Reconciliation and the Foundations of Aboriginal Law in Canada

by

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Abstract

The current framework for reconciliation is based on the Court's accepted the Crown's assertion of sovereignty, legislative power and underlying title. The basis of this is their interpretation of Section 91(24), which reads it as a plenary grant of power over Indians and their lands. This has led them to simply bypass the question of the inherent right of self-government and to generate a constitutional framework that amounts to little more than a proportionality check on the exercise of Crown sovereignty. I argue that if we are to find a meaningful reconciliation—and not simply one that is assigned by the logic of force that resides behind the unquestioned assumption of sovereignty—then we will need to address the history of sovereignty without assuming its foundations. My project sets out to expose the limitations of the current model by following the lines of descent and association that underlie the legal conceptualization of Aboriginal sovereignty.

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Acknowledgments

I would like to acknowledge the tireless efforts of my supervisors John Borrows and James Tully. I can honestly say that this dissertation would not be what it is without the many long conversations that I had with both of them (both in person and virtually). They have been (and continue to be) integral to my thinking. Any good qualities that this dissertation has are, in my mind, the product of that ongoing dialogue. Needless to say, any faults that it may have are entirely my own.

Dedication

In memoriam of my Mother, Linda Nan Nichols (1947-2016)

Preface

I would like to preface this investigation with a brief methodological note. My approach to the question of reconciliation has been to work within the Western legal, political, and philosophical tradition. Some readers may wonder why I have selected these materials and not opted to use the resources of Indigenous traditions. As I see it, this line of reasoning poses the following type of question: "If our aim is to find a way to move beyond the confines of the current system, is it not better to look for other resources than those which were used to build it?" My initial response to this concern depends very much on how we understand it. If the gist of it is that we should be seeking a diversity of resources and not opting for what Wittgenstein would refer to as a "one sided diet," then I would agree with this concern; we should make use of a diversity of approaches and perspectives.[1] This means that we need to work with the tools that we have on hand and within the confines of the problem and context that we exist within. There is, as the saying goes, more than one way to skin a cat. But, on the other hand, if it is read as a call to simply and flatly reject any approach that would make use of the resources of the Western tradition because they may be in some way contaminated, then I wholly and entirely reject it. I do so because there is, as I see it, a kind of metaphysical demand lurking in this reading (viz. a demand for the kind of uncontaminated or 'pure' tools that would be needed to build utopia), which, if adopted, would leave us stuck in a crippling form of skepticism that would only ever enable us to determine that any

[1] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Blackwell: Oxford, 2001) at §593.

movement fails to meet the standard we have chosen. The only comfort that such a view from nowhere can offer is a hollow claim to moral superiority. [2] As Hegel forcefully points out, "it is just as foolish to imagine that any philosophy can transcend its contemporary world as that an individual can overleap his time or leap over Rhodes."[3] This point is driven home by Quentin Skinner when he maintains that, "all revolutionaries are…obliged to march backwards into battle."[4] The rough and ready gist of this is that in order to actually do the work of effecting political change, one must work from within their historical context and this means grappling with the political, legal, and philosophical texts that are woven into its structure. The urge to simply burn these texts and begin anew is as empty as the claim that one can jump over their own shadow. These texts do not sit discreetly on library shelves. They are carried with us in our actions and in our words and so to abandon them entirely is to condemn oneself to unconsciously repeating them.[5]

I find that Audre Lorde's evocative claim that "the master's tools will never dismantle the master's house" is a helpful way to find a way through this problem.[6] What I find useful in this picture is that we can imagine that the resources of the Western

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[2] Here I have in mind Hegel's critique of the beautiful soul and his forceful rejection of romantic idealism in the preface to the *Philosophy of Right*.

[3] G.W.F Hegel, *Elements of the Philosophy of Right.* Ed. Allen W. Wood. Translated by H.B. Nisbet. (Cambridge: Cambridge University Press, 2004) at 21-22.

[4] Quintin Skinner, *Visions of Politics, Volume I: Regarding Method* (Cambridge: Cambridge University Press, 2002) at 149-150.

[5] I am paraphrasing Gorge Santayana's famous aphorism, which maintains that "those who cannot remember the past are condemned to repeat it." Santayana uses "savages" as an example of those who are condemned to repeat themselves, but my own position is that this unfortunate condition afflicts all and was by and large far more prevalent among the self-proclaimed "civilized". See Gorge Santayana, *The Life of Reason: Reason in Common Sense.* Critical Edition. Co-edited by Marianne S. Wokeck and Martin A. Coleman. Volume VII, Book One of The Works of Gorge Santayana (Cambridge, Mass: MIT Press, 2011) at 172.

[6] Audre Lorde. "The Master's Tools Will Never Dismantle the Master's House." *The Audre Lorde Compendium: Essays, Speeches and Journals*. (London: Pandora-Harper Collins, 1996) at 160.

tradition (or any tradition) are analogous to a set of tools that have been used to construct a system of domination (viz. the master's house). Now if we can stretch this analogy a little, we can add in a set of actors within the system and imagine them using the tools to work on the house. What happens past this point depends entirely on *how they use the tools*. There is, undoubtedly, a way of using the tools that will result in the maintenance of the existing house or even the construction of another house that would be practically identical to the first. We could even imagine that for experienced builders, this way of using these tools could become rather automatic (e.g. a hammer is used to put in and take out a nail, etc.). It could even become so automatic that they would find it difficult to conceive of any other way to use the tools and so would immediately object if another builder attempted to use a tool in a way that they did not recognize. In this case, the master's instructions on how to use tools to build a house have been internalized by the builders and they are thus captured by a picture. But, as Wittgenstein reminds us, no game is entirely circumscribed by rules.[7] Or, to rephrase this point in a way that fits with the analogy we are working with: there is no particular use that inheres within the tools themselves. They arrive to us, much like words, with a history of usage that needs to be taken into account, but this does not strictly determine the boundaries of how actors put them to use. Nor is this history solid and consistent all of the way down; rather, it is analogous to a series of sedimentary layers that have been subject to sudden and violent eruptions and so tend to crisscross, overlap, and interpenetrate one another. As Wittgenstein helpfully points out,

> The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—

[7] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Blackwell: Oxford, 2001) at §68.

> because it is always before one's eyes.). The real foundations of his enquiry do not strike a man at all. Unless that fact has at some time struck him.—And this means: we fail to be struck by what, once seen, is most striking and most powerful.[8]

This is precisely why re-description has such an explosive potential: it can serve to draw our attention to something that is hiding in plain sight. The master's house that once seemed to be so solid and impenetrable (consistent with itself through and through) can be exposed as being nothing more than a house of cards. Once this is openly surveyable, the builders are free to explore the new uses that the tools could have. This is something that history can easily show us if we turn our eyes from generalizations and focus on particular cases. After all, in slave rebellions the master's tools were often used to destroy both the master's house and the master himself. We should remember that a hammer does not determine its use, one can use it to build, destroy or even, as Nietzsche shows us, to philosophize.

I also see the approach that I have adopted as stemming from my own standpoint as a Métis individual. In that, I have always found myself to be resistant to any attempt to draw out the bright lines that are required to separate culture into strict either/or categories. My own preference is to explore the wider ranges of the neither/nor, which present themselves both at the margins of the systems of the metropole (viz. in the diverse and strange world of the borderlands, the open vistas of the hinterlands, the sublime expanse of the wastelands and the wilds) and concealed within the blind alleys, concealed foundations and hidden rooms of the metropolitan capital itself. As such, my standpoint does not come with the force of some deep reservoir of privileged cultural

[8] *Ibid*, at §127.

authority; rather, it draws me to search for the points at which connections can be made and new possibilities can be explored. This is the spirit in which I have attempted to approach the history of the Six Nations of the *Haudenosaunee* with Canada (and before that the British Crown). I believe that Deskaheh's appeal for justice still has many possibilities that have yet to be explored and my aim is to use the various tools and resources that I have ready at hand to carry that work forward to investigate the foundations of the current international political and legal order.

Chapter 1

A Reconciliation without Recollection: An Investigation of the Foundations of Aboriginal Law

Three degrees of latitude overthrow jurisprudence. A meridian determines the truth…It is an odd kind of justice to have a river for its boundary. Truth lies on this side of the Pyrenees, error on the other.
Blaise Pascal, *Pensées* (23)

A 'picture' held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.
Ludwig Wittgenstein, *Philosophical Investigations* §115

What is the meaning of reconciliation? If we refer to the *Oxford English Dictionary* for our answer, we will find that it can refer to both an action and a state.[1] There is the transitive act of reconciling and the state of being reconciled. In the former sense it can refer to the process of restoring unity or peace between parties that have been estranged or even hostile. In this sense it can be interpreted as an essential component of settling disputes by way of mutual understanding and agreement. But, it can also have a more unilateral sense. There is the reconciliation of bookkeepers and accountants. Here one settles discrepancies between accounts by making them compatible and consistent with one another. There is also the reconciliation of fate. One can reconcile themselves to events that are beyond their control (whether this is death or the will of God).[2] This form of reconciliation may bring with it a sense of acceptance and peace or simply resignation, but can one force another to accept something as a fact that they must reconcile themselves to? Coercive force may well appear to be as irresistible as fate, but it cannot offer the same guarantees. H. L. A. Hart has this very problem in mind when he addresses the problem of authority, law, and coercive force.[3] A legal system may indeed be used to maintain a group in a position of permanent inferiority, but this comes at a price. One can simply never be sure that this forced reconciliation is real because one can never be sure whether the other party has accepted their situation as fate

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[1] *The Oxford Dictionary & Thesaurus*, 1997, *sub verbo* "reconcile".

[2] For a critical examination of the stakes of this kind of imposed reconciliation for the rule of law see Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L. J. 470 at 472 [Walters, *Morality*], "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada," in Will Kymlicka and Bashir Bashir, *The Politics of Reconciliation in Multicultural Societies*, (Oxford: Oxford University Press, 2008), Dawnis Minawaanigogizhigok Kennedy, "Reconciliation without Respect? Section 35 and Indigenous Legal Orders," in Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: University of British Columbia Press, 2008), and Felix Hoehn, *Reconciling Sovereignties*: *Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

[3] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994) at 200-203.

or if they are simply biding their time. Quite simply, there is no way to distinguish between "voluntary acceptance" and "mere obedience" and as a result, this type of legal system suffers from a kind of constitutive instability.[4] Such a system produces a vicious circle in which those who benefit from the system ground their claim to legitimacy in the phrase *salus populi suprema lex* ("let the welfare of the people be the supreme law") and those who are excluded take up the revolutionary response of *fiat justitia ruat caelum* ("let justice be done though the heavens fall").[5] Here the distinction between the rule of law and the rule by law is lost in the adversarial call and response of two solitudes. Given its ambivalence what can reconciliation mean in the context of Canadian aboriginal law?

Reconciliation in Canadian Jurisprudence

The concept enters the case law in *Sparrow* when Chief Justice Dickson and Justice La Forest use it to interpret the relationship between s. 35(1) of the *Constitution Act, 1982* and s. 91(24) of the *Constitution Act, 1867*.[6] What is being reconciled is, as the Court puts it, "federal power" and "federal duty" via a justificatory test. This naturally has connection with the kind of wider historical reconciliation we will see later on in *Mikisew Cree*, but it is not entirely the same. The judico-historical gulf between s. 35(1) and s. 91(24) is difficult to overstate.[7] In effect, Aboriginal peoples move from being the

[4] *Ibid*, at 201-202.

[5] Robert Cover, *Justice Accused: Antislavery and the Judicial Process*, (New Haven: Yale University Press, 1975) at p. 107.

[6] *R. v. Sparrow*, [1990] 1 S.C.R. 1075. at 1109 [hereinafter *Sparrow*].

[7] Brian Slattery refers to this as a "sea change" in common law rules. He argues that it has given rise to two related forms of Aboriginal rights, which he terms "historical" and "generative". Historical rights are, the form of Aboriginal title that existed at common law in the period following the Crown's *de facto* assertion of sovereignty. It is expressed in the *Royal Proclamation* and forms of what he refers to as the "*common law of Aboriginal rights*." It is governed by the common law *Principles of Recognition* (and he argues is the meaning of "recognized" in s. 35(1) of the *Constitution Act*, 1982). This "historical title" forms, "…the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial governments and the

object of a constitutional head of power to having their "existing" rights "recognized and affirmed". The interpretive complications do not end with the vague language of the provisions themselves. The Court in *Sparrow* seems to simply assume that s. 91(24) grants the federal Parliament *power over* Indians and their lands. While this is consistent with previous case law it is one interpretation of the provision and not an unquestionable fact.[8] There is also the question of the meaning of s. 35(1) within the context of the *Constitution Act, 1982* itself.[9] It is not within the *Charter* (which extends from s. 1 to s.

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scope of dispossession." It is this process of colonial dispossession that has led to the transformation of the historical forms of Aboriginal right into "generative right." These are governed by the *Principle of Reconciliation* (and provide the meaning of "affirmed" in s. 35(1)). The purpose of this generative form is the successful settlement of Aboriginal claims, and as Slattery rightly maintains, this must involve "…*the full and unstinting recognition of the historical reality of Aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands*": Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255 at 147-9 and 168-169.

[8] The history of the Supreme Court's interpretation of s. 91(24) will be addressed in detail in chapter 3. It is interesting to note that the Court in *Sparrow* chooses to interpret s. 91(24) as being effectively "federal power" without limit and it is this ***interpretive choice*** that leads them to reconcile it with the "federal duty" that is taken on in s. 35(1). This interpretation of s. 91(24) is simply assumed (see *Sparrow, supra* note 6, at 1103). There is no inquiry into its nature or basis, no restriction on its form or scope. This interpretive choice fits into a 140-year-old interpretive paradigm that has read s. 91(24) as an unlimited grant of power *over* Indigenous peoples. This has never been the only interpretive possibility for s. 91(24). As John Borrows argues, the basis cannot simply be the wording of the provision itself as "…the technical wording of powers granted by section 91 is "*in relation to*" matters not assigned exclusively to provincial legislatures. In particular, the exclusive federal legislative authority in section 91(24) only "*extends to*" Indians and lands reserved for Indians. There should be a vast difference between legislation *extending to* or *in relation* to a subject matter and exercising legislative power over a particular group of people." See John Borrows, "Unextinguished: Rights and the Indian Act" (unpublished) at 11. There are other interpretive possibilities. The provision can been read in light of the 250-year-old tradition that stretches back to the *Royal Proclamation of 1763*. Such an interpretation necessarily determines the form of the power (i.e. it would be a *power with* Aboriginal peoples on a *nation-to-nation* basis within a more complicated model of treaty-federalism) and limits its possible scope to accord with this form. If the Court in *Sparrow* had interpreted s. 91(24) in this light instead of simply assuming that it grants unlimited or plenary power, there would be ***no conflict*** between the provisions for them to reconcile. See also Larry Chartrand, "The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy," (2013) 50:1 Alta L Rev 181 at 182 and for more on the meaning of the term power-with see James Tully, *Violent Power-Over and Nonviolent Power-With: Hannah Arendt On Violence and Nonviolence* (Paper delivered at Goethe University 7 June 2011) [unpublished]; James Tully, Richard Gregg and the Power of Nonviolence: The Power of Nonviolence as the unifying animacy of life (J Glenn and Ursula Gray Memorial Lecture, delivered at Colorado College, 1 March 2016) [unpublished]. For more on the concept of treaty-federalism refer to Russel Lawrence Barsh and James Youndblood Henderson, *The Road: Indian Tribes and Political Liberty*. (Berkeley: University of California Press, 1980) and, more recently, Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. (Toronto: University of Toronto Press, 2014).

[9] Peter Hogg points out that s. 35 was a late addition to the *Constitution Act, 1982*. It was not included in the October 1980 version and then it appears in the April 1981 version without the word "existing" only to vanish

34) and thus it is not subject to either s. 1 or s. 33. In *Sparrow* the Court was tasked with finding a way to read a limit into s. 35(1) without depriving it of meaning entirely. Their solution was to introduce a kind of s. 1 *Oakes* analysis via s. 91(24) and then, to avoid the colonial connotations of this provision, characterize it as the expression of a "fiduciary relationship". This constitutional form of reconciliation has been expanded through the subsequent case law.

Through *Gladstone*, *Van Der Peet,* and *Delgamuukw*, reconciliation becomes both a constitutional principle and a substantive goal. The judicial process of reconciling the constitutional conflict between s. 91(24) and s. 35(1) is still in place, but it is interpreted as being a part of a larger substantive goal. That goal is the reconciliation of the pre-existence of Aboriginal peoples with the Crown's assertion of sovereignty over Canadian territory.[10] Reconciliation is thus a remedial principle that generates a judicial process. This process must reflect the fact that Aboriginal rights (including title) are not derived from the Crown. According to Lamert, C.J.C. this means that the court must take "…into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each."[11] The cases all seem to maintain that reconciliation, if it is to have any meaning, must be mutual, but, as we have seen, they part company on how this mutuality is to be

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entirely in the November 5th, 1981 version. The omission drew intense criticism and, as a result, it was added later in November with the addition of the word "existing". The history of the provision alone demonstrates that it was the product of contention and compromise. This is also evident in the vague drafting and placement. What does "recognized and affirmed" mean? Does "existing" open to door for extinguishment? See Peter Hogg, 'The Constitutional Basis of Aboriginal Rights' in Maria Morellato ed., *Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book, 2009) at 5-7, and Brian Slattery, "The Constitutional Guarantee of Aboriginal Treaty Rights" (1982) 8 Queen's L.J. 232.

[10] *Delgamuuku v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 81 [hereinafter *Delgamuuku*].

[11] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 50 [hereinafter *Van der Peet*]

achieved. Nowhere is the Court's hesitancy more evident than in the title cases. The Court has consistently maintained that negotiation has more to offer than litigation on the question of title.[12]This is, at least to some degree, understandable. After all, the question of title cuts to the very heart of the dispute between the Crown and Aboriginal peoples. In this question the court senses the limits of its municipal jurisdiction and so it has avoided setting a clear and determinative precedent by tripping itself over procedural technicalities (the previous cases on title have exhibited a number of methods of judicial non-decision such as, split decision (*Calder*), *obiter dicta* (*Delgamuuku*) and uncertainty (*Marshall; Bernard*)). In this it has attempted to set the terms of a negotiation process and yet the question of title keeps coming back before the Court. Indeed, if reconciliation is to have any substantive meaning the question of title needs to be answered.[13]

With *Tsilhqot'in Nation*, Chief Justice McLachlin (writing for a unanimous Court) provides us with an answer to this question: title now exists, but it is a title that is subject to reconciliation. Reconciliation is presented as a "project", a "process" and a "governing ethos".[14] But, again, what kind of reconciliation is this? The framework that the Court envisions for this process is the test for the justification of infringement. McLachlin, C.J.C. states that, "this framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians."[15] The problem here is that reconciliation is operating on the basis of the Crown's unilateral right of infringement. This retains the same basic assumption that Dickson C.J.C. maintained in *Sparrow*, namely, "…there was from the

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[12] *Delgamuukw*, *supra* note 10 at para. 186.

[13] See Douglas Lambert, "Where to From Here: Reconciling Aboriginal Title with Crown Sovereignty" in Maria Morellato ed., *Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book, 2009).

[14] *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44 at paras. 17, 23 and 87 [hereinafter *Tsilhqot'in Nation*]

[15] *Ibid*, at para. 125.

outset never any doubt that *sovereignty and legislative power*, and indeed the underlying title, to such lands *vested in the Crown....*"[16] But, this response does little more than beg the question. If the basis of the Crown's right to unilaterally infringe on Aboriginal rights is Crown sovereignty then, one must ask, how did the Crown become sovereign? This is the actual heart of the situation in Canada. And on this point there is, paradoxically, both a lot and really not very much to say. There is a lot to say in the sense that the process of colonization of the territory now known as Canada has a long and complicated history. On the other hand, as Borrows notes, "the Court has not articulated how (and by what legal right) assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance".[17] They are silent on this issue precisely because there is nothing to say. Crown sovereignty is predicated upon an arbitrary assertion.[18] It cannot

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[16] *Sparrow*, *supra* note 6, at 1103 (emphasis added).

[17] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall L.J. 537 at 582.

[18] The basis of the Crown's claim being an assertion or *de facto* in nature has appeared in the case law. In *Haida Nation* McLachlin C.J. states that the "…process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which 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": *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 SCR 511 at para. 32 [Hereinafter *Haida Nation*]. This opens up the possibility that the Crown's assertion of sovereignty is predicated on a *de facto* control of land that has yet to be made *de jure* via the formation of treaties that reconcile "pre-existing Aboriginal sovereignty with assumed Crown sovereignty": *ibid.* at para. 20. This is supported by *Taku River Tlingit* when McLachlin C.J. states that: "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"; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550 at para. 42. This characterization of Crown sovereignty is also cited with approval in the Court's recent decision in *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at para. 66. On a liberal reading these statements open up a number of possible arguments around the constitutional status of treaties and the nature of Crown sovereignty. Also see Walters, *supra* note 2, at 515 and Hoehn, *supra* note 2. While this may be a promising line of reasoning as of yet it has not significantly altered the jurisprudence as, despite the questionable basis of its claim to radical title, the Crown still retains the right of unilateral infringement. I should also note that when I refer to Crown sovereignty throughout the book I am including underlying or radical title. This is important as in *Tsilhqot'in Nation* the Court maintains that it is underlying title that gives rise to "…the fiduciary duty owed and the right to encroach subject to justification" (*Tsilhqot'in Nation, supra* note 14 at para. 112.). Sovereignty remains essentially connected as it is the assertion of sovereignty that (magically) allows the Crown to acquire "radical or underlying title" (*Ibid,* at para. 12). But, one could imagine a version or theory of reconciliation that would be willing to compromise on sovereignty (e.g. to see the *de facto* and assertion type qualifications the Court has been making and the final agreements or aboriginal

account for itself aside from offering up the legal fictions of the doctrine of discovery and *terra nullius,* which set out to exclude the very need for a justification for colonization by permanently stripping one party of any and all legal rights. This silent and unquestioned acceptance exposes the impossibility of the project of reconciliation: the project begins with the assumption of Crown sovereignty and then it sets out to reconcile this with "Aboriginal interests".[19] In effect, the process of reconciliation thus defined cements in a permanent asymmetry between the Crown and Aboriginal nations. This asymmetrical relationship cannot be reconciled no matter what extravagant constructive techniques of legal interpretation are marshalled. And so the project of reconciliation is doomed to run aground before it actually sets out on its journey. Perhaps this offers us an explanation to Binnie J.'s cryptic metaphor in *Beckman v. Little Salmon/Carmacks First Nation*: "the future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards."[20] Perhaps the canoeist should not look back because were he to do so he would suddenly discover that he never actually left the shore.

Reconciliation as Picture Thinking

What are the assumptions that bind the Court to the project of reconciliation—and all of its determinations as "project", "process", "governing ethos" and "grand purpose of s. 35"—and yet keep it from moving forward in any meaningful sense? [21] It is as if the

title as a move towards the "domestic dependent nations" model from the United States), but retain the unilateral right of infringement via underlying title. This is not a theory of reconciliation; it is little more than a shell game that serves to conceal the problem under a different guise.

[19] *Tsilhqot'in Nation, supra* note 14 at para. 118.

[20] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 at para. 10 [hereinafter *Little Salmon/Carmacks*]

[21] For the first three terms see *Tsilhqot'in Nation, supra* note 14 at paras. 17, 23 and 87 and for the fourth see *Little Salmon/Carmacks, supra* note 20 at para. 10.

Court is held captive by a picture of reconciliation that is repeating itself in the language of each decision. On the one hand it recognizes that if reconciliation is to have any meaning beyond a juridico-colonial procedure, it must be concerned with the mutual settlement of grievances both past and present. As Lamer C.J.C maintains in *Van der Peet*, true reconciliation requires that the court must place equal weight on the common law and the aboriginal perspective; "we" are, after all, "all here to stay".[22] But where is "here" and who is "we"? The problem that remains constant in all cases is that there is no real justification for treating Aboriginal nations as subjects of the Crown. As Dickson C.J. states in *Simon*,

> [at] the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.[23]

How can one be both less than a sovereign state and not a citizen? This *sui generis* logic pervades the jurisprudence in this area: Aboriginal claims to land as being based in a right of "occupancy" and a "diminished" right of self-government, not pre-existing sovereignty.[24] According to this line of reasoning, there is no right to sovereignty as this requires a level of socio-cultural sophistication that is beyond the reach of "…a handful of Indians."[25] The Court has avoided dealing directly with the question of Aboriginal sovereignty because legal reasoning could not explain the basis for the superior nature of

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[22] *Van der Peet*, supra note 11 at para. 50 and *Delgamuukw*, *supra* note 10 at para. 186

[23] *Simon v. The Queen*, [1985] 2 SCR 387 at 404 [hereinafter *Simon*].

[24] The claim concerning the "diminished" nature of the Aboriginal right to self-government is based in Chief Justice Marshall's decisions in *Johnson v. M'Intosh*, 21 U.S. 543, 5 L, Ed. 681 (1823) [hereinafter *M'Intosh*], *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831), and *Worcester v Georgia*, 31 US 515, 8 L Ed 483 (1832). For more on this see Joshua Nichols, "A Reconciliation Without Recollection? *Chief Mountain* and the Sources of Sovereignty" (2015) U.B.C. L. Rev. 48:2 and Christopher D. Jenkins, "Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) U.B.C. L. Rev. 1.

[25] *R. v. Syliboy* (1929), 1 D.L.R. 307 (N.S. Co. Ct.) at 313 [hereinafter *Syliboy*]

Crown sovereignty: it is simply there as an unquestionable assertion. Where does this leave us? How do we initiate an investigation into this picture of reconciliation? The metaphor of the canoeist from *Beckman v. Little Salmon/Carmacks First Nation* is, to my mind, a useful place to start, as it relies on two related assumptions that tacitly underlie the logic of the jurisprudence of reconciliation and need to be addressed before any investigation can begin.

A) Historicism

The first assumption concerns the model of history that is being offered in this picture of reconciliation. The metaphor of the canoeist collapses time and space so as to offer us, as readers, a picture in which the past is behind us and the future in front of us. The past is identified as location of "misunderstandings" and "ancient grievances".[26] Whereas the future lies open before us and so if our aim is to make progress towards reconciliation we must, like the canoeist, face the future and not the past. This simplistic model assumes that history is a single uniform continuum that all parties agree on. Accordingly, the past is simply a set of value-free facts that need only to be summarized and ordered into sequence. Their status as historical "facts" is outside the bounds of contestation. While this may well be *a model* of history, it cannot lay claim to being objective (the degree of bias is, in my opinion, inversely proportional to its claim to being value-free). It is the colonial administrator's preferred image of history: the past is a set of facts that require nothing more than an occasional inventory and then they can return to the silent shelves of the national archive. Accordingly, there is no separate view of history for the colonizer and the colonized. There is simply *the* history of *the* nation.

[26] *Ibid.*

This model of history also serves to determine the relationship between the past and the present. If one party is able to determine what constitutes a part of *the* past, then that same party can also determine the present reality of the conflict. The distance between the "ancient grievances" and the present can deprive the other party of grounds via a combination of laches and adverse possession (the imputed distance makes disputes concerning the content of the past out to be little more than petty grudges and self-indulgent malingering, while the present becomes simply a fact that must be accepted).[27] What the past cannot be to this mind set is open to the contestation of a plurality of parties in an ongoing conflict. It cannot be open to the possibility of the kind of radical interpretation that would derail the narrative of historical progress and its claim to an objective historical continuum, leaving us with an undetermined set of contingent histories.[28]

B) The Ship of State

The second assumption pertains to the image of the canoe—as well as to the "here" and "we" in Lamer C.J. phrase in *Delgamuukw* and Binnie .J's reading of the Two-Row Wampum in *Mitchell*[29]—as it suggests that the parties to the dispute occupy common

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[27] For a detailed account of how originalism (a specific legal form of historicism) has been deployed within Aboriginal law despite the Canadian "living tree" approach to constitutional interpretation see John Borrows, "(Ab)Originalism and Canada's Constitution", (2012) Supreme Court Law Review 58:2d.

[28] I share Quentin Skinner's suspicion concerning those who claim to have a "general theory about the mechanisms of social transformation" and follow his suggestion that our normative concepts are not simply statements about the world, but the "tools and weapons of ideological debate." See Quintin Skinner, *Visions of Politics, Volume I: Regarding Method* (Cambridge: Cambridge University Press, 2002) at 177-180.

[29] *Mitchell v. M.N.R.*, [2001] 1 SCR 911 at para. 130 [hereinafter *Mitchell*]. This form of reasoning is also present in *R. v. Gladstone*, [1996] 2 SCR 723 at para. 73 where Lamer C.J.C. states: "…**distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.** Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of

ground and so can move forward together.[30] In effect, it assumes that "we" are all present and accounted for within the ship of state. Here again we have the false image of unity covering over the complicated legal and historical realities of settler colonialism in Canada. What does the canoe—as the "here" that contains "us"—represent? If it is the state, then how did the parties come to constitute a single vessel?[31] The "merged" sovereignty that is presented in *Mitchell* through the metaphor of the ship of state takes the process of merging as one of historical fact, which, if accepted, would be to legitimate a form of "constructive conquest".[32]

Even if one were to ignore the problem of how the ship came to be and accept its appearance at face value how could it be a single ship? That is, how can the parts—according to Binnie J. the ship is "…composed of the historic elements of wood, iron and canvas" [33]— be considered to form a coherent whole given the socio-economic realities of their current situation? In terms of substantive equality it is clear that they live in separate worlds (as any cursory review of the literature on the socio-economic conditions of Aboriginals in Canada will demonstrate). Even under the narrow gaze of formal equality there is the thorny problem of the distinction between "citizen" (or, prior to

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sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation" [emphasis added]. The Chief Justice cites this paragraph with approval in relation to the first part of the test to infringements of aboriginal title in *Delgamuukw, supra* note 10 at para. 161. The question of how the distance between the 'fact' that Aboriginal societies exist within a broader community (an obvious factual statement relating to the physical realities of settler-colonialism) to the sovereignty of the Crown (a legal concept) over unceded Aboriginal territory is not answered. Much like Chief Justice Dickson's statement in *R. v. Sparrow* the sovereignty of the Crown is a fact by virtue of having never been doubted.

[30] *Delgamuukw, supra* note 10 at para. 186.

[31] Gordon Christie askes precisely this question in his article "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) Supreme Court Law Review 16:2d at 292-294.

[32] *Ibid* at 297

[33] *Mitichell, supra* note 29, at 130.

1949, "British subject") and "Indian". After all, the Supreme Court has held that s. 91(24) is unlike most of the other heads of power in the *Constitution Act, 1867*—which have relatively bright lines between federal and provincial jurisdiction—in that it authorizes Parliament to legislate over a racially determined group of people in an all-encompassing manner.[34] This makes Lord Atkin's famous "watertight compartments" metaphor a far more apt description of the relationship.[35] In order to accept the ship of state with its "merged" sovereignty offered by Binnie J. in *Mitchell* we would have to mistake the dream of enfranchisement as the reality of the present. Only then could "we" form a fully determinable set of peoples—the 'ship of state' or 'body politic'—that could move into the future under the direction of a common legal-political order.

The general problem that this assumption attempts to cover over is the plurality of communities, which also entails a plurality of legal orders. Just as there is no singular history in a settler colonial context there is also no singular community. The implication being that there is no single sovereign that can authorize a common positive legal structure (as Austin requires) nor is there the single community that could provide the agreement necessary for a "rule of recognition" (as Hart requires). As Stanley Cavell rightly observes, the myth of the "ship of state" is "…not merely false, but mythically false. Not just untrue but destructive of truth."[36]

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[34] *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548 [hereinafter *Canard*].

[35] In *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at p. 354 Lord Atkins wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."

[36] Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality and Tragedy*. (New York: Oxford University Press, 1999) at 365

These two assumptions—which I will refer to as historicism and the ship of state—lie at the foundation of modern aboriginal law in Canada. They are the assumptions that have captured the Court and inexorably repeat themselves under the term "reconciliation". They can be heard in the mysterious and magical assertions of our Supreme Court from Dickson C.J.C.'s "…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....*"[37] and the strange coupling of terms like *de facto* and *assertion* to characterize Crown sovereignty while maintaining the right of unilateral infringement of Aboriginal rights and title.[38] Any investigation into the meaning of reconciliation that does not address these assumptions has committed itself to the magic circle of Crown sovereignty. The termination point of such an investigation would be mistaking a refusal to re-examine the past for progress. Contrary to Justice Binnie's assertion, the future is not more important than the past. Rather, it is a product of how we choose to imagine (and re-imagine) the past.

History, Law and Legitimacy

What is the importance of history to our understanding of the relationship between law and legitimacy? Any attempt to answer this question—with such questions there are only ever attempts—would have to begin by asking what we understand by the term 'history'. If we take an everyday understanding of history—taken as a progressive series of events, names and dates—then it seems we simply have to select a starting point and begin articulating the series associated with it. Our starting point could be any

[37] *Sparrow*, *supra* note 6, at para. 1103 (emphasis added).

[38] *Haida Nation*, *supra* note 18, at para. 32.

particular state. Such an answer would naturally move from past to present constructing a line of progression. From this we gain an orientation, a point within the present from which the open horizon of the future is, to a greater or lesser degree, constrained by the "It was" of historical time. [39]An answer of this type is at once banal and frustrating. Confronted with the past as that-which-we-cannot-change we begin to see the historian's library as little more than a graveyard where we keep an endless series of long unread books. Each volume accounts for the moments that preceded, and indeed lead to, 'us' but without the tensions and risks that gave them meaning. They present the great wars and revolutions of the past to us as if they were little more than a series of exhibits in a museum. Each would offer us a beginning, a foundation, and extend a series from that point until it reaches—and indeed explains and defines—'us', but we would inevitably find this version of ourselves strange. This historical 'us' seems to anticipate who we are. It offers a sense of community and purpose, but, oddly, it is a version of ourselves that arrives before we do. It claims to anticipate who we are. But, the closer we look the more the resemblance fades. Inevitably we begin to see the gaps, and spaces in its history, those moments left unaccounted for when nothing seemingly happens, and we are left feeling somehow outside of this version of 'us'. We can't seem to fit our own experiences into this historical outline and so, for the most part, we continue on by not looking back. Once this 'us' is accepted as our foundation time is ordered according to a set mode of historical reason whose axioms are causality, continuity, and progress. These axioms set the *how* of historical time, its *modus openendi*, but its orientation is set by the fictions of

[39] cf. Friedrich Nietzsche, *Thus Spoke Zarathustra*, Translated by Graham Parkes (Oxford University Press: Oxford, 2005) at 121-2; Hannah Arendt, *The Human Condition*, (University of Chicago Press: Chicago, 1958) at 236-43.

beginning and end. By accepting this image of history we trade-in our historical imagination, with all of its questions, possibilities and risks, for a sense of comfort and security that is, when we actually begin to stop and look at it, empty. This is, of course, a misconception of what history has to offer us, it is the stuff of historicism, but it is nonetheless a common misconception. How could we begin to challenge this image of history? We could begin by refusing the necessity of the progression itself. The axioms of causality, continuity, and progress are actually depended on the fictional co-ordinates of beginning and end. The series is, after all, not what *had* to occur. Nor are the connections between events *necessarily* causal. While these are neither novel nor controversial propositions as soon as we begin to apply them to the foundations of law we find ourselves confronted with the sternest of warnings.

In the *Metaphysics of Morals* Kant argues that questioning the historical origins of authority is, oddly, both pointless and a punishable offence akin to treason.[40] He argues that it is pointless because there is nothing to find. After all, he reminds us, "…savages draw up no record of their submission to law."[41] Pascal also characterizes such an inquiry as pointless; the law is simply law, there is nothing more to see,

> It is self-contained, it is the law and nothing more. Whoever wanted to examine the reason for this would find it so feeble and lightweight that, if he were unaccustomed to contemplating the feats of human imagination, he would marvel that in a century it had accumulated so much pomp and reverence.[42]

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[40] Immanuel Kant, *The Metaphysics of Morals*. Edited and Translated by Mary Gregor. (Cambridge: Cambridge University Press, 2006) at 111-2, 136 [hereinafter Kant, *Metaphysics of Morals*].

[41] *Ibid.* at 112.

[42] Blaise Pascal. *Pensées and Other Writings*. Edited by Anthony Levi. Translated by Honor Levi. (Oxford University Press: New York, 1995) at 24 [hereinafter *Pascal*].

But, this 'feeble and lightweight' answer is not without effect. It is, at least potentially, revolutionary. In this sense it has much in common with the child's observation in the *Emperor's New Clothes*: "But, he isn't wearing anything at all!" On the one hand it is a simple and obvious fact, the emperor is naked, but whatever comical effect this has is quite soon eclipsed by the troubling, terrorizing fact that everyone knew this and continued on 'as if' they did not.

Here, I would argue, we begin to uncover the importance of history for our understanding of the relationship between law and legitimacy. History spans the gap between the empty truth and the 'as if'. It can serve as a kind of magical, and indeed invaluable, tool for grounding the relationship between law and authority. In this role its job is to make effects appear 'as if' they were causes.[43] In doing so it provides the lawgiver with authority, but, as Rousseau notes, it is not the authority of reason. It is of a different order altogether as it can "…compel without violence and persuade without convincing."[44] Its power is as miraculous as it is fragile. The lawgiver mixes wisdom with sleight-of-hand. This leaves the boundary between the legislator and charlatan undecidable.[45] No matter how beautiful its descriptions or astounding its logical acrobatics the legislator's account remains, like the charlatan, a work of fiction. It is always grounded elsewhere. It requires access to the 'there' and 'then' as they never were—a state of nature, utopia, a social contract— but we are asked to not examine the details of the account too closely. This fiction is, after all, the very basis of its claim to

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[43] Jean-Jacques Rousseau. *The Basic Political Writings*. Translated by Donald A. Cress. (Hackett Publishing: Indianapolis, 1987) at 164.

[44] *Ibid.* at 164.

[45] Geoffrey Bennington. *Legislations*. (Verso: New York, 1994) at 222; Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy*, (Princeton University Press: Princeton, 2009) at 21-26.

the law; it forms the foundation of law. If the legislator is to retain its legitimacy its foundation must be maintained as it provides the appearance of necessity and it is this 'as if' that holds the progressive line of historical narrative together. This leaves it vulnerable to the question of the 'here' and 'now' (and, as Skinner's work has so clearly demonstrated, to the "…contingencies of our local history and social structure.").[46]

This is precisely what the *Emperor's New Clothes* so clearly illustrates. The empty truth of the relationship between law and legitimacy is open for all to see. What does this mean? Are Kant, Pascal, Rousseau and the host of others who repeat this warning correct? Is this empty truth simply too dangerous? Is it something that only fools, demagogues, and would-be-tyrants pursue? Do we need to treat the fiction of foundation 'as if' it were a genuine and eternal truth? By doing so do we not lose the distinction between rule *by* law and the rule *of* law? What do we receive for turning a blind eye? The promise that what "…was introduced once without reason" will become reasonable or that "the law will work itself pure"?[47] If so it seems that when it comes to the relationship between law and legitimacy history must serve and maintain the idols of 'foundation' and 'progress'. But, is this the only approach? Is there a way to understand law not from the 'there' and 'then' of historical fiction, but from the now? Can the useless and empty truth that we find in the now—the one opened up by the child's exclamation—serve as a different sort of approach to the problem of foundation?[48]

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[46] Skinner, *Visions of Politics, supra* note 28, at 89.

[47] *Pascal*, *supra* note 42, at 24.

[48] Like Skinner I find the answer to this question of our approach to the past in Michel Foucault's contention that "the history which bears and determines us has the form of a war" (Cited in Skinner, *Visions of Politics, supra* note 28, at 177). This is what, to my mind, connects what I have been referring to as the 'empty truth' of the here and now to the study of the past; namely, the locally contested and contingent reality that they both share.

The problem of reconciliation is a difficult one. If we approach it via the jurisprudence our path simply leads us in circles around the concept of sovereignty.[49] There is a labyrinthine quality to it. This is because sovereignty acts as a hidden premise that does not allow us to inquire further.[50] This limitation in the jurisprudence is reminiscent of Kant's argument that any inquiry into the historical origins of the authority of the sovereign should be a punishable offence.[51] He goes so far as to state that such an inquiry is pointless because "…we can already gather from the nature of uncivilized men that they were originally subjected to it by force."[52] This response assumes a narrow conception of the investigative possibilities that the historical question opens up. It is not simply a matter of whether the foundational act was accomplished by contractual consent or brute force. It extends to the socio-legal and political processes that generate the

[49] Sovereignty resides in the jurisprudence much like gravity: it can only be seen indirectly via its effects on a constellation of related concepts (title, jurisdiction, extinguishment, infringement, and the 'diminished' right of self-government). See Borrows, *Alchemy, supra* note 17, at 562, 569.

[50] There is a kind of logic that is reminiscent of the folktale *Bluebeard* at play here: a castle is opened up for us as the reader and we are welcome to explore each and every room with the exception of one. This excluded room is an open secret. We are simply told not to use our key to go inside. Once we violate this prohibition and enter the room we see its simple truth: it conceals violence without measure or proportion. We also see that the violence and death that it hides (which is in a certain way, flat, or banal, as there is no real magic to be seen here) is, at least to my mind, the actual foundation of the castle and the explanation of the bizarre color that marks the owner of the castle. The name of the door within the castle is, for the purposes of my analogy, sovereignty. This *Bluebeard logic* can be found in any number of political thinkers (see Kant below for instance) who propose to offer a system of thought that explains away the foundations of law by marking off a "state of nature" (or other open secret) in which the rules are paradoxically presented as both entirely a part of and entirely separate from the rest of the system.

[51] Kant, *Metaphysics of Morals, supra* note 40, at 111-112, 136. Legal positivism has taken Kant's imperative as its foundation. It is this conceptual commitment that provides it with its provincial and imperial determination. It is also what makes it effectively useless when attempting to understand legal systems in settler-colonial contexts. It assumes sovereignty via the assumption of a singular community and if that community cannot be said to exist in any meaningful way then it remains as a conceptual utopia projected into the future. In either case it offers us a vision of law built upon the kind of justice that would have a river as its boundary. Simply put, it becomes little more than the preferred view of the colonializer.

[52] *Ibid* at 112.

civilized/uncivilized distinction, which allows an act of force to appear to be necessary. In order to address the source of this distinction we have to begin to change tactics and find a way to question the rules that have formed the game. We need what Wittgenstein refers to as a "perspicacious representation" in order to find our way about. As he states in §122 of the *Philosophical Investigations*,

> A main source of our failure to understand is that we do not *command a clear view* of the use of our words. – Our grammar is lacking in just this sort of perspicuity. A perspicuous representation produces just that understanding which consists in 'seeing connexions'.[53]

This entails a departure from the standard form of legal scholarship that would chart its course in and through the positive sources of the law alone. While this scholarship is necessary in order to engage in the language game of reconciliation (a game that requires all participants to position themselves within the "authority" of the law of one party while confining the other's law to the rules of evidence), it constrains the scope of possible inquiry. [54]

This form of investigation rests more on a standpoint than on any particular thesis. Foucault summarizes this standpoint in a lecture he delivered at the *College de France* on the 30th of January 1980:

> It is an attitude that consists, first, in thinking that no power goes without saying, that no power, of whatever kind, is obvious or inevitable, and that consequently no power warrants being taken for granted. Power has no intrinsic legitimacy. On the basis of this position, the approach consists in wondering, that being the case, what of the subject and relations of

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[53] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Blackwell: Oxford, 2001) at §122. For more on the concept of perspicuous representation [*übersichtliche Darstellung*], which can also be translated as a surveyable representation see G.P. Baker and P.M.S. Hacker, "Surveyability and Surveyable Representations" in *Wittgenstein: Understanding and Meaning, Volume 1 of An Analytical Commentary on the Philosophical Investigations. Part I: Essays.* 2nd edition. (Blackwell: Oxford, 2009).

[54] In *Mitchell* the Court, quoting from *Delgamuuku,* found it "imperative that the laws of evidence operate to ensure that the [A]boriginal perspective is 'given due weight by the courts'". *Mitchell, supra* note 29, at para. 37.

> knowledge do we dispense with when we consider no power to be founded either by right or necessity, that all power only ever rests on the contingency and fragility of history, that the social contract is a bluff and civil society a children's story, [and] that there is no universal, immediate, and obvious right that can everywhere and always support any kind of relation of power. Let us say that if the great philosophical approach consists in establishing a methodical doubt that suspends every certainty, the small lateral approach on the opposite track that I am proposing consists in trying to bring into play in a systematic way, not the suspension of every certainty, but the non-necessity of all power of whatever kind.[55]

Historicism attempts to provide power with a narrative that can convert the contingency of its descent into necessity and color over the violence of its actions with the aura of progress. This standpoint, or "small lateral approach", is the first step of this investigation precisely because it is a refusal to see the past as a closed and pre-determined set of facts that form the basis of power and authority; it is a refusal of the heraldry of historicism. It is a search for the descent of power, its genealogy without recourse to the fiction of divine origins. As Foucault writes, "The search for descent is not the erecting of foundations: on the contrary, it disturbs what was previously thought immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself."[56]

This search, or as I have chosen to call it, "investigation," does not simply uncover the way in which the rules of the language game of reconciliation came to be or how they are internally inconsistent. If this was the limit, then all that would be required would be to show that the form of reconciliation offered by the courts takes place in and through the "active forgetting" of the problem of sovereignty and that this can be seen in its use of

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[55] Michele Foucault, *On the Government of the Living (Lectures at the Collége de France 1979-1980)*. Translated by Graham Burchell (New York: Palgrave Macmillan, 2014) at 77-78

[56] Michele Foucault, "Nietzsche, genealogy, history". In Paul Rabinow , ed, *The Foucault Reader*. (New York: Pantheon, 1991) at 81.

historicism and the metaphor of the ship of state. If we stopped at this point it could well be seen as 'erecting a foundation' or perhaps simply uncovering the crown machinery for the reader to marvel at.[57] As Wittgenstein put it,

> All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all out arguments: no it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the elements in which arguments have their life.[58]

[57] I am grateful to James Tully for his suggestion that I refer to the combination of reconciliation, the forgetting of sovereignty through historicism and the ship of state, and the concurrent colonial governance practiced under the *Indian Act* as the "crown machinery". I will use the term (as well as the more singular variation "crown-machine") throughout the book to refer to a series of related practices and legal-philosophical arguments that are used to justify and legitimate the actions of the Crown in relation to Aboriginal peoples. This set of practices and arguments is subject to an *ad hoc* process of amendment that helps recalibrate it in relation to the continuous resistance of Aboriginal peoples. As a result, it has more than one aspect. Like Jastrow's picture of the duck-rabbit in the *Philosophical Investigations*, it offers a picture that has two categorically different aspects (See Wittgenstein, *Philosophical Investigations*, *supra* note 53 at 165-166). What changes is not the *object* of perception or its organization, but the *way* we see it (i.e. it is not a seeing *that* but a seeing *as*). Thus, from one perceptive the 'crown-machine' appears to be logically organized, efficient, continuous and impersonal (the image that the Crown wants to project—the ideal sovereign governing machine). The *bluebeard logic* I referred to earlier is deployed to stabilize this aspect and present it as the only possible one: it is a kind of warning (i.e. do not enter, nothing to see, etc.) that is also a paradoxical concession of the very contingency of what it claims a necessary. It functions like the curtain in the Wizard of Oz (i.e. it preserves the magical illusion of sovereign power by concealing the ordinary conman on the other side). Whereas from another it is a higgledy-piggledy assortment of components that have been slapped together with very little rhyme or reason and is prone to unexpected transformations. From this aspect it is not a *machine*, but an *assemblage*—or to use Wittgenstein's register a 'language game' (i.e. a *contingent social practice* that can by altered by 'acting otherwise'). Foucault's use of the term *dispositif*—which is variously translated as device, apparatus, construction, machinery and deployment—draws out what I am getting at with 'crown machinery' and 'crown machine'. As he articulates it in an interview from 1977: "What I'm trying to pick out with this term is, firstly, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions–in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be established between these elements." See Michele Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Edited by Colin Gordon (Pantheon: New York, 1980) at 194. This aspect is not *discovered* by the philosopher alone, but seen in and through the practices of freedom where civic actors who are agonistically engaged. For an instructive account of this approach see the chapter entitled "Public Philosophy as a critical activity" in James Tully, *Public Philosophy in a New Key Volume I: Democracy and Civic Freedom*. (Cambridge University Press: Cambridge, 2008).

[58] Ludwig Wittgenstein, *On Certainty*, eds. G.E.M. Anscombe and G.H. von Wright (Blackwell: Oxford, 1974) at §105

If the investigation were to present the crown machinery as the point of departure then it would serve to present it as *the* rules of *all possible* games and not simply one of a multitude. Wittgenstein captures the difficulty here when he says: "It is so difficult to find the beginning. Or, better: it is difficult to begin at the beginning. And not try to go further back."[59] By this I understand him to mean that there is a temptation to continue on towards an *absolute* beginning as it would then provide an *absolute* foundation, which would be outside of all possible language games (this is the kind of philosophical problem that Wittgenstein claims to arise when "language *goes on holiday*").[60] After all, historicism can accept the bloodiest of foundations for the state and allow it to 'work itself pure' over the course of time.[61] My investigation does not stop at simply uncovering the historical contingency of the crown machinery or the illegitimacy of the power that it produces. Rather, the point is that fragmentation and heterogeneity expose both the possibility of new moves in the language game of reconciliation and the 'acting otherwise' that was always already taking place. As I see it, these *new moves* continually stem from the ground that resides both outside and hidden within the language game of

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[59] *Ibid* at §105

[60] Cavell, *supra* note 36, at 226; Wittgenstein, *Philosophical Investigations*, *supra* note 53, at §38.

[61] Hegel's account of history—which has many similarities with Kant's—holds that the history of the world is not the "theater of happiness", but a "slaughter bench", which then serves to justify the unlimited violence of heroic vengeance. G.W.F. Hegel, *Philosophy of History*. Translated by J. Sibree. (New York: Prometheus Books, 1991) at 21, 26-7. There are two references to the 'right of heroes' in the *Elements of the Philosophy of Right.* Ed. Allen W. Wood. Translated by H.B. Nisbet. (Cambridge: Cambridge University Press, 2004) and they occur in the following sections.

a) The first occurs in §93 in the section three (Coercion and Crime) of part one (Abstract Right).
b) The second in §350 in the third subsection (World History) of section three (The State) in part three (Ethical Life).

Hegel provides a detailed account of the hero and its role in history in 1830 in the second draft of his *Lectures on the Philosophy of World History*. Translated by H. B. Nisbet. (Cambridge: Cambridge University Press, 1980) at 68-93.

reconciliation. The courts have termed this ground the "Aboriginal perspective," but it is much more than simply one side of the game of reconciliation. Rather, it extends beyond the confines of the game of reconciliation to the discourses and practices of law and governance (we could term these indigenous legal and political orders) that are otherwise than the machinery of the crown. It is not a single perspective, but a plurality of perspectives. And, these perspectives offer another way of seeing the image of the ship of state and its claims to universal history. In place of the uniformity and unity—those qualities that are so firmly fixed in the language of modern constitutionalism—of Justice Binnie's forward facing canoe there is the strange multiplicity of Bill Reid's *The spirit of Haida Gwaii*.[62] In this image the focus is no longer on the composition of the canoe itself (i.e. on how the "historic elements of wood, iron and canvas" form a singular whole[63]), but on the irreducibly diversity of its passengers. Nor is the focus on moving forward, toward the future, and refusing to look back towards the past. Reid's epigram offers another perspective to counter this restless and harried movement away from the past: "the boat that goes on forever anchored in the same place."[64] It accepts that we are all here to stay, but this does not mean that we all share the same perspective. In this anchored position there is no magic circle of foundation. No *bluebeard logic* forbidding others from questioning the historical warrant of sovereign authority. No picture of universal history with its stages of civilization that can crown the violence of colonization as fate. As Tully puts it,

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[62] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 17-29.

[63] A perspective that is characteristic of modern constitutionalism and captured by the motto of the United States, *e pluribus unum* (out of many, one). See *Mitichell, supra* note 29, at 130.

[64] Tully, *Strange Multiplicity, supra* note 62, at 202.

> The answer given by the black canoe is that, although the passengers vie and negotiate for recognition and power, they always do so in accord with the three conventions [viz. mutual recognition, consent and continuity].[65]

From this it follows that,

> …we must listen to the description of each member of the crew, and indeed enter into conversation ourselves, in order to find the redescriptions acceptable to all which mediate the differences we wish each other to recognize.[66]

Their strength comes from the plurality of their perspectives, the overlapping histories that they draw on, and not from a single, unquestionable—and so uncontestable—foundation.

If we are to find a meaningful reconciliation—and not simply one that is assigned by the logic of force that resides behind the unquestioned assumption of sovereignty—then we will need to address the history of sovereignty without assuming its foundation. The problem of reconciliation and the question of sovereignty are constitutively related. As the authors of the *Royal Commission on Aboriginal Peoples* state,

> The major and underlying paradox, and the key to unraveling the others, lies in the unique way Indian sovereignty has been conceptualized in Canadian legal and constitutional thinking.[67]

This paradox is, in my view, the problem of reconciliation. The work to undo it begins with following the lines of descent and association that underlie the legal conceptualization of Indian sovereignty. A major part of this lineage finds legislative expression in the *Indian Act*. In particular, in how the act and its associated institutions

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[65] *Ibid*, at 212.

[66] *Ibid*, at 111.

[67] Report of the Royal Commission on Aboriginal Peoples. Volume 1: *Looking Forward Looking Back*. Part Two: *False Assumptions and a Failed Relationship*. (Canada Communication Group: Ottawa, Ontario, 1996) at 239

operate to control the basic elements of self-government, such as membership, political structure, and jurisdiction.

A Genealogy of the Indian Act

The history of this legislation is carried in its name: "Indian", this puzzling proper noun that collects together a set of peoples whose only commonality is the fact that the names they chose for themselves were buried under the weight of a name that they were assigned. The purpose of the *Indian Act* is itself puzzling. If it succeeded on its own terms (by "civilizing" or "enfranchising"), there would be no more "Indians" within the jurisdictional boundaries of Canada, only citizens.[68] The *Indian Act* was designed as a temporary measure. It was designed to cancel out its object. But what of its constitutional basis? While it is clear that s. 91(24) of the *Constitution Act, 1867* grants the Federal Government exclusive jurisdiction over *Indians, and Lands Reserved for Indians* where does the authority to name an entire group of people as a constitutional head of power come from? Here we must enter the magic circle of legal fictions.[69] It is the so-called

[68] Canada is another puzzling proper noun as it comes from the Iroquoian word for "village" or "settlement". What can it mean to adopt a name from another people for a state in which they cannot name themselves? There is a kind of paradoxical inversion of hospitality here.

[69] It is necessary to point out that the Crown has consistently (and unilaterally) interpreted the meaning of s. 91(24) in its favor. A clear example of this can be seen when we look at how the Crown exercised power over those that they did not explicitly recognize as being "Indian" (i.e., the Métis and Inuit). Although excluded from the *Indian Act* this formal exclusion did not mean that the Métis and Inuit were free from unilateral Crown interference. Rather, the basic pattern has been to act as if s. 91(24) licenced power over these peoples, but it was a power without clear lines of responsibility. This meant that when it suited their purposes the Crown would claim that these peoples were not Indians for the purpose of s. 91(24) (an argument that failed in *Reference Re Eskimos* [1939] SCR 104) and/or the *Indian Act*. The history of these exclusions parallels the one that I am working through in this book, in that, these divisions are tightly bound up with the colonial legal project that set out to legally define who Indians were so as to limit (and ultimately extinguish) their rights to their lands. The removal of this layer of unilateral settler law is long overdue. Its removal does not mean that there will not be distinctions between the various nations that have continued to exist under this system; rather, it will shift the existing lines imposed by the settler state system of legal recognition and open up further points of connection and overlap that can be negotiated by the nations themselves. My point here is that while s. 91(24) and the Indian Act creates a complicated set of inclusions and exclusions it has effected all of the Aboriginal peoples of Canada (i.e., Indian, Inuit, and Métis). For more on legal fictions see Borrows,

doctrine of discovery—with its associated fictions of *terra nullius*, sovereignty and divine right—that grants the Crown this arbitrary power over "Indians". This fictional foundation is the only support for the relationship that exists between the Crown and its "Indians".[70] The *Indian Act* is the legislative expression of this relationship: it is a type of emergency legislation without limits.[71] I specify that it is a "type" because it bears the basic hallmarks of emergency legislation (i.e., a high degree of administrative discretion coupled with a suspension of the rights and freedoms that characterize the "normal"

Alchemy, *supra* note 17. There is an extensive body of literature on the legal doctrine of discovery and *terra nullius*, see Andrew Fitzmaurice, "The genealogy of Terra Nullius" (2007) 38: 129 Australian Historical Studies 1, Patrick Macklem, "What is International Human Rights Law? Three Applications of a Distributive Account" (2007) 52 McGill L. J. 575 at para. 36, Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. J. 382 at 399-406, and Tracey Lindberg, "The Doctrine of Discovery in Canada" and "Contemporary Canadian Resonance of an Imperial Doctrine," in Robert J. Miller, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, (Oxford: Oxford University Press, 2010) 89-125; 126-170.

[70] There is a relationship between the Crown and the Aboriginal peoples of Canada that is a nation-to-nation relationship, which is predicated in protecting them from the threats posed by colonists. This relationship is expressed in a number of documents from the *Royal Proclamation*, 1763, to the Rupert's Land Order and the numbered treaties. See Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples." In *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001). There are a number of ways in which this nation-to-nation relationship can be characterized and it has been touched on in US jurisprudence in the Marshall Trilogy (in particular in *Worcester v. Georgia*) and a few Canadian cases (*Cambell*, *Souix*, etc). The key problem is that even in the post-*Constitution Act*, 1982 era the presumption of Crown sovereignty has been assumed. As Chief Justice Dickson states in *Sparrow*, "…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"(*Sparrow*, *supra* note 6, at p. 1103). There has been a shift away from this presumption since *Haida Nation*—as Chief Justice McLachlin characterizes Crown sovereignty as a combination of an "assertion" and the "*de facto* control of land and resources" at para. 32—but the actual consequences of this shift for Aboriginal self-government and Crown jurisdiction has yet to play out. As it stands the Crown can still infringe on Aboriginal Rights and Title and the *Indian Act* enables the Crown to set the terms of engagement in its favor. The presumption of Crown sovereignty may be showing signs of wear but it is a fiction that still shapes the day-to-day reality of Aboriginal peoples.

[71] This is an intentionally provocative statement. Naturally to fully substantiate my point would require an extensive treatment of the literature on emergency powers. My main point here is that the *Indian Act* is not normal law (as law is understood in a common law context). It does not base its legitimacy in the consent of those that it governs. It establishes an administrative regime with unchecked discretionary powers over a set of individuals that it recognizes only as wards or dependents. While there are a series of fiduciary obligations that the Crown has to Aboriginal peoples (that stem back to the *Royal Proclamation*, 1763) these obligations were discretionary and subject to the executive authority that s. 91(24) vested in the Crown. Since the enactment of s. 35(1) of the *Constitution Act*, 1982 this authority has been restrained by the jurisprudence of the Court. The *Indian Act* is still active in this new context—and the vast discretion vested in the Crown remains in play—but the Crown has retreated leaving a legal vacuum in place of vital self-governing bodies.

constitutional order), but it is also dissimilar to emergency legislation. The object of the legislation is not an emergency. Its object is "Indians". As John Borrows states,

> The *Indian Act* makes it easier to control us: where we live, how we choose leaders, how we live under those leaders, how we learn, how we trade, and what happens to our possessions and relations when we die.[72]

This control is not the stuff of "ancient grievances", but rather it is part of the present field of our experience. It forms an unavoidable but all too often overlooked part of the history of our present; a history that can be traced back to the (seemingly) 'watertight' categorical separation between the legal and political standards applicable to the civilized and the uncivilized. An investigation into the problem of reconciliation must begin here—from the lived reality of this control—and proceed to trace out the contingent processes that have brought it into being. In order to follow these processes, I will employ the two methodological steps that are outlined by Tully in *Public Philosophy in a New Key*:

1) First, contemporary surveys of both the language games and the practices of governance in which struggles occur that serves to expose what can be said and done within them and;
2) Second, historical surveys that can serve to loosen the bounds of these games by allowing participants "…to see them as one *form* of practice and one *form* of problematization that can be compared critically with others" and so allow them to "…consider the possibilities of thinking and acting differently."[73]

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[72] John Borrows. "Seven Generations, Seven Teachings". (2008) Research Paper for the National Centre for First Nations Governance, at p. 5.

[73] Tully, *Public Philosophy Volume I*, *supra* note 57, at 31.

These methodological steps translate into the itinerary of this investigation, which can be summarized as follows:

1. First, we will examine the discursive foundations of the *Indian Act* by considering the philosophical projects that served to ground the legitimacy of British Imperial practice in the mid-19th century. The three strains of discourse that we will consider are J. S. Mill's civilizing liberal-imperialism, the extinction thesis and Henry Maine's new culturalism. They provide the discursive foundations for Indian legislation, policy and administrative practices over the last 150 years (viz. for what I refer to as the 'crown machinery'), but they do so in different ways. My aim in this chapter is twofold; first, I will explore how these foundations operate in relationship to one another and how the question of legitimacy destabilizes these discourses; and, second, I will explore how this foundational instability relates to the continual and haphazard process of legal and political renovation that has characterized the life of the crown machinery from the project of enfranchisement to its transformation into the project of reconciliation.
2. Second, we will situate the *Indian Act*, s. 91(24), their associated institutions and practices of governance in the context of these imperial foundations in the 19th century and follow the general line of their development to the *White Paper* in 1969. This chapter follows-up on the investigation of the European discursive foundations from the previous chapter by engaging with what the colonial institutions and authorities in Canada were doing during the same period. There is thus a shift in focus from the broader philosophical discourses to the legislative and administrative system that was being constructed and (continually)

recalibrated in relation to Aboriginal resistance. The aim here will be to see both the continuities and discontinuities that exist between the broader discursive trends and the administrative practices within Canada.

3. Third, we will review how the courts have interpreted the *Indian Act* over time and relate their interpretations to both the active resistance of Aboriginal peoples and the foundational problems addressed in the previous sections. This chapter focuses on three particular aspects of the case law in this area; a) the legal nature of the authority granted in s. 91(24); b) the definition of "Indians" and the structure and authority of "Bands"; and, c) the Court's recent rejection of the doctrine of interjurisdictional immunity in *Tsilhqot'in Nation.* When this change is seen in the light of the history of how the Court has interpreted s. 91(24), the definitions of Indians and the structure and authority of Bands we can see that the framework of reconciliation is an extension of the 140-year history of unilaterally excluding Aboriginal peoples from the division of powers that govern their lands. It highlights the fact that the s. 35 framework and the current interpretation of s. 91(24) share a common foundation. Both rely on *terra nullius*, discovery and divine right to diminish Aboriginal peoples to such a degree that the Crown was able to acquire sovereignty and radical or underlying title to their lands by assertion alone.
4. Fourth, and finally, we will consider how s. 91(24), the *Indian Act* and the practices of governance that they set in place fit into the current legal-political architecture of Canada and the ongoing struggles that continue to shape it. This is admittedly a broad field to cover and so I have divided this chapter into two

sections. First, I focus on the change in policy from *Calder* to the *Indian Act, 1985*. In this section I follow the three lines of policy change that stretch between these two key points. This includes the various legislative changes that were considered at the Federal level, the beginning of the modern land claims process with the *James Bay and Northern Quebec Agreement* in 1975, and the constitutional consultations leading up to 1982. I then move to a reconsideration of the *Penner Report* and *Bill C-52*. Despite the fact that the former was largely disregarded and the latter was never enacted they set out to tackle the problem of self-government on a constitutional level and, by my reading, the positions taken continue to shape policy. As such, a comparative analysis of them offers us an invaluable snapshot of policy formulation in the wake of the *Constitution Act, 1982*. Second, I conclude by reconsidering what the implementation of the *United Nations Declaration of the Rights of Indigenous People* could mean for the future of reconciliation. My aim in this section will be to explore what implementation could mean if the government and the courts were to reject the current interpretation of s. 91(24) and the colonial version of federalism that it entails. This will be a mapping out of an imaginary space, but it is not utopian. That is, it does not come from nowhere (despite the meaning of the name utopias always reflect a context). Rather, it draws on the resources of the 250-year-old tradition of constitutional law that is reflected in the treaties, the *Royal Proclamation, 1763*, s. 25 of the *Constitution Act, 1982* and the everyday practices of resistance of Aboriginal peoples. It will offer both a rough and ready account of what I have termed *reconciliation-with-recollection* could mean in practice.

Chapter 2

A Genealogy of Reconciliation: Civilizing, Extinction and Culturalism as the Discursive Foundations of the Indian Act

The multitude of poor, and yet strong people still increasing, they are to be transplanted into Countries not sufficiently inhabited: where neverthelesse, they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground, to snatch what they find; but to court each little Plot with art and labour, to give them their sustenance in due season. And when the world is overcharged with Inhabitants, then the last remedy is Warre; which provideth for every man, by Victory, or Death.

Thomas Hobbes, *Leviathan* (239)

Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.

J. S. Mill, *On Liberty* (9)

The history of conquest as well as of commercial companies and especially that of missions afford a melancholy and in some respects a laughable picture…We shudder with abhorrence when we read the accounts of many European nations, who, sunk in the most dissolute voluptuousness and insensible pride have degenerated both in body and mind and no longer possess any capacity for enjoyment or compassion. They are full-blown bladders in human shape, lost to every noble and active pleasure, and in whose veins lurks avenging death.

J. G. Herder, *Outline of a Philosophy of the History of Man* (185)

My purpose in this chapter is to investigate the 19th century discursive foundations of the *Indian Act*. I say "foundations" because, as with all colonial law, the origin is far from being simple or uniform. They are always plural. This plurality is evidenced in a number of practices and processes ranging from the nature of law making, to the resistance of indigenous peoples and the changing aims of the colonizer. These foundations are important as they serve to provide both an explanation of the object and purpose of the legislation—which, the judiciary may draw from in its process of interpretation—and a rationalization for the exercise of Crown power. Their importance is not simply that when they are set out before us we are able to see the contradictions inherent in their design. After all, how can one do anything but marvel at the kind of political alchemy that holds that the best way to lead others to liberty is through despotism? Uncovering these contradictions is doubtlessly a necessary part of our investigation, but it cannot stop there. If we were to stop there it may seem that the problems are confined to the covers of the texts that we are examining and thus the solution is as easy as placing a text back on the shelf.

The approach I am taking focuses on how the conceptual instability of these foundations relates to the constant process of legal and political renovation on the so-called *Indian Question*. I am interested in how the seemingly endless string of experiments, unintended consequences and failures generated by these projects were rationalized. And further, how these rationalizations serve to gradually change these projects. This process of change is key. It is how the conceptual foundations that we can no longer accept return to us dressed in new clothes and yet bearing a striking family resemblance to those that preceded them. What else can begin to account for how the

answer to the *Indian Question* in Canada has shifted from the term "enfranchisement" to "reconciliation"? Despite all claims of to the contrary there is a genealogical connection between these terms. Their shared heritage is plainly exhibited in their unquestioning acceptance of Crown sovereignty. I am not saying that the differences between these terms are a mere surface phenomenon that conceals their true identity. Rather, I am saying that these terms (and the discourses, practices and policies associated with them) have no one thing in common, no single defining characteristic or essence, but there is "…a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail."[1] Simply put, they are genealogically related and it is the specific details of their relation that concerns us in this chapter.

In order to begin our investigation into this genealogical relationship we will need to focus three strains of political thought in Imperial Britain that were utilized during the mid-nineteenth century shift to devolve more powers to the settler colonies. This shift (which, begins after the *War of 1812*, is signaled by the *Durham Report* in 1839 and formalized with the passage of the *1867 British North America Act* and, ultimately, the first version of the *Indian Act* in 1876) leads to the complete refiguring of the Indian-Crown relationship. The Imperial-Federation of military alliances that was formalized with the *Royal Proclamation of 1763* was suddenly shifted to municipal jurisdiction under s. 91(24) effectively refiguring Indigenous nations into wards of the state. The three strains of discourse that play a leading role in this transformation are: the civilizing liberal-imperialism articulated by James and J. S. Mill, the new culturalism put forward in the work of Henry Maine, which served to inform Imperial Britain's post-1857 shift

[1] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Blackwell: Oxford, 2001) at §66.

towards the theory and practice of *indirect rule*, and the extinction thesis which developed in the 1860s and was associated with Charles Darwin, Herbert Spencer, and T. H. Huxley (prefigured in the pessimism of Malthus and Hobbes).

Generally speaking, these strains are active in the following pattern of events. Following the *War of 1812*, the *Upper Canada Rebellion* in 1837, the intense colonial rebellions of the 1850s and 1860s (Ireland in 1848, India in 1857, and Jamaica in 1865) and the end of the *American Civil War* the Imperial Crown generally adopts the *indirect rule* model advanced by Henry Maine into minimize administrative costs and maximize the extraction of revenue (this change was possible as they did not require direct control over land).[2] For the settler colonies this translated into the devolution of powers that left them responsible for administering the relationship between the Crown and indigenous nations.[3] As Mill noted in *Considerations on Representative Government* (1861),

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[2] There is a repetition of this transition from civilizing to indirect rule on the international stage in the middle of the 20th century as the Mandate System gives way to the informal world of international relations that characterizes the *Pax Americana*. For a detailed account of this transformation see: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*. (Cambridge: Cambridge University Press, 2005) and Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. (Cambridge: Cambridge University Press, 2001). Also, for an excellent account of the British Empire's ideological shift away from the liberal-imperial model to Maine's culturalism and indirect rule see: Karuna Matena, *Alibis of Empire: Henry Maine and the End of Liberal Imperialism.* (Princeton: Princeton University Press, 2010). For a response that maintains the importance of the civilizing vision of empire in British Imperial Ideology see Duncan Bell, *Reordering the World: Essays on Liberalism and Empire*. (Princeton: Princeton University Press, 2016). In regards to the definition of indirect rule, my own position is that it constitutes a kind of family resemblance concept for a number of related models and strategies. My own view on the traits that these different versions or strains share is set out in some detail in Chapter 5 at 311-313. The gist being that indirect rule is similar to a devolved or dependent form of government, but the fact of this dependency is concealed from those who are subject to it. The sheer diversity of the modes or forms of concealment give rise to the crisscrossing and overlapping pattern of similarities and differences between the version offered by Maine and the forms of neo-colonial or neo-imperial models that take shape in the mid 20th century. On the origins of the concept of neo-colonialism see Jean-Paul Sartre, *Colonialism and Neocolonialism*. Translated by Azzedine Haddour, Steve Brewer and Terry McWilliams. (New York: Routledge, 2006) and Noam Chomsky and Edward S. Herman, *The Washington Connection and Third World Fascism* (Montreal: Black Rose Books, 1979).

[3] The Imperial Parliament retained sole responsibility for maintaining relations with the Indian Nations and Tribes. This responsibility was maintained by the Imperial Parliament until 1860. Then by an Act of the Legislative

> It is now a fixed principle of the policy of Great Britain, professed in theory and faithfully adhered to in practice, that her Colonies of European race, equally with the parent country, possess the fullest measure of internal self-government…How liberal a construction has been given to the distinction between imperial and colonial questions is shown by the fact that the whole of the unappropriated lands in the regions behind our American and Australian Colonies have been given up to the uncontrolled disposal of the colonial communities; through they might, without injustice, have been kept in the hands of the Imperial Government, to be administered for the greatest advantage of future emigrants from all parts of the empire.[4]

These "unappropriated lands" were by no means vacant and following the transfer from the Imperial Government to the settler colonies there is a sudden shift of focus on how these lands were to be administered.

The devolution of self-governing powers and the "giving up" of these "unappropriated lands" brings with it the *Indian Question*. While Mill does not address this issue in the settler colonies in particular (his model of governing a dependency is British India under his employer, the *East India Company*) it was his liberal-imperial model that was put into practice in Canada. It is well suited to the purposes of the settler colonies as it simply requires that the colonizer make the determination that the colonized are 'savages' (as Mill readily admits this is a "truth" whose recognition is "for the most part" empirical[5]) and the issue of consent becomes irrelevant as the appropriate mode of government is one of force. The legitimacy of this mode of government hinges on the colonizer facilitating the transition of the colonized into a higher stage of civilization.[6]

Assembly of Canada control over Indian Affairs was transferred to the Province. The text of the Act itself states: "From and after the 1st day of July next, the Commissioner of Crown Lands, for the time being, shall be Chief Superintendent of Indian Affairs" (23 Victoria (1860), ch. 151, sec. 1).

[4] J. S. Mill, *On Liberty and Considerations on Representative Government.* Edited by R. B. McCallum (Oxford: Basil Blackwell, 1948) at 309.

[5] *Ibid* at 130

[6] *Ibid* at 9 and 313

The commitment to the universal perfectibility of humanity and to the moral and intellectual education of the colonized is directly connected to the question of land and private property (a connection that can be seen in the work of a constellation of thinkers from Hobbes, Locke and Kant to Mill). The desired result was simple: once the colonized were successfully civilized they will focus their labor on private plots of land as individual citizens and the Crown will possess radical title to all lands. This explains why "enfranchisement" (the assimilation of indigenous peoples into the body politic and with them their lands) was the single consistent guiding aim of Indian policy from the 1830's through to the *White Paper* in 1969 (and one could argue it is still present in the logic of Bill C-31 in 1985 and the 6(1)-6(2) status system).[7]

The continual resistance of indigenous peoples to the assimilative policies of enfranchisement led various colonial administrators towards the extinction thesis as an explanatory framework (their resistance to the process of civilizing being little more than a symptom of their inevitable extinction). It is manifest from the very beginning of the transformation we are concerned with here as Sir Francis Bond Head's *Manitoulin Island Experiment* in the 1830s demonstrates. While this kind of cultural palliative care model provided a useful moral explanation for the process of colonization (the innate inferiority of indigenous peoples means that their demise was as inevitable as fate leaving colonists free from moral responsibility beyond providing palliative care) it offered little in the way of practical policies that allow for the control of land beyond relocation and containment (which tended to produce immediate resistance and require more repressive

[7] J. Leslie and R. Maguire, eds, *Historical Development of the Indian Act* 2nd ed (Treaties and Historical Research Centre: Indian and Northern Affairs, 1978) at 191

force).[8] Due to this limitation the extinction strain plays a constant but lesser role in the history of *Indian Question* in Canada. As for the final strain, the real emergence of a type of culturalism within the domestic sphere does not come until after the *White Paper* in 1969 and it is mainly via the development of Aboriginal law in the Courts from *Calder* to *Tsilhqot'in Nation* (the recognition of innate right of aboriginal peoples and the requirement that the Court take some account of the "aboriginal perspective").[9] It exists as one possible view on what s. 35 and reconciliation means, namely, an internal form of indirect rule where self-government is strictly confined to the bounds set by the *de facto* power of the Crown.

This brief overview serves to explain why our inquiry will begin by focusing on the relationship between Mill's model of liberal-imperialism and the project of enfranchisement. In order to explore this relationship, it will be necessary to map out the conceptual requirements and lines of tension that are endemic to this model of governance. The main line of tension centers on Mill's use of universal historical-

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[8] As Sir Francis Bond Head writes in a letter from 1836: "So long as we were obtaining possession of their country by open violence, the fatal result of the unequal contest was but too easily understood; but now that we have succeeded in exterminating their Race from vast regions of land, where nothing in the present dam remains of the poor Indian but the unnoticed bones of his ancestors, it seems inexplicable how it should happen, that even where the race barely lingers in existence, it should still continue to wither, droop, and vanish before us like Grass in the Progress of the Forest in flames. "The Red Men," lately exclaimed a celebrated Miami Cacique, "are melting like Snow before the Sun!"" The mysterious inevitability of this extermination led him to the three following conclusions: "1) That an attempt to make farmers of the Red Men has been, generally speaking, a complete failure; 2) That congregating them for the purpose of civilization has implanted many more vices than it has eradicated; and, consequently, 3) That the greatest kindness we can perform towards these intelligent, simple-minded people, is to remove and fortify them as much as possible from all communication with the Whites." "Bond Head to Glenelg, no. 32, 20 November, 1836." In *British Parliamentary Papers, vol. 12, Correspondence, Returns and other Papers relating to Canada and to the Indian Problem Therein, 1839*. (Shannon, Ireland: Irish University Press, 1969) at 353.

[9] For an instructive analysis of this shift and the Court's development of Aboriginal rights see: James Tully, *Public Philosophy in a New Key Volume I: Democracy and Civic Freedom*. (Cambridge: Cambridge University Press, 2008) at 268-273 and Michael Asch. "From "Calder" to "Van der Peet": Aboriginal Rights in Canadian Law, 1973-1996," In *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, ed. Paul Havemann (Oxford: Oxford University Press, 1999).

developmental stages in order to justify the use of coercive force to govern those peoples that are deemed to be uncivilized. The only requirement that needs to be met to legitimate this despotic mode of governance is that it has the improvement of the uncivilized as its end. Mill's ideal form of government for the uncivilized is presented as temporary. As he states,

> It has been the destiny of the government of the East India Company to suggest the true theory of the government of a semi-barbarous dependency by a civilized country, and after having done this, to perish.[10]

This model of a temporary despotism that is justified by its end (the complete unification of the body politic) meets its analog with Marx's articulation of the dictatorship of the proletariat (that grim specter that continues to haunt the history of communist political struggles).

> In 1852 Marx wrote,
>
> > Long before me, bourgeois historians had described the historical development of this struggle between the classes, as had bourgeois economists their economic anatomy. My own contribution was (1) to show that the existence of classes is merely bound up with certain historical phases in the development of production; (2) that the class struggle necessarily leads to the dictatorship of the proletariat; [and] (3) that this dictatorship, itself, constitutes no more than a transition to the abolition of all classes and to a classless society.[11]

The parallel with Mill is even more striking in "The British Rule in India" (1853) when Marx applies this model of history to a colonial context,

> England, it is true, in causing a social revolution in Hindostan, was actuated only by the vilest interests, and was stupid in her manner of enforcing them. But that is not the question. The question is: can mankind fulfil its destiny without a fundamental revolution in the social state of

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[10] Mill, *On Liberty*, *supra* note 4, at 324.

[11] Karl Marx & Frederick Engels, *Collected Works Vol. 39* (New York: International Publishers, 1983) at 62–65.

> Asia? If not, whatever may have been the crimes of England she was the unconscious tool of history in bringing about that revolution.[12]

Mill's liberal-imperial despotism shares the fate of Marx's dictatorship of the proletariat: the temporary government of force becomes permanent as the end goal moves constantly further and further into the future. The mode of government this logic establishes, despite all claims to the contrary, has no real limitations on its use of coercive force.

With this in mind let us consider the course of our investigation for this chapter. I will begin by following four related lines of inquiry through Mill's texts:

1. How is the distinction between the civilized and uncivilized determined?
2. What type of governmental body is best suited to this mode of government?
3. What legitimates the government of the uncivilized by the civilized?
4. How can one determine when the end of this government is reached?

By following these lines of inquiry we will be able to relate the implicit commitments and paradoxes within his text to points of tension and struggle that relate to both the persistence of the project of enfranchisement and its eventual transformation. From that basis, we will then move on to consider the extinction strain, which serves as a constitutive companion to the project of enfranchisement. It also has a role in shaping the response to the *Indian Question* in Canada, but it tends to be entwined with the project of enfranchisement and its logic of civilizing the colonized. It provides a rhetorical evasion of responsibility when the colonized resist and/or there is no sign of the continual progress that the enfranchisement project requires for its own legitimacy. The final section of this chapter will focus on how the ultimate failure of the project of enfranchisement leads (via a curious repetition of the course of Imperial British policy in

[12] Karl Marx, "The British Rule in India", *New York Daily Tribune*, 25 June 1853.

the 19th century and of International Law following the collapse of the Mandate System in the middle of the 20th century) to a culturalism and domestic model of *indirect rule* known as the project of reconciliation.[13] My aim is not to simply provide the reader with a historical summary of the relevant sections of each author's work. Rather, I am interested in how the conceptual instability of these discursive foundations relates to the constant process of legal and political renovation on the so-called *Indian Question* from the project of enfranchisement and its transformation into the project of reconciliation.

Liberty and Legitimate Despotism: The Liberal-Imperialism of J. S. Mill

It is difficult to read Mill's political philosophy without experiencing a sense of disorientation. On the one hand there is his careful analysis of the dangers of majoritarian rule within liberal democratic states and the need for finding a way to protect minorities. In this respect Mill's text opens up before us like a familiar street with the commonplace signs and slogans of liberal democracy, which have been a part of our political reality since the 18th century. With the language of rights, constitutions and individualism a text like *On Liberty* can easily draw the reader into seeing an account of their own political struggles. For example,

> The 'people' who exercise the power are not always the same people with those over whom it is exercised; and the 'self-government' spoken of is not the self-government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power.[14]

[13] I follow Tully's argument on this point: "…the present application of the right of internal self-determination within the prevailing constitutional order constitutes a form of indirect colonial rule." Tully, *Philosophy in a New Key Volume I*, *supra* note 9 at 286.

[14] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 3-4.

This observation on the dangers that majoritarian politics belongs as much to our present as to 1859.[15] At certain points Mill's defense of the liberty of the individual could almost be mistaken for some of the more revolutionary political thinkers of the Enlightenment. Consider the following selection on free speech,

> If all mankind minus one, were of one opinion, and only one person were of contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[16]

Or his articulation of the "harm principle" as the only standard for the restriction of individual liberty,

> That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[17]

But it is here, at the very heart of his defense of individual liberty, that the comforting familiarity of our surroundings begins to fade away. The detail that triggers this shift can easily be missed, it is after all a single word, but this single word serves to be the single qualification on the rightful use of power and so should stand out: that word is "civilized". With this single word another aspect comes into view and the everyday street suddenly becomes a collection of scaffolding and facades. Mill is clear on this point:

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[15] This was a danger that was painfully clear to Mill as by 1859 the 1848 revolutions and so-called "spring time of the people" had long since collapse leaving Europe under the rule of reactionary conservative movements. For more on this refer to Eric Hobsbawm, *The Age of Capital, 1848-1875* (New York: Vintage Books, 1996) at 9-28.

[16] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 14.

[17] *Ibid* at 8-9.

> Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.[18]

Here we encounter the aspect that shifts our perception form the familiar street to the scaffolds and facades of the movie set (or perhaps simply to the scaffold itself). This is not to suggest that the language and associated practices of liberal-imperialism are relics of the 19th century that we have since left behind. Rather, following the end of the Mandate system in the middle of the 20th century we have grown accustomed to seeing despotism as a symptom of the absence of political liberty (or the product of cultural difference) and not as a prescription for attaining it.[19] Seeing a political philosophy focused on the principle of liberty prescribing despotism is, to my mind, akin to seeing Jastrow's picture of the duck-rabbit in Wittgenstein's *Philosophical Investigations*: we encounter a single picture that has two categorically different aspects and what changes is not the object of perception or its organization, but the *way* we see it.[20] The key part of this analogy for my purposes is that these are two aspects of a single picture. In other words, Mill's defense of liberty for the individual in the civilized community and prescription of despotism for the uncivilized are not modular elements or compartments that can simply be removed or replaced (as the shallower defenses of Mill via his

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[18] *Ibid* at 8-9.

[19] While the Bush Doctrine's emphasis on democratic regime change does signal a return to a more Millian approach to American Imperialism it is distinguished by its emphasis on "shock and awe" military interventions that remove a regime and allow for the spontaneous development of liberal democracy. In contrast, Mill's liberal-imperialism prescribes a mode of government (modeled on the *East India Company*) to facilitate a gradual process of transition and this process is by no means certain (he maintains that civilization can go backwards on his universal developmental scale).

[20] Wittgenstein, *Philosophical Investigations*, *supra* note 1 at 165-166.

historical context would have us believe). They are, rather, two aspects of a single political philosophy. The contrast between these two aspects is so stark that it seems as if night and day are divided by a line that can be crossed in a single step. This stark contrast brings us to our first question: how does Mill determine this line?

The Science of Savage Character: The Uncivilized and Mill's Philosophy of History

The distinction between the civilized and the uncivilized is put forward as a line with four stages: savagery, slavery, barbarism, and civilization. The line that connects these stages is progressive: history moves from savagery to civilization, or rather, the only history that exists is precisely the movement along the line. This movement is neither certain nor is it unidirectional: civilization can move backwards or stop progressing altogether.[21] As Mill states in the third chapter (entitled "Of Individuality, as one of the elements of well-being") of *On Liberty*,

> The progressive principle, however, in either shape, whether as the love of liberty or of improvement, is antagonistic to the sway of Custom, involving at least emancipation from that yoke; and the contest between the two constitutes the chief interest of the history of mankind. The greater part of the world, has, properly speaking, no history, because the despotism of Custom is complete.[22]

There is no history at the beginning of the line. The same sentiment is found in Hegel's lectures on the philosophy of history given at the University of Berlin between 1822 and 1830 (it is also found in Kant's essay *"Idea for a Universal History with a Cosmopolitan*

[21] As Mill states: "If civilization has got the better of barbarism when barbarism had the world to itself, it is too much to profess to be afraid lest barbarism, after having been fairly got under, should revive and conquer civilization. A civilization that can thus succumb to its vanquished enemy, must first have become so degenerate, that neither its appointed priests and teachers, nor anybody else, has the capacity, or will take the trouble, to stand up for it. If this be so the sooner such a civilization receives notice to quit, the better. It can only go on from bad to worse until destroyed and regenerated (like the Western Empire) by energetic barbarians." Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 83.

[22] *Ibid* at 63.

Purpose" (1784)).[23] Mill's own philosophy of history is strikingly similar on this count (this similarity—which also connections his work to Kant's—is not confined to the idea of there being periods without history, but relates to the role of coercion as means of progress as I will draw out further on).[24] According to Mill the "blank pages" of the history of mankind are a result of the "despotism of Custom". This is a period in which:

> Custom is there, in all things, the final appeal; justice and right mean conformity to custom; the argument of custom no one, unless some tyrant intoxicated with power, thinks of resisting.[25]

But, it should also not be mistaken for being stationary. There can be movement "provided all move together".[26] What this period lacks—and the reason why it lacks history—is individuality. This is the key for Mill's philosophy of history, but it is also

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[23] As the lecture notes state: "The History of the World is not the theater of happiness. Periods of happiness are blank pages in it, for they are periods of harmony—periods when the antithesis is in abeyance." G.W.F. Hegel. *Philosophy of History*. Translated by J. Sibree. (Prometheus Books: New York, 1991) at 26-7.

[24] Mill would undoubtedly be displeased by this connection as his attitude towards German philosophy (Hegel in particular) was far from complimentary. Consider this excerpt from his letter to Alexander Bain in 1867: "I found by actual experience of Hegel that conversancy with him tends to deprave one's intellect. The attempt to unwind an apparently infinite series of self contradictions not disguised but openly faced & coined into [illegible word] science by being stamped with a set of big abstract terms, really if persisted in impairs the acquired delicacy of perception of false reasoning & false thinking which has been gained by years of careful mental discipline with terms of real meaning. For some time after I had finished the book [Stirling's *Secret of Hegel*] all such words as reflexion, development, evolution, &c., gave me a sort of sickening feeling which I have not yet entirely got rid of." John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XVI - The Later Letters of John Stuart Mill 1849-1873 Part III*, ed. Francis E. Mineka and Dwight N. Lindley (University of Toronto Press: Toronto, 1972) at 1324.

[25] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 63. Mill mentions Hegel (usually in conjunction with Schelling) a number of times throughout his works, but the engagements are limited. Hegel is set-up to play the role of the metaphysician of the *a priori*who refuses the law of contradiction and holds that Being and Nothing are the same (at best Mill's rendition presents Hegel as a kind of strawman for mysticism that is meant to show the superiority of the English empiricist tradition). This can be seen in the following selection from John Stuart Mill: ""What kind of an Absolute Being is that," asked Hegel, "which does not contain in itself all that is actual, even evil included?" Undoubtedly: and it is therefore necessary to admit, either that there is no Absolute Being, or that the law, that contradictory propositions cannot both be true, does not apply to the Absolute. Hegel chose the latter side of the alternative; and by this, among other things, has fairly earned the honour which will probably be awarded to him by posterity, of having logically extinguished transcendental metaphysics by a series of *reductiones ad absurdissimum*."*The Collected Works of John Stuart Mill, Volume IX - An Examination of William Hamilton's Philosophy and of The Principal Philosophical Questions Discussed in his Writings*, ed. John M. Robson, Introduction by Alan Ryan (University of Toronto Press: Toronto, 1979) at 47.

[26] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 63.

qualified as savagery is also a condition that is characterized by individuality. As Mill writes in the essay *Civilization* (1836), "…a savage tribe consists of as handful of individuals, wandering or thinly scattered over a vast tract of country".[27] He expands on this point just a few pages later:

> Consider the savage: he has bodily strength, he has courage, enterprise, and is often not without intelligence: what makes all savage communities poor and feeble? The same cause which prevented the lions and tigers from long ago extirpating the race of men—the incapacity of co-operation. It is only civilized beings that combine. All combination is compromise: it is the sacrifice of some portion of individual will, for a common purpose. The savage cannot bear to sacrifice, for any purpose, the satisfaction of his individual will. His social cannot even temporarily prevail over his selfish feelings, nor his impulses bend to his calculations.

And so, we see that the savage has no history because he is, at one and the same time, far too individualistic and far too communitarian. He is both animal and child.[28] He both follows his own will and blindly accepts the authority of his superiors. Whereas the slave lacks history because he is "habituated to control, but not to self-control" and barbarism—which, unlike savagery and slavery, Mill does not provide a clear and consistent definition for—seems to function at times as a catch-all term to refer to the uncivilized generally as being too passive.[29]In this they all have the wrong kind of

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[27] J.S. Mill, "Civilization" in *Collected Works of John Stuart Mill Volume XVIII*. Edited by J. M. Robson. (University of Toronto Press: Toronto, 1977) at 119. The influence of this characterization of savagery on Canadian case law is unmistakable. It is this type of reasoning that has been used to deny Indigenous nations a claim to anything beyond a conditional right to occupy land. In *R. v. Syliboy* (1929), 1 D.L.R. 307 (N.S. Co. Ct.) at 313 the Mikmaq are referred to as "…a handful of Indians" and the language of "vast tracts" is found throughout the case law on title from *St. Catharine's Milling* to *Tsilhqot'in Nation*. The co-constitutive relationship between the land use and the level of development is also found in Mill, as he states: "There are two elements of importance and influence among mankind: the one is, property: the other, powers and acquirements of mind" *Ibid* at 121.

[28] Mill explicitly connects savages and children often. The connection is that both require what he refers to as "an education of restraint" in order "to fit them for future admission to the privileges of freedom." *Ibid* at 91.

[29] Mill provides us with his characterization of the slave right after the one on the savage and so it is worth considering at length: "Look again at the slave: he is used indeed to make his will give way: but to the commands of a master, not to a superior purpose of his own. He is wanting in intelligence to form such a purpose: above all, he cannot frame to himself the conception of a fixed rule: nor if he could, has he the

individuality and the wrong kind of sociality to facilitate progress. In order for history to begin—and for it to not simply be movement or duration—there must be progress towards a certain form of individuality. After all, we are told that it is the "the natural growth of civilization [that] power passes from individuals to the masses."[30] There is a strange repetition of terms at work here as we are informed that history begins and ends with individuals and is both halted (despite moving) and driven by despotism.[31] This brings us to the following question: what is the role of the individual in the progress of history?

Mill informs us that a people "…may be progressive for a certain length of time, and then stop; when does it stop? When it ceases to possess individuality."[32] The connection between historical progression and individuality is explicit so what is "individuality" for Mill? The answer to this question can be found in the third and, to a lesser degree, the fourth chapter of *On Liberty*. He does not provide us with a definition: at least in the more common sense that would follow the formula 'x is y'. That is, in the sense that would provide us with a categorical distinction between the "individuality" of savages and that form of genius that propels the motor of history. Rather, he provides us with a definition through contrasts and roles:

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capacity' to adhere to it: he is habituated to control, but not to self-control: when a driver is not standing over him with a 'whip', he is found more incapable of withstanding any temptation, or "restraining"' any inclination, than the savage himself." Mill, "Civilization", *supra* note 23 at 122. For a consideration of his use to the term barbarism see Michael Levin, *Mill on Civilization and Barbarism*. (Routledge: New York, 2004) at 31-2.

[30] *Ibid* at 126.

[31] In this there is another interesting parallel with Hegel as the *Phenomenology* begins with "sense certainty" and ends with "absolute knowledge" and yet, his descriptions of the state of "absolute knowledge" echo his descriptions of "sense-certainty." One could argue that the only difference between the beginning and the end (or the individuality of the savage and the civilized genius) is one of emphasis. See G.W.F Hegel, *Phenomenology of Spirit*. translated by A.V. Miller (Oxford: Oxford University Press, 1997).

[32] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 63.

> No government by a democracy or a numerous aristocracy, either in its political acts or in the opinions, qualities, and tone of mind which it fosters, ever did or could rise above mediocrity, except in so far as the sovereign Many have let themselves be guided (which in their best times they always have done) by the counsels and influence of a more highly gifted and instructed One or Few. The initiation of all wise or noble things, comes and must come from individuals; generally at first from some one individual. The honour and glory of the average man is that he is capable of following that initiative: that he can respond internally to wise and noble things, and be led to them with his eyes open. I am not countenancing the sort of 'hero-worship' which applauds the strong man of genius for forcibly seizing on the government of the world and making it do his bidding in spite of itself. All he can claim is, freedom to point out the way. The power of compelling others into it is not only inconsistent with the freedom and development of all the rest, but corrupting to the strong man himself.[33]

This constellation of the one and the many is a familiar one within the western political thought (from Plato's philosopher king to Hegel's "right of heroes"). The relationship as presented here requires some parsing.

First the many: they are the mass who remain inert in their "collective mediocrity."[34] They are resistant to change and without history. Their mode of government (if left to themselves) is the "despotism of custom." Why is it characterized as "despotism"? For the same reason why there can be (paradoxically) movement but no history (and so that it can justify using despotism as a means to counter and correct it). It moves together as a mass and resists the guidance of the one or few and in this it is guilty of a transgression against history (indeed against nature itself). The only way that it can have history is by producing what it does not know how to make: the individual.

> It is through the cultivation of these [those who have the strongest natural feeling] that society both does its duty and protects its interests: not by

[33] *Ibid* at 59

[34] *Ibid* at 58

> rejecting the stuff of which heroes are made, because it knows not how to make them.[35]

The language of "duty" and "interests" here is key as they are indicative of a leap over the distinction of 'is' and 'ought.' The many cannot produce the one (it does not know how) and so it can only be the *deus ex machina* of necessity, fate or providence. Mill finds this in nature[36],

> Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and

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[35] *Ibid* at 53

[36] There is, it seems to me, a vitalism at work in Mill's use of "inward forces." While he explicitly rejects essentialism (in *A System of Logic Part 1* § 3 is entitled "Individuals have no essences") he holds that "…the real essence of an object has, in the progress of physics, come to be conceived as nearly equivalent, in the case of bodies, to their corpuscular structure." John Stuart Mill, *The Collected Works of John Stuart Mill, Volume VII - A System of Logic Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation (Books I-III)*, ed. John M. Robson, Introduction by R.F. McRae (Toronto: University of Toronto Press, 1974) at 115. By taking his account of "inward forces" as the *real essence* of the humanity Mill begs the question. We are left with a strange ostensive definition of the individual taken from a particular set of examples. He points the way to a definition by saying "this here" or "this is a genius." By doing this he is able to gain access to a concept that has the philosophical force of the *a priori* (it can be used to determine the nature of man and map out an entire philosophy of history and political order) by claiming to have discovered it in nature via induction. His proposal for a science of the formation of character (which he referred to as 'ethology') sought to determine the empirical laws that govern human nature. These were to be collected "*à posteriori* from observation of life" through deductive reasoning. As Mill put it: "Ethology is the science which corresponds to the art of education; in the widest sense of the term, including the formation of national or collective character as well as individual. It would indeed be vain to expect (however completely the laws of the formation of character might be ascertained) that we could know so accurately the circumstances of any given case as to be able positively to predict the character that would be produced in that case. But we must remember that a degree of knowledge far short of the power of actual prediction, is often of much practical value. There may be great power of influencing phenomena, with a very imperfect knowledge of the causes by which they are in any given instance determined. It is enough that we know that certain means have a tendency to produce a given effect, and that others have a tendency to frustrate it. When the circumstances of an individual or of a nation are in any considerable degree under our control, we may, by our knowledge of tendencies, be enabled to shape those circumstances in a manner much more favourable to the ends we desire, than the shape which they would of themselves assume. This is the limit of our power; but within this limit the power is a most important one." John Stuart Mill, *The Collected Works of John Stuart Mill, Volume VIII - A System of Logic Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation (Books IV-VI and Appendices)*, ed. John M. Robson, Introduction by R.F. McRae (Toronto: University of Toronto Press, 1974) at 861-70. If he is asked why it is legitimate that the one uses force to subjugate the many his only answer is "because of the strength of their inward forces." This is, to my mind, akin to offering us a kind of ostensive definition where the speaker points to the object and say "this is that" and thereby neglects the fact that their own subjective judgment is being offered. In this he is like the magician finding a coin behind a spectator's ear and joining them in their astonishment as he forgot that he placed it there by sleight of hand.

> develop itself on all sides, according to the tendency of the inward forces which make it a living thing.[37]

The contrast between mechanics and organic nature is often repeated as he compares those who do not have their own "desires and impulses" (that is are externally determined by the many) as having as much character as a "steam-engine."[38]Automation is presented as the condition of the many under their "blind and mechanical adhesion" to custom.[39] The individual is possessed of set of "inward forces". This 'force of nature' argument is clearly laid out in Mill's account of the genius:

> Persons of genius, it is true, are, and are always likely to be, a small minority: but in order to have them, it is necessary to preserve the soil in which they grow. Genius can only breathe freely in an *atmosphere* of freedom. Persons of genius are, *ex vi termini*, more individual than any other people—less capable, consequently, of fitting themselves, without hurtful compression, into any of the small number of moulds which society provides in order to save its members the trouble of forming their own character. If from timidity they, consent to be forced into one of these moulds, and to let all that part of themselves which cannot expand under the pressure remain unexpanded, society will be little the better for their genius. If they are of a strong character, and break their fetters, they become a mark for the society which has not succeeded in reducing them to commonplace, to point at with solemn warning as 'wild,' 'erratic,' and the like: much as if one should complain of the Niagara river for not flowing smoothly between its banks like a Dutch canal.[40]

There is a conditional that we should be close attention to here: the key characteristic for the genius to possess (the one that will mark their society) is strength of character. If they have it then they are able to "break their fetters" (the "moulds" that the masses impose) and mark their society. The "moulds" thus serve as a kind of sorting mechanism or test of

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[37] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 52.

[38] *Ibid* at 53.

[39] *Ibid* at 52.

[40] *Ibid* at 57-8.

strength. This plays directly into Mill's account of historical development and his justification for the subjugation of the uncivilized by civilized foreign governments. As Mill states:

> From the general weaknesses of the people or of the state of civilization, the One and his counsellors, or the Few, are not likely to be habitually exempt; except in the case of their being foreigners, belonging to a superior people or a more advanced state of society. Then, indeed, the rulers may be, to almost any extent, superior in civilization to those over whom they rule; and subjection to a foreign government of this description, notwithstanding its inevitable evils, is often of the greatest advantage to a people, carrying them rapidly through several stages of progress, and clearing away obstacles to improvement which might have lasted indefinitely if the subject population had been left unassisted to its native tendencies and chances. In a country not under the dominion of foreigners, the only cause adequate to producing similar benefits is the rare accident of a monarch of extraordinary genius. There have been in history a few of these who, happily for humanity, have reigned long enough to render some of their improvements permanent, by leaving them under the guardianship of a generation which had grown up under their influence.[41]

The course of historical development is a difficult one. It requires the arrival of an individual who will bring the many to submission by acting as a "…prophet supposed to be inspired from above, or conjurer regarded as possessing miraculous power."[42]This is the only possible course of history (Mill informs us that he is "not aware that history furnishes any [other] examples"): the only way for the mass of "political atoms or corpuscles" to coalesce into a "body" and learn to "feel themselves one people" is through the "previous subjection to a central authority common to all."[43]The civilized foreign government thus serves as surety for the "rare accident" that is the local or autochthonous monarch and as a colonizer they provide the uncivilized with the

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[41] *Ibid* at 157-8

[42] *Ibid* at 154

[43] *Ibid* at 156

governmental "…focus at which all its scattered rays are collected, that the broken coloured lights which exist elsewhere may find what is necessary to complete and purify them."[44]

The arrival of the individual on the stage of history is necessary (to combat the despotism of the many) and its means are justified before he arrives because his ends are not his own.[45] Mill's presumption of purpose in nature echoes the very first proposition in Kant's *Idea for a Universal History with a Cosmopolitan Purpose*: "All the natural capacities of a creature are destined sooner or later to be developed completely and in conformity with their end."[46] It is this presumption that acts as the motor or history (Mill's genius or "uncontented character",[47]Kant's "unsocial sociability", and Hegel's "right of heroes") and without it there is nothing but the passage of time without history under the tyranny of custom.[48] The problem (and perhaps also the benefit as it offers

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[44] Mill uses this analogy to argue for centralized as opposed to local representative bodies, but the logic he uses is the same as he applies to colonial contexts. *Ibid* at 289

[45] The sudden and unexplained development of a hero who uses coercion to counter the coercion of custom parallels Hegel's account of the hero. There are two references to the 'right of heroes' in the *Philosophy of Right* (1820) and they occur in the following sections.

c) The first occurs in §93 in the section three (Coercion and Crime) of part one (Abstract Right).
d) The second in §350 in the third subsection (World History) of section three (The State) in part three (Ethical Life).

See his *Elements of the Philosophy of Right*. Edited by Allen W. Wood and Translated by H.B. Nisbet. (Cambridge University Press: New York, 2004). Hegel provides a more detailed account of the hero and its role in history in 1830 in the second draft of his *Lectures on the Philosophy of World History*, Translated by H. B. Nisbet. (New York: Cambridge University Press, 1975) at 68-93.

[46] Immanuel Kant, *Political Writings*. Edited by Hans Reiss and Translated by H. B. Nisbet. (New York: Cambridge University Press, 1991) at 42. This point is also connected to Kant's work on natural or organic teleology in the second half of the third *Critique*.

[47] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 145. He goes on to refer to the "function of Antagonism" at 200.

[48] Consider Kant's comments on a world without this "unsocial sociability": "…man would live an Arcadian, pastoral existence of perfect concord, self-sufficiency and mutual love. But all human talents would remain hidden forever in a dormant state, and men, as good-natured as the sheep they tended, would scarcely render their existence more valuable than that of their animals." *Ibid* at 45.

colonial administrators near unlimited discretion) of this argument is that *it cannot be wrong*. In fact, it can even learn to profit from its mistakes through experimentation. As Mill maintains in his *System of Logic*,

> It is enough that we know that certain means have a tendency to produce a given effect, and that others have a tendency to frustrate it. When the circumstances of an individual or of a nation are in any considerable degree under our control, we may, by our knowledge of tendencies, be enabled to shape those circumstances in a manner much more favourable to the ends we desire, than the shape which they would of themselves assume. This is the limit of our power; but within this limit the power is a most important one.[49]

The initial determination is simple: the question of who is uncivilized is as unmistakable as what is good. The subject simply knows it and points saying "I desire this" or "that is a savage." Once the term is applied then there is no need to bother attempting to gain their consent. As Mill puts it in his essay *A Few Words on Non-Intervention* in 1859: "…barbarians have no rights as a *nation*, except a right to such treatment as may, at the earliest possible period, fit them for becoming one."[50]In fact, he recognizes that the rules of what he calls "ordinary international morality" imply reciprocity, but claims that "barbarians will not reciprocate" as their minds are incapable of it.[51] If one wished to justify the suppression of any group then all that would be required would be to characterize them as 'savage' (or any other mode of the uncivilized) and there is no limit to the force that can be used to ensure that they are "taught obedience" and "…submit to the restraints of a regular and civilized government."[52] After all, Mill informs us that

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[49] Mill, *A System of Logic Ratiocinative and Inductive, supra* note 34 at 870.

[50] John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education*, ed. John M. Robson, Introduction by Stefan Collini (Toronto: University of Toronto Press, 1984) at 119.

[51] *Ibid*

[52] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 111 and 133.

"…human beings are only secure from evil at the hands of others" if they are both "self-*protecting*" and "self-*dependent*".[53]

The line that divides the uncivilized and the civilized—or for that matter the savage and the genius—is presented as an obvious and uncontroversial fact for those who are civilized. In this it bears mark of G. E. Moore's naturalistic fallacy: it is possible to perform philosophical alchemy by concealing your subjective judgment in nature and then receiving its fruit as the product of historical necessity.[54] The key interpretive means to distinguish between the savage and the genius is the magic of the philosopher (who, oddly, also happens to be a genius). As Wittgenstein states in *On Certainty*: "I want to say: We use judgments as principles of judgment."[55] To answer our first question: the distinction between the civilized and the uncivilized (the savage and the hero) is a judgment dressed up as a principle. But, aside from its subjective basis (which deprives it of its claim to necessity and thereby the historical justification of destiny) it presents us with a set of properties that determine how to govern. The main one being that power should be exerted on the "inner force" of the individual. It should be used to shape and grow them like a tree. As Mill states:

> Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself. Supposing it were possible to get houses built corn grown, battles fought, causes tried, and even churches erected and prayers said, by machinery—by automatons in human form—it would be a considerable loss to

[53] *Ibid* at 142.

[54] As Moore states: "Mill has made as naïve and artless a use of the naturalistic fallacy as anybody could desire. "Good", he tells us, means "desirable", and you can only find out what is desirable by seeking to find out what is actually desired…. The fact is that "desirable" does not mean "able to be desired" as "visible" means "able to be seen." The desirable means simply what ought to be desired or deserves to be desired; just as the detestable means not what can be but what ought to be detested…" G. E Moore, *Principia Ethica*. (Amherst, New York: Prometheus Books, 1988.) at 66–7.

[55] Ludwig Wittgenstein, *On Certainty*, edited by G.E.M. Anscombe and G.H. von Wright (Oxford: Blackwell, 1974) at §124

> exchange for these automatons even the men and women who at present inhabit the more civilized parts of the world, and who assuredly are but starved specimens of what nature can and will produce. Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develope itself on all sides, according to the tendency of the inward forces which make it a living thing.[56]

This exchange would be a "considerable loss" as we would fail to cultivate man. This cultivation is not done through the imposition of external force on him (as it would be with an automaton), but on his "inward forces." This is a model of power that requires the freedom of those it governs. This brings us to our next question: what type of governmental body is best suited to this mode of government?

A) Governing the Uncivilized: The Role of the Intermediate Body

Mill believed that a key distinguishing feature of his political philosophy was that it recognized that the form that government takes must be adapted to the stage of advancement of those that it governs. His articulation of this aspect of his work in *Considerations on Representative Government* is particularly explicit on this point and should be considered at length:

> It is otherwise with that portion of the interests of the community which relate to the better or worse training of the people themselves. Considered as instrumental to this, institutions need to be radically different, according to the stage of advancement already reached. *The recognition of this truth, though for the most part empirically rather than philosophically, may be regarded as the main point of superiority in the political theories of the present above those of the last age*; in which it was customary to claim representative democracy for England or France by arguments which would equally have proved it the only fit form of government for Bedouins or Malays.[57]

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[56] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 52.

[57] *Ibid* at 130-1. Emphasis added.

He contrasts this method with his understanding of Bentham's utilitarianism, which he viewed as being too abstract.[58] The 'truth' that Bentham failed to appreciate was his failure to appreciate the effect of character on political form. Mill arrives at this 'truth' (which, as I have argued above, is clearly exhibited in his account of individuality and human nature in *On Liberty*) is recognized more through empirical observation than philosophical speculation alone.[59] This required, as Pitts' notes, the combination of a "rough dichotomy between savage and civilized" with a philosophy of history (adapted from the conjectural historiography of the Scottish Enlightenment) and utilitarianism to justify "despotic, but civilizing, imperial rule."[60] Returning to the citation above, Mill goes on to say:

> The state of different communities, in point of culture and development, ranges downwards to a condition very little above the highest of the beasts. The upward range, too, is considerable, and the future possible extension vastly greater. A community can only be developed out of one of these states into a higher, by a concourse of influences, among the principal of which is the government to which they are subject. In all states of human improvement ever yet attained, the nature and degree of authority exercised over individuals, the distribution of power, and the conditions of command and obedience, are the most powerful of the influences, except their religious belief, which make them what they are, and enable them to become what they can be. They may be stopped short at any point in their progress, by defective adaptation of their government to that particular stage of advancement. And the one indispensable merit of a government, in favour of which it may be forgiven almost any amount of other demerit compatible with progress, is that its operation on the people is favourable, or not unfavourable, to the next step which it is necessary for them to take, in order to raise themselves to a higher level.[61]

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[58] For more on the relationship between Mill and Bentham see: Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*. (Princeton, NJ: Princeton University Press, 2005) at 133-8.

[59] I find this to be a curious qualification for a philosopher who never left the confines of Western Europe. How can one argue for such a subtle grasp of the particularity of human character and yet have never encountered the nations that you determine to be savages or barbarians?

[60] *Ibid* at 133.

[61] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 130-1.

This is the basis for Mill's account of what the term "good government" means (chapter two of *Considerations on Representative Government* is entitled "The Criterion of a Good Form of Government"). There is no one form of "good government" that could be applicable to all. It must be adapted to the stage that the people it is going to govern are at and this process of adaptation will shift the "nature and degree of authority", "distribution of power" and the "conditions of command and obedience". There is thus a range of possible configuration of government in response to the stage of civilization. Ranging from savages (as Mill notes a stage that is "very little above the highest of the beasts" who have to learn how to "obey"[62]), slaves (who need to learn how to act for themselves and so need a government of "leading-strings"[63]), barbarians (who form a passive mass and so need to be taught the discipline of individuality) and the civilized (who require representative government so as to preserve the best *soil* and *atmospheric* conditions for the cultivation of the individual genius that prevents it from stagnating or moving backwards[64]). These may occur in hybrid forms (Mill will sometimes use the term "semi-barbarous") but, as he notes, "to attempt to investigate what kind of government is suited to every known state of society, would be to compose a treatise, not on representative government, but on political science at large."[65] He thus confines himself to providing only its "general principles."

Now that we understand that the aim of government (of "good government") is to further the orderly progress of those that it governs from one stage to the next we can

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[62] *Ibid* at 132.

[63] *Ibid* at 132-3.

[64] *Ibid* at 57-8 and 83.

[65] *Ibid* at 133.

narrow the focus of our inquiry to the form of government best suited for this purpose. While Mill insists that the form that government must take varies in accordance with the level of civilization of those that it governs his model has two general categories: the uncivilized and the civilized. The civilized are to be governed by representative democracy. On the other hand, the uncivilized are governed without their consent and so the general form of government that applies is non-representative. There is a high degree of variability within this general category. After all, the language that Mill adopts to describe governance is borrowed from agriculture and animal husbandry (i.e., he speaks of cultivation, soil, atmosphere, trees, ripening, taming, softening and hardening[66]). This means that within the general form of non-representative government the actual practices of governing (the nature and degree of authority, distribution of power, and conditions of command and obedience[67]) vary in accordance with the unique qualities of the population being governed. This process is both deductive and experimental: it is a knowledge of "tendencies."[68]In the final chapter of *Considerations on Representative Government* (entitled "Of the Government of Dependencies by a Free State") he clearly states that the best form of government for the uncivilized is what he refers to as a delegated or intermediary body:

> It is of no avail to say that such a delegated body cannot have all the requisites of good government; above all, cannot have that complete and ever-operative identity of interest with the governed, which it is so

[66] Consider this selection from his Remarks on Bentham in 1833: "For a tribe of North American Indians, improvement means, taming down their proud and solitary self-dependence; for a body of emancipated negroes, it means accustoming them to be self-dependent, instead of being merely obedient to orders: for our semi-barbarous ancestors it would have meant, softening them; for a race of enervated Asiatics it would mean hardening them." John Stuart Mill, *The Collected Works of John Stuart Mill, Volume X - Essays on Ethics, Religion, and Society*, ed. John M. Robson, Introduction by F.E.L. Priestley (Toronto: University of Toronto Press, 1985) at 16.

[67] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 130-1.

[68] Mill, *A System of Logic Ratiocinative and Inductive*, *supra* note 34 at 870.

> difficult to obtain even where the people to be ruled are in some degree qualified to look after their own affairs. Real good government is not compatible with the conditions of the case. There is but a choice of imperfections. The problem is, so to construct the governing body that, under the difficulties of the position, it shall have as much interest as possible in good government, and as little in bad. Now these conditions are best found in an intermediate body. A delegated administration has always this advantage over a direct one, that it has, at all events, no duties to perform except to the governed. It has no interests to consider except theirs. Its own power of deriving profit from misgovernment may be reduced—in the latest constitution of the East India Company it was reduced—to a singularly small amount: and it can be kept entirely clear of bias from the individual or class interests of any one else.[69]

He recognizes that this cannot be the fullest expression of "good government" (due to its obvious lack of consent or representation of their interests), but this fault is due to the fault within the people it is set to govern as. They are incapable of the practice of liberty: they are either too individualistic (savage), selfless (slaves), or simply caught up in the passivity of the masses that necessarily accompanies the despotism of custom (barbarians). They need a delegated body that has no other interest than in their cultivation (aside from the inevitable motivations of self-interest and profit that can be reduced legislatively). This form is superior to allowing Parliament to govern dependencies as it is "swayed by those partial influences in the exercise of the power reserved to them."[70] In contrast "…the intermediate body is the certain advocate and champion of the dependency before the imperial tribunal."[71] It is a body composed of specialists. Returning to Mill,

> The intermediate body, moreover, is, in the natural course of things, chiefly composed of persons who have acquired professional knowledge of this part of their country's concerns; who have been trained to it in the place itself, and have made its administration the main occupation of their

[69] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 320.

[70] *Ibid*

[71] *Ibid*

> lives. Furnished with these qualifications, and not being liable to lose their office from the accidents of home politics, they identify their character and consideration with their special trust, and have a much more permanent interest in the success of their administration, and in the prosperity of the country which they administer, than a member of a Cabinet under a representative constitution can possibly have in the good government of any country except the one which he serves.[72]

In summary, the intermediate body is, according to Mill, the best possible model for the governing of the uncivilized because it is designed with one sole purpose in mind: it is a system that is calculated to form the population that it governs.[73] Once it accomplishes this transformation and converts the uncivilized into the civilized it completes its destiny it perishes.[74] Its problem (the problem that pervades it from start to finish) is that there is no way to determine when this process is complete. Without a way to verify (via a "view from nowhere") that it has reached its destination the intermediate body ceases to be temporary, the experiments of civilizing cease to have an orientation or goal, and it becomes next to impossible to distinguish between the pedagogical purposes of its coercive practices. What is left resembles Kafka's penal colony: it is an intricately customized system of domination held together by a mixture of self-serving faith and the blind inertia of custom.[75] It is a place without orientation (as the truth that it promised remains always on the horizon) and with the passage of time without progress, without hope. Its last vestige of purpose is reactive. It exists (much like Carl Schmitt's *katechon*) in a continual state of siege, waiting only for its own fall, as the teeming masses of the uncivilized threaten to drag it back into the "blank pages" of time without history.

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[72] *Ibid* at 320.

[73] *Ibid* at 321.

[74] *Ibid* at 324.

[75] Franz Kafka, "In the Penal Colony." In *The Complete Short Stories.* Edited by Nahum N. Glatzer. Translated by Willa and Edwin Muir. (New York: Schocken Books, 1971).

B) Peace, Order and Good Government: Mill and the Indian Question

The phrase "peace, order and good government" appears in a number of the Imperial Acts of Parliament in the 19th and 20th century. Examples of its use include the constitutions of Canada (*British North America Act 1867*), Australia (*Commonwealth of Australia Constitution Act 1900*), and, formerly, New Zealand (*New Zealand Constitution Act 1852*) and South Africa (*South Africa Act 1909*). It stands in contrast to a number of other prominent tripartite mottos from the late 18th and 19th centuries such as the motto of the French Republic (*Liberté, égalité, fraternité*[76]) and the rendition of John Locke's *Life, Liberty and Property* in the *United States Declaration of Independence* (*Life, liberty and the pursuit of happiness*). Even at first glance the values expressed in these three mottos are very distinct: where *Liberté, égalité, fraternité* has the ring of a rallying cry to be shouted from the barricades and *Life, liberty and the pursuit of happiness* the promise of a bucolic agrarian utopia, whereas *Peace, order and good government* reflects its distinctly Imperial origins. While 'peace' and 'order' are undoubtedly necessary qualities for both a government and those that it governs they provide only the most minimal conditions for government of any kind (even the most restrictive dictatorship would see

[76] The history of the inclusion of '*fraternité*' in the motto is a complicated one. Unlike '*liberté*' and '*égalité*' its roots are decidedly Christian. While the association between '*liberté*' and '*égalité*' is seen as being essential—one insuring the other as in isolation there can be 'liberty for some' and/or 'equality in servitude'—the inclusion of '*fraternité*' is much less direct. Among the host of mottos that the revolutionary period produced '*fraternité*' was by no means always included. There were terms that where both less specifically Christian terms (i.e., *Amitié*) and Christian terms that were not gender exclusive (i.e., *Charité*) it is ultimately '*fraternité*' that remains. For a more detailed examination refer to Mona Ozouf's article on fraternity in Francois Furet and Mona Ozouf (eds.) *A Critical Dictionary of the French Revolution*. Translated by Arthur Goldhammer. (Cambridge: Belknap Press, 1989) at 694-703; the chapter entitled 'In Human Language, Fraternity…' in Jacques Derrida, *Politics of Friendship.* Translated by George Collins. (New York: Verso Press, 2000); and in the chapter on Nancy and Derrida in my book *The End(s) of Community*. (Waterloo: Wilfred Laurier University Press, 2013).

their inherent value). This leaves significant weight on the meaning of "good government." Naturally due to the 'open textured' meaning of the word "good" (to borrow H.L.A. Hart's expression) there will be a host of possible variations. Within Canadian constitutional law the phrase (which occurs in the opening paragraph of s. 91 of what is now referred to as the *Constitution Act, 1867*) has been interpreted as a wide-ranging grant of residual legislative authority in the federal government. This residual power has been limited by the jurisprudence to include three branches (matters that are purely residual, national concern, and emergency powers), which are all subject to specific limitations via legal tests.[77] The implicit meaning of 'good government' in this sense would be, at the very least, respect for the constitutional limitations of federal legislative power. But, Mill provides us with a definition of the term that, to my mind, has significant explanatory value within the Canadian context. As we noted above he maintains that the "good" of government is necessarily connected with the cultivation of humanity within a series of set stages of civilization. What is 'good' for those in one stage is not so for the other. The term does not simply vary in degree, but in kind. The uncivilized are governed by force. They are, at best, wards. The force exerted on them is, from the perspective of those who govern them 'for their own good' (as long as one can maintain the universal validity of the mold they are being forced into), but it is also behind their backs. This means that there could be a state that simultaneously maintained two distinct kinds of government within its bounds: this state is Canada. The way in which the powers granted to the Federal government under s. 91(24) of the *British North America Act 1867* were realized in the Indian legislation that followed it (and anticipated

[77] The leading case on this doctrine is *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401.

in the Indian legislation that preceded it from the 1830s onwards) there have been two distinct orders of "good government" in Canada. In one order this claim to the "good" is founded on the representation of citizens and in the other it is an order of force (akin to that of emergency powers, but lacking a clear limit) used to make those that it governs "…to submit to the restraints of a regular and civilized government."[78]

The significance of Mill's work extends beyond constitutional structure. His version of liberal-imperialism provides the crown-machine with a justification that makes it immune to contestation by the colonized. Once the determination is made that a population on a territory is uncivilized there is no need to secure their full and informed consent (this process can now be seen as simply one instrument that can be used to reduce conflict as it is divorced from the question of legal legitimacy). Nor is there any need to investigate how sovereignty was acquired. The entire concept of reciprocity is inapplicable to them due to their lack of capacity.[79] They have no right to be considered a nation as their only social existence is either as a handful of individuals or a passive mass. The only requirement that the colonizer must meet in order to justify its actions is that the coercion exercised on them is orientated towards civilizing them (it must be pedagogical coercion). As Deputy Superintendent-General Duncan Campbell Scott explained to a special committee of the House of Commons in 1920: "…Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department…"[80] This is the line of reasoning that connects the unswerving acceptance of crown sovereignty (whether

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[78] Mill, *On Liberty and Considerations on Representative Government, supra* note 4 at 111.

[79] Mill, *A Few Words on Non-Intervention, supra* note 48 at 119.

[80] *Historical Development of the Indian Act, supra* note 7 at 114.

de jure or *de facto*) to Justice McEachern's 'tin ear'[81], and the idea that the only rights that they can lay claim to exist are a "mere burden" that is "dependent upon the good will of the sovereign" and so can be revoked unilaterally.[82]It is based on a position or perspective that refuses the principle of reciprocity and so refuses the most basic principles of natural justice (*audi alteram partem* and *nemo judex in sua causa*). Its ability to determine the rights and capacities of the other party enables it to frame them as uncivilized, justify the use of force to acquire sovereignty and present any resistance as a product of false consciousness (the influence of the 'despotism of custom') comes at a cost as its legitimacy is tied to an impossible undertaking (i.e., civilizing them).

The basic logic of Mill's liberal-imperialism enables the colonizer to separate the colonized from the settler-citizens and treat them as wards of the Crown. It does this by employing a pessimistic view of human nature (a tradition that connects Hobbes and Malthus as well as Kant and Hegel).[83] While there are many variations that could fit this general description there are some important common points:

1. The state of nature begins in a way that is contrary to *the truth* of human nature. Whether humanity is presented as being primarily predatory (the familiar theme captured by the phrase *Homo homini lupus est*[84]) or passive (like Kant's

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[81] At the trial level of *Delgammuukw* a Gitxsan elder wanted to sing her *limx'oy* (songs that are part of the *adaawk*) and the judge responded by saying "I can't hear your Indian song Mrs. Johnson because I have a tin ear." *Delgammuukw v. British Columbia* (8 March 1991), Smithers No. 0843 (B.C.S.C).

[82] This line of reasoning extends from *St.Catharine's Milling* in 1888 to *Calder* in 1973. The words are Lord Watson's from St.*Catharine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.) at 54-58.

[83] In 1823 Mill was arrested for distributing Neo-Malthusian pamphlets to women in working class areas. Nicholas Capaldi, *John Stuart Mill: A Biography*. (Cambridge University Press: Cambridge, 2004) at 41.

[84] A Latin proverb (meaning "man is a wolf to man") that stretches from Plautus' *Asinaria* to Francisco de Vitoria and Thomas Hobbes (among several others). Derrida addresses the relationship between various iterations of this proverb and the concept of sovereignty in Jacques Derrida, *The Beast and the Sovereign, Volume 1*. Translated by Geoffrey Bennington (University of Chicago Press: Chicago, 2009).

reference to the pointless life of Tahitians[85]) the point remains the same: the state of nature is one of *original sin*.

2. This leads to the concept of pedagogical coercion. The fact that the state of nature begins in a position that is contrary to *the* human nature means that coercion directed against it is justified as a response (i.e., it is a form of self-defense) and, further, this coercion is a form of correction or teaching.[86]

This logic can be seen in Mill as his extension of the license to use coercive force on the uncivilized is based upon his concept of the 'despotism of custom.' We are told that savagery, slavery and barbarism are contrary to the destiny of human nature and that only movements towards this destiny can be considered to be historical (all others, we can assume, are simply the passing of time). The problem that this logic is inevitably

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[85] In *Reviews of Herder's Ideas on the Philosophy of the History of Mankind* (1785) Kant poses the following question to Herder: "Does the author really mean that, if the happy inhabitance of Tahiti, never visited by more civilized nations, were destined to live in their peaceful indolence for thousands of centuries, it would be possible to give a satisfactory answer to the question of why they should exist at all, and of whether it would not have been just as good if this island had been occupied by happy sheep and cattle as by happy human beings who merely enjoy themselves?" Kant, *Political Writings*, *supra* note 44 at 219-20. This is a curious argument as the existence of a peaceful people contradicts the fourth proposition in Kant's *Idea for a Universal History*, which holds that antagonism (or 'unsocial sociability') is primary; see *Ibid* at 44-5. So it seems that Kant can only see the pacific nature of the Tahitians as an indication of their pointlessness or possibly self-exterminating nature. Herder's response to Kant's antagonistic thesis (or as Herder refers to it Kant's 'evil doctrine') can be seen in the following quote from his *Ideas for a Philosophy of History*: "Men of all quarters of the globe, who have perished over the ages, you have not lived solely to manure the earth with your ashes, so that at the end of time your posterity should be made happy by European culture. The very thought of a superior European culture is a blatant insult to the majesty of Nature." In J. G. Herder, *Herder on Social and Political Culture*. Edited and Translated by F. M. Barnard. (Cambridge: Cambridge University Press, 1969) at 311.

[86] Hegel draws the logic of this argument out very clearly in the *Philosophy of Right*: "Pedagogical coercion, or coercion directed against savagery and barbarism [*Wildheit und Rohheit*], admittedly looks like a primary coercion rather than one which comes after a primary coercion which has already occurred. But the merely natural will is in itself a force directed against the Idea of freedom as that which has being in itself, which must be protected against this uncivilized [*ungebildeten*] will and given recognition within it. Either an ethical existence [*Dasein*] has already been posited in the family or state, in which case the natural condition referred to above is an act of violence against it, or there is nothing other than a state of nature, a state governed entirely by force, in which case the Idea sets up a right of heroes against it." Hegel, *Philosophy of Right*, *supra* note 45 at 120-1.

confronted with is its inability to come to an end: it cannot determine when it has produced the civilized subject and so is caught in what we could refer to as a paradox of a permanently temporary form of government. This is a problem that goes to the very root of the system of justification that this logic establishes. If the coercion that was used to secure sovereignty over the colonized is to retain its status as a response (as self-defense) then the colonizer must be able to civilize them. If the difference between the uncivilized and the civilized is persistent then either the colonizer must question its foundational claims concerning human nature (and thereby expose its use of coercive force as unprovoked and wrongful) or it must shift the onus to the colonized yet again.

The latter possibility provides the connection between Mill's liberal-imperialism, the extinction thesis and culturalism. The extinction thesis provides one possible solution to the problem of difference by framing it as a product of biological constitution (a solution Mill consistently rejected as he maintained that difference was environmentally determined).[87] The answer is attractive as it retains the foundational status of the colonizer's definition of human nature and with it the legitimacy of their sovereignty. There is no need to examine the past as conquest was inevitable. But, it offers little in the way of practical policy options as, at best; it can justify a palliative version of the *cordon sanitaire* (the *Manitoulin Island Experiment* being the obvious example as was the Removal Act of 1830 in the United States) or the active extermination of the population (the so-called *Black War* in Tasmania during the early 19th century).[88] Culturalism

[87] Bell, *Reordering the World*, *supra* note 2 at 224-5.

[88] For more on the *Black War* and the *Removal Act of 1830* see: Patrick Brantlinger, *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1800-1930*. (Ithaca: Cornell University Press, 2003) at 124-30 and 56-7.

provides the next response by attributing the problem of difference to the thickness of the culture of the colonized. The general line of this type of argument holds that cultural difference is irresolvable and so the colonizer (whose sovereignty remains unquestioned) should proceed by abandoning its civilizing project and governing via *indirect rule*. The key point to remember here is that each of these approaches to colonization are related by both the problem of difference (which each addresses unilaterally) and their acceptance of the use of coercive force to obtain sovereignty over the colonized. The following section will further explore the relation between the liberal-imperial civilizing project and the extinction thesis.

Reading the Right of History: Universal History and the Extinction Thesis

The project of civilizing the colonized is both conceptually and historically related to the extinction strain. An example of this conceptual connection can be seen within Marx's "The British Rule in India" (1853) as he concludes by quoting a poem by Goethe:

> …whatever bitterness the spectacle of the crumbling of an ancient world may have for our personal feelings, we have the right, in point of history, to exclaim with Goethe:
>
> "Sollte diese Qual uns quälen
> Da sie unsre Lust vermehrt,
> Hat nicht myriaden Seelen
> Timur's Herrschaft aufgezehrt?"
>
> ["Should this torture then torment us
> Since it brings us greater pleasure?
> Were not through the rule of Timur
> Souls devoured without measure?"]
> [From Goethe's "An Suleika", Westöstlicher Diwan][89]

[89] Marx, "The British Rule in India", *supra* note 11.

It is easy to quickly read over the reasoning here. But, we should pause and ask ourselves what kind of 'right' history can provide? There is an admission of tension here over the spectacle of human suffering. The tension is split between two perspectives: first, the personal which can see only torment (which, we can assume, troubles its conscience) and second, a collective historical perspective that provides a 'right' to take pleasure in this spectacle as 'we' can see the arc of historical necessity in it. Hegel provides a detailed account of this tension between perspectives:

> We endure in beholding it a mental torture, allowing no defense or escape but the consideration that what has happened could not be otherwise; that it is a fatality which no intervention could alter. And at last we draw back from the intolerable disgust with which these sorrowful reflections threaten us, into the more agreeable environment of our individual life — the Present formed by our private aims and interests. In short we retreat into the selfishness that stands on the quiet shore, and thence enjoy in safety the distant spectacle of "wrecks confusedly hurled." But even regarding History as the slaughter-bench at which the happiness of peoples, the wisdom of States, and the virtue of individuals have been victimized — the question involuntarily arises — to what principle, to what final aim these enormous sacrifices have been offered. From this point the investigation usually proceeds to that which we have made the general commencement of our enquiry. Starting from this we pointed out those phenomena which made up a picture so suggestive of gloomy emotions and thoughtful reflections — as the very field which we, for our part, regard as exhibiting only the means for realizing what we assert to be the essential destiny — the absolute aim, or — which comes to the same thing — the true result of the World's History.[90]

Here again the individual's "moral reflections" (the "mental torture") is presented as being the product of a picture that shapes its perspective (they cannot experience anything more than "a gloomy satisfaction in the empty and fruitless sublimities"). The truth of the slaughter-bench (the "true result" or "absolute aim" that gives redemption by accepting slaughter as sacrifice) can only be seen from the perspective of universal

[90] Hegel. *Philosophy of History*, *supra* note 21 at 21.

history. This revaluation of the spectacle of suffering and death via a universal historical perspective (or "view from nowhere") can be found in Kant, Hegel, and Mill, but it is by no means confined to them. Whether it is Hobbes' *bellum omnium contra omnes*, Smith's claim that savages are self-terminating due to their inefficient customs,[91]or Malthus' expansion of this logic in his *Essay on Populations* they all see progress as the outcome of disaster.[92] They belong to a constellation of thinkers who combine a "struggle for existence" model of human nature with a universal and progressive model of history. The result is a kind of dark theodicy that held that evil means ("pathological" in the Kantian sense) are *necessary* to reach moral ends (J. G. Herder referred to this a Kant's "evil doctrine").[93]Following this logic the problem we are confronted with when we consider the wreckage of violence and suffering that fills the course of history is not the question of responsibility (the 'slaughter-bench' is animated by *necessity*), but rather it is a matter of finding the right seat to view it from. The philosophy of history and morality becomes the practice of *anamorphosis.*[94]

The logic is effectively repeated in their accounts of the use of capital punishment (an institution that each supported). Each sees the death of the condemned as having positive significance: Kant sees a natural equality between murder and the death penalty, which allows execution to establish the authority of the lawgiver; Hegel expands on Kant and

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[91] Adam Smith. *The Wealth of Nations.* Vol. 1. Edited by Edwin Cannan. (Chicago: University of Chicago Press, 1976) at 2.

[92] For a through account of the development of the extinction thesis see Brantlinger, *Dark Vanishings, supra* note 88, at 85.

[93] I would like to thank James Tully for drawing my attention to Herder's critique of Kant on this point. He explores Herder's critique of Kant's concept of culture in his text *Public Philosophy in a New Key Volume II: Imperialism and Civic Freedom*. (Cambridge: Cambridge University Press, 2008) at 27-30.

[94] Anamorphosis is a technique of perspective in which a distorted image can be reconstituted when the viewer either uses a special object or occupies a specific vantage point.

places it as the very beginning of the state as the execution of the murderer enables those who witness it to internalize the law and become moral subjects[95]; and Mill (whose views are articulated in a speech he gave to Parliament in 1868) holds that it is an invaluable deterrent due to the strong impression that it makes on the innocent.[96] The death of the condemned is, for each, a necessary object lesson in the law. This is its connection to the historical perspective exemplified by Marx above: in each there is a claim to a perspective from which we would be able to read (and to be able to teach others how to read) the true meaning of the suffering of others. This perspective would enable the individual to see purpose and necessity in "the panorama of sin and suffering that history unfolds".[97] It is also why the project of civilizing has always been related to the extinction strain. Whether the uncivilized live under the rule of the colonized or simply die the same 'right' is exercised and the same lesson is learned. In both versions the colonizer is potentially able to see their rule as being "…crowned by fate".[98] The only difficulty that remains is teaching others how to overcome their personal feelings and see the course of reason through history: this is the role of Mill's individual (hero and

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[95] Immanuel Kant, *The Metaphysics of Morals*. Edited and Translated by Mary Gregor. (New York: Cambridge University Press, 2006) at 17 and 106-7. Hegel, *Philosophy of Right*, *supra* note 45 at 130-2. I have written on this issue in both Kant and Hegel in my book *The End(s) of Community*.

[96] John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XXVIII - Public and Parliamentary Speeches Part I November 1850 - November 1868*, ed. John M. Robson and Bruce L. Kinzer (Toronto: University of Toronto Press, 1988) at 266-72.

[97] Hegel. *Philosophy of History*, *supra* note 21 at 21.

[98] The phrase I cite here is taken from Walter Benjamin's essay *Critique of Violence* where he states: "…an attack on capital punishment assails, not legal measure, not laws, but law itself in its origin. For if violence, violence crowned by fate, is the origin of law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence." The same association is at work here: the right of the colonizer is presented as being the product of fate (historical necessity) and not the contingent (and thus contestable) actions of human actors. This "we have the right, in point of history"—which is, as we have seen, by no means confined to Marx—is an indicator that there is, as Benjamin notes concerning the death penalty, "something rotten in the law." Walter Benjamin, "Critique of Violence." Edited by Peter Demetz and Translated by Edmund Jephcott. *Reflections: Essays, Aphorisms, Autobiographical Writings*. (New York: Schocken Books, 1986) at 286.

genius). The problem—both of governing and of history—is that while their appearance is the product of necessity, their cultivation is, at best, an uncertain undertaking.

The capacity to adopt the universal historical perspective is a limited one: solving the anamorphosis of reason in history requires that rare touch of philosophical genius. The endurance of the individual is always being tested as the tension between its own limited perspective and the universal perspective remains constant. Much like Mill's account of the progress of civilization there is always the risk of losing the narrative and backsliding into "moral reflections" that can only see the course of history as "wrecks confusedly hurled." Few are able to find the right seat in the theater of history. It is this problem that leads Mill towards, what Duncan Bell refers to as, "melancholic resignation" in the later years of his life.[99] In a letter to A. M .Francis in 1869 Mill writes: "…the common English abroad—I do not know if in this they are worse than other people—are intensely contemptuous of what they consider inferior races, & seldom willingly practise any other mode of attaining their ends with them than bullying & blows."[100]His resignation here is not due to the use of coercive force *per se*, but the inability or unwillingness of the "common English" to use it *correctly* (i.e., they use it for 'pathological' and not rational ends of civilizing). It is not that Mill doubts the validity of his own perspective: on this point he never waivers. Rather, as the colonial violence spread during the middle of the 19th century he assigned the failure to the settlers, the colonial administrators, and the uncivilized themselves. There were simply not enough of

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[99] Bell, *Reordering the World*, *supra* note 2 at 12. Also, for an excellent account of the varieties of historicism and their relation to empire in Victorian Britain refer to chapter 5 of Bell's aforementioned book.

[100] Bell also cites this letter as an example of Mill's melancholic resignation at 232. For the original see: John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XVII - The Later Letters of John Stuart Mill 1849-1873 Part IV*, Edited by Francis E. Mineka and Dwight N. Lindley (Toronto: University of Toronto Press, 1972) at 1599.

the "…highly gifted and instructed" individuals to guide the many though the process of civilizing the world.[101] This line of reasoning allows a further layer of insulation to the universal historical perspective. If there are failures in the project of civilizing they can be attributed to the one, the few or the many, but not the perspective itself.

The universal historical perspective is necessary to the project of civilizing (it provides, in Marx's words, the '*right in point of history'*) as it immunizes the colonizer from the contestation of the colonized. In this is follows a kind of kettle logic that allows the colonizer to respond to the colonized accusation:

1. The coercive force that we used did not harm you, it benefited you;
2. You were already destroying yourselves when we found you;
3. You would have died in any case.

The three statements are inconsistent: the first denies that the wrong was actually harmful, the second attributes the wrong to the colonized themselves, and the third denies any involvement in the wrong whatsoever.[102]All three are active forms of justification in the project of civilizing put forward by thinkers such as Mill, Smith and Malthus. The extinction thesis is simply one member of a family of arguments. Its utility is that when the civilizing project shows signs of failing it allows the colonizer to attribute that failure to the biological constitution and/or the thick cultural organization of the colonized.[103]

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[101] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4 at 59.

[102] The term "kettle logic" derives from a story that Sigmund Freud relates in both *The Interpretation of Dreams* and *Jokes and Their Relation to the Unconscious* in which a man is accused by his neighbor of retuning a kettle in a damaged condition and he responds with three inconsistent arguments: A) That he had returned the kettle undamaged; B) That it was already damaged when he borrowed it, and; C) That he never borrowed it in the first place. See: *The Interpretation of Dreams*. Translated and Edited by James Strachey. (New York: Basic Books, 2010) at 143-5; *Jokes and Their Relation to the Unconscious* Translated and Edited by James Strachey. (New York: W.W. Norton & Company, 1989) at 72 and 254-5.

[103] For more on the theme of the auto-extinction of Aboriginal peoples see Brantlinger, *Dark Vanishings*, *supra* note 85 at 1-3.

Like the civilizing project of liberal-imperialism its strength is due to its basis in a "view from nowhere": it treats the colonized as objects of knowledge. This, in turn, provides both a justification for the process of colonization and an explanation that can sooth the conscience of the colonizer. In practical terms the argument offers very little: they can be isolated, scientifically studied, or simply exterminated.[104] The Darwinian Revolution in the mid-19th century did little to change this pre-existing discursive structure. Rather, as Brantlinger notes, it served to strengthen it.[105]

The common feature that relates the extinction thesis to the civilizing project of liberal-imperialism is that they foreclose on the possibility that the practice of colonization (the use of coercive force to take lands and to civilize others) constitutes a wrong. This is foreclosed at a conceptual level because if it is put into question it would also entail that the universal historical perspective (which is, in Wittgenstein's terms, the 'world-picture' or *Weltbild* that provides the unmentioned "mater-of-course foundation" for both[106]) is *not universal*. Fichte's response to Kant's argument for the rational necessity of the death penalty for murderers draws out the implicit connection between an *absolute* right to use coercive force (a feature that is present in Mill's liberal-imperialism) and *absolute* sovereign authority. Fichte responds to Kant by conceding that his argument would be correct *if* we lived "…in a moral-world, governed by an omniscient judge in

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[104] It is important to note that the isolation of the Aboriginal peoples of Canada from the settler population was not driven by the extermination thesis. Rather, it is based in the Imperial policy of non-interference of non-molestation that finds expression in the *Royal Proclamation, 1763*. While it was possible to use the extermination thesis to repurpose or reimagine this division (as was done in the *Manitoulin Island Experiment*) its basis lies in the nation-to-nation relationship that pre-existed the process of internal colonization, which began in the mid-19th century. For a thorough explanation of the process of "internal colonization" see Tully, *Public Philosophy Vol. 1, supra* note 9 at 259-61.

[105] Brantlinger, *Dark Vanishings, supra* note 86 at 164.

[106] Wittgenstein, *On Certainty, supra* note 53 at 24.

accordance with moral laws."[107]But, he asks, "…from where does a mortal get the right of this moral world-order, the right to render the criminal his just deserts?"[108]He advances his argument further and argues that anyone who could maintain this argument within this world would also be committed "…to say that the sovereign's rightful title to it is unexaminable; to derive the sovereign's authority from God; and to regard the sovereign as God's visible representative and every government as a theocracy."[109] This same argument applies to the project of colonization and all of its justifications. If it was possible to secure a "view from nowhere" and see the rationality of history, then it would also be possible to ignore the demands of the colonized and act as the judge of our own actions (the principles of *audi alteram partem* and *nemo judex in sua causa* do not apply to God). Without these (impossible) conditions how does a mortal individual living within the confines of this world get the right to determine who is civilized and who is not (or, to use a theological register, the living and the dead)? This is the problem with the civilizing arguments. They are immune from contestation, but as a result they are caught in their own snare. There is no possibility of progress towards the end goal: all that is left is melancholic resignation as the laboratories of civilizing become nothing more than Kafkaesque penal colonies.

From Enfranchisement to Reconciliation: Culturalism and Indirect Rule

[107] J. G. Fichte, *Foundations of Natural Right*. Edited by Frederick Neuhouser and Translated by Michael Baur. (New York: Cambridge University Press, 2000) at 246. I explore Fichte's arguments against Kant on this point in more detail in *The End(s) of Community*.

[108] *Ibid.*

[109] *Ibid.*

The liberal-imperial civilizing project had grounded itself on the assumption that culture was thin. This was the practical point of contact for its entire grad historical narrative: once the "scattered rays" and "broken coloured lights" of the world had been collected, cataloged and sorted all that left to do was "…to complete and purify them."[110] This meant that the 'despotism of custom' (whose existence justified colonial despotism as a kind of universal historico-civilizational act of self-defense) had to be broken up in order to free the creative energy of the individual. For this assumption to hold true the resistance of the colonized (which, from the confines of this framework, could only be seen as a kind of misguided atavism) would need to gradually dissipate. As it became clear that the colonial rebellions of the first half of the 19th century were intensifying the promises of the liberal-imperial civilizing project soon began to fade and a crisis of legitimacy set in. Culture had proven to be far too thick. This led to a turning point in British Imperial ideology as it moved from universalism to culturalism and *indirect rule*.[111]This approach started from the assumption that culture was thick. This meant that the invasive array of political institutions and experimental civilizing technologies would need to be removed as they were destabilizing native societies and thereby threatening imperial order.[112] In order for this order to be stabilized governing powers would need to be devolved to the colonies themselves. And this, in turn, brought about a distinct shift in the justification of imperial legitimacy as it moved from being the universal historical destiny of civilization to being a necessary rehabilitative framework.[113]The continuity

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[110] Mill, *On Liberty and Considerations on Representative Government*, *supra* note 4, at 289.

[111] For a detailed review of this transition see Mantena, *Alibis of Empire*, *supra* note 2.

[112] *Ibid* at 171.

[113] Mantena refers to this mode of legitimation as the 'alibi' of empire: *Ibid* at 12.

that maintains the relation between the civilizing project and culturalism is that, despite all of their differences, they both serve as modes of imperial legitimation.[114] They are also bound together in a dialectical relation as the wreckage of the former provides the need for the rehabilitative framework of the latter.

The problematic that I am attempting to address follows this mid-19th century transition from a different perspective. As Imperial Britain devolved powers to the settler colonies a process of internal colonization began.[115] Within Canada this process was informed and structured by the liberal-imperial project of civilizing that operated under the term 'enfranchisement'. The project followed the liberal-imperial formula that Mill set out: Indigenous forms of government were systematically broken up and replaced with *Bands*; individual members of the previously self-determining peoples were catalogued and registered as a population of *Indians*; their children were forcefully removed and placed in residential schools; their lands divided up into a system of reserves; and everything occurs under the all-encompassing non-representative power of the Department of Indian Affairs. The legal-political order established under the authority of s. 91(24) and enacted through the *Indian Act* existed as a parallel system within Canada whose closest family member is the state of emergency. There is the system of

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[114] In the chapter entitled "The Negotiation of Reconciliation" Tully states that what has remained constant through the phases of colonial domination that have occurred since the establishment of the *Indian Act* is that "…Aboriginal peoples are subordinate and subject to the Canadian Government, rather than equal, self-governing nations subject to the agreements reached though the treaty system." Tully, *Philosophy in a New Key Volume I, supra* note 9, at 226-7.

[115] Duncan Bell argues—contra Uday Singh Meta and the historical work on empire that has followed his lead by focusing on the colonial experience of India from Pitts to Mantena—that "…many British liberals regarded settler colonialism as a preferable model of empire to the conquest and alien rule associated with India." Bell, *Reordering the World, supra* note 2 at 9 and 366. This is a crucial point to keep in mind because: "Most of the so-called "anti-imperialists" from the eighteenth century to the late nineteenth, from Bentham through Spencer to Hobson and Hobhouse, promoted settler colonialism of one kind or another." *Ibid* at 369.

responsible representative government for the settler-citizen (the form of "good government" Mill saw as appropriate for the civilized) and then there is the non-representative and authoritarian system that was designed for the colonized.

The aim of this parallel system was the complete unification of the body politic: *Indians* were seen as a temporary impediment. This aim remains in place from the 1830s through to the *White Paper* in 1969. Its mandate was ultimately derived from a "view from nowhere" which enabled it to legitimize its existence as "good government" for the uncivilized subjects of the Crown. There are, as I have argued, limits to this approach. As Quinten Skinner notes in *Liberty Before Liberalism*:

> …what it is possible to do in politics is generally limited by what it is possible to legitimize. What you can hope to legitimize, however, depends on what courses of action you can plausibly range under existing normative principles. But this implies that, even if your professed principles never operate as your motives, but only as rationalizations for your behavior, they will nevertheless help to shape and limit what lines of action you can successfully pursue.[116]

By the late 1960s it was no longer possible to legitimize the project of enfranchisement because there had been a shift of the existing normative principles. The constant and increasing resistance of the Indigenous peoples in Canada combined with the growing resistance to colonial authority on a global scale (e.g. the *Civil Rights* movement in the United States and the growing resistance of peoples in the so-called "Third World" for decolonization) had brought about a political sea-change. It was no longer acceptable to unilaterally determine the limits of the principle of liberty. In short, the '*right in point of history'* that Marx claimed for Europeans in 1853 had expired.

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[116] Quintin Skinner, *Liberty Before Liberalism*. (Cambridge: Cambridge University Press, 1998) at 105.

Within Canada the *White Paper* was the last explicit attempt to use the crown-machine to unilaterally answer the *Indian Question*. Its failure was formally pronounced in the *Calder* decision in 1973 when a majority of the Supreme Court of Canada found that the rights of Indigenous peoples were not solely derived from the Crown, but were inherent in the fact that they were here before the Europeans arrived. This entailed a complete reorganization of the Crown's response to the *Indian Question*. The project of enfranchisement becomes the project of reconciliation. This is not to say that a complete legal and political project simply takes shape overnight. Rather, the change in normative principles (from the unilateral *'right in point of history'* or "view from nowhere" to consent) changed the plausible range of actions that could be used to legitimize the authority of the Crown. The most basic outlines of this transformation echo the change in Imperial British policy in the mid-19th century: culture is thick and the previous policies have caused harm to Indigenous societies and so the basis of Crown authority is that it is needed to prevent further collapse. It is a rehabilitative power. But there are also changes. In particular, the context of internal colonization shifts the importance of lands. [117] While the Imperial Crown could withdraw and continue to pursue its interests via informal mechanisms of economics and trade from the security of the metropole the Domestic Crown could not. The existing apparatus of the previous project remains in place, but is gradually repurposed in an *ad hoc* manner. There has been an informal devolution of powers, but the basic structure of the *Indian Act* remains in place. This gives the Crown a

[117] Interestingly in Canada this is more than merely an alibi for the power of the Federal Crown as the Indian Association of Alberta (under the leadership of Harold Cardinal) responded to the *White Paper* with *Citizens Plus* (it takes its title from a term used in the *Hawthorne Report* and it is also known as the *Red Paper*), which argued for the retention of the *Indian Act* as a means of protecting their lands. See: Indian Association of Alberta. *Citizens Plus*. (Edmonton: Indian Association of Alberta, 1970).

number of powers that cannot be accounted for in principle as they are remnants from the previous normative *world-picture*, which rely on the "view from nowhere."[118] The most obvious of these are the unilateral powers of infringement and recognition (the ability to use s. 91(24) and the *Indian Act* to determine who and who is not an *Indian* or a *Band*).[119]By continuing to grant these powers legal force we fall prey to what John Borrows has referred to as the alchemy of sovereignty.[120] This is a difficult trap to escape from. As Quintin Skinner states,

> …it is remarkably difficult to avoid falling under the spell of our own intellectual heritage. As we analyse and reflect on our normative concepts, it is easy to become bewitched into believing that the ways of thinking about them bequeathed to us by the mainstream of our intellectual tradition must be *the* ways of thinking about them.[121]

Freeing ourselves from this spell (or to use Wittgenstein's terminology 'picture') requires that we expose the provisional 'system of judgments' that holds it in place and makes it seem as if it is beyond question and contestation.[122]

We will pause here a moment and reconsider our course thus far from a broader vantage point. The purpose of this chapter was to explore how the discursive foundations of 19th century British imperialism addressed (or failed to address) the question of legitimacy. Mill's liberal-imperialism offers legitimacy for despotic modes of

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[118] This includes the legal doctrines that are based in this *world-picture* such as *terra nullius* and discovery.

[119] The Court determines standing by determining whether or not claimants are "bands" within the meaning of the *Indian Act*. The collective nature of aboriginal rights (which has been assigned through colonial law and not by the actual political-legal practices and structures of Indigenous peoples) was recently upheld by the Court in *Behn v. Moulton Contracting Ltd*., [2013] 2 SCR 227.

[120] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall L.J. 537. Also see the recent continuation of this in: John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48:3 UBC L Rev 701.

[121] Skinner, *Liberty Before Liberalism*, *supra* note 114 at 116.

[122] Wittgenstein, *On Certainty*, *supra* note 55 at §105. Also see Tully, *Philosophy in a New Key Volume I*, *supra* note 9 at 32-3.

governance, but the legitimacy hinges on civilizing the colonized population (i.e., the legitimacy was contingent upon the despotism being temporary and for the improvement of the colonized). Since there are no possible objective criteria to determine who is or is not civilized the legitimacy that is promised is always tied to a future that is yet to come. In practice this means that the system of governance becomes unable to account for resistance over time and the promise of legitimacy fades. It can turn to the extinction thesis, which fixes the blame on the colonized themselves, but this to is tied to the promise of a future event (i.e., it is only legitimate if the colonized become extinct). Maine's culturalism rejects the civilizing thesis and argues that culture is 'thick' and so colonized peoples are best left to govern their internal affairs. This offers a set of pragmatic instructions for maintaining an indirect system of colonial rule, but it does not offer legitimacy for it. Rather, it simply accepts domination as part of the status quo and moves to stabilize it by ignoring the question of legitimacy altogether. Its claim to stability rests on the colonized either not noticing or simply accepting this arrangement of governance. All of these discourses work to *finesse* rather than *face* the question of legitimacy. They are designed to provide a foundation for relationships of domination, but their solutions are, as we have seen, constitutively flawed. The crown machinery has used all three of these discursive strains; they have overlapped and crisscrossed through its 140-year historical development from the project of enfranchisement to the project of reconciliation. The upshot of this is that the question of legitimacy *remains open*. My aim in the chapters that follow will be to show both how the crown machinery has dealt with this question and to help open up the possibility of facing it directly so as to offer the possibility of a *reconciliation with* Indigenous peoples.

Chapter 3

A Despotism for Dealing with Barbarians: A Survey of the Foundations of Indian Policy in Canada

"To seek it with thimbles, to seek it with care;
To pursue it with forks and hope;
To threaten its life with a railway-share;
To charm it with smiles and soap!

"For the Snark's a peculiar creature, that won't
Be caught in a commonplace way.
Do all that you know, and try all that you don't:
Not a chance must be wasted to-day!

"For England expects—I forbear to proceed:
'Tis a maxim tremendous, but trite:
And you'd best be unpacking the things that you need
To rig yourselves out for the fight."

Lewis Carroll, *The Hunting of the Snark* (1876)

In this chapter I will situate the *Indian Act*, s. 91(24), their associated institutions and practices of governance—viz. the machinery of the crown[1]—in the context of their imperial foundations in the 19th century and follow the general line of their development to the *White Paper* in 1969. This chapter follows-up on the investigation of the European discursive foundations from the previous chapter by engaging with what the colonial institutions and authorities in Canada were doing during the same period. There is thus a shift in focus from the broader philosophical discourses to the legislative and administrative system that was being constructed and (continually) recalibrated in relation to Aboriginal resistance. The aim here will be to see both the continuities and discontinuities that exist between the broader discursive trends and the administrative practices within the Dominion. I have selected this specific period of time as it covers the

[1] As in previous chapters, I will employ this term to refer to a system of legal-philosophical arguments that are used to justify and legitimate the actions of the Crown in relation to Aboriginal peoples (viz. the series of arguments that are deployed to justify the unilateral taking of lands and the despotic governance of Aboriginal peoples—e.g. Lockean conceptions of property and agriculture, Mill's model of culture and universal history, the concept of the struggle for existence that connects Hobbes, Malthus, and Darwin, etc.). I use the term to convey a number of key characteristics: 1) The arguments make subjective judgments appear to be objective statements (i.e. they appear to be impersonal, objective or mechanical—e.g. nomads are incapable of owning land—and are therefore presented as being immunized against contestation); 2) The arguments do not form a single coherent and constant system, but rather an *ad hoc* assemblage that can be reordered and recalibrated in accordance with resistance (e.g. there is much to distinguish the relationship between the Crown and Aboriginal peoples in the position taken by the Privy Council in *St. Catherine's Milling* and the most recent articulation in *Tsilhqot'in Nation*, but they both maintain unilateral Crown sovereignty. Just as there is much to distinguish J.S. Mill's model of Imperial Liberalism—with its civilized/uncivilized distinction and universal history—from Henry Maine's culturalism and Indirect Rule, but their political consequences bear a striking resemblance as both maintain the legitimacy of imperialism); 3) The constant element is the intransigent character (i.e. metaphysical) of the arguments (e.g. the Court in *Sparrow* stating that Crown sovereignty was never doubted. Another example would be Kant's claim that questioning the historical warrant of the mechanism of government is futile or even criminal or Mill's paradoxical claim that a 'good despotism' is impossible *except as a means to a temporary purpose*). I have attempted to capture this last characteristic with the term 'bluebeard logic' (i.e. an open contradiction within a system of propositions and arguments that cannot be accounted for and so is only supported by the use or threat of physical violence). Wittgenstein captures this characteristic in §112 of the *Philosophical Investigations*: "A simile that has been absorbed into the forms of our language produces a false appearance, and this disquiets us. "But *this* isn't how it is!"—we say. "Yet *this* is how it has to *be*!"" See Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Blackwell: Oxford, 2001) [hereinafter Wittgenstein, *Philosophical Investigations*].

transition from British Imperial rule through to the devolution of powers to the Dominion in 1867 and the development of the "vast administrative dictatorship" of the *Indian Act*.[2]

These changes and the practices of resistance that responded to them served to shape the Crown's administrative aims and practices. This process of construction was by no means a smooth or continual developmental process (i.e. the crown machinery did not move from the draughtsman's sketchbook to the on the ground reality of the colony in one continuous move). Rather, the machinery of the crown takes shape in and through the concurrent interaction of related and conflicting processes that stretch from philosophical propositions, legislative drafting, administrative interpretation, enforcement, institutional design, scientific discourse and the continually adapting and innovating practices of resistance of Aboriginal peoples.[3] Its formation is more analogous to processes of sedimentation interacting with the sudden eruption of volcanic activity or, to follow the mechanistic line of comparison, it is like the *ad hoc* construction and maintenance of an engine from a scrapyard where the haphazard selection of parts never quite fit the task at hand, which necessarily entails that the engine never runs smoothly—it continually resides on the very edge of collapse. Any attempt to provide an exhaustive—or even general—survey of this vast and complicated territory would require a far more extensive treatment than I can offer here. My aim is not to provide an exhaustive map of this period of time so that I could somehow settle what was going on during this period once and for all. Such an exhaustive or complete map is an impossibility akin to the map in Lewis

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[2] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 90-1 [hereinafter Tully, *Multiplicity*].

[3] Refer to Foucault's comments on his use of the term *dispositif* in Michele Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Edited by Colin Gordon (Pantheon: New York, 1980) at 194.

Carroll's *Sylvie and Bruno Concluded* that had "the scale of a mile to the mile".[4] Accordingly, the criterion of success here will not be to somehow discover that the general administrative program from 1867 to 1969 was *identical* to the civilizing imperialism set out by J. S. Mill. Rather, my aim here is to provide a few brief surveys of the historical landscape as seen from different scales and assemble them together as a kind of sketchbook of reminders. As a survey (in line with Wittgenstein's concept of "perspicuous representation"), I am looking to provide a few landmarks or points of reference that will enable us to find our way about. The aim is not to provide the definitive map at this—or indeed any other—scale, but to provide a different *point of view*. The map is *not* the territory, but this does not render maps useless.[5] They offer us a way of seeing things again, from a different angle, under a different light, so that we can

[4] Lewis Carroll, *Sylvie and Bruno Concluded* (Macmillan and Co.: London, 1893) at 169. J. L. Borges draws out the absurdity of such a metaphysical desideratum in his short story *Del rigor en la ciencia* (*On Rigor in Science*) where he presents (through the device of literary forgery as it is presented as a citation from Suárez Miranda, *Travels of Prudent Men*, Book Four, Ch. XLV, Lérida, 1658) an empire where the science of cartography has become so exact that only a 1:1 scale will suffice: ". . . In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast map was Useless, and not without some Pitilessness was it, that they delivered it up to the Inclemencies of Sun and Winters. In the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography." See J. L. Borges, *Collected Fictions*. Translated by Andrew Hurley (Penguin; New York, 1998) at 325.

[5] I am making use of Gordon Baker's distinction between what he refers to as the "Bird's eye View Model" approach to Wittgenstein (viz. that he—much like Gilbert Ryle—is engaging in a mapping out *the* grammatical geography and policing its limits) and his more open-ended approach to "perspicacious representation". See Gordon Baker, *Wittgenstein's Method: Neglected Aspects*. Edited by Katherine Morris (Blackwell: Oxford, 2004) at 28-46. I would also add the caveat that I do not adhere to the therapeutic reading of Wittgenstein as, by my understanding, the pictures do not simply make *individual philosophers*—or, for that matter, philosophers as a *particular group*—suffer disquiet. They provide the *justification for* and *legitimization of* violence. This latter aspect is what I feel gets lost in all of the therapeutic approaches. It is not merely a balm to the troubled mind (which would make it much more related to the ethical project of the *Tractatus* and a certain reading of Heidegger's concern with authenticity). But, a work that is *for others* and focused on the intersubjective aspects of justice. For this I draw more on the political readings of Wittgenstein (in particular James Tully). For a recent and through account of this reading see Michael Temelini, *Wittgenstein and the Study of Politics* (University of Toronto Press: Toronto, 2015).

see that which what once seemed immutable and constant to be conventional and accidental, thereby opening up the possibility of other paths.

With this in mind, I have limited the scope of this investigation to two particular lines or aspects: viz. membership and political form. The structure of the chapter will be divided up as follows:

a) I will begin by setting out a rough sketch of the pre-confederation changes in Indian Administration from 1812 to 1867. This will provide the reader with a sense of the transition from treaty-federalism under Imperial rule to administrative despotism within the confines of the Dominion. The scale of focus here is broad and meant to place the series of transitions that are occurring in British North America within their Imperial context (viz. the mid-19th century transition to a model of indirect rule). My aim is to provide a picture of the pre-confederation landscape that can serve as an object of comparison (in Wittgenstein's sense of the term) so that we can see the transformations in Indian policy that have followed.

b) In the second section I will shift the scale of my focus down slightly and focus on the importance of the Indian Question from the perspective of the Dominion from 1867 to the 1920s. I will move from providing a general survey of the process of western expansion and the numbered treaties and then focus my attention on how these processes and policies lead to the first phase of wide scale confrontation (e. g. the rise of Pan-Indian political resistance and the increasing use of repressive measures of cultural and political suppression via legislative amendments to the *Indian Act* and more informal enforcement mechanisms). This section will—like the previous section—be restricted to a picture of the landscape of Indian policy

during this period. My focus will be on the legislation and policy that is dominant in this period as it is this that connects it to current government practices. I note this specifically because there is still, even at this point, a counter narrative within the various governments of the Crown that advises a different course of action. This can be found in a number of speeches by key political actors or even in transcripts of Parliamentary debates and while it is valuable for enriching our sense of the debates leading up to legislation it is not our focus here. The main purpose of this section is to allow us to see the shift from one mode of Indian administration to another (viz. Imperial to the Dominion). This will also provide some background for the more detailed case study that follows it.

c) The third section forms the heart of the chapter. Here I will narrow the scale of focus down to a particular event: the Six Nations' appeal for justice at the *League of Nations* in 1923. I believe that this event offers us a useful point of reference or landmark for determining the overall form of Indian Policy during this period (i.e. from its first full articulation in the *Indian Act* of 1876 through to its crisis of legitimacy in the 1950s and partial collapse with the *White Paper* in 1969). It is ideally suited to this function for a number of reasons: firstly, it involves a direct political confrontation between an Aboriginal nation and the Dominion over the question of legitimacy and self-government and so constitutes "…a direct challenge to the very foundations of federal policy"[6]; secondly, this confrontation reaches the international stage and Canada is forced to justify its Indian policies to

[6] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. (University of British Columbia Press: Vancouver, 1986) at 134.

other states during the first period of decolonization (the delegates of Estonia, Ireland, Panama and Persia—nations all very familiar with the vicissitudes Imperial *realpolitik*—supported the Six Nations' cause[7]); thirdly, Canada's response is written by Duncan Campbell Scott who served as deputy superintendent of the Department of Indian Affairs (DIA) from 1913 to 1932 and it is one of the events that leads to one of the most aggressive periods of assimilating policy in Canadian history (e.g. in response, a permanent police presence was established at Grand River, the hereditary council was replaced, a network of informers was employed to break local resistance, and in 1927 Section 141 of the *Indian Act* was adopted, which effectively barred Indians from accessing legal representation until its repeal in 1951[8]).

d) In the final section I will zoom out again to provide a brief overview of the transformations in Indian policy that followed the Second World War. I will

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[7] *Ibid*, at 123.

[8] *Ibid*, at 59, 134, 157. I should note two points here; first, this was not the first time that the colonial government barred access to legal representation. In a piece of legislation entitled *An Act to make better provision for the Administration of Justice in the unorganized tracts of Country in Upper Canada, 1853* prohibited "any person" from "inciting Indians or half-breeds." It effectively precluded anyone from acting as legal counsel for Indians and was passed as a direct result of aboriginal "intransigence" regarding the Robinson-Huron treaty. I'd like to thank Robert Hamilton for drawing my attention to this early predecessor to s. 141. See Janet E. Chute, "Singwaukonse: A Nineteenth-Century Innovative Ojibwa Leader" (1998) 45 *Ethnohistory* 1 at 86. Secondly, s. 141 was not introduced *solely* to deal with the Six Nations status case. The land claims issue in British Columbia was another source of legal resistance to DIA policy (cf. Titley, *A Narrow Vision, supra* note 3, at 135-161. In addition, decisions of the Judicial Committee of the Privy Council from the 1918 decision in *Re Southern Rhodesia Land* and the 1921 decision in *Amodu Tijani v. Secretary, Southern Nigeria* had held that Aboriginal title pre-existed British authority and remained in place unless explicitly extinguished. This was a distinct reversal from the position that Lord Watson had taken in *St. Catherine's Milling and Lumber Company v. The Queen*, (1888), 14 App. Cas. 46 [hereinafter *St. Catherine's Milling*], which held that Aboriginal title was created by the British Crown and could be removed at its pleasure. As Paul Tennant points out, it is reasonable to presume that this played a major role in Parliament moving to ban claims-related activities in 1927. He also notes, that the removal of this policy in the 1951 revisions to the *Indian Act* could be due to the fact that after 1949 the Supreme Court of Canada becomes the final court of appeal and this means that the cases of the Judicial Committee of the Privy Council would henceforth only serve as precedents. See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1992) at 214-215.

address the 1951 amendments to the *Indian Act*, which followed Canada's commitment to the United Nations' *Universal Declaration of Human Rights*. My aim here will be to place the changes going on within Canada in the international context of this wave of decolonization. This leads to the ultimate crisis of legitimacy for the policy of assimilation, which took shape with the *White Paper* in 1969. The detail in this section will be general as its purpose is to provide a bridge to the following chapters on what I am referring to as the era of reconciliation and indirect rule, which will cover from 1969 to Canada's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2016.

Pre-Confederation to the Indian Act of 1876

In keeping with the analogy of sedimentation we can say that there are, generally speaking, three layers of Indian policy that exist prior to confederation under the *British North America Act, 1867*. These layers are by no means entirely distinct. There is interaction both across and between the layers. Some principles are retained, but repurposed to suit new goals. Whereas others seem to be suddenly discarded, but are then followed by a series of variations that resemble them operating under new names. These three layers are merely a rough and ready guide to help the reader get a sense of both the gradual administrative transitions and sudden volcanic changes that the 19th century brings to Indian policy.

A) Imperial Federalism

This could also be referred to as *suzerainty*, or *Treaty-Federalism*.[9] The origins of this layer stretch back to the period prior to the *Royal Proclamation of 1763*. During this period the official policy was to leave relations with Indian nations to the governors of colonial governments. By the end of the 17th century it had become abundantly clear to the British Imperial authorities that this policy was, at best, impractical. The problem was that the local settler populations were continually expanding into Aboriginal lands and displacing them. At its basis this stems from a distinction between Imperial and colonial interests regarding land-acquisition (i.e. the difference in their respective scales of governance translated into conflicting interests in land). This had led to a series of escalating conflicts that threatened "…trade, travel, and diplomacy and could even lead to war when settlers were unrestrained."[10] Simply put, the local settler population was focused on continual expansion whereas the Imperial Crown was more interested in overall stability and control (an expression of this can be seen in the colonial grievances that precipitated the American Revolutionary War in 1775 and in the subsequent use of the concept of *manifest destiny* in the 19th century).[11] This problem continued and was

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[9] John Milloy uses the term "Imperial federalism" in John S. Milloy, *A Historical Overview of Indian-Government Relations 1755-1940* (Ottawa: Department of Indian Affairs and Northern Development, 1992) [hereinafter Milloy, *Historical Overview*]. For the term suzerainty refer to Brian Slattery, "Making Sense of Aboriginal Treaty Rights" (2000) 79 *Can Bar Rev* 196 at 198, 201, 209-210. It appears in the case law in Lamer J.'s (as he was then) decision in *R. v. Sioui*, [1990] 1 SCR 1025 and again in Binnie J.'s concurring decision in *Mitchell v. M.N.R.*, [2001] 1 SCR 911 at 142 where he cites Slattery's article while attempting to square the Crown's circular reasoning on the issue of sovereignty by providing an account of "merged sovereignty" (for more see my engagement with this case in the Introduction to this book). For more on the concept of treaty-federalism refer to Russel Lawrence Barsh and James Youndblood Henderson, *The Road: Indian Tribes and Political Liberty*. (Berkeley: University of California Press, 1980) and, more recently, Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. (Toronto: University of Toronto Press, 2014).

[10] John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 66 (hereinafter Borrows, *Indigenous Constitutionalism*).

[11] As the court in *United States v Kagama*, 118 US 375, 6 S Ct 1109 (1886) put it, for Indigenous communities, "…the people of the States where they are found are often their deadliest enemies" at 383 [hereinafter *Kagama*]. This is not to suggest that the Imperial Crown was *uninterested* in land; rather, they sought to maximize their sovereign control by making these new lands a part of the royal demesne (and so outside the

clearly restated in the *Report of the Parliamentary Select Committee on Aboriginal Tribes* in 1837:

> The protection of Aboriginies should be considered as a duty peculiarly belonging and appropriate to the executive government, as administered either in this country or by the governors of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures…[T]he settlers in almost every colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore out not to be the judge in such controversies.[12]

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jurisdiction of Parliament and the common law) while avoiding the Spanish contagion that had been associated with the doctrine of conquest (i.e. the legitimacy of Spanish conquest was linked to the 'divine' grants from papal authority and without the glimmer of divinity they appeared to be little more than unjust wars that the Indigenous peoples could contest). This problem with the doctrine of conquest was further complicated for the English as the continuity theory from the Norman conquest provided that the pre-existing legal and political structures survived conquest. The colonists' interest in land was different as they wanted to secure as much independence from the Crown as possible (i.e. they did not want to recognize conquest as their basis and this would leave them as vassals of the sovereign and this led them to argue for Aboriginal sovereign rights as then they could acquire title by purchase). This difference in priorities between the Empire and its colonists translated into constant tension and competing discourses on the question of the legal status of Indian lands. Robert Williams Jr. summarizes the competing discourses that were in place in the later 18th century prior to the *American War of Independence*: "The British Crown's discourse of empire asserted a Norman-derived royal prerogative right to control the disposition of Indian lands on the frontier in the Proclamation of 1763. Virginia and the other landed colonies asserted their controlling rights to the West on the basis of their Crown charters and the purer legal discourse of the natural-law-based Saxon Constitution realized by their colonies' governments. And finally, a large group of frontier speculators who cared for neither the Crown's nor the landed colonies' pretensions claimed that under natural law and natural right, the Indians themselves as sovereign princes of the soil they occupied could sell land to whomever they wished." See Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 287 [hereinafter Williams, *Discourses of Conquest*]. Williams summary does not cover the Lockean arguments for taking land, which can be seen in the *United States Declaration of Independence 1775* (i.e. Indians are characterized as "inhabitants of our frontiers" and "Savages whose known rule is warefare"). This offers a fourth line of argumentation whereby colonists can acquire rights in the land though their Anglo-Saxon allodial rights (viz. Lockean labour-derived rights), which were not extinguished by the Norman Conquest and the coming of royal prerogative. Chief Justice Marshall rejects these arguments in *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832), but it could well be argued that they are followed by President Jackson's Indian removal polices. I'd like to thank James Tully for drawing my attention to this important point. For an excellent summary of this conflict between the Crown and the settlers over the legal basis for land acquisition in North America see the chapter entitled "Conquest, Settlement, Purchase, and Concession: Justifying the English Occupation of the Americas" in Anthony Pagden, *The Burdens of Empire 1539 to the Present*, (Cambridge: Cambridge University Press, 2015) [hereinafter Pagden, *Burdens*].

[12] See United Kingdom, *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements)* (London, UK: William Ball, Aldine Chambers, Paternoster Row, 1837) at 117. This report is a reaction against the larger trend—which begins after the *War of 1812*—of devolving administrative responsibilities to local settler governments in order to reduce the costs associated with maintaining a network of military alliances that were no longer necessary. For a more extensive treatment of this trend see John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition." (Ottawa: Research paper prepared for the Royal Commission on Aboriginal Peoples, 1995) (hereinafter Giokas, *The Indian Act*). It is interesting that the normative force of this statement draws on a principle of natural justice

The Imperial Crown responded to this problem with the *Royal Proclamation of 1763* and a subsequent series of treaties that were designed to protect Indigenous peoples from the European settlers.[13] This translated into an administrative apparatus (the Indian Department, which was established in 1755 as an operational arm of the military) that was focused on supervision and separation.[14] Superintendents were appointed by the Imperial Crown to maintain military and trading alliances (by distributing gifts as symbols of alliance between the Imperial Crown and allied Aboriginal Nations[15]) and ensure that settlers were not encroaching on Aboriginal lands.

B) Imperial Civilizing

Following the British victory in the War of 1812 the military importance of their alliances with Aboriginal nations began to decline. This led the Colonial Office to begin to look for ways to reduce its costs by eliminating the system of gifts and annuities

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(viz. *Nemo judex in causa sua*). I say 'interesting' as this principle is mobilized despite the fact that Aboriginal peoples are clearly being judged by the laws of an occupying force in both cases (except, of course, in cases where a treaty concedes some jurisdiction, but even here there is the question of degree that leads to the problem of a conflict of laws). Neither the Imperial nor the Colonial governments could lay claim to neutrality in relation to Aboriginal peoples. This points to a long standing picture of Aboriginal sovereignty as being *lesser-than* or diminished in relation to European states. For more on this refer to Williams, *Discourses of Conquest*, *supra* note 11, Pagden, *Burdens*, *supra* note 11 and for the relationship with international law see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*. (Cambridge University Press: Cambridge, 2001) [hereinafter Anghie, *Imperialism*].

[13] This policy was by no means uniformly applied in North America. The Imperial authorities adopted a regional approach. As such, the Maritime Indian population never received the same protections as those in Upper and Lower Canada. For a more detailed analysis of what was occurring within the Maritimes see Robert Hamilton, "They Promised to Leave Us Some of Our Land": Aboriginal Title in Canada's Maritime Provinces (LLM Thesis, York University Osgoode Hall Law School, 2015) [unpublished] and Leslie F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979).

[14] Giokas, *The Indian Act*, *supra* note 12, at 16-19; Darlene Johnson, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44:1 UT Fac L Rev at 15 [hereinafter Johnson, *Six Nations*].

[15] Cary Miller provides some instructive insight into the significance of gifts among the Anishinaabeg in the early 19th century in her essay "Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 182-1832" (2002) 26: 2 Am Indian Q 221.

associated with the treaty system (a trend that has been referred to as "Imperial financial retrenchment"[16]). This, in turn, led to a general shift in policy away from a more lateral *nation-to-nation* relationship (a key characteristic of Imperial federalism) that supported the self-governing autonomy of Aboriginal nations towards the concept of civilizing. This concept was appealing from an economic perspective precisely because it promised to unify the body politic—by taking the settlers as the model of normality—and thereby place the responsibility for all citizens under the local colonial governments. This shift was further supported by the popularity of new "progressive" ideas (viz. Millian liberal imperialism that was in vogue in Imperial policy circles in the first half of the 19th century) amongst the new bureaucrats within the Indian Department itself as well as various missionary and humanitarian societies. By the 1820s the Imperial Colonial Office had begun to question the continued existence of the Indian Department. They initiated a number of inquiries to explore their policy options. The first of these was the Darling

[16] John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian Department*, (Ottawa: Treaties and Historical Research Centre, DIAND, 1985) at 10 [Hereinafter Leslie, *Commissions*]. Part of the rationale for this process of financial retrenchment was the drastic decline of the Indigenous population that occurred between 1780-1880. Smallpox was responsible for killing 80-90% of the Indigenous population during this period. This decline became a major factor in the policy shift as the once powerful and populous nations whose alliances had helped secure British dominance in the area were now drastically weakened. As this occurred the British policy shifted towards the kind of unilateralism that characterizes the civilizing and palliative models (here I am thinking of Bond Head's Manitoulin Island experiment). This decline was exacerbated by the British withholding the vaccine that was readily available to the settlers in this period, an action that were would refer to today as genocide. For more on this refer to James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2014); Shelley A. M. Gavigan, *Hunger Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905* (Vancouver: UBC Press, 2013); Robert Boyd, *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline Among the North-West Coast Indians* (Vancouver: UBC Press, 1999); and for sources that deal with the broader context of smallpox see Gareth Williams, *Angel of Death: The Story of Smallpox* (London: Palgrave MacMillian, 2010); Donald R Hopkins, *The Greatest Killer: Smallpox in History* (Chicago: University of Chicago Press, 2002); Elizabeth Fenn, *Pox Americana: The Great Smallpox Epidemic 1775-1782* (New York: Hill and Wang, 2001); Jonathan B. Tucker, *Scourge: The Once and Future Threat of Smallpox* (New York: Grove Press, 2001); Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (New York: Norton, 1999); and, David E. Stannard, *American Holocaust: The Conquest of the New World* (New York: Oxford University Press, 1994).

Report of 1828, which recommended a policy of effectively segregating the Aboriginal population on reserves that would be focused on converting them to Christianity and transforming them into farmers. This was by no means a new idea as similar types of reserves were a part of Indian policy in Québec from the mid-17th century.[17] This policy was approved in 1830 on the condition that it would not increase costs. Around this period the Indian Department was divided into two separate offices (one in each of the Canadas—only the office in Lower Canada remained under military supervision). This led to two separate policy initiatives being perused at the same time—Darling's civilizing reserves in Lower Canada and Bond Head's Manitoulin Island experiment (which, as we have previously noted, was driven by the extinction thesis and took the form of a kind of palliative care) in Upper Canada. By the late 1830s it was clear that both of these approaches had failed. But, the bulk of the criticism was focused on the approach taken by Bond Head. The general civilizing approach of the Darling Report was continued.[18] This can be seen in the passing of the *Crown Lands Protection Act* in Upper Canada in 1839.[19] This act classified all lands that were "appropriated for the residence of certain Indian Tribes" as Crown lands.[20] This move positioned the Crown as the formal guardian

[17] The first of these was created at Sillery in 1637 so that "Indians could be taught the Catholic catechism, farming techniques and other useful trades…" See Giokas, *The Indian Act*, *supra* note 12, at 20.

[18] This policy is clearly outlined in a communication from the Colonial secretary (Lord Glenelg) to the Governor General and Lt. Governor of Upper Canada: ""Wandering Indians" were to be settled on land: those who were settled had to become farmers. Indians were to be given a sense of permanency on their improved lands, with the title to their reserve locations assured under the great Seal of the province. As well, reserve land would be protected from creditors and would be alienable only with the consent of the Governor General, principal Chief, and resident missionary. Since Indian education was also a basic aspect of Indian civilization every encouragement was to be given to missionaries and instructors were to be issued to Indian department officials to cooperate with them." See Giokas, *The Indian Act*, *supra* note 12, at 21.

[19] *An Act for the Protection of Lands of the Crown in this Province from Trespass and Injury* R.S.U.C. 1792-1840 (1839, c. 15).

[20] *Ibid.*

of Indian lands, which, in turn, served to further the ends of civilizing policy by maintaining the necessary degree of separation and supervision.

The slow progress of the civilizing project—which, was due primarily to Aboriginal resistance to policies that were aimed at destroying their entire form of life—led to a number of inquiries. By far the most influential of these during this period was the Bagot Commission of 1844. The Commission conducted a systemic review of the cost effectiveness and efficiency of Indian policy. In its final report it made a number of far reaching recommendations that prefigure the colonial policies that followed it—some of which are still in operation today (e.g. the centralization and eventual phasing out of Indian Department; the transition from Indian title towards freehold title in order to encourage assimilation[21]; and the establishment of a register of Indians—via a complete census— that could be used to establish band lists that could be used to restrict the costs of annuities and gifts[22]). This recommendation was taken up—at least in part— by the Colonial legislatures in the *Indian Land Acts* of 1850, which were designed to *protect*

[21] This was a precursor to how the Federal Crown would respond to the Métis peoples in the *Manitoba Act*. See *An Act to amend and continue the Act 32 and 33 Victoria chapter 3 and to establish and provide for the Government of the Province of Manitoba* (Assented to 12th May, 1870). As a side note, it is clear that the origins of Métis land rights are distinct from Aboriginal title by *design* and thus treating it as some sort of essential feature of Métis land interests is deeply problematic. In my mind the Court's treatment of this issue in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at paras. 51-59 highlight this problem. The presumption is that Métis land interests are individual and not communal in nature, but this stems from the civilizing policies of the Imperial Crown and the Dominion. The argument this simply shifts to "historic use and occupation", which is part of a general pattern of originalism in the case law that, as John Borrows has argued, "…should be diminished in Aboriginal rights cases. This is because Aboriginal agency is severely restricted when the Court interprets rights through the prism of unilateral Crown actions." See Borrows, *Indigenous Constitutionalism*, *supra* note 10, at 144.

[22] This last recommendation was by far the most prescient as it contains the seeds of both the status and the band council system. It also recommended that the following classes of persons be ineligible to be listed as Indians: Indian women who married white men, mixed children, and Indian children educated in industrial schools.

reserve lands by restricting who could access them.[23] They did this by—for the first time in Canadian law—legally defining the term "Indian" for the purpose of determining eligibility to reside on reserve lands. Thus two of the most basic elements of the crown machinery (viz. the *unilateral* determination of membership and land use) were set in place by the Colonial legislatures seventeen years before confederation.

C) Assimilation and Indirect Rule

The civilizing policies that were directed by the Colonial Office in London (as well as the India and Foreign Offices) led to a series of intense colonial rebellions of the 1840s and 1860s (*Upper Canada Rebellion* in 1837, Ireland in 1848, India in 1857, and Jamaica in 1865). This—as I have previously detailed—led the Imperial Crown to move away from the civilizing model towards the *indirect rule* model advanced by Henry Maine, which promised to minimize administrative costs and maximize the extraction of revenue. In the case of British North America this trend can be seen in the growing concern with the costs of maintaining the Indian Department. In 1856 the Pennefather Commission was established and instructed to report on two points:

1. As to the best means of securing the future progress and civilization of the Indian tribes in Canada.
2. As to the best mode of so managing the Indian property as to secure its full benefit to the Indians, without impeding the settlement of the country. [24]

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[23] *An Act for the better protection of the Lands and Property of the Indians of Lower Canada.* S. Prov. C. 1850, c. 42; *An Act for the protection of the Indians in Upper Canada from the imposition, and the Property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850, c. 74.

[24] *The Historical Development of the Indian Act*, Edited by John Leslie and Ron Maguire, (Ottawa: Treaties and Historical Research Centre, DIAND, 2nd ed. 1978) at 28 [hereinafter *Historical Development*].

In 1858 they offered their opinion on the general state of the Imperial Government's Indian policy:

> The position in which the Imperial Government stands with regard to the Indians of Canada, has changed very materially within the last fifteen years. The alteration, however, is rather the working out of a system of policy previously determined on, than any adoption of new views on the part of the English Cabinet.
>
> As the object of this system was gradually to wean the Indians from perpetual dependence upon the Crown, successive years show an increasing loosening of the ties to which the Aborigines clung. Many of the officers appointed to watch over their interests were removed, vacancies were not filled up, the annual presents were first commuted, and subsequently withdrawn and the Indian Department is being gradually left to its own resources.[25]

The Commissioners noted that while the Manitoulin Island experiment was "practically a failure," but they remained optimistic about the overall project of civilizing and assimilating the Indians.[26] They blamed the slow progress of the project on the "apathy" and "unsettled habits" of the Indians, but that overall they maintained that there was "…no inherent defect in the organization of the Indians, which disqualifies them from being reclaimed from their savage state."[27] The final recommendations of the commission were directed to the complete assimilation of Indians (foreshadowing the termination policies that were later pursued by both United States and Canada). Their recommendations included: moving from communal reserves to allotting lands to individuals (also a recommendation of the Bagot Commission in 1844); combining the smaller reserves into larger units; consolidating Indian legislation; dismantling the tribal

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[25] *Ibid.*

[26] *Ibid.*

[27] Leslie, *Commissions, supra* note 16, at 138; *Historical Development, supra* note 24, at 29.

governance structures and, once the civilizing process was complete, abolishing the Indian Department itself.[28] From the Imperial standpoint the primary benefit of assimilation was that it promised to eliminate the costs associated with the Imperial Federal model by producing a uniform body politic of British subjects (with a single land code) within the colony. But, assimilation was not the *only* way to achieve these ends. Indirect rule—which, in the context of settler colonies means transferring jurisdiction to the colonial governments thereby creating Dominions—also offered the Imperial Crown a way to step away from its legal and economic obligations to Aboriginal nations.

The recommendations of the Pennefather Commission were quickly translated into Imperial Indian policy as in the practice of distributing treaty presents (symbols of the *nation-to-nation* relationship between the Imperial Crown and Aboriginal nations) ended in 1858. The *Indian Lands Act* of 1860 formally ended the era of Imperial federalism as it transferred authority for Indians and Indian lands to the Colonial legislature.[29] This act fundamentally reconfigured the relationship between the Crown and Aboriginal nations. This transfer of jurisdiction is where the *indirect rule* model fits into the policy landscape of the mid-19th century. The Imperial Crown *unilaterally* transferred its responsibilities to Aboriginal nations to the Colonial legislature—thereby stepping out of the tripartite Imperial federal system that was set in place by the *Royal Proclamation of 1763.* From this point forward the administration of Indian policy cannot be described as either disinterested or neutral—assimilation will continue, but it will be carried out by the emerging Dominion. [30]

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[28] Giokas, *The Indian Act, supra* note 12, at 27.

[29] *An Act respecting the Management of Indian Lands and Property*, S.C. 1860, c. 151, s.4.

[30] Milloy, *Historical Overview, supra* note 9, at 59.

The Colonial legislature was more than ready to assume these responsibilities. In fact, it had further advanced its encroachment on Indian policy before the Pennefather Commission even issued its report in 1858. With the passage of the *Gradual Civilization Act* in 1857 it signaled that it would continue to follow the line of civilizing policy—the line that connects the Darling Report to the Bagot and Pennefather Comissions—towards total assimilation of Indians and the absorption of their lands. While it did continue the overall trajectory of Imperial civilizing policies it also exhibited a number of innovations in key policy areas.

1. *Lands*: In a stark departure from the procedures set up in the *Royal Proclamation of 1763* the Act allowed for the *unilateral* reduction of reserve lands without a formal public surrender or compensation.[31]
2. *Political Form*: Whereas previous civilizing policies had largely attempted to respect Aboriginal political autonomy (or at least not directly oppose it), the process of civilizing that the acts put forward is, again, *unilateral* in nature. The strategy of "enfranchisement" by-passes the need for the consent of tribal councils, which had been increasingly resistant to civilizing policies. Aboriginal nations were keenly aware of this shift and immediately called for the repeal of the *Gradual Civilization Act*. The Colonial legislature refused and instead passed the *Gradual Enfranchisement Act* in 1868, which marked the first attempt to uproot the traditional political systems of Aboriginal nations and replace them with "simple municipal institutions" that would serve to prepare them for

[31] This served as a precedent for provisions in later versions of the *Indian Act* that allowed for the expropriation and leasing of reserve lands without band consent. Giokas, *The Indian Act, supra* note 12, at 29.

"responsible government."[32] As Giokas rightly notes, "…these measures were clearly seen by the government as a way of bringing recalcitrant traditional Indian governments to heel by seeing to their elimination or control."[33] The resulting conflict set an adversarial tone that characterizes Crown-Aboriginal relations to this day.[34]

3. *Membership*: This legislation extended the Colonial Legislatures power—which originated in Lower Canada's *Indian Land Act* of 1850— to determine who was to be considered an "Indian". It reinforced the sexism present in previous legislation by making it so the enfranchisement of a man automatically entailed the enfranchisement of his wife and children.

These innovations serve as indicators of the distinction between the interests of the Imperial Crown and that of the local settler governments. They are all extensions of preexisting Imperial policies—which, stem from the cost-cutting imperatives that followed the War of 1812—but, they also all move beyond the confines of their predecessors by making these polices *unilateral*. Some vestiges of the more lateral *nation-to-nation* relationship remained in play beyond the mid-19th century (e.g. the continuation of the treaty making process, the centralization of the responsibility for Indian affairs with the Federal Crown, the unique communal quality of Aboriginal title

[32] "Annual Report of the Indian Branch of the Department of the Secretary of State for the Provinces" in Canada, Sessional Papers, No. 23 (1871) at 4. Cited in Giokas, *The Indian Act, supra* note 12, at 33; *Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6. (hereinafter the *Gradual Enfranchisement Act*).

[33] Giokas, *The Indian Act, supra* note 12, at 33.

[34] *Ibid,* at 30.

etc.), but these were also conceived from the position of an unquestioned sovereign power that looked on Aboriginal nations as a "mere burden".[35]

D) Striation or Continuity?

There are commonalities between the Indian policy of the Imperial Crown and the colonial governments. Generally speaking, the principles of protection, supervision and separation extend throughout the various strata of Indian policy in the 19th century (and persist today), but they are directed towards new ends. One way of thinking of this shift is to return to the machine/assemblage analogy and think of these principles as engine components that can be placed in a different configuration in order to achieve different outcomes. For example, the protective component of Indian policy extends from its basis in the 18th century to today. It has been deployed to support the pernicious 'trust like' relationship that presented the Crown as the guardian of Indian wards (avoiding the issue of consent via a paternalistic conception of best interests). There is not a single clear distinguishing mark that allows us to strictly determine the difference between Imperial Indian policy and the policies put forward by colonial governments. Rather, there is a series of distinctions, shifts in emphasis and changes of degree that, when taken together, transform the overall shape of policy. The system that begins to take shape from the *Indian Land Acts* of the 1850s through the *Gradual Civilization Act* in 1857, is given form by the *British North America Act, 1867* (in particular through the ambiguity of s. 91(24) and its grant of power *in relation to* Indians and their lands) and continues to expand with the *Gradual Enfranchisement Act* of 1869 and the first *Indian Act* in 1876 is

[35] These are Lord Watson's words in *St. Catherine's Milling, supra* note 8, at 58.

distinct from what preceded it.[36] This accumulation of similarities and differences follows a general shift away from a political relation that held *power-with* Aboriginal nations (a relation that—no matter its selfish motivations or racketeering like its tactics—*relied* on their consent) towards the despotic *power-over* system that eventually gives shape to the *Indian Act.*

In my opinion these differences stem (at least in part) from the difference of scale in the respective viewpoints of the British Empire and its colonies. That is, Imperial policies are driven by a concern with minimizing the costs of governing several colonies. This scale of focus leads them to view resistance and conflict somewhat differently. Imperial federalism can be seen as an expression of this difference. Even following the War of 1812—as it is dismantling Imperial federalism and transferring its responsibilities to the local colonial governments—the Imperial Crown is focused on lowering costs by minimizing conflict. The colonial governments, on the other hand, have a direct and pressing concern with the *acquisition of land*. This is precisely why the court in the *United States v Kagama* held that "…the people of the States where they are found are often their deadliest enemies."[37] This focus on land acquisition necessarily entails an increase in resistance from Aboriginal nations and so—as it is no longer possible to gain their consent—the favored model of governance becomes *unilateral.* The parallels between this and J. S. Mill's liberal imperialism are strong. The unilateral *power-over* relationship that takes shape with *the Indian Act* in 1876 is explained and justified by the

[36] For more on the significance of section 91 being a set of powers that are "*in relation to*"—i.e. there is no textual basis to assume that s. 91(24) confers plenary *power-over* Indians and their lands—matters not assigned exclusively to provincial legislatures see John Borrows, "Unextinguished: Rights and the Indian Act" (unpublished) at 11.

[37] *Kagama, supra* note 11, at 383.

civilized/uncivilized distinction. Mill's philosophy of history seems to offer a viewpoint that is perfectly suited to the ends of colonial governments. He offers a ladder that allows the settlers to survey the vast expanses of time and geography that exist under the name British North America and see nothing more than a "…handful of individuals, wandering or thinly scattered over a vast tract of country".[38] This philosophical viewpoint provides a key part of the explanatory background for the administrative despotism that characterizes Indian policy from the mid-19th century on. The problem is that once this ladder is climbed it disappears. It provides an exception from the normal conditions of morality and it connects the actions it justifies to a future state. The legitimacy of this "temporary despotism" is tied to the progressive civilization of those who are deemed to be savages. But, it leads to a paradox. As John Tobias notes concerning the *Gradual Civilization Act*,

> The paradox that was to become and remain a characteristic of Canada's Indian policy was given a firm foundation in this act…Thus, the legislation to remove all legal distinctions between Indians and Euro-Canadians actually established them. In fact, it set standards for acceptance that many, if not most, white colonials could not meet, for few of them were literate, free of debt, and of high moral character. The 'civilized' Indian would have to be more 'civilized' than the Euro-Canadian.[39]

The policies that are designed to remove all distinctions between the civilized and uncivilized actually establish and maintain them—this is precisely because they are all based in a view from nowhere. Mill's universal history is unable to distinguish between

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[38] John Stuart Mill, "Civilization" in *Collected Works of John Stuart Mill Volume XVIII*. Edited by J. M. Robson. (Toronto: University of Toronto Press, 1977) at 119.

[39] John L. Tobias, "Protections, Civilization, Assimilation: An Outline History of Canada's Indian Policy" *in Sweet Promises: A Reader on Indian-White Relations in Canada*, Edited by J. R. Miller (Toronto: University of Toronto Press, 1991) at 130 [hereinafter *Tobias*].

the map and the territory and any policy framework that bases itself on it is left tilting windmills and hunting snarks. Without this madness what once seemed to be historical necessity is seen for what it always was, *the arbitrary assertion of sovereign power*. Nevertheless, we must remember that the various components of the crown-machine retain the possibility of being reconfigured for different ends. Even during its initial phase of construction nothing was necessary; its design was haphazard, open to constant change and is layered with possibilities for reconfiguration.[40]

The Indian Question and the Dominion

The Dominion is formed with the *British North America Act, 1867* and the Indian question is a primary component of its policy agenda. This was due, in large part, to the rapid territorial expansion of Canada. It acquired Rupert's Land and the North-Western Territory from the Hudson's Bay Company in 1870—a process that also led to the creation of the province of Manitoba. This transfer led to Métis resistance (led by Louis Riel in the Red River colony) and the unhappy history of the *Manitoba Act* and Métis scrip lands.[41] This was quickly followed by the addition of British Columbia in 1871.

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[40] One of these possibilities stems from the protective component of the crown-machine. As John Borrows puts it, "…the law in North America developed to ensure that local governments had substantial obstacles placed in their path in dealing with First Nations. The *Royal Proclamation* and 250 years of Canadian law, as affirmed in subsection 91(24) of the *Constitution Act, 1867*, interposed a more distant imperial or federal power between First Nations and colonial/state/local/provincial governments." See John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 736 (hereinafter Borrows, *Durability*). Borrows contrasts this 250-year-old constitutional principle—which he, following Brian Slattery, refers to as *The Aboriginal Constitution*—with the more recent 140-year-old principle of unilateral Crown dominance, which he refers to as Canada's Colonial Constitution. See John Borrows, *Canada's Colonial Constitution* (Paper delivered at the Faculty of Law, University of British Columbia, 19 January 2016), [unpublished] and Brian Slattery, "The Aboriginal Constitution" (2015) 67 SCLR (2d) 319. See also Pagden, *Burdens*, *supra* note 11, at 144-147 as he contextualizes the protective component of the Proclamation in relation to the colonists' desires to distance themselves from the reach of the sovereign authority of the Crown (i.e. the question of the nature of Aboriginal rights becomes entangled in this struggle between the British Crown and the colonists).

[41] *Manitoba Act*, *supra* note 21.

These acquisitions led to a concern with governing—and preventing possible U.S. encroachment on—the sparsely settled and vast geographic expanse of its new western frontiers.[42] The solution was a national policy that focused on the construction of a transcontinental railway and the promotion of western settlement.[43] This project necessitated securing of vast tracts of lands from a diverse set of Aboriginal nations. The importance of the Indian question can be clearly seen in the legislation from this period.

In 1868 Parliament passed an act that gave the Secretary of State the role of Superintendent-General of Indian Affairs and control over the management of Indian lands, property and all of their funds as well as all Crown lands across the Dominion. [44] This was the first national legislation that addressed the Indian question. It effectively consolidated much of the previous legislation concerning Indian lands that had been passed by the colonial legislatures in the decade preceding confederation—continuing the "guardianship policy"—and extended it throughout the Dominion. It also finalized the definition of the term "Indian" on a patrilineal model (i.e. it excluded non-Indian men who married Indian women, but included non-Indian women who married Indian men). This was quickly followed by the passage of the *Gradual Enfranchisement Act* in 1869, which marked the formal implementation of assimilation as the guiding principle of

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[42] This sense of urgency was further exacerbated by the gradual withdrawal of the British from their commitments in the North American colonies see Carl Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism 1867-1914* (Toronto: University of Toronto Press, 1970) at 60-66 [hereinafter Berger, *Sense of Power*].

[43] Eden and Molot refer to this era of national policy—which, in their opinion, is the first of three discernable policies and extends from confederation in 1867 to 1940—as "defensive expansionism". The third component of this policy the protectionist tariffs introduced by the Macdonald government in 1878. See Lorraine Eden and Maureen Appel Molot, "Canada's National Policies: Reflections on 125 Years" (1993) 19(3) Can Pub Pol'y 232-251.

[44] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of and Ordnance Lands*. (31 Vic, cap. 42), 22 May 1868.

Indian policy in Canada. The general purpose of this legislation is clearly summarized in an official government report issued in 1871:

> The Acts framed in the years 1868 and 1869, relating to Indian affairs, were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage as a Council, local matters – that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs…Thus establishing a responsible, for an irresponsible system, this provision, by law was designed to pave the way to the establishment of simple municipal institutions.[45]

The use of the phrase "pave the way" (with its connotations of covering over and flattening out) is particularly revealing. It had become clear that the failure of pre-confederation attempts at assimilation was due, in large part, to the resistance of traditional Indigenous governments. These legislative measures provided the means to remove that resistance by redefining the traditional governments as "irresponsible systems." It is from this point forward that federal control of on-reserve governmental

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[45] "Annual Report of the Indian Branch of the Department of the Secretary of State for the Provinces" in Canada, *Sessional Papers*, No. 23 (1871) at 4. Cited in Giokas, *The Indian Act, supra* note 12, at 33. The use of "responsible government" as a premise for legitimating the unilateral displacement of the traditional systems of government used by Aboriginal nations is a particularly interesting use of rhetoric in this context. For the first half of the 19th century the colonists had been locked in a struggle between their elected assemblies and the unelected executives. As Jeremy Webber puts it, the struggle was a Canadian variation of "…the long contest between king and parliament." Responsible government was (understandably) the primary objective of the colonists. Their aim was to ensure that the governments of each colony was answerable to the citizens that elected it and not the Imperial Crown. The shift to applying this argumentative framework to Aboriginal nations is fundamentally at odds with the principles of this aim. Within this frame the traditional governments are being presented as "irresponsible" in the same manner that the British Monarch is. This supplies the premise for their removal, but the impetus does not come from those who live under this "irresponsible system". Rather, it comes from the colonists. This is the addition that contradicts the fundamental premise of the call for responsible government (with its connotations of democratic equality). For this to make sense it must be the case that the Aboriginal people are not able to make their own decisions—the must lack the capacity for reason. The civilized/uncivilized and ward/guardian argument sits here as a hidden premise. Without it this is simply a repetition of the same imperialistic system of governance that the colonists had rallied against. Only this time the Indian Agent would assume the role of the imperial executive and both the conditions of membership and system of governance would be arbitrarily imposed. See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis*, (Portland: Hart Publishing, 2015) at 14-20.

systems becomes, as John Milloy aptly phrases it, "…the essence of Canadian-Indian constitutional relations."[46]

The difficulty, to my mind, is in determining exactly where this "essence" is derived from—viz. what is the basis of authority and legitimacy for this extraordinary *power-over* Aboriginal nations. This is by no means a simple task. Nor is it one that starts from the premise that this essence is hidden from us (i.e. that it is, as Wittgenstein puts it, "…something that lies *beneath* the surface").[47] Rather, the difficulty is that what we are trying to understand is something that is "already in plain view".[48] What obscures it is a particular picture of federalism and the constitutional order of Canada. In this picture Aboriginal nations are presented as being paradoxically *entirely within* and yet, somehow *outside of* the normal constitutional order (i.e. lacking the rights of British subjects). This plenary or *power-over* interpretation of s. 91(24) has left Aboriginal nations subject to the power of Parliament to an entirely undetermined degree—so much so that the courts are left with the unenviable (if not entirely impossible) task of determining exactly how this plenary *power-over* Indians and their lands fits within the division of powers in sections 91 and 92. In order for this picture to make sense, Aboriginal nations are re-defined by the Dominion as "Indians" who *by their very nature* lack the capacity to either own land (they can merely *occupy* it—hence Lord Watson's definition of Indian title as "personal and usufructuary right, dependent upon the good will of the Sovereign"[49]) or to govern

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[46] John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in *Sweet Promises: A Reader on Indian-White Relations in Canada*, Edited by J. R. Miller (Toronto: University of Toronto Press, 1991) at 145.

[47] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §92.

[48] *Ibid*, at §89.

[49] *St. Catherine's Milling*, *supra* note 8, at 54-55.

themselves. The foundation of all of this is, like any other despotism, built upon a magical circle of legal fictions (e.g. discovery, *terra nullius*, divine right, etc.), which is vulnerable to the simplest question of legitimacy or, to borrow Kant's phrasing, *historical warrant*: viz. "what gives you the right"? The only available response to this question, aside from the obscure non-responses supplied by legal fiction, is *the right of the strongest*. It is this baseless basis that has been inflated into appearing as if it was all that is "great and important" in the constitutional history of Canada, but, as soon as we rearrange the picture, and see it from another angle, we see "nothing but a house of cards".[50]

In 1874 federal legislation extended the existing Indian legislation (and broadened the laws relating to alcohol) to the western frontier.[51] This was quickly followed in 1876 by the consolidation of all laws relating to Indians into the first *Indian Act*. This firmly established the direction of Indian policy of the newly formed Dominion. As Leslie and Maguire note, it "created a framework of Indian legislation that remains fundamentally intact today."[52] This framework expanded on the basic formula of the *Gradual Enfranchisement Act* by extending Parliamentary control over political structures,

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[50] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §118. There may well be some who would disagree with my claim that the right of the strongest cannot form a legitimate basis for the state. They would likely respond to this by invoking the spirit of Hobbes (or indeed the tradition that stretches from Thrasymachus, Machiavelli, Bodin, Schmitt, etc.) and maintain that the right of the strongest is the only possible foundation for political association. I do not agree with this position—as should be rather obvious by this point—but I also do not take it lightly. Each of the members of this tradition require sustained critical engagement and have much to teach us. In lieu of my own response to the Hobbesian viewpoint I would refer any reader drawn to this position—or curious about it—to Quentin Skinner's exemplary scholarship. In particular, *Hobbes and Republican Liberty* (Cambridge; Cambridge University Press, 2008) and *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998).

[51] *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*. S.C. 1874, c. 21. This law made it a punishable offense for an Indian to be found "in a state of intoxication" and refusing to name the supplier.

[52] *Historical Development*, *supra* note 24, at 60.

membership and lands.[53] Like the *Gradual Enfranchisement Act* that preceded it the *Indian Act* was, as Milloy notes, designed to ensure "…that Indians would lose control of every aspect of their corporate existence."[54] The founding principle of this policy was clearly articulated in the 1876 Annual Report to the Department of the Interior:

> …our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. The soundness of this principle I cannot admit. On the contrary, I am firmly persuaded that the true interests of the aborigines and of the State alike require that every effort should be made to aid the red man in lifting himself out of this condition of tutelage and dependence, and that it is clearly our wisdom and our duty, through education and other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[55]

The legal basis of this entire framework is the *power-over* interpretation of s. 91(24); this is where the *Indian Act* derives its authority and its claim to legitimacy. It is this unlimited *power-over* Indians and their lands that enabled Parliament to fashion the machinery that was needed to complete the unfinished policies of civilization that it had inherited from its colonial predecessors. The structural tension in this machinery is clear; the general principle of Indian legislation, its very foundation, is *unsound*. This is, to my mind, the key characteristic of this legislation and settler-colonialism in general. By admitting that the foundation is *unsound* it can continue forward; the crown-machine was designed as a "temporary despotism."[56] Without this temporal bracketing the reassuring

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[53] Leslie and Maguire maintain that the three principle areas of concern in the *Indian Act* are "…lands, membership, and local government." See *Historical Development, supra* note 24, at 51.

[54] Milloy, *Historical Overview, supra* note 9, at 99.

[55] "Annual Report to the Department of the Interior" in Canada, *Sessional Papers*, No. 9 (1876) cited in Giokas, *The Indian Act, supra* note 12, at 36-37.

[56] Consider Mill's account of the destiny of the East Indian Company in J. S. Mill, *On Liberty and Considerations on Representative Government.* Edited by R. B. McCallum (Basil Blackwell: Oxford, 1948) at 324 [hereinafter Mill, *On Liberty*]. It is as if by admitting that the principle of inequality is unsound that it is suddenly immunized to the moral force of the contestations of those that are subjected to it. It reverses the onus of the question of legitimacy (viz. "what gives you the right?) by admitting that what is being done is

developmental analogy of children and pedagogy would dissolve and leave only the static position of the slave and the *idée fixe* of divine right.[57] Thus, in order to retain a claim to universal legitimacy this principle can only serve as an interim measure to the ultimate goal of unifying the body politic (much like the concept of the state of emergency, which suspends the operation of the normal constitutional order in order to 'save' it).

The *Indian Act* was not uniformly applied across the Dominion.[58] Rather, it was applied on a more regional basis in relation to how "developed" or "advanced" the Indians were determined to be. It specifically excluded the western bands from many provisions; including those relating to enfranchisement and the election system for band councils.[59] Those bands who were not included in the Act itself were by no means free of

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normally wrong, but is necessary due to the nature of the subject (i.e. savages, criminals, children, women, terrorists, etc.). This move is only successful as long as those who employ it remain committed to a view from nowhere—as it is only this that can provide the absolute universal developmental hierarchy that enables them to determine the 'true' position of the subject and assign the appropriate treatment.

[57] When I refer to the master/slave relationship as 'static' I am simply referring to its design (i.e. ideally the relationship would be a permanent and stable asymmetry between the parties). Naturally, the practical realities of this relationship are—as Hegel and Marx famously illustrated—dialectical, or, to remove the heavy presumptions that accompany that term, agonistic. My point here is a limited one: the guardian/ward relation is *different* than the master/slave relation and I am employing it as an object of comparison so that we can see the guardian/ward relationship from a different angle (i.e. more clearly than the shallow historical moralism of good but misguided intentions). The difference is that the relationship is designed to be impermanent; it is just a transitional phase towards an ultimate state of equality. This serves to provide those who assume the mantle of guardianship with a kind of self-sealing moral position. They have a ready-made and self-issued response to the question of legitimacy; the moral obligation they assume magically pays all debts in advance via promissory notes (i.e. what Rudyard Kipling referred to in 1899 as the White Man's Burden). As soon as they are challenged for their unilateral and arbitrary assertion of *power-over* those they deem to be wards they acknowledge that the system is despotic and so normally illegitimate, but it is excepted from this standard because it is merely the temporary means to the greater good. This entire game is predicated on the ability to make the determination of who is civilized and who is uncivilized (as well as on the very significance of these categories). Its claim to legitimacy rests on a model of universal history that—like the last judgment—requires the absolute certainly that only a view from nowhere can provide. When this relationship collapses its great and important institutions suddenly fall like houses of cards or "…buildings, leaving behind only bits of stone and rubble", because the ground on which they stood was not the divine ordination but human language. Wittgenstein, *Philosophical Investigations, supra* note 1, at §118.

[58] As Prime Minister Alexander Mackenzie put it in 1876, the "wild nomad of the North-West" could not be judged by the same standards as "the Indian of Ontario." See *Historical Development, supra* note 24, at 81.

[59] *Indian Act* S.C. 1876, c. 18, s. 94 [hereinafter *Indian Act 1876*].

the administrative controls of the Dominion. The Act included any "…tribe, band or body of Indians" whether or not they had entered into treaty relations with the Crown.[60] Indian agents supervised elections and could either appoint the council (as was often the case on the prairies) or allow the customary process to occur (a practice more common in British Columbia).[61] In either case the three-year term limit was often enforced no matter if it legally applied to the band in question or not. The so-called advanced tribes of central Canada—those who were supposed to be the beneficiaries of the enfranchisement and elective system—rejected it.[62] As Tobias notes,

> …they knew that the superintendent general would have not only supervisory and veto power over band decisions, but also, according to the provisions of the act, he could force the band council to concern itself with issues with which it did not wish to deal.[63]

The band councils themselves were, by design, little more than nominal governments (or puppets) under the effective control of the Dominion. This is clearly demonstrated by the sheer number of discretionary powers that the Act confers on the superintendent general.[64] For a more specific example we can simply refer to the limited measure of jurisdiction the band councils had on reserve lands. Initially band councils were granted the power to make by-laws, but they were given no means of enforcing them.[65] In 1879 they were granted the power to enforce their by-laws, by imposing a fine ($30) or a jail

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[60] *Ibid,* at s.1-2. Those who had not entered into treaty relations and did not have reserve lands were defined as "irregular bands". This is a clear indication of the nature of the presumption of Crown sovereignty that was in play; consent was simply not a requirement.

[61] Giokas, *The Indian Act, supra* note 12, at 39.

[62] Only one band is known to have adopted the system during this period see Giokas, *The Indian Act, supra* note 12, at 39.

[63] *Tobias, supra* note 39, at 133.

[64] The term "superintendent-general" occurs 86 times over the 100 provisions that make up the first *Indian Act.*

[65] *Indian Act 1876, supra* note 57, at s. 63.

term (30 days) for violations, but the provision for a hearing was not added until 1880.[66] These provisions established a procedure that required a justice of the peace, which meant that proceedings for on reserve by-law violations had to be held in the settler towns. This oversight was amended in 1881 when officers of the Indian department were granted the power to act as *ex officio* justices of the peace on reserve lands.[67] This did not serve to increase the jurisdiction of the band council. Rather, it radically increased the powers of the Department of Indian Affairs and its Indian agents to enforce their own civilizing regulations (a vague and continually shifting set of regulations targeting moral character). It allowed a single administrative apparatus (indeed, in many cases the very same individual) to have the ability to act as both the police and the judiciary. This clearly violated the basic principles of criminal law and procedural fairness, but nevertheless the amendments that followed reinforced this structural arrangement.[68] In 1882 Indian agents were granted the same enforcement powers accorded to the police and in 1884 an amendment granted them authority over any and all matters "affecting Indians" as well as the discretion to conduct their trials wherever they deemed conditions

[66] *Indian Act* S.C. 1879, c. 34, s. 4; *Indian Act* S.C. 1880, c. 28, s. 74. Incidentally the 1880 amendments also included new provisions (viz. ss.70-72) that significantly reduced the autonomy of band councils by giving the Governor in Council sole discretionary powers over the proceeds from the sale of Indian lands and resources (a power that has remained in place ever since).

[67] *Indian Act* S.C. 1881, c. 17, s. 12.

[68] I am referring to the related principles of judicial independence and *Nemo judex in causa sua*, which have a distinctive twist in this context given that Aboriginal peoples were formally excluded from the legislative process. This fact was by no means lost on those who were operating within this system at the time. In fact, the North-West Mounted Police (a police force created in 1873—and modeled on the paramilitary *Royal Irish Constabulary*—to respond to fears of U.S. expansion and Aboriginal resistance) repeatedly expressed concerns about the legality of the pass system and the restrictions on ceremonial dances. The gist of the concern was that if these practices were challenged in court and found to be illegal it would bring the administration of justice into disrepute. See Titley, *A Narrow Vision, supra* note 3, at 165-168; F. Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935", (1988) 13:1 *Prairie Forum.*

to be "…conducive to the ends of justice."[69] This seemingly unlimited grant of jurisdiction was—at least formally—limited to the bounds of the *Indian Act* by the introduction of the *Criminal Code* in 1886, but this limitation was practically negated by the continued expansion of the civilizing regulations within the *Indian Act* via an *ad hoc* series of amendments.[70] These regulations covered practically every facet of daily life both on and off of the reserves and included the infamous prohibitions on ceremonial practices and the pass system.

This process of continual administrative encroachment was by no means uncontested. Rather, its expansion is directly correlated to Aboriginal practices of resistance and the general context of the Dominion during this period. The initial stages of the Dominion's expansion were fraught with anxieties. The British had been redefining their model of Imperial administration following from the War of 1812 (as we have previously detailed) and by the time of the *British North America Act, 1867* the measured distance of indirect rule was in place. This brought with it a fear of Imperial abandonment. The English speaking population—which, had previously been concentrated in Upper Canada, the Maritime colonies and scattering of Hudson Bay Company outposts—were keenly aware of the growing power and instability of their southern neighbor.[71] The fear of annexation formed one of the primary motivations for the western expansion of the Dominion. In addition, the question of western expansion added to the long standing conflict between the English and French colonists. In this context Aboriginal resistance was seen as a distinct and pressing threat. The Red River

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[69] *Indian Act* S. C. 1882, c. 30, s.3; *Indian Act* S.C. 1884, c.27, s.22-23.

[70] *Criminal Code* R.S.C. 1886, c. 43, s. 117.

[71] See the chapter entitled "Critique of the Republic" in Berger's *Sense of Power*, *supra* note 42.

War—and indeed, the North-West War later on in 1885—was seen through a lens colored by the both the external loyalist/republican distinction and the internal English/French divisions.[72] This can be seen in both the militaristic responses during the rebellions and in the overall changes that take place in Indian administrative policy during this period. The pass system—an informal administrative policy that was intended to control the movement of Indians—was introduced during the North-West Rebellion in 1885.[73] This was accompanied by the legal suppression of ceremonial practices (e.g. the sun dance of the Blackfoot, thirst dance of the Cree and a vast array of other dances and gift-giving practices), which were seen as a potential threat.[74] These repressive techniques or mechanisms were not extraordinary measures within Indian policy; they were a natural extension of it.

The main structural lines of Indian policy were set by the first *Indian Act* in 1876. The administrative apparatus that it generated was, from the outset, focused on the

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[72] The usual reference to these events is to term them "rebellions" but this presumes the very authority that was being contested here. I would like to thank Larry Chartrand for highlighting this point. Further, this lens is clearly evidenced by the anti-francophone legislation passed in Manitoba in 1890 viz. the *Public Schools Act*, S.M. 1890, c. 38 and *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*, S.M. 1890, c. 14. This trend was by no means confined to the provincial boundaries of Manitoba as the Northwest Territories also removed French as an official language in 1892 (this trend continued as Alberta and Saskatchewan followed suit in 1905). This combined with the execution of Riel in 1885 served to strengthen the developing sense of French nationalism in Quebec during the late 19th century.

[73] The pass system was studied by a commission from South Africa in 1902 see Giokas, *The Indian Act, supra* note 12, at 46. At this time South Africa was in the process of adapting and expanding their own system of pass laws. This coincided with the transition of the colony to a self-governing Dominion in 1910. The newly formed Dominion passed and a series of legislation (e.g. the *Native Land Act* in 1913, which was renamed the *Bantu Land Act*, 1913 and *Black Land Act*, 1913) that served to regulate the acquisition of land and control the movement of the black population by instituting a system of "reserves", which were the precursors of the infamous apartheid system that was in place from 1948-1994. For more on the pass laws in South Africa and their role in development of apartheid see Leonard Monteath Thompson, *A History of South Africa*, 3rd ed. (New Haven: Yale University Press, 2001) and Deborah Posel, *The Making of Apartheid 1948-1961: Conflict and Compromise*, (Oxford: Oxford University Press, 1991).

[74] Titley, *A Narrow Vision, supra* note 3, at 164-165.

unilateral control of lands, membership and local government.[75] It based this power in its own interpretation of the authority it was granted in s. 91(24) of the *British North America Act, 1867*.[76] This interpretation necessarily implies a picture of federalism that *unilaterally* excludes Aboriginal nations. The only constitutional question that this interpretation of s. 91(24) gave rise to was how this unlimited *power-over* Indians and their lands effected the division of powers between Parliament and the Provincial Legislatures. This question led to litigation almost immediately after confederation with the *St. Catharine's Milling* case. The decision of the Privy Council supported this interpretation of s. 91(24) by presenting aboriginal rights and title as a "mere burden" that exists at the pleasure of the sovereign and that the Provinces retain their interest in lands once this "burden" is released.[77] The fact that this case is decided without an Aboriginal party is a clear indication of just how captivating this picture of federalism was. The Dominion used this picture to move forward with its project of western expansion and national unification.[78] The *Indian Advancement Act* of 1884 set out to accelerate this process by moving the more "advanced" eastern bands to a one-year elective band

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[75] *Historical Development, supra* note 24, at 51.

[76] An interpretation, which, as we have already detailed, reads "in relation to" as being plenary *power-over*. See note 36.

[77] *St. Catherine's Milling, supra* note 8, at 58. This centralization of legislative authority over Indian affairs was a repetition of the older Imperial administrative model; Parliament now took the place of the Imperial Crown and the Provincial Legislatures that of the colonies. Despite the basic structural similarity, the on the ground reality for Aboriginal peoples within the Dominion was radically different. The relative degree of internal autonomy that they had experienced under Imperial rule had vanished; what was left was a crown-machine that was intent on transforming them into British subjects and thereby unburdening title to all lands within the bounds of the Dominion.

[78] The post-confederation continuation of the treaty process (i.e. the eleven so-called Numbered Treaties, which date from 1871 to 1921) also fits within this unilateral model as the *Indian Act* extended to *all* Indian bands regardless of whether or not they had entered into treaty relations (see *Indian Act 1876, supra* note 57, at s.1-2). The vast administrative despotism of the *Indian Act* did not rely on the treaty process for its legitimacy. Rather, the treaty process remains a crucial site for contesting this legitimacy by refusing to read them as mere surrender documents (see note 9).

council system and extending the power of the Superintendent-General (locally represented by the Indian agents) to direct every aspect of the political affairs of the "advanced" bands.[79] Sir John A. Macdonald clearly articulated the guiding aim of Indian policy in the House of Commons in 1887 when he stated that the "…great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion."[80]The subsequent amendments to the *Indian Act* continually enhanced the powers of the Superintendent-General. For example, an amendment in 1887 granted the Superintendent-General the ability "to determine who is or is not a member of any band of Indians."[81] Further amendments in 1894 extended the effect of this power by granting the Superintendent-General sole authority to determine whether non-Indians could reside on reserve lands.[82] While the Indian Act was subject to an almost endless series of amendments they were primarily changes in degree. The crown-machinery was constantly being recalibrated and adjusted, but its structural lines (i.e. its focus on the *unilateral* control of lands, membership and local government) remained as fixed as the steel rails that stretched across and bound together the new Dominion. It was these structural lines—lines that were designed as a one-way street to assimilation—which inevitably drew the remaining traditional Indigenous governments

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[79] *An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers,* S.C. 1884, s. 28. These slight increase of band powers via by-laws was eclipsed by the enlarged powers of the Superintendent-General, which included the ability to direct every aspect of elections and band council meetings. See Giokas, *The Indian Act, supra* note 12, at 44-45. Parliament also attempted to increase the speed of assimilation by passing a *Franchise Act* in 1885 that gave all Indian males the vote, but objects of the settler society (centering on differences regarding property ownership, taxes and rational capacities) led to it being repealed in 1898. See *Historical Development, supra* note 24, at 51; Titley, *A Narrow Vision, supra* note 3, at113.

[80] "Return to an Order of the House of Commons, May 2" in Canada, *Sessional Papers*, No.20b (1887) at 37. Cited in Giokas, *The Indian Act, supra* note 12, at 47.

[81] *Indian Act*, S.C. 1887, c.33, s.1.

[82] *Indian Act*, S.C. 1894, c.32, s.2.

into a series of escalating confrontations with the Dominion. In order to get a better sense of how Indigenous peoples responded to these lines we will need to shift to a more ground level perspective. That is, we will need to focus our attention on an example of just such a confrontation.

The Six Nations Status Case

The conflict between the Six Nations and the Dominion was the first to be taken to an international legal body, namely the League of Nations. In 1923 Chief Deskakeh (also known as *Hi-wyi-iss* and Levi General) issued a pamphlet entitled "The Redman's Appeal for Justice."[83] The appeal was addressed to the secretary-general of the League of Nations and outlined the Six Nations case against the Dominion. The Dominion quickly found itself to be the object of international criticism (as a number of former colonies—Persia, Estonia, Ireland and Panama—supported a more official hearing of the case) and it responded by defending its Indian policy in an official letter to the secretary-general. The letter—written by the deputy superintendent of the Department of Indian Affairs, Duncan Campbell Scott—is, to my knowledge, the only articulation of the Dominion's Indian policy that is addressed to other nations during this period of time.[84] This episode in the conflict between the Six Nations Confederacy and the Dominion provides us with

[83] Deskaheh, "The Redman's Appeal for Justice." In *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1876*, Edited by Keith D. Smith (Toronto: University of Toronto Press, 2014) at 143-148 [hereinafter *Redman's Appeal*].

[84] Many Indigenous nations (including the Six Nations) had taken their petitions to the British Crown. This was a clear demonstration of their view of the *nation-to-nation* relationship that existed between them and the British Crown. It was a relationship that preceded the Dominion and that they did not consent to end. The practice of the British Crown was to simply relay these petitions back to the Dominion as these matters were seen to be within the exclusive jurisdiction of the Dominion. For an account of an instance of this practice see Titley, *A Narrow Vision, supra* note 3, at 117. The letter itself was signed by Joseph Pope (the under-secretary of state for external affairs) and printed in the official journal of the League of Nations in 1924. See Government of Canada, Appeal of the "Six Nations" to the League, (1924) 5:6 *League of Nations Official Journal* 829 [hereinafter *Canada, Appeal*].

an excellent example of how the crown-machinery responded to Indigenous resistance and vice versa. [85] I do not mean that this particular conflict can stand for all others in a strict sense. This would simply repeat the very same nonsense that resides within the collective noun 'Indian' (i.e. it would not reveal any particular quality that is shared by all members of the group aside from the name and the unilateral process of naming). The grievances, methods of resistance and desired ends of each Indigenous nation are all highly variable. The conflict between the Six Nations and the Dominion is not interchangeable with the Dene, Nuu-chah-nulth, Tsilhqot'in, Mi'kmaq, or any other Indigenous nation. Each of these conflicts has a history of its own. But, there is a constant. The constant is what I have been referring to as the picture of federalism—that picture which serves to *unilaterally* exclude Indigenous nations by positioning them as 'Indians'—and the crown-machinery that operationalizes it. It is this constant that this case serves to exemplify. Naturally, it serves to show us some of the more precise details regarding how the crown-machinery was geared or calibrated and how it operated to pursue the aim of assimilation at this particular point in time. This much is true of any point in the history of Indian policy, but it is the particular historical context that makes this case particularly useful for my purposes. This is because this part of the conflict between the Six Nations and the Dominion takes place at a moment of volcanic change in the international legal order. This period marks the initial stages of the project of dismantling the European Empires that had dominated the 19th century with their vast networks of colonial dependencies. The positivist legal arguments that had once served to

[85] The Six Nations Confederacy is the English term for the *Haudenosaunee* (People of the Longhouse). The French refer to them as the Iroquois. The confederacy consists of six Indigenous nations: Mohawk, Oneida, Onondaga, Seneca, Cayuga, and Tuscarora. Also, I note that this is an 'episode' because it is part of a conflict that extends from pre-confederation to today.

unilaterally justify (or, more accurately, to bury outside the boundaries of universal history) the conquest and exploitation of non-European peoples were no longer seen as uncontestable.[86] The former colonies were pressing for self-government and inclusion in the international system as sovereign, independent nation-states.[87] These changes forced the Dominion to justify its Indian policy within a new international legal context. It also made it clear that the assimilationist policies were not producing "docile bodies" that could be grafted into the body politic as British subjects.[88] Rather, they were (much like

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[86] The philosophical discourses that provided the foundations of the colonial world were obsessed with mapping out the geographical dimensions of universal history and pointing out its limits (Hegel's *Lectures on the Philosophy of History* is probably the most detailed example of this, but, as we have seen, Kant, Mill and Marx also make contributions). Those peoples and places that are deemed to be outside of history could be shown the light of civilization via the slavers bonds; this was after all the compromise that Charles V reached following the Valladolid debate in 1551. For an instructive account of this history and its various legacies refer to Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1986) and *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800* (New Haven: Yale University Press, 1995). The absurdity of this cartography is aptly parodied by Lewis Carroll in *The Hunting of the Snark* as the crew (whose number includes a beaver whose emblematic association with Canada stretches back to its use in the coat of arms of the Hudson's Bay Company in 1678) is guided by a map of the ocean that is nothing more than a blank sheet of paper. It is, to my mind, this same absurd absence of reason (or *carte blanch* assertion, so perfectly exemplified by the *Requerimiento* of 1513) that Pascal puts his finger on in his remark about boundaries of justice in his *Pensées and Other Writings*. Edited by Anthony Levi. Translated by Honor Levi. (Oxford University Press: New York, 1995) at 23.

[87] Anghie, *Imperialism, supra* note 12, at 115-119.

[88] Foucault uses this term in his 1975 book entitled *Surveiller et punir: Naissance de la prison* (translated as *Discipline and Punish: The Birth of the Prison*). He uses the term to illustrate how the disciplinary technologies of the late 18th century related to the body; a relation that he contrasted with slavery, which was based on the appropriation of bodies as object or chattel. In contrast to the owned body of the slave, a docile body "…may be subjected, used, transformed and improved." What was new in this was not the body was the object or site of power, but that the techniques, the "scale of control", had changed. As he puts it, "…it was a question not of treating the body, *en masse*, 'wholesale', as if it were an indissociable unity, but of working it 'retail', individually; of exercising upon it a subtle coercion, of obtaining holds upon it at the level of the mechanism itself—movements, gestures, attitudes, rapidity: an infinitesimal power over the active body." See Michel Foucault, *Discipline and Punish: The Birth of the Prison,* translated by Alan Sheridan (New York: Vintage Books, 1995) at 136-137. My aim in using this term is simply to highlight the fact that there are many points of connection between Foucault's account of the rise of disciplinary technology and those developed and applied in those lonely laboratories of civilization where the crown-machinery continually carried out its work. I cannot begin to explore these points of connection here. It opens a landscape that is so unfathomably vast and dark that it is utterly bewildering to me. The precise details of the operation of the "vast administrative despotism"—i.e. the residential schools, experimental farms, moral education, the policing of moral character, the supervisory and penal roles of the Indian agents, etc.—constitutes a missing chapter in the history of discipline. All I can really say, with any degree of certainty, is that the crown-machinery was geared to produce something that, to my mind, strongly resembles Foucault's account of docile bodies, but it starts from a different set of presumptions and employs a very different procedural model.

the British civilizing policies of the first half of the 19th century) serving to increase resistance. The nature of the Dominion's response to this increased resistance, which can be seen in the effective ban on the right to seek legal counsel via s. 141 to the *Indian Act* in 1927, served to push the crown-machinery ever faster towards the crisis of legitimacy that begins to take hold in the 1950s.[89] This is why I believe that this particular moment can serve as a landmark to help us find our way about Indian policy in the early 20th century and begin to trace out the paths that will eventually lead to the White Paper in 1969.

In order to appreciate the significance of positions that these documents articulate, we will need to get a better sense of both the history of the conflict between the parties and the context of the intended audience. Without this the documents could well seem to simply hang in the air as an abstract exchange of legal propositions. In my opinion it is

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Its task was to transform Indians into British subjects; figuratively speaking to transform a kind of foreign tissue into one that could be seamlessly grafted into the body politic. This, to me, seems to constitute a difference from Foucault's account of the development of discipline in France. The British system (as it is expressed in Indian policy) does not begin with the presumption of complete docility and move towards systematicity; rather, it begins with resistance and adopts a haphazard, experimental approach to achieve its ends. The complex interaction of legislation, policy, administration, enforcement, and resistance brings with it an endless series of unexpected turns and detours (and this is the case no matter the overall configuration i.e. whether it is set to civilize or to indirect rule). From the French perspective (a perspective that is informed by and, to my mind, reflects the civil law tradition with its more vertically structured system of codification) this haphazardness would constitute a failure. In the British case it is not a failure at all; rather, it is its *modus operandi*. It reflects, in many ways, how the common law functions. As Pagden states, "The English common law, unlike the law in Spain and France during the sixteenth century, was uncodified. The absence of any accepted body of legislation made the resulting conflict between the Parliament, the Crown, and the various colonies and overseas dependencies hard to resolve." (See Pagden, *Burdens*, *supra* note 11, at 121). The common laws structure lent itself to a more open and experimental *modus operandi*; as in it series of policy initiatives are deployed and then they are adjusted, recalibrated or substituted in and through the case law. Its movements are haphazard and muddled, but they are *movements* (i.e. it does have a general trajectory). There are a set of boundary principles, which exhibit what I have been referring to as *bluebeard logic* (i.e. they cannot be challenged or contested directly, but they are not hidden). The nature of Crown sovereignty and its corresponding picture of federalism (which excludes or diminishes the rights of Aboriginal nations *ab initio*) are like this. Within these boundaries the crown-machinery is an open system that can be recalibrated and reconfigured in any number of ways. If these boundaries are put directly into question the engine seizes and what remains is the bare assertion of force as law (here again, we encounter bluebeard as this is what happens after the prohibition on the room is transgressed).

[89] See *supra* note 8.

just this sort of ahistorical abstraction that grounds the position of the Dominion with its constant refrain of sovereignty (i.e., they are British subjects by birth, by location, by once using the salutation "Our Sovereign Lord" in a legal document, etc.). Without a sense of the actual history of the relationship it may well appear that the position taken by the Six Nations lacks the "…foundation for any real grievance" or is even "fanatical."[90] In order to avoid this appearance I will begin by providing the reader with a brief overview of the history of relationship between the Six Nations and the British. My aim will be to give the reader a sense of the deep historical roots of the conflict (e.g. the military alliance between the Six Nations and the British, the Two-Row Wampum of 1613, the Haldimand Proclamation of 1784, etc.). My main focus will be on how the administrative transition that begins after the War of 1812 (i.e. shifting the responsibility for Indian administration from the Imperial Crown to the colonial governments) led to a conflict, which escalated from confederation on to the episode we are focusing on in the early 1920s. Next, I will provide a similarly brief account of the changes that were taking place on the international level following the end of the First World War. My focus here will be on the formation of the League of Nations and the position of the settler colonies in the dismantling of the colonial empires via the Mandate System. From that basis I will then turn my attention to the documents themselves and provide an examination of the positions that they take. Finally, I will end this section with a short summary of how the crown-machinery was set in motion to respond to the Six Nations in the fallout from the exchange at the League of Nations.

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[90] These are the words of Duncan Campbell Scott in a letter to the Minister of the Interior Charles Stewart dated September 13, 1922. Cited in Titley, *A Narrow Vision*, *supra* note 3, at 118.

A) The Six Nations of the Grand River

The historical roots of the relationship between the Six Nations Confederacy and the British run deep.[91] When the British and the French arrived in the northeastern reaches of North America the Confederacy (which was composed of five nations up until the addition of the Tuscarora—who were fleeing from colonial encroachment on their territory—in 1714) was the predominant regional force.[92] The Europeans soon recognized that they were key to tipping the balance of power in their struggle for control of the continent. As Felix Cohen observes,

> The friendship of these Indians was a highly important, if not decisive, factor in the struggle of France and England for the continent. The history of this struggle, as enacted in America, is largely the history of these Indians, who in defending their own lands, played an international role which brought them recognition in treaties between France and England. It is no wonder that the Iroquois were "courted and conciliated" by England and that their national character was scrupulously observed and recognized.[93]

The Six Nations formed an alliance with the British in the Treaty of Fort Albany in 1664. They expressed the significance of this relationship (and, indeed, its formal structure) by

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[91] I am indebted to Darlene Johnson's excellent article on the history of the Six Nations struggle in Canada see Johnson, *Six Nations*, *supra* note 14.

[92] The Six Nations confederacy was characterized by an elaborate (and long standing as they trace their system back to over a thousand years ago) legal system and democratic structure, which features three legal decision making bodies resemble a parliamentary system. The Covenant Circle Wampum represents this structure. As Johnson explains: "The intertwining strands that form the circle represent the fifty chiefs of the confederacy. Their hands are bound symbolically together so firmly and so strongly that, if a tree should fall upon the circle, it could not shake or break it. Inside the circle, the clans, laws, ceremonies, ways, and traditions of the confederacy are protected. The people and their future generations remain in security, peace, and happiness. People are free to leave the circle - that is, to submit to the law of a foreign nation – by passing underneath the arms of the chiefs. But, to stand on the outside of the circle is to stand without a language, without a culture." Johnson, *Six Nations*, *supra* note 14, at 9.

[93] Felix Cohen, *Handbook of Federal Indian Law* (New York: LexisNexis, 2012) at 417.

presenting the British with the Two-Row Wampum Belt (or *Kaswentha*). As Taiaiake Alfred explains,

> The metaphor for this relationship—two vessels, each possessing its own integrity, travelling the river of time together—was conveyed visually on a wampum belt of two parallel purple lines (representing power) on a background of white beads (representing peace). In this respectful (co-equal) friendship and alliance, any interference with the other partner's autonomy, freedom, or powers was expressly forbidden.[94]

The alliance proved to be invaluable to the British as the Six Nations assisted them in securing their victory over the French in the Seven Years' War. Following this victory, the British formally acknowledged their obligations to their Indigenous allies with the Royal Proclamation of 1763.[95] Many of the Six Nations continued to maintain the alliance during the American War of Independence and it was the result of this conflict that led to the relocation to Grand River.[96] The British had made no provisions for their allies in the Treaty of Paris in 1783. This meant that they were seemingly left with neither lands nor rights. The Six Nations, through their leader Joseph Brant, protested this to the Governor of Quebec (Sir Frederick Haldimand) by reminding him of the long-standing alliance. In response, the Governor offered them territory under British protection. Brant chose the Grand River valley, a region west of Lake Ontario, and in 1784 the Governor purchased this territory from the Mississauga. The land was transferred to them that same

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[94] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*. 2nd ed. (Oxford: Oxford University Press, 2009) at 76.

[95] The preamble makes the military and political significance of these alliances clear: "And whereas it is just and reasonable, an essential to our interest and the Security of the Colonies, that the several Nations or Tribes of Indians with whom We are connected…should not be molested or disturbed." George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation of 1763*]. See also Pagden, *Burdens*, *supra* note 11, at 144.

[96] The civil nature of the conflict led to some internal confusion and division, but the British promised compensation and so Joseph Brant (an influential Mohawk war chief) rallied a large portion of the Six Nations to the British side. See Johnson, *Six Nations*, *supra* note 14, at 12.

year under the Haldimand Proclamation.[97] The Six Nations regarded (and indeed still regard) this proclamation as full recognition of their status as an independent nation.[98]

Following the War of 1812 the military importance of the confederacy to the British declined. This was, as we have seen, the beginning of a period of transition in Indian policy and administration. The guiding star of policy had shifted from maintaining important military alliances (via a system of treaties, gifts, protection and separation) to the reduction of administrative costs. This ushered in a series of commissions and reports (e.g. Darling, Bagot, and Pennefather), which recommended that the Indians be civilized. This was seen as the surest means to the end of reducing costs and ensuring the continued settlement of the colony. The administrative machinery was gradually repurposed to effect these new ends. The Indians were slated to become British subjects; the only question that remained was how to effect this transubstantiation. By 1830 the Indian Department—which had been established in 1755 as part of the military—had become a branch of the public service and in 1860 control was transferred from England to the Province of Canada. This process of devolution continued with the formal creation of the Dominion in 1867, which in turn brought more legislative machinery to task. With the *Gradual Enfranchisement Act*, *Indian Lands Act*, and, finally the *Indian Act* the main structural lines of Indian policy were set; the Federal Crown would now have *unilateral* control over lands, membership and local government. These were seen as the main

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[97] Johnson, *Six Nations*, *supra* note 14, at 13.

[98] This interpretation was actually affirmed by Lieutenant Governor John Graves Simcoe (Haldimand's successor) at a council with the Six Nations in which he presented a series of past and present agreements between the British and the confederacy and stated that "These authentic papers prove that no King of Great Britain ever claimed absolute power or sovereignty over any of your lands that were not fairly purchased or bestowed by your Ancestors at Public Treaties, they likewise prove that your natural independency has been preserved…" Cited in Johnson, *Six Nations*, *supra* note 14, at 14.

levers or point of control that were required to civilize the Indians and enfranchise them into the body politic.

Now let's take a step back from this series of legislative shifts and administrative changes for a moment and try to imagine the policy aim that was guiding them, that is, let's try and express it as a picture. It is a picture of a single ship of state (or body politic depending on the preferred political metaphor). The ship is structured by a series of principles (federalism, democracy, constitutionalism, etc.), but it is a single ship. The current version of it does have a separate compartment that operates on different principles—viz. administrative despotism—but it is presented as only temporary or transitional state to the single, unified ship.[99] The contrast with this picture and the one we find in the Two-Row Wampum is stark. There are two ships. They are travelling together, but they remain separated at a respectful distance, each managing their own affairs. The conflict between these pictures is immediately obvious. So how do we explain how one of them is given the *force of law*, or, to make the question a bit more precise, what is the legal foundation for the Dominion's picture? The letter we will examine will provide a series of responses to this question. Its author will marshal the evidence and lay out the case, but at its basis it is an assertion. It is the same assertion that lies at the basis of the unlimited *power-over* interpretation of s. 91(24). And it is, in turn, reliant on a view of history that adds a series of caveats and qualifications on the human species. J. S. Mill clearly illustrates the upshot of this view point when he states that, "Despotism is a legitimate mode of government in dealing with barbarians …"[100] This

[99] This is, to my mind, the picture that informs Justice Binnie's reinterpretation of the Two Row Wampum in *Mitchell v. M.N.R.*, [2001] 1 SCR 911 I deal with this at length in the Chapter 1.

[100] Mill, *On Liberty*, *supra* note 56, at 9.

view is, to borrow an analogy from Wittgenstein, like the case of the eye and the visual field. It looks out and says "This is my world" or "Those are barbarians." But, it does not see itself. Nothing in the visual field allows it to infer that it is seen by an eye. The limits of its perspective are simply taken as the limit of *the world*.[101] It works to insulate its viewpoint by disqualifying (with the *force of law*) the view of others that contest it by reminding it that it is simply *one way of seeing* things. And so, it mistakes its perspective for the *a priori* order of things. The order that it sees seems like,

> It is *prior* to all experience, must run through all experience; no empirical cloudiness or uncertainty can be allowed to affect it—It must rather be of the purest crystal. But this crystal does not appear as an abstraction; but as something concrete, indeed, as the most concrete, as it were the *hardest* thing there is….[102]

It is, as Wittgenstein puts it, held captive by a picture.[103] But, despite appearances, the eye does not reside suspended in a void; rather, the strange and diverse passengers of the black canoe have continually struggled to assemble reminders to show what already lies open to view (viz. that true legitimacy can only be based on mutual recognition, consent and continuity).[104]

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[101] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*. Translated by D. F.. Pears and B. F. McGuinness (London, Routledge, 2001) at 5.63-5.634.

[102] Wittgenstein, *Philosophical Investigations, supra* note 1, at §97. The use of the term 'crystal' is particularly evocative in this context. It leads us to the role of "crystallization" in the case law from *Guerin v. The Queen*, [1984] 2 SCR 335 to *R. v. Van der Peet*, [1996] 2 SCR 507, and *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010. How is it that mere assertion of sovereignty can "crystallize" (to absolutely fix) the rights of the other party? This is, to my mind, where we begin to enter the magical circle of legal fictions (*terra nullius*, discovery, divine right, etc.). For a recent and instructive critique of this refer to John Borrows' chapter entitled (Ab)originalism and Canada's Constitution in *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

[103] *Ibid*, at §115.

[104] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 212.

The Six Nations continually resisted the administrative encroachment of the Domnion into their affairs. In 1839 (following the transfer of the Indian Department from military to civilian control in 1830) they demanded to be governed by their own laws, but the government of Upper Canada refused. In 1890 they responded to the growing bureaucratic control of the crown-machinery by delivering a petition to Ottawa demanding recognition of their autonomy and exemption from the *Indian Act*. The government responded in predicable fashion by stating:

> The Superintendent-General of Indian Affairs is unable to concur in the view put forward in this petition, and he is of the opinion that there is no ground on which the same can be supported.[105]

During this period internal divisions began to form within the confederacy. A group of reformers sought to replace the hereditary council with an elective one. The reformers (who were known by a series of names from Dehorners, the Warriors Association, the Six Nations' Rights Association, and the Indian Rights Association) were composed of members from each of the nations within the confederacy. The only discernable line that separated the supporters of the hereditary council from the reformers was religion; the majority of the former adhered to the longhouse religion, whereas the latter were largely Christian.[106] The reformers delivered a petition to Ottawa in 1907 requesting that the traditional council be removed, but it only represented a small portion of the electorate so Ottawa refused.[107] This failure led to the movement to fade, but the traditional council feared that its authority was going to being undermined. This led to a shift in the leadership of the council away from the members who supported the status quo to a

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[105] Cited in Titley, *A Narrow Vision, supra* note 3, at 112.

[106] Titley, *A Narrow Vision, supra* note 3, at 110-113.

[107] The petition only had 300 signatures, which was one quarter of the adult male population. *Ibid,* at 113.

group who favored total sovereignty. This group (led by Chief Deskeheh) established a special committee to plan a campaign for sovereignty in 1919. They sought legal advice and hired a lawyer to compile evidence to support their claims.

In 1920, under Duncan Campbell Scott's leadership, an amendment to the *Indian Act* was proposed that included mandatory residential school attendance and granted the Government the unilateral power to enfranchise Indians who were over the age of twenty-one.[108] The amendment proved to be highly controversial among both the Indian and settler communities.[109] The Six Nations sent their lawyer to Ottawa to appear before the committee that was considering the amendment. He put forward the sovereignty argument and the committee's response was that they intended to replace the traditional government as soon as a majority of the adult male electorate approved.[110] The amendment became law later that year and this prompted the Six Nations to press their case forward. They sent a petition outlining their position to the Governor General in 1920. This led Scott to recommend that the petition should be considered by the Supreme Court and that the compulsory enfranchisement provisions would not apply to them until a decision had been reached.[111] This apparent success was, in fact, simply part of Scott's plan to remove the traditional council from power. The Deputy Minister of Justice reviewed the petition and informed Scott that it was "a hopeless case."[112] Scott then informed the Six Nations that enfranchisement provisions would be applied to them.

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[108] *Historical Development, supra* note 24, at 115; Titley, *A Narrow Vision, supra* note 3, at 114.

[109] For an account of the response see *Historical Development, supra* note 24, at 116-117.

[110] Titley, *A Narrow Vision, supra* note 3, at 114.

[111] *Ibid*, at 115.

[112] *Ibid.*

This, combined with concerns raised by the *Soldier Settlement Act,* prompted them to issue a second petition, which was referred back to Scott.[113] In his response he cited a statement made by John B. Robinson, the attorney general for Upper Canada, in 1824,

> To Talk of treaties with the Mohawk Indians residing in the heart of one of the most populous Districts of Upper Canada upon lands purchased for them and given to them by the British Government is much the same in my humble opinion as to talk of making treaty alliances with the Jews in Duke Street or with the French Emigrants who have settled in England.[114]

Scott then went on to state that:

> With reference to enfranchisement I may say that the policy of the Government is to carefully protect and educate the Indians and to thus contribute towards their civilization in order that they may eventually be merged into the general body of citizenship. If this in any way conflicts with the aspirations of Indians whose faces are set against ultimate destiny, it can only be regretted.[115]

The Six Nations sought legal advice and responded by taking their case to the King of England in 1921. Chief Deskeheh personally delivered the petition, which was forwarded to Winston Churchill (then the secretary of state for the colonies). Churchill simply forwarded it to the governor general in Canada as it was, in his opinion, a matter that was within the exclusive jurisdiction of the Dominion.[116] Chief Deskeheh's visit to England had generated considerable attention and sympathy from the media. Scott, who was also in London at the time, was approached by the editor of *Canada* (a weekly magazine

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[113] The concern was that the Act (which was assented to in 1919) would empower the government to unilaterally surrender reserve lands for soldiers. See *Soldier Settlement Act,* R.S.C. 1927, c. 188 at s. 10.

[114] Cited in Titley, *A Narrow Vision, supra* note 3, at 115-116. The position taken here exhibits a curious mix of practical difficulty (or to a term from the register of International law, the principle of territorial integrity) and comparisons that serve to distort the relationship between the British and the Six Nations by comparing them to minority groups living in uncontested sovereign territory. The position implicitly relies on the assumption that British sovereignty to the lands of Upper Canada is equivalent to that which the possess over England.

[115] Cited in Titley, *A Narrow Vision, supra* note 3, at 116. It is clear here that the picture was indeed crystallized as it is presented as the "ultimate fate" of Indians.

[116] *Ibid,* at 117.

published in London) for an official reaction, but he refused. This increased the media attention, which served to increase Scott's frustration.

The Mackenzie King government was elected in 1921 and it adopted a somewhat more conciliatory approach to the Indian question. It repealed the compulsory enfranchisement provisions (against Scott's protests) and moved to set up a Royal Commission to settle the dispute with the Six Nations. Any progress that was made was soon lost when an incident at the Grand River reserve involving police officers (who were investigating reports of liquor manufacturing) and a group of armed Indians. The presence of an armed force on their lands convinced the traditional council that the negotiations were not sincere.[117] This led them to take their case to the newly formed League of Nations.

B) The League of Nations and the Mandate System

The League of Nations was established in the wake of the First World War at the Paris Peace Conference in 1919. Its principle mission was to maintain world peace by forming a community of nations that would settle their disputes through negotiation and arbitration. While the idea itself was far from new (Kant's *Perpetual Peace* was written in 1795) the institutionalization of it brought about a seismic shift in international law. The worldview of the positivist tradition, which had served as the legal basis for the European Empires throughout the 19th century was now fundamentally contested. This worldview had maintained (*contra* the natural law tradition) that the sovereign was the only source of law. Once that was accepted the study of law itself became an autonomous

[117] *Ibid*, at 119.

field of scientific inquiry (a field that was, from the outset, focused on defining the concept of sovereignty by determining which entities were in fact 'sovereign').[118] The international legal order that it gave rise to was one ruled by a kind of mechanistic formalism, which divided the world into sovereign states and uncivilized tribes.[119] As Antony Anghie points out the League challenged this worldview in at least two different respects:

> First, it challenged the positivist idea that international law is the law governing states and that states are the only actors in international law. Second, and more importantly, the existence of the League suggested new ways of approaching the problem of sovereignty, and led inter-war lawyers to question conceptions of sovereignty that been fundamental to the positivist international law of the nineteenth century.[120]

In effect, the First World War had highlighted a deep fissure in the positivists worldview: viz. the community of civilized nations had collapsed leaving a straight line from unilateral nature of state sovereignty to the normalization war. This left the inter-war jurists the task of constructing a system that limited sovereignty while recognizing the centrality of the sovereign state. This new approach was embodied in the Mandate System, which was designed to deal with the former German colonial territories in Africa and the Pacific as well as a number of non-Turkish provinces of the Ottoman Empire.

The basic principles of the Mandate System are set out in Article 22 of the League Covenant,

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of

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[118] Anghie, *Imperialism, supra* note 12, at 56.

[119] *Ibid*, at 56-65.

[120] *Ibid*, at 125.

> such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant…The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League…The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.[121]

This was a departure from the stark boundaries that characterized the positivists worldview in the 19th century. The colonial territories were slated to become sovereign states. The principles of "well-being and development" (which formed the "sacred trust of civilizations") were directly connected to that of self-determination.[122] This entailed a shift from the positivist focus on the autonomous sphere of law to a pragmatic jurisprudence based on rules, procedures, policies, and administration.[123] The uncivilized world was no longer simply outside of law and history, it was the site of their administrative realization.

This system of international "tutelage" with its linear continuum of stages of development was by no means entirely new. As Anghie clearly details League lawyers returned to the work of Francisco de Vitoria whose characterization of the natives as

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[121] *League of Nations Covenant*, Article 22, paras. 1-3.

[122] This connection was clearly set out by President Woodrow Wilson in an address to a joint session of Congress on January 8, 1918. In this address he laid down what he saw as a "programme of the world's peace,…the only possible programme" in a set of fourteen numbered points (now known as the Fourteen Points speech). The issue of the colonies was addressed in point five, which required, "A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined." See John Milton Cooper, *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (Cambridge: Cambridge University Press, 2001) at 24 and Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford: Oxford University Press, 2007) at 40.

[123] Anghie, *Imperialism, supra* note 12, at 188.

'infants' supported the guardianship model.[124] But, it also bears some resemblance to the civilizing machinery that the British had developed in the first half of the 19th century (and the crown-machinery that the Dominion of Canada was busily attempting to perfect since its formation in 1867). If we consider the general outline of the Mandate System itself this similarity is, to my mind, striking. Generally speaking, the Mandate System drew on the social sciences to develop a new set of technologies and methods of control. These enabled it to access the structural and functional components that make up states (i.e., what we could figuratively refer to as the organelles of states). This made it possible to move past the simplistic binary of civilized/uncivilized. The presence of sovereignty was now measured on a gradational scale that went from backward to advanced.[125]Naturally, the very possibility of a scale (whether binary or gradational) was based on the presumptions supplied by universal history. This provided an abstract model of the ideal (and therefore sovereign) state. It is this singular model that provided the Mandate System with what Anghie refers to as the "fantastic universalizing apparatus."[126] With this in hand it was possible to measure differences and set to work straightening the "crooked timber of humanity".[127] The Mandate System sought to selectively eliminate those customs and traditions that were seen as barriers to creating efficient communities

[124] As he aptly puts it: "The circle was complete: in seeking to end colonialism, international law returned to the origins of the colonial encounter." *Ibid,* at 145.

[125] *Ibid,* at 155.

[126] *Ibid,* at 149.

[127] These measurements were by no means immune to political pressures. The determination that the former German colonies in Africa and Asia were at the lowest scale was made to placate the Dominions' (viz. Australia, New Zealand, and South Africa) desire to annex them entirely. They were unwilling to accept any determination that would suggest that these territories would ever become independent. See Anghie, *Imperialism, supra* note 12, at 121. The phrase "the crooked timber of humanity" is Isiah Berlin's see his *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Princeton: Princeton University Press, 2013).

of rational individuals.[128] Native governments and legal structures were slated to be replaced with the modern political intuitions of responsible government.[129] This program is, by now, undoubtedly a familiar one. All of the basic components of Indian policy from the mid-19th century on are repeated here. We may not see the familiar legislative terms of the *Gradual Civilization Act, Gradual Enfranchisement Act, Indian Act,* or the *Indian Advancement Act* but their substantive content and operational procedures are all here. It also led to the very same paradoxical dead-end. The system that was set up to liberate the mandate peoples from the "strenuous conditions of the modern world" actually maintains those conditions.[130] This is, to my mind, the same paradox that Tobias notes concerning the *Gradual Civilization Act.* As he puts it, "…the legislation to remove all distinctions between Indians and Euro-Canadians actually establishes them."[131] Simply put, the Mandate System internationalized the Anglo-American model of the Indian reservation.[132]

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[128] Anghie, *Imperialism, supra* note 12, at 162.

[129] *Ibid*, at 168-169.

[130] *Ibid*, at 178. As Anghie point out, "[t]he peculiar cycle thus creates a situation whereby international institutions present themselves as a solution to a problem of which they are an integral part. Such a situation is very much part of contemporary international relations." My contention is that this is also the case in Canada and that the two problems are related.

[131] *Tobias, supra* note 39, at 130.

[132] This should not be altogether surprising considering that Jan Smuts (one of the two principal drafters and architects of the Covenant) a prominent South African statesman who was doubtlessly familiar with the *Native Land Act* of 1913 (renamed the *Bantu Land Act*, 1913) and *Black Land Act*, 1913. As previously stated, these acts regulated the acquisition of land and controlled the movement of the blacks by creating a system of "reserves", which were the precursors of the infamous apartheid system that took shape in 1948 (see footnote 73). Naturally substantiating the similarity between the Mandate System and Anglo-American Indian administration (beyond a rough and ready comparison) would require, among other things, a thorough comparative examination of the initial proposals (e.g. the Phillimore Commission, the Fourteen Points), as well as an investigation into the United States' administrative policies relating to Indians and the colonies ceded in the Spanish-American War (with a particular focus on the Philippines from 1898 to 1919). What I am positing here is a *family resemblance* between the model of Indian administration that was developed within the Dominions of the British Empire in the second half of the 19th century. The crown-machine that was designed to prepare the Indians for a higher state of civilization may not have been designed to create independent states (as the Mandate version of it was), but it was designed to build their atomic components

Returning now to the historical context of the appeal of the Six Nations to the League. By the early 1920s this volcanic change to the international legal order (i.e., the transition from 19th century positivism to pragmatism) is in full swing. The war had weakened the Imperial powers both in terms of their military capacities and their legitimacy. Their symbolic status as the pinnacle of civilization was shaken and with it the hierarchy of metropole and colony. In response nationalist movements were rapidly expanding and gaining strength (e.g. the Egyptian Revolution and the Turkish War of Independence in 1919 as well as rebellions throughout the colonized world).[133] This trend was bolstered by the success of the Bolshevik Revolution in Russia provided, which provided inspiration to those resisting Imperial domination. Mahatma Gandhi's first Satyagraha campaigns in Champaran and Kheda take place in 1917-1918. The remaining Imperial powers responded with repressive measures (e.g. the French suppression of the Cochinchina uprising in 1916 and the British use of military force in the massacre at Amritsar in 1919), but this only served to increase resistance. It is this tense atmosphere of anticolonial resistance and volcanic international change that forms the context for the exchange between the Six Nations and Canada.

C) The Documents

In order to properly interpret the exchange that takes place in these documents I will need to provide the reader with a little more detail regarding each of them. This first to appear was Chief Deskaheh's "The Redman's Appeal for Justice", which was

(the citizen). In both cases the same abstract system of measurement (civilization) was unilaterally imposed under the rubric of guardianship. It should not be surprising that the socio-legal technologies could be applied to both.

[133] Anghie, *Imperialism, supra* note 12, at 139.

published as a pamphlet—and so it was publicly circulated in the British press—in London in August, 1923.[134] It is addressed to the Secretary-General of the League of Nations (Sir James Eric Drummond). On September 4th Deskaheh presented it to the President of the Assembly (Cosme de la Torriente y Peraza) who responded by informing him that for procedural reasons no action could be taken in that session.[135] Despite this the Canadian delegate (George P. Graham) was concerned that future appeals may be more successful and wrote to Ottawa recommending that Canada issue a more detailed response. Scott volunteered to prepare the statement, which he completed by December 27th. The document, entitled "Statement Respecting The Six Nations' Appeal to The League of Nations", was reviewed and subsequently endorsed by the Minister of the Interior (Charles Stewart), the Deputy Minister of Justice (E. L. Newcombe[136]) and the Canadian delegate to the League (Graham). It was then forwarded to the Under-Secretary of State for External Affairs (Sir Joseph Pope) in January of 1924 for circulation to the League and was published in its official journal. [137]

These details are important as they serve to highlight the fact that these documents articulate official positions on a legal conflict (a fact that is also reflected in their form, content and tone). With this in mind my aim now is to provide the reader with

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[134] It is unclear as to whether Deskaheh is the sole author of the document. Given the formal structure and official purpose of the document (by this I mean that Deskaheh is writing under the authority of his political role—a fact that is made clear in the introduction of the document—within the Six Nations) it may have been drafted with the assistance of legal counsel. The counsel for the Six Nations at this time was George T. Decker (a prominent attorney from Rochester). I mention this to highlight the fact that this is an official statement of a legal and political position and not a personal letter or pamphlet. See Titley, *A Narrow Vision*, *supra* note 3, at 116-117.

[135] Titley, *A Narrow Vision*, *supra* note 3, at 122.

[136] It is interesting to note that Newcombe was subsequently appointed to the Supreme Court in 1924 where he served until his death in 1931.

[137] Titley, *A Narrow Vision*, *supra* note 3, at 123.

a brief analysis of each. I will focus on how each document presents the following three elements of their case: 1) The relationship that exists between the parties; 2) The nature of the present conflict, and; 3) The remedies sought.

The Redman's Appeal for Justice

The Appeal is relatively brief and to the point. It sets out the Six Nations case in a series of twenty numbered paragraphs. These paragraphs can be further subdivided into the elements we will be analyzing: the relationship between the parties is set out in paras. 3-8; the nature of the present conflict in paras. 10-19; and, finally, the remedies in the closing paragraph. The first two paragraphs clearly establish the overall position of the Six Nations and so is best cited at length,

> Under the authority vested in the undersigned, the Speaker of the Council and the Sole Deputy by choice of the Council composed of forty-two chiefs, of the Six Nations of the Iroquois, being a state within the purview and meaning of Article 17 of the Covenant of the League of Nations, but not being at present a member of the League, I, the undersigned, pursuant to the said authority, do hereby bring to the notice of the League of Nations that a dispute and disturbance of peace has arisen between the State of the Six Nations of the Iroquois on the one hand and the British Empire and Canada, being Members of the League, on the other… The Six Nations of the Iroquois crave therefore invitation to accept the obligations of Membership of the League for the purpose of such dispute; upon such conditions as may be prescribed. [138]

This paragraph serves to establish the identity of the parties (i.e. both the Six Nations and Canada are presented as states) and the purpose of the document (i.e. to gain membership in the League and initiate the dispute resolution procedures set out in Articles 12-17 of the Covenant).

[138] *Redman's Appeal*, *supra* note 83, at 143.

The Six Nations' case for membership in the League is made on the basis of an account of their long history of interactions with European states in the colonies of North America. This history provides the Six Nations account of their relationship to the Dominion of Canada,

> Great Britain and the Six Nations of the Iroquois (hereinafter called " The Six Nations ") having been in open alliance for upwards of one hundred and twenty years immediately preceding the Peace of Paris of 1783, the British Crowns in succession promised the latter to protect them against encroachments and enemies making no exception whatever, and King George the Third, falling into war with his own colonies in America, promised recompense for all losses which might be sustained by the Six Nations in consequence of their alliance in that war and they remain entitled to such protection as against the Dominion of Canada.[139]

What is invoked here—and it is a position that the Six Nations have maintained from the *Two-Row Wampum in 1664* on—is Imperial Federalism. The specifics of this position are reinforced by their explanation of the acceptance of the Grand River lands under the *Haldimand Proclamation of 1784*.

> …the Six Nations (excepting certain numbers of those people who elected to remain), at the invitation of the British Crown and under its express promise of protection, intended as security for their continued independence, moved across the Niagara and thereafter duly established themselves and their league in self-government upon the said Grand River lands, and they have ever since held the unceded remainder thereof as a separate and independent people, established there by sovereign right.[140]

The emphasis here is on the following terms: self-government, separate and independent. Again, this position entirely consistent with their long standing position as being a self-governing people under the protection of the British Imperial Crown. This point is driven home in paragraph 7.

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[139] *Ibid*, at 144.

[140] *Ibid.*

> The Six Nations have at all times enjoyed recognition by the Imperial Government of Great Britain of their right to independence in home-rule, and to protection therein by the British Crown—the Six Nations on their part having faithfully discharged the obligations of their alliance on all occasions of the need of Great Britain, under the ancient covenant chain of friendship between them, including the occasion of the late World War.[141]

This underlines the ultimate basis of the Six Nations appeal. That is, a relationship that they have consented to and honored from 1664 onwards was unilaterally altered when the British devolved powers to the Dominion in 1867 (a process that, as we have seen, began after the War of 1812). So while the specific case concerns a dispute with the Dominion it is one that occurs due to a unilateral breach by the Imperial British Crown.

From this basis Deskaheh goes on to outline the current dispute between the Six Nations and the Dominion. There are five related grievances and I will review them in order of occurrence in the Appeal:

1) Enfranchisement: This is presented as an attempt to unilaterally "… impose Dominion rule upon" the Six Nations and their lands (via the parceling out of lands to those who were to be enfranchised).[142]
2) Penal Jurisdiction: As Deskaheh states, "The Dominion Government is now engaged in enforcing upon the people of the Six Nations certain penal laws of Canada." This is seen as a violation of the Six Nations' own jurisdiction on their territory and over their nationals, which are being held in Canadian prisons.[143]

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[141] *Ibid*, at 145.

[142] *Ibid*, at 145-156

[143] *Ibid*, at 146.

3) Misappropriated Funds: This issue is briefly touched on. The gist of it being that Six Nations funds—which, are held in trust by the Dominion—have been, and are still being, "…misappropriated and wasted without consent of the Six Nations."[144]
4) Inciting Rebellion: This grievance is tied to the issue of misappropriation as Deskaheh maintains that the Dominion "…has been using these trust funds to incite rebellion within the Six Nations, to furnish occasion for setting up of a new Government for the Six Nations, tribal in form but devised by the Dominion Parliament and intended to rest upon Canadian authority under a Dominion Statute known as the "Indian Act.""[145]
5) Hostile Invasion: This refers to the incident with the RCMP that prompted the Six Nations to leave negotiations with the Dominion and appeal to the League. This incident is detailed in paragraph 15, which I will cite as a whole: "To the manifest end of destroying the Six Nations Government, the Dominion Government did, without just or lawful cause, in or about December of the year 1922, commit an act of war upon the Six Nations by making an hostile invasion of the Six Nations domain, wherein the Dominion Government then established an armed force which it has since maintained therein, and the presence thereof has impeded and impedes the Six Nations Council in the carrying on of the duly constituted government of the Six Nations people, and is a menace to international peace."[146]

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid,* at 146-147.

The legal substance of these specific grievances is that they constitute a "violation of the nationality and independence" of the Six Nations, which is contrary to the treaties that exist between them and the British Crown.[147] Deskaheh summarizes the basis of the Six Nations case at the close of paragraph 16,

> …the said acts and measures were and are in violation as well of the recognized law of Nations, the Six Nations never having yielded their right of independence in home-rule to the Dominion of Canada, and never having released the British Crown from the obligation of its said covenants and treaties with them, but they have ever held and still hold the British Crown thereto.[148]

The Appeal closes with a list of the remedies sought.

1) Recognition of their independent right of home-rule.
2) Appropriate indemnity for the said aggressions for the benefit of their injured nationals.
3) A just accounting by the Imperial Government of Great Britain, and by the Dominion of Canada of the Six Nations trust funds and the interest thereon.
4) Adequate provision to cover the right of recovery of the said funds and interest by the Six Nations.
5) Freedom of transit for the Six Nations across Canadian territory to and from international waters.
6) Protection for the Six Nations hereafter under the League of Nations, if the Imperial Government of Great Britain shall avow its unwillingness to continue to extend adequate protection or withhold guarantees of such protection.[149]

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[147] *Ibid*, at 147.

[148] *Ibid.*

[149] *Ibid.*

They also seek interim relief in the form of unrestricted access to the fund held in trust and a suspension of all "aggressive practices" by the Dominion.

The Appeal puts its finger on the flashpoint that was tearing the colonial empires apart: viz. the *unilateral* basis of colonization—as expressed in its legal incantations of discovery, *terra nullius*, divine right, etc.—which continued on in the guise of the so-called community of nations. The treaties and promises that had helped secure the alliances that helped to build the British Empire could be revised at will. Their meaning was—and, to my mind, still is—lost in a sort of strange riddle: "what begins as a treaty, end as a surrender document, but never changes a single word?" This must have been what drew the attention and support of the formerly colonized states in 1923 (i.e. Estonia, Ireland, Panama and Persia). It was a joke that they were all, in one way or another, sadly familiar with. The League was set up as a means of reconciling the Empires with their colonies by leveling the ground. This was the idea of the community of nations; to open access to the principle of equality and thereby move the boundary of justice beyond the limits of Europe. The Mandate System clearly demonstrates the failure of this idea. The only honest motto for this version of the community of nations is captured in George Orwell's *Animal Farm*, "All animals are equal but some animals are more equal than others."[150]

The Dominion's Response

The Dominion's response is much longer than the Appeal. This is due, in large part, to its format. As Scott states in the opening paragraph,

> The undersigned has the honour to submit herewith a categorical statement respecting the petition to the League of Nations entitled "The Red Man's

[150] George Orwell, *Animal Farm and 1984* (New York: Houghton Mifflin Harcourt, 2003) at 80.

> Appeal for Justice" communicated by Levi General, otherwise Chief Deskakeh, on behalf of the Council of the Six Nations of Brantford, to the President of the Assembly on September 4th, 1923, arranged in sections numerated in correspondence with those of the petition, the verbiage of which is quoted and indented at the beginning of each.[151]

As I see it there are two points of note here; first, the response is referred to as a "categorical statement" and it adopts the format of quotation and response. The Six Nations Appeal is cited in full and there are extensive citations from Canadian case law, Orders-in-Council, the *Royal Proclamation of 1763*, the *Indian Act*, and an annex that contains a copy of the *Simcoe Deed*, an example of a land surrender, a financial statement of the Six Nations trust account as well as a copy of the *Indian Act* in full. This helps explain the length of the document and points out that the actual arguments in response to the Appeal make up only a small portion of it. Second, the references to both the author of the document and the other party serve to reposition them so as to imply that the dispute is a domestic matter.[152]

The response is set out as a point-by-point refutation of the Six Nations' Appeal. The gist of the Dominion's position is that the League is not the appropriate venue for this dispute because it is a domestic matter (i.e. the Six Nations are under the exclusive jurisdiction of the Dominion). The counter-arguments that are marshalled against the Six Nations are easily summarized and so I will begin by providing the reader with a list of them in order of occurrence:

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[151] Canada, *Appeal*, *supra* note 84, at 829.

[152] Chief Deskakeh is referred to first by his English name, which seems to suggest that the appeal is personal in nature and that his official title is of secondary importance or perhaps even illegitimate in some way. The reference to the Six Nations includes the addition of a specific location (i.e. "of Brantford"), which is a way of situating them within Canadian jurisdiction.

1. The Six Nations are not a state because they are "…subjects of the British Crown domiciled within the Dominion of Canada and owing a natural debt of allegiance to His Majesty's Government thereof, and are therefore not competent to apply for or receive membership in the League."[153]
2. "The Six Nations are not now, and have not been for "many centuries" a recognized or self-governing people but are, as aforesaid, subjects of the British Crown residing within the Dominion of Canada. The statement that the Six Nations have treated with the Dominion of Canada is incorrect. The Dominion of Canada has at no time entered into any treaty with the Six Nations or recognized them as having any separate or sovereign rights."[154]
3. In a land surrender dated August 4th, 1826 "…the Indian council speaks of the King as "Our Sovereign Lord" The same language is used in other similar documents, and thus the Six Nations, through their Council, have officially recognized their allegiance to the British Crown."[155]
4. In regard to the enfranchisement provisions of the *Indian Act*, explains that, they "…provide legislative machinery whereby Indians who so desire, and who are duly qualified, may acquire full Canadian citizenship. This legislation was enacted to stimulate progress among the Indians and to afford them an opportunity for self-development and advancement." This and the Solder

[153] Canada, *Appeal, supra* note 84, at 829

[154] *Ibid*, at 830.

[155] *Ibid*, at 833.

Settlement provisions "…exists solely for the benefit of the Indians themselves and can only be invoked of their own motion."[156]

5. The Dominion has not misused the Six Nations funds as the Indian Department allows the Council to "…take part in the administration and expenditure of their capital and interest funds…[and] leaves decisions with respect to expenditure of band funds to the discretion of the Council, in so far as possible, consistent with proper economy and due regard for the interests of the Indians."[157]
6. The Six Nations are subject to Canadian criminal law because, "Indians are subject to the laws of the land in the same manner as other of His Majesty's subjects. It is necessary to maintain order and punish offenders for the protection of the Indian community itself. Ever since their arrival in the country they have had the protection of the laws and access to the Courts. They have fully availed themselves of these privileges and have in no way conducted or maintained any separate courts or legal machinery of their own."[158]
7. The presence of the RCMP on the Six Nations lands has "…no political significance or bearing upon the agitation of the petitioners. Such measures as have been taken are in pursuance of the regular administration of law, without which the Indians would be deprived of the benefit of police protection. No military force has been used in any way."[159]

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[156] *Ibid*, at 833-834.

[157] *Ibid*, at 834.

[158] *Ibid*, at 834.

[159] *Ibid*, at 835.

8. As for the treaties between the Six Nations and the British, Scott explains that "…there has been no treaty of any kind between His Majesty's Government in Canada and the Six Nations." The *Haldimand Proclamation of 1784* and the *Simcoe Deed of 1793* are simply grants of land "…not involving any political recognition whatsoever." Additionally, the treaties that Canada does make with Indians are not 'treaties' "…in the meaning comprehended by international law." Rather, in the Canadian context the term "…denotes the plan of negotiation adopted by the Government in dealing with the usufructuary rights which the aboriginal peoples have been recognized as possessing in the land from the inception of British rule."[160]

These arguments are supported by a litany of legislation, case law and orders-in-council, but what is their actual substance? That is, what assumptions do they rely on in order to bear weight? I would say that the foundation for the entire set of arguments is on the two contrary meanings of the term "treaty". Without this distinction the remaining arguments are little more than question begging (i.e. stating that the Six Nations are British subjects tells us nothing of how they actually became so, without some evidence of consent it is simply an arbitrary assertion). So what is in the distinction that we are given? The normal sense of the term "treaty" is that found within international law. It necessarily implies mutual recognition of each party as a state. The second, or special, sense of the term withholds recognition. It is simple part of a "plan of negotiation"—or, what I would refer to as the crown-machinery—and it deals with the "usufructory rights" of Aboriginal peoples (Scott does not cite Lord Watson from the *St. Catharine's Milling* decision of the

[160] *Ibid,* at 835-836.

Privy Council, but it is undoubtedly what he had in mind). The gist of the difference is that a normal treaty starts on the recognition of equal legal standing whereas the special treaty starts from an imbalance between the parties standing. Simply put, Aboriginal peoples can only possess "usufructory rights"? Why is this? The usual response centers on a set of criteria (e.g. government, population and territory) and/or legal fictions (e.g. *terra nullius*, discovery, divine right, etc.), but, at its basis, it is simply a matter of *recognition*. These special "treaties" were used to by the colonizing powers to draw indigenous peoples into national constitutional systems—this process has since been termed "domestication."[161] It was common practice throughout Africa, Australasia and the Americas; a fact that was surely not lost on the membership of the newly formed League. Scott seems to be alive to this particular concern. We can see this evidenced in his extensive attempts to reinforce the legitimacy of this practice by pointing to its continuity. He states,

> It may be interesting to note that one of these "treaties" was negotiated with the inhabitants of the large territory comprised in the Mackenzie River district so recently as the summer of 1921, and within the past few months a "treaty" has been negotiated with tribes of Mississagua and Chippowa Indians resident in the province of Ontario.[162]

Immediately after this he adds another layer of fortification,

> Naturally and obviously it was not the intention in this or preceding "treaties" to recognize or infer the existence of any independent or sovereign status of the Indians concerned. Such a principle, if admitted, would apply as much, if not more, to these other groups of Indians as to the Six Nations, and the entire Dominion would be dotted with

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[161] UNCHR (Sub-Commission), "Final report submitted by Miguel Alfonoso Martinez, Special Rapporteur, Treaties, Agreements, and Other Constructive Agreements between States and Indigenous Populations" (22 June 1999) UN DocE/CN.4/Sub.2/1999/20, 26-38[168]-[244] Cited in Duncan B. Hollis, ed, *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012) at 133.

[162] Canada, *Appeal, supra* note 84, at 836.

> independent, or quasi-independent Indian States "allied with but not subject to the British Crown" It is submitted that such a condition would be untenable and inconceivable.[163]

This argument is well-worn in international law (i.e. it is an expression of the principle of territorial integrity).[164] It acts as a kind of rearguard action. That is, the primary argument of special "treaties" is refused the tact shifts to practical impossibility. Its weakness is not that it is somehow factually incorrect (un-domesticating Aboriginal nations would *undoubtedly* be a very difficult process), but that it has about the same moral basis as a thief pleading that the funds have already been expended. Scott is not content leaving the field on that note and so launches one last volley,

> It may here be explained that Indian affairs are administered by a department of the Dominion Government under a special Act of the Canadian Parliament known as the Indian Act, which provides that the Minister of the Interior, or the head of any other Department appointed for that purpose by the Governor-General in Council, shall be the Superintendent-General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians of Canada.[165]

The last point is that these "treaties" are legitimate by virtue of the manner in which they are subsequently administered. The chances that the guardianship model would help to bolster the legitimacy of these "treaties" in the eyes of those in the League who were sympathetic to the Six Nations' case are, at best, negligible.

The sheer extent of the argumentation that Scott adds to secure the legitimacy of the special "treaties" is indicative of both its importance to the Dominion's position and its weakness. You get the feeling that Scott is convinced of the legitimacy of his position,

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[163] *Ibid.*

[164] For an instructive analysis of the relationship between the principle of self-determination and territorial integrity in the context of in the Six Nations status case see Johnson, *Six Nations*, *supra* note 14, at 27-31.

[165] Canada, *Appeal*, *supra* note 84, at 836.

but, at the same time, when the list of reasons is set out in front of him on paper they seem to be, in some way, insufficient. I believe that Wittgenstein puts his finger on just this phenomenon in *On Certainty*,

> And now if I were to say 'It is my unshakable conviction that etc.', this means in the present case too I have not consciously arrived at the conviction by following a particular line of thought, but that it is anchored in all my *questions and answers*, so anchored that I cannot touch it.[166]

There is no particular line of argument that secures the legitimacy of the Dominion's position. But, they do "…form a system, a structure."[167] The question is what anchors this structure. Scott cannot articulate it and so he seems to be left drowning, clutching at straws. It is not that the arguments that he offers are not related to one another; quite the reverse, the positions he articulates are all related. Rather, he is drowning because they require a shared mythology to anchor them in a way that they make sense; the ultimate anchor then is that Aboriginal peoples are *uncivilized*. This is the premise that explains why treaties made with them do not involve any form of political recognition and why they can be *unilaterally* domesticated within the Dominion. We could say that this forms the river-bed of the Dominion's arguments. Unlike a foundation a river-bed shifts, it moves with the flow of the water in such a way that "…there is not a sharp division of one from the other."[168] The problem for the Dominion was that in the early 1920s the river-bed had shifted so significantly that what had appeared to be hard rock was now being washed away like sand. This explains why the British government elected to intervene after these arguments were delivered. The Foreign Office contacted the

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[166] Ludwig Wittgenstein, *On Certainty*, eds. G.E.M. Anscombe and G.H. von Wright (Blackwell: Oxford, 1974) at §103.

[167] *Ibid*, at §102.

[168] *Ibid*, at §97.

governments who had expressed sympathy with the Six Nations and informed them that their attempts to re-open the case constituted an "impertinent interference" in the internal affairs of their Empire by a group of "minor powers."[169] This exercise of *realpolitik* was effective as the "minor powers" quickly abandoned the case.

Aftermath

The repercussions did not end there. The plan to depose the hereditary council was set in motion as soon as they had broken off negotiations with Ottawa in the early months of 1923. Seeing as they could not agree on who would sit on the proposed royal commission Scott selected a partisan to conduct an inquiry. Col. Andrew Thompson was appointed for the task on March 1, 1923. His report was ready by November 22 and its principle recommendation was that the hereditary council be immediately replaced regardless of popular support.[170] Even before the report was complete Scott was preparing for possible resistance. In October he appointed Col C. E. Morgan (a veteran of the Boer War who had experience working as a colonial administrator in South Africa) as the Indian superintendent at Brantford. Col. Morgan prepared his own special report on reserve conditions for Scott, which he delivered in early August. It recommended the immediate removal of the hereditary council and cautioned that this would require a strong police presence.[171] With these two reports in hand Scott moved to secure an Order-in-Council to imposed an elective council on the Six Nations. On September 17, 1924 the Order-in-Council was passed; it stated:

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[169] Cited in Titley, *A Narrow Vision, supra* note 3, at 123.

[170] *Ibid*, at 124-125.

[171] *Ibid*, at 125.

> In consideration of this report and recommendation and in view of the fact that this Band is considered fit to have Part II of the *Indian Act*, entitled "Indian Advancement" applied to it, the Minister recommends that from and after the date thereof, the said Part II of the *Indian Act* shall apply to the Six Nations Band of Indians.[172]

On October 7—little more than a month after Chief Deskaheh presented the Appeal to the President of the Assembly—Col. Morgan arrived at a council meeting with the RCMP, read the Order-in-Council that authorized the imposition of the elective council and expelled them from the hall.[173] The election for the new council saw a low turnout (16-30% of the electorate) and resulted in a twelve-member council who were primarily Christian (i.e. the faction that had petitioned Ottawa for this very action back in 1907).[174] These aggressive and unilateral tactics were yet another demonstration of just how unpersuasive the Dominion's position on Indian policy was. The only way that it could deal with resistance was through more, and more suppression. It relied on making an example of those that dared to resist. But, despite the excessive measures that the crown-machine resorted to (including a permanent police presence and the use of informants) in this case it did not actually achieve its aims.[175] The support for the traditional council persisted and the elective council has been consistently regarded by many within the Six Nations as illegitimate.[176] The crown-machine's show of strength was simply a demonstration of its inability to secure consent without coercion.

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[172] Cited in Johnson, *Six Nations*, *supra* note 14, at 20.

[173] Titley, *A Narrow Vision*, *supra* note 3, at 126.

[174] *Ibid*, at 113, 126.

[175] *Ibid*, at 134.

[176] There have been a number of legal challenges to the legitimacy of the elected council (most often by challenging the legitimacy of the Order-in-Council that established it). The first case was initiated in 1957. It resulted in the decision in *Logan v. Styres* [1959] O.W.N. 361, 20 D.L.R. (2d) 416 (Ont. H.C.), which held that the Six Nations are British subjects because they accepted the protection of the Crown. The decision relied on little historical evidence as it based itself on two unilateral declarations by British officials (see

A Building Crisis of Legitimacy

The trajectory of Indian policy during the first half of the 20th century was characterized by a continual increase in control and complexity.[177] The broad policy aims remained constant (to civilize, assimilate and then disappear; aims that can be dated back to pre-confederation period), but the technical means to achieving these ends had become the focus. Special acts and detailed amendments had become the *modus operandi* of Indian policy in the Dominion. The 1906 version of the *Indian Act* was, at 195 sections, twice the length of the original act. Simply put, the crown-machinery was expanding; new components were constantly being added. These components served to increase the discretionary powers of the Superintendent-General and the Governor-in-Council.[178] For example, amendments passed in 1911 allowed any authority with statutory powers of

Johnson, *Six Nations*, *supra* note 14, at 21). In 1970 supporters of the confederacy took direct action and locked the elected council of the council house. Members of the elected council sought an injunction, which resulted in the *Isaac v. Davey* [1973] 3 O.R. 677, 38 D.L.R. (3d) 23 (Ont. H.C.) case. The question before the court was whether or not the Six Nations constituted a "band" within the meaning of the *Indian Act*. Osler J. reviewed the official results of band elections in 1969 and concluded that the hereditary council had a better claim and dismissed the plaintiffs request for an injunction (the issue of the Six Nations sovereignty was not considered in this case). The elected council appealed the decision and in *Isaac v. Davey* [1974] 51 D.L.R. (3d) 170 Arnup J.A. held that because the tract of land is vested in the Crown it fits the definition of a "reserve" and so the Six Nations fall within the definition of a "band". The hereditary council appealed and in *Davey v. Isaac* (1977) 77 D.L.R. (3d) 481 the Supreme Court of Canada held that the Six Nations were a band as they have trust funds held for them by the Crown (see Johnson, *Six Nations*, *supra* note 14, at 22).

[177] For a comprehensive account of this period see Giokas, *The Indian Act, supra* note 12, at 47-55.

[178] Any concerns about treaty rights were pushed aside. The 1911 Frank Oliver (the Minister of the Interior) outlined the general approach of the government to treaties in the House of Commons: "For while we believe that the Indian having a certain treaty right is entitled ordinarily to stand upon that right and get the benefit of it, yet we believe that there are certain circumstances and conditions in which the Indian by standing on his treaty rights does himself an ultimate injury, as well as does an injury to the white people, whose interests are brought into immediate conjunction with the interest of the Indians." Cited in Giokas, *The Indian Act, supra* note 12, at 50. This position should be compared with Lamer C.J.C.'s use of the "public interest" framework for dealing with what he refers to as "unlimited rights" in *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 60 and its use in the infringement standards for Aboriginal title in *Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 257. The only difference is that the unilateral power of the Crown is articulated in the register of reconciliation.

expropriation to expropriate reserve lands for public works.[179] In 1914, the Superintendent-General was granted the authority to make health by-laws that would supersede any of those made by band council.[180] In 1927, the Superintendent-General gained the right to require anyone soliciting funds for an Indian legal claim to obtain a license from him (effectively removing the right to seek legal counsel).[181] In 1936, an amendment was passed that enabled the Superintendent-General to apply existing provincial laws to reserves by incorporating them by reference.[182] These are just a few examples of a dizzying array of amendments that deal with every aspect of daily life on the reserves from the regulation of ceremonial practices to pool halls and school attendance (not to mention the more informal policies which included the infamous pass and the everyday disciplinary control exercised *in situ* by Indian Agents).[183] By the 1940s it had become clear that this approach was not generating the desired results. The crown-machinery had expanded by leaps and bounds. There seemed to be no real limits to its reach. It had reduced the powers of the band council to be little more than advisory in nature.[184]It had effective control over all aspects of the lives of Indians and their lands. As a result, it should have constituted a "fantastic universalizing apparatus," but for all of

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[179] In addition, municipalities with over 8000 people could apply to a judge to expropriate reserve lands; the only standing being whether or not it was "expedient" to do so. See *Indian Act* S. C. 1911, c. 14, s. 1-2.

[180] *Indian Act* S. C. 1914, c. 35, s. 6.

[181] *Indian Act* S. C. 1926-27, c. 32, s. 6.

[182] *Indian Act* S.C 1936, c.20, s. 2. As is the first instance in a trend to expanding the jurisdiction of the provinces over Indians and their lands. As we will see this continues with the addition s. 87 of the 1951 *Indian Act* (now s. 88), the recommendation for "fused federalism" in the Hawthorn Report in 1966 (Cited in Giokas, *The Indian Act, supra* note 12, at 76) and, as I have addressed in detail in the previous chapter, the overall trend in the case law towards the so-called modern approach to federalism in relation to s. 91(24).

[183] See notes 68 and 73.

[184] In 1936 amendments (*Indian Act* S. C. 1936, c.20, s.4) were passed that enabled Indian agents to cast the deciding vote in band council elections that resulted in a tie and to sit in and direct all band council meetings. See

its elaborate and detailed construction it simply did not move.[185] It provided ample resources for seizing lands, but it could not produce citizens that it had promised and therefore it could not produce legitimacy. In effect, the system was plagued by its own foundational principle. As J. S. Mill put it,

> A good despotism is an altogether false ideal, which practically (except as a means to some temporary purpose) becomes the most senseless and dangerous of chimeras. [186]

The despotic powers were *only* legitimate *if* they could be demonstrated to be in the best interests of those that were subjected to them. But, the crown-machinery could show no evidence of progress on this front. It could forcefully enfranchise Indians (even entire bands), but it could not generate the kind of mass voluntary enfranchisement that would legitimize its "vast administrative despotism."[187] In order to actually supply the legitimacy that it promise it would have to completely assimilate the Indians and their lands into the body politic and then, once the transition was complete, to simply wither away and perish.[188] But, it was actually following the opposite trajectory entirely; it was growing, its administrative structures were serving to deepen the cultural and economic divides between its wards and the 'civilized' citizens they were purportedly slated to become. Without the promise of being "temporary" it was seen as being a growing expenditure with no real purpose or sense of direction. Simply put, the promise that had given birth to the crown-machinery (i.e. the promise of financial savings and the

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[185] Anghie, *Imperialism*, *supra* note 12, at 149.

[186] Mill, *On Liberty*, *supra* note 56, at 141.

[187] Tully, *Multiplicity*, *supra* note 2, at 90-1.

[188] As Marx of the role of dictatorship of the proletariat or J.S. Mill says of the East India Company. See Ibid, at 324 and Karl Marx & Frederick Engels, *Collected Works Vol. 39* (International Publishers: New York, 1983) at 62–65.

realization of the ideal body politic via civilizing) had turned against it. The Second World War served as a kind of catalyst to shift the governments focus away from the narrow and haphazard technical modifications of the machinery (an approach favored by the bureaucratic staff who serviced it) towards the broader horizons of policy.[189]

The war had made it clear that the current trajectory (or lack thereof) of Indian policy was no longer economically sustainable or politically desirable. It had become, if anything, an embarrassing relic of 19th century imperialism, which was no longer acceptable given the rising tide of international human rights. The fracture in the relationship between the concepts of sovereignty and civilization—which, the League of Nations had been designed to patch—was now complete. The atrocities of the war made it undeniably clear that Europe could no longer claim to be the model for all historical progress. This left the concept of sovereignty untethered.[190] It could serve as a bases for law within the boundaries of the state, but beyond that was simply a legal gray area in which Hobbesian leviathans drifted, like ships passing in darkness. The Universal Declaration of Human Rights in 1948 was designed to provide the bright lines needed for a "community of nations".[191] It universalized a set of individual rights that had once been confined to the boundaries of the metropole. As J. S. Mill had so confidently stated,

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[189] Giokas, *The Indian Act*, *supra* note 12, at 54.

[190] This position itself is by no means a new one. There is a long tradition of political thought that dismisses the possibility of international law entirely due to its lack of a *true* (sovereign) binding force (e.g. Hobbes, Hegel, Schmitt, etc.).

[191] It may have been designed to provides these lines, but they have never been particular bright. Rather, they have been, from the very outset, contested as being anything but universal in nature. The Saudi Arabian delegation voiced its opposition to the committee responsible for drafting the Declaration in 1947 by stating that the committee had "for the most part taken into consideration only the standards recognized by Western civilization." (Cited in Pagden, *Burdens*, *supra* note 11, at 243).

> Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become improved by free and equal discussion.[192]

But, the lines that had once separated the liberty of the civilized from the despotism that was to improve the uncivilized were now unclear. Wittgenstein offers us a way to reimagine the construction of these boundaries,

> To say "This combination of words makes no sense" excludes it from the sphere of language and thereby the bounds of the domain of language. But when one draws a boundary it may be for various kinds of reason. If I surround an area with a fence or a line or otherwise, the purpose may be to prevent someone from getting in or out; but it may also be part of a game and the players supposed, say, to jump over the boundary; or it may be to show where the property of one man ends and that of another begins, and so on. So if I draw a boundary line that is not yet to say what I am drawing it for.[193]

As soon as one can no longer be certain that the distinction between civilized and uncivilized is *objective* then the act of drawing the line becomes subjective. The line is not drawn by the hand of history. It does not contain its own rules. They are assigned. Suddenly the fixed position of liberty become suspect and so, open to contestation. The barbarians had been excluded from liberty, they had been, to borrow Wittgenstein's phrase, "…withdrawn from circulation."[194] But, now that Europe had exhibited all of the traits and qualities that they had associated with the barbarians the gates were open. Even the barbarians could lay claim to liberty. Quite simply, the push for self-determination was redoubled. This set the stage for a shift in the confrontation within the settler states as the Millian model of the "temporary" despotism was no longer possible. This left

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[192] Mill, *On Liberty*, *supra* note 56, at 9.

[193] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §299.

[194] *Ibid*, at §300.

Canada with very little in the way of available explanations for their Indian policy (aside from the shallow comforts offered by sovereignty).

Following the war Canada moved to establish a joint committee of the Senate and the House of Commons to examine the general structure of its Indian administration. Its focus was to look into the following topics:

1. treaty rights and obligations;
2. band membership;
3. Indian liability to pay taxes;
4. voluntary and involuntary enfranchisement;
5. Indian eligibility to vote in federal elections;
6. non-Indian encroachment on reserves;
7. the operation of Indian day and residential schools;
8. "Any other matter or thing pertaining to the social and economic status of Indians and their advancement which…should be incorporated into the revised Act."[195]

The limits of the Joint Committee's commitment to egalitarianism can be seen in what this list omits (e.g. self-government, the state of band funding and the role of the provinces).[196] It established hearings with government officials and experts before meeting with Indigenous representatives. The first Indigenous person to speak before the Committee was the president of the newly formed North American Indian Brotherhood (Andrew Paull) who criticized the form of the Committee (it was not the independent Royal Commission that had been requested), its composition (there were no Indigenous

[195] Cited in Giokas, *The Indian Act, supra* note 12, at 55.

[196] *Ibid.*

representatives) and its limited scope of inquiry.[197] This seemed to have little effect as a motion to permit five Indigenous observers failed. There was a wealth of testimony from Indian bands (mostly in the form of letters) and this level of consultation was a first. But, we must ask, what was its effect? A statement made by the co-chairman (D. F. Brown) after the first year of hearings clearly indicates the direction of the "new" Indian policy,

> And I believe that it is a purpose of this Committee to recommend eventually some means whereby Indians have rights and obligations equal to those of all other Canadians. There should be no difference in my mind, or anybody else's mind, as to what we are, because we are all Canadians.[198]

The substantive content of this position can be seen in the testimony of a key government anthropologist (Diamond Jenness). He proposed a twenty-five-year plan to,

> …abolish, gradually, but rapidly, the separate political and social status of Indians (and Eskimos); to enfranchise them and move them into the rest of the population on an equal footing.[199]

It should be obvious at this point that there is nothing new in these statements. In fact, it is simply a statement of the primary desideratum of Indian policy stretching back to the Darling Report of 1828: to be rid of the "…little colony of unwelcome foreigners" once and for all, to be free of the costs associated with maintaining them, and to, finally, unify the body politic.[200] The only question that the Joint Committee actually entertained was the question of how to achieve it.

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[197] *Ibid,* at 56.

[198] Cited in *Ibid.*

[199] Cited in *Ibid,* at 57-58.

[200] The words are Alexis de Tocqueville's; he described the conditions of the Indigenous peoples in the United States in the 19th as follows, "Isolated within their own country, the Indians have come to form a little colony of unwelcome foreigners in the midst of a numerous and dominating people." See *Democracy in America*, translated by George Lawrence, J. P. Mayer, ed, (New York: Harper and Row, 1988) at 334.

In 1949 the government made its first substantive step in its "new" Indian policy by transferring the responsibility for the Indian Branch to the Department of Citizenship and Immigration.[201] This enabled them to introduce Bill 267 of 1950 by stating that its goal was to integrate "…the Indians into the general life and economy of the country" but, this would require "a temporary transition period" during which "special treatment and legislation are necessary."[202] The actual content of the *Indian Act* of 1951 was largely a return to the original act of 1876. As John Tobias notes,

> The new act definitely differs from the Indian acts between 1880 and 1951, but only because it returned to the philosophy of the original act: civilization was to be encouraged but not directed or forced on the Indian people. Assimilation for all Indians was a goal that should be striven for without an abundance of tests or the compulsory aspects of the preceding acts.[203]

The crown-machine was thus effectively reset. Its accumulated bulk was reduced, its profile streamlined, but it was far from "new". The main structural lines of Indian policy (the ones that were so clearly set by the first *Indian Act* in 1876; viz. the unilateral control of lands, membership and local government) had never changed. That being said this "new" version was also not entirely the same. There was one change in particular that serves to foreshadow a significant change. This is the addition of s. 87 (now s. 88). This provision, which we will deal with extensively in the next chapter, incorporated provincial laws of general application as federal law.[204] It was an extension of a discretionary power that was given to the Superintendent-General in 1936. But, this

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[201] Its home since 1936 had been in the Ministry of Mines and Resources and prior to that the Ministry of the Interior.

[202] Cited in *Ibid,* at 63.

[203] *Historical Development, supra* note 24, at 150-151.

[204] The changes also include the creation of the Register which, continues to unilaterally regulate Indian status.

version was automatically applied (subject to the confusing limits of treaties and federal legislation). It represents, to my mind, the first real shift in Indian policy since 1876: viz. the decentralization of federal jurisdiction over Indians and their lands in favor of an increasing role for the provinces.

The 1951 revision did not settle the issue. It merely marked the beginning of an extended crisis of legitimacy that was marked by increasing political pressures. The Civil Rights Movement in the United States, the steady dissolution of the remaining European Empires, and the so-called Quiet Revolution in Quebec, all served to make the "temporary transition period" more and more uncomfortable.[205] Throughout the 1950s and 1960s there was a proliferation of internal reviews, committees, and inquiries. All of this eventually culminated in the *White Paper* in 1969.[206] There is a somewhat pleasing (if not magical) circularity to it; what begins as a *unilateral* civilizing policy ends with a *unilateral* proclamation, "you are now all equal before the law!" The problem was that the audience did not erupt into applause. In fact, the simply incantation failed and the magic show fell apart. As Weaver states,

> Although the policy-makers struggled to produce a 'good' policy, the White Paper was basically a self-serving policy designed to free the government from criticism, protecting it from future accusations of discrimination.[207]

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[205] In 1960 the *Canadian Bill of Rights* was passed (*Canadian Bill of Rights*, S.C. 1960, c. 44.). That same year citizenship was granted to all status Indians.

[206] The term 'white paper' refers to a kind of policy document that had, as Sally Weaver notes, "…been used for purely informational purposes in announcing completed policies, or as mechanisms for enhancing consultation with the provinces, the public, and opposition members in Parliament during minority governments." See Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970*, (Toronto: University of Toronto Press, 1981) at 122 [hereinafter Weaver, *Indian Policy*].

[207] *Ibid*, at 197.

It was indeed self-serving, but it was, to my mind, more than a desire to free the government from the accusation of discrimination. It was also, consciously or not, repeating the picture that had captivated policy-makers of the 19th century viz. the unified and uniform body politic. What could not be accomplished by social engineering was now being attempted by political fiat. The problem was that equality (which was the guiding star of the *White Paper*), much like self-defense, has a universal appeal, but lacks clear boundaries. As Tully rightly states,

> Abstract moral principles can literally mean anything the user wishes them to mean unless they are grounded and articulated in relation to the experiential self-understanding of those to whom they are applied.[208]

The Indigenous response was a complete rejection. The Alberta Indian Association published a position paper entitled *Citizens Plus* (the title explicitly referring to the term used in the Hawthorne Report) and this was, after some revisions, adopted as the National Indian Brotherhood's response to the White Paper. The Red Paper was presented before the full cabinet of the Trudeau government by Chief Adam Soloway and Chief John Snow (both in traditional regalia) on June 4, 1970. They read the papers in the form of a dialogue,

> Chief Adam Soloway: "The White Paper states: The legislative and constitutional basis of discrimination should be removed."
> Chief John Snow: "The Red Paper states: The legislative and constitutional basis for Indian status and rights should be maintained until such times as Indian people are prepared and willing to renegotiate them."
> Chief Adam Soloway: "the White Paper states: There should be a positive recognition of the unique contribution of Indian culture to Canadian life."
> Chief John Snow: "The Red Paper states: These are nice sounding words which are intended to mislead everybody. The only way to maintain our culture is for us to remain as Indians…"[209]

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[208] James Tully, "Deparochializing Political Theory and Beyond: A dialogue approach to comparative political thought" (2016) Confluence at 3 [forthcoming].

[209] Cited in Weaver, *Indian Policy, supra* note 206, at 183.

The government quickly retracted the policy, but the landscape had fundamentally shifted.[210] The question was what the new landscape looked like.

The broad contours of this landscape can be found in the most significant and wide-ranging study of this period, the Hawthorne Report.[211] It recommended that the government address the Indian problem by adopting a number of new approaches. The two most significant ones were: first, to include the provinces via a system of "fused federalism"; and, second, to move away from the paternalistic administrative management of Indian bands towards a system of self-governing bands within a provincial municipal framework.[212] The "new" landscape of Indian governance thus gave more power to band councils (by removing some supervision), but it simultaneously limited them by situating them as municipalities under the concurrent jurisdiction of Parliament and the Provincial Legislatures. There is a pattern here that is very similar to what the British Imperial Government was doing near the tail end of its civilizing policy viz. it began to decentralize its authority by devolving powers to the colonial governments. The difference being that the *British North America Act* of 1867 was a clear and structured legal framework put in place by the Imperial Parliament to increase the governing powers of its colonists. The Canadian version of devolution is far more *unilateral* in nature; the pre-existing legal and political systems of Indigenous nations are ignored, the treaties are read down into little more than surrender documents and the

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[210] *Ibid*, at 185-189.

[211] Interestingly in the same year that the first volume of the Report was published the government moved the Indian Branch from the Department of Citizenship and Immigration and created the Department of Indian Affairs and Northern Development. See Giokas, *The Indian Act*, *supra* note 12, at 73.

[212] Ibid, at 79-82.

power of Parliament under s. 91(24) is read as being unlimited. This result is not a change in substance from the goal of assimilation, it is a change in form. It created a picture of federalism that enabled the band to continue on as a municipality and Indians as "citizens plus". This residual difference could fit squarely within the confines of the existing constitutional structure and so there would be no need to really be concerned about the possibility of "…independent, or quasi-independent Indian States."[213]

With that worry pushed aside it was possible the leave the precise details to the courts. This did not necessarily mean that the crown-machine suddenly ceased to function. It was simply modified; the spells became unspoken. Sovereignty (and underlying title) was never to be questioned or subjected to doubt. All that was required to animate the machinery was to invoke (or, more appropriately, conjure up) the unlimited *power-over* Indians and their lands that were given by the British in s. 91(24). It contained the force all of the old spells and incantations, which now appeared to be, if spoken, little more than "nonsense on stilts."[214] The trick was one could simply never ask how the British were able to give what they never had; this was to be evaded at all cost. If pressed the courts have little recourse, but to silently trace, and re-trace the lines of those inscrutable and mysterious numbers: s. 91(24). The words of bluebeard logic warn off all those who dare to ask what lies behind the numbers; "Beyond this there is nothing to see!" Naturally, it is precisely this question that Aboriginal peoples began to put forward through the courts from *Calder* forward.

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[213] Canada, *Appeal, supra* note 84, at 836.

[214] This was, or course, Jeremy Bentham's famous dismissal of the early-modern natural law tradition. As he puts it, "*Natural rights* is simple non-sense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts." See John Bowring, ed, *The Works of Jeremy Bentham*, vol. 2 (Edinburgh: William Tait, 1838-1843) at 501.

At this point we will take a step back for a moment here and reconsider the ground that we covered in this chapter. I began by outlining the pre-confederation changes in Indian Administration from 1812 to 1867. This provided us with a sense of how the transition from treaty-federalism to administrative despotism worked at the level of legislation, policy and practice. From this I shifted to a consideration of the way the Dominion addressed the Indian Question from 1867 to the 1920s. It served to highlight how the system of administrative despotism (viz. the crown machinery) was put in place and continually reconfigured in relation to Aboriginal resistance. In this third section I narrowed the scale of focus to address the particular case of the Six Nations' appeal for justice at the *League of Nations* in 1923. This offered us a clear example of how the crown machinery operated in this period and it shows that the question of self-determination in international law was in play from the beginning of the 20th century. I then closed the chapter by zooming out and providing an overview of the transformations in Indian policy that followed the Second World War. This served to place the changes going on within Canada in the international context of the 1960s wave of decolonization. This provides the context for the next chapter which will address key changes in the case law following from *Calder*.

Chapter 4

A Law Without Measure for a Land Without Citizens:
The Indian Act in Canadian Jurisprudence

A good despotism is an altogether false ideal, which practically (except as a means to some temporary purpose) becomes the most senseless and dangerous of chimeras.
J. S. Mill, *Considerations on Representative Government* (141)

It is *futile* to inquire into the *historical warrant* of the mechanism of government, that is, one cannot reach back to the time at which civil society began (for savages draw up no record of their submission to law; besides, we can already gather from the nature of uncivilized men that they were originally subjected to it by force).
Immanuel Kant, *The Metaphysics of Morals* §52

The fundamental fact here is that we lay down rules, a technique, for a game, and that then when we follow the rules, things do not turn out as we had assumed. That we are therefore as it were entangled in our own rules…This entanglement in our rules is what we want to understand (i.e. get a clear view of).
Ludwig Wittgenstein, *Philosophical Investigations* §125

What is the *Indian Act*? [1] The question is, at least at first glance, simple and direct. It seems that one could simply respond by quoting the act itself and say that it is "an act respecting Indians" (the use of the word "respecting" here verging on irony) or by reciting two basic facts: a) the *Indian Act* is an act of Parliament originally passed in 1876; and, b) it is the legislative expression of the exclusive jurisdiction given in s. 91(24) of the *British North America Act* passed by the Imperial Parliament in 1867 (now referred to as the *Constitution Act*, 1867). This provides us with a formal definition that relates the legislation to its constitutional basis. And while it does allow us to generally situate this specific act within the legal architecture of Canada by giving us its so-called "pith and substance", it provides us with no information about the object of the act or how it operates within the "mechanism of government" (to borrow Kant's phrasing from the epigraph).[2] So how does the set of possible responses change if we shift our focus to the object and purpose of the legislation? On this front we are presented with several possible avenues of investigation from the "modern principle" of statutory interpretation to the legislative history of the act and its precursors.[3] The words of the act are of little assistance as the terms that would indicate who the act applies to (i.e. Indian and Band) are defined by the unilateral procedures within the act itself. This is unhelpful as it leaves us with legislative tautologies like an Indian is a person who is or is entitled to be

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[1] *Indian Act* (R.S.C., 1985, c. I-5)

[2] Immanuel Kant, *The Metaphysics of Morals*. Edited and Translated by Mary Gregor. (New York: Cambridge University Press, 2006) at 111-112.

[3] As the Court holds in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21, "…the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

registered as an Indian or a Band is a body of Indians.[4] If we are to escape from this circular path, our investigation will need to consider the history of the act.

Even a cursory historical examination (and, seeing as the roots of the *Indian Act* are inextricably intertwined with the project of settler colonialism, it is a history that precedes both confederation and the *Royal Proclamation, 1763*) will lead us to the legislative acts that preceded it and gave it shape. There is the *Gradual Civilization Act* (1857), the *Gradual Enfranchisement Act* (1869) and a host of commissions and reports with names such as Darling, Bond Head, Pennefather, and Bagot among others. The titles of these two acts alone begin to give us an indication of the object and purpose of the *Indian Act*: its purpose is captured in the verbs that it sets out to address its object (*to civilize*, *to enfranchise*, etc.). If we adopt these verbs into the working response to our initial question, then we can say that the *Indian Act* sets out the powers and procedures that give form to the project of "civilizing" the "Indians" or, to put it another way, it is the legislative basis for the *mechanism of governing* "Indians." The act is a response—or rather, given the fact that the act has been subject to a continual *ad hoc* process of amendment, a series of responses— to a problem: what is to be done about the "Indians"?

The response that the Crown articulates with the *Indian Act* is, as James Tully states in *Strange Multiplicity*, "…a vast administrative dictatorship which governs every detail of Aboriginal life" and this "…entire regime was imposed without the consent of Aboriginal peoples."[5] Another way of expressing this is to say that it exists as a "good despotism", which Mill—as long as we ignore his exception—rightly refers to as "…the

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[4] *Indian Act, supra* note 1.
[5] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 90-1.

most senseless and dangerous of chimeras."[6] But, it seems to me, we have lost sight of this danger and are still living in the shadow of Mill's exception. The *Indian Act* continues to unilaterally determine the identity of its subjects and govern every aspect of their lives without their consent, but this blatant despotism somehow escapes us. It is as if we have recited its words so often that their nonsense has been disguised. And so, in a kind of semantic version of prescription (or adverse possession), it has acquired the appearance of truth and legitimacy by way of continuous repetition. We have forgotten its strangeness and with that its danger. The "temporary purpose" of the *Indian Act* (to civilize Indians) has been abandoned, but its mechanisms of governance continue to move under the banner of reconciliation. Wittgenstein provides, what is to my mind, an appropriate analogy for this situation,

> You think that after all you must be weaving a piece of cloth: because you are sitting at a loom—even if it is empty—and going through the motions of weaving.[7]

How can we begin to move out of the shadow and see the disguised nonsense of this "good despotism"? How can we begin to understand our entanglement in these rules? One possible approach is to turn to the law to review the basis of its authority or, to borrow Kant's phrase, its historical warrant. This method of inquiry has been made possible (contrary to Kant's claim concerning "savages" and record keeping in the epigraph) by the wealth of records that have been generated by the continuous resistance of Aboriginal peoples to Crown domination.[8] These records enable us to enquire into the

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[6] J. S. Mill, *On Liberty and Considerations on Representative Government.* Edited by R. B. McCallum (Basil Blackwell: Oxford, 1948) at 141.

[7] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Blackwell: Oxford, 2001) at §414.

[8] This resistance extends far beyond what is captured in the jurisprudence. Law's province has the unfortunate tendency to only see the resistance that it recognizes though the lens the rules and tests that it itself generates. An example of this tendency towards solipsism is the distinction between law and custom, which was used

historical warrant of this mechanism of government with a view to challenging its legitimacy. After all, the *Indian Act* has been imposed without the consent of those that it governs and so it ignores the most fundamental constitutional convention: *quod omnes tangit ab omnibus comprobetur* (q.o.t), "what touches all should be agreed to by all".[9] Its only possible claim to a historical warrant is found in the unilateral logic of colonialism and some shabby, bankrupt legal fictions that would purport to convert force into law by opening up an exception in the qualifications for the fundamental equality of human beings.

Our task in this chapter will be to travel over the wide field that the 140-year history of this "vast administrative dictatorship" opens up before us. An exhaustive survey of this field is an immense undertaking as it would need to cover the legislative, juridical, political and administrative dimensions in addition to the numerous contrapuntal practices of resistance practiced by Aboriginal peoples.[10] Our investigation in this chapter will be confined to one aspect of this colonial landscape, namely, the

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as a kind of criterion for determining who was or was not civilized. The problem was that the concept of law affords itself no generally accepted and therefore correct or standard use. It is an essentially contested concept (this despite W.B. Gallie's own doubts on the matter, which I believe vanish as soon as the implications of legal pluralism and history of colonialism are taken seriously. See W.B. Gallie, *Philosophy and the Historical Understanding*. (Chatto & Windus: London, 1964) at 190). While there can be dominant schools of thought (e.g. law as being commands laid down by a sovereign, law as a distinctive structure or set of institutions, etc.) there can be no single universally acceptable criterion to determine the boundary between law and custom. When this distinction was used to discount the complex legal systems of entire cultures as being merely custom it cannot stand as anything more than a self-serving assertion of power. It is as absurd as weaving on an empty loom or claiming that the 'self' consists mainly of 'peculiar motions in the head or between the head and throat' (*Philosophical Investigations*, *supra* note 7, at §413). Aboriginal self-government has not been extinguished despite past 140 years of the Crown's administrative despotism. Rather, it inheres in the continuous and multiform practices of resistance that Aboriginal peoples live out on a daily basis. For an example of this see John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self Government." (1992) 30:2 Osgoode Hall LJ 291.

[9] Tully, *Strange Multiplicity*, *supra* note 5 at 74.

[10] For my use of the term 'contrapuntal' see the phrase "contrapuntal reading" in Edward Said, *Culture and Imperialism*. (Vintage Books: New York, 1993) at 66-7.

juridical interpretation of the *Indian Act*. Even this field is vast and so we will narrow our focus further to the lines of authority and resistance[11] that relate to the problem of self-government most directly:

A) *The legal nature of the authority granted in s. 91(24)*: In this section our guiding line of inquiry will be to ask how s. 91(24) can be understood to confer the authority necessary to support the *Indian Act* or to allow for concurrent provincial jurisdiction without the expressed consent of Aboriginal peoples. This line can be rephrased into a clear and direct question: where does s. 91(24)—i.e. Indians and their lands—fit within the division of powers set out in the *Constitution Act, 1867*? The answer to this question is of fundamental importance as it will explain how Aboriginal sovereignty has been unilaterally excluded from the picture of Canadian federalism that is being put forward by the Supreme Court. This line will take us from *St. Catherine's Milling*—where the Privy Council establishes the picture that excludes Aboriginal peoples—through a series of cases dealing with the doctrine of interjurisdictional immunity in relation to s. 91(24) and s. 88 of the *Indian Act*. I believe that this set of cases offers us the most detailed account of how the courts have attempted to interpret both the scope of s. 91(24) and how it fits into the broader constitutional framework. From the 1970s through to the early 1980s the majority decisions in *Cardinal*, *Natural Parents*, and *Four B* extend the reasoning of *St. Catherine's Milling* to offer us a picture of federalism that places Aboriginal peoples in a labyrinth of concurrent jurisdiction that is

[11] I refer to these as both lines of authority and resistance as they form both decisions themselves compose the legal authority in term of the common law in Canada and that the cases themselves are the product of one form of Aboriginal resistance.

overseen by the "vast administrative dictatorship" of the *Indian Act*. But, in true common law fashion, there are a series of dissents in these cases that offer us another possibility. Chief Justice Laskin (as he was then) put forward a theory of s. 91(24) that views Indian lands as being federal enclaves that are immune from Provincial jurisdiction. While this possibility is by no means a complete deviation from the picture of federalism put forward in *St. Catherine's Milling* it reveals the tension within the Court on this question and the continued possibility of another way forward.

B) *The definition of "Indians" and the structure and authority of "Bands."*: In this section we will consider how the definitions of "Indians" and bands (from its 19th century legislative foundations) fit within the picture of federalism that the Court has formulated in and through its interpretation of s. 91(24). This is directly connected to the preceding section of the interpretation of s. 91(24) as it concerns who resides within the ambit of that authority and what kind of political structure can exist there. Simply put, if the Court's interpretation of s. 91(24) provides us with a picture of federalism then the question of who Indians are and what form of political structure governs them determines their place within this picture. This, in turn, helps us to see what form of legal justification could possibly support such a picture. This section is divided into two main subsections:

    I. The definition of Indians: This section begins with a brief overview of the legislation from 1850 to the first version of the *Indian Act* in 1876 and its revision in 1880. This legislation provides backdrop for case law that follows from it. With the overview in place we will then turn to the

judicial interpretation of the definition of "Indians" from the 1939 *Eskimo Reference* through to *Lavell*, the *United Nations Human Rights Committee* finding in *Lovelace v. Canada* 1981, the legislative changes to registration in the 1985 revision of the *Indian Act*, *McIvor* and the current *Daniels* case.

II. The definition of band councils: The aim in this section is to provide a survey of how the courts have interpreted the authority of the band council. These cases develop from situations in which a band makes a move away from the normal rules of the *Indian Act* game. This is unsurprising as the 'normal rules' of the *Indian Act* are unambiguous. The source of authority and of ultimate administrative power is the Crown. But, there are some moves that have been taken by bands to move away from this power *over* relationship. I have limited my focus to three specific examples of these moves:

    i. First, in *Pamajewon* we see an example of band councils asserting laws outside the bounds of the *Indian Act*. This leads to a direct confrontation to the unilateral authority of the Crown.

    ii. Second, a band council requests to switch from the *Indian Act* election procedures in s. 74 and form a custom election code. This enables them to change rules concerning eligibility, term of office, size of council, and to integrate hereditary leaders. But, what happens when there is a dispute within the band over the results of an election? This has led to a body of cases in which the federal

courts are forced to determine whether or not a custom band council fits within their jurisdiction under the *Federal Court Act.*

iii. And, finally, we will conclude this section by considering how the courts have dealt with the constitutionality of the legislative and self-government powers set out in Final Agreements (also known as modern treaties).

C) *Tsilhqot'in Nation and the Meaning of s. 91(24):* In the concluding section of this chapter we will reconsider the implications of the Court's rejection of the doctrine of interjurisdictional immunity in *Tsilhqot'in Nation* for both federalism and the future of reconciliation. When this change is seen in the light of the history of how the Court has interpreted s. 91(24), the definitions of Indians and the structure and authority of Bands we can see that the framework of reconciliation is an extension of the 140-year history of unilaterally excluding Aboriginal peoples from the division of powers that govern their lands. It highlights the fact that the s. 35 framework and the current interpretation of s. 91(24) share a common foundation. Both rely on *terra nullius,* discovery and divine right to diminish Aboriginal peoples to such a degree that the Crown was able to acquire sovereignty and radical or underlying title to their lands by assertion alone. Both are based on little more than a stated absence of doubt. What this means is that even if Parliament were to suddenly repeal the *Indian Act* the picture of federalism would remain the same. In effect, the era of reconciliation has changed the procedures, but it has not even begun to address the issue of the *historical warrant* of the Crown's mechanism of government. In order to do this, we need to

have a clear view of how the s. 35 framework has become entangled with s. 91(24). It is this entanglement that has left us with a picture of federalism in which Aboriginal peoples are left with little more than the simple municipal institutions and abandoned laboratories of civilization that were set in place in the 19th century. My hope is that by finding other ways to see this picture—a position from which we can begin to survey its course through history and see its contingency—we can also see how this is not the only possibility. Our reconciliation need not be one without recollection. *The spirit of Haida Gwaii* shows us that life within *the boat that goes on forever anchored in the same place* can always be otherwise than it is.

The Authority of s. 91(24)

The precise nature of the legal authority conferred on the federal Parliament by s. 91(24) of the *Constitution Act*, 1867 is, much like the *Indian Act*, neither simple nor direct. On a plain reading of the provision itself it seems clear: Parliament has the exclusive jurisdiction to make laws in relation to "Indians, and lands reserved for Indians." But, even in venturing this far we have complications that need to be accounted for. First, there is the fact that the provision contains two heads of power, namely "Indians" and "lands reserved for Indians." Second, there is the question of the purpose or nature of this section. Its position within the *Constitution Act, 1867* is unique as it is a power to make laws in relation to a specific category of people who, unlike 'aliens' in s.91(25)[12], are racially defined and have proprietary claims to land that preexist those of

[12] Laskin J. made this point (minus the racial determination) very directly in his dissent in *Cardinal v. Alberta (Attorney General)*, [1974] SCR 695 at 728 [hereinafter *Cardina*l]: "It was contended by the respondent Attorney-General of Alberta that federal power in relation to "Indians" was akin to its power in relation to

the state.[13] This adds a higher than normal degree of concern regarding the limits of the legislative authority that it confers. As Peter Hogg states,

> The federal Parliament has taken the broad view that it may legislate for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians.[14]

What is the basis of this "broad view" and what limits does it have?[15] If we read s. 91(24) in line with British Imperial policy prior to confederation, then it seems that the primary purpose would be to protect the Indians from the interests of local settlers and other European powers via the establishment of treaties. This point is reinforced by the fact that Aboriginal peoples did not consent to or participate in the enactment of the *Constitution Act, 1867*. This means that the Imperial Parliament would have no legitimate basis for

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aliens (s. 91(25)) and that Indians like aliens were subject to provincial laws of general application. I do not pursue the analogy because it breaks down completely when regard is had to the fact that we are dealing here not only with Indians but with "lands reserved for the Indians"."

[13] I use the term "proprietary claim" here to indicate how the settler legal system interprets the claims of Aboriginal peoples. This claim has been characterized in different ways within the common law over time (e.g. as a "mere burden" on title that exists at the pleasure of the sovereign to a *sui generis* right that is derived from prior occupation), but it is always tied to the question of land. It is not simply a dispute over land. It is a dispute over sovereignty and the right of self-government. My own position is that the confusing system of rights and title that has been developed is predicated on the unquestioned sovereignty of the Crown (within this system judges, much like blind men confronting an elephant, discover what they believe to be separate and distinct rights from something that is, when seen from another perspective, actually only coherent as parts of a whole). This has led to an asymmetry that the legal system cannot (or rather will not) investigate. It can and does qualify sovereignty by adding terms such as *de facto* or assertion or substitutions like suzerainty, but as long as the Crown retains the unilateral right to infringe Aboriginal right and title the asymmetry remains firmly in place (an asymmetry whose sheer and unquestionable degree brings to mind Job's position in relation to God in the Old Testament). By characterizing the claims of Aboriginal peoples as *sui generis* right of occupancy, confining the Aboriginal perspective to the rules of evidence, and establishing a complicated and costly system of adjudicating these disputes the Court simply articulates a new doctrine of constructive conquest under the banner of reconciliation and thereby reduces the law to "…the most vital and effective instrument of empire…". See Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 6.

[14] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 618.

[15] As John Borrows notes, the basis cannot simply be the wording of the provision itself as "…the technical wording of powers granted by section 91 is "*in relation to*" matters not assigned exclusively to provincial legislatures. In particular, the exclusive federal legislative authority in section 91(24) only "*extends to*" Indians and lands reserved for Indians. There should be a vast difference between legislation *extending to* or *in relation* to a subject matter and exercising legislative power over a particular group of people." See John Borrows, "Unextinguished: Rights and the Indian Act" (unpublished) at 11.

changing the special horizontal relationship between Aboriginal peoples and the Crown. And so, by conferring this power on the federal Parliament, the Imperial Crown could ensure that there was a clear successor to its responsibilities under both the treaties and the *Royal Proclamation of 1763*.[16] This relationship between the Crown and the Aboriginal peoples is best described by the terms "suzerainty" or, "treaty-federalism".[17] This form of relationship is categorically distinct from that of sovereignty in that the parties both maintain their internal autonomy (as graphically illustrated by the separation between the rows in the *Two Row Wampum Treaty Belt* in 1613). This interpretation places specific limits on "the exclusive power of legislation and administration" that was vested in Parliament with s. 91(24), which affect both its legislative capacity and the place of Aboriginal peoples within the federal structure.[18]

a) The conflict between this interpretation of Canadian constitutional history and the *Indian Act* is obvious. The *Indian Act* unilaterally governs every aspect of the

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[16] This is Lord Watson's position in *St. Catherine's Milling and Lumber Company v. The Queen*, (1888), 14 App. Cas. 46 at 59. The decision—which, serves as the conceptual model for the relationship between the Crown and Aboriginal peoples in Canada until *Calder*—holds that Aboriginal title is "…a personal and usufructuary right, dependent upon the good will of the Sovereign" (*Ibid* at 54). As Lord Watson states, "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown…" (*Ibid* at 58). Crown sovereignty is taken as a given. The conceptual picture of the relationship between the Crown and Aboriginal peoples is puzzling. The only source of Aboriginal title is the power of the Crown (as expressed by the *Proclamation*) and so the "burden" is self-imposed and the Crown retains the unilateral power to extinguish this "burden". The problem here is where this asymmetry derives from. Is it to be found in the terms of the treaties? What about unceded territory? And if it has no basis in these texts and historical records what are we left with? Can the Crown acquire title to lands by unilateral proclamation?

[17] For the term suzerainty refer to Brian Slattery, "Making Sense of Aboriginal Treaty Rights" (2000) 79 Can Bar Rev 196 at 198, 201, 209-210. It appears in the case law in Lamer J.'s (as he was then) decision in *R. v. Sioui*, [1990] 1 SCR 1025 and again in Binnie J.'s concurring decision in *Mitchell v. M.N.R.*, [2001] 1 SCR 911 at 142 where he cites Slattery's article while attempting square the Crown's circular reasoning on the issue of sovereignty by providing an account of "merged sovereignty" (for more see my engagement with this case in the Introduction to this book). For more on the concept of treaty-federalism refer to Russel Lawrence Barsh and James Youndblood Henderson, *The Road: Indian Tribes and Political Liberty*. (Berkeley: University of California Press, 1980) and, more recently, Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. (Toronto: University of Toronto Press, 2014).

[18] *St. Catherine's Milling*, *supra* note 16, at 59.

lives of those it determines to be Indians and leaves no possible space for Aboriginal self-government.[19] And so, if s. 91(24) is to be read in the light of the relationship between the Imperial Crown and Aboriginal peoples prior to confederation then the vast majority of the *Indian Act* is simply and utterly *ultra vires* (the exception being those protections that are consistent with the *Proclamation*).

b) The second limitation that this reading of s. 91(24) necessarily implies relates to the division of powers. The horizontal nation-to-nation relationship between Aboriginal peoples and the Crown gives the federal government exclusive (but not plenary) jurisdiction to pass laws dealing with "Indians and lands reserved for Indians."[20] The purpose of this is, as Bruce Ryder rightly states, to guarantee "...political spaces to the founding cultural groups in which they could define their own policies and preserve their institutions."[21] This adds a unique emphasis to the

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[19] The conceptual disjunction between the *Royal Proclamation of 1763* and the *Indian Act, 1873* is even more evident when one takes into consideration the *Quebec Act of 1774*. The *Proclamation* recognized and protected Indian Nations, but did not do so for the *Canadiens*. They protested this and their resistance led to the passing of the *Quebec Act*, which provided them similar protections (e.g. restoring the use of the Civil Law, guaranteeing the free practice of Catholicism, etc.). How is it that they were treated as legally similar in 1763 and 1774 (even though Quebec was technically conquered) yet different in kind in 1867 (when the *Quebec Act* was used to protect the rights of provinces against the central government)? In 1867 Quebec is granted a clear position in the division of powers whereas Aboriginal peoples are placed under the exceptional jurisdiction of s. 91(24) and then in 1873 the administrative despotism of the *Indian Act*. There is a sea change that needs to be accounted for here. I would like to thank James Tully for drawing my attention to this important contrast.

[20] John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48:3 UBC L. Rev. 701 at 734-38.

[21] Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations." (1991) 36 McGill L. J. 308 at 362. This seminal article provides a clear and consistent "autonomist" approach to interpreting both s. 91(24) and s. 88. It bases this in the elements of Canadian constitutional history that I have outlined here (i.e., the special constitutional status of Aboriginal peoples as recognized in the treaty making process and the *Royal Proclamation of 1763*, the exclusive jurisdiction that s. 91(24) grants to the federal government and the fact that Aboriginal peoples did not consent to or participate in the enactment of the *Constitution Act, 1867*). My own approach to s. 91(24) and s. 88 takes its lead from Ryder's "autonomist approach". My contribution to it is to expose the necessary set of

references to "exclusivity" throughout ss. 91 and 92 of the *Constitution Act, 1867* and places hard limits on the theory of federalism that is applicable. This means that when the courts are faced with a division of powers question relating to s. 91(24) the only appropriate model of federalism is the so-called classical paradigm. Its use of watertight jurisdictional compartments is consistent with the purpose of s. 91(24), which is necessarily different than any other head of power.[22] The classical paradigm provides the courts with the necessary interpretive tools to limit the scope and application of provincial laws thereby preserving space for Aboriginal self-government. These tools include: a more robust version of the doctrine of interjuristictional immunity[23] that supports an "enclave" theory of jurisdiction over Indian lands, a broader "covering the field" approach to paramountcy and the prohibition on federal inter-delegation. This is the only approach to the division of powers that respects the purpose of the Imperial Parliament's division of legislative authority of the *Constitution Act, 1867* into two lists of "exclusive" spheres and its pre-existing responsibilities under the treaties and the *Royal Proclamation of 1763*. In contrast, the modern

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assumption that grounds the argument for applying the "modern approach" to this area (i.e. it is dependent on unquestioned and unexplained Crown sovereignty).

[22] This is directly against the longstanding (and unexplained) position that the Supreme Court has taken in regards to s. 91(24), which Justice Abella articulates in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* [2010] 2 SCR 696 at para 20: "There is no reason why, as a matter of principle, the jurisdiction of an entity's labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is – and should be - the same as for any other head of power."

[23] I agree with Robin Elliot's argument that the term "interjurisdictional immunity" is an unhappy one as it encourages the misconception that the purpose of the doctrine is to protect the interests of particular entities rather than jurisdictional exclusivity. I believe that we should follow his suggestion and rename it the "doctrine of jurisdictional exclusivity". See Robin Elliot, "Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters—Again." (2008), 43 S.C.L.R. (2d) 433 at 495.

> principle with its overlapping spheres of concurrent jurisdiction and more flexible double aspect and paramountcy doctrines is utterly inconsistent with the purpose of s. 91(24).[24] In order for it to it to gain the appearance of coherence within the four corners of the constitution it endeavors to treat s. 91(24) as no different than any other head of power.[25] While this may appear attractive for the purposes of administrative efficiency for both levels of government to enjoy concurrent jurisdiction it begs the question of where this jurisdiction is derived from and where the space of Aboriginal self-government went.

The only possible explanation for how s. 91(24) could be understood to confer the authority necessary to the support the *Indian Act* or to allow for concurrent provincial jurisdiction without the expressed consent of Aboriginal peoples is absolute sovereignty (i.e. a form of sovereignty that would be immune to both *q.o.t.* and the basic principles of natural justice[26]), which itself can only be based in the legal fictions of *terra nullius,* discovery and divine right.[27] And yet, in *Tsilhqot'in Nation* the Court has informed us

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[24] Borrows, *Durability of Terra Nullius, supra* note 20, at 734-38.

[25] Hogg presents a version this argument in *Constitutional Law, supra* note 14, at 624. See note 62 in this chapter as well.

[26] I am referring of course to *audi alteram partem* and *nemo judex in causa sua*.

[27] An example of this reasoning can be seen in *Kruger and al. v. The Queen*, [1978] 1 SCR 104 ay 107 when Dickson J. (as he was then) cites Robertson J. from the BCCA decision: "The Proclamation of 1763 was entirely unilateral and was not, and cannot be described as, a treaty. Assuming (without expressing any opinion) that the Proclamation has the force of a statute, it cannot be said to be an act of the Parliament of Canada: there was no Parliament of Canada before 1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an act of a legislative body which was not created until more than a hundred years later." There are a number of necessary assumptions that undergird this interpretation. First, in order to maintain the logic that the unilateral nature of the *Proclamation of 1763* reflects unilateral Crown sovereignty it is necessary to ignore the treaties and Imperial policy towards Aboriginal peoples prior to confederation. Second, Aboriginal peoples would have had to consent to this unilateral sovereignty or be subjected to it via conquest without conditions. Third, this unilateral sovereignty is then passed onto the colonial Parliament with the *British North America Act, 1867* and from that point forward it has the seemingly unlimited capacity to despotically govern Aboriginal peoples (the only qualification on their power being clear and plain legislative intent and the division of powers). If these assumptions are accepted then it explains why Dickson J. assert that "claims to aboriginal title are woven

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."[28]This claim begs the question of the legal basis for Parliament's "broad view" of its own legislative powers under s. 91(24) and the Court's ability to interpret it as a double aspect matter.[29] So, we must ask, what determines the limit of Parliament's authority over "Indians, and lands reserved for Indians"?

This question brings us to our aim in this section we will investigate the legal nature of the authority granted in s. 91(24) by following how the courts have read this

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with history, legend, politics and moral obligations." (*ibid* at 109). What is curious is that this position requires the interchangeability of history and legend, how else can the Crown move from a set of horizontal nation-to-nation treaties to the kind of unilateral sovereignty that it would need to give the colonial Parliament absolute sovereignty over them in s. 91(24)? It is as if the court has taken a page from *The Surprising Adventures of Baron Munchausen* as the Crown is seemingly able to lift itself out of the swamp of its contested historical and legal obligations by pulling its own hair. No wonder that Dickson C.J.C will later state in *R. v. Sparrow*, 70 D.L.R. (4th) 385 at 1103 [hereinafter *Sparrow*] that "…there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown." The sovereignty of the Crown is a fact by virtue of having never been doubted. Its only authority for this is the fiction that the Crown could obtain sovereignty over Aboriginal peoples simply by virtue of legislating it. This requires the unstated premise that lies at the root of both Crown sovereignty and the process of reconciliation: *terra nullius*. Dickson C.J.C effectively admits this by citing Chief Justice Marshall's *Johnson v. M'Jntosh* (1823), 8 Wheaton 543 (U.S.S.C.) as authority for his undoubtable concept of Crown sovereignty.

[28] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 at para. 69 [hereinafter *Tsilhqot'in Nation*]. For an investigation into this claim see Borrows, *Durability of Terra Nullius*, *supra* note 20 and Gordon Christie, "Who Makes Decisions Over Aboriginal Lands?" (2015) 48:3 UBC L. Rev. 743.

[29] The Court has recognized the varying scope of different heads of powers. In *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 SCR 669 at para. 11, the Court states: "Some heads that set forth narrow powers leave little room for interpretation. Other, broader, heads result in legislation that can have several aspects." But, the "broad view" that Parliament has taken to s. 91(24) has an even more tenuous claim to authority following the passage of s.35(1) of the *Constitution Act, 1982*. In *Sparrow*, *supra* note 27, at 1109 the Court held: "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." This attempt to reconcile the juridico-historical gulf between s. 35(1) and s. 91(24) was the first sense of reconciliation within the jurisprudence. It is, in my opinion, a task that has still barely begun. Contrary to the Court in *Sparrow* the best way to achieve reconciliation is not through a justificatory test for infringement (a test that—unlike the *Oakes* test that it is based on—has no basis within the *Constitution Act, 1982* as neither s.1 nor s.33 apply to s.35), but rather, it is through asking how legislation *extending to* or *in relation* to Indians and lands reserved for Indians became the kind of *power over* a particular group of people that could support the despotism of the *Indian Act*.

provision. Since *St. Catherine's Milling* this body of jurisprudence has been developed in and through the question of how s. 91(24) affects provincial legislative power.[30] In *Tsilhqot'in Nation* the Supreme Court has made a significant change to this jurisprudence by holding that there is no longer any role for "…the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power *over* "Indians" under s. 91(24) of the *Constitution Act, 1867*."[31] The Court has thus followed Chief Justice Dickson's (as he was then) view that:

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial

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[30] The fact that the case law on s. 91(24) develops out of a conflict over jurisdiction between two branches of the Crown and not between the Crown and Aboriginal peoples is, to my mind, a symptom of the implicit premise that provides the Crown with unquestionable sovereignty (*terra nullius*). There is a set of cases following from the passage of the *Canadian Bill of Rights*, S.C. 1960, c. 44., which attempted to use the guarantee of "equality before the law" and the prohibition on "discrimination by race" against the *Indian Act*. The first such case is *The Queen v. Drybones*, [1970] SCR 282. In this case the Court held that the use of the racial classification "Indian" in s. 95 of the Act (a provision that made it illegal to be intoxicated on a reserve) violated the equality guarantee in the *Canadian Bill of Rights*. The majority does not touch on the problem that this finding could pose to the entire *Indian Act* and s. 91(24). Justice Pigeon notes this issue in his dissent and provides an argument for the retention of the *Indian Act* (despite its obvious conflict with the *Canadian Bill of Rights*) based on s. 91(24) and the division of powers at 303: "In the instant case, the question whether all existing legislation should be considered as in accordance with the non-discrimination principle cannot fail to come immediately to mind seeing that it arises directly out of head 24 of s. 91 of the *B.N.A. Act* whereby Parliament has exclusive legislative authority over "Indians, and Lands reserved for the Indians". As was pointed out by Riddell J. in *Rex v. Martin*, this provision confers legislative authority over the Indians *qua* Indians and not otherwise. Its very object in so far as it relates to Indians, as opposed to Lands reserved for the Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally. This legislative authority is obviously intended to be exercised over matters that are, as regards persons other than Indians, within the exclusive legislative authority of the Provinces. Complete uniformity in provincial legislation is clearly not to be expected, not to mention the fact that further diversity must also result from special legislation for the territories. Equality before the law in the sense in which it was understood in the Courts below would require the Indians to be subject in every province to the same rules of law as all others in every particular not merely on the question of drunkenness. Outside the territories, provincial jurisdiction over education and health facilities would make it very difficult for federal authorities to provide such facilities to Indians without "discrimination" as understood in the Courts below." This argument provides the constitutional insulation necessary to immunize the *Indian Act* against further challenges stemming from the *Canadian Bill of Rights* in *Attorney General of Canada v. Lavell*, [1974] SCR 1349, and *Attorney General of Canada et al. v. Canard*, [1976] 1 SCR 170. In short, it repeats the "broad view" of s. 91(24) that we find in the division of powers cases and uses this to override the *Canadian Bill of Rights.* This leads to Sandra Lovelace taking her case to the *United Nations Human Rights Committee* in 1977 and in 1981 it reached its decision which 'inter alia' found Canada to be in breach of Article 27, of the *International Covenant on Civil and Political Rights* (*Lovelace v. Canada, Communication* No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40)).

[31] *Tsilhqot'in Nation*, *supra* note 28, at para. 140 [emphasis added].

> powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.[32]

My position is that in the case of s. 91(24) the "dominant tide" (i.e. the modern paradigm of federalism) and the "undertow" (i.e. the classical paradigm of federalism) necessarily entail two categorically distinct models of the relationship between the Crown and Aboriginal peoples. By following the "strong pull" of the modern approach to federalism the Court has altered the meaning of the "exclusive authority" of s. 91(24) and thereby

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[32] *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at 17. The contrast that the Court is outlining here is between two competing juridical responses to constitutional interpretation in the area of the division of powers in s. 91 to s. 95 of the *Constitution Act, 1867*. Ryder provides us with an instructive overview of the main point of distinction between the two: "The classical and modern paradigms represent different judicial approaches to defining "exclusivity" of federal and provincial powers, and thus of preserving provincial autonomy." Ryder, *The Demise and Rise*, *supra* note 21, at 312. The classical paradigm adopts a "strong" interpretation of exclusivity. It refuses the possibility of overlap between federal and provincial heads of power. It works to retain "watertight compartments" of jurisdiction by taking a strong position on paramountcy (i.e. when there is federal legislation in place it "covers the field" and prevents the effect of provincial law), interjurisdictional immunity (which, as we have seen, address the issue of valid laws passed by one body that affect the jurisdiction of another) and a prohibition on inter-delegation (the delegation of federal power to the provinces or *vice versa*, which was ruled against in *Nova Scotia (A.G.) v. Canada (A.G.)*, [1951] S.C.R. 31). In contrast the modern paradigm allows for interplay and overlap. Once again, Ryder provides the overview: "The modem paradigm, on the other hand, is premised on a weaker understanding of exclusivity. Instead of seeking to prohibit as much overlap as possible between provincial and federal powers, the modem approach to exclusivity simply prohibits each level of government from enacting laws whose dominant characteristic ("pith and substance") is the regulation of a subject matter within the other level of government's jurisdiction. Exclusivity, on this approach, means the exclusive ability to pass laws that deal predominantly with a subject matter within the enacting government's catalogue of powers. If a law is in pith and substance within the enacting legislature's jurisdiction, it will be upheld notwithstanding that it might have spillover effects on the other level of government's jurisdiction." Ryder, *The Demise and Rise*, *supra* note 21, at 312. Ryder has clearly explained the function of the "pith and substance" approach and this leaves us to briefly address the aspect or double aspect doctrine and the restrained approach to paramountcy. The aspect doctrine is an interpretive tool that is used when both levels of government have equally valid constitutional rights to legislate on an issue (i.e. each has the capacity to legislate depending on the aspect from which the subject is approached). This approach rejects the idea of the "watertight compartments" and moves towards the overlap and interplay that characterizes the modern or flexible approach to federalism. The classic example of this doctrine at work is *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161 at 181-83. Finally, the modern approach to paramountcy is to move to requiring an "express conflict" between the federal and provincial legislation before finding the latter to be *ultra vires* or reading it down (for more on the how the courts have applied the express conflict standard see note 47).

overlooked the distinct constitutional status and history of Aboriginal peoples.[33] But, seeing as the explicit wording in *Tsilhqot'in Nation* relates to only one head of s. 91(24) ("Indians") this sea change in this jurisprudence is not complete.[34] The question of the application of interjurisdictional immunity to "lands reserved for Indians" (aside from Aboriginal rights and title subject to s.35[35]) remains open. This small opening offers us the opportunity to urge the Court to reconsider what the "strong pull" of co-operative federalism necessarily implies in the context of s. 91(24). We will do this by tracing its course through the jurisprudence on the relationship between s. 91(24) and valid provincial laws of general application.

A) St. Catherine's *Milling*, s. 91(24) and the Division of Powers

It is telling that *St. Catherine's Milling*—a case where there is no Aboriginal party to plead its case before the Privy Council—forms the first chapter in both the judicial interpretation of s. 91(24) and Aboriginal title. The case establishes the following two connected points:

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[33] Borrows, *Durability of Terra Nullius*, *supra* note 20, at 734-38.

[34] If it is indeed the case that the specific wording in *Tsilhqot'in Nation*, *supra* note 28, at para. 140 only applies to the first head of s. 91(24) then it could still hold open the possibility of most of Ryder's autonomist approach (depending, of course, on what approach it takes to questions of paramountcy regarding "Indians"). As Ryder states: "While autonomy for First Nations people would be furthered by interpreting federal jurisdiction over "Indian lands" as creating "constitutional reserves" immune from provincial legislation, it is not a plausible alternative to similarly interpret federal jurisdiction over the first branch of s. 91(24) ("Indians") as creating an "enclave" around all First Nations people that would shield them from the application of provincial laws off reserves… At the same time, subjecting First Nations people to the full operation of provincial laws off reserves in the same manner as other Canadian citizens ignores their distinct constitutional status." See Ryder, *The Demise and Rise*, *supra* note 21, at 368. This is by no means certain as the wording at paras. 150 and 151 state that the doctrine will not be applied in cases where lands are held under Aboriginal title, which seems to suggest that "lands" in s. 91(24) is being restricted to reserve and treaty lands. If this is the case the possibility of the autonomist approach has been narrowed to the point of insignificance.

[35] *Tsilhqot'in Nation*, *supra* note 28, at para. 150-51.

1. Lord Watson interprets the *Royal Proclamation, 1763* as showing that "…the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."[36] And, furthermore, he states that "the Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden."[37]
2. Section 91(24) confers upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." The wording of the provision is "…sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation."[38] But, this legislative power does not carry with it a proprietary right over the subject matter. This means that Parliament has "…the power of legislating for Indians, and for lands which are reserved to their use" and the Provinces retain the underlying title to the land.[39]

With this interpretation the *Proclamation* is effectively reversed: it moves from the Crown formally recognizing and protecting Indian Nations to a document that grants absolute sovereignty over them. This is done without even a passing reference to the actual pre-confederation relationship between the Imperial Crown and Aboriginal Peoples. It is as if Lord Watson reads the *Proclamation* through the lens of the wording of s. 91(24). When he could have just as easily used the *Proclamation* to restrict the seemingly limitless grant of authority that the words of the provision itself seem to grant. He could have done so by using the history of the relationship to explicitly define what

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[36] *St. Catherine's Milling*, *supra* note 16, at 54.

[37] *Ibid* at 58.

[38] *Ibid* at 59.

[39] *Ibid.*

the limits of legislation *extending to* or *in relation* to "Indians, and lands reserved for Indians" are. Instead we are told that Indian title is a "mere burden" under the exclusive jurisdiction of Parliament and this will remain authoritative until *Calder* in 1973.[40] From this basis the only question concerning s. 91(24) left to resolve was how this exceptionally broad or even unlimited provision fits within the division of powers.[41]

This question has led to a number of cases that have formed a general rule, which holds that provincial laws apply to both "Indians" and "lands reserved for Indians".[42] Sanders summarized this trend in the case law by stating that:

> "Indians" fall into a "double aspect" area in which provincial laws will always apply in the absence of special federal legislation. No case states this proposition bluntly.[43]

The basis for treating s. 91(24) as a double aspect matter (despite its obvious uniqueness) has not been explored by the courts. Nonetheless, in the jurisprudence that has developed there are a number of exceptions. [44] Some of these exceptions are relatively uncomplicated as they concern cases where there is a clear violation of the division of powers (i.e. those that would be caught on a pith and substance analysis of the matter). [45]

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

[41] This not to say that Aboriginal peoples did not attempt to use the courts to challenge the nature of the Crown's authority. In fact, in 1927 Parliament made use of its seemingly unlimited legislative authority to make it illegal for Indians to hire a lawyer by adding Section 141 to the *Indian Act*. This provision made it a summary offense to receive any payment or promise of payment from an Indian for the prosecution of a claim without the written consent of the Super Intendent General. See *Indian Act* R.S.C. 1927, c. 98.

[42] Hogg, *Constitutional Law*, *supra* note 14, at 623.

[43] Douglas Sanders, "The Application of Provincial Laws" in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1984) at 452-453.

[44] Examples of cases that establish this rule include: *R. v. Hill* (1907) 15 O.L.R. 406(C.A.).; *Four B Manufacturing v. United Garment Workers* [1980] 1 S.C.R. 1031.[hereinafter *Four B*]; *R. v. Francis* [1988] 1 S.C.R. 1025.[hereinafter *Francis*]; and *Paul v. British Columbia* [2003] 2 S.C.R. 585. [hereinafter *Paul*]

[45] For a recent example of this see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at para. 6.

For example, provincial laws which explicitly single out Indians or lands reserved for Indians are invalid as that power is within s. 91.[46] Likewise the doctrine of federal paramountcy holds that where there is an inconsistency between provincial and federal law, the federal law trumps it (the question being whether the Court takes the classical "covering the field" or modern "express conflict" standard).[47] The most serious complications arise when an otherwise valid provincial law of general application affects the essential aspects of federal responsibility and there is no competing federal law in existence. In this case the courts are faced with the difficulty of deciding what "exclusive" means in the case of s. 91(24) by treating it as a double aspect matter, limiting provincial jurisdiction via the doctrine of interjurisdictional immunity or referential incorporation via s. 88 of the *Indian Act*.[48] This decision is particularly significant as it necessarily implies very different conceptions of both federalism and the constitutional status of Aboriginal peoples.

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[46] See *R. v. Sutherland* [1980] 2 S.C.R. 451; *Dick v. The Queen* [1985] 2 S.C.R. 309. [hereinafter *Dick v. R.*]; *Leighton v. British Columbia* (1989) 57 D.L.R. (4th) 657 (B.C.C.A.); and *Kitkatla Band v. British Columbia* [2002] 2 S.C.R. 146.

[47] The language that the Court has used to determine if there is an "express conflict" that requires the neutralization of provincial legislation (paramountcy) is that there is either a "practical and functional incompatibility" between the two schemes (*Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 S.C.R. 749 at 866-67 [hereinafter *Bell 88*]) or where the federal regulations "display a sufficient intent that [the federal government] wished to cover the field exclusively" (*Francis*, supra note 44, at 10). Also, there is a similar limitation on provincial legislative powers in Manitoba, Saskatchewan and Alberta as the *Natural Resource Transfer Agreements* (which have constitutional status by virtue of a constitutional amendment passed in 1930) contain a clause that provides for subsistence hunting and fishing rights for Indians.

[48] This decision is further complicated due to the referential incorporation theory of s. 88 set out by Beetz J. in *Dick v. R.* This is highlighted in *R. v. Morris*, [2006] 2 SCR 915 at para. 44 where the Court states that: "Section 88 reflects Parliament's intention to avoid the effects of the immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law." This interpretation further narrows the ambit of "exclusivity" in s. 91(24) and complicates its judicial application as laws that go to "core Indianness" can still be unilaterally incorporated into federal law by s. 88 of the *Indian Act*. This process makes a mockery of both the history of federalism in Canada and the constitutional status of Aboriginal peoples.

I believe that this penumbra of cases offers us the most detailed account of how the courts have attempted to interpret both the scope of s. 91(24) and how it fits into the broader constitutional framework. We will begin by reviewing how the courts have applied the doctrine of interjurisdictional immunity in relation to s. 91(24). Here our focus will be on Chief Justice Laskin's (as he was then) articulation of the theory of federal "enclaves" in his dissenting judgments in *Cardinal* and *Natural Parents* and the rejection of it in favor of the more flexible concept of "Indianness" in *Four B* and *Francis*.[49] From there we will review the shift in the Court's interpretation of s. 88 of the *Indian Act* from the declaratory theory put forward in *Kruger* to the theory of referential incorporation in *Dick v. R.*.[50] We will then consider how the definition of "Indians" and bands (from its 19th century legislative foundations) fits within the picture of federalism that the Court has formulated in and through its interpretation of s. 91(24). Finally, we will conclude the chapter by reconsidering the implications of the Court's rejection of the doctrine of interjurisdictional immunity in *Tsilhqot'in Nation* for both federalism and the future of reconciliation.[51]

B) Interjurisdictional Immunity and s. 91(24)

The doctrine of interjurisdictional immunity is based on the references to "exclusivity" throughout ss. 91 and 92 of the *Constitution Act, 1867*. For instance, the opening paragraph of s. 91 states that the Parliament of Canada has "exclusive" legislative authority in relation to matters coming within the listed classes of subjects.

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[49] *Cardinal v. Alberta (Attorney General)*, [1974] SCR 695 [hereinafter *Cardinal*]; *Four B*, *supra* note 43; *Francis*, *supra* note 44.

[50] *Kruger and al. v. The Queen*, [1978] 1 SCR 104 [hereinafter *Kruger*]; *Dick v. R.*, *supra* note 46.

[51] *Tsilhqot'in Nation*, *supra* note 28.

What does "exclusive" mean? If the limits are strictly formal, then it would have very little practical meaning as creative drafting techniques would allow for concurrent (not to mention confused) jurisdiction on all matters. If, on the other hand, the limits are strictly enforced in terms of both form and effect then the process of legislating becomes next to impossible. In this case, the legislative branches would be faced with the nearly impossible task of having to anticipate all of the possible affects that their laws may have on matters within the jurisdiction of the other branch. Between these two extremes lies the penumbra of cases in which otherwise valid, generally worded legislation enacted by one order of government intrudes on the core area of the jurisdiction of the other order.[52] When this type of case concerns s. 91(24) the courts are effectively tasked with determining the limits of federal jurisdiction over Indians and the lands reserved for them. In these cases, the courts must answer the following question: what is the meaning of "exclusive" legislative authority in regards to s. 91(24)? Broadly speaking this question has given rise to two approaches: the so-called "enclaves" theory of Indian lands and the much narrower "core of Indianness" theory. The most comprehensive articulation of the "enclaves" theory of s. 91(24) comes from Chief Justice Laskin's dissents in *Cardinal* and *Natural Parents* in the mid-1970s.[53] It remains the best defense for applying the classical approach to federalism to s. 91(24) and it offers the possibility of providing jurisdictional space for meaningful Aboriginal self-government (assuming that

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[52] This expression of the doctrine is paraphrased from Beetz J. in *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail),* [1988] 1 SCR 749 at 833 [hereinafter *Bell Canada v. Quebec*.] The expression holds true for both the enclave and Indianness theory of jurisdiction as the difference between them is the location of the core (one holds it at the boundaries of lands and the other on the vague boundaries of judicial discretion to determine the limits of Indianness).

[53] There are older cases that suggest that Indian reserves should be regarded as federal enclaves: *R. v. Rogers* (1923), 33 Man R. 139, [1923] 3 D.L.R 414 (C.A.).

federal power is constrained to the limits of free, prior and informed consent akin to what we see in "treaty-federalism" and not given the "broad view" that enables the kind of unilateral and unrestrained power that we find exemplified in the *Indian Act*).[54] The second approach adopts the more flexible modern approach to federalism by limiting the degree of intrusion to what Beetz J. referred to as the "basic, minimum and unassailable content" of the matter in question.[55]In the case of s. 91(24) the Court developed the unhappy term "Indianness" to refer to this essential or core content.[56] The overall trend has been one of decline as the Court has followed the "dominant tide" of the modern paradigm of federalism. In doing so they have relied strongly on the assumption that s. 91(24) is no different than any other head of federal power in the *Constitution Act, 1867*. They have simply accepted a "broad view" of the Crown's legislative capacity and, as such, they have enabled the Crown's despotic governmental practices under the *Indian Act*; unilaterally subjected Aboriginal peoples to a confused system of concurrent provincial and federal jurisdiction; and, continued the implicit use of the *doctrine of*

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[54] Ryder offers a useful argument for using the classical approach for s. 91(24): "If provincial autonomy is a value frequently cited in, although imperfectly promoted by, existing Canadian constitutional doctrine, autonomy for First Nations people is a hidden constitutional value whose injection into interpretive practices is long overdue." Ryder, *The Demise and Rise*, *supra* note 21, at 363. I agree with this sentiment and approach. My own concerns relate to how this has remained a "hidden constitutional value" for the last 140 years. It seems that thus far the courts have been willing to accept that s. 91(24) provided the jurisdiction required for both the creation of a federally administered despotism and provincial legislative infringement. It has done so without providing any basis for its interpretation, it simply assumes it and so the debates concerning s. 91(24) have been effectively carried out as a division of powers issue between Parliament and the Legislatures. The real underling issue here is not whether s. 91(24) is strictly federal or a double aspect matter (placing Indians strictly under Federal jurisdiction on the classical model *without redefining what s. 91(24) means* remains founded on the same power *over* relationship as the modern vision—such a redefinition *could not be unilaterally imposed* and would have to base itself on treaty federalism), but what these two different approaches to federalism necessarily imply about the relationship between the Crown and Aboriginal peoples. The question driving this can be phrased as follows: how can s. 91(24) be interpreted as fundamentally changing the treaty federalism relationship that existed between Aboriginal peoples and the Imperial Crown?

[55] *Bell Canada v. Quebec*, *supra* note 52, at 839.

[56] *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 SCR 751 at 760-61 [hereinafter *Natural Parents*].

discovery in Canadian law. In the following section, we will trace how the Court has defined federal jurisdiction under s. 91(24) by reviewing the theory of "enclaves" in *Cardinal* and *Natural Parents* and the rejection of it in *Four B* and *Francis*.

C) The Theory of Enclaves

In *Cardinal,* the appellant, a treaty Indian, sold a piece of moose meat to a non-Indian. The transaction took place at his home on a reserve in Alberta. He was charged with unlawful trafficking in big game, in breach of s. 37 of the provincial *Wildlife Act*.[57] He argued that the provincial law was not applicable to him as an Indian on a reserve and was acquitted at trial on the ground that the *Wildlife Act* was *ultra vires* in its application to the appellant by virtue of s. 91(24). The province appealed the case and the judgment at trial was reversed. At the Supreme Court the case resulted in a majority decision from Martland J. (supported by Fauteux C.J. and Abbott, Judson, Ritchie and Pigeon JJ) and a dissent from Laskin J. (supported by Hall and Spence JJ.).

The majority held that s. 12 of the *Alberta Natural Resources Agreement of 1929* made the provisions of the *Wildlife Act* applicable to all Indians, including those on reserves. This was due to the fact that, by their interpretation, s. 1 of the *British North America Act, 1930,* gave the agreement the force of law, notwithstanding anything contained in the *British North America Act, 1867* (now referred to as the *Constitution Act, 1867*), any amendment, or any federal statute.[58] This argument provided a solid constitutional basis for concurrent jurisdiction, but, due to the specific wording of the

[57] R.S.A. 1970, c. 391.

[58] *Cardinal*, *supra* note 49, at 698-99.

agreement[59], it did not provide a clear answer concerning the application of provincial law on reserves. On this question Martland J. stated that,

> Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Company v. Bryden*, that a Province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that Provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to Federal legislation. A vivid illustration of this is to be found in the Privy Council decision a few years after the *Union Colliery* case in *Cunningham v. Tomey Homma*, which sustained Provincial legislation, pursuant to s. 92(1), which prohibited Japanese, whether naturalized or not, from voting in Provincial elections in British Columbia.

It is a curious coincidence that the line of reasoning here qualifies the exclusivity of federal power under s. 91(24) on the basis of a case on s. 91(25) which upholds the right of the province to exclude a specific ethnic group from voting.[60] The reasoning of the

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[59] Section 12 of the *Alberta Natural Resources Agreement of 1929* reads: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting trapping and fishing game and fish for food at all seasons of the year *on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access*" (*ibid*. emphasis added). This wording could be read as excluding reserves as it is an open question as to whether they are included in the jurisdictional boundaries of the provinces. The appellant makes just this argument and Martland J. addresses it directly at 709-10.

[60] It is worth considering the words of the Lord Chancellor in *Cunningham v. Tomey Homma*: "Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? Yet if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91 (25) would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion, that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization, *but the privileges attached to it, where these depend upon residence, are quite independent of nationality.*" *The Collector of Voter for the Electoral District of Vancouver City and the Attorney General for the Province of British Columbia v Tomey Homma and the Attorney General for the Dominions of Canada (British Columbia)* [1902] UKPC 60 at 3-4 [emphasis added]. It is difficult to understand how it could be "absurd" that s.91(25) could cover all laws that pertain to naturalization, and yet entirely reasonable that it can be severed from the most basic of civic privileges.

Lord Chancellor in *Cunningham v. Tomey Homma* makes use of a pith and substance interpretive approach to hold that the mere mention of aliens is not enough to make a provincial law *ultra vires*. Rather, the court must determine the limits of the subject matter. From this Martland J. goes on to hold that

> A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.[61]

The point that Martland J. makes concerning the nature of the exclusivity in s. 91(24) is based on his own interpretive approach. Its reasoning relies on the idea that all of the heads of power in ss. 91 and 92 are the same, but it seems to jump past the fact that this sameness is produced by the juristic perspective he adopts. That is, by electing to determine the effect of s. 91(24) by virtue of the text of the provision alone, the meaning of s. 91(24) is determined without a consideration of its actual historical, political and legal context of Aboriginal peoples.[62] These are taken as mere externalities: all that is left

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[61] *Cardinal*, *supra* note 49, at 703.

[62] For another iteration of this argument see Hogg, *Constitutional Law*, *supra* note 14, at 624.: "The [enclave] theory was always implausible, because it involved a distinction between the first and second branches of s. 91(24) for which there is no textual warrant, and it placed the second branch ('lands reserved for the Indians') in a privileged position enjoyed by no other federal subject matter. It is plain that there is no constitutional

for the Court to do is to maintain the balance of federalism by interpreting the pith and substance of legislation on a case by case basis. In effect, by limiting itself to a *law qua law* perspective the Court is able to pronounce the magical words "*mutatis mutandis"* and suddenly Indians are akin to railways.[63] It is this magical reasoning that is able to convert the pre-confederation 'treaty-federalism' of the Imperial Crown into the Domestic Crown's absolute sovereignty over Aboriginal peoples. Martland J. supports this logic by citing the words of Riddel J. of the Privy Council,

> In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.[64]

There is *no reason* because there is no contextual inquiry into the purpose and scope of the words of s. 91(24). It is here that the thinking of the Court plays a queer trick that is akin to the one Wittgenstein touches on in §352 of the *Philosophical Investigations*,

> Here saying "There is no third possibility" or "But there can't be a third possibility!"—expresses our inability to turn our eyes away from this picture: a picture which looks as if it must already contain both the problem and its solution, while all the time we *feel* it is not so.[65]

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distinction between 'Indians' and 'lands reserved for the Indians,' and that provincial laws may apply to both subject matters." Ryder responds to this by stating that: "… I believe these authors are wrong to suggest that federal jurisdiction under s. 91 (24) should not be treated differently than any other head of power. To suggest that it should is not simply a "politically-based perception," rather, it is one that brings to the fore the hidden constitutional history of First Nations people, and interprets s. 91(24) with that history in mind. If this seems to be an unusual or "political" theory, I would suggest that it is only because the legitimate constitutional claims to autonomy of First Nations people have been neglected or ignored for so long." Ryder, *The Demise and Rise*, *supra* note 21, at 363. I would add to this that it is curious that Hogg notes that s. 91(24) has allowed the federal Parliament to make laws "…for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians." And even observe that the validity of these laws has been determined by the courts via pith and substance. But then to argue that s. 91(24) cannot have a distinction between its two branches because no other head of power does. It appears that in Hogg's estimation s. 91(24) is both exceptional and ordinary. See Hogg, *Constitutional Law*, *supra* note 14, at 618.

[63] *Cardinal*, *supra* note 49, at 706

[64] *Ibid.*

[65] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §352.

Martland J. excludes the possibility that s. 91(24) could be distinct due to his commitment to a picture of federalism and that places Aboriginal peoples as wards under the guardianship of federal power. It is this picture that excludes the possibility of Aboriginal self-government (a picture that we have yet to fully turn away from). Instead it sets out to determine the meaning of federal jurisdiction in s. 91(24) on a case by case basis under the wide ambit of judicial discretion available under the doctrine of "pith and substance". Under this approach the legal world of Aboriginal peoples in Canada is determined by judges who are concerned with a picture of federalism that does not involve them as anything more than an object to be weighed and measured (perhaps with more care following s. 35 of the *Constitution Act, 1982*). It is in this way that Indians end up sharing the same uncertain measure that John Seldon saw at work in equity in the 17th century:

> Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.[66]

The difference here is that the "uncertain measure" of judicial discretion is being used to determine the legal boundaries for entire cultures, over their lands, without their consent. Near the end of his decision Martland J. makes use of this discretion to determine the meaning of s. 12 and thereby holds that the provisions of the *Wildlife Act* apply "…to all Indians, including those on Reserves, and governed their activities throughout the

[66] John Selden, *Table Talk*, quoted in M. B. Evans and R. I. Jack (eds), *Sources of English Legal and Constitutional History*, (Sydney: Butterworths, 1984) at 223–224.

Province, including Reserves."[67] This argument hinges on including reserves into the phrase "…any other lands to which the said Indians may have a right of access."[68] As Laskin J. notes in his dissent, this argument must ignore both the fact that the accused was not hunting for food (which is the object of s. 12) and that s. 10 of the same act deals with reserves explicitly. [69] It must also assume that s. 91(24) is no different than any other head of power in s. 91. As we have previously noted, this assumption grants the federal government sovereignty *over* Aboriginal peoples by reading the words of the provision alone and thus it serves to close off jurisdictional spaces for self-government (not to mention that it presumes that the Imperial Parliament had the curious power of being able to give what it did not have simply by virtue of legislating it). The conceptual problem here arises in the first step (i.e. reading s. 91(24) as conferring sovereignty *over* Aboriginal peoples), which, as Wittgenstein notes, "is the one that altogether escapes notice… (the decisive movement in the conjuring trick has been made, and it was the very one that we thought quite innocent.)"[70] I believe that the reasoning of Martland J. (or rather what remains as the implicit premise for his reasons) provides us with an example of how s. 91(24) has remained the basis for laws without measure governing lands without citizens. So does Laskin J. depart from this picture?

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[67] *Cardinal*, *supra* note 49, at 710

[68] *Ibid*, at 698-99.

[69] *Ibid*, at 710. Laskin J. responds to this interpretation of the words of s. 12 in his dissent in the case at 723: "Even if the words in s. 12, "any other lands to which the said Indians may have a right of access", are taken in a broad general sense as capable, if s. 12 stood alone, of embracing Indian Reserves, they must be read to exclude such Reserves which are specially dealt with in s. 10. The canon of construction enshrined in the maxim *generalia specialibus non derogant* is particularly apt here.".

[70] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §308.

Laskin J. starts his dissent by clearly stating the uniqueness of the issue before the Court in this case. As he puts it,

> This appeal raises, for the first time in this Court, the question whether provincial game laws apply to a Treaty Indian on an Indian Reserve so as to make him liable to their penalties for engaging on the Reserve in activities prohibited by the provincial legislation.[71]

By characterizing the issue in this manner he makes it clear that he is approaching the issue as a precedent setting division of powers case (as opposed to the more limited and technical approach of the majority, which manages to avoid this issue). He quickly moves to setting out a classical "watertight compartments" approach to the second branch of s. 91(24).

> Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land, albeit they are physically in a Province, beyond provincial competence to regulate their use or to control resources thereon. This is not because of any title vested in the Parliament of Canada or in the Crown in right of Canada, but because regardless of ultimate title, it is only Parliament that may legislate in relation to Reserves once they have been recognized or set aside as such.[72]

The basis for this "exclusivity" is set strictly on a theory of the exclusivity of federal legislative powers in the *Constitution Act, 1867* and not a pre-existing right of Aboriginal self-government. Considering that this case is decided in the immediate wake of *Calder* this theory of s. 91(24) is all the more curious. After all, as Justice Judson stated in *Calder*,

> …it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means…[73]

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[71] *Ibid* at 698-99.

[72] *Ibid*, at 714.

[73] *Calder*, *supra* note 40, at 328.

How could title be placed outside the bounds of the prescriptive powers of the Crown while social organization (a concept that is necessarily connected to both politics and law) remained squarely within it? It seems like Laskin J. may be anticipating this concern by stating that this legislative power exists "regardless of ultimate title".[74] But, this hardly settles the matter and it is a question that remains unanswered even today.[75]

Laskin J. continues to elaborate on his theory of federal jurisdiction on reserve lands. He maintains that reserves are "enclaves" that "are withdrawn from provincial regulatory power," but they are nonetheless subject to the plenary nature of federal jurisdiction, which includes the capacity to referentially incorporate provincial legislation.[76] Laskin J. is clear that in his opinion "provincial regulatory legislation cannot, *ex proprio vigore*, apply to a Reserve."[77] Additionally, he views s. 88 of the *Indian Act* as being limited to the first branch of s. 91(24) ("Indians") due to its own wording.[78] This preserves the boundaries of the enclave, but what kind of enclave is a reserve?

> The significance of the allocation of exclusive legislative power to Parliament in relation to Indian Reserves merits emphasis in terms of the kind of enclave that a Reserve is. It is a social and economic community

[74] *Cardinal*, *supra* note 49, at 714.

[75] The only case that the Supreme Court has given us so far on the right of self-government is *R. v. Pamajewon* [1996] 2 S.C.R. 82 at 832-4 [hereinafter *Pamajewon*], which side-steps the issue altogether by characterizing the right in a narrow manner. But, it presumes that Aboriginal peoples would have to prove that they have such via the *Van der Peet* test on a case by case basis. This presumption is built on the unquestioned assumption of Crown sovereignty over Aboriginal peoples in s. 91(24). See Brad Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) McGill LJ. 1011; Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press, 2001) at 173-4; P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, (Oxford: Oxford University Press, 2004) at 471-4; Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia*, (Saskatoon: Native Law Center, 2001) at 82-95.

[76] *Cardinal*, *supra* note 49, at 716.

[77] *Ibid*, at 727.

[78] *Ibid*, at 727-28. He continues this approach to s. 88 in *Natural Parents*, *supra* note 56, at 763.

> unit, with its own political structure as well according to the prescriptions of the *Indian Act*. The underlying title (that is, upon surrender) may well be in the Province, but during its existence as such a Reserve, in my opinion, is no more subject to provincial legislation than is federal Crown property; and it is no more subject to provincial regulatory authority than is any other enterprise falling within exclusive federal competence.[79]

There is a curious tension in his argument that requires further consideration here. We are told that the exclusive nature of federal jurisdiction on reserve lands is related to the fact that a reserve "…is a social and economic community unit, with its own political structure."[80] But again, he maintains that this political structure is set according to "prescriptions of the *Indian Act*".[81] This point echoes the dissent of Hall J. in *Calder* when he states that, "the right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority."[82] This same logic equally applies to the question of Aboriginal self-government. By maintaining that the social, economic and political structure of Aboriginal peoples living on reserve lands originate in the prescriptions of the *Indian Act* Laskin J. (with Hall and Spence JJ.) presupposes the sovereignty of the Crown over every aspect of the lives of Aboriginal peoples. This maintains the "broad view" of s. 91(24), but strictly holds it to federal jurisdiction on reserve lands. As he states,

> The present case concerns the regulation and administration of the resources of land comprised in a Reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s. 91(24) does not preclude the application of such provincial legislation to Indian Reserves, the power will have lost the exclusiveness which is ordained by the Constitution.[83]

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[79] *Ibid*, at 716-17.

[80] *Ibid.*

[81] *Ibid.*

[82] *Calder*, *supra* note 40, at 353.

[83] *Cardinal*, *supra* note 49, at 717-18.

Laskin J. is correct when he states that jurisdictional boundaries that surround Indian lands are integral to the meaningful regulation and administration of resources.[84] In effect, the enclave theory of jurisdiction over Indian lands provides a bright line for the limits of provincial jurisdiction. But, what about the first branch of s. 91(24)?

It does not seem plausible that this would create an "enclave" around Aboriginal people that would shield them from the application of provincial laws off of reserve.[85] But, subjecting them to the full operation of provincial laws ignores their distinct constitutional status. This means that the boundaries of provincial jurisdiction over the first branch of s. 91(24) will be much more difficult to practically determine. In 1976 Laskin (now the Chief Justice) addresses this problem in the *Natural Parents* case by introducing the concept of "Indianness" to refer to the core of federal jurisdiction that provincial legislation cannot touch. In this case, he argued that a provincial adoption law could not constitutionally apply of its own force to the adoption of a child with Indian status by non-Indians:

> It could only embrace them if the operation of the Act did not deal with what was integral to that head of federal legislative power, there being no express federal legislation respecting adoption of Indians. It appears to me to be unquestionable that for the provincial *Adoption Act* to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness," to strike at a relationship integral to a matter outside of provincial competence.[86]

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[84] The absence of these jurisdictional boundaries has, at least to my mind, contributed to confusion concerning internal limitations within the case law on Aboriginal rights. By refusing to acknowledge territorial limitations within provincial jurisdiction the Crown is able to either confine rights to food, social and ceremonial purposes (which can easily fit within existing regulatory schemes) or grant a commercial level right while altering the infringement test to include the interests of the Canadian society as a whole as in *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 73-75.

[85] Ryder, *The Demise and Rise*, *supra* note 21, at 368.

[86] *Natural Parents*, *supra* note 56, at 760-61.

But, it is clear that provincial legislation that does not touch "Indianness" could apply to native people,

> Such provincial legislation is of a different class than adoption legislation which would, if applicable as provincial legislation simpliciter, constitute a serious intrusion into the Indian family relationship. It is difficult to conceive what would be left of exclusive federal power in relation to Indians if such provincial legislation was held to apply to Indians. Certainly, if it was applicable because of its so-called general application, it would be equally applicable by expressly embracing Indians. Exclusive federal authority would then be limited to a registration system and to regulation of life on a reserve. The fallacy in the position of the respondents in this case and, indeed, in that of all the intervenors, including the Attorney General of Canada, is in the attribution of some special force or special effect to a provincial law by calling it a "provincial law of general application", as if this phrase was self-fulfilling if not also self-revealing. Nothing, however, accretes to provincial legislative power by the generalization of the language of provincial legislation if it does not constitutionally belong there.[87]

By drawing attention to the use of the phrase "provincial law of general application" Laskin C.J. highlights a key concern with the concept of "Indianness": it subjects Aboriginal peoples to the "uncertain measure" of judicial discretion. The uncertain measure of "Indianness" may be a practical necessity beyond the limits of Indian lands, but if it is set as the standard for both branches of s. 91(24) then Aboriginal peoples are effectively surrounded by the presumption that "provincial law of general application" apply.

This theory of enclaves is, at least potentially, useful as it provides space for Aboriginal jurisdiction on Aboriginal lands, but this is dependent on the answer to the question that it leaves unanswered: what are the origins of and the limits to federal power in s. 91(24)? The courts have been consistently silent on this. As Martland J. expressed it

[87] *Ibid,* at 761.

in 1976 in his concurring decision in *Natural Parents*: "The ambit of that authority is uncertain, in that it has not been positively defined by the Courts."[88] These words remain true today. We can only infer its limits via the case law that deals with the limits of provincial jurisdiction. On this front the enclave theory is rejected and the concept of "Indianness" is extended to both branches of s. 91(24) in *Four B* and *Francis*.

D) The Uncertain Measure of Indianness

In 1979 the Court delivers its decision in the *Four B* case. The Chief Justice mounts yet another defense of his enclave theory in his dissenting judgment, but this time only one other justice follows (Ritchie). The majority (delivered by Beetz J.) decides the case on the basis of the functional test from the *Stevedoring Reference*.[89] The focus of our attention will be on how the majority responds to the appellant's argument on the nature of exclusive federal jurisdiction under s. 91(24). Beetz J. summarizes their position,

> What is submitted on behalf of appellant is that the matter to be regulated in the case at bar is the civil rights of Indians on a reserve; that this matter falls under the exclusive legislative authority of Parliament to make laws relating to "Indians and Lands reserved for the Indians" pursuant to s. 91.24 of the *British North America Act, 1867*; that provincial law is inapplicable to this matter even in the absence of relevant federal law…[90]

He continues this summary later on,

> Counsel for appellant has also stressed that the civil rights in issue are not only the civil rights of Indians, but Indian civil rights exercised on a

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[88] *Ibid*, at 772.

[89] *In the matter of a reference as to the validity of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529. This is cited in *Four B*, *supra* note 43, at 1047. This test is based on a pith and substance approach, which maintains that with respect to labor relations exclusive provincial jurisdiction is the rule. The exception to this, as Beetz J. notes, "…comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses" (*Ibid* at 1045). This approach allows him to focus on the factual details of the business in the case (he is careful to distance it from the Band Council and present it as a private business) and ignore the fact that is physically situated on reserve lands.

[90] *Four B*, *supra* note 43, at 1046.

> reserve. The import of this submission, as I understand it, is that the exclusive character of federal jurisdiction is somehow reinforced because it is derived from two related heads of federal authority instead of one, federal authority over Indians and over Lands reserved for the Indians.[91]

His response to this line of reasoning is problematic and merits closer consideration. According to his understanding, the appellant is arguing that the exclusive nature of federal jurisdiction in s. 91(24) is reinforced due to the presence of two heads of power. This would, according to Beetz J., lead to the possibility that "…provincial laws would not apply to Indians on reserves although they might apply to others."[92] He seems to suggest that the possibility that non-Indian citizens might be subject to federal laws when on reserve lands would be an unacceptable result. We can only assume that this would be so due to the risk of uncertainty or even that old common law bugbear, the legal vacuum. Yet, it seems to be perfectly acceptable that the law would vary in this manner for Indians. This reading produces its own absurdity. It does so by avoiding the issue that is at the heart of the enclave theory from *Cardinal*. Namely, that the two heads of s. 91(24) require two distinct interpretive approaches. Without these approaches it is impossible to give meaning to the exclusive nature of federal jurisdiction and respect the distinct constitutional status of Aboriginal peoples. Instead Beetz J. rejects the argument as an attempt to "revive the enclave theory of the reserves in a modified version" and then goes on to offer the following as a rationale for his own interpretive approach.[93] As he states,

> Section 91.24 of the *British North America Act, 1867* assigns jurisdiction to Parliament over two distinct subject matters, Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians. The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced

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[91] *Ibid*, at 1049.

[92] *Ibid*, at 1048.

[93] *Ibid*, at 1049.

> because it is exercised over Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve.[94]

While it may be true that the power of Parliament under s. 91(24) is the "same whether Indians are on a reserve or off a reserve" this reasoning does not determine the reach of valid provincial laws of general application. Nor does it necessarily require that the same standard is applied to both of the "…two distinct subject matters." Instead it simply suggests that the power to make laws is the same and so either we would have to imagine that provincial laws simply do not apply to Indians (regardless of whether or not they are on reserve lands) or that they are subject to concurrent jurisdiction that can be qualified in some cases. Despite a glaring absence of justification for this position Beetz J. confines the exclusive federal jurisdiction in s. 91(24) to "Indianness" (the standard Laskin C.J. applied in *Natural Parents* to the first branch alone). By doing so this "uncertain measure" is used to set the jurisdictional boundaries on both a federal category of person and their lands.

This leads us to ask where exactly are the limits of exclusive federal jurisdiction over Indians and the lands reserved for them? Beetz J. clearly maintains that the labor relations of a business on reserve lands cannot be considered to fit within this exception (even if both the employers and employees were all Indians[95]), but this does not tell us what kind of things would count. He does provide a few examples to help us determine the jurisdictional boundary: "…registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc."[96] It is

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[94] *Ibid*, at 1049-50.

[95] A possibility he addresses at 1047-48.

[96] *Ibid*, at 1048.

telling that these examples are all clearly governed by the *Indian Act*. If we are to understand that these examples set the limit, then it would seem that the measure of Indianness is set by Parliament alone. Beetz J. reinforces this suggestion when he leaves open the question of Parliament's ability to pass legislation that would regulate labor relations under s. 91(24).[97] He does so again when he holds that provincial laws apply "…as long as such laws do not single out Indians nor purport to regulate them *qua* Indians, and as long also as they are not superseded by valid federal law."[98] If the positive content of Indianness is determined by federal law then this is little more than a repetition of the doctrine of paramountcy. By this reading Indians are subjected to the uncertainty of concurrent jurisdiction on both their legal status as Indians and their lands. And yet, this accords with the approach that the courts have taken. As Ryder states,

> The courts have been willing to see the legal status of an Indian created by federal government legislation as being a matter at the core of federal jurisdiction, while they have not been willing to so characterize cultural and economic aspects of First Nations peoples lives.[99]

This leaves Aboriginal peoples in a position in which they are subject to both valid provincial laws of general application and the Court's "broad view" of the undefined federal powers of s. 91(24).[100] It is by this interpretation (or lack thereof) that Indians become little more than creatures of statute whose creator may withhold, grant or

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[97] *Ibid*. It is worth considering Beetz J. words on this point: "I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy."

[98] *Ibid*

[99] Ryder, *The Demise and Rise*, *supra* note 21, at 370.

[100] Noel Lyon, "Constitutional Issues in Native Law" in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1984)

withdraw their powers and privileges as it sees fit in its sovereign will. And so we must ask, again, where are the limits of exclusive federal jurisdiction over Indians and their lands? In *Francis* La Forest J. held that in cases where there is existing federal legislation the doctrine of paramountcy can tolerate concurrent jurisdiction in the absence of an express conflict[101] (especially in cases where the court sees the matter as being somewhat removed from the "Indian way of life", which seems to be a matter that is so blatantly obvious that can be addressed by judicial notice alone).[102] But what about cases in which a provincial law of general application does affect Indians *qua* Indians? Surely this is where the exclusivity of s. 91(24) serves as a shield and protects the special constitutional status of Aboriginal peoples? The simple answer is not necessarily. At this point the courts still have to consider the possibility that the law can be referentially incorporated by s. 88 of the *Indian Act*.

E) Section 88 and Provincial Law

The interpretive approach that the Court has adopted on s. 91(24) of the *Constitution Act, 1867* means that Provincial laws apply to Indians in two ways. First, they may apply directly and of their own force (*ex propio vigore*) as long as they do not infringe on exclusive federal jurisdiction (i.e. "Indianness" or Indians "*qua* Indians"), or are in an expressed conflict with a federal law (via the "restrained" or modern approach to paramountcy).[103] The second way is via s. 88, which operates to incorporate into

[101] See note 47 for how the courts have defined this standard.

[102] *Francis*, *supra* note 44. A point he was quite certain of as he stated at para. 4: "In *Kruger v. The Queen* [1978] 1 S.C.R. 104, this Court held that general provincial legislation relating to hunting applies on reserves, a matter which is obviously far more closely related to the Indian way of life than driving motor vehicles."

[103] For the modern approach to the division of powers see note 32.

federal law those provincial laws of general application that do affect "Indianness" or derogate from the "status and capacities" of Indians.[104] This theory of the meaning of s. 88 is the one that Beetz J. set in place in *Dick v. R.*, which we will turn to in more detail later. Prior to this the courts had found it very difficult to determine the meaning of s. 88: was it a declaration of the limits on the application of provincial laws to Indians (a reiteration of the shielding effect of federal exclusivity) or an incorporation of provincial laws at the federal level to ensure that they will apply?

In 1978 Dickson J. (as he was then) decided the *Kruger* case and held that the phrase "laws of general application" in s. 88 would be determined by two *indicia*: the first was a requirement that the law apply uniformly throughout territory of the province and the second was that it must not be "in relation to" one class of citizens in object and purpose.[105] He followed the approach that Martland and Ritchie JJ. took in *Natural Parents,* which held the section to being little more than a declaration that provincial laws of general application apply to Indians, but laws that affect them "*qua* Indians" do not.[106] This approach is fairly consistent with the classical "watertight compartments" approach to federalism (as it retains some sense of federal exclusivity), but it also introduces confusion as it requires that the closing words of the section—"except to the extent that such laws make provision for any matter for which provision is made by or under this

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[104] *Dick v. R.*, *supra* note 46, at 33.

[105] *Kruger*, *supra* note 50, at 110.

[106] Martland J. is cited at Kruger, *supra* note 50, at 117: "The extent to which provincial legislation could apply to Indians was stated to be that the legislation must be within the authority of s. 92 of the *British North America Act, 1867* and that the legislation must not be enacted in relation to Indians. Such legislation, generally applicable throughout the Province, could affect Indians." Dickson J. also cites Ritchie J. at 116-117: "In my view, when the Parliament of Canada passed the *Indian Act* it was concerned with the preservation of the special status of Indians and with their right to Indian lands, but it was made plain by s. 88 that Indians were to be governed by the *laws of* their Province of residence except to the extent that such laws are inconsistent with the *Indian Act* or relate to any matter for which provision is made under that Act."

Act"— be read as meaning that that federal and provincial powers are concurrent, not exclusive.[107]

In 1985, in *Dick v. R.*, the Court united behind a single approach. It strictly narrowed the test for "laws of general application" by placing the onus on Aboriginal peoples to show that the "…the policy of such an Act was to impair the status and capacities of Indians,"[108]and entirely reversed the approach taken in *Kruger* by holding that the purpose was to referentially incorporate laws that *do* affect Indians "*qua* Indians".[109] This approach may have resolved the problem concerning the meaning of the closing words, but it introduced another set of problems. First, there is no mention of lands in s. 88 and so either it is limited to the first branch of s. 91(24) or the term "Indians" must be understood as referring to both branches. This latter possibility has perverse implications as it would mean that the laws s. 88 referentially incorporates would only apply to those that the *Indian Act* deems to be Indians and not to others. This flies in the face of the established principle "…that statutes relating to Aboriginal peoples are to be construed generously and liberally, and any ambiguities resolved in their favour."[110] Second, while it saves the meaning of the closing words it deprives the phrase "laws of general application" of meaning as it is connected with the vague and unhappy judicial concept of "Indianness". Finally, there are the administrative implications as the laws that s. 88 pertains to apply as federal law to Indians. This means, as Wilkins details, that "such measures, when applied to Indians, are subject, as a matter of course, to federal procedures, policies, priorities, and discretion but to

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[107] Kerry Wilkins ""Still Crazy After All These Years": Section 88 of the Indian Act" (2000) 38(2) Alta L. Rev 458 at 466 [hereinafter Wilkins, *Section 88*].

[108] *Dick v. R., supra* note 46, at 31.

[109] *Ibid*, at 33.

[110] Kent McNeil "Aboriginal Title and Section 88 of the Indian Act" (2000) 34 UBC L Rev 159 at 440.

provincial priorities and procedures when applied to anyone else."[111] There is no clear answer to the question of who is responsible for administering this system or even paying for it and there is "…room for doubt, in circumstances such as these, whether the federal order has constitutional authority to require that provinces assume the added financial and administrative burden of applying these hybrid measures beyond the permissible range of their application as provincial legislation."[112]

What unites both the declarative and referential incorporation theory is the conviction that s. 91(24) vests Parliament with the authority to unilaterally determine which laws do and do not apply to Indians and their lands and the absolute silence as to where this power was derived from. All we are left with is the repetition of Riddel J. from 1917 assuring us that despite the fact that Provincial Legislatures cannot pass laws dealing with Indians "…there is no reason why general legislation may not affect them".[113] This "no reason why" is entirely dependent on how one sees the authority of Parliament over Indians and their lands. It is part of a picture of Canadian federalism that positions Aboriginal peoples as objects of a federal head of power and not founding partners. Furthermore, it is a picture that cannot account for how it came to be, yet it is repeated *ad nauseum*. Wilkins clearly articulates this lack of doubt,

> No one doubts Parliament's legislative authority to do what s. 88, broadly speaking, does: incorporate certain provincial laws for the purpose of applying them to Indians. No one doubts, either, that Parliament also has a constitutional mandate to apply the incorporated laws to section 91(24) lands.[114]

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[111] Wilkins, *Section 88*, *supra* note 107

[112] *Ibid*, at 471. This suggests that the provinces could potentially use the doctrine of interjurisdictional immunity to shield themselves from the costs and administrative complications of s. 88.

[113] This statement first appears in *R. v. Martin* (1917), 41 O.L.R. 79. It is cited by Martland J. in Cardinal, *supra* note 49, at 706 and by Dickson J. in *Kruger*, *supra* note 50, at 111.

[114] Wilkins, *Section 88*, *supra* note 107, at 489-90.

While this is true to the extent that it is consistent with how the courts have interpreted s. 91(24) it says nothing about how the Crown obtained this sovereignty over Aboriginal peoples (a key point given the Court's recent claim that *terra nullius* never applied in Canada).[115] This is the point on which the Court consistently maintains that there is no room for doubt; so consistently in fact that it makes room for what it seeks to exclude. As Dickson C.J.C states "…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".[116] This stated and restated lack of doubt has about the same sense as the phrase "there is nothing to see here", in that, it is more about the authority of the speaker than the literal meaning of the words themselves. Wittgenstein provides some insight into the possible origins of this picture of federalism, its "main cause" is "a one-sided diet: one nourishes one's thinking with only one kind of example."[117] The one example that nourishes the Court in this case is the unquestioned assumption of Crown sovereignty (a diet that flies in the face of the most basic principles of natural justice, which require that we listen to the other side and do not act as a judge in our own cause). This diet has yet to be balanced by the Aboriginal perspective as it has been confined to the vagaries of the common law rules of evidence, which is always subject to the tin ear of the judiciary.[118] Given the foundational implications for both the meaning of federalism and the special

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[115] *Tsilhqot'in Nation supra* note 28, at para. 69.

[116] *Sparrow, supra* note 27, at 1103. We can see this in Judson J's words from *Calder* (who is citing the words of Lord Watson from *St. Catherine's Milling*): "[t]here can be no question that this right was 'dependent on the goodwill of the Sovereign.'" (*Calder*, *supra* note 40, at 328).

[117] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §593.

[118] At the trial level of *Delgammuukw* a Gitxsan elder wanted to sing her *limx'oy* (songs that are part of the *adaawk*) and the judge responded by saying "I can't hear your Indian song Mrs. Johnson because I have a tin ear." *Delgammuukw v. British Columbia* (8 March 1991), Smithers No. 0843 (B.C.S.C).

constitutional status of Aboriginal peoples we would imagine that the legislative process that introduced this section would assist us in determining its meaning. We turn to this now.

The Origins of s. 88

The section was first introduced in 1950 as s. 87 of Bill 267, *An Act Respecting Indians* (the term "respecting" being confined to its unilateral sense of 'referring to').[119] The bill itself gave rise to considerable opposition from the public and within Parliament. It was the first major revision of federal Indian law in seventy years and it was done without consulting Indian leaders (a point of key importance as Indians did not have the right to vote in Canada until 1960).[120] The government of the time responded by withdrawing the bill and revising it. It was introduced in 1951 as Bill 79 and while there were a number of changes s. 87 remained the same.[121] The current version of the section reads,

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent

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[119] 2d Sess., 21st Parl., 1950. This is cited by Kerry Wilkins, *Section 88, supra* note 107, at 459. He provides an excellent overview of the legislative history of this provision and a detailed analysis of its implications.

[120] The deliberations that lead up to the legislative changes in 1951 included the role that the provinces had to play in the process of assimilation. As Wilkins states: "The other clearly relevant theme that emerged from those deliberations was the growing federal conviction, identified most clearly in the 1948 report, that the provinces had a role to play in achieving the recognized long-term goal of assimilation - or, in a later idiom, "integration" – of the Indian peoples into mainstream society." (Wilkins, *Section 88, supra* note 107, at 463). Section 88 was, at a minimum, consistent with that conviction.

[121] Bill 79, *An Act Respecting Indians*, 4th Sess., 21st Parl., 1951. The section has been altered in 2005 and again in 2012, but these changes were simply to add the *First Nations Fiscal and Statistical Management Act* (in 2005), which was changed to *First Nations Fiscal Management Act* in 2012 (it was passed as s. 678 in an omnibus bill entitled the *Jobs, Growth and Long-Term Prosperity Act* S.C. 2012, c. 19). It is also interesting to note that the United States Congress enacted a very similar law (Public Law 280) in 1953. This law enabled states to assume criminal and civil jurisdiction in matters involving Indians as litigants on reserve lands. Prior to its enactment these issues were dealt with in either tribal or federal court. For more on this and the problems it raises for the place of Aboriginal self-government in US Federalism see Kyle S. Conway "Inherently or Exclusively Federal: Constitutional Preemption and the Relationship Between Public Law 280 and Federalism" (2013) 15(5) J Const L 1323.

> that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.[122]

While it is possible to simply accept this as validly enacted law and move towards its interpretation by the courts we should pause here and consider the practical implications of it. This is a statutory provision in a federal law that states that provincial law applies to a class of subjects that the constitution assigns exclusively to federal legislative authority. This alone is, or should be, shocking. Wilkins notes that to the best of his knowledge "s. 88 was unprecedented" and that he knows of no other statutory provision in federal law that acts in this way.[123] It seems to be little more than a technological shortcut that allows the "*unilateral federal* imposition of provincial legislative regimes on Indians".[124] But, beyond that, what does it say about the meaning of s. 91(24)? It requires the "broad view" that this provision grants Parliament sovereignty *over* Indians and their lands and, as we have noted, the *historical warrant* of this authority can have no other basis than *terra nullius*, discovery and divine right. How else can a law that they were neither consulted on, nor consented to, be used to delegate authority to the provinces to infringe on

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[122] *Indian Act*, *supra* note 1. Note that wording of the section explicitly excludes treaties from the referential incorporation it sets in place and does not mention lands (i.e. the second branch of s. 91(24)). For more on the question of application to lands see Wilkins, *Section 88*, *supra* note 107, at 483-97

[123] Wilkins, *Section 88*, *supra* note 107, at 460.

[124] *Ibid*, at 464 (emphasis in original). The distinction between legislating a general rule of referential incorporation and the long standing prohibition on inter-delegation is a so fine as to be almost practically undeterminable. In *McEvoy v. New Brunswick (A.G.)*, [1983] 1 S.C.R. 704 at 720 the Court held that "Parliament can no more give away federal constitutional powers than a province can usurp them" (See also *Nova Scotia (A.G) v. Canada (A.G.)*, *supra* note 32, at 34, 54, 58). It seems odd that despite this Parliament can make a general rule that referentially incorporates provincial laws. The only distinction between this and delegation is that provincial legislatures are restricted to passing valid laws (i.e. they cannot pass laws that single out Indians or the lands reserved for them), but this limitation can be negated by creative legislative drafting (let alone by the fact that "Indianness" is a vague concept).

Aboriginal rights? It seems to be designed to practically nullify the very possibility of Aboriginal self-government. Borrows provides us with an invaluable critique of the effect of s. 88, which we will consider at length.

> ...section 88 of the *Indian Act* drastically constrains jurisdictional spaces which should be filled by Indigenous sovereignty. It does so by delegating vast fields of political activity to provincial governments by referentially incorporating, as federal law, provincial laws of general application. This severely limits First Nations' political power in Canada. It also creates very few incentives for the federal government to work with First Nations and pass legislation recognizing and affirming Aboriginal and treaty rights throughout the country…The federal government's 'transfer' of legislative responsibility from itself and First Nations to provincial governments is a significant reason why Canada lags behind the United States in developing politically healthier Indigenous communities. This is a national tragedy. Section 88 does not enhance self-determination by making provincial laws applicable to "Indians". At a federal level, this allows the federal government to almost completely abandon its section 91(24) constitutional responsibility concerning "Indians and lands reserved for Indians". By 'passing the buck' to the provinces the federal government does not face the consequences of its delegation of authority to the provinces. First Nations must comply with provincial laws which they have no real role in crafting or administering. In fact, if provinces were to 'single out' Indians in the passage of provincial legislation such action would be *ultra vires*, or unconstitutional, because acting in relation to Indians is beyond provincial authority. Thus, section 88 of the *Indian Act* removes incentives from both the provincial and federal governments to work with Indians on the detail of laws which most effect Indian peoples' lives. The 'idea' of assimilation built into the *Indian Act* and other Canadian legislative action usurps First Nations' authority. The *Indian Act* essentializes Canada's treatment of Indigenous peoples in Canada and subjects them to a false 'form' of organization, subordinate to other governments in the land.[125]

This provides us with a clear and sustained view of the impact that s. 88 has on Aboriginal peoples. It is part of the crown machinery that continues to animate the "vast administrative dictatorship which governs every detail of Aboriginal life."[126] And at its

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[125] John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 167-68.

[126] Tully, *Strange Multiplicity*, *supra* note 5, at 90-1.

basis is the specter of the *doctrine of discovery* that remains firmly in place with the undoubted and undetermined power of s. 91(24). The courts have doubled the effect of this power *over* Aboriginal peoples by adopting the modern approach to federalism and reading down the meaning of "exclusive" in the *Constitution Act, 1867*. This has left them and their lands subject to a confusing labyrinth of concurrent jurisdiction whose last remaining openings are closed off by allowing generally worded provincial legislation that regulates Indians *qua* Indians to be referentially incorporated under s.88. This interpretive approach has confined exclusive federal jurisdiction to the "uncertain measure" of "Indianness".

We have seen the confusion that this has generated via our considerations of the doctrine of interjurisdictional immunity and s. 88, but it does not stop here. This picture is further complicated by the fact that the determination of *who Indians are* has been subject to continual contestation and resistance. It is puzzling how the courts are to begin to define what Indians *qua* Indians means when the definition in the *Indian Act* (which Beetz J. used in *Dick v. R.* as the example of the kind of "Indianness" that resides under the exclusive jurisdiction of the federal government) does not cover all of those that the courts have included in the ambit of the authority of s. 91(24). So, this draws us to ask a series of related questions; who has been placed within this ambit? How were they placed there? How does this determine how they are governed? It is this line of questioning that brings us to the next section of the chapter.

The Definition of Indians and the Authority of Bands

This section reviews how the courts have dealt with the definition of Indians and the authority of bands in s. 91(24) and the *Indian Act.* This is directly connected to the

preceding discussion of the interpretation of s. 91(24) as it concerns who resides within the ambit of that authority and what kind of political structure can exist there. Simply put, if the Court's interpretation of s. 91(24) provides us with a picture of federalism then the question of who Indians are and what form of political structure governs them determines their place within this picture. This, in turn, helps us to see what form of legal justification could possibly support such a picture. As Tully so clearly reminds us,

> 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.[127]

Our investigation into the judicial interpretation of the definition of Indians and the structure and authority of bands will require a brief overview of the legislation from 1850 to the first version of the *Indian Act* in 1876 and its revision in 1880. This legislation provides the backdrop for case law that follows. Following the overview, I will first turn to the judicial interpretation of the definition of "Indians" from the 1939 *Eskimo Reference* through to *Lavell*, the *United Nations Human Rights Committee* finding in *Lovelace v. Canada* 1981, the legislative changes to registration in the 1985 revision of the *Indian Act*, *McIvor* and the current *Daniels* case and then, to the authority of band councils.[128]

A) Legislative Origins

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[127] James Tully, *Public Philosophy in a New Key, Volume I: Democracy and Civic Freedom* (Cambridge University Press, 2008), at 286.

[128] *Reference whether "Indians" includes "Eskimo"*, [1939] SCR 104 [hereinafter *Eskimo Reference*]; *Lovelace, supra* note 30; *Lavell, supra* note 30; *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2009] BCCA 153; *Daniels v. Canada*, 2013 FC 6 [hereinafter *Daniels I*]; *Canada (Indian Affairs) v. Daniels*, [2014] FCA 101 [hereinafter *Daniels II*].

The process of unilaterally defining who Indians are via legislation began prior to confederation. It was a part of the systemic changes that were taking place between the Colonial Legislatures and the Imperial Parliament during the mid-19th century (i.e. it is part of the devolution of powers to the Dominion that would ultimately be expressed in the *British North America Act, 1867*). The Imperial Parliament had retained sole responsibility for maintaining their relationship with Aboriginal peoples until 1860. This is when the Legislative Assembly of Canada passed the *Indian Lands Act*, which vested control over Indian Affairs in the Province.[129] But, the first specific legislation aimed at defining who Indians are was passed in 1850. The *Act* dealt with the protection of lands

[129] 23 Victoria (1860), ch. 151, sec. 1. "From and after the 1st day of July next, the Commissioner of Crown Lands, for the time being, shall be Chief Superintendent of Indian Affairs." This process of devolution was influenced by the adoption of regional approaches to Indian Administration by the Colonial Office in London, which was formalized in the 1840s and 1850s. Broadly speaking this regional approach translated into a policy of "insulating" Indians from settlers in the Maritimes, whereas in Upper and Lower Canada it was "amalgamating" and in Rupert's Land and the Northwest it was providing support for Hudson's Bay Company policy (See Giokas, *The Indian Act, supra* note 133, at 22). In the Maritime colonies the process of devolution was underway by the 1840s. This is evidenced most clearly by the New Brunswick, Nova Scotia, and Prince Edward Island *Indian Acts* of the 1840s and 50s, but also in the earlier transfer of power over Crown lands (which was considered to include Indian reserve lands). These acts serve as a useful point of reference as they highlight the colonial legislatures' perspective on the Indian Question. The preamble to the New Brunswick *Indian Act* of 1844 provides a clear indication of this perspective: "Whereas the extensive Tracts of valuable Land reserved for the Indians in various parts of this Province tend to greatly retard the settlement of the Country, while large portions of them are not, in their present neglected state, productive of any benefit to the people, for whose use they were reserved: And whereas it is desirable that these Lands should be put upon such footing as to render them not only beneficial to the Indians but conducive to the settlement of the Country" (See *An Act to regulate the management and disposal of Indian Reserves in this Province* 7 Victoria (1844), ch. 47). The focus on the "valuable" tracts of underutilized lands (with its heavy Lockean overtones) followed by the protective (and paternalistic) pretext of guardianship so by no means unique, but it does provide us with a snapshot of the interests of the local settler governments. The upshot of this snapshot is that legislative authority over Indians was already with the colonial legislatures and they were focused on the acquisition of reserve lands. Laws dealing with Indians required imperial approval, but this was true of all laws, and that approval was never withheld. I would like to thank Robert Hamilton for turning my attention to these important precursors to the *Indian Lands Act*. For a more detailed analysis of this legislation see Robert Hamilton, "They Promised to Leave Us Some of Our Land": Aboriginal Title in Canada's Maritime Provinces (LLM Thesis, York University Osgoode Hall Law School, 2015) [unpublished] and Robert Hamilton, "After Tsilhqot'in: The Aboriginal Title Question in Canada's Maritime Provinces," (2016) 67 UNB LJ.

and property of Indians in Lower Canada (now Québec) and s. 5 defined the people it was intended to cover:

> .... be it declared and enacted: That the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:
> First. - All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.
> Secondly - All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.
> Thirdly - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such: And
> Fourthly - All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.[130]

This unilateral determination is targeted directly at the connection between Indians and their lands. It places a set of restrictions on who can qualify as an Indian. The qualifications are broad as they encompass marriage, adopting and blood relation (a status that can be imputed to an individual). The expressed purpose of this cordon is to protect their lands and property, but it is curious that the best way of doing this is by removing their capacity to determine their own membership. It seems to me that this is the key step in the construction of what I have termed the crown machinery. This move to unilaterally define Aboriginal peoples and place "protective" limits on who can occupy their lands is a distinct shift from the nation-to-nation relationship that had characterized the Imperial Federal practices, it places them in a ward-guardian relationship to the settler-state. It has obvious utility from this perspective as it provides a legal mechanism

[130] 13 and 14 Victoria (1850) Cap. 42; *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada.* In the same year the Provincial Legislature passed an act entitled *An Act for the Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by them from Trespass and Injury* (13 and 14 Victoria (1850) Cap. 74 (Province of Canada)). Interestingly this act does not define who Indians are, but simply states that it is for "Indians and persons intermarried with Indians."

by which Aboriginal peoples can be separated from the body politic of the settler-citizens as a determinable and thus governable population (a necessary step in the deployment of the civilizing process of Mill's liberal-imperialism). From this point forward the boundaries of Indian lands will be determined by an externally imposed administrative language of blood and descent.

This connection between blood and land must not be confused with the familiar logic of determining citizenship by the *jus sanguinis* or *jus soli*. As soon as Aboriginal peoples are legislatively defined by a government that they did not participate in or consent to they become subjects that have been deprived of the right to determine who they are. In and through the process of legislative definition and the imposition of a register to administer status, the meaning of blood *fundamentally changes*. It is no longer a chosen sign of membership. Its significance is assigned and regulated externally. This is how Indian blood becomes the bond that, at one and the same time, connects them to their lands and divides them from the body politic of settler-citizens (as well as creating divisions within Aboriginal communities between the members who have status and those who do not). This bond between blood and soil is set in place by the settler-state so that it can be severed. By controlling the definition of the term Indians the settler-state could continue to unilaterally narrow its boundaries and move towards its ultimate goal of removing the burden of Indian blood from the radical title to their lands once and for all. It is part of the process of the legislative and administrative extirpation of the Indian (i.e. enfranchisement). In this process the settler-state takes the place of a fiduciary that can (paradoxically) infringe upon and extinguish the beneficiaries at will. This process of narrowing the definition starts less than a year after first definition.

In 1851, the Provincial Legislature passed an Act repealing the 1850 definition of Indians and replaced it with the following:

> .... the following persons and classes of persons, and none other, shall be considered as Indians belonging to the Tribe or Body of Indians interested in any such lands or immoveable property:
> Firstly: All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants:
> Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons: And
> Thirdly. All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.[131]

This change in the definition removed the sole mechanism for Aboriginal peoples to determine their own membership (adoption). It also applies a patrilineal model that excludes non-Indian men who married Indian women, but includes non-Indian women who marry Indian men.

The definition is narrowed again in 1857 when the Province of Canada passed the *Gradual Civilization Act*.[132] This purpose of this Act is clearly set out in its preamble:

> Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinction between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it…[133]

This purpose is then applied to the target population, which is detailed in s. 1:

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[131] 14 and 15 Victoria (1851) Cap. 59.

[132] 20 Victoria (1857) Cap. 26. *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws respecting Indians* (hereinafter the *Gradual Civilization Act*).

[133] *Ibid.*

> ... shall apply only to Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any Tribe or Band of Indians in common) and who shall themselves reside upon such lands, and shall not have been exempted from the operation of the said section, under the provisions of this Act; and such persons and such persons only shall be deemed Indians within the meaning of any provision of the said Act or of any other Act or Law in force in any part of this Province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian subjects.[134]

The phrases "removal of all legal distinction" and "facilitate the acquisition of property" betray the true purpose of this legislation. It is part of a basic bait-and-switch tactic that holds out the promise of legal citizenship (i.e. as citizens they will now be able to purchase the lands they once only "occupied") and by choosing it the Indians disappear along with their claim to their lands. [135] The actual purpose of this act—and indeed of all Indian law issued from the settler-state—is clearly expressed in the phrase "to facilitate the acquisition of property." With this Act the definition of Indians is now set as a term within a larger system whose explicit purpose is to eliminate all legal distinctions within the body politic and thereby establish the Crown's claim to radical title to all lands. It also makes clear that the relationship between the settler-state and Indians is strictly unilateral in nature as not only are Indians defined by the settler-state, but those Indians who express the desire to be enfranchised must be deemed to "deserve" it (an expression

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[134] *Ibid.*

[135] It is hardly surprising that only one Indian was enfranchised between 1857 and the enactment of the first Indian Act in 1876. It should also be noted that Aboriginal peoples protested the *Gradual Civilization Act* and petitioned for its repeal. See John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition." (Ottawa: Research paper prepared for the Royal Commission on Aboriginal Peoples, 1995) at 27-31 (hereinafter Giokas, *The Indian Act*).

of the role of morals in the process of civilizing the Indian, which is so clearly articulated in the regulation of alcohol).

In 1868 the Senate and House of Commons of Canada enacted legislation that made the definition set out by the Provincial Legislature in 1851 national policy. [136] This was quickly followed by the passage of the *Gradual Enfranchisement Act* in 1869.[137] This Act marked a substantial set of changes to Indian policy. These changes included the following:

a) It provided (for the first time) that any Indian woman who married a non-Indian man would lose Indian status and band membership (as would any children of that marriage).[138]

b) It placed a blood quantum qualification (i.e. "no person of less than one-fourth Indian blood") on the division of annuity money. This is the only time in Canadian history that blood quantum has been explicitly used.[139]

c) It established the band council system as an attempt to prepare Indians for "responsible government."

The law was designed to establish a set of "simple municipal institutions" that would be entirely subject to the discretion of the Governor in Council.[140] This was the first time

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[136] *Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868, c. 42, s. 15.

[137] *Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6. (hereinafter the *Gradual Enfranchisement Act*).

[138] *Ibid*, s. 6. The Act contains a set of provisions that directly target and systematically disempower Indian women (e.g. preventing them from voting in band council elections and allowing enfranchised men to draw up wills regarding his land that favor his children, but not his wife).

[139] *Ibid*, s. 4; Giokas, *The Indian Act*, *supra* note 133, at 34.

[140] "Annual Report of the Indian Branch of the Department of the Secretary of State for the Provinces" (Canada, Sessional Papers, No. 23 (1871) at 4. Cited in Giokas, *The Indian Act*, *supra* note 133, at 33.

that the settler-state extended its legislative intrusion beyond land holding patterns to the legal and political systems of Aboriginal peoples. It was purposively designed to break the resistance of the existing Aboriginal governments by replacing them with a set of dependent band councils, which were designed to be little more than temporary placeholders in the larger process of assimilation referred to as "enfranchisement".[141] Like the introduction of Indian status, the introduction of the band council system imposes an artificial set of legal and political structures, which fail to recognize the "Nations and Tribes" that the *Proclamation* refers to and continue the Crown's despotic rule over Aboriginal peoples.

As we have seen, this legislative definition of Indians shifts from its introduction in 1850 to its ultimate incorporation (via the consolidation of previous Indian legislation) into the first *Indian Act* in 1876.[142] The term "Indian" is defined as:

> *First*. Any male person of Indian blood reputed to belong to a particular band;
> *Secondly*. Any child of such person;
> *Thirdly*. Any woman who is or was lawfully married to such person.[143]

This definition—which remained in place until 1951—explicitly determines the inheritability of status by imposing a patrilineal model (introduced in 1851) and placing the legal qualification on marriage. This gives colonial officials the ability to determine what would constitute a legitimate form of marriage (i.e. to impose their own cultural

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[141] Giokas, *The Indian Act*, *supra* note 133, at 35. See also Report of the Royal Commission on Aboriginal Peoples. Volume 1: *Looking Forward Looking Back*. Part Two: *False Assumptions and a Failed Relationship*. (Canada Communication Group: Ottawa, Ontario, 1996) at 237, 240, 253 [hereinafter *RCAP 1:2*].

[142] S.C. 1879, C. 34, s. 4, at s. 3. In the terms of this Act divides bands into two categories: regular and irregular. The distinction is meant to *encourage* groups that have not adopted the band council system or initiated the treaty process to do so (the encouragement being the legal disadvantages placed on irregular bands and 'non-treaty Indians'). For more on this distinction in the *Indian Acts* of 1976 and 1880 see Giokas, *The Indian Act, supra* note 133, at 36-40.

[143] S.C. 1976, c.18 at s. 3(3).

norms as law) and exclude the children of unions they would not recognize as illegitimate children.[144]

According to John Milloy, the first versions of *Indian Act* in 1876 and 1880 built upon the "political formula of 1869" to effectively ensure "…that Indians would lose control of every aspect of their corporate existence."[145] The annual report of the department of the interior in 1876 clearly expressed this formula:

> Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. ...the true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[146]

The *Indian Act* collected together the protective features of the previous legislation and clarified them. The 1880 Act replaced the Indian Branch of the Department of the Interior with the Department of Indian Affairs.[147] This change served to centralize the control over Indian monies by removing this control from the band councils and placing it in the hands of the Governor in Council.[148] Another example can be found in the provisions against trespassing, which made it so that no one other than an "Indian of the band" could

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[144] *Ibid,* at s. 3(3)(a) to 3(3)(e). It is also interesting to note that 'half-breeds' are formally excluded and the s. 3(3)(b) allows for the exclusion of Indians who are residing in another country for a continuous period of five years (limiting the mobility of Aboriginal groups whose traditional territories straddle the border with the United States).

[145] John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in Sweet Promises: A Reader on Indian-White Relations in Canada, J. R. Miller (ed.), (Toronto: Toronto University Press, 1991) at 151.

[146] Department of the Interior, *Annual Report for the year that ended 30th June, 1876* (Parliament, Sessional Papers, No. 11, 1877) at xiv. Cited in *RCAP 1:2, supra* note 141, at 255.

[147] S..C. 1880, c. 28, s. 74, at s. 7.

[148] *Ibid,* at ss. 70, 71.

reside on reserve lands without obtaining a license from the Superintendent General (a provision that combined with the so-called "marrying-out" rule so that Indian women who married either a non-Indian or an Indian from another band were effectively exiled).[149] Through its legislated control over Indian status, Indian legal and political structures, land holding patterns and resources, it presents us with the first fully functional version of the crown machinery. This version of the machine remains essentially the same—despite the *ad hoc* process of amendment that helps recalibrate it in relation to the continuous resistance of Aboriginal peoples—until it is substantially overhauled in 1951. It is interesting to note that the net effect of this overhaul was actually to return Canadian Indian legislation to its original 1876 form. [150] It seems that when it comes to the Indian question in Canada the more things change, the more they remain the same. In any case, one of the key events leading up to this overhaul occurs in 1939 when the Supreme Court delivers its decision in the *Eskimo Reference*. This decision introduces a distinction between the definition of Indians in s. 91(24) and the *Indian Act* whose significance the courts are still struggling to come to terms with.

B) The Judicial Definition of Indians

In the *Eskimo Reference* the Court was asked to determine whether Inuit in Québec were under federal or provincial jurisdiction. The federal government did not want to assume responsibility and so it argued that the term "Indians" in s. 91(24) should be read in light of the *Royal Proclamation of 1763*. It argued that the Inuit were not covered in the *Proclamation* for two reasons: first, the terms "nation" and "tribe" are not

[149] John S. Milloy, *A Historical Overview of Indian-Government Relations 1755-1940* (Ottawa: Department of Indian Affairs and Northern Development, 1992) at 11, 12.

[150] *RCAP 1:2, supra* note 141, at 285.

employed in relation to them and; second, they were never "connected" to or "under the protection" of the Imperial Crown.[151] The Court rejects both of these arguments. It adopted an originalist interpretive approach to determining the meaning of the term and finds that "…the *British North America Act*, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of *British North America* as a whole."[152] The problem with the decision is less the finding itself than in the way it arrives at it. By anchoring the meaning of the term "Indians" in its historical context the Court reinforces the "broad view" of s. 91(24), which grants the federal government an undetermined ambit of power *over* "…the Indians of *British North America* as a whole." The practical outcome of this was limited due to the fact that Parliament has no obligation to legislate to the full limits of its authority. As a result, the Inuit became Indians for the purposes of s. 91(24), but not as defined within the *Indian Act*. This placed them under the ambit of "exclusive" federal jurisdiction. But, as we have seen, the case law has restricted that ambit of legislative authority over the Indians *qua* Indians (a term whose meaning is unilaterally determined by the courts and most often drawn from the *Indian Act*).

The next series of challenges to the definition of Indians begins with the *Lavell* case in 1974.[153] This case followed on the seemingly successful use of the equality provision of the *Canadian Bill of Rights* in *Drybones* to challenge the provision in the *Indian Act* that deprived Indian women of their status when they married non-Indian

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[151] *Eskimo Reference*, *supra* note 128, at 115.

[152] *Ibid.*

[153] *Lavell*, *supra* note 30.

men.[154] Justice Ritchie (writing for the plurality of Fauteux C.J., Martland, and Judson JJ.) held that:

> … the effect of the *Bill of Rights* on the *Indian Act* can only be considered in light of the provisions of s. 91(24) of the *B.N.A. Act* whereby the subject of "Indians and lands reserved for Indians" is assigned exclusively to the legislative authority of the Parliament of Canada… the exclusive legislative authority vested in Parliament under s. 91(24) could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians". The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the constitution…To suggest that the provisions of the *Bill of Rights* have the effect of making the whole *Indian Act* inoperative as discriminatory is to assert that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the constitution of enacting legislation which treats Indians living on Reserves differently from other Canadians in relation to their property and civil rights.[155]

This argument (first used by Justice Pigeon in his dissent in *Drybones*[156]) is a curious one. It places no limits on the legislative authority vested in Parliament by s. 91(24) and holds any change to this "broad view" to the clear and plain intent standard.[157] In effect, equality before the law would make it impossible for the Parliament of Canada to "discharge of its constitutional function under s. 91(24)." This "function" is to "…to specify how and by whom Crown lands reserved for Indians are to be used."[158] This allows the Court to simply refer to the way in which Parliament exercised its authority under s. 91(24) to define what the term "Indian" means.[159] This argument adopts the kind

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[154] *Indian Act* R.S.C. 1970, c. I-6, s. 12(1)(b); *Drybones, supra* note 30.

[155] *Lavell, supra* note 30, at 1358-59.

[156] *Drybones, supra* note 30, at 303.

[157] *Lavell, supra* note 30, at 1360.

[158] *Ibid.*, at 1372.

[159] At this time the *Indian Act* S.C. 1951, c. 29 at s. 2(1)(g) had changed the definition to: ""Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian." This

of threadbare interpretation of the concept of equality, which allows for categorical distinctions (i.e., the familiar double-dealing logic of the "separate but equal" doctrine in the United States). Laskin J. responds to this in his dissent:

> In my opinion, the appellants' contentions gain no additional force because the *Indian Act*, including the challenged s. 12(1)(b) thereof, is a fruit of the exercise of Parliament's exclusive legislative power in relation to "Indians, and Lands reserved for the Indians" under s. 91(24) of the *British North America Act*. Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the *Canadian Bill of Rights* is no more a justification for a breach of the *Canadian Bill of Rights* than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the *Canadian Bill of Rights*.[160]

This serves to draw out the problem with reasoning used by both Ritchie and Piegon JJ.: it begs the question of the meaning of s. 91(24). This reasoning relies on the premise that discriminatory treatment *inheres* in the grant of legislative power under s. 91(24), but this is circular. It assumes the meaning of "Indians" in s. 91(24) and the *Indian Act* is the same (a curious conclusion given the distinction that the *Eskimo Reference* had already made). But, it actually leaves the term entirely undefined. It does not define the term "Indians" it simply holds it open to definition by Parliament. As a result, it holds that Parliament has unlimited authority over Indians and their lands until such time that it chooses to restrict this power via clear and plain legislation. This "broad view" does not *inhere* in the wording of s. 91(24). It only acquires this magical meaning through interpretation, but the actual act of interpretation is hidden from view. This is, to borrow

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circular definition retains the unilateral power of the previous definition, but conceals how the determination is actually being made by the register.

[160] *Lavell, supra* note 30, at 1389.

Wittgenstein's analogy, the decisive movement in the conjuring trick. It is the movement that escapes notice because "it was the very one that we thought quite innocent."[161]

In 1976 Laskin (now the Chief Justice) revisits this argument in the *Canard* case where he holds that the argument of the majority in *Lavell*

> …resides in the view that the *Indian Act* is a self-contained code which if it exhibits any dissonance with the *Canadian Bill of Rights* is justified by the very fact that Indians have been designated as a special class for which Parliament may legislate. I did not accept that view in *Lavell* and I do not accept it now, because I do not regard the mere grant of legislative power as itself authorizing Parliament to offend against its generally stated protections in the *Canadian Bill of Rights*. If Parliament deems it necessary to treat its grant of legislative power under s. 91(24) of the *British North America Act* in terms that would be offensive to the *Canadian Bill of Rights*, it is open to Parliament to do so, but s. 91(24) is not, in my opinion, an invitation to the Courts to do what Parliament has not chosen to do. It seems to me patent that no grant of federal legislative power, as a mere vehicle for legislation, should be viewed as necessarily carrying with it a built-in exclusion of the mandates of the *Canadian Bill of Rights*.[162]

This forceful repetition of his argument in *Lavell* provides a valuable additional observation concerning the role of the Courts. It reverses the force of the clear and plain intent standard. Ritchie J. had held that the *Canadian Bill of Rights* did not meet this standard and so it could not be interpreted as applying to the *Indian Act* in that case. Laskin C.J. holds that this position rests on the Court overstepping its jurisdiction and assuming the meaning of s. 91(24). It is open for Parliament to do this (as prior to 1982 Canada operated on the principle of Parliamentary sovereignty) but without a clear and plain expression of this it was not open to the Court to simply assume the meaning of s.

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[161] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §308.

[162] *Canard*, *supra* note 30, at 184.

91(24) and thereby shield it from the effect of the *Canadian Bill of Rights*. But, in *Canard* the majority (Beetz J. writing) rejects this line of reasoning and holds that:

> The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights*, was enacted, by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell*, or of legislative history of which the Court could and did take cognizance.[163]

This is exactly the problem with the Court's approach: s. 91(24) does not define "Indian" nor does it express the form of constitutional relationship. It could accommodate a nation-to-nation federal relationship. But, the Court reads it as power *over* and leaves it open for Parliament to define. In short, it repeats the "broad view" of s. 91(24) that we find in the division of powers cases and uses this to override the effect of the *Canadian Bill of Rights* on federal Indian legislation. The only meaningful "constitutional limits" that Beetz J. can be referring to are those provided by the division of powers, but, following his decisions in *Cardinal* and *Four B*, these limits only apply to Indians *qua* Indians (a cipher whose positive content is most often provided by federal legislation or judicial fiat and can be bypassed via s. 88 if necessary). The upshot of this is that the Courts operate under the presumption that Indians are subject to concurrent jurisdiction and have no access to the *Canadian Bill of Rights* until clear and plain legislation tells them otherwise. This tactic leads Sandra Lovelace to take her case to the *United Nations*

[163] *Ibid*, at 207.

Human Rights Committee in 1977 which, in 1981, reached its decision finding Canada to be in breach of Article 27 of the *International Covenant on Civil and Political Rights.*[164]

In 1976, Canada became a signatory to the *International Covenant on Civil and Political Rights*.[165] Article 27 of the ICCPR provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to process and practice their own religion, or to use their own language." The testimony of Mary Two-Axe Earley (President, Quebec Equal Rights for Indian Women) before the Standing Committee on September 13, 1982 provides a vivid picture of the discrimination that Indian women have faced in Canada:

> We are stripped naked of any legal protection and raped by those who would take advantage of the inequities afforded by the Indian Act. We are raped because we cannot be buried beside the mothers who bore us and the fathers who begot us, although dogs from neighbouring towns are buried on our reserve land: because we are subject to eviction from the domiciles of our families and expulsion from the tribal roles; because we must forfeit any inheritance or ownership of property; because we are divested of the right to vote; because we are unable to pass our Indian-ness and the Indian culture that is engendered by a woman in her children: because we live in a country acclaimed to be one of the greatest cradles for democracy on earth, offering asylum to refugees while, within its borders, its native sisters are experiencing the same suppression that has caused these people to seek refuge by the great mother known as Canada.[166]

The continuous resistance to the restrictions on Indian status, combined with the passage of s. 35 of the *Constitution Act, 1982*, led to the most recent revision of the *Indian Act*. In 1985 Parliament introduced *Bill C-31* and removed the influence of

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[164] *Lovelace v. Canada*, *supra* note 30.

[165] "ICCPR" adopted December 16, 1966, entry into force March 23, 1976. G.A. Res. 2200A (XXI) accession by Canada 19 May 1976, Can. T.S. 1976 No. 47.

[166] Cited in *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at para. 37 [hereinafter *McIvor BCSC*].

marriage on status.[167] It replaced the previous system of registration with an even more complicated one. We will only touch on a few of the most controversial features of the new system.[168] The *Royal Commission on Aboriginal Peoples* argues that *Bill C-31* introduced the following issues:

a) The Two-Parent Rule and the Second-Generation Cut-Off: Prior to 1985 Indian status was passed through the male line (via one parent). Section 6(1)(f) changes this requirement so that Indian status can now only be passed on if both parents have status. Section 6(2) allows a person who only has one parent with status to get a "life interest" in status, but this cannot be passed on.[169] This means that those who regained their status under s.6(1)(c) would only be able to pass it on for one generation. In this sense, we can see this new system of registration as an extension of the project of assimilation that began in 1857. It appears in the bare and technical language of a modern statute and is given *de jure* status by the courts. In this it is similar to the Jim Crow laws of the southern United States following Reconstruction and their hollow principle of "separate but equal". As the *RCAP* states, this complicated system of registration works to "…continue the policy of assimilation in disguised but strengthened form."[170]

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[167] *An Act to amend the Indian Act,* S.C. 1985, c. 27

[168] For an overview of how both the previous and the new system work to discriminate against women and usurp the right of Aboriginal peoples to determine their own identity see Mary Eberts, "McIvor: Justice Delayed—Again" (2010) 9:1 Indigenous Law Journal 15.

[169] As Eberts notes, the two-parent rule should be contrasted with the reform of Canadian citizenship law which came into effect in 1977 via *An Act Respecting Citizenship*, S.C. 1974-75-76, c. 108. This legislation retained the on-parent rule for passing on Canadian citizenship, but simply broadened it so that it could be passed by either the mother or the father. See *Ibid,* at 23.

[170] *RCAP 1:2, supra* note 141, at 279-83.

b) Band Membership: Section 10 of *Bill C-31* allows Bands to create their own membership codes. This separates Indian registration from Band membership. This has led to two paradoxical results: First, there are now individuals who have Indian status but do not have membership within a Band. The lack of Band membership has serious repercussions due to the collective nature of Aboriginal and treaty rights. In practical terms this means that these status Indians can be barred from exercising those rights and lack the standing to challenge infringements of their rights in the courts.[171] Secondly, by restricting Band funding so that they only receive funds for members with Indian status the Crown is able to use its economic powers to indirectly control Band membership. In addition, under the *Indian Act* a Band's ability to hold reserve lands depends on the Band having registered Indians in its membership. Meaning that a Band without registered Indians would effectively be trespassing on Indian lands.

This brings us to the *McIvor* and *Daniels* cases. The *McIvor* case provides us with a vivid illustration of just how resilient the crown machinery is. Sharon McIvor regained status after 1985 and her son was given 6(2) status. This meant that her grandchildren would not be registered. Instead of challenging s. 6(2) directly they sought to expand s. 6(1)(a) to all of those born before April 17, 1985. They argued that Bill-31 was failed remedial legislation and that registration is a benefit of the law within the meaning of s. 15 of the

[171] For more on this problem see Bruce Miller, *Invisible Indigenes: The Politics of Nonrecognition* (Lincoln: University of Nebraska Press, 2008). This implication can be seen in the discussion of standing in *Behn v. Moulton Contracting Ltd*., [2013] 2 SCR 227 at paras. 26-36. Also see Giokas, *The Indian Act, supra* note 132, at 66.

Charter.[172] At the trial their argument succeeded. Ross J. recognized that the Crown's argument that status is a personal right "…would treat status as an Indian as if it were simply a statutory definition pertaining to eligibility for some program or benefit."[173] This is inappropriate (to say the least) as "…having created and then imposed this identity upon First Nations peoples, with the result that it has become a central aspect of identity, the government cannot now treat it in that way, ignoring the true essence or significance of the concept."[174] In closing she found that s. 6 of the 1985 Act violates s. 15(1) of the Charter and she refused the Crown's request for a 24-month suspension of relief.[175] At the Court of Appeal Justice Groberman curtailed the scope of the remedy by changing the comparator group and thereby narrowing the definition of the discrimination and suspending the order.[176] The result of this was the passage of *Bill C-3* in 2010, which has been heavily criticized for the lack of meaningful consultation during the drafting process and its narrow and technical language.[177] The courts can narrow the force of *Charter* claims and preserve the "broad view" of s. 91(24). This, in turn, enables the crown machinery to avoid the force of the *Charter* by simply adjusting its definitions.

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[172] The gist of the case was the effects of the second-generation cut-off are inconsistent with the equality provision of the *Charter*. The similarity with *Lavell* is obvious, but, one would imagine, that the result should be different as the equality provision is now part of the constitution itself and so not vulnerable to the principle of Parliamentary supremacy. The factual components of the case are convoluted due to the effects of the changes in the registration system over time. See Eberts, *McIvor, supra* note 168, at 27-46.

[173] *McIvor BCSC, supra* note 166, at para 193

[174] *Ibid.*

[175] *Ibid*, at paras. 343-50.

[176] Eberts, *McIvor, supra* note 168, at 35-40; *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153

[177] *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)* 3rd Session, 40th Parliament, 59 Elizabeth II, 2010; Sarah E, Hamill, "McIvor v Canada and the 2010 Amendments to the Indian Act: A Half-Hearted Remedy to Historical Injustice" (2011) 19:2 Constit. Forum; Forum Constit. 75.

The *Daniels* case is the current chapter in the judicial definition of "Indians". As the Dawson J. A. states in the decision of the Federal Court of Appeal: "…This is a division of powers case about the interpretation of section 91(24) of the *Constitution Act, 1867*."[178] The question before the Court—much like the *Eskimo Reference*— "… whether the federal government has jurisdiction over Métis and non-status Indians pursuant to section 91(24) of the *Constitution Act, 1867*."[179] The response of the courts to this question (at both the trial and the appeal level) was yes. There are two related problems with this case: first, it maintains the "broad view" of s. 91(24) (i.e., that it confers plenary power *over* Indians and their lands). This can clearly be seen in the list of the purposes of s. 91(24) that Justice Phelan adopts:

- to control native people and communities where necessary to facilitate development of the Dominion.
- to honour the obligations to natives that the Dominion inherited from Britain while extinguishing interests that stood in the way of the objects of Confederation.
- eventually to civilize and assimilate native people.[180]

The purposes are obviously mutually inconsistent: how could it be possible to "honour the obligations to natives that the Dominion inherited from Britain" while controlling them, extinguishing their interests and, eventually, assimilating them? There is no inquiry into the justifications that were used to legitimate these purposes. What possible legal basis could the Imperial Crown or the Dominion use in order to legitimate policies of control, extinguishment and assimilation? If there is none how can they possibly be

[178] *Daniels II, supra* note 128, at para. 16.

[179] *Ibid* at para. 1.

[180] *Daniels I, supra* note 128, at para. 353; *Daniels II, supra* note 128, at para. 36.

accepted as the purposes of this head of power today? Furthermore, how can they be accepted via a "purposive" or "living tree" approach to constitutional interpretation? As Justice Phelan rightly maintains,

> I accept the Plaintiffs' submission that the purposive approach – the "living tree" doctrine – is the appropriate approach (see *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698). History helps to understand perspectives on the purpose but does not necessarily determine the purpose for all time. This is particularly the case with a constitution power which has, at some level, racial tones and which involved people who were seen in a light which today we would find offensive. Racial stereotyping is not a proper basis for constitutional interpretation.[181]

If racial stereotyping is not a proper basis for constitutional interpretation then how can it be possible to accept the idea that the purpose of s. 91(24) is to pursue policies of control, extinguishment and assimilation? The only basis for these policies is *racial stereotyping* (i.e., that there is a civilizational hierarchy and so there is no need to acquire free, prior and informed consent). Dawson J.A. was faced with the question of whether Phelan J. failed to follow the approach to constitutional analysis mandated by the Supreme Court. His response was that,

> …there is ample evidence to support the view that Métis were considered within section 91(24) at the time of Confederation. A progressive interpretation was, therefore, unnecessary, and the Judge did not err by failing to address the social changes that would underlie such an interpretation.[182]

[181] *Daniels I, supra* note 128, at para. 538.

[182] *Daniels II, supra* note 128, at para. 148.

This is plainly correct. The conclusions that Phelan J. reaches *do not* require a progressive interpretation. I would go further than Dawson J.A. and say that the reasons do not show that a progressive interpretation was used in the first place.[183]

This leads to the second problem with the case, it accepts a race-based view of the basis of s. 91(24).[184] Dawson J.A. qualifies this finding, but in doing so he simply follows the logic that Beetz J. sets out in *Canard* (i.e., he holds the term "Indians" open so that it can be adapted).[185] Allowing the discrete and multiple Indigenous identities to fit into the term "Indians" does not cure the problem of racism. It continues it. As Chartrand rightly notes, this logic

> …fails to appreciate that the provision is, without imposing a check on its unilateral reliance [on] federal authority, inherently racist as it offends fundamental human rights.[186]

This is because it assumes that s. 91(24) confers absolute power *over* Indians and their lands. There is no possible basis for this assumption other than the set of racist legal fictions that can no longer be accepted as valid law (i.e., *terra nullius*, discovery, etc.). Phelan J. attempts to prove the purpose of s. 91(24) based on a premise that itself requires proof. The unquestioned assumption that s. 91(24) confers sovereignty leads the reasoning of the Court into circles. In the end *Daniels* offers nothing new. It is simply the application of the finding of the Court in the *Eskimo Reference* and *Canard.*[187]

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[183] The blame for this cannot be laid entirely on Phelan J. as the plaintiffs themselves conceded that s. 91(24) is a broad plenary power. See the following instructive analysis by Larry Chartrand, "The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy," (2013) 50:1 Alta L Rev 181 at 182.

[184] *Daniels I*, *supra* note 128, at para. 568.

[185] *Daniels II*, *supra* note 128, at paras. 83-124.

[186] Chartrand, *Daniels Case*, *supra* note 183, at 184.

[187] Dawson J.A. notes this at *Daniels II*, *supra* note 128, at para. 124; *Eskimo Reference*, *supra* note 128, at 118; *Canard*, *supra* note 30, at 207. The recent decision of the Supreme Court in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 does nothing to change the problems that are in both the previous

Wittgenstein provides a description of the interpretive trap that the Court is caught in when it repeats the "broad view" of s. 91(24): "It is like a pair of glasses on our nose through which we see whatever we look at. It never occurs to us to take them off," and so we "predicate of the thing what lies in the method of representing it."[188] If the Court were to actually remove these "glasses" and employ a purposive or "living tree" approach to s. 91(24) they could not possibly find that its purposes are to control, extinguish and assimilate. This is a set of historical purposes that form one historical narrative that is in direct conflict with the nation-to-nation treaty relationship that related to honoring "…the obligations to natives that the Dominion inherited from Britain".[189] A "living tree" approach would have to balance s. 91(24) with s. 35 and remove any purpose that does not have a basis in the free, prior and informed consent of Aboriginal peoples. This would go beyond the approach that the Court took in *Sparrow* (i.e., "reconciling" the *unquestioned assumption* of federal "power" Indians and their lands with the self-imposed "duty" that is expressed in s. 35) as it would place the assumption of federal

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decisions. The short unanimous decision that is written by Justice Abella simply passes over the history of s. 91(24) quickly and offers no analysis of the distinction between a power that "extends to" versus one that is a power *over*. As she states at para 34: "Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution." The fact that s. 35 can be read in a way that *does not* restrict the scope of s. 91(24) is an indication of their shared foundation. The "grand purpose" of reconciliation remains anchored to the *doctrine of discovery* (this is why Binnie J.'s canoe can never leave the shore). What we are left with is that Abella J. states at para. 46: "A broad understanding of "Indians" under s. 91(24) as meaning 'Aboriginal peoples', resolves the definitional concerns raised by the parties in this case. Since s. 91(24) includes all Aboriginal peoples, including Métis and non-status Indians, there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples." Aboriginal peoples now all enter an undetermined ambit of authority that is founded on nothing but an assertion and an absence of doubt (by the party that benefits from it). It seems that this picture of life in the black canoe is predicated on seeing the figure in the center as a king holding a scepter (a paradigmatic symbol of European sovereign power and divine right) in place of the ambiguous tall figure of the chief (that may or may not be the Spirit of Haida Gwaii) holding a talking stick.

[188] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §103-4.

[189] *Daniels I*, *supra* note 128, at para. 353

power under s. 91(24) directly into question.[190] In so doing it would have to uphold the basic constitutional principle of *q.o.t* and the requirements of natural justice (i.e. *audi alteram partem* and *nemo judex in causa sua*). As Chartrand suggests, one possible version of such a reinterpretation of s. 91(24) would restrict it to a "treaty power" that would allow Parliament to "…negotiate with nations and peoples who occupy and possess territory that Canadian authority wished to acquire."[191] A broader way, to characterize this type of interpretation—and sharpen the distinction between it and the current 'power *over'* model—is to use the phrase 'power-*with*'.[192] This serves as an object of comparison that challenges the foundational claim of the current picture of federalism in Canada and moves towards the kind of democratic constitutionalism that could offer the possibility of a reconciliation based on dialogue and consent.[193] This is not a model that naively presumes to end all conflict and open the way to perpetual peace (i.e. it is not the confession of a *beautiful soul* that, as Hegel notes, remains "….*dumb*, shut up within its inner life" as it cannot find a way to make the world conform to the picture it sees).[194] Rather, as Tully argues,

> The treaty system is a living human practice in which, by great effort, the battle for recognition by arms has been transformed into the conflict of words. This does not end the strategies of fraud and deceit humans play

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[190] *Sparrow*, *supra* note 27, at 1109.

[191] Chartrand, *Daniels Case*, *supra* note 183, at 185.

[192] I would like to thank James Tully for suggesting that I adopt this term. He develops this term (via the work of thinkers such as Mary Follette, Hanna Arendt, Richard Greg and Gandhi) in two unpublished essays: *Violent Power-Over and Nonviolent Power-With: Hannah Arendt On Violence and Nonviolence* (Paper delivered at Goethe University 7 June 2011) [unpublished]; Richard Gregg and the Power of Nonviolence: The Power of Nonviolence as the unifying animacy of life (J Glenn and Ursula Gray Memorial Lecture, delivered at Colorado College, 1 March 2016) [unpublished].

[193] Tully, *Strange Multiplicity*, *supra* note 5 at 136.

[194] G.W.F Hegel, *Phenomenology of Spirit*. translated by A.V. Miller (Oxford: Oxford University Press, 1997) at §653.

> under the colour of the conventions. It only stops the killing, and this is only as long as the participants continue to listen to each other.[195]

This view of the concept of constitutionalism does not adopt a singular foundation of authority (i.e. the one that the "broad view" of s. 91(24) silently presumes). It invites us to view the plurality of foundations as a source of strength rather than dissolution or lawlessness. As Wittgenstein puts it "…the strength of the thread does not reside in the fact that some one fiber runs through the whole length, but in the overlapping of many fibers."[196]

Instead we are left with a repetition of the same baseless logic that presents s. 91(24) as plenary power *over* the undefined term "Indians." This means that those who fit within these bounds fall through a rabbit hole in the constitutional order. They are caught in a *sui generis* space within the division of powers that has been fashioned by judicial interpretation. The Court is captured by a picture of federalism that grants Parliament unquestioned sovereignty *over* Indians and their lands. It has consistently refused to inquire into the basis of this presumption. Instead it simply repeats that it is beyond doubt or qualifies sovereignty by employing the terms "assumption", "assertion" or "*de facto*" while retaining the unilateral power to infringe on Aboriginal and treaty rights.[197] This

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[195] Tully, *Strange Multiplicity*, *supra* note 5 at 138.

[196] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §67.

[197] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para. 32 [hereinafter *Haida Nation*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 at para. 42 [hereinafter *Taku River*]; This characterization of Crown sovereignty is also cited with approval in the Court's recent decision in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 66 [hereinafter *MMF*]. The full expression of this confusing qualification of sovereignty can be found in *Tsilhqot'in Nation*, *supra* note 28, 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. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. 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. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown." For a detailed exploration of the problems with the

has left us in a position where there is something that is "already in plain view" but this is precisely why "…we seem in some sense to not understand."[198] Wittgenstein provides us with tools that we need to break this spell. By assembling and rearranging "reminders for a particular purpose" it is possible to begin to offer a survey of aspects that have been forgotten.[199] What has been forgotten is the Aboriginal perspective and the *historical warrant* of Crown sovereignty (aspects that are connected by the requirements of the most basic principles of constitutionalism and natural justice). This is evident when we reconsider the definition of "Indians" under s. 91(24) and the *Indian Act*, which has, as we have seen, been subject to continuous resistance and ongoing litigation. The legal definition of "Indians" is part and parcel of a narrative of imperial despotism. From the introduction of the first legislative definition in 1850 through to today it remains a unilaterally imposed legal status. In order to maintain the constitutional legitimacy of the *Indian Act* the courts have had to assume that the powers conferred to the Dominion by the Imperial Parliament under s. 91(24) were a plenary or sovereign power *over* Indians and their lands. In doing so the courts have committed themselves to a circular picture of federalism. They have not been able to either hear the Aboriginal perspective or explain the *historical warrant* of this theory of s. 91(24). Instead they confine the former to the bounds of evidence (which is subject to the translation effect of judicial discretion) and simply assume the latter is in place. Without this assumption they would not be able to retain the "broad view" of s. 91(24) as they would need to explain how the Imperial

concept of "Crown title" in this case see Ryan Beaton, "Aboriginal Title in Recent Supreme Court of Canada Jurisprudence: What Remains of Radical Crown Title?" (2014) 33 Nat'l J. Const. L. 61.

[198] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at §89.

[199] *Ibid*, at §127, §92.

Parliament was able to give something that it did not have (thereby cloaking themselves as the *bona fide* purchaser for value). While this kind of legal alchemy was once possible the required legal fictions (i.e. *terra nullius*, discovery, divine right, etc.) no longer retain even the appearance of legitimacy. This has left the courts in a position where they must either simply confess that there is no basis for the unilateral and unrestricted theory of s. 91(24) or continue to indulge in the kind of assumptions and hidden premises that have been leading them in circles since *Calder* was decided in 1973. By adopting the expression Indians *qua* Indians to define the area of exclusive federal jurisdiction the choice is rather clear.

But what of Bands? In *Four B* Beetz J. used "membership in a band" and "the right to participate in the election of Chiefs and Band Councils" as examples of the kind of "Indianness" that resides under the exclusive jurisdiction of the federal government.[200] So how have the courts interpreted this aspect of Indians *qua* Indians? Does the specter of *Gradual Enfranchisement Act* (with its "simple municipal institutions") still determine the lived reality of self-government?

C) <u>The Judicial Definition of Bands</u>

The Band Council is, as we have seen, a colonial invention. It was first introduced in 1869 with the *Gradual Enfranchisement Act*. Its explicit purpose was to prepare Indians for "responsible government."[201] This served to frame all indigenous political and legal systems as "irresponsible" and thus illegitimate. The contradictory nature of this gesture is blatantly obvious. The basic democratic principle of consent is being used

[200] *Four B*, *supra* note 43, at 1048.

[201] Giokas, *The Indian Act*, *supra* note 133, at 34.

as the justification for interfering with the self-government of Aboriginal peoples without their consent and despite their continual resistance. It employs the basic institutional forms of representative government (e.g. elections and representatives), but the ultimate control is not in the hands of the membership. In fact, as we have seen, the membership itself is defined and/or controlled externally (i.e. a band may elect to control its membership list, but the funding is based on the number of registered Indians). The powers of the band council are strictly bound by the *Indian Act* and it cannot be considered to be a constitution that can lay any claim on the will of the people that it governs. This model that was designed to maintain colonial domination during a process of assimilation. It was designed to disappear. The process of enfranchisement saw no future for these simple municipal institutions. Their purpose was pedagogical. Once the Indians were fully absorbed into the body of citizens they would not require a separate form of government. The authority and structure of bands fits this model from its inception in 1869 to the most recent form of the *Indian Act*. The arrangement of authority in the legislation is unequivocal. There have been periods of adjustment and recalibration over the course of the last 140 years, but the general form of administrative despotism remains constant. The ambit of discretional authority that the Minister has within the *Indian Act* is difficult to exaggerate. For example, if we consult s. 3(1) of the current version of the Act we are told that the "Act shall be administered by the Minister" and that within this role the Minister is "…the superintendent general of Indian affairs."[202] The language used to describe the role clearly conveys the power *over* arrangement. We can think of the relationship between the Minister and the Act as that between a machine

[202] *Indian Act* R.S.C., 1985, c. I-5

and its operator. The machine presents a set of levers and buttons that allow the operator to set it in motion. This is by no means unique. Ministers are often placed in the seats of administrative power. But, this machine was designed to control and assimilate Indians. This is clearly evident in the sheer number of discretionary levers and buttons that it features and how they connect to bands.[203] Consider the language of the provisions relating to the elections of chiefs and band councils:

> 74(1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.[204]

This provision enables the Minister to dissolve a band council and hold a new election. The only restriction on this discretionary power is that it be "advisable for the good government of a band". There is no need to consult the group in question. Their powers are strictly bound within the Act. The Minister is the one who determines what is and is not advisable for the "good government" of Indians. This is obvious when we consider the section dealing with the powers of the council:

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[203] It is interesting to note that s. 4(2) enables the Governor in Council (this is a term that refers to Governor General—the Queen's representative—who acts by and with the consent of the Queen's privy Council for Canada) to suspended these features with the (rather telling) exception of the sections dealing with the definition and registration of Indians and the surrender and designation of lands. These are after all the two main targets of assimilation and the heads of power that compose s. 91(24). Additionally, in s. 17 we are told that "the Minister may, whenever he considers it desirable" amalgamate bands (if there is a request based on a majority vote), constitute new bands and establish band lists (on the basis of existing lists or from the register—meaning that he cannot make new Indians as this is under the discretion of the Register in s. 5). This discretionary power combines with the changes in registration under *Bill C-3* and the ability for bands to control their own membership. This combination leads to a situation in which there can be registered Indians who do not have a band. They cannot exercise Aboriginal rights as they are collective and not individual rights. They cannot be recognized as a legitimate collective without the Minister. But, the Minister is under no obligation to remedy this situation and so these groups fall through an exception within the law. They are read as a mere "…handful of Indians" (*R. v. Syliboy* (1929), 1 D.L.R. 307 (N.S. Co. Ct.) at 313).

[204] *Indian Act* R.S.C., 1985, c. I-5

> 81 (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister…[205]

This is stated prior to the twenty-one subsections that details the purposes that the council can regulate. The language is not ambiguous. The Governor in Council and the Minister maintain power over the band council. It remains a creature of statute strictly bound by the Act. If one were to condense the entire Act down to a single phrase it would simply state, "the Minister or Governor in Council may do whatever they deem necessary for the good government of Indians." It does not matter whether or not this immense discretionary power is actually used. If the Minister neglects to use certain levers or buttons for an extended period of time it may seem as if the band council is a self-governing body. But, the relationship of power *over* remains firmly in place despite the neglect. It is and remains tied to the strings of power that initially gave it form. This does not mean that its use is, as Wittgenstein puts it, "everywhere circumscribed by rules."[206] It can be used otherwise, but this remains the legal structure of its authority. The Aboriginal perspective is not taken into account within the bounds of the colonial law. It can only be manifest by acting otherwise within the *Indian Act* game. This resistance has a history that can be seen in each and every adjustment and recalibration of the crown machinery. But, my purpose in this section is not to attempt to recount that history. Rather, my aim is to provide a brief survey of how the courts have interpreted the authority of the band council. These cases develop from situations in which a band makes a move away from the normal rules of the *Indian Act* game. This is unsurprising as the

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[205] *Ibid.*

[206] Wittgenstein, *Philosophical Investigations, supra* note 7, at §68.

'normal rules' of the *Indian Act* are unambiguous. The source of authority and of ultimate administrative power is the Crown. But, there are some moves that have been taken by bands to move away from this power *over* relationship. I have limited my focus to three specific examples of these moves: First, in *Pamajewon* we see an example of band councils asserting laws outside the bounds of the *Indian Act*. This leads to a direct confrontation to the unilateral authority of the Crown. Second, a band council requests to switch from the *Indian Act* election procedures in s. 74 and form a custom election code. This enables them to change rules concerning eligibility, term of office, size of council, and to integrate hereditary leaders. But, what happens when there is a dispute within the band over the results of an election? This has led to a body of cases in which the federal courts are forced to determine whether or not a custom band council fits within their jurisdiction under the *Federal Court Act.* And, finally, we will conclude this section by considering how the courts have dealt with the constitutionality of the legislative and self-government powers set out in Final Agreements (also known as modern treaties).

Pamajewon and the Right of Self-Government

In *Pamajewon* two band councils passed laws relating to gambling on their territory. These laws were not passed pursuant to s. 81 of the *Indian Act* and neither sought a provincial license.[207] They consciously stepped outside of the bounds of the *Indian Act* game and asserted their right to self-government. The Crown's response to this was to charge a number of members from each first nation with criminal offences

[207] *Pamajewon*, *supra* note 75, at paras. 5-10. For a detailed examination of the factual details of gambling and provincial licensing see Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon" (1997) 42 McGill L.J. 1011 [hereinafter Morse, *Pamajewon*]. It is particularly interesting to note that the Shawanaga First Nation Council was offered a Provincial license but refused as they believed that doing so would compromise their position on the inherent right of self-government (Morse, *Pamajewon*, at 1024).

relating to gambling.[208] At the trial both first nations plead not guilty. The members of the Shawanaga First Nation put forward three arguments at trial:

a) the Crown had failed to prove the essential elements of the offense;

b) they should not be convicted because their actions were taken pursuant to laws enacted by persons in possession of *de facto* sovereignty as per s. 15 of the *Criminal Code*; and, finally,

c) the application of s. 201(1) of the *Criminal Code* was an unconstitutional violation of their inherent right of self-government.

Carr J. rejected all three. He held that they had not demonstrated that they were acting in "obedience" to the lottery law as the law itself did not require them to act and that they did not have *de facto* sovereignty.[209] As Lamer C.J.C. summarizes,

> Relying on the terms of the *Royal Proclamation of 1763* and the Robinson Huron Treaty of 1850, and the granting of exclusive jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government under s. 91(24) of the *Constitution Act, 1867*, he held that any right of self-government which was once held by the Shawanaga First Nation had been extinguished by the clear and plain intention of the Crown, with the result that the appellants could not rely on such a right as a defence to the charges against them.[210]

This argument clearly relies on the "broad view" of s. 91(24). Only the presumption of unlimited sovereign power *over* could extinguish the right of self-government. The only legitimate *historical warrant* for this power is consent or conquest. In this case there is

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[208] There were two sets of appellants in the case. First, Pamajewon and Jones who were members of the Shawanaga First Nation. They were charged and found guilty of keeping a common gaming house contrary to s. 201(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. Second, Arnold Gardner, Jack Pitchenese and Allan Gardner who were all members of the Eagle Lake First Nation. They were found guilty of conducting a scheme for the purpose of determining the winners of property, contrary to s. 206(1)(*d*) of the *Criminal Code*.

[209] *R. v. Jones and Pamajewon* [1993] 3 C.N.L.R. 209 (Ont. Prov. Div.) at 211.

[210] Cited in *Pamajewon*, *supra* note 75, at paras. 14.

neither. And while Lamer C.J.C. does not adopt this particular approach to determining the question, the result is, as we will see, effectively the same.

The members of the Eagle Lake First Nation argued that they should not be convicted because s. 206 of the *Criminal Code* unjustifiably interfered with their s. 35(1) right to self-government. At trial Flaherty J. held that this argument was an attempt to base the right to self-government on the economic disadvantages suffered by the First Nation. As the trial judge put it:

> However one may wish to complain about ones economic disadvantage and however apparent it might be, redress needs to be found in other ways. People need to find ways of creating wealth and generating revenue that are not contrary to the Criminal law. . . .I am not persuaded that the economic disadvantages of the Eagle Lake First Nations people as evident as they have been established to be in these proceedings and of First Nations people generally can be addressed by activity which contravenes the Criminal law nor can I strike down a section of the *Criminal Code* which is otherwise constitutionally valid for the reasons carefully and ably submitted in this case.[211]

This characterization sidesteps the substantive issue altogether. It is analogous to interpreting a prisoners claim to a right to liberty on the basis of innocence as arising from the discomfort of confinement and not the actual details of the offense that resulted in the imprisonment.[212] At appeal the cases were combined and the appellants again argued that their convictions violated their respective bands' rights to self-government. They maintained that the right to self-government existed either as a necessary component of their aboriginal title or as an inherent aboriginal right. Osborne J.A. ruled that that the content of aboriginal title is determined by the nature of the traditional

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[211] Cited in *Pamajewon*, *supra* note 75, at paras. 16.

[212] The analogy here is imperfect as typically the prisoner/state relationship is not complicated by questions of jurisdiction and the legitimacy of sovereign authority.

aboriginal use and occupation of that land.[213] This meant that the specific right of self-government would have to be argued on a rights basis. Furthermore, he held *Sparrow* as authority for the proposition that any broad inherent right to self-government was extinguished by the British assertion of sovereignty. Osborne J.A. cited Dickson C.J.C. and La Forest J.

> [W]hile 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.[214]

Here again the case stands on the thin air of an absence of doubt. From this basis Osborne J.A. narrows any possible claim to self-government to fine grain historical and cultural details of each particular case. He states that,

> If the Shawanaga First Nation and Eagle Lake Band had some rights of self- government which existed in 1982 (I am prepared to assume that they did), the right of governance asserted must be viewed like other claimed aboriginal rights; it must be given an historic context. Here, there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation. Moreover, there is no evidence of an historic involvement in anything resembling the high stake gambling in issue in these cases.[215]

Lamer C.J.C. adopts the approach set out by Osborne J.A. and finds that:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.[216]

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[213] *R. v. Pamajewon,* [1994] O.J. No. 3028 at 400

[214] *Sparrow*, *supra* note 27, at 1103 as cited in *R. v. Pamajewon,* [1994] O.J. No. 3028 at 400.

[215] *R. v. Pamajewon,* [1994] O.J. No. 3028 at 400.

[216] *Pamajewon*, *supra* note 75, at para. 27.

The weight of this standard effectively shuts off this approach to asserting a right of self-government. Asking a First Nation to show that self-government is "…an element of a practice, custom or tradition integral" to their "distinctive culture" that can be traced back prior to contact with Europeans is an impossible task.[217] It is akin to the Court asking a First Nation to prove that their language contains meaning that could be said to be a "defining feature" of their culture.[218] The thrust of the analogy can also be expressed as a question: namely, how can one possibly untangle a culture from its legal and political structures? By what authority can the Court confine the Aboriginal perspective to questions of fact that are cognizable within the common law? And furthermore, how can it bind the development of their diverse cultures to the moment of contact with Europeans? This focus on historical context shifts the onus. It is not the Crown that needs to articulate how it acquired sovereign power *over* Aboriginal peoples. This maintains its force from the simple fact that it was never doubted. It is the assumption of this foundation—a foundation that can only be based on the legal fictions of discovery, *terra nullius* and divine right—that grants the Court the jurisdiction necessary to place the onus on the Aboriginal claimant and the judicial discretion to determine the weight of the indigenous laws expressed in their oral histories. This is what determines the substantive

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[217] *R. v. Van der Peet*, [1996] 2 SCR 507 at para. 46 [hereinafter *Van der Peet*]. See also Morse, *Pamajewon*, *supra* note 207, at 1035-37. For critiques of the *Van der Peet* test see the following: John Borrows, "The Trickster. Integral to a Distinctive Culture" (1997) 8:2 Constitutional Forum 27; Leonard I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger and Van der Peet'* (1997) 8:2 Constitutional Forum 40; R.L. Barsh & J.Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; and Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) Constitutional Forum 8:2.

[218] *Ibid*, at para. 59.

content of the Court's repeated commitment to the reconciliation. As Lamer C.J.C. states in *Van der Peet*,

> It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[219]

The question here is how weight is to be determined and at what level. By confining the Aboriginal perspective to the facts of the case the substantive question is avoided. The question of "reconciling" is bound up in judicial discretion. This balancing game maintains that the judiciary must take the Aboriginal perspective into account and accord it equal weight, but they must also "do so in terms which are cognizable to the non-aboriginal legal system."[220] It is hardly surprising that the Court adopts the analogy of translation in *Marshall; Bernard.*[221] This is an apt description of the game that is being played.[222] The real question centers directly on jurisdiction: how can the Court simply

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[219] *Van der Peet, supra* note 217, at para. 50.

[220] *Ibid,* at para. 49

[221] *R. v. Marshall; R. v. Bernard,* [2005] 2 SCR 220 at para. 48 [hereinafter *Marshall; Bernard*]. As Slattery argues the process of translation "…artificially constrains and distorts the true character of Aboriginal title and risks compounding the historical injustices visited on Indigenous peoples. Far from reconciling Indigenous peoples with the Crown, it seems likely to exacerbate existing conflicts and grievances"; Brian Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85:2 Can Bar Rev 255 at 281.

[222] It leads to the same well-intentioned but hollow and ineffective process that we find in the criminal law context with the *Gladue* reports and the use of sentencing provisions to address the problem of the over representation of Aboriginal people within the Canadian prison system. Subsection 718.2(e) of the *Criminal Code*, R.S.C., 1985, c. C-46. is part of the process of sentencing and it provides the judiciary with a "guiding principle" not a substantive power. This means that it cannot change the available sentencing range. It offers the accused the opportunity to bring a broader consideration of the circumstances before the judge, but it does so in a way that places the accused in the position of having to decide to simply accept the 'normal' sentencing process or to reveal the most intimate details of their personal history as an Aboriginal. This is an optional process, but it is one that has strong confessional overtones. In a settler-colonial context these overtones serve to cover over the legacy of colonization and reaffirm the jurisdiction of the Crown over Aboriginal peoples.

decide that the Aboriginal perspective is to be determined as a matter of fact? As Morse argues, the debate between the majority and the two dissents on the significance of the activity in question in *Van der Peet*

> …misses the central point, which is the existence of Aboriginal governmental jurisdiction and its relationship to the legislation of other governments. The conflict should rather be envisaged as one between competing governments, each attempting to exercise its legislative jurisdiction, akin to the lengthy history of federal provincial constitutional conflicts.[223]

As Wittgenstein states in *On Certainty*, "knowledge is in the end based on acknowledgment."[224] This game is fixed in advance: it is not about the evidence or the facts. It is about the ability to set the rules of the game and the discretion to acknowledge or ignore the moves. This is based on the unquestioned assumption of sovereign power *over* Aboriginal peoples.

D) Custom Band Councils and the Question of Jurisdiction

The case of custom bands is similarly limiting. While it may initially appear that providing bands with the ability to choose to determine their membership and election codes was a move away from the legacy of despotism and assimilation, this appearance

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It invites the judge to see into the life of the accused through the lens of Indian *qua* Indian (to borrow the language from the s. 91(24) jurisprudence) and offer them some small degree of clemency on that basis. It also places an onerous fact finding process on the accused as they must produce (through their legal counsel) the report and present it to the court. As in the Aboriginal rights jurisprudence the Aboriginal perspective is confined to a factual inquiry that is subject to judicial discretion. For some commentary on these issues see: Kent Roach and Jonathan Rudin, "Gladue: The Judicial and Political Reception of a Promising Decision" (2000) 42:3 Can J Crim 355; Kent Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools," (2014) 64:4 UTLJ 556; and for a recent comparative analysis see Samantha Jeffries and Philip Stenning, "Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries," (2014) 56:4 Can J Crim & Criminal J 447.

[223] Morse, *Pamajewon, supra* note 207, at 1034.

[224] Ludwig Wittgenstein, *On Certainty*, eds. G.E.M. Anscombe and G.H. von Wright (Blackwell: Oxford, 1974) at §378.

is, at best, misleading. Allowing bands to control their own lists provides a degree of self-determination but it does so within a system that forecloses on the possibility of self-government. This can be seen in a series of cases in which the Federal Courts attempt to determine their jurisdiction over custom bands. In *Lavell* Laskin J. (as he was then) expressed doubt as to whether any type of band council would fit the definition in the *Federal Court Act*:

> I share the doubt of Osler J. whether a Band Council, even an elected one under s. 74 of the *Indian Act* (the Act also envisages that a Band Council may exist by custom of the Band), is the type of tribunal contemplated by the definition in s. 2(g) of the *Federal Court Act* which embraces "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". A Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(g) are taken literally, they are broad enough to embrace boards of directors in respect of powers given to them under such federal statutes as the *Bank Act*, R.S.C. 1970, c. B-1, as amended, the *Canada Corporations Act*, R.S.C. 1970, c. C-32, as amended, and the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15, as amended. It is to me an open question whether private authorities (if I may so categorize boards of directors of banks and other companies) are contemplated by the *Federal Court Act* under s. 18 thereof. However, I do not find it necessary to come to a definite conclusion here on whether jurisdiction should have been ceded to the Federal Court to entertain the declaratory action brought by Mrs. Bédard against the members of the Band Council. There is another ground upon which, in this case, I would not interfere with the exercise of jurisdiction by Osler J.[225]

The problem here has to do with where the powers of band councils derive from. If their powers are conferred by Parliament, then they are a creature of statute. But, this simply begs the question. It simply leads back to the question of the Aboriginal perspective and the inherent right of self-government. Given this it is unsurprising that Laskin J. would have doubts concerning the jurisdiction of the Federal Courts. Despite this the Federal

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[225] *Lavell, supra* note 30, at 1379.

Court decides the issue just four years after *Lavell* in *Gabriel.*[226] Thurlow J. arrived at this conclusion by reviewing the powers the *Indian Act* confers on a band council and deciding that the scheme of the statute *resembled* a restricted form of municipal government by the council on the reserve. On the basis of this resemblance he concluded that such a council was a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act.* This decision was confirmed by the Federal Court of Appeal without any further elaboration on this point.[227] A similar (but far more explicit) analogy was put forward by Cameron J. A. of the Saskatchewan Court of Appeal in 1982,

> As municipal councils are the "creatures" of the Legislatures of the Provinces, so Indian band councils are the "creatures" of the Parliament of Canada.[228]

He also elaborated on this point later on in the same decision:

> In summary, an Indian band council is an elected public authority, dependent on Parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power - delegated to it by Parliament - in relation to the Indian reserve whose inhabitants have elected it; as such it is to act from time to time as the agent of the Minister and the representative of the band with respect to the administration and delivery of certain federal programmes for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the Minister of certain of his statutory authority relative to the reserve.[229]

This characterization is simple and direct: band councils (whether custom or not) are "creatures" of the Parliament of Canada. But, there have been some cases that have

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[226] *Gabriel v Canatonquin,* [1978] 1 FC 124 [*Gabriel*]

[227] In *Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536 at para. 35 [hereinafter *Gamblin*] Mandamin J. refers to *Gabriel* as "…the seminal case for the proposition that a First Nation council is a "federal board, commission or other tribunal"."

[228] *Re Whitebear Indian Council and Carpenters Provincial Council of Saskatchewan* (1982), 135 D.L.R. (3d) 128, 3 W.W.R. 554, 15 Sask. R. 37 (Sask. C.A.) at 133 [hereinafter *Whitebear*].

[229] *Ibid,* at 134.

returned to the doubts expressed by Laskin J. For instance, in *Devil's Gap* Dawson J. (as she was then) cited Dickson J.'s decision in *Guerin*, which held that a First Nation's interest in reserve 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.[230]

From this basis she found that,

> Given that nature of the First Nation's interest in the reserve lands, and the reservation of rights in Treaty No. 3, I am unable to conclude that the decision to refuse to proceed with a lease extension agreement is an exercise of any power conferred under the Act or any other Act of Parliament. As such, I find that the Chief and Council were not acting as a "federal board, commission or other tribunal" when they refused to consent to an extension of the Cottagers' lease. It follows that the Court does not have jurisdiction to deal with this application for judicial review.[231]

This doubt does not necessarily disturb the jurisdiction of the Federal Court entirely. Rather, it raises the issue of what kind of decision is before the court. She responds to the reasoning in both *Gabriel* and *Whitebear* by stating that the "argument that a band council obtains its existence, powers, and responsibilities from Parliament… exemplifies the narrow conception of a band council and its powers" and that this view is inconsistent with the jurisprudence.[232] She articulates a broader view that holds that band councils have "at least all of the powers necessary to effectively carry out their responsibilities, even if not specifically provided under the Act."[233] What this has translated to in the case law is simply a qualification on the general presumption that the Federal Court retains the

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[230] *Guerin et al. v. The Queen et al*., [1984] 2 S.C.R. 335 at 379; Cited in *Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B,* [2009] 2 FCR 276 at para. 44.

[231] *Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B,* [2009] 2 FCR 276 at para. 45.

[232] *Ibid*, at para. 58-59.

[233] *Ibid.*

jurisdiction necessary to judicially review decisions of band councils (including custom councils).[234] The issue hinges on how the judge views the nexus between the nature of the council decision and the source of the authority applicable to that decision. This two-step process is set out by Nadon J. in *Anisman*,

> …a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise. [235]

In addition, in the *Algonquins of Barriere Lake* case Mainville J. found that the common law of aboriginal title and aboriginal and treaty rights were part of the federal common law under the meaning of section 101 of the *Constitution Act, 1867*.[236] And, in *Gamblin* Mandamin J. takes this to necessarily include the aboriginal right of governance.[237] This means that the jurisdiction of the Federal Court over custom band councils (and if Mandamin J. is correct over all possible forms of Aboriginal self-government) hinges on a determination of the nature of the decision in relation to the source of authority. This determination is made on the basis of judicial discretion. The test for determining jurisdiction allows the court to make use of analogies between the decision of the band council and the *Indian Act* (as well as other Federal statutes). This effectively

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[234] One such example can be found in *Wood Mountain First Nation No. 160 Council v. Canada (Attorney General)* (2006), 55 Admin. L.R. (4th) 293 (F.C.) at para. 8 where Strayer J. finds that the *Indian Act* "does not create the authority for custom elections but simply defines them for its own purposes" and so "such elections are not held under the authority of an Act of Parliament." This entails that "the Minister has no authority over such elections. Nor does INAC have any role in determining what is band custom for the purpose of governance of an election."

[235] *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 at paras. 29-30. This seems to be the full extent of the independence of custom bands (i.e. they are released from s. 74 and so they can determine the form of their council and elections, but beyond that they are bound by the assumption of delegation).

[236] *Elders of Mitchikinabikok Inik v Algonquins of Barriere Lake Customary Council*, 2010 FC 160 at para. 102. Mainvile J. based this reasoning on

[237] *Gamblin*, supra note 227, at para 59.

circumscribes the possibility of a band council having any certainty regarding its jurisdiction. It also means that the *Indian Act* can be set as "the source or the origin of the jurisdiction or power" for all band councils (custom or not). The ambit of independent authority they have has been effectively limited to the specific section of the *Indian Act* that they have received Ministerial permission to be exempted from. Beyond that they are bound by the assumption that their powers are delegated by Federal Parliament (either directly or indirectly via the *resemblance* of the decision). It seems as if even the ghost of the *Indian Act* can determine the authority of band councils. As for what this says about the actual basis of the jurisdiction of Aboriginal governments it is difficult to say. The Federal Court is still citing *Gabriel* as authority for its jurisdiction, but its reasoning, as we have already see, is predicated on the *resemblance* to the *Indian Act*. Even if the jurisdiction of the Aboriginal government is held to be based on "pre-existing legal right" the courts can read this right as being part of federal common law. When this is combined with the reasoning in *Pamajawon* the possibility of using the band council as a vehicle for moving out from the administrative despotism of the *Indian Act* seems impossible. According to the jurisprudence the *Indian Act* can determine the jurisdiction of all bands if not by letter, then by resemblance. When a band council passes a law on the basis of their inherent right to self-government it will need to prove that such a right exists via the test in *Van der Peet*. This, as we have seen, effectively closes the door to such actions. It seems that there is little difference between the current understanding of band councils and the "simple municipal institutions" envisioned over 140 years ago in the *Gradual Enfranchisement Act.* Is there a path left open within the current configuration of the

crown machinery for Aboriginal peoples to pursue self-government? In order to answer this question, we will have to turn our attention to the modern treaties.

Modern Treaties and Federalism

In *Beckman v Little Salmon/Carmacks* Binnie J. articulated the purpose of the modern treaties:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long term relationship is the grand purpose of s. 35 of the Constitution Act, 1982. The modern treaties ... attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.[238]

In view of this grand purpose we must ask, how have the courts situated modern treaties within the current picture of federalism? The only response to this question thus far has come from the British Columbia Court of Appeal in the *Chief Mountain* decision.[239] The issue in this case was the constitutionality of the legislative and self-government powers set out in the Nisga'a Final Agreement (hereinafter the "NFA"). The appellants (who are members of the Nisga'a Nation) argued that the NFA and the attending Settlement Legislation effectively created a "third order of government" via s. 35 of the *Constitution Act, 1982* that is inconsistent with the distribution of powers set out in sections 91 and 92 of the *Constitution Act, 1867*.[240] Harris J.A. followed the trial judge in rejecting the appellants reasoning and upholding the constitutionality of the NFA and the Supreme

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[238] *Beckman v Little Salrnon/Carmacks First Nation,* 2010 SCC 53 ac para 10,

(20 10) 3 SCR 103 [hereinafter *Beckman*].

[239] *Sga'nism Sim'augit (Chief Mountain) v Canada (AG),* 2013 BCCA 49, 359 DLR (4th) 231, leave to appeal to SCC refused, 35301 (22 August 2013) [*Chief Mountain*]. I have written on this case previously and my reasoning here is simply an abbreviation of that more extensive examination of the case, see Joshua Nichols, "A Reconciliation Without Recollection? Chief Mountain and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

[240] *Chief Mountain, supra* note 239, at para. 5.

Court of Canada has subsequently denied the application for leave to appeal the judgment.[241] Accordingly, *Chief Mountain* now sits as the current authority on the constitutionality of the NFA and the validity of modern treaties. Given that fact the importance of the case is rather difficult to overstate. Simply put, this case deals with the future of reconciliation. Harris J.A. clearly follows the Supreme Court's view on the "grand purpose" of the modern treaties as it informs us that they are designed to "achieve reconciliation" and "lay the foundation" for the new relationship between Aboriginal peoples and the Crown.[242] As such, we need to pay very close attention to precisely how he determines the fit between the NFA and "the wider constitutional fabric of Canada."[243]

Harris J.A. found that the powers given in the NFA were "valid delegations of power."[244] It is this finding that allows him to maintain that that it is "…unnecessary to decide whether some or all of the self-government powers derive from an inherent Aboriginal right."[245] The reasoning here is puzzling. How can it be "unnecessary" to identify the actual source of these powers? After all, when we are considering the meaning of a legal agreement the relationship between the parties can change the character of that agreement. This possibility is reflected on a very general level in the difference between a unilateral act of delegation and a treaty. A unilateral act of delegation is premised on an asymmetrical relationship: one party gives another something that they do not have (i.e., authority) and this transfer is a conditional one.[246]

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[241] SCC docket 35301; leave denied August 22, 2013.

[242] *Chief Mountain*, *supra* note 239, at para. 49.

[243] *Ibid.*

[244] *Ibid.* at para. 8.

[245] *Ibid.*

[246] *Black's Law Dictionary*, 5th ed, *sub verbo* "delegation".

Whereas a treaty is normally understood as a compact made between two or more independent nations.[247] Of course, this is not the case in the Canadian jurisprudence. As Dickson C.J.C. states in *R. v. Simon*, "an Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[248] But, whichever rules do actually govern the creation of these *sui generis* treaties it is clear that the relationship is not analogous to a unilateral act of delegation.[249] If it were it would entail that either the *sui generis* treaties are surrender documents or that Aboriginal peoples were subject to Crown authority without consent.[250]And if these types of arguments are going to be used to explain the rules that govern the *sui generis* treaties then the Court will need to provide evidence to support them as they cannot simply stand as self-evident facts and unquestioned assumptions. So, how is it that in *Chief Mountain* we encounter something that is called a "treaty" and has the characteristics of a "valid act of delegation"? Is the ultimate achievement of the process of reconciliation a treaty that

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[247] *Black's Law Dictionary*, 5th ed, *sub verbo* "treaty".

[248] *Simon v. The Queen*, [1985] 2 SCR 387 at 404 [hereinafter *Simon*].

[249] See *Syliboy*, *supra* note 203; *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*]; *R. v. Marshall*, [1999] 3 S.C.R. 456 [hereinafter *Marshall*]. At para. 76 in *Badger* Cory J. states that treaties are "analogous to contracts" but this analogy is qualified by the fact that they are (once again) sui generis as they are of a "…very solemn and special, public nature." As such, finding that treaties are "valid delegations of power" could well—without further explanation—represent a distinct shift in the characterization of treaties within the case law. For more on the problems surrounding the *sui generis* status of treaties in Canadian jurisprudence see Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L. J. 143 [hereinafter "Justifying Principles"], Leonard Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 Alta. L. Rev. 149 [hereinafter "Defining Parameters"] and J.Y. Henderson, "Interpreting *Sui generis* Treaties" (1997) 36 Alta. L. Rev. 46 [hereinafter "Interpreting *Sui generis* Treaties"]; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol.* 2 (Ottawa, Minister of Supply and Services, 1996) [hereinafter *RCAP 2*].

[250] In "Justifying Principles" Christie argues that the Court's approach to interpreting treaties only makes sense if the treaties are thought of as surrenders. This shifts the burden directly onto the Court as in order for this interpretation to claim legitimacy the Court would have to determine how and why this is the case: *Ibid.* at 161 and 198-200.

can be—like any act of delegation— "withdrawn or amended" by the Crown?[251]If so it would certainly shift the connotations of Binnie J.'s (somewhat enigmatic) assertion that "the future is more important than the past."[252]

This was not the first time that the validity of the NFA was contested. In *Campbell* Williamson J. faced the same question but adopted an entirely different approach to determining the fit between the modern treaties and "the wider constitutional fabric of Canada."[253] In response to the problem of sovereign incompatibility he finds that "…the *Constitution Act, 1867* did not distribute all legislative powers to the Parliament and the legislatures."[254] These bodies have the powers set out in ss. 91 and 92, but this distribution is of the powers that the colonies had until June 30, 1867.[255] It does not distribute an absolute or final set of powers and so it "…does not end, what remains of the royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982."[256] This makes it clear that the picture of federalism that each case offers is quite distinct: one avoids a positive determination by treating it as if it were a "valid delegation of power" and the other fits the inherent right of self-government into the residual spaces between the division of powers set out in the *Constitution Act, 1867*. But, the key difference between these cases is that each offers us a different method for testing the

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[251] *Chief Mountain, supra* note 239, at para. 48.

[252] *Beckman, supra* note238, at para. 10.

[253] *Chief Mountain, supra* note 239, at para. 48.

[254] *Ibid.* at para. 180.

[255] *Ibid.* at para. 76 and 180.

[256] *Ibid.* at para. 180.

constitutional validity of the NFA. In *Chief Mountain* Harris J. presents us with the "valid delegation" model, which maintains that,

> The source of the treaty rights, whether they are rooted in Aboriginal rights or rights delegated from either federal or provincial governments, is not, therefore, the critical question in assessing the validity of a treaty. What matters is that the rights have been agreed to by parties with the necessary capacity and authority.[257]

Whereas in *Campbell* Williamson J. addresses the issue of source directly and finds the "diminished sovereignty" that is the Aboriginal right of self-government. At first glance the distinction between *Campbell* and *Chief Mountain* seems obvious and yet when we begin to examine the actual legal effects of this difference in terms of the legal status and vulnerability of the NFA we find that they are virtually identical. In each the NFA is found to be constitutionally valid and that the *Sparrow/Badger* test for infringement applies. Yet, there is a difference here to be accounted for and it concerns what these approaches hold for the future of reconciliation and the picture of federalism.

In *Campbell* the recognition of an Aboriginal right to self-government opens the door to a shift within the Canadian jurisprudence. While it is by no means a leap out of the 'magic circle' of Crown sovereignty and the various legal fictions that have served as its foundation thus far (i.e., the doctrine of discovery, *terra nullius*, adverse possession, etc.) it does suggest a line for future development.[258] It could be bolstered by a reconsideration of the "enclaves" approach taken by Laskin C.J.C. in *Cardinal*. This would have the benefit of removing the suggestion that Aboriginal self-government fits

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[257] *Chief Mountain*, *supra* note 239, at para. 51.

[258] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall L.J. 537 at 562, 569 [hereinafter Borrows, "Sovereignty's Alchemy"]. See also Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 Windsor YB Access Just 329.

between the spaces of ss. 91 and 92 and, instead, situate it directly in s. 91(24). Naturally, this would also require removing the "broad view" of s. 91(24) with its unquestioned assumption of unlimited power *over* Aboriginal peoples. It would require strictly confining s. 91(24) to honoring the obligations that the Crown has to Aboriginal peoples and abandoning the legacy of control, assimilation and extinguishment.[259] Given the more recent developments on the nature of the Crown's sovereignty in relation to Aboriginal peoples *Haida Nation* and *Taku River Tlingit* the reasoning in *Campbell* and *Cardinal* could be revisited.[260] The Crown's power of extinguishment post-confederation could be directly called into question and with it the very idea that the *Sparrow/Badger* test can continue to apply to treaties.[261] This could open the way to the possibility of revisiting the top end of the duty to consult in *Delgamuukw* and *Haida Nation* so as to require the consent of the Aboriginal nation in cases of the Crown proposing changes to

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[259] This would offer some certainty as a classical approach to federalism would adopt a territorial limit to the issue of lands, which would serve to ease the fears of the Crown around the bugbear of unlimited rights (e.g. in *Gladstone, supra* note 84 and *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2009 BCSC 1494; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237). It would also limit the vague Indians *qua* Indians reasoning to the first head of s. 91(24).

[260] In *Haida Nation* McLachlin C.J. states that the "…process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which 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": *Haida Nation, supra* note 197, at para. 32. This opens up the possibility that the Crown's assertion of sovereignty is predicated on a *de facto* control of land that has yet to be made *de jure* via the formation of treaties that reconcile "pre-existing Aboriginal sovereignty with assumed Crown sovereignty": *ibid.* at para. 20. This is supported by *Taku River Tlingit* when the Court states that: "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"; *Taku River, supra* note 197, at para. 42. This characterization of Crown sovereignty is also cited with approval in the Court's recent decision in *MMF, supra* note 197, at para. 66. On a liberal reading these statements open up a number of possible arguments around the constitutional status of treaties and the nature of Crown sovereignty. Also see Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L. J. 470 at 515; Felix Hoehn, *Reconciling Sovereignties*: *Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

[261] Rotman, "Defining Parameters" *supra* note 249.

treaties (effectively barring the possibility of unilateral infringement).[262] With this change treaties would have to cease being seen as merely documents with a measure of constitutional protection (that measure being determined by the courts) and start being viewed as constitutional documents.[263] While this is only a possible (even if unlikely) line of jurisprudential development it is one that the reasoning in *Campbell* and *Cardinal* holds open. This offers at least the possibility of a form of federalism based on holding power *with* Aboriginal peoples. It is only by finding such a perspicacious picture of federalism that we can arrive at a reconciliation that would *not* be dependent on the support of legal fictions that can no longer be reasonably defended.

With *Chief Mountain* we find that the question of the source of authority and jurisdiction is set aside as being unrelated to the question of constitutional validity. As such, the NFA is reviewed 'as if' it was a simple municipal charter. The legislation is deemed valid to the extent that it conforms to the ability of Parliament and the legislatures to delegate powers to subordinate bodies. The only trace of difference in the case of the NFA is its constitutional protection under s. 35, which is deemed acceptable due to the fact that the *Sparrow/Badger* test applies and extends unilateral Crown authority over it on the basis of the unquestioned power of s. 91(24). What kind of future does this kind of reasoning open to us? What picture of federalism does this offer us? The answer is far from certain. On the one hand the reasoning fits with an established pattern within the jurisprudence where the courts avoid the issue of an Aboriginal right to self-

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[262] *Haida Nation*, *supra* note 197, at paras. 24, 30, 48; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168.

[263] Christie, "Justifying Principles" *supra* note 249 at 202. See Borrows, "Sovereignty's Alchemy" *supra* note 258; J.Y. Henderson, "Interpreting *Sui generis* Treaties", *supra* note 249; Walters, "Morality", *supra* note 260; Tully, *Strange Multiplicity*, *supra* note 5.

government by speaking instead of rights and title. Within this line of reasoning the Crown is granted unquestionable sovereignty and underlying title while Aboriginal nations are left with a series of residual rights that act as a burden on this claim. *Chief Mountain* fits comfortably within this pattern. The only real distinction is that it explicitly holds back from actually determining the source of authority and jurisdiction (for at least one party to the treaty). We are simply told that it is possible to determine 'validity' of a treaty and without determining the source of authority.[264] Looking into the actual source of authority is unnecessary to the result as it is to the "true nature" of the treaty. If this is the "future of reconciliation" it seems like we have to reverse Binnie J.'s dictum and maintain that *the past is more important than the future*.[265] After all, it is the "broad view" of s. 91(24) that gives the Crown the power to control, assimilate and extinguish.[266] This unquestioned *historical warrant* is offering a picture of federalism where Aboriginal peoples remain stuck within a set of "simple municipal institutions." By following the bluebeard logic of the Court and not inquiring into the past we are left with a future in which the foundations of reconciliation are based on the *mere possibility* of valid delegations.[267] But, how can the Crown *validly* delegate power to Aboriginal peoples when its power *over* them is founded on the *thin air* of its own unilateral assertions? As it stands, it seems that there is no way out of the "magic circle" of Crown sovereignty.[268] This is, to my mind, precisely because the *only way out* is through

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[264] *Chief Mountain*, *supra* note 239, at para. 51.

[265] *Beckman*, *supra* note238, at para. 10.

[266] *Daniels I*, *supra* note 128, at para. 353; *Daniels II*, *supra* note 128, at para. 36.

[267] I defined what I mean by the term *bluebeard logic* in the introduction.

[268] Borrows, "Sovereignty's Alchemy" *supra* note 258.

questioning the validity of the Crown's *historical warrant* (this is what the various practices of resisting and acting otherwise have always contested). Without doing this s. 91(24) will continue to silently determine the course of the future and all paths will remain circular.

Tsilhqot'in Nation and the Meaning of s. 91(24)

We have travelled over a wide field of jurisprudence criss-crossing in every direction in search of some arrangement of perspectives or set of reminders that could begin to loosen the grip of the current picture of federalism that is holding the Supreme Court captive. The sections of this chapter offer a number of "sketches of landscapes" in which "[t]he same or almost the same points were always being approached afresh from different directions."[269] So now that we have come to the end of these "long and involved journeyings", how can we arrange them so as to get a more perspicuous picture of the landscape? I believe that the best vantage point is to return to *Tsilhqot'in Nation* and reconsider the *basis for* and *significance of* the removal of interjurisdictional immunity. In the opening paragraphs the Chief Justice offers a summary of the six conclusions she reaches in the case, but we will focus on one of them:

> Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group *or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity*.[270]

[269] Wittgenstein, *Philosophical Investigations*, *supra* note 7, at preface.

[270] *Tsilhqot'in Nation*, *supra* note 28, at para. 2 [emphasis added].

The reasoning here connects the 'framework' of s. 35 to the place of s. 91(24) in the division of powers. My question is simple and direct: what is the basis of this displacement? The Chief Justice's response to this is split. Part of the response can be found in how the s. 35 framework is set out. The subsection on the justification of infringement is particularly relevant in this regard. The second, and more direct, part of the response is found in the closing subsection of the decision, which is on the division of powers. This subsection is part of the Court's response to the question of whether or not the *Forest Act* (as Provincial legislation) is ousted by the *Constitution*.[271] The first subsection that responds to this question provides a short outline of the s. 35 test for infringement and maintains that, "[t]his framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians."[272] This is, to my mind, the justification for the displacement of the doctrine of interjurisdictional immunity. This justification can be rephrased as follows: the framework of s. 35 permits a "principled reconciliation" that makes the limited protections offered by the "exclusive" nature of federal jurisdiction over Indians and their lands unnecessary. This means that in order to explain the basis for this displacement—and the resulting alteration of the picture of federalism—we will need to turn our attention to this "principled reconciliation."

This articulation of reconciliation poses some serious problems. First, the use of reconciliation here is ***unilateral***. This is because *Aboriginal rights* do not speak for themselves. They are only "recognized and affirmed" *after* they have been subjected to the legal tests that have been designed (again unilaterally) to determine whether or not

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[271] *Forest Act*, R.S.B.C. 1996, c. 157.

[272] *Tsilhqot'in Nation*, *supra* note 28, at para. 125.

they can be said to “exist”. Only those rights that can pass through the alchemical processes of crystallization (simply another term for the magical effects of discovery) and the “integral/distinctive” test can be placed in the curatorial collection of Aboriginal rights that have constitutional protection. Once they have been subjected to this process the Court can begin reconciling them as legally defined rights. This brings us to the second problem, on the other side of this process of justification the Court places “…the interests of all Canadians”. This can only ever be an amalgam of what the Provincial Legislatures and Federal Parliament say this interest is and how the Court interprets it. Furthermore, in *Sparrow* the Court held that:

> The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.[273]

Why is the Supreme Court using a justification that it previously found to be effectively meaningless and unworkable? In this model of reconciliation one party is restrained by a series of deeply restrictive standards (whose only possible justification are the legal fictions of discovery, *terra nullius* and divine right) that determine the possible significance of their perspective. While the other party enjoys the unquestioned presumption of both sovereignty and underlying title as well as the ability to cloak its perspective in the “public interest”. How can this be a part of the framework that is supposed to make reconciliation possible?

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[273] *Sparrow*, *supra* note 27, at 1113.

Part of the response is, I would assume, found in *Gladstone*. In this case Lamer C.J.C. attempts to deal with a right that extends beyond the limits of "moderate livelihood"[274] and food, social and ceremonial purposes (i.e. proposes that can be said to have the "internal limitation" as they are not "unlimited" commercial rights). As he put it:

> The only circumstance contemplated by *Sparrow* was where the aboriginal right was internally limited; the judgment simply does not consider how the priority standard should be applied in circumstances where the right has no such internal limitation.[275]

From this he goes on to argue that

> …under *Sparrow*'s priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.[276]

What kind of standard can the Court apply to determine whether or not one party to a conflict is "taking into account the existence and importance" of the others rights? Is this not simply bypassing the need for the other party to consent? After all, it seems that in a normal situation the determination of the "importance" of a given right is, and must be, mutually agreed upon. If it is not, then it is not a form of reconciliation that relies on the mutual consent of the parties involved. This means that it can only be a unilateral reconciliation of *judicial concepts*. Lamer C.J.C. clearly sets out the framework for dealing with "unlimited" rights:

> Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival

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[274] A standard from the United States Supreme Court in *State of Washington v. Washington State Commercial, Passenger, Fishing Vessel Association***,** 443 U.S. 658 (1979) (known as the *Boldt* decision) introduced into the Canadian case law by Lambert J. in *R. v. Van der Peet* (1993) 80 B.C.L.R. (2d) 75, at 126.

[275] *Gladstone, supra* note 84, at para. 60.

[276] *Ibid,* at para. 63.

> of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally necessary part of that reconciliation.[277]

The key move here—the move that cloaks this version of reconciliation with the appearance of legitimacy—is the claim that "…distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign." In what sense can Aboriginal peoples be said to be "a part of" the broader community? If this is simply a kind of factual statement—along the lines of his statement in *Delgamuukw* that "we are all here to stay"[278]—then the claim concerning Crown sovereignty would not necessarily flow from it. But, even if we attempt to interpret this as a description of a factual situation the prepositions do not make sense (i.e. "exist within, and are a part of"). It is these unilaterally determined prepositions that make it appear as if the Crown's claim to sovereignty is simply a matter of fact. It does so in much the same manner as Justice Binnie's reinterpretation of the Two-Row Wampum in *Mitchell or as* Chief Justice McLachlin's use of the concept of translation in *Marshall; Bernard*.[279] By this reasoning the inherent rights of Aboriginal peoples—those rights that exist by virtue

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[277] *Ibid*, at para. 73.

[278] *Delgamuukw*, *supra* note 262, at para. 186.

[279] *Mitchell*, *supra* note 16, at para. 130; *Marshall; Bernard*, *supra* note 221, at para. 48.

of the fact that when the colonists arrived they were "…organized in societies and occupying the land as their forefathers had done for centuries"[280]—are suddenly and entirely absorbed by the Crown. Here the entire 140-year project of colonization and assimilation is realized and legitimated by judicial fiat. Lamer C.J.C. clearly recognizes this and hedges the position slightly:

> . . . the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.[281]

The problem here, once again, is that the Court is *reconciling* the parties by and through a process that it determines in order to arrive at a resolution that it assigns. The only element of consent it can attempt to lay claim to is the fact that the Aboriginal claimant brought the dispute before the court. But, submitting a claim before an adjudicative body cannot be transmuted—no matter what legal alchemy is employed—into a consent to the sovereignty of the state that grants that body jurisdiction. This reasoning would fundamentally confuse the concept of dispute with that of surrender. It is the Court—as the "guardian of the constitution"[282]—that is unilaterally determining whether the infringement that the Crown is proposing either *recognizes* "…the prior occupation of North America by aboriginal peoples" or *reconciles* that occupation with the assertion of Crown sovereignty.[283] This necessarily implies that this process can take place entirely

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[280] *Calder*, *supra* note 40, at 328.

[281] *Gladstone, supra* note 84, at para. 60.; cited in *Tsilhqot'in Nation, supra* note 28, at para. 81.

[282] *Hunter v. Southam Inc.*, [1984] 2 SCR 145 at paras. 16, 44.

[283] *Gladstone, supra* note 84, at para. 60.; cited in *Tsilhqot'in Nation, supra* note 28, at para. 81.

within the bounds of the constitution. Only those rights that the Court can *hear* and *translate* into the common law will receive protection because only those rights can be *recognized and affirmed* as "existing". But, if this is the case, then the form of reconciliation that the Court is referring to can only be the *internal process* of reconciling the *federal power* with *federal duty*.[284] This was, after all, how the Court first characterized reconciliation in *Sparrow*. It is based on the "broad view" of s. 91(24) and the unquestioned assumption of the Crown's power *over* Aboriginal peoples. It is—despite the Court's explicit claims to the contrary in *Tsilhqot'in Nation*[285]*—necessarily* reliant on the doctrine of discovery, *terra nullius* and divine right. This explains how the Court can maintain that "…there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[286] The only possible basis for the nexus between Crown sovereignty and underlying title is *legal fiction*—this is "…what is left when Aboriginal title is subtracted from it."[287] And it is this that explains how the Court can unilaterally determine that Provincial laws apply to land held under Aboriginal title.[288]

The removal of the doctrine of interjurisdictional immunity fundamentally alters the picture of federalism in Canada. It does so without addressing the history of Aboriginal peoples or listening to their perspectives. It is a unilateral assertion that has

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[284] This was how the Court first characterized reconciliation in *Sparrow*, *supra* note 27, at 1109: "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…"

[285] *Tsilhqot'in Nation*, *supra* note 28, at para. 69.

[286] *Sparrow*, *supra* note 27, at 1103.

[287] *Tsilhqot'in Nation*, *supra* note 28, at para. 70; Borrows, *Durability of Terra Nullius*, *supra* note 20, at 742.

[288] *Ibid*, at para. 101.

the same degree of legitimacy that the introduction of s. 88 of the *Indian Act* did when it was introduced (without consultation or consent) in 1951. The effect of this change is substantial and must not be understood as a *diminution* of the Crown's powers under s. 91(24). It is certainly a reduction of the *limited protections* that "exclusive" federal jurisdiction under s. 91(24) offered to Aboriginal peoples. But, it is also a fundamental expansion of the "broad view" of s. 91(24). The Court has stated that that it will treat Aboriginal title as a double aspect matter.[289] Now that the limited shielding of Indians *qua* Indians has been removed the ground has been cleared for the provinces to draft legislation of general application for Aboriginal title lands (the modern approach at least restricts the Legislatures from using the term "Indians" in this legislation). A picture of federalism that has been in place—even if only in limited forms—for two-hundred-fifty years has been unilaterally altered.[290] So how does the Court explain this change? The Chief Justice briefly summarizes the s. 35 framework,

> As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. 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.[291]

The logic here is, as we have already detailed, puzzling. What constitutes a "meaningful diminution" of an Aboriginal or treaty right? It seems that this is what the Court believes it is determining by applying this framework. It allows them to distinguish between what

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[289] *Tsilhqot'in Nation, supra* note 28, at para. 129.

[290] Borrows, *Durability of Terra Nullius, supra* note 20, at 735-37.

[291] *Ibid*, at para. 139.

is a "meaningful diminution" and what is simply consistent with the standard of recognition that it feels to be appropriate. How can the Court hope to possibly make this determination when it is using the "public interest" as a unit of measure? What kind of reconciliation is this? It seems to be one in which a solitary accountant balances the books. The Aboriginal perspective is reduced to a curated collection of crystalline legal objects that can be weighed and measured. Wittgenstein aptly points out the kind of disguised nonsense at work here, "I want to say: We use judgments as principles of judgment."[292] But, this constellation of unilateral judgments is passed off as a 'framework' and this leads the Court to state:

> What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none…The doctrine of interjurisdictional immunity 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.[293]

It is difficult to fully appreciate the significance of this statement. It is a sea change in the jurisprudence. John Borrows clearly articulates the stakes of this change,

> The court's conclusion cuts against a two-hundred-fifty year constitutional principle first outlined in the *Royal Proclamation of 1763*, and accepted by many First Nations in central Canada in the 1764 Treaty of Niagara. These principles prevented local colonial governments from molesting or disturbing First Nations in their use and occupation of land. Governments who are the closest to First Nations have the greatest incentive to benefit from Indigenous lands. For example, British Columbia stands to gain the most from infringing Aboriginal title; any diminishment of Aboriginal title accrues to their benefit. Therefore, the law in North America developed to ensure that local governments had substantial obstacles placed in their path in dealing with First Nations. The *Royal Proclamation* and 250 years of Canadian law, as affirmed in section 91(24) of the *Constitution Act,*

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[292] Wittgenstein, *On Certainty*, *supra* note 224, at §124.

[293] *Tsilhqot'in Nation*, *supra* note 28, at para. 140-41.

> *1867*, interposed a more distant imperial or federal power between First Nations and colonial/state/local/provincial governments. The exclusion of the provinces for dealing with First Nations was one of the few checks and balances Indigenous peoples enjoyed under Canadian law throughout history. In fact, our country was partially formed on this basis. While the 13 former American Colonies rebelled against this principle in the American War of Independence, governments north of the border have largely upheld the Proclamation and Treaty of Niagara's principles – that is until June 26, 2014 when the *Tsilhqot'in* decision was released. With the *Tislhqot'in* decision the Supreme Court of Canada has overturned First Nations *Marta Carta*.[294]

By relying on the framework of s. 35 and ignoring the history of s. 91(24) the Court follows the unquestioned assumption of Crown sovereignty as articulated by Lord Watson in *St. Catherine's Milling* and repeated by Chief Justice Dickson in *Sparrow*. It highlights the fact that the s. 35 framework and the "broad view" s. 91(24) share a common foundation. Both rely on *terra nullius,* discovery and divine right to diminish Aboriginal peoples to such a degree that the Crown was able to acquire sovereignty and radical or underlying title to their lands by assertion alone. As Borrows argues,

> The assertion of radical title retroactively affirms the Crown's appropriation of Indigenous legal interests without their knowledge or consent. In most other contexts this would be called stealing.[295]

The Court concludes 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".[296] This clearly shows the picture of federalism that the Court has adopted. It forecloses on the very idea that

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[294] Borrows, *Durability of Terra Nullius*, *supra* note 20, at 735-37.

[295] Ibid, at 724.

[296] *Tsilhqot'in Nation*, *supra* note 28, at para. 147; Borrows, *Durability of Terra Nullius*, *supra* note 20, at 738-39.

Aboriginal peoples—who have always had their own legal and political systems—form a part of the federal structure of Canada. Borrows drives this point home,

> A legal vacuum would not be created if the Court recognized the pre-existing and continuing nature of Indigenous jurisdiction along with Aboriginal title. Indigenous law exists in Canada. The recognition of Aboriginal title is contingent on the recognition of Aboriginal social organization and its continuity down to the present day. Thus, as noted, the very existence of Tsilhqot'in title recognizes that Aboriginal peoples' effectively occupied land at the time sovereignty was asserted; it affirms that they have continuously retained such control, exclusive of other Aboriginal groups, down to the present day. The Court's own reasoning presupposes a legal presence, rather than a vacuum, when it recognizes Aboriginal title.[297]

Simply put, the legal vacuum that it fears is its own creation. Overall by declaring that the s. 91(24) allows for Provincial laws of general application the Court has fully adopted the modern approach to federalism. This, as we have already seen, relies on the idea that s. 91(24) is *no different* than any other head of power in the *Constitution Act, 1867*. It is an approach that ignores the special constitutional status of Aboriginal peoples as recognized in the treaty making process, the *Royal Proclamation of 1763* and the fact that Aboriginal peoples did not consent to or participate in the enactment of the *Constitution Act, 1867*. It assumes that the exclusive jurisdiction that s. 91(24) grants to the federal government is unlimited power *over* Indians and their lands (what I have been referring to as the "broad view") and unilaterally broadens this power in favor of the Crown by interpreting it as a double aspect matter. This subjects Aboriginal peoples to a confused system of concurrent provincial and federal jurisdiction and continues the implicit use of the doctrine of discovery in Canadian law.

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[297] Borrows, *Durability of Terra Nullius*, *supra* note 20, at 738-39.

This decision did not have to take this form. Aboriginal title is not unlimited in the same way that Lamer C.J.C. was so concerned about in *Gladstone*. It is by definition geographically limited. The Court could have used this opportunity to revive the "enclaves" theory of s. 91(24) and adopt the "autonomist" approach to the division of powers that Bruce Ryder mapped out in 1991.[298] This approach would offer the benefit of protecting Aboriginal title lands from provincial incursion. It would open the space required for the Tsilhqot'in Nation to govern their lands by their laws in a nation-to-nation relationship. This would clarify the purpose of and limits to s. 91(24) by reading it as a "treaty power" and finally ending the colonial "broad view" with its legacy of control, assimilation and extinguishment.[299] This would open up a space where Aboriginal peoples could negotiate with the Crown on more even constitutional ground (one that ***does not*** begin with the presumption of Crown power *over* Aboriginal peoples)—a space that could be used to move towards the equal federal relationship that the Royal Commission of 1664 recommended (viz. Aboriginal nations would be equal 'partners in confederation').[300] This more diverse picture of federalism would have constituted a step towards actually honoring the obligations that the Dominion inherited from the Imperial Parliament. It would also offer a clear and reasonable solution to the problem of "unlimited rights" (which, remains a continuous jurisdictional bugbear for the Provinces) as territorial boundaries would provide areas in which First Nations have the authority to effectively co-manage the land base.[301] This would serve to put the bugbear

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[298] Ryder, *The Demise and Rise*, *supra* note 21.

[299] Chartrand, *Daniels Case*, *supra* note 183, at 185.

[300] Cited in Tully, *Strange Multiplicity*, *supra* note 5, at 137.

[301] This is the main problem in both *Gladstone* and the more recent—and far reaching as it is not limited to a single species—*Ahousaht* (see note 258) decision: the federal and provincial regulatory agencies refuse to co-

of "unlimited" rights (a curious fear as it is precisely the nature of the right the Crown claims over Aboriginal peoples and their lands) to bed and with it this use of the "public interest" standard of justification in *Gladstone* and *Tsilhqot'in Nation*. This approach offers an opportunity to move towards a model of federalism that would meaningfully share power *with* Aboriginal peoples.

Instead the Court has opted to continue the "extravagant and absurd idea" that the Crown acquired sovereignty and underlying title by unilaterally proclaiming it.[302] This can be see, as Borrows maintains, in the Court's reasoning on the test for determining the existence of Aboriginal title, the test for infringement, the rejection of interjurisdictional immunity and its remarks on legal vacuums.[303] It is, to my mind, also the basis of its framework of reconciliation, which it has used to continue to expand a picture of federalism that constitutively excludes Aboriginal peoples. In order to see the actual form of this framework it must be considered from the Aboriginal perspective. Here the undefined and unchecked powers of s. 91(24) continue the work of legislatively defining Indians so that it can legally evacuate their lands and transform the Crown's *fictional* claims to underlying title to full and unburdened title. Bill C-31 continues to reduce the number of Indians as if status "…were simply a statutory definition pertaining to

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manage the resource and claim that they cannot fit an "unlimited right" into their management model. They continue to argue that an "unlimited right" for Aboriginal fisheries is both unfair and unworkable (the logic that justifies the "public interest" justification for infringement). The solution is to grant Aboriginal fisheries priority within their territory and work with them to co-manage the resource within those areas. But, the resistance to this approach is, I would imagine, that it would constitute Crown recognition of title and compromise its general approach of treating Aboriginal rights as extinguished until litigated.

[302] Chief Justice John Marshall stated that the doctrine of discovery was based on 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." *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832) at 517.

[303] Borrows, *Durability of Terra Nullius*, *supra* note 20.

eligibility for some program or benefit."[304] While, at the same time, the *Indian Act* defines and determines the governing powers of band councils (either directly or by judicially interpreted *resemblance*). The Courts work to close off any action that could depart from this "administrative despotism" by using its alchemy to determine the rights that it can *hear* and what it cannot under the guise of a factual inquiry. It has ushered Aboriginal peoples towards a process of negotiation with the Crown that has resulted in little but crippling debt and modern treaties whose place within the federal order is *seemingly* the same as the simple "simple municipal institutions" that were set in place over 140 years ago. The process of reconciling s. 91(24) with s. 35, which began in *Sparrow*, has now assumed a discernible systemic shape. The power to unilaterally infringe on Aboriginal title, rights, and treaties all stems from the "broad view" of s. 91(24). It is a power without positive definition or justifiable basis. The era of reconciliation has changed the procedures, but it has not even begun to address the issue of the *historical warrant* of the Crown's mechanism of government. This means that in every case in which the Court uses s. 91(24) it is repeating the content of the doctrine of discovery, *terra nullius*, and divine right (which, despite their differences, all maintain the ability of one party to determine the rights of the other without seeking their consent). It is subjecting Aboriginal peoples to a picture of federalism they never consented to. And it is doing it under the aegis of the term "reconciliation". In the words of the Chief Justice in *Hiada Nation*: "This is not reconciliation. Nor is it honourable."[305] This is *indirect rule*.

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[304] *McIvor BCSC, supra* note 166, at para 193

[305] *Haida Nation, supra* note 197, at para. 33.

Before we move on we will pause here and review the ground we have covered in this chapter. I began by investigating the way in which the courts have interpreted s. 91(24). This line took us from *St. Catherine's Milling* to a series of cases dealing with the doctrine of interjurisdictional immunity in relation to s. 91(24) and s. 88 of the *Indian Act*. It served to show us that the current interpretation of s. 91(24) has remained constant since 1888 and it unilaterally subjects Indians and their lands to an undetermined and unquestioned administrative despotism (viz. this interpretation strictly limits them to being the object of a head of power within picture of federalism and so the only possible form of self-government is via devolved municipal powers). It also showed that despite this there have been a number of dissents that held open the possibility of changing this interpretative framework and thereby altering the current model of federalism. From this I moved onto a consideration of how the definitions of "Indians" and bands fit within the picture of federalism that the Court has formulated in and through its interpretation of s. 91(24). This involved two subsections; first, I reviewed the definition of Indians from the 19th century legislation through to the judicial interpretation of it in cases from the *Eskimo Reference* in 1939 to more recent cases of *Lovelace*, *McIvor* and *Daniels*. In the second subsection, I provided a similar review of the definition of bands from the earliest legislation through to the modern case law. This served to show how the current set of self-government forms remain locked within the municipal confines put in place by the current interpretation of s. 91(24). I then closed the chapter by reconsidering the implications of the Court's rejection of the doctrine of interjurisdictional immunity in *Tsilhqot'in Nation* for both federalism and the future of reconciliation. The purpose of this was to show that the Court's s. 35 framework and the current interpretation of s.

91(24) share a common foundation. Both rely on *terra nullius,* discovery and divine right to diminish Aboriginal peoples to such a degree that the Crown was able to acquire sovereignty and radical or underlying title to their lands by assertion alone. With this in mind we can now move forward to the final chapter.

Chapter 5

An Era of Reconciliation, An Era of Indirect Rule:
From the White Paper to the Full Box of Rights.

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.
Charles Dickens, *A Tale of Two Cities*

What *we* do is to bring back words from their metaphysical to their everyday use.
Ludwig Wittgenstein, *Philosophical Investigations* §116

I ended the last chapter by suggesting that the project of reconciliation has been misnamed. One could dismiss this concern by arguing that the name is of less consequence than the practical substance of the project itself. My response to this line of reasoning is, following Wittgenstein, "words are also deeds."[1] This is especially important in the context of a conflict. Quentin Skinner's work is especially helpful on precisely this point,

> …people generally possess strong motives for seeking to legitimize any conduct liable to appear questionable. One implication is that they will generally find it necessary to claim that their actions were motivated by some accepted principle. A further implication is that, even if they were not motivated by any such principle, they will find themselves committed to behaving in such a way that their actions *remain compatible* with the claim that their professed principles genuinely motivated them. To recognize these implications is to accept that the courses of action open to such agents will in part be determined by the range of existing principles they can hope to profess with some degree of plausibility.[2]

Reconciliation is a term that is used to legitimate conduct and so, as Skinner rightly argues, when it is employed its meaning and use serves to restrict the range of available actions.[3] When it is applied to a conflict, in its everyday use, it suggests that two or more parties are engaged in a process of settling a dispute by way of mutual understanding and agreement. But this is, as I have previously noted, not its only sense. It is also a word that belongs to the more solitary world of bookkeepers and accountants. They also reconcile,

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[1] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Oxford: Blackwell, 2001) at §546.

[2] Quintin Skinner, *Visions of Politics, Volume I: Regarding Method* (Cambridge: Cambridge University Press, 2002) at 155.

[3] By 'restrict' I do not mean to suggest that legitimating words like "reconciliation" only serve a limiting function; they do not and cannot supply bright lines, because their usage is subject to contestation and change. Reconciliation opens up a number of possible avenues of action that are bounded by blurred edges. The crown machine has consistently used the unilateral sense of reconciliation (which I have termed *reconciliation-to*); this does not exhaust the potential of this term. There is still the path of mutual consent; there is still the possibility of *reconciliation-with* the older 250-year-old consent based constitutional relationship with Aboriginal peoples.

but they do so in order to make one account consistent with another. Reconciliation is how they balance their books. Its entrance into Canadian jurisprudence leaned in this latter direction.

In *Sparrow*, Dickson C.J.C and La Forest J. use the word "reconciliation" to balance the terms of the *Constitution Act, 1982* with that of 1867. As they put it, "federal power must be reconciled with federal duty."[4] But, what is the character of this federal power? We are told that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[5] Then they cite *Johnson v. M'Intosh*, the *Royal Proclamation* and *Calder*.[6] It is hard to see how these can serve as authority for this lack of doubt. After all, *Johnson v. M'Intosh* is the first case in the Marshall Trilogy and lays out a version of the doctrine of discovery that the subsequent cases go on to reject.[7] In addition, the specific pages cited from *Calder* include Hall J.'s move from *Johnson v. M'Intosh* to *Worcester v. Georgia* and Judson J.'s statement that the origin of title does not come by way of European recognition, but the fact "…that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[8] The *Royal Proclamation* itself can be read as the Crown formally recognizing and protecting Indian Nations (as

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[4] *R. v. Sparrow*, [1990] 1 S.C.R. 1075. at 1109 emphasis added [hereinafter *Sparrow*].

[5] *Ibid*, at 1103.

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

[7] The other two being *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)

[8] *Calder, supra* note 5, at 328, 383 and 402. This finding is held in tension with the fact that none of the justices doubted that the Crown had the power to extinguish Aboriginal rights. As Judson J. put it at 328, "[t]here can be no question that this right was "dependent on the goodwill of the Sovereign"". The question of how exactly this hierarchy of sovereignties can be accounted for in law is not answered; we are simply confronted by the plain statement that "there can be no question." This prohibition in further inquiry is yet another manifestation of what I have termed bluebeard logic.

the Haudenosaunee have argued for centuries) or a document that asserts absolute sovereignty over them (as Lord Watson held in *St. Catherine's Milling*).[9] Simply put, the division between the inherent rights of Aboriginal peoples and the nature of Crown sovereignty is not settled in these cases; it is merely repeated. But none of this is reflected in how Dickson C.J.C and La Forest J. interpret s. 91(24). It is simply the provision that grants the federal government the power to legislate with respect to Indians. We should recall Peter Hogg's understated analysis of this power,

> The federal Parliament has taken the broad view that it may legislate for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians.[10]

This "broad view" has, as I demonstrated in the previous chapter, never been qualified or restricted by the court. *Sparrow* does not alter that pattern; it extends it. When Dickson C.J.C and La Forest J. turn to the text of s. 35 they state that there is "no explicit language" in s. 35 that would authorize the courts to "assess the legitimacy of any government legislation that restricts aboriginal rights." They find that the words "recognition and affirmation" incorporate the fiduciary relationship and so "import some restraint on the exercise of sovereign power."[11] Let us hold on to this for a moment and reflect on its content. There is no "explicit language" in s. 35 that enables the courts to question the legitimacy of the federal power contained in s. 91(24); what can this possibly mean? I do not think that there can be a definitive answer to this question because the difficulty encountered by the court here is *self-imposed*. What kind of "explicit language" would meet this threshold? It seems that the court is perfectly

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[9] I offer an extended account of the origins of these contrasting interpretations in Chapter 3.

[10] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 618.

[11] *Sparrow*, *supra* note 3, at 1109.

comfortable with assessing the legitimacy of the claims of Aboriginal peoples. The basis of this unbalanced approach remains entangled in the legal fictions that our courts so conscientiously avoid (viz. discovery, divine right, *terra nullius*, etc.). If the legitimacy of the "broad view" of s. 91(24) cannot be called into question, then the courts cannot reconcile it with s. 35 by virtue of the fact that you cannot reconcile an *undetermined value*. Any process that is predicated on this version of reconciling federal power with duty will be utterly hopeless.

Simply put, there is a conflict between the very concept of reconciliation and the "broad view" of s. 91(24). In *Van der Peet*, Lamer C.J.C. notes the effect that the word "reconciliation" has on the judicial process that the Court develops to adjudicate disputes between the Crown and Aboriginal peoples:

> It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[12]

Here we find that "reconciliation" cannot determine the specific content of Aboriginal rights (this is the role of the courts), but it does play a role in determining the form of the judicial process. This provides us with what could be termed the minimal requirement of the concept of reconciliation (viz. equal weight on Crown and Aboriginal perspectives). It is presented to us via the long standing juridical metaphor of the scales of justice. But it fails to reflect on the vulnerability of this metaphor. Weights and measures are not

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[12] *Van der Peet, supra* note 217, at para. 50.

objectively determined; they are standards. In order for the scales to be seen as a metaphor for justice or "true reconciliation" the parties to the dispute must agree on the standards used to determine weight. But it is precisely here that the conflict between the concept of reconciliation and the process adopted by the Court is clearest. The Court simply assumes the validity of the Crown's claim. This has led to a procedure in which the only check on the Crown's ability to unilaterally infringe on Aboriginal rights is a proportionality test, which occurs after the infringement. This minimal protection can only be accessed by groups that have the time, energy and resources to engage in lengthy and complicated litigation. And even if a claim does finally make it through it is going to put on the scales against the undetermined value, or to borrow Selden's phrasing, the "uncertain measure" of the judicial interpretation of Crown sovereignty.[13]

As the Court so aptly put it in, "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."[14] This same absence of doubt is repeated in *Tsilhqot'in Nation* when the Court states that "at the time of the assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province."[15] This same absence of doubt serves as the basis for the "broad view" of s. 91(24). So if we return to the metaphor of the scales, we see that the process of determining weight is simply a show. Once the court has come to a determination of the weight, then it is placed on the scales with the undetermined power of s. 91(24). The Aboriginal claim is subjected to the strict

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[13] John Selden, *Table Talk*, quoted in M. B. Evans and R. I. Jack (eds), *Sources of English Legal and Constitutional History*, (Sydney: Butterworths, 1984) at 223–224.

[14] *Sparrow*, *supra* note 4, at 1109.

[15] *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44 at para. 69.

judicial scrutiny via a set of unilaterally determined standards. This effectively sets the limits of what is possible in the game.

This exercise is, to my mind, simply another version of the "public interest" justification that Dickson C.J.C and La Forest J. reject because they find it to be "…so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[16] The common ground between the "broad view" of s. 91(24) and the "public interest" justification is vagueness. Any game based on this version of reconciling will result in little more than a kind of sleight of hand and showmanship that accompanies magic shows. In *Tsilhqot'in Nation* the Court does seem to signal a concern with the unbalanced nature of this game as they put it,

> …to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest.[17]

But, without some definite limitations on the scope of "public interest" (and with it Crown power under s. 91(24)) this does not overcome the problem; it simply repeats it. The sword of s. 91(24) can (we are told) be used liberally by either Parliament or the Legislatures (such is the substance of the "broad view" and the modern theory of federalism). Meanwhile s. 35 does not provide a usable shield for Aboriginal peoples; it leaves them with a limited right for after the fact compensation. In other words, what we are left with is a procedural game that is designed to *finesse* rather than *face* the actual challenge of reconciliation.

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[16] *Sparrow, supra* note 3, at 1113.

[17] *Tsilhqot'in Nation, supra* note 13, at paras. 125 (emphasis added).

This is, in my view, why reconciliation so quickly moved from being the rather solitary process of constitutional jurisprudence we find in *Sparrow* to being referred to by the Supreme Court as the "governing ethos" and "grand purpose" of s. 35.[18] This inflated language (generally more common in the rhetoric of political speeches than the more controlled and dispassionate climes of common law decisions) with all of its grand proclamations is, I argue, little more than the product of the Court's self-imposed blindness. By assuming the legitimacy of Crown sovereignty and its claim to underlying title, it has placed itself in a fixed position that can only attempt to manufacture the appearance of change by way of what Dickens' aptly termed the "superlative degree of comparison", which is to say, it finesses comparison altogether. There is no recollection in this reconciliation, no memory, no context. By this I do not mean that *nothing* is remembered and the court meets each case as if it was the first of its kind. Rather, what is repeated (*ad infinitum, ad nauseam*) is a claim that is never put into question: the Crown has sovereignty, legislative power and underlying title. There is no historical moment that can be referred to that could possibly explain how the Crown acquired these powers; therefore, there can be no recollection, no memory and no context for them. No matter what arcane judicial semantics are marshalled to its cause, the basis of these powers is simply a form of proof by assertion. This is a reconciliation without recollection precisely because the very terms that are being used to determine the game are, like the view from nowhere, metahistorical. What is left is a process by which the Crown's unquestioned *power-over* Indians and their lands allows them to unilaterally reconcile the duties that

[18] *Ibid,* at paras. 17; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at para. 10.

are "recognized and affirmed" in s.35 to this power. If this is what we are calling reconciliation, then it is a game whose outcome is fixed in advance. Aboriginal peoples live under the vast administrative despotism of the *Indian Act*, they are counted by a Federal register that determines who is and is not an "Indian", their governmental systems are cast (by analogy or the dubious fiction of the 'as if' we find used in *Chief Mountain*) as municipal creatures of statute with devolved powers, poverty, illness, and over-incarceration are endemic, but the Court keeps weaving on its empty loom. "Come with us into the future" it urges, "the future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards."[19] It continues forward as if it could overcome an antinomy (viz. the inherent rights of Aboriginal peoples and Crown sovereignty) by simply getting into its canoe and paddling off in hunt of snarks.[20] In other words, it seems to me that reconciliation has *gone on holiday*.[21]

Given the happy connotations of the term reconciliation, it is unsurprising that it has come to be the "grand purpose" of s. 35. It is, to borrow Wittgenstein's phrasing, as if the word has led us on a road that we were inclined to go on, but it has led us away from

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[19] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at para. 10 [hereinafter *Little Salmon/Carmacks*]

[20] In its commitment to the "broad view" of s. 91(24) the Court has locked itself into a rather Kantian trap. The Crown is positioned as a "necessary being" and so they are confronted with the fourth antinomy (viz. in order to posit the existence of a "necessary being" reason must contradict itself and place it outside the sensible realm. See Immanuel Kant, *The Cambridge Edition of the Works of Immanuel Kant: The Critique of Pure Reason*, Translated and Edited Paul Guyer and Allen Wood, (Cambridge: Cambridge University Press, 1998) at 548-549). It is left split between the metaphysical dream of necessity and the nightmare of unlimited contingency. I would say that on a rough and ready analysis the court has adopted the Kantian solution of continually moving forward 'as if' the necessary being was there buried under appearances. If this fits, then it can hardly be surprising that they would also adopt his bluebeard logic to the question of the sovereign's historical warrant. See Immanuel Kant, *The Metaphysics of Morals*. Edited and Translated by Mary Gregor. (New York: Cambridge University Press, 2006) at 111-2, 136.

[21] To paraphrase Wittgenstein, we pack our bags for such a holiday as soon as the Court tries to "…bring out the relation between *the* name and the thing by staring at an object in front of [it] and repeating a name or even the word "this" innumerable times." See Wittgenstein, *Philosophical Investigations, supra* note 1, at §38.

where we were, and didn't show us clearly the place we had been all along.[22] By allowing it to be used, we play a role in legitimating the conduct of the courts and the settler state. My suggestion is that a term that fits the everyday reality of Aboriginal peoples in Canada since the failure of the *White Paper* is indirect rule. But, what does this phrase mean? I do not intend it as merely an accusation or empty indictment. Rather, I am arguing that the term reconciliation *does not fit* as a description of the framework that the Court is using to mediate the relationship between the crown machine and Aboriginal peoples. It only serves to obscure the practices that give it meaning. I am arguing that this framework can be better understood as a part of a system of indirect rule. If we follow Skinner's argument that "any principle that helps to legitimize a course of action will…be among the enabling conditions of its occurrence", then by redescribing the framework we gain a more perspicacious perspective and this can serve to change the available range of actions by showing us the other possibilities.[23] These possibilities are not new; rather, they have been there all along, in each act of resistance. They simply need to be remembered, rearranged so that we can begin to see 'reconciliation' again, from a different angle, under a different light, so that we can bring it back to its everyday use.

The explosive potential of this redescription is that it can change the way that we see a given set of actions. Allow me to use an object of comparison to illustrate this point. In the *Theses on the Philosophy of History*, Walter Benjamin presents us with the story of a chess playing automaton. As he puts it,

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[22] I am paraphrasing Wittgenstein's phrase from the *Blue Book*. See Ludwig Wittgenstein, *The Blue and Brown Books*, 2nd edition (New York: Harper & Row, 1964) at 41.

[23] Skinner, *Regarding Method*, *supra* note 2, at 156.

> The story is told of an automaton constructed in such a way that it could play a winning game of chess, answering each move of an opponent with a countermove. A puppet in Turkish attire and with a hookah in its mouth sat before a chessboard placed on a large table. A system of mirrors created the illusion that this table was transparent from all sides. Actually, a little hunchback who was an expert chess player sat inside and guided the puppet's hands by means of strings…[24]

The basic structure of this stage exposes the potential of aspect perception: if it is seen as it is intended to be, then it appears magical, but if the stage is seen from a different angle, then all that remains is a clever piece of deception. If we use this to think through the problem of reconciliation, we can see it like this: there are two chess players on a stage. The game seems fair as the rules of chess are known to both and the moves occur in the open for all to see. But, one player seems to constantly win. Hidden under the table is another player who moves the pieces to ensure the result. This combination of a visible and hidden player is the system of indirect rule; it employs misdirection and sleight of hand to conceal the decisive moves. The hidden player is, for us, the "broad view" of s. 91(24) and its associated legal fictions (viz. *terra nullius*, discovery, divine right, etc.). When this is seen the seemingly equal playing field is exposed as being rigged. This brings the possibility of changing the way in which the game is played in the future. If it is to continue under the name 'reconciliation,' then the hidden player must be removed. If not then, at the very least, the nature of the game that is being played will be available for all to see.

Returning to the task at hand, in order to show how indirect rule can change our perspective and expose the still unexplored possibilities of reconciliation I will need to do

[24] Walter Benjamin, *Illuminations: Essays and Reflections*, Edited by Hannah Arendt (New York: Schoken, 1968) at 253.

more than simply substitute the descriptive term. If it is, as I believe it to be, a description of a certain displacement or configuration of what I have termed the 'crown machinery', then we will have to offer a survey of it from another, broader angle. This means that we will need to move from the fine grain details and crisscrossing conversations of the common law that formed the focus of the previous chapter—which will continue to serve as a benchmark or point of reference within our investigation—and try to find our bearings from a different vantage point. The line of inquiry that leads us to this vantage point begins when we ask the following question: how does s. 91(24), the *Indian Act* and the practices of governance that they set in place fit into the current legal-political architecture of Canada and the ongoing struggles that continue to shape it?

This is, naturally, far too broad. The territory that it opens up is vast and undetermined. It is as if it is being constructed *ad hoc* as it is being mapped or the territory is moving and rearranging itself behind our backs. As soon as we feel that we know our way about we turn around and realize that we have lost sight of the landmarks we had relied on. This is not surprising; contested territories are often covered in fog. So we will need to make due with sketches of landscape. This is not to say that these sketches are *merely sketches* and so we should feel free to ignore them or that they are parts that could, at some point, be assembled into *the* map. The use of these provisional maps is that they can serve to draw our attention to the distinction between *the map and the territory*. This is the kind of reminder that is needed when we become so convinced of the truth of our map that we insist on following it even when it bears no resemblance to the territory. This is, to my mind, where we are with 'reconciliation'. The framework that is being used as the map of reconciliation starts from the premise that the Crown has

sovereignty, legislative power, and underlying title and so it cannot distinguish between the unilateral sense of *reconciliation-to* and the mutual requirements of *reconciliation-with-recollection*.[25] This framework cannot function without the hidden player; it needs the "broad view" of s. 91(24) to ground the unilateral right of infringement. This is the alchemy that sets the framework in motion. With it in place the rules of the game appear fixed; reconciliation becomes little more than a procedural check on unquestioned Crown sovereignty. But, the game is not entirely bounded by rules. By redescribing this framework as part of a system of indirect rule I am not simply accusing or condemning; rather, my intent is to shift the perspective. By moving the background assumptions into view it is possible to see both the visible and hidden player; this changes the game. My aim is to rearrange the perspective so that we can see that the rules are open to contestation. There are and have always been different moves in the game of reconciliation; it is true that we are all here to stay, but this does not mean that we should turn our back on the past. Nor does it mean that we can settle grievances by placing them in the past and looking only towards the future. The Court's forward facing canoe may bear the name 'reconciliation' but it can only carry those who are hunting snarks.[26] There

[25] By "framework" I am referring to how the Court in *Tsilhqot'in Nation* makes use of the term. For example, consider para. 118: "Section 35 of the Constitution Act, 1982 represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public." We are told later on that, "[t]his framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians." See *Tsilhqot'in Nation, supra* note 13, at paras. 118, 125 (emphasis added).

[26] This canoe is just another version of the ship of state and as Cavell maintains this myth is "…not merely false, but mythically false. Not just untrue but destructive of truth." See Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality and Tragedy.* (New York: Oxford University Press, 1999) at 365.

is no reconciliation without recollection; this is, to my mind, the meaning of *The spirit of Haida Gwaii.* As Tully rightly states,

> The answer given by the black canoe is that, although the passengers vie and negotiate for recognition and power, they always do so in accord with the three conventions [viz. mutual recognition, consent and continuity].…we must listen to the description of each member of the crew, and indeed enter into conversation ourselves, in order to find the redescriptions acceptable to all which mediate the differences we wish each other to recognize.[27]

It is time that we stop playing the rigged game of reconciliation and explore the other avenues and possibilities that this word holds.

In order to follow this line of inquiry I have divided this chapter into the following two sections:

A) *The change in policy from Calder to the Indian Act, 1985*: In this section my focus will be on covering the overall shift in Indian policy that follows the failure of the *White Paper*. Part of this territory was covered in the previous chapter (e.g. the case law that defines—or, more accurately, leaves undefined—the scope of s. 91(24), *Bill C-31*, the jurisdiction of bands, etc.) and so I will focus my attention on the *Penner Report* and *Bill C-52*. Despite the fact that the former was largely disregarded and the latter was never enacted they offer us an invaluable snapshot of policy formulation in the wake of the *Constitution Act, 1982*. This transition is key as it is the shift from Parliamentary to Constitutional supremacy. This significance of this shift is that, as Noel Lyon phrased it, "[i]t renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question the

[27] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 212 and 111.

sovereign claims made by the Crown."[28] The *Penner Report* was commissioned in order to try and make sense of this transition in the rules of the game. It provides us with a vision of a new sort of game. We will follow the various threads that lead to it (e.g. the *White Paper*, the beginning of the modern land claim process with the *James Bay and Northern Quebec Agreement* in 1975, and the constitutional consultations leading up to 1982) and explore how it can help us to reimagine the game we now find ourselves playing. The *Penner Report* remains as relevant as it is, from the perspective of the current framework, radical. Its contours include recommendations for redrawing the meaning of s. 91(24) in light of the inherent rights that were "recognized and affirmed" in s. 35. This would take place by the federal government enacting legislation to occupy the field of s. 91(24) and then vacate it in favor of Aboriginal nations who could then have the jurisdictional space to formally govern their lands. The parallels with Chief Justice Laskin's so-called "enclave theory" from *Cardinal, Natural Parents* and *Four B* are clear. This map of the possibilities of the inherent right of self-government was clearly rejected by the government of the day in *Bill C-52* and it is one that remains unexplored as today the framework of s. 35 is constructed on the "broad view" of s. 91(24). As I have shown, this allows the Court in *Tsilhqot'in Nation* to claim that *terra nullius* has never applied in Canada, but it also leaves it incapable of accounting for the legitimacy of Crown sovereignty, legislative power and underlying title. Everything is anchored in the silent (or, rather, unspeakable) foundations of its interpretation of s. 91(24). By returning to this

[28] Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall LJ* 95 at 100. These words are cited with approval in *Sparrow, supra* note 3, at 1106.

particular moment we are able to explore the possibilities of a turning point that was not adopted (at least not formally). Both the *Penner Report* and *Bill C-52* set out to tackle the problem of self-government on a constitutional level and, by my reading, the positions taken continue to shape policy. As such, a comparative analysis of them offers us an invaluable snapshot of policy formulation in the wake of the *Constitution Act, 1982*.

B) *Reconciliation and the implementation of the United Nations Declaration of the Rights of Indigenous People*: On May 10, 2016, Canadian Indigenous Affairs Minister Carolyn Bennett addressed the Permanent Forum on Indigenous Issues at the United Nations and officially endorsed UNDRIP, without the qualifications attached by the previous government. She further stated that Canada intends "…. nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution." This signals a shift from the previous government's approach to UNDRIP, which held it to be "aspirational" and therefore not legally binding. The actual meaning of this apparent change in policy hinges on the question of what implementation in accordance with the Canadian Constitution looks like. Minister Bennett also stated that s. 35 of the *Constitution Act, 1982* provides a "robust framework" and a "full box of rights". This could be read as a signal that the current legal framework (with all of its unilateral principles and doctrines) of s. 35 and s. 91(24) of the *Constitution Act, 1867* will be used to restrict the content of UNDRIP. If this is the case, then it seems that, from the perspective of the Federal Crown, the "box of rights" is already full and the change of policy little more than a slight shift of emphasis. But, at this point, this is simply one of many possibilities. The one thing

that this announcement makes clear is that the conversation about the future of reconciliation in Canada is not strictly confined to the Domestic legal sphere. While this may seem to be a sudden and abrupt change, it is by no means a new development. From the Pre-Confederation Treaties, the Delegation of British Columbia Chiefs meeting with King Edward to discuss the Indian Land Question in the early 1900s, the Six-Nations bringing their concerns to the *League of Nations* in the 1920s, to the *Lovelace* case in the 1970s, International law has always been part of the conversation in Canada. This fact has been obscured by a 140-year-old legal narrative that has characterized Aboriginal peoples as wards of the Crown and, since 1982, by the predominance of constitutional law. My aim in this section will be to explore what implementation could mean if the government and the courts were to reject the "broad view" of s. 91(24) and the colonial version of federalism that it entails. This will be a mapping out of an imaginary space, but it is not utopian. That is, it does not come from nowhere (despite the name utopia really does reflect a context). Rather, it draws on the resources of the 250-year-old tradition of constitutional law that is reflected in the treaties, the *Royal Proclamation, 1763*, s. 25 of the *Constitution Act, 1982* and the everyday practices of resistance of Aboriginal peoples. It will offer both a rough and ready account of what I have termed *reconciliation-with-recollection* could mean in practice. This will offer a way to reimagine both the possibilities of reconciliation in Canada and the so-called Fourth-World.

The Hidden Player: Policy from Calder to the Indian Act, 1985

Prior to *Calder* the legitimacy of Crown sovereignty, legislative power and underlying title was not in question. Since 1888 the decision of the Privy Council in *St. Catherine's Milling* had served to clarify precisely this point, as Lord Watson put it, "the Crown has *all along* had a present proprietary estate in the land, upon which the Indian title was a mere burden."[29] Now there is something undoubtedly strange about this account. It presents us with an ordered field of view, which serves to effectively settle the conflict before it. That is, the conflict between Parliament and the Legislatures (we should always remember that there were no Aboriginal representatives party to this case) over underlying title is decided from this perspective. Indian title is a "mere burden." It seems to produce a clear and unambiguous picture of the place of Indians and their lands in Canadian federalism: namely, Indians and their claims to lands are a "mere burden" that is to be administered by Parliament and underlying title remains vested in the Provinces (this is a picture we have yet to escape). But there is, even here, something that cannot be accounted for. It is like the case of the eye and the field of sight, as Wittgenstein puts it, "…you really do not see the eye."[30] This unseen seer is implicated by two related features of this picture: 1) the Crown is positioned outside of the confines of history (i.e. it has *all along* had…); and 2) Indian title is a "mere burden" that entitles them to nothing more than is "…a personal and usufructuary right, dependent upon the good will of the Sovereign."[31] Within the picture it is the Crown's ever-present claim to sovereignty and underlying title that transforms Aboriginal peoples into "mere burdens"

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[29] *St. Catherine's Milling and Lumber Company v. The Queen*, (1888), 14 App. Cas. 46 at 58.

[30] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*. Translated by C. K. Ogden (Routledge: London, 1981) at § 5.633.

[31] *St. Catherine's Milling*, *supra* note 30, at 54.

(viz. Indians), but how this occurs is left unexplained. It takes place off-stage. Despite the simple matter-of-fact manner in which this picture is conveyed, in true Hegelian fashion, it contains its own contradiction. It is this contradiction that formally enters Canadian legal discourse in *Calder*. The majority of the Supreme Court (six of the seven justices involved in the decision) found that Aboriginal title was grounded in prior Aboriginal occupation of the land. As Hall J. puts it, "the right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority."[32] In other words the Crown's claim that its claim was effectively outside history was refused. This effectively undoes any claim to internal continuity for the picture of federalism found in *St. Catharine's Milling.*

In *Calder* so-called "Aboriginal perspective" (and by this I mean the *inherent* basis of Aboriginal rights) enters Canadian legal discourse. Its arrival is, to put it mildly, a belated one. After all, Lord Watson's view of Indian title had been undone by the Judicial Committee of the Privy Council by 1921.[33] Canada managed to avoid the implications of this decision by using the unchecked power of s. 91(24) to enact s. 141 of the *Indian Act*, which barred Indians from accessing legal representation from 1927 to 1951. By the time it was repealed the Supreme Court of Canada had become the final court of appeal and so this decision was safely outside of Canadian law.[34] It takes nineteen years to finally enter Canadian law. Once it actually arrives it is a sea-change or

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[32] *Calder, supra* note 5, at 353.

[33] The 1918 decision in *Re Southern Rhodesia Land* and the 1921 decision in *Amodu Tijani v. Secretary, Southern Nigeria* had held that Aboriginal title pre-existed British authority and remained in place unless explicitly extinguished. Cited in Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1992) at 214-215.

[34] The argument for the convenient timing of the repeal is made by Paul Tennant.

benchmark in Canadian legal and political history; one whose full implications, to my mind, remain unexplored. Its appearance is not the action of some mysterious *deus ex machina*; it has a history. This perspective had been there, to repurpose Lord Watson's phrasing, *all along*. Aboriginal peoples have never accepted that their interests were a "mere burden." In each and every act of resistance they have put the legitimacy of Crown sovereignty, legislative power and underlying title into question. The question of why this finally moves from the everyday, on the ground, reality of Aboriginal life in Canada to the more rarified confines of the common law is a complicated one.

The answer, in my view, is entangled with the history of the terms that have been marshalled to legitimate the European colonial empires over the last 500 years. By the early 20th century the legal fictions that had served to ground these claims to legitimacy had worn thin. This is clearly seen in the conflict between the Six Nations and Canada at the League of Nations. The Dominion's arguments for the legitimacy of its sovereignty, legislative power and underlying title *all hinge* on a *unilateral* power of recognition. It is this miraculous and unaccounted for power that transforms the Six Nations into subjects of the British Crown and their treaties into little more than surrender documents. These arguments did not hold water with their intended audience in 1924. Several members of the League pushed to formally hear the case, but they dropped the issue when the British Foreign Office intervened. The fact that the British needed to resort to such an explicit use of *realpolitik* indicates that the range of terms that could be used to legitimize their behavior had changed. As Skinner rightly maintains,

> …the range of terms that innovating ideologists can hope to apply to legitimize their behavior can never be set by themselves. The availability of such terms is a question about the prevailing morality of their society;

> their applicability is a question about the meaning and use of the terms involved, and about how far these can plausibly be stretched.[35]

The fact that the British needed to resort to such an explicit use of *realpolitik* indicates that the range of terms that could be used to legitimize their behavior had changed. Simply put, the vocabulary of legitimation had shifted; the legal fictions that had once supported the European Colonial Empires and their claims of universal history were now seen as shabby and embarrassing relics. Their magical power (viz. to set a universal standard to determine the limits of human rationality and with it the capacity for self-government) had vanished. It is precisely the consequences of this change that flow through the Mandate System, the United Nations Trusteeship Council, to the process of decolonization in the 1960s and bring us to the *White Paper* and *Calder*.

There is, in my view, a very real sense that we have never left the shores of *Calder*. We remain struck on its bizarre non-sequitur. As Judson J. states,

> Although I think that *it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.* This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. *There can be no question that this right was "dependent on the goodwill of the Sovereign".*[36]

Aboriginal title inheres in the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." But, at the very same time we find that, *there can be no question* that this right was

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[35] Skinner, *Regarding Method*, *supra* note 2, at 156.

[36] *Calder*, *supra* note 5, at 328 (emphasis added).

dependent on the goodwill of the Sovereign. How so? How can an inherent right become dependent on the goodwill of the Sovereign? Courts in other jurisdictions have responded to this contradiction by simply excluding this question from their jurisdictional purview altogether. In *Johnson v. M'Intosh*, Chief Justice Marshall of the United States Supreme Court drew this line:

> 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.*[37]

There is another version of this approach in the Australian case law. In 1979 Justice Jacobs of the High Court of Australia states in *Coe v. Commonwealth of Australia* that a challenge to a nation's sovereignty is "not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged."[38] The Canadian courts have, much to their credit, not taken this course of action. Instead they have attempted to maintain an impossible, or even schizophrenic, position: Aboriginal rights and title are, at one and the same time, *inherent and dependent*. This is the beginning of what I have termed indirect rule. The picture had changed; Aboriginal peoples had *inherent rights*. But, the legitimacy of Crown sovereignty, legislative power and underlying title was, according to the courts, *still not in question*. The result of this judicial compromise is nothing more than a house built on sand. The question of how exactly the Crown obtained this unquestioned power gained emphasis from the court's refusal to question it.

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[37] *Johnson v. M'Intosh,* 21 U.S. 543 (1823) at 588-89 (emphasis added).

[38] *Coe v Commonwealth of Australia*, [1979] HCA 68 at 3.

In the terms of rhetoric, the court's actions effectively constitute an unconscious paralipsis.[39] Quite simply the more that the courts stated that the Crown's sovereignty was unquestionable the more questionable it became. As I have argued this bluebeard logic, which, attempts to set limits on further inquiry by warning (e.g. "there is nothing to see here") or threat (e.g. "do not go in, or else") does not dissuade further inquiry; it attracts it. The development of the "broad view" of s. 91(24) is, to my mind, a response to this very problem. The legitimacy of the Crown's sovereignty had become inexpressible. It's only remaining leg to stand on was to focus on the unimaginable nature of the consequences that would flow from its unilateral powers being removed. This is the only remaining substance of the Dominion's response to the Six Nations case in 1924. As D.C. Scott put it,

> Naturally and obviously it was not the intention in this or preceding "treaties" to recognize or infer the existence of any independent or sovereign status of the Indians concerned. Such a principle, if admitted, would apply as much, if not more, to these other groups of Indians as to the Six Nations, and the entire Dominion would be dotted with independent, or quasi-independent Indian States "allied with but not subject to the British Crown" It is submitted that such a condition would be untenable and inconceivable.[40]

After *Calder* the magic that had made Aboriginal peoples appear to be "mere burdens" could no longer be openly used. Something else was needed to keep the game moving. My position is that the "broad view" of s. 91(24) has served just this purpose. It contains all of the magic of the forbidden legal fictions (i.e., *terra nullius*, divine right, discovery,

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[39] Paralipsis is a technique of giving emphasis to something by claiming to say little or nothing about it. A frequently cited example of an unconscious paralipsis occurs in Hamlet during the famous play-within-the-play scene. Hamlet asks his mother how she likes the play and she replies "The lady doth protest too much, methinks." This has become a figure of speech that is used to describe how repeated denials can serve as an indication that the opposite may in fact be the case.

[40] Government of Canada, Appeal of the "Six Nations" to the League, (1924) 5:6 *League of Nations Official Journal* 829 at 836.

etc.) without having to go to the trouble of actually expressing them. They could therefore be put into play without responsibility; the courts simply need to point towards s. 91(24) and the Crown's unquestionable aura appears. But, this only works if the source of the magic goes unseen. It is a trick of perspective; it works so long as we do not ask where this interpretation came from.[41] This is why I have argued that it acts as the 'hidden player'—or to borrow Gilbert Ryle's evocative phrase, the *ghost in the machine*—that allows the game to continue on despite the fact that the contradiction expressed so clearly in *Calder* remains open and unresolved. It is this combination of the

[41] Let us imagine it this way: There are three people in a room playing a game; a judge and two players. As we watch the game it becomes clear that one player is able to win each game because the judge allows it to make a decisive move that the other cannot (i.e., we can think of this as a trump card that it can play at any point in any game). When we ask why this player gets to make this move and the other cannot; in response, the judge points to a door that is labeled "s. 91(24)" and acts as if that was a complete answer. The door itself is locked. One of Wittgenstein's remarks in *Culture and Value* provides us with a way of seeing this again, "If you do not want certain people to get into a room, put a lock on it for which they do not have the key. But it is senseless to talk with them about it, unless you want them all the same to admire the room from the outside!" He continues on the same remark; "the decent thing to do is: put a lock on the doors that attracts only those who are able to open it & is not noticed by the rest" (Ludwig Wittgenstein, *Culture and Value: A Selection from the Posthumous Remains*, Revised Edition, Edited by G. H. von Wright (Oxford: Blackwell, 1998) at 10e). The "decent thing" cannot be done because of the role that the door has been assigned in the game. In order to allow the one player to always win the judge has to point to it and the other player must admire it (i.e. accept its legitimacy and inquire no further). This is precisely how I read Justice Binnie's claim that "the future is more important than the past" and Kant's warnings to not inquire into to the "historical warrant" of sovereigns (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at para. 10; Immanuel Kant, *The Metaphysics of Morals*. Edited and Translated by Mary Gregor. (Cambridge: Cambridge University Press, 2006) at 111-2, 136). It is what I have been referring to as bluebeard logic. It is undone when the door is open. This resolution is not magical though; it does not determine the result in advance, or serve to end all games. It simply exposes the nature of the game that is being played. The player that once had the trump card now must either find a new way to legitimate its powers (e.g. find a vocabulary that can accommodate these powers) or forgo legitimation altogether and use force to win. This is the message I take from Kafka's parable in *Before the Law* (See Franz Kafka, *The Complete Stories*, Edited by Nahum N. Glatzer (New York: Schocken Books, 1983) at 3-4). If we choose to the follow the doorkeepers warning and wait, the door never opens. On the other hand, if we refuse the warning, then it may well be that behind this door there is another and another with more and more powerful guards (after all a quest for *the* Law has no possible end point because there is no such destination), but this does not mean that the game does not change with each door that is opened. The key, in my mind, is that the very attempt to open the door *changes the game* (i.e., at the very least it moves from waiting to confronting the doorman). As Wittgenstein puts it, "If we think of the world's future, we always mean the place it will get to if it keeps going as we see it going now and it doesn't occur to us that it is not going in a straight line but in a curve & that its direction is constantly changing" (*ibid*, at 5e). Opening the door exposes this curve and the possibility of things being otherwise than they are.

open contradiction and the hidden player that characterizes the gradual re-articulation of the crown machinery from *Calder* to the *Constitution Act, 1982*.

Three Lines of Re-Articulation

In the last chapter I detailed how the Supreme Court struggled to generate a workable solution to the contradiction they exposed in *Calder*. The immediate questions concerning the meaning of s. 91(24) for federalism and the implications of the *Bill of Rights* have already been surveyed. The lines of constitutional interpretation that emerge from this period serve to contain the Aboriginal perspective by shoring up the Crown's claim to sovereignty, legislative power and underlying title. Through *Cardinal, Natural Parents,* and *Four B* the Supreme Court provides us with an interpretation of s. 91(24) and s. 88 of the *Indian Act* that places Aboriginal peoples under concurrent and overlapping spheres of jurisdiction. Through *Drybones* and *Lavell* the Court uses s. 91(24) to read down the equality provisions of the *Bill of Rights* on the *Indian Act.* These cases work to together to present a picture of federalism that grants the Crown undetermined *power over* Aboriginal peoples. They serve to contain the potential implications of *Calder* by preserving and extending the reasoning of *St. Catherine's Milling*. Simply put, in these cases we see the Court hard at work trying to put the fly of inherent Aboriginal rights back into the fly-bottle of Parliamentary supremacy.

The period from the failure of the *White Paper* to the *Constitution Act, 1982* is a kind of interregnum (i.e., an interval or pause between administrative regimes). The Crown machinery is being re-articulated to address the challenge that *Calder* poses to its legitimacy. Before we follow the various lines this process of re-articulation gives rise to we must we must remember two points:

1) First, the picture that *St. Catherine's Milling* gives us is that Indians are a Federal burden and the Provinces hold underlying title.
2) Second, the process of assimilation was designed to use the unlimited administrative powers of the Federal government to finalize this picture. The jurisdictional questions raised by s. 91(24) would be resolved by removing Indians from the picture (viz. it would be, in effect, a self-cancelling head of power or, to borrow Mill's apt phrasing, a "temporary despotism").

This reminder is important because the processes of re-articulation that follow from *Calder* all stem from it. The Court's recognition of the *inherent* basis of Aboriginal rights and title exposes the problem that was already contained within this picture from the very beginning. Simply put, as soon as Aboriginal peoples are recognized as being more than "mere burdens" whose rights were given to them by the Crown the question of Crown legitimacy is opened within the law. This, in effect, recognizes that the picture offered in *St. Catherine's Milling* was always just that, a picture, a field of view and, as such, not complete unto itself. Like all pictures it relates to a particular perspective, which can be put into question. *Calder* introduces the Aboriginal perspective into Canadian law and with it the question of the legitimacy of the Crown's claim to sovereignty, legislative power and underlying title.

The processes of re-articulation that have stemmed from this can be grouped into two general perspectives.

a) The first attempts to capture and contain Aboriginal peoples within the confines of *St. Catherine's Milling* by moving towards a model of indirect rule. It positions the right of self-government as being strictly historical in nature and focuses

instead on delegating powers of self-management similar to that of a municipality while retaining the Crown's claim to ultimate sovereignty and underlying title. Seen from this perspective s. 35 is little more than a self-imposed procedural limitation on the otherwise unlimited power of s. 91(24). It forecloses on the hard constitutional question of Aboriginal law and thereby treats it as a sub-species of administrative law.[42] This is what I have referred to as *reconciliation to* or *reconciliation-without-recollection*.

b) The second focuses on the *inherent* nature of Aboriginal rights and refuses the picture of *St. Catherine's Milling* altogether. It references the *Royal Proclamation, 1763* and the treaties as the sources of a 250-year-old constitutional principle that is grounded in the recognition of the inherent and continuous nature of their right to govern both themselves and their lands. This necessarily requires a rejection of the "broad view" of s. 91(24), the *Indian Act* and its "vast administrative despotism." It also rejects the view of federalism that is based on it, which serves to exclude the possibility of Aboriginal jurisdiction by placing them and their lands under the concurrent and overlapping jurisdictions of Parliament and the Provincial Legislatures. It holds the line so clearly articulated by the *Two Row Wampum Treaty Belt* in 1613, repeated in the Royal Commission of 1664 (viz. that Aboriginal nations are "equal partners in confederation") and can even be seen in the late 19th century (e.g. Lord Duffern's speech at Government House, Victoria, British Columbia in 1876).[43] This perspective can

[42] By this I mean that it simply takes Crown sovereignty for granted and moves to reviewing the use of this undetermined power. It converts a substantive constitutional issue into a procedural administrative one.

[43] Lord Duffern stated that "In Canada, no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in Indian Tribes and the communities that hunted or wandered over

> be thought of as the "Aboriginal Constitution" (following Borrows and Slattery), "Treaty-Federalism" (following Barsh and Henderson), common or diverse constitutionalism (following Tully) or, in my own terms, as *reconciliation with*.[44]

These two perspectives have served to shape law and policy on the Aboriginal question since the 19th century. There is a kind of dialogical relationship at work between them. They continually relate and respond to one another. This continual process of contestation has resulted in a process of policy formation that is characterized by a kind of haphazard movement between confrontation and concession. At one time a given policy will be clearly grounded in one perspective, but, at the very same time, it will attempt to co-opt the other by adopting its techniques (e.g., the use of consent in the making of the numbered treaties). There are, for lack of a better word, phases in the dispute between these perspectives. At one time the lines between them may be relatively bright (e.g. the high points of assimilation policy in the late 19th and early 20th century) and at another blurred. The crisis of legitimacy that occurs with the *White Paper* and *Calder* marks a phase in which the lines begin to blur. This is because the language that

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them, [therefore]…not until [we negotiate treaties] do we consider that we are entitled to deal with a single acre." This is cited in Michael Asch's book *On Begin Here to Stay Treaties and Aboriginal Rights in Canada*. (Toronto: University of Toronto Press, 2014) at 158-159. I would like to thank him for pointing it out to me as it serves to highlight that even during this phase of Indian policy the treaty approach was alive and actively contesting the extinguishment strategy that was being pursued in British Columbia. For the references to the *Two Row Wampum* and the *Royal Commission of 1664* see the Royal Commission on Aboriginal Peoples, *Partners in confederation, Aboriginal peoples, self-government and the constitution* (Ottawa: Minister of Supply and Services, 1993).

[44] For the concept of the "Aboriginal Constitution" see John Borrows, *Canada's Colonial Constitution* (Paper delivered at the Faculty of Law, University of British Columbia, 19 January 2016), [unpublished] and Brian Slattery, "The Aboriginal Constitution" (2015) 67 SCLR (2d) 319. For more on the concept of treaty-federalism refer to Russel Lawrence Barsh and James Youndblood Henderson, *The Road: Indian Tribes and Political Liberty*. (Berkeley: University of California Press, 1980) and, more recently, Michael Asch, *On Being Here to Stay* (*ibid*). For Tully's account of common constitutionalism see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 184.

was used to legitimate the crown machinery from the mid-19th century on had lost its ability to serve that function. From this point it becomes increasingly difficult to find a clear and plain expression of either perspective in law and policy. This is not to say that there are not lines, or limits that demarcate between them, but rather the lines become harder to read.

With this in mind let us turn our attention to three of the lines of re-articulation that follow from *Calder*. For the sake of simplicity, I will refer to the lines as legislative renovation, land claim agreements and constitutional change. I am not suggesting that these 'lines' constitute entirely separate parallel processes. Nor do I mean to suggest that they have a single author or source. Rather, they are actively contested processes that crisscross and overlap one another. The commonality between them is that they stem from the ultimate failure of the project of assimilation. The *White Paper* attempted to complete the substantive aims of that project (the disappearance of Indians and their claims to their lands) under the aegis of the principle of equality. Its failure brought with it a crisis of legitimacy that formally enters Canadian law with *Calder*. These lines originate in this crisis and aim, in one way or another, to resolve it. They cover a vast and complicated territory that extends from *Calder* through to today. My aim is not to provide a complete map of this territory, but rather three brief surveys to help us find our way around. Following the surveys, I will shift to a more detailed analysis of the *Penner Report* and *Bill C-52.*

A) Line One: Legislative Renovation

In the wake of the failure of the *White Paper* the Department of Indian Affairs (DIA) began to search for a self-government policy that could serve as a replacement for its previous goal of assimilation.[45] The results of this research are expressed in a discussion document that was released in 1982 entitled *Strengthening Indian Band Government*. This document identified five areas of the existing Indian Act that served to reduce the effectiveness of band councils. These five problem areas can be summarized as follows:

1) All of the powers granted to band councils are subject to control by the Minister and/or the Governor-in-Council.
2) The land tenure system within the Act restricts the abilities of bands and individuals to actually make use of their lands.
3) The Minister's trust responsibilities for band moneys prevent band governments from controlling their own assets.
4) Band governments do not have defined legislative powers to address social and economic development. This results in a situation where the DIA devolves administrative responsibilities to bands for programs they are unable to define and reshape.
5) The band council's legal capacities in terms of contract law were unclear, which restricted their ability to relate to third parties.[46]

[45] John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition." (Ottawa: Research paper prepared for the Royal Commission on Aboriginal Peoples, 1995) at 90 (hereinafter Giokas, *The Indian Act*).

[46] Cited in *ibid*, at 90-1.

In order to address these problems, the DIA presented a number of possible legislative avenues for Parliament: 1) revising the *Indian Act* in whole or in part; 2) developing a series of acts to deal with each aspect of band self-government; 3) regional or individual band acts; or, 4) providing companion legislation to the existing Indian Act that bands could opt to enter.[47] The latter approach was favored, which is unsurprising as the optional structure avoids the appearance of a unilateral exercise of power. The general contours of approach were outlined by the DIA in another discussion document from 1982 entitled, *The Alternative of Optional Indian Band Government Legislation*. Its recommendations (which I summarize below) correspond to the problems identified by its companion document above.

1) The ministerial authority over bands should be removed or delegated to bands, but the powers of supervision over bands and disallowance of their by-laws should be retained.
2) Bands should develop constitutions to establish their political structure and accountability to their membership.
3) Bands should have the authority to determine their own membership, but this ability should be restricted by a Federally determined standard of "minimal connection."
4) Federal authority over Indian land, social services and moneys should be delegated to bands. This should include the power to tax their own population, but Federal protection of Indian lands under the *Indian Act* should be retained.

[47] *Ibid.*

5) Bands should have a clearer defined legal status that would enable them to enter into the existing legal framework of contract law.[48]

There is, as Giokas rightly notes, a strong resemblance between this approach and the one adopted by the United States in the *Indian Reorganization Act* of 1934.[49] This can be seen in the recommendation for band constitutions and a clearly defined legal identity that would enable bands to conduct business within existing frameworks. The difference between these approaches—and it is this difference that makes the comparison with the U.S. legislation so very relevant for our purposes—is in how they account for the source of the band's authority to govern itself. The United States based its approach on the inherent nature of tribal sovereign powers. Whereas the Canadian approach is based on the delegation of federal power to the band councils, which exists as little more than creatures of statute.[50].

What should be clear from this is that this approach is a re-articulation of the picture from *St. Catherine's Milling*. It follows the logic of indirect rule. This logic is clearly spelled out in a comment made by M. Yanaghita (the Japanese member of the Permanent Mandates Commission of the League of Nations) in 1923.

> We find that under this system many chiefs, both great and small, are given charge of matters of minor importance connected with village administration. They are permitted to carry out these duties in a most imposing manner, taking advantage of the great traditional respect which they still receive from those under them. Scarcely aware of the fact that their little sovereignty has been transferred to a higher group, they will

[48] *Ibid.*

[49] Ch. 574, 48 Stat. 984, codified at 25 U.S.C. ss 461-479.

[50] *Giokas, supra* note 45, at 92.

> assist in the work of the mandatory government and will be content with the empty title and modest stipend.[51]

This provides us with a useful representation of the basic structure of indirect rule. At its basis it is simply delegated authority. There is a source of authority (in this case the "mandatory government") and a local administrator (the "chiefs"). There is, in this respect, no difference between this model and the more familiar form of municipal governance. Municipalities are, after all, creatures of statue. Their powers are devolved by the legislative body that created them. Generally speaking this arrangement is not problematic. Within the familiar setting of a constitutional democracy the residents of the municipality are also citizens of the state and so, their interests are represented in the legislative body. This means that the entire relationship is conducted openly and its legitimacy is maintained by the principles of representative democracy. This is where the difference between the familiar model of municipal governance and indirect rule come into play. In a system of indirect rule the basic municipal structure of power is hidden from all aside from the source of authority. This concealment is the magic that defines indirect rule. It is what this remark from 1923 so clearly illustrates: from the perspective of the villagers the chief is sovereign. This appearance is advantageous to the mandatory government because it is able to cloak itself in borrowed legitimacy. This was the substance of Henry Maine's insight in the 19th century: culture was, contrary to J. S. Mill's civilizing thesis, *thick* and so, colonial governance required the maintenance of traditional forms and structures of law and self-government.[52] By maintaining the

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[51] League of Nations, *Permanent Mandates Commission, Minutes of the Third Session*. (Geneva: League of Nations Publications, 1923) at 283.

[52] See Chapter 2 for a detailed account of this.

appearance of traditional forms of self-government the mandatory government was able to avoid the resistance that accompanied direct rule. This, in turn, enabled it to minimize administrative costs and maximize the extraction of revenue. The advantages of indirect rule are contingent on the *magic of appearances* being maintained (viz. the "empty title" must appear to be real). If the actual structure of the relationship becomes clear to all parties involved the advantages vanish. This is, to my mind, what Hannah Arendt so effectively captures with her phrase "the rule of nobody."[53] Once the "empty title" is visible all that remains, is as Mahmoud Mamdani aptly put it, a system of "decentralized despotism."[54]

The challenge in the Canadian context is that the crown machinery was explicitly geared to assimilate the traditional leadership structures. This was the very purpose of band councils stretching back into their origins in the *Gradual Enfranchisement Act* in 1868. This meant that following the collapse of the project of assimilation the DIA was faced with the task of converting these imposed political structures (the band councils) into legitimate ones. While, at the very same time, ensuring that these structures remain fixed within the municipal level of the division of powers. This was the only way to ensure that the *St. Catherine's Milling* model of federalism could continue to exist (i.e. the model that places the burden of Indian administration on Parliament and the underlying title to their lands in the hands of the Legislatures). This is, by my view, what accounts for the disconnect between the problems that the DIA identifies in *Strengthening Indian Band Government* and the piecemeal nature of the responses it

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[53] Hannah Arendt, *The Human Condition*, 2nd Edition, (Chicago: University of Chicago Press, 1998) at 45.

[54] Mahmoud Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*. (Princeton: Princeton University Press, 1996) at 25.

recommends. The responses are constrained by the need to maintain a model of federalism that fundamentally excludes Aboriginal peoples as anything other than the subject of a head of constitutional power. This is why the recommendations so clearly maintain *unilateral* Crown power over band councils and membership (through the use of the "minimal standards" of blood quantum). In order for this approach to actually work Aboriginal peoples would need to accept this legislative change as the legitimate expression of their rights. This requires that they either knowingly accept the very *power over* relationship that they have actively resisted for the last 140 years or that they simply fail to see its true nature. Without this acceptance the crisis of legitimacy remains and the project of legislative renovation is little more than an attempt to substitute an "empty title and modest stipend" for the inherent right of self-government.

B) Line Two: Land Claim Agreements

This process begins with the *James Bay and Northern Québec Agreement* of 1975 and the *Northeastern Québec Agreement* of 1978.[55] Through these agreements the vast traditional territories of the Cree and the Naskapi were ceded to the province of Québec. In exchange three categories of lands were created over which the Cree and Naskapi have descending degrees of proprietary interest and control. The agreements also establish a system of self-government via provisions that are tellingly referred to as "special legislation concerning local government."[56] The overall purpose of the agreement itself is clearly set out in the opening section of the agreement.

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[55] *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-1977, c. 32. This agreement and its associated documents are collected in the *James Bay and Northern Québec Agreement and Complimentary Agreements.* (Québec: Les Publications du Québec, 1991) (hereinafter *JBNQA*).

[56] *Ibid,* at s. 5. 1. 2.

> These people are inhabitants of the territory of Québec. It is normal and natural for Québec to assume its responsibilities for them, as it does for the rest of the population. And that is what the Québec Government will be in a position to do as a result of this Agreement. It will be the guarantor of the rights, the legal status and the well-being of the native peoples of its northern territory. Until now, the native peoples have lived, legally speaking, in a kind of limbo. The limits of federal responsibility were never quite clear, nor was it quite clear that Québec had any effective jurisdiction. The land these people inhabited was in Québec, after 1912, and yet Québec 's title was not properly defined. This Agreement will remove any grounds for further doubt or misunderstanding. Jurisdiction will be established in a precise and definitive manner. Until now, Québec 's presence in the North has not been complete. Today we are completing and reaffirming this presence.[57]

This account of the historical relationship between the parties is strange, but it is by no means unfamiliar. This area of Québec (comprising 410,000 square miles) was transferred from the Northwest territories to the Province via the *Québec Boundaries Extension Act* of 1912.[58] In this transfer Québec assumed obligations to, as Ciaccia puts it, "…settle such land questions and other claims as the native peoples might raise."[59]

Let us consider this a bit more closely: according to the logic that is set out in the selection above the relationship that existed between the parties from 1912 on was unclear. Now this lack of clarity is by no means complete. That is, it does not assume that each party had an equal claim to sovereignty over and underlying title to the territory. The legal interests of the Cree and the Naskapi (who had never before ceded title to their lands) are limited to that of a "mere burden." There is no explanation offered as to why this is the case. It is simply an unstated assumption. The Cree and the Naskapi are simply

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[57] *Ibid*, at 6. This opening section is entitled "Philosophy of the Agreement" and was written by John Ciaccia (who was then a member of the National Assembly for Mount Royal and the Special Representative of Premier Robert Bourassa).

[58] *Quebec Boundaries Extension Act*, 1912, Can. 2 Geo. V, c. 45

[59] *JBQNA, supra* note 55, at 5.

"two minorities" who have special "needs and interests" and are "closely tied to their lands."[60] What the agreement actually clarifies is who is legally responsible for administering this burden. The answer is found in the agreement, which supersedes the *Indian Act*. It replaces the "historic approach of Indian affairs" which it deems to be "no longer valid."[61] As Ciaccia states, "[w]e did not want to create " reserves" in the conventional meaning of that word and, in fact, we are not creating them."[62] Instead it creates a new land regime of "self-administration" which provides that "…local matters will be regulated by the people who live there, as they are in any other municipality anywhere else in Québec."[63] And like "any other municipality" the underlying title to the lands and the ultimate legislative powers remain with the Province. As Ciaccia reassuringly maintains,

> There will be public roads in and near these communities, for example. It's not going to take any red tape to get to them, either. *The Government will have the normal right to expropriate land for public purposes*. There will be servitudes for utilities. And the general public will have the same rights on land in the public domain, such as the roads, as it has anywhere else- and the same limited rights on land not in the public domain as it has on private property anywhere else. That is to say, there is a normal right of access for lawful and legitimate purposes. The Category l lands are not to be walled off or cloistered. Nobody will automatically be guilty of trespass simply for entering Category l lands. We are not creating shelters or confinements for wards of the State, for the simple reason that the concept expressed in the Agreement aims at wiping out the stigma attached to being a ward of the State. In reality, we are giving *cultural minorities* the chance of collective survival, and we are doing this *without in any way diminishing the Province's power to use the resources of Quebec for the good and the benefit of all the people of Quebec*.[64]

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[60] *Ibid,* at 7, 10.

[61] *Ibid,* at 9-10.

[62] *Ibid.*

[63] *Ibid,* at 8.

[64] *Ibid,* at 10 (emphasis added).

The rights of the Cree and the Naskapi are reduced in advance to "cultural minorities." There is no mention of the inherent nature of their rights nor is there an explanation for how their rights were diminished. The reasoning of *St. Catherine's Milling* determines the result of the agreement in advance. They are subjects simply by virtue of being Indians under the unquestioned and undefined limits of s. 91(24) and, as such, their consent is unnecessary. Parliament could simply extinguish their rights, but it, in its mercy, it grants them "…the chance of collective survival." It does so because direct extinguishment would require legitimation and, as we have already seen, by the 1970s there was no legitimating vocabulary available to cover such an act. The modern land claim agreements do not set out to face the challenge of reconciling the Crown's claim to sovereignty and underlying title with the inherent rights of Aboriginal peoples; they finesse it. What is left is, as Ciaccia twice assures us, not "reserves in the classical sense."[65] But, it just so happens that these new communities happen to fit precisely into the space available in the picture of federalism we find in *St. Catherine's Milling*. The Cree and the Naskapi remain under the status provisions of the *Indian Act* and their ability to govern their lands is devolved to them from the Crown. This may be a change from the "historic approach of Indian affairs", but it follows the same old rules of the game. It may seem that there is a return to the 250-year-old tradition of treaty making, but it is a return whose limits are set in advance by the presence of the crown machinery and the "broad view" of s. 91(24). They are negotiated in a context where the Crown explicitly controls the membership, funding and everyday legal reality of the party that it is negotiating with. The only possible product is municipal in nature. There is no

[65] *Ibid.*

acknowledgment of the inherent nature of Aboriginal rights in these agreements. They are, much like the *White Paper* that preceded them, designed to resolve the anxiety of legitimation once and for all. Simply put, the 'old rules' remain in place, but they are not mentioned. They operate as a hidden premise (or, to adopt the terms of our chess analogy, a hidden player), which sets the relationship between the parties that, in turn, ensures the result. It is these 'old rules' that ground the agreement that finally completes and affirms "Québec 's presence in the North."[66]

C) Line Three: Constitutional Change

The third line of re-articulation is, for many, the most familiar as it is the dominant feature of our current landscape. The repatriation of the constitution meant fundamentally changing the legal and political architecture of Canada. It seemed that the move from a system organized on the principle of Parliamentary sovereignty to one of Constitutional supremacy would necessarily change the rules of the game. After all, such a change would enable the Supreme Court to bind all governmental authority to the terms of the constitution. But, this characterization of the shift is, obviously, an abstract and oversimplified one. The actual Canadian legal structure was never one organized on the principle of Parliamentary sovereignty. At least not the sovereignty of the Canadian Parliament. It was a colonial government and so operated under the sovereign legislative power of the British Crown in Parliament and the judicial decisions of the Privy Council. The nature of the problem in *St. Catherine's Milling* clearly illustrates this complicated relationship. Nevertheless, constitutional change offered the possibility of a way out of

[66] *Ibid,* at 6.

the antinomy brought about by the Court's simultaneous acknowledgement of the inherent basis of Aboriginal rights and the supremacy of Crown sovereignty in *Calder*. This fact was by no means lost on the national aboriginal organizations of the day who were intent on changing the 'old rules' of the game. The National Indian Brotherhood (NIB), Native Council of Canada (NCC) and Inuit Committee on National Issues (ICNI) were all active on this front.[67] They were invited to attend the first ministers' meetings on in 1978 and 1979, but as observers. They successfully pressed for more direct involvement in the negotiations. This success was due, in large part, to the political pressure they were able to exert through the highly publicized lobbying efforts of the NIB and close to 300 Chiefs in England in 1979.[68] But, the success was partial. They were consulted during the process, but not present for the actual negotiations at the bargaining table. The result of this process was the inclusion of three provisions (ss. 25, 35 and 37) relating to aboriginal peoples within the *Constitution Act, 1982*. The actual effect of these provisions was—and in many respects still is—unclear. As Peter Hogg points out, s. 35 was a late addition to the *Constitution Act, 1982*. It was not included in the October 1980 version and then it appears in the April 1981 version without the word "existing" only to vanish entirely in the November 5th, 1981 version. The omission drew intense criticism and, as a result, it was added later in November with the addition of the word "existing". The history of the provision alone demonstrates that it was the product of contention and compromise. This is evident in both the vague drafting and placement of s. 35 (viz. s. 35 is not a part of the *Charter* and so not subject to either s. 1 or s. 33). What does

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[67] The NIB represented the interests of status Indian, the NCC non-status and Métis, and the ICNI Inuit. See *Giokas, supra* note 43, at 89.

[68] *Ibid.*

"recognized and affirmed" mean? Does "existing" open the door for extinguishment?[69] These issues could have been settled by the future constitutional conferences promised by s. 37, but this resulted in the failures of the Meech Lake and Charlottetown accords.[70]

This brings us back to more familiar territory. From this point the landmarks carry names such as *Sparrow*, *Delgamuukw*, and, most recently, *Tsilhqot'in Nation*. But, self-government has remained unexplored. Its possibilities remain concealed by the Court's unquestioning acceptance of the "broad view" of s. 91(24). This has transformed s. 35 from a constitutional provision to an administrative process. That is, it takes Crown sovereignty, legislative power and underlying title for granted and confines itself to reviewing the use of this undetermined power. It thereby (magically) converts a substantive constitutional issue into a procedural administrative one. The existing forms of Aboriginal governance are, to borrow the words of Ciaccia in the *James Bay and Northern Québec Agreement*, "in a kind of limbo" between the devolved powers of a municipality and the possibility of something else.[71] But this was by no means the only possible course of events. In the immediate aftermath of the *Constitution Act, 1982* the *Penner Report* offered another way forward on the issue of self-government. It is one that still holds the potential to change our perspective.

D) <u>The Penner Report</u>

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[69] Peter Hogg, 'The Constitutional Basis of Aboriginal Rights' in Maria Morellato ed., *Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book, 2009) at 5-7.

[70] The Meech Lake Accord was negotiated without any input from Aboriginal peoples. In 1990 Elijah Harper (a former Chief of the Red Sucker Lake First Nation who was then the MLA for Rupertsland in Manitoba) protested this fact by filibustering the motion in the Legislature and preventing ratification. The Charlottetown Accord sought to avoid this by including a constitutional amendment that would explicitly recognize Aboriginal peoples' "inherent right of self-government within Canada." But, the 1992 referendum to implement it failed.

[71] *JBQNA*, *supra* note 55, at 6.

In order to get a sense of the significance of the report's recommendations we will need to begin by briefly explaining the composition, process and mandate of the committee that drafted it. The report itself is the product of the Special Committee on Indian Self-Government. This committee originated from a requested issued on June 1st, 1982 by Standing Committee on Indian Affairs and Northern Development to the House of Commons for authority "to examine the government of Canada's total financial and other relationships…with Indian people."[72] The House of Commons responded to this request on August 4th, 1982 by issuing a two-part Order of Reference. Initially this took the form of two sub-committees.

1. The first was the Sub-committee on Indian Women and the Indian Act. It was directed to "to study the provisions of the Indian Act dealing with band membership and Indian status, with a view to recommending how the Act might be amended to remove those provisions that discriminate against women on the basis of sex".[73]
2. The second was called the Sub-committee on Indian Self-Government. It was directed to make recommendations to Parliament " ...in regard particularly to possible provisions of new legislation and improved administrative arrangements to apply to some or all Band Governments on reserves taking into account the various social, economic, administrative, political and demographic situations of

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[72] Parliament of Canada, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (Ottawa: Ministry of Supply and Services, 1983) at 3 (hereinafter the *Penner Report*). I wish to, once again, acknowledge my deep and abiding debt to John Giokas' for his incisive analysis. His interpretation of the *Penner Report* provided the basis for my own reading and can be found at *Giokas, supra* note 43, at 93-103.

[73] This was undoubtedly triggered by the fact that the *United Nations Human Rights Committee* had released its decision in *Lovelace v. Canada, Communication* No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) just the year before, which 'inter alia' found Canada to be in breach of Article 27 of the *International Covenant on Civil and Political Rights.*

> Indian bands, and the views of Indian bands in regard to administrative or legal change".[74]

In December of that same year the House of Commons changed its rules regarding committees and decided to merge the two sub-committees into a single special committee known as "The Parliamentary Task Force on Indian Self-Government." The Special Committee was composed of 10 members, of these there were 7 Members of Parliament and 3 representatives from national aboriginal organizations.[75] The aboriginal members were limited to having non-voting *ex officio* and liaison status.[76] The Committee received information in three ways; oral testimony taken at public meetings between members and witnesses; written submissions; and the various research projects that it commissioned. Its investigations were expansive including some 567 witnesses and involving trips to the United States for comparative purposes.[77]

We should pause here for a moment and consider the scope of the mandate that the House of Commons gave to the Special Committee and its historical context. In terms of its context it is crucial to note that the *Constitution Act, 1982* was proclaimed as law by Queen Elizabeth II in Ottawa on April 17th, 1982. This is less than two months prior to

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[74] *Penner Report, supra* note 72, at 3.

[75] The 7 voting members were as follows: Mr. Keith Penner (Lib.) MP for Cochrane—Superior (Ontario) (CHAIRMAN); Mr. Stan Schellenberger (P.C.) MP for Wetaskiwin (Alberta) (VICE-CHAIRMAN); Honourable Warren Allmand (Lib.) MP for Notre-Dame-de-Gráce—Lachine East (Québec); Mr. Jim Manly (N.D.P.) MP for Cowichan—Malahat—The Islands (B.C.); Mr Frank Oberly (P.C.) MP for Prince Geroge—Peace River (B.C.); Mr. Raymond Chénier (Lib.) MP for Timmins—Chapleau (Ontario); and Mr. Henri Tousignant (Lib.) Témiscamingue (Québec).

[76] The 3 non-voting aboriginal representatives were as follows: Ms. Roberta Jamieson (*Ex officio* member) for the Assembly of First Nations; Ms. Sandra Isaac (Liaison member) for the Native Women's Association of Canada; and, Mr. Bill Wilson (Liaison member) for the Native Council of Canada. See *Penner Report, supra* note 68, at 4-5.

[77] *Ibid,* at 5; *Giokas, supra* note 45, at 93.

the initial request from the Standing Committee and less than four before the mandate was given to the two sub-committees. There is clear evidence that the report was meant to assist Parliament in determining the practical meaning of the new relationship promised by the suggestive (but vague) language of s. 35. For example, the Special Committee temporarily suspended its hearings due to the confusion resulting from overlap between its inquiry and the Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters on March 15th, 1983. During this constitutional conference an accord was signed to place the issue of self-government on the agenda for the next conference, which was to be held on March 8th, 1984. The Special Committee was thus well aware of the potential impact of its report; they were providing what could well be the road map for achieving "…permanent and fundamental change in the relationship between Indian peoples and the federal government."[78] The Committee's mandate was thus undeniably broad, but it was by no means *complete*. As the introduction of the report itself states,

> It should be pointed out that the Special Committee was directed to examine *Indian self-government, not aboriginal self-government*. The Committee therefore devoted its efforts exclusively to discussing changes in -the relationship between Canada and Indian peoples, even though the Constitution identifies three aboriginal peoples-Indians, Inuit and Métis. Inuit were not among the witnesses. Although some Métis people were included as witnesses as part of delegations from the Native Council of Canada and its affiliates, the Committee did not have a mandate to report on issues of concern to the Métis.[79]

This distinction between Indian and Aboriginal self-government makes it clear that the report was focused on *Indian Act* bands and status Indians. The full implications of this

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[78] *Penner Report*, *supra* note 72, at 44.

[79] *Ibid,* at 5 (emphasis added).

narrowing of the issue of self-government will become clear as we outline the substance of its recommendations.

The overall approach that the Special Committee took to its (almost impossibly) wide ranging mandate is, to my mind, captured in the epigraph they selected.

> I sit on a man's back choking him and making him carry me and yet assure myself and others that I am sorry for him and wish to lighten his load by all possible means—except by getting off his back.[80]

This evocative image (reminiscent of a scene from the works of Kafka or Beckett) offers a different perspective—or to borrow Wittgenstein's terms, it serves as "object of comparison"—on the relationship between the Crown and Aboriginal peoples. Seen in this light the nature of the problem seems clear; it is the fundamental asymmetry between the parties (viz. the fact that one sits on the other's back). But, this is only one aspect of this picture and one that almost every approach to the problem would likely concede. Where the approaches tend to diverge is the on the question of the cause, which then serves to shape the prescribed resolution (e.g. the civilizing narrative grounds the cause of the asymmetry in the 'backwardness' of Aboriginal peoples and this naturally leads to both the ward/guardian relationship and, if that fails, the extinction thesis). This is precisely where the picture offered in the epigraph diverges. The most significant aspect of it—and the one that, in my view, the Committee bases its approach on—can be seen when we ask how this relationship began in the first place. It is this aspect that is required if we are to begin to understand why the dominant party is seemingly unable to see the solution that is so manifestly clear to everyone else.

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[80] *Ibid*, at 2. The words are taken from Leo Tolstoy's *What Then Must We Do?* (a non-fiction work on the social conditions of Russia published in 1886). The Report credits the citation itself to a submission to the Special Committee by The Mayo Indian Band.

The Committee is able to show us this aspect by providing a historical account of the "old relationship" that the epigraph so effectively captures. They begin their version of this with a basic restatement of *Calder*.

> For thousands of years prior to European immigration: North America was inhabited by many different self-governing aboriginal peoples, speaking many languages and having widely differing cultures and economies. The Royal Proclamation of 1763, which formalized British colonial policy for North America, recognized this situation.[81]

This initial relationship is characterized by two familiar features: first, Aboriginal peoples preexisted the arrival of Europeans and were *self-governing*. It is clear that there are no diminishing narratives in play here. By this I mean any legal fictions that could serve to reduce or eliminate the legal rights and capacities of Aboriginal peoples (i.e., they are not described as merely "occupying" the land). The specific term "self-governing" does not actually appear in *Calder*, but it is implied in Justice Judson's use of the phrase "organized in societies."[82] Second, it interprets the *Royal Proclamation of 1763* as recognizing the fact that Aboriginal peoples were self-governing and establishing relationships with them on a nation-to-nation basis. This rejects the reading found in *St. Catherine's Milling*, which interprets it as a document establishing sovereignty over them. It also entails that the treaties are not, as D. C. Scott maintained, merely part of "…the plan of negotiation adopted by the Government in dealing with…usufructuary

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[81] *Ibid,* at 39. It is curious that the Committee adopts the terms of *Calder* here (i.e., "self-governing aboriginal peoples"), but then reverts to its narrower concept of "Indian self-government." It seems to be aware, to at least some degree, of the historical problems that their approach creates as the flawed colonial process of band creation and Indian registration are effectively repeated, but they nonetheless remain committed to it.

[82] *Calder*, *supra* note 5, at 328. Anyone who would object to this line of reasoning would be faced with the impossible task of providing an example of an isolated group of human beings who are organized into a society, but not self-governing. I specify "isolated" as referring to examples of colonized societies simply repeats the problem.

rights."[83] Rather, they are further recognition of the nation-to-nation relationship established in the *Royal Proclamation of 1763.* This also means that they are not *sui generis* in terms of international law (the implications of this will become clearer later on).

With this set of initial conditions in place the Committee moves on to their account of how this initial relationship of mutual consent changes.

> Over the years, however, the initial relationship between Indian people and the British Crown changed. In the evolution of Canada from colonial status to independence, the Indian peoples were largely ignored, except when agreements had to be made with them to obtain more land for settlement. The Indian peoples played no part in negotiating Confederation, or in drafting the *British North America Act of 1867* which, under section 91 (24), assigned legislative authority with respect to "Indians, and Lands reserved for the Indians" to the federal government. The government assumed increasing legislative control over Indian communities, leading to The Indian Act, 1876, which, with minor modifications, remains in effect today. The result, over the years, has been the steady erosion of Indian governmental powers. Under the Indian Act, traditional Indian governments were replaced by band councils that functioned as agents of the federal government, exercising a limited range of delegated powers under federal supervision.[84]

There are two related features that characterize this change in the relationship: first, there is a change from the previous consent based model to a unilateral one. Second, the Federal government grounds this unilateral approach by interpreting s. 91(24) as granting them *power over* Indians and their lands (i.e., it adopts what I have been referring to as the "broad view"), but the meaning of the provision is not self-evident. The fact that the *British North American Act, 1867* confers legislative authority *in relation to* "Indians and, lands reserved for Indians" to Parliament cannot serve as a final or unquestionable

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[83] *Canada, Appeal, supra* note 40, at 835-836.

[84] *Penner Report, supra* note 72, at 39-40.

ground for the "broad view". That is, it does not interpret itself. This combined with the fact that Aboriginal peoples "played no part" in negotiating this provision serves to highlight the unilateral, arbitrary and self-serving nature of this interpretation. This is, again, contrary to Lord Watson's approach in *St. Catherine's Milling*, which views the only limitation on the power of s. 91(24) as stemming from the Provinces' interests in land in s. 109 (viz. he treats it as a *complete code*). By adopting this positivist approach the more lateral structure of the pre-existing relationship is suddenly and completely obscured. Simply put, it uses a judgment as if it were a principle of judgment.[85] As a result, the only possible explanation that this approach leaves open to the courts who are asked to explain or account for the legitimacy of this unilateral relationship is the magical power of the Crown to provide proof by assertion, which, as we well know, is a proof that can only ever be accepted if you never doubt or question it.

If we recast this into the image from the epigraph, we find that the dominant party simply cannot account for how it got onto the others back, it has come to accept this condition as a given (or even as a condition of its possibility), and so it remains fixed in place. The *Emperor's New Clothes* helps us to understand this curious form of blindness that afflicts the dominant party in this picture; the emperor falls for the weavers' trick because he believes that this invisible suit will show the people the truth of his power (viz. the weavers claimed that the fabric was invisible to the unworthy). His gullibility is a product of his condition: he needs to find an answer to the question that the people pose to kings (viz. "who are you to rule?"). It is not simply pride that leads him to the parade;

[85] The phrase is Wittgenstein's. See Ludwig Wittgenstein, *On Certainty*, eds. G.E.M. Anscombe and G.H. von Wright (Blackwell: Oxford, 1974) at §124.

rather, it is his need for some external, objective, and final ground for his unilateral power over them. If the weavers had been able to deliver the new clothes they would have made the emperor immune to further contestation; the visibility/invisibility of the clothes would have become the criteria for determining the rational capacity of the viewer only. It is this same blindness that afflicts the dominant party in the epigraph; he cannot see the problem with his position because of his desire to remain in power. If he was willing, even for a moment, to entertain the possibility that the problem was his position on the other's back then he would have to answer for his position and possibly end up walking on his own two feet; it seems to me that this is precisely what he wishes to avoid. The point of both stories is that the contestability of the asymmetrical relationship between the parties is open for all to see. It is *hiding in plain sight*. All that is needed is a change in perspective. This is what the approach taken by the Committee offers us.[86] It changes our perspective by placing the relationship in its historical context and so is able to account for how this relationship began. Simply put, it makes the illegitimacy of it open for all to see.

In my view it is this more perspicacious perspective (one that they gained by actually listening to Aboriginal peoples and not taking the confines of *St. Catherine's Milling* as the limits of all possible relationships) that convinces the Committee that it was not enough to simply renovate the existing crown machinery, which was, as we have seen, the approach advocated for by the DIA in its *Strengthening Indian Band Government*. Rather, they recommended that the very basis of the relationship had to be changed. This is reflected in the starting point that the Committee adopted for its model

[86] Their approach is, in my view, a version of the 250-year-old constitutional principle that. Borrows and Slattery refer to as *The Aboriginal Constitution*. See John Borrows, *Canada's Colonial Constitution* (Paper delivered at the Faculty of Law, University of British Columbia, 19 January 2016), [unpublished] and Brian Slattery, "The Aboriginal Constitution" (2015) 67 SCLR (2d) 319.

of self-government: it rejected the delegated authority model entirely—which had served as the basis for the Crown's Indian policy for well over 100 years by this point—in favor of one predicated on the inherent nature of what it refers to as "Indian self-government."[87] The Committee's rejection of the DIA's approach was direct and to the point,

> The Committee's assessment is that the DIAND approach would be unacceptable as the basis of a new relationship for a variety of reasons. First, it was described by the Minister, and perceived by the witnesses, as a revision within existing arrangements which have been found to be unsuccessful and limiting; *it is a further extension of 'devolution', which has been rejected. The proposal envisages Indian governments as municipal governments and fails to take account of the origins and rights of Indian First Nations in Canada.* A major objection is that permission to opt in would be a favour granted to bands that the Minister of Indian Affairs, in his discretion, deemed to be sufficiently "advanced". The paternalistic role of the Department would be maintained.[88]

The upshot of this position can be found in the following recommendation:

> The Committee does not support amending the Indian Act as a route to self-government. The antiquated policy basis and structure of the Indian Act make it completely unacceptable as a blueprint for the future.[89]

Given the foundational nature of this shift the next question that we need to address, naturally, concerns the practical steps that the Committee provides for implementing this within the new constitutional framework.

E) <u>The Problem of Implementing the New Relationship</u>

The Committee was well aware of the challenges involved in amending the constitution. The Indian self-government amendment that they were recommending

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[87] I am using the term of the Report itself, which, as I have already noted, explicitly confined itself to the narrower issue of Indian self-government as opposed to the wider field of Aboriginal self-government.

[88] *Penner Report*, *supra* note 72, at 47.

[89] *Ibid.*

would require the approval of the federal government and seven provinces constituting at least half of the population of Canada. Given the fact that this process would likely be protracted, they considered three other courses of action for achieving self-government. They referred to these as: the courts, the bilateral process and legislative action. Their position on the first option was clear,

> Obtaining a judgement in the Supreme Court of Canada is a very lengthy process. The fundamental issue may not be directly addressed. In any event, a single court ruling could not define the full scope of Indian government or even design a new structure accommodating Indian government, although it might provide some impetus to political action. Clearly, it is an option that Indian First Nation governments might pursue, and they are free to do so. But *the Committee regards this procedure as difficult to execute and uncertain in its outcome*.[90]

Their insight here is prescient. The process has proven to be both difficult and uncertain (not to mention costly). It has given rise to a kind of labyrinthine jurisprudence. In each case a certain corner is moved, a wall shifted, but the position of *Calder* remains fixed (viz. the Crown possesses unquestioned sovereignty, legislative power, and underlying title and Aboriginal peoples have inherent rights). No matter how Crown sovereignty is qualified or limited (by suggestive qualifying terms such as *de facto* or *assertion*) the fact is that in all cases the Court has maintained the unilateral power of the Crown to infringe on Aboriginal rights. It has contained the possibility of s. 35 by turning it into a proportionality test via the "broad view" of s. 91(24). This opens up a kind of creeping procedural legitimation of Crown sovereignty; the sheer fact that the Crown's claim to sovereignty, legislative power and underlying title is never in doubt allows a hidden player to ensure the outcome of the game. This serves to provide the appearance of movement towards a new relationship while

[90] *Ibid,* at 45 (emphasis added).

maintaining the same old municipal limits of self-government. In other words, the "broad view" of s. 91(24) acts as the hinge proposition around which the entire system of indirect rule moves. While the outcomes of this line can only be seen from our current position the limitations of this line of action were clearly evident to the Committee in 1983. It was these limitations that led them to focus on the combination of the bilateral process and legislative action.

Their suggestion on these fronts were—and to my view still are—largely consistent with the 250-year-old tradition of Aboriginal constitutionalism. The starting point of this process is (as the Aboriginal witnesses pointed out to the Committee) found in the proposition that "an Indian order of government already exists in Canada."[91] It is manifest in the bilateral nature of the treaty making process and the *Royal Proclamation of 1763*. As they put it,

> The treaty-making process also provided a direct government-to-government link between the Crown and Indian peoples. This, in the Indian view, was confirmed by the setting aside of "Indians, and Lands reserved for the Indians" in a unique manner when the *British North America Act* was passed in 1867. They therefore viewed the passage of successive *Indian Acts* as a misinterpretation of federal authority. Instead of continuing to enter into agreements with Indian nations, the federal government legislated over them and imposed restrictions on them.[92]

This misinterpretation serves to highlight the role that s. 91(24) has played from confederation on. As they state further down the same page,

> Parliament has not attempted to exercise the full range of its powers under section 91(24), which sets apart "Indians, and Lands reserved for the Indians". Consequently, the limits of these powers have not been established. In the past, Parliament has, through the *Indian Act*, legislated in a manner that has regarded Indian communities as less than municipalities. On the few occasions where it has legislated in a more

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[91] *Ibid.*

[92] *Ibid,* at 46.

> wide-ranging manner-for example, with respect to liquor, which is a provincial responsibility when not related to Indians the courts have upheld the exercise of its powers.[93]

This is clear and plain articulation of what I have referred to as the "broad view". The key here is that because of the starting point that the Committee takes they are able to see that this is not the only possible interpretation of this provision. In fact, it is an interpretation that requires the historical blinders of legal formalism (which were provided by Lord Watson in *St. Catherine's Milling*) in order to maintain itself. Once this is put in question from a historically informed perspective (as Aboriginal peoples have continually presented and represented to the Crown) its status as *an interpretation* is exposed. This opens up the possibility of reading, and indeed, using s, 91(24) otherwise. The Committee correctly saw that this reading is bolstered by the addition of ss. 25 and 35. This is what they refer to as the "new context" for legislation.[94] It leads them to recommend "…that Parliament should move to occupy the field of legislation in relation to "Indians, and Lands reserved for the Indians" and then vacate these areas of jurisdiction to recognized Indian governments."[95] The fact that this suggestion still strikes us as radical is, to my mind, a testament to just how fixed the picture of *St. Catherine's Milling* remains. The recommendation itself is by no means without precedent; it is a recognition of the fact that s. 91(24) can be interpreted in light of the 250-year-old tradition of Aboriginal constitutionalism. The courts are not entirely unaware of this (as Laskin's "enclave theory" clearly shows), but they have continued to uphold the "broad view" and its regime of administrative despotism. What the Committee is recommending

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[93] *Ibid.*

[94] *Ibid,* at 49.

[95] *Ibid,* at 59.

here would unhinge the crown machinery. After all, it cannot function without unquestionable and unilateral sovereignty and underlying title. Now that we can see how the Committee would ground the "new relationship" within the existing constitutional architecture we can move onto the more specific details of implementation.

The basic architecture of implementation consisted of three legislative measures. The last of these measures was for Parliament to "occupy and vacate" s. 91(24). The first was to be the creation of a "Indian First Nations Recognition Act." The purpose of this act was to transition away from the devolved model of *Indian Act* bands and a Federally administered registration system to the inherent model of Indian First Nation governments. This task in and of itself was, as the Committee recognized, a deeply complicated one. The administrative policy of assimilation, with its basic transitional units of Indian and band, had been designed to dissolve or de-constitute all of the pre-existing models of governance and leadership. But, this process of conversion had stalled. What had been designed to be transitional administrative units had remained in place and so the Indian and the band were the only political units recognized by the settler state. This meant that the relationship between membership and political structure was fractured along innumerable lines. The divisions between status/non-status and traditional/band crossed crisscrossed and overlapped in such a way that the process of reconstituting legitimate political entities would be, in many respects, the primary challenge. As the Committee put it,

> Band membership has for many years been determined not by Indian people but by federal standards, which have excluded some people who properly belong. In the process of constituting a First Nation, the true community identified with the band must be consulted. Although the primary unit would therefore be based on current band groupings, restrictive *Indian Act* definitions of membership would be inappropriate in

> the context of self-government. The number of people involved in the process would be greater than the present membership through the inclusion of some people now excluded from membership by the operation of the Act.[96]

The process that they envisioned to resolve this problem was both flexible and narrow. The narrowness of the process was a product of its starting position. The fact that they adopted the *Indian Act* band as the only eligible political unit left a number of issues unresolved (in particular the question of the Métis, non-status Indians and Inuit). They recommended membership processes that would attempt to address this by virtue of their flexibility. The following five step procedure was put forward as a possible model:

1. The people in each community would begin with the *Indian Act* list, plus those who might be reinstated by any changes in legislation.

2. These people would get together to ask who might be missing and to include those they wished to include.

3. These people would agree on membership criteria and thus decide who else might be included or excluded. The criteria should be in accordance with the standards in international covenants concerned with human rights.

4. These same people would agree on appeal procedures and mechanisms.

5. The whole group would then determine their form of government and apply for recognition.[97]

This approach could address at least some of the problems by opening up the lines of membership and political form. This would address, at least in part, the non-status question and open up the possibility of larger political units (i.e. several bands could potentially combine themselves into a unitary or federal structure). In order to attempt to cover those not included in this process they recommended that special federal support

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[96] *Ibid,* at 54.

[97] *Ibid,* at 55.

programs be generated to address their needs. The result of this would be a "two-tier" system of First Nations citizens and "free-floating Indians" who remain under a new federal administrative system.[98] The Committee has little to say about what the latter would look like or how it would do justice to the inherent rights of the "free-floating" Indians. They focus their attention on the procedures required for recognizing the new First Nation governments.

The "Indian First Nations Recognition Act" was to be a product of bilateral cooperation. It had two primary roles:

a) specify minimum criteria, such as popular support, accountability and a membership code, and establish a process for verifying that Indian bands wishing to be recognized as self-governing had met these criteria; and
b) elaborate a procedure under which recognition would be accorded.[99]

This required a second legislative stage to authorize the federal government to enter into these agreements. This involved the creation of a new Ministry of State for Indian First Nations Relations, which would be linked directly to the Privy Council Office. This would then help to form a bilateral panel that would receive and adjudicate the recognition applications. The Committee provided the follow three criteria as examples that the panel could use:

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[98] *Giokas, supra* note 45, at 93.

[99] *Penner Report, supra* note 72, at 58

a) demonstrated support for the new governmental structure by a significant majority of all the people involved in a way that left no doubt as to their desires;

b) some system of accountability by the government to the people concerned; and

c) a membership code, and procedures for decision-making and appeals, in accordance with international covenants.[100]

Once the criteria were met the First Nation would determine the scope of jurisdiction that it wanted to exercise. This was highly flexible and could be changed over time. The limits of this possible scope were similar to that of a Province. As the Committee stated,

> A First Nation government should have authority to legislate in such areas as social and cultural development, including education and family relations, land and resource use, revenue-raising, economic and commercial development, and justice and law enforcement, among others.[101]

Once the desired scope of initial jurisdiction was settled the panel would submit their recommendations to the governor in council, which would pass an order to the Governor General to affirm the recognition of the individual First Nation.[102] The Committee viewed the inclusion of the Governor General as necessary to "symbolize the unbroken link with the Crown and confirm that recognition would continue from government to government."[103]

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[100] *Ibid*, at 57.

[101] *Ibid*, at 64.

[102] *Ibid*, at 61.

[103] *Ibid.*

The result of this process could be seen as the realization of the kind of fragmentation that D. C. Scott used to fortify his rejection of the Six Nations argument that the treaties were government-to-government agreements. His words are worth reconsidering at length.

> Naturally and obviously it was not the intention in this or preceding "treaties" to recognize or infer the existence of any independent or sovereign status of the Indians concerned. Such a principle, if admitted, would apply as much, if not more, to these other groups of Indians as to the Six Nations, and the entire Dominion would be dotted with independent, or quasi-independent Indian States "allied with but not subject to the British Crown" It is submitted that such a condition would be untenable and inconceivable.[104]

The Committee did not follow this line of reasoning. They attended to the witnesses who offered them another perspective on this possibility.

> Many witnesses emphasized that, in seeking to establish Indian First Nation governments, they did not wish to create divisions that would weaken Canada. Their object is to change the relationship of Indian First Nations to other governments, not to fragment the country. In their opinion, the exercise of political self-determination is a necessary step toward national unity. Canada would be strengthened, not weakened as a result.[105]

This led them to reject Scott's all-or-nothing conception of the state as being little more than the "barricades of the past."[106] Their starting point was not the abstract categories of international law with its bird's eye view of uniform sovereign states, but the history of a particular case. This enabled them to move past the self-imposed limits that inform the "broad view" of s. 91(24) and animate the crown machinery. In place of the *St. Catherine's Milling* picture of federalism and its paper thin foundations (viz. the

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[104] *Canada, Appeal, supra* note 40, at 836.

[105] *Penner Report, supra* note 72, at 41-42.

[106] *Ibid,* at 60.

combination of the Crown's proof by assertion and the judiciary's interpretation without question, which can only be held in place by what I have referred to as bluebeard logic) they offer a vision of a diversity of governmental styles. As they state,

> These styles will reflect historical and traditional values, location, size, culture, economy, and a host of other factors. This diversity is to be respected. It can further be expected that these developments will proceed at different paces, and no time limits or pressures should be imposed. Indian governments will benefit from each other's experience. Needs will also change as conditions evolve and as structures appropriate for one stage cease to be appropriate for another.[107]

This flexible model would not be without difficulty or conflict. The Committee is well aware of the potential for inter-governmental conflicts and, in fact, recommends that a specialized tribunal be constituted to arbitrate such disputes. While the picture they offer is by no means complete it does offer a path towards a reconciliation that would be based on the principles of mutual recognition, consent and continuity. It demonstrated that recognizing Aboriginal peoples as "equal partners in confederation" was (*contra* Scott) neither "untenable" nor "inconceivable."[108] The Government's response to their report serves to demonstrate the persistence of the "broad view."

The Government's Response in Bill C-52

The first part of the federal government's response came in March of 1984. It consisted of a brief 7-page document that was presented by John C. Munro (then the Minister of Indian Affairs and Northern Development). While it avoided directly rejecting the substance of the *Penner Report* it shifted the emphasis away from the inherent right of self-government. It maintained that the Aboriginal question "…can only

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[107] *Ibid*, at 56.

[108] These are the words of Royal Commission of 1664, *supra* note 43.

be resolved through agreement with Provincial Governments in the context of ongoing constitutional discussions involving First Ministers' conferences."[109] The implications of this require statement some unpacking. First, by maintaining that the provinces must be involved the Minister is holding to the *St. Catherine's Milling* picture of federalism. The heart of the conflict is set as being between s. 91(24) and s. 109. These provisions are presented as the two-halves of the problem; they give the federal and the provincial governments their respective positions and voices. In contrast Indians and their claims to their lands are residual; a "mere burden" that can be worked out without their actual input. All of this rests on the unstated presumption that grounds this picture of federalism; namely, that the Crown is able to acquire sovereignty, legislative power and underlying title simply by asserting that it has it. This "broad view" of s. 91(24) allows Lord Watson to use it as the hinge proposition that repositions the *Royal Proclamation of 1763* and the treaties as being nothing more than confirmations of sovereign power. Because of this Aboriginal peoples do not have a seat at the table of constitutional powers. Rather, the federal government occupies their seat. It is their guardian, their trustee, but unlike any other kind of trustee they are also vested with the unilateral authority to extinguish the trust. In this picture the only barrier to this all-encompassing power is the province's interests in land under s. 109. Lord Watson resolves this in favor of the provinces.[110] If the government had adopted the view of s. 91(24) that the Special Committee had offered them then the provinces would not need to be involved. Their

[109] *Response of the Government to the Report of the Special Committee on Indian Self-Government* (Ottawa: Indian and Northern Affairs Canada, 1984) at 2.

[110] I believe that it is safe to assume that this constituted an attempt to maintain a balance of powers that weakens the federal government so as to maintain the position of the Dominion in relation to the British Crown.

reading of the provision starts with the *Royal Proclamation of 1763* and the treaties. It reads these as constitutional documents that create a lateral government-to-government relationship. This is then read as the context that gives the vague phrase "Indians and lands reserved for Indians" its meaning. Their lands are not simply vested in the provinces by virtue of s. 109. This position is further bolstered by the (then) new provisions of ss. 35 and 25. The Special Committee characterized this as a "new relationship," but it is actually a renewal. It bases itself on the 250-year-old tradition of Aboriginal constitutionalism. The Minister simply rejects this view. There is no explanation as to why the provinces need to be involved. It is simply taken as the reality of the situation (i.e., the picture of *St. Catherine's Milling* is not seen as a picture; it is like a pair of spectacles that cannot be taken off).

The Special Committee 's bilateral legislative approach is thus rejected. The resolution is set in the future constitutional conferences promised by s. 37. But, the language of the Minister's response suggests that the horizon of this future is closed in. The new relationship that the Special Committee calls for is re-characterized as one that would allow "Indian First Nations and their governments…to set their own course within Canada to the maximum extent possible."[111] The emphasis here is on the term "within" and "maximum extent possible." It suggests the existence of limits that are in some way known in advance. This shifts the focus from reinterpreting the balance of powers to jurisdictional limits. It does so, to my view, because it takes those limits as fixed. It continues on this line by focusing on the material needs of Indians (it refers to the need to

[111] *Response, supra* note 109, at 1.

break the "dependency cycle") and the importance of preserving their culture.[112] The right of self-government is drawn into the historical background, which suggests that this right is no longer "existing" for the purposes of s. 35. Naturally, it offers no explanation as to how this right could be confined to the bounds of the past. All of this translates into a response that sought to *finesse* the question of self-government. The hard constitutional question is deferred to the ongoing process of constitutional conferences. In the meantime, the Minister suggests that the government will focus its attention on making improvements to existing legislation. In other words, it would focus on simply adjusting the *status quo* of the crown machinery.

This is clearly evidenced in the legislation the government tabled following their response. In Bill C-52 the government set out a lengthy (there are 65 sections) and detailed legislative program to address the issue of self-government.[113] Giokas provides us with a clear and insightful analysis of its substance,

> It appears on a close reading to delegate powers instead of recognizing them and continued to permit a considerable degree of oversight including disallowance powers as under the current Indian Act. In addition, the source of Indian Nation power was never stated. In retrospect, it seems clear that despite its recognition language and format, Bill C-52 attempted to skirt the line between true recognition and delegated authority in a way that left many unconvinced that it was true recognition legislation.[114]

The exact status of the Indian Nation governments (the language in the Bill avoids the use of the term "First Nation") that this Bill would have created is unclear. The composition of the "recognition panel" weighted towards federal control in terms of both

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[112] *Ibid.*; *Giokas, supra* note 45, at 103-104.

[113] Bill C-52 was entitled "*An Act relating to self-government for Indian Nations*" and was introduced in the House of Commons on June 27, 1984 by the Minister of Indian Affairs. See *Giokas, supra* note 45, at 103.

[114] *Giokas, supra* note 45, at 105.

its composition and the criteria it would employ. The governor in council could set the "criteria relating to the possession of a land base and evidence of viability in terms of population and economic potential."[115] This evaluative power was reminiscent of the one first introduced in the *Indian Advancement Act* of 1884.[116] It allows the federal government to hold back the delegation of additional powers of local governance until a band could demonstrate that it was at an "advanced stage of development." The real spirit of this power is captured in the title of the 1884 legislation, viz. "…*training them for the exercise of municipal powers."* Once a band was deemed eligible and passed through this process its position within the division of powers was unclear. It was still confined to local matters and these limited powers could be removed via the federal power of disallowance. The *Indian Act* would still apply (the Indian Nations would only be exempted from ss. 32, 33—which covered the sale and barter of produce in the prairie provinces—and 88) to them. It would still determine their membership and their lands would still be held in trust by the federal government. Simply put, everything would seem to change but it would really remain the same. It was, by my view, the program for a magic show of sorts. The legislation would set up a stage and a panel of magicians. A band would appear, they would drape a cloth over it, pronounce the appointed words and then suddenly withdraw the cloth to reveal an Indian Nation. The idea was that this would satisfy the desire for self-government. But, like any trick of indirect rule, its success hinges on maintaining the appearance of difference. The "empty title and modest stipend" must be taken as self-government. This is why this legislation fails; the trick was far too

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[115] Cited in *Giokas, supra* note 45, at 106.

[116] *An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers*, S.C. 1884, s. 28.

obvious. There was no *real* difference between a band and an Indian Nation. Sensing this the government allows the legislation to die on the order paper.

The moves that follow from this decision are familiar ones. The *Indian Act* is revised in 1985 and *Bill C-31* replaces the previous system of registration. It allows for bands to create their own membership lists by separating status from band membership. This could be read as a partial realization of the *Penner Report* recommendation to separate the registrar's general list from the membership of each First Nation Government. But, this appearance is just that, an appearance. A custom band may well control its membership, but its funding is determined on the basis of the number of status Indians in its membership. The registration system imposed is designed to reduce the number of status Indians over time. As long as individuals continue to marry out the number of individuals eligible for Indian status declines. It is a waiting game based on probabilities. The legislative machinery that is currently in place is, as Giokas rightly notes, the same as "…the *Indian Act* of 1876 and its precursors in most important respects."[117] It paradoxically continues both the guardianship and assimilative policies of the colonial period. It thus constitutes a system of "protective assimilation."[118] The sheer obviousness of this brings us to ask how this could be taken as a system of indirect rule. After all, indirect rule hinges on the magic trick of making an "empty title and modest stipend" appear to be a legitimate system of self-government. My response to this is that it is in the continual strategy of deferral. The current administrative system is always presented as being temporary. This is by no means a new strategy. It is a foundational

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[117] *Giokas, supra* note 45, at 2.

[118] *Ibid.*

one. But, its initial temporary status was different. It began by openly promising assimilation. Now it promises self-government. The machinery remains the same, but how it is used is different. There is a kind of *de facto* delegation as the Minister allows band councils greater degrees of control, but the various levers and buttons of unilateral oversight remain. The possibility of the future of self-government is always one that is under construction. At first it was pushed to the constitutional conferences, but this ends with the failure of the Charlottetown Accord in 1992. This left two avenues open: for the Aboriginal peoples who were not covered by treaties there remained the modern land claim process that began with *James Bay and Northern Québec Agreement* of 1975. As we have already seen this process has not resulted in anything other than a new form of special municipality. This leaves the final avenue. The question self-government has been left to the procedure that the *Penner Report* aptly characterized as being "difficult to execute and uncertain in its outcome" (viz. the courts).[119]

F) The Era of Indirect Rule and the Mechanism of Deferral

At this point I am in the position to answer the question I posed above. What hides the truth of the municipal nature of the relationship between the Crown and Aboriginal peoples? It seems clear that all of the courses currently on the table are captured by this framework of "devolved powers". So how is it that the crown machinery can maintain the illusion of legitimacy? The answer, to my mind, is in the actions of the Court. The Court has led us into a system of indirect rule. It provides the illusion of a resolution on the horizon. It is always the next case that promises reconciliation. It is this

[119] *Penner Report*, *supra* note 72, at 45.

promise that hides what is otherwise so plainly obvious; the *Indian Act* is not the waiting room for reconciliation, it is simply the same old administrative despotism. The unjustifiable warrant of the crown's machinery is concealed by the Court's elaborate stagecraft. The everyday reality of Aboriginal peoples remains the same. The framework of its justification has changed. It is always a *reconciliation to come*, but what this leaves us with for now is simply *reconciliation to* the unilateral power of the Crown. This does not mean that the solution is some kind of complete or final reconciliation (the voyage of the *Black Canoe* has no end). But, it is also not one that continues to justify the *Indian Act* and its "vast administrative despotism" as temporary necessities. If the Court wishes to continue to speak of the Aboriginal perceptive and reconciliation, then it must renounce the "broad view" of s. 91(24). This hidden player has determined the outcome of the game for far too long. If it refuses and continues blindly forward peddling its *reconciliation without recollection*, then these words should be seen to be hollow. The possibility to change the rules of the game is still there as it has always been, hiding in plain sight.

It is, to my mind, hidden in the way the Court has thus far reconciled s. 91(24) and s. 35 (i.e., in the existing framework of reconciliation). It could have used different spells. It could have simply blinded itself to the historical warrant of the Crown (as did Australia and the United States). But, it has kept the question of legitimacy open. This presents us with two challenges. First, if it continues on its current course then this open door offers nothing more than the illusion of a *reconciliation to come*, which serves to conceal the unjustifiable nature of the Crown's legitimacy. But, this is not the only course of action available. The Court has signaled its willingness to question the legitimacy of

the Crown's claim to sovereignty (by qualifying it as being *de facto* or an *assertion*). This, in combination with the recent Federal government's recent announcement concerning UNDRIP, opens up the possibility of another course of action.

Reconciliation and Implementation

This brings us to the second question that we began the chapter with; namely, how are we to approach the question of the implementation of the *United Nations Declaration of the Rights of Indigenous People*? It is unprecedented and so seems to extend before us as a vast and unexplored territory. It is tempting to cast our gaze to the horizon and try to anticipate the path ahead, but attempting to survey the future is a risky venture. It is, more often than not, the province of prophets and fortune tellers. Their maps of the future are about as useful as the Bellman's map in the *Hunting of the Snark*, which is to say, they are as helpful as a blank sheet of paper can be. This is what I take to be Hegel's point from the Preface to the *Philosophy of Right* when he states (with his characteristic—if not somewhat arcane—flair) that, "…the owl of Minerva begins its flight only on the onset of dusk."[120] If we are actually trying to understand where we are then we cannot begin by consulting blank maps that can only ever hope to "*issue instructions* on how the world ought to be."[121] It is not that such maps have no claim to existence, but rather their claims are nothing more than *opinions*. And as Hegel reminds us, opinion is well suited to this task as it is "…a pliant medium in which the imagination can construct anything it pleases."[122] So if the way forward has so little to offer us how

[120] G.W.F. Hegel, *Elements of the Philosophy of Right*. Edited by Allen W. Wood and Translated by H.B. Nisbet. (New York: Cambridge University Press, 2004) at 23 (hereinafter Hegel, *Philosophy of Right*)

[121] *Ibid*, at 22.

[122] *Ibid.*

are we going to get our bearings? Here, yet again, Justice Binnie's words from *Beckman v. Little Salmon/Carmacks First Nation* can provide us with some guidance.

> …the future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.[123]

This approach captures what has become of reconciliation in the courts; they have crafted it into a blank map. The government has taken it as their framework and now seems posed to continue the 140-year-old hunt for the snark. How can we bring reconciliation back from this peculiar holiday? My response is that we begin by refusing the temptation to look towards blank maps of the future with their endless promises of a *reconciliation to come* (whose reality in the present is always confined to being simply a *reconciliation to* the status quo). In order to bring reconciliation back to its everyday use we need to start looking behind us; we need a *reconciliation with recollection*. This means that the question of implementation cannot be limited to the abstract and formal application of a domestic constitutional 'framework' to an international declaration. This exercise simply uses one 'framework' to determine the measure of the other; it is as pointless as putting something into its own shape and seeing that it fits.[124]If reconciliation is going to come back from holiday the question of implementation has to begin from the context of the particular case. This means that it must begin by acknowledging that the relationship between the struggle for Aboriginal self-government and international law is by no means a new one. Nor is implementation merely a domestic issue. It is, as Henderson rightly states, "part of the unfinished business of decolonization."[125]

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[123] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at para. 10

[124] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §216.

[125] James Sa'ke'j Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition.* (Saskatoon: Purich Publishing, 2008) at 34 (hereinafter Henderson, *Indigenous Diplomacy*).

In order to address the question of implementation I will divide my inquiry into the following subsections. First, I will show how the paradoxical position of Aboriginal rights (i.e. that they are neither reducible to minority rights nor claims for international statehood) is the product of a model of that state that is inseparable from its 19th century context.[126] This helps us to see that the line that seems to strictly determine the possible

[126] A brief point of clarification is required here, what I mean by stating that Aboriginal rights are "neither reducible to minority rights nor claims for international statehood" is that they do not fit within these conceptual confines directly or neatly. Naturally, Aboriginal peoples have taken a diversity of positions on how they see their rights. Some do argue for international statehood and lay claim to a right of succession. This has demonstrably not been the predominant approach overall. My own concerns with adopting this particular sovereigntist tactic are drawn out clearly by Tully: "Some Quebec and Aboriginal sovereigntists ignore the members within their borders who disagree with their projects and reduce the other members of society to a homogenous 'other'. By this tactic, they undermine the legitimacy of their own claim to recognition, for they misrecognize, or fail to recognize at all, the claim of others affected by their claim, precisely the injustice they are protesting in their own case. Such performative contradictions violate the first principle of recognition politics, the principle of reciprocity, mutual recognition, mutual acknowledgment or *audi alteram partem* (always listen to the other side). That is, every member affected by the proposed change should be acknowledged and have a say in the discussions and negotiations." See James Tully, *Public Philosophy in a New Key Volume I: Democracy and Civic Freedom*. (Cambridge University Press: Cambridge, 2008) at 201 (hereinafter Tully, *Public Philosophy I*). I feel that J.G.A. Pocock offers a similar (if somewhat less clearly expressed) version of this concern when he states that "History, the breakdown of dreamtime, may be the precondition of judgment, and a dreamtime which comes to court for judgment may destroy itself, win or lose." By 'dreamtime' he is, by my reading, referring to Aboriginal claims that are being grounded in mythic terms and are used as irrefutable grounds for a kind of absolute sovereignty. By entering the courts and expressing them these positions must become historical (i.e. open to interpretation and contestation). See J.G.A. Pocock, *The Discovery of Island: Essays in British History* (Cambridge: Cambridge University Press, 2005) at 249. This does not mean that Aboriginal peoples do not have the right to refuse to engage in the processes of reconciliation being offered in the settler states. If reconciliation is to have any meaning there must be an ability to refuse it. The concern here is what this refusal means. There is a strong presumption that the only possible options for political and legal association are for Aboriginal peoples to be either a minority within the settler state or a secessionist movement that aims at establishing a separate Westphalian state. This covers over the diverse legal and political traditions of Aboriginal peoples; there are a diversity of other options that could be explored under the broad contours of federalism. My concern (and the concern that I see in both Tully and Pocock) is that some may choose to adopt the Westphalian model of the state as their own and take up the very unilateral model of sovereignty (with its basis in the same mixture of mythology, legal fiction and bluebeard logic). If this path is taken then they have adopted a model of sovereignty that violates, as Tully puts it, "the first principle of recognition politics, the principle of reciprocity, mutual recognition, mutual acknowledgment or *audi alteram partem* (always listen to the other side)." My hope is to simply highlight two points: 1) that those who refuse to engage and seek some alternative course need not be constrained by the false either/or of being a minority within a settler state or a separate state, and 2) whatever course of action is taken it must face the question of legitimacy (outlined by Tully above). In regard to the minority approach, this has been the dominant approach of the Crown (i.e. that Aboriginal peoples are British subjects or Canadian citizens by virtue of the mere assertion of sovereignty) and so it has the same legitimacy deficit that the Crown's claims to sovereignty, legislative power and underlying title have. Will Kymlicka has provided a much different sense of the term 'minority' in this context. It is one that challenges the simplistic all-or-nothing version of the concept that conflicts with the equality principle of democratic citizenship. My claim that Aboriginal rights cannot be reduced to minority rights refers to the former narrow concept of a minority and not Kymlicka's broadened version. He develops

outcomes of Aboriginal self-determination cannot sustain its claim to abstract generality; it is the product of a particular perspective and so can be changed. In other words, the presumptions that underlie Justice Binnie's forward-facing canoe and his reinterpretation of the Two-Row Wampum in *Mitchell* are not some neural set of laws, but a particular (and therefore contestable) narrative (i.e., the ship of state).[127] This allows us to reframe the problem and see that the question of Aboriginal self-determination can be used to rethink the limitations of this model of the state and the international order. Simply put, the current constitutional framework should not be seen as the shape that UNDRIP must fit into. Rather, UNDRIP should be used to put the hidden presumptions that ground the current constitutional framework into question so that we can actually get to the *unfinished business of decolonization*. Second, I will provide a sketch of the various points of convergence and overlap that connect the struggle for Aboriginal self-government in Canada and the international project of decolonization beginning in the 1920s. This is a rough and very limited sketch of a vast territory.[128] Its purpose is to show that the struggle for Aboriginal self-government has never been simply a domestic matter. This shows that the stakes of the Indigenous question are not limited to Canadian reconciliation; rather, it extends to the very future of popular sovereignty as the legitimating principle for political organization. In order to see these stakes, I argue that

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this through a number of works, but the primary point of reference is his *Multicultural Citizenship: a liberal theory of minority rights*. (Oxford: Oxford University Press, 1995).

[127] *Mitchell v. M.N.R.*, [2001] 1 SCR 911, 2001 SCC 33 at para. 130.

[128] A more adequate approach to it would be to adopt a comparative and international focus. This would begin by exploring the question of Indigenous self-determination in multiple settler colonial contexts and how these sets of laws, policies, practices and institutions (this family of crown machines) related both to one another and the development of international legal intuitions in the 20th century. It is, in my opinion, not simply chance that the Mandate System of the *League of Nations* so strongly resembles the crown machinery that we find preceding it in Dominions such as Canada. Given the focus of my current investigation this broader project can only be seen as being a possible line of future inquiry.

we must reject the simplistic vision of historicism that serves to ground the myth of the unitary state and its unified and singular people. This means coming to the grips with the fact that the struggle for Aboriginal rights and title *was never merely a domestic matter*. The prospect of the implementation of UNDRIP is thus not akin to the sudden arrival of a stranger; rather, it is part of the 250-year-old tradition of Aboriginal constitutionalism and diplomacy. Third, and finally, I will provide an outline of how an approach informed by what I have termed *reconciliation with recollection* would work in practice.

A) Unsettling the Ship of State

There is a tendency to see the question of Aboriginal self-government in Canada as a strictly domestic issue. This is by no means strange. After all, Aboriginal law is a part of the common law. It consists of various bits and pieces of legislative machinery and constitutional sources. At times the courts will incorporate legal decisions from other jurisdictions, but this is part of the ordinary practice of the common law. But, it is an *unsettled* one. It does not easily fit into the lines that are used to determine this difference between international and domestic law. This is clearly exemplified in the contested status of treaties in Canada. From the perceptive of the Crown they are little more than part of "…the plan of negotiation adopted by the Government in dealing with…usufructuary rights."[129] Whereas Aboriginal peoples have continually maintained that they are lateral *nation-to-nation* agreements. This distinction between these accounts cuts to the very foundation of the relationship: 1) holds that these treaties and s. 91(24) legitimate a *power over* relationship in which Aboriginal rights are merely contractual terms that are subject to unilateral extinguishment (prior to 1982) or infringement; and 2)

[129] *Canada, Appeal, supra* note 40, at 835-836.

holds that they create a lateral *power with* relationship that has been unilaterally breached for the last 140 years. In the terms of international law, the precise nature of the problem is difficult to categorize. This is, as Tully rightly notes, a product of the form of colonization that was employed.

> In external colonization, colonies and the imperial society coexist in different territories. The colonies can free themselves and form geographically independent societies with exclusive jurisdiction over their respective territories (as Canada, United States, Australia and New Zealand have done in relation to the former British Empire). With internal colonization, this is not possible. The problematic, unresolved contradiction and constant provocation at the foundation of internal colonization, therefore, is that the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that the Indigenous peoples refuse to surrender.[130]

As a result, the conflict between settler states and Indigenous peoples is caught between the conceptual lines that define the Westphalian system of states. It seems that it must either be a domestic conflict between a state and a minority or an international conflict between a colonial power and a separate nation (or group of nations). Both of these perspectives distort the reality of the conflict. The first because of its complete inability to provide a legitimate account for how Aboriginal peoples became a minority (i.e., there is no evidence of the kind of mutual consent or military conquest that could serve to legitimate the unilateral *power over* relationship). The second because Aboriginal peoples cannot be simply and uniformly defined as secessionist movements. This has left Aboriginal peoples caught in, what Roger Merino helpfully terms, the "paradox of inclusion-exclusion."[131] As he puts it,

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[130] Tully, *Public Philosophy I*, *supra* note 126, at 262.

[131] Roger Merino, "Law and Politics of Indigenous Self-Determination: The Meaning of the Right of Prior Consultation" [unpublished] at 2.

> After colonization the political and economic elites constructed states under European models according to which the state was the legal and political expression of a homogeneous social collective (a 'nation'). Therefore, Indigenous Peoples have to be either included within these new nation-states (denying their different social, political and economic arrangements) or excluded from them (which meant in some contexts the legal and material elimination of these peoples). Thus, in the new state model 'Indigenous Nations' were not accepted.[132]

The persistence of Indigenous resistance to both the logic of assimilation and the path of succession leaves the basic conceptual machinery of international law stuck. It seems that either Indigenous peoples must choose one of two paths; first, they can concede to being cultural minorities and thereby avail themselves to the international human rights regime. This requires that they renounce their particular claims to their lands and accept the unilateral power without legitimation. Second, they can maintain that they are a separate nation and struggle for international recognition. This is a *false dilemma* akin to the robber's 'choice' of "your money or your life"; the real issue is not which option is selected but the illegitimacy of the use of force to impose it.

This false dilemma is a historical product of the 19th century. Its foundations can be seen in the Crown's claim that Aboriginal peoples are strictly a domestic concern. In order for this line (or any of the many versions of it) to hold true there needs to be some account of why self-governing Aboriginal peoples are treated as if they were a cultural minority with a historical claim to some *lesser-than* set of property rights. In the 19th century the explanation for this was provided by a variety of civilizing discourses and the legal fictions associated with them (viz. *terra nullius*, discovery, divine right, etc.). This

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[132] *Ibid.*

legitimating framework was useful because it could be unilaterally imposed. There was no need to explain them. As J. S. Mill so clearly put it,

> Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.[133]

The notion of historical stages provided the ground for determining the boundaries of applicability for the concept of *liberty*. Simply put, the accepted model of legitimation did not require mutual consent in all cases. This produced a model of the nation-state whose boundaries were taken as being the line that separated liberty from despotism. The line between the community of nations who had access to the concept of liberty and the barbarians who did not was maintained by a unilateral use of the concept of recognition.

This led to a rather simplistic model of the state, which conceived of it as the legal and political expression of a singular people or nation. The unity of the people was their access to the concept of liberty, but this was defined in opposition to the barbarians who did not.[134] The problem was that this boundary was the product of a *unilateral assertion*. All that served to distinguish it from a simple assertion of the right of the strongest (whose rather obvious flaws are drawn out by Hobbes) was the civilized/uncivilized distinction. This distinction provided legitimation to the colonial empires, but it came at a

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[133] J. S. Mill, *On Liberty and Considerations on Representative Government.* Edited by R. B. McCallum (Basil Blackwell: Oxford, 1948) at 9.

[134] I would like to note that the concepts of liberty, freedom and self-determination are both related to one another and essentially contested. This means that while a certain interpretation of these concepts may well claim general acceptance at a given point in time it does not *capture the field* of the concept (so to speak). They remain open to (and are enriched by) other contesting approaches and perspectives. It is a mistake to allow these invaluable concepts to remain the exclusive province of any particular tradition of political thought. For an invaluable expression of this line of reasoning see Quintin Skinner, *Liberty Before Liberalism*. (Cambridge: Cambridge University Press, 1998).

high cost. The distinction was predicated on a claim concerning the nature and structure of historical progress. Those at the highest stage had access to liberty and a duty to educate those at the lower stages (i.e., to civilize them). The form of this education was peculiar to say the least as it maintained that the ends and the means could be categorically distinct. Much like alchemy's claim to convert lead into gold the civilizing thesis held that violent and coercive means could lead to peaceful ends (this line of reasoning connects Hobbes, Kant, Hegel, Mill and Marx among others). There was effectively no real limit on the means used to educate barbarians; as Mill so clearly maintains, even despotism is legitimate. This was practically very useful as it covered any and all forms of domination and coercion, but it was not unconditional. As Skinner rightly notes, "[a]ny principle that helps to legitimize a course of action will therefore be among the enabling conditions of its occurrence."[135] The legitimating power of the civilizing thesis was connected to the improvement of barbarians. But, this raised two related problems. There was no standard or criteria that could serve to measure their progress. There was no possible objective standard that could serve to legitimate the line between liberty and despotism. In other words, legitimacy was connected directly to the nowhere of *utopia* and the impossible historical logic of *theodicy*. In other words, it required a view from nowhere to provide the kind of absolute judgment that could deliver the legitimacy it had promised. This meant that both the colonizer's claim to legitimacy and the barbarian's ability to lay claim to liberty and justice were infinitely deferred. Reaching it was as impossible as obtaining a view from nowhere or reaching the 'end of history.' Without the promise of legitimacy all that remains was a despotism that was

[135] Skinner, *Regarding Method, supra* note 2, at 156.

continually resisted. This resistance began to shift the onus from the barbarians (who had been assigned the impossible task of proving that they were *civilized*) and to the colonial administrators in charge of the "temporary despotisms" of empire.

Those who were deemed to be barbarians (and so not entitled to liberty or "free and equal discussion") did not accept this designation. Nor did they fail to keep records (as Kant had imagined they would). Rather they continually pressed for an explanation that could justify the unilateral power of the colonial governments. This process of resistance and contestation takes a wide number of forms, but it collectively served to shift the available terms of legitimation. The only terms of legitimation left standing were those that applied to free and equal subjects (i.e., mutual recognition and constitutional democracy). This left the colonial empires with little room to respond other than a kind of rearguard position that claimed that their models of political association were all that was possible. That it was either their version of the nation state or Hobbes' *bellum omnium contra omnes*.[136] This position is clearly expressed in D. C. Scott's claim that the treaties between the Crown and Aboriginal peoples cannot be regarded as treaties in the normal sense because the result would be "untenable and inconceivable."[137] Wittgenstein captures the basis of this problem perfectly.

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[136] In effect, the colonial powers used the conditions of conflict and depravation that they created under their temporary despotisms as evidence of a threat that could ground its legitimacy on the promise of security. But security alone is insufficient. It always needs recourse to the horizon of a future reconciliation. Without it there is no means of deferral aside from the use of violence, which, as non-violent praxis clearly shows, simply adds emphasis to the question of legitimacy.

[137] *Canada, Appeal, supra* note 40, at 836. In my mind there is a family resemblance between this position and the one expressed in the claim that 'if god is dead then everything is permitted' (i.e., the fear of moral relativism). Both are predicated on a hidden premise that maintains that the only possible criteria or standard for law, justice and truth are *absolute*. They thus concede that the 'view from nowhere' is impossible, but continue to prop it up by maintaining its impossible criteria. The everyday practices of dialogue, consent and mutual recognition are simply ignored. This is, to my mind, akin to using darkened glasses to stare at the horizon and then shifting your gaze back to the immediate surroundings and believing that there is either

> The idea, as we think of it, is unshakable. You can never get outside it; you must always turn back. There is no outside; outside you cannot breathe.—Where does this idea come from? It is like a pair of glasses on our nose through which we see whatever we look at. It never occurs to us to take them off.[138]

What D. C. Scott's glasses serve to obscure is what Tully helpfully refers to as the 'plurality' of contests over recognition. As he explains,

> This concept refers to two features of recognition politics. (1) that struggles over the mutual recognition of identities are too complex, unpredictable and mutable to admit of definitive solutions, and (2) that the intersubjective activity of striving for and responding to forms of mutual recognition is an intrinsic public good of modern politics that contributes to legitimacy and stability whether or not the form of recognition demanded is achieved.[139]

This further entails that,

> *The primary question is thus not recognition, identity or difference, but freedom*; the freedom of the members of an open society to change the constitutional rules of mutual recognition and association from time to time as their identities change. This is an aspect of the freedom of self-determination of peoples, one of the most important principles of modern politics from the American and French revolutions to the Universal Declaration of Human Rights.[140]

The only way to continue to avoid the implications of this plurality was to avoid the question of legitimation altogether by borrowing the magicians' techniques of sleight of hand to conceal it (and then protecting the secrets of the trade with the "do not enter" warnings of bluebeard logic). The colonial governments found that the unilateral power that the civilization distinction offered could still be used as long as its basis was hidden from sight. This was (and is) the secret of indirect rule. If it is successful, then it allows

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nothing to see or that you are blind. The point being that the source of the problem is not everyday reality, but the criteria that you are using to judge it.

[138] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §103.

[139] Tully, *Public Philosophy I*, *supra* note 126, at 189.

[140] *Ibid.* (emphasis added).

an "empty title and modest stipend" to be passed off as real self-determination, but when its mechanisms are exposed it suddenly collapses like a house of cards. The only justification available after this is that 'might makes right', which is no justification at all.[141] This sets the stage for the process of decolonization that begins in the early 20th century and conflict between the right of self-determination and territorial integrity.

B) Recollection without Historicism

There is a pattern of crisscrossing and overlapping lines that connects the struggle for Aboriginal self-government in Canada with the international process of decolonization. This is evident in the course of events that we have already covered. The Six-Nations presenting their case at the *League of Nations* in the 1920s (a tactic that was also used by the Maori during the same period) and the *Lovelace* case in the 1970s clearly show that International law has always been part of the conversation in Canada.[142] It has been a part of each major shift in Canadian Indian policy. This should be of no surprise. After all, the international legal institutions of the 20th century were designed to restructure the colonial system of the preceding century.[143] From their inception these institutions became avenues for *all colonized peoples* (by this I mean both those subjected to the external and the internal forms of colonization) to contest the legitimacy of the system created by the colonizing powers. This meant that the language and practices of colonial legitimation were being simultaneously contested and re-asserted at

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[141] *Ibid*, at 234.

[142] Henderson, *Indigenous Diplomacy*, *supra* note 125, at 24.

[143] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*. (Cambridge University Press: Cambridge, 2005) and Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press: Cambridge, 2001).

both the *intra* and *inter*national stage. The arguments that Indigenous peoples in Canada have been continually reasserting over the last 250 years (i.e., what Tully refers to as the "prior and coexisting sovereignty argument" and many others—following Barsh and Henderson—have called 'treaty federalism') were applied to the emerging field of international legal discourse.[144] They applied and adapted the historical and contextual resources of the "prior and coexisting sovereignty argument" to the concept of self-determination on the international stage. This means that the self-determination argument was never a separate and discrete line, but rather a related and parallel path.

This can be easily seen as soon as we begin to consider the course of the *intra*-national struggle in Canada in relation to the development of international law. The second wave of international indigenous diplomacy (following the failure of the *League of Nations*) begins with the rise of international human rights in the 1960s.[145] In the mid-1960s the Declaration and (a few years later) the *International Convention on the Elimination of All Forms of Racial Discrimination* provided a definition of "racial discrimination" that served to delegitimize the maintenance of separate rights for different racial groups.[146] While it did not mention Indigenous peoples it was clear that it could be used to terminate their treaty rights and this is precisely what the *White Paper* set out to do in 1969.[147] This (unintentional) shift against the rights of Indigenous peoples was counter balanced by the Human Rights Covenants in 1966 (the *International*

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[144] Tully, *Public Philosophy I*, *supra* note 129, at 278; Russel Lawrence Barsh and James Youndblood Henderson, *The Road: Indian Tribes and Political Liberty*. (Berkeley: University of California Press, 1980); and Asch, *supra* note 43 draws out this point in relationship to the treaties.

[145] Henderson, *Indigenous Diplomacy*, *supra* note 125, at 24

[146] *Ibid*, at 31-32.

[147] *Ibid.*

Covenant on Economic, Social, and Cultural Rights and the *International Covenant on Civil and Political Rights*) as the first article of both asserts that, "All peoples have the right of self determination."[148] This brought a new wave of international diplomatic efforts on the part of Indigenous peoples. It was through their concerted efforts that in 1972 (a year before the Court releases the decision in *Calder*) the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights appointed a Special Rapporteur to study "the problem of discrimination against Indigenous populations."[149] In 1975 the International Court of Justice (ICJ) released its advisory opinion in the *Western Sahara* case.[150] Tully provides a useful summary of their opinion,

> …the ICJ rejected the doctrine of discovery and asserted that the only way a foreign sovereign could acquire a right to enter into territory that is not terra nullius is with the consent of the inhabitants by means of a public agreement. The Court further advised that the structure and form of government and whether a people are said to be at a lower level of civilization are not valid criteria for determining if the inhabitants have rights, such as the right of self-determination. The relevant consideration is if they have social and political organization.[151]

This served as yet another blow to the 19th century doctrines that had legitimated the European colonial projects. Its ramifications were not (and could not be) limited to those who experienced the external form of colonization. It added to the building international momentum on the question of Indigenous self-determination. In 1977 at the International NGO Conference on Discrimination Against Indigenous Populations in the Americas in

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[148] *Ibid*, at 33.

[149] *Ibid*, at 34.

[150] *Western Sahara: Advisory Opinion of 16 October 1975* (The Hague: ICJ Reports, 1975).

[151] Tully, *Public Philosophy I*, *supra* note 126, at 281.

Geneva, Indigenous leaders moved towards developing human rights standards appropriate for this concern. The result of this diplomatic effort was the *Declaration of Principles for the Defense of Indigenous Nations and Peoples of the Western Hemisphere*.[152] This was later followed in 1982 by the formation of a Working Group on Indigenous Populations. The group was established within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission of Human Rights. This was the beginning of the long and arduous process that resulted in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*.[153] While this constitutes a major advance in the Indigenous struggle for self-determination it is also not without its limitations. As Tully notes, "…under the 2007 Declaration, the transcendent priority of existing exclusive state jurisdiction and territorial integrity is reproduced rather than questioned by the way the distinction between internal and external self-determination can be interpreted."[154] The main issue to be decided concerns the conflict between territorial integrity (Article 46) and self-determination (Articles 3 and 4).[155] This conflict is not a new one. It has shaped the course from the intra to the international legal stage.

The rejection of the Indigenous question at the *League of Nations* by the settler states and their colonial powers (via the concept of territorial integrity) was extended into the United Nations. This extension can be seen in the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples, which legitimated the

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[152] Cited in Henderson, *Indigenous Diplomacy*, *supra* note 125, at 34.

[153] *UN Declaration on the Rights of Indigenous Peoples*, 2007, Doc. A/61/L.67 (hereinafter UNDRIP)

[154] Tully, *Public Philosophy I*, *supra* note 126, at 285.

[155] *UNDRIP*, *supra* note 151. This conflict also necessarily concerns the phrase "free, prior and informed consent" as the concept of "consent" presumes self-governance and jurisdiction over territory (Articles 10, 11, 19, 28 and 29).

dismantling of the external colonial projects while excluding the internal ones.[156] The so-called 'saltwater thesis' denied Indigenous peoples the right to self-determination. The basis of its denial was, once again, territorial integrity. It was attractive to the newly independent states that had inherited the deep social and cultural fractures left by the colonial powers and were concerned by the prospect of *intra*-national division.

The basic structure of the territorial integrity argument was by no means new to Aboriginal peoples. It exists within *St. Catherine's Milling*, which positions them (without their consent) as already a part of a state. It magically converts their claims to their lands and the pre-exiting nation-to-nation treaties as being little more than gifts from the Imperial Crown that, following its gradual retreat, become the burdens of the Dominion. Burdens that, as we well know, could be extinguished at will. This magical argument hides its presumptions by presenting itself as a simple application of the rules of formal legal interpretation. This enables Lord Watson to read s. 91(24) as a complete and final grant of unilateral power over Indians and their lands. What it ignores (and must always refuse) is any and all references to the context for this constitutional provision. In order to continue to serve as a foundation it requires that either the British Crown was able to give what it did not have or that it could unilaterally interpret all preexisting agreements in its favor. As Pocock rightly points out this bizarre logic re-interprets treaties as constituting "…a kind of legal self-annihilation or suicide on the part of the indigenous contractor, so that to enter into a treaty was to lose the right to enforce it and consequently all rights under it."[157] At its basis, once its foundations are laid bare, all that

[156] Tully, *Public Philosophy I*, *supra* note 126, at 283.

[157] Pocock, *supra* note 126, at 230.

remains of it is that ‘might makes right’. This absence of a foundation is propped up by bluebeard logic and theatrical displays of violence (e.g. the use of police force to suppress the Six Nations in the 1920s and Canada’s use of the police and military power to respond to the resistance of the Mohawk of Kanesatake in the Oka Crisis in 1990).

The fixed nature of this response can be seen in the similarity between the arguments used by Canada against the Six Nations in the 1920s and those used against the Mi’kmaw Nation in the 1980s. In 1980 the United Nations Human Rights Committee accepted a complaint from the Mi’kmaw Nation that alleged violations to their right of self-determination. Just one month after Canada received notice of the complaint from the Secretary General the *Sûreté du Québec* (provincial police) conducted a raid on the Mi’kmaq Reserve at Listuguj. Canada followed this action with a formal response to the Mi’kmaw. Their position was simple: (1) self-determination “cannot affect the national unity and territorial integrity of Canada” and; (2) the treaties “are merely considered to be nothing more than contracts between a sovereign and a group of its subjects.”[158] Both the pattern of response and its conceptual basis are the same. The conceptual basis of this position appeared again in 1993 at the World Conference on Human Rights in Vienna during the drafting of the *Vienna Declaration and Program of Action*. Canada (along with Indonesia and India) took the position that Indigenous peoples should be described as a ‘people’ and not ‘peoples’. The basis of this absurd position being that the use of the singular term ‘people’ would serve to provide a kind of formalistic bar to the application of human rights doctrines so that these states could continue treating Indigenous peoples

[158] *The Mikmaq Tribal Society v. Canada*, Communication No. 78/1980 at 2-6. Also see Henderson, *Indigenous Diplomacy, supra* note 125, at 38-39.

as a minority.[159] Quite simply, Canada has continually maintained that Aboriginal peoples can only ever be a minority or a secessionist movement. The process of reconciliation has been constructed on this very basis; it is a *reconciliation to* the Crown's unilateral *power over* Aboriginal peoples and their lands via the "broad view" of s. 91(24). Aboriginal peoples have continually responded to this argument by reminding the Crown of their treaties and the nation-to-nation relationship that the *Royal Proclamation of 1763* recognized.

This context helps to frame exactly what is at stake in implementation. The stakes are, quite simply, the future of popular sovereignty as the legitimating principle for political organization. This could well strike some readers as little more than hyperbole, but I would ask those readers to pause and consider the situation carefully. The conflict between the concepts of territorial integrity and self-determination is a foundational one. The question of Indigenous self-determination exposes this clearly. If the Westphalian model of the state is to be retained, then we must refuse to recognize Indigenous peoples as *peoples*. They must be nothing more than a minority within currently existing states. The cost of this position is high; it must withstand the historical reality that Aboriginal peoples *did not consent to this relationship*. This means it must either simply draw a line that forbids inquiry into the historical warrant of sovereignty or judicially reinterpret each and every piece of historical evidence. Both of these options rely on *unilateral* power over Aboriginal peoples and neither of them are convincing. They are attempts to finesse rather than face the challenge of reconciliation. Tully draws out the consequences of this strategy,

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[159] Henderson, *Indigenous Diplomacy*, *supra* note 125, at 53 and 122.

> *Unilateral* defence of the status quo, unilateral constitutional change and unilateral succession are all unjust in the sense that they violate with respect to other members the very principle that is invoked to justify the act. Moreover, such unilateral acts are unstable, for the disregarded members are seldom silenced for long. All the force of existing society or of the secessionist state cannot stabilize effectively the unjust situation or gain the recognition they need from others, as we have seen in many tragic cases.[160]

The implications are unavoidable; either find a way to finesse legitimation (and paint continued resistance as secessionist) or forgo legitimation altogether. In any case what is clear at this point is that the Westphalian model of the state is caught in this dilemma. Simply put, the picture of the ship of state is no longer a sustainable one. Clifford Greetz captures the situation.

> The diffusionist notion that the modern world was made in northern and western Europe and then seeped out like an oil slick to cover the rest of the world has obscured the fact…that rather than converging toward a single pattern those entities called countries were ordering themselves in novel ways, ways that put European conceptions, not all that secure in any case, of what a country is, and what its basis is, under increasing pressure. The genuinely radical implications of the decolonization process are only just now coming to be recognized. For better or for worse, the dynamics of Western nation building are not being replicated. Something else is going on.[161]

It is precisely the "implications of the decolonization" that are at stake in the question of implementation. If the Canadian government continues forward with the status quo and uses its framework to read down the right of self-determination to fit the municipal model of *St. Catherine's Milling* then reconciliation will continue its current holiday. As Tully reminds us,

> 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

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[160] Tully, *Public Philosophy I*, *supra* note 126, at 201.

[161] Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton: Princeton University Press, 2000) at 230-231.

> 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 governments are said to be free and legitimate.[162]

The consequence is that Aboriginal peoples will effectively be left in a constitutional prison fashioned by the Court and when they inquire why the response will be that it is *how power is reconciled with duty*. This is not the only available course of action. It is also possible to use implementation to work through and remove the barricades of the past from the current framework. It is possible for Canada to lead the way towards a post-Westphalian model of the state that takes the open-ended *plurality* of contests over recognition as its starting point. This would replace the unitary model of the ship of state and its endless historical progress towards reconciliation—which, has never been anything more than a theological mechanism of deferral—with the diverse and unmoving *Black Canoe*. In other words, it is possible to use this moment as an opportunity to find a reconciliation *with* Aboriginal peoples and thereby shape future processes of internal self-determination.

C) Implementing Reconciliation-with-Recollection

While it may seem that the challenge of articulating what I have termed '*reconciliation-with-recollection*' (or simply '*reconciliation-with*') will require another long and difficult journey. That we should busy ourselves by stocking up various discursive provisions and to rig ourselves "out for the fight" so to speak (to borrow Carroll's phrasing). But, this is not the nature of the task at hand. There is no need to attempt to leap over our own time or craft (yet another) blank map. Our itinerary is not

[162] Tully, *Public Philosophy I*, *supra* note 126, at 286.

set by a horizon that is yet to come, it is not speculative in nature. Rather, as Wittgenstein maintained, "[w]hat *we* do is to bring back words from their metaphysical to their everyday use."[163] There is, as such, no need to set out towards the horizon. The resources that are required were already there; hidden in plain sight, so to speak. I could say that (following Hegel—or one of his many versions) the task is to recognize the "rose in the cross of the present."[164] The difficulty is in finding a way to help us see what is already there. Not that 'what is there' is somehow simple; a final truth that is simply buried and once uncovered will provide reconciliation in the blink of an eye. Rather, it is seeing the diverse possibilities that are there. As Wittgenstein reminds us, no game, no matter how detailed, is bounded on all sides by rules. The task "…consists in assembling reminders for a particular purpose."[165] This means that the resources that we require are already there; *they never left.*

Reconciliation *with* Aboriginal peoples is just that; it is a process that is carried out with them. It necessarily requires that the "broad view" of s. 91(24) be abandoned by the Court. This is no small task. It has served as the "hinge proposition" around which the entire body of the current framework moves. It is the magical or alchemical (to follow Borrow's helpful metaphor) provision that acts as the ground for all of the unilateral barricades that have served to constrain the Aboriginal perspective. It grants the Court the magical power that is needed to determine that it is contact with Europeans that determines the line for Aboriginal rights (as it did in *Van der Peet*) whereas it is the

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[163] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §116.

[164] Hegel, *Philosophy of Right*, *supra* note 120, at 22.

[165] Wittgenstein, *Philosophical Investigations*, *supra* note 1, at §127.

assertion of sovereignty for title.[166] Not to mention the very idea that Aboriginal rights can be articulated on a spectrum that runs from rights to title.[167] This kind of patent absurdity is captured by the joke about three blind men and an elephant.[168] All of this complicated and convoluted jurisprudence is carried out on the basis of the idea that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[169] As we have already seen (and as the Court's recent qualifications of Crown sovereignty suggest) as soon as we begin to question the basis of this undoubted claim we find nothing but the barricades of the past (i.e., *terra nullius*, discovery, divine right, etc.). There is, simply put, no legitimate basis for the "broad view" of s. 91(24). And as the Court rightly maintained in the *Reference re Secession of Quebec*, "[i]n our constitutional tradition, legality and legitimacy are linked."[170]

The way to begin the process of *reconciliation with* is thus to remove the hinge of the current framework and all of the unilateral rights that it carries. This may well seem (to use D. C. Scott's terms) "untenable" and "inconceivable", but it is actually consistent with

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[166] *Van der Peet, supra* note 217; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010

[167] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at 43. It is interesting to note that the concept of the 'spectrum' is said to be helpful "…not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances." This is interesting because while the concept of a spectrum provides gradation (whereas the watertight compartments are clearly divisible units with strict limits) it remains *contained* within the ship of state. The constitutional metaphor of the living tree is not put to use. As Roger Merino helpfully points out "…self-determination must be understood as the main right for Indigenous Peoples, a *foundational right* in the sense that it is the basis of a whole legal, political and economic system rooted in non-western ontologies and epistemologies." See Merino, *supra* note 131, at 22.

[168] The story is a familiar one: each believes that he discovers a separate and divisible object, but this is simply a problem of perceptive. If they begin to listen to one another and collaborate then it is possible to see that they are really just describing one thing. In this case what is being described is Aboriginal self-government.

[169] *Sparrow, supra* note 3, at 1103.

[170] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 33.

another aspect of Canada's constitutional tradition. As the Lord Chancellor, Viscount Sankey stated in *Edwards v Canada (AG)*,

> The British North America 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. Like all written constitutions it has been subject to development through usage and convention… Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs. [171]

The ship of state (whether it is outfitted with water-tight compartments or spectrums) has never been the appropriate metaphor for the constitutional relationship between Aboriginal peoples and Canada. But, it has persisted. This is, to my mind, because of the exceptional treatment that the "broad view" of s. 91(24) required. It simply could not grow and develop with the rest of the tree. It has been confined a set of constitutional interpretive practices that Borrows has termed "(Ab)originalism".[172] He provides us with a reminder of what is at stake in this.

> While Aboriginal and treaty rights are exercisable only by Aboriginal peoples, and thus do not flow from the liberal enlightenment in this respect, this should not cause us to overlook the truth that they likewise exist to restrain government action. They are living constitutional traditions…Thus, we must take care to ensure that while we appropriately define Aboriginal rights as having different contours, we do not place them entirely outside of the constitution's broader framework.[173]

And yet, this is precisely what the "broad view" of s. 91(24) and the current framework serve to do. But this can be changed. There is also no need for the Court to point to the

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[171] *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) at 136.

[172] John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 128.

[173] *Ibid*, at 144.

need for a negotiated political process or constitutional amendment to do so. As the "guardians of the constitution" they have an obligation to use their discretion to give effect to its provisions.

By continuing to uphold the Crown's claim to sovereignty, legislative power and underlying title the Court is confining Aboriginal peoples to the very 'straightjacket' they cautioned against in the *Reference re Secession of Quebec.*

> The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order.[174]

It is time to acknowledge that Aboriginal peoples are not "mere burdens" to be divided between s. 91(24) and s. 109, but full participants in the federation. This can be realized by shifting the hinge of the framework from s. 91(24) to s. 25. As Tully points out,

> Section 91(24) of the Constitution can be read as recognizing the existence of the first confederation. Section 25 specifies the treaty character of the relations of the first confederation, and Section 35 can be interpreted to recognize and affirm an inherent right to self-government.[175]

This realignment may seem radical and it doubtlessly will require a process that will be complex and unpredictable, but this is no reason to maintain the status quo. Legitimacy and legality cannot be held apart by simply begging the question and pointing to a *reconciliation to come*. Once again Tully reminds us of the stakes.

> Indigenous peoples will be free and self-determining only when they govern themselves by their own constitutions, and these are equal in international status to Western constitutions. That is, they will have an

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[174] *Reference re Secession*, *supra* note 169, at para. 150.

[175] Tully, *Public Philosophy I*, *supra* note 126, at 238.

> effective say in having their constitutions recognized and accommodated in a negotiated treaty relationship *with* the present constitutions of existing states, not *within* them. [176]

This difference between what I have referred to as *reconciliation with* and *reconciliation to* is clearly exposed here.

The stakes of these two approaches are drawn out by the prospect of implementation. On the one hand Canada could continue following its blank map. This would make implementation into little more than a coronation of the status quo. This would serve to effectively defer the meaning of internal self-determination. On the other Canada could listen to the Aboriginal perspective and begin the process of working through the current impasse together. This entails, as Asch maintains, returning to the treaties and reading them *with* Aboriginal peoples and thus treating them as constitutional documents that continue to live and grow over time.[177] The work of reconciliation does not begin from nothing; its foundations are there already, hiding in plain sight. We need to see that the view of the treaties that is put forward by Lord Watson in *St. Catherine's Milling*, articulated by D. C. Scott, and perpetuated by the Court's use of (Ab)originalism is only *one perspective*. It has been this perspective that has dominated the last 140 years under the "broad view" of s. 91(24) and the "vast administrative despotism" that it empowers. This history of the numbered treaties show that there were many others within the Crown who did not take this view even after confederation.[178] It is still possible to listen to Aboriginal peoples as equal partners in confederation and thereby return to the

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[176] *Ibid*, at 286.

[177] Asch, *supra* note 43, at 162-165.

[178] *Ibid*, at 157.

relationship of mutual recognition. By my view it was this possibility that Lord Denning had in mind when he stated that,

> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown-originally by the Crown in respect of the United Kingdom—now by the Crown in respect of Canada—but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun rises and the river flows". That promise must never be broken.[179]

If Canada were to do so this could serve as a model for other states who are experiencing conflicts over recognition within multinational societies. It is not only part of the unfinished business of decolonization, but, to my mind, the enlightenment. By this I mean that it is part of the process of living up to the requirements of the principles of freedom and equality without the barricades and "temporary despotisms" of the past.

This latter option would minimally require that *the hinge of the current framework must be shifted from s. 91(24) to s. 25*. This realignment entails a fundamental rethinking of the jurisprudence on Aboriginal rights and title. The unilateral right of infringement would need to be removed. Consent would become the standard and it would need to be acquired before any projects or activities take place.[180] In order to be

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[179] This is from the decision of the British Court of Appeal on an Appeal brought by the Indians of Alberta in 1982. It is cited in the *Penner Report*, *supra* note 72, at 49.

[180] The standard of consent is often dismissed as being a 'right to veto' that cuts against the principle of equality. This mischaracterizes the nature of the conflict altogether as it presents a view in which Indigenous peoples are already a part of *the people* within the settler state and that they are demanding the kind of power over relationship that grants undoubted sovereignty, legislative power and underlying title. At its heart this is a false dilemma that is based on two hidden premises: a) it presumes that Indigenous peoples are part of *the people* without their consent and so their claims cut against the other citizens b) it is based on an all or nothing (or absolutist) understanding of sovereignty that obscures the possibilities of democratic constitutionalism and federalism. The consistent position of Indigenous diplomacy over the last 250 years (indeed stretching back to the Two Row Wampum in 1613) has been premised on something other than this absolutist power over view. After all, 'treaty federalism' is a way of dividing sovereignty and holding *power with*. Roger Merino (*supra* note 131, at 22) provides a clear and direct response to this argument: "Self-determination and

workable this requires that Aboriginal peoples have self-government with jurisdiction over clearly defined territorial boundaries. This, in turn, means that the related questions of political form, membership and territory must be dealt with. As I have already detailed, none of the current forms of self-governance satisfy this. The model in all cases is some variant of a municipality with devolved powers. The minimal requirement of meaningful self-government is the recognition of its inherent claim to internal sovereignty, legislative power and underlying title. The *Penner Report* and the *Report of the Royal Commission on Aboriginal Peoples* both provide guidance on how this could be carried out. There will doubtlessly be a diversity of forms of governance that will grow and develop as this process takes shape. This is neither "untenable" nor "inconceivable"; it is simply what is already there, hidden in plain sight. It offers us a way to move towards a post-Westphalian model of political association that is based on a concept of sovereignty that is no longer taken to be absolute, but is rather suited to the overlapping and interdependent terrain of everyday reality. It is time to stop following blank maps and hunting snarks. Mutual reconciliation (or *reconciliation with*) cannot be achieved through unilateral assertions. It requires that the means and ends be the same; it begins with free and equal discussion. This is the answer given by the black canoe, it is the *spirit of Haida Gwaii*.[181]

territoriality support the right of consent, wrongly called 'right to veto' because it does not derive from a special power conferred to Indigenous Peoples due to their hegemonic position in the democratic system (as is the case with the presidential veto power), but it is an expression of their self-determination as peoples." It does not offend the principle of equality to recognize this; rather, it offends the principle of equality to simply presume that Indigenous peoples are a part of *the people* within a settler state without their free, prior and informed consent.

[181] Tully, *Strange Multiplicity*, *supra* note 44, at 212.

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