

Positivist and Pluralist Trends in Canadian Aboriginal Law:
The Judicial Imagination and Performance of Sovereignty
in Indigenous-State Relations

by

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B.Sc., McGill University, 2002
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A Dissertation Submitted in Partial Fulfillment
of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

in the Faculty of Law

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University of Victoria

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We acknowledge and respect the lək'wəŋən peoples on whose traditional territory the university stands, and the Songhees, Esquimalt and WSÁNEĆ peoples whose historical relationships with the land continue to this day.

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Abstract

This dissertation identifies institutional positivism and historically grounded pluralism as interpretive trends in the Canadian case law on Indigenous-state relations, and explores tensions between these trends. These are tensions between practices of judicial interpretation, not between theories of interpretation or legal concepts. They are practices developed case-by-case, with interpretive trends emerging over time through series of cases addressing similar issues in related contexts. Institutional positivist approaches insist that judicial recognition of Indigenous legal orders and accommodation of Indigenous interests must take place within established constitutional forms founded on state sovereignty. Historically grounded pluralist approaches show greater willingness to balance principles of state sovereignty against principles of popular sovereignty and of Indigenous priority in Canadian territory. While the two approaches overlap significantly, their differences sometimes lead to contrasting legal conclusions on key issues of, e.g., treaty interpretation, the relationship between Indigenous legal orders and the state legal system, and the jurisdictional dimension of Aboriginal title.

This dissertation examines these positivist-pluralist tensions in the context of the current period of ideological transition and rapidly evolving imaginaries of Indigenous-state relations. Chapters 1 and 2 explore the case law to highlight concrete ways in which this ideological transition finds doctrinal expression in both positivist and pluralist modes. Chapters 3 and 4 offer broader reflections on philosophical debates relating to legal positivism and the role of popular sovereignty in constitutional interpretation by Canadian courts. The final chapter then considers the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canadian law, with a focus on implementing legislation recently adopted by British Columbia and on two recent judgments that split the Supreme Court of Canada on the proper role of the Canadian judiciary in coordinating Canadian state law with non-state legal orders (Indigenous in one case and international in the other). This concluding chapter explains how the ongoing interplay of positivist and pluralist concerns will inevitably shape the reception of UNDRIP in Canadian law and the ongoing elaboration of Canadian Aboriginal law more generally.

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Acknowledgments

I would like to thank the members of my supervisory committee—John, Jim, and Avigail—for the many hours of conversation and the many pages of detailed feedback that helped give shape and substance to the lines of thinking that flowed into this dissertation. I could not have asked for a more supportive and engaged PhD committee.

I would also like to thank Ron Stevenson for extended discussions about, and fruitful disagreement over, the ideas expressed in this dissertation. I have learned a great deal, too, through ongoing exchanges and collaborations with Rob Hamilton and Josh Nichols. I am also grateful for the unstructured, meandering, and insightful conversations of the Cedar Trees Institute at the University of Victoria, including regular participants Rebeca Macias Gimenez, Pablo Ouziel, Rebecca Nelems, and Keith Cherry. And I am happy to have entered an equally unstructured writing exchange with Kristen Lewis, which led, among other things, to the poems and fragments inserted between the chapters of this dissertation.

I thank the Pierre Elliott Trudeau Foundation for the financial support to carry out this project.

On matters beyond the academic confines of this project, but overlapping in time, I thank Varada for helping me rediscover the joy, love, and madness in life's adventures.

Preface

The human being is, relatively speaking, the most botched of all the animals, the sickliest, the one most dangerously strayed from its instincts—with all that, to be sure, the most interesting!

- Friedrich Nietzsche, *Antichrist* §14¹

We may be the only animals to have developed a need for myth and ideology to orient ourselves, literally to find our way in our surroundings, almost to construct those surroundings—our “environment”—in the first place. We live in our stories as much as in our bodies, and in the final analysis maybe no firm line can be drawn between the two—though provisionally I am tempted to say that the body has the power to bring even our most elaborate stories to heel.

Or to put the point as aphorism: “If the flesh came into being because of spirit, it is a marvel, but if spirit came into being because of the body, it is a marvel of marvels. Yet I marvel at how this great wealth has come to dwell in this poverty.”² Maybe our stories and storytellers can teach us how to tend to what lies beyond ourselves and our stories: “I am not your teacher. Because you have drunk, you have become intoxicated from the bubbling spring that I have tended.”³

We seem to need our myths, our ideologies, theologies, spiritual practices, legal orders to grope our way towards a place of meaning, where we can dwell and feel at home—in sum, to tend to our treasure in this poverty. In any case, when our stories break down, when we can no longer give ourselves any meaningful account of our individual and collective lives, and of all that we tend to, we seem lost in whatever surroundings we happen to occupy. This may be one sense in which “the world is as sharp as a knife” (Haida saying).⁴

¹ Based on the translation found in *Twilight of the Idols and The Anti-Christ*, translated by RJ Hollingdale, (New York: Penguin Books, 1990). I have modified the translation slightly. The original German text reads: “der Mensch ist, relativ genommen, das missrathenste Thier, das krankhafteste, das von seinen Instinkten am gefährlichsten abgeirrte – freilich, mit alledem, auch das interessanteste!”

² Nag Hammadi Scriptures, *Gospel of Thomas*, saying #29. The translation is from *The Nag Hammadi Scriptures: The International Edition*, edited by Marvin Meyer (New York: HarperCollins Publishers, 2007) at 143. At 133-156, the Gospel of Thomas is introduced and translated by Meyer, who explains at 133: “The *Gospel of Thomas* is a collection of sayings of Jesus, numbered by scholars at 114 sayings, that are said to communicate salvation and life. In contrast to the New Testament gospels, which focus upon the crucifixion and resurrection as they set forth a gospel of the cross, the *Gospel of Thomas* presents a figure of Jesus who does not die for anyone’s sins on the cross and does not rise from the dead on the third day. Rather, in the tradition of Jewish teachers of wisdom, the Jesus of the *Gospel of Thomas* utters wise sayings, one after another, and through these sayings the *Gospel of Thomas* proclaims a gospel of wisdom.” Meyer notes at 137: “The textual evidence for an early date [first-century CE] for the *Gospel of Thomas* [...] may rival that of any of the New Testament gospels.”

³ Nag Hammadi Scriptures, *Gospel of Thomas*, saying #13. The translation is from Meyer, *supra* note 2 at 141.

⁴ See Robert Bringhurst, *A Story as Sharp as a Knife: The Classical Haida Mythtellers and Their World* (Madeira Park, British Columbia: Douglas and McIntyre, 2011) at 373, where Bringhurst relates the following story told by Kilhguulins (Henry Edenshaw) to anthropologist John Reed Swanton at Ghaw, Haida Gwaii in

The laws of a community are a particularly authoritative expression of orientation to its surroundings and of the ways of living that it cultivates. If the stories that sustain this broader orientation lose their vitality, fall into disrepute, are rejected or experienced as pathological, then the authority and legitimacy of the community's laws inevitably weaken. That is, a sense of orientation and meaning begins to drain from those laws—they may continue to function as a system of rules, but as a world they crumble.

The legal order of the Canadian state was built, to a considerable extent, on a pillar of historical progress, of myths and stories recounting a hierarchy of civilizations and a civilizing mission for newcomers to the Americas, who were to take its Indigenous peoples as wards under the tutelage of civilizational superiors or simply to cast them aside in the wake of progress. Through various official channels, explored in the chapters below, the Canadian state has in recent years rhetorically rejected these myths of civilizational hierarchies, and issued apologies for harms carried out under their banners.

This rhetorical rejection suggests an attempt at ideological transition, i.e. at a re-orientation to our surroundings and sense of home as a political community. The chapters that follow highlight some of the ways in which this tentative ideological transition has lately been acknowledged in the Canadian case law on Indigenous-state relations, and some of the issues of legal interpretation and doctrinal development that have arisen as a result. These chapters are thus a fairly granular examination of one small part of a relatively enormous societal project.

1901: "A man once said to his son: The world is as sharp as a knife. If you don't watch out, you'll fall right off. His son replied that the earth was wide and flat; no one could fall off. And as he kicked at the ground to show how solid and reliable it was, he ran a splinter into his foot and died soon after."

Reflections on sovereignty via *Gay Science* §338¹

This or that taste, craving, habit has tortured and elevated you with its lights, mysteries, and abominations for a stretch of years, perhaps your whole life.

And all at once, seemingly, it has lost its flavour. Maybe it leaves you cold, or it suddenly seems grotesque. Or a light went on and the sight of yourself, your spirit, at some trough has left you nauseous, exposed before yourself, sea-sick.

You may look outwardly calm or despondent, or depressed, disoriented, strange. But who could guess at the economy of inner changes, and of all that may have grown up beneath the surface projects, the patterns of thought, word, and action, the half-formed plans?

Enough—something has turned and a façade has crumbled. In this state you are vulnerable to all manner of quacks, diagnosticians, and even sophisticated, well-meaning healers of all stripes.

What you need most, though, is not a medicalization and treatment of your outward despondency and lack of purpose, however pathological the symptoms. What you need is a simpler inner guide, one that can integrate more fully the parts of you that can be gathered into a sane whole, a life affirmed within its proper limits and from some sense of love, perhaps a new façade that will itself crumble in due course as you, like others, grope towards a vocation of sorts.

¹ Friedrich Nietzsche, *The Gay Science*, translated by Walter Kaufmann (New York: Vintage Books Random House, 1974). The reflections on this page are loosely inspired by §338.

Ship's wake

The ship has wandered off-course
But has dragged everything with it
Those left in its wake
 mostly scramble to get on board
In spite of the coast guard monitors
And their alternately vicious
 and mind-numbingly bureaucratic
 gauntlet of obstacles
The ship lurches between
 fear and loathing
But the gravitational force of its natural state
 is a heavy, soul-deadening boredom
 that the most well-heeled passengers
 will do almost anything to shake off
 if only they can hatch
 a sufficiently perverse thought
 about how to do it
Ancient myths still drift all around
 the ship and its forsaken cargo
 that the dark non-existence
 of surrounding waters is an illusion
Myths that are distinguished from
 the ceaseless evanescent rumours that
 clatter through the crowds
Distinguished in their resistance to chatter
 and the nagging sense they produce
 of the monstrous emptiness
 of direction on board
And yet, and yet –
 how few takers! when you whisper
 calmly into another's longing eyes:
 “would you like to take a swim
 with me, far away
 from this lurching ghost ship?”

Introduction: Positivist and Pluralist Approaches in Canadian Aboriginal Law

[Law] is an institution that remakes its own language and it does this under conditions of regularity and publicity that render the process subject to scrutiny of an extraordinary kind. As an ethical or political matter, then, the structure of the legal process entails remarkable possibilities—little enough realized in the event—for thinking about and achieving that simultaneous affirmation of self and recognition of other that many (I among them) think is the essential task of a discoursing and differing humanity.

- James Boyd White, *Justice as Translation*¹

That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not.

[...]

The traditional symbols of community in the West, the traditional images and metaphors, have been above all religious and legal. In the twentieth century, however, for the first time, religion has become a largely private affair, while law has become largely a matter of practical expediency. The connection between the religious metaphor and the legal metaphor has been broken. Neither expresses any longer the community's vision of its future and its past; neither commands any longer its passionate loyalty.

- Harold J. Berman, *Law and Revolution*²

“Ich weiss nicht aus, noch ein; ich bin alles, was nicht aus noch ein weiss” – seufzt der moderne Mensch ... An dieser Modernität waren wir krank, – am faulen Frieden, am feigen Compromiss, an der ganzen tugendhaften Unsauberkeit des modernen Ja und Nein.

- Friedrich Nietzsche, *Der Antichrist* §1

1. *The puzzle of ideological transition*

The Canadian state and Canadian law look to shed colonial baggage, to slough off a bundle of ideologies asserting the superiority of European civilization. These ideologies have served as justification for, among other things, the sovereignty of European crowns, later settler states, over Indigenous peoples and territories. Yet obviously the Canadian state and Canadian law would like to hold itself together, to maintain the legitimacy of its asserted sovereignty and territorial integrity. The puzzle, it seems, is how to cultivate legitimacy while discarding the ideological foundations on which these state assertions were originally laid.

¹ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990), at 24.

² Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), at v-vi.

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We might call this the puzzle or challenge of ideological transition. The puzzle has two main pieces, which fit awkwardly together. On one hand, we have an official rhetorical repudiation of colonialism, expressed in a number of ways discussed in the chapters that follow, including official apologies for past policies, practices, and laws imposed on Indigenous peoples, and statements of support for Indigenous rights to land and self-government. On the other hand, we have the state's affirmation of its sovereignty and territorial integrity as unassailable, regardless of its colonial pedigree and past ideological justification.

Each of these elements is, I think, essentially a given in the social and political imaginaries of Canadians today. That is, even those who believe in the superiority of European civilization and its right to political domination understand that direct public expression of such views will tend to attract widespread condemnation. (This is not to say that such condemnation isn't tested, or even courted, by segments of the public. In the current Canadian political landscape, however, blunt expression of such views remains largely on the fringe.)

Similarly, even those who view the Canadian state's assertions of sovereignty as illegitimate understand that institutions of government, media, and education across the country operate on the presumption, at least implicit, of state legitimacy. The rhetorical repudiation of colonialism and the operative legitimacy of state sovereignty thus structure our social and political worlds, whatever beliefs and opinions we happen to have as individuals about that rhetorical repudiation and operative legitimacy.

Yet, for all their actuality, these two elements remain an awkward fit. The one arguably repudiates the original driving ideological force of the other. This clash sets the broad terms of a challenge that goes to the core of the Canadian constitutional order. It involves social, political, and essentially human problems of coexistence between peoples who carry distinct—though now interwoven—cultural, political, and legal traditions and practices, grappling with a colonial heritage that has come to be widely seen as a dark, disturbing, and oppressive legacy.

It is also a legal challenge in a narrower, more technical, sense. What resources does Canadian law have—in terms of principles, precedents, vocabulary, modes of argumentation, interpretation, and adaptation, etc.—to develop ways of talking about and imagining such basic terms as, e.g., “sovereignty”? Are these resources adequate to the current historical moment, to its broader social, political, and ecological problems, as these relate to the stated aim of repudiating the colonial foundations of Canadian law? How does Canadian law grasp, how does it express, and how does it shape the current challenge of ideological transition?³

³ These might be understood as particular instances of questions that plague all state assertions of sovereignty, as all modern states function to some degree as colonial projects requiring legitimation. From this perspective, the colonialism of settler-states is an especially stark manifestation of the more general phenomenon. The focus in this dissertation remains on the Canadian state, but the broader point is worth keeping in mind as it suggests that the question of state sovereign legitimacy cannot be solved “simply” by addressing Indigenous-state or Indigenous-settler relations. By its very nature, any state assertion of sovereignty is an ongoing

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This dissertation explores these questions through the Canadian case law on Indigenous-state relations, or “Aboriginal law” in Canada. The courts have been the main architects of Aboriginal law in Canada, particularly in the four decades since the adoption of the *Constitution Act, 1982*.⁴ The chapters that follow examine the shifting sets of interpretive tools the courts have deployed in carving out foundational doctrines of Aboriginal law, with a particular focus on what the courts have had to say about Crown and Indigenous sovereignties and Aboriginal title. For purposes of this Introduction, the guiding question for this examination may be put as follows:

How are Canadian courts addressing the puzzle of ideological transition in the case law on Indigenous-state relations?

The chapters that follow explore this question by looking at doctrinal matters of Aboriginal and treaty rights, at interpretive approaches the courts have taken to historic Indigenous-Crown agreements, and at contrasting constitutional visions that (partially) emerge through these doctrinal developments and interpretive approaches. This exploration will trace out what I see as two distinct judicial visions, or partial visions, of Indigenous-state legal relations emerging in the case law today. The distinction hinges primarily on contrasting orientations to the role of Canadian courts in adjudicating aspects of these relations: either (1) as courts developing a form of inter-societal law coordinating Indigenous legal orders and state law, or instead (2) as strictly domestic courts in a more positivist sense, meaning that they may take account of Indigenous legal orders and of Indigenous-state relations and agreements only to the extent such matters are first translated into the terms of the domestic state legal system founded on Crown sovereignty.

I label these contrasting orientations to the role of the courts *historically grounded pluralism* and *institutional positivism*, respectively—or, more simply, *pluralism* and *positivism*. The labels are loose handles at best, but they are practical as a kind of shorthand for the contrasting judicial orientations that will be examined in detail in the chapters of this dissertation. These contrasting judicial orientations are not conceptual binaries or legal philosophies. They are interpretive approaches, assemblages of interpretive manoeuvres and doctrinal tools that coalesce over series of cases into recognizably distinct—though in many ways overlapping and cross-cutting—positions.⁵

Judicial interpretation, at least in common law traditions, is not produced through “application” of a legal philosophy or constitutional theory to the facts of particular cases, as though a theory or philosophy might sensibly be abstracted from the specific context in which

project of legitimation. See e.g. Martin Loughlin, *Foundations of Public Law*, (Oxford: Oxford University Press, 2010); Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011). These issues are addressed in chapter 4.

⁴ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁵ For a similar conception of judicial ideological orientations in the US context, see Duncan Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, MA: Harvard University Press, 1997). My legal philosophical approach in this dissertation has been greatly influenced by Duncan Kennedy’s form of critical legal studies.

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it is articulated. If we read judicial reasons as though they are produced by applying theory to facts, we distort the work of legal interpretation carried out by the courts. We get a clearer picture of the case law and its development when we see (fragments of) legal philosophies and constitutional visions *emerging* through a roughly consistent marshalling of interpretive manoeuvres and doctrinal tools across several cases.

This does not mean, of course, that judges never hold or articulate detailed theoretical commitments. Yet the law that develops through judicial reasoning in common law traditions consists not of large theoretical constructs but of bundles of interpretive manoeuvres and the uses to which they've been put in previous cases. Judicial precedent forms a vast warehouse of building materials and tools—legal reasons—from which lawyers draw in arguing cases and judges in deciding them. At any given moment in a common law system, any number of participants—judges, lawyers, politicians, legal scholars, interested members of the public—may be marshalling subsets of these materials and tools to specific ends under the banner of a particular legal philosophy or constitutional vision.⁶

The very nature of the materials and tools—including the fact, precisely, that they have a history of being marshalled to the various ends of competing philosophies and visions—ensures that no single theoretical or philosophical account of law can impose final meaning on them. The meaning of these material and tools, of the interpretive manoeuvres from which judicial reasons are built, is necessarily shaped by the contexts in which they are used. Meaning may acquire and retain considerable consistency across a series of cases in a given area of law, as particular interpretive manoeuvres are repeatedly deployed in concert in similar ways, but there is always a degree of flux and large shifts in meaning can happen suddenly and in unpredictable ways. For instance, if a high court rejects notions of civilizational hierarchy as a basis for disregarding Indigenous assertions of land and treaty rights, that may disrupt various interpretive manoeuvres that relied implicitly or explicitly on such notions. This result may throw into doubt many aspects of the legal doctrine built up from these interpretive manoeuvres. Specific examples are discussed below, and throughout the following chapters, of this dynamic playing out in the case law.

This meaning-in-practice understanding of the case law and legal language has a long tradition, which James Tully distills in *Strange Multiplicity*, drawing in particular on Ludwig Wittgenstein, Matthew Hale, and John Marshall.⁷ As Tully notes, this tradition sees “the language of constitutionalism [as] woven into the practices and institutions of contemporary societies” and as “a labyrinth of terms and their uses from various periods, including the

⁶ See “Ideological Conflict over the Definition of Legal Rules”, chapter 3 in Kennedy, *supra* note 5, for a detailed analysis, in the US context, of how ideological conflict may take the form of competition between “universalization projects” (e.g. liberalism and conservatism) that often finds expression in conflict about the rules of law.

⁷ James Tully, *Strange Multiplicity* (New York: Cambridge University Press 1995). See especially 103-124. Tully draws notably on Wittgenstein's philosophy of language in his *Philosophical Investigations*; on Sir Matthew Hale's defence of the common law against Thomas Hobbes's deductive rationalism; and on John Marshall's opinion, as Chief Justice of the Supreme Court of the United States, in *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832).

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surrounding regular ways and uniform institutions of modern constitutionalism”. Understanding a general term (e.g., “sovereignty”) in this language “is nothing more than the practical activity of being able to use it in various circumstances”.⁸ Understanding, in this sense, “is not the possession of a theory, but the manifestation of a repertoire of practical, normative abilities, acquired through long use and practice, to use the term and go against customary use in actual cases.”⁹

On this view, the development of the common law and the language of constitutionalism are animated by the approach that Janet Halley formulates as a note-to-self in *Split Decisions*: “Instead of working to defend, protect, and maximize theory as an account of the world and program for the world, I am trying to see it as theory fragments lying about that we can use quite instrumentally, pragmatically, and disloyally to deal with problems we perceive and want to do something about.”¹⁰

In this dissertation, Canadian case law and the Canadian constitution are grasped as the terrain shaped through the countless interventions of individuals and groups using the law in Halley’s pragmatic sense to deal with issues and problems that they wanted to do something about. (The law is then also the terrain *on which* that shaping continues to be carried out, as individuals and groups struggle against, and work together with, each other to alter in various ways the terrain on which they stand.) In particular, the case law is best grasped by understanding that judges are much more likely to craft judgments using theory fragments, in Halley’s sense, than by trying to apply a “theory” or legal philosophy wholesale to the facts of a particular case.

The method of examination adopted in the chapters below flows from this granular and practice-based understanding of the law. Chapters 1 and 2 take a dive directly into the case law to explore assemblages of interpretive manoeuvres and doctrinal tools in action. Chapter 1 brings out distinct positivist and pluralist approaches to interpreting historic agreements between Indigenous peoples and the Crown. Chapter 2 then works through the evolution of the Canadian doctrine of Aboriginal title over the past half-century, to again bring out distinct assemblages of interpretive manoeuvres and doctrinal tools that can be roughly yet recognizably identified as distinct positivist and pluralist orientations.

Chapters 3 and 4 then scramble onto more theoretical plateaux, with chapter 3 highlighting key weaknesses of so-called “descriptive” legal positivism in accounting for the legal terrain that has emerged in chapters 1 and 2. Chapter 4 then explores ambiguities surrounding the repeated judicial affirmation that the constitution is “a statement of the will of the people”¹¹ and the ways in which this affirmation may figure in pluralist judicial

⁸ Tully, *supra* note 7, at 106.

⁹ Tully, *supra* note 7, at 106. This view of language also finds pithy expression in Friedrich Nietzsche, *On the Genealogy of Morals*, translators Walter Kaufmann and RJ Hollingdale (New York: Random House, 1967), Second Essay §13: “only that which has no history is definable.”

¹⁰ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006) at 7.

¹¹ E.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217 [“*Secession Reference*”] at para 85, quoting *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, at 745. The Court adds that the constitution of

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orientations. Finally, chapter 5 draws on the discussions of theory and the detailed study of case law from the first four chapters to examine issues that are currently on the horizon for Aboriginal law in Canada, notably the implementation within Canada of the United Nations Declaration on the Rights of Indigenous Peoples.¹²

These chapters, which are road-mapped in greater detail at the end of this Introduction, are grounded in a view of legal interpretation, particularly *constitutional* interpretation, as part of a larger conversation of self-government within the broader political community, the public (or publics) at large.¹³ The language of law used by the courts to interpret the constitution is a particular (often particularly authoritative) mode of expressing the social and political imaginaries in which the courts are embedded. My use of “social and political imaginaries” is shaped by Charles Taylor’s use of “social imaginary” in *A Secular Age*.¹⁴ Taylor offers the following characterization of the term:

Our social imaginary at any given time is complex. It incorporates a sense of the normal expectations that we have of each other; the kind of common understanding which enables us to carry out the collective practices which make up our social life. This incorporates some sense of how we all fit together in carrying out the common practice. This understanding is both factual and “normative”; that is, we have a sense of how things usually go, but this is interwoven with an idea of how they ought to go, of what mis-steps would invalidate the practice.¹⁵

The work of legal interpretation carried out by courts is necessarily embedded in a social imaginary in this sense—or in social imaginaries, given that different groups and individuals within a political community will inhabit overlapping yet slightly (or in some cases significantly) varying imaginaries. (I will tend to speak of “social and political imaginaries” to capture this overlapping pluralism.) To be effective, legal interpretation must draw appropriate connections between the law and collective practices and normal expectations. Effective legal interpretation will therefore be, in large part, an expression of the social and political imaginaries of the communities that are addressed by the legal interpretation (as these imaginaries are grasped by the legal interpreter). As Robert Cover puts the point:

A legal tradition [...] includes not only a *corpus juris* but also a language and a mythos—narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish a repertoire of moves—a lexicon of normative

Canada, in particular, “is the expression of the sovereignty of the people of Canada”: *Secession Reference* at para 85.

¹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

¹³ This view of legal interpretation as embedded within a broader democratic conversation draws from White, *supra* note 1.

¹⁴ Charles Taylor, *A Secular Age* (Cambridge, MA: The Belknap Press of Harvard University Press, 2007): see especially 171-176 under the heading “What Is a ‘Social Imaginary’?”

¹⁵ Taylor, *supra* note 14 at 172.

action—that may be combined into meaningful patterns culled from meaningful patterns of the past.¹⁶

In many cases, particularly those involving constitutional or other fundamental legal issues, legal interpretation will also strive to influence social and political imaginaries. Notably, high courts in modern systems of constitutional democracy tend to position themselves as guardians of the constitution as an expression of the will of the people.¹⁷

2. *State and public attitudes to ideological transition*

It will be helpful, therefore, to place this dissertation within a broader context of social and political imaginaries, before diving into questions of ideological transition at the more granular levels of legal doctrine and legal interpretation. We can approach this broader context by reflecting on the somewhat hazy question of the state's and the public's attitudes to the challenge of ideological transition.

Depending on one's perspective, the state may seem to approach this challenge as a trick to pull off, by sleight-of-hand as necessary, or as a serious task of state that must be met honourably (though with a careful eye on sovereign control and territorial integrity). It's probably fair to say that the state, through its many departments, agencies, and individual representatives, muddles forward on this challenge at various stations between these two extremes. To the extent we can attribute intentions to "the state" as such, the state surely aims for at least grudging assent to its sovereign power and the legitimacy of its law, a minimal threshold allowing the state to keep focused on the evermore pressing demands of global economic competition.¹⁸

What, then, of "passionate loyalty" to the "symbols of community", to the metaphors and images of the law? Are we able to imagine such a possibility for state law today, beyond "abstract and superficial nationalisms"¹⁹ or increasingly jingoistic "nationalist

¹⁶ Robert Cover, "Nomos and Narrative" (1983) 97 *Harvard Law Review* 4 at 9.

¹⁷ In the Canadian context, see e.g. *Hunter v Southam Inc.*, [1984] 2 SCR 145 ["*Hunter*"], at 155: "The judiciary is the guardian of the constitution". In *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, at para 89, a majority of the Supreme Court of Canada, citing *Hunter*, specified that the judiciary became the guardian of the constitution as "a necessary corollary of the enactment of the supremacy clause", i.e. section 52(1) of the *Constitution Act, 1982*. See *supra* note 11 and accompanying text for statements by the Supreme Court of Canada characterizing the constitution as an expression of the will of the people. Chapter 4 addresses these issues in detail.

¹⁸ While discussion of state sovereignty in this dissertation is focused on domestic legal doctrines of Indigenous-state relations, these doctrines must also be understood in the context of the "project of neoliberal global constitutionalism" that has applied pressures to the actual practices of state sovereignty over the past several decades. As Tarik Kochi notes, "what has emerged [through this project of neoliberal global constitutionalism] is the strengthening of aspects of the neoliberal state as a security apparatus guaranteeing, protecting and defending markets, property rights and capital from interference": Tarik Kochi, "The End of Global Constitutionalism and Rise of Antidemocratic Politics", *Global Society* 34:4 (April 2020), 487-506 at 496, available online: <<https://doi.org/10.1080/13600826.2020.1749037>>.

¹⁹ Berman, *supra* note 2 at vi.

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neoliberalism”²⁰? If not, what does that say about law as the authoritative expression of how we govern ourselves as a political community? Does the liberal state inevitably chase passionate attachments into the private realm, along with religious images and symbols? Or does this view of private-public segregation reflect only liberal political theory as opposed to political reality?²¹

These matters of passion and attachment can be understood as a dimension of our social and political imaginaries, a dimension that is largely shorn from the ways in which these imaginaries find expression in legal doctrine. While these larger questions of passion and attachment are not taken up in a sustained or systematic way in the chapters that follow, they necessarily form a horizon within which more technical legal questions are explored. These technical or doctrinal legal questions are themselves deeply intertwined with broader social and political issues relating to ideological transition. Indeed, technical legal questions are largely prompted by the pressure of ideological transition as expressed, for instance, through the rhetorical repudiation of colonialism. (This prompting of technical legal questions is illustrated below with concrete examples from the case law.) We would perceive no doctrinal “legal challenge” of ideological transition if we were not committed in some sense to ideological transition in broader social and political contexts.

This contrast between broader (or more diffuse) issues of passion and attachment, on the one hand, and doctrinal legal challenge, on the other, is thus not meant to reflect a supposed division between law and morality, or law and politics. The point is simply that the law has its own vocabularies, grammars, and modes of development, that shape the language in which the law speaks to these broader human issues.

Of course, the law is a language self-consciously addressed to a vast range of issues and relations that make up human life, with constitutional law in particular purporting to offer a kind of overarching language in which society’s fundamental disputes are to be voiced and resolved. The technical or doctrinal nature of the legal challenge is thus also not a question of its subject matter, of the relationships and disputes it speaks to, but rather of technical expertise and rhetorical skill in expressing these relationships and disputes in the language of the law, in a way that adequately captures and channels the stakes, interests, and passions involved. Unless there is sufficient consensus, among individuals and communities making up the broader political community, that the law performs this task adequately—that it provides a language in which their fundamental interests and passions can be heard and treated fairly, or at least not unduly stifled—then questions of legitimacy will linger around the law and ripple through communities.

²⁰ See Kochi, *supra* note 18 at 501. As Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (New York: Columbia University Press, 2019) at 83-84, describes the situation: “citizenries have become vulnerable to demagogic nationalistic mobilization decrying limited state sovereignty and supranational facilitation of global competition and accumulation. And instead of spontaneously ordering and disciplining populations, traditional morality has become a battle screech, often emptied of substance as it is instrumentalized for other ends.”

²¹ For a thoughtfully nuanced “yes” to this last question, see Kahn, *supra* note 3.

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Questions of legal doctrine raised by broader social and political issues of ideological transition, and to a certain extent these broader social and political issues themselves, are properly speaking the subject matter of this dissertation. But I do not want to confuse either the questions of legal doctrine or the broader social and political issues of ideological transition with the yet larger (or more diffuse) matters of passionate loyalty to symbols of community, of attachment to the metaphors and images of the law. The former—both the questions of legal doctrine and the broader social and political issues of ideological transition—are embraced within the horizon set by these more diffuse matters of loyalty and attachment to symbols, metaphors, and images. Loyalty and attachment (alongside disdain and aversion, in varying degrees and relations of tension) to symbols, metaphors, and images are interwoven within our social and political imaginaries, as the lifeblood or libidinal economy of these imaginaries.

Schematically, we can distinguish: (i) **the social and political imaginaries** that form our “background”, i.e. our “largely unstructured and inarticulate understanding of our whole situation”,²² which includes a libidinal dimension of loyalty, attachment, disdain, and aversion; (ii) **the articulated social and political issues or demands** of our time, e.g. the growing rhetorical repudiation of colonialism and calls for decolonization (as well as the corresponding resistance and backlash); and (iii) **a multitude of particular legal issues and questions** that are raised against the background of shifting social and political imaginaries and that are often directly prompted by cases brought before the courts involving the pressing social and political matters of our time. These three aspects of “our whole situation” influence and feed back on one another. The third aspect is where matters are formulated in the doctrinal language of the law and where the rhetorical and technical skills of legal practice and analysis are put to work.

While the primary focus of the chapters below is on the second and particularly the third aspects listed above, I would like to say a few words here about the background of social and political imaginaries in the Western legal tradition. I will then offer a pair of brief illustrations from the case law to make concrete the issues discussed in this Introduction, before providing a road map through the chapters that follow.

3. Law and Revolution: prior ideological transitions in the Western legal tradition

In *Law and Revolution*, Harold Berman points to six “great revolutions” that have shaped the Western legal tradition: the Papal Revolution of 1075, the Lutheran Revolution of 1517, the English Revolution of 1640, the American Revolution of 1776, the French Revolution of 1789, and the Soviet Revolution of 1917. In Berman’s account, the ideological energies and passionate loyalties driving each of these revolutions flowed from “the belief that the law was betraying its ultimate purpose and mission.”²³ In particular, “the great revolutions of

²² Taylor, *supra* note 14 at 173.

²³ Berman, *supra* note 2 at 22.

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Western political, economic, and social history represent explosions that have occurred when the legal system proved too rigid to assimilate new conditions.”²⁴

Yet revolutionary success in transforming political, economic, and social orders can only be secured if revolutionary change is itself ultimately embodied in law, thus stabilizing a new regime. Berman argues that each of the great revolutions ultimately had to compromise with, and draw heavily on, elements of the prior legal regime, leaving a recognizably continuous Western legal tradition, however much the surviving elements may have been rearranged and repurposed within a new legal system. In each case, then, an “historical dimension has been given to the new system established by the revolution. In the first place, the new legal system is considered to be rooted historically in the events that produced it. In the second place, it is considered to have changed not only in response to new circumstances but also according to some historical pattern.”²⁵

This historical dimension of the law is intertwined with what is “[p]erhaps the most distinctive characteristic of the Western legal tradition”, that is, “the coexistence and composition within the same community of diverse jurisdictions and diverse legal systems. It is this plurality of jurisdictions and legal systems that makes the supremacy of law both necessary and possible.”²⁶ This legal pluralism “originated in the differentiation of the ecclesiastical polity from secular polities”, while “[s]ecular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law, and mercantile law.”²⁷

The historical dimension of the legal tradition explains why, “in any Western legal system” a legal rule must be “interpreted and explained in part by appeal to the circumstances that brought it into being and by the course of events that have influenced it over time.”²⁸ The pluralist dimension shows how the “overlapping histories” of “various communities” with their “various legal traditions” have prevented the tyranny of any single legal system or version of history. On this intertwining of historical and pluralist dimensions in the Western legal tradition, Berman writes:

Blind historicism is also frustrated by the plurality of overlapping histories which constitute Western civilization. It is not “the past” in any monolithic sense that constitutes the historical dimension of law but rather the past times of various communities in which each person lives and of the various legal systems that those communities have produced. It is only when the different legal regimes of all these communities – local, regional, national, ethnic, professional, political, intellectual, spiritual, and others – are swallowed up in the law of the nation-state that “history” becomes tyrannical.²⁹

²⁴ Berman, *supra* note 2 at 22.

²⁵ Berman, *supra* note 2 at 16.

²⁶ Berman, *supra* note 2 at 10.

²⁷ Berman, *supra* note 2 at 10.

²⁸ Berman, *supra* note 2 at 16.

²⁹ Berman, *supra* note 2 at 17.

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We have, in broad strokes, a picture of a legal tradition fueled by passionate loyalties and ideological energies erupting in several major revolutions that have transformed existing systems of law and the historical communities that produced them, while nonetheless drawing on and reinterpreting those same systems of law to ground lasting change. In this tradition, law continuously draws on and remakes history with an eye to present-day purposes, sifting through commitments previously undertaken, and the various narratives that surround them, in order to hatch together promises sturdy enough to bind a legal structure and keep constitutional enterprises afloat.

The chapters that follow also look at legal history in this broad sense, particularly in fleshing out the orientation I am calling *historically grounded pluralism*. Our legal history—for instance, the history of relations and negotiations surrounding Indigenous-Crown treaties—helps provide a foundation for Aboriginal law today, *not* because that legal history provides coherent or definitive answers to doctrinal questions that arise today, but because it contains recorded promises, practices, precedents, relationships, institutional frameworks, as well as justifications, criticisms, and narrative accounts of these various historical elements—all of which is material for reflection and debate today. That is, we draw on this material to provide compelling historical and legal accounts of our current constitutional and doctrinal landscape and of how to resolve disputes that arise today. The material is not infinitely pliable, nor is it strictly determinative; this material, taken up into the language and grammar of the law, fires legal debate.

Yet Berman also points to a twentieth century trend, which we are still living through, that threatens the pluralist dimension of the Western legal tradition: “[t]he source of the supremacy of the law in the plurality of legal jurisdictions and legal systems within the same legal order is threatened in the twentieth century by the tendency within each country to swallow up all the diverse jurisdictions and systems in a single central program of legislation and administrative regulation.”³⁰

For Berman, this tendency, which he also labels a revolution, is more dire and the response more “desperate”³¹ than the experience of the previous six great revolutions, for “[a]lmost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law, on the part of all classes of the population.”³² Perhaps, as Berman says about the end of an era, this pervasive contempt is not something that can be proven scientifically, but something a person either senses or does not.

After all, to play devil’s advocate to Berman’s thesis, it is not hard to find passages in the case law today that aim at, or presume, forms of inspiration and passionate attachment within the law. For instance, in Canada a great deal of *Charter* interpretation, in both the case law and commentary, gives pride of place to *human dignity* as sacrosanct.³³ Similarly, discussion

³⁰ Berman, *supra* note 2 at 38-39.

³¹ Berman, *supra* note 2 at v.

³² Berman, *supra* note 2 at 40.

³³ See e.g. the majority’s discussion of dignity and *Charter* rights in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras 76-80, including at para 76: “The *Charter* and

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of human rights, again in both case law and commentary, often strives towards reverence.³⁴ In a somewhat different register, talk of free speech or second amendment rights—or simply the Constitution in general—in the US is liable to arouse a wide range of passionate loyalties.³⁵

It would also be easy to exaggerate the extent to which the law in previous times, even revolutionary law (that is, the legal changes or new legal regimes demanded by revolutionary movements), could draw on *widespread* support and passionate loyalty. The American Declaration of Independence and the US Constitution and Bill of Rights ring with high political rhetoric in the name of “the people”, but sober historical analysis draws large question marks over the notion of widespread passionate loyalty, even among whites.³⁶ As for Canadian legal history, apart from Indigenous-Crown treaties, constitutional documents prior to the *Constitution Act, 1982*³⁷ hardly even gesture towards anything like the loyalty or attachment of the people.

Are we then really living in an age that is especially cynical about law, an age particularly devoid of passionate loyalty to its images and metaphors? This question, while it may not lend itself to any definitive answer, is particularly apt in a time of ideological transition. Despite the reservations and qualifications expressed above, times of ideological transition do provide especially fertile ground for cynicism in and about the law. Indeed, periods of ideological transition may be understood in part as periods of disruption and reordering of a political community’s underlying passionate loyalty and attachment (and, correspondingly, disdain and aversion) to the symbols, metaphors, and images of the law.

4. *Ideological transition in the case law: a time for cynicism?*

In British colonial and Canadian state law, the images and claims of Crown sovereignty have been etched on two main pillars: treaty negotiations between representatives of the Crown and of Indigenous peoples (in which metaphors of kinship were common currency³⁸) and claims to the civilizational superiority of Europe (in which images of hierarchy and metaphors of civilizational tutelage were common). From the decades prior to Canadian confederation until after the second world war, the state increasingly abandoned reliance on

the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter*”.

³⁴ For a recent example from the Supreme Court of Canada, see the opening sentence of the reasons of Justice Abella, writing for the majority, in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [“*Nevsun*”] at para 1: “This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses”: *Nevsun* at para 1. (Though do we want a phoenix rising from the ashes of total war to turn around and declare global war? Even if the target is human rights abuses, the juxtaposition is strange.)

³⁵ On this point, see again Kahn, *supra* note 3.

³⁶ See e.g. Howard Zinn, *A People’s History of the United States of America* (New York: HarperCollins Publishers, 2003) at 49-102.

³⁷ *Supra* note 4.

³⁸ See e.g. Robert A. Williams, Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997).

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treaty relationships as a basis for claims to legitimate territorial control, placing greater emphasis instead on ideologies of European civilizational superiority and on the associated aims of “enfranchising” and assimilating Indigenous peoples into the state body politic.³⁹

Canadian law embraced notions of civilizational hierarchy, as detailed below. The state today strikes at this ideological pillar of sovereignty, at least rhetorically. The state, at both the federal and provincial levels, has also resumed treaty negotiations in recent decades. Yet much of the legal doctrine in the case law relating to Indigenous-state relations, including the foundations of Crown sovereignty, was grounded in the now-repudiated ideologies of civilization hierarchy. The result today is a rift between established legal doctrines that govern Indigenous-state relations in the case law, on the one hand, and the social and political imaginaries that no longer accept those ideological foundations, on the other.

This rift between legal doctrine and ideological foundations is a natural breeding ground for cynicism. Canadian courts have taken notice. The Supreme Court of Canada (“SCC”) has been relatively, even strikingly, open for a domestic high court in raising questions about the *de jure* status of Crown assertions of sovereignty over Indigenous territory, at least territory that is not subject to treaty.⁴⁰ The Court has also devoted considerable attention to developing case law to address the situation, elaborating Crown fiduciary duties and duties of consultation and accommodation, among others, flowing from the honour of the Crown and structured under the banner of reconciliation as the overarching purpose of its jurisprudence on Indigenous-state relations.

The fact that Canadian courts have placed such emphasis on *honour* and *reconciliation* shows that the stakes are significant, going to the very legitimacy of the law. In the case law itself, as explored throughout this dissertation, questions of legitimacy revolve around

³⁹ For an overview of this transition in the relationships between Indigenous peoples and European powers, see e.g. *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) [*RCAP vol 1*], in particular Chapter 6, “Stage Three: Displacement and Assimilation” at 130-185. As the Report notes, “[i]n retrospect it is clear that the non-Aboriginal settlers, because of their sheer numbers and economic and military strength, now [in the early 19th century] had the capacity to impose a new relationship on Aboriginal peoples. Their motive for so doing was equally clear: to pursue an economic development program increasingly incompatible with the rights and ways of life of the Aboriginal peoples on whose lands this new economic activity was to take place. To justify their actions, the non-Aboriginal settler society was well served by a belief system that judged Aboriginal people to be inferior. Based originally on religious and philosophical grounds, this sense of cultural and moral superiority would be buttressed by additional, pseudo-scientific theories, developed during the nineteenth century, that rested ultimately on ethnocentric and racist premises”: *RCAP vol 1* at 131. This passage also suggests a relationship between economic motive and ideological justification that is addressed later in this Introduction.

⁴⁰ See e.g. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42: “The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty”; see also e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] at para 20: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.”

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assertions of Crown sovereignty, an issue that is obviously fundamental to the Canadian constitutional order.

Although the courts have been responsive to the challenge of ideological transition, the task for the courts remains daunting. For the state is naturally reluctant to relinquish real decision-making power over the economic development of land and natural resources within its territory. The perceived failure of the state and of state law to meaningfully implement the rhetorical repudiation of colonial ideology—in essence, the perceived heavy-handedness of the state in pushing forward with economic development projects on territory claimed by Indigenous peoples, despite rhetorically renouncing colonialism—is a source of continuing flare-ups and opposition from defenders of Indigenous rights and other aligned interests (notably environmental protection interests, though such alignments of interest are variable and uneasy, including within Indigenous communities). These flare-ups in turn stoke a degree of backlash from a portion of the public who feel aggrieved in some sense or other by the state's repudiation of its ideological heritage or by the perceived "appeasement" of Indigenous and aligned interests.

It remains unclear whether the courts are, in current case law, laying stable foundations for a new constitutional vision of Indigenous-state relations and for images and metaphors of sovereignty that will draw, if not passionate loyalty, then at least legitimacy and acceptance. To carry out this task successfully, they will have to continue addressing the rift that has opened between legal doctrine and ideological foundations.

In other words, the courts must show themselves capable of addressing "the ultimate purpose and mission" of the law underlying legal doctrine. They must show that the law is not only a technical language addressing matters of "practical expediency", but a language that embodies a way of life, or collaborating and competing ways of life, a language that can meaningfully speak to why we might want to *live* one way rather than another, as social and political communities. This is not to say that the courts must reach a settled account of the ultimate purpose and mission of the law, but simply that their judgments must show that the law has the tools, the *language*, to intelligently debate the issue, i.e. to reflect on our forms of political and social life *and on why those forms of life are worthy or not of embrace*. If the law is unable to perform this task, to embody such debate with at least an adequate degree of vitality, then it will naturally fall into contempt or widespread indifference, as a domain of expertise that might be used instrumentally for specific ends but with nothing meaningful to tell us about how to orient ourselves to important social, political, and cultural issues.

These broad questions of the purpose and mission of the law are not unique to areas of Aboriginal law, of course. But matters of Indigenous-state relations present a particular challenge in the current period of ideological transition. Aboriginal law may therefore be especially symptomatic of the state of Canadian law, of its vitality for debating and reflecting on deeply contested political, social, and cultural issues in the country. After all, the explicit purpose of much colonial and early Canadian state law dealing with Indigenous-state relations was precisely the establishment of European civilizational superiority and the

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elimination of distinct Indigenous polities.⁴¹ The Canadian state and Canadian law now repudiate this colonial purpose, while nonetheless affirming legal doctrines of state sovereignty and Indigenous-state relations that were, originally at least, largely animated by that purpose. To continue affirming legal doctrines while rhetorically repudiating their ideological foundations is to risk a definition of cynicism in the law. Is Canadian law capable of meeting the current period of ideological transition, and the attendant risk of cynicism, with a vitality that adequately grasps the historical and political context by presenting paths forward that orient legal doctrine according to some compelling sense of mission and purpose? If so, what might that look like?

Broadly speaking, the courts seem to have two main options. First, the courts could acknowledge and even endorse the growing rhetorical repudiation of past ideological foundations, while at the same time *insulating* existing legal doctrine from the consequences of such repudiation. In particular, they could insulate the case law from challenges to the legitimacy of state sovereignty assertions and to the basic constitutional architecture of state law (such as doctrines relating to federal-provincial division-of-powers, to constitutional separation of powers, to Crown sovereign immunity, etc.). In support of this option, Canadian courts might point to their institutional status as domestic courts whose lawful authority flows from the sovereignty of the Crown. The Canadian superior courts are, after all, descendants of the royal courts first established by the English Crown. In a similar vein, the courts might point to the limits of their institutional competence for dealing with such fraught political issues as the historical relations between the state and Indigenous peoples or between Indigenous and settler societies. The separation of the judiciary from the legislative and executive branches counsels against the courts wading into such issues any deeper than necessary to resolve legal questions. On this view, questions of ideological transition are, by and large, not the business of the courts, and they should refrain from any aggressive attempts to re-animate or re-orient Canadian law with a new purpose and mission that would restructure Indigenous-state relations. For reasons discussed in detail in Chapter 1, I refer to this option as *institutional positivist*, while acknowledging, again, that this label is at best a rough shorthand.

Alternatively, the courts could view the repudiation of colonial ideologies as requiring them to undertake a deeper examination of the ways in which these ideological roots have shaped the legal doctrines relating to Indigenous-state relations that the courts still apply today. This view would acknowledge that the courts have drawn on and have been oriented by ideologies of civilizational hierarchy in elaborating legal doctrines of Indigenous-state

⁴¹ See *RCAP vol 1*, *supra* note 39, at 130-185; *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada, 2015) [*“TRC Summary Report”*]. The opening sentence of the Introduction to the *TRC Summary Report* reads: “For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as ‘cultural genocide.’”

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relations. This view would accept that it is therefore appropriate for courts today to search for a new orientation (a new, or renewed, “ultimate mission and purpose”) that may significantly reshape existing legal doctrines.

Where would the courts look for such an orientation? As noted above, the two pillars of legitimacy for Crown sovereign claims in Canada have been treaty relationships with Indigenous peoples and ideologies of European civilizational superiority. If the latter pillar is now rejected, a natural place to turn to would be treaty relationships and, more broadly (since not all Indigenous peoples in Canada have concluded treaties with the Crown), the historical relationships between Indigenous peoples and the Crown, and between Indigenous legal systems and systems of British colonial and later Canadian state law. As Berman’s account of the Western legal tradition highlights, the *pluralism* inherent in this tradition supplies a wealth of tools for precisely this task of re-orienting Canadian law on Indigenous-state relations along more historically grounded pluralist lines—not in the sense of a return to some past state of legal relations or legal doctrine, but rather in the sense of a present reconsideration of elements from our legal history in light of current transformations in our social and political imaginaries.

The basic orientation of this historical and pluralist approach would require respect for both Indigenous and state legal orders—respect for *the historical reality* of these legal orders as embodying ways in which peoples govern themselves. Respect in this sense flows not simply from any moral imperative, but rather from clear appreciation of the fact that a legal order must acquire and maintain a degree of legitimacy in order to function, and thus to exist. Acquisition and maintenance of legitimacy is necessarily embedded in historical, social, and political contexts. Acknowledgment of this basic fact, and respect for the historical contexts of social and political relationships, is the foundation of the judicial orientation I characterize as *historically grounded pluralism*. Such an orientation approaches our current moment of ideological transition by acknowledging the historical context of Indigenous-state legal relationships and turning attention to issues of coordinating Indigenous and state legal orders, including the many technical legal questions raised by attempts at such coordination.⁴²

⁴² The focus on jurisdictional coordination is beginning to enter the language of agreements between state and Indigenous governments in Canada. See e.g. the shíshálh Nation / British Columbia Foundation Agreement, dated October 4, 2018, available online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_-_signed.pdf>. The Foundation Agreement notably calls for “clarify[ing] the relationship between shíshálh laws and jurisdiction and the Province’s laws and jurisdiction”: see sections 1.1(a), 2.3(d), 2.4(c). See also *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, adopted by Parliament with royal assent on June 21, 2019. In the Preamble to this Act, “Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services”, while sections 18 to 24 provide for coordination of applicable Indigenous, provincial, and federal laws. A slightly older example of attempted jurisdictional coordination is the Kunst’aa guu – Kunst’aayah Reconciliation Protocol, first signed by the Haida Nation and British Columbia in 2009, also available online: <http://www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf>. The intention here is not to hold up these agreements or the federal Act as models, but to underscore the fact that issues of Indigenous-state

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It is unclear whether such historically grounded pluralism can of itself form a new purpose and mission for Canadian law on Indigenous-state relations. At a minimum, it seems a promising approach for more openly debating questions of purpose and mission.

Such historically grounded pluralism, if adopted as a judicial approach to Indigenous-state relations, might not so much *oppose* as *subsume* the positivist approach within a broader “integrative jurisprudence”,⁴³ in the sense that Berman gives to that term:

A social theory of law should stress the interaction of spirit and matter, of ideas and experience, in its definition and analysis of law. It should bring the three traditional schools of jurisprudence – the political school (positivism), the moral school (natural-law theory), and the historical school (historical jurisprudence) – together in an *integrative* jurisprudence.⁴⁴

Whether or not the case law is moving towards such an integrative jurisprudence, the chapters that follow argue that the contrast between the positivist and pluralist approaches that we actually find in current Canadian case law is, essentially, *a matter of degrees*. Even judges who adopt what a positivist approach accept reconciliation as an overarching purpose of contemporary Aboriginal law and the honour of the Crown as a key principle governing the duties of the Crown in its relations with Indigenous peoples—both of which at least suggest a new ideological orientation from which to reshape existing legal doctrines. Conversely, even judges who adopt a pluralist approach accept, as a matter of course, that there are limits to the institutional competence of domestic courts and that these limits restrain the ways in which the courts may explore, for purposes of shaping legal doctrine, the historical and political aspects of Indigenous-state relations.

The chapters that follow aim to show that we currently find in the Canadian case law on Indigenous-state relations a growing articulation of both pluralist and positivist orientations. The aim in the first instance is explanatory: I hope to provide a helpful overview of broad trends in the case law and to draw a rough map of where these trends may be headed in the coming years and decades.

I acknowledge at the outset that, to my mind, the pluralist orientation has particular strengths. The pluralist approach offers a clearer path for state law to come to grips—or at least to grapple—with its colonial heritage, both its earlier ideological embrace and its current rhetorical repudiation, and with the present challenge of ideological transition. As Berman argues:

Finally, a social theory of law must move beyond the study of Western legal systems, and the Western legal tradition, to a study of non-Western legal systems and traditions, of the meeting of Western and non-Western law, and of the

jurisdictional coordination are not merely academic questions but are already being addressed in Canadian law.

⁴³ Chapters 3 through 5 offer alternative formulations of this same idea in speaking at times of a possible *synthesis* of positivism and pluralism, or *reconstruction* of positivism through pluralism, or ongoing *agonism* of positivism and pluralism.

⁴⁴ Berman, *supra* note 2 at 44 (emphasis in original).

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development of a common legal language for mankind. For only in that direction lies the way out of the crisis in Western legal tradition in the late twentieth century.⁴⁵

While the chapters that follow do not aim specifically at a “social theory of law”, Berman’s point applies broadly to the study and elaboration of Canadian Aboriginal law. The pluralist approach that is emerging in the case law at least points the general way towards a “meeting of Western and non-Western law”. That is a principal takeaway from the analysis in this dissertation.

Before turning to a preliminary look at Canadian case law, I return briefly to a point touched on above: the growing function of the state as guarantor of neoliberal economic interests, and in particular the pressure this exerts on Canadian law to uphold the final decision-making power of the state over economic development of land and natural resources. This pressure is obviously significant, as witnessed recently in battles relating to the Trans Mountain Pipeline Expansion and the Coastal Gaslink projects, among many other examples.⁴⁶ The desire for land and control of economic resources has undeniably been a key factor shaping British colonial and later US and Canadian law governing Indigenous-state and Indigenous-settler relations.⁴⁷

Colonial law and settler state law have always clothed such relations in accounts of lawful foundations, providing ideological justifications that go beyond mere economic self-interest. How we understand the relationship between economic self-interest and ideological justification will go a long way to determining how cynical we are about such justifications and the legal doctrines they hatched. If we accept that economic self-interest has been a crucial driving force of colonialism, does that mean that ideological justifications and legal

⁴⁵ Berman, *supra* note 2 at 45.

⁴⁶ The Trans Mountain Pipeline expansion project (“TMX”) aims to roughly triple the capacity of an existing pipeline system for transporting crude from Alberta to the southern coast of British Columbia. TMX has been the subject of extensive litigation. The federal cabinet’s original approval of the project was quashed by the Federal Court of Appeal (“FCA”) in August 2018: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153. In May 2018, the federal government had purchased the Trans Mountain pipeline system from Kinder Morgan Inc and, following the FCA’s decision, cabinet eventually re-approved TMX. The FCA upheld this second approval: *Coldwater Indian Band v Canada (Attorney General)*, 2020 FCA 34, leave to appeal to SCC dismissed, 2020 CanLII 43130. Coastal GasLink (“CGL”) is a proposed natural gas pipeline project that triggered nationwide opposition, led by activists and hereditary chiefs of the Wet’suwet’en Nation in central British Columbia, through whose traditional territory the pipeline is set to pass. In December 2019, the United Nations Committee on the Elimination of Racial Discrimination issued a decision through its “Early Warning and Urgent Procedures” calling on Canada “to immediately cease construction of the Trans Mountain Pipeline Expansion project and cancel all permits, until free, prior and informed consent is obtained from all the Secwepemc people” and similarly “to immediately halt the construction and suspend all permits and approvals for the construction of the Coastal GasLink pipeline in the traditional and unceded lands and territories of the Wet’suwet’en people, until they grant their free, prior and informed consent”: UNCERD, Decision 1(100), 100th session, 2801st meeting, adopted 13 December 2019, online <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/EWU/CAN/9026&Lang=en>.

⁴⁷ See *RCAP vol 1*, *supra* note 39 at 94-185.

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doctrine relating to Indigenous-state relations are best understood as “superstructure”, a thin veneer over economic interests that provide the true key to legal doctrine?

Undoubtedly, the dominant social, political, and economic conditions and interests prevailing at any given time significantly circumscribe the legal reasoning and doctrines produced by courts, as well as the legal results they reach. How could it be otherwise? If legal results are too disconnected from social, political, and economic realities, they will find no traction in these realities. If they are too dramatically at odds with dominant interests, they are unlikely to be implemented. As for the task of legal reasoning, the legal imagination of judges inevitably draws on the social and political imaginaries they inhabit. The case law, particularly constitutional law, is largely a work of translation through which judges express, in the language of the law, certain aspects of the social and political imaginaries they inhabit.

That said, there are at least two reasons why this necessary embedding of law in social and political context does not lead to—in fact contradicts—the purely cynical or “superstructural” understanding of law. First, the courts and government officials who developed legal doctrines to govern relations with Indigenous peoples did not *merely* search for ideological foundations for relations as they existed, but used the law (with greater or lesser success) to reshape, redirect, restrain, as well as to justify or sanction existing relations between colonial governments, later settler states, and Indigenous peoples. From within their own worldviews and legal orders, Indigenous peoples and leaders similarly approached relations with colonial powers and peoples. We may approve or condemn the various ends pursued and the means used, but the very articulation of legal doctrine and of ideological foundations imposed a certain structure, shape, and direction on relations between Indigenous peoples and the Crown, and between Indigenous and settler societies. Of course, individuals and societies are ever inventive in ways of circumventing, evading, and redeploying legal structures and ideological foundations. Yet this undeniable reality merely underscores the fact that legal doctrine and ideological foundations are not mere epiphenomena, but rather part and parcel of the socio-political fabric that we constantly reweave through contestation *and* on which we draw in order to contest existing laws, policies, and practices.⁴⁸

In his critique of moral values, Nietzsche sees “morality as consequence, as symptom, as mask, as tartufferie, as illness, as misunderstanding; but also morality as cause, as remedy, as stimulant, as restraint, as poison”.⁴⁹ This is good advice for a critical approach to law as

⁴⁸ This characterization draws on James Tully’s notion of “democratic constitutionalism”, by way of contrast with “constitutional democracy” which conceives of certain constitutional principles, structures, and institutions as largely beyond the reach of political contestation: see James Tully, “Modern Constitutional Democracy and Imperialism,” *Osgoode Hall Law Journal* 46.3 (2008), 461-493.

⁴⁹ Friedrich Nietzsche, *On the Genealogy of Morals*, translated by Walter Kaufmann and RJ Hollingdale (New York: Random House, 1967), Preface §6. See also Quentin Skinner, *The Foundations of Modern Political Thought, Volume One: The Renaissance* (New York: Cambridge University Press, 1978) at xii-xiii, where Skinner discusses “one crucial way in which the explanation of political behaviour depends upon the study of political ideas and principles, and cannot meaningfully be conducted without reference to them”, noting in particular that “anyone who is anxious to have his behaviour recognised as that of a man of honour will find himself restricted to the performance of only a restricted range of actions. Thus the problem facing

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well. It is not hard to see that law often provides cover for particular interests or to recognize that individuals and groups may establish legal principles as pretext to protect their own economic or political interests. But even in such situations, if there exists at least a roughly functioning legal system, invoking the legal apparatus in this way will set in motion effects of that apparatus according to its own logic, procedures, and substantive reasoning. Over any considerable length of time, such effects are hard to calculate, even harder to control.

Thus, while the law may be, among other things, a symptom of underlying economic and political interests and relations, it can also be, at one and the same time, a stimulant or restraint on the pursuit of such interests, and a salve or a poison on such relations. In a time of ideological transition, when the past ideological foundations of the law and its ultimate purpose and mission are being called sharply into question, the precise function of an area of law or legal rule is likely to be particularly uncertain and multiform. For purposes of this dissertation, it is enough that the law is not a pure consequence of social, political, and economic factors, though it is undeniably intertwined with these.

The intertwining nature of legal and political history is a second consideration undermining the view of law as epiphenomenal, particularly in the context of Indigenous-state relations. To the extent that judges and government officials in the 19th and 20th centuries drew on notions of civilizational superiority to explain or justify developments in Indigenous-state relations, they were surely—to varying degrees—genuine believers. This means that it is not possible to neatly separate legal doctrine from ideological commitment. In the context of the colonial encounter between Indigenous and European legal orders, it is not as though there existed a clear legal doctrine of sovereignty which, for distinct extra-legal reasons (e.g. doctrines of religious or civilizational hierarchy), Indigenous peoples were found not to satisfy. Rather, as Anthony Anghie has argued, legal conceptions of sovereignty were developed *through* the colonial encounter while simultaneously shaping it.⁵⁰

We cannot compartmentalize legal doctrine from ideological commitments, nor from social and political imaginaries, if we wish to gain a realistic understanding of how law evolves and operates in practice. The law is not simply a veil behind which independent ideological interests are pursued. It is likely only in a period of ideological transition—and of corresponding room for cynicism—that such a view may seem at all plausible. For in such a period, there is a dearth of living mythology woven through the practices, norms, and institutions of the law and thus of the polity, which therefore seem governed by cruder material or more brutal ideological ends.⁵¹ We might look around at the patches of mythology

an agent who wishes to legitimate what he is doing at the same time as gaining what he wants cannot simply be the instrumental problem of tailoring his normative language in order to fit his projects. It must in part be the problem of tailoring his projects in order to fit the available normative language.”

⁵⁰ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2005). See also Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007).

⁵¹ This is not to say we are living without myths or mythology in modern society. A fuller discussion of this issue than can be given here would have to distinguish what we might call *living* mythology/ideology, which transmits practices and ways-of-living (“savoir-vivre”) together with a sense of meaningfulness in such

that remain—sometimes as fig leaves, often as sites of culture wars—and find it hard to believe they ever (let alone a mere two or three generations ago!) belonged to a living mythology that was widely embraced.

For present purposes, these broad points about the interconnection of legal doctrine and ideological commitments are best explained through concrete examples. Chapter 1 provides an extended discussion of examples from the case law, but it will help to begin with a pair of relatively straightforward examples here. The main point is to briefly highlight the complex interaction and entanglement between (i) background social and political imaginaries, (ii) social and political issues that get articulated against this background, and (iii) the arrival of these issues before the courts in the form of legal disputes seeking judicial resolution.

The legal disputes appearing before the courts are typically deeply embedded in the particular situation of the parties (what Canadian courts like to call a case’s “factual matrix”). Legal debate translates those aspects of social and political issues embedded in a particular fact situation into the doctrinal language of the law. Judicial resolution of disputes depends on the development of legal doctrine that speaks to the issues brought before the courts by deploying the vocabulary and grammar of the law. Deploying this legal apparatus inevitably raises narrower or more technical questions of law that take on a life of their own, and the technical solutions developed in response may in turn influence the broader discussion of social and political issues, as well as the background social and political imaginaries.

5. *Simon and Restoule: the interplay of legal doctrine with social and political imaginaries*

Consider the reasons of the SCC in *Simon v The Queen*.⁵² The case, decided in 1985, saw the Court explicitly rework the language of Canadian law around sovereignty and Indigenous-state relations, in response to an undeniable evolution in the broader social and political imaginaries of those relations. (Perhaps it would be more accurate to say that the Court acknowledged that the language of Canadian law had already been remade by the undeniable evolution in these broader imaginaries of Indigenous-state relations.) In *Simon*, the Court addressed the question whether “the Treaty of 1752” concluded between Mi’kmaq representatives in Nova Scotia and Governor Hopson on behalf of the Crown, “was validly created by competent parties”.⁵³

practices and ways-of-living, from *desublimating* mythology/ideology (perhaps better labelled *marketing*), which produces compulsive behaviour while disrupting any stable sense of meaningfulness. On desublimation and disruption, see Bernard Stiegler, *Dans la disruption: comment ne pas devenir fou?* (Les liens qui libèrent, 2016). For a fascinating discussion of the modern myth that we live without mythology, and of the illness at the heart of this modern myth, see “Cargo Cults of the South Pacific” in Thomas Merton, *Love and Living* (New York: Farrar, Straus and Giroux, 1979), at 80-96; for a fuller discussion in the context of modern law, see Peter Fitzpatrick, *The Mythology of Modern Law*, (New York: Routledge, 1992). On the myth of Canadian state law’s “objectivity”, see John Borrows, *Beyond Experience? Objectivity, Indigeneity & Freedom of Religion* (not yet published).

⁵² *Simon v The Queen*, [1985] 2 SCR 387 [“*Simon*”].

⁵³ *Simon*, *supra* note 52 at 397.

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Nova Scotia submitted the following before the SCC: “The issue of capacity is raised for the purpose of illustrating that the Treaty of 1752 was of a lesser status than an International Treaty and therefore is more easily terminated. The issue is also raised to give the document an historical legal context as this issue has been raised in previous cases.”⁵⁴ The SCC explained that “[t]he historical legal context provided by the respondent [i.e., Nova Scotia] consists primarily of the 1929 decision of Acting Judge Patterson in *R. v. Syliboy*, [1929] 1 D.L.R. 307 (Co. Ct.) and the academic commentary it generated immediately following its rendering.”⁵⁵ On the issue of the Mi’kmaq’s capacity to enter into a binding treaty with Governor Hopson, Judge Patterson’s observations in his decision included the following:

[T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.⁵⁶

The SCC unanimously repudiated this language, making clear that it could no longer support interpretive manoeuvres for assessing the meaning, within Canadian law, of agreements between Indigenous peoples and the Crown:

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.’s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.⁵⁷

To this extent, then, the sovereignty asserted by the Crown and inherited by the Canadian state can no longer be understood in Canadian law as unilateral and unlimited in relation to Indigenous peoples. No judicial performance explicitly resting on such premises is now, the SCC has stated, an adequate or even tolerable legal expression of the social and political imaginaries in which the courts are embedded.

Yet this conclusion in turn raised many questions for the Court in *Simon*. If Indigenous-Crown treaties are legally binding, are they to be understood as international treaties between sovereigns? The Court’s answer is no, they are *sui generis*.⁵⁸ Do the treaties then belong to

⁵⁴ *Simon*, *supra* note 52 at 398.

⁵⁵ *Simon*, *supra* note 52 at 398.

⁵⁶ *Simon*, *supra* note 52 at 399.

⁵⁷ *Simon*, *supra* note 52 at 399.

⁵⁸ The Court expressed its view on this point in *Simon*, *supra* note 52 at 404, as follows: “While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”

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the domestic legal order, enforceable by Canadian courts? The Court's answer is yes. Do the treaties then have a status comparable to statute or common law or constitutional law? The Court in *Simon* declined to decide whether the Treaty of 1752 was protected by section 35(1) of the *Constitution Act, 1982*,⁵⁹ although section 35(1) does now provide constitutional protection to many Indigenous-Crown agreements, both historic and modern. The SCC has, however, qualified even this modern constitutional protection by holding that both federal and provincial levels of government may infringe treaty rights if the "infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group."⁶⁰

Thus the Court's repudiation in *Simon* of certain interpretive manoeuvres as ideologically unacceptable forced adaptations and new interpretive manoeuvres in the Court's articulation of sovereignty within the more technical language of legal doctrine previously developed to address issues of sovereignty, treaty relationships, and hierarchies of legal rules. This illustrates a basic reality that is essential to the discussion throughout this dissertation: *the particular character, and the acceptable and unacceptable practices, of Crown sovereignty in relation to Indigenous peoples are in a state of constant elaboration in Canadian law*.⁶¹

Unsurprisingly, though, this ongoing adaptation has never led Canadian courts to a wholesale rejection of existing state practices of sovereignty. After all, the SCC has repeatedly characterized the judiciary as the "guardian of the constitution"⁶² and naturally sees and seeks a stabilizing role for the courts, itself foremost among them, in the elaboration of constitutional law for the country.

As *Simon* illustrates, the courts aim to perform their role in a manner that is convincing and legitimate within existing social and political imaginaries as the courts perceive these. In this, they are like other actors in our social and political worlds. As with other social and political actors, it is always worth asking of the courts *whom* they aim to convince and *what kind of conversation* they are opening or carrying on about legitimacy. James Boyd White, borrowing from John Dewey, suggests approaching judicial reasons by asking: "Is this conversation one in which 'democracy begins?'"⁶³

⁵⁹ *Simon*, *supra*, note 52 at 415.

⁶⁰ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*"Tsilhqot'in Nation"*] at para 139: "Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society."

⁶¹ Mark Walters, "Law, Sovereignty, and Aboriginal Rights" in *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, edited by Patrick Macklem and Douglas Sanderson (Toronto: University of Toronto Press, 2016) at 40 makes a similar point: "As a construct of ordinary legal discourse, sovereignty is, like all ordinary legal constructs, something that must be constantly interpreted and reinterpreted over time to ensure that it contributes to the general understanding of law as an enterprise that integrates legality and legitimacy."

⁶² E.g. *Hunter*, *supra* note 17 at 155: "The judiciary is the guardian of the constitution".

⁶³ White, *supra* note 1 at 101.

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The language of Judge Patterson in *Syliboy* is not addressed to the Mi'kmaq and does not aim to convince them nor to open a conversation about legitimacy or democracy in which Indigenous peoples are seen as active participants. The SCC, in rejecting that language in *Simon* and in elsewhere linking the legitimacy of state sovereignty to treaty relationships between the Crown and Indigenous peoples,⁶⁴ has signalled that one important measure of its modern Aboriginal law jurisprudence is whether it helps to open a more equal and more respectful conversation between these treaty partners and potential treaty partners (in the case of Indigenous peoples who have not yet concluded treaty agreements with the Crown). The courts have a significant voice in conversations about state sovereignty and legitimacy in Canada. While the courts must speak to the specific disputes that come before them, they inevitably also address changing aspects of the broader social and political world from which these disputes arise and in which they (both the disputes and the courts) are embedded.

But the courts do not simply acknowledge or react to changes they perceive in the broader social and political context. As *Simon* also illustrates, when the courts acknowledge such changes, this is typically because the changes raise significant legal questions, which the courts must then resolve within the specific (and sometimes exceedingly technical) constraints of the language and institutions of the law.⁶⁵ Answers to these more focused questions cannot simply be read off from changes in social and political imaginaries. It may take considerable skill in doctrinal development and creativity in legal interpretation for a court to lay the foundations for technical answers that are adequate to changes in surrounding social and political imaginaries.

In the best of cases, the courts develop answers that in turn help transform social and political contexts and imaginaries in positive ways, e.g. towards greater mutual respect and recognition between parties who are often in conflict. In the worst of cases, court decisions may set obstacles on the path to such transformation, or even sow further division, abuse, and exploitation within or across communities. As for Indigenous-state relations in particular, the courts have been, for better or worse, central institutions in elaborating performances and practices of state sovereignty over the past two centuries in North America, increasingly so in Canada over the past half-century.

In the decades following *Simon*, Canadian courts have come to accept not only the binding nature of Indigenous-Crown treaties but also the relevance of the inter-societal negotiations that produced them.⁶⁶ Judicial interpretation of an Indigenous-Crown treaty thus

⁶⁴ See *supra* note 40 and accompanying text.

⁶⁵ White, *supra* note 1 at 96-97, notes that the jurisdictional questions at the heart of law prevent any straightforward reduction of law to policy: "The question for the lawyer is *always* more than what the best result or rule would be, for it includes as well the question: Who should have the power to decide what the best result or rule is, under what standards, and subject to what review? The activities of the law create a social universe in which power is allocated or distributed among many, and every act of the lawyer or judge must reflect a judgment about how this allocation works, or should work. This is an important way in which the law undercuts the tendencies towards tyranny that exist whenever one person has power over another."

⁶⁶ The courts, including the SCC, have sometimes strayed from this principle in practice. For a discussion of this point, including a particularly striking example in *Grassy Narrows First Nation v Ontario (Natural*

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requires an understanding of the Indigenous perspective, including the legal order of the Indigenous people or peoples who concluded the treaty with the Crown. The SCC has stated that the Indigenous perspective is necessary not only to the proper interpretation of treaties, but also to a proper understanding of Aboriginal title and other Aboriginal rights.⁶⁷

A decision in 2018 by the Ontario Superior Court in *Restoule v Canada* gives some sense of the evolving nature of treaty interpretation.⁶⁸ *Restoule* dealt with the interpretation of the Robinson Huron Treaty and the Robinson Superior Treaty (“the Robinson Treaties”) concluded in 1850 between Anishinaabe peoples and the Crown in the upper Great Lakes region of Ontario. In particular, the decision addressed the proper interpretation of a clause in those treaties dealing with potential increases in treaty annuities. In line with guiding case law, the Court accepted the Anishinaabe plaintiffs’ request that it “interpret the Treaties’ long-forgotten promise to increase the annuities according to the common intention that best reconciles the interests of the parties at the time the Treaties were signed.”⁶⁹ The Court agreed that this was the correct interpretive approach and that it required “an appreciation of the Anishinaabe and Euro-Canadian perspectives, the history of the parties’ cross-cultural shared experience, and the Crown’s duty of honourable dealings with Indigenous peoples.”⁷⁰

In carrying out this interpretive task, the Court in *Restoule* accepted extensive expert evidence on Anishinaabe legal principles and engaged in a detailed analysis of this evidence to draw inferences about the understanding Anishinaabe negotiators would have had of the treaty terms. These inferences were central to the conclusions the Court ultimately drew about the meaning of the treaty provisions in dispute in *Restoule*.

The Court’s approach in *Restoule* reflects a social and political imaginary in which treaties are understood as agreements across distinct legal orders. As such, the agreements cannot sensibly be interpreted without at least a minimal understanding of the different legal orders involved. As in *Simon*, however, the law’s acknowledgment and expression of this broader evolution in social and political imaginaries in turn triggered a series of more focused legal questions. The answers developed by the courts (among other actors) to these legal questions will themselves in turn have an impact on the social and political contexts and imaginaries of Indigenous-state relations.

One of the most intriguing legal questions raised, but not definitively answered, in *Restoule* is whether courts should treat Indigenous law as domestic law, such that the courts

Resources), 2014 SCC 48, [2014] 2 SCR 447, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 84-88 and 144-147.

⁶⁷ See e.g. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [“*Delgamuukw*”] at para 112, where Chief Justice Lamer, writing for the majority, explained that Aboriginal title is “*sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.” This is not to say that the SCC and other courts have, in practice, consistently referred to and incorporated Indigenous legal systems and perspectives in the elaboration Aboriginal rights. Yet existing legal doctrine does call for this.

⁶⁸ *Restoule v Canada (AG)*, 2018 ONSC 7701 [“*Restoule*”].

⁶⁹ *Restoule*, *supra* note 68 at para 2.

⁷⁰ *Restoule*, *supra* note 68 at para 2.

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are empowered to pronounce upon Indigenous law. That is, should Canadian courts presume to *interpret*, in the sense of giving binding authoritative statements on, Indigenous law? Should the Superior Court of Ontario provide its own legal interpretation of the meaning of Anishinaabe legal rules, principles, and procedures? Or should Canadian courts in some respects treat Indigenous law as they would foreign law,⁷¹ receiving expert evidence on aspects of the Indigenous legal orders relevant to a given case, and drawing factual conclusions from the expert evidence? Or would it be best to invoke again the *sui generis* nature of Indigenous-Crown legal relations and develop an approach to the reception of Indigenous law in Canadian courts on its own terms, to be subsumed neither under approaches taken to domestic law nor those applicable to foreign law?

Currently, these remain largely open questions in Canadian law. The trial judge in *Restoule* had to decide on an approach to the Anishinaabe legal perspective presented to her, with relatively little guidance from existing case law. The plaintiffs asked the Court to accept expert evidence on Anishinaabe law and to draw factual conclusions, not to provide legal interpretation. Canada, one of the defendants, supported this approach and Ontario, the other defendant, does not seem to have objected. The Court could therefore accept this proposed approach without presuming to determine whether this is the approach generally required in Canadian law. As the trial judge stated:

The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective. The Plaintiffs did not ask the court to apply Anishinaabe law. Rather, the Plaintiffs and Canada submit that the court should take respectful consideration of Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis.⁷²

In performing this analysis, the trial judge insisted that “[t]he evidence of both the Anishinaabe perspective and the Euro-Canadian perspective came before the court on equal footing.”⁷³ The trial judge’s review of the historical evidence also revealed the steps taken by the parties to the negotiations in 1850 to meet each other on equal footing, including efforts by Crown representatives to acknowledge the Anishinaabe legal order and to speak to it through certain procedures adopted for negotiations:

The substantive treaty discussions started September 5, 1850, following a pipe ceremony and possibly a smudging ceremony, with all the delegates from Lakes Superior and Huron gathered. As Mr. Morrison pointed out, it is important to note that the Treaty Council took place around the Anishinaabe Council Fire at Bawaating (Sault Ste. Marie), and not at the King’s Council Fire at Manitowaning, nor at the Legislative Assembly or Executive Council offices of

⁷¹ If the courts treat Indigenous law as they would foreign law in this respect—by drawing conclusions of fact about Indigenous law based on expert evidence, rather than providing legal interpretations of Indigenous law—that does not necessarily mean they should treat Indigenous law as they would foreign law in other respects, e.g. in applying conflicts-of-laws analyses.

⁷² *Restoule*, *supra* note 68 at para 13.

⁷³ *Restoule*, *supra* note 68 at para 12, citing *Mitchell v Minister of Natural Revenue*, 2001 SCC 33, [2001] 1 SCR 911 at para 39.

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the Provincial Government in Toronto, nor at the Royal Palace of the Monarch in London, England. Further, not only did the Treaty Council take place at a central and long-standing site of Anishinaabe governance, it was conducted in Anishinaabemowin, as well as English, and incorporated ceremonies and protocols that characterize the long-standing system of Great Lakes diplomacy. The location of the Treaty Council, as well as the protocols and procedures followed, indicate that the British, including Robinson, had developed at least a functional understanding of the Anishinaabe systems of law, diplomacy, and language.⁷⁴

Citing Canada's call, in its closing submissions, for a "reconciliatory and purposive approach to treaty interpretation", the trial judge found that "the central purpose of the Robinson Treaties, to renew a relationship on which this country was founded, must remain at the forefront of the interpretation exercise."⁷⁵ This exercise in judicial interpretation is informed by "[t]he underlying purpose of the honour of the Crown" which is "to facilitate the reconciliation of the pre-existing sovereignty of Indigenous peoples with the assumed sovereignty of the Crown."⁷⁶

In broad terms, then, the Court in *Restoule* interpreted treaty negotiations and agreements between Indigenous peoples and the Crown as significant moments in their ongoing relationships and, in the case of historic agreements like the Robinson Treaties at least, as attempts to renew relationships on which Canada was founded. The parties to these treaties are seen as engaging in dialogue and negotiation across legal orders, neither of which is subordinating itself to the other. In interpreting the Robinson Treaties, the Court engaged in a detailed review of the historical context of negotiations and sought to understand the perspectives of both the Anishinaabe and Crown negotiators. In this exercise, the Court relied on the testimony of both Anishinaabe and Crown experts. This approach holds out a certain promise of being a conversation "in which democracy begins."

Of course, there are difficult questions lurking here as to the precise role and authority of the court itself. The court is a state institution, descended (in the case of superior courts) from the English royal courts. Does the court's own authority then derive specifically from Crown assertions of sovereignty? If so, should the court be asked to adjudicate challenges to state sovereignty and competing assertions of Indigenous and Crown sovereignty? As noted in chapter 1 below, high courts in Australia and the United States have explicitly ruled out such possibilities—though the rapid evolution in this area of law over the past few decades may mean that the positions taken by those high courts will be revisited and nuanced. All five chapters below address difficulties and issues raised by these broad questions relating to state sovereignty and the judicial role.

⁷⁴ *Restoule*, *supra* note 68 at para 214 (the judge's citations to sources of historical evidence omitted).

⁷⁵ *Restoule*, *supra* note 68 at paras 333-334.

⁷⁶ *Restoule*, *supra* note 68 at para 491, citing *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at paras 66-67; *Haida Nation*, *supra* note 40 at para 20.

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One final point, before turning to an overview of the chapters that follow, will help underscore the flux in the case law on Indigenous-Crown relations. In 1984 the Superior Court of Ontario (“ONSC”) interpreted aspects of the Robinson Huron Treaty in *Ontario (Attorney General) v Bear Island Foundation*, as did the Court of Appeal for Ontario (“ONCA”) on appeal in 1989.⁷⁷ *Bear Island* involved a claim to approximately 4,000 square miles of land in northern Ontario by the Temagami Band of Indians, a band registered pursuant to the *Indian Act*, and the Teme-agama Anishnabay, described by the trial judge as “an association recognized by the Indians themselves and referred to by them as the ‘Tribe’”.⁷⁸ The Ontario courts referred to these claimants collectively as the Temagami Indians.⁷⁹

Ontario argued that the “the Temagami Indians were represented at the signing [of the Robinson Huron Treaty in 1850] by an Ojibwa chief called Tawgaiwene” and that they were therefore parties to the Treaty and had thereby ceded claims to their traditional lands.⁸⁰ The Temagami argued that, at the time, “the band’s chief or head man was Peter Nebenegwune who was not present at the signing nor did he ever become party to the treaty.”⁸¹ The Temagami argued that they had never ceded claims to their traditional lands. The trial judge agreed with Ontario and the ONCA subsequently upheld the trial judge’s decision. One aspect of the courts’ interpretation of the Treaty is particularly noteworthy for the present discussion.

Both the ONSC and the ONCA held that, even if the Temagami *had not* been signatories or subsequently adhered to the Robinson Huron Treaty, the Treaty itself expressed the *unilateral* extinguishment by the sovereign British Crown of any Indigenous claims to lands covered by the Treaty. In other words, at least from the perspective of Canadian courts, the Treaty must be read in part as a statement by the Crown that Indigenous claims to the land are extinguished, *regardless* of the perspective of the Indigenous parties involved. Here is how the ONCA expressed this point:

Even if it could be said that the Temagami Band was not a signatory to or did not adhere to the Robinson-Huron Treaty, there is yet another basis upon which it can be said that the treaty operates to extinguish the aboriginal claims of the appellants. The treaty is an expression of the will of the sovereign to extinguish aboriginal rights.⁸²

Drawing on a number of cases including *Johnson v M’Intosh*, a foundational case from the US Supreme Court that is addressed in detail in chapter 1 below, the ONCA concluded that “a sovereign may express the intent to extinguish aboriginal rights through a treaty even

⁷⁷ *Ontario (Attorney General) v Bear Island Foundation*, 1984 CanLII 2136 (ONSC), 49 O.R. (2d) 353 [“*Bear Island (ONSC)*”] at 9; *Ontario (Attorney General) v Bear Island Foundation*, 1989 CanLII 4403 (ONCA), 68 OR (2d) 394 [“*Bear Island (ONCA)*”].

⁷⁸ *Bear Island (ONSC)*, *supra* note 77 at 9.

⁷⁹ For a discussion of this litigation that provides further context on the Temagami claims, see Borrows, *supra* note 66 at 94-100.

⁸⁰ *Bear Island (ONCA)*, *supra* note 77 at 12.

⁸¹ *Bear Island (ONCA)*, *supra* note 77 at 12.

⁸² *Bear Island (ONCA)*, *supra* note 77 at 22.

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though the treaty itself may be imperfect in the sense that not all of the Indian bands or tribes whose lands are involved are signatories.”⁸³

The ONCA acknowledged that “counsel, whose research has been extensive, were unable to find a Canadian case dealing precisely with this subject. However, in *State of Idaho v. Coffee*, 556 P. 2d 1185 (1976), the Supreme Court of Idaho dealt with this issue.”⁸⁴ In *Coffee*, the ONCA explained, “lands occupied by the Idaho Kootenai Indians were included in a treaty made between a number of Indian tribes and the United States. While the other tribes signed the treaty, the Idaho Kootenai did not. The issue before the Supreme Court was whether or not the treaty extinguished the aboriginal rights in the Kootenai land.”⁸⁵

The ONCA quoted a passage from the reasons of the Supreme Court of Idaho, including the latter Court’s holding that “[w]hether the Indians signing the treaty had the power to give the land away is not relevant. The United States did have the power to take the land, and when it said it was receiving the land, the effect was that the land was taken.”⁸⁶ The ONCA stated that it agreed with the approach of the Supreme Court of Idaho and concluded that “[t]he ratification of the Robinson-Huron Treaty by the Governor-General in Council was a plain and unambiguous declaration by the Sovereign that the aboriginal title was extinguished.”⁸⁷

The notion of treaty at play here is strange. In *Restoule* this same Treaty is understood as an expression of an agreement reached between the parties to the Treaty. In *Bear Island* it is read, in part at least, as a unilateral “declaration by the Sovereign” extinguishing the rights even of people who may not have been party to the treaty. The understanding in *Restoule* accords better with the common-sense view that treaties are meant to cement or symbolize an agreement between parties. The understanding in *Bear Island* may fit better with the view that Canadian courts, as domestic state courts, derive their authority entirely from asserted Crown sovereignty and therefore cannot sensibly question Crown assertions of sovereignty; arguably, on this view, the very jurisdiction of the courts to interpret the Treaty, as it applies to the territory it purports to cover, derives from asserted Crown sovereignty over this territory. If the assertion of that sovereignty comes in the form of the Treaty itself, the courts must accept the assertion in that form as a basis for their own authority to interpret the Treaty in the first place.

None of this reasoning is explicit in *Bear Island* and the interpretive approach taken by the Ontario courts might be defended on other grounds. However, I think that some version of this line of reasoning animates the Ontario courts’ approach. The chapters that follow explore this line of reasoning in greater detail, as embodying the positivist approach briefly introduced above.

⁸³ *Bear Island (ONCA)*, *supra* note 77 at 25.

⁸⁴ *Bear Island (ONCA)*, *supra* note 77 at 25.

⁸⁵ *Bear Island (ONCA)*, *supra* note 77 at 25.

⁸⁶ *Bear Island (ONCA)*, *supra* note 77 at 26, quoting *State of Idaho v Coffee*, 556 P 2d 1185 (1976) (Supreme Court of Idaho) at 1191-1192.

⁸⁷ *Bear Island (ONCA)*, *supra* note 77 at 26.

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The ONSC and ONCA in *Bear Island* covered much of the same historical events and evidence as the ONSC in *Restoule*. Surprisingly, the Court in *Restoule* never mentions *Bear Island*. The latter case does not seem ever to have been overruled. Indeed, in related litigation in 1999, the ONCA referred to its 1989 decision in *Bear Island*, explicitly citing its holding on Crown extinguishment of Aboriginal title.⁸⁸

The SCC heard an appeal from the 1989 decision of the ONCA in *Bear Island* and upheld, by unanimous decision, the judgment of the Court of Appeal.⁸⁹ The SCC noted that the trial judge, affirmed by the Court of Appeal, had held that “[o]n the assumption that an aboriginal right existed [...] that right had been extinguished either by the Robinson-Huron Treaty or by the subsequent adherence to that treaty by the Indians, or because the treaty constituted a unilateral extinguishment by the sovereign.”⁹⁰ The SCC then stated that the “case raises for the most part essentially factual issues, on which the courts below were in agreement.”⁹¹ The SCC saw no basis to overturn the lower courts’ findings of fact, and upheld the final legal outcome reached by the lower courts.

However, the SCC added that, “on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right”.⁹² This was contrary to the specific legal conclusion drawn by the trial judge on this point. Yet the SCC found it “unnecessary [...] to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.”⁹³

The SCC thus recited the bases for the lower court holdings, including the conclusion that “the treaty constituted a unilateral extinguishment by the sovereign.” The SCC did not explicitly take issue with that conclusion, though it did qualify other legal conclusions reached the trial judge. Finally, the SCC specifically upheld the legal outcome on the basis that the Temagami had in any case adhered to the Robinson-Huron Treaty. While the SCC did not explicitly draw on the Crown’s supposed sovereign power of unilateral extinguishment, it also did not object to the lower courts’ characterization of and reliance on this power.

While it is surprising that none of this judicial history is touched upon in the *Restoule* decision, clearly the reasons in *Restoule* and *Bear Island* involve quite different conversations about the treaty relationship. To a considerable degree these sets of reasons, and their respective approaches to treaty interpretation, talk past one another. These divergent

⁸⁸ *Ontario (Attorney General) v Bear Island Foundation*, 1999 CanLII 9307 (ONCA), 126 OAC 385 at para 48.

⁸⁹ *Ontario (Attorney General) v Bear Island Foundation*, [1991] 2 SCR 570 [“*Bear Island (SCC)*”].

⁹⁰ *Bear Island (SCC)*, *supra* note 89 at 574.

⁹¹ *Bear Island (SCC)*, *supra* note 89 at 574.

⁹² *Bear Island (SCC)*, *supra* note 89 at 575.

⁹³ *Bear Island (SCC)*, *supra* note 89 at 575.

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interpretive approaches continue to evolve alongside one another in the case law. The positivist approach is no longer so starkly presented as in *Bear Island*, but it continues to evolve and forcefully articulate a view of Canadian judicial authority flowing from the assertion of Crown sovereignty, as explained in the chapters that follow. The positivist approach thus continues to evolve in tandem and tension with the gradually (re-)emerging language of the historically grounded pluralist approach.

Both the positivist and pluralist approaches speak, as all legal interpretation must, (i) from within a context of evolving social and political imaginaries, (ii) out of which particular social and political issues come to the fore and find conscious articulation as matters of contention, and (iii) to certain aspects of these matters once they are formulated in legal terms in the context of specific legal disputes or of proposals for legislative change or constitutional reform, or in the context of public debate more generally. While we might say, in some technical sense, that judicial decisions are only authoritative with respect to the specific legal disputes that come before the courts, they inevitably also speak to (and from) the broader political and social context and constantly evolving imaginaries. Particularly in a system of constitutional democracy like Canada's, where the courts are granted an authoritative role in interpreting and declaring the supreme law of the country, judicial decisions may have a significant impact on social and political perspectives. At a minimum, the opposing legal conclusions drawn by positivist and pluralist approaches in important constitutional cases suggest distinct ways of seeing and speaking to the current social and political context.

The five chapters that follow explore this situation of positivist and pluralist conversations jostling with one another, with occasional direct skirmishes, in the Canadian case law on Indigenous-state relations. Below is a brief overview of each of these chapters.

6. Overview of the five chapters that follow

The first half of the first chapter draws on a recent SCC decision, *Caron v Alberta*,⁹⁴ to illustrate current positivist and pluralist judicial approaches, examining in detail five contrasting interpretive manoeuvres found in the majority and dissenting reasons, respectively. These series of interpretive manoeuvres link together to embody a positivist interpretive approach (in the majority reasons) and a more pluralist interpretive approach (in the dissenting reasons). *Caron* is helpful in providing an especially clear instance of the contrast between these two approaches and a concrete reference point for subsequent discussion.

The second half of the first chapter then traces the roots of both the positivist and pluralist approaches through Canadian Aboriginal law to the foundational “Marshall trilogy” of cases: *Johnson v M'Intosh* (1823), *Cherokee Nation v Georgia* (1831), and *Worcester v Georgia* (1832).⁹⁵ This trilogy is named for John Marshall, Chief Justice of the Supreme Court of the

⁹⁴ *Caron v Alberta*, 2015 SCC 56 [“*Caron*”].

⁹⁵ *Johnson v M'Intosh*, 21 US 543 (1823) [“*M'Intosh*”]; *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [“*Cherokee Nation*”]; *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832) [“*Worcester*”].

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United States from 1801 to 1835, who wrote the governing opinion in each of the three cases. In a positivist vein, Marshall wrote in *M'Intosh* that “[c]onquest gives a title which the Courts of the conqueror cannot deny”⁹⁶ and he accepted (though with reservations) that “conquest” could be used to describe (if only as something of a legal fiction) the relationship of the United States to Indigenous peoples within its asserted territory. In a more pluralist vein, Chief Justice Marshall makes clear in the trilogy that judicial interpretation of Indigenous-state relations must be grounded in evolving social and political realities and that legal doctrine must strive to coherently express the governing social and political imaginaries of the country. In fact, these positivist and pluralist aspects are two sides of the same coin in the Marshall trilogy and are only teased apart through subsequent case law developments, as the this first chapter seeks to explain.

Chapter 2 then drills down into doctrinal details of Aboriginal title as fleshed out in Canadian case law over the past half century. This chapter examines elements of the doctrine of Aboriginal title that seem, in the case law, to oscillate between a more positivist and a more pluralist conception. For instance, the case law speaks of Aboriginal title as having “crystallized” at the moment the Crown asserted sovereignty over a given territory, with Aboriginal title then understood as a burden on underlying Crown title.⁹⁷ The case law also speaks, however, of Aboriginal title as having its source in Indigenous legal systems existing prior to the assertion of Crown sovereignty, stressing that Aboriginal title is in this respect unique among estates in Canadian law.⁹⁸ Similarly, the case law at times speaks of a Crown fiduciary duty with respect to Indigenous lands being triggered by the Crown *assertion* of sovereignty, and at other times as being triggered by the *voluntary surrender* by Indigenous peoples of land to the Crown.

While these different ways of speaking may, in each of these two examples, be theoretically or doctrinally reconcilable, they tend to be embedded within quite distinct judicial conversations about Indigenous-state relations, as this second chapter aims to bring out. The argument is not that judges are always consciously or explicitly moulding the elements of Aboriginal title to either a positivist or pluralist vision of Indigenous-state relations, but simply that certain characterizations of these elements fit better within a conversation that assumes or rests on a positivist vision, while contrasting characterizations fit better within a more pluralist conversation.

The third chapter takes a step back from doctrinal details to consider broader questions of legal philosophy, drawing on parts of the “Hart-Dworkin debate” which has to a large extent shaped the meaning of “legal positivism” in the Anglo-American legal world over the past several decades. In recent years, some positivists have acknowledged that an unanswered challenge for legal positivism is to provide a satisfactory account of legal interpretation or

⁹⁶ *M'Intosh*, *supra* note 95 at 588.

⁹⁷ *Delgamuukw*, *supra* note 67 at para 145. For a discussion of this “crystallization”, see John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37 Osgoode Hall LJ 537-596.

⁹⁸ *Delgamuukw*, *supra* note 67 at para 112; *Tsilhqot'in Nation*, *supra* note 60 at para 14.

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legal interpretive methodology. Legal positivism in the Hartian tradition insists that the ultimate criteria of legal validity in a functioning legal system are found in an appropriate set of social facts—e.g. that a statute has been enacted through the accepted procedures (for federal law in Canada, for instance, being approved by voting majorities in three readings in the House of Commons and in the Senate, then receiving royal assent), or that precedent in the case law has been properly issued by a controlling court, or that an authoritative constitutional text permits (or requires) legal officials to apply principles of political morality (such as equality rights). In principle, positivist legal interpretation must also resolve ambiguities in the law by reference to factual touchstones—for instance, interpreting statutes in terms of legislative intent as found in statutory text, clarified as needed by legislative debates and legislative history—without engaging in independent moral reasoning. Legal positivism thus draws a particular line between law, on one side, and morality and politics, on the other.

The notion of “social fact” and the positivist distinction between law and morality/politics, introduced in the first chapter, are explored in detail in this third chapter. Legal positivists, following Hart, characterize legal positivism as “descriptive sociology”. Yet, while positivism may aim at description, the central phenomenon it aims to describe—*legal interpretation by judges*—is a normative activity. Even descriptive positivism must therefore present a compelling account of the kinds of reasons that move judges to decide cases one way or another, to adopt one interpretive approach or another. Positivism struggles to provide a convincing descriptive account of legal interpretation in common law systems, precisely because the deep tradition of common law style reasoning found in such systems does not respect the line that positivism draws between law and morality/politics. To the extent that a prescriptive account is implicit in legal positivism—that legal interpretation *ought* to respect the positivist line between law and morality/politics—legal positivists in the Hartian tradition fail to offer a convincing defence of it (in large part because their stated commitment to description prevents any clear attempt at a prescriptive account).

However, as first noted in chapter 1, prescriptive legal positivist theories can be traced genealogically to thinkers like Hobbes and Bentham, who develop broader political philosophies that anchor legal validity and legitimacy squarely in sovereign legislative intent. The closing sections of this third chapter consider the extent to which prescriptive positivism, so understood, appears to animate positivist interpretative approaches found in the Canadian case law on Indigenous-state relations. Cases examined in the first two chapters will be reconsidered in this light. This reflection shines a clearer light on the *preference* expressed by institutional positivism for grounding legal validity in sovereign intent and, in particular, in state assertions of sovereignty. This preference is understandable if we view the Canadian legal system as, in essence, a project founded on European assertions of sovereignty in North America. However, the shortcomings of legal positivism as a descriptive theory undermine claims that positivism merely provides an accurate account of what law *is* and of how legal interpretation must proceed in order to correctly determine what the law is. In other words,

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legal positivism is unable to show that it is any kind of *legal error* to prefer alternative visions on the sources of legal validity and legitimacy flowing into the Canadian legal system.

Chapter 4, drawing on the limits of legal positivism sketched in chapter 3, highlights the inevitability of judges grounding the elaboration of constitutional law in the social and political imaginaries of the communities governed by that law. The linchpin of analysis in this chapter is the claim, repeatedly affirmed by the SCC, that “[t]he Constitution of a country is a statement of the will of the people.”⁹⁹ In particular, “[t]he Constitution [of Canada] is the expression of the sovereignty of the people of Canada.”¹⁰⁰ That is, our legal order, is one of popular sovereignty. The Court has asserted, perhaps most forcefully in the *Secession Reference* (though it is also at the heart of the dissenting reasons in *Caron*, discussed in chapter 1), that the principle of popular sovereignty may play an important role in legal interpretation and may be determinative of the legal outcome in certain cases.

But how precisely does “the will of the people” factor into legal interpretation? Should the courts look to key constitutional documents such as the *Canadian Charter of Rights and Freedoms* as the source of constitutional values affirmed by “the people”? If so, should the courts focus primarily on the text, perhaps with occasional recourse to its drafting history, but without looking to assess changes in public opinion or empirical measures of the current will of the people? That is, should the courts treat the principle that the constitution expresses “the will of the people” as a kind of legal fiction, attributing authorship of the constitution to the people as a matter of principle, but never assessing how or whether the constitutional text reflects any actual will of the people? Such an approach may be supported by pointing to institutional limitations of courts in a system of divided legislative, executive, and judicial branches, and may therefore find a natural resonance with legal positivism. Or should the courts in some sense empirically assess the will of the people, e.g. through expert evidence on evolving social norms and realities (perhaps in cases dealing with issues such as prostitution¹⁰¹ or physician-assisted dying¹⁰²)? Or should the courts focus on developing legal principles allowing “the people” to voice their will directly in the language of the law, through referenda¹⁰³ or judicially mandated constitutional negotiations¹⁰⁴ (as the SCC seems to suggest, for instance, when characterizing litigation and the courts as supports for negotiations between Indigenous peoples and the Crown¹⁰⁵)? Chapter 4 explores, somewhat schematically given the limited space for the topic in this dissertation, how these different

⁹⁹ E.g. *Secession Reference*, *supra* note 11 at para 85, quoting *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 745.

¹⁰⁰ *Secession Reference*, *supra* note 11 at para 85.

¹⁰¹ See *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

¹⁰² See *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

¹⁰³ See *Secession Reference*, *supra* note 11.

¹⁰⁴ E.g. *Tsilhqot'in Nation*, *supra* note 60 at para 17, confirming that “[t]he Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims”.

¹⁰⁵ E.g. the concluding statement of Chief Justice Lamer, writing for the majority, in *Delgamuukw*, *supra* note 67 at para 186: “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in [*R v Van der Peet*, [1996] 2 SCR 507] at para. 31, to be a basic purpose of s. 35(1) – ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’. Let us face it, we are all here to stay.”

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approaches to “the will of the people” have figured in Canadian case law, drawing connections to the positivist and pluralist interpretive approaches explored in the first three chapters.

Finally, Chapter 5 takes a more focused look at how notions of popular sovereignty currently figure in the positivist and pluralist judicial interpretations of Indigenous-state relations. This chapter assesses the different conversations opened by these contrasting approaches, in the context of (1) current debate over the implementation in Canada of the United Nations Declaration on the Rights of Indigenous Peoples,¹⁰⁶ with a focus on the recent adoption in British Columbia of Bill 41, the *Declaration on the Rights of Indigenous Peoples Act*,¹⁰⁷ and (2) two recent decisions from the SCC, *Uashaunnuat* and *Nevsun*, respectively addressing the interrelation of Canadian law and Indigenous law, and the role of Canadian courts in interpreting international law.¹⁰⁸

The conclusion that ends this dissertation draws together the themes covered in the five chapters, noting the ongoing tension and interplay in Canadian law between positivist and pluralist approaches to relations between Indigenous peoples and the state. Canadian law does not face any simple choice between the two approaches. The positivist approach has the weight of a significant part of our legal tradition on its side, grounded in the view that domestic court authority flows ultimately from Crown sovereignty, as well as in associated views on the institutional limitations of the courts. This weight must be balanced, however, against the SCC’s stated commitment to popular sovereignty as the foundation of the Canadian constitution. Moreover, the common law style of judicial reasoning also runs deep and carries great weight in our legal tradition. This dissertation argues that historically grounded pluralism offers a coherent and compelling response, in the form of common law reasoning, to the historical and political context of Indigenous-state relations in Canada—though, again, such a pluralist interpretive approach does not simply *reject* positivist concerns, but rather *subsumes* them in balance with others. A deeper embrace of pluralism on the part of the judiciary would, on its own, hardly resolve the many difficult, often technical, legal and political questions arising from the current context of Indigenous-state relations. However, it might loosen positivism’s grip on our legal imagination, and help open more fruitful conversations about a genuine meeting of European and Indigenous legal orders and about the treaty relationships built across them. At a minimum, pluralist interpretive tools may provide a needed correction and modification of entrenched positivist modes of interpretation.

¹⁰⁶ *Supra* note 12.

¹⁰⁷ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

¹⁰⁸ *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [“*Uashaunnuat*”]; *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [“*Nevsun*”]. *Uashaunnuat* and *Nevsun* are discussed in detail in Chapter 5.

Personal Interlude

What happened here
on this little patch of life?

To have a living mythology is not to need, not to inhabit, a foreign language in order to speak about your world, but to have a world speak directly and convincingly through you. Today our languages of public discourse have largely become foreign languages in our mouths, even when we speak our mother tongues. Do they disclose a world that we believe in, a world with “mission and purpose”? If not, we are living a form of public nihilism.

Consider the language of sovereignty in Canadian law and politics. The meaning of Crown sovereignty in Canada has been largely shaped by myths of a Christian-European civilizing mission, of civilizational hierarchy, and of progress as measured by that mission and by the accumulation of material wealth and political power. Today Canadian law and the Canadian political establishment rhetorically repudiate the civilizing mission that ideologically fired and shaped the meaning of Crown sovereignty in Canada throughout the first century of confederation.

This repudiation of colonial mythology now calls for reconciliation. Reconciliation here is often understood as “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.¹ But *what is the meaning* of Crown sovereignty in this context, once it has been emptied of the ideological mission and mythology that has largely shaped it? Is the only mythology remaining that of economic progress, and is reconciliation then a call for integration within “a neoliberal-capitalist-extractive complex”?² Is this the form of assimilation to which we are all destined?

Economic progress or “growth” may be the remnant of that striking impulse of western Christendom to “reform the world” traced, for instance, by Harold Berman in *Law and Revolution*³ and Charles Taylor in *A Secular Age*⁴ as a defining feature of western Europe following the Papal Revolution in the eleventh century. Clearly, however, the devotion to

¹ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at para 17, quoting *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, quoting *R v Van der Peet*, [1996] 2 SCR 507 at para 31.

² I’m borrowing the terms in which Gordon Christie describes “the special interests that the Canadian state is built around and that it protects, those of a neoliberal-capitalist-extractive complex”: Gordon Christie, “Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges”, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo, ON: Centre for International Governance Innovation, 2018).

³ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983)

⁴ Charles Taylor, *A Secular Age* (Cambridge, MA: The Belknap Press of Harvard University Press, 2007).

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economic growth at the heart of nation-state politics today has been stripped of religious and mythological concern with the spiritual dimension of human existence.⁵

I have suggested in the Introduction, and will suggest throughout the remaining chapters, that there are pluralist roots in Western law that may provide living ground on which Canadian state law can meet Indigenous legal orders and forge a new understanding of sovereignty (or public authority by another name) in Canada—eventually maybe even a new language and mythology that citizens could inhabit as a world with mission and purpose. This does not mean any monolithic mission and purpose, nor necessarily any new measure of “progress”, but rather a public language rich enough to debate, dispute, and contest the meaning and purpose of public authority without reducing the public realm to matters of “practical expediency”⁶ or “demagogic nationalistic mobilization”.⁷

At a minimum, the more pluralist approach sometimes at work in the Canadian case law opens a somewhat clearer path to shaking off the corpse of a sovereign mythology based on civilizational hierarchy. The main critique of positivism that emerges in the following chapters is precisely that positivism at times chains itself unnecessarily to that corpse.

I intend this brief personal interlude to give a sense of how I have come to and how I approach this PhD project and the research it involves. In a related vein, I weave short expressive fragments or poems throughout the dissertation, at the beginning or end of chapters. My excuse for this approach is that legal academic writing can be exceedingly dry and impersonal. Or, more to the point, *my* legal academic writing often begins to feel exceedingly dry and impersonal. Some of the poems and fragments are serious, some not. Weaving them in at the margins speaks to the gnawing sense in academia that, while we hold court with rational explanations and proposals for the world around us, that world and spirit itself are burning in ways that put our academic chatter to shame.

I will also add a few words here by way of a more straightforward description of my path to this project and of my engagement with its subject matter as both academic and practising lawyer.

I was born near Montreal and grew up on the south shore of the city. My father was born in Scotland to Scottish parents; he grew up in Glasgow. My mother was born in Scotland to a Scottish mother and a Canadian father, a soldier stationed in Scotland during part of the second world war; my mother grew up in St-Jean-Baptiste, near Winnipeg. My understanding is that my maternal grandfather’s family had been in Canada for a few generations prior to the war and that they were of Dutch Mennonite ancestry, having emigrated from Holland to

⁵ For alternatives to economic devotion in the US context, and a discussion of mythology and civil religion at the heart of modern US nationalism, see Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

⁶ See Berman, *supra* note 3, at v-vi, and discussion in the Introduction above for context.

⁷ See Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (New York: Columbia University Press, 2019) at 83-84, and discussion in the Introduction for context.

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Russia before later arriving in Canada. My own parents met in Montreal during the city's 1967 International and Universal Exposition, or Expo 67.

In the academic world I have often been asked, in light of my research and work in Aboriginal law, whether I am Indigenous. I am not Indigenous and I do not, to my knowledge, have any Indigenous ancestry. As best I can remember, through at least the end of high school I had only the most cursory knowledge of the history of Indigenous peoples and of their historical relations with the state and with settler communities. My path to Aboriginal law as an area of research and legal practice is somewhat circuitous.

There is little from my childhood that seems obviously relevant, other than the fact that I was an anglophone living in a majority francophone suburb of Montreal, and that I was relatively well integrated into the francophone world of Quebec. Which is to say, I had close francophone friends, played hockey on mostly or exclusively (except for me) francophone teams, and probably spoke more French than English outside my home until I entered high school. That's *not* to say I was well integrated into French Quebec *culture* as expressed in movies, tv shows, books, songs, etc. In these respects, I was immersed in English, which is to say American, culture.

But I lived through the second referendum on Quebec secession while I was in high school and that experience left some kind of mark. When I applied for law school many years later (having first studied math, then philosophy, and generally stretching childhood somewhat indecently), I explained, in various "statements of intent" and "personal statements" that my area of greatest interest in the law was "sovereignty" and that I first became aware of "issues of sovereignty" through the question of Quebec secession.

In law school, I took directed studies on issues of sovereignty in the relations between Quebec and the rest of Canada, and inevitably came across discussions covering that other great area of sovereignty talk in Canada: the murky basis for Crown assertions of sovereignty over territory already occupied and governed by Indigenous peoples. I was pursuing my law degree in the US but began reading Canadian case law and commentary on Indigenous-state relations.

My law degree complete, I returned to Canada and clerked for judges for two years. During my second year of clerking, I heard John Borrows speak about graduate studies at the University of Victoria and issues involved in coordinating Indigenous and state legal orders. Several months later, in September 2015, I entered the PhD program in the Faculty of Law at the University of Victoria and almost simultaneously began working part-time as a lawyer. My legal practice is very modest, averaging about 10 hours per week. My legal work has principally involved research into archival, ethnographic, and oral history sources addressing the history of peoples in northwestern British Columbia, representing clients from that area who claim Aboriginal rights and title, and working with individual families who are challenging denials of Indian status under the *Indian Act* relating to the legacy of Indian "enfranchisement".

PERSONAL INTERLUDE

In other words, my path to this area of legal and academic work has been largely intellectual and professional. On a deeper level, corresponding to the moment of ideological transition examined in this dissertation, there is something of the sentiment expressed by Anne Carson when she says: “To live past the end of your myth is a perilous thing.”⁸ Or of Nietzsche’s sense of the “monstrous logic of terror” and “sequence of breakdown, destruction, ruin, and cataclysm” that must follow in the wake of the death of God, and the *simultaneous* sense of “exhilaration” at the newly “open sea”.⁹

This combined sense of breakdown and exhilaration, described in §343 of *Gay Science*, is not the more famous declaration that “God is dead” proclaimed by the “madman” in §125. In the face of “infinite nothing” and “divine decomposition”, the madman does not express any corresponding sense of exhilaration by which we might “comfort ourselves, the murderers of all murderers”. By contrast, in §343 Nietzsche speaks of “a new and scarcely describable kind of light, happiness, relief, exhilaration, encouragement, dawn.” Today, too, some of us may glimpse a kind of relief, expectation, and dawn in the impending collapse of unsustainable ways of living and governing ourselves. But it would be hard to deny, almost a century and a half on from Nietzsche’s *Gay Science*, that his madman seems to better capture our mood today.

As Thomas Merton, closer to us by almost a century, has noted, “[t]he contemplative life in our time is [...] necessarily modified by the sins of our age.”¹⁰ Merton adopts Nietzsche’s contemplations with some modification: “Nietzsche, speaking for our world, proclaimed that God was dead. And that is why, in our contemplation, God must often seem to be absent, as though dead. But the truth of our contemplation is in this: that never more than today has He made His presence felt by ‘being absent.’”¹¹

To regain our “contemplative independence”¹², to rediscover the open sea, requires loosening the grip of dead mythology on our minds, so that we can also let go of the felt need to grip others. As Merton puts the value of contemplation:

Before there can be any external freedom, man must learn to find the way to freedom within himself. For only then can he afford to relax his grip on others, and let them get away from him, because then he does not need their dependence. It is the contemplative who keeps this liberty alive in the world, and who shows others, obscurely and without realizing it, what real freedom means.¹³

⁸ Anne Carson, *red doc* (McLelland & Stewart, 2016) blurb on book jacket. I first came across this quotation as an epigraph at the opening of Greg Grandin, *The End of the Myth: From the Frontier to the Border Wall in the Mind of America* (New York: Metropolitan Books, Henry Holt and Company, 2019), and I use it here in a sense that resonates with Grandin’s use.

⁹ Friedrich Nietzsche, *The Gay Science*, translated by Walter Kaufmann (New York: Vintage Books Random House, 1974), §343.

¹⁰ Thomas Merton, *Inner Experience: Notes on Contemplation* (HarperOne: New York, 2003) at 121.

¹¹ Merton, *supra* note 10 at 122.

¹² Merton, *supra* note 10 at 129.

¹³ Merton, *supra* note 10 at 154.

PERSONAL INTERLUDE

We have come to the end of certain myths in the modern world and there seems to be a widespread anxiety that the ensuing collapse may drag unimaginable catastrophe in its wake. Running alongside this anxiety is a minor key of expectancy for healthier, more meaningful, more fulfilling forms of public life that may emerge from the collapse of unsustainable ways of living. In the period of transition we are now living through, all traditions—spiritual, political, legal—will reveal their inner worth in shepherding whatever is worth saving.

Within this broader context of social, political, spiritual, and ecological crisis, the questions asked and the paths pursued in the following chapters are exceedingly modest and granular. They offer a detailed exploration of certain aspects of the Canadian legal tradition now grappling with ideological transition in “issues of sovereignty” and Indigenous-state and Indigenous-settler relations. The exploration may reveal something of what is vital and valuable in that tradition as we collectively shepherd our worlds forward.

The complete absence of a map
is the root of religious feeling
the first step on a path
of lasting reverence

Do not let the moral voice within
Do not let the moral voice
become your voice
It is not your voice
not the voice of a friend
not of God
or of the starry heavens above
It is the voice of a scarecrow
or at best a prickly guide
through the fears and resentments
we've conspired to externalize
You are full of love
still overflow with love
The moral voice can guide
you past shipwreck
warn you against mutiny
and sickly scrutiny
as you find your way
to harbours and sidebays
where you slosh and overflow
By all means, then, take
the moral voice as a first mate
in the scraggly sea you navigate
But, sweet God, don't hesitate
to kick the scrawny bastard overboard
anytime he brandishes his sword

CHAPTER 1

Room to Manoeuvre: The Legal Imagination of Sovereignty in Indigenous-State Relations

Law's exile of moral, philosophical, and religious insight about the nature of its own meaning-making metaphysics sustains a dangerous lack of self-reflexivity.

- John Borrows, *Origin Stories and the Law*¹

The dominant experience over constitutional history in Canada has been of a constitution as compact and political compromise.

- Benjamin Berger, *Children of Two Logics*²

Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.

- John Marshall, *Johnson v M'Intosh*³

1. Declaration of Métis Independence and entry into confederation

In July 1867, the three British colonies of Canada, New Brunswick, and Nova Scotia were united as the four Canadian provinces of Nova Scotia, New Brunswick, Quebec, and Ontario. They entered confederation, as the expression goes. At the time, there was a vast expanse of territory to their north and west known, on British maps, as Rupert's Land and the North-western Territory. Rupert's Land was territory under royal charter to the Hudson's Bay Company ("HBC"). The North-western Territory was, from a European perspective, unorganized territory over which the British Crown asserted sovereignty, but in which it had little real presence apart from aspects of the fur trade under the *de facto* control or influence of the HBC. At the time, most inhabitants across Rupert's Land and the North-western Territory were Indigenous peoples. Estimates suggest "there were 25-35,000 Indians in the western interior in 1870, and another 10,000 metis, and fewer than 2,000 Europeans or Canadians".⁴

¹ John Borrows, "Origin Stories and the Law: Treaty Metaphysics in Canada and New Zealand" in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Oxon, UK: Routledge, 2019) 30-56 at 38.

² Benjamin Berger, "Children of Two Logics: A Way into Canadian Constitutional Culture" (2013) 11:2 *International Journal of Constitutional Law* 319-338 at 328.

³ *Johnson v M'Intosh*, 21 US 543 (1823) ["*M'Intosh*"] at 588.

⁴ Gerald Friesen, *The Canadian Prairies: A History*, (Toronto: University of Toronto Press, 1987) at 137.

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The founding document of confederation was the *British North America Act, 1867* (“*BNA Act, 1867*”),⁵ a statute passed by the Imperial British Parliament that set the basic terms of the new federal system and its executive, legislative, and judicial components. The Act established the Dominion Parliament and divided all legislative powers granted by the Act between that Dominion Parliament and the provincial legislatures.

The final two sections of the *BNA Act, 1867* provided for the “Admission of Other Colonies” into confederation. Section 146 specified that it would be “lawful for the Queen [...] on address from the Houses of the Parliament of Canada to admit Rupert’s Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions” as contained in the address from the Parliament of Canada “and as the Queen thinks fit to approve”. If the Queen (in effect, her Imperial Privy Council) issued the Order-in-Council to admit such territory, the provisions of her Order would “have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.”

The young Dominion was eager to welcome the vast area of Rupert’s Land and the North-western Territory (collectively, the “Territory”) into confederation. Already in December 1867, the Parliament of Canada sent an Address (the “*1867 Address*”)⁶ to the Queen requesting that the entire Territory be admitted into the Union. In the *1867 Address*, the Parliament of Canada promised that it would respect the “legal rights of any corporation, company, or individual” in the Territory.⁷ The specific content of that promise ultimately became a focus of argument before the Supreme Court of Canada in 2015 in *Caron v Alberta*.⁸ *Caron* is examined below.

Britain in 1867 was not prepared, however, to accede to Canada’s request in the absence of agreement with the HBC. Canada therefore negotiated with the HBC and, agreement in hand, the Parliament of Canada issued another address to the Queen in May 1869 (the “*1869 Address*”),⁹ providing details of that agreement and again requesting that the Territory be annexed to Canada.

To that point, no one had sought the input of the Territory’s inhabitants, but reports of imminent annexation had begun to circulate and “led to unrest ... particularly in the major population centre of the Red River Settlement”.¹⁰ Led by Métis leader Louis Riel, part of the population took up arms in November 1869, seizing Fort Garry, a key military outpost, thereby establishing control over access to the settlement. On December 8, Riel proclaimed the establishment of a provisional government through a “Declaration of the People of

⁵ *The British North America Act, 1867*, 30 & 31 Vict, c 3 (UK) [“*BNA Act, 1867*”], since renamed the *Constitution Act, 1867*, reprinted in RSC 1985, Appendix II, No 5.

⁶ *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, 17 December 1867 [“*1867 Address*”], being Schedule A to the *Rupert’s Land and the North-Western Territory Order*, 23 June 1870, (UK) reprinted in RSC 1985, Appendix II, No 9 [“*1870 Order*”].

⁷ *1867 Address*, *supra* note 6.

⁸ *Caron v Alberta*, 2015 SCC 56 [“*Caron*”].

⁹ *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, 31 May 1869 [“*1869 Address*”], being Schedule B to the *1870 Order*, *supra* note 6.

¹⁰ *Caron*, *supra* note 8 at para 19.

Rupert's Land and the North West" (the "Declaration") that echoed the American Declaration of Independence of 1776 in structure and rhetorical style, though embodying a considerably more moderate assertion of political and legal independence.¹¹

While the Declaration has been fairly characterized as the Declaration of Métis Independence, it was expressly made "in the name of the people of Rupert's Land and the North West", apparently including "the neighbouring tribes of Indians who are now in friendly relations with us". The Declaration also characterized the provisional government it proclaimed as "the only and lawful authority now in existence in Rupert's Land and the North West which claims the obedience and respect of the people."¹²

In general terms, the Declaration asserted the inherent liberty of a people "to establish any form of government it may consider suitable to its wants, as soon as the power to which it was subject abandons it or attempts to subjugate it without its consent to a foreign power".¹³ And in specific terms, the Declaration laid out the case that the HBC had abandoned the people of the Territory and acted "contrary to the law of nations" when it "surrendered and transferred to Canada all the rights which it had or pretended to have" in the Territory.¹⁴

As a result, "from the day on which the Government [i.e. the HBC] we always respected abandoned us—by transferring to a strange power the sacred authority confided to it—the people of Rupert's Land and the North West became free and exempt from all allegiance to the said Government." While the Declaration thus invokes notions of popular liberty and "refuse[s] to recognize the authority of Canada", it also asserts "our rights and interests as British subjects".¹⁵

The Declaration did not insist on permanent independence from Canada, stating rather that "we hold ourselves in readiness to enter into negotiations with the Canadian Government as may be favourable for the good government and prosperity of this people."¹⁶ In this respect, the Declaration obviously had much more modest aims than the American Declaration of 1776. It seems that the Métis provisional government wanted, in essence, to negotiate the terms on which annexation of the Territory to Canada would take place. The Declaration did, however, assert the inherent lawful authority of the people of the Territory

¹¹ The text of the English version of the Declaration is from the journal of Alexander Begg, as reproduced in *Alexander Begg's Red River Journal*, edited by William Lewis Morton (Toronto: Chaplain Society, 1956) at 218-220. See also Thomas Flanagan, "Political Theory of the Red River Resistance: The Declaration of December 8, 1869", *Canadian Journal of Political Science*, vol 11, no 1 (March 1978), 153-164, where the English text is reproduced at 153-155 and the French at 155-157. The Declaration is signed by John Bruce as "President" and Louis Riel as "Secretary" of the "Provisional Government" that it proclaims.

¹² See *supra* note 11.

¹³ Flanagan, *supra* note 11 at 162-164, argues that the two authors cited by the Declaration in support of this principle—William Barclay (1541-1605) and Jean-Baptiste Du Voisin (1744-1813)—were in fact absolute monarchists who provide questionable authority, at best, for the principle asserted by the Declaration.

¹⁴ See *supra* note 11.

¹⁵ See *supra* note 11. The French text of the Declaration—at least in the version labelled as authentic by Father George Dugas, who may in fact have drafted the text at Riel's request—refers to "nos droits et nos intérêts" without qualification or mention of being British subjects: see Flanagan, *supra* note 11 at 156-158.

¹⁶ See *supra* note 11.

to determine their own political fate in the absence of an effective government acting in the people's interests.

In the event, Canada would not risk military confrontation without British support and the British, for their part, pressured Canada to negotiate. The Métis provisional government drew up a bill of rights, in several iterations, for Canada to guarantee as a condition for the provisional government to accept annexation. In early 1870, Canada sent a delegation to Red River, headed by Donald Smith, who recognized the authority of the Métis provisional government, after it had been restructured and confirmed by a convention of the entire Red River settlement, with Riel now officially recognized as head of the provisional government.

Donald Smith reviewed a version of the bill of rights drawn up by the provisional government and discussed the contents in detail with representatives of that government. That draft bill of rights included demands that the Territory enter confederation as a province and that all laws for the new province be published in both French and English. This demand for a guarantee of legislative bilingualism was at the heart of *Caron* almost a century and a half later.

Following the negotiations at Red River, the Métis provisional government in turn sent a delegation to Ottawa in the spring of 1870, with the aim of working out the details of an agreement with Canada on the terms of annexation. The provisional government informed its delegates that they did not have authority to conclude a binding final agreement; any agreement they reached with Canada would have to be ratified by the provisional government. From the perspective of the provisional government, these were negotiations conducted on behalf of distinct legal authorities and formal ratification by both parties was required to give binding force to any final agreement.

The parties did reach an agreement in Ottawa that was subsequently approved by the provisional government in Red River and by the Dominion Parliament through the *Manitoba Act, 1870*,¹⁷ which created the new province of Manitoba out of a (very small) fraction of the Territory upon the Territory's annexation to Canada. These developments paved the way for the *1870 Order* of the Queen-in-Council¹⁸ annexing the Territory to Canada, effective July 15, 1870, pursuant to section 146 of the *BNA Act, 1867*.

Of course, these negotiations were radically asymmetric in terms of the military and political power and population size governed by these respective legal orders—with the Red River settlement (and arguably the inhabitants of the Territory more broadly) represented in improvised fashion by the Métis provisional government, on one side, and the Dominion of Canada together with Imperial Britain (and arguably, in a more diffuse sense, European colonial power and authority) on the other.

In the decades that followed the 1870 agreement, the Métis population at Red River was largely dispersed and overwhelmed by migrants from the east, particularly Ontario. The

¹⁷ *Manitoba Act, 1870*, SC 1870, c 3, reprinted in RSC 1985, Appendix II, No 8.

¹⁸ *Supra* note 6.

Métis population suffered considerably from Canada's failure to effectively survey and grant the 1.4 million acres of land it promised to set aside for the Métis.¹⁹

By contrast, Canadian institutions became more stable and self-assured with the westward sweep of settlement.²⁰ The outcome of the negotiations between Canada and the Métis provisional government was embedded, on the Canadian and British side, in various legal and constitutional instruments, notably the *Manitoba Act, 1870*, adopted by the Dominion Parliament, the *1870 Order of the Queen-in-Council*, and the *British North America Act, 1871* (the “*BNA Act, 1871*”),²¹ adopted by the Imperial Parliament in order to confirm the Dominion Parliament's authority to create new provinces. The *BNA Act, 1871* thus shored up the validity of the *Manitoba Act, 1870*.

In the following decades, the Dominion Parliament adopted further legislation adjusting provincial and territorial borders in the annexed Territory and in 1905 creating two new provinces, Alberta and Saskatchewan, across parts of the Territory.²² The Métis provisional government, for its part, did not leave any comparable institutional legacy or set of legal instruments ratifying and implementing its 1870 agreement with Canada.

This extremely cursory review of a striking episode in Canadian history will have to suffice for purposes of setting up the central question of the first half of this chapter: how should a Canadian court today approach and resolve a dispute about the legal and constitutional force attaching to promises made in the 1870 agreement between Canada and the Métis provisional government? That question is at the heart of the clash between the interpretive approaches of the majority and dissent in *Caron*, which respectively exemplify the approaches described in this dissertation as *institutional positivism* and *historically grounded pluralism*.

The purpose of this chapter is to present these two interpretive approaches and to draw out some of their distinctive characteristics. The rest of this chapter is divided into two parts. The first (section 2) examines *Caron* in some detail, placing side-by-side a handful of key contrasting interpretive steps taken by the majority and dissent. The second (section 3) part then provides some philosophical and legal historical reflection on the contrasting interpretive approaches found in *Caron*.

There are reasons for beginning with a particular court judgment before turning to the broader discussion. Most important, *institutional positivism* and *historically grounded pluralism*, as understood and examined in this dissertation, are not concepts or theories of adjudication but *interpretive approaches*, built from particular interpretive and rhetorical manoeuvres, including statements about such things as the role of domestic courts and the

¹⁹ See *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [“*MMF*”].

²⁰ See e.g. Friesen, *supra* note 4 at 130-241.

²¹ *The British North America Act, 1871*, 34 & 35 Vict, c 28 (UK) [“*BNA Act, 1871*”], since renamed the *Constitution Act, 1871*, reprinted in RSC 1985, Appendix II, No 11.

²² *Alberta Act*, 20 July 1905, 4-5 Edward VII, c 3 (Canada), reprinted in RSC 1985, Appendix II, No 20; *Saskatchewan Act*, 20 July 1905, 4-5 Edward VII, c 42 (Canada), reprinted in RSC 1985, Appendix II, No 21.

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legislature, about the constitution as a statement of the will of the people, principles relating to separation of powers and provincial sovereignty, etc. Judges use interpretive and rhetorical manoeuvres to arrange the materials before them into sets of reasons that “resolve” the case at hand. The materials to be arranged include legal materials—e.g., statutes, regulations, judicial precedent, constitutional provisions, treaties, international conventions—and legal arguments put forward by the parties, sometimes with academic commentary and citations to foreign or international courts, as well as factual evidence relating to the dispute before the court. Judicial interpretation, so understood, is best explained through concrete examples, supplemented by discussion that draws on those concrete examples.

Thus, a further reason for beginning directly with *Caron* is to have a concrete touchstone to help ground the broader discussion that follows in the second half of the chapter. That discussion will also draw on foundational cases of Canadian Aboriginal law, notably the Marshall trilogy of decisions issued by the Supreme Court of the United States between 1823 and 1832, which have had great influence in Canadian law as well. Chapter 2 will continue to flesh out *institutional positivism* and *historically grounded pluralism* through discussion of the case law on Aboriginal title specifically, before chapters 3 and 4 provide more sustained legal philosophical discussion of issues raised in the first two chapters. Chapter 5, finally, will bring the examination of the first four chapters to bear on questions lying on the immediate horizon for Canadian Aboriginal law.

The structure of this first chapter is thus emblematic of the dissertation as a whole—the aim is to move back and forth between, on the one hand, the more concrete level of legal dispute and doctrinal evolution in the case law and, on the other hand, the more theoretical level of legal philosophy and legal historical development, in a fashion that is mutually illuminating for these intertwined levels. That said, this approach accords a certain priority to (or adopts a certain parochialism²³ towards) concrete legal context and doctrinal development as the material for legal philosophical reflection and discussion (with the understanding that such reflection is never purely descriptive, as it is necessarily informed by partisan²⁴ commitments).

One final note before diving into *Caron*: I am not a historian and this chapter does not pretend to be a historical study of the events summarized above and discussed below. The

²³ On the virtues of parochialism, in the sense intended here, see David Dyzenhaus, “The Genealogy of Legal Positivism”, *Oxford Journal of Legal Studies* 24:1 (2004), 39-67, at 66: “But parochialism here is a virtue. It is only the fact that the legal theories of Dworkin and the neo-Benthamites are anchored not only in particular legal traditions, but in politically partisan accounts of those traditions, that permits them to provide insights both about the low ground of participant engagement with legal practice and about the high ground of abstract theory, as well as about the levels in between.” I will draw on Dyzenhaus’ genealogy of legal positivism later in this chapter, as well as in chapter 3.

²⁴ Using this word, too, in the non-pejorative sense found in the passage quoted *supra* note 23 and further explained in the following passage also from Dyzenhaus, *supra* note 23 at 66: “Once we see that parochialism is a necessary component of productive engagement between rival legal theories, we can also see how that engagement is never quite on the theorist’s terms, if only because engagement is with practices for which the theorist has to account, even if part of his account is that the practices embed institutional mistakes.” Various legal philosophical issues indicated in these passages are addressed in chapter 3.

central aim of this chapter is to make sense of the divergent approaches to legal interpretation illustrated in the majority and dissenting reasons of *Caron*. I largely present the historical events in question through the Court's reading of them, though I will occasionally clarify or amend certain historical statements made by the Court where I am aware of particular shortcomings.

2. *Caron v Alberta: how to interpret the 1870 agreement between Canada and the Métis?*

Caron had its humble beginnings in traffic offences charged to Gilles Caron and Pierre Boutet in Alberta. The two defendants conceded the relevant facts but challenged the applicable provincial law and regulation as unconstitutional, on the ground that they had not been enacted in French as well as in English.²⁵ They argued that Alberta had a constitutional obligation to “enact, print, and publish its laws and regulations in both French and English.”²⁶ In other words, they claimed a right to legislative bilingualism in Alberta.

Caron turned on the Court's interpretation of the negotiations and resulting agreement in 1870 between representatives of Canada and of the Métis provisional government, established at Red River to represent inhabitants of Rupert's Land and the North-Western Territory (the “Territory”). The Court had to decide whether the outcome of those negotiations included a guarantee of legislative bilingualism throughout the entire Territory following annexation to Canada, such that the guarantee remained constitutionally binding on Alberta after that province's creation in 1905. By a count of six justices to three, the Court said no.

The majority in *Caron* drew on features of the Canadian constitutional order—notably, modern understandings of provincial sovereignty, minority language rights, and constitutional entrenchment—to interpret the content of the agreement between Canada and the Métis provisional government. In effect, the majority circumscribed the legal significance of that agreement by requiring consistency with modern elements of Canadian constitutionalism, parliamentary sovereignty foremost among them. John Borrows has observed that this approach is common in treaty interpretation: “Parties engaged in treaty interpretation often act as if post-hoc national structures mirror historical circumstances.”²⁷

Conversely, the dissent laid primary emphasis on historical context in first determining the content of the negotiated agreement, in order then to ask how the relevant constitutional provisions might be interpreted to give effect to the agreement.

Oversimplifying greatly (and unfairly to both majority and dissent), we might say that the majority interpreted the historic agreement instrumentally for consistency with parliamentary sovereignty and modern constitutional structure, while the dissent interpreted relevant constitutional provisions instrumentally to fulfill the actual historic agreement.

²⁵ *Caron*, *supra* note 8 at para 8.

²⁶ *Caron*, *supra* note 8 at para 8.

²⁷ Borrows, *supra* note 1 at 30.

The discussion of *Caron* below begins by providing a somewhat more detailed overview of the historical background relevant to the case, before adding nuance to the oversimplified characterizations just given of the majority and dissent's respective interpretive approaches.

Overview of the historical events before the Court in Caron

As explained above, in December 1867 the Canadian Parliament sent its first address to the Queen requesting annexation of the Territory. After the Queen declined to act on that request, Canada negotiated an agreement with HBC for the surrender of HBC's royal charter over Rupert's Land, and then sent a second request for annexation to the Queen in May 1869, including the terms of that agreement.

While neither British nor Canadian representatives had to that point discussed annexation with inhabitants of the Territory, reports of imminent annexation were circulating. The situation escalated:

In November 1869, a group of inhabitants blocked the entry of Canada's proposed Lieutenant Governor of the new territory. Shortly thereafter, a group of Métis inhabitants, including Louis Riel, seized control of Upper Fort Garry in the Red River Settlement. Riel summoned representatives of the English- and French-speaking parishes. These representatives and others subsequently formed a provisional government.²⁸

The provisional government issued at least three "Lists of Rights" between December 1869 and March 1870, demands "that Canada would have to satisfy before they would accept Canadian control".²⁹ These Lists included a demand for legislative bilingualism throughout the Territory, as well as a demand that the entire Territory enter confederation as a province. Both the majority and dissent in *Caron* accepted the findings of the trial judge that legislative bilingualism was already the *de facto* reality under HBC rule.

Confronted with Métis resistance, Canada suggested to Britain that the transfer be delayed. In the meantime, however, the HBC had surrendered its royal charter to the British Crown, who opposed the delay and pressured Canada to negotiate with the provisional government. As a result, Canada sent a delegation to Red River to negotiate:

Canadian representative Donald Smith met with Riel and members of the provisional government in early 1870 to discuss their concerns. [...] Canada subsequently invited a delegation to Ottawa to present the demands of the settlers. Three delegates from the provisional government travelled to Ottawa in April 1870 to negotiate [...] They met and negotiated with Prime Minister John A. Macdonald and the Minister of Militia and Defence, George-Étienne Cartier.³⁰

²⁸ *Caron*, *supra* note 8 at para 19.

²⁹ *Caron*, *supra* note 8 at para 20.

³⁰ *Caron*, *supra* note 8 at para 23.

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While the majority stated (and the dissent did not dispute) that “there is little evidence regarding the substance of [the] negotiations” that took place in Ottawa,³¹ the negotiations between Smith and the provisional government at Red River were well documented in the record that was before the Court. Responding specifically to demands presented in one of the Lists of Rights, “Smith assured the inhabitants of their right to legislative bilingualism, stating: ‘... I have to say, that its propriety is so very evident that it will unquestionably be provided for’”.³²

When the provisional government sent its delegates, in turn, to Ottawa in April 1870 to pursue further negotiations, it advised those delegates in a letter of instruction that the demand for legislative bilingualism was peremptory.³³ It also “informed the delegates that they were not empowered to conclude final arrangements with the Canadian government; any agreement entered into would require the approval of and ratification by the provisional government.”³⁴ There seems to be no record of what, if anything, was said specifically about the “peremptory” demand for legislative bilingualism in the course of the negotiations in Ottawa between the representatives of the provisional government and Minister Cartier. (Prime Minister Macdonald was “indisposed” and absent from negotiations from April 28 until May 2, leaving Minister Cartier to lead the negotiations on behalf of Canada.³⁵)

However, one undisputed outcome of the negotiations is that in May 1870 the Parliament of Canada adopted the *Manitoba Act, 1870*. The *Manitoba Act, 1870* created, upon annexation of the Territory as a whole, a new province out of only a small portion of the Territory. The Territory was formally annexed to Canada in July 1870 by the *1870 Order of the Queen-in-Council*. The *Manitoba Act, 1870* included a guarantee of legislative bilingualism in the newly created province.³⁶ The remainder of the Territory admitted into

³¹ Caron, *supra* note 8 at para 23. Father Noël-Joseph Ritchot, the delegate of the Métis provisional government who took the lead in negotiations with Prime Minister Macdonald and Minister Cartier, in fact kept a detailed record of the Ottawa negotiations in his diary. This portion of Father Ritchot’s diary was published in George Stanley, “Le journal de l’abbé N.-J. Ritchot – 1870” (1964) 17:4 *Revue d’histoire de l’Amérique française* 537-564.

There has been extensive academic and legal debate over the interpretation of this diary, particularly in the context of the Manitoba Metis Federation case that eventually reached the Supreme Court of Canada: see the Court’s 2013 reasons in *MMF*, *supra* note 19. The Supreme Court did not mention the diary in *MMF*, though it had been the subject of extensive debate at trial. For academic commentary, see e.g. Darren O’Toole, “Section 31 of the *Manitoba Act, 1870*: A Land Claim Agreement” (2015) 38:1 *Manitoba Law Journal* 73-117; Thomas Berger, “The Manitoba Métis Decision and the Uses of History” (2015) 38:1 *Manitoba Law Journal* 1-27; Thomas Flanagan, “The Case Against Metis Aboriginal Rights” (1983) 9:3 *Canadian Public Policy* 314-325. Flanagan was an expert witness for Canada at trial in *Manitoba Metis Federation Inc v Canada (AG)*, 2007 MBQB 293; in its reasons, the trial court discusses Father Ritchot’s diary at length.

³² Caron, *supra* note 8 at para 190.

³³ Caron, *supra* note 8 at para 176.

³⁴ Caron, *supra* note 8 at para 176.

³⁵ See Stanley, *supra* note 31 at 548-549.

³⁶ See section 23 of the *Manitoba Act, 1870*, *supra* note 17: “Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British

the Union came under federal jurisdiction—in particular, under the legislative authority of Parliament, which had a constitutional obligation of legislative bilingualism under section 133 of the *BNA Act, 1867*.³⁷

What to make of this situation? The Métis provisional government was, it seems, unsuccessful in pressing its demand that the entire Territory enter the Union as a province. (Though Father Ritchot, who was, in effect, the lead negotiator in Ottawa on behalf of the Métis provisional government, considered this outcome not inconsistent with the demand that the Territory become a province of Canada.³⁸ He accepted Minister Cartier’s proposal for the immediate creation of Manitoba as a province, with the creation of further provinces out of the remaining territory to follow at a later date.)

Was the provisional government also unsuccessful in its demand that legislative bilingualism be guaranteed throughout the Territory? Perhaps the most that can be said without controversy is that the newly admitted Territory was formally split under two legislative authorities—that of Manitoba (in matters of provincial jurisdiction) in the new province and that of Parliament in the remainder of the Territory, both of which had constitutional obligations of legislative bilingualism.

But did that amount to a lasting constitutional entrenchment of legislative bilingualism across the entire Territory? Perhaps the most that can be said here without controversy is that when the provinces of Alberta and Saskatchewan were later formed from parts of the Territory, those new provinces assumed that the federal obligation of legislative bilingualism did not pass to their legislatures. The Supreme Court of Canada seemed to confirm this assumption in *Mercure*.³⁹

However, the Court in *Mercure* did not consider in any detail the constitutional significance of Canada’s negotiations and 1870 agreement with the Métis provisional

North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.”

³⁷ The federal obligation of legislative bilingualism still holds in section 133 of the *Constitution Act, 1867*, *supra* note 5: “Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.”

³⁸ In his diary, Father Ritchot notes, with respect to the first clause in the instructions he received from the Métis provisional government (which clause stated that the Territory should enter the Union as a province): “Le projet de constituer une petite province [...] accompagné du projet de faire rentrer le reste des terres de Rupert et du Nord-Ouest dans la Confédération comme province ne me paraît pas contredire le contenu de la 1ère clause de nos instructions”: Stanley, *supra* note 31 at 561. That is, Father Ritchot considered that it was consistent with the provisional government’s demand that Canada should commit first to create the province of Manitoba over a small portion of the Territory, and subsequently to admit the rest of the Territory as a further province, or further provinces. As he reiterates later in the diary: “Je comprends que l’intention est de former plus tard des territoires restés en dehors du Manitoba, d’autres provinces”: *ibid* at 563.

³⁹ *R v Mercure*, [1988] 1 SCR 234, 48 DLR (4th) 1 [“*Mercure*”].

government, nor how that agreement may have been entrenched through the *1870 Order*. The *1870 Order* belongs to Canada's constitution by virtue of being listed (Item 3) in the Schedule to the *Constitution Act, 1982*.⁴⁰ In turn, the *1867 Address* and the *1869 Address* are attached as schedules to the *1870 Order*, which became the focus of constitutional interpretation in *Caron*. The majority and dissent both accepted that the promise in the *1867 Address* to protect the "legal rights of any corporation, company, or individual" was the most plausible textual hook on which to hang the appellants' argument that Canada's promise to ensure legislative bilingualism throughout the Territory had been entrenched in the constitutional provisions through which Canada gave effect to the 1870 agreement with the Métis provisional government.

Institutional positivism and historically grounded pluralism in Caron

There are, of course, many additional elements to be drawn from the historical context that might be relevant to the dispute in *Caron*. The aim here is not to re-litigate the case, nor to argue that either the majority or the dissent had the better decision. The purpose of subsections (a) to (e) below is rather to highlight key points of contrast in the interpretive approaches taken by the majority and the dissent, in order to begin fleshing out the meaning of *institutional positivism* and *historically grounded pluralism* as interpretive approaches taking shape in Canadian Aboriginal law today.

While *Caron* was not argued or decided specifically as a matter of Aboriginal law, the judgment is helpful in isolating and teeing up questions about the proper judicial approach to interpreting historic agreements between representatives of the Canadian state and representatives of Aboriginal peoples within Canada's asserted territory. The term "Aboriginal peoples" is used here with reference to its definition in section 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights in Canada and explicitly affirms that Métis are Aboriginal peoples within the meaning of that section.⁴¹

Caron can also be read more generally as a case dealing with the relationship between a state legal order and state assertions of sovereignty, on one side, and peoples within the territory of the state who assert their own inherent legal authority independent from the state. Such relationships raise legal issues for all nation-states,⁴² but those issues are particularly acute in the context of Indigenous-state relations in settler states like Canada.

As *Caron* illustrates, significant constitutional cases tend to allow for, or require, a great deal of legal imagination and creativity in crafting a judicial resolution. This is evidently true for cases in which legal interpretation includes an important dimension of historical interpretation, e.g. assessments of historical relationships between the state, settlers, Métis,

⁴⁰ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁴¹ *Constitution Act, 1982*, *supra* note 40, section 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"; and section 35(2): "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

⁴² See e.g. Robert Cover, "Nomos and Narrative" (1983-1984), 97 *Harvard Law Review* 4-68.

Indigenous peoples, and of various institutions and practices that shaped these relationships. These cases present the courts—and legal imagination more generally—with a great deal of room to manoeuvre. That is not a defect of these cases or of the legal system; it is simply the reality of any attempt to render complex historical, social, political relationships in the language of law in order to draw precise legal conclusions about disputes arising within the context of these relationships.

The historical, social, and political contexts at issue in *Caron* present considerable legal uncertainty. This uncertainty underscores a difficult question: how should a Canadian court today interpret a historic agreement between Canada and a Métis government asserting legal authority independent of the state? The majority and the dissent in *Caron* adopt contrasting interpretive approaches in answering this question. The interplay between these two approaches in *Caron* offers a clear illustration of a dynamic resonating across Canadian Aboriginal law and throughout the Court's recent efforts to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty", "prior Aboriginal occupation with *de facto* Crown sovereignty", and Canadian state law with "pre-existing systems of aboriginal law."⁴³

These phrases highlight the fact that reconciliation, the "ultimate purpose of the honour of the Crown"⁴⁴ which the Court has placed at the heart of section 35, requires the courts to grapple with Canada's history of legal pluralism arising from Indigenous-state relations. *Caron* is used in this chapter to introduce some of the key interpretive manoeuvres deployed by the courts in that task of grappling with Canada's legal pluralism, and to illustrate how sequences of such manoeuvres may be linked together to produce contrasting legal outcomes, in what I am describing as institutional positivist and historically grounded pluralist modes, respectively.

Here, then, are five contrasting pairs of such interpretive manoeuvres drawn from *Caron*:

a. Opening salvos: to frame history with law, or law with history?

The opening paragraphs of the majority and dissenting reasons are a study in contrasting frames. The opening sentence of the majority's reasons takes us squarely to the heart of modern Canadian constitutional law: "These appeals sit at a contentious crossroads in

⁴³ See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 ["*Haida Nation*"] at para 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*"; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 ["*Taku River Tlingit*"] at para 42: "The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty"; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 ["*Delgamuukw*"] at para 126: "aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law"; *Guerin v The Queen*, [1984] 2 SCR 335 ["*Guerin*"] at 379: "Their [referring to 'Indians'] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."

⁴⁴ *MMF*, *supra* note 19 at para 66.

Canadian constitutional law, the intersection of minority language rights and provincial legislative powers.”⁴⁵ The majority reasons repeatedly draw on constitutional principles relating to minority language rights and provincial legislative powers to interpret the outcome of negotiations in 1870 between Canada and the Métis provisional government.

In contrast, the first paragraph of the dissenting reasons immediately foregrounds the historic negotiations and agreement, insisting that the question before the Court “requires us to go back to the country’s foundational moments, to its ‘constitution’ in the most literal sense. More precisely, at the heart of this case are the negotiations regarding the annexation of Rupert’s Land and the North-Western Territory to Canada.”⁴⁶ The dissent closes its first paragraph by stressing that the negotiations and resulting historic compromise were the necessary foundation for any constitutional moment to emerge: “It is common ground that [the negotiations] unequivocally resulted in a historic political compromise that permitted the annexation of those territories.”⁴⁷

b. Are we asking which rights were *granted* or *agreed upon*?

Having placed the interpretation of the historic agreement within the frame of Canadian constitutional debates, the majority turns to the question of what the constitution *granted*. The majority is interested in what *Canada and Britain intended* to give or to create through the legal instruments they used to implement the 1870 agreement. The majority focuses on intent through the lens of concerns internal to Canadian and British legal systems and practices, rather than through the lens of the negotiations between Canada and the Métis provisional government.

In particular, the majority finds an insurmountable obstacle to the appellants’ argument in the fact that the *1870 Order* did not explicitly address legislative bilingualism. The majority finds it “inconceivable that such an important right, if it were *granted*, would not have been *granted* in explicit language.”⁴⁸

The dissent, for its part focusing on the historical context and negotiations, does not ask what the constitution granted, but what the parties agreed upon. The dissent ultimately concludes that an obligation of legislative bilingualism binds Alberta today “on the basis that the historic agreement between the Canadian government and the inhabitants of Rupert’s Land and the North-Western Territory contained a promise to protect legislative bilingualism.”⁴⁹ In other words, the dissent builds its reasons on a foundation of historical evidence, finding that a commitment to legislative bilingualism was part of the historic agreement. That historical finding then grounds the dissent’s interpretation of the commitments that Canada entrenched through formal legal instruments. On this basis, the

⁴⁵ *Caron, supra* note 8 at para 1.

⁴⁶ *Caron, supra* note 8 at para 115.

⁴⁷ *Caron, supra* note 8 at para 115.

⁴⁸ *Caron, supra* note 8 at para 4 (italics added).

⁴⁹ *Caron, supra* note 8 at para 116.

dissent accepts “the appellants’ argument that that [historic 1870] agreement is constitutionally entrenched by virtue of the *1867 Address*.”⁵⁰

The dissent thus places greater emphasis on what was agreed in negotiations between Canadian representatives and representatives of the provisional government, interpreting Canada’s own legal instruments accordingly. By contrast, the majority places greater emphasis on what Canada intended through these legal instruments and is less prepared to interpret that intent in light of historical evidence about what was jointly agreed in negotiations.

It is worth underscoring, again, that these contrasting emphases are matters of degree and orientation, not conceptual binaries. This point is examined further below. Nonetheless, although the contrast highlighted in each pair of interpretive manoeuvres discussed here may be a matter of degrees, the two series of interlinking manoeuvres (in the majority and dissenting reasons, respectively) ultimately produced opposite legal outcomes in *Caron*. Over a series of cases across an area of law, interpretive approaches made from such building blocks—i.e. interpretive manoeuvres differing by degrees or orientation from opposing counterparts—may acquire a rough consistency and develop into recognizably distinct patterns of interpretation.

c. Okay, but didn’t the *1867 Address* precede the negotiations?

The majority quite fairly points out that the *1867 Address*, including its promise that the “legal rights of any corporation, company, or individual” in the Territory would be assured after annexation, preceded by more than two years any negotiations between Canada and the Métis provisional government. Even if it were possible to overlook the fact that the *1867 Address* nowhere explicitly mentions legislative bilingualism or language rights, how could anyone think that it entrenched a promise of legislative bilingualism made years later? The majority finds it simply cannot build a constitutional guarantee of legislative bilingualism from “broad and uncontroversial generalities” or “infus[e] vague phrases with improbable meanings.”⁵¹

Once again, the dissent counters with a focus on the political and historical context. The meaning of the promise in the *1867 Address*, for purposes of resolving the legal dispute in *Caron*, must be understood not solely with reference to Parliament’s intent in 1867, but with reference also to the subsequent negotiations that paved the way for annexation through the *1870 Order* and, therefore, also for the constitutional entrenchment of the words of the *1867 Address* as a schedule to the *1870 Order*.

True, when Parliament issued the *1867 Address*, it had not turned its mind specifically to guaranteeing legislative bilingualism in the territory to be annexed. Yet, as events unfolded, the British Crown refused to issue the order requested in the *1867 Address* and again in the *1869 Address* until Canada had reached a settlement with the provisional government at Red

⁵⁰ *Caron*, *supra* note 8 at para 116.

⁵¹ *Caron*, *supra* note 8 at para 6.

River. In this context, Parliament's promise in the *1867 Address* to protect the "legal rights of any corporation, company, or individual" in the Territory was transformed into "a forward-looking undertaking that was shaped by subsequent negotiations. The meaning of its terms must therefore be informed by those negotiations."⁵² By the time the *1867 Address* was attached to the *1870 Order*, after the conclusion of negotiations, it is clear, in the dissent's view, that the "legal rights" actually negotiated in the interim included the right to legislative bilingualism.

These contrasting readings of the *1867 Address* are where the clash of interpretive approaches in *Caron* really comes to a head. The majority is dismissive of "the complex web of instruments, vague phrases, political pronouncements and historical context on which the appellants' claims depend."⁵³ The majority's position is understandable given its focus on Parliamentary intent as the most important factor controlling the meaning of the *1867 Address*. For no legal alchemy based on subsequent events can transform what Parliament intended in 1867.

For the dissent, however, the majority's interpretive approach is both inaccurate and unjust, *precisely because* its interpretation of Parliament's words ignores the crucial "socio-political context" of events *subsequent* to Parliament's initial pronouncement of those words:

The British government was applying significant pressure on Canada to negotiate reasonable terms for the transfer. This was the socio-political context in which the negotiations and the promises made to the inhabitants by the Canadian government must be understood. *An interpretation that does not account for this context is not only inaccurate, but also unjust.*⁵⁴

The dissent supports its interpretation of the legal effect of the negotiations and promises with a constitutional principle of its own—the nature of the constitution as an expression of the will of the people:

The Constitution of Canada emerged from negotiations and compromises between the founding peoples, and continues to develop on the basis of similar negotiations and compromises. Such compromises are achieved when parties to the negotiations make concessions in pursuit of a mutual agreement and reach a meeting of the minds. *Therefore, our reading of constitutional documents must be informed by the intentions and perspectives of all the parties, as revealed by the historical evidence.* It is in this context that we will apply the third interpretive principle regarding the nature of a constitution as a statement of the will of the people.⁵⁵

The dissent's appeal to constitutional principle here is another useful reminder that nuance must be brought to the contrast drawn between majority and dissent at the outset of this chapter—i.e. to the oversimplified view that the majority interprets the historic

⁵² *Caron*, *supra* note 8 at para 130.

⁵³ *Caron*, *supra* note 8 at para 46.

⁵⁴ *Caron*, *supra* note 8 at para 183 (italics added).

⁵⁵ *Caron*, *supra* note 8 at para 235 (italics added).

agreement instrumentally for consistency with the constitution, while the dissent interprets the constitution instrumentally for consistency with the historic agreement. Clearly, both approaches interpret the constitution (including constitutional text, principles, and structure) and historical events in mutually informing ways. Yet there remains an undeniable difference in emphasis. Even when the dissent draws on the “interpretive principle regarding the nature of a constitution as a statement of the will of the people,” it puts flesh on the bones of this constitutional principle by focusing on the historic agreement, and in particular on the need to account for the perspective not just of Canadian representatives and institutions but also of those who entered into agreement with Canada:

[I]n assessing the historical context of the promise contained in the *1867 Address*, due weight must be given to the perspective of the people who, through their representatives, concluded a historic compromise that resulted in the peaceful entry of their territories into Canada. As the historical record discussed above demonstrates, they had every reason to believe that they had secured the right to legislative bilingualism as a condition for their entry into union.⁵⁶

And in more general terms:

The story of our nation’s founding therefore cannot be understood without considering the perspective the people who agreed to enter into Confederation. If only the Canadian government’s perspective is taken into account, the result is a truncated view of the concessions made in the negotiations.⁵⁷

In case there was any doubt as to the driving force in the dissent’s analysis, its closing paragraphs stress that the historical context “*dictates* an interpretation of ‘legal rights’ that recognizes this promise” of legislative bilingualism.⁵⁸

The interpretive orientation found in the dissent’s reasons sees constitutional provisions, at least those used to implement foundational historic agreements, *first* as vehicles for implementing the historic agreement and only *second* as elements of a self-structuring (or “autopoietic”⁵⁹) constitutional system. The majority’s interpretive orientation is generally the reverse.

Both the majority and dissenting reasons are necessarily embedded within the broader social and political imaginaries of the present day. The Introduction to this dissertation, reviewing two pairs of cases⁶⁰ dealing with Indigenous-state relations, noted the impact on legal doctrine of the decisive shift away from background notions of civilizational hierarchy, which had previously structured the social and political imaginaries expressed in Canadian

⁵⁶ Caron, *supra* note 8 at para 219.

⁵⁷ Caron, *supra* note 8 at para 236.

⁵⁸ Caron, *supra* note 8 at para 240 (italics added).

⁵⁹ On law as autopoietic, see e.g. Gunther Teubner, *Law as an Autopoietic System*, translated by Anne Bankowska and Ruth Adler, edited by Zenon Bankowski (Cambridge, MA: Blackwell Publishers 1993).

⁶⁰ *Simon v The Queen*, [1985] 2 SCR 387 and *R v Sylbooy*, [1929] 1 DLR 307 (NS Co Ct); *Restoule v Canada (AG)*, 2018 ONSC 7701 and *Ontario (Attorney General) v Bear Island Foundation*, 1989 CanLII 4403 (ONCA), 68 OR (2d) 394. See section 5 of the Introduction.

law, and towards the current rhetorical repudiation of colonialism and search for an acceptable vision of respect and equality across legal orders.

This transformation of social and political imaginaries naturally informs the views of both the majority and dissent in *Caron*, particularly their readings of the socio-political context of the historical events before the Court. Note, however, that the dissent's emphasis on historical context—to the point of stating that this context *dictates* the proper interpretation of relevant constitutional provisions—opens greater space for a transformed reading of historical context to have a transformative impact on constitutional interpretation. By contrast, the majority's approach—hewing more tightly (1) to the intention of state institutions and actors at the time they adopted relevant constitutional provisions and (2) to existing internal constitutional principles and institutional structures—insulates, to some degree, constitutional interpretation from transformations in our social and political imaginaries that compel revisions in our readings of history.

d. Didn't they know how to entrench language rights?

The majority places great stock in the notion that Parliament knew how to entrench language rights if it wanted to. Thus, “[t]he words in the *1867 Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the *1867 Address*”.⁶¹ As noted in subsections (b) and (c) above, this focus on what Parliament intended flows from the majority's framing of the case in terms of what rights were “granted” to the inhabitants of the Territory. Even setting that point aside, the majority's emphasis on Parliament knowing how to entrench language rights in 1870 is anachronistic, for at least two reasons.

First, Parliament did not really know how to entrench anything at the time. On basic principles of parliamentary sovereignty derived from Britain, no parliament could entrench an act against itself. It was doubtful whether the *Manitoba Act, 1870* was entrenched against the Parliament of Canada, which had passed that Act into law. Or, to put the point somewhat differently, it was unclear whether the Parliament of Canada had the power to create new provinces within the federal structure of Canada established by the *BNA Act, 1867*.

It is hard to assess the historical legal situation with certainty, since the *BNA Act, 1867*, adopted by the Imperial Parliament, was undoubtedly entrenched against the Parliament of

⁶¹ *Caron*, *supra* note 8 at para 103. See also para 46: “the express and mandatory language respecting legislative bilingualism used by the Imperial Parliament in s. 133 of the *Constitution Act, 1867* and by the Parliament of Canada in the *Manitoba Act, 1870* stands in marked contrast to the complex web of instruments, vague phrases, political pronouncements and historical context on which the appellants' claims depend.” This suggests that the majority's real point about the contrasting instruments involved is focused not so much on constitutional entrenchment as on the fact that the *Manitoba Act, 1870* explicitly mentions linguistic rights, while the *1870 Order* does not. As noted below, this point fails to grapple with the fact that the *1870 Order* placed the Territory outside the new province of Manitoba under the legislative authority of the Parliament of Canada, which unquestionably did have an express and constitutionally entrenched obligation of legislative bilingualism under section 133 of the *Constitution Act, 1867*.

Canada and divided powers between that Parliament and the provincial legislatures. Arguably, then, the *Manitoba Act, 1870*, once adopted by the Parliament of Canada, achieved a measure of protection insofar as the new province's jurisdictional powers were protected under the *BNA Act, 1867*. Yet precisely such a result—the Parliament of Canada successfully entrenching an Act against itself—conflicts with British notions of parliamentary sovereignty and raised questions about the power of the Parliament of Canada to create new provinces.

At a minimum, this situation is hardly a model of clarity. This state of uncertainty led the Imperial Parliament to enact the *BNA Act, 1871*, in order to address “doubts ... respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or which may hereafter be admitted, into the Dominion of Canada.”⁶² If implementation of the historic agreement between Canada and the provisional government was to stand or fall with Parliament's know-how for constitutional entrenchment, it was on shaky ground.

Second, as the dissent in *Caron* explained, the *Manitoba Act, 1870* and the *1870 Order* “are not really comparable, as they did not come from the same legislative authorities — the *Manitoba Act, 1870* was passed by the Canadian Parliament, while the *1870 Order* was issued by Imperial authorities.”⁶³ Moreover, “the annexed territories fell under federal authority. It was therefore guaranteed pursuant to s. 133 of the *Constitution Act, 1867* that federal Acts applicable to the territories would be printed and published in both languages as a consequence of their being Acts of the Parliament of Canada.”⁶⁴ Arguably, the protection for legislative bilingualism in 1870 would have appeared stronger in the portion of the annexed Territory under federal authority than in the new province of Manitoba, since there was no doubt that section 133 was entrenched against the Parliament of Canada.

e. No privileging of Parliament's intentions—just its legal instruments

Despite all the points highlighted above, the majority insists that it is not privileging Parliament's intentions:

Of course, this is not to suggest that the intentions of Parliament occupy a position of privilege over those of the territorial inhabitants negotiating three years later in 1870. On the contrary, the understanding and intention of the representatives and negotiators also informs the context of the negotiations in 1870. However, there is no evidence that they used the words “legal rights” from the *1867 Address* in the broad manner suggested by the appellants.⁶⁵

The majority here says that it is not privileging the intentions of Parliament and is also taking into account the meaning that the territorial inhabitants' representatives attached ... to words used by Parliament. This reveals how deeply anchored the majority's approach is in the perspective of Parliament, or at least in a perspective grounded by the legal instruments of Parliament.

⁶² *BNA Act, 1871*, *supra* note 21, Preamble.

⁶³ *Caron*, *supra* note 8 at para 214.

⁶⁴ *Caron*, *supra* note 8 at para 214.

⁶⁵ *Caron*, *supra* note 8 at para 56.

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By contrast, the dissent does not focus on the meaning that representatives of the Métis provisional government would have attached to words *used in constitutional instruments by Canada and Britain* to give effect to the historic agreement. Rather, the dissent focuses on the words *used in negotiations* between Canadian representatives and representatives of the Métis provisional government in reaching the 1870 agreement. The dissent then uses its conclusions about the content of the negotiated agreement to ground its interpretation of the words that Canada and Britain used in their own constitutional instruments to give effect to the agreement.

On each of the five points addressed in subsections (a) to (e) above, the majority and dissent made contrasting interpretive manoeuvres. In broad terms, the contrast reflects the dissent's primary emphasis on historical evidence and context (as read through present-day social and political imaginaries) and the majority's primary emphasis on (1) the historical intent of state institutions and actors as governed by (2) internal constitutional principles and structure flowing from state authority. The majority's interpretive approach is also embedded in present-day social and political imaginaries, of course—it would be unacceptable, for instance, for the majority to appeal to civilizational hierarchy to justify its approach.⁶⁶ Yet the analysis above shows how the majority's approach—emphasizing the perspective of state institutions and constitutional principles and structures flowing from state authority—provides something of a buffer insulating established legal doctrine from fundamental revisions in the face of transformative shifts in social and political imaginaries.

In *Caron*, the two series of interpretive manoeuvres adopted by the majority and dissent, respectively, linked together to produce opposite conclusions about the specific legal dispute before the Court. The majority concluded that the appellants had failed to establish that Alberta was bound by an obligation of legislative bilingualism and dismissed the appeal. The dissent concluded that the appellants had established this obligation and would have allowed the appeal. In the result, then, no constitutional obligation of legislative bilingualism is enforced on Alberta today.

The specific legal dispute in *Caron* arose under traffic safety legislation adopted by the provincial legislature of Alberta and, insofar as the dispute was adjudicated in Canadian courts, this forced parties involved in the litigation to mobilize a host of technical legal aspects of the Canadian legal system in order, first, to present the dispute over traffic tickets as a constitutional issue and, second, to develop legal arguments about the proper resolution of the constitutional issue thus raised. The nature and forum of this constitutional issue forced the parties to debate, largely through the same medium of technical legal argument, issues of social and political importance today, including the meaning and binding authority of historic agreements between the state and Métis or Indigenous peoples. The interpretive approaches adopted by the parties and the justices inevitably also express aspects of the social and political imaginaries in which we live today.

⁶⁶ See discussion in section 5 of the Introduction.

Caron thus offers a concrete illustration of the interplay between these three dimensions addressed in the Introduction: (i) evolving social and political imaginaries, (ii) the explicit formulation of social and political issues in public debate, and (iii) the translation of certain aspects of these social and political issues into the language of legal doctrine in the context of a specific dispute. The judgments issued by the courts, particularly the SCC, in cases like *Caron* are a uniquely authoritative expression, within the Canadian constitutional order, of the legal system's grasp of these issues and of its attempt to formulate rules and principles to govern them.

The majority and dissent in *Caron* provide a snapshot of the positivist and pluralist approaches to this task. Both approaches look to draw together commitments grounded in the political community's legal history, in order to justify a binding legal outcome today. In the ways detailed above, however, they adopt distinct orientations to the task, characterized by several contrasting interpretive manoeuvres. The remainder of this chapter traces some of the roots of these contrasting interpretive orientations through foundational Aboriginal law cases, and explores legal philosophical implications and issues raised by the contrast.

3. The roots of positivism and pluralism in Canadian Aboriginal law and in the Marshall trilogy

The disagreement in Caron as a dispute about the source of law and lawful authority

In an article addressing treaty interpretation in Canada and New Zealand, John Borrows makes the following observations:

Indigenous issues in Canada and New Zealand also raise metaphysical questions. 'Where do we come from?' is a fundamental inquiry in the treaty field. The answer to this question structures subsequent legal analysis. Law's origin is a big deal. If we believe our primary laws come from Britain, this will produce different normative obligations from those laws which originate on Indigenous shores. Thus, we should not overlook law's 'in the beginning' inquiries. When we identify law's source, we can learn more about in whose image it was created. Origins matter. Or to use a scientific analogy: origins *are* matter; they spawn the elements from which legal worlds are subsequently formed.⁶⁷

One way of reading the underlying disagreement between majority and dissent in *Caron* is in terms of the origins of Canadian law. The majority looks to the institutions and legal instruments of Imperial Britain and the Canadian state as the primary sources of law in framing the case. The dissent leans more heavily on the negotiations and agreement between Canada and the Métis, as established by the historical evidence before the Court.

Again, it bears emphasizing that this contrast is a matter of degrees. The majority certainly does not ignore the content of the negotiations when interpreting the legal instruments used by Canada and Britain. The dissent, for its part, accepts that those legal instruments are key to the case: the appellants must establish that those legal instruments can

⁶⁷ Borrows, *supra* note 1 at 34.

plausibly be read as implementing a negotiated guarantee of legislative bilingualism. Yet the majority's approach fits more naturally within a picture of the Canadian constitutional order as a political project founded on the assertion of Crown sovereignty on North American soil. The project must adapt to local conditions in order to take root, but it traces its political legitimacy and lawful authority to the assertion of Crown sovereignty and to the institutions founded on that assertion.

By contrast, the dissent's approach fits most naturally within a picture of our constitutional order as a political project founded by commitments made between distinct communities and political powers born of local social, political, and historical relationships within Canadian territory. While the courts must interpret constitutional texts and institutional contexts that spring ultimately from the British Crown's assertion of sovereignty and establishment of Canadian confederation, the political legitimacy and lawful authority of the interpretation flow from founding commitments between peoples on Canadian soil and the relationships established between them.

Consider, in this respect, the constitutional status of the *1870 Order*. No party in *Caron* disputed that when the *1870 Order* was issued, it had the force in Canadian law of a statute passed by the Imperial Parliament, as stated in section 146 of the *BNA Act, 1867*, and, since 1982, of a constitutional document listed in the Schedule to the *Constitution Act, 1982*.⁶⁸ The *1870 Order* is therefore constitutionally entrenched against the Parliament of Canada.⁶⁹ These are basic aspects of how the *1870 Order* functions as a legal instrument within the Canadian legal system. The appellants in *Caron* did not ask the Court to revisit these technical features of the *1870 Order* as an entrenched legal instrument in Canadian law—on the contrary, their argument depended on these technical features as the medium through which Canada implemented the guarantee it made (according to the appellants) to entrench legislative bilingualism across the annexed Territory. In this sense, there was widespread agreement before the Court, and between the justices, about such technical aspects of the Canadian legal system.

Yet, as we saw in the first part of this chapter, the dissent placed much greater emphasis than the majority on the historic negotiations and agreement as a *source* of the legal content that instruments such as the *1870 Order* and the *Manitoba Act, 1870* implemented in the newly annexed Territory. The historic negotiations and agreement were, for the dissent, a crucial source of the content (the “matter”) that these legal instruments organized through their technical legal form.

⁶⁸ *Constitution Act, 1982*, *supra* note 40, Schedule, Item 3.

⁶⁹ Prior to the adoption of the *Constitution Act, 1982*, *supra* note 40, the *1870 Order* could be amended by legislation of the British Parliament, though by the early 20th century a convention was established that the British Parliament would only do so on request from the Canadian Parliament. See discussion in, e.g., *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 [the “*Patriation Reference*”]. With the adoption of the *Constitution Act, 1982*, *supra* note 40, amendment of constitutional documents such as the *1870 Order* is governed by the procedures laid out in sections 38 to 48 of that Act.

From this angle, we can see the disagreement in *Caron* as a disagreement about the source of the law, about *where lawful authority flows from* and where the Court derives its own authority to declare what the law is. The dissent looks to historical events and relationships as a key source of law; the majority looks to the authority and practices of Canadian and British political institutions. The perspective taken by the majority might be defended on the ground that the Canadian constitutional order, like the British (indeed, as an offspring of the British), is founded on Crown sovereignty as the ultimate source of all lawful power. On this view, domestic courts, as arbiters of lawfulness within this constitutional order, must trace the validity of any legal proposition to some authority flowing ultimately from Crown sovereignty.

In certain cases, the distinction may seem subtle. Suppose, for instance, that all justices in *Caron* had agreed that the negotiations and historic agreement of 1870 included a commitment to legislative bilingualism and that, on a plain reading, the instruments used by Canadian and British Parliaments entrenched that commitment across the Territory with continuing legal validity today. Would it matter if one group of justices located “the source” of that legal validity in the historical negotiations and agreement, while another group located it instead in the legal instruments used by Canada and Britain to implement the agreement?

In cases where the positivist and pluralist orientations converge on a common outcome, it may be uninteresting to argue too deeply about their relative merits. But *Caron* gives us a case in which the orientations diverge in terms of acceptable legal outcome. Other recent landmark decisions, including *Mikisew Cree II*, *Uashaunnuat*, and *Nevsun*, offer further examples.⁷⁰ The point is not that positivism and pluralism, taken as theoretical approaches to legal interpretation, drive these divergent outcomes. Rather, the divergent legal outcomes favoured by majority and dissent are, in each of these cases, heavily context-dependent, resting on (sometimes only slightly) differing visions of historical relationships, political context, the role of domestic courts, and of the legal significance of these factors.

Across a series of cases, however, these different ways of seeing and interpreting may emerge as recognizably distinct legal orientations or “philosophies” and may be progressively refined by identifiable judicial or legal camps. There is a continuous back-and-forth in this process between the factual contexts of particular legal disputes and partial theorizing about the legal concepts and interpretive approaches used to resolve those disputes.

Relating institutional positivism as a judicial approach to theories of legal positivism

Of course, the point of describing the *Caron* majority’s interpretive approach as *institutional positivism* is that such an interpretive approach resonates with theories of legal

⁷⁰ *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 [“*Mikisew Cree I*”]; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [“*Uashaunnuat*”]; *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [“*Nevsun*”]. *Uashaunnuat* and *Nevsun* are discussed in detail in chapter 5. On *Mikisew Cree II*, see Robert Hamilton and Joshua Nichols, “In Search of Honorable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution” (2020) *University of Toronto Law Journal*, vol 70, issue 3, 341-375.

positivism. The following pages explore that resonance with accounts of legal positivism developed by HLA Hart and his followers, while pointing to the seeds of institutional positivism found in the Marshall trilogy as taken up in Canadian law. However, the Marshall trilogy also contains the seeds of a more pluralist approach, sensitive to the local context of social and political relationships. These seeds suggest a different direction in which Canadian Aboriginal law may yet branch out.

According to positivists in the tradition shaped by Hart, a modern legal system must have both primary rules and secondary rules.⁷¹ Primary rules require or prohibit particular actions (e.g. driving faster than a set speed limit on a given highway, entering a public establishment without wearing a mask during a pandemic), while secondary rules contain the criteria of legal validity for primary (and sometimes other secondary) rules. Secondary rules thus include, for example, the procedural requirements that must be followed for a legislature to validly adopt bills into law. The ultimate criteria of validity in a legal system are those secondary rules that are accepted by legal officials without needing validation through any further secondary rules. In a legal system with a written constitution, the rules enshrined in its provisions are obvious candidates for ultimate criteria of validity. But these criteria may come in other forms as well, e.g. unwritten constitutional principles and case law precedent.⁷² The ultimate criteria of legal validity within a given legal system, taken all together, make up what Hart called the “rule of recognition” of that legal system.

Legal positivism is largely defined by the line it draws between law and politics (and, in a related sense, between law and morality), based on the rule of recognition. Legal positivists insist that it is a matter of socio-political fact whether there exists sufficient consensus within a political community, particularly amongst its legal officials, on the ultimate criteria of legal validity, i.e. on the rule of recognition. Acceptance (or not) of the rule of recognition by legal officials is a question of fact, sharply distinguished from questions of legal validity *under* the rule of recognition. It would be a category mistake to ask whether the ultimate criteria themselves are valid or invalid; rather, they are either accepted (at least, by a critical mass of legal officials applying them) or they are not, in which case there is no functioning legal

⁷¹ There is a vast literature on legal positivism. In the Anglo-American legal world, the discussion has been organized largely around “the Hart-Dworkin debate”. A helpful overview can be found in Scott J Shapiro, ‘The “Hart-Dworkin” Debate: A Short Guide for the Perplexed’, in Arthur Ripstein, ed, *Ronald Dworkin* (Cambridge: Cambridge University Press 2007), 22-55.

⁷² Plausible positivist descriptions of the Canadian legal system would surely characterize its rule of recognition as including rules found in written constitutional documents, in unwritten constitutional principles, and in case law precedent. On unwritten constitutional principles in Canada, see e.g. *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 752: “in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.” The Court affirmed that statement in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 54. See also *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 at paras 82-109 addressing “The Unwritten Basis of Judicial Independence” in the Canadian constitution. The Court has also stressed, however, that “[t]he unwritten principles must be balanced against the principle of Parliamentary sovereignty”: *Babcock v Canada (Attorney General)*, [2002] 3 SCR 3, 2002 SCC 57 at para 55. The precise role of unwritten principles in adjudication continues to divide the Court: see e.g. *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

system. As Hart stated, his theory requires “that the existence and authority of the rule of recognition should depend on its acceptance by the courts”.⁷³ (Of course, there can be borderline cases, in which it is debatable whether the legitimacy of a constitution is accepted by a critical mass of legal officials. That would, however, remain a question of social or political fact, on the positivist view, not a question of legal validity.)

For the domestic legal systems of modern states, the state’s assertions of sovereignty over its territory may be the quintessential ultimate criterion of legal validity, with all legal validity within the domestic legal order resting ultimately on the acceptance of the legitimacy of the state’s assertions of sovereignty. On this view, domestic judges must, by virtue of their office, *accept* the legitimacy of state assertions of sovereignty, and thus cannot *reason* about the legality or legitimacy of these assertions. Such reasoning simply cannot be understood or intelligibly cognized from within the domestic legal order. From this positivist perspective, state assertions of sovereignty are what first open a space of legal reasoning for domestic courts. Legal validity flows ultimately from sovereign intent.

Moreover, the judicial channels through which legal validity flows outward from the fact of sovereign intent are, on the positivist view, also determined through “social facts”.⁷⁴ In particular, judges should not engage in independent moral reasoning to assess legal validity.⁷⁵ Rather, they must determine, to the extent possible, the fact of sovereign intent through criteria found in the rule of recognition.

For instance, a positivist perspective on the Canadian legal system would find that it belongs to (or flows immediately from) the rule of recognition that the federal Parliament is the seat of sovereign legislative power in matters of federal jurisdiction, and that federal bills become legally valid statutes once adopted by majority vote in three readings in both the House of Commons and Senate and receiving royal assent. The legal validity of a statute flows from the acceptance of this law-making power of Parliament and the fact that the statute was adopted according to the accepted legislative procedures. When disputes inevitably arise about the proper interpretation of various statutory provisions, judges should resolve them by attempting to determine sovereign legislative intent. Such analysis may legitimately draw

⁷³ HLA Hart, *The Concept of Law*, 3rd edition, edited by L Green, J Raz, and PA Bulloch (Oxford: Oxford University Press, 2012) at 250. Dennis Patterson, writing as a legal positivist, glosses this point by saying: “The constitution is law because everyone regards it as such. Validity is best explained as a psychosocial phenomenon.” Dennis Patterson, “Theoretical Disagreement, Legal Positivism, and Interpretation”, *Ratio Juris*, vol 31, no 3 September 2018 (260–275), at 273. Patterson’s positivist account of legal interpretation is examined in chapter 3.

⁷⁴ Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), at 372 writes that an account of legal interpretation is positivistic when “it roots interpretive methodology in social facts.” Patterson, *supra* note 73 at 261 (footnote 2), adopts Shapiro’s characterization of positivistic legal interpretation. See also Dyzenhaus, *supra* note 23: “[p]ositive law, properly so called, is not merely law whose existence is determinable by factual tests but law whose content is determinable by the same sort of tests”. Shapiro and Patterson write as positivists, while Dyzenhaus writes as a critic of positivism. I draw on Dyzenhaus in the following pages of this chapter and again in chapter 3 when I examine the positivist accounts developed by Shapiro and Patterson.

⁷⁵ Unless directed to do so by some legal rule or authority whose validity is established by factual tests; see the following note and accompanying text.

on the broad factual context in and through which such intent is expressed—examining, for instance, the legislative history of the statute, the institutional design of the legislature (including, e.g., the role of sub-committees and drafting committees), relevant political conventions, etc.—in order to provide the most accurate factual reconstruction of legislative intent.

The point, in essence, is that the rule of recognition is established as a matter of socio-political fact and judges must determine how legal validity flows from the rule of recognition as a matter of “social pedigree”, i.e. they must assess the validity of a legal proposition according to the factual context described above. When interpreting the law, judges may engage in moral reasoning only if directed or authorized to do so by some element of the rule of recognition or by some other legal authority factually validated by the rule of recognition.⁷⁶ They may also engage in moral reasoning to fill in gaps in the law, but then they are not technically engaged in *legal interpretation*, even if they themselves state and believe that they are.

These issues are unpacked in greater detail in chapters 3 and 4. But it should be stated here that the focus on sovereign legislative intent is not entirely so narrow in Hart and his followers as the paragraphs above may suggest. As already noted, legal positivists in Hart’s tradition allow room in the rule of recognition not only for criteria of sovereign intent, but also for such things as judicial precedent and unwritten constitutional principles that need not themselves flow from sovereign intent or constitute criteria for determining sovereign intent. From a historical perspective, however, such allowance looks like a compromise position resulting from Hart’s insistence that his theory of law is a matter of “descriptive sociology” as opposed to a prescriptive account of how a legal system ought to function. Given the deep common law tradition of the British legal system that Hart was (primarily) looking at, he could not plausibly have developed a descriptive account narrowly focused on sovereign legislative intent as the source of all legal validity.

David Dyzenhaus, in diagnosing what he calls “judicial positivism”, helpfully draws the genealogy of legal positivism in Anglo-American thinking back to the legal reform projects of Hobbes and Bentham.⁷⁷ These reform projects aimed at eliminating the pernicious—according to Hobbes and Bentham—reality that common law judges *are* constantly engaging

⁷⁶ For instance, a constitutional provision enshrining equal rights is, on the positivist view, legally binding only because it is accepted as part of the constitution, not because of its moral content. Yet the fact that it is so binding may require judges to engage in moral reasoning about the meaning of “equality” in order to interpret the precise content of equality rights. Their judicial interpretations are legally valid because they remain authorized ultimately by factual tests, i.e. by proper “social pedigree”. Such “incorporation” of moral reasoning into assessments of legal validity is accepted by “soft” or “inclusive” positivists. Inclusive legal positivists “hold that when moral considerations are incorporated into a legal order’s criteria for legal validity, and when argument on the basis of such criteria yields a correct answer, there is no reason to deny that the answer is fully determined by law”: Dyzenhaus, *supra* note 23 at 44. By contrast, “exclusive” legal positivists hold that any such arguments based on moral considerations amount to arguments about what the law ought to be, not interpretations of what the law is. These issues are pursued in more detail in chapter 3.

⁷⁷ Dyzenhaus, *supra* note 23.

in political and moral reasoning under the guise of developing the common law. As Dyzenhaus writes:

Positive law, properly so called, is not merely law whose existence is determinable by factual tests but law whose content is determinable by the same sort of tests, here tests which appeal only to facts about legislative intent. [...] The very values that underpin the design of the legal order which Hobbes and Bentham favour are supposed to issue in non-evaluative legal reasoning by judges, reasoning which does not involve moral deliberation. That judges will have to engage in at least some measure of moral deliberation is not denied, but as soon as they do they are, from the positivist perspective, no longer engaged in legal reasoning. As I will now argue, the stance that I call judicial positivism comes about because there are judges who accept some version of Hobbes's or Bentham's political theories, but find themselves working in a legal order which is not designed along the right lines.⁷⁸

Hobbes and Bentham wanted to eliminate, to the extent possible, moral deliberation from the judicial task of interpreting the law. As they saw it, judges ought to interpret the law based on factual tests, and in particular factual tests about legislative, or sovereign, intent. Moreover, judicial interpretation should not have the force of law beyond the case being decided; limiting judicial authority in this way would thereby limit the consequences of any judicial moral reasoning to the case at hand.

Hobbes and Bentham were clear that they were engaging in reform projects, not descriptive analysis. Their reform projects confronted a legal system with a deep common law tradition that did not conform to their positivist vision. Dyzenhaus describes the contrasting style of legal reasoning anchoring this common law tradition:

The common law style of reasoning is exemplified in the reasoning of judges within the conceptual space of the common law tradition. Such judges suppose—and thus aim to show in their judgments—that the law (which includes both statutes and their judgments)—is a repository of inexhaustible legal reasons. As long as they go about reasoning in the right way—searching for the reason of the law—they will be able to solve any problem of interpretation by working out what the best understanding of relevant legal material requires. That solution is both fully determined by the law and the result of reason.⁷⁹

I find the formulation “fully determined by the law and the result of reason” somewhat misleading once we discard the positivist barrier between law and morality (and, in a related way, between law and politics, law and history, ...), because it may suggest a questionable independence of the law from morality, politics, history. As argued in the Introduction, judicial reasoning is deeply influenced by shifts in the social and political imaginaries in which the courts are embedded. However, given Dyzenhaus' subsequent elaboration of

⁷⁸ Dyzenhaus, *supra* note 23 at 45.

⁷⁹ Dyzenhaus, *supra* note 23 at 46.

“legal reason”, this may amount essentially to a difference in formulation rather than substantial disagreement:

Reason here is ‘artificial’ in that it is not unconstrained ‘natural’ reason but constrained legal reason—reason immanent in already existing legal material. But it is reason nonetheless, which is to say moral, practical reason, reason which sustains conclusions about what the law both morally and legally requires. *But the morality does not come from a source extrinsic to law. It does not have to be injected into the law by some authority.* Rather, morality emerges through judges engaging in the common law style, through their bringing to the surface the fundamental principles already immanent in the law.⁸⁰

My characterizations of institutional positivism and historically grounded pluralism, as styles of judicial reasoning exemplified by the majority and dissent in *Caron*, closely track Dyzenhaus’ characterizations of judicial positivism and common law reasoning. Dyzenhaus admittedly does not mention pluralism. Yet historically grounded pluralism is the natural response of common law reasoning to the kind of historical, social, and political context found in *Caron* and in Indigenous-state relations in North America more broadly. In the remainder of this chapter, I begin to illustrate this point using the Marshall trilogy of cases. The subsequent chapters of this dissertation are, in a sense, an extended meditation on the same point within the Canadian context more generally—the point, that is, that historically grounded pluralism is a compelling common law response available to Canadian courts when adjudicating issues of Indigenous-state relations.

Before turning to the Marshall trilogy, it is worth quoting Dyzenhaus at some length on the dilemma Hart faced because of his commitment to a “descriptive” account of the law. Dyzenhaus’ characterization of this dilemma nicely captures an unresolved tension running through positivist theories of law that is also reflected in the institutional positivist approach found in the case law examined throughout this dissertation:

Hart found himself caught in a dilemma between his tradition and its politically motivated opposition to the common law style theory and an a-political description of that style which concedes too much, perhaps almost everything to it. The first horn of this dilemma consists of the attempt to describe the conceptual space of the common law by using positivist, legislative language. Such language implies that the space in which the judge operates is unconstrained by law and offers political reasons for adopting this implication—the avoidance of the childish fiction.^[81] Since that implication seems false and since Hart wishes to

⁸⁰ Dyzenhaus, *supra* note 23, at 46 (italics added). See also James Tully’s characterization of common law reasoning in *Strange Multiplicity* (New York: Cambridge University Press 1995), at 103-124, discussed in the Introduction at note 7 and accompanying text. Tully draws notably on Sir Matthew Hale’s defence of the common law against Thomas Hobbes’s deductive rationalism.

⁸¹ In other words, the positivist focus on sovereign or legislative intent as the sole source of legal validity implies that judicial interpretation of, e.g., the historical relations between Indigenous peoples and the state cannot *really* be *legal* interpretation, because such relations are not a source of legal validity from the positivist perspective—except perhaps indirectly if some statute or constitutional provision authorizes the courts to draw legal conclusions from such relations. The majority in *Caron* exemplifies this positivist approach, interpreting the legal significance of the 1870 negotiations and agreement between Canada and the

avoid putting legal theory on a political, prescriptive foundation, he moves at other times in the direction of the other horn. On this second horn, not only is the space very much filled by law, but the more natural description—from the inside—is the common law one in which judges are drawing out the best solution from the inexhaustible stock of legal reasons. But to adopt the second horn is also to go some considerable distance to adopt the common law style of reasoning.⁸²

Dyzenhaus is a critic of legal positivism in both prescriptive and descriptive forms, but he is particularly biting in his criticism of the descriptive tradition shaped by Hart, which renounces (or represses) the “politically motivated opposition” to common law reasoning of earlier positivists. In “judicial positivism” today, Dyzenhaus sees a “neo-Benthamite” revival that “argues on democratic grounds for a legal order in which Parliament has a virtual monopoly on law-making. It resists constraints on ultimate legal authority that go beyond the constraints of manner and form required to make it possible to identify both Parliament’s laws and their content.”⁸³ Although Dyzenhaus is critical of judicial positivism, he applauds the openness with which it embraces its prescriptive roots and seeks to draw from them today.

The institutional positivism of the majority in *Caron* may not go quite so far as to argue for “a legal order in which Parliament has a virtual monopoly on law-making.” But it does tend towards the position that sovereign legislative intent is the ultimate source of law, by focusing its legal interpretation on instruments of the Dominion Parliament (the *Manitoba Act, 1870*), the British Crown (the *1870 Order*), and the British Parliament (the *BNA Act, 1867*) and treating sovereign legislative intent as governing the meaning of the provisions found in each of those instruments. While the dissent also interprets these same instruments, it looks primarily to the historic negotiations and agreement between Canada and the Métis provisional government as the source of meaning and lawful authority for the relevant provisions found in those instruments.

Recent decisions of the SCC illustrate a sharpening of the institutional positivist focus on sovereign legislative intent as the sole source of law-making in the Canadian legal order. Major cases such as *Mikisew Cree II*, *Uashaunnuat*, and *Nevsun* are particularly illustrative,

Métis provisional government through the lens of British and Canadian sovereign intent—i.e. the majority does its best to reconstruct the legislative intent of the Dominion Parliament embodied in the *Manitoba Act, 1870* and of the British Crown embodied in the *1870 Order*, which was in turn authorized through the legislative intent of the British Parliament embodied in section 146 of the *BNA Act, 1867*. The dissent interprets these same instruments but derives the legal content and lawful authority of these instruments from the historic negotiations and agreement themselves, to a much greater extent than the majority. Of course, the positivist perspective recognizes that legislative or sovereign intent cannot resolve every legal question that may arise. When this happens, judges may have to fill in the gaps, e.g. through moral reasoning (including at times moral reasoning about historical political relations). Positivists that Dyzenhaus has been discussing in the lead-up to the passage quoted here—John Austin in particular—wanted to dispense with what they considered “the ‘childish fiction’ of the common law that judges do not make the law”: Dyzenhaus, *supra* note 23 at 48; see also at 53. But this desire to do away with the “childish fiction” is part of a prescriptive program, which Hart renounces in his own stated desire to stick with “descriptive sociology”. Hence Hart’s need to move off this first horn of the dilemma described by Dyzenhaus.

⁸² Dyzenhaus, *supra* note 23 at 53.

⁸³ Dyzenhaus, *supra* note 23 at 62.

though in each of these cases the institutional positivist position is found only in concurrence or dissent. *Uashaunnuat* and *Nevsun* are treated in detail in chapter 5. These two cases also present an elaboration of the pluralist approach in the majority reasons. Yet other cases, notably *Tsilhqot'in Nation*⁸⁴—the most recent major statement of the SCC on Aboriginal title, discussed in detail in chapter 2—and *Sparrow*,⁸⁵ awkwardly incorporate aspects of both the positivist and pluralist approaches within a single set of reasons.

This ongoing partial schizophrenia of the judicial interpretation of Indigenous-state relations is not surprising, given the historical situation. The colonial project in North America involved extensive assertions of Crown sovereignty over Indigenous territories and peoples. Domestic courts in the US and Canada today—and comparably in the British settler states of Australia and New Zealand—gained *de facto* judicial authority within the territories claimed by their respective states through the state's acquisition of *de facto* sovereignty. In other words, whatever one thinks about the legitimacy or legal validity of Crown assertions of sovereignty over Canadian territory, the state has gradually and effectively extended its *de facto* control over land and resources within this territory. As Canadian governments and courts now acknowledge, the state did not thereby extinguish Indigenous legal orders, but it did severely constrain their ability to develop free of state interference and domination. Clearly, if the Canadian state had not extended its *de facto* control in this manner, then the courts established and maintained by the state would not enjoy the *de facto* authority they now do, with vast state powers at their disposal to enforce their orders and thus to give effect to their legal reasons.

It is not hard to understand, given this broad context, how domestic court judges might view state sovereignty as the foundation of their own lawful authority and jurisdiction. At the same time, it is also not hard to see how this context raises questions about the legitimacy and legality of state assertions of sovereignty. Judges working in a common law tradition—which does not see sovereign or legislative intent as the sole source of law, but draws also on “a repository of inexhaustible legal reasons”⁸⁶ thoroughly imbued with moral reasoning, with respect for existing customs and practices, with historical and judicial precedent, and with reasoning by analogy—have the interpretive resources with which to tackle such questions *as legal questions*.

Institutional positivism responds to this possibility by focusing on the place of domestic courts within the state institutional context. Institutional positivism, as the term is used in this dissertation, is a form of positivism with a specific focus of concern. Institutional positivism is *positivist* insofar as it understands (implicitly or explicitly) sovereign intent as the ultimate source of law. It is *institutional* insofar as it highlights the position of domestic courts as institutions whose own (*de facto*) authority depends on (*de facto*) successful assertion of state sovereignty. Of course, institutional positivism, in good positivist fashion, need not accept that *de facto* and *de jure* can be peeled apart in this context—state assertion of sovereignty is

⁸⁴ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*“Tsilhqot'in Nation”*].

⁸⁵ *R v Sparrow*, [1990] 1 SCR 1075 [*“Sparrow”*]. *Sparrow* is discussed below and again in chapter 2.

⁸⁶ Dyzenhaus, *supra* note 23, at 46.

at the heart of the rule of recognition and is not the kind of thing that can be legally valid or invalid; rather it is accepted, or it is not.⁸⁷

In this respect, consider the following statement from Chief Justice John Marshall of the United States Supreme Court in his 1823 opinion in *M'Intosh*,⁸⁸ a foundational case in US federal Indian law: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."⁸⁹ Questions about the legal validity or *de jure* status ("the original justice") of a state's assertions of sovereignty cannot be entertained by that state's courts. From the perspectives of such courts, what matters is the *de facto* status of state sovereignty, i.e. whether that sovereignty has been "successfully asserted." Successful assertion establishes, *as a matter of fact*, the authority of the state's domestic courts to declare the law of the land.

The following discussion uses the term "*M'Intosh* exclusion" to refer to this prohibition on state domestic courts reviewing legal questions about state assertions of sovereignty over Indigenous lands and peoples. In the language of US, English, and Australian courts—language which the SCC has recently rejected from Canadian law—the *M'Intosh* exclusion is a branch of the "act of state" doctrine, prohibiting domestic courts from adjudicating categories of state action deemed too political for review.⁹⁰ However, the *M'Intosh* exclusion is entangled, in the Marshall trilogy itself as also in subsequent Canadian case law, with notions of civilizational hierarchy and other issues specific Indigenous-state relations. In this

⁸⁷ For a helpful discussion of the role of *de facto* sovereignty in the Marshall trilogy and in recent Canadian Aboriginal case law, see Kent McNeil, "Shared Indigenous and Crown Sovereignty: Modifying the State Model" (2020). *Articles & Book Chapters*, 2815, available online: <https://digitalcommons.osgoode.yorku.ca/scholarly_works/2815/>. See also Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011), for a discussion, drawing on Carl Schmitt, of the never-ending contest (e.g. between Congress and the Supreme Court) in US constitutionalism to claim the voice of popular sovereignty and the power to (in Schmitt's language) decide on the exception. While Schmitt was a strident critic of legal positivism, particularly of Hans Kelsen's legal formalism, Schmitt's own political theology draws a similar line between law and politics, such that legitimacy and lawful authority within a legal system ultimately flow from the successful (*de facto*) assertion of sovereignty, an assertion that itself lies beyond the scope of adjudication as to legal validity; like the positivists' rule of recognition, the assertion of sovereignty is successful / accepted, or it is not. Common law reasoning is arguably opposed, in this respect, both to legal positivism and to Schmitt's political theology. From the common law perspective, they are arguably two sides of the same coin. On this point, consider Kahn's *Political Theology* at 31: "The opening words of chapter one [of Schmitt's *Political Theology*] are some of the most famous in the history of political theory: 'Sovereign is he who decides on the exception.' This sentence sets up the structure of the entire inquiry and is thus the point of entry into a political-theological approach. That approach is a kind of mirror image of the political theory of liberalism: not law, but exception; not judge, but sovereign; not reason, but decision. The inversion is so extreme that we might think of political theology as the dialectical negation of liberal political theory."

⁸⁸ *M'Intosh*, *supra* note 3.

⁸⁹ *M'Intosh*, *supra* note 3 at 588.

⁹⁰ For a recent discussion of the act of state doctrine in Canadian law, see *Nevsun*, *supra* note 70. The majority in *Nevsun* states at para 28: "The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law."

sense, it is not simply a branch of the act of state doctrine, but carries specific ideological baggage. This point is taken again below.

The *M'Intosh* exclusion has been expressed, in the blunt technical language of modern law, by the High Court of Australia in cases dealing with Aboriginal title claims. In *Coe v Commonwealth of Australia*, for instance, Justice Jacobs of the High Court stated that a challenge to state sovereignty was “not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged.”⁹¹ In *Mabo v Queensland (No 2)*, the High Court upheld the proposition that “[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.”⁹²

The Supreme Court of Canada has taken a more ambiguous position on the *M'Intosh* exclusion. In *Sparrow*, a unanimous Court endorsed the following statement: “Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”⁹³ Yet in the very same judgment the Court also wrote the following, relying on the authority of *M'Intosh*:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, 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; see *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.).⁹⁴

We find the same basic ambiguity, or unresolved tension, in the unanimous SCC decision in *Tsilhqot'in Nation* issued a quarter century after *Sparrow*.⁹⁵ *Tsilhqot'in Nation* is examined in detail in chapter 2, and the ambiguity running through the case law is examined throughout this dissertation. Here I simply note that the SCC has made other statements that seem to run counter to its partial embrace of the *M'Intosh* exclusion in cases like *Sparrow* and *Tsilhqot'in Nation*. For instance, the Court has acknowledged competing state and Indigenous sovereign claims, highlighting the importance of reconciling “pre-existing Aboriginal sovereignty with

⁹¹ *Coe v Commonwealth of Australia*, [1979] HCA 68 at para 3 of the reasons of Justice Jacobs, dissenting in the outcome (the appeal before the Court dealing with an application to amend pleadings), though this substantive point was not in dispute between members of the Court. The principal reasons of the Court were written by Justice Gibbs, who similarly stated, at para 12 of his reasons: “The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged”.

⁹² *Mabo v Queensland (No 2)* [1992] HCA 23 at para 31 of the reasons of Justice Brennan.

⁹³ *Sparrow*, *supra* note 85 at 1106, quoting Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26:1 *Osgoode Hall Law Journal* 95-126 at 100.

⁹⁴ *Sparrow*, *supra* note 85 at 1103.

⁹⁵ See *Tsilhqot'in Nation*, *supra* note 84 at para 69, where the Court both states that “[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763” and simultaneously affirms that “[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia].”

assumed Crown sovereignty”;⁹⁶ has characterized Crown sovereignty as *de facto* in at least some areas of the country;⁹⁷ has found that Aboriginal rights and title have a source in Indigenous legal systems that existed prior to, and survived, assertions of Crown sovereignty;⁹⁸ and has held that the Crown is under a binding legal obligation to negotiate treaties to resolve claims grounded in pre-existing Indigenous sovereignty and land rights (at least in certain circumstances).⁹⁹ These are all fairly striking statements for a domestic court to make.

Before turning, in chapter 2, to an examination of this unresolved tension as embedded specifically in the case law on Aboriginal title, it is worth returning to *M’Intosh*—characterized by the SCC as “the *locus classicus* of the principles governing aboriginal title”¹⁰⁰—and unpacking the words of Chief Justice Marshall in greater detail. The analysis below reveals that, while *M’Intosh* held that US courts could not directly question the legitimacy or legality of US assertions of sovereignty, it also forcefully asserted judicial authority to determine the legal significance and content of state sovereignty. The *M’Intosh* exclusion is thus Janus-faced: one face mutely and obediently accepts successful state assertions of sovereignty; the other face declares what that sovereignty amounts to, legally

⁹⁶ *Haida Nation*, *supra* note 43 at para 20: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act*, 1982.”

⁹⁷ *Taku River Tlingit*, *supra* note 43 at para 42: “The purpose of s. 35(1) of the *Constitution Act*, 1982 is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”

⁹⁸ See *Delgamuukw*, *supra* note 43 at para 126: “aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law”; *Guerin*, *supra* note 43 at 379: “Their [referring to ‘Indians’] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.”

⁹⁹ See *Haida Nation*, *supra* note 43 at para 20: “Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims.” See also para 25: “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act*, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation” [emphasis added]. In *Tsilhqot’in Nation*, *supra* note 43 at para 17, the Court confirmed that para 25 of *Haida Nation* was speaking of a legal duty: “The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims” [emphasis added]. Note, however, that the British Columbia Supreme Court, for one, explicitly declined to read *Haida Nation* and *Tsilhqot’in Nation* as affirming “a new principle of general application compelling negotiation in all aboriginal litigation”: See *Songhees Nation v British Columbia*, 2014 BCSC 1783 at para 19. Courts are generally reluctant to compel, as opposed to encourage, negotiations. It remains to be seen whether certain circumstances may prompt more specific court orders compelling the Crown to negotiate. Some duty-to-consult judgments arguably impose more specific obligations to negotiate if the Crown wishes to pursue its proposed course of action. See e.g. *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153. This is different, however, from imposing on the Crown a stand-alone obligation to negotiate, independent of any action the Crown wishes to pursue.

¹⁰⁰ *Calder v Attorney-General of British Columbia*, [1973] SCR 313, at 380 (*per* Hall J). See also *Guerin*, *supra* note 43 at 380; *Sparrow*, *supra* note 85 at 1103; *Wewaykum Indian Band v Canada*, 2002 SCC 79, at para 75.

speaking. The second face speaks particularly loud in the two subsequent cases of the Marshall trilogy, *Cherokee Nation* and *Worcester*.¹⁰¹

M'Intosh dealt with the validity of private purchases, made prior to the American Revolution, of Indigenous territory north of the Ohio River where the British Crown claimed sovereignty. Chief Justice Marshall held that US courts could not uphold these purchases, on the grounds (1) that the doctrine of discovery, as he called it, gave the discovering European nation the exclusive power to acquire territory from Indigenous peoples by purchase or conquest, and (2) that the *Royal Proclamation of 1763*¹⁰² prohibited purchases of Indigenous lands except by the British Crown at a public meeting with appropriate Indigenous representatives. Following the American Revolution, according to Chief Justice Marshall, the newly sovereign US stepped into the shoes of the British Crown for purposes of the doctrine of discovery and of the sole right to purchase Indigenous lands under the *Royal Proclamation*.

As discussed above, there is a plausible legal positivist reading of Chief Justice Marshall's famous statement that conquest gives a title that cannot be questioned in the courts of the conqueror. Beyond the specific concerns of legal theory, however, the *M'Intosh* exclusion is undoubtedly an expression of the political and social imaginary in which Chief Justice Marshall and the Supreme Court of the United States were embedded at the time. Throughout the 19th century and the first half of the 20th, as settler state offspring of the British empire embraced the colonial project and a vision of civilizational hierarchy, European assertions of sovereignty over Indigenous territories were accepted as a matter of course within the social and political imaginaries of governing elites. The *M'Intosh* exclusion is an expression, in legal doctrinal form, of this acceptance of state assertions of sovereignty over territories in the new world. As Antony Anghie has argued, the very notion of sovereignty in modern international law largely developed *out of* the colonial encounter.¹⁰³ The imaginary of imperial expansion and colonization inevitably found legal articulations that justified imperial assertions of sovereignty.

The *M'Intosh* exclusion holds, in positivist fashion, that such justifications are beyond the concern of domestic courts, as matters settled in the realm of politics or the international legal order. Thus, domestic courts are in principle precluded from assessing the validity or the justice of state assertions of sovereignty over Indigenous territories and peoples. However, given that the *M'Intosh* exclusion itself sprang from the social and political imaginary of imperial expansion, it is not surprising to find *M'Intosh* giving voice to this imaginary and its justifications for imperial assertions. Consider the following passage:

¹⁰¹ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*"Cherokee Nation"*]; *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832) [*"Worcester"*].

¹⁰² George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*"Royal Proclamation"*].

¹⁰³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

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On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence.¹⁰⁴

Chief Justice Marshall here gives voice to the imperial imaginary without necessarily endorsing its “apology” for imperial expansion or its assertion of “unlimited independence” in the new world. Nine years later in *Worcester* the Chief Justice takes a caustic view of the “extravagant and absurd idea” that European rulers could unilaterally convey “legitimate power” (let alone “unlimited independence”) over the lands and peoples of the new world. He says the following in reference to the charters issued by the British Crown in “planting colonies in America”:

The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. *This was the exclusive right of purchasing such lands as the natives were willing to sell.* The Crown could not be understood to grant what the Crown did not affect to claim; nor was it so understood.¹⁰⁵

By the logic of the *M’Intosh* exclusion, Crown assertions of sovereignty (inherited by the US after independence) could not directly be adjudicated in US courts. In the passage above, however, Chief Justice Marshall has no hesitation in defining the legal content of the sovereignty asserted. *Worcester* takes a restrictive view of what the Crown originally claimed, namely an exclusive right, as against all other European powers, to purchase such lands as Indigenous peoples were willing to sell—in other words, an exclusive right among European powers to engage in treaty-making with Indigenous peoples in the territory claimed. This view does, in fact, seem broadly to conform with the Crown policy of treaty-making from the time of contact until Canadian confederation.¹⁰⁶ *Worcester* is blunt about

¹⁰⁴ *M’Intosh*, *supra* note 3 at 572-573.

¹⁰⁵ *Worcester*, *supra* note 101 at 544-545 (italics added).

¹⁰⁶ See e.g. Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1989), at 67-73; John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” 155-172 in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada*, (Vancouver: UBC Press, 1997). See also the two sets of dissenting reasons by Justices Strong and Gwynne, respectively, in *St. Catharines Milling and Lumber Co v The Queen*,

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the limits of the grants originally conveyed through royal charters: “these grants asserted a title against Europeans only, and were considered blank paper so far as the rights of the natives were concerned.”¹⁰⁷

Nonetheless, at least in *M’Intosh*, Chief Justice Marshall allows for some element of expansion or evolution in the legal content of Crown and state sovereignty, such that the original claim of discovery might be “convert[ed ...] into conquest”:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, *it becomes the law of the land and cannot be questioned*. So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. *However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice.*¹⁰⁸

This is a fuller statement of the *M’Intosh* exclusion, accompanied by a strikingly weak apology for the “restriction” imposed on Indians through “conquest” at the hands of Europeans. This fuller statement is particularly instructive. It shows that the *M’Intosh* exclusion both (1) forbids domestic courts from questioning the state assertions of sovereignty that underlie the domestic legal order, and (2) allows for the legal content of the asserted sovereignty to evolve and to expand¹⁰⁹ with the social and political imaginary of the “conquering” state (or of the “great mass of the community”), even if the resulting legal significance is “opposed to natural right, and to the usages of civilized nations”.

The passage thus makes clear that Chief Justice Marshall is not *stipulating* that discovery may be converted into conquest based on legal principles. It is rather *despite* basic legal principles (of “natural right” and “the usages of civilized nations”) that domestic U.S. courts must recognize that conquest has “becom[e] the law of the land and cannot be questioned.” The forces driving this recognition are found in the social and political context and include:

(1887) 13 SCR 577. Of course, Indigenous leaders often had to negotiate under the considerable pressure of European expansion and settlement.

¹⁰⁷ *Worcester*, *supra* note 101 at 546.

¹⁰⁸ *M’Intosh*, *supra* note 3 at 591-592 (italics added).

¹⁰⁹ And to contract, as *Worcester*, *supra* note 101, suggests. For instance, while Chief Justice Marshall emphasized the conquest of Indian Nations in *M’Intosh*, he took pains in *Worcester*, at 546, to explain that in the royal charters that planted colonies in the new world, “[t]he power of war is given only for defence, not for conquest.” In *Worcester*, Chief Justice Marshall was consciously responding to the rapidly evolving social and political context of Indigenous-state relations, including the intense public focus on Georgia’s efforts, supported by President Andrew Jackson, to remove the Cherokee Nation from within its state boundaries: see, e.g., Joseph Burke, “The Cherokee Cases: A Study in Law, Politics, and Morality”, *Stanford Law Review*, Vol. 21, No. 3 (Feb., 1969), 500-531.

the *assertion* that discovery has become conquest, subsequent adherence to that principle, the acquisition and holding of the country under it, and the origin of the property of the “great mass of the community” in that principle. These are the factors that Chief Justice Marshall points to as converting discovery into conquest, so far as the domestic “law of the land” is concerned.

Similarly, with “the concomitant principle that the Indian inhabitants are to be considered merely as occupants [...]”, Chief Justice Marshall describes this “restriction” as opposed to basic legal principles but nonetheless as “indispensable” to the legal system “under which the country has been settled” and as “adapted to the actual condition” of its Indigenous and non-Indigenous inhabitants (“the two people”). However weakly this principle may “perhaps be supported by reason”, it must be accepted by the country’s courts of justice.

In the reasoning of Chief Justice Marshall, legal interpretation must account for social and political context. There may be elements of the social and political context that are indispensable to the domestic legal order (at least as perceived in the social and political imaginary in which the judicial interpretation is embedded). Courts of justice within that legal order must first accept these elements if they are to pronounce upon and reason about “the law of the land”; for otherwise they would undermine the very legal order from which they derive their authority as domestic courts. This is one way of rendering the positivist dimension of the thought expressed so succinctly in the *M’Intosh* statement quoted earlier: “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”¹¹⁰

This interpretation of *M’Intosh* clearly resonates with basic elements of legal positivism, including the core tenet of Hartian positivism that every functioning legal system has a “rule of recognition” consisting of the system’s fundamental criteria of legal validity. The legal validity of all other rules, principles, and propositions within the legal system derives from these criteria.

However, the legal opinions of Chief Justice Marshall in *M’Intosh*, *Cherokee Nation*, and *Worcester* are also rich in a key dimension that is lacking in Hartian legal positivism—careful attention to the judicial task of *continuously translating* shifting aspects of social and political context into legal principles—in other words, giving legal expression to the evolving social and political imaginaries in which courts are embedded. Dividing the *M’Intosh* exclusion into two elements as suggested above, the first element (that domestic courts cannot question state assertions of sovereignty) resonates with positivism (and may be described as a branch of the act of state doctrine), while the second (that the courts must continuously adapt the legal content of such assertions to changing social and political context) is decidedly dissonant. This work of legal translation is the lifeblood of the common law.

¹¹⁰ *M’Intosh*, *supra* note 3 at 588.

The need for ongoing legal interpretation of social and political context—for continuous legal articulation of evolving social and political imaginaries—together with the positivist urge to suppress and deny this legal creativity, help explain the ambiguity that surrounds many legal terms, left floating uncertainly between statements of fact and expressions of legal imagination. For instance, in *M'Intosh* the term “conquest” naturally suggests military conquest, and thus points to established bodies of law dealing with factual situations of military conquest.¹¹¹ Yet Chief Justice Marshall is not using the term in quite that sense in *M'Intosh*. Instead, he is applying the term to the situation of a European power having “discovered” Indian territory and acquired a degree of *de facto* control over it. This application of the term is a legal doctrinal development, holding that certain situations that we would not factually classify as “conquest”, according to common use of that term, will be so classified as a matter of law. The factual reference of the term is stretched through legal convention. As noted above, Chief Justice Marshall acknowledges that it may well seem an “extravagant [...] pretension” to use the term “conquest” in this way.¹¹²

Why then does he use the term? Undoubtedly because it allows the Court to borrow (if only selectively and with modifications) from legal principles established for situations of conquest. In this way, the application of the term “conquest” in *M'Intosh* is a *legal* interpretation of the relevant social and political context—it amounts to a synthesis of the complex social, political, and legal terrain of Indigenous-state relations then prevailing in the new world under the banner of a body of law developed to govern situations of actual military conquest, moulded to the particular context of Indigenous-US relations.

Cherokee Nation introduced another striking legal synthesis of Indigenous-state relations by characterizing Indian nations as “domestic dependent nations.”¹¹³ Chief Justice Marshall’s understanding of Indigenous-state relations seems to have undergone considerable creative evolution between *M'Intosh*, on one hand, and *Cherokee Nation* and *Worcester*, on the other.¹¹⁴ His judgment in the latter case, in particular, emphasizes the self-governing status of Indian nations—“independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws”¹¹⁵ prior to the arrival of Europeans—and concludes that the self-governing status of the Cherokee Nation is protected by treaty and federal law.¹¹⁶ Moreover, *Worcester* insists on the formally equal status of

¹¹¹ Chief Justice Marshall would surely have had *Campbell v Hall*, (1774) 1 Cowp 204, 98 ER 1045, in mind. *Campbell* was a landmark case decided in 1774 by the Court of King’s Bench in England; the case addressed fundamental aspects of legal regimes applicable to territories conquered by the British Crown. This is not to say that Chief Justice Marshall intended to import the reasoning from *Campbell* wholesale into US law governing relations between Indigenous peoples and the United States. *M'Intosh* does not, for instance, hold that upon conquest the laws of Indigenous peoples were incorporated into the laws of colonial Britain or, later, of the United States. However, Chief Justice Marshall’s choice of the term “conquest” to frame Indigenous-US relations would undoubtedly have called *Campbell* to mind as an important point of reference as *M'Intosh* attempted to craft a satisfactory legal regime to govern those relations.

¹¹² *M'Intosh*, *supra* note 3 at 591.

¹¹³ *Cherokee Nation*, *supra* note 101 at 17.

¹¹⁴ See Burke, *supra* note 109.

¹¹⁵ *Worcester*, *supra* note 101 at 542-543.

¹¹⁶ *Worcester*, *supra* note 101 at 595.

Indian nations: “The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”¹¹⁷

The power of Chief Justice Marshall’s reasoning in these judgments lies in the legal creativity with which he draws together broad and complex social, political, and legal terrain under notions such as “conquest” and “domestic dependent nation”. The point here is not to endorse either of these notions as successful syntheses of that complex terrain. The point is rather to underscore the experimental quality of Chief Justice Marshall’s legal reasoning in the Marshall trilogy. He is trying out different formulations as his legal imagination attempts to get a handle on the complex social and political context of Indigenous-state relations that come before his Court in the form of specific legal disputes. While he accepts Crown (and later US) assertions of sovereignty as a matter of principle underpinning the authority of US courts, he looks to the historical, social, and political relationships between Indigenous peoples and European powers and settlers (as those relationships are perceived through the social and political imaginary in which he lives and thinks) as the source of legal content for state sovereignty.

In other words, there are considerable affinities between the interpretive approach found in the Marshall trilogy and that of the dissent in *Caron*. This interpretive approach recognizes the institutional context of domestic courts and the essential importance of successfully asserted state sovereignty to the legal system they inhabit, but at the same time looks to the context of historical, social, and political relations in which sovereignty is asserted as a primary source of the meaning, the legal content, and the lawful authority of the sovereignty thus asserted.

As explained above, Canadian courts continue to cite the Marshall trilogy, particularly *M’Intosh*, for the proposition that the Crown acquired sovereignty and underlying title to lands in North America by “discovering” it, i.e. through simple assertion of sovereignty to the exclusion of other European powers. The discussion above reveals how narrowly positivistic a reading this is of the Marshall trilogy. It is a reading that in fact reads out the heart of Chief Justice Marshall’s legal reasoning, the creativity of the common law style that draws from “a repository of inexhaustible legal reasons”¹¹⁸ thoroughly imbued with moral reasoning, with respect for existing customs and practices, with historical and judicial precedent, and with reasoning by analogy.

Yet those are precisely the aspects of the Marshall trilogy’s interpretive approach that hold the most promise for Canadian courts grappling with the task of reworking and re-articulating notions of sovereignty in a period of ideological transition. The task is similar to the one that faced by Chief Justice Marshall. Of course, the ideological transition we are currently living through—the repudiation of colonialism through official and unofficial

¹¹⁷ *Worcester*, *supra* note 101 at 559-560.

¹¹⁸ Dyzenhaus, *supra* note 23, at 46.

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channels, with the often stated (if still vague and contested) aim of reconciliation—is entirely different from the one Chief Justice Marshall was facing, which involved a consolidation and stabilization of state power in relations with Indigenous peoples whose populations and military strength were in steep decline. As the dissent stated in *Caron*, referring to the years following Canadian confederation, “the political climate at the time was imbued with improvisation.”¹¹⁹ The same was true of the period and context in which the Marshall trilogy was issued, which called for a corresponding degree of improvisation and creativity in the common law. The discussion above shows some of the ways in which the Marshall trilogy answered that call.

Today, too, the political and legal climate of Indigenous-state relations in Canada is “imbued with improvisation.” Indeed, improvisation has been a constant in the elaboration of state sovereignty, and in the related legal doctrines found in the case law. The discussion in this chapter and in the Introduction has highlighted the tension and ambiguity running through Canadian case law addressing Crown assertions of sovereignty in relation to Indigenous peoples and to pre-existing Indigenous sovereignty. The discussion thus far has explained how this tension and ambiguity have been structured in large part by competing legal interpretive approaches—the institutional positivist approach and the historically grounded pluralist approach. The remaining chapters continue to explore this tension and ambiguity running through Canadian Aboriginal law, beginning with the next chapter’s focus on the doctrine of Aboriginal title.

¹¹⁹ *Caron*, *supra* note 8 at para 136.

Portrait of a priest and his followers

He has a kind face and a good heart, and he speaks with wisdom—hard-earned wisdom that has leavened in time with a touch of joy and the loving recognition that has found him at this late stage of life.

But some secret lies at the root of it all, some sordid act or memory that launched this path and its wisdom. He is a religious type you can learn a great deal from, maybe even love, but while on a different path. Those who follow him along his own never seem to catch up, can never quite grasp the joy he projects, and ultimately blame themselves while idolizing him. This blame may be light and nothing to bear, indeed it is the kind of blame that followers long to carry, to create a home for—little more than the shadow of admiration.

They admire him, so it seems natural to them that he is farther along the path. But what is it that he has and they do not? His secret, simply his sordid secret—and the fact that he has accepted it and buried it. He forgives himself something that they would not forgive themselves. And that *is* genuine wisdom. Yet their incapacity to forgive themselves—that is also the root of their admiration for him and of their need for reassurance and forgiveness through him. *They* would never attempt to project such wisdom, holiness, joy—the guilt they carry stands in the way, even if the sins themselves are all-too-human and petty. So they assume that *he* must never have done all the petty or monstrous things they have done. Actually, he has just learned to let it go and become holy. Whether it was murder, rape, debauchery, parricide—what matter to us! We admire him his capacity to forgive and let go.

His true sin in our eyes is that he likes his followers precisely because they do not probe or question him on the roots of this capacity. They do not suspect or even *smell* a secret here, but simply accept that he has something that sets him apart, accept that he has found peace through it, and admire him. Very good!

But we have more refined nostrils—and though we admire his forgiveness, we smell the roots, and that colours for us his joy in attracting followers who lack this sense. It colours too all his words, his vestments, his posture—turning everything slightly pale and artificial. To say it again—we do not object to the roots, but only that they should bear such followers as fruits!

He senses this in us and senses too that we do our best to refrain from offending him, that we actually quite admire him—but within proportion. This makes him wary of us and so, while we can learn much from his wisdom, we keep a sensible distance.

Also—and this may be the real root of his wariness, and not only wariness—we have known more than just a touch of joy. We have known real, spontaneous, uncontrived joy, joy that flows into life uninvited and overflows it. We have suffered from too much joy and never had to seek our way towards it—joy in our hands, our laugh, our dance, not joy clothed in the obscure metaphysics or hidden inner layers. And so ... well, I guess we have our secrets too ----

Ancient Heart

The ancient heart
spirit of the world
That has witnessed
all heartache, love,
and tender struggle
of the animal adventure
That has found a home
in this poverty
Richest as it empties itself
Great reservoir of madness
where we come to cleanse
and refresh ourselves
in waters that don't dissemble
Beyond lying words
Thought is almost always
a matter of dissembling
not experiencing, feeling, sensing
the humble truth
of our earthly setting
The ancient heart and the present moment
The one great pot and the only spoon
From which we all feed ourselves

Parable of an oak

A sturdy and solid oak anchored himself to a mountainside, gripping the slope and burying his snout into the earth.

He clawed at the earth, dug his nails in, aching in his bones.

He grasped at his own desire, but was restless and couldn't find the right angle in the mountain's slope.

He gripped and groped, trying at least to impose his aches on something else, to burrow down until he burrowed through.

He lunged and gnawed, sometimes holding his breath rigid and stiff the length of his trunk, then exhausting himself in elongated exhales, crowning himself in plumes of great green smoke that would sway and lilt gently down into the valley.

Still he plunged his hands into the depths, joints gnarling against cold damp stone, twisting out of himself, no longer self-conscious about form and bounds, reaching out for some living touch.

He tugged and scraped with exposed innards, pulling up with white knuckles that settled and set into quiet grey bark, a solid crusted script that visitors and friends came to rest against and trace with contemplative fingers, before turning their faces to the sun and the dappled shade.

CHAPTER 2

Positivism and Pluralism in the Doctrine of Aboriginal Title

This chapter explores the doctrine of Aboriginal title as developed in Canadian case law over the past half century. The picture that emerges is one of intertwining positivist and pluralist judicial approaches in a kind of uneasy and incomplete synthesis. The picture includes several fault lines that are currently active in the case law as a result of this half-formed synthesis.

It may be hyperbole to think of current doctrine as Frankenstein's monster—but certainly it is not a fully formed creation. The Canadian doctrine of Aboriginal title bears the stamp of a violent attempt to impose state sovereignty (with the Crown or state as the supreme source of all lawful authority) on pre-existing political relationships and legal orders, followed more recently by an attempt to recover or accept some dimensions of Indigenous law-making authority that are widely acknowledged (in our current social and political imaginaries) to have been illegitimately and/or unlawfully suppressed.

Quentin Skinner characterizes the state, “conceptualised in distinctively modern terms”, as “the sole source of law and legitimate force within its territory, and as the sole appropriate object of its citizens’ allegiances.”¹ In making sense of the Canadian doctrine of Aboriginal title, this is a helpful characterization to have in mind. For the first century of Canadian confederation, some version of this idea helped ground and stabilize the dominant official view that any legal rights enjoyed by Indigenous peoples, including any rights to their traditional territories, flowed from the state, i.e. were established through the lawful authority of the state. In this context, of course, “the state” includes—at least until the *Constitution Act, 1982*²—the Canadian and the British state, and “the Crown” as head of both the Canadian and British states.³ The positivist perspective examined in this dissertation embraces, or tends

¹ Quentin Skinner, *The Foundations of Modern Political Thought, Volume One: The Renaissance* (New York: Cambridge University Press, 1978), at x. Noting Skinner's characterization, Harold Berman comments that “[b]y this definition, it is doubtful that even today the United States of America would qualify as a state, since it is governed in part by international law (including customary law as well as international treaties and agreements) and its citizens may have other allegiances (for example, religious allegiances)”: Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) at 613-614 (note 18 to page 281). That is a fair point about the reality of modern states, but Skinner refers specifically to how states are *conceptualized* in distinctively modern terms. For present purposes, Skinner's characterization is helpful in understanding the *idea* or *ideal* of the modern state, an ideal which continues to exert a pull on legal positivist theories and interpretive approaches, even if reality never quite matches this conceptualization.

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

³ It is worth keeping in mind the distinction, drawn by Hobbes and emphasized by Skinner, between the sovereign as *representative* and the state as *fictional unity* of the people. Skinner writes: “The act of covenanting may thus be said to engender two persons who had no previous existence in the state of nature. One is the artificial person to whom we grant authority to speak and act in our name. The name of this person, as we already know, is the sovereign. The other is the person whom we bring into being when we acquire a single will and voice by way of authorizing a man or assembly to serve as our representative. The name of

towards, the view that Crown or state sovereignty is “the sole source of law” within Canadian territory, or at least is the sole source of law that can be legitimately accepted and applied by Canadian courts.

As this positivist perspective rose to judicial dominance in the second half of the 19th century, it had to contend with the long prior history of Indigenous occupation and governance of Canadian territory and with the recognition of this history in treaty relationships between the Crown and Indigenous peoples, as well as in military and economic alliances. Nonetheless, for the first hundred years or so after the creation of the Canadian state through the *British North America Act, 1867*,⁴ this positivist view was dominant: insofar as Canadian law recognized any rights of Indigenous peoples, such rights were understood to be established through the lawful authority of the state (or the sovereign acting for the state),⁵ notably through the *Royal Proclamation of 1763*⁶ and the various iterations of the *Indian Act*.⁷

However, beginning with the *Calder* decision of the Supreme Court of Canada (“SCC”) in 1973, Canadian courts have come to acknowledge pre-existing Indigenous societies and legal orders as a source of Aboriginal title in Canadian law today.⁸ The SCC has stated that Aboriginal title is unlike other estates in Canadian law in that it derives in part from sources that pre-date the assertion of British sovereignty.⁹ This view of Aboriginal title has helped (re-)open the door for domestic courts to recognize Indigenous legal orders and inherent law-making authority within Canada. As noted in chapter 1, the SCC has spoken of the need to “reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”.¹⁰ Over the past few years, Canadian courts have also explicitly affirmed inherent Indigenous law-making authority, and have begun developing doctrine to coordinate Indigenous jurisdiction with federal and provincial jurisdictions and with the Canadian constitution more broadly.¹¹

this further person, Hobbes next proclaims in an epoch-making moment, is the commonwealth or state”: Quentin Skinner, “The sovereign state: a genealogy” in *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, eds Hent Kalmo and Quentin Skinner (New York: Cambridge University Press, 2010) 26-46, at 36-37. The distinction between the sovereign as representative and the state as fictional unity of the people will be addressed in Chapter 4, but does not affect the argument in this chapter, which will for the most part speak of Crown sovereignty and state sovereignty interchangeably.

⁴ *The British North America Act, 1867* (UK), 30 & 31 Vict, c 3, since renamed the *Constitution Act, 1867*, reprinted in RSC 1985, Appendix II, No 5 [“*BNA Act, 1867*” or “*Constitution Act, 1867*”], s 91(24).

⁵ See *supra* note 3.

⁶ George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [“*Royal Proclamation*”].

⁷ *Indian Act*, RSC 1985, c I-5.

⁸ *Calder v Attorney-General of British Columbia*, [1973] SCR 313 [“*Calder*”]. *Calder* is discussed below.

⁹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [“*Delgamuukw*”] at para 114: “What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward” (emphasis in original). This point is discussed further below.

¹⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [“*Haida Nation*”] at para 20. See footnote 43 and accompanying text in chapter 1 for further examples of the SCC using similar language.

¹¹ See e.g. *Pastion v Dene Tha*, 2018 FC 648 [“*Pastion*”], in which the Federal Court explained (1) that the adoption of a custom election code by a First Nation is an exercise of Indigenous law, not derived from any “specific provision of Canadian law” (para 7) and (2) that “Indigenous legal traditions are among Canada’s legal traditions” (para 8) despite “a long period [...] of denial and suppression” of Indigenous legal traditions

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The coordination of Indigenous law with federal and provincial law has also recently become a focus and stated purpose of certain federal and provincial statutes.¹²

These developments have brought the tensions between positivism and pluralism to the jurisprudential surface, whereas they had previously been suppressed through disregard for Indigenous law-making authority (or, in a more restrained institutional positivist sense, through a professed incapacity of domestic courts to cognize any lawful authority that conflicts with, or does not flow from, state sovereignty). In the wake of these re-emerging tensions, the courts have tried to craft a coherent legal doctrine of Aboriginal title. As the courts continue to shape and reshape the legal doctrine, they rarely make explicit mention of the broader tensions between these interpretive approaches, but we can clearly discern competing positivist and pluralist impulses in particular doctrinal developments and judicial disagreements. Such, in any case, is the premise of this chapter; the discussion that follows aims to cash it in through a discussion of doctrinal evolution over the past half-century and through specific examples of current doctrinal fault lines that illustrate positivist-pluralist tensions.

The chapter is structured as follows. The first section briefly reviews the rise of the positivist perspective on Indigenous land rights—viewing such rights as creatures of state sovereignty, if they exist at all—that was ascendant for the first century of Canadian

in Canada; *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [“*Vuntut Gwitchin*”], describing the adoption of a written constitution by the Vuntut Gwitchin First Nation [“VGFN”] as an exercise of “their inherent right of self-government” (para 145) and noting that the self-government agreement reached between the VGFN and Canada “preserved their inherent right to self-government and at the same time brought the VGFN Constitution into the constitutional fabric of Canada” (para 206).

¹² At the federal level, see e.g. *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, adopted by Parliament and receiving royal assent on June 21, 2019. In the Preamble to this Act, “Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services”, while sections 18 to 24 provide for coordination of applicable Indigenous, provincial, and federal laws. At the provincial level, see e.g. British Columbia’s *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [“*DRIPA*”]; section 2 of this Act states that its purposes “are as follows: (a) to affirm the application of the Declaration to the laws of British Columbia; (b) to contribute to the implementation of the Declaration; (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.” (A similar bill received royal assent as federal law on June 21, 2021: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14.) In legislative debates leading to the adoption of British Columbia’s Act, the government pointed to the shíshálh Nation / British Columbia Foundation Agreement as a model of the kind of agreement that might be pursued under the Act. See British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10817 (Scott Fraser, Minister of Indigenous Relations and Reconciliation). The Foundation Agreement is available online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_-_signed.pdf. The Agreement provides a broad framework for “establish[ing] a long-term relationship between shíshálh Nation and the Province” drawing both on section 35 and the United Nations Declaration on the Rights of Indigenous Peoples [“UNDRIP”], and for, among other things, “clarify[ing] the relationship between shíshálh laws and jurisdiction and the Province’s laws and jurisdiction”: sections 1.1(a), 2.3(d), 2.4(c). *DRIPA* and UNDRIP are discussed in detail in chapter 5. On implementation of UNDRIP, see also *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, edited by Oonagh Fitzgerald, John Borrows, Larry Chartrand, and Risa Schwartz (Waterloo: CIGI Press, 2019); *Review of Constitutional Studies*, vol 24.1 (2019).

confederation and that was cemented in *St. Catharines Milling*, in the judgments of both the SCC (in 1887) and of the Judicial Committee of the Privy Council (“JCPC”) of the United Kingdom (in 1888).¹³ The second section then notes the transition to the modern doctrine of Aboriginal title, beginning with *Calder* in 1973 and *Guerin* in 1984,¹⁴ two cases that laid the foundation for early doctrinal developments under section 35 of the *Constitution Act, 1982*, although both cases arose prior to the adoption of section 35 and therefore did not interpret or apply that constitutional provision. This second section highlights key doctrinal development up to and including *Tsilhqot’in Nation*,¹⁵ the SCC’s most recent (2014) in-depth treatment of Aboriginal title, and draws links between Aboriginal title and other doctrinal developments in Aboriginal law. Finally, section three traces some of the conceptual and doctrinal fault lines that have emerged in the wake of this transition away from a more strictly positivist conception of Aboriginal title towards an uneasy juxtaposition of positivist and pluralist conceptions.

1. The post-confederation ascendancy of positivism in Indigenous-state relations

The Treaty of Paris, signed in February 1763 by France, Britain, and Spain, ended the Seven Years’ War between those countries. Through the Treaty, almost all French claims in North America were ceded to Britain. The *Royal Proclamation* issued by George III in October 1763¹⁶ laid the foundations for colonial governments in the newly acquired British territories and included detailed provisions for relations between Britain, the colonies, and Indigenous peoples. The *Royal Proclamation* has been called the “Indian Bill of Rights” in Canada.¹⁷

The *Royal Proclamation* established a regime of land cessions in which Indigenous territory could be surrendered only to the Crown and only with the consent of the people

¹³ The discussion that follows addresses both the judgment of the SCC, *St. Catharines Milling and Lumber Co v R* (1887), 13 SCR 577 at 640-41 [*“St. Catharines Milling (SCC)”*], and the judgment of the JCPC, *St. Catherine’s Milling and Lumber Company v The Queen* (1888), 14 App Cas 46, 4 Cart BNA 107 [*“St. Catherine’s Milling” (JCPC)*]. Note that the JCPC judgment altered the spelling of “St. Catharines” to “St. Catherine’s”.

¹⁴ *Guerin v The Queen*, [1984] 2 SCR 335 [*“Guerin”*].

¹⁵ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*“Tsilhqot’in Nation”*].

¹⁶ *Supra* note 6.

¹⁷ See e.g. *R v Marshall; R v Bernard*, [2005] 2 SCR 220, 2005 SCC 43 at para 86: “the *Royal Proclamation* must be interpreted in light of its status as the ‘Magna Carta’ of Indian rights in North America and Indian ‘Bill of Rights’”. The term can be traced back at least so far as *St. Catharines Milling (SCC)*, *supra* note 13 at 652, where Justice Gwynne wrote with reference to the *Royal Proclamation*: “It is with that part of French Canada which now constitutes the Province of Ontario that we are presently concerned, and so inviolably has the proclamation been observed therein that it, together with the Royal instructions given to the Governors as to its strict enforcement, may, not in aptly, be termed the Indian Bill of Rights.” This language was also adopted by Justice Hall in *Calder*, *supra* note 8 at 395 and in dissent by Justice McLachlin (as she then was) in *Opetchesah Indian Band v Canada*, [1997] 2 SCR 119 at para 82, where she also noted that the *Royal Proclamation* is the “starting point in an assessment of the relationship between aboriginals and the Crown on the question of land”. For further context on the *Royal Proclamation* and recent case law developments, see Robert Hamilton and Joshua Nichols, “The Tin Ear of the Court: *Ktunaxa Nation* and the Foundations of the Duty to Consult” (2019) 56:3 *Alberta Law Review* 729-760.

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surrendering it. The *Royal Proclamation* barred private purchase of Indigenous land “not having been ceded to, or purchased by Us”, including “within those Parts of Our Colonies where We have thought proper to allow Settlement”. Where the Crown thought proper to allow settlement, cessions were allowed on a voluntary basis to the Crown: “if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie”.¹⁸

As noted in chapter 1, the Crown largely respected this regime of voluntary surrender prior to confederation, at least in Upper Canada, and it seems to have formed the policy of the federal government through the first years of confederation.¹⁹ However, a change in approach culminating with the adoption in 1876 of the first consolidated *Indian Act*²⁰ signalled a new era of Crown-Indigenous relationships, with Parliament asserting extensive and minutely detailed law-making authority over “Indians, and Lands reserved for the Indians” under section 91(24) of the *BNA Act, 1867*.²¹

From the late 19th century through the middle of the 20th, amendments were introduced to the *Indian Act* that increasingly authorized the extraction of resources from, and the expropriation of, Indigenous land without any need to secure Indigenous consent.²² The institutions of state—judicial, legislative, executive—proceeded on the assumption that Parliament had the power to unilaterally extinguish Indigenous rights, including any rights to land.²³ Broadly speaking, the *Royal Proclamation*’s consent-based regime of negotiation

¹⁸ *Royal Proclamation*, *supra* note 6.

¹⁹ See Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1989), at 67-73. See also John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in *Aboriginal and Treaty Rights in Canada*, edited by Michael Asch (Vancouver: UBC Press, 1997), 155-172. See also the two sets of dissenting reasons by Justices Strong and Gwynne, respectively, in *St. Catharines Milling (SCC)*, *supra* note 13, including the statement by Justice Gwynne quoted *supra* at note 17.

²⁰ The full title of the statute was *An Act to amend and consolidate the laws respecting Indians*, SC 1876, c 18.

²¹ *Supra* note 4.

²² See Johnston, *supra* note 19 at 75-88.

²³ It is still accepted doctrine in Canadian jurisprudence that Parliament retained this power of unilateral extinguishment until the coming into force of the *Constitution Act, 1982*, section 35 of which now grants constitutional protection to “existing aboriginal and treaty rights”, including Aboriginal title. As Chief Justice Lamer wrote for the majority in *Delgamuukw*, *supra* note 9 at para 173: “the exclusive power to legislate in relation to ‘Indians, and Lands reserved for the Indians’ has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.” In *Delgamuukw*, Chief Justice Lamer drew on this principle to exclude the possibility that the provincial legislature of British Columbia had the power to extinguish Aboriginal title after British Columbia joined confederation as a province in 1871. If an Aboriginal or treaty right is found to have been extinguished prior to section 35 coming into force, then it is not considered an “existing” right within the meaning of that section and cannot benefit from the constitutional protection section 35 confers. However, even where the courts find that legislative power to extinguish Aboriginal rights existed, they are extremely reluctant today to conclude that any piece of legislation in fact extinguished such rights. As Chief Justice Lamer explained in *Delgamuukw*,

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between representatives of Indigenous peoples and Crown representatives was overtaken by the Crown's unilateral assertion of sovereignty and Canada's embrace of supreme law-making power through section 91(24).

The judiciary affirmed this unilateral assertion of Crown sovereignty and helped develop doctrinal justification for it. The foundational case is *St. Catharines Milling*.²⁴ The case addressed Treaty 3, concluded in 1873 between representatives of Anishinaabe (or Ojibwe) peoples²⁵ and representatives of the Crown commissioned by the Canadian government. Treaty 3 covers territory in what is now northwestern Ontario and southeastern Manitoba. The text of the Treaty, as recorded by Crown representatives, states that the Treaty cedes, releases, and surrenders the territory “to the Government of the Dominion of Canada for Her Majesty the Queen”. Following the conclusion of the Treaty, the federal government (i.e. the government of the Dominion of Canada) issued timber licences on Treaty territory. The province of Ontario disputed the authority of the federal government to do so, arguing that once the territory had been surrendered to the Crown, the beneficial interests in the land belonged to the province by virtue of section 109 of the *BNA Act, 1867*.²⁶

In other words, *St. Catharines Milling* was a dispute between Canada and Ontario as to which order of government held the beneficial interests in the territory ceded to the Crown. Canada argued that its Anishinaabe treaty partners had surrendered their title to the Dominion government, i.e. to Canada, not to Ontario. Ontario argued that the Anishinaabe treaty partners had no title to surrender, because any interest they may have had in the territory was a mere burden on the beneficial interests held by the Province, in accordance with the language of section 109:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, [...] shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, **subject** to any Trusts existing in respect thereof, and **to any Interest other than that of the Province in the same**.²⁷

The JCPC, which was at the time the highest court of appeal for the Canadian legal system, agreed with Ontario that Indigenous peoples did not hold any legal title that could be transferred to Canada. Lord Watson, writing for a unanimous JCPC, found that any title Indigenous peoples may have had flowed from the *Royal Proclamation*, and that the terms of the *Royal Proclamation* “show that the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the sovereign.” Correspondingly, “there

supra note 9 at para 180, courts will only find that Aboriginal rights were extinguished if legislation expresses “clear and plain intent” to extinguish the rights in question, a standard that is “quite high.”

²⁴ *Supra* note 13. For a comprehensive analysis of the JCPC's judgment in *St. Catherine's Milling*, including the historical context of the judgment and its legacy in Canadian case law, see Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019).

²⁵ The text of the Treaty, as recorded by Crown representatives, characterizes the parties to the Treaty as “Her Most Gracious Majesty the Queen of Great Britain and Ireland” and “the Saulteaux Tribe of the Ojibway Indians”.

²⁶ *Supra* note 4.

²⁷ *BNA Act, 1867*, *supra* note 4, section 109 (emphasis added).

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has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.” The land could not be vested in the Indians because “that was not the character of the Indian interest.” The JCPC therefore upheld the SCC’s majority ruling that the land, in practical terms, belonged to the province.

Lord Watson’s reasons are short and give little explanation as to why Indigenous land rights could derive only from the *Royal Proclamation*, or why they were merely personal and usufructuary. The JCPC’s view that land could not be vested in Indigenous peoples would seem to be contradicted by the Crown practice of concluding treaties with them.

Responses to this seeming contradiction can be found in the reasons offered by some of the justices in the SCC judgment. Justice Henry, for instance, concluded that Treaty 3 was not evidence that the Crown had purchased title to the land because, for one thing, “the consideration is stated to have emanated from Her Majesty’s bounty, &c.”²⁸ Anything the Crown gave in exchange for the “cession of all Indian rights, titles, and privileges whatever they were” was mere generosity on the part of the Crown and “not an acknowledgment of any title in fee simple in the Indians.”²⁹ Besides, “the Indians were not in possession of any particular portion of the land; for years and years they might never be on certain portions of it; they cannot be said to have yielded possession, for that they cannot be assumed to have had, but virtually only relinquish their claims to the lands as hunting grounds.”³⁰

Similarly, Justice Taschereau rejected the argument that the Crown policy of treating with Indigenous peoples for the cession of land amounted to a recognition of their legal title to land. While this policy was grounded in “obvious political reasons, and motives of humanity and benevolence,” it did not give the Indians “any title in law, any title that a court of justice can recognize as against the crown.”³¹ Any conclusion to the contrary would mean “that all progress of civilization and development in this country is and always has been at the mercy of the Indian race.”³² According to Justice Taschereau, Indians must continue to receive the same consideration for their just claims and demands as they have received in the past, “but as a sacred political obligation, in the execution of which the state must be free from judicial control.”³³

The JCPC did not specifically endorse the reasons of either Justice Henry or Justice Taschereau. Indeed, the JCPC’s recognition of “the tenure of the Indians [as] a personal and usufructuary right” affirms that they had legally cognizable rights to the land. Nonetheless, the JCPC accepted that any Indian tenure was “dependent upon the goodwill of the sovereign” and subject to the Crown’s “substantial and paramount estate” and to the Crown’s sovereign authority. Thus, any legal rights held by the Indians necessarily flowed (at least

²⁸ *St. Catharines Milling (SCC)*, *supra* note 13 at 640-641.

²⁹ *St. Catharines Milling (SCC)*, *supra* note 13 at 640-641.

³⁰ *St. Catharines Milling (SCC)*, *supra* note 13 at 641.

³¹ *St. Catharines Milling (SCC)*, *supra* note 13 at 648-649.

³² *St. Catharines Milling (SCC)*, *supra* note 13 at 649.

³³ *St. Catharines Milling (SCC)*, *supra* note 13 at 649.

for purposes of Canadian and British courts) from the lawful authority of the *Royal Proclamation*.

In this respect, the reasons of Lord Watson for the JCPC are more squarely an expression of institutional positivism than the reasons of Justices Henry and Taschereau. Rather than attempt substantive justifications for why Indigenous peoples could not truly own or govern their territories, the JCPC simply accepted that the Crown's assertion of sovereignty did effectively confer sovereignty and supreme law-making power on the British state over the territory in question (which sovereignty and law-making power were later gradually transferred in federally divided fashion to Canada and its provinces). We saw a similar move in *M'Intosh* and a variation of it in *Bear Island Foundation*, as discussed in the Introduction and chapter 1. *Syliboy*, also discussed in the Introduction, is closer to the reason offered by Justices Henry and Taschereau, insofar as it purports to justify Crown acquisition of sovereignty by reference to character of Indigenous peoples and their ways of life. (In *M'Intosh*, Chief Justice Marshall does recite the kinds of "apology" offered by Justices Henry and Taschereau for European disregard of Indigenous legal orders, but he simultaneously expresses scepticism about such justifications in *M'Intosh* and disdain for them in *Worcester*.³⁴)

2. *The modern era of Aboriginal title: stalled recognition of Indigenous jurisdiction*³⁵

a. *Calder v Attorney-General of British Columbia*

The 1973 ruling by the SCC in *Calder* was a watershed in Canadian Aboriginal law. The Nisga'a, a First Nation on the coast of British Columbia, filed a claim seeking a judicial declaration of Aboriginal title to traditional Nisga'a territories. The trial court and court of appeal dismissed the claim,³⁶ concluding that if the Nisga'a ever did possess Aboriginal title to their traditional territories, that title had been extinguished.

The Nisga'a appealed to the SCC. By a four to three majority, the SCC dismissed the appeal on procedural grounds. However, six out of seven SCC justices held that Aboriginal (or "Indian") title survived the assertion of Crown sovereignty, noting that such title derived from the existence of Indigenous peoples living in organized societies prior to the arrival of Europeans and the assertion of Crown sovereignty. Justice Judson, writing for himself and Justices Martland and Ritchie, stated:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their

³⁴ See the discussion in section 3 of chapter 1.

³⁵ A condensed version of this section is forthcoming in the *University of New Brunswick Law Journal* in an article co-authored with Robert Hamilton and Joshua Nichols, the current working title for which is "'But, how can that be law for me?': Indigenous Jurisdiction and Canadian Federalism after *Tsilhqot'in*".

³⁶ The trial level judgment by the British Columbia Supreme Court is *Calder v Attorney-General of British Columbia*, 8 DLR (3d) 59, 71 WWR (ns) 81; the judgment by the British Columbia Court of Appeal is *Calder v Attorney-General of British Columbia* (1970), 13 DLR (3rd) 64, 74 WWR (ns) 481.

forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right”. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.³⁷

While Justice Judson thus derived Indian title from prior occupation by Indigenous peoples living in organized societies and held that it survived British assertions of sovereignty, he concluded that the sovereign had subsequently extinguished Indian title in British Columbia: “in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.”³⁸

Justice Hall, writing for himself and Justices Spence and Laskin, noted that the trial judge had accepted “the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer. That proposition is wholly wrong as the mass of authorities previously cited, including *Johnson v. McIntosh* and *Campbell v. Hall*, establishes.”³⁹ Unlike Justice Judson, however, Justice Hall concluded that the Aboriginal title of the Nisga’a had not been extinguished, and he would accordingly have granted the declaration of Aboriginal title sought by the Nisga’a.⁴⁰

The seventh justice, Justice Pigeon, did not address the substantive merits of the case. He concluded that the courts lacked jurisdiction to hear the case because British Columbia had not waived sovereign immunity through legislation and the Nisga’a plaintiffs had not obtained a *fiat* from the province authorizing their suit against the Crown in right of the province.⁴¹ Justices Judson, Martland, and Ritchie agreed with Justice Pigeon on this point. The appeal by the Nisga’a was, accordingly, dismissed on this procedural ground by a 4-3 majority of the SCC.

Calder nonetheless opened the door for a more pluralist approach to Aboriginal and treaty rights in Canadian law, as a clear majority of the Court stated that Aboriginal title survived Crown assertion of sovereignty and did not depend on any explicit recognition by the state. Rather, *Calder* established that Aboriginal title derives from the presence of self-governing Indigenous societies prior to the arrival of European peoples and prior to sovereignty assertions on behalf European Crowns.

b. *Guerin v The Queen*

A decade later, in *Guerin*,⁴² the SCC reaffirmed the unique character of Aboriginal title, as an estate whose sources pre-date assertions of Crown sovereignty. The factual background

³⁷ *Calder*, *supra* note 8 at 328.

³⁸ *Calder*, *supra* note 8 at 344.

³⁹ *Calder*, *supra* note 8 at 416.

⁴⁰ *Calder*, *supra* note 8 at 422.

⁴¹ *Calder*, *supra* note 8 at 427.

⁴² *Supra* note 14. For a comprehensive analysis of *Guerin*, see James Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples*, (Vancouver: UBC Press, 2005).

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to *Guerin* was set in motion when the Musqueam Indian Band surrendered part of its reserve land to the Crown for the Crown to lease to a private golf club on the Band's behalf. In 1958, the Crown entered into the lease, on behalf of the Musqueam, for 162 acres of their reserve land, but did so on terms different from those discussed with the Musqueam Council. A majority of the Court concluded that the Crown thereby violated a fiduciary duty it owed to the Band.

Justice Dickson,⁴³ writing the plurality opinion for himself and Justices Beetz, Chouinard, and Lamer, explained that this fiduciary duty was grounded in the *Royal Proclamation*:

An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.⁴⁴

The Crown fiduciary obligation, and the question of whether it is triggered only upon surrender of reserve (or Aboriginal title) land, is taken up in more detail below. Yet while this Crown fiduciary duty thus has its source in the *Royal Proclamation*, Justice Dickson made clear that Indigenous peoples' "interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."⁴⁵ He based this conclusion primarily on *Calder*, in which "Judson and Hall JJ. were in agreement [...] that aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation."⁴⁶ Justice Dickson acknowledged that, in this respect, "the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling*", but he argued that *Calder* was more consistent with the understanding of Indian title developed in the Marshall trilogy and other Privy Council cases on native title in British colonies.⁴⁷

c. *Delgamuukw v British Columbia*

In *Delgamuukw*, a little more than a decade after *Guerin*, Chief Justice Lamer consolidated the *Calder* and *Guerin* understanding of Aboriginal title, with an added emphasis on pre-existing systems of Indigenous law: "aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law."⁴⁸ He also

⁴³ When the SCC heard oral argument in *Guerin* on June 13 and 14, 1983, Dickson was a puisne justice of the Court; by the time the *Guerin* judgment was released on November 1, 1984, he was Chief Justice. The official SCC judgment in *Guerin* refers to him as Justice Dickson, and I follow that convention here.

⁴⁴ *Guerin*, *supra* note 14 at 376

⁴⁵ *Guerin*, *supra* note 14 at 379.

⁴⁶ *Guerin*, *supra* note 14 at 377.

⁴⁷ *Guerin*, *supra* note 14 at 377-379.

⁴⁸ *Delgamuukw*, *supra* note 9 at para 126.

highlighted the uniqueness of Aboriginal title in Canadian law: “What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward”.⁴⁹

Thus it is not only the *fact* that Indigenous peoples occupied and governed the land prior to European arrival that is important in establishing Aboriginal title. Rather, the Aboriginal legal perspective contributes to the *characteristics* of Aboriginal title. As Chief Justice Lamer explained, Aboriginal title is “*sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.”⁵⁰ The Chief Justice was careful to specify that the “aboriginal perspective” includes Aboriginal systems of law: “the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law.”⁵¹

From *Calder* through *Guerin* to *Delgamuukw*, we thus find a line of SCC Aboriginal title cases coming to recognize that Aboriginal title has its source, at least in part, in the existence of Indigenous legal orders pre-dating the assertion of Crown sovereignty. One obvious question is then: how is it that assertions of Crown sovereignty displaced or subordinated (or simply ignored) Indigenous legal orders, particularly in territories not subject to treaty?

d. *Haida Nation* and *Taku River Tlingit*

The SCC addressed this question, if indirectly, in its paired judgments in *Haida Nation*⁵² and *Taku River Tlingit*.⁵³ Chief Justice McLachlin, for a unanimous Court, emphasized the role of treaties in reconciling “pre-existing Aboriginal sovereignty with assumed Crown sovereignty”⁵⁴ and cast some doubt on the legitimacy or *de jure* status of Crown sovereignty pending such reconciliation: “The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”⁵⁵ In *Haida Nation*, the Chief Justice also elaborated the Crown’s duty to consult and to accommodate Aboriginal interests where credible *prima facie* claims of Aboriginal rights and title are asserted and stand to be adversely impacted by proposed Crown action.

Taken together, these paired judgments acknowledge that the prior existence of Indigenous sovereignty raises issues for the legitimacy of asserted (“assumed” or “*de facto*”) Crown sovereignty, and that this situation requires judicial intervention in the form of legal

⁴⁹ *Delgamuukw*, *supra* note 9 at para 114 (underlining in original), citing Kent McNeil, “The Meaning of Aboriginal Title”, in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (1997) at 144.

⁵⁰ *Delgamuukw*, *supra* note 9 at para 112.

⁵¹ *Delgamuukw*, *supra* note 9 at para 147.

⁵² *Supra* note 10.

⁵³ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [“*Taku River Tlingit*”].

⁵⁴ *Haida Nation*, *supra* note 10 at para 20.

⁵⁵ *Taku River Tlingit*, *supra* note 53 at para 42.

doctrine developed under section 35 to help reconcile Indigenous sovereignty with assumed Crown sovereignty. In particular, the Crown duty to consult and accommodate, as elaborated in *Haida Nation*, aims to restrain acts of *de facto* Crown sovereignty from “cavalierly run[ning] roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.”⁵⁶

With *Haida Nation* and *Taku River Tlingit*, the SCC has thus come to recognize not only that Aboriginal title has a source in Indigenous legal systems pre-dating assertions of Crown sovereignty but also that there is a need for legal doctrine to help coordinate (or otherwise “reconcile”) pre-existing Indigenous sovereignty with assumed Crown sovereignty. These developments would seem to set the stage for recognizing Indigenous jurisdiction (or sovereignty or self-government or law-making authority by another name) as a dimension of Aboriginal title. *Tsilhqot’in Nation*, the SCC’s landmark Aboriginal title case of the 2010s, presented an opportunity.

e. *Tsilhqot’in Nation*

In *Tsilhqot’in Nation*, however, Chief Justice McLachlin, again writing for a unanimous Court, preferred a carefully ambiguous characterization of the governmental dimension that attaches to Aboriginal title. She wrote that “Aboriginal title confers ownership rights similar to those associated with fee simple, including: *the right to decide how the land will be used*; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and *the right to pro-actively use and manage the land*.”⁵⁷ It is unclear whether the italicized rights, particularly the last one, are meant to convey governmental or law-making powers that go beyond property rights. As *Tsilhqot’in Nation* was a landmark case focused on the nature of Aboriginal title, the careful ambiguity of this wording is surely deliberate.

This choice by the Court—not to recognize, in explicit terms, jurisdiction or law-making authority as a component of Aboriginal title—resonates with a second notable feature of the judgment. The Court minimizes and all but euthanizes the role of interjurisdictional immunity (“IJI”) in examining whether provincial laws of general application improperly impinge on the core federal jurisdiction in relation to “Indians and Lands reserved for the Indians” under section 91(24) of the *Constitution Act, 1867*.

As the Court explained, the doctrine of IJI “is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude.”⁵⁸ *Tsilhqot’in Nation* raised the question whether provincial forestry legislation that purported to apply to Aboriginal title land might run afoul of IJI by trenching on exclusive federal jurisdiction in relation to “Indians and Lands reserved for the Indians”

⁵⁶ *Haida Nation*, *supra* note 10 at para 27.

⁵⁷ *Tsilhqot’in Nation*, *supra* note 15 at para 73 (italics added).

⁵⁸ *Tsilhqot’in Nation*, *supra* note 15 at para 131.

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under section 91(24). The trial judge in this case had applied the doctrine of IJI to conclude that “the Province has no power to legislate with respect to forests on Aboriginal title land.”⁵⁹

The SCC, however, concluded “that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title.”⁶⁰ Rather, the applicability of provincial laws to Aboriginal title land should simply be subject to the same justifiable-infringement test (first developed in *Sparrow*⁶¹) as federal laws: “[t]he s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*.”⁶²

The Court reasoned that section 35 “imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. [...] The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.”⁶³ By contrast, the doctrine of IJI “is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.”⁶⁴ The Court compared Aboriginal rights under section 35 to *Charter* rights,⁶⁵ stressing that both are “held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose.”⁶⁶

This analogy to *Charter* rights, as limits and prohibitions on governmental power, is not necessarily incompatible with recognizing a jurisdictional dimension of Aboriginal title. It is, however, a step back from talk of reconciling Indigenous sovereignty with asserted Crown sovereignty. Reconciliation in this latter sense requires the coordination of inherent Indigenous jurisdiction with provincial and federal jurisdictions, in contrast to the narrower conception of Aboriginal title as a mere limit, analogous to *Charter* rights, on the exercise of federal and provincial powers. The contrast between these two approaches is driven home throughout the Court’s discussion of IJI, notably in its characterization of the problem raised by *Tsilhqot’in Nation*: “The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers [...] But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.”⁶⁷

⁵⁹ *Tsilhqot’in Nation*, *supra* note 15 at para 132.

⁶⁰ *Tsilhqot’in Nation*, *supra* note 15 at para 151.

⁶¹ *R v Sparrow*, [1990] 1 SCR 1075 [*“Sparrow”*].

⁶² *Tsilhqot’in Nation*, *supra* note 15 at para 152.

⁶³ *Tsilhqot’in Nation*, *supra* note 15 at para 139.

⁶⁴ *Tsilhqot’in Nation*, *supra* note 15 at para 141.

⁶⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*“Charter”*].

⁶⁶ *Tsilhqot’in Nation*, *supra* note 15 at para 142 (*italics in original*).

⁶⁷ *Tsilhqot’in Nation*, *supra* note 15 at para 144.

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Indeed, the Court worried specifically that “applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all.”⁶⁸ This worry about legislative vacuums on Aboriginal title lands undermines the jurisdictional dimension of Aboriginal title which the line of cases discussed above—*Calder*, *Guerin*, *Delgamuukw*, *Haida Nation*, and *Taku River Tlingit*—had seemed to establish, or at least be on the way to establishing.

It may be that the Court’s underlying concern was more a practical than a doctrinal one—the worry that many First Nations in British Columbia are not presently in a position, as a matter of institutional capacity or political organization or current priorities or all of the above, to adopt and enforce laws regulating forests immediately upon a declaration of Aboriginal title. As a practical matter, then, excluding provincial regulation of forests on Aboriginal title land may indeed create legislative vacuums, not because the Aboriginal title-holders would lack lawful authority to regulate forests on their land, but simply because they are not immediately in a position to exercise and enforce that jurisdiction. If that was the Court’s underlying worry, however, it would have been more helpful for the doctrinal development of Aboriginal title had the Court made the worry explicit, rather than ignoring the latent jurisdictional dimension of Aboriginal title and characterizing section 35 rights as mere limits on federal and provincial law-making powers.

Whatever the Court’s unstated worries, when the Court in *Tsilhqot’in Nation* explicitly addresses issues of coordinating jurisdictions, it sees only federal and provincial jurisdictions. On that view, if Aboriginal title lands are subject neither to federal nor to provincial laws, we may have legal vacuums. The upshot of these doctrinal elements of *Tsilhqot’in Nation* is, in the end, to reframe Aboriginal title as a bundle of property rights, or *Charter*-like limits on federal and provincial jurisdictions, subject to provincial and federal infringement analogous to the justifiable infringement of *Charter* rights under section 1 of the *Charter*. This contrasts with a conception of Aboriginal title grounded in Indigenous sovereignty (or inherent jurisdiction and law-making power) that must be reconciled with asserted Crown sovereignty and coordinated with provincial and federal jurisdictions.

These aspects of the Court’s judgment in *Tsilhqot’in Nation* thus amount to a partial doctrinal reversion to a more strictly positivist picture of all lawful authority flowing from the state. This partial doctrinal reversion seems out of step with many notable developments in Indigenous-state relations both within and beyond the case law. These developments, discussed in the Introduction and in chapter 1, include government commitments to implementing the United Nations Declaration on Indigenous Peoples,⁶⁹ federal legislation

⁶⁸ *Tsilhqot’in Nation*, *supra* note 15 at para 147.

⁶⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007), articles 3 and 4 (affirming the rights of Indigenous peoples to

that affirms the principle of Indigenous self-government,⁷⁰ a growing body of case law that explicitly affirms Indigenous sovereignty⁷¹ and inherent jurisdiction or law-making authority.⁷²

3. Positivist-pluralist fault lines in the doctrine of Aboriginal title: three examples

This section looks at three current fault lines in the SCC's Aboriginal title doctrine, in each case noting how the tension reflects the Court's broader ambivalence between a positivist and pluralist approach to Indigenous-state relations. The three fault lines discussed below underlie the following elements, respectively, of the current Aboriginal title doctrine: (a) the legal source of the Indigenous interests that Aboriginal title and the related Crown fiduciary duty are meant to protect; (b) the circumstances or actions that trigger the Crown fiduciary duty owed in relation to Aboriginal title land; and (c) the justiciability of Crown sovereignty in Canadian courts. The subsections below point to ways in which each of these fault lines has manifested in recent cases.

a. Sources of Indigenous legal interests in Canadian law

Beginning with *Guerin* in 1984, the SCC has developed a doctrine of Crown fiduciary duties owed to Indigenous peoples with respect to reserve and Aboriginal title land. The Court has been ambivalent, however, as to whether these fiduciary duties should be conceived as arising from the intersection of distinct legal orders—Indigenous legal orders on the one hand and the state legal order on the other—or rather as a product of the state legal order.

As explained in section 2 above, both *Calder* and *Guerin* point, as a source of Aboriginal title, to legal interests existing prior to the arrival of Europeans. Chief Justice Lamer reiterated this point in *Delgamuukw*: “aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law.”⁷³

However, later in his *Delgamuukw* reasons, the Chief Justice insisted that, despite the above “theoretical standpoint”, Aboriginal title could not pre-date the assertion of Crown sovereignty:

self-determination, autonomy, and self-government). See *supra* note 12 for federal and provincial commitments to its implementation.

⁷⁰ See *supra* note 12.

⁷¹ See the line of cases discussed in this section, notably *Haida Nation*, *supra* note 10 at para 20, where the SCC speaks of the importance of reconciling “pre-existing Aboriginal sovereignty with assumed Crown sovereignty”. This language is taken up in *Restoule v Canada (AG)*, 2018 ONSC 7701 at para 337, which speaks of “the reconciliation of the pre-existence of Indigenous sovereignty with assumed Crown sovereignty.”

⁷² See e.g. *Pastion*, *supra* note 11 at paras 7-14; *Vuntut Gwitchin*, *supra* note 11 at paras 145, 206.

⁷³ *Delgamuukw*, *supra* note 9 at para 126.

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[F]rom a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.⁷⁴

Granted, it makes no sense to speak of the Crown's underlying title, nor of Aboriginal title as a burden on the Crown's underlying title, before this underlying title exists. However, if Aboriginal title is simply the form in which the common law cognizes pre-existing Indigenous legal interests in land, it seems misleading to speak of those pre-existing legal interests as though they were produced through the Crown's assertion of sovereignty. The Chief Justice seems to be saying that Aboriginal title should be understood, at least from the (practical as opposed to theoretical?) standpoint of the Canadian courts, as produced through the assertion of Crown sovereignty. Perhaps "produced" is too strong a rendering of "crystallized", which does not quite negate the Court's recognition, "from a theoretical standpoint", that Aboriginal title has a source in pre-existing Indigenous occupation of land under their own legal orders. At a minimum, though, the Chief Justice's statement about crystallization emphasizes that the moment of Crown sovereignty assertion provides the foundation for Aboriginal title as cognized by Canadian courts.

Why does Chief Justice Lamer stress this point about the "crystallization" of Aboriginal title?⁷⁵ If Aboriginal title has its source in pre-existing Indigenous societies and their systems of law, why insist that Canadian law must conceive of Aboriginal title as crystallized at the moment when the Crown asserted sovereignty and thereby gained "underlying title"? The answer is, in part at least, that the Chief Justice was looking to maintain some consistency with earlier case law. The Court allows the case law to evolve but generally avoids any wholesale rejection of prior governing principles. (Recall Chief Justice Marshall's statement in *M'Intosh*, discussed in chapter 1, that the principle of Crown sovereignty and underlying title, "if it be indispensable to that system under which the country has been settled, [...] certainly cannot be rejected by courts of justice."⁷⁶)

Consider, for instance, the principle that, upon assertion of Crown sovereignty, the appropriate legislature (the British Parliament at first; the Canadian Parliament after 1867) acquired the power to unilaterally extinguish Indigenous rights. As noted above, Canadian legislative, executive, and judicial institutions have operated on this assumption since confederation.⁷⁷ Chief Justice Lamer reaffirmed the principle in *Delgamuukw*: "the exclusive power to legislate in relation to 'Indians, and Lands reserved for the Indians' has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head

⁷⁴ *Delgamuukw*, *supra* note 9 at para 145.

⁷⁵ For a detailed critique of this "conjuring" of Crown sovereignty, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," *Osgoode Hall Law Journal* 37.3 (1999): 537-596.

⁷⁶ *Johnson v M'Intosh*, 21 US 543 (1823) [*M'Intosh*] at 591-592.

⁷⁷ See *supra* note 23 and accompanying text.

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of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.”⁷⁸ With the adoption of the *Constitution Act, 1982*, including protection for “existing aboriginal and treaty rights” in section 35, the state’s unilateral power of extinguishment has been commuted into a unilateral power of infringement (subject to justifiability review by the courts).⁷⁹

This principle of unilateral extinguishment/infringement derives from, or at least fits most easily with, a positivist picture of state sovereignty as the source of all lawful authority and of the state’s unilateral power to determine the scope of existing rights. Recognition of pre-existing Indigenous legal orders as a source of Aboriginal title and of the legal characteristics of Aboriginal title complicates this positivist picture. The reasons of Justice Dickson in *Guerin* added to the tension by insisting that Indigenous legal interests in reserve land and Aboriginal title land are not created through any act of the Crown or state and that a Crown fiduciary duty attaches to such lands *at the moment of surrender* to the Crown.

The state’s unilateral power of extinguishment/infringement was not at issue in *Guerin* because the case involved the voluntary surrender of land for lease to a private golf club. *Delgamuukw* and other cases discussed below had to reconsider these statements from *Guerin* in the context of reserve and Aboriginal title lands that were *not* being voluntarily surrendered but over which the state nonetheless asserted unilateral power.

Chief Justice Lamer’s statement about “crystallization” can therefore be understood as an attempt to make the Crown fiduciary duty more compatible with a positivist conception of law-making authority flowing solely from the state sovereign. In practical terms, it makes more legal sense to say that Parliament has the unilateral power to extinguish (prior to adoption of the *Constitution Act, 1982*) or to infringe (after its adoption) interests that are created by the state in the first place (i.e. created by lawful authority that can be traced back, ultimately, to assertion of Crown sovereignty); it is less compelling to argue that Parliament has the unilateral power to extinguish or infringe legal interests belonging to independent legal systems which pre-date the assertion of Crown sovereignty. Or, perhaps more to the point for institutional positivism, domestic courts arguably cannot recognize rules or rights from independent legal systems unless those rules or rights have first been domesticated through some act of the sovereign.⁸⁰

⁷⁸ *Delgamuukw*, *supra* note 9 at para 173.

⁷⁹ See note 23 above for further discussion of this point.

⁸⁰ In *M’Intosh*, *supra* note 76 at 593, Chief Justice Marshall states plainly that, under the legal regime established by the *Royal Proclamation of 1763*, US courts cannot interfere with or pronounce upon the laws by which Indigenous peoples govern themselves: “If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know

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The Chief Justice's reasons in *Delgamuukw* thus seem to take away with one paragraph (some of) what they gave with another: while Aboriginal title is acknowledged to have roots in Indigenous legal systems that pre-date Crown sovereignty, this title is ultimately *produced* (at least from the perspective of Canadian courts) by the assertion of Crown sovereignty, through which it is crystallized as a burden on the underlying Crown title.⁸¹

This same tension is mirrored in the Court's statements about the origin of Crown sovereignty itself. In *Tsilhqot'in Nation*, the Court states both that "the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763" and that, nonetheless, "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia]."⁸² Yet acquisition through mere assertion relies, if not strictly on the doctrine of *terra nullius*, then at least on related doctrines positing a hierarchy of civilizations or some other explanation of the priority of European legal orders over Indigenous.

This ambivalence about the source of Aboriginal title, created by the tension between contrasting positivist and pluralist approaches to understanding its legal origins, matters not only "from a theoretical standpoint" but also has practical doctrinal consequences. How we conceive the source of Aboriginal title can make a difference in how we conceive of the Crown fiduciary duty related to this title. The *Royal Proclamation* regime is one of Indigenous peoples holding territory under their own jurisdiction,⁸³ but which they may choose to surrender to the Crown. The Court in *Guerin* held that such surrender triggers the Crown's fiduciary duty to dispose of the land in the best interests of the Indigenous people surrendering it. *Guerin* placed the Crown in the role of a true fiduciary, as explained in greater detail below.

If, by contrast, we insist that assertion of Crown sovereignty first produced Aboriginal title as a "burden" on underlying Crown title, then we are more liable to think of the Crown as standing in a fundamentally governmental capacity over Indigenous peoples and their territories, even prior to any surrender they may wish to make of their lands. Indeed, we see the "governmental capacity" vs "true fiduciary" contrast playing out as one of the major fault lines in recent case law relating to the Crown fiduciary duty. The remainder of this subsection reviews this contrast in greater detail.

of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty."

⁸¹ For a slightly different take on the relation of Indigenous legal systems to Aboriginal title, see Kent McNeil, "Indigenous Law and Aboriginal Title", *Osgoode Legal Studies Research Paper* No. 2/2017 (August 2016), available online: <<https://ssrn.com/abstract=2825097>>. McNeil focuses on Indigenous legal systems as *evidence* in support of Aboriginal title, rather than as an independent source of Aboriginal title.

⁸² *Tsilhqot'in Nation*, *supra* note 15 at para 69.

⁸³ This is the view adopted by, for instance, Chief Justice Marshall, as quoted *supra* note 80.

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There is a clear break between the Crown fiduciary duty described in *Guerin* and the Crown obligations described in cases like *Osoyoos*,⁸⁴ *Wewaykum*,⁸⁵ and *Tsilhqot'in Nation*. In *Guerin* Justice Dickson describes a genuine fiduciary duty that legally binds the Crown to deal with surrendered interests in reserve or Aboriginal title land for the benefit of those who surrender the interests. As Justice Dickson explained:

[T]he *sui generis* interest which the Indians have in the land [...] gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.⁸⁶

Thus the Crown fiduciary duty as originally described in *Guerin* had two, and only two, essential features: it was triggered by the surrender of land to the Crown, and it required the Crown to deal with the land for the benefit of the Indigenous group surrendering it. Although the context may be "*sui generis*", Justice Dickson insisted that the Crown fiduciary obligation was "nonetheless in the nature of a private law duty." In clarifying his disagreement with Justice Wilson, who preferred to think of the Crown's obligation as a private trust, Justice Dickson wrote: "This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect."⁸⁷

While acknowledging the public law dimension of the Crown fiduciary duty, Justice Dickson thus held that this duty imposed the usual fiduciary obligations on the Crown to act in the best interests of the duty's beneficiaries and that failure to do so would result in the same liability for the Crown as would result in the private law context. In this sense, the Crown had a binding obligation to act as a true fiduciary. Note that Justice Dickson also made clear in *Guerin* that the Indigenous interest is, generally speaking, the same in the case of both reserve land and Aboriginal title land: "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases".⁸⁸

Osoyoos presented the Court with a very different context. At issue were the powers given to the Crown under the *Indian Act* to expropriate reserve land *without the consent* of the First

⁸⁴ *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 ["*Osoyoos*"].

⁸⁵ *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 ["*Wewaykum*"].

⁸⁶ *Guerin*, *supra* note 14 at 382.

⁸⁷ *Guerin*, *supra* note 14 at 376.

⁸⁸ *Guerin*, *supra* note 14 at 379.

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Nation whose reserve land was at issue. We are therefore not dealing with voluntary surrender, but unilateral expropriation by the Crown under the *Indian Act* (exercised, in *Osoyoos*, in conjunction with the provincial powers of expropriation in British Columbia's *Water Act*). The Court thus had to clarify the relationship between the Crown fiduciary duty developed in *Guerin* and the Crown's powers of expropriation provided by the *Indian Act*.

In *Osoyoos*, the Crown argued that a fiduciary duty based on the usual principles of fiduciary law could not be reconciled with the Crown's powers of expropriation: "the Attorney General contends that a fiduciary obligation to impair minimally the Indian interest in reserve lands is inconsistent with the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed."⁸⁹ In other words, the Crown could not act as a true fiduciary in such cases. The Court, however, felt that Crown fiduciary duty and powers of expropriation could be reconciled through a "two-step process":

This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. **At this stage, no fiduciary duty exists.** However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.⁹⁰

Osoyoos thus describes a two-step process in which the Crown first makes a decision, unfettered by any fiduciary duty, to infringe Indigenous interests in reserve lands, and only then is bound to ensure the minimal infringement necessary to achieve its ends. The Attorney General in *Osoyoos* was clearly right to point out that the obligations imposed on the Crown in such a process are far removed from "the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed."⁹¹

Osoyoos brought the Crown fiduciary duty in line with the Court's explanation, in *Sparrow*, of the Crown's role as fiduciary with respect to section 35 rights. In *Sparrow*, the Court consciously transformed the fiduciary obligation announced in *Guerin* into a form of minimal impairment test. It is worth taking a quick look at the heart of the Court's reasoning in *Sparrow*, as the logic is in essence that reproduced in *Tsilhqot'in Nation* a quarter-century later, namely: when unilateral exercise of state power confronts Indigenous interests, the Court grasps the latter in terms of *rights* that limit state legislative and executive power. The Court has yet to articulate any substantive doctrine of inherent Indigenous *jurisdiction* or

⁸⁹ *Osoyoos*, *supra* note 84 at para 51.

⁹⁰ *Osoyoos*, *supra* note 84 at para 53 (emphasis added).

⁹¹ *Osoyoos*, *supra* note 84 at para 51.

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law-making power as a dimension of the Indigenous interests confronting and intertwining with state power.

Sparrow was a criminal case dealing with an Aboriginal right to fish, not Aboriginal title. The defendant in *Sparrow* was charged with violating the federal *Fisheries Act* by fishing with a net longer than permitted under that Act. A unanimous Court found that he was exercising an Aboriginal right to fish at the time of the alleged violation. The Court thus had to determine whether section 35 protected his Aboriginal right to fish from the operation of the relevant *Fisheries Act* regulation.

The Court noted that in *Guerin*, “the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. [...] This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation.”⁹² The Court found this to ground a “a general guiding principle for s. 35(1)”, namely that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”⁹³

Yet unlike *Guerin*, which involved voluntary surrender of lands, *Sparrow* involved the unilateral exercise of state power to regulate fisheries, including the defendant’s Aboriginal right to fish. The Court had to develop a framework for the government’s “responsibility to act in a fiduciary capacity” in such a context. The Court acknowledged that section 35 rights are not subject to any justifiable infringement clause like that found in section 1 of the *Canadian Charter of Rights and Freedoms*, which “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁹⁴ Despite the absence of any such explicit language, the Court finds that section 35 rights must be subject to a similar form of justifiable infringement:

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.⁹⁵

⁹² *Sparrow*, *supra* note 61 at 1108.

⁹³ *Sparrow*, *supra* note 61 at 1108.

⁹⁴ *Charter*, *supra* note 65, section 1.

⁹⁵ *Sparrow*, *supra* note 61 at 1109.

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On one level, this passage involves an obvious misdirection: the incorporation of the fiduciary relationship into section 35 is said to “import some restraint on the exercise of sovereign power”, yet the primary doctrinal significance of this passage is to import a justifiable infringement analysis into section 35, i.e. to *allow* the exercise of sovereign power to infringe section 35 rights when the government can justify the infringement. (Note also that the government only needs to provide a justification if the rights-holders bring the matter to court.) Moreover, the fiduciary relationship undergoes a radical transformation through this incorporation: whereas *Guerin* imposed the obligations of a true fiduciary on the Crown, *Sparrow* recast the fiduciary relationship as requiring the Crown to justify any unilateral infringements of section 35 in the exercise of its sovereign power. By this standard, the Crown stands, by virtue of section 1 of the *Charter*, in a fiduciary relationship to all Canadians in respect of their *Charter* rights and freedoms. This stretches the private law notion of fiduciary beyond recognition.

On another level, however, the passage is simply a faithful incorporation of the Crown fiduciary duty into the institutional positivist picture of lawful authority flowing from state sovereignty. Within such a picture, state power is limited by rights, not by other sources of lawful authority such as Indigenous legal orders. The Court in *Sparrow* interprets the fiduciary relationship between the Crown and Indigenous peoples accordingly, i.e. as a form of restraint on exercises of sovereign power that infringe Indigenous rights.

An alternative picture is found already, to some extent, in *M’Intosh*. In *M’Intosh*, Chief Justice Marshall was considering the legal situation established by the *Royal Proclamation*’s prohibition on private purchases of Indigenous lands and requirements that any surrender to the Crown occur through public meetings between legitimate representatives of the Crown and of the Indigenous peoples surrendering lands. As explained above, Justice Dickson in *Guerin* found that the Crown took upon itself, through the *Royal Proclamation*, a fiduciary duty to deal with surrendered lands in the best interests of the Indigenous peoples surrendering them. But how should we describe the legal situation of Indigenous territory that has not been surrendered? What laws apply to that territory? Chief Justice Marshall stated that the laws of the Indigenous people occupying the territory would apply. He imagined a private purchase of land in Indigenous territory:

The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian [...]⁹⁶

In other words, lands within Indigenous territory are governed by the legal orders of Indigenous peoples until such time as the territory itself is surrendered to the Crown or the state. (Note that Justice Dickson identified the moment of surrender as triggering the Crown’s

⁹⁶ *M’Intosh*, *supra* note 76 at 593. See *supra* note 80 for a more complete quotation of this passage.

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fiduciary obligations; the significance of this point is taken up in subsection (b) below.) Of course, Chief Justice Marshall's position remains *institutionally* positivist, in the sense given to the term in the Introduction and chapter 1, insofar as he insists that the courts of the United States do not cognize the laws of Indigenous peoples: "[t]he grant [to the private purchaser] derives its efficacy from their [i.e. 'the Indians'] will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title."⁹⁷

Yet Chief Justice Marshall did clearly recognize the governmental capacities and inherent law-making powers of Indigenous peoples. On his view, the territories of Indigenous peoples were governed by their own legal orders unless and until surrendered to the Crown or, later, to the United States. What might this picture suggest for Canadian doctrine in the context of Indigenous lands that have not been surrendered? Most fundamentally, it would mean thinking Indigenous *jurisdiction* alongside federal and provincial jurisdictions, rather than thinking of Indigenous rights by analogy with *Charter* rights as mere limits on the exercise of jurisdiction. The Indigenous-Crown fiduciary relationship would not then be a matter of minimally impairing Indigenous rights in the exercise of sovereign power, but of coordinating jurisdictions. As discussed in section 2 above, the general trajectory towards this jurisdictional conception of section 35 rights general has already been traced in the SCC's own landmark cases on Aboriginal title. This chapter will conclude with some reflection on how this jurisdictional conception of Aboriginal title might play out if, for instance, the Tsilhqot'in Nation asserted jurisdiction over forest management on its Aboriginal title lands.

To return, for the moment, to the doctrinal path actually taken by the SCC, in *Wewaykum* Justice Binnie succinctly stated what was already plain from cases like *Sparrow* and *Osoyoos*: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting".⁹⁸ He added that the extent of the Crown's fiduciary duty must be tailored to whether it is acting primarily in a governmental capacity or as true fiduciary.⁹⁹

Tsilhqot'in Nation rounded out the picture by noting that, even in the case of Aboriginal title land, the Crown may infringe Aboriginal title against the will of the title-holders, so long as the infringement can be justified in the broader public interest. Strangely, the Court in *Tsilhqot'in Nation* identified underlying Crown title as the source of *both* the Crown fiduciary duty owed to Aboriginal title-holders *and* the Crown power to infringe Aboriginal title without consent of the title-holders.¹⁰⁰

To recap briefly, then, Justice Dickson stated in *Guerin* that the Crown fiduciary duty is "in the nature of a private law duty"¹⁰¹ and assessed the Crown's conduct by the measure of

⁹⁷ *M'Intosh*, *supra* note 76 at 593.

⁹⁸ *Wewaykum*, *supra* note 85 at para 96.

⁹⁹ *Wewaykum*, *supra* note 85 at paras 96-104.

¹⁰⁰ *Tsilhqot'in Nation*, *supra* note 15 at para 71.

¹⁰¹ *Guerin*, *supra* note 14 at 385.

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private law fiduciary duty. By contrast, *Sparrow*, *Osoyoos*, *Wewaykum*, and *Tsilhqot'in Nation*¹⁰² move away from that strict standard, allowing the Crown to pursue broader public interests that are opposed to the Indigenous interests which it is meant to protect as a fiduciary, so long as it maintains some sense of proportion between those opposed sets of interests, i.e. so long as it can justify infringement of Indigenous interests in the broader public interest.

Not surprisingly, in current cases invoking the Crown fiduciary duty, the argument often turns to whether the Crown conduct at issue was pursued in a “governmental capacity”, requiring the balancing of competing interests and thus attenuating any fiduciary obligations, or rather as a true fiduciary acting with discretionary control over specific Indigenous interests—or where, on a spectrum defined by the extremes of governmental capacity and true fiduciary, impugned Crown conduct should be placed.

This issue was at the heart of arguments in *Williams Lake*, in which the SCC reviewed a decision of the Specific Claims Tribunal that found the Crown had breached fiduciary obligations owed to the Williams Lake Indian Band both before and after British Columbia joined confederation in 1871.¹⁰³ All nine SCC justices agreed that the pre-confederation Crown had breached its fiduciary obligations to the Band. Seven justices agreed that, following confederation, the federal Crown had breached fiduciary obligations to the Band; Justice Brown, with Chief Justice McLachlin concurring, dissented on this point. The disagreement turned on identifying the specific Indigenous interest over which the federal Crown had discretionary control (in particular, whether the Band’s traditional lands were the object of that specific interest) and the scope of that discretionary control in light of the post-confederation division of responsibilities between the federal and provincial Crowns.

In *Manitoba Metis Federation*,¹⁰⁴ a similar issue arose as to whether lands promised to Métis children in the *Manitoba Act, 1870*¹⁰⁵ constituted a specific Aboriginal interest capable of grounding Crown fiduciary obligations. All nine justices in that case agreed that the lands did not constitute such an interest, essentially because the Crown, in administering the relevant provision of the *Manitoba Act*, was acting in a governmental capacity requiring it to

¹⁰² *Tsilhqot'in Nation* dealt with land held under Aboriginal title, while *Guerin*, *Osoyoos*, and *Wewaykum* dealt with reserve lands. Justice Dickson stated in *Guerin* that the interest is the same in both cases: “It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases”: *Guerin*, *supra* note 14 at 379. *Wewaykum* drew a distinction, however, between the fiduciary role of the Crown when first establishing reserve land in which there is no existing Indigenous interest and its role where such interest already exists (either because the land has already been reserved or belongs to the traditional territory of the Indigenous people concerned).

¹⁰³ *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83 [“*Williams Lake*”]. Parliament established the Specific Claim Tribunal under the *Specific Claims Tribunal Act*, SC 2008, c 22, “with a mandate to award monetary compensation to First Nations for claims arising from the Crown’s failure to honour its legal obligations to Indigenous peoples, even where delay or the passage of time would bar an action in the courts”: *Williams Lake* at para 2.

¹⁰⁴ *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [“*Manitoba Metis Federation*”].

¹⁰⁵ *Manitoba Act, 1870*, SC 1870, c 3, reprinted in RSC 1985, App II, No 8 [“*Manitoba Act*”].

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balance many competing interests.¹⁰⁶ (A majority of the Court found, however, that the Crown had failed to diligently fulfill a constitutional obligation to an Aboriginal people, an obligation the majority derived from the honour of the Crown.¹⁰⁷)

The issue has now gone international. In *Wakatu*, a New Zealand case dealing with claims relating to Crown treatment of Maori lands, the Supreme Court of New Zealand reviewed the SCC doctrine of Crown fiduciary duty in great detail.¹⁰⁸ Central to the case, as Chief Justice Elias explained, was whether at material times “the Governor was acting in a ‘governmental’ capacity in relation to the land” or “for the benefit of the Maori proprietors”.¹⁰⁹ Referring to the Canadian doctrine, she noted in particular that “[t]he Supreme Court of Canada has continued to accept the distinction applied in *Guerin* between the fiduciary responsibilities of the Crown when acting on behalf of Indian bands in dealings with land in which they have interests and its governmental responsibilities when pre-existing interests are not involved.”¹¹⁰ She then reviewed the application of this distinction in *Wewaykum* and *Manitoba Metis Federation* in particular.¹¹¹

In concurrence, Justices Arnold and O’Regan also drew on Canadian case law, concluding that “the general approach adopted by the majority in *Guerin* applies to the present case and that the Crown owed fiduciary duties to Maori who had customary rights to the land purchased by the Company in the Nelson area.”¹¹² They found that, as in *Guerin*, “the Crown was not called upon to balance the interests of settlers and Maori or to take any decision of a political or governmental nature – it was simply performing, or ensuring the performance of, promises made to the original customary owners by the Company in the context of land sales.”¹¹³

This brief overview of *Guerin*, *Sparrow*, *Osoyoos*, and *Tsilhqot’in* through to *Williams Lake*, *Manitoba Metis Federation*, and *Wakatu* gives a sense of how the doctrine of Crown fiduciary duty has been pulled in two competing directions: one portraying the Crown in a fiduciary role closely analogous to that of a private law fiduciary, and another emphasizing that the Crown can never be an ordinary fiduciary insofar as it must act in a governmental capacity, balancing many competing sets of interests. Admittedly, this tension cannot be

¹⁰⁶ Chief Justice McLachlin and Justice Karakatsanis, jointly writing for the majority, concluded that although section 31 of the *Manitoba Act*, reserving 1.4 million acres of land for Métis children, “shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine ‘such mode and on such conditions as to settlement and otherwise’ belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests”: *Manitoba Metis Federation*, *supra* note 104 at para 62. The dissent agreed with the majority’s conclusions on the absence of a Crown fiduciary duty: see para 160.

¹⁰⁷ *Manitoba Metis Federation*, *supra* note 104 at paras 75, 128.

¹⁰⁸ *Proprietors of Wakatu v Attorney-General*, [2017] NZSC 17 [“*Wakatu*”].

¹⁰⁹ *Wakatu*, *supra* note 108 at para 289.

¹¹⁰ *Wakatu*, *supra* note 108 at para 354.

¹¹¹ *Wakatu*, *supra* note 108 at paras 355-356.

¹¹² *Wakatu*, *supra* note 108 at para 779.

¹¹³ *Wakatu*, *supra* note 108 at para 785.

derived in simplistic fashion from the tension between positivist and pluralist visions of the relationship between Indigenous peoples and the state. Nonetheless, as argued above, the emphasis on the Crown's governmental capacity resonates most naturally with the positivist view of the state as sole source of lawful authority. On the other, hand the cases that insist on the Crown's properly fiduciary role—*Guerin* and *Wakatu*— may fit more naturally with a pluralist view of Indigenous and state legal orders existing side-by-side, with a fiduciary duty attaching to specific interests in land when *transferred* from one legal order to the other. The following subsection takes up this point from another angle by returning to Justice Dickson's statement in *Guerin* that the Crown fiduciary duty arose upon surrender of Musqueam reserve land for lease to a third party.

b. Triggering the Crown fiduciary obligation: surrender or assertion of sovereignty?

There is a further ambivalence in the case law, closely related to that described in the previous subsection, as to whether the Crown fiduciary duty is triggered by the *surrender* of Indigenous legal interests or rather by the Crown's *assertion* or *exercise* of sovereignty. In *Wewaykum*, the Court acknowledged that Justice Dickson had stated in *Guerin* that the fiduciary duty arose upon surrender, but insisted that statement should not be read too strictly: "In *Guerin*, Dickson J. said the fiduciary 'interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown' (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty [citing to *Osoyoos*]." ¹¹⁴

As suggested above, Justice Dickson's position in *Guerin*—that the Crown fiduciary duty is triggered by surrender—fits more easily with the pluralist understanding of the fiduciary duty reaching across distinct legal systems, in accordance with the *Royal Proclamation* regime of voluntary surrender on which Justice Dickson focuses in *Guerin* and Chief Justice Marshall in *M'Intosh*. Under that regime, Indigenous peoples held their interests in land under their own customs and legal systems unless and until they chose to surrender those interests to the Crown. ¹¹⁵ Broadly speaking, the interests in land are voluntarily handed over from one legal system to another. (Justice Dickson did not himself paint such a pluralist picture in any detail in *Guerin*; however, subsection (a) above noted that Chief Justice Marshall did so in *M'Intosh*.)

By contrast, the view that the Crown's fiduciary duty is triggered through unilateral Crown assertion or exercise of sovereignty fits more easily with the view that the Crown stands, from the moment of such unilateral assertion or exercise, in a governmental capacity with respect to the interests of Indigenous peoples in their lands. The latter position is particularly clear in *Osoyoos*, where the Court clearly subordinates the fiduciary duty to Crown exercise of sovereignty. In line with the position taken in *Osoyoos*, note that the Court

¹¹⁴ *Wewaykum*, *supra* note 85 at para 98 (underlining added in *Wewaykum*).

¹¹⁵ See discussion of *M'Intosh* in text accompanying notes 96 and 97 above.

in *Haida Nation* describes the honour of the Crown as binding the Crown “from the assertion of sovereignty to the resolution of claims and the implementation of treaties”.¹¹⁶ This apparent displacement—or simple non-recognition—of Indigenous legal orders at the moment of Crown sovereignty assertion fits most naturally with the positivist picture of all lawful authority flowing ultimately from state sovereignty.

Together with the ambivalence described in subsection (a) above, this ambivalence as to the trigger for the Crown fiduciary duty plays out in debates over the justification analysis found in recent Aboriginal title cases. If we emphasize the source of Aboriginal title in pre-existing Indigenous legal orders and hold that the Crown fiduciary duty is triggered only upon surrender of those interests, then we are likely to set the bar high for justifications of Crown actions that infringe Aboriginal title. However, if we focus on assertion of Crown sovereignty as producing (or “crystalliz[ing]”¹¹⁷) Aboriginal title and on Crown assertion or exercise of sovereignty as triggering its fiduciary duty, then it is easier to conceive the Crown acting in a governmental capacity over interests that fall entirely under its sovereign power, perhaps lowering the bar for justification of infringements.

In recent cases, the Court has used the *Haida Nation* spectrum of required Crown consultation, originally designed to protect claimed yet “unproven” Aboriginal rights and title, in its analysis of the justification for Crown infringement of *established* rights. The Court in *Haida Nation* distinguished the Crown duty to consult from the Crown fiduciary duty (deriving both from the honour of the Crown) on the ground that claimed-yet-unproven rights were not specific or cognizable legal interests of the kind needed to ground a fiduciary duty. “Pending [negotiated] settlement,” the Court explained, “the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.”¹¹⁸

Yet the *Haida* spectrum of required Crown consultation now seems to govern the Court’s justification analysis for Crown infringements of *established* section 35 rights as well. In *Clyde River*, the Court characterized the duty to consult in these terms:

The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown [...] It has both a legal and a constitutional dimension [...] Its constitutional dimension is grounded in the honour of the Crown [...] And, as a legal obligation, it is based in the Crown’s

¹¹⁶ *Haida Nation*, *supra* note 10 at para 17; emphasis added.

¹¹⁷ *Delgamuukw*, *supra* note 9 at para 126.

¹¹⁸ *Haida Nation*, *supra* note 10 para 45. As Gordon Christie notes, “[e]fforts by the Court to turn the Crown’s mind to its obligations to preserve Aboriginal interests in the interim through a process of consultation and accommodation have been balanced by a jurisprudence that preserves ultimate Crown power over decision-making”: Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006), 39:1 *UBC Law Review* 139-184 at 184.

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assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).¹¹⁹

As discussed above, *Haida Nation* stressed the importance of the duty to consult in protecting *claimed yet still unproven* Aboriginal interests. In *Clyde River*, the Court ties this duty to established section 35 rights, and grounds the duty squarely in “the Crown’s assumption of sovereignty”. In fact, the Court makes explicit that where *established* section 35 rights are at issue, this should factor into the *Haida Nation* analysis: “As this Court explained in *Haida*, deep consultation is required ‘where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals.”¹²⁰

If the *Haida Nation* analysis governs the Court’s analysis of Crown justification for infringing established treaty rights, will it not also govern in the case of established Aboriginal title? This seems to be an open question. In *Tsilhqot’in Nation*, the Court suggested a qualitative break between the justification analysis applicable to claimed title and that applicable to established title:

Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.¹²¹

Yet the Court goes on to explain that this fiduciary duty “infuses an obligation of proportionality into the justification process”, which the Court finds comparable to that imposed by the *Haida Nation* spectrum.¹²² The Court did, however, add one further element to the fiduciary duty in the case of established Aboriginal title: “the Crown’s fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. [...] This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.”¹²³ I return to this sustainability requirement in the conclusion to this chapter.

The case law is not yet settled as to whether the *Haida Nation* analysis will govern the Court’s justification analysis in the case of Crown infringements on Aboriginal title, though it is perhaps leaning that way. Again, this approach would fit best with a positivist picture of

¹¹⁹ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069 [“*Clyde River*”] at para 19.

¹²⁰ *Clyde River*, *supra* note 119 at para 43 (italics in original).

¹²¹ *Tsilhqot’in Nation*, *supra* note 15 at para 80.

¹²² *Tsilhqot’in Nation*, *supra* note 15 at para 87.

¹²³ *Tsilhqot’in Nation*, *supra* note 15 at para 86.

state sovereignty as the source of lawful authority, and of the corresponding need for state to retain unilateral decision-making power in the face of competing interests. On the other hand, the momentum towards a jurisdictional conception of Aboriginal title, retraced in section 1 of this chapter, may yet bend the Crown fiduciary duty (and section 35 jurisprudence more generally) in alternative doctrinal directions, with a focus on coordination between Indigenous jurisdiction and federal and provincial jurisdictions.

c. The *Royal Proclamation* and Crown sovereignty: in what sense is the Court prepared to adjudicate Crown assertions of sovereignty?

Guerin originally traced the Crown fiduciary duty to the restrictions imposed by the Crown on the alienability of Indigenous land to third parties. Justice Dickson wrote that “[t]he Crown first took this responsibility upon itself in the *Royal Proclamation* of 1763.”¹²⁴ The Court has also stated that at the time of the *Royal Proclamation*, “both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.”¹²⁵

Clearly, within the early years of confederation, and notably with the adoption of the *Indian Act* in 1876,¹²⁶ Canada no longer viewed Indigenous peoples as sovereign nations.¹²⁷ Hence the issue lurking in the background of *Guerin*, finally confronted in *Sparrow*, that the Crown fiduciary duty seems to be subsumed within a framework of Crown sovereignty allowing the Crown to extinguish or infringe those interests it must otherwise guard as a fiduciary. As described above, the Court has grappled with this situation under various descriptions, including the “two-step process” developed in *Osoyoos* and the “many hats” characterization relied on in *Wewaykum*.

The Court, however, has also indicated some willingness to question the very sovereign claims made by the Crown, which necessarily underlie Parliament’s broad assertions of power over Indigenous peoples. In *Sparrow*, for instance, the Court seemingly staked out the authority to adjudicate Crown sovereign claims, quoting with approval Professor Noel Lyon: “Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”¹²⁸ And in *Taku River Tlingit*, the Court qualified Crown sovereignty as “*de facto*”: “The purpose of s. 35(1) of the *Constitution Act*, 1982 is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”¹²⁹

¹²⁴ *Guerin*, *supra* note 14 at 376.

¹²⁵ *R v Sioui*, [1990] 1 SCR 1025 at 1052-53.

¹²⁶ *Supra* note 20.

¹²⁷ See e.g. *Report of the Royal Commission on Aboriginal Peoples*, vol 1, *Looking Back, Looking Forward* (Ottawa: The Commission, 1996) at 259-262; Johnston, *supra* note 19 at 75-88.

¹²⁸ *Sparrow*, *supra* note 61 at 1106.

¹²⁹ *Taku River Tlingit*, *supra* note 53 at para 42. See also, e.g., *Haida Nation*, *supra* note 10 at para 32: “This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which

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Chapter 1 noted that domestic courts tend to avoid wading into such waters, with high courts in the US and Australia stating, in the context of adjudicating Indigenous-state relations, that challenges to state sovereignty are simply not cognizable by the courts of the state.¹³⁰ In *Wakatu*, Chief Justice Elias forestalls the issue by drawing an explicit contrast between the Crown's claims to sovereignty in New Zealand and in North America, indicating that in New Zealand the Crown "distinctly recognized the proprietorship of the soil in the natives and disclaimed alike all territorial rights, and all claims of sovereignty, which should not be founded on a free cession by them".¹³¹

What does the SCC mean when it says it has "the authority to question sovereign claims made by the Crown"?¹³² In practice, the meaning has been fairly modest: in the context of *Sparrow* and the Court's other Aboriginal rights cases, it has meant that the Court will review exercises of Crown sovereignty that infringe Aboriginal rights (claimed or established) and impose procedural safeguards in accordance with the honour of the Crown (covering both the Crown duty to consult and fiduciary duty). We might call the result a judicially mediated form of Crown sovereignty, or a procedural legitimation of Crown sovereignty (in contrast to the substantive justifications previously provided by such doctrines as *terra nullius*, which the Court has now explicitly rejected). As typified by the two-stop process in *Osoyoos*, this is a very weak form of questioning claims of Crown sovereignty: the Court there concludes that the Crown's decision to exercise its powers of expropriation is unfettered by any fiduciary duty; the fiduciary duty kicks in only subsequently to require that the Crown not expropriate more than necessary to achieve its goals.

More generally, to the extent the doctrines of Crown fiduciary duty and duty to consult allow the Court to question sovereign claims made by the Crown, this amounts only to an after-the-fact judicial review of particular exercises of Crown sovereignty, a form of judicial review we find throughout administrative law. Moreover, as explained above, this form of *post hoc* administrative judicial review seems, presently, to apply even in cases of *established* Aboriginal and treaty rights, including Aboriginal title.

Yet the case law's stated recognition, at least at the level of principle, of prior Indigenous legal orders and the growing recognition of inherent Indigenous jurisdiction by governments and courts in Canada, as discussed in section 1 above, leave open the door for more substantive judicial questioning of the relationship between Crown sovereignty and Indigenous legal orders. This chapter concludes with a somewhat speculative look at how that might play out.

arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."

¹³⁰ See discussion accompanying footnotes 88-100 in chapter 1.

¹³¹ *Wakatu*, *supra* note 108 at footnote 130 to para 116 (quoting a letter from Lord Stanley to the New Zealand Land Company, dated 10 January, 1843). For the explicit contrast with the Crown's claims in North America, see *Wakatu* at paras 340-344.

¹³² *Sparrow*, *supra* note 61 at 1106.

4. Conclusion: imagining Indigenous and state jurisdictional coordination

These concluding paragraphs imagine recognition of a jurisdictional dimension of Aboriginal title might play out in a hypothetical scenario.¹³³ Hopefully, this is an effective way of revisiting and tying together key points discussed above.

Consider the situation of the Tsilhqot'in Nation, the only Indigenous people in Canada to date to have won a judicial declaration of Aboriginal title to parts of their traditional territory. As noted in section 1 above, the Court in *Tsilhqot'in Nation* worried that if provincial laws of general application, say in relation to forest management, could not apply to Aboriginal title land, then we might be facing legislative vacuums, or a patchwork of federal and provincial regulations. The Court stated that Aboriginal title included the "right to pro-actively use and manage the land"¹³⁴ but did not consider the possibility of a jurisdictional dimension that could be exercised by the Aboriginal title-holders to develop laws and regulations for such things as forest management.

Imagine that this "right to pro-actively manage the land" comes to be understood as recognizing the inherent jurisdiction of Aboriginal title-holders to govern Aboriginal title land under their own lawful authority. Suppose further that the Tsilhqot'in Nation were to adopt, through its own governance structures, specific laws to govern forest management on the land the Nation holds under Aboriginal title—laws governing, e.g., the issuing of licences to cut and remove timber.

Tsilhqot'in Nation makes clear that if British Columbia or private proponents wish to engage in timber activities on Tsilhqot'in Aboriginal title land, they must seek the consent of the Tsilhqot'in Nation. The exercise of Indigenous Tsilhqot'in jurisdiction to adopt forestry laws would help all parties to understand the meaning of consent in this context. In essence, Tsilhqot'in laws would articulate the meaning of Tsilhqot'in consent: those laws would spell out the activities that the Tsilhqot'in Nation does and does not approve and would establish the lawful procedures for securing approval for proposed activity. This would help existing section 35 doctrine move away from a focus on consultation procedures set by the Crown—and away from the corresponding debate over the rights of Indigenous peoples to exercise a "veto" over proposed activity at the conclusion of consultations—and towards the application of Tsilhqot'in law. In the scenario considered here, proponents would be expected to apply for timber licences under Tsilhqot'in law; the entire process would then be geared, not to any question of acceptance or veto, but simply to the application of Tsilhqot'in law.

If, in this scenario, the province thought that Tsilhqot'in law was somehow inadequate or unconstitutional and wished to authorize proponent activity contrary to existing Tsilhqot'in law, the first step for the province would be to engage the Tsilhqot'in in negotiation. Such negotiations would be centered around questions of coordinating provincial and Tsilhqot'in

¹³³ A version of this scenario is forthcoming in the *University of New Brunswick Law Journal* in an article co-authored with Robert Hamilton and Joshua Nichols, the current working title for which is "'But, how can that be law for me?': Indigenous Jurisdiction and Canadian Federalism after *Tsilhqot'in*".

¹³⁴ *Tsilhqot'in Nation*, *supra* note 15 at para 73.

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laws and whether a satisfactory agreement could be reached to amend Tsilhqot'in laws in ways acceptable to all parties.

If no agreement could be reached through negotiation and the province intended to proceed with issuing licences or adopting regulations that purport to override Tsilhqot'in law, that would raise questions about the province's power to infringe section 35 rights. Under current doctrine, with Aboriginal title conceived essentially on a property rights model, the province can proceed with its infringing action, subject to judicial review if the Tsilhqot'in Nation brings the matter to court. Current doctrine does not determine precisely how this burden might shift if Indigenous jurisdiction were explicitly recognized as a dimension of Aboriginal title. At a minimum, the explicit recognition of Indigenous jurisdiction should lead the courts to reconsider who ought to bear the burden of bringing matters of potential infringement to court. In the scenario considered here, if the province wished to act or regulate contrary to Tsilhqot'in forestry laws, should the presumption not be that such laws are valid over Tsilhqot'in Aboriginal title lands, with the burden on the province to take the matter to court if it wishes to act contrary to Tsilhqot'in laws?

In other words, in this scenario, (1) obtaining the "consent" of Aboriginal title-holders means agreeing that relevant matters are governed by the laws of the title-holding nation, and (2) for the Crown to proceed without Indigenous consent, i.e. for the Crown to act contrary to governing Indigenous laws, the Crown should first have to justify this proposed infringement. This scenario also suggests the need for dispute resolution processes that can interpret Indigenous laws and their interaction with provincial and federal laws. The burden for this work cannot fall entirely to Canadian courts in the first instance; coordination of jurisdictions will require co-management and co-adjudicatory processes and bodies.¹³⁵ Moreover, this jurisdictional approach could help transform the Indigenous-Crown fiduciary relationship from a paternalistic to a collaborative relationship. In *Tsilhqot'in Nation*, the Court held that both Aboriginal title-holders and the Crown have an obligation to sustainably manage lands held under Aboriginal title.¹³⁶ As institutions evolve to apply Indigenous laws on Aboriginal title, treaty, and reserve lands, and to coordinate Indigenous law with federal and provincial laws, mutual sustainability requirements might form the basis for mutual fiduciary obligations on a partnership model in the sustainable management of lands and resources.

In the interim, while joint Indigenous-state processes and institutional forms develop, Canadian courts are not without doctrinal tools for assessing jurisdictional coordination and conflict between Indigenous laws and federal and provincial laws. Principles drawn from conflicts-of-laws doctrine, principles of federalism, and principles of deference to Indigenous law-makers in the exercise of their own jurisdiction provide tools for courts to develop

¹³⁵ This point is developed in Ryan Beaton, "Articles 27 and 46(2): *UNDRIP* signposts pointing beyond the justifiable-infringement morass of section 35", in *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, edited by John Borrows *et al* (Waterloo, ON: Centre for International Governance Innovation, 2019).

¹³⁶ *Tsilhqot'in Nation*, *supra* note 15 at paras 86, 105, 121.

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doctrine recognizing Indigenous jurisdiction within a renewed framework of Canadian federalism. Thoughtful elaboration of these principles may be especially important for dealing with issues such as conservation and environmental protection, which will likely require greater coordination and integration of Indigenous and provincial and federal laws, as compared with matters of resource extraction that may, in many cases, be more thoroughly governed under local Indigenous laws.

This chapter has traced the intertwining tension between positivist and pluralist interpretive approaches found in the Canadian doctrine of Aboriginal title. This tension continues to create fault lines in the case law, sites of contestation and doctrinal elaboration case-by-case. It is clear from the review of doctrine and fault lines undertaken in this chapter that sovereignty is not a fixed concept but rather “an argumentative resource.”¹³⁷ As Mark Walters notes: “As a construct of ordinary legal discourse, sovereignty is, like all ordinary legal constructs, something that must be constantly interpreted and reinterpreted over time to ensure that it contributes to the general understanding of law as an enterprise that integrates legality and legitimacy.”¹³⁸

The following two chapters take a step back from the specific doctrines of Indigenous-state relations to consider more generally the positivist and pluralist interpretive approaches, their agonistic intertwining, and what they may reveal of sovereignty as an argumentative resource.

¹³⁷ Hent Kalmo and Quentin Skinner, “Introduction: a concept in fragments” in *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, edited by Hent Kalmo and Quentin Skinner (New York: Cambridge University Press, 2010) 1-25 at 9.

¹³⁸ Mark Walters, “Law, Sovereignty, and Aboriginal Rights” in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 40.

Reflections on the Marriage of Heaven and Hell

The battle with addiction is not always what you think. Or the battle with addiction—as popularly understood and medically diagnosed—is just a particular case, a kind of sedimentation of the default condition, the wrapping and twisting of our needs around habits that are emotional dead-ends.

This crippling of the human soul is inevitable. Before I am anything, I am reaching out in blind desperation to the world thrust into, and I am scarred by whatever reaches back, even love and protection. We scream for our scars to be tended to, and help ourselves to whatever echoes back. We pick up the pieces of self-tending here and there. We cultivate the patch of desert as a voice crying through the wilderness. That is the raging beauty of being born.

The gentle cooing of the parent can only nourish if it also recalls and holds in balance the mad shaking of the wilderness—the kingdom spread around us that we mostly unlearn to see because of the dead-ends latched onto. To ease out of the dead-ends, to shake in madness and exhilaration, to be reborn, is what every great tradition teaches—here greatness lies in blasting through the spiritual paralysis of our everyday dead-ends. The “addict” is a special case only because slow crisis has come to the surface with nasty clarity. Addiction may be a gateway, as spiritual desert is a gateway.

Cracked Shell

You sat with me and we cracked the shell.
The beach had only a dusting of sand
and the sun had not yet burst in the east.
If I hadn't been so green,
I might have sat with you forever.
But innocence is restless.
When the sky opened,
it soaked an empty beach,
and morning quietly
slipped out of reach

CHAPTER 3

Positivism and Its Discontents

The Introduction and first two chapters have drawn out characteristics of institutional positivism and historically grounded pluralism in action in Canadian Aboriginal law, including a deep dive into the Canadian doctrine of Aboriginal title. This chapter takes a step back from that specific doctrinal context to consider the broader appeal of legal positivism within the common law tradition, as well as the stumbling blocks for a positivist account of law noted by defenders of positivism themselves. This chapter does not offer an exhaustive treatment or even a complete survey of recent debates on legal positivism and its critics. The aim is rather: (1) to review, in broad strokes, the appeal of legal positivism as a theory of law and of legal interpretation; (2) to understand core challenges facing a positivist account of legal interpretation; and (3) to conclude by drawing on the discussion of points (1) and (2) to clarify the legal positivist vision of Indigenous-state relations that partly guides and partly emerges from the institutional positivist approach that we find in action in Canadian Aboriginal law. Point (3) is the payoff for purposes of this dissertation and therefore sets the scope of discussion under points (1) and (2); the overarching aim of the chapter is to arrive at a clearer view of the constitutional vision of Indigenous-state relations that institutional positivism offers as we proceed through our current period of ideological transition.

1. The appeal of “unreconstructed” legal positivism¹

Section 3 of chapter 1 explored the appeal of institutional positivism to domestic courts in a modern state. This appeal rests on a seductively simple picture of domestic courts that portrays their lawful authority as a currency flowing from state assertions of sovereignty. This picture foregrounds a basic political reality: the *de facto* success of a state’s assertions of sovereignty lays the foundation for the establishment of the state’s domestic courts and for the regular enforcement of their judgments. Is it not natural, then, to view the lawful authority of domestic court judgments as resting ultimately on the state’s successful assertion of sovereignty? Surely, the thinking goes, domestic courts cannot question the foundations of the state’s claims to sovereignty. To raise questions here would be to cut the legs out from under their own lawful authority.

Chapter 1 considered this positivist line of thought in terms of the *M’Intosh* exclusion, encapsulated in Chief Justice John Marshall’s statement that “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”² In the same set of reasons, Chief Justice Marshall offers a more detailed

¹ Modified versions of some passages in this section are forthcoming in the *University of New Brunswick Law Journal* in an article co-authored with Robert Hamilton and Joshua Nichols, under the current working title “‘But, how can that be law for me?’: Indigenous Jurisdiction and Canadian Federalism after *Tsilhqot’in*”.

² *Johnson v M’Intosh*, 21 US 543 (1823) [*M’Intosh*] at 588.

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explanation of his use of “conquest” that is revealing for the opposition it draws between the successfully asserted and sustained foundations of the US legal system, on the one hand, and principles of natural right, on the other:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; *if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.* So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. *However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice.*³

As this passage suggests, the presence of Indigenous peoples governing the land under their own legal orders threatens to make a puzzle out of the positivist picture of state domestic court authority. How is it that the authority of domestic courts to proclaim “the law of the land” flows from state assertions of sovereignty if those assertions were made in the face of pre-existing legal orders that were never conquered, on the normal use of that term? The strategy adopted in *M’Intosh* is to focus on the institutional role of the state’s domestic courts: yes, it may be an extravagant pretension to convert “discovery” into “conquest” so as to displace prior legal orders; and, yes, to do so may be opposed to natural right and to the usages of civilized nations; but if that pretension is indispensable to the legal system that has taken *de facto* control of the land, then *the courts of that legal system* must accept it. In a word, the *M’Intosh* solution is to place the relevance of pre-existing Indigenous legal orders outside the frame of our picture of domestic court authority, in a realm of “private and speculative opinions of individuals.”

Chief Justice Marshall himself was not entirely satisfied with this solution. Given the opportunity to revise *M’Intosh* almost a decade later, in *Cherokee Nation* and *Worcester*,⁴ Chief Justice Marshall mocked the pretense that US assertions of sovereignty had somehow wiped clear pre-existing Indigenous legal orders. In *Cherokee Nation*, he introduced the concept of “domestic dependent nation” in an attempt at reshaping the legal doctrine to adequately capture the relationships between Indigenous nations and the state. In *Cherokee Nation* and *Worcester*, these relationships are characterized as diminishing the sovereignty

³ *M’Intosh*, *supra* note 2 at 591-592 (italics added).

⁴ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*“Cherokee Nation”*]; *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832) [*“Worcester”*].

of Indigenous nations in the conduct of foreign affairs, but otherwise leaving internal Indigenous law-making authority largely intact.⁵

The discussion in chapter 1 also drew connections between institutional positivism as exemplified by the *M'Intosh* exclusion and the majority reasons in *Caron*, on the one hand, and theories of legal positivism in the tradition of Hart, on the other. Central to legal positivism in this tradition is the notion of a rule of recognition, which rests on the distinction Hart drew between primary and secondary rules in a legal system. The primary rules are those that directly require or proscribe particular conduct (e.g. rules that prohibit driving without a valid licence or that require businesses open to the general public to serve customers without discriminating on the basis of race or sex or religion); the secondary rules are those that govern the adoption or amendment of other legal rules (primary or secondary). Validity is determined by secondary legal rules: a legal rule is valid if properly adopted according to applicable secondary rules. For instance, regulations amending driving licence requirements may be valid if adopted by a government minister according to rules stipulated by statute providing for that minister to pass regulations on highway safety. The validity of the statute will itself be governed by rules applicable to the legislative process; the legislative process in turn may be governed by rules stipulated by written constitutional text or unwritten constitutional principles.

The rule of recognition for a given legal system consists of those secondary rules that are neither valid nor invalid but are accepted as the fundamental rules governing the validity of other rules in the legal system. For a legal system to function, there must be sufficient consensus amongst its officials about the rule of recognition, i.e. they must generally agree on which rules fundamentally govern validity and on the content of those rules. As discussed in chapter 1, positivists like Hart consider it a question of socio-political fact—to be sharply distinguished from questions of legal validity—whether there exists such consensus among the system's legal officials.

The great appeal of legal positivism is that it presents legal disputes as solvable by reference to “social facts”.⁶ According to positivists, when we engage in a dispute about the validity of a legal proposition, we are ultimately arguing about whether relevant social facts

⁵ For more on the legacy of the Marshall trilogy in the US, see e.g. Nell Jessup Newton, “Federal Power over Indians: Its Sources, Scope, and Limitations” (1984) 132:2 *University of Pennsylvania Law Review* 195-288; Philip Frickey, “Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law” (1993) 107:2 *Harvard Law Review* 381-440; Robert Williams Jr “‘The People of the States Where They Are Found Are Often Their Deadliest Enemies’: The Indian Side of the Story of Indian Rights and Federalism” (1996) 38 *Arizona Law Review* 981-998; Robert Clinton, “There is no Federal Supremacy Clause for Indian Tribes” (2002) 34:1 *Arizona State Law Journal* 113-260; Philip Frickey, “(Native) American Exceptionalism in Federal Public Law” (2005) 119:2 *Harvard Law Review* 431-490; and Maggie Blackhawk, “Federal Indian Law as Paradigm within Public Law” (2019) 132:7 *Harvard Law Review* 1787-1877.

⁶ See e.g. Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011) at 382, stating that an account of legal interpretation is positivistic when “it roots interpretive methodology in social facts.” Dennis Patterson, “Theoretical Disagreement, Legal Positivism, and Interpretation” (2018), 31 *Ratio Juris* 3, 260-275 at 261, note 2, notes his agreement with Shapiro's statement. The positivist accounts of legal interpretation offered by Patterson and Shapiro are discussed in detail below.

establish that the proposition either belongs to the rule of recognition or is validated by secondary rules (which themselves either belong to the rule of recognition or are validated by other secondary rules ... and so on until we reach the rule of recognition). Legal disputes, on this view, do not turn on any moral commitments of the disputants.⁷ Law is thus distinguished from morality; the validity of legal rules does not rest on moral commitments.

The simplest example may be the legal proposition asserting sovereignty over a given territory. Within a state legal system, the very assertion of state sovereignty over a territory by the appropriate person or legal body may be sufficient to determine the validity of the proposition that the state is sovereign over that territory. *M'Intosh* takes this position: where the British Crown asserted sovereignty (through discovery and "conquest", with the US stepping into the shoes of the sovereign following the American Revolution), US courts cannot question that assertion, "whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."⁸ We saw in chapter 1 that the High Court of Australia has taken a similar position, holding that state assertions of sovereignty are acts of state that are not justiciable in the courts of that state. The Supreme Court of Canada ("SCC") has similarly held, citing *M'Intosh* specifically, that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [i.e. Indigenous territories] vested in the Crown".⁹ On the other hand, as detailed in the preceding chapters, the SCC has at times expressed ambivalence on this point, and raised questions about the legitimacy of Crown sovereignty asserted in the face of pre-existing Indigenous sovereignty.¹⁰

As Chief Justice Marshall makes clear, "private and speculative opinions [...] respecting the original justice" of assertions of Crown sovereignty in US territory are irrelevant (from the perspective of US courts) to the validity of the legal proposition asserting state sovereignty over that territory. As such, the effectiveness Crown's prerogative power to assert sovereignty (a sovereignty later inherited by the US) belongs to the rule of recognition: US courts must accept this power as foundational to the legal order they are tasked with elaborating and, if the Crown has duly exercised this power over a given territory, the validity of state sovereignty over that territory flows from the "social fact" of that exercise of power.

Of course, questions may arise about the factual details of the Crown's assertion of sovereignty. In *Calder*, for instance, there was some debate about the actual date of the Crown's assertion of sovereignty over the territory for which the Nisga'a were seeking a declaration of Aboriginal title. Justice Judson wrote that "the area in question in this action never did come under British sovereignty until the Treaty of Oregon in 1846. [...] The

⁷ Inclusive positivists, including Hart himself, qualify this statement by accepting that moral reasoning may play a role in legal interpretation if specifically authorized by a rule of the legal system, e.g. a constitutional provision that requires courts to protect rights of equality and therefore requires judicial interpretation of the meaning of "equality". See the discussion below in subsection (2)(b)(iii) of this chapter.

⁸ *M'Intosh*, *supra* note 2 at 588.

⁹ *R v Sparrow*, [1990] 1 SCR 1075 at 1103. See the discussion of this passage in chapter 1 at note 94 and accompanying text.

¹⁰ See especially sections 2 and 3 of chapter 2.

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Oregon Treaty was, in effect, a treaty of cession whereby American claims were ceded to Great Britain.”¹¹ While it is true that the Treaty of Oregon settled the southern border of British claims to what became British Columbia, the British had apparently asserted sovereignty over the territory since at least 1792.¹² Prior to the Treaty of Oregon, the British and US claims overlapped. Justice Hall took some issue with the 1846 dating, noting the following with respect to the territory at issue in *Calder*:

Canadian sovereignty over part (the greater part of Pearce Island) was not confirmed until the United States-Canadian boundary was fixed by the Alaskan Boundary Commission in 1903. This historical fact cannot be overlooked in considering whether, as the respondent alleges, the Indian right or title, if any, was extinguished between 1858 and when British Columbia entered Confederation in 1871.¹³

Subsequent cases have settled on 1846 as the date when “British sovereignty over British Columbia was conclusively established”.¹⁴ In the *Tsilhqot’in Nation* litigation, however, Canada argued “that the most compelling date for the assertion of British sovereignty is 1792”.¹⁵ The *Tsilhqot’in Nation* and British Columbia were “content to accept the date of sovereignty assertion as 1846, the date of the Oregon Treaty.”¹⁶ Canada based its argument on a distinction “between the date that sovereignty was ‘conclusively established’ (Canada suggests this date is 1846) and the date that sovereignty was ‘asserted’.”¹⁷

At trial in *Tsilhqot’in Nation*, Justice Vickers ultimately found that 1846 was the relevant date of Crown sovereignty assertion for purposes of the claims before him: “I have no difficulty in concluding that The Treaty of Oregon, 1846 is a watershed date that the courts have relied upon up to now. I see no reason to move from that date.”¹⁸ Note that the territory claimed by the *Tsilhqot’in Nation* is not in the area considered by the Alaskan Boundary Commission of 1903, which fixed the US-Canada boundary on the west coast of British Columbia. This entire debate over the correct date of sovereignty assertion gives a sense of how legal interpretation—here, relating to the acquisition of Crown sovereignty—may turn on the interpretation of social facts.

A somewhat more complicated example from *Calder* is the question whether the *Royal Proclamation of 1763*¹⁹ is law in British Columbia. Justice Judson found that it was not,

¹¹ *Calder v Attorney-General of British Columbia*, [1973] SCR 313 [“*Calder*”] at 325.

¹² See e.g. *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 [“*Tsilhqot’in Nation* (trial level)”] at paras 585-602 for a discussion of possible dates for British assertion of sovereignty over the territory that is British Columbia today.

¹³ *Calder*, *supra* note 11 at 348.

¹⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 145, stating that the trial judge in the case had found “and the parties did not dispute on appeal, that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846.”

¹⁵ *Tsilhqot’in Nation* (trial level), *supra* note 12 at para 588.

¹⁶ *Tsilhqot’in Nation* (trial level), *supra* note 12 at para 587.

¹⁷ *Tsilhqot’in Nation* (trial level), *supra* note 12 at para 589. See generally *ibid* at paras 585-602 for Justice Vickers’ discussion of this point in his decision at the trial level in *Tsilhqot’in Nation*.

¹⁸ *Tsilhqot’in Nation* (trial level), *supra* note 12 at para 601.

¹⁹ George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [“*Royal Proclamation*”].

based “upon the very terms of the Proclamation and its definition of its geographical limits and upon the history of the discovery, settlement and establishment of what is now British Columbia.”²⁰ Justice Hudson disagreed, concluding that the *Royal Proclamation* did apply in British Columbia. He noted that it “was an Executive Order having the force and effect of an Act of Parliament” and he considered its “force as a statute” to be “analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire.”²¹ Without diving into the weeds of this disagreement, which is aired at length in *Calder*, we can see how it presents another instance of legal dispute that seems to turn on differing interpretations of social facts, without any obvious need for moral reasoning. It is certainly plausible, then, to think that such legal disputes may be resolved according to the more convincing interpretation of social facts.

The great appeal of legal positivism is to present *all* legal disputes as turning on the interpretation of social facts. On the positivist view, we engage in legal interpretation—perhaps more to the point, *judges* engage in legal interpretation—to determine *what the law is according to the relevant social facts*, not what it ought to be according to our moral or political preferences. If we think the law ought to be other than it is, we must pursue legal change through the appropriate political processes, rather than smuggle moral and political preferences into legal interpretation.

By the same token, the great weakness of legal positivism is that it has little to say in response to questions along the lines of “but, how can that be law for me?” In a recent discussion of positivist and pragmatist approaches to legal interpretation, David Dyzenhaus argues that legal positivism simply does not have any adequate answer to this question. Dyzenhaus makes the case for “a reconstructed legal positivism” that would incorporate the “deeply pragmatic”²² requirement that *de facto* successful state assertions of sovereignty must be legitimated through a legal order capable of answering the question “but, how can that be law for me?”. The state’s legal order must develop answers that are acceptable²³ from the perspective of those whom the state asks or expects to recognize the legitimacy of its sovereign claims. As Dyzenhaus puts it:

[Positivists] start with a *de facto* legal order, one that has solved the problem of disorder, and explain its claim to authority as constituted by actual acceptance. [...] positivists eschew talk of morality and legitimacy and think that the authority relationship can be confined to the officials of the order; that is, the acceptance of subjects is not necessary. But, or so I will argue, positivism teaches us, against its intentions, that once one embarks on the path of explaining the

²⁰ *Calder*, *supra* note 11 at 323.

²¹ *Calder*, *supra* note 11 at 394-395.

²² David Dyzenhaus, “The Inevitable Social Contract”, *Res Publica* (2020) at 10; online: <<https://doi.org/10.1007/s11158-020-09467-z>>.

²³ Dyzenhaus insists on a blurring of the line between subjective and objective understandings of “acceptable” in this context. That is, in determining whether the state’s assertions of authority are acceptable, the degree of actual acceptance by legal subjects is a significant consideration but leaves room for debate about the acceptability of state authority. As Dyzenhaus, *supra* note 22 at 2, puts it: “the line between acceptable and in fact accepted reasons should be blurred.”

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authority of a de facto order, the distinction between legitimate or *de iure* authority and de facto authority is difficult to sustain. Morality comes into the picture [...]²⁴

Dyzenhaus' reconstructed legal positivism provides a broad framework for understanding the SCC's struggles with the ongoing tension between positivism and pluralism in its Aboriginal law doctrines. The doctrine of Aboriginal title reviewed in detail in chapter 2—and perhaps Canadian Aboriginal legal doctrine more broadly—is arguably working itself towards a pragmatic synthesis of positivism and pluralism as a kind of “reconstructed legal positivism” in Dyzenhaus' sense.

In the case of Indigenous peoples, the rhetorical force of the question “but, how can that be law for me?” is of course underscored by the history of Indigenous-state relations. Why should Indigenous peoples accept assertions of state sovereignty as establishing a source of lawful authority capable of displacing their own pre-existing legal orders? Is it sufficient for domestic courts to state that the legitimacy or “original justice”²⁵ or “moral palatability”²⁶ of state sovereignty assertions is beyond the realm of their concern as domestic courts? Or does the very assertion of sovereignty not, as Dyzenhaus suggests, carry with it some commitment to developing the law in directions that give greater legitimacy to the assertion? If so, then questions of legitimacy and moral palatability must at least sometimes inform legal interpretation.

Consider, for instance, the SCC reasons in *Haida Nation*, discussed in chapter 2. The Court found that the Crown has a legal obligation to enter into treaty negotiations to resolve outstanding Indigenous claims, as “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.”²⁷ The Court also found that, until negotiated resolution is reached through treaties, Crown duties of consultation and accommodation of Indigenous interests flow from the honour of the Crown. In cases like *Haida Nation*, concern with the legitimacy, original justice, and moral palatability of Crown sovereignty assertions clearly informs judicial interpretation of legal doctrine under section 35.

The Court in *Haida Nation* does not repudiate assertions of Crown sovereignty. Nor does reconstructed legal positivism, in Dyzenhaus' sense, support such repudiation. Dyzenhaus argues rather that state assertions of sovereignty must be understood, at least in democracies, to commit the state to establishing a legal order that is responsive to basic expectations of legitimacy, i.e. to the question “but, how can that be law for me?” asked by any citizen or legal subject. The judicial interpretation of section 35 in *Haida Nation* is animated by such a commitment. The Court asks legal obligations flow from the honour of the Crown, given that the Crown has asserted sovereignty in the face of pre-existing Indigenous legal orders.

²⁴ Dyzenhaus, *supra* note 22 at 2.

²⁵ *M'Intosh*, *supra* note 2 at 588; see discussion in text accompanying note 8 above.

²⁶ Shapiro's term, discussed in detail in subsection (2)(d) below.

²⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*“Haida Nation”*] at para 20.

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Chapter 4 will pursue aspects of Canadian case law that support a pragmatic synthesis, or balanced agonism, of positivism and pluralism along these lines. First, however, the following sections take a closer look at unreconstructed legal positivism—that is, positivism that insists, following Hart, on a strict separation of law and morality and on providing a purely descriptive account of law. For if legal positivism successfully bears out its claim to provide the best descriptive account of the law, then it can rightly deflect the question “but, how can that be law for me?” The descriptive positivist response will be, in essence: we are simply describing what law is and how it works in practice, simply providing an account of lawful authority, of what makes some rule or principle binding law as opposed to a rule of etiquette or morality or a political convention. If you object to the content of any particular legal rule or principle or doctrine, your objection is not ultimately with our account of what law *is*, but with the political processes that established the content of that particular rule or principle or doctrine. You should aim at reforming the law, or even at revolution if you wish to overthrow the legal system, but that is in any case a matter of political, social, and constitutional processes that establish the content of the law; judicial interpretation, by contrast, is about determining what the law is and positivism provides the best descriptive account of how that interpretation is carried out, given the nature of law.

Of course, if positivism fails to provide a compelling descriptive account of law, some positivists may nonetheless be of the view that legal positivism provides the best account of how law and legal interpretation *ought* to function. In that case, however, positivists can no longer deflect the question “but, how can that be law for me?”; they would have to engage directly in the normative debate about why we should prefer one approach to legal interpretation over another. Section 3 of chapter 1 noted that Dyzenhaus traces the roots of legal positivism to the reform projects of Hobbes and Bentham. Those reform projects aimed to justify legal positivism on the basis of a broader political theory that would limit judges to an essentially administrative role, resolving disputes that come before them without the authority to interpret and declare the law in a manner binding on other parties. Hart and his followers insist, however, on the descriptive character of their project, which aims to account for the law as it is and to sidestep debates about how the law ought to be.

Section 2 below looks at positivist attempts to provide an account of legal interpretation that remains true to the descriptive project and to the key positivist distinction between law and morality. The argument below is that these efforts are not ultimately compelling. In concluding this chapter, section 3 will return to the possibility of a “reconstructed legal positivism” in Canadian Aboriginal law, in light of sections 1 and 2.

2. Attempts at descriptive positivist accounts of legal interpretation

The question whether positivism can provide a plausible account of legal interpretation has to some extent reinvigorated the “Hart-Dworkin debate” since Scott Shapiro, a legal

positivist, argued in 2007 that legal positivists had yet to provide such an account.²⁸ This section will draw on Shapiro's contribution to this debate, while framing the discussion primarily through a more recent contribution by Dennis Patterson, also a legal positivist, who finds positivism still lacking an adequate account of legal interpretation more than a decade on from Shapiro's intervention.²⁹ Patterson proposes a positivist legal interpretive methodology to fill this gap.

The subsections below: (a) unpack the meaning of legal interpretation, or "legal interpretive methodology", using the majority and dissenting opinions from *Riggs v Palmer*³⁰ that have figured prominently in the Hart-Dworkin debate; (b) briefly recap elements of the debate most relevant for purposes of this chapter; and in (c) and (d) review positivist accounts of legal interpretation proposed by Patterson and Shapiro, respectively. I argue that Patterson's account is unconvincing because it (i) draws an unsteady line between, in Patterson's terms, practice and interpretation, and (ii) blurs or erases distinctive features of positivism as a theory of law. I argue that Shapiro's account is unconvincing because it fails to provide any real guidance for the actual practice of judicial interpretation.

a. Legal interpretive methodologies

The meaning of "legal interpretive methodology" is best examined through concrete examples. Patterson focuses on *Riggs* to clarify his own account. It will be helpful, therefore, to begin by reviewing the facts of that case and the majority and dissenting opinions.

On the facts accepted by the court in *Riggs*, sixteen-year-old Elmer Palmer "willfully murdered" his grandfather, Francis Palmer.³¹ Elmer knew that he was a beneficiary under provisions of his grandfather's will and committed the murder "that he might prevent his grandfather from revoking such provisions [...] and to obtain the speedy enjoyment and immediate possession of his property."³² A literal reading of the statutory language governing the disposition of property under wills in the state of New York would have granted Elmer the property provided for him under his grandfather's will. The Court therefore had to decide whether a literal reading of the statutory language was the proper interpretive approach for deciding the case.

²⁸ Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" in *Ronald Dworkin*, edited by Arthur Ripstein (New York: Cambridge University Press, 2007), 22-55. As Shapiro points out, the "Hart-Dworkin debate" must be taken as shorthand for a sprawling debate with many participants beyond Hart and Dworkin: *ibid* at 31.

²⁹ Patterson, *supra* note 6 at 261, note 2: "positivism must be enhanced, specifically with the addition of an account of interpretation that is consistent with the main lines of positivism. It is the burden of this article to supply such an account": *ibid* at 261, note 2.

³⁰ *Riggs v Palmer*, 115 NY 506 (1889). *Riggs* was one of the cases, with *Henningsen v Bloomfield Motors, Inc.*, 32 NJ 358 (1960), "chosen haphazardly" by Dworkin to ground his initial critique of positivism: Ronald Dworkin, "The Model of Rules" (1967), 35 *University of Chicago Law Review* 14-46 at 23. *Riggs* is available online: <http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm> (last verified May 23, 2021).

³¹ *Riggs*, *supra* note 30 at 509.

³² *Riggs*, *supra* note 30 at 508-509.

i. Judge Earl for the majority: what did the legislature *intend*?

The majority in *Riggs* held that the murder disqualified Elmer as a beneficiary under his grandfather's will. Judge Earl, writing for the majority, acknowledged "that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed [...] give this property to the murderer."³³

Judge Earl did not accept, however, that a literal reading of the statutes was sufficient to interpret the governing law. Rather, he turned also to the purpose animating those statutes and to the intention of the legislators. He found that "[t]he purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view."³⁴ As to the intention of the legislators, Judge Earl insisted that judges cannot restrict themselves strictly to its statutory expression: "The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation."³⁵ Ultimately, "[s]uch a construction ought to be put upon a statute as will best answer the intention which the makers had in view."³⁶ In other words, Judge Earl adopted "the counterfactual intention theory of statutory interpretation,"³⁷ asking what the legislature would have intended for a case like *Riggs*.

Judge Earl added that "[b]esides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law."³⁸ According to Judge Earl, these maxims include the rule that "[n]o one shall be permitted [...] to acquire property by his own crime."³⁹ Finally, Judge Earl stated that the same result would hold under the civil law systems of the Civil Code of Lower Canada and the Code Napoleon.⁴⁰

It is not entirely clear from Judge Earl's opinion whether he offered these additional points as further evidence of legislative intent, or rather as independent grounds for disqualifying Elmer as a beneficiary. If the latter, then we might label his interpretive approach "counterfactual intention theory *plus*," with legislative intent the foremost among a hodgepodge of reasons Judge Earl offered for deviating from plain statutory meaning.⁴¹

³³ *Riggs*, *supra* note 30 at 509.

³⁴ *Riggs*, *supra* note 30 at 509.

³⁵ *Riggs*, *supra* note 30 at 509.

³⁶ *Riggs*, *supra* note 30 at 510.

³⁷ Patterson, *supra* note 6 at 272, note 43.

³⁸ *Riggs*, *supra* note 30 at 511.

³⁹ *Riggs*, *supra* note 30 at 511.

⁴⁰ *Riggs*, *supra* note 30 at 513.

⁴¹ This would fit Ronald Dworkin's account of the case. On Dworkin's view, Judge Earl determined that the applicable statutory language had to be read in light of the principle that "no man shall profit from his wrong." According to Dworkin, *supra* note 30 at 41, we argue for such principles and the weight they carry "by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards." In a word: hodgepodge (or "shotgun", as Leiter has it: Brian Leiter, "Explaining Theoretical Disagreement" (2009), *University of*

Of the fundamental maxims of the common law, Judge Earl wrote that they, “without any statute giving them force or operation, frequently control the effect and nullify the language of wills.”⁴² This suggests that the interpretive force of these maxims is independent of legislative intent. On the other hand, Judge Earl argued that law-makers in New York “were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject [of a designated beneficiary murdering the testator].”⁴³ The reason for this omission is that “[i]t was evidently supposed that the maxims of the common law were sufficient to regulate such a case and that a specific enactment for that purpose was not needed.”⁴⁴ Arguably, then, Judge Earl drew on the maxims of the common law and references to the civil law as further evidence of legislative intent.

ii. Interpretive methodologies as organizing principles

Either way, Judge Earl’s opinion illustrates how legal interpretive methodologies function as organizing principles in judicial opinions. That is, judges rely on interpretive methodologies, explicitly or implicitly, for at least two key functions: (i) to identify the legal materials relevant and applicable to the case at hand, and (ii) to assemble these materials in a way that supports a particular legal outcome. I use the term “legal materials” in a broad sense to include such things as statutory and constitutional text, statutory and constitutional structure, legislative intent, legislative history, records of constitutional debates, recorded public meanings of words and expressions, case law precedent, comparisons with other jurisdictions, general policy objectives (e.g., fairness or efficiency), institutional roles (e.g., division of legislative and judicial competence), etc.—all the materials from which common law judicial opinions are regularly built.

In any given case, distinct interpretive methodologies may pick out different legal materials as relevant to the work of legal interpretation. Each interpretive methodology also brings these materials into particular relations with one another, often hierarchical—for instance, by giving priority to legislative intent over plain textual meaning—though often quite hodgepodge, as when a judicial opinion supports a given outcome on various bases, e.g. of legislative intent, statutory language, policy considerations, and precedent, without clearly identifying any one basis as overriding.

The interpretive approach in Judge Earl’s opinion, for instance, identifies relevant legal materials—including statutory language, statutory purpose, maxims of the common law, civil law rules—and organizes these around his (primary) stated aim of determining legislative intent.⁴⁵

Chicago Law Review 76, 1215-1250 at 1233). Dworkin’s distinction between rules and principles is discussed in subsection (2)(b)(ii) below.

⁴² *Riggs*, *supra* note 30 at 512.

⁴³ *Riggs*, *supra* note 30 at 513.

⁴⁴ *Riggs*, *supra* note 30 at 513.

⁴⁵ Judges may certainly adopt interpretive methodologies “opportunistically” (i.e., without any deep commitment to the same methodology across cases) to reach their preferred outcome, as Leiter, *supra* note 41 at 1242-44, suggests Judge Earl likely did in *Riggs*. I also agree with Leiter, *supra* note 41 at 1244-49, that we

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A majority of the court in *Riggs* signed onto Judge Earl's opinion. There was, however, a dissent. The dissent took particular issue with Judge Earl's interpretive approach.⁴⁶

iii. Judge Gray in dissent: what did the legislature *say*?

Judge Gray wrote the dissenting opinion. He insisted that the applicable statutory language was clear and did not authorize courts to disqualify a beneficiary for having murdered the testator. Thus, "the matter does not lie within the domain of conscience. We are bound by the rigid rules of the law, which have been established by the legislature."⁴⁷

Judge Gray accepted that principles of equity and natural justice may "suggest sufficient reasons for the enactment of laws" that would disqualify beneficiaries who commit murder to collect their inheritance.⁴⁸ But they do not authorize a court to deviate from plain statutory meaning. Thus, the interpretive approach taken by the majority failed to respect the legislative role: "The capacity and the power of the individual to dispose of his property after death, and the mode by which that power can be exercised, are matters of which the legislature has assumed the entire control, and has undertaken to regulate with comprehensive particularity."⁴⁹

Judge Gray pointed out that the relevant New York statutes "have prescribed various ways in which a will may be altered or revoked", and that none of these ways applied to the case at hand.⁵⁰ Judge Gray also cited decisions from other courts, including the Kentucky Court of Appeals and the Pennsylvania Supreme Court, holding to the plain meaning of statutes prescribing the circumstances in which a written will may be altered or revoked.⁵¹

Judge Gray accepted that it might well be unjust for Elmer to collect his inheritance. But it belonged to the legislature to change the law accordingly; the court was "not empowered to institute [...] a system of remedial justice" in the face of unambiguous statutory language.⁵²

Moreover, Elmer was already being punished under the criminal law of New York. Thus, the plain statutory meaning may indicate that the legislature left the full weight of punishment for a case like this under criminal law, rather than add consequences for property rights. Judge Gray opened his opinion by noting that Elmer "was tried and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out

should consider possible ideological motivations when faced with apparent interpretive opportunism. But even if judges adopt interpretive methodologies opportunistically in this sense, that very fact shows that they accept that a certain form of interpretive methodology is required in judicial reasoning.

⁴⁶ I do not agree with Leiter, *supra* note 41 at 1232, that the disagreement in *Riggs* is not, at "Face Value," about interpretive methodology. The opinions might not explicitly use terms such as "interpretive methodology" but, as explained throughout this section, there is a clear sense in which their disagreement turns on interpretive methodology.

⁴⁷ *Riggs*, *supra* note 30 at 515.

⁴⁸ *Riggs*, *supra* note 30 at 517.

⁴⁹ *Riggs*, *supra* note 30 at 516.

⁵⁰ *Riggs*, *supra* note 30 at 517.

⁵¹ *Riggs*, *supra* note 30 at 518-519.

⁵² *Riggs*, *supra* note 30 at 517.

his sentence in the state reformatory.”⁵³ He returned to this point in closing his opinion: “In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred.”⁵⁴

Judge Gray’s interpretive approach thus circumscribed statutory language as the focus of legal interpretation, drawing on the institutional roles of the courts and the legislature, and on the functional division between criminal law and property rights, in support of this focus. Where the relevant statutory language is unambiguous, Judge Gray’s approach excludes principles of equity and natural justice from the judge’s task of interpreting the law. I do not agree with Shapiro that Judge Gray insisted on plain statutory meaning “even though this interpretation of the Statute of Wills results in absurdity.”⁵⁵ Judge Gray certainly accepts that his preferred outcome may be *unjust*, but his reasoning makes clear why it is not, on his view, *absurd*.

The majority and dissenting opinions in *Riggs* thus frame their disagreement as a matter of interpretive methodology. This raises the question: are disputes over interpretive methodology *legal* disputes, i.e. disputes about what the law requires? The judges themselves seem to think so, or at least to write as though they do. Is positivism able, then, to provide a satisfactory account of (what appear to be) legal disagreements over interpretive methodology? That is the challenge posed by Dworkin, elaborated by Shapiro, and accepted by Patterson.

b. Mini-recap: The Hart-Dworkin Debate up to Patterson’s Intervention

This subsection offers a very brief review of the most relevant aspects of the Hart-Dworkin debate. Patterson, like Hart, insists on the descriptive character of the positivist project.⁵⁶ It is worth keeping in mind, however, that even a purely descriptive account of law has normative consequences. Such an account, if compelling, provides a basis on which to condemn as “not really law” any interpretive approach that does not conform with the account.⁵⁷ Of course, if an account is descriptively successful, then instances of legal officials adopting non-conforming interpretive methodologies are, by definition, relative exceptions.

⁵³ *Riggs*, *supra* note 30 at 515.

⁵⁴ *Riggs*, *supra* note 30 at 519-520.

⁵⁵ Shapiro, *supra* note 28 at 54, note 55.

⁵⁶ Patterson, *supra* note 6 at 267 and 273, agrees with Hart’s characterization of legal positivism as an exercise in “descriptive sociology.”

⁵⁷ For these reasons, I find it hard to follow the distinction Patterson, *supra* note 6 at 266-267, draws between the descriptive and the normative, or what he also calls “the empirical and the conceptual,” stakes of the debate: “Dworkin and the positivists divide not over the question whether some judge or lawyer is ‘doing law’; rather, their disagreement is over how best to characterize legal practice.” Yet surely any descriptive account of legal practice must generally tell us when someone is or is not “doing law.” Granted, Patterson accepts the actual practice of law as given. Nonetheless, if his account is to escape tautology, it must allow for (and be able to identify) relatively exceptional cases of legal officials acting in ways that fail to accord with his account, even if it is the most accurate overall account of legal practice.

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i. The Rule of Recognition: Distinguishing law from morality

As Patterson notes, “[w]hat Hart described were the conditions under which a rule could be said to be a legal rule and not a rule of some other sort (e.g., a moral rule). The criteria of legal validity are found in the Rule of Recognition.”⁵⁸ As noted earlier, the rule of recognition (“RR”) itself is neither valid nor invalid but provides the ultimate criteria of legal validity and “imposes a duty on judges to apply valid legal rules”.⁵⁹ This duty “is not a function of morality. Rather it identifies the perception or attitude (Hart calls it the ‘internal point of view’) officials take to the Rule of Recognition.”⁶⁰ For a legal system to function, there must, as a matter of socio-political fact, exist among legal officials both sufficient consensus on the contents of the RR and sufficient acceptance of its legitimacy.

ii. Dworkin’s initial critique: Legal principles and the weight they carry are not established by pedigree

Dworkin argued in his initial critique of Hart that a focus on “pedigree” to determine legal validity makes nonsense of legal disagreements in “hard cases” (or what Dworkin later called “theoretical disagreements”⁶¹). Dworkin initially understood Hart’s positivism to include only all-or-nothing legal rules such that any valid rule, e.g., that the speed limit on a particular highway is 60 mph, automatically answers the range of legal questions to which it applies, e.g., whether a driver going 65 mph on that highway is breaking the speed limit.

Yet the dispute in *Riggs* does not turn on the validity of any such a rule. For one thing, cases like *Riggs* are not decided by all-or-nothing rules. “In *Riggs*,” rather, “the court [i.e., the majority] cited the principle that no man may profit from his wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute.”⁶² Even if this principle might be established by precedent as a common law maxim, Dworkin argues that the case-by-case application of such principles remains flexible, dependent on context, and allows of so many exceptions, that courts will necessarily have recourse, in assessing the weight to be accorded the principle in given cases, “to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings.”⁶³

iii. Inclusive positivist response: the RR may validate moral considerations as legal principles

Positivists, however, reject Dworkin’s narrow conception of rules. As Patterson notes, Hart accepted “that in some systems of law, as in the United States, the ultimate criteria of legal validity [i.e., the RR] might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional

⁵⁸ Patterson, *supra* note 6 at 267.

⁵⁹ Patterson, *supra* note 6 at 268.

⁶⁰ Patterson, *supra* note 6 at 268, note 27.

⁶¹ See Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press 1986).

⁶² Dworkin, *supra* note 30 at 29.

⁶³ Dworkin, *supra* note 30 at 37.

restraints.”⁶⁴ Such principles include, e.g., the guarantee of “equal protection of the laws” enshrined in the Fourteenth Amendment of the US Constitution and “the right to the equal protection and equal benefit of the law” promised in section 15 of the *Canadian Charter of Rights and Freedoms*.⁶⁵

The proper interpretation and application of such principles is not always clear. Judges engage in extensive debate over the meaning of provisions like “equal protection.”⁶⁶ Judicial debate over principles of justice and morality accords with inclusive positivism so long as some source of law, either belonging to the RR or whose validity is itself confirmed by the RR, directs or allows legal officials to apply such open-textured moral principles. For instance, the Fourteenth Amendment directs judges to interpret and apply the notion of “equal protection” and, as part of the US constitution, the Amendment belongs to (or flows directly from) the RR of the US legal system. The RR may also indirectly validate moral principles through their incorporation in valid legislation or common law precedent.

In this way, inclusive positivism arguably accounts for disputes of the kind we see in *Riggs*. After all, Judge Earl argues that “[n]o one shall be permitted [...] to acquire property by his own crime” is a fundamental maxim of the common law, thus affirming its pedigree as common law precedent. Judge Gray in dissent does not challenge the validity of this maxim, but rather rejects the possibility that such maxims may authorize the court to add to Elmer’s criminal punishment by denying his inheritance. Seen from this angle, the majority and dissent are arguably engaged in a disagreement over the proper interpretation of a principle whose validity is established by precedent—a disagreement captured by inclusive positivism.

- iv. Refining Dworkin’s critique: the choice between interpretive methodologies cannot be reduced to the interpretation of open-ended principles

However, as Shapiro explains, there is another angle to Dworkin’s characterization of such disagreements. For the disagreement in *Riggs* is not merely about the proper application of an open-ended principle. Rather, as we saw in subsection (2)(a) above, the dispute over proper interpretive methodology includes disagreement as to which principles (and other sources of law) may properly inform the work of legal interpretation in the first place, the weight each is to be given, and the proper ways of relating these principles and other sources to one another. Should common law maxims inform statutory interpretation in the first place, and even carry sufficient weight to displace a literal reading of statutory text? How should the institutional role of the courts be weighed, or the functional division between criminal

⁶⁴ Patterson, *supra* note 6 at 264, note 12.

⁶⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁶⁶ Dworkin, *supra* note 30 at 25-26, highlights various ways in which the principle “no man shall profit from his wrong” is similarly open to legal interpretation.

law and property rights? These questions are so many ways of asking for the relevant “grounds of law”⁶⁷ and how these should be organized to produce a valid legal judgment.

Riggs turns on such questions, if we take the judges’ words for it.⁶⁸ The competing interpretive methodologies of the majority and dissent disclose different grounds of law and proceed to arrange these grounds in distinct ways. In other words, the disagreement in *Riggs* is not really about the proper application of an open-ended principle, but rather about the kinds of considerations (e.g., judicial versus legislative roles, or the respective functions of criminal law and property rights) that judges use to disclose relevant grounds of law and to arrange these grounds in support of a given outcome.⁶⁹ Disagreements over broad organizing methodologies thus do not reduce to disagreements about the proper application of an open-ended principle validated by the RR.

Shapiro is right that when we see Dworkin’s critique from this angle, we better appreciate the challenge it presents to legal positivism. The heart of legal positivism is a claim that the RR governs legal officials’ application of valid law. The choice of interpretive methodology is at the heart of judicial reasoning (and thus application of law) in cases like *Riggs*. If legal positivism hopes to capture such judicial reasoning *as legal reasoning*, it must therefore provide an account of how the RR determines the choice of legal interpretive methodologies.

Of course, legal positivists need not provide an account that would settle *every* dispute over interpretive methodology, nor even capture every such dispute as a genuine legal disagreement. In discussing *Riggs*, Leiter, for one, concludes that if “officials in the New York legal system at the time of *Riggs* did not converge upon either the counterfactual intention theory of statutory meaning or the plain meaning theory [...] then, on the positivist view [...] there is no fact of the matter about which criterion of legal validity is correct.”⁷⁰ On Leiter’s view, the majority and dissent in *Riggs* might well have been arguing *as though* they were declaring, not making, law. But that is simply what judges and lawyers do when “the law runs out.”

Patterson counters that “there is more to the positivist approach to interpretation in law than Leiter allows”⁷¹ and he regrets the fact that “Leiter says nothing about a positivist

⁶⁷ Dworkin’s term, helpfully explained by Shapiro, *supra* note 28 at 36-41. For purposes here, it is roughly equivalent to “valid sources of law.”

⁶⁸ As indicated *supra* note 45, this certainly does not rule out interpretive opportunism. I am interested here in the interpretive methodologies actually used, not the judges’ motivations for using them.

⁶⁹ The considerations that a judge uses to disclose relevant grounds of law may themselves figure in the grounds of law the judge uses to reach a decision. For instance, in *Riggs* Judge Gray drew on the functional division between the judiciary and legislature to disclose the paramount importance of statutory text as a ground of law in that case. He did not present this functional division itself as a ground of law. However, he might have pointed to constitutional provisions on judicial and legislative functions to argue that this division is itself established as a ground of law.

⁷⁰ See Patterson, *supra* note 6 at 272, note 43, quoting Brian Leiter, “Theoretical Disagreements in Law: Another Look” in *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence*, edited by David Plunkett, Scott Shapiro, and Kevin Toh (New York: Oxford University Press, 2019), 249-262. See also Leiter, *supra* note 41 at 1223.

⁷¹ Patterson, *supra* note 6 at 272.

account of legal interpretation.”⁷² Yet, as Patterson notes, even Leiter agrees that a positivist account must at least resolve *some* disagreements over interpretive methodology.⁷³ Similarly, Shapiro argues that positivism must at least make such disagreements *intelligible* as legal disagreements, and “rule out some interpretive stances” even if it does not always “determine a unique methodology.”⁷⁴

After all, legal positivism must provide an account with at least *some* explanatory power to discriminate between valid and invalid interpretive methodologies. Otherwise, it cannot account for the (apparent) legal reasoning of judges in the many cases, like *Riggs*, where interpretive methodology is a central issue.

Patterson uses *Riggs* as a foil to develop his account of legal interpretation. His aim is neither to develop an account that will explain only the specific dispute in *Riggs*, nor one that will resolve every possible dispute over interpretive methodology, but rather to provide the broad lines of an account that will *make sense* of such disputes on positivist terms and resolve at least some of them. As Patterson writes, “[w]hile I acknowledge that more work needs to be done, I do believe the *Riggs* opinion is sufficient to identify the basic contours of a positivist account of interpretation.”⁷⁵ With that purpose in mind, the next subsection turns to Patterson’s account of legal interpretation.

c. In Patterson’s account, diffuse “social facts” replace secondary rules as the building blocks of the RR

Patterson makes two key moves in developing his account of legal interpretation. First, he distinguishes the mundane *practice* of law, grounded in pervasive agreement about what the law is and how to carry out legal tasks, from the relatively exceptional situations in which *interpretation* is needed to determine what the law is and how affected parties may proceed, situations that might require judicial resolution.⁷⁶

Second, Patterson argues that the RR not only “identifies what count as valid sources of law” but “also contains the conventional ways of construing those sources to decide cases.”⁷⁷ The crucial word here is *conventional*, for it bridges Patterson’s two key moves: the RR contains interpretive methods that are themselves grounded in the pervasive agreement (embodied in conventions, practices) that defines the world of legal practice. Interpretive methodology is thus located in the legal profession’s conventional ways of construing legal sources—it is part of what legal officials *do*, normally without reflection or any need to interpret this activity of construing. This grounding of legal interpretation in convention is meant to secure the positivist character of Patterson’s account, as explained in detail below.

⁷² Patterson, *supra* note 6 at 263, note 9.

⁷³ Patterson, *supra* note 6 at 270, note 36.

⁷⁴ Shapiro, *supra* note 28 at 49.

⁷⁵ Patterson, *supra* note 6 at 272, note 42.

⁷⁶ Patterson, *supra* note 6 at 267.

⁷⁷ Patterson, *supra* note 6 at 267.

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Exceptionally, as in the case of *Riggs*, facts arise that make it difficult or impossible to carry out normal legal practice without reflecting on the conventional ways of construing relevant legal sources. In *Riggs*, Elmer murdering his grandfather in order to collect his inheritance forced the legal system to reflect on the usual practice of enforcing wills in accordance with a plain reading of applicable New York statutes. Carrying on as normal was impossible, for it would have resulted in “rewarding” Elmer for murder—this fact could not help but slap legal officials in the face and give pause for reflection. As Patterson writes, “a straightforward reading of the requisite statute was all but impossible.”⁷⁸

Patterson makes sense of the ensuing judicial disagreement in *Riggs* by asking which opinion more convincingly followed the conventional ways of construing legal sources. In Patterson’s terms, it was the majority who more convincingly embodied “the intersubjective consensus manifested in the ongoing practice of [legal] officials.”⁷⁹ On Patterson’s account, the disagreement in *Riggs* over proper interpretive methodology is thus really about existing conventions, i.e. “social facts”, and how to resolve the case in a way that best expresses the intersubjective consensus already contained in these conventions.

There are two major difficulties with Patterson’s account. First, when disputes about interpretive methodologies arise, judges appeal not only to what existing legal practice *is* but also to what it *should be*—either by offering justification for the law as (they claim) it is or by arguing that it should be developed in a particular direction. The majority and dissent in *Riggs* each appeal to precedent and existing practice, of course. But they also appeal to a sense of fairness, justice, institutional role, public morality—in short, to “a sense of appropriateness developed within the legal profession and the public over time.”⁸⁰ Patterson’s account does not deny this point so much as try to accommodate it by arguing that all these things—sense of fairness, justice, institutional role, and sense of appropriateness—already belong to the world of shared legal practice. That is, the “social facts” of the legal profession are such that these things belong as a matter of course to the work of legal interpretation.

Yet here we run into the second difficulty with Patterson’s account: if a positivist account makes the RR as accommodating as all that, then the defining features of legal positivism are blurred. If, on a positivist account, the interpretive methodologies of judges include—as a matter of *shared practice*, of *custom*, rather than, e.g., of statutory or constitutional authorization—considerations of professional and public morality, then we have dissolved much of the Hart-Dworkin debate.

That is, Patterson develops Hart’s “descriptive sociology” in such a way that the building blocks of the RR are no longer secondary *rules* but diffuse “social facts” that seem to accommodate every consideration of professional appropriateness and political morality that

⁷⁸ Patterson, *supra* note 6 at 271.

⁷⁹ Patterson, *supra* note 6 at 267.

⁸⁰ Dworkin, *supra* note 30 at 41.

Dworkin argues a judge might weigh in the work of legal interpretation. The following subsections explain in greater detail these two difficulties in Patterson's account.

- i. Patterson's line between practice and interpretation wavers when applied to *Riggs*

Patterson begins from the fact that the daily work of lawyers, judges, and other legal officials belongs to a shared world of practice, characterized by overwhelming consensus.⁸¹ As Patterson writes, "disagreement can only occur against the background of pervasive agreement in judgment. Thus, Dworkin starts in the wrong place" by grounding his account of law on disagreement and the need for legal interpretation to resolve it.⁸²

Patterson is categorical about the grounding of the RR in shared practice. He writes that "[a]s an ultimate rule [of legal validity], the Rule of Recognition rests *only* on an intersubjective consensus manifested in the ongoing practice of officials." He insists that "the criteria of legal validity are *simply* a matter of an intersubjective practice among legal officials." "In other words," Patterson adds, "the validity conditions for legal propositions [...] achieve their status *solely* in virtue of the ongoing willingness of officials in the legal system to recognize them as such."⁸³

Patterson offers a further gloss on this point: "Positivists have focused on valid sources of law and have concluded, rightly, that validity is a function of intersubjective agreement. The constitution is law because everyone regards it as such. Validity is best explained as a psychosocial phenomenon."⁸⁴

This last quotation is revealing in its slide from validity as "a *function* of intersubjective agreement" to validity *as* intersubjective agreement ("as a psychosocial phenomenon"). The latter formulation elides the distinct *functions* of primary and secondary rules, indeed of the RR itself. For Hart, legal officials' *acceptance* of the rules forming the RR is, indeed, merely a matter of intersubjective agreement; as such, these rules are neither valid nor invalid. However, *validity* is not merely a matter of intersubjective agreement or of consensus manifested in practice. Validity, rather, is a matter of satisfying secondary rules (either those contained in the RR or ones that are themselves ultimately validated by the RR). In this way, secondary rules mediate between the "psychosocial phenomenon" of acceptance (or the *political fact* that legal officials accept the secondary rules in the RR as the ultimate criteria of legal validity) and legal validity. It is this mediating role of secondary rules that, in Hart's account, distinguishes *legal* rules from other social rules (e.g., of morality, etiquette, religion).

⁸¹ Patterson, *supra* note 6 at 269, quoting Leiter, *supra* note 41 at 1227, insists that "there is *massive* and *pervasive* agreement about the law throughout the system" and that "[m]uch of the lawyer's work involves no sort of 'interpretation' or 'theory' whatsoever."

⁸² Patterson, *supra* note 6 at 268-269.

⁸³ Patterson, *supra* note 6 at 267, for all three quotations in this paragraph; italics added here in each case.

⁸⁴ Patterson, *supra* note 6 at 273.

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I agree with Patterson that, on any plausible positivist account, legal officials' interpretation and application of the rules comprising the RR necessarily *rest* on a shared world of practice, technique, and convention. Yet, it is another thing altogether to *identify* these rules *directly with* the shared practices, techniques, and conventions of legal officials. To do so largely collapses the distinction between legal rules and other social conventions, a distinction that lies at the heart of legal positivism.

The next subsection returns in greater detail to this point, i.e., to whether Patterson's identification of the criteria of legal validity with shared conventions ultimately undoes the positivist character of his account. Let us turn for the moment to Patterson's discussion of *Riggs*, where he puts to explanatory work his distinction between, on one hand, "the intersubjective consensus manifested in the ongoing practice of legal officials" and, on the other hand, the need for legal interpretation that arises exceptionally when normal practice is interrupted (e.g., by novel facts).

As I read Patterson's analysis of *Riggs*, the line he draws between practice and interpretation wavers. On the one hand, he argues that Judge Earl's opinion is, on its own merits, a more persuasive interpretation of the law. This suggests that Judge Earl's opinion would have been the correct (or at least better) articulation of existing law, *even if* it had failed to attract a majority of the court. On the other hand, Patterson seems to argue that the *very fact* that a "vast majority" of the court agreed with Judge Earl shows (or means?) that Judge Earl's opinion embodied the intersubjective consensus expressed in the ongoing practice of legal officials. After all, if a majority of the court adopts a given interpretive approach, does that not necessarily make it part of the ongoing practice of legal officials and therefore, on Patterson's analysis, part of the RR?

The obvious problem with answering "yes" is that it reduces Patterson's analysis to tautology—the majority's interpretive approach belongs to the RR because it belongs to the ongoing practice of legal officials because it was adopted by a majority of the court. By the same token, it undermines Patterson's argument that Judge Earl's opinion attracted a majority because it was, on its merits, a persuasive argument. In brief, Patterson seems undecided whether Judge Earl's interpretive approach belongs to the RR because it is a more persuasive *interpretation* of the law, or simply because it was the *actual practice* adopted by a majority. The following paragraphs unpack these two sides of Patterson's analysis in more detail.

On one hand, Patterson stresses the *persuasiveness* of Judge Earl's argument, finding that "[t]he majority opinion in *Riggs* is a sophisticated doctrinal argument." Judge Earl's opinion "begins in classic fashion with the distinction between law and equity," on the basis of which it shows "how the 'no man shall profit from his own wrong' principle is a constitutive feature of law in the most general way." Judge Earl then "made a strong case for the proposition that precedents both directly on point (that is, the law of wills), as well as those from related

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departments of law, support an exception to the ordinary meaning of the words of the statute.”⁸⁵ In short, Patterson finds Judge Earl’s opinion convincing.

As Patterson next points out, Judge Gray argued in dissent “that the court was ‘bound by the rigid rules of the law’” and that “Elmer is being twice punished for this offence.”⁸⁶ Patterson disagrees:

In a clever rebuttal to Judge Gray, the majority pointed out that he begged the question of whether Elmer was entitled to receive his victim’s property under the will. The point was that the very question before the court was whether the property rightfully belonged to Elmer or not. Judge Gray did not seem to notice his error.⁸⁷

Yet Judge Gray did not beg the question any more than the majority did. Judge Gray clearly understood that the question before the court was whether the property rightfully belonged to Elmer. On Judge Gray’s interpretive approach, that question had to be settled by applying the plain meaning of the statutory language adopted by the legislature. For the court to do otherwise was, in Judge Gray’s view, to trespass on the proper domain of the legislature, and to confuse the functions of criminal law and property rights. It *follows* from this interpretive approach that the property in question *did* lawfully belong to Elmer. Judge Gray answered the question before the court by insisting on plain statutory meaning. Having adopted this approach, he explained that the majority’s decision effectively punished Elmer twice—once according to the criminal law, and a second time by denying him the inheritance he was due according to a plain statutory reading. We might disagree with Judge Gray’s interpretive approach, but this does not mean he begged the question of whether the property at issue in *Riggs* rightfully belonged to Elmer.

Patterson, of course, does disagree with Judge Gray’s interpretive approach, as did a majority of the court in *Riggs*. “How,” Patterson asks, “did Judge Earl persuade enough of his colleagues to see the law as he did? Three factors suggest themselves.”⁸⁸ Patterson extracts three interpretive norms from Judge Earl’s opinion, concluding that “minimal mutilation, coherence, and generality are the three aspects of the majority’s opinion that support the notion that its interpretation of the law is more persuasive than that offered by the dissenting opinion.”⁸⁹

Suppose we accept Patterson’s conclusion that these three interpretive norms fairly capture the aspects of Judge Earl’s opinion that a majority of the court found persuasive. How would this support a positivist account of the disagreement in *Riggs*, and of its resolution in favor of the majority opinion? It is at this point, when Patterson asks what “we learn about legal interpretation from the *Riggs* case,” that he shifts from a focus on the

⁸⁵ Patterson, *supra* note 6 at 271 for all quotations in this paragraph.

⁸⁶ Patterson, *supra* note 6 at 271.

⁸⁷ Patterson, *supra* note 6 at 271-272.

⁸⁸ Patterson, *supra* note 6 at 272.

⁸⁹ Patterson, *supra* note 6 at 272.

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persuasiveness of Judge Earl's opinion to an emphasis on the "social fact" that a "vast majority" of the court was in agreement.⁹⁰ He writes:

Legal judgment proceeds from the intersubjective application of the same methods of appraisal across time, in various contexts, and with identical outcomes. *Agreement in judgment is both the central fact of legal practice and the most important social fact that any account of law must explain.*⁹¹

Given Patterson's focus on agreement as "the central fact of legal practice," it is significant that Judge Earl himself referred to precedent, decided just one year prior to *Riggs*, that adopted the interpretive approach preferred by Judge Gray: *Owens v Owens*, 100 NC 240 (1888). While *Riggs* and *Owens* are from different jurisdictions (and contain somewhat different fact patterns) and therefore in principle involve different RRs, Judge Earl expressly denied that any difference between the laws of North Carolina and those of New York (or between the facts of the two cases) justified the different outcomes. He flatly stated that the Supreme Court of North Carolina got *Owens* wrong.⁹²

It seems implausible to say that the best explanation of the disagreement over interpretive approach in cases like *Riggs* and *Owens* is that judges in majority are manifesting a psychosocial phenomenon of intersubjective consensus reflecting the existing RR, while those in dissent are, presumably, not clued into that consensus. At a minimum, in order to determine whether the majority (or dissent) in any given case is articulating an existing consensus, we have to evaluate the argument of the majority (or dissent) against the criteria contained in that existing consensus, as best we can make them out. In other words, we have to engage in legal interpretation, rather than simply pointing to an alleged fact of consensus. Patterson's own analysis of *Riggs* suggests as much when stresses the persuasive character of Judge Earl's opinion: "There has to be a reason why the majority opinion was *so persuasive* to the other members of the New York Court of Appeals. The best explanation for this is that there are features of the majority opinion which attracted the assent of the vast majority of the court."⁹³

Presumably, then, Patterson ought to reject the decision of the Supreme Court of North Carolina in *Owens*, because he finds Judge Earl's opinion more persuasive than Judge Gray's (which lines up with the *Owens* court). As noted, however, in explaining the *positivist character* of his account, Patterson insists, not on the persuasiveness of Judge Earl's opinion, but on the *fact* that there is intersubjective agreement: "My contention is that once these factors are identified, *it becomes clear that there is intersubjective agreement on matters of interpretation* just as there is when it comes to valid sources of law. These interpretive methods are just as much a part of the Rule of Recognition as valid sources of law."⁹⁴

⁹⁰ Patterson, *supra* note 6 at 272.

⁹¹ Patterson, *supra* note 6 at 272-273 (italics added).

⁹² *Riggs*, *supra* note 30 at 514.

⁹³ Patterson, *supra* note 6 at 273 (italics added).

⁹⁴ Patterson, *supra* note 6 at 273 (italics added).

Patterson might look to reconcile these two sides of his analysis by saying that a majority of the *Riggs* court was persuaded by Judge Earl's opinion *because* it accorded with the existing consensus and shared legal practice.⁹⁵ What then to make of the fact that the opposing position carried the day in North Carolina? Does that very fact indicate, contrary to Judge Earl's own reasoning, that the law of North Carolina diverged in relevant ways from the law of New York? What if a majority of the court in *Riggs* had found the reasoning in *Owens* more persuasive, and had therefore agreed with Judge Gray? Would that mean that Judge Gray's opinion manifested the intersubjective consensus and interpretive methodology *already contained in the RR*?

For that is the upshot of Patterson's argument. He is not simply arguing that whenever a majority of a court settles on an interpretive method, that majority embodies intersubjective consensus. The success of Patterson's argument turns on the claim that such intersubjective consensus *reveals* or *confirms* the interpretive method that *already* belongs to the RR. As Patterson writes: "In short, Judge Earl did not change the law: He clarified it (by pointing to an underlying and well-established legal principle)."⁹⁶

In sum, Patterson presents the reader with two distinct lines of reasoning to support the claim that Judge Earl was clarifying, not changing the law: (i) the persuasiveness of Judge Earl's opinion, and (ii) the fact that a "vast majority" of the *Riggs* court signed onto Judge Earl's opinion. The second of these lines, "the intersubjective agreement on matters of interpretation," is what ultimately grounds the positivist character of Patterson's account. If the view put forward by Judge Gray had succeeded in attracting a majority of the court, as it carried the day in *Owens*, then Patterson's account would have to begin from *that* fact of intersubjective consensus. For "[a]greement in judgment is both the central fact of legal practice and the most important social fact that any account of law must explain."⁹⁷

Patterson is surely right that "disagreement can only occur against the background of pervasive agreement in judgment."⁹⁸ However, if we adopt the view that whatever consensus (or majority) emerges in the case-by-case evolution of legal interpretation necessarily confirms or reveals what that consensus *already is*, then we are at the very least verging on tautology. More significant for present purposes, such a view erases the defining features of legal positivism as a theory of law, a point further fleshed out in the following subsection.

ii. Interpretive methods as customary practice: what remains of legal positivism?

As noted above, Patterson argues that "[v]alidity is best explained as a psychosocial phenomenon."⁹⁹ Subsection (2)(c)(i) above noted how this statement seems to erase the

⁹⁵ This would fit with the position of Shapiro, *supra* note 28, which I address in subsection (2)(d) below.

⁹⁶ Patterson, *supra* note 6 at 271.

⁹⁷ Patterson, *supra* note 6 at 272-273.

⁹⁸ Patterson, *supra* note 6 at 268-269.

⁹⁹ Patterson, *supra* note 6 at 273.

distinctive role played by secondary rules. Yet this role is at the heart of positivism as a theory of law, as the basis on which positivism distinguishes legal rules from other social rules.¹⁰⁰

On the positivist account of law, we can always trace legal validity back to rules in the RR that are “law because everyone [or at least a critical mass of legal officials] regards [them] as such.”¹⁰¹ We might say that legal officials’ shared practices, techniques, and conventions *organize* or *structure* their shared acceptance of these ultimate rules. However, that is quite different from saying that their shared practices, techniques, and conventions *are* the rules comprising the RR. Yet the identification of validity (including proper interpretive methodology) with “the intersubjective consensus manifested in the ongoing practice of legal officials”¹⁰² *is the central feature* of the account of legal interpretation that Patterson develops.

Notably, Patterson’s proposal is entirely consistent with Dworkin’s claim that when a judge “fixes legal rights,” ideally that judge “has already taken the community’s moral traditions into account, at least as these are captured in the whole institutional record that it is his office to interpret.”¹⁰³ Patterson’s response seems to be: if judges do, as a matter of fact, generally consider a community’s moral traditions in their practice of legal interpretation, then by that very fact such consideration of moral traditions belongs to the RR, thereby securing a positivist basis for considerations of public morality in legal interpretation.

In a footnote quoting A.W.B. Simpson, Patterson himself registers this blurring of lines between positivism and other accounts of law:

A. W. B. Simpson [...] said it best: “[T]he common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers [...]. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, *just as customary practices may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and by precept as membership of the group changes.*” It is, of course, ironic that such a wonderful description of the actual practice of law is found in a work that purports to show the shortcomings of legal positivism.¹⁰⁴

On my reading of Patterson’s argument, the irony here would rest on legal positivism abandoning its core tenet, the careful delineation of functions for primary and secondary rules, particularly the ultimate rules making up the RR. If we identify legal validity directly with customary practices as Patterson suggests, then we blur the distinctive nature of legal

¹⁰⁰ Patterson, *supra* note 6 at 267, himself underscores this point.

¹⁰¹ Patterson, *supra* note 6 at 273,

¹⁰² Patterson, *supra* note 6 at 267.

¹⁰³ Ronald Dworkin, “Hard Cases” (1975), 88 *Harvard Law Review* 6, 1057-1109 at 1104.

¹⁰⁴ Patterson, *supra* note 6 at 267, note 26 (italics added).

rules, as defended by positivism. The passage italicized in the above quotation clearly expresses this assimilation of the nature of legal validity to that of other social norms.

Patterson's account of legal interpretation, to its credit, does not seek to minimize the complexity of interpretive methodologies as organizing principles in judicial reasoning. Patterson sees this complexity embedded in the rich world of shared legal practice. However, identifying the validity of interpretive methodologies directly with shared customs threatens to undermine the positivist character of Patterson's account by eliding the functions of primary and secondary rules.

Moreover, Patterson's account veers towards tautology by seeming to insist that when a court majority adopts a given interpretive methodology, that very fact reveals an already existing consensus, which must form the starting point of positivist analysis. Ironically, this faith in an existing consensus produces a variation on Dworkin's faith in an existing coherent political morality that supports, in principle, a correct legal resolution for every legal disagreement.¹⁰⁵ Both approaches notably fail to account for the prevalence of legal ideological division. The fact that disagreement only becomes intelligible against a background of agreement does not preclude the possibility that those disagreements that do arise may assume recognizably ideological patterns.¹⁰⁶

Indeed, ideological division is a particularly striking feature of disagreements over interpretive methodologies, e.g., originalism versus living constitutionalism, textualism versus purposivism. Accounting for ideological division, and for whether a legal system's interpretive tools can accommodate and manage such division, may therefore require drawing on resources from beyond the Hart-Dworkin debate.¹⁰⁷ I return to this point in conclusion in section (3) below. First, the next subsection considers Shapiro's proposal for a positivist account of legal interpretation.

d. *Shapiro: interpretive methodology should track the intent of the "legal system's designers"*

The potentially decisive role of interpretive methodology in determining legal outcomes explains why Patterson and Shapiro insist that positivism must provide some account of how social facts ground judicial choice between interpretive approaches. As explained above, Patterson's solution is to characterize judicial choice of interpretive methodology as a *manifestation* of social facts—namely, a manifestation of the intersubjective consensus existing between judges (at least between those in majority), rather than as the outcome of legal interpretation. In this way, Patterson seems to foreclose questions of how social facts

¹⁰⁵ Dworkin's faith arguably goes further by affirming that correct answers exist not only relative to each legal system, but that "good law" is ultimately determined according to an absolute (liberal) political morality. See David Dyzenhaus, "The Rule of Law as the Rule of Liberal Principle" in *Ronald Dworkin*, edited by Arthur Ripstein (New York: Cambridge University Press, 2007), 56-81.

¹⁰⁶ See Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, MA: Harvard University Press, 1997).

¹⁰⁷ Perhaps, as Dyzenhaus, *supra* note 105, suggests, this may also require greater care in distinguishing theories of law from theories of adjudication.

might form the basis of, or part of the content of, legal disagreement between judges over proper interpretive method. Patterson focuses directly on a purported social fact *of* consensus, rather than on social facts as a basis for legal interpretation that might lead to consensus *about* social facts.

By contrast, Shapiro takes the latter tack. He suggests that legal positivists should look to social facts as the *subject matter* of judicial disputes over interpretive methodology. According to Shapiro, “[t]he proper methodology for a particular legal system would be the one that best harmonizes with the ideological objectives of those who designed the current system, regardless of the moral palatability of their ideology.”¹⁰⁸ On this view, “proper interpretive methodology is grounded in social fact because the specific purposes of a legal system are matters of social fact.”¹⁰⁹

If judges accepted Shapiro’s proposal, they might still disagree about interpretive methodology, but they would be disagreeing about which interpretive method best harmonized with the “ideological objectives” of the legal system’s designers, as reflected in the institutional structure of the legal system and perhaps in other expressions of designers’ intent (e.g. statements made by the designers at constitutional conventions). Judges would at least agree about what they are disagreeing about: how best to interpret social facts relevant to determining the intent of the legal system’s designers. Shapiro’s proposal is thus positivistic because “it roots interpretive methodology in social facts.”¹¹⁰

Yet the justification Shapiro offers for his proposal does not appear to be positivistic, i.e. does not appear to be grounded in social facts, but is presented as a matter of general political theory or morality. In other words, Shapiro’s positivist account of interpretive methodology does not stick to the purely descriptive mode advocated by Hart. Instead, Shapiro provides an argument about how judges *ought to* engage in legal interpretation. This is in the mould of the reform projects of Hobbes and Bentham and the judicial positivism described by Dyzenhaus, which argues that judicial interpretation *ought to* focus on assessing sovereign intent and to refrain from moral reasoning when interpreting the law.¹¹¹ As Shapiro writes:

It should be emphasized that the reason to privilege the objectives of legal designers in legal interpretation is not simply motivated by the desire to answer Dworkin’s objections. More importantly, deference to the ideology of designers is necessary if designers are to do their job, *which is to settle questions about which specific objectives the group should pursue*.¹¹²

[...]

Once it is recognized that legal designers play this “settling” function, one can see why their resolutions concerning particular ends and values must be privileged when ascertaining interpretive methodology. For if members of the

¹⁰⁸ Shapiro, *supra* note 28 at 45.

¹⁰⁹ Shapiro, *supra* note 28 at 45.

¹¹⁰ See *supra* note 6.

¹¹¹ See section 3 of chapter 1.

¹¹² Shapiro, *supra* note 28 at 45 (italics in original).

group are permitted to engage in moral and political philosophy to determine the proper justification for legal practice, they would effectively unsettle these matters. We might say that accounts of legal interpretation such as Dworkin's defeat the purpose of having legal authorities – they allow subjects to reopen the questions that authorities resolved by designing a legal system. After all, the judgments of designers are just more fodder for constructive interpretation. Their judgments will receive only the amount of deference that the Dworkinian interpreter deems to be morally appropriate in the light of current practice. To make that judgment, the interpreter will be forced to engage in abstract philosophical reflection and confront questions that have baffled humanity for the past few millennia.¹¹³

How might Shapiro's proposal work in a case like *Riggs*? Or cases like *Calder* or *Guerin* or *Caron*? In *Calder* and *Guerin*, the relevant system designers would include those who crafted the *Royal Proclamation of 1763*,¹¹⁴ as well as those who crafted the *British North America Act, 1867*.¹¹⁵ The ideological objectives of the former seem not only different but contrary in many respects to those of the latter. The introduction and chapters 1 and 2 reviewed both (1) the legal pluralism inherent in the *Royal Proclamation's* regime of voluntary land surrenders and in early treaty relationships (including the Treaty of Niagara designed to reach Indigenous-Crown agreement on elements of the *Royal Proclamation*¹¹⁶) and (2) the disregard for Indigenous self-government that accompanied the *British North America Act, 1867*, particularly legislation adopted under section 91(24) that aimed to civilize and assimilate Indigenous peoples to Euro-Canadian society. Adoption of the *Constitution Act, 1982*,¹¹⁷ recognizing Aboriginal and treaty rights in section 35, add a further layer of constitutional sedimentation.

Shapiro insists that the legal system's designers include not only the founders but also those who designed constitutional amendments. We should therefore take into account shifting ideological commitments reflected in formal constitutional amendments. What, however, if we are bequeathed a legacy of conflicting ideological commitments? Canadian Aboriginal law, as examined in the Introduction and chapters 1 and 2, involves long-running tension between positivist commitments to state authority to the exclusion of Indigenous legal orders, on the one hand, and pluralist commitments to a legal landscape that accommodates both state-derived legal authority and the legal authority inherent in Indigenous legal orders. In different historical periods, as we have seen, dominant social and political imaginaries may tend to push the courts further in one ideological direction or the other.

¹¹³ Shapiro, *supra* note 28 at 46.

¹¹⁴ *Supra* note 19.

¹¹⁵ Since renamed the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

¹¹⁶ See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in *Aboriginal and Treaty Rights in Canada*, edited by in Michael Asch (Vancouver: UBC Press, 1997), 155-172.

¹¹⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

It is understandable that judges sympathetic to an institutional positivist interpretive approach emphasize positivist commitments found in our constitutional history, while those sympathetic to a pluralist interpretive approach emphasize pluralist commitments. We should also expect that these contrasting approaches will continue to exist alongside one another and evolve in ongoing tension in Canadian law. In this context, would it be plausible to hold that a single coherent interpretive methodology is bequeathed to us as a matter of social fact alone? If we wish to draw out a functionally coherent interpretive thread from our constitutional history, we may inevitably have to take some initial orientation from our own present ideological commitments. There will be variability in our individual present ideological commitments, but there may also be evolving consensus on certain ideological commitments. The preceding chapters have examined the current ideological transition away from a period of state commitment to civilizational hierarchy and the resulting transformations in Canadian Aboriginal legal doctrine. Judges, like the rest of us, will show some variability in their individual ideological commitments, but this variability will be embedded within the broader social and political imaginaries of our day that necessarily inform our understanding of the history of Indigenous-state relations.

In other words, some baseline of ideological commitments may be required in order to structure *any* reading of our constitutional history, in order to make constitutional history *legible* to us in the first place.¹¹⁸ Consider again the SCC's repudiation in *Simon* of notions of civilizational hierarchy, notions that had previously supported the view that Indigenous-Crown treaties were not legally enforceable.¹¹⁹ As a matter of social fact, those now-repudiated ideological commitments shaped, over a considerable period of time, a significant aspect of the design of our legal system, and therefore also shaped a great deal of Canadian Aboriginal legal doctrine that our legal system has inherited. In *Simon*, however, the SCC states that such ideological commitments are now morally repugnant and cannot be made to cohere with other ideological commitments (e.g. those now grouped under the "honour of the Crown") found, also as a matter of social fact, in our constitutional history. In a previous era, we may not have viewed these contrasting ideological commitments as irreconcilable, but our current social and political imaginaries now cast them in that light. The change in perspective is not a matter of a more accurate grasp of relevant social facts, divorced from moral reasoning about them. The change is in significant part a function of the ideological transition we are currently living through, and judges can hardly bracket the moral reasoning involved in that ideological transition as they search for a coherent interpretive approach to answering doctrinal questions in Aboriginal law today.

¹¹⁸ In this vein, see e.g. Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011) at 106: "we are not passive recipients of a conceptual inheritance. We cannot do genealogy without thinking the concepts anew. We find meanings or we do not. When we do, they are our meanings to be elaborated in ways that make sense to us. Ideas do not sustain themselves. They are sustained in the social imaginary; they are sustained only within entire networks of believe and practice."

¹¹⁹ See the discussion of *Simon* in section 5 of the Introduction.

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If we prefer to say that the ideological transition *has* given us a more accurate grasp on social facts of our constitutional history (by discarding ideological commitments that had a falsifying effect), then it's clear that we cannot divorce the greater accuracy from moral commitments and reasoning inherent in the ideological transition. The analysis of *Caron* in chapter 1 showed that *both* the institutional positivist approach of the majority *and* the historically grounded pluralist approach of the dissent inevitably read the relevant constitutional history through a lens of moral and ideological commitments inherent in our current social and political imaginaries. The same is true of every era and every court, for every court sees the legal system through the lens of moral and ideological commitments found in the social and political imaginaries in which the court is embedded. This is not a defect of legal reasoning that we could strive to avoid or minimize—it is only from within our background social and political imaginaries that our “whole situation” can be disclosed, that our constitutional history can come into view at all. We can always make a conscious attempt to rethink this or that moral or ideological commitment in our social and political imaginaries, but we can never simply suspend the entire background and scaffolding of our practices and our reasoning.

With respect to *Riggs*, too, we might ask what social facts about institutional design would be useful in deciding between a counterfactual intention theory of statutory interpretation and a plain meaning theory. Note that both Judge Earl and Judge Gray appeal to facts about institutional design to help justify their respective interpretive approaches. Judge Gray places such facts at the heart of his argument: he insists that the separation of powers between the legislative and judicial branches requires the courts to adopt a plain-text or literal reading of statutory language. Judge Earl argues instead that courts must interpret legislative *intent* and that this sometimes requires going beyond a literal reading of the text. Judge Earl points to the fact that legislatures draft and adopt laws against the backdrop (in common law systems) of a legal system that includes fundamental common law maxims on which judges rely when interpreting the law. It seems unlikely that closer scrutiny of the social facts surrounding institutional design will resolve this kind of disagreement.

It is possible, of course, that in some cases there may be social facts that are compelling. We can imagine, for instance, a version of the state constitution of New York (or the debates surrounding its adoption) that explicitly calls for judicial restraint and a focus on plain statutory language when interpreting statutes.¹²⁰ Moreover, Shapiro, like Leiter, quite reasonably insists that a positivist account of legal interpretation need not in each case determine a single correct interpretive methodology. As Shapiro says, it is sufficient if his

¹²⁰ Shapiro, *supra* note 28 at 55, note 59, himself notes that “sometimes courts settle theoretical disagreements [relating to interpretive methodology]. See, for example, *Edwards v. Canada (Attorney General)* [1930] A.C. 124, where the Privy Council rejected originalism as an appropriate method of constitutional interpretation.” *Edwards* is the case often cited in Canadian law as establishing “living tree constitutionalism”, as the Privy Council stated, [1930] 1 DLR 98, at 106-107: “The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.”

account can show that there are wrong interpretive methods.¹²¹ Social facts about institutional design might eliminate certain candidate interpretive methods, while leaving a range of methods that can be defended as consistent with the aims of the designers. Judges would then have to select an appropriate interpretive methodology from within that acceptable range, perhaps on the basis of such things as social fairness, administrative efficiency, institutional competence, morality, or political ideology. (Of course, no judge is likely to openly avow the latter basis.) On the positivist view, this selection would be a matter of extending the law (not simply declaring it), within positivist constraints.

That qualification is fair enough, but it raises two sets of questions. First, just how loose are such constraints? In other words, how often will a credible interpretation of social facts, free of moral reasoning, resolve or even helpfully constrain the kinds of disputes over interpretive methodology that we find in cases like *Riggs* or *Caron* (or the entire doctrine of Aboriginal title reviewed in chapter 2)? If Shapiro's account is that, in such cases, apparent legal disagreement typically turns primarily on non-legal grounds (e.g., matters of social fairness, administrative efficiency, institutional competence, morality, or political ideology), then how different is his account, practically, from Dworkin's? Does Shapiro, like Patterson, not end up largely dissolving the Hart-Dworkin debate, with Dworkin and Shapiro essentially agreeing on the considerations that inform judicial choice of interpretive approach—though with Dworkin insisting that judges are, as they purport to be, engaged in genuine legal dispute, and Shapiro insisting that judges are really engaged in non-legal dispute under the cover of legal interpretation?

As Patterson notes, for Dworkin law “is a matter of imposing the best constructive interpretation on an institutional history”.¹²² In other words, we accept the institutional history of the legal practice in question, say constitutional interpretation by domestic courts. Judges must work within the constraints of that institutional history and their decisions should extend it in a coherent fashion. But where those institutional constraints leave open a range of approaches to such things as interpretive methodology, a judge ought to choose an approach that best coheres with the political morality of the community as the judge understands it.

Similarly, Shapiro's proposal would have judges develop interpretive methodology by drawing only on social facts about the legal system to the extent possible, but then also on considerations of morality, efficiency, etc., in order to select the appropriate interpretive methodology within the range left open by the social facts. In a related vein, Patterson sees judicial practice itself as *embodying* the social facts that produce a continually evolving consensus on interpretive methodology. Though Patterson does not explicitly suggest factors

¹²¹ Shapiro, *supra* note 28 at 49: “There may be no right answer to these disputes, but there are usually wrong ones. [...] and more important, a theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution of them. An adequate theory, in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law” (italics in original).

¹²² Patterson, *supra* note 6 at 266.

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that might influence that evolution, the discussion in subsection (2)(c) above makes clear they would also include broad considerations of morality, efficiency, etc. In other words, both these proposals would incorporate such broad factors into the positivist account of legal interpretation that this account starts to look similar, in practical terms, to Dworkin's account of law.

Granted, Shapiro can always insist that his guiding question (which approach best advances the ideological goals of the designers?) is in principle distinguishable from Dworkin's (which approach best extends the institutional history and practices of legal interpretation, as measured by the political morality of the community?). There might well be cases in which these different guiding questions produce different outcomes.

This brings us, however, to the second set of questions raised by Shapiro's proposal. Let us assume that in some cases Shapiro's approach produces results that clash with the political morality of the community. Suppose, for instance, we were to conclude that social facts relevant to the design of the Fourteenth Amendment made clear that it was not designed to prohibit segregation, or that social facts relevant to the design of the *British North America Act, 1867* made clear that any previous recognition of Indigenous legal orders was henceforth to be disregarded. Shapiro argues that we should prefer the ideological goals of the designers to "moral palatability". But why? Shapiro offers us, as explained above, an argument based on a broad political theory, in which the legal system's designers have the task of "settling" issues of legal design. According to Shapiro, if they are to fulfill this task, then the rest of us, including judges, must refrain from unsettling such issues simply because we now consider them morally unpalatable.

But is it plausible that categorically ruling out considerations of moral palatability will ensure that matters, once settled by designers, are more likely to remain settled? Does Shapiro's argument not counsel, at most, a certain degree of caution for judges who wish to revisit ideological objectives on ground of moral unpalatability? Can we know in advance how the calculus of moral palatability will play out in each case? A judge might fully agree with Shapiro that principles and compromises designed into the legal system play a vital role in the authoritative settlement of disputes. She might also agree that it is crucial, therefore, for judges to be guided by the ideological goals of the designers as embodied in such principles and compromises. Suppose, however, exceptional cases arise in which the judge is convinced that those ideological goals have become so divorced from the contemporary political morality of the community that upholding them will radically fail the purpose of authoritatively settling disputes. Perhaps she is convinced that holding fast to those ideological goals will in fact stoke further dispute and division, and that there is no reasonable prospect of formal constitutional amendment to address the situation.

For instance, the designers of the Fourteenth Amendment might have had the ideological objective of allowing each state broad latitude to impose the degree of racial segregation it considered appropriate within its borders, assuming the designers considered segregation compatible with equal protection under the Amendment. The designers of the *British North America Act, 1867* might have had the objective of imposing restrictions on Senate eligibility

that allowed only certain men, and no women, to become members of that body.¹²³ A judge in, respectively, 1954 United States or 1928 Canada might consider (rightly or wrongly) that these objectives are so dissonant with the political morality of the community that “equal protection” has come to prohibit segregation or that “persons eligible” for the Senate have come to include women; the judge might conclude that drawing such conclusions as a matter of law will do more to authoritatively settle disputes than would sticking to the ideological objectives of the designers, even accounting for the possibility of formal constitutional amendment and the institutional limitations of the judiciary. Shapiro’s account of the “settling” function of designers cannot rule out such conclusions; at most, his account offers reasons why courts should be aware of their institutional limitations and proceed cautiously when deviating from the apparent ideological objectives of the legal system’s designers.

Moreover, if a judge does depart from the ideological objectives of the designers, I do not see why the judge would be “forced to engage in abstract philosophical reflection and confront questions that have baffled humanity for the past few millennia,” as Shapiro states.¹²⁴ The judge might simply conclude (a conclusion that may of course be disputed) that, e.g., there now exists a moral consensus in the political community that cannot countenance racial segregation under “equal protection” or the exclusion of women from “persons eligible” to sit in a governmental body or the principle that Indigenous peoples are savages lacking legal capacity to enter binding treaties.

3. *Conclusion: the prospects for reconstructed legal positivism in Aboriginal law*

In this chapter, section (1) considered the appeal of legal positivism based on its careful distinction between law and morality and on its commitment to an account of legal interpretation that turns on social facts without recourse to moral reasoning. For many, this is appealing because legal interpretation is seemingly placed on an objective basis; courts, in particular, can stick to the business of stating what the law is, leaving to the appropriate political processes the business of deciding whether and how the law ought to be changed.

Section (2) considered some of the ways in which positivists have attempted to cash out this commitment to an interpretive methodology grounded in social facts. Patterson offered a positivist account of interpretive methodology as *manifestation of* social facts: the interpretive methods used by judges (or by majorities of judges) are to be understood as expressions of “intersubjective consensus” embodied in the existing practices of the legal

¹²³ As the Supreme Court of Canada decided in *Reference re meaning of the word “Persons” in s. 24 of British North America Act*, [1928] SCR 276, holding that “persons” in the relevant section of the *British North America Act, 1867* did not include women. At 281-282, Chief Justice Anglin, writing for a majority of the Court, explained: “In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer. Passed in the year 1867, the various provisions of the B.N.A. Act [...] bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted.” The Court’s decision was overturned by the Privy Council on appeal: *Edwards*, *supra* note 120.

¹²⁴ Shapiro, *supra* note 28 at 46.

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system in question. Shapiro offered a positivist account of interpretive methodology grounded in *debate about* social facts: legal debate over interpretive methodology is to be understood as debate over the best interpretation of social facts, and judges ought to adopt the interpretive methods that best cohere with the ideological objectives of the legal system's designers as expressed through institutional structure and other social facts that attest to those objectives.

As argued above, however, Patterson's account seems to undermine the distinction between primary and secondary rules, and thus the very distinction between law and morality that positivism aims to vindicate. Shapiro's account maintains this distinction by focusing debate about interpretive methodology on social facts expressing the ideological objectives of the legal system's designers. Yet he motivates this interpretive focus, ultimately, on the basis of a normative political theory about the "settling function" that the system's designers ought to be allowed to play. This normative political theory urges judges to accept the ideological objectives of the designers in order to uphold the settling function of the designers. However, Shapiro's argument in support of that theory cannot rule out cases in which this settling function will, in a judge's considered view of the whole context, actually be undermined if the judge defers to the apparent ideological objectives of the designers. The judge may conclude that upholding certain ideological objectives of the designers would in fact further unsettle the authority of the law, given the evolution of social and political imaginaries in the political community of the judge.

Patterson and Shapiro offer two broad positivist accounts of how to ground legal interpretation in social facts: by construing legal interpretive methods as the manifestation of social facts (the practices, customs, conventions of legal officials) or by construing debates about legal interpretive methods as debates about social facts. The discussion in this chapter is obviously not a comprehensive review of positivist accounts, nor is it meant as a refutation of legal positivism. The aim has been rather to highlight some of the main difficulties facing descriptive positivist accounts and thus to motivate a fuller consideration of the role that questions of legitimacy, ideology, and morality might properly play in judicial interpretation.

This aim is in line with Dyzenhaus' call for a reconstruction of legal positivism, as discussed in section (1) above. A state that is committed to democratic principles cannot justify its assertions of sovereignty based solely on *de facto* control. The preceding chapters, particularly the detailed review of Aboriginal title doctrine in chapter 2, noted ways in which the SCC and other Canadian courts have already acknowledged questions of legitimacy raised by *de facto* or assumed Crown sovereignty, as well as the need for legal interpretation to take matters of legitimacy into account. This interpretive direction is found, notably, in the many Crown duties that the courts have now derived from the honour of the Crown, in the name of reconciling pre-existing Indigenous sovereignty with assumed Crown sovereignty. These doctrinal developments are, broadly speaking, in line with Dyzenhaus' argument that assertions of sovereignty commit a state to developing a legal order that will make its assertions of lawful authority acceptable to those the state considers legal subjects. Judicial interpretation must be informed by this commitment and must therefore work towards a

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reconstruction of legal positivism, in the sense that *de facto* state sovereignty, while recognized and accepted by domestic courts, is understood to include a commitment to legitimacy and to a legal system that develops acceptable answers to the question “but, how can that be law for me?”

The next chapter will discuss in greater detail the paths this reconstruction might take in Canadian law generally, and then in Canadian Aboriginal law more specifically. The avenue into this discussion is provided by the SCC’s repeated affirmation that the constitution is “a statement of the will of the people”¹²⁵ and that “[t]he judiciary is the guardian of the constitution”.¹²⁶ It seems to follow from these commitments that judicial interpretation will, at least in certain contexts, be informed by questions of democratic legitimacy.

¹²⁵ *Caron v Alberta*, 2015 SCC 56 [“Caron”], at para 235. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 85; *Re Manitoba Language Rights*, [1985] 1 SCR 721, at 745.

¹²⁶ E.g. *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155.

Man and Crowd

A man came, drew a circle, and stood in the middle. He declared himself the centre of the world.

Few noticed. He did not make any great movements. He did not put on any kind of show. Some asked why he was standing. Some giggled. Some sneered. Most ignored him.

One day a few persisted. Are you protesting? Are you standing for a cause? Did someone put you up to this? Do you have a bone to pick? Some took pity and whispered about underlying suffering, some condition of trauma and woe.

He declined all offers and all labels. He simply stood and declared himself the centre. Without fanfare, without hostility. But with a kind of inner certainty that struck people as inexplicable and grotesque. The mood started to turn. More people gathered around. The crowd was giving its attention now. Some jeered, some feinted to lunge at him. Insults flecked about and some grew angry. Some women tried to hush the jeers and called for sorrow. A scuffle broke out among the men in the third or fourth row back—a sudden hard yet squished sound of fist striking jaw dead-on. A child screamed. Yet all seemed under the shadow of expectation for some reaction, some explanation from the man who simply stood in the centre of his own carefully drawn circle and set his eyes with inscrutable purpose.

The irritation reached a boiling point, as though gasping for a promised climax that never comes. Eventually the crowd thinned out, dispersing a nauseous feeling of dislike for the man who had given them nothing for their attention—no gesture, no explanation, no cause, nothing to paw and judge. He was deemed revolting at an inarticulate yet viscerally personal level.

Then came the days of grudging respect, for the inscrutable persistence if nothing else—a communal blind spot into which all manner of quack and scholar could propound convoluted theories. Then the years of strange solidarity with the misunderstood and lonely souls who felt a kind of bond and sometimes came just to stand or sit beside the man. But they too eventually left disappointed, without sign of attachment or shared grudge against the world.

Finally came the long period of religious fervour projected onto the man by teachers and gurus who claimed him in naked opportunism or devotional sincerity, or some mix of the two. These final projections drifted across the man like evening shadows. Their chatter clattered and faded against the overwhelming authority of the man's silence.

At last, the man gathered himself in, bowed quietly, and took his final rest.

Sombre guitarist

The townspeople wanted much
from the sombre guitarist, piercing
and straight in words set over
his simple melodies
--so much that they burnt him
through and through
as an offering
to their ownmost yearning
to make some offering and
to receive in return
But a burnt offering is burnt,
placed outside
the economy of give-and-take,
set free
And he now sings of scattered sorrow
most mournfully

If you should happen to wake one day and find that you are bitterly at war with yourself, why not make an experiment? Make many experiments. Try cajoling, try negotiating, try fighting, try love and understanding, acceptance, resignation, despair, rage, fasting, prayer, ritual, intoxication, gnashing of teeth, turning inward—observe, finally, bite your lip and be reborn. Let the full history of the human, the subhuman and overhuman, flow and pool in you. You might learn something, find a richer perspective. Then you might want to get to work and get to play. Not to judge, not to condemn, but to recognize, remember, and to rejoin the great project and carnival of cultivation.

CHAPTER 4

Popular Pluralism: The Constitution as Expression of the Sovereignty of the People(s)

1. Introduction and recap: popular sovereignty through the first three chapters

Chapters 1 and 2 retraced the evolving tensions between institutional positivism and historically grounded pluralism as interpretive approaches found in the Canadian case law on Indigenous-state relations. Although these interpretive approaches wind around one another in complex ways, the tensions between them, as revealed in the first two chapters, turn centrally on the question whether assertions of Crown sovereignty are the ultimate source of all lawful authority that domestic courts are tasked with interpreting.

In *Caron*,¹ for instance, a majority of the Supreme Court of Canada (“SCC”) focused its analysis on documents expressing Crown sovereign intent, taking “Crown” expansively to include the Crown-in-Council and the Crown-in-Parliament. While “the Crown” is often used to refer to the executive branch of government as distinct from the legislative, the British parliamentary system does include the Crown within Parliament,² and bills do not become law until they receive the royal assent of the Crown or, in Canada, of the Crown’s representative, the Governor General (federally) or a Lieutenant Governor (provincially). More generally and more substantively, British colonial legislatures and, ultimately, the Canadian Parliament and provincial legislatures could not be established without prior assertion of Crown sovereignty. First, territory is claimed for the British Crown; only subsequently can the Crown-in-Council or Crown-in-Parliament establish legislatures in the territory claimed.³

Does this mean that popular sovereignty is an emanation of, and subsumed under, Crown sovereignty? Are they one and the same in British-derived constitutional orders and legal imagination? More to the point for purposes of this dissertation: do Canadian courts see a distinction between principles of popular sovereignty and those of Crown sovereignty? If so, what role does the principle of popular sovereignty play in the work of legal interpretation, particularly constitutional interpretation, carried out by the courts?

¹ *Caron v Alberta*, 2015 SCC 56 [“*Caron*”]. See the discussion of *Caron* in chapter 1.

² For the inclusion of the Crown in Parliament, see e.g. the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK) [“*Constitution Act, 1867*”], section 17: “There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.”

³ For an example of the British Crown establishing colonial legislatures without the assistance of Parliament, see the *Royal Proclamation, 1763*, reprinted in RSC 1985, App II, No 1. The *Constitution Act, 1867*, *supra* note 2, is an example of the British Crown-in-Parliament establishing a legislature (the Canadian Parliament) and transforming the existing colonial legislatures of Canada, Nova Scotia, and New Brunswick into provincial legislatures within the new federal framework. For a discussion of the limits of Crown prerogative powers in this context, see the reasons of the English Court of King’s Bench in *Campbell v Hall*, (1774) 1 Cowp 204, 98 ER 1045.

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Returning to *Caron* for a moment: the case required the Court to pronounce upon the constitutional obligations flowing from the 1870 negotiations and agreement between the Métis provisional government and Canada, which paved the way for the annexation of Rupert's Land and the North-Western Territory (collectively, "the Territory") to Canada. The majority in *Caron* focused on the *Manitoba Act, 1870*,⁴ adopted by the Canadian Parliament, and the *1870 Order*⁵ of the Queen-in-Council (i.e. the British Privy Council) in order to interpret those constitutional obligations. The majority's focus, as examined in chapter 1, was on the perspective expressed by state institutions through these instruments. The majority did not entertain the idea that Crown sovereignty (or state sovereignty, with the Crown as representative) might be distinguished from popular sovereignty. Yet the Crown was only one party in the 1870 negotiations. The Métis provisional government represented the other party, namely the people of the Red River settlement and, arguably, the inhabitants of the entire Territory.⁶

The dissent in *Caron* argued that majority's approach was inconsistent with the principle of popular sovereignty. Referring to the "the interpretive principle" that the constitution is "a statement of the will of the people", the dissent argued:

The Constitution of Canada emerged from negotiations and compromises between the founding peoples, and continues to develop on the basis of similar negotiations and compromises. Such compromises are achieved when parties to the negotiations make concessions in pursuit of a mutual agreement and reach a meeting of the minds. Therefore, our reading of constitutional documents must be informed by the intentions and perspectives of all the parties, as revealed by the historical evidence. It is in this context that we will apply the third interpretive principle regarding the nature of a constitution as a statement of the will of the people.⁷

This SCC has repeatedly affirmed that "[t]he Constitution of a country is a statement of the will of the people, adding that the Canadian constitution "is the expression of the sovereignty of the people of Canada."⁸ In *Caron*, the dissent relied on this principle to pull Crown sovereignty apart from popular sovereignty. The dissent insisted that the Crown could not fully represent the popular sovereignty that the Court had to consider when interpreting the constitutional obligations that flowed from the 1870 negotiations and agreement. For the dissent, the popular sovereignty that the Court had to consider necessarily included the will

⁴ *Manitoba Act, 1870*, SC 1870, c 3, reprinted in RSC 1985, App II, No 8.

⁵ *Rupert's Land and the North-Western Territory Order*, 23 June 1870, (UK) reprinted in RSC 1985, App II, No 9 ["1870 Order"].

⁶ See section 2 of chapter 1 for a discussion of the 1870 negotiations. The Métis provisional government claimed to speak in the name of the inhabitants of Rupert's Land and the North-Western Territory generally. Their mandate to represent the people of the Red River settlement was clearly much stronger than might have been the case in other regions of that vast Territory. That said, the Crown would have been at least as hard pressed to claim any popular mandate across the Territory.

⁷ *Caron*, *supra* note 1 at para 235. See subsection (2)(c) of chapter 1 for a discussion of this passage and related ones from the dissent's reasons.

⁸ *Reference re Secession of Quebec*, [1998] 2 SCR 217 ["*Secession Reference*"] at para 85. See also e.g. the *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, at 745.

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of the people represented by the Métis provisional government; the dissent insisted that, in the interpretive work of the Court, the perspective represented by the provisional government could not be subsumed under that of Crown representatives or Crown institutions.⁹ Again, the Crown represented only one party in the negotiations; the Métis provisional government represented the other.

Caron was the focus of chapter 1. Chapter 2 then retraced the dynamics between positivist and pluralist approaches in the doctrine of Aboriginal title, highlighting how the tensions there too turn on domestic court recognition and interpretation of lawful authority flowing from sources beyond Crown sovereignty. Chapter 3 then addressed an issue that had been lurking through the first two chapters: whether positivism is, as many of its defenders maintain, simply a more accurate account of what law is, at least of what law is within a domestic legal system as interpreted by the system's own courts. Does the pluralist interpretive approach, retraced in chapters 1 and 2, illegitimately draw on principles of "original justice"¹⁰ or "moral palatability"¹¹ in developing legal doctrine—illegitimate in the sense that, if judges deploy their independent moral reasoning in the process of legal interpretation, they threaten to blur the line between morality and law on which rests, according to legal positivism, the very notion of legal validity? If legal positivism were vindicated as the best purely descriptive account of law and legal interpretation, then only a positivist interpretive approach would yield valid *legal* outcomes. A pluralist interpretive approach, where it led to contrary conclusions, would not really yield valid law at all, but a kind of policy or moral exhortation, at best a deformation of the law through moral and other non-legal considerations.

Chapter 3 found these positivist claims wanting. The positivist proposals considered there did not ultimately provide a compelling descriptive account of law and legal interpretation. Those proposals either undermined core tenets of legal positivism or had to supplement these with a broader political theory that advocated legal positivism on normative grounds, rather than solely as an accurate descriptive account of what law is. At best, then, these positivist proposals provided normative arguments about the role judges *ought* to play within the legal system and about the considerations that *ought* to inform judicial interpretation of the law. Scott Shapiro, notably, argues that judges can respect the positivist distinction between law and morality by choosing interpretive methods that best cohere with the intent of the legal system's designers. In order to determine the designers' intent, judges should not engage in

⁹ See e.g. *Caron*, *supra* note 1 at para 219 (dissenting reasons): "in assessing the historical context of the promise contained in the 1867 *Address* [included as a schedule to the 1870 *Order*], due weight must be given to the perspective of the people who, through their representatives, concluded a historic compromise that resulted in the peaceful entry of their territories into Canada."

¹⁰ Term taken from *Johnson v M'Intosh*, 21 U.S. 543 (1823) [*"M'Intosh"*] at 588-89, a passage discussed in chapters 1 and 3 and touched on again below.

¹¹ Term taken from Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" in *Ronald Dworkin*, edited by Arthur Ripstein (New York: Cambridge University Press, 2007) 22-55 at 45.

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moral reasoning but examine “social facts” that reveal designer intent, e.g. matters of institutional structure and statements by designers about their ideological objectives.¹²

But here we land back in the realm of normative arguments of a kind that are regularly put to judges themselves. Judges constantly hear and make arguments about the limits of their institutional role and about the principles that should accordingly govern judicial interpretation.¹³ A common refrain in these arguments is the separation of powers between the legislative and judicial branches, as well as concern with democratic legitimacy and the justifiability of courts circumscribing or overriding legislative intent.¹⁴

¹² This positivist account is developed in Shapiro, *supra* note 11, and is discussed in subsection (2)(d) of chapter 3.

¹³ As noted in chapter 3, Shapiro, *supra* note 11 at 55 note 59, himself points out that “sometimes courts settle theoretical disagreements [relating to interpretive methodology]. See, for example, *Edwards v. Canada (Attorney General)* [1930] A.C. 124, where the Privy Council rejected originalism as an appropriate method of constitutional interpretation.” *Edwards* is the case often cited in Canadian law as establishing “living tree constitutionalism”, as the Privy Council stated, [1930] 1 DLR 98, at 106-107: “The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.”

¹⁴ Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011) at 13 argues that “[t]he American Supreme Court founds its claim for legitimacy on its capacity to speak in the voice of a transhistorical popular sovereign. [...] The American legislature governs under the provenance of the Court, not with the Court. [...] Only by taking seriously this idea of a national ‘truth’ can we begin to make sense of the abiding appeal of originalism as an interpretive strategy.” Kahn contrasts this claim for legitimacy by the US Supreme Court with that of European courts and the Supreme Court of Canada which, according to Kahn, is grounded in “proportionality” review of legislation, an approach that places the courts and legislatures in dialogue across a single horizontal plane. Kahn writes, *ibid* at 163 note 36, that “Canada expresses this single horizon of legislative and adjudicative action in S.1 of the Charter of Rights. Judicial application of S.1 requires proportionality review to justify breaches of Charter rights.” This “horizontal” view of the relationship between legislatures and the judiciary in Canada resonates with Kent Roach’s influential dialogical account of the relationship. See e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue, Revised Edition* (Toronto: Irwin Law, 2016) at 73-74: “The *Charter* is a prototype of a democratic form of common law constitutionalism that gives both courts and legislatures strong voices in determining the treatment of rights and freedoms and that promotes continuing dialogue among courts, legislatures, and society about these matters. Under the *Charter*, the dangers of judicial activism can be met by legislative activism in which a parliament takes responsibility for limiting or derogating from rights as interpreted by the courts. [...] Unlike the liberal approach of the American *Bill of Rights*, which is designed to ‘withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities,’ the *Charter* stimulates democracy by reminding legislatures about rights and by putting them into political play.” The views of both Kahn and Roach capture a genuine difference between the US and Canadian systems, but the difference should not be overstated. The Supreme Court of Canada also situates the Canadian judiciary as “guardian of the constitution”: e.g. *Hunter v Southam Inc.*, [1984] 2 SCR 145 [“*Hunter*”] at 155. In *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 89, a majority of the Court, citing *Hunter*, specified that the judiciary became the guardian of the constitution as “a necessary corollary of the enactment of the supremacy clause”, i.e. section 52(1) of the *Constitution Act, 1982*. In the *Secession Reference*, *supra* note 8 at para 72, the Court similarly stressed that with the adoption of the *Constitution Act, 1982*, “the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy.” As the Court has also repeatedly affirmed that the constitution is a statement of the will of the people (see *supra* note 8 and accompanying text), the Court therefore understands the judiciary as the guardian of the will of the people that is expressed through the constitution.

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The SCC itself has, as indicated above, repeatedly affirmed the foundational principle that the constitution is an expression of popular sovereignty. The Court has also repeatedly stated that the judiciary is the guardian of the constitution.¹⁵ There is no sign on the Court of dissent from these broad principles—all seem to accept the constitution as expression of popular sovereignty and the judiciary as constitutional guardian. But the principles are the locus of debate as to how they ought to inform judicial interpretation. The Court thus regularly turns its mind to the legitimating power underlying the constitution and to its own role in guarding the constitution. This chapter will explore the Court's own understanding of the relationship between that underlying legitimating power and its guardianship role.¹⁶

It is not surprising to see a case like *Caron* turn on disagreement about the meaning of these issues of democratic legitimacy and judicial guardianship. *Caron* presents the Court with an expression of popular sovereignty, in the form of the Métis provisional government, that had its source outside and took shape beyond the forms sanctioned by state institutions founded on assertions of Crown sovereignty. Such cases bring to the fore the principle of popular sovereignty as distinct from Crown sovereignty and may force judges to reconsider the role of popular sovereignty in legal interpretation. Should the principle of popular sovereignty play a substantive role beyond judges simply reciting that the constitution is an expression of the will of the people? Should judges stick to recitation, as an expression of formal commitment to democratic principle, while steering clear of trying to assess the will of the people in some substantive sense for which courts are not institutionally equipped? Or is it necessarily part of the judicial role as constitutional guardian to look behind the formal principle in order to assess and channel the will of the people through judicial interpretation of the constitution?

This chapter explores these questions. As in previous chapters, the aim is not to develop independent theoretical or normative answers that are subsequently applied to the case law. The aim, rather, is to get a better handle on the strands of argument actually found in the case law—the interpretive manoeuvres ready-to-hand,¹⁷ so to speak—and thereby to disclose the forms of argument available. The value of this approach, as I see it, is to make (more) visible the different paths that are currently open for doctrinal development. This is not a purely descriptive approach, since the ways in which existing strands are disclosed will necessarily depend on the social and political imaginaries within which we currently live and my own baseline of ideological commitments formed from within that background, both of which (background imaginaries and baseline of ideological commitments) are needed to make the case law *legible* to me in the first place. On the other hand, my approach is not purely normative either, because it is constrained by what I find in the case law.

¹⁵ See *supra* note 8 and accompanying text and *supra* note 14 and accompanying text.

¹⁶ Chapter 5 will also explore two recent instances of this judicial debate in *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 and *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

¹⁷ In the sense, broadly speaking, that Martin Heidegger gives to the term (*zuhanden* in the original) in *Being and Time*, translated by John Macquarrie and Edward Robinson (New York: Harper & Row Publishers, 1962).

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These comments are simply a reminder of the methodological claims that underpin this entire dissertation: (i) I do not aim to vindicate the Canadian case law or any of the possible paths it discloses as ideal or fully just solutions to the historical and present issues plaguing Indigenous-state relations, but (ii) I also do not strive for a purely descriptive account of the case law, purportedly free of ideological commitments or biases. This methodological approach aims to uncover interpretive trends currently working themselves out in the case law and to make (more) visible some of the potential paths leading forward. Grounding the analysis in the actual case law necessarily constrains the paths that are available and that can be seen. This places significant limitations on our moral imagination; working within these limitations always risks translating them into justifications for the *status quo*. The value in nonetheless working within these limitations rests on the reasonably secure assumption that the courts will continue, for the foreseeable future, to play a significant role in shaping the law and legal outcomes in matters of Indigenous-state relations, and also (to a lesser but still significant extent) in influencing broader social and political imaginaries of Indigenous-state relations in this country. To the extent we wish to have a clearer view of the directions that judicial interpretation may take in this field of law, we must explore how the field is disclosed from within existing judicial perspectives.

The methodological approach in this dissertation thus parallels that of the common law in beginning from the current context of social, political, and historical relations as disclosed by existing legal precedent and institutional structure, all viewed from within the social and political imaginaries in which we live. Once current realities are thus disclosed, however, neither the common law nor the methodological approach adopted here aims simply to reaffirm and preserve the *status quo*. Rather, the disclosure helps us see alternative paths on which the law might travel, even if our vision is limited to the near horizon. Once we move some distance along one path or another, new possibilities will present themselves that we cannot, from our current position, fully predict. At best, we can make educated guesses about which paths are more likely to open up healthier possibilities and which will lead to darker places. Available paths are constrained by the existing context in the short term, but the process is open-ended in the long run.

Returning from these general methodological reminders to the specific focus of this chapter, the sections below examine the role of popular sovereignty in judicial interpretation. The overall aim of the chapter is to understand how different conceptions of this role tend to push courts towards one interpretive path or another and how this dynamic plays out in the Aboriginal law context in particular. The sections below: (i) introduce, in very broad strokes, notions of popular sovereignty drawn from political theory, in order to help better understand the terms of the judicial debate; (ii) consider different interpretive uses of the principle of popular sovereignty in Canadian case law; and (iii) conclude by revisiting the positivist and pluralist interpretive approaches in the Aboriginal law context, with a focus on the respective understanding and use each makes of the principle of popular sovereignty. Ultimately, this chapter draws out the commitment of historically grounded pluralism to *plural popular sovereignty* or *popular pluralism*.

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That is, the pluralist interpretive approach explored in chapters 1 and 2 deploys the principle of popular sovereignty in a particular way: it requires courts (at least in some contexts) to view the Crown as not-fully-representative of popular sovereignty within the Canadian legal order. On one hand, the notion of multiple, overlapping popular sovereignties is not radical at all: the provinces are all sovereign within their spheres of jurisdiction, and “provincial Crowns” thus represent distinct popular sovereignties.¹⁸ On the other hand, Canadian law has long grappled with a fictional (in)divisibility of the Crown¹⁹ in order to maintain the idea that one and the same Crown represents all of these sovereign “peoples” and Canadian sovereignty as a whole. There is therefore a dimension of substantial innovation (or recovery of a pre-positivist, pre-unilateral-statist perspective) in judicial interpretation that distinguishes Crown sovereignty from popular sovereignty so as to recognize and do justice to the will of people whose sovereignty is *not* represented by the Crown.²⁰

¹⁸ See e.g. *1068754 Alberta Ltd v Québec (Agence du revenu)*, 2019 SCC 37 at para 83: “The provinces of Canada ... are of equal dignity and each is vested with identical exclusive jurisdiction over the subjects listed in section 92 [of the *Constitution Act, 1867*]. This jurisdiction is necessarily confined to matters ‘in the Province’ because any other arrangement would permit one province to violate the internal sovereignty of its fellow provinces” (quoting Ruth Sullivan, “Interpreting the Territorial Limitations on the Provinces” (1985), 7 *Supreme Court Law Review* 511 at 516). The popular sovereignty of each province overlaps with the popular sovereignty of Canada as a whole (or federal sovereignty) in the sense that the people of a province are also part of the people of Canada.

¹⁹ See e.g. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447 at paras 32-40; *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 at para 196: “the Crown is indivisible when it comes to such concepts as the ‘honour of the Crown’. However, where action is required on the part of the Crown in right of the Province or federal government, or has been undertaken by either – the manifestation of the honour of the Crown, such as the duty to consult and accommodate First Nations, is clearly divisible by whichever Crown holds the constitutional authority to act.” Also compare the contrasting views of Chief Justice Dickson and Justice La Forest (though they concurred in the outcome) in *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85. Chief Justice Dickson states at 101: “As Professor Hogg succinctly notes [...] divisibility of the Crown in Canada does not mean that there are eleven Queens or eleven Sovereigns but, rather, it expresses the notion [...] of ‘... a single Queen recognized by many separate jurisdictions.’ Divisibility of the Crown recognizes the fact of a division of legislative power and a parallel division of executive power.” Chief Justice Dickson continues at 109: “From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside the sovereignty of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada.” Justice La Forest, at 144, questions the “conclusion that it is realistic, in this day and age, to proceed on the assumption that from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are simply internal to itself, such that the Crown may be considered what one might style an ‘indivisible entity’.” As the quotations contained in this footnote suggest, a certain amount of metaphysical speculation surrounds the (in)divisibility of the Crown. On the dangers found in state law’s “own meaning-making metaphysics”, see John Borrows, “Origin Stories and the Law: Treaty Metaphysics in Canada and New Zealand” in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Oxon, UK: Routledge, 2019) at 38.

²⁰ See e.g. *Caron*, *supra* note 1 at para 183 (dissenting reasons): “The British government was applying significant pressure on Canada to negotiate reasonable terms for the transfer [of Rupert’s Land and the North-Western Territory]. This was the socio-political context in which the negotiations and the promises made to the inhabitants by the Canadian government must be understood. An interpretation that does not account for this context is not only inaccurate, but also unjust.” See also *ibid* at para 236 (dissenting reasons): “The story of our nation’s founding therefore cannot be understood without considering the perspective the people who

The popular sovereignty represented by the Métis provisional government, and that represented by Indigenous leaders in historic or modern treaty negotiations, is distinct from the popular sovereignty of the state, represented by the Crown. Even if treaties may in some sense intend to “merge” sovereignties,²¹ that very notion implies that the sovereignties to be merged remain distinct through the process of negotiation at least to the moment of agreement. Positivist and pluralist interpretive approaches diverge implicitly (and sometimes explicitly, as in *Caron*) on how the pluralist reality of Indigenous-Crown negotiations (and Indigenous-state relations more generally) ought to inform judicial interpretation of the law in this area.²² This divergence has already been explored from certain angles in chapters 1 and 2; the concluding section of this chapter will revisit the positivist-pluralist contrast in light of the discussion of popular sovereignty given in sections (2) and (3) below. This will set us up for a close look, in the final chapter 5, at the implementation of UNDRIP²³ in Canada in the context of ongoing positivist-pluralist interpretive divergence.

2. *The “Paradox of Constitutionalism” and the dynamic of legitimacy between Crown sovereignty and popular sovereignty*

A core element in our modern conception of political legitimacy, at least in political communities that are or aspire to be democratically self-governing, is that those governed by a political order must consent to it. As James Tully puts the point:

If the Constitution does not rest on the consent of the people or their representatives, or if there is not a procedure by which it can be so amended, then they are neither self-governing nor self-determining but are governed and determined by a structure of laws that is imposed on them. They are unfree. This is the principle of popular sovereignty by which modern peoples and governments are said to be free and legitimate.²⁴

This principle of popular sovereignty immediately gives rise to the question of how the consent of the people is to be expressed and evaluated. In the context of a modern state like Canada, with millions of people spread across millions of square miles, there is obviously no

agreed to enter into Confederation. If only the Canadian government’s perspective is taken into account, the result is a truncated view of the concessions made in the negotiations.”

²¹ For a discussion of “merged” or “shared” sovereignty in Indigenous-state relations, drawing on final *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group Publishing, 1996), see *Mitchell v M.N.R.*, [2001] 1 SCR 911, 2001 SCC 33 at paras 125-137 (concurring reasons of Justice Binnie).

²² See section 5 of the Introduction for an illustration of contrasting positivist and pluralist approaches to treaty interpretation found in, respectively, *Ontario (Attorney General) v Bear Island Foundation*, 1989 CanLII 4403 (ONCA), 68 OR (2d) 394 and *Restoule v Canada (AG)*, 2018 ONSC 7701.

²³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [“UNDRIP”].

²⁴ James Tully, *Public Philosophy in a New Key, Volume I: Democracy and Civic Freedom* (Cambridge University Press, 2008) at 286. See also, e.g., Dieter Grimm, *Sovereignty: Origin and Future of a Political and Legal Concept*, tr. Belinda Cooper (New York: Columbia University Press, 2015) at 67-75 (“Sovereignty in the fully formed constitutional state is popular sovereignty”: at 69), as well as the statements of the Supreme Court of Canada cited at *supra* note 8.

simple way to speak directly with “the people”, nor for “the people” to speak directly with one voice. For us to hear the will of the people, then, we need some commonly accepted rules by which it may legitimately find expression. Procedures are established to ascertain the will of the people—e.g. voting procedures to elect representatives who speak for the people or referendum procedures to allow the people to speak “for themselves” on a given issue. But this also requires processes for adjudicating disagreements about the rules and procedures, i.e. it requires judicial processes. As the SCC notes: “It is the law that creates the framework within which the ‘sovereign will’ is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation.”²⁵ In other words, “to be committed to democracy is *eo ipso* to be committed to constitutionalism and the rule of law.”²⁶ On this view, then, an independent judiciary helps voice the will of the people to govern themselves under the rule of law.²⁷ In some democracies, the people may also wish to empower the courts to review the constitutionality of legislation on the basis of consistency with a bill of rights²⁸ or with a federal division-of-powers²⁹ or with the independence of the judiciary³⁰ or with linguistic and denominational rights,³¹ etc.

In order for the will of the people in a modern state to find expression, there must therefore already exist a complex set of procedures that shape and channel that expression. As the previous paragraph indicates, the particular procedures that exist within a political community will inevitably reflect certain substantive commitments about who “the people” are and about the limits of what “the people” may legitimately express. This, in a nutshell, is the paradox of constitutionalism. The people can only ever speak through channels that already build in some conception of who the people are and how they should speak. That is, the people do not exist as the bearers of popular sovereignty prior to the institutions and

²⁵ *Secession Reference*, *supra* note 8 at para 67.

²⁶ James Tully, *The Unattained Yet Attainable Democracy: Canada and Quebec Face the New Century*, The Desjardins Lecture, McGill University, March 23, 2000, at 19.

²⁷ Of course, this does not necessarily require a system of judicial supremacy in which courts are empowered to strike down legislation for inconsistency with a bill of rights. For a helpful minimalist definition of the “rule of law”, see Duncan Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, MA: Harvard University Press, 1997) at 13-14.

²⁸ E.g. the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [“Charter”]. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [“Carter”], discussed below, is a recent example of the Supreme Court of Canada striking down legislation for inconsistency with the *Charter*.

²⁹ As enshrined, e.g., in sections 91 and 92 of the *Constitution Act, 1867*, *supra* note 2. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 is a recent example of the Supreme Court of Canada reviewing legislation for consistency with the federal-provincial division-of-powers, with a majority of Court concluding that the legislation at issue is valid.

³⁰ As enshrined, e.g., in section 96 of the *Constitution Act, 1867*, *supra* note 2. *Trial Lawyers Association of British Columbia v Attorney General*, 2014 SCC 59, [2014] 3 SCR 31 and *Reference re Code of Civil Procedure (Que.)*, art.35, 2021 SCC 27 are recent examples of the Supreme Court of Canada finding legislation inconsistent with section 96.

³¹ As enshrined, e.g., in section 93 of the *Constitution Act, 1867*, *supra* note 2. *Ontario English Catholic Teachers’ Assn v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 is an example of the Supreme Court of Canada reviewing legislation for consistency with section 93, with the Court concluding that the legislation is valid.

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representatives that speak in their name. “The people”, in this constitutional sense, is always constituted in part through institutions and practices established on their behalf. As Martin Loughlin and Neil Walker write:

Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the ‘consent of the people’ and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre’s words, ‘are a sovereign that cannot exercise sovereignty’; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established. This indicates what, in its most elementary formulation, might be called the paradox of constitutionalism.³²

This paradox may seem to threaten an infinite regress in the hunt for the ultimate foundations of popular sovereignty. If constitutional forms must pre-exist any actual exercise of popular sovereignty, then who establishes those constitutional forms, and according to which rules or principles? And, if there is an answer to this question, then who establishes those constitutional-form-establishing rules or principles? Etc. This will never lead us back, along any actual historical path, to an exercise of pure constituent power. Political communities do not emerge from the pure potentiality of “constituent power” through an act of consent given by “the people”.³³ There are always already modes of decision-making and deliberation in place, some form of political community in place. As Loughlin and Walker argue, the relationship between constituent power and constitutional forms of power is better understood as an ongoing dynamic of maintaining legitimacy, with established constitutional forms simultaneously responding to the will of the people and shaping it.

This schematic characterization of the relationship between constituent power and constitutional forms of power presents two primary characters: “the people” who form the constituent power and the government who hold the offices and powers specified by constitutional forms. This cast is arguably short one important character. Chapter 2 noted that Quentin Skinner highlights a central distinction in Hobbes’ political theory between the sovereign as *representative* and the state as *fictional unity* of the people.³⁴ Skinner writes, referring to the notion of a social covenant establishing the political community:

The act of covenanting may thus be said to engender two persons who had no previous existence in the state of nature. One is the artificial person to whom we grant authority to speak and act in our name. The name of this person, as we already know, is the sovereign. The other is the person whom we bring into being when we acquire a single will and voice by way of authorizing a man or assembly

³² Martin Loughlin and Neil Walker, “Introduction” in *The Paradox of Constitutionalism*, edited by Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2008) at 1.

³³ For a general discussion of this point, see Jeremy Webber, “The Meanings of Consent” in *Political Community and the Meaning of Consent: Between Consenting Peoples*, edited by Jeremy Webber and Colin M. Macleod (Vancouver: UBC Press, 2010) 3-41.

³⁴ See footnote 3 in chapter 2.

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to serve as our representative. The name of this further person, Hobbes next proclaims in an epoch-making moment, is the commonwealth or state.³⁵

Skinner gives us a crisp encapsulation of the Hobbesian distinction between state and sovereign, between “the people” as bearer of sovereignty and the government that represents the people and gives voice to their sovereignty. “The people”, in the sense of this fictional unity that is the state, is the source of lawful authority and authorization for the government to act as sovereign; the people as fictional unity is not a mortal person, may exist indefinitely, and must be distinguished from the actual population of mortal legal subjects. Hobbes thus distinguishes (i) the population of individual legal subjects, (ii) their fictional unity, through the principle of popular sovereignty, as the commonwealth or state, and (iii) the sovereign as authorized representative of the state. Without wanting to import any further Hobbesian theory, this distinction between popular sovereignty and Crown (authorized representation of) sovereignty is a useful starting point for thinking about the possible distinction between popular sovereignty and Crown sovereignty in Canadian case law.

In most contexts and most cases, Canadian courts find little reason for distinguishing between Crown sovereignty and popular sovereignty. As noted above, and as evident in the discussion of case law in chapter 2, the courts treat “the Crown” as a flexible concept that refers broadly to the government acting in the name of the people. Canadian courts typically speak of “Crown sovereignty” as the foundation of lawful public authority within the Canadian legal order. However, this way of speaking comes under pressure in cases like *Caron*, in cases dealing with treaty interpretation, and in the Aboriginal law context more generally, for the obvious reason that the Crown is only one party in Indigenous-Crown relations—even if a particularly complex party, whose representative capacities and jurisdictional powers are deemed divisible in elaborate ways.³⁶

How should the courts respond to such pressure in their work of legal interpretation? The institutional positivist answer, as we have seen in previous chapters, emphasizes the position of the courts within a legal system founded on assertions of Crown sovereignty and insists that the role of the courts is to interpret the lawful authority that flows ultimately from Crown sovereignty. In other words, the institutional positivist response accepts “the Crown” (in the complex and divisible sense of the myriad governmental forms flowing from assertion of Crown sovereignty) as the established representative of sovereign authority within the legal system. Institutional positivism accordingly resists arguments that require the courts to question the nature or legitimacy of Crown sovereignty, including where an assertion of Crown sovereignty over a people or territory seems to conflict with principles of popular sovereignty. It bears emphasizing again that *institutional* positivism, in the sense developed throughout this dissertation, grounds this response primarily on its view of the proper role of

³⁵ For Hobbes, the sovereign was ideally a monarch, but he allowed that the people could authorize a democratically elected government to act as sovereign. See Quentin Skinner, “The sovereign state: a genealogy” in *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, eds Hent Kalmo and Quentin Skinner (New York: Cambridge University Press, 2010) 26-46 at 36-37.

³⁶ See *supra* note 19.

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domestic courts within a state legal system; institutional positivism need not deny that the distinction between the will of the people and the Crown (i.e. between popular sovereignty and sovereign representative) has theoretical or practical purchase in other contexts—“just not in my courtroom” is the institutional positivist refrain.³⁷

In contrast, the historically grounded pluralist approach, as we have also seen in previous chapters, is willing in at least some contexts to consider the gap between principles of popular sovereignty and assertions of Crown sovereignty. These contexts, incidentally, are decidedly non-Hobbesian. Consider the context in *Caron*, for instance. The dissent insisted that the Court must do justice both to the will of the people represented by the Crown *and* to that represented by the Métis provisional government, even as the Métis provisional government negotiated a merging of sorts of the popular sovereignty it represented with that of the existing Canadian state. Similarly, the SCC has said of section 35 Aboriginal and treaty rights generally:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.³⁸

Such statements acknowledge that a commitment to popular sovereignty in the Canadian context is in fact a commitment to *popular pluralism*. The need “to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”³⁹ is at the same time, given the Canadian constitutional commitment to popular sovereignty, a need to reconcile multiple popular sovereignties. There is no need to speculate on the sense, if any, that Hobbes might make of this context. Hobbes’ distinction between popular sovereignty and its governmental representation helps us conceive the gap between assertions of Crown sovereignty and principles of popular sovereignty. What the historically grounded pluralist approach may find in that gap—and how it proposes to address situations of alleged conflict between assertions of Crown sovereignty and principles of popular sovereignty—need not be guided by Hobbesian political theory.⁴⁰

³⁷ Recall, for instance, the language from *M’Intosh*, *supra* note 10 at 588-589 (“Conquest gives a title which the courts of the conqueror cannot deny”) and *Coe v Commonwealth of Australia*, [1979] HCA 68 at 3 (a challenge to state sovereignty is “not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged”). The judicial approach embodied in these passages is discussed again below.

³⁸ *R v Van der Peet*, [1996] 2 SCR 507 at para 30 (reasons of Chief Justice Lamer, writing for the majority; underlining in the original).

³⁹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [“*Haida Nation*”] at para 20.

⁴⁰ I am grateful to James Tully for discussions about the limitations and potential disadvantages of drawing Hobbes into this discussion.

In this respect, Geneviève Nootens offers a useful reminder, particularly apt in the Canadian context being considered here:

[I]t is surely very interesting to be aware of the fictitious character of popular sovereignty and representation, but it is surely much more interesting to have a closer look at the struggles through which actual people had their right to rule themselves recognized in day-to-day political processes such as public debate etc.⁴¹

Indeed, to the extent that established constitutional forms are responsive to the will of the people in modern constitutional democracies, this responsiveness is largely the product of popular struggles in which various groups demand greater public accountability.⁴² This was certainly true of the struggle of the Métis settlement at Red River demanding a negotiated entry into Canada, of the struggles involved in Indigenous-Crown treaty negotiations and implementation, and of Indigenous-Crown relations more generally.

Nootens argues that we capture historical reality more accurately if we conceive of established constitutional forms not simply as the institutionalization of constituent power, but as the always modifiable product of an ongoing contestation, negotiation, and compromise between and across the ruling classes and popular movements—both within and without the established constitutional forms—demanding new and broader forms of public accountability.⁴³ The next section looks at the ways in which judicial interpretation has responded to this historical reality in areas beyond the Aboriginal law context. The questions to keep in mind are (i) whether interpretive methods adopted by the courts allow for judicial consideration of the distinction between popular sovereignty and Crown sovereignty, and (ii) if so, how judicial interpretation will be informed by the social and historical realities that are found in the gap between the two.

3. *The “Paradox of Constitutionalism” and the dynamic of legitimacy in Canada’s system of judicial supremacy*

In a system of judicial supremacy, the courts are the final institutional authority of constitutional interpretation.⁴⁴ Canada moved towards a system of judicial supremacy with the adoption of the *Constitution Act, 1982*, as the SCC has noted: “the Canadian system of government was transformed to a significant extent from a system of Parliamentary

⁴¹ Geneviève Nootens, *Popular Sovereignty in the West* (Routledge: New York, 2013) at 69.

⁴² This is the central argument of Nootens, *supra* note 41.

⁴³ On this point, see e.g. James Tully, “The Imperialism of Modern Constitutional Democracy” in *The Paradox of Constitutionalism*, eds Martin Loughlin and Neil Walker (Oxford University Press: Oxford, 2008) at 322: “the field of ‘constitutional form and constituent power’ is really a game between the constitutive sovereign and the constituent people *within* and over the constitutional form (the ‘contract’ between them) — a game that, according to the realists, the sovereign dominates.”

⁴⁴ Some matters of constitutional interpretation may be deemed non-justiciable or “political questions” best left for resolution by the other branches of government—see *supra* note 37, for instance—but in a system of judicial supremacy the judiciary remains the final institutional authority on the extent of its own jurisdiction. That is, the courts will decide what they can and cannot decide. This point is taken up in more detail in chapter 5.

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supremacy to one of constitutional supremacy”.⁴⁵ The courts in Canada are the final arbiters of constitutionality, insofar as they are empowered to strike down legislation that they find inconsistent with the constitution⁴⁶ and have broad discretion to order remedies for state action that they consider in violation of the *Charter*.⁴⁷

In modern constitutional democracies, such a system of judicial supremacy draws out the paradox of constitutionalism, or the Janus-faced nature of the constitution: on the one hand, the constitution as a fundamental statement of the will of the people; on the other, the constitution as a legal document (or set of legal documents) handed over to the courts for authoritative interpretation. In line with the discussion of the paradox of constitutionalism in the previous section, we should therefore expect the courts’ work of constitutional interpretation to both influence and be influenced by the will of the people that is supposed to find expression in the constitution. But how precisely do Canadian courts understand the role of the “will of the people” in their work of constitutional interpretation? What are the entry points for the principle of popular sovereignty in judicial reasoning?

As an initial matter, the SCC has stated its commitment to the principle of popular sovereignty: “The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government”.⁴⁸ The Court explicitly grounds the authority of the Canadian constitution in this principle: “The Constitution is the expression of the sovereignty of the people of Canada.”⁴⁹

One way for the Court to draw on this commitment in its work of constitutional interpretation is to allow the will of the people some influence in the interpretation of particular constitutional provisions. In Canadian jurisprudence, this approach often draws inspiration from the statement of the Privy Council that “the Constitution must be viewed as a ‘living tree’ capable of growth and expansion within its natural limits”⁵⁰ and from the subsequent judicial elaboration of that statement. The SCC continues to cite this statement with approval, affirming again in 2011, for instance, that “this metaphor has endured as the preferred approach in constitutional interpretation, ensuring ‘that Confederation can be adapted to new social realities’”.⁵¹

⁴⁵ *Secession Reference*, *supra* note 8 at para 72.

⁴⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [“*Constitution Act, 1982*”], section 52. The Canadian system of government has always had an element of judicial supremacy (or “constitutional supremacy” as the Court has it), insofar as the courts were empowered to strike down legislation they found inconsistent with the *Constitution Act, 1867*, *supra* note 2, including the federal-provincial division-of-powers established in sections 91 and 92, principles of judicial independence enshrined in section 96, and denominational rights protected by section 93. For examples of the Court reviewing legislation for consistency with these various provisions of the *Constitution Act, 1867*, see notes 29-31 above.

⁴⁷ *Charter*, *supra* note 28, section 24.

⁴⁸ *Secession Reference*, *supra* note 8 at para 85.

⁴⁹ *Secession Reference*, *supra* note 8 at para 85.

⁵⁰ *Edwards v Attorney-General for Canada*, [1930] AC 124, at 136, per Lord Sankey.

⁵¹ *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at para 56.

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In *Carter*, the SCC's 2015 ruling on physician-assisted dying, for instance, the Court allowed that a change in the "matrix of legislative and social facts" may justify a lower court in departing from otherwise binding SCC precedent in interpreting constitutional provisions.⁵² The Court noted that in *Rodriguez*,⁵³ decided two decades prior to *Carter*, it had considered a similar challenge to the criminal prohibitions against physician-assisted dying. The Court in *Carter* explained that when it upheld the criminal prohibitions in *Rodriguez*, it had relied on evidence of "the widespread acceptance of a moral or ethical distinction between passive and active euthanasia".⁵⁴ The Court then noted that the record before the trial judge in *Carter* contained evidence that could be taken to undermine the conclusion drawn in *Rodriguez* about this widespread consensus. The Court found that this change weighed in favour of the trial judge not being bound by the Court's earlier precedent.⁵⁵ In this way, evidence that the "will of the people" has shifted in terms of the social norms and moral values that it endorses can be used by the courts in the work of interpreting particular constitutional provisions.

Simon, discussed in detail in the Introduction, provides an analogous example in the Aboriginal law context.⁵⁶ In *Simon*, the SCC considered the reasoning in *Syliboy*, in which the Nova Scotia County Court held that Indigenous peoples in Nova Scotia in the 18th century lacked the legal capacity to enter binding agreements with the Crown, on the basis that they were uncivilized.⁵⁷ The SCC in *Simon* rejected that reasoning and language as "reflect[ing] the biases and prejudices of another era in our history" and as "no longer acceptable in Canadian law".⁵⁸ As discussed in the Introduction, the Court thus acknowledged that the country's ideological transition in matters of Indigenous-state relations, the evolution in our social and political imaginaries, must be reflected in a corresponding evolution in legal doctrine. Treaty interpretation, like *Charter* interpretation, "can be adapted to new social realities".⁵⁹

Allowing legal doctrine to evolve in light of evolving social and political imaginaries is consistent with both the positivist and pluralist interpretive approaches examined in previous chapters. It is inevitable, in any case, that we read historical, social, and political context, as well as legal precedent, through the lens of the imaginaries in which we live. That reality alone does not require courts to draw a distinction between principles of popular sovereignty and Crown sovereignty.

⁵² *Carter*, *supra* note 28 at para 47.

⁵³ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

⁵⁴ *Carter*, *supra* note 28 at para 47.

⁵⁵ *Carter*, *supra* note 28 at para 47.

⁵⁶ *Simon v The Queen*, [1985] 2 SCR 387 ["*Simon*"]. See the discussion of *Simon* in section 5 of the Introduction.

⁵⁷ *R v Syliboy*, [1929] 1 DLR 307 (Co Ct) ["*Syliboy*"]. See the discussion of *Syliboy* in section 5 of the Introduction.

⁵⁸ *Simon*, *supra* note 56 at 399.

⁵⁹ *Reference re Securities Act*, *supra* note 51, at para 56.

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However, principles of popular sovereignty are sometimes put to more radical purpose as a basis to challenge assertions of Crown or state sovereignty. The argument in support of this more radical purpose is, schematically speaking, that assertions of sovereignty are invalid when they run contrary (in some basic sense that any argument along these lines must spell out) to the will of the people over whom sovereignty is asserted. As we saw in chapters 1 and 2, this more radical possibility has been explicitly addressed and rejected by US and Australian high courts in the context of Indigenous-state relations. As US Chief Justice John Marshall put the point:

We will not enter into the controversy whether agriculturists, merchants, and manufacturers have a right on abstract principles to expel hunters from the territory they possess or to contract their limits. *Conquest gives a title which the courts of the conqueror cannot deny*, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. ... *It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it.*⁶⁰

In *Coe*, Jacobs J of the High Court of Australia similarly stated that a challenge to a nation's sovereignty was "not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged."⁶¹

These statements represent one approach courts may take when faced with possible divergence between principles of popular sovereignty and assertions of Crown or state sovereignty as embodied in established institutions and constitutional forms. This approach consists of a judicial refusal to entertain arguments about such a divergence, insisting that the institutional role of a domestic court does not allow it to question the sovereignty of the state that established the legal system in which the court is embedded. Faced with such legal challenges to state sovereignty, *M'Intosh* and *Coe* insist that the principle of popular sovereignty is a kind of legal fiction from the perspective of domestic courts. That is, the courts accept as a matter of principle that constitutional legitimacy is grounded in the will of the people; they are to treat this as a legal fiction, however, by refusing to entertain arguments that existing constitutional forms violate principles of popular sovereignty. I have characterized this approach as institutional positivism in previous chapters. As indicated there, whether we ultimately agree with institutional positivism or not, the institutional reasoning behind this judicial stance is understandable.

Indeed, this institutional positivist response to arguments challenging state sovereignty is surely the dominant response of domestic courts in modern constitutional democracies. The previous chapters in this dissertation noted ways in which the SCC has, however, expressed ambivalence in this regard. Chapter 2 traced this ambivalence through a number of landmark cases dealing with Aboriginal and treaty rights, with a particular focus on Aboriginal title. The Court has emphasized the need "to reconcile pre-existing Aboriginal sovereignty with

⁶⁰ *M'Intosh*, *supra* note 10 at 588-589; italics added.

⁶¹ *Coe*, *supra* note 37 at 3.

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assumed Crown sovereignty”⁶² and has derived binding legal obligations from the honour of the Crown to help develop a legal framework for reconciliation.

The concluding section below will revisit the Aboriginal law context. First, it is worth noting that the judicial ambivalence noted in the previous paragraph has not been limited to the Aboriginal law context. In fact, the SCC’s reasons in the *Secession Reference* likely represent the Court’s most nuanced consideration of the interplay between constitutional legitimacy and popular sovereignty. In that reference, the Court was asked to answer three questions: whether Quebec had a right to secede unilaterally under Canadian law; whether it had such a right under international law; and what should happen in the case of a conflict between the answers to those first two questions.

The Court concluded that Quebec did not have a *legal right* to carry out secession unilaterally,⁶³ but that a vote for secession by a clear majority of Quebecers on a clear referendum question would trigger a constitutional obligation on the other members of the Canadian federation to negotiate with Quebec regarding secession. Should a government fail to do so in accordance with constitutional principles, such failure would call into question the legitimacy of that government. Any significant loss of legitimacy on the part of governments within the Canadian federation would call into question the legitimacy of the Canadian constitutional order as a whole, at least in its claim to govern Quebec. The Court acknowledged that a breakdown in negotiations would likely leave the question of Quebec sovereignty in the international realm, and that international recognition of Quebec as a sovereign state would in effect end Canadian sovereignty over Quebec.⁶⁴

A comprehensive discussion of the Court’s reasons is beyond the scope of this chapter. The paragraphs below will focus on three key aspects of the Court’s reasons: (a) the distinction between legitimacy and legality; (b) the discussion of how unwritten constitutional principles bear on the question of secession; and (c) the Court’s recognition of the limits of its own institutional authority in interpreting these constitutional principles. In sum, the Court explained that, within the Canadian constitutional order, the Court is the ultimate authority on the *legal* interpretation of the constitution. That is, the Court has the institutional mandate to order the enforcement of its understanding of legal rights and obligations under the constitution. But the Court recognized that it cannot claim the same institutional mandate on questions of constitutional *legitimacy*. Yet, in contrast with the institutional positivist position staked out in *M’Intosh* and *Coe*, the Court developed its interpretation of the criteria of constitutional legitimacy, particularly in relation to the principle of popular sovereignty. The Court did not offer this interpretation as a judicially enforceable account of legitimacy—the Court’s own reasoning suggests that would be an oxymoron. Rather, the Court provided an account of the constitutional principles governing

⁶² *Haida Nation*, *supra* note 39 at para 20.

⁶³ This was the Court’s answer under both Canadian and international law, though I focus only on the Court’s discussion of Canadian law here. Given the Court’s answers to the first two questions, the third was rendered moot.

⁶⁴ *Secession Reference*, *supra* note 8 at para 103.

legitimacy in order to provide guidance to other constitutional actors, including the broader Canadian public. The following paragraphs expand on these elements of the *Secession Reference*.

a. *The distinction between legitimacy and legality in the Secession Reference*

The Court explained that “a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people.”⁶⁵ The Court drew two conclusions from this requirement. First, even when the aspirations of the people are expressed in forms that are not legally cognizable under the constitution, such expressions of popular aspirations may nonetheless engage principles of constitutional legitimacy. The Court made the point specifically with respect to the holding of a referendum on secession: “Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.”⁶⁶ As a result, “even though a referendum [...] has no direct legal effect” the democratic principle means that “an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution’s amendment process in order to secede by constitutional means.”⁶⁷

The Court thus recognized that expressions of popular sovereignty may carry constitutional weight, even when they are not expressed through established constitutional forms. This recognition of popular sovereignty implies a correlative duty. As the Court put it, the “corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table.”⁶⁸ These are “binding obligations under the Constitution of Canada”,⁶⁹ but they are not legally enforceable: “Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess.”⁷⁰ The consequence of failing to discharge these obligations is not a court-ordered remedy, but a loss of legitimacy. The Court noted the potential for governments to lose legitimacy both with the people they represent and on the international plane, where the question of Quebec sovereignty would ultimately be decided, should negotiations break down following a clear vote for secession.

⁶⁵ *Secession Reference*, *supra* note 8 at para 67.

⁶⁶ *Secession Reference*, *supra* note 8 at para 87.

⁶⁷ *Secession Reference*, *supra* note 8 at para 87.

⁶⁸ *Secession Reference*, *supra* note 8 at para 88.

⁶⁹ *Secession Reference*, *supra* note 8 at para 153.

⁷⁰ *Secession Reference*, *supra* note 8 at para 101.

b. *Unwritten constitutional principles in the Secession Reference*

The SCC explained that unwritten principles form the “lifeblood” of the constitution.⁷¹ The written text of the constitution alone could never be adequately responsive to the unanticipated and changing needs of a complex political community. As the Court explained:

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government.⁷²

The Court thus affirmed, in essence, that “the law [...] is a repository of inexhaustible legal reasons”,⁷³ by insisting that the constitution provides a complete framework for our system of government. The constitution must, in principle, be capable of addressing whatever problems or situations arise. However, this insistence that the constitution contains “a comprehensive set of rules and principles” has to be understood in the context of the Court’s distinction between legality and legitimacy and in light of the fact that it is referring to “constitutional conventions and the workings of Parliament” which are not necessarily enforceable by the courts.

According to the Court, then, our constitutional framework must be flexible and complete enough to respond to clear expressions of popular sovereignty, even when these expressions lie beyond constitutionally established forms. However, the response of our constitutional framework will be governed at least in part by principles of legitimacy that are not judicially enforceable.

c. *Judicial recognition of institutional limits in the Secession Reference*

This brings us to the limits of the Court’s institutional authority. While “a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government”, it does not follow that the Court’s interpretive role is constant across all these rules and principles. As the Court put this point, “the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations [...] is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution.”⁷⁴

The Court noted that when obligations under the Constitution are violated, “the appropriate recourse in some circumstances lies through the workings of the political process

⁷¹ *Secession Reference*, *supra* note 8 at para 51.

⁷² *Secession Reference*, *supra* note 8 at para 32.

⁷³ David Dyzenhaus, “The Genealogy of Legal Positivism”, *Oxford Journal of Legal Studies*, vol 24, no 1, 39-67 at 46. Dyzenhaus is there describing the “common law style of reasoning”: see notes 77 to 83 and accompanying text in chapter 1.

⁷⁴ *Secession Reference*, *supra* note 8 at para 89.

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rather than the courts.”⁷⁵ If government representatives were to conduct post-referendum negotiations in a manner that undermined the legitimacy of the government they represent, they would face the consequences in the political not the judicial realm:

The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.⁷⁶

The Court also acknowledged that a breakdown of negotiations post-referendum or “an unconstitutional declaration of secession” could lead to a “*de facto* secession” and thus the end of Canadian state sovereignty over Quebec. Although the Court refers here to “an *unconstitutional* declaration of secession”, it recognized that it does not have the institutional capacity to step in and settle any post-referendum debate as to whether a declaration of secession is constitutional or not, legitimate or not. The Court lacks the institutional mandate to settle such questions of sovereign legitimacy:

The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.⁷⁷

In sum, the Court in the *Secession Reference* acknowledged there may be occasions when aspirations of the people, expressed outside of governmental representation and any other constitutionally recognized processes, trigger constitutional obligations governed by principles of legitimacy. The Court acknowledged that the judiciary is not institutionally equipped to enforce matters of legitimacy. If governmental representatives—the constitutional actors who exercise official powers in the name of the Crown, or of the sovereignty represented by the Crown—fail to meet these obligations in accordance with principles of legitimacy, this may lead to a breakdown in the relationship between popular sovereignty and constitutional form. Such would be the situation, for instance, of “*de facto* secession”.

In this way, the Court in the *Secession Reference* was willing to entertain questions of potential divergence between popular sovereignty and Crown sovereignty. The Court did not assign these questions to a purely political realm beyond judicial consideration. Rather, the Court offered a detailed judicial interpretation of such a situation—the hypothetical case of a clear vote by the people of a province to secede from Canada—and of the constitutional principles that would govern it. The Court described the obligations that would arise for governmental actors to maintain or re-establish the legitimacy of the relationship between popular sovereignty and constitutional form. But these are not obligations that can be

⁷⁵ *Secession Reference*, *supra* note 8 at para 102.

⁷⁶ *Secession Reference*, *supra* note 8 at para 153.

⁷⁷ *Secession Reference*, *supra* note 8 at para 155.

judicially enforced, and the Court acknowledged that a failure to maintain that relationship may lead to a breakdown of constitutional legitimacy. With these considerations in mind, the next section revisits the judicial treatment of popular sovereignty in the Aboriginal law context.

4. *Conclusion: popular pluralism in Indigenous-state relations*

The Introduction to this dissertation looked at two pairs of cases from the Aboriginal law context that illustrate the translation of changes in social and political imaginaries into changes in legal doctrine. The discussion in this chapter adds some nuance to our understanding of this process of translation. On the one hand, such translation is in many ways the stock-in-trade of common law reasoning, which continually adapts the “repository of inexhaustible legal reasons”⁷⁸ to evolving social norms and realities. *Carter*, discussed above, provides a particularly transparent example of this process of adaption, as the Court had to explain why it was changing its mind on the constitutionality of criminal prohibitions against physician-assisted dying. The reasoning in Aboriginal law cases often resembles that in *Carter*—a court may note evolving social norms and realities, and the discarding of older biases and prejudices to justify evolution or change in legal doctrine. The SCC reasons in *Simon* are noted above as an instance of judicial reasoning along these lines. To the extent the principle of popular sovereignty figures in this pattern of judicial reasoning, it simply affirms the common law ethos that legal doctrine must continually adapt to evolving social norms and realities, that the law is necessarily grounded in the social and political imaginaries of the people whose law it is, if they are a self-governing people. As argued in chapter 1, this common law reasoning underlies historically grounded legal pluralism as an interpretive approach. However, common law reasoning of this kind can often also be accommodated within an institutional positivist approach.⁷⁹

In some cases, however, the principle of popular sovereignty figures as a challenge to assertions of Crown or state sovereignty. In such cases, parties might appeal to popular sovereignty not simply to ask that evolving social norms and realities be taken into account in the interpretation of existing legal provisions or constitutional forms. They might instead appeal to popular sovereignty as a challenge to the very legitimacy of established constitutional forms. The *Secession Reference*, discussed in detail above, is an example of such a challenge outside the Aboriginal law context. In the *Secession Reference*, the Court acknowledged and provided an extended discussion of the potential for a disconnect between the will of the people expressed outside of constitutional forms and the will of the people as represented through those forms. The dissent in *Caron* highlighted a similar disconnect by insisting that the Crown, as representative of Canadian state sovereignty, did not represent

⁷⁸ Dyzenhaus, *supra* note 73.

⁷⁹ Some legal positivists characterize adaptive aspects of judicial common law reasoning as *extending* or *making* law as opposed to declaring or interpreting law, but this is in many ways a matter of semantics. See discussion of Dyzenhaus in chapters 1 and 3.

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the “will of the people” on whose behalf the Métis provisional government negotiated entry into Canada in 1870.

Caron did not, of course, involve a challenge to the legitimacy of established constitutional forms today; rather the dissent applied the principle of popular sovereignty to insist that the Crown could not represent the will of the people of Red River in 1870, and that their perspective as represented by the Métis provisional government therefore had to be weighed independently of the Canadian state perspective when interpreting the 1870 negotiations and agreement. Some cases in the Aboriginal law context do involve a more direct challenge to the legitimacy of established constitutional forms today, insofar as these established state forms displace or ignore the popular sovereignty and legal orders of Indigenous peoples. Chapter 2 noted that the twin decisions of *Haida Nation* and *Taku River Tlingit* speak of “*de facto* Crown sovereignty”⁸⁰ and of the need “to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”.⁸¹ Along lines that resonate with the dissent in *Caron*, the Introduction explained how the Superior Court of Ontario in *Restoule* held that, in interpreting the Robinson-Huron and Robinson-Superior Treaties of 1850, equal interpretive weight had to be accorded to the legal perspectives represented by both Anishinaabe and Crown negotiators.

Judicial reasoning in these cases, whether interpreting the meaning of historical agreements in the past or the context of Indigenous-state relations today, highlights the fact of popular pluralism: the popular sovereignties of different peoples are in play and the Crown cannot legitimately claim to represent them all. The Crown may *aspire* to do so and may enter treaty relationships with that end in view. So long as the Canadian constitutional order is committed to the principle of popular sovereignty, however, such an aspiration cannot simply be imposed on treaty partners or on Indigenous peoples who have yet to enter treaty relationships with the Crown. Rather, the aspiration of Crown sovereign assertions would have to be assessed according to principles not only of legality but also of legitimacy. In the *Secession Reference*, the Court made clear that this was true even amongst the founding members of confederation, with legitimacy to be assessed according to constitutional principles that include the principle of popular sovereignty. In cases like *Restoule*, *Haida Nation* and *Taku River Tlingit*, among others discussed in previous chapters, the Court indicates that, in the context of Indigenous-state relations, the honour of the Crown and reconciliation also constitute fundamental principles.

As detailed in chapter 2, the courts have derived various legal rights and obligations from the honour of the Crown to help provide a legal framework for reconciliation. However, as in the *Secession Reference*, the SCC has emphasized that political negotiation is necessary to achieve and maintain constitutional legitimacy, which cannot simply be imposed or enforced judicially. Historically grounded pluralism, as an interpretive approach explored in previous chapters, accepts popular pluralism as the historically undeniable starting point in

⁸⁰ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [“*Taku River Tlingit*”] at para 42.

⁸¹ *Haida Nation*, *supra* note 39 at para 20.

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Indigenous-state relations, and insists that aspirations towards constitutional legitimacy must also begin from a recognition of popular pluralism as the legal starting point.⁸²

The institutional positivist approach, exemplified in *M'Intosh* and *Coe* and found in much of the judicial reasoning examined in chapter 2, is less willing to engage questions of constitutional legitimacy and popular pluralism. This positivist approach emphasizes the institutional role of the courts as interpreters of lawful authority flowing from Crown sovereignty, and is skeptical of the capacity and propriety of domestic courts entertaining any alleged disconnect between popular sovereignty and asserted Crown sovereignty. As always, however, it bears emphasizing that the difference between the pluralist and positivist approaches, as actually found in the case law, is a matter of degrees. Even the pluralist approach considered here is sensitive to the institutional role of the courts and the limits of that role. Rather than simply refuse to entertain questions of legitimacy, however, the pluralist approach may acknowledge the limits of judicial capacity to enforce principles of legitimacy. This allows the courts to provide judicial guidance on such principles, and to develop supporting legal doctrine as a framework for the work of political negotiation, while acknowledging that such negotiation always remains necessary in order to achieve and maintain constitutional legitimacy.⁸³

The next (and final) chapter will explore this ongoing dynamic and tension between positivist and pluralist interpretive approaches in the context of the implementation of UNDRIP in Canadian law.

⁸² Historically grounded pluralism thus accepts the multi-juridical character of the Canadian legal order, including not only the common law and civil law but also Indigenous legal traditions. See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

⁸³ As the Court expressed this in the context of the *Secession Reference*, *supra* note 8 at para 101: "it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess."

The Carnival

Then a wild carnival swept through the city, with a momentum that seemed to swallow up and proclaim the sense and truth of all that had ever been. Every citizen was invited to rump out on stage and make a fool or a star of themselves, shouting out their version of how all should be. The carnival shone so bright that it seemed the very embodiment of eternity and the Revelation of Being. And yet there never was such an explosion of evanescent and senseless bustle.

The seagulls play

They ride the wind on windy days, hanging in place for as long as they can, then letting themselves drift sideways, like stage gulls pulled offstage by invisible strings. They get a kick out of it. They play. It's all simple and clear. But the gulf between their play and our world is disturbing—something our world can't seem to digest, that keeps slipping through our fingers.

The Alchemist

One of my closest friends was an alchemist. He used to drag me down to the ocean and make me drink hard brine that burned like sulphur through my insides. He said he swore by it, though I never saw him drink it himself.

He would hypnotize me with his intensity, spouting off about the limits of self-denial that we can push through, about the far horizons of spirit that draw our sails with focused concentration and self-possession. He made you feel you could split atoms with your own sheer force of longing.

And so—when other kids ran off to the carnival for juice and popsicles, when other teens pulled their gloomy angst and preened, when other young men went off to split more sensual joys or to dissolve into career—I pulled my galoshes and buckets to huddle with my friend the alchemist in the valley below.

I would speak and listen for hours under his shadow, hanging onto my galoshes through piques of pride, resentment, and insecurity. I couldn't tell you today what all we had talked about through those strange seasons—any more than I could tell you what the brine spoke to me. But I will say this: while aging carnival creatures all around me seem lost at their receding horizons—I have stepped from the valley and welcome all my horizons slow sailing home.

CHAPTER 5

Performing Sovereignty in a Time of Ideological Instability: The Reception of UNDRIP into Canadian Law¹

I am thus suggesting a way of reading a text as rhetorically constitutive: as an act of expression that reconstitutes its own resources of language and in doing so constitutes a community, directly with its reader and indirectly with those others in the world about whom it speaks (or towards whom it invites its reader to take one attitude or another).

- James Boyd White, *Justice as Translation*²

1. Introduction: the judicial performance of sovereignty

Previous chapters have noted Canada's stated commitment to shedding the civilizing mission founded on notions of European superiority. Those chapters explored the ways in which this evolving ideological commitment has rippled through Canadian Aboriginal law and raised questions about the elaboration of sovereignty in Canadian courts. The Canadian state and Canadian law remain committed, of course, to defending the legitimacy of the state's assertions of sovereignty.

Canadian law is thus faced with the task of reconstituting and re-legitimizing state sovereignty through our current period of ideological transition. This task is, in crucial respects, performative. Case law continually re-inscribes "sovereignty" within legal doctrines that make "sovereignty" perform various functions. As Mark Walters notes, "[a]s a construct of ordinary legal discourse, sovereignty is, like all ordinary legal constructs, something that must be constantly interpreted and reinterpreted over time to ensure that it contributes to the general understanding of law as an enterprise that integrates legality and legitimacy."³

Beyond or alongside particular legal outcomes, then, the case law can be read as an ongoing public performance, or contending public performances, of sovereignty. One measure of any such performance is whether it embodies or enacts sovereignty in a manner

¹ A version of this chapter has been accepted for publication (expected in fall 2021) by *UBC Law Review*, for a special issue focusing on British Columbia's adoption of the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 ["*DRIPA*"].

² James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990) at 101.

³ Mark Walters, "Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 40.

adequate to the situation before the court—a situation that includes not only the specific legal dispute at hand but also the broader social, political, and historical context.⁴

As discussed in chapter 3, David Dyzenhaus uses the rhetorical question *but, how can that be law for me?* to capture the concern with legitimacy that must underpin judicial interpretation of the law.⁵ The “reconstructed legal positivism” favoured by Dyzenhaus would have domestic courts interpret state assertions of sovereignty as committing the judiciary to developing the legal system in ways that help establish and maintain the legitimacy of state sovereignty. This judicial commitment means, in part, developing acceptable answers to the question, asked by any citizen or legal subject, *but, how can that be law for me?* This question is one way to begin thinking about the measure of a court’s performance of sovereignty: do the reasons of the court provide acceptable answers to all parties purportedly governed by the law that the court interprets?

In Canadian Aboriginal law today, the courts are faced with developing such answers in the context of the ideological transition and instability examined in previous chapters. Canadian courts, the Supreme Court of Canada (“SCC”) in particular, must *translate* the ways that sovereignty functioned within past colonial contexts into ways that it may function beyond or apart from those colonial webs of meaning. Through the accumulation of judicial decisions in particular cases, together with countless factors beyond the courtrooms, we may ultimately find the courts pursuing this task through relatively conservative translations or through significantly transformative performances of sovereignty, or something in between. Better and worse performances are possible, no doubt, at any point along such a spectrum.

Whether the courts are able to develop satisfactory translations, i.e. are able to perform sovereignty in ways that are convincing and adequate to the current moment, is obviously a contested and open question. The previous chapters have considered positivist and pluralist judicial approaches to this task in the Aboriginal law context broadly. This chapter offers something of a case study of these contending approaches in the context of Canada’s commitment to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”).⁶ The implementation of UNDRIP in Canadian law is a focus of the state’s promises of reconciliation with Indigenous peoples. The courts, including the SCC, have so far refrained from saying much about UNDRIP. There have, however, been notable legislative efforts geared towards implementation. British Columbia has adopted the *Declaration on the Rights of Indigenous Peoples Act* (“DRIPA”), which received royal assent on November 28, 2019.⁷ At the federal level, a similar law has recently been adopted by

⁴ This is the broad context that Charles Taylor refers to as our “whole situation”: Charles Taylor, *A Secular Age* (Cambridge, MA: The Belknap Press of Harvard University Press, 2007) at 173. See the discussion of Taylor on “social imaginary” in sections 1 and 2 of the Introduction.

⁵ David Dyzenhaus, “The Inevitable Social Contract”, *Res Publica* (2020) at 10; online: <<https://doi.org/10.1007/s11158-020-09467-z>>. See the discussion in section 1 of chapter 3, at notes 22 to 24 and the accompanying text.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [“UNDRIP”].

⁷ *DRIPA*, *supra* note 1.

Parliament,⁸ modelled on a private member's bill introduced by Romeo Saganash during the previous Parliament.⁹

This chapter will examine both *DRIPA* and two recent SCC decisions, *Uashaunnuat* and *Nevsun*,¹⁰ released within a week of each other in early 2020. The SCC decisions do not speak directly to UNDRIP, but they expose judicial fault lines relating to the interplay between Canadian state sovereignty and non-state legal systems (Indigenous in *Uashaunnuat* and international in *Nevsun*), an interplay that is also at the heart of UNDRIP. For now, the specific directions that UNDRIP implementation will take in Canadian law remain hard to predict. *Uashaunnuat* and *Nevsun* help give a sense of the terms and stakes of the current judicial debates that are directly relevant to the paths that implementation may ultimately follow.

In line with the methodology of the dissertation as a whole, this chapter aims first to draw out key features of *DRIPA* and the SCC judgments, without imposing a heavy conceptual lens on this initial analysis. Once key features emerge, I will highlight specific connections to the pluralist and positivist approaches discussed in previous chapters. This chapter's focus on both legislation and judicial reasons also gives us a chance to consider the intertwining of the legal and political contexts relevant to the implementation of UNDRIP. In this respect, two points woven throughout the previous chapters bear repeating here. First, we cannot sensibly talk of law as "independent" of politics or think of constitutional forms as legal structures that contain the business of politics from the outside, as it were.¹¹ Second, the practices, norms, language, and institutions of the law nonetheless place distinct constraints on judicial performance, so that it would also be a distortion to try "reducing" the work of the courts to politics. Judicial interpretation, especially of constitutional law, is best understood as a set of practices that express and partly reshape, through a distinctive legal voice, the social and political imaginaries in which the courts are embedded.¹²

⁸ The federal law, Bill C-15: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14, received royal assent on June 21, 2021.

⁹ Romeo Saganash, Member of Parliament representing the New Democratic Party, introduced Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, as a private member's bill on April 21, 2016 during the 42nd Parliament of Canada. Bill C-262 never passed its third reading in the Senate and died on the order paper with the dissolution of the 42nd Parliament.

¹⁰ *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 ["*Uashaunnuat*"] (disclosure: I acted as co-counsel for the intervener Amnesty International Canada before the SCC in *Uashaunnuat*); *Nevsun Resources Ltd v Araya*, 2020 SCC 5 ["*Nevsun*"].

¹¹ See James Tully's notion of "democratic constitutionalism", contrasted with "constitutional democracy", in James Tully, "Modern Constitutional Democracy and Imperialism," *Osgoode Hall Law Journal* 46.3 (2008): 461-493.

¹² I take inspiration here from White's *Justice as Translation*, *supra* note 2 at 101, describing the judicial opinion as a "form of life" and offering the following advice for reading it: "I am thus suggesting a way of reading a text as rhetorically constitutive: as an act of expression that reconstitutes its own resources of language and in doing so constitutes a community, directly with its reader and indirectly with those others in the world about whom it speaks (or towards whom it invites its reader to take one attitude or another)." It is helpful to speak of "imaginaries" in the plural, as there is no single social or political imaginary in a country, but many overlapping and in some respects contradictory ones. The imaginaries of some communities may be

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The remainder of this chapter is divided into four sections. The first section briefly reviews structural elements of UNDRIP, noting its frank dual commitment both to repudiating colonial ideology and to upholding state sovereignty. The second section turns to *DRIPA*. While specific provisions found in *DRIPA* do not offer much detail for the actual implementation of UNDRIP, they arguably suggest that British Columbia would prefer to skirt larger questions of sovereignty in favour of pursuing more focused agreements with Indigenous peoples. There may be good reasons for such an approach. However, as witnessed by ongoing disputes between the state and Indigenous peoples, and within Indigenous communities themselves, over pipelines, fisheries, forestry, mining activities, etc., issues relating to competing sovereign claims and to the legitimacy of state assertions of lawful authority continually rise to the surface. A commitment to the implementation of UNDRIP seems as promising a context as any in which to begin addressing these broader issues in greater depth and transparency. In fairness, the legislative debates leading to the adoption of *DRIPA* do suggest provincial openness to pursuing agreements with Indigenous peoples that address these larger issues.

The third section reviews the judgments issued by the SCC in *Uashaunnuat* and *Nevsun*, cases in which the Court split 5-4 with the same five justices in majority and same four in dissent in each case. The heart of the disagreement between majority and dissent in these cases revolved around the proper role of domestic courts in interpreting elements of non-state legal orders that arguably impinge on state sovereignty. In constitutional democracies like Canada, where judges are styled guardians of the constitution,¹³ the courts are undoubtedly a major site for the performance and elaboration of state sovereignty. *Uashaunnuat* and *Nevsun* each offer contending performances in the context of specific legal disputes; below I unpack some of the differences between majority and dissent that may have wider repercussions in the evolution of Canadian law. Finally, the fourth section notes how these contending performances of sovereignty may play out in the context of implementing UNDRIP. Judicial debates about sovereignty would seem to be on the agenda for Canadian law for the foreseeable future and that is, I think, on balance a good thing.

underrepresented, others overrepresented, in the judiciary. Judges tend to present their own reasons as the “correct” interpretation of law in any given case. This tendency, particularly with respect to constitutional interpretation, may obscure the underlying contrasts and conflicts between different social and political imaginaries in the country. What Howard Zinn, *A People’s History of the United States*, (New York: HarperCollins, 2015), at 10 writes of history applies equally to constitutional interpretation: “The history of any country, presented as the history of a family, conceals fierce conflicts of interest (sometimes exploding, most often repressed) between conquerors and conquered, masters and slaves, capitalists and workers, dominators and dominated in race and sex.” In the judicial context, dissenting reasons help to bring some of this tension to the surface—though, again, disagreement within the judiciary typically will not fully represent the diversity of views present in the broader political community, particularly given the vested interests of the judiciary as “guardian of the constitution”: see *infra* note 13.

¹³ E.g. *Hunter v Southam Inc*, [1984] 2 SCR 145 [*“Hunter”*] at 155: “The judiciary is the guardian of the constitution”. In *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 89, a majority of the SCC, citing *Hunter*, specified that the judiciary became the guardian of the constitution as “a necessary corollary of the enactment of the supremacy clause”, i.e. section 52(1) of the *Constitution Act, 1982*. See also the discussion in chapter 4, note 14 and accompanying text.

2. *UNDRIP: repudiation of colonial ideology, affirmation of state sovereignty*

Relations between Indigenous peoples and the Canadian state currently seem destined to flare up around the tension inherent in two basic elements of the state's approach. The first element is the state's rhetorical repudiation of the ideological foundations of colonialism, which asserted a hierarchy of civilizations justifying European acquisition of sovereignty in the "new world". In Canada, this repudiation has been expressed through various official means, including the Royal Commission on Aboriginal Peoples,¹⁴ the Truth and Reconciliation Commission,¹⁵ formal apologies issued by federal and provincial governments for past colonial practices and policies, SCC judgments, and indeed through Canada's endorsement of UNDRIP itself.¹⁶

We find a pithy (and relatively non-committal) statement of these now repudiated ideological foundations in the reasons of Chief Justice Marshall in *Johnson v M'Intosh*,¹⁷ a foundational case reviewed in previous chapters and a case on which the SCC has repeatedly relied.¹⁸ In Chief Justice Marshall's words:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence.¹⁹

¹⁴ See *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Canada Communication Group Publishing, 1996).

¹⁵ See *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada 2015) [*TRC Summary Report*]. The opening sentence of the Introduction to the *TRC Summary Report* condemned "the central goals of Canada's Aboriginal policy" over the first century of confederation as amounting to "cultural genocide": "For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as 'cultural genocide.'"

¹⁶ See the endorsement by Minister Carolyn Bennett before the United Nations in May 2016: *Northern Public Affairs*, "Fully Adopting UNDRIP: Minister Bennett's Speech at the United Nations" (10 May 2016), online: <www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>.

¹⁷ *Johnson v M'Intosh*, 21 US 543 (1823) ["*M'Intosh*"].

¹⁸ In *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 380, Justice Hall described *M'Intosh* as "the locus classicus of the principles governing aboriginal title." See also *Guerin v The Queen*, [1984] 2 SCR 335 at 380; *R v Sparrow*, [1990] 1 SCR 1075 at 1103; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 75.

¹⁹ *M'Intosh*, *supra* note 17 at 572-573. The Marshall Trilogy of cases, including *M'Intosh*, is discussed in section 3 of chapter 1. As noted there, Chief Justice Marshall also stated in *M'Intosh* that the presumption of the United States that "discovery" had been converted into "conquest" was an "extravagant [...] pretension", though he felt bound to recognize that same pretension as the established "law of the land": *M'Intosh* at 591-

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The second basic element of the state's current approach to Indigenous-state relations is a reaffirmation of state sovereignty despite the repudiation of its past ideological foundations. As seen in previous chapters, this reaffirmation is at times accompanied by recognition that the state must take steps to establish the legitimacy of its assertions of sovereignty, in light of the evolving social and political imaginaries of Indigenous-state relations.²⁰

The dynamic between these two elements is at the heart of current political and legal developments in Indigenous-state relations. That dynamic is embedded within the terms of UNDRIP as well, as the following paragraphs briefly spell out.

UNDRIP's preamble affirms, for instance, "that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust". Beyond this affirmation of equality in the preamble, article 3 of the Declaration states that, like other peoples, "Indigenous peoples have the right to self-determination." These provisions make plain that a driving force of UNDRIP is the repudiation of colonial ideologies of civilizational hierarchy.

At the same time, the final article of UNDRIP reaffirms "the territorial integrity" and "political unity of sovereign and independent States."²¹ The second paragraph of this final article also allows for limits on the exercise of the rights listed in UNDRIP, along the lines of section 1 of the *Canadian Charter of Rights and Freedoms*, which provides federal and provincial governments the opportunity to justify limits they place on rights and freedoms listed in the *Charter*.²²

592. The Chief Justice was even more blunt in his criticism of that "extravagant and absurd idea" nine years later in *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832) at 544-545. For a comprehensive review of the historical background to the litigation in *M'Intosh*, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007).

²⁰ See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20: "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims [...] Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*"; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42: "The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty." See the discussion of the evolution of Canadian Aboriginal title doctrine reviewed in chapter 2.

²¹ UNDRIP, *supra* note 6, article 46(1).

²² UNDRIP, *supra* note 6, article 46(2) reads in part: "The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

Section 1 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Charter*"] reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Note that in the legislative debates on *DRIPA*, Michael de Jong, MLA of the BC Liberal Party, suggested that article 46(2) was "the United Nations declaration equivalent of section 1 of our Charter"; Scott Fraser,

The combination of these two elements—the rejection of a hierarchy of civilizations and the simultaneous reaffirmation of state sovereignty—both in the Canadian state’s approach and in the provisions of UNDRIP, offer a broad vision of aspirations for Indigenous rights and self-government within Canada *and* of limits to those aspirations. Beyond the broad vision, however, they offer little guidance in the context of specific disputes—little guidance as to the specific consequences that we should draw for state practices and performances of sovereignty today.

The Introduction explored two other instances of the legal open-endedness that accompanies broad ideological commitments and periods of transition. In *Simon*, the SCC rejected notions of civilizational hierarchy as a basis for concluding that Indigenous-Crown treaties are legally non-binding.²³ That ideological rejection could not, however, of itself answer the many doctrinal questions that followed about the specific domestic legal status of Indigenous-Crown treaties and about how domestic courts ought to interpret and enforce them. In *Restoule*, the Superior Court of Ontario stressed the need for judicial understanding of Anishinaabe legal principles in order to interpret the provisions of treaties concluded between Anishinaabe peoples and the Crown in 1850.²⁴ The Court adopted this interpretive approach despite binding precedent on the same treaties that took a sharply contrasting approach.²⁵ As in *Simon*, the ideological shift in *Restoule* raises doctrinal questions—notably about the role of Canadian courts in reaching conclusions about Indigenous law, whether through legal interpretation or hearing of expert evidence—that cannot be answered in any straightforward or immediate sense from the ideological shift alone.

As the examples discussed in the Introduction illustrate, the particular character and the acceptable and unacceptable practices of Crown sovereignty are in a state of constant elaboration in Canadian law. In this ongoing performance, the SCC seeks a stabilizing role for the judiciary, as the “guardian of the constitution”.²⁶ When addressing assertions of Crown sovereignty, the courts will therefore look to develop legal doctrine in a way that grounds and structures the legitimacy of those assertions. In doing so, the courts might impose significant legal obligations on the Crown and restrictions on the exercise of state sovereignty, but they are not going to fundamentally repudiate existing forms of state power.

The final article of UNDRIP is also designed to stabilize existing conditions of state sovereignty and territorial integrity. Canadian case law and UNDRIP are thus designed, in part, to legitimize the entrenchment of state sovereignty over Indigenous territories and peoples, despite (though also through) provisions in the latter affirming that the state must

Minister of Indigenous Relations and Reconciliation, responded that he “would tend to agree with the intent” of that suggestion: British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10824.

²³ *Simon v The Queen*, [1985] 2 SCR 387 [“*Simon*”]. See the discussion in section 5 of the Introduction.

²⁴ *Restoule v Canada (AG)*, 2018 ONSC 7701 [“*Restoule*”]. See the discussion in section 5 of the Introduction.

²⁵ *Ontario (Attorney General) v Bear Island Foundation*, 1989 CanLII 4403 (ONCA), 68 OR (2d) 394. See the discussion in section 5 of the Introduction.

²⁶ See *supra* note 13.

aim to secure the “free, prior and informed consent” of Indigenous peoples to decisions that impact them.²⁷ Entrenchment of state sovereignty accompanied by a promise to make that sovereignty acceptably legitimate for all citizens, including Indigenous peoples: that is the basic political compromise at the heart of UNDRIP, as it is in the “reconstructed legal positivism” described by Dyzenhaus.²⁸

The legal open-endedness of ideological transition means, however, that this fundamental political compromise is not a simple or stable endpoint. Rather, the commitment to ideological transition must be translated into, and continually worked out within, legal doctrine. This judicial task is constantly renewed and animated by changes in the surrounding social and political imaginaries, and by the conflicts and demands that emerge from those changes. Such changes, conflicts, and demands may precipitate periods of ideological transition. The courts necessarily respond by developing legal doctrine to resolve the cases brought before them. This evolution in the legal doctrine will, in turn, have some effect on ideological transition itself and on the broader social and political imaginaries of the country. As emphasized in chapter 4 (and as the history of democracy writ large in any case makes plain), it is always possible for legitimacy and legality to fall apart. The work of the courts is embedded within this ongoing project of weaving legitimacy and legality together in a sufficiently acceptable manner—where “sufficiently acceptable” is not subject to any simple measure and can never be secured once for all.

Stated commitments to implementing UNDRIP and debates over judicial treatment of its provisions (and of domestic implementing legislation) should therefore be understood within this broader context of “reconstructing” state sovereignty and of doctrinal open-endedness in the process of reconstruction. The ongoing tension and interplay between institutional positivism and historically grounded pluralism traced throughout this dissertation can be seen as a particular embodiment of this process, agonistically played out across cases and in disagreements between majority and dissent within cases (and between parties to the cases, in academic commentary, in public debate, etc.). That is, we might look at the pluralist trends traced in previous chapters as working towards a reconstruction of positivist aspects of Canadian state law, so as to develop the state’s assertions of sovereignty in a direction that is acceptably legitimate for all citizens. Conversely, we can understand the institutional positivist trends that continue to evolve in the case law, also traced in previous chapters, as emphasizing the importance of the institutional limits on the courts and worrying about the

²⁷ UNDRIP, *supra* note 6, article 19. See also articles 10, 11(2), 28(1), 29(2), and 32(2).

²⁸ Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015) advances a similar argument; at 22, Macklem explains that according to the legal conception he develops of human rights (such as those declared in UNDRIP), “human rights serve as instruments that mitigate adverse consequences of how international law organizes global politics into an international legal system. [...] They speak to adverse consequences of how international law deploys the concept of sovereignty to organize global politics into a legal order—consequences that generate political projects aimed at their amelioration.” See also James Anaya and Sergio Puig, “Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples”, 67 *University of Toronto Law Journal* 435–464 (2017). I thank Avigail Eisenberg and James Tully for calling my attention to these specific sources and to how the arguments advanced there resonate with those developed in this dissertation.

loss of judicial legitimacy if those limits are too far exceeded. There is thus an ongoing interplay of concerns about legality and legitimacy in the evolving tensions between pluralist and positivist approaches. In any given case or series of cases, we might think that one approach or the other produces the more compelling argument, while nonetheless acknowledging the validity of the concerns underlying the contrasting approach. As stressed throughout the preceding chapters, it is always helpful to remember that the differences between institutional positivism and historically grounded pluralism, as interpretive approaches actually found in the case law, are generally matters of degrees.

In any case, legitimizing state sovereignty in relation to Indigenous peoples clearly *is* at least one aim of both Canadian case law and UNDRIP, and this is a doctrinally open-ended aim. What exactly “legitimacy” might come to mean or look like in practice cannot be determined simply from the text of UNDRIP or from the state’s commitment to implement its provisions domestically. Many social and political factors will have an impact on implementation. The ongoing tensions between positivist and pluralist interpretive approaches will be particularly relevant to the judicial role in implementing UNDRIP and to judicial interpretation of domestic legislation geared towards that implementation.

To gain a more solid grasp on how those positivist-pluralist tensions may shape the judicial reception of UNDRIP in Canada, the next section reviews the key provisions of *DRIPA*, the UNDRIP-implementing legislation adopted in British Columbia, with section 3 then diving into the judicial debates found in *Uashaunnuat* and *Nevsun*.

3. To address or skirt larger issues of sovereignty in implementing UNDRIP?

DRIPA borrows heavily from Bill C-262, which was introduced in Parliament by Romeo Saganash as a private member’s bill in April 2016.²⁹ Bill C-262 passed its three readings in the House of Commons but did not pass third reading in the Senate before the dissolution of Parliament and the Fall 2019 federal election. I briefly note some of the key provisions common to both here,³⁰ before highlighting the major addition made in *DRIPA*, which on its face may seem to signal the Province’s intent to pursue relatively focused agreements rather than attempting to address larger questions of sovereignty and Indigenous jurisdiction. However, comments made by the provincial government during debate over *DRIPA* suggest openness to tackling some of these larger questions, as well.

Bill C-262 contained a preamble with nine “Whereas” clauses, including one that reproduced in essence the repudiation in UNDRIP’s own preamble of “doctrines, policies and practices based on or advocating superiority of peoples ...” A further clause in Bill C-

²⁹ See *supra* note 9. Most, if not all, of what is said here about Bill C-262 applies equally to Bill C-15, which has now been adopted into federal law: see *supra* note 8.

³⁰ Nigel Bankes, “Implementing UNDRIP: some reflections on Bill C-262”, ABLawg.ca, November 27, 2018, has provided a careful analysis of the federal Bill C-262. I have drawn on Bankes’ analysis in my discussion of *DRIPA* in this section. Bankes’ analysis is available online: <http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf>.

262's preamble stressed that "in regard to indigenous peoples, it is important for Canada to reject colonialism ...". Although *DRIPA* does not contain a preamble, it does include, like Bill C-262, UNDRIP itself as a Schedule, and the preamble to UNDRIP covers much the same ground as the preamble in Bill C-262. It is clear, in any case, that the very adoption of *DRIPA* is meant, in part, to endorse this repudiation of the ideological foundations of colonialism.

Section 2 of *DRIPA* lays out three explicit purposes for the Act: "(a) to affirm the application of the Declaration to the laws of British Columbia; (b) to contribute to the implementation of the Declaration; (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies." The language of section 2(a) follows that of section 3 of Bill C-262, which stated that UNDRIP "is hereby affirmed as a universal international human rights instrument with application in Canadian law."

This language has raised questions about what it means to say that a UN Declaration has "application in Canadian law" or to affirm its "application [...] to the laws of British Columbia". Nigel Bankes has analyzed the question in detail for Bill C-262 and concluded that "application in Canadian law" almost certainly does *not* mean that UNDRIP is thereby incorporated into Canadian law. Bankes provides examples of statutes in which Parliament used language explicitly affirming the incorporation of international legal documents into Canadian law, in contrast to the much vaguer (and apparently never previously used) affirmation of "application in Canadian law."³¹

Moreover, section 4 of Bill C-262 stated that "[t]he Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples." Section 3 of *DRIPA* imposes the same requirement on the government of British Columbia with respect to the laws of the province. These provisions suggest that Bill C-262 and *DRIPA* were not intended, immediately upon their adoption, to incorporate the provisions of UNDRIP directly into the laws of Canada and of British Columbia, respectively. Processes of consultation and cooperation would still be required to make those laws fully consistent with the rights set forth in UNDRIP.³²

³¹ See Bankes, *supra* note 30 at 4-7.

³² Although note the government's position in legislative debates on *DRIPA* that UNDRIP is in some sense already included within section 35 of the *Constitution Act, 1982*: "Just to confirm that everything that's within Bill 41 [i.e. *DRIPA*] is within the Constitution of Canada and section 35": British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10808 (Scott Fraser, Minister of Indigenous Relations and Reconciliation). Minister Fraser's point, however, seems to be that section 35 contains the flexibility and space within Canadian law for the implementation of *DRIPA* and UNDRIP, rather than a claim that such implementation is already achieved: "I believe Bill 41 and the constitution of Canada together provide great opportunities for us to work together in a way, with respect and recognition, recognizing rights and title. That sort of thing will move us in a way to bring more certainty and predictability to the province, to make us a more just province also. I don't see the constitutional context or section 35 jurisprudence context as a confine. I see Bill 41 within that as a real opportunity here for British Columbians": *ibid* at 10809.

Similarly, section 4 of *DRIPA* requires the provincial government to “prepare and implement an action plan to achieve the objectives of the Declaration” (subsection 4(1)), along the same lines as section 5 of Bill C-262. Section 5 of *DRIPA* requires the minister responsible for the Act to prepare an annual report for the legislative assembly on the progress “made towards implementing the measures referred to in section 3 and achieving the goals in the action plan” (subsection 5(3)), similar to requirements in section 6 of Bill C-262.

Taken together, these provisions (in sections 3 to 5) of *DRIPA* reinforce the conclusion that “affirming the application” of UNDRIP to the laws of British Columbia does not mean that UNDRIP is thereby incorporated into the laws of British Columbia with the same legal status as a provincial statute. The provincial government itself takes this same position in the legislative debates on *DRIPA*.³³ The government added that, in its view, section 4 was non-justiciable as it imposed no positive obligations on the province.³⁴

In other words, the positions taken by the provincial government as it shepherded *DRIPA* into law signal a determination to keep the implementation of UNDRIP out of the courts to the extent reasonably possible, though it did specifically affirm that UNDRIP is relevant to the judicial interpretation of section 35.³⁵ But does *DRIPA* tell us anything positively about the approach British Columbia intends to take, beyond reviewing provincial laws for consistency with UNDRIP and preparing an action plan and annual reports?

Indications of an answer may be found in sections 6 and 7 of *DRIPA*, which have no analogue in the federal Bill C-262. Subsection 6(1) states: “For the purposes of this Act, a member of the Executive Council, on behalf of the government, may enter into an agreement with an Indigenous governing body.” Subsection 6(2) clarifies that this is “subject to section 7”. Subsection 7(1) states:

7 (1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

(a) the exercise of a statutory power of decision jointly by

³³ E.g., “Bill 41 [i.e. *DRIPA*] doesn’t give the UN declaration itself the force of law and doesn’t create any new laws and new rights. [...] It’s to be applied within the constitutional framework of Canada, including section 35 of the constitution”: British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 297 (November 25, 2019) at 10753 (Scott Fraser, Minister of Indigenous Relations and Reconciliation).

³⁴ “As I stated previously, article 4 does not create a positive obligation on the part of the state, but there will be conversations about funding from the provincial government”: British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10821 (Scott Fraser, Minister of Indigenous Relations and Reconciliation).

³⁵ In answering one line of questions, Minister Fraser explained the effect of section 2(a) of *DRIPA* in the following terms: “The courts may look to the declaration as an interpretive aid — where if there’s ambiguity in legislation such that there’s an interpretation that aligns better with the declaration, that interpretation would be preferred”: British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10825 (Scott Fraser, Minister of Indigenous Relations and Reconciliation).

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- (i) the Indigenous governing body, and
- (ii) the government or another decision-maker;
- (b) the consent of the Indigenous governing body before the exercise of a statutory power of decision.

The remaining provisions of section 7 clarify the scope of such an authorization to negotiate and impose certain requirements to publicize summaries of negotiations and to publish agreements reached.

Sections 6 and 7 are broadly worded and it remains to be seen what forms of practices and agreements will be developed through their provisions. The following paragraphs offer three general remarks.

First, the addition of these two sections to *DRIPA*, which is otherwise closely modelled on Bill C-262, underscores the province's commitment to government-to-government negotiations, as opposed to litigation, as the primary means of implementing UNDRIP in British Columbia. Note that "Indigenous governing body" is defined in subsection 1(1) of *DRIPA* as "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*". Subsection 1(2) requires the province to take a flexible and context-sensitive approach to identifying such entities: "For the purposes of implementing this Act, the government must consider the diversity of the Indigenous peoples in British Columbia, particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems of the Indigenous peoples in British Columbia."

Second, section 7 anchors negotiations to the exercise of provincial statutory powers of decision, with a view either to the joint exercise of such powers by Indigenous governing bodies and the province or to obtaining the consent of Indigenous governing bodies prior to their exercise. A first reading of these provisions might suggest an intent by the province to sidestep broader questions of sovereignty, Indigenous jurisdiction, and legal pluralism, in favour of more focused agreements relating to the exercise of provincial statutory powers governing, e.g., provincial authorizations for fishery, forestry, or mining activities.

During the legislative debates on *DRIPA*, however, the government stated that, although subsection 6(1) is "subject to section 7", this does not mean that agreements pursued under section 6 are limited to those specified in subsection 7(1). Scott Fraser, Minister of Indigenous Relations and Reconciliation stated:

Section 6 enables ministers, for the purposes of the act, to enter into agreements with Indigenous governing bodies. Yes, the legislation will allow ministers to enter into a variety of agreements with Indigenous governments. This includes

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various kinds of collaborative decision-making processes that do not contemplate joint or consent statutory decisions.³⁶

Minister Fraser pointed to the shíshálh Nation / British Columbia Foundation Agreement as a model of the kind of agreement that might be pursued under section 6.³⁷ That agreement provides a broad framework for “establish[ing] a long-term relationship between shíshálh Nation and the Province” drawing both on section 35 and UNDRIP, and calls for “clarify[ing] the relationship between shíshálh laws and jurisdiction and the Province’s laws and jurisdiction”.³⁸ With such overarching objectives in mind, the agreement sets up a number of co-management or co-operative tables for reviewing development proposals in shíshálh territory. Through the Agreement, moreover, the shíshálh Nation and the Province call on the federal government to join their reconciliation efforts, as they deem Canada’s participation essential to achieving reconciliation as envisioned by the Agreement.³⁹

In the legislative debates on *DRIPA*, Minister Fraser also pointed to the *Haida Gwaii Reconciliation Act* as an example of legislation implementing joint decision-making between the Province and Indigenous peoples.⁴⁰ That Act followed the Kunst’aa guu – Kunst’aayah Reconciliation Protocol concluded between the Haida Nation and the province in 2009. The Protocol does not shy away from addressing issues of sovereignty, even though it does not purport to resolve the differences between the Haida Nation and the province on those issues; in fact, the Protocol’s preamble lays out their “differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii”.⁴¹ Despite those differing views, the Haida Nation and the province agreed to certain co-management processes and structures.

If these are models of the agreements the province intends to pursue through the provisions of *DRIPA*, drawing on the content of UNDRIP, then maybe the province does wish to engage in negotiations on broader issues relating to sovereignty and jurisdiction.

A third and final observation on the substance of *DRIPA*: whether the province and Indigenous peoples pursue more focused agreements or broader ones under the Act, difficult

³⁶ British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10816 (Scott Fraser, Minister of Indigenous Relations and Reconciliation).

³⁷ British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10817 (Scott Fraser, Minister of Indigenous Relations and Reconciliation). The Foundation Agreement is available online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_-_signed.pdf>.

³⁸ Foundation Agreement, *supra* note 37, sections 2.3(d), 2.4(c), 3.12(c).

³⁹ See Foundation Agreement, *supra* note 37, section 6.1.

⁴⁰ “Joint decision-making is not new in provincial law. A number of current pieces of legislation already reference joint decision-making with First Nations. For instance, the Haida Gwaii Reconciliation Act comes to mind to me now. The environmental assessment legislation passed last year also has a process of collaborative decision-making. Joint decision-making is contemplated through agreements like the recent one with the shíshálh Nation, as I mentioned also”: British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 299 (November 26, 2019) at 10818 (Scott Fraser, Minister of Indigenous Relations and Reconciliation).

⁴¹ The Kunst’aa guu – Kunst’aayah Reconciliation Protocol is available online: <http://www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf>.

CHAPTER FIVE

legal questions relating to sovereignty and representation are unavoidable. After a century and a half of the *Indian Act* and concerted attempts to dismantle Indigenous political structures in favour of imposed elected councils, it seems inevitable that there will be disputes and uncertainty as to who qualifies as a rights-holding collective under section 35 of the *Constitution Act, 1982* and who qualifies as an Indigenous governing body representing such a collective. Questions about legitimate representation arise in any political community; colonial history adds further layers of complexity in the case of Indigenous peoples invoking constitutional rights under section 35.

DRIPA ties these disputes regarding legitimate representation to section 35 case law through its definition of “Indigenous governing body”. Disputes about the identity of section 35 rights-holders and about the identity of those who have standing to represent those rights-holders continue to make their way into Canadian courtrooms⁴² and are particularly vexing for various reasons, not least because it is particularly invasive of Indigenous jurisdiction and self-government for Canadian courts or officials to determine the legitimate identity and proper representatives of an Indigenous people. Yet those determinations may have to be made for purposes of pursuing negotiations and Canadian courtrooms are often the default or necessary forum of adjudication.

In this respect, it is worth noting that article 27 of UNDRIP requires states to set up, jointly with Indigenous peoples, processes of adjudication to resolve certain disputes. If article 27 were sensibly implemented in Canada, the joint Indigenous-Crown processes or institutions set up for that purpose would surely constitute a forum preferable to Canadian courtrooms for resolving disputes over Indigenous identity and representation. From the perspective of Canadian law, such article 27 processes and institutions might be conceived of as a form of expert tribunal, perhaps with a residual supervisory jurisdiction in superior courts. From the perspective of Indigenous peoples, the decision to participate in such article 27 processes and institutions, and their proper characterization, would be grounded in their own traditions and legal orders.⁴³

During legislative debates on *DRIPA*, the provincial government made clear, in response to a line of questions specifically raising article 27 of UNDRIP, that it had no intention to pursue such alternative adjudicative processes or institutions. Minister Fraser stated that the

⁴² See e.g. *Behn v Moulton Contracting Ltd*, 2013 SCC 26, [2013] 2 SCR 227; *Hwilitsum First Nation v Canada (Attorney General)*, 2018 BCCA 276; *Rice v Agence du revenu du Québec*, 2016 QCCA 666; *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517; *Te Kipilanoq v British Columbia*, 2008 BCSC 54. There are many other cases. For recent commentary, see Kent McNeil, “Aboriginal Title and Indigenous Governance: Identifying the Holders of Rights and Authority” in *Osgoode Hall Law School: Legal Studies Research Paper Series*, Research Paper No. 67 Volume 12, Issue 14, 2016.

⁴³ I have briefly laid out a provisional case for article 27 tribunals or similar bodies elsewhere: Ryan Beaton, “Articles 27 and 46(2): UNDRIP signposts pointing beyond the justifiable-infringement morass of section 35”, in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws*, eds. John Borrows, Larry Chartrand, and Oonagh Fitzgerald (CIGI 2018), available online: <<https://www.cigionline.org/publications/undrip-implementation-more-reflections-braiding-international-domestic-and-indigenous>>.

government's intention was to leave all adjudication of section 35 issues in Canadian courtrooms.⁴⁴

These comments by Minister Fraser must be balanced against the overriding intent of *DRIPA* to pursue implementation of UNDRIP through negotiation rather than direct incorporation of UNDRIP into the laws of British Columbia. Yet legal questions will inevitably arise in the course of negotiations (and of crises, foreseen and unforeseen) that require the state to work out the meaning of its assertions of sovereignty vis-à-vis Indigenous peoples. After all, British Columbia is not renouncing its assertion of sovereignty over provincial territory, even as it affirms its intent to elaborate the meaning of that assertion in negotiations with Indigenous peoples.

The parties to such negotiations, and interested observers, generally agree that issues relating to sovereignty and jurisdiction are best resolved through negotiation as opposed to litigation.⁴⁵ However, negotiation tables and courtrooms are not siloed forums. The evolving meaning and practices of state sovereignty may be worked out implicitly through negotiation and collaboration (as well as through conflict, force, unilateral action), or more explicitly through articulations of government policy and broader constitutional vision. In either case, this work is not carried out in isolation from the work of judicial interpretation.

The point is not to characterize either the political or the legal realm as the privileged site for the articulation of meaning—each has its own language and constraints for expressing the evolving meanings of practices relating to sovereignty, jurisdiction, and pluralism. However, judicial reasons may be particularly helpful in providing a lay of the land insofar as they undertake sustained reflection on these evolving meanings, look to consolidate and articulate currents in the social and political imaginary, and thereby also to some extent to channel developments along certain paths of meaning and practice.

With these comments on the limited yet significant role of the courts in mind, the next section turns to two recent decisions by the SCC that offer sustained engagement with issues of sovereignty, jurisdiction, and pluralism. An examination of these decisions helps clarify part of the constitutional context in which *DRIPA* has been adopted and will be interpreted and applied.

4. Uashaunnuat and Nevsun: domestic courts and non-state legal orders

In *Justice as Translation*, White suggests “we can say that the legal text, like every text, is a stage in a conversation and ask of it: Is this conversation one in which ‘democracy

⁴⁴ British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parl, 4th Sess, No 297 (November 25, 2019) at 10755-56.

⁴⁵ The SCC has repeatedly emphasized this preference. See e.g. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [“*Delgamuukw*”] at para 207 (“I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake”); *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [“*Tsilhqot’in Nation*”] at para 17 (“The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims”).

begins?’ If not, the consequences are serious indeed; if so, it remains to be seen how.”⁴⁶ With respect to judicial reasons, White adds: “In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life—one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority—or another.”⁴⁷ Canadian judges are not elected officials, but the very nature of their work—the public testing of parties’ written and oral arguments, the drafting and publication of reasons for their decisions—is part of a broader conversation among citizens as to how we ought to govern ourselves.

In both *Uashaunnuat* and *Nevsun*, we find a remarkable split between majority and dissent over the role and authority of domestic courts in relating to non-state legal orders—Indigenous legal orders in the case of *Uashaunnuat* and the international and foreign legal orders in *Nevsun*. I will discuss *Uashaunnuat* in considerable detail as it is more immediately relevant to the implementation of UNDRIP in Canada; I look to *Nevsun* to add further depth and resonance to the discussion of *Uashaunnuat*, as it is the same 5-4 judicial split in both cases.⁴⁸

The aim here is not to argue that either the majority or the dissent offer better judgments (nor is it to suggest that the judgments are equally good), whether measured as conversations that help “democracy begin” or according to any other measure. The aim of this section is rather to bring out differences in the constitutional relations or “forms of life” these respective judgments envision between domestic courts and non-state legal orders. Section 4 will then conclude by drawing tentative conclusions about what these alternative forms of life might mean for the implementation of UNDRIP.

a. *Uashaunnuat: How should Canadian courts relate provincial sovereignty and Indigenous legal orders?*

The discussion below includes a somewhat technical review of the majority and dissenting reasons. This technicality is an aspect of legal and constitutional interpretation that tends to hinder the ability of judicial reasons to engage broad democratic debate. This is a reality that must be frankly acknowledged. It is an aspect of the legal-open-endedness

⁴⁶ White, *supra* note 2 at 101.

⁴⁷ White, *supra* note 2 at 101. For a perspective on constitutional interpretation by Canadian courts as part of a dialogue between the courts and legislatures, see Kent Roach, “Dialogic Judicial Review and its Critics” (2004), 23 *Supreme Court Law Review* (2d), 49-104. Although Roach’s immediate focus is on dialogue between courts and legislatures, his article makes clear that this focus is embedded within concern for broader democratic conversations in society at large. As the concluding paragraph of the article states, in part: “Dialogue theorists should make clear that their theories will not tell judges how to decide hard cases, but are directed more at how society should struggle together for the best answers to controversies about justice.”

⁴⁸ In both cases, the majority consisted of Chief Justice Wagner, and Justices Abella, Karakatsanis, Gascon, and Martin, and the dissent consisted of Justices Moldaver, Côté, Brown, and Rowe. In *Uashaunnuat*, the majority reasons were authored jointly by Chief Justice Wagner and Justices Abella and Karakatsanis, while Justice Abella authored the majority reasons in *Nevsun*. Justices Brown and Rowe jointly authored the dissent in *Uashaunnuat*, and jointly authored a partial dissent in *Nevsun*. In *Nevsun*, Justice Côté, while largely agreeing with Justices Brown and Rowe, authored a separate dissent in which Justice Moldaver concurred. The *Nevsun* split is explained further below.

discussed in section 1 above (and throughout previous chapters). Broad ideological and political commitments do not fully determine the legal doctrine that may express or implement those commitments case-by-case; a great deal of legal creativity and technical skill is typically required to develop legal doctrine that brings such commitments to life, so to speak. Considerable technical knowledge may be required to fairly appreciate doctrinal developments. Even armed with such knowledge, different people who profess the same ideological and political commitments may disagree sharply on what counts as a faithful or effective doctrinal expression of those commitments.

In order to appreciate the significance of this doctrinal open-endedness and the stakes of doctrinal choices in a given area of law, some review of relevant technical doctrinal details is required. Incidentally, this entire discussion of doctrinal open-endedness and of the importance of doctrinal choices underscores the need for judges to make every effort to publish judgments that are reasonably accessible to the broader public. If the constitution is an expression of the will of the people, then the courts—as guardians of the constitution—should strive to make its legal expression accessible to all of us, as self-governing people.⁴⁹ (In a similar if less vital vein, legal academics should also strive to make legal reasoning more broadly accessible—not by wielding an air of expertise to bolster our moral or critical commentary, but rather by making the technical discussion more transparent, so that the moral and critical discussion may, for expert and non-expert alike, take place on a more level playing field.)

The discussion of *Uashaunnuat* below first provides some basic procedural background to the SCC’s decision, followed by an overview of the broader stakes and issues of the case, a characterization of the conversations opened by the majority and dissenting reasons, respectively, and finally a more detailed technical discussion of both sets of reasons.

Procedural Background of the Case

In 2013, the Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John (“the Innu”), two Innu First Nations, filed suit against two mining companies operating a “megaproject” on the asserted traditional territory of the Innu, which the Innu call Nitassinan. Nitassinan straddles the border between Quebec (“QC”) and Newfoundland and Labrador (“NL”) and thus includes territory on either side of the provincial boundary. The two mining companies are headquartered in Montreal, QC, and the Innu filed the suit in the Quebec Superior Court (“QCSC”) in Montreal.

The Innu advanced claims of extracontractual civil liability based on article 1457 of the *Civil Code of Quebec* (“CCQ”) and of no-fault liability for neighbourhood disturbances under article 976 of the CCQ. They based these claims on alleged violations of their asserted Aboriginal rights, including Aboriginal title, protected under section 35 of the *Constitution Act, 1982*. The remedies they sought included: a permanent injunction against the mining

⁴⁹ This would accord with the SCC’s affirmation of democracy as “a fundamental value in our constitutional law and political culture”: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 61; see paras 61-69 generally.

companies ordering them to cease all work related to the megaproject; \$900 million in damages; and a declaration that the megaproject constitutes a violation of their Aboriginal title and other Aboriginal rights.⁵⁰

The mining companies and the Attorney General of NL (“AGNL”) filed motions to strike allegations from the Innu’s pleadings to the extent they asserted Aboriginal rights and title over territory in NL. The companies and the AGNL argued that these portions of the Innu’s claim concerned real rights over property situated in NL which were beyond the jurisdiction of the QCSC and would have to be brought before the courts of NL. In particular, the companies and the AGNL pointed to article 3152 of the *CCQ*, limiting (with exceptions inapplicable to the Innu’s claims) the jurisdiction of the QCSC over real rights to property located within the province of QC. The AGNL also asserted the immunity of the Crown of any one province from suit in the courts of another as a constitutional principle that barred the Innu from asking the QCSC for remedies against the Crown in right of NL. According to the AGNL, asking the QCSC to make declarations or findings of Aboriginal rights and title over territory in NL amounts, in substance, to asking for remedies against the Crown in right of NL.

The QCSC rejected the motions of the companies and the AGNL, and the Quebec Court of Appeal upheld the decision of the QCSC. These lower courts held that Aboriginal rights, including title, could not properly be classified as real rights for purposes of the jurisdictional analysis under the *CCQ*. Article 3152 of the *CCQ* would therefore not apply to Aboriginal rights and title and would not constitute a bar to the jurisdiction of the QCSC to hear the claims advanced by the Innu. The lower courts also accepted the Innu’s contention that the remedies sought would not be binding against the Crown, but rather only against the two private mining companies.

Majority and dissent in a nutshell

A majority of the SCC upheld the decisions of the lower courts, while the dissent would have overturned and held that the QCSC lacked jurisdiction to make findings about the existence of Aboriginal rights and title over territory in NL. The majority and dissent seemed to agree that the case brought to the fore a tension between Canadian law’s conception of Aboriginal rights and title, on the one hand, and principles of provincial sovereignty and jurisdiction, on the other. They disagreed, however, on the proper resolution of this tension.

It is now well established in SCC case law that section 35 rights (i.e. “aboriginal and treaty rights”) are unique in Canadian law for having their source both in the Canadian legal system and in pre-existing Indigenous legal orders. As the majority stated in *Uashaunnuat*, “[t]he unique nature of s. 35 rights flows from both their historical and cultural origins as well as their status as constitutional rights.”⁵¹ Aboriginal title, in particular, is distinguished from all other estates in land in Canadian law, as the latter derive from the assertion of Crown

⁵⁰ *Uashaunnuat*, *supra* note 10 at para 7.

⁵¹ *Uashaunnuat*, *supra* note 10 at para 25.

sovereignty, while “Aboriginal title pre-dates all other interests in land in Canada, arising from the historic occupation of territory by distinct cultures”.⁵² As other cases have stated, Aboriginal title arises not only from prior occupation of land by Indigenous cultures, but also from the prior existence of Indigenous legal orders and from “the relationship between common law and pre-existing systems of aboriginal law.”⁵³

As for the constitutional principle of Crown immunity, the dissent put it this way: “It is this simple. The Crown of one province cannot be sued in another province’s court”.⁵⁴ The majority did not take issue with this statement. Moreover, the majority and dissent agreed that the QCSC lacked jurisdiction to adjudicate real property rights where the property in question was located outside of QC. Given the *CCQ*’s division of rights into personal and real, there was certainly a strong argument that Aboriginal title is more sensibly classified as real.

Something, it would seem, had to give. The majority saw the appeal as “an opportunity to consider how [reconciliation and the honour of the Crown] inform the determination of which court has jurisdiction over a s. 35 claim that straddles multiple provinces.”⁵⁵ Ultimately, in grappling with the tension between the unique nature of section 35 rights and the significance of interprovincial immunity to provincial sovereignty, the majority emphasized the former, “reiterat[ing] that the legal source of Aboriginal rights and title is *not* state recognition, but rather the realities of prior occupation, sovereignty and control”.⁵⁶ This emphasis underpinned the majority’s core conclusion in *Uashaunnuat*: “[w]e do not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights.”⁵⁷

The dissent, grappling with the same basic tension, insisted that the adjudication of section 35 rights in Canadian courts must be shaped to Canada’s constitutional structure, including the primacy of provincial sovereignty and boundaries. The dissent acknowledged “the practical difficulties faced by Indigenous peoples of Canada who seek to claim Aboriginal rights in a single traditional territory that straddles provincial borders.”⁵⁸ Rather than emphasizing the unique source of Aboriginal rights, however, the dissent insisted that “Aboriginal rights exist within the limits of Canada’s legal system, which means that Aboriginal rights claims before the courts must not go beyond what is permitted by Canada’s legal and constitutional structure.”⁵⁹

⁵² *Uashaunnuat*, *supra* note 10 at para 29.

⁵³ *Delgamuukw*, *supra* note 45 at para 114.

⁵⁴ *Uashaunnuat*, *supra* note 10 at para 275.

⁵⁵ *Uashaunnuat*, *supra* note 10 at para 23.

⁵⁶ *Uashaunnuat*, *supra* note 10 at para 49 (italics in original), citing *Delgamuukw*, *supra* note 45 at para 114.

⁵⁷ *Uashaunnuat*, *supra* note 10 at para 49.

⁵⁸ *Uashaunnuat*, *supra* note 10 at para 77.

⁵⁹ *Uashaunnuat*, *supra* note 10 at para 77.

Indeed, the dissent found a particular affront to provincial sovereignty in the submissions of the Attorney General of Canada (“AGC”), who in essence supported the Innu position that the QCSC had jurisdiction to hear the entirety of their claim:

The AGC’s submissions, and notably that “superior courts have jurisdiction to decide section 35 rights of an Indigenous party as they affect another province” (p. 4), implicitly treat the provinces as if they were (at best) administrative units or (at worst) inconvenient technicalities. This is profoundly disrespectful of the constitutional order under which provinces are sovereign within their own jurisdiction. In 1867, it was not the Canadian state that created the provinces; rather, it was the provinces’ colonial predecessors who created Canada.⁶⁰

I turn now to the key issue, for purposes of this chapter, of the kind of constitutional conversations opened up by the majority and dissent, respectively.

The contrasting constitutional conversations of majority and dissent in Uashaunnuat

Not much is to be gained by arguing about whether the majority or dissent is “right” at this broad level, at least not *as a matter of law* in any technical sense. They are grappling with a tension between fundamental elements of the Canadian constitutional order, a tension which is not, at bottom, due to any technical mistake or inconsistency in Canadian case law or legal principles, but is instead rooted in the country’s history and its evolving social and political imaginaries. The majority and dissent offer differing visions of the role of Canadian law and Canadian courts in addressing this tension. Thus, debate over these visions should not be construed narrowly as a matter turning on technical legal expertise. At this level, the disagreement between majority and dissent should be understood as embedded within a broader national debate about the appropriate ways to see, understand, and speak about the colonial encounter and its legacy in Canada today.

The majority reasons in *Uashaunnuat* emphasize the historical reality of Indigenous political communities and legal orders pre-dating the arrival of Europeans, and bring this reality to the fore in addressing the relationship between Aboriginal title and provincial sovereignty and jurisdiction. *We must do justice to this priority*, according to the majority, if our stated commitment to reconciliation is to have real meaning.⁶¹ As the majority reasons put the point: “This Court has described s. 35 as a commitment that must be given meaningful content, recognizing both the ancient occupation of land by Aboriginal peoples and the contribution of those peoples to the building of Canada”.⁶²

Section 35 is a constitutional provision and the courts occupy a position of authority with respect to its legal interpretation. But in the context of the kinds of broad concerns cited above—the prior occupation of land by Indigenous peoples and their contribution to the

⁶⁰ *Uashaunnuat*, *supra* note 10 at para 241.

⁶¹ See chapter 2 for a detailed discussion of reconciliation and the honour of the Crown as guiding principles for judicial interpretation of section 35. As the majority writes in *Uashaunnuat*, *supra* note 10 at para 22: “Reconciliation, the fundamental objective of the modern law of Aboriginal rights, engages the honour of the Crown [...]”

⁶² *Uashaunnuat*, *supra* note 10 at para 21 (citations omitted).

building of Canada—the Court is positioning section 35 as the vehicle through which it engages in the broader national debate over reconciliation. The majority in *Uashaunnuat* insists that part of the judiciary’s role, particularly that of the SCC, is to engage in this broader debate—even though, at this broad level of national debate, the SCC cannot simply impose any final resolution by virtue of its institutional authority over legal interpretation. The importance of reconciliation between the state and Indigenous peoples is a matter that goes to the legitimacy of the Canadian constitutional order; as discussed in chapter 4, legitimacy in this sense is not amenable to judicial enforcement.

Nonetheless, the SCC is an important voice in the broader national debate, enhanced in the years after 1982 by the failure of political processes to give further substance to section 35: “Although s. 35(1) recognizes and affirms ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada’, defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation”.⁶³

In sum, the majority reasons stake out a position for the courts in the broader national debate on reconciliation by insisting the judiciary will not subordinate pre-existing Indigenous polities to principles of provincial sovereignty. This invites into the courtroom an open-ended conversation as to how Canadian courts *should*, then, go about reconciling Indigenous legal orders with federal and provincial ones. From a judicial perspective, this conversation will necessarily also include many technical questions about the development of legal doctrine, some of which are indicated below.

By contrast, the dissenting reasons portray such a wide-ranging conversation as inappropriate in the Canadian courtroom. As noted above, the dissent insists that “Aboriginal rights claims before the courts must not go beyond what is permitted by Canada’s legal and constitutional structure.”⁶⁴ The role of the courts in contributing to reconciliation must not expand beyond this legal and constitutional structure, which was *created by* “the provinces’ colonial predecessors” and in which principles of provincial sovereignty therefore remain paramount.⁶⁵

In the dissent’s view, then, the authority of Canada’s legal and constitutional structure flows from principles of provincial sovereignty and it is illegitimate for the courts to entertain a conversation about the best ways to *balance* principles of provincial sovereignty against the objectives of reconciliation, however laudable those objectives may be. Such balancing is not a legitimate function for the courts because, in performing it, they would undermine the authority of the constitutional order it is their task to protect. These concerns express the institutional positivist commitment traced in earlier chapters: domestic courts are tasked with interpreting the lawful authority flowing from state sovereignty. The dissent insists that, for Canadian courts elaborating Canadian constitutional law, this lawful authority was

⁶³ *Uashaunnuat*, *supra* note 10 at para 24 (citations omitted).

⁶⁴ *Uashaunnuat*, *supra* note 10 at para 77.

⁶⁵ *Uashaunnuat*, *supra* note 10 at para 241

established through the confederation of sovereign provinces. The lawful authority flowing from that sovereignty is paramount, as far Canada's domestic courts are concerned, and cannot be balanced against competing interests.

If I happen to find myself in greater agreement with either the majority or dissent at this broad level of constitutional vision, it is not for technical legal reasons. A background in academic research or legal practice might give me some insight into how Canadian courts function, into the legal history of Indigenous-Crown relations, and into the development of the common law and constitutional interpretation, all of which certainly *informs* my own readings of the majority and dissenting reasons. But our national conversation on reconciliation is an extremely broad one, and what I may have of legal expertise I will surely lack in many other fields and aspects of life—political history, sociological conditions, colonial and post-colonial economic development, all manner of lived experiences, etc. etc.—which rightfully inform the views others have of “reconciliation” in this country.

The language of constitutional law, as developed by the courts in particular, should be understood as part of, as embedded within and emerging from, this broader conversation. Of course, the voice of the courts, especially the SCC, may be particularly consequential, given its connection to state power. The point here is simply that judicial disagreements over broad constitutional vision do not turn primarily on technical legal reasons (such that one vision or the other may be straightforwardly right or wrong as a matter of law) but reflect the kind of disagreements we find within the broader national conversation, and over which none of us can claim a form of paramount expertise.

However, as also discussed in section 1 above, when judges are dealing with these issues in the context of specific legal disputes, they must translate their broad constitutional visions into the more technical language of specific legal provisions and doctrines relevant to the case before them. At this more technical level, there is greater room for specifically legal criticism (relating, e.g., to coherence of doctrine, consistency with precedent, grounding in established legal or constitutional principles). A basic task for judges grappling with such fundamental issues is to offer *convincing* translations of the broader constitutional visions into legal doctrine. The following few pages address some of the issues that arise in *Uashaunnuat* through the doctrinal translations of broader constitutional visions. The discussion below does not propose anything like an exhaustive treatment of *Uashaunnuat*, but simply an illustration of some of the doctrinal issues that arise for both the majority and dissent. These are issues that will inevitably recur in the context of *DRIPA* and the implementation of UNDRIP in Canada more broadly.

Uashaunnuat in greater technical detail

In tackling doctrinal elements of the case, the majority and dissent agreed that the Court first had to determine whether the relevant *CCQ* provisions purported to grant the QCSC jurisdiction to hear the Innu claims at issue. They also agreed that if the Court determined that the *CCQ* did purport to grant such jurisdiction, the Court would then have to determine whether such a grant was constitutionally permissible in the circumstances.

The majority and dissent further agreed that the action brought by the Innu was a “mixed action”, in that it involved both a personal action against the mining companies for alleged violations of articles 976 and 1457 of the *CCQ*, as noted above, as well as assertions of Aboriginal rights and title, which ultimately grounded the allegations that their rights were violated. The majority and dissent agreed that the *CCQ* granted the QCSC jurisdiction over the mixed action only if it granted that court jurisdiction over both the personal component and the Aboriginal rights and title component. They also agreed that the QCSC would have jurisdiction over a purely personal action against the companies by virtue of article 3148 of the *CCQ* and that it would *not* have jurisdiction over a real action relating to property outside QC. The Court was therefore faced with the question of how to classify claims of Aboriginal rights and title for purposes of the *CCQ*, and in particular whether Aboriginal rights and title are to be classified as real rights under the *CCQ*. If so, then the Innu assertions of Aboriginal rights and title over NL territory would be beyond the jurisdiction of the QCSC.

The majority concluded that the *sui generis* nature of Aboriginal rights, including title, meant they could not be “pigeonholed” into the category of either personal or real rights.⁶⁶ Thus, the majority concluded that article 3152 of the *CCQ* was inapplicable in this case. (As noted above, article 3152 restricts the jurisdiction of the QCSC over real rights to property located within the territorial boundaries of QC, apart from exceptions inapplicable to this case). Given that the *CCQ* contains no provision explicitly addressing jurisdiction over *sui generis* section 35 rights, the majority concluded that the jurisdiction of the QCSC to adjudicate the Innu’s assertion of such rights turned on the default provision, article 3134, which states that “[i]n the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec.”⁶⁷ As the mining companies were domiciled in QC, the majority concluded that “Quebec authorities have jurisdiction over both aspects of this non-classical mixed action.”⁶⁸

The dissent acknowledged the *sui generis* nature of Aboriginal title but nonetheless determined that, for purposes of classification under the *CCQ*, the actual characteristics of Aboriginal title (as a right to land, held against the world at large) mean that a claim for Aboriginal title must be understood as a real property claim. On that basis, the dissent would have struck a number of the remedies sought by the plaintiffs. The dissent would have held in particular that:

Quebec authorities lack jurisdiction over: (1) the claim for ‘declaratory remedies’ to recognize Aboriginal title and other Aboriginal or treaty rights in land situated in Newfoundland and Labrador; (2) the claim for a permanent injunction to put a stop to the operations, facilities and activities of the [mining companies], on land situated in Newfoundland and Labrador; and (3) the fiduciary claim or the claim based on administration of the property of others with respect to the

⁶⁶ *Uashaunnuat*, *supra* note 10 at para 36.

⁶⁷ *Uashaunnuat*, *supra* note 10 at para 18.

⁶⁸ *Uashaunnuat*, *supra* note 10 at para 59.

[mining companies'] works and facilities situated in Newfoundland and Labrador.⁶⁹

The position of the dissent is understandable, given that Aboriginal title includes the right to the land itself to the exclusion of all non-rights-holders, and thus resembles real rights in this respect. On the other hand, the majority could fairly point to the unique character of Aboriginal rights and title highlighted above (and not denied by the dissent) to conclude that they simply could not be forced into the category of either personal or real rights for purposes of the *CCQ*. While this summary glosses over many details of the disagreement between majority and dissent on this point, it seems fair to say that neither side has an overwhelming doctrinal argument. The majority sees its own position as doing greater justice to the unique nature of section 35 rights; the dissent sees its own position as upholding foundational principles of provincial sovereignty.

Issues Left for Future Cases

Given the majority's conclusion that the *CCQ* grants the QCSC jurisdiction to hear the entirety of the Innu claim, including the portion based on asserted Aboriginal rights and title in NL, the majority had to consider constitutional objections to this grant of jurisdiction.

As already noted, the majority emphasized the *sui generis* nature of Aboriginal rights, including title, grounded in prior Indigenous presence and legal systems, and insisted that Canadian constitutional strictures had to be interpreted flexibly so as not to frustrate access to justice for Indigenous litigants. The majority also delved into the rationale for the rule that the territorial limits of a province's superior courts' adjudicative jurisdiction over real property ought generally to correspond to the territorial limits of that province's legislative jurisdiction. The majority argued that this was because it is the law of the province where real property is located that generally governs that property. However, the law governing Aboriginal rights is developed under section 35 of the *Constitution Act, 1982* and is uniform across Canada. As a result, the underlying rationale for the lack of jurisdiction in one province's courts to adjudicate real rights to property located outside that province does not apply to the adjudication of section 35 rights.⁷⁰ The dissent disagreed, insisting that "the jurisdiction of the provincial superior courts cannot be expanded simply because a case raises issues of federal or constitutional law."⁷¹

This doctrinal wrangling over the intersection of federal or constitutional law with provincial adjudicative jurisdiction is, essentially, a background skirmish to the real point of constitutional tension that remains unresolved in *Uashaunnuat*. This has to do with the constitutional principle that the Crown is immune from suit unless the Crown has specifically permitted it. Each Canadian province has adopted legislation governing suits against the Crown of that province in its own courts. However, the Crown in right of any given province is arguably immune from suit in the courts of any other province. As noted above, the dissent

⁶⁹ *Uashaunnuat*, *supra* note 10 at para 203.

⁷⁰ *Uashaunnuat*, *supra* note 10 at paras 62-65.

⁷¹ *Uashaunnuat*, *supra* note 10 at para 120.

put the point bluntly: “It is this simple. The Crown of one province cannot be sued in another province’s court”.⁷² The AGNL argued that the Innu’s request that the QCSC grant declarations of Aboriginal rights and title over part of NL territory effectively amounted to a suit against the Crown in right of NL in Quebec’s courts.

It is hard to argue with the position of the AGNL on this point. For one thing, should the suit proceed to trial, the defendant mining companies will surely argue that their activities, which the Innu allege constitute violations of their Aboriginal rights and title, were duly authorized under statute and regulation—in the NL portion of the territory at issue, these authorizations would flow from NL legislation, regulation, and Crown action. The Innu will respond that such authorizations are constitutionally invalid to the extent they purport to permit the alleged violations of their Aboriginal rights and title. It then falls to the relevant Crown—here the Crown in right of NL—to defend its laws and actions, perhaps by marshalling evidence to argue that the alleged Aboriginal rights and title cannot be established, or by arguing that the laws and actions at issue do not in fact infringe on those rights and title, or by justifying any such infringements in accordance with the justification tests developed in the case law.⁷³ At a minimum, the AGNL had a compelling argument that the claims advanced by the Innu engage asserted provincial sovereignty and make NL, in substance if not in form, a defendant in the proceedings before the QCSC. (Indigenous peoples with claims overlapping those of the Innu may also worry about the impact of a ruling in favour of the Innu and therefore argue that they should also be added as defendants to the Innu claims before the QCSC.⁷⁴)

The majority side-stepped this entire issue by adopting the Innu’s position that they were not seeking any remedies binding against the Crown of NL: “Quebec courts have jurisdiction in this case to resolve the dispute between the Innu and the mining companies. The Innu seek no relief against the Crown of Newfoundland and Labrador, and they admit that any conclusions in respect of their s. 35 rights will not bind the Crown of Newfoundland and Labrador.”⁷⁵

⁷² *Uashaunnuat*, *supra* note 10 at para 275.

⁷³ In *Tsilhqot’in Nation*, *supra* note 45 at para 152, the SCC held that the doctrine of interjurisdictional immunity does not limit provincial sovereignty over land held under Aboriginal title, and that section 35 provides the appropriate framework for assessing the justifiability of state infringements of Aboriginal rights, including title, regardless of whether the infringements may be caused by federal or provincial action: “The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramouncy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.”

⁷⁴ See *Uashaunnuat*, *supra* note 10 at paras 294-296.

⁷⁵ *Uashaunnuat*, *supra* note 10 at para 72.

However, the dissent fairly pointed out that “any claim that asserts Aboriginal title necessarily involves the Crown. Unlike ordinary property disputes which pit private parties against each other within a framework of private law, an Aboriginal title claim cuts to the very root of the Crown’s sovereignty and triggers obligations on the part of the Crown.”⁷⁶ Again, where the mining companies undertake activities pursuant to the laws of NL and regulatory permits validly issued under those laws, any findings by the QCSC that such activities violate the constitutional rights of the Innu would seem necessarily to strike at the constitutional validity of the laws of NL, or of provincial decisions taken pursuant to them, and therefore to make the Crown in right of NL a defendant.

The majority has seemingly thought wise to leave these issues unresolved at this stage. Perhaps reasonable solutions will present themselves in the context of trial proceedings and be elaborated there, or in negotiations between Innu and relevant Canadian (provincial and federal) governments.⁷⁷

For its part, the dissent did acknowledge the barriers that provincially bifurcated proceedings would seem to erect for Indigenous litigants in cases like *Uashaunnuat*. The dissent urged creative solutions, pointing to precedent in which the superior courts of multiple provinces drew on their inherent jurisdiction to jointly hear a case, and arguing such a solution would ultimately provide greater access to justice for Indigenous litigants than the outcome reached by the majority.⁷⁸

I return to this issue of jurisdiction and appropriate forum in section 4 below, indicating its relevance for the implementation of UNDRIP in Canada, and thus also of *DRIPA* in British Columbia. First, the following subsection offers a few observations about the SCC’s judgment in *Nevsun*, released one week after *Uashaunnuat*.

b. *Nevsun: Sovereignities in dialogue, domestic courts as chorus*

Nevsun will not be explored in the same level of detail as *Uashaunnuat*, but the case is worth considering alongside *Uashaunnuat*, given that the disagreements between the same 5-4 judicial split are carried forward from one case to the other, with the Court’s judgment in *Nevsun* released just one week after its judgment in *Uashaunnuat*. The majority in *Nevsun* argued that the Court must deepen its conversation with international law and must shoulder its share of the burden on domestic courts to move international law forward. The dissent objected that this fails to respect Canada’s domestic constitutional order and the proper separation of powers between different branches of the state. The following paragraphs briefly elaborate.

The majority offered a concise summary of the dispute at para 3:

⁷⁶ *Uashaunnuat*, *supra* note 10 at para 276 (italics in original).

⁷⁷ The Innu and the mining companies seem to have reached a negotiated resolution several months after the SCC decision: <<https://magazine.cim.org/en/news/2020/rio-tinto-and-innu-communities-negotiate-agreement-over-long-standing-dispute-en/>>.

⁷⁸ See *Uashaunnuat*, *supra* note 10 at paras 207-235.

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Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.⁷⁹

The Eritrean workers sued Nevsun in British Columbia Supreme Court (“BCSC”), seeking “damages for breaches of domestic torts including conversion, battery, ‘unlawful confinement’ (false imprisonment), conspiracy and negligence”, and “for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.”⁸⁰

Nevsun responded with a motion “to strike the pleadings on the basis of the ‘act of state doctrine’, which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submits, includes Eritrea’s National Service Program. Its position was also that the claims based on customary international law should be struck because they have no reasonable prospect of success.”⁸¹ The BCSC chambers judge dismissed Nevsun’s motion to strike and the British Columbia Court of Appeal (“BCCA”) upheld that dismissal.

The majority at the SCC held that there was no distinct act of state doctrine in Canadian law, as the principles that underlie the doctrine in other jurisdictions have been “completely absorbed” in the “conflict of laws and judicial restraint jurisprudence” in Canadian law.⁸² Justices Brown and Rowe, writing together in partial dissent, agreed with the majority about the absorption of the act of state doctrine in Canadian law. Justice Côté, writing for herself and Justice Moldaver, argued that this conclusion should be nuanced somewhat and that, whether or not the label “act of state doctrine” is applied, “it is not legitimate for [the Court] to adjudicate claims between private parties which are founded upon an allegation that a foreign state violated international law.”⁸³ They would have overturned the lower court decisions and granted Nevsun’s motion on that basis in this case.

The heart of the disagreement in *Nevsun* turned, however, on the second question before the Court, namely whether “the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity [can]

⁷⁹ *Nevsun*, *supra* note 10 at para 3.

⁸⁰ *Nevsun*, *supra* note 10 at para 4.

⁸¹ *Nevsun*, *supra* note 10 at para 5.

⁸² *Nevsun*, *supra* note 10 at para 57. The act of state doctrine is at the heart of the institutional positivist holdings in *M’Intosh*, *supra* note 17 at 588-589 (“Conquest gives a title which the courts of the conqueror cannot deny”) and in Australian courts: see e.g. *Coe v Commonwealth of Australia*, [1979] HCA 68 at para 3 of the reasons of Justice Jacobs, dissenting in the outcome (the appeal before the Court dealing with an application to amend pleadings), though this substantive point was not in dispute between members of the Court. The principal reasons of the Court were written by Justice Gibbs, who similarly stated, at para 12 of his reasons: “The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged”. See the discussion in chapter 1, notes 88-95 and accompanying text, and in chapter 4, notes 37 and 60-61 and accompanying text.

⁸³ *Nevsun*, *supra* note 10 at para 305.

ground a claim for damages under Canadian law”.⁸⁴ As the majority stressed, the question before the Court was not whether the prohibitions *did* ground a claim for damages in Canadian law, as it currently stands, but whether the claims had a reasonable chance of success at trial, and thus whether there was a reasonable prospect that Canadian law would evolve in the course of this trial to recognize that the customary international law prohibitions in question henceforth will ground claims for damages.

The majority explained that, in Canada, “customary international law is automatically adopted into domestic law without any need for legislative action”.⁸⁵ Thus the prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity already belong to Canadian common law, and the real question is whether Canadian law may recognize monetary damages for their breach. The majority agreed with the BCCA’s ruling that such private law remedies “may be an incremental first step in the development of this area of the law and, as a result, held that the claims based on breaches of customary international law should not be struck at this preliminary stage.”⁸⁶ The majority stressed in particular that, “like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights”.⁸⁷

The dissent on this second issue was written jointly by Justices Brown and Rowe, with Justices Moldaver and Côté concurring on this issue. The essence of the dissent’s doctrinal objections to the majority reasons was: (1) it is only the *prohibitive* norms of customary international law that are automatically incorporated into Canadian law and such norms cannot ground the private law remedies being sought in this case, and (2) there is no clearly established norm of customary international law that holds *corporations* liable for violations of human rights; the burden is on the plaintiffs to establish such a norm and in this case they have not alleged facts sufficient to meet that burden.

Leaving aside the details of this doctrinal disagreement, the majority and dissent each engage in broader conversations about sovereignty, jurisdiction, and pluralism that carry forward the themes of *Uashaunnuat*. The majority envisions the SCC as part of an international choir of domestic courts advancing the state of human rights: “Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the ‘choir’ of domestic court judgments around the world shaping the ‘substance of international law’”.⁸⁸

⁸⁴ *Nevsun*, *supra* note 10 at para 26.

⁸⁵ *Nevsun*, *supra* note 10 at para 86.

⁸⁶ *Nevsun*, *supra* note 10 at para 68.

⁸⁷ *Nevsun*, *supra* note 10 at para 119; see generally paras 119-132.

⁸⁸ *Nevsun*, *supra* note 10 at para 72 (citations omitted). Although the passage cited here does not refer explicitly to human rights, the majority leaves no doubt about their importance in the opening sentence of its reasons: “This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses” (para 1). The image painted here—the phoenix rising from the ashes of world war in order to ... declare global war (!)—is jarring. The

By contrast, the dissent emphasized the primacy of Canadian law over international law in domestic courts. The dissent wrote, for instance: “It follows that Canadian courts will apply the law of Canada, including the supreme law of our Constitution. And it is that law — Canadian law — which defines the limits of the role international law plays within the Canadian legal system.”⁸⁹ Or again, after reviewing basic elements of Canada’s constitutional order and the separation of legislative and judicial powers, the dissent stated: “These are foundational considerations, going to the proper roles of courts, legislatures and the executive. The incorporation of a rule of customary international law must yield to such constitutional principles”.⁹⁰ In conclusion, the dissent insisted that the very legitimacy of Canadian courts was at stake: “The courts’ role within this country is, primarily, to adjudicate on disputes within Canada, and between Canadian residents. [...] Our courts’ legitimacy depends on our place within the constitutional architecture of this country”.⁹¹

In *Nevsun*, as in *Uashaunnuat*, we thus find, intertwined with the doctrinal elements of the cases, striking expressions of anxieties, frustrations, fears, hopes, and warnings about the direction of the courts and Canadian law. These expressions are themselves woven into narratives of sovereignty and sovereign practices, about the jurisdiction of Canadian courts to speak of these things, and about the relations between Canadian state law and other legal orders. Because of the authority vested in the courts, particularly the SCC, these narratives of sovereignty are at the same time performances of sovereignty by the highest official authority of constitutional interpretation in the Canadian legal system. That position of authority implies both power and, as the dissent underscores in both *Uashaunnuat* and *Nevsun*, constraint. The dissent in both these cases is giving voice to the concerns that underlie institutional positivist interpretive approaches, as examined in previous chapters.

Similarly, the majority’s narrative in *Nevsun* continues its narrative from *Uashaunnuat*, opening Canadian courts and constitutional interpretation to a conversation based on a more open-textured view of the relationship between the Canadian legal order and Indigenous legal orders (in *Uashaunnuat*) and international law (in *Nevsun*). The dissenting narrative in each of these two cases casts the authority of the Canadian legal and constitutional structure as grounded in state sovereignty (and, more particularly, pre-confederation provincial sovereignty in *Uashaunnuat*). The dissenting narrative argues that the majority loses sight of this ultimate ground of its judicial authority. The dissent worries that the majority approach thereby puts the very legitimacy of the courts at risk. The continuity of the judicial debate across the two cases is hardly surprising, given the same five-judge majority and four-judge dissent in *Uashaunnuat* and *Nevsun*, with the two judgments released almost simultaneously.

In sum, these decisions are public elaborations and performances of state sovereignty in Canadian law, embodying distinct visions that resonate with, respectively, the pluralist and

image of an international choir of domestic courts better suits, I think, the overall content of the majority’s reasons.

⁸⁹ *Nevsun*, *supra* note 10 at para 152.

⁹⁰ *Nevsun*, *supra* note 10 at para 175.

⁹¹ *Nevsun*, *supra* note 10 at para 259.

positivist interpretive approaches explored throughout this dissertation. As such, they shed light on the legal and political context for the reception of UNDRIP in Canada, and for the interpretation and application of implementing legislation like *DRIPA*.

5. Conclusion: UNDRIP and the role of Indigenous law in Canadian courts

Uashaunnuat and *Nevsun* make clear that positivist-pluralist tensions are alive and kicking in Canadian constitutional interpretation. *Uashaunnuat* underscores the relevance of these tensions to judicial perspectives on the relationship between Canadian state law and Indigenous legal orders. That relationship is central to the implementation of UNDRIP within Canadian law. This chapter does not offer specific predictions about the paths that implementation will take and how positivist-pluralist tensions will play out in concrete doctrinal matters; it may be too early for detailed predictions. Yet positivist-pluralist tensions, of the kind traced throughout this dissertation, will undoubtedly be an important driving force in judicial debates.

In the legislative debates over *DRIPA*, too, a repeated line of questioning and concern was whether the implementation of UNDRIP would fit within the existing structures of the Canadian constitution. These are the kinds of concerns raised by the dissent in both *Uashaunnuat* and *Nevsun*. Broadly speaking, the view underlying these concerns is that Canadian law must, insofar as it relates to other legal orders, whether Indigenous or international, *domesticate* the elements of those orders that are to be incorporated into Canadian law, meaning that these elements must be subsumed within existing Canadian constitutional structures grounded in state sovereignty.

Of course, no Canadian government or court is going to argue that Canadian constitutional structures must be abandoned; the majority in *Uashaunnuat* and *Nevsun* obviously do not take that line. Rather, their reasons offer a more open-textured vision of the Canadian constitution, holding that some aspects of provincial sovereignty may have to bow to the “prior occupation, sovereignty, and control” of Indigenous peoples and that domestic courts cannot duck their lines in the “choir” of developing international law. The contrasting visions offered by majority and dissent in *Uashaunnuat* and *Nevsun* will continue to animate both political and legal debates on the implementation of UNDRIP, a document that calls on domestic legal orders, particularly in a settler state like Canada, to engage deeply with both Indigenous legal orders and international law.

I am sympathetic to the more open-textured vision of Canadian law offered by the majority in these two cases, as it strikes me as a more realistic and less rigid account of relations between these different legal orders. However, I also see the force of the underlying refrain in the dissenting reasons: the Canadian courts chosen by the plaintiffs in these cases are not an entirely suitable forum for adjudicating and resolving the disputes they bring forward.

Of course, the forcefulness of this objection is significantly undercut if no more appropriate forum is available. In the situation of *Uashaunnuat*, the dissent would require the

plaintiffs to bifurcate their claims and file them in both QC and NL; the dissent suggests only in a general manner that the superior courts of the two provinces might be able to coordinate hearings to ease the considerable (if not prohibitive) burden that bifurcated proceedings would place on the plaintiffs. In *Nevsun*, the dissent argues that the majority's approach would cause the judiciary to improperly impinge on and embarrass the executive branch's conduct of foreign relations.⁹² The force of this point will vary greatly case-by-case. It arguably loses much of its punch in the context of credible accusations of slavery, forced labour, and crimes against humanity, where the accused foreign government may not be especially open to diplomatic engagement. The Canadian executive might be as likely to feel supported as embarrassed by judicial intervention in such contexts. In any case, is it more democratic to address such alleged crimes in the less embarrassing (i.e. less open?) venues of foreign affairs than in a courtroom?

The alternative forums suggested by the dissent in these two cases may not seem promising. However, other forums can be imagined—in the case of UNDRIP, not only imagined but called for in the document itself. As noted earlier, article 27 of UNDRIP specifically requires of states that they establish forums or processes other than their domestic courts for the adjudication of Indigenous claims (unless, that is, some process established under the jurisdiction of domestic courts has been duly established and implemented “in conjunction with indigenous peoples concerned”). Article 27 states:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

As *Uashaunnuat* illustrates, jurisdictional complications continue to emerge in adjudicating Aboriginal and treaty rights in Canadian courts. The contending performances and visions offered in that case and in *Nevsun* will surely continue to evolve and to generate tension. That is not a bad thing. The tension may force careful reflection on all sides about the evolution of Canadian law, particularly in relation to Indigenous sovereignty and jurisdiction. It may, as suggested above, work towards a kind of reconstruction of legal

⁹² See e.g. *Nevsun*, *supra* note 10 at para 148, where Justices Brown and Rowe argue that allowing the plaintiffs' claims to go ahead in the way the majority allows “would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which is the executive's domain.” At para 262 they add: “In substance, this appeal is about, as much as anything else, maintaining respect for the appropriate role of each order of the Canadian state. The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs).” Justice Côté takes a similar position in her reasons, arguing at para 297 that “questions of international law relating to internationally wrongful acts of foreign states [...] are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.”

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positivism, or a synthesis of positivist and pluralist approaches, or simply an ongoing agonism that continues to give voice to competing, legitimate concerns.

Greater attention to article 27 in the implementation of *DRIPA* in British Columbia, and of UNDRIP more generally in Canada, may open up practices that draw on both of these contending interpretive approaches. Recalling that the shíshálh Foundation Agreement aims towards a coordination of provincial laws with shíshálh laws, perhaps the ground has already been prepared in places for practical conversations about joint adjudicative bodies, or in any case adjudicative processes jointly established by the Crown and Indigenous peoples concerned. Jointly established processes or bodies would seem, after all, a more promising site for working out relations between state and Indigenous legal orders. Increased reliance on such processes or bodies may respond *both* to the positivist concern that Canadian courts are not appropriate forums for balancing principles of state sovereignty against other interests *and* to the pluralist concern that Canadian law cannot simply subordinate Indigenous and international legal principles to principles of state sovereignty.

Knowledge as a young person: the knowledge we have when we are young is almost always a fig leaf, a bit of presumption, and a challenge to authority all at once. We're proud when we catch sight of something that someone pretending to authority has missed, we pounce, we delight ourselves and others who simply hate authority. We may have genuinely caught sight of something interesting. But in our eagerness to follow through on our joyous mini-rebellion, we grab hold of just about anything to shore up our insight, to defend the little clump of grass we've laid claim to. This defensive knowledge is gathered around to hide our youth, the limited sphere of our knowledge, to hide our shame and uncertainty.

Conclusion: Positivism, Pluralism, and the Grip of State Sovereignty

The five chapters of this dissertation have explored the evolving tensions between institutional positivism and historically grounded pluralism in the Canadian case law on Indigenous-state relations. These are tensions between practices of judicial interpretation, not between theories of interpretation or legal concepts. They are practices developed case-by-case, with interpretive trends emerging over time through series of cases addressing similar issues in related contexts. As interpretive practices, institutional positivism and historically grounded pluralism are built from particular interpretive and rhetorical manoeuvres. These manoeuvres are sets of tools drawn from that vast repository of legal reasons and case law precedent that the common law has established and refined over ages. When faced with the eminently practical task of deciding a case and crafting reasons justifying their decision, judges reach for the tools they consider best suited to disclosing the legal materials and considerations (or “grounds of law”) needed to resolve the case, and to disclosing the (sometimes loose) order of importance amongst these considerations.

There is a great deal of overlap between institutional positivism and historically grounded pluralism, understood as practices of judicial interpretation in this sense. The first chapter focused on *Caron* in order to illustrate both the overlap and contrast between these two interpretive approaches.¹ The majority and dissent in *Caron* agreed that the case required the Court to interpret the constitutional text entrenched with the *1870 Order* that annexed Rupert’s Land and the North-Western Territory to Canada.² They agreed that the case turned on the ways in which the *1870 Order* and the *Manitoba Act, 1870*³ entrenched a historic agreement reached between Canada and the Métis provisional government. They also agreed that the constitutional texts had to be read in light of the relevant historical context, especially the negotiations between Canadian representatives and representatives of the Métis provisional government at Red River.

However, the majority and dissent emphasized different aspects of this historical and legal context and reached opposite conclusions on the issue before the Court: the majority held that the *1870 Order* did not entrench an obligation of constitutional bilingualism binding on Alberta today, while the dissent argued to the contrary that the historical context, properly understood, made clear that just such an obligation had been entrenched through the *1870 Order* and should be found binding today. Chapter 1 focused on five pairs of contrasting interpretive manoeuvres from the majority and dissenting reasons to show how these contrasting building blocks embodied the different emphases of the majority and dissent and ultimately produced opposite legal conclusions. The majority reasons began from a modern

¹ *Caron v Alberta*, 2015 SCC 56 [“*Caron*”]; see the analysis of *Caron* in part 1 of chapter 1.

² *Rupert’s Land and the North-Western Territory Order*, 23 June 1870, (UK) reprinted in RSC 1985, Appendix II, No 9 [“*1870 Order*”].

³ *Manitoba Act, 1870*, SC 1870, c 3, reprinted in RSC 1985, Appendix II, No 8 [“*Manitoba Act, 1870*”].

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interplay between constitutional principles (of official minority language rights and provincial sovereignty); asked what was *granted* to the Métis provisional government; focused the analysis on the intentions of Parliament; drew on modern conceptions of constitutional entrenchment; and refused to read the specific content of historical negotiations into broad language used by Parliament. In contrast, the dissenting reasons began from the historical negotiations themselves; asked what was *agreed* by the parties; focused the analysis on the perspective of the Métis provisional government as well as that of Parliament; noted the climate of improvisation that existed in 1870 in matters of entrenchment; and insisted that Canada's constitutional commitment to popular sovereignty required reading the broad language used by Parliament in terms of the historic agreement actually reached between the parties.

In sum, the majority positioned the Court to interpret the relevant constitutional texts as expressing the sovereign intent of the Crown and Parliament, while the dissent insisted that a commitment to popular sovereignty required reading the relevant constitutional texts as entrenching the agreement actually reached by the parties. The dissent stressed that the perspective of the Métis provisional government and the people it represented was distinct from Canada's and could not be subsumed under the sovereign perspective represented by the Crown. Both perspectives, according to the dissent, had to inform the interpretation of the relevant constitutional texts.

The discussion of *Caron* thus drew out both the overlap and the contrast between institutional positivism and historically grounded pluralism as methods of judicial interpretation. That discussion stressed the fact that judges are not engaged in academic debate over the relative merits of these two approaches. They are trying to resolve specific disputes by developing legal doctrine in ways that balance the need for continuity and coherence (both with prior case law in a given field and with legal doctrine in related fields) against the need to reconsider and modify legal doctrines in light of evolving social and political norms and realities. Striking that balance is particularly challenging and contested in Aboriginal law today, precisely because we are living through a period of rapidly evolving social and political imaginaries of Indigenous-state relations. Throughout this dissertation, I have referred to our current period as one of ideological transition, noting various official ways in which the state has repudiated prior colonial ideologies of Indigenous-state relations that assumed a civilizing mission for Europeans in the new world.

In other words, if we want to understand *what is actually at stake* in the positivist-pluralist tensions of Canadian Aboriginal law today—if we want to understand what the judicial disagreements are all about—we have to read them in light of this historical, social, and political context. Judges, like the rest of us, live within the imaginaries of their social and political environments. The disputes in Aboriginal law that make their way to the courtroom arrive as legal formulations of social and political issues that are contested or unresolved in the underlying social and political imaginaries. Institutional positivism and historically grounded pluralism are contending judicial practices that are evolving in response to the challenges of ideological transition and in response to one another. They are competing with

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one another to draw the guiding threads of Canadian Aboriginal law through this period of transition and to weave a compelling doctrinal response from within our evolving social and political imaginaries. This judicial debate in turn has some influence—difficult to quantify, but likely not insignificant—on the continuing evolution of our social and political imaginaries.

The second part of chapter 1 aimed to draw out a clearer sense of this interplay between the evolution of legal doctrine, on the one hand, and the broader social and political context, on the other. The second part of chapter 1 retraced both positivist and pluralist strands found in the Marshall trilogy, a foundational series of judgments released by the US Supreme Court between 1823 and 1832 under the pen of Chief Justice John Marshall. The positivist strands of the Marshall trilogy were woven into whole judicial cloth in Canadian law in the decades following confederation. The institutional positivist stance found in the Marshall trilogy—“[c]onquest gives a title which the Courts of the conqueror cannot deny”⁴—continues to ground the governing Canadian legal doctrine that assertions of sovereignty on behalf of the British Crown formed a sufficient basis for the Crown to acquire sovereignty and underlying title to territory in the new world.⁵

A more attentive reading of the Marshall trilogy reveals, however, that Chief Justice Marshall understood this positivist stance, together with its assumption that Indigenous peoples had been “conquered” in the US, as a judicial response to the contemporary social, political, and historical realities of Indigenous-state relations. Even in *M’Intosh*, the first judgment of the Marshall trilogy and the one that most clearly adopts a positivist stance, Chief Justice Marshall characterized this assumption of conquest as an “extravagant [...] pretension” seemingly “opposed to natural right and to the usages of civilized nations”; it was the existing social and political realities and imaginaries that required, according to Chief Justice Marshall, US courts to adopt the positivist stance: “yet if it [i.e. the assumption of conquest and Crown acquisition of underlying title] be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice.”⁶

M’Intosh therefore does not adopt the assumption of conquest and the corresponding positivist stance in a vacuum, as a matter of legal principle. To the contrary, *M’Intosh* states that *despite* legal principles (of natural right and the usages of civilized nations), the social and political realities and imaginaries that ground the US legal system dictate that US courts adopt the assumption of conquest and a positivist stance with respect to state sovereignty and

⁴ *Johnson v M’Intosh*, 21 US 543 (1823) [*“M’Intosh”*] at 588.

⁵ See e.g. *R v Sparrow*, [1990] 1 SCR 1075 [*“Sparrow”*] at 1103: “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; see *Johnson v. M’Intosh* (1823), 8 Wheaton 543 (U.S.S.C.).” The Court adopted similar language in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*“Tsilhqot’in Nation”*] at para 69: “At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia].”

⁶ *M’Intosh*, *supra* note 4 at 591-92; see chapter 1 note 108 and accompanying text for a fuller discussion of this passage from *M’Intosh*.

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underlying title. The form of legal reasoning actually deployed in the Marshall trilogy thus suggests, at a minimum, that any major transformation in the social and political imaginaries of Indigenous-state relations may require courts to revisit the legal fiction of conquest and the positivist stance of domestic courts.

The second chapter examined the effects of such a transformation in Canadian imaginaries of Indigenous-state relations on the legal doctrine of Aboriginal title in particular. The chapter first reviewed the dominance of institutional positivism in the doctrine of Aboriginal title through the decades after confederation, then explored the partial unweaving of this dominance over the past half century, with the 1973 decision of the SCC in *Calder* marking a decisive turning point.⁷ *Calder* and the major cases that followed—*Guerin*,⁸ *Delgamuukw*,⁹ *Haida Nation*,¹⁰ *Taku River Tlingit*,¹¹ and *Tsilhqot'in Nation*,¹² among others—established an element of legal pluralism in the Canadian constitutional landscape, though its scope and contours remain deeply disputed. What those cases have unambiguously established is that Aboriginal title has roots in both common law and Indigenous legal orders. Indeed, this is also now established of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*¹³ more generally. We thus find courts increasingly prepared to explore both Euro-Canadian and Indigenous legal perspectives in matters of treaty interpretation, for instance.¹⁴

From chapters 1 and 2 we have, hopefully, a clearer sense of institutional positivism and historically grounded pluralism as judicial responses to the current period of ideological transition. The first two chapters show these judicial responses in action, and in interplay with one another. In the decades following confederation, an ideology of civilizational hierarchy had largely suppressed this latent interplay between positivist and pluralist judicial approaches in Canadian Aboriginal law. The disregard for Indigenous peoples as self-governing political communities with their own legal orders meant that Canadian law and Canadian courts rarely considered issues of coordination or conflict between state and Indigenous laws. From the perspective of Canadian courts, it was largely taken for granted

⁷ *Calder v Attorney-General of British Columbia*, [1973] SCR 313 [*“Calder”*].

⁸ *Guerin v The Queen*, [1984] 2 SCR 335 [*“Guerin”*].

⁹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*“Delgamuukw”*].

¹⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*“Haida Nation”*].

¹¹ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*“Taku River Tlingit”*].

¹² *Supra* note 5.

¹³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁴ See the discussion of *Restoule v Canada (AG)*, 2018 ONSC 7701 [*“Restoule”*] in section 5 of the Introduction. Courts have also recognized inherent Indigenous jurisdiction and powers of self-government in the adoption of election codes: see e.g. *Pastion v Dene Tha*, 2018 FC 648 [*“Pastion”*], in which the Federal Court explained that the adoption of a custom election code by a First Nation is an exercise of Indigenous law, not derived from any “specific provision of Canadian law” (para 7); *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [*“Vuntut Gwitchin”*], describing the adoption of a written constitution by the Vuntut Gwitchin First Nation [*“VGFN”*] as an exercise of “their inherent right of self-government” (para 145) and noting that the self-government agreement reached between the VGFN and Canada “preserved their inherent right to self-government and at the same time brought the VGFN Constitution into the constitutional fabric of Canada” (para 206).

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that, in matters of Indigenous-state relations, the state was the source of all lawful authority.¹⁵ The sovereign intent of the Crown or state (as embodied in its various legislative, executive, and administrative forms) was paramount and governed matters of, e.g., treaty interpretation and the circumscribing or extinguishing of any Indigenous rights that did exist.¹⁶

Canadian case law and official organs of the state have in recent decades repudiated ideologies of civilizational hierarchy. As explored in chapters 1 and 2, this repudiation has brought to the surface questions about the relation between state sovereignty and pre-existing Indigenous sovereignty, and about the meaning and basis for Crown assertions of sovereignty over territories occupied by Indigenous peoples. The Supreme Court of Canada (“SCC”) has developed considerable bodies of legal doctrine founded on the honour of the Crown to help “reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”,¹⁷ which the Court now affirms as the overarching purpose of modern Aboriginal law.¹⁸ Chapter 2 reviewed these doctrinal developments in detail, situating them in the context of our current ideological transition. These developments are the doctrinal ripples of ideological change moving through the case law.

As also noted in chapter 2, however, Canadian courts are certainly not about to repudiate Crown sovereignty. Domestic courts are embedded within a constitutional order and institutional structure that was established on the strength of the state’s *de facto* successful assertions of sovereignty. And the SCC has repeatedly characterized the judiciary as the guardian of that constitutional order.¹⁹ The challenging question for the courts now is how they situate themselves with respect to the *de facto* acquisition of Crown sovereignty that launched this constitutional project. Are the courts in any position to question the legality or the legitimacy of assertions of Crown sovereignty? The courts’ own institutional authority—the fact that they have vast state powers of enforcement at their disposal—flows from the *de facto* success of those sovereignty assertions. Would they not be chopping at the basis of their own authority and legitimacy if they entertained arguments about the illegality or illegitimacy of Crown sovereignty? Or can they separate the historical conditions that gave rise to their own institutional authority from the sources of lawful authority which they recognize and apply today? Is it appropriate for domestic courts to both (1) recognize that their actual institutional power rests on the *de facto* historical success of Crown sovereignty assertions, yet nonetheless (2) *balance* principles of state sovereignty—and principles of legal validity that flow from it—against other sources of lawful authority, such as prior Indigenous

¹⁵ *Pastion*, *supra* note 14, affirmed that “Indigenous legal traditions are among Canada’s legal traditions” (para 8) but acknowledged “a long period [...] of denial and suppression” of Indigenous legal traditions in Canadian courts.

¹⁶ See the discussion, in section 5 of the Introduction, of *R v Syliboy*, [1929] 1 DLR 307 (Co Ct) and *Ontario (Attorney General) v Bear Island Foundation*, 1989 CanLII 4403 (ONCA), 68 OR (2d) 394.

¹⁷ *Haida Nation*, *supra* note 10 at para 20.

¹⁸ See e.g. *Taku River Tlingit*, *supra* note 11 at para 42: “The purpose of s. 35(1) of the *Constitution Act*, 1982 is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”

¹⁹ E.g. *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 155; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 89.

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presence and self-government on Canadian territory? These are the kinds of questions, raised by our current period of ideological transition, that trigger the contending positivist and pluralist responses examined throughout this dissertation.

One positivist response is to try to defuse these questions by arguing that the very nature of law and legal interpretation depends on a careful separation of law and morality, and correspondingly of law and politics. Chapter 3 examined this response, which presents legal positivism as the best descriptive account of law and legal interpretation. According to descriptive legal positivism, when judges fail to respect the necessary separation between law and morality, they are not really engaged in legal interpretation at all. They are making or extending the law—in effect, legislating from the bench—on the basis of moral, political, economic, or other considerations, even if they present their reasons as interpretations and clarifications of existing law. Legal positivists generally accept that this kind of judicial legislation is sometimes necessary to fill in gaps or resolve ambiguities in existing law. They argue, however, that we must be clear about the distinction between law and morality and, correspondingly, between legal interpretation and judicial legislation, so that we can ensure judges resolve cases through genuine legal interpretation wherever possible. The judicial role is to apply the law as it is, with a minimum of independent moral reasoning (or political or economic or other non-legal reasoning) used to fill in gaps and resolve ambiguities where strictly necessary.

Thus, according to descriptive legal positivism, when disputes arise about the correct interpretation of the law, courts should strive to resolve them by reference to social facts rather than moral reasoning. Legal positivists point to social facts that can help us reconstruct sovereign intent, where sovereign intent typically means the intentions of the legislature or the executive, or the intentions of those who designed the constitutional structure of the legal system. However, in attempting to *describe* the forms of judicial reasoning actually found in common law systems,²⁰ legal positivists have to contend with the fact that judges very often draw on principles of justice or “moral palatability”²¹ or legitimacy when engaging in (what the judges present as) legal interpretation. In chapter 3, we saw that Dennis Patterson tries to accommodate this reality within a positivist account by arguing that such judicial practices embody the social fact of consensus about these practices. In other words, judges are not engaged in independent moral reasoning, but are simply embodying “the intersubjective consensus manifested in the ongoing practice of [legal] officials.”²² Chapter 3 argued that Patterson’s account verges on tautology and, more important for purposes of this dissertation, ultimately undermines the distinction between law and morality, and between legal

²⁰ The legal positivist debates addressed in this dissertation focus primarily on the British, US, and Canadian legal systems, though note that David Dyzenhaus has also written extensively on the legal system of South Africa: see e.g. David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).

²¹ For the use of this term, see Scott Shapiro, “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed” in *Ronald Dworkin*, edited by Arthur Ripstein (New York: Cambridge University Press, 2007), 22-55 at 45 and the discussion of Shapiro’s argument in subsection (2)(d) of chapter 3.

²² Dennis Patterson, “Theoretical Disagreement, Legal Positivism, and Interpretation” (2018), 31 *Ratio Juris* 3, 260-275 at 267. See the discussion of Patterson’s argument in subsection (2)(c) of chapter 3.

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interpretation and moral reasoning, which defines legal positivism. Borrowing words from David Dyzenhaus, Patterson's account "concedes too much, perhaps almost everything" to Dworkin's account of law, or to what Dyzenhaus calls "the common law style theory" opposed to legal positivism.²³

Chapter 3 also considered the account of Scott Shapiro, who defended the positivist distinction between law and morality, between legal interpretation and concern for "moral palatability", as necessary to uphold the "settling function" of the legal system's designers. According to Shapiro, the proper role of the legal system's designers is to settle fundamental matters of institutional structure and ideological objectives for the legal system. Judges should not be allowed to revisit such matters, otherwise they will unsettle the choices made by the designers, who will therefore be incapable of carrying out their settling function. The logic of Shapiro's argument takes us beyond descriptive positivism, however, for it relies on a broader normative account of the settling function that ought to be played by designers of the legal system. Shapiro's account provides an argument, that is, for why judges *ought* to rely, in positivist fashion, on social facts and not on moral reasoning when they engage in legal interpretation. Shapiro argues that when the ideological objectives of the legal system's designers can reasonably be inferred from social facts, judges ought to defer to those objectives even if they consider them morally unpalatable and even if they believe that the broader contemporary political community finds them morally unpalatable. In its reliance on a broader normative political theory, Shapiro's argument resonates with the legal *reform* projects that Dyzenhaus traces as the genealogical roots of contemporary legal positivism.²⁴

Chapter 3 argued that Shapiro's account at most urges a certain *degree* of judicial deference to the ideological objectives of the legal system's designers. So long as such deference is justified only on the basis of the settling function that designers supposedly play, there may always arise cases where this justification runs out, in the considered opinion of a judge. That is, there may be cases in which a judge concludes that upholding the ideological objectives of designers—for instance, to allow racial segregation in public institutions or to exclude women from political office or to classify Indigenous peoples as insufficiently civilized to exercise sovereignty—will be *more* unsettling for the legal system than a rejection of those ideological objectives. Perhaps, in the judge's considered view, social and political imaginaries have evolved in ways that bring different subsets of the designers' ideological objectives into sharp conflict with one another—for instance, objectives of equality amongst citizens with objectives of maintaining racial separation or of maintaining gender roles—and the judge sees no way to uphold all of these now conflicting ideological objectives of the designers. Perhaps there never was any coherent set of ideological objectives, but rather competing ideological projects embedded in the design of the legal system from the start. It is likely, after all, that a legal system's designers will have been

²³ David Dyzenhaus, "The Genealogy of Legal Positivism", *Oxford Journal of Legal Studies*, vol 24, no 1, 39-67 at 53. Dyzenhaus is referring specifically to Hart and the dilemma Hart faced in attempting to provide a descriptive positivist account of law; as Patterson endorses and carries forward Hart's descriptive project, Dyzenhaus' characterization applies to Patterson's argument in this context as well.

²⁴ See Dyzenhaus, *supra* note 23. See the discussion of this point accompanying notes 77-83 in chapter 1.

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ideologically divided amongst themselves and the legal system's design may embody not only compromise, but ongoing contest between distinct sets of ideological commitments competing for the upper hand.

In any case, the existence and nature of ideological coherence are almost certain to remain matters of judicial debate and disagreement, as revealed in the discussion of case law throughout this dissertation, from *Caron* in chapter 1 through to *Uashaunnuat*²⁵ and *Nevsun*²⁶ in chapter 5. When judges read the social, political, and legal history relevant to deciding a case, as well as applicable case law precedent, they necessarily do so through the lens of the political and social imaginaries in which they live and of their own individual commitments, biases, values, experiences, etc., formed against the background of those imaginaries. How could we ask judges to bracket, in their work of legal interpretation, the moral reasoning embedded within these background social and political imaginaries and implicit in their own lived experience? Any given moral principle or argument can of course be unpacked and made the subject of debate—for instance, whether “separate-but-equal” is inherently discriminatory or whether specific gender roles are sexist or whether earlier generations have legal obligations to later ones on matters of, e.g., climate and sustainability—and such debates do figure, precisely, in the work of legal interpretation undertaken by the courts. But if we told judges that they were to bracket *entirely* the social and political imaginaries which they inhabit and the moral commitments implicit in their own lived experience, in order to objectively examine social facts that may determine the ideological objectives of the legal system's designers—would we not, in effect, be asking judges to paralyze their very capacities for interpretation and debate about the legal issues and materials before them, including any such social facts?

Moreover, the kind of argument put forward by Shapiro, emphasizing the important settling function of the legal system's designers, is regularly put to the courts themselves. Chapter 4 examined some of the ways in which Canadian courts have addressed such arguments relating to principles of popular sovereignty. The SCC has repeatedly affirmed that the constitution of Canada is an expression of popular sovereignty.²⁷ But what precisely should the courts make of this principle in matters of constitutional interpretation? At one interpretive extreme, the courts could accept the principle of popular sovereignty as a kind of legal fiction, in line with Shapiro's argument for deference to the ideological objectives of the system's designers. That is, the courts could accept, as a matter of legal principle, that the constitutional forms established by the designers embody the will of the people and that this principle is not open to judicial debate; the courts would simply not entertain arguments that

²⁵ *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [“*Uashaunnuat*”].

²⁶ *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [“*Nevsun*”].

²⁷ E.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217 [“*Secession Reference*”] at para 85: “The Constitution is the expression of the sovereignty of the people of Canada.” See also the *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, at 745. In *Caron*, *supra* note 1 at para 235, the dissent explained its disagreement with the majority, in part, by pointing to the “interpretive principle regarding the nature of a constitution as a statement of the will of the people.” On this point, see the discussion of *Caron* in section 2 of chapter 1.

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the established constitutional forms violated principles or expressions of popular sovereignty voiced outside of the established forms. We find a paradigmatic instance of this positivist stance in the refusal by domestic courts to question state assertions of sovereignty—for instance, the statement by Chief Justice Marshall that “[c]onquest gives a title which the Courts of the conqueror cannot deny”²⁸ or the statement of the High Court of Australia that a challenge to state sovereignty is “not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged.”²⁹ In Aboriginal law contexts, the SCC has at times adopted a similar stance, though often paired a seemingly contradictory posture, leaving the matter in a certain state of ambiguity.³⁰

However, as explained in chapter 4, in the *Secession Reference*³¹ the SCC unanimously rejected a strict institutional positivist approach to principles of popular sovereignty. The Court explained that expressions of popular will beyond established constitutional forms—for instance, in the form of a clear referendum vote in favour of provincial secession from Canada—may themselves trigger constitutional obligations on members of the Canadian federation to uphold the legitimacy of existing constitutional forms. The Court provided a detailed analysis of constitutional principles that would, in its view, govern the fulfillment of such obligations. The Court added, however, that the judiciary does not have the institutional mandate, authority, or capacity to enforce such obligations—simply put, the courts cannot enforce legitimacy. Constitutional legitimacy requires an ongoing responsiveness of established constitutional forms and office-holders to the actual will of the people, as expressed not only through established forms but also outside of these.

The *Secession Reference* showed that the Court does not consider questions of legitimacy and responsiveness to the will of the people to be matters belonging to a political realm beyond the reach of judicial analysis and commentary. The Court offered a legal interpretation of the constitutional principles and obligations that must guide government conduct and negotiations to establish and maintain constitutional legitimacy and responsiveness to the will of the people, as expressed both within and without established constitutional forms.

²⁸ *M’Intosh*, *supra* note 4 at 588.

²⁹ *Coe v Commonwealth of Australia*, [1979] HCA 68 [“Coe”] at para 3 of the reasons of Justice Jacobs. See also para 12 of the reasons of Justice Gibbs in *Coe*: “The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged”; *Mabo v Queensland (No 2)* [1992] HCA 23 at para 31 of the reasons of Justice Brennan: “The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.”

³⁰ See e.g. *Tsilhqot’in Nation*, *supra* note 5 at para 69, where the SCC affirmed *both* that “[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia]” and that “the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*.” For a fuller discussion of the ambiguous or ambivalent stance taken by the SCC, see section 3 of chapter 2.

³¹ *Supra* note 27.

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While the SCC's corresponding statements in the Aboriginal law context may be more ambiguous, a holistic view of recent doctrinal developments makes clear that the Court has adopted an essentially similar approach to matters of constitutional legitimacy in this area of law, particularly in its elaboration of section 35 of the *Constitution Act, 1982*. As noted above, the Court has spoken of the need to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty"³² and qualified Crown sovereignty as *de facto* in regions where the Crown has yet to concluded agreements to resolve outstanding Indigenous claims.³³ The Court has identified the honour of the Crown and the goal of reconciliation as governing principles of modern Canadian Aboriginal law. The Court has also developed legal doctrines aimed at structuring and supporting the political negotiations needed to address issues of legitimacy in Indigenous-state relations—for instance, doctrines relating to treaty interpretation, to Crown fiduciary duties owed to Aboriginal peoples, to Crown duties of consultation and accommodation of asserted Aboriginal interests, and to Crown fulfilment of solemn constitutional obligations to Aboriginal peoples.³⁴

Whether or not we think these doctrinal developments have been successful and have achieved the Court's aims, taken as a whole they demonstrate a judicial willingness to acknowledge gaps or potential gaps between established constitutional forms and constitutional legitimacy, and a willingness to develop legal doctrines intended to help bridge such gaps. The Court is not about to repudiate assertions of Crown sovereignty, but it is prepared to structure and limit exercises of Crown sovereignty and to attach legally enforceable obligations when exercises of Crown sovereignty have a particular impact on Indigenous peoples and interests. Yet the appropriate form and extent of these judicial steps have been deeply contested. Institutional positivist approaches insist that judicial recognition of Indigenous legal orders and accommodation of Indigenous interests must take place within established constitutional forms founded on state sovereignty. Historically grounded pluralist approaches have shown greater willingness to *balance* principles of state sovereignty against principles of popular sovereignty and of Indigenous priority in what is now Canada.

While this tension was examined throughout the dissertation, chapter 5 offered a focused examination of the positivist-pluralist judicial debate as it surfaced in two recent cases, *Uashaunnuat* and *Nevsun*, that raised questions about the relationship between Canadian state law and non-state legal orders—Indigenous legal orders in *Uashaunnuat* and international law in *Nevsun*. Chapter 5 reviewed this judicial debate with an eye to the domestic implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").³⁵ Canada has stated its commitment to full implementation, and

³² *Haida Nation*, *supra* note 10 at para 20.

³³ *Taku River Tlingit*, *supra* note 11 at para 42: "The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty."

³⁴ See chapter 2 for a detailed review of these doctrinal developments.

³⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) ["UNDRIP"].

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legislation to that end has now been adopted by the provincial legislature of British Columbia and the federal Parliament of Canada.³⁶

UNDRIP itself reproduces the basic parameters of the judicial debate in Canada: a rejection of colonial ideology and a commitment to implementing Indigenous rights designed to mitigate the adverse consequences of *de facto* state sovereignty on Indigenous peoples, on the one hand, combined with a reaffirmation of state sovereignty, territorial integrity, and the power to infringe Indigenous rights in the broader public interest, on the other. As with the positivist-pluralist judicial tension embedded in Canadian law, these broad parameters leave considerable room for debate over concrete implementation of the substantive and procedural rights and obligations laid out in UNDRIP, and of the coordination of Indigenous and state jurisdictions. As a general matter, these broad parameters embody a commitment to legitimating state sovereignty in relations with Indigenous peoples, a commitment that has been variously described in the chapters of this dissertation as a commitment to a reconstruction of legal positivism, or to a synthesis of positivism and pluralism, or to an ongoing agonism between the two.³⁷ Undoubtedly, the interplay between institutional positivism and historically grounded pluralism—and, at a more fundamental level, between the interpretive manoeuvres and commitments that compose them—will continue to shape the judicial elaboration of Canadian Aboriginal law generally and the reception of UNDRIP into Canadian law specifically.

Chapter 5 closed with a suggestion that article 27 of UNDRIP may provide an opportunity to address positivist and pluralist concerns simultaneously. Article 27 calls for states and Indigenous peoples to collaboratively establish procedures, “giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources”.³⁸

The dissent in both *Uashaunnuat* and *Nevsun* expressed the positivist worry that the legitimacy of Canadian courts was at stake if they strayed too far from the task of interpreting the lawful authority of the domestic legal system founded on Crown sovereignty. They argued that Canadian courtrooms were not the appropriate forum in which to *balance* fundamental principles of that domestic legal system against other interests, such as the prior existence of Indigenous legal orders in Canada or the importance of developing domestic remedies for breaches of international law. The majority in those cases countered that the dissent adopted too rigid a subordination of Indigenous legal orders and international law to

³⁶ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14.

³⁷ The language of “reconstructed legal positivism” is taken from David Dyzenhaus, “The Inevitable Social Contract”, *Res Publica* (2020) at 10; online: <<https://doi.org/10.1007/s11158-020-09467-z>>. See the discussion of Dyzenhaus in section 1 of chapter 3. See also the concluding section of chapter 5 for a brief recap on the potential reconstruction of legal positivism, or the synthesis or ongoing agonism of positivist and pluralist strands, in Canadian Aboriginal law.

³⁸ UNDRIP, *supra* note 35, Article 27.

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principles of state sovereignty and too rigid a view of the role of domestic courts in relating to Indigenous and international laws.

Co-adjudicatory processes and bodies, jointly established by the Crown and Indigenous peoples, may offer a sensible response to the kinds of concerns expressed by both the pluralist majority and the positivist dissent in *Uashaunnuat* and *Nevsun*. Such processes and bodies could allow for Indigenous representatives to elaborate governing Indigenous law alongside Crown representatives or members of the judiciary who would interpret applicable state law. This would also require the development of practices and principles for the coordination of Indigenous and state laws.

If processes and bodies were established for the co-development of Indigenous and state laws in this sense, that would express a significant change in the social and political imaginaries of Indigenous-state relations in Canada. It would indicate a choice to test certain co-adjudicatory paths through our current period of ideological transition. As with other significant ideological developments noted in the dissertation, this would throw up many technical legal questions that would require doctrinal attention and creativity to answer. For instance, would such bodies and processes be subject to review by superior courts according to principles of administrative law? If so, how would superior courts review interpretations of Indigenous law in particular? Should a special division of the Federal Court, with relevant expertise, be established to undertake judicial review in this area? Or should co-adjudicatory processes include appellate divisions as well, including both Indigenous and Crown representation, with final appellate decisions shielded from further review by other courts? Could any such set-up be rendered consistent with the constitutional protection of superior court jurisdiction under section 96 of the *Constitution Act, 1867*?

In the judicial debate over such technical questions, and countless others that would arise, positivist and pluralist approaches would no doubt continue to vie for the dominant doctrinal position, to provide the more compelling doctrinal account and constitutional vision of the role of domestic courts and the sources of lawful authority in Canadian law. This ongoing agonism reflects two major aspects of the legal system we have inherited: the common law tradition, with its long history of interpreting situations of legal pluralism, and the centralizing power of the state and its assertions of foundational lawful authority.

It is impossible to tell from our current vantage point how the current positivist-pluralist debate might look with the hindsight of another several decades, or longer. Will historically grounded pluralist reasoning ultimately wear down rigid principles of state sovereignty, until a consensus emerges that those principles are quite malleable and must regularly be balanced against other interests flowing from, e.g., Indigenous legal orders and international law? Will the lawful authority flowing from state sovereignty eventually come to be seen as a permeable body suspended in an expansive sea of common law style reasoning? Or will institutional positivism persist in establishing the indispensability of principles of state sovereignty, and the need for them to structure domestic judicial reasoning within the established constitutional forms of the state and the separation of powers as foundational to modern democracies?

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These are questions well beyond the capacity of this dissertation to answer or even to suggest pathways leading towards an answer. But the long-term plausibility of either the positivist or pluralist paths, or combinations of them that are hard for us to imagine concretely today, are helpful reminders of the open-endedness of processes of constitutional evolution and judicial elaboration. At a minimum, this reminder should allay some of the usual fears about testing creative legal approaches to deep constitutional problems. If we close our eyes to this open-endedness—to the fact that, when viewed from the historical perspective of a century or two, or even several decades, legal systems are often in a state of tremendous flux, transition, adaption, decay, and regeneration—we may worry that Indigenous-state co-adjudicatory bodies are a radical innovation that threatens safe and stable institutions. But stability is a relative term, as is stagnation. The legal system must adapt to changing conditions, new conflicts and crises, and evolution in social and political imaginaries. As with all difficult questions addressed in this dissertation, the appropriate forms and rate of adaptation will be matters of degree and ongoing debate.

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