLii 4516 (BC CA) at 889.

⁹² Descola, *supra* note 4 at 132.

⁹³ *Ibid.*

⁹⁴ Basil Johnston, *Ojibwe Heritage* (Toronto, CA: McClelland & Stewart, 1976)

a. *Animism as ontology*

Despite its connotations in anthropology as a simple religion and a failed epistemology,⁹⁵ Descola suggests that ‘animism’ is an ontological orientation whereby humans attribute to nonhumans “an interiority identical to their own”.⁹⁶ This shared interiority of all beings is what gives nonhuman entities anthropomorphic characteristics such as a consciousness and a set of social norms or codes of conduct like ones similarly established by human beings. In most cases, an internal material is assumed to link all organisms together, separated only by the physical forms they take on in the world, which is a condition and result of their respective diets and modes of reproduction.⁹⁷ In other words, human and non-human entities are differentiated by their corporeal forms and modes of behaviors that are prompted by their physicalities. Thus, discontinuity is introduced into an animist universe at the physical level wherein humans and non-humans possess the same cognitive, linguistic, and social capabilities because of a shared interiority. Yet, as Descola notes, animist societies tell numerous stories that explain the circumstances that led to the differentiation in the respective physical forms of plants, animals, and humans.⁹⁸ In Anishinaabe *dibaaJimowinan*, these changes often occur because of interactions between humans and other beings.

For example, Basil Johnston⁹⁹ tells of a story of when men and women were helpless to the forces of nature, surviving only by the benevolence of other animals who

⁹⁵ Nurit Bird-David, “‘Animism’ Revisited: Personhood, Environment, and Relational Epistemology’ (1999) *Current Anthropology* 40(1) 67; Gary Harvey, *Animism: Respecting the Living World*, (South Australia: Wakefield Press, 2005) at 3; Rane Willerslev, “Taking Animism Seriously, but Perhaps Not Too Seriously” (Dec 2013) *Religion & Society* 4(1) 1.

⁹⁶ Descola, *supra* at 4 at 129.

⁹⁷ *Ibid* at 116.

⁹⁸ *Ibid* at 132.

⁹⁹ Johnston, *Ojibwe Heritage*, *supra* note 93 at 33.

could not only comprehend the utterances of the Anishinaabeg but met in council with one another to collectively decide what to do when the Anishinaabeg disrespected animal-kind. Heidi Stark,¹⁰⁰ who examines the articulations of Anishinaabe nationhood through treaty-making, incorporates into her analysis a story about Nanabush who transforms into a rabbit to steal fire for the Anishinaabeg by wearing the fire on its coat. For Stark, the story informs not only an Anishinaabeg political discourse, as will be discussed below, but also provides an ontological narrative. It moreover offers an explanation as to why certain rabbits are brown in the summer and white in the winter.¹⁰¹ Although both stories illustrate “the emergence of a natural discontinuity from an original cultural continuum”, the discontinuity does not resemble the natural order within western ontology since the speciation of organisms did not destroy or make less the subjective existence, reflective consciousness, or intentionality of each being.¹⁰² Rather, they continue to live in accordance to the norms and cultures that each group of beings’ physicality allows.

What Descola calls norms and cultures of nonhumans is what Johnston calls the Great Laws of Nature that were bestowed on all things and creatures by *Kitche-Manitou*.¹⁰³ In all its assumed likeness to Western monotheism or natural law, Johnston’s reflection on the word *manitou* illustrates that the Great Laws of Nature are more practical than ideological. As Johnston writes in *The Manitous*:¹⁰⁴

The wayfarers’ and missionaries’ misconceptions about Anishinaabae life were drawn from their observations of aboriginal ceremonies and language.

¹⁰⁰ Heidi Kiiwetinepinesiik Stark, “Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada” (Spring 2012) *American Indian Q* 36(2) 119.

¹⁰¹ *Ibid* at 121.

¹⁰² Descola, *supra* note 4 at 132.

¹⁰³ Johnston, *Ojibwe Heritage*, *supra* note 93 at 13.

¹⁰⁴ Basil Johnston, *The Manitous: The spiritual world of the Ojibwe* (New York, NY: HarperCollins, 1995) at 1-2.

One such major misconception was related to the Anishinaubae notion of God. The chief cause of the misunderstanding was the term *manitou*, which from the beginning was interpreted to mean only spirit. Naturally, this narrow interpretation of the term distorted the essential truth of what the Anishinaubae people meant...

Thereafter, whenever an aboriginal person uttered the word *manitou*, Western Europeans thought it meant spirit. When a medicine person uttered the term *mantiouwun* to refer to some curative or healing property in a tree or plant, they took it to mean spirit. When a person said the word *manitouwut* to refer to the sacrosanct mood or atmosphere of a place, they assumed it meant spirit. And when a person spoke the word *mantiouwih* to allude to a medicine person with miraculous healing powers, they construed it to mean spirit...

But most aboriginal people understood their respective languages well enough to know from the context the precise sense and meaning intended by the word *manitou* or any of its other derivatives...

Therefore, when the Anishinaubae people predicted the term *manitou* of God, they added the prefix “Kitchi” meaning great. By this term they meant ‘The Great Mystery of the supernatural order, one beyond human grasp, beyond words, neither male or female, not of the flesh’... What little is known of Kitchi-Manitou is known through the universe, the cosmos, and the world.

The major difference from the western monotheistic God and the Anishinaabe’s Great Mystery is rather than a supernatural being who resembles man capable of willing the universe *ex nihilo* into existence and setting it into motion, the Great Mystery simply implies the greater intricacies of the world as perceived through human senses.¹⁰⁵ Of course, this can be taken as the naturalism which defines the worldview of the ancient Greeks who extensively relied on human rationality to explain the universe. We however

¹⁰⁵ Johnston, *Ojibwe Heritage*, *supra* note 93 at 6.

find purely incorporeal beings that are integrated in the Anishinaabe cosmology as a significant distinction from Ancient Greek cosmology. For example, the existence of the trickster, as a supernatural being, is predicated on their relational ability to transform into other forms. In other words, the trickster's ontological status is one of transformation rather than illusion as one might see in Ancient Greek mythos. Tricksters and other *manitous* existences are defined by the metamorphosis as a method to live among and interact with human peoples. According to Johnston, the ability to metamorphosize is the only way to ensure the trickster fulfils its purpose of teaching the Anishinaabeg how to be strong.¹⁰⁶

As Descola notes, the metamorphosis of a being belonging to a shared or relational interiority is a classic feature in animist ontologies as much as is in the Anishinaabeg cosmology.¹⁰⁷ In many instances, humans can shed its corporeal form for that of an animal or plant, and vice versa. In one story collected by Thomas Overhold, John Callicott, and William Jones¹⁰⁸ a boy trying to outrun the ghost of his mother throws an awl on the ground that transforms into a mountainous range of bones to keep the distance between the boy and his mother. As confusing as the story may be upon initial reading, it makes more sense when one understands that the awl in the story is in all probability made of bone. Mentions in the story about skeletons along the mountain range may substantiate this claim.¹⁰⁹ Additionally, the language of the Anishinaabeg is gendered between animate and inanimate. Lawrence Gross,¹¹⁰ who provides a comprehensive analysis of *Anishinaabemowin* -- a review of which is certainly out of the scope of this dissertation,

¹⁰⁶ *Ibid* at 16.

¹⁰⁷ Descola, *supra* note at 4 at 135.

¹⁰⁸ Thomas Overhold, J. Baird Callicott & William Jones, *Clothed-In-Fur and Other Tales: An introduction into an Ojibwa World View* (Washington, MD: University Press of America, 1982).

¹⁰⁹ *Ibid* at 36.

¹¹⁰ Lawrence Gross, *Anishinaabe Ways of Knowing and Being* (Farnham, UK: Ashgate Publishing, 2014).

shows the possibilities that within Anishinaabe ontology, even objects assigned to the inanimate category are still considered to hold animate characteristics. Accordingly, even an inanimate object like *migoos*¹¹¹ can still possess the power of metamorphosis within a relational context to other beings.

But what could possibly be the political function then metamorphosis in Anishinaabeg stories? According to Descola, it avoids *excessive* continuity between distinct collectivities, “each of which possess characteristics that are defined by the anatomical equipment of its members and their habitat, and the behavior that make these [collectivities] possible”.¹¹² In other words, the characteristics that help to better define collectivities – be it groups of bears, crows, deer, humans, or other beings -- allow relationships to make sense, but from a radical immanent and relational ontology in which core qualities could be interchangeable. Metamorphosis, despite the anthropogenic insistence that this ability is merely symbolic or metaphorical, is the process of making those relations and their negotiations intelligible. As Descola notes:¹¹³

For metamorphosis in the strict sense to take place and for it successfully to confirm in a truly intersubjective experience the properties that are ascribed to the beings of the world, a further step needs to be taken, one that breaks through the barrier constituted by forms. And this is possible in two sets of circumstances: either when plants and animals or the spirits that are their hypostases visit humans, taking on the same experience as the latter (usually in dreams) or else when humans... go to visit those same entities. In both cases, the visitor assumes a position that puts him [or her] on the same footing as [his or her] hosts, for this is necessary if [he or she] is to establish

¹¹¹ John Nichols & Earl Nyhom, eds, *Ojibwewi-ikidowinan: An Ojibwe Word Resource Book* (St. Paul: Minnesota Archaeological Society, 1979) *sub verbo* “*miigoos*”.

¹¹² Descola *supra* note 4 at 137.

¹¹³ *Ibid* at 138.

communication and does so by adopting the same costume as those [he or she] is addressing.

The combination of similar interiorities and differences in physicality within animist ontologies, which includes the ability of humans and nonhumans to metamorphosize as a means of fostering fuller relations with one another, leads Descola to examine totemism as an ontology since the concept within older anthropological texts not only deny peoples' affinity to their totem as reality but construct totemic systems based on the assumed polarity between 'culture' and 'nature'.¹¹⁴ The next section explores Descola's analysis to show that while he correctly assesses certain ontological aspects of totemism, his analysis can be supplemented by deeper political and legal implications that emerge from the social ordering of the Anishinaabe totem system. More specifically, I suggest that the Anishinaabeg clan system generates legal obligations to others through oral traditions, treaty making, and the resultant alliances are affirmed by expressions of kinship.

b. *The socio-legalities of Anishinaabeg totems*

Prior to Descola's contribution to understanding the totemic system beyond the assumed oppositions of nature and culture, French ethnologist Claude Lévi-Strauss's *Totemism* was arguably the "most incisive critique of totemistic phenomena", but one that still denied the full ontological understanding of totemism.¹¹⁵ In developing a schema based on the polarity between nature and culture, Lévi-Strauss implemented a table of mutual relationships between the two. On one side, there existed animals or plants within the 'reality' of nature; on the other, there were various groups and individuals in culture who

¹¹⁴ *Ibid* at 144.

¹¹⁵ Haekel, Joseph "A short history of totemistic theory", *Britannica Encyclopedia Online*, online <<https://www.britannica.com/topic/totemism-religion/Kpelle#ref38118>>.

constructed an identity based on a particular species or a specific plant or animal.¹¹⁶ In line with his studies on kinship systems, Levi-Strauss saw in Indigenous Totem and Kinship systems as evidence that human societies were not universally built on the basis of an imaginary social contract or Hobbes' Leviathan as an escape from the state of anarchy otherwise found in Nature. Following the work of Levi-Strauss, Micheal Asch,¹¹⁷ suggests that human societies were built on a kinship system in which the contribution of Otherness (and not social or political homogeneity) is essential to their development.

Descola however further problematizes Levis-Strauss's theory for its obscure conception of 'totemism', which he criticizes as depending too squarely on the existence of two conditions. First, groups must identify themselves with plants or animals in their relations between themselves and nature; and secondly, the designation of people into groups was to be based on kinship which was done with the aid of a plant or animal.¹¹⁸ According to Descola, Lévi-Strauss viewed the second condition as a tendency to form a system not with other human groups but one that was hereditary to their totem.¹¹⁹ This meant, as least for Descola, that the totemic segments in which different groups emerged from different plants or animals was ontological and likened them to differing castes.

Relying largely on the creation stories of Aboriginal groups in Australia, Descola draws out the features of his configuration for totemism as a broader ontology. His analysis begins with an outline of the cosmological and etiological systems that Aboriginal groups in Australia call *alchera* or "Dreamtime" in English.¹²⁰ *Alchera* refers to a place and time

¹¹⁶ *Ibid.*

¹¹⁷ See Michael Asch, "Levi-Strauss and the Political: The elementary structures of kinship and the resolution of relations between Indigenous peoples and settler states" (Sept 2005) *J Royal Anthropological Institute* 11(3) 425.

¹¹⁸ Descola, *supra* note 4 at 145.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* at 146.

when primeval beings emerged from the depths of the Earth at exactly their identified sites. The journey of these primeval beings shaped all the places still detectable in the natural environment such as rock formations and large water sources. Their eventual disappearance is additionally marked by the different plants and animals they left behind, together with the knowledge of the totemic affiliations and the names that each are designated to.¹²¹ Descola emphasizes to his readers that Dreamtime is not just a mythical tale of classical heroes or stories of ancestors. Rather, it is an ontological association between nonhuman entities or natural phenomenon and the groups of human peoples which stabilizes the forms of life that are prefigured into classes and types.¹²² Descola proceeds with an inventory of Aboriginal groups to draw out the highly dynamic totemic systems that are established along patrilineal, matrilineal, or sexual lines. In some cases, these divisions are either hybridized between the three or subdivided further into smaller totemic groups based on human objects, natural phenomenon, and geographical locations. The common characteristic shared between all variations of Australian totemic designations is that each contains a specific collection of physical and moral attributes shared by all members of the totem whether human or nonhuman.¹²³ In other words, the shared physical and moral attributes establish a mode of identification founded on an interspecies continuity of both interiorities and physicalities. It is these continuities that complexify the nature\culture distinctions introduced by Levi-Strauss which significations are reduced to human group-identity formations and negotiations.

¹²¹ *Ibid.*

¹²² *Ibid* at 147.

¹²³ *Ibid* at 159.

Before concluding his discussion, Descola briefly compares the totemic systems of Aboriginal groups in Australia to that of Indigenous peoples in North and South America to assert that the same Lévi-Straussian interpretation of totemistic phenomena can be applied without dichotomizing culture and nature. In contrast to Australian societies, however, the totemic designations are purely denotative and contain no material or spiritual continuity between humans and their clan's corresponding species.¹²⁴ In other words, physical discontinuity between humans and non-humans are maintained in North and South American totemic systems. Further, the identification of humans into totemic classes "constitute concrete paradigms for the humans, who were said to be descended from the species from which they derived their class name".¹²⁵ I will return to this claim shortly, but the point Descola makes is that the way Indigenous peoples in the Americas organize themselves still falls in the classification of totemism due to the personal relationships established between a human and an animal species. Descola substantiates this claim by looking at the word 'totem', which is a derivative of *dodem* in Anishinaabemowin. For Descola, the root *-dodem* expresses a kinship or coresident relationship as signified by the verbal root /*o.te/, which is translated as "to live together as a collective", and /*oto.t.e.ma/, or "someone's coresident".¹²⁶ In both cases, each phrase indicates an intimate relationship and when applied to the word 'totem', the phrases correspond to the link between a human person and their individual guardian animal. While these terms do express such relationships for many Anishinaabe, the word *dodaem* contains a much deeper meaning

¹²⁴ *Ibid* at 166.

¹²⁵ *Ibid* at 167.

¹²⁶ *Ibid* at 168.

that extends beyond the individual experience and into the political and legal ordering of Anishinaabe society.

This is not to say individual totemic relations are nonexistent in the ontology of the Anishinaabeg. Indeed, Johnston dedicates an entire chapter in *the Manitous*¹²⁷ to explain how an Anishinaabe person would seek the patronage of various animals and other-worldly beings for pedagogical, spiritual, or material needs. But these totemic relations also have political and legal implications at the societal level. For instance, in *Ojibwe Heritage*, Johnston outlines a comprehensive clan system that reflects the basic individual *and* social needs of the Anishinaabeg based on five totems representing leadership, defense, sustenance, learning, and medicine.¹²⁸ Each totem is constitutive of Anishinaabe society that guides the fulfilment of various public duties within a clan. Regardless of the size of a tribe or band (which we now call nations)¹²⁹, families would carry out its functions according to their totem. As Johnston states, the totem was the primary social ordering and mode of identification that took precedence over other tribal or familial ties. For example, upon meeting for the first time, two strangers would first ask “*waenaesh k’dodaem?*” or ‘what is your totem’ before establishing where either person resided.¹³⁰ In contrast to Descola, Johnston asserts that the term *dodaem* comes from the same root as *dodum* or *dodosh*. The former signifies ‘to do’ or ‘to fulfil’ while the literal translation for the former is ‘breast’— from which sustenance is drawn.¹³¹ The interpretation of the word totem by

¹²⁷ Johnston, *Ojibwe Heritage*, *supra* note 93.

¹²⁸ Johnston, *Ojibwe Heritage*, *supra* note 93 at 59.

¹²⁹ Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinaabe understanding of Treaty One* (Saskatoon: Purich Publishing, 2013); Alan Ojiig Corbiere, *Anishinaabe Treaty-Making in the 18th- and 19th-Century Northern Great Lakes: From Shared Meanings to Epistemological Chasms* (Philosophy, York University, 2019) [unpublished].

¹³⁰ Johnston, *Ojibwe Heritage*, *supra* note 93 at 59.

¹³¹ *Ibid* at 61.

Johnston, who was a fluent Anishinaabemowin speaker, reflects the more aspirational connotations of its derivative form.

The aspirational objectives reflected in the *dodaem* could therefore act as a form of pedagogy at the individual level and emanated throughout a clan and into the inter-national level. The link between the oral legalities of the Anishinaabeg and pedagogical approaches within totemic structures is significant because, as Aimée Craft reminds us in her analysis of Treaty One negotiations, Anishinaabeg *inakonigewinan* were not codified but taught orally.¹³² Laws were infused within the language and passed down through various teaching as they related to *mino-bimaadzwin* or ‘the good life’. Maintaining kinship relations among humans and between the land – or, what Descola would label non-human actors – was the key principle to carrying out *mino-bidaadzwin*. As noted above, anthropologists and others in the social sciences often denied the reality of this kinship by labelling it ‘fictive’, but Descola’s analysis illustrates that in no case could established kinship ties among Anishinaabeg and other non-human actors be considered fictive as defined under Anishinaabe laws. As Craft states: “there is no fiction in Anishinaabe kinship. The Anishinaabe are kin to the rocks, the trees, the animals, the animals, the birds, the fish, to each other...”¹³³

Yet while Descola’s brief analysis on the word totem encapsulates some aspects of the Anishinaabeg kinship relations as foundational to their ontology, they do not denote a point of origin that humans descended from. In fact, Johnston explicitly states the order of which all things came into existence in his creation stories. From Kitchi-Mantiou’s vision, the cosmos was created first; after which plants, animals, and humans were respectively

¹³² Craft, *supra* note 128 at 71.

¹³³ *Ibid* at 70.

brought into being.¹³⁴ Craft echoes this sentiment in her analysis when outlining the Anishinaabeg dependence on their relationships with themselves, other humans, and the natural world. The order of creation was based on necessity and since humans were created last, they depended on (but did not originate from) all other things.¹³⁵ Even in the stories of Edward Benai-Benton,¹³⁶ which I argue is heavily influenced by Christian theology and thus more hierarchically oriented than the stories of Johnston, humans were fashioned independently of plants and animals. Nevertheless, the Anishinaabeg define their obligations and responsibilities from these kinship relationships.

One articulation of these obligations and responsibilities under Anishinaabe law is indeed the kinship ties to the land. It is well documented the significance of land for many Indigenous Nations, including the Anishinaabe nation. The Royal Commission on Aboriginal Peoples, one of Canada's most comprehensive Inquiries into Indigenous-Crown relations noted:¹³⁷

Land is absolutely fundamental to Aboriginal identity. We examine how land is reflected in the language, culture and spiritual values of all Aboriginal peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect. Unfortunately, those concepts have not been honoured in the past, and Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment.

¹³⁴ Johnston, *Ojibwe Heritage*, *supra* note 93 at 12-13.

¹³⁵ Craft, *supra* note 128 at 70.

¹³⁶ Edward Benai-Benton, *The Mishomis Book: The voice of the Ojibwe* (Minneapolis, MN: University of Minnesota Press, 1988) at 74.

¹³⁷ Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 417.

The alternative concepts of territory, property, and tenure, etc. is often framed as stewardship over ownership. However, it is important to emphasize this connection to the land should not be interpreted in a Rousseauian fashion; Anishinaabeg are not mindless wandering “noble savages”. The sacred responsibility toward the land was inherently linked to a sense of belonging to it as much as it belonged to Anishinaabeg.¹³⁸ This is reflected in the dissertation of Alan Ojiig Corbiere,¹³⁹ who underscores the political, spiritual, and economic connection to the land and the legal obligations that stem from those connections. Corbiere notes that each tribe had a “system of ‘exclusive rights and control’ over a specific territory”¹⁴⁰ in which no one else could access without permission. Although the ‘control’ over a territory might change depending on the seasons or a clan’s need,¹⁴¹ Anishinaabeg generally understood where one territory began and another ended, even if European authorities did not. This is probably due to the long-standing tradition of treaty making that existed and still exists between Indigenous nations.

Accordingly, another articulation of obligations and responsibilities to others under Anishinaabe law is through treaty making. The first chapter already reviewed various legal practices in treaty making protocols and processes. However, in Craft’s analysis, the obligations and responsibilities stemming from kinship ties also dictated the need to respect each nation’s autonomy, authority, and jurisdiction by ensuring the inclusion of all participants prior to commencing negotiations.¹⁴² In fact, each nation present at the outset of Treaty One negotiations took great strides in selecting a spokesperson who could speak

¹³⁸ Craft, *supra* note 128 at 95.

¹³⁹ Corbiere, *supra* note 128.

¹⁴⁰ See *ibid* at 51 for how the phrase ‘exclusive rights and control’ was used by Crown authorities and missionaries during negotiations because they held no other terms for Anishinaabeg connection to the land.

¹⁴¹ *Ibid* at 47.

¹⁴² Craft, *supra* note 128 at 73.

for those who selected them. As Corbiere points out, this selection process and the respect for the principle of non-interference was part of wider practices within Anishinaabe governance structures.¹⁴³ Although the authority of an *ogimaa* (hereditary chief) was generally passed down through patrilineal lines, others could contest the position and be selected to lead based on past war deeds or verbal eloquence. In such cases, people would still remember that the chieftainship would still reside in a specific clan. This could lead to conflicts over the right to lead (and most likely exacerbated by intervening Indian Affairs superintendents), but as Corbiere points out, such conflicts indicated the importance of the hereditary line chieftainship because it perpetuated the clan ties to the land, “especially in matters of land ownership and treaty”.¹⁴⁴

These articulations of Anishinaabe *inaakonigewin* illustrate the pre-eminence of the totemistic structures in Anishinaabe society, not just as an ontological designation of people into corresponding categories. Instead, these structures are political and juristic orders that contain practical tools for social organization and resolving conflicts between peoples, which as Emily Snyder points out, is an intellectual process of legal reasoning rather than the mere practice of culture or tradition¹⁴⁵ -- a concept the Supreme Court of Canada has yet to acknowledge. The next section will explore ‘the epistemic link’ between Anishinaabe *aadizookaanag* as they pertain to the articulations of Anishinaabe law outlined above. It should be clear from this configuration that the conceptualization of power, authority, and even sovereignty differs from western discourses on sovereignty but are no less valid than the latter.

¹⁴³ Corbiere, *supra* note 128 at 52.

¹⁴⁴ *Ibid* at 55-59.

¹⁴⁵ Emily Snyder, *Gender, Power and Representations of Cree Law* (Vancouver: UBC Press, 2018) at 23.

IV. AADIZOOKAANAG APIICHI-INAAKONIGEWIN

In addition to the ontological aspects of stories as outlined above, stories also inform the political and legal structures of Anishinaabeg society. In this regard, stories are very much an epistemic source of *inaakonigewin*. As Heidi Stark writes: “stories shape how we see and interact with the world. They lend insight into the ways in which we see our communities as well as how we see ourselves within these communities. How, when, and in which context stories are told is as telling of the people as the stories themselves.”¹⁴⁶ For Stark, the story of the trickster stealing fire functions as a vehicle that drives Anishinaabe political discourse. I argue this point further by stating all *aadizokaanag* shapes Anishinaabeg legal theory and practice as well as the political. The articulations of Anishinaabe *inakonegewinan* mentioned above are only two aspects of a larger legal order. Nevertheless, they are shaped by two stories from Basil Johnston that I utilize here to reflect the legal articulations embedded in the stories. I am also aware of the critique in the emerging field of Anishinaabeg studies that scholars tend to overanalyze and ‘rip apart’ stories to uncover hidden meanings, exclude Indigenous voices or include them in ways that dismantle their authority.¹⁴⁷ Accordingly, as an Anishinaabe-nini, I will take the role of a storyteller and let the reader take what they will. As Basil Johnston wrote in the preface of *Ojibwe Heritage*, readers (and listeners) are expected to draw their own inferences, conclusions, and meanings according to their intellectual capacities.¹⁴⁸ Since there is no instantaneous understanding, time and deliberation is required for adequate appreciation.

¹⁴⁶ Stark, *supra* note 99 at 122.

¹⁴⁷ Eva Marie Garroutte & Kathleen Delores WestCott, “The Story is a Living Being: Companionship with stories in Anishinaabeg studies” in Jill Doerfler, Heidi Kiiwetinepinesiik Stark, Niigaanwewidam James Sinclair, eds *Centering Anishinaabeg Stories: Understanding the World Through Stories* (Winnipeg: University of Winnipeg Press, 2013) 61 at 62.

¹⁴⁸ Johnston, *Ojibwe Heritage*, *supra* note 93 at 8.

The stories I retell below are a reflection from my own understanding stemming from the academic journey I have taken in politics and law.

a. Nana'b'oozoo and the flood

Nana'b'oozoo was sitting near the banks of a river one day when the waters unexpectedly began to rise. The river rose quickly, forcing Nana'b'oozoo to retreat up a mountain until he could go no further. From the summit Nana'b'oozoo looked around for any sign of land, but there was no place where he could seek refuge. The waters continued to rise until finally the trickster had nothing to grab onto except two logs drifting nearby. Using his loincloth, Nana'b'oozoo tied the two logs together to create a makeshift raft for himself. When he safely secured himself onto his raft, he looked around and found nothing but water. He was not alone, however. As far as Nana'b'oozoo could see, animals of every species were thrashing about, filled with terror, trying to keep themselves from drowning. Those who saw Nana'b'oozoo frantically cried out as they swam towards the trickster. Screams filled the air as they pleaded for help. "Nana'b'oozoo! Brother! Let me on" the animals begged. Nana'b'oozoo could barely keep himself afloat; there was no way he could help anyone else without endangering his own life. Guilt and pity overtook Nana'b'oozoo as he realized that even if he could secure his own safety, it would be no use since would only mean that it prolonged the inevitable. He did not want to die of starvation; let alone die by drowning.

Amidst the chaos, Nana'b'oozoo called to the manitous to help lower the water levels to their original state, but nothing happened. The waters continued to rise and there was no transcendental or miraculous voice ordering him to do his bidding. While Nana'b'oozoo waited, his mind raced through many thoughts about what he could do. He

remembered the story of Geezhigo-Quae, who once fell through the sky and subsequently made the earth from a small clutch of soil from the bottom of the sea. Nana'b'oozoo wondered if he could carry out what Geezhigo-Quae had done once before. He doubted it since it was the work of manitous that created the Earth, not any mortal. However, Nana'b'oozoo had no option. He quickly called over as many birds and animals as he could. "Needjee! Come quick. Can someone fetch some soil from the bottom of the sea so I can try and restore the earth?"

One after another, the quickest and bravest of animals attempted to grab soil from the bottom of the sea but they could not. The waters were much too deep for many – and worse, there were evil manitous near the bottom who tried to capture anyone one who trespassed into their territory. Yet, the least expected animal to bring success was the one who got the soil from the bottom. The tiny muskrat swam with everything he had to get the soil from the bottom of the sea and bring it to Nana'b'oozoo. Nana'b'oozoo gratefully took the soil from Muskrat who had risked his life for everyone, and imitated Geezhigo-Quae by breathing into the clutch of soil. Suddenly, the tiny ball of mud began to grow in his hands until it became too heavy for Nana'b'oozoo to carry. Setting it down, the ball turned into an island which allowed many animals to seek refuge on its shores. The island continued to grow as valleys and hills, forest and meadows were shaped by the growth of the once tiny ball of mud. Soon enough, the waters returned to their original levels and all living beings were once again safe in their natural element.

Johnston reminds his readers that up until he was in crisis, Nana'b'oozoo had taken the Earth for granted.¹⁴⁹ Indeed, it is usually not until a crisis emerges that one realizes

¹⁴⁹ Johnston, *Manitous*, *supra* 103 at 13.

what they truly depend on for survival. For example, without the logs, Nana'b'oozoo would have drowned instantaneously; if not for the Muskrat and the other animals who helped the trickster obtain a little bit of soil, the Earth would have not been restored.¹⁵⁰ In this story, there is no separation between Nana'b'oozoo and the plants and animals of the natural world. They exist within an interrelated universe where the actions of one influence all others. Yet, without the help of the plants and animals, Nana'b'oozoo would perish. It is from this dependence that the obligations and responsibilities to both human and nonhuman beings emerge. The kinship ties with plants and animals are intrinsically linked to human peoples' dependence on them. As such, Anishinaabeg are bound by obligations of care towards their land, or they will not survive. One such obligation is giving thanks for what bounty the earth offers through ceremony but mutual duties to other humans exist as well. As Craft writes:¹⁵¹

If people travel through Anishinaabe territory, they are entitled to feed themselves. This is the way of the Anishinabe. However, the outsider cannot take more than he needs. He must also share his catch with the Anishinaabeg. As *nimishomis* (my grandfather) put it, if he took three fish, he would share them by giving me two and keeping one for himself. "I know that I will catch more fish but I do not know that you will not go hungry".

The point Craft makes from this statement is that under Anishinaabe law, these obligations to the Earth, to nonhuman actors, and to one another cannot be understood in isolation from practices of treaty-making.¹⁵² The story of the man, the snake, and the fox below outlines why.

¹⁵⁰ *Ibid.*

¹⁵¹ Craft, *supra* note 128 at 99.

¹⁵² *Ibid* at 98.

b. The man, the snake, and the fox

A hunter named Daebaussigae had been tracking animals for some time. As he decided to head back home, he heard a faint call from deep in the forest. Hoping to not go home empty-handed, Daebaussigae followed the sound of the call. The louder the call got, the more it reminded him of human cries, the same cries he heard as a child when he witnessed the torturing of an enemy prisoner. The memory unnerved Daebaussigae, He could still hear the awful cries that still rang in his ears then. Claspings his hands over his head to drown out the sight and sounds of the prisoner being tortured, Daebaussigae was not able to take it and cried out: “Stop it! Enough!” Although he had not expected the torturers to listen to him, they let up. At the time, not many saw his act as a deed of compassion but one of weakness. However, that was how Daebaussigae was: kind and compassionate.

So, when he came upon a giant snake making the screaming sounds, twisted and bounded up in a trap of roots, vines, and throngs, it was no wonder that Daebaussigae released the snake. The hunter was not dumb though – the giant snake had to convince him first. When Daebaussigae first came across the snake, it cried out to him. “Needjee, help me! I am stuck.” The sound of the giant snake’s voice scared Daebaussigae so badly that the only thing the hunter could do was fall to the ground, senseless. After regaining consciousness, the snake spoke to him again. “Needjee, I am sorry I frightened you. I mean you no harm, but I am bound up and cannot leave. Will you set me free?” Still trembling, Daebaussigae could only stand in place and shake his head. The snake tried to convince the hunter a third time. “Please, Needjee. I have been stuck here for days and I do not know how long I will last. I may waste away and rot here. I do not want that. Please, will you

untie me?” After regaining his composure, Daebaussigae summoned the courage to speak. “No! You will turn on me if I let you out of your trap.” The snake continued to plead with Daebaussigae until the hunter’s kind heart caused him to trust the snake and untie him.

He drew his knife and cut the cords of throngs and vines. However, the instant the giant snake was free, he wrapped himself around Daebaussigae. The hunter screamed in fear and pain but could not escape. A fox, who had heard the screams, was drawn to where Daebaussigae and the giant snake were fighting each other. Never seeing such a spectacle before, the fox decided to lay low and see what would happen, but it was soon clear that the snake was about to crush the man to death. Curious to learn of the situation, the fox cried out: “Hey, you two! Why are you fighting?” Startled, the giant snake loosened its coil long enough for Daebaussigae to get out. Gasping for air, the hunter explained the situation, but the snake denied the accusations the moment Daebaussigae was done.

At the end of the snake’s account of things, the fox declared that he did not understand the snake’s language and asked the serpent to show what he meant. Sighing, the snake conceded and crawled back into the position of his previous entanglement. “There, fox, do you see now?” The fox nodded. The serpent tried to crawl back out of his position but found himself stuck once more. In his rage, the giant snake vowed to get his revenge for the fox’s treachery. Daebaussigae, however, was relieved and grateful for what the fox had done. He thanked the fox many times over and pledged his life to it. The fox protested. He did not want anything in return and told Daebaussigae that his gratitude was enough. However, Daebaussigae would not let it go. Wanting to get on with his own hunting, the fox finally told Daebaussigae that in times of winter, hunting was scarce and often his family would go hungry. “Say no more,” Daebaussigae said, “whenever you need

food, come to my camp and I will feed you.” The fox thanked him for his gracious offer and accepted it. With an apology for his impatience, the fox bid Daebaussigae farewell.

Years had passed and Daebaussigae often thought about this agreement, but the fox never came to collect. More years had passed and eventually Daebaussigae stopped recalling the event. One winter, while Daebaussigae was repairing his children’s clothing, his youngest of twelve came running into the lodge. “*Noos! Noos!*” There’s a fox! He’s outside, on top of the food racks. He’s stealing our food!” As quickly as he put down his thread and needle, Daebaussigae picked up his bow and arrow. Outside, Daebaussigae stole within range of the fox who had been tearing into some dried meat. With a smooth gesture, Daebaussigae notched an arrow and let it go. The arrow struck the fox square in the neck. The fox wretched and twisted, gasping for breath. Daebaussigae did not feel bad for the fox as the victim was a thief who got what he deserved. However, as he came closer with his knife, ready to finish off the little thief and remove his pelt, the dying fox lifted his head the best he could. With his final breath, the fox whispered, “Don’t you remember?” And then he was no more.

This story is an embedded narrative in another story told by Johnston to draw parallels to the history of Indigenous-Crown relations.¹⁵³ After their initial meeting, Indigenous nations help the settler newcomers escape from the tight coils of their oppressive regime by teaching them to live off the land. Grateful for their help, the settlers promise Indigenous nations food, water, medicine, and clothing anytime Indigenous peoples need them. However, just as Daebaussigae forgets his promise over time, so too do the settlers who end up killing Indigenous nations when they ask for the promises to be

¹⁵³ Johnston, *Manitous*, *supra* note 103 generally at 182-193.

fulfilled. These parallels also reflect the importance of maintaining treaty making processes and protocols under Anishinaabe *inaakonigewin*. For example, the man and fox never undergo renewal and affirmation processes as reviewed in the first chapter, causing the man to forget his agreement. Likewise, the unwritten terms of treaties are disregarded by the Canadian judiciary and replaced with problematic interpretations of Indigenous-Crown relations reinforced by the metaphysical assumptions about Crown sovereignty. As has been explored throughout this thesis, those assumptions have adverse effects on Indigenous peoples' lands, lives, and the sources of laws that guide their societies – their stories and oral traditions which are intertwined with the political and legal structures of Indigenous peoples.

c. *Legal obligations within an ecology of relation*

The metaphysical inquest into Anishinaabeg stories and their underlying legal properties inherently leads to drawing comparisons to the notions of sovereignty outlined earlier in the chapter. Most notably are the conceptions regarding the source of power and authority. The epistemic discontinuities of western sovereignty in its linear trajectory make it hard to pin down the direction of power because as noted above, power flowed from the conception of a monotheistic god downward during the Renaissance, but reversed directions in the Classical Age. Complicating matters is the conception of 'biopolitical sovereignty' as one of many configurations of postmodern sovereignty in which power is sustained by an all-encompassing public narrative diffused throughout the law and other institutions to further perpetuate the justification of power in terms of health, good care and security of populations.¹⁵⁴ In this sense, the means justify further means – that is,

¹⁵⁴ Dimitris Vardoulakis, *Sovereignty and its Other: Toward the Dejustification of Violence* (New York: Fordham University Press, 2013) at 153.

biopolitical sovereignty is self-justificatory. From this insight and especially within the context of the Canadian judiciary, we can see that regardless of its direction, power flows unidirectionally, or one way from the top: it is asserted, with the possibility of violence it both generates and wishes us to fear as its very condition of justification: it is never truly negotiated with the Indigenous peoples. The narrative that Aboriginal and treaty rights are a means to reconcile Crown sovereignty with the prior occupation of Indigenous nations in North America is a story the Supreme Court tells itself to perpetuate its own power.

In contrast to this conception of power and authority, the political ontology of the Anishinaabe allows for an ‘ecology of relations’ within their cosmological ordering. In borrowing the term from Descola, who uses it to characterize the relational modes that modulate all modes of identification¹⁵⁵ (many of which are outlined as the legal practices of the Anishinaabeg throughout this thesis), an ecology of relations here is meant to make the distinction between western and Anishinaabe conceptions of power. For example, gift-giving and other forms of exchange produce a symmetrical albeit not always reciprocal relationship between two entities.¹⁵⁶ That said, exchange is a *leitmotif* of capitalist societies as illustrated by the construction of the social contract and if it were not the case, the British and French would not have been able to be incorporated into the treaty making procedures of Indigenous nations as outlined throughout this thesis. Yet an ecology of relations illustrates how legal obligations maintained through a complex web of kinship ties that distributes power horizontally rather than vertically, as to consubstantially produce the political ordering shared by the reciprocal actions of the many partners. As noted above,

¹⁵⁵ Descola, *supra* note 4 at 130

¹⁵⁶ In fact, Descola makes the distinction between ‘exchange’ and ‘gift-giving’. The former is characterized as more reciprocal than the former. See *ibid* at 311.

these kinship ties are grounded in obligations to one another, the earth, and the Creator – who is also considered a source of authority but one who facilitates the cognitive capacities of others rather than being operationalized as a form of coercion. While the mention of a Creator might be off-putting to those committed to the secularization of law and politics, legal scholars point how the modern constitution is viewed as a similar source of authority as Indigenous peoples view the Creator’s authority.¹⁵⁷ In either case, an ecology of relations is one way to express the political ontology of the Anishinaabeg, which are intrinsic within our oral legalities.

V. STORIES AS A LEGITIMATE SOURCE OF LAW

In this chapter, I have attempted to answer the question as to why the Supreme Court of Canada’s unproblematic acceptance of Crown sovereignty upholds a juridical logic of elimination and perpetuates epistemic violence against Indigenous peoples’ oral tradition, and by extension legalities. Part of the answer can be found in how sovereignty has been thought and spoken about. Inspired by the genealogical study of the concept of sovereignty as put forth by Jens Bartelson, I have illustrated how the discursive elements condition various configurations of sovereignty based on a political ontology that assumes power between the sovereign and its subjects as absolute, universal, and indivisible. When these concepts are individualized, secularized, and historicized, sovereignty still follows a linear trajectory that precludes the possibilities of accepting any political ordering that could compete with its presupposed supremacy as valid. In comparison, the Anishinaabe conception of power stems from the abilities granted by the Creator and flows throughout

¹⁵⁷ John Borrows, “Origin stories and the law: Treaty metaphysics in Canada and New Zealand” In Mark Hickford and Carwyn Johns (eds.) *Indigenous Peoples and the State: International perspective on the Treaty of Waitangi* (Routledge: New York, 2019) 30-56 at 39.

a complex and relational web of kinship ties with human and nonhuman actors. These ties are created at the ontological level in which the shared interiority of all living things inform the sociolegal structures and practices of the Anishinaabeg. I then outlined two articulations of Anishinaabe *inaakonigewin* –kinship ties to the natural world and treaty making – and the stories that undergird them. In doing so I was able to illustrate that rather than existing as a pure myth or metaphor, Anishinaabeg *aadizookaanag* are reflective of the legal principles that guide our societies and thus a very legitimate source of Anishinaabe law.

However, one may interpret the stories outlined in this chapter as cautionary tales that resemble the use of *exempla* in the creation of knowledge pertaining to Christian political ordering during the Renaissance, as explored in the previous section. I would argue three counterpoints. First, rather than existing as a mere moral anecdote, Anishinaabe stories contain centuries of legal thought and reasoning expressed through the animist ontology, which organizes the social relations of human and nonhuman actors. The experience and knowledge stemming from treaty making – whether inter-tribally, with other animal nations, or with the Crown – are transmitted through the oral tradition in the form of stories. Secondly, unlike *exempla*, there is no reproduction of knowledge that reinforces its own premise due to the expectation given to the listener to utilize their reflexive capabilities for their own interpretations. This flexibility allows for the reproduction of new modes of knowledge outside an absolutist and universal ontology and undergoes its own discursive negotiation process. This additionally exemplifies the principles of non-interference, reciprocity, and respect for each party’s perspective in treaty negotiations through efforts constantly renewed to achieve broader political consensus.¹⁵⁸

¹⁵⁸ Craft, *supra note* 128 at 23-25

Lastly, to argue that Indigenous stories and their legalities are stuck into what would be similar to a Renaissance reenactment of exempla is to fall back into a western-centric and frozen interpretative approach to Indigenous traditions placing them necessarily under the light of Western comparative to be intelligible, a behaviour already taken by the Supreme Court in *Sparrow* and rightfully criticized by scholars such as Asch and Macklem,¹⁵⁹ and John Borrows.¹⁶⁰ Instead, Indigenous peoples' stories adapt, grow, and change based on the circumstances they encounter.

¹⁵⁹ Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v Sparrow*" (1991) *ALTA L REV* 29(2) 498.

¹⁶⁰ See generally, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 56-76.

CONCLUSION: TRANSFORMATIVE EFFECTS OF STORIES ON THE LAW

The initial point of inquiry of this dissertation asked why Indigenous oral traditions are often discredited or subsumed under Canada's supposed multi-plural judicial system. I asked why Canada fails to question its own cultural assumptions regarding its assertion of Crown sovereignty while downplaying the legal properties of Indigenous oral tradition (including origin stories) as incapable of matching such settler-sovereignty. Origin stories indicate how a society views themselves in relation to the world and with others. They also provide concepts and principles that explain order, relationships, responsibilities, and remedies, thus contributing to a conception of authority and political accountability within broader contours of legal thought and practice.¹

In the first chapter, I explored the framework for Indigenous-Crown relations as set in *Calder et al. v. Attorney General of British Columbia*,² which acknowledged the existence of Indigenous title for the first time in Canadian history. This case is important, as I argued, because it exemplifies – along with the *Marshall* trilogy and other international jurisprudence – how the concept of sovereignty is interpreted and posited by the Supreme Court of Canada in ways that undermine Indigenous peoples' legal orders and associated traditions by essentially subsuming them under the authority of the Crown. The framework in *Calder* reveals elements of political absolutism in its unilateral assertion of sovereignty, probing us to investigate further what are the underlying concepts, including the origin stories which inform these absolutist elements that shape the conception of Canadian

¹ John Borrows, "Origin stories and the law: Treaty Metaphysics in Canada and New Zealand" in Mark Hickford & Carwyn Johns, eds, *Indigenous Peoples and the State: International Perspective on the Treaty of Waitangi* (Routledge: New York, 2019) 30 at 30.

² *Calder et al. v Attorney-General of British Columbia* [1973] SCR 313 [*Calder*].

sovereignty. To better understand how Canadian sovereignty is interpreted by the Court as superior over Indigenous legal and political orders, I then explored in the second chapter several foundational Aboriginal and treaty rights cases, including the interpretive framework in *R. v. Sparrow*.³ While attempting to rectify the harms done to Indigenous peoples by applying a wide and liberal approach to interpreting section 35(1) of the Canadian constitution, the Supreme Court mischaracterized the sources of Indigenous legalities by limiting their scope of Indigenous oral traditions to the procedural law of evidence and to various legal standards like the Integral to a Distinctive Culture test. These legal standards insist on proving to the Court the existence of Aboriginal rights based on their pre-contact cultural origins rather than their current political or legal orders. This of course bolsters the justification of *prima facie* infringements on Aboriginal rights. While the Court framed this justification as reconciling Crown sovereignty with the prior occupation of Indigenous peoples in North America, the decisions in *Delgamuukw v. British Columbia*,⁴ *R v Pamajewon*,⁵ and *Mitchell v. MNR*⁶ only furthered a juridical logic of elimination wherein Indigenous peoples' legal, political, spiritual knowledges are disregarded or dissolved, thereby removing the ability for Indigenous nations to govern their own activities so settler society can further control, regulate, and expropriate unceded Indigenous lands and resources.

The third chapter returns to the origin stories of both western and specifically Anishinaabe societies to examine why the Canadian judiciary continues the juridical logic of elimination in its interpretations of Aboriginal and treaty rights despite its attempts to

³ *R. v. Sparrow* [1990] 1 SCR 1075 [*Sparrow*].

⁴ *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

⁵ *R v Pamajewon* [1996] 2 SCR 821.

⁶ *Mitchell vs MNR (Ministry of Natural Resources)* [2001] 1 SCR 911.

do otherwise. I suggested that the answer is found in problematizing the Supreme Court's acceptance of the Crown assertions to sovereignty over Indigenous lands. More precisely, I argued that the concept of sovereignty is derived from a very particular political ontology, inhering a series of ontological assumptions that frame sovereignty as absolute and at the end point of a linear and faux-universal process of historicization. Taken as a whole, sovereignty generates its own Eurocentric origin story -- that of an imagined original violence or sin plaguing the human condition, remedied only by an absolute authority being vested in the vengeful yet benevolent God, later secularized with the emergence of Modern sovereignty which replaces God as the source of ordering.

As further explored in the third chapter, these theological, ontological, and cultural assumptions are carried over with the emergence of the Modern state through a series of epistemic continuities that precludes and negates the possibilities of sovereign Indigenous political and juristic orders (including their systems of knowledge or political ontologies). Ultimately, Indigenous peoples' orders are relegated to a prehistoric time is plagued by 'savagery' in opposition to what would be the progress of both Modernity and the reproduction of its sovereign logic as the antidote to the imagined original violence. Paradoxically, this origin story is imposed onto other societies around the globe by Western states through warfare, colonialism, and so-called 'liberation' campaigns. While Anishinaabeg stories are similarly conditioned by particular cultural assumptions and a political ontology, I have suggested that Anishinaabe origin stories prioritize a shared internal continuity with human and other-than-human actors, differentiated only by their physicalities. This, I have argued, allows for a broad and intricate social order wherein totemic kinship ties produce legal responsibilities and obligations with other humans and

the natural world, affirmed through treaty making protocols and procedures. The main difference would be that Anishinaabeg stories do not start with the assumption of a form of violence in need of an absolute ruler, but conflict is mitigated through consensual and relational processes geared towards creative problem solving and wisdom. Thus, Indigenous oral stories have more than just “an air of reality”⁷. In fact, even with their metamorphic and eco-centric characteristics, Anishinaabeg stories are grounded in a long tradition of legal thought and practices.

These insights are hardly new and rest on the shoulders of scholars who came before me. For instance, Blackfoot legal scholar Leroy Little Bear⁸ reminds us that no matter how dominant a worldview is, alternative interpretations of the world exist. Similarly, Lakota theologian Vine Delora Jr⁹ convincingly asserts that the stories in both the Old Testament and Indigenous peoples’ origin stories are probably accurate in many respects because they recount events which changed the way people understood the world at that time. Stories therefore have a transformative effect on people and the world they inhabit. Yet the problem with settler-colonialism is that “it tries to maintain a singular social order by means of force and law, suppressing the diversity of human worldviews”.¹⁰ This is why Indigenous origins stories are so important in resisting the adverse impacts of settler-colonialism. As Aman Sium and Eric Ritskies¹¹ note, stories can be ‘resurgent moments’ in which Indigenous peoples can reclaim epistemic ground that was erased by

⁷ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 53; *Delgamuukw v British Columbia*, 1993 CanLii 4516 (BC CA) at 889.

⁸ Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Battiste (ed) *Reclaiming Indigenous Voice and Reason* (Vancouver CA: UBC Press, 2000) 77.

⁹ Vine Deloria Jr., *God is Red: A Native View of Religion*, 3rd ed (Golden, US: Fulcrum Publishing, 2003)

¹⁰ *Ibid* at 77.

¹¹ Aman Sium and Eric Ritskies, “Speaking Truth to Power: Indigenous Storytelling as an Act of Living Resistance” (2013) *Decolonization & the Indigenous future* 2(1) 1 at 3.

colonialism, thereby laying the foundation for the resurgence of Indigenous liberation and the material recovery of lands, lives, and languages.

One outstanding question remains, however: how far can Indigenous liberation and recovery go in a Canadian courtroom setting? Here I echo the same sentiment as Anishinaabeg Legal scholar John Borrows¹² in his chapter on origin stories and the law that suggests legal discourse often treats the grand questions of life in a pedestrian manner. Any argument before the Court must be framed solely within the epistemological boundaries of the common law despite its social, moral, and even metaphysical impacts.¹³ The acceptance of Indigenous peoples' stories will require the Canadian judiciary to rethink the relationship between the law and the moral, social, spiritual, philosophical, and metaphysical elements of life. However, as Bradley Brian¹⁴ points out, one simply does not change their mind or redesign their worldview. Indeed, incorporating the origin stories of Indigenous peoples does not subvert "state-centric law as the grand mediating force in human affairs".¹⁵ Thus we need concrete actions and institutional changes that would reflect and embody Indigenous legal orders – including their sovereignties. But even such transformations have its limits when Indigenous peoples continually allow the settler-colonial state to interpret, subsume, and limit our legal traditions, including the scope of our oral traditions and sacred storytelling.

As this thesis has illustrated, this is because the Crown and Canadian governmental authorities are still unilaterally asserting their sovereignty over pre-existing Indigenous legal and political orders. They do this by subsuming Indigenous oral traditions and legal

¹² Borrows *supra* note 1 at 33.

¹³ *Ibid.*

¹⁴ Bradley Brian, "Legality Against Orality" (2011) *L Culture & the Humanities* 9(2) 261 at 273.

¹⁵ Borrow, *supra* note 1 at 46.

orders to the realm of ‘culture’ held as ‘lower or less important in the scale of what they sanction as political authority and conflict resolution. Meanwhile, Canadian authorities are not questioning their own cultural narratives and assumptions that have informed their conception of sovereignty, especially the elements of absolutism that are derived from monotheistic theology and their secularization within the Modern State and the International Systems that secure its supremacy via its replication.¹⁶ In other words, they make their own cultural assumptions disappear by holding an imaginary perpetual and primordial sense of danger to peace and good governance, which then justify the absolutist elements inherent to their conception of power, authority, and sovereignty. Meanwhile, holders of such political ontology create themselves the so-called prelude violence which they need to justify the imposition of their political system and its reproduction on others, including North American Indigenous peoples.

Consequently, I would argue that very little, if any, liberation can be found in the courtroom. That said, Indigenous peoples are often left with little to no option but to argue their cases in front of the Canadian judiciary; it is either this or face a highly militarized RCMP force and other repressive means at the disposition of the Canadian state. In some instances, there will be positive results in court. For example, *R. v. Desautel*¹⁷ recently extended the Aboriginal right to hunt for food to non-resident Indigenous persons living in the United States. Yet, the decision still places Canadian sovereignty as the supreme decision maker in the affairs of Indigenous peoples. While this form of political and juridical supremacy will not be undone overnight, I believe overcoming this problem is not

¹⁶ See in general, Antony Anghie, *Imperialism, Sovereignty, and the making of International Law* (Cambridge, UK: Cambridge University Press, 2005).

¹⁷ *R. v. Desautel* [2021] SCC 17

insurmountable. Indigenous peoples will have to bear the responsibility of reimagining their relationships to the common law and their own legal orders, to the natural world, and with others to produce moments of resurgence where Indigenous liberation and recovery is possible. Perhaps it is yet another articulation of Anishinaabe *Inaakonigewin* but producing the moments of resurgence is also reflective of what Blaser¹⁸ calls ‘worlding’, which as discussed in the third chapter, is a process of *making* a political reality through enactment of storytelling. I think there is hope found here. Worlding can be enacted with the help of our stories of past, present, and future. It has the potential to create new possibilities outside the absolute and totalizing state-centric relationships produced from the Western political ontology. As such, I end this thesis with a story of my own as a jumping off point for the practice of worlding. It is entitled *Nanabush v. the Queen*:

It was springtime, so Nanabush wore his best-beaded business suit. The shifting colors contrasted marvellously with the red carpet and the black walnut walls of the Canadian Supreme Court’s main courtroom. Nanabush stood before the nine judges, garbed in their traditional scarlet and white robes. Most stern of all was Chief Justice Daphne Knight who had presided over previous cases involving Anishinaabe law. Nanabush was no stranger to the Chief Justice. In *Rabbit v. Nanabush*, Knight ruled in favor of the Anishinaabe trickster figure when she held that Nanabush did not violate Rabbit’s right to eat freely when he placed thorns on the rose for its protection. However, in *R. v. Nanabush*, the Chief Justice banished him for accidentally maiming a neighboring village’s chief when stealing their wampum. The Anishinaabe didn’t see Nanabush for a long time after that.

However, the case before the courts today was a different matter. The weight of the case was enormous because it had major implications for

¹⁸ Mario Blaser “Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages” (2012) *Cultural Geographies* 21(1) 49

every living thing across Turtle Island. Every two- or four-legged manitou, whether winged, finned, or grounded, held their breath as they tuned into their online video stream and waited for the proceedings to begin. The question at hand was whether Canada's claim to underlying title and exclusive sovereignty in the country was considered legitimate and legal.

It all started when Nanabush was caught with Coyote trying to smuggle a whole bunch of smokes across the US-Canadian border. The Federal Court held that neither Nanabush nor Coyote had the right to sell, trade or distribute the smokes under section 35(1) of the Canadian constitution. The Crown had used *Mitchell* and *R.J.R-MacDonald Inc v. Canada (Attorney General)*¹⁹ to argue their case. As Audra Simpson²⁰ point out, these cases were also used to frame Mohawk sovereignty as lawlessness and thus criminal. The Court sided with the Crown and Nanabush appealed it.

In the Court of Appeals, Nanabush argued that the cases used by the lower Courts could not apply to Nanabush since Canada had failed to live up to its own legal principles regarding Aboriginal and Treaty rights prior to cases like *Mitchell* and *RJR*. Nanabush waxed poetry in front of the bench to show how the Crown had, on multiple occasions, violated the rule of law through blunt exercises of power when asserting sovereignty over Indigenous people. He pointed to the legitimization of the oral tradition in common law thanks Mr. Calder, Mr. Sparrow, Mrs Van Der Peet, Mr. Mitchell, and others who fought to preserve their oral legalities. Nanabush even recited the 1764 Treaty of Niagara to show how Indigenous nations, even while resisting the horrendous impacts of land dispossession, still maintained their political and legal autonomy. In fact, Nanabush could recount the entire treaty process verbatim since he was there during negotiations. He transformed into a rabbit to eavesdrop – well, that is until he got chased by a bunch of hungry Indians who had grown impatient with

¹⁹ *RJR-MacDonald v. Canada (Attorney General)* [1995] 3 SCR 199 [*RJR*]

²⁰ Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham, USA: Duke University Press, 2014) at 141.

Crown representatives. His argument was so good, that the only thing the defendant could counter was that Nanabush wasn't even real, just a figment of an ancient people's imagination. The claim brought gasps to Bear, Trout, Crane, and Deer who came to watch the proceedings. Since Nanabush was in fact standing in front of the judges, the court had no choice but to overturn the Provincial Court's decision.

So there stood Nanabush, in the Supreme Court of Canada before Chief Justice Knight and 8 other judges. As the judges sat, the Chief Justice looked at her notes, then to Nanabush as if to silently motion him to start. Nanabush took a deep breath, cleared his throat, and began his argument...

"Contrary to liberal notions of stories as depoliticized acts of sharing, we must recognize stories as acts of creative rebellion."²¹

²¹ Sium and Ritskies, *supra* note 442 at 5.

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