
Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 1 – January 2018

Sui Generis Sovereignties

The Relationship between Treaty Interpretation and Canadian Sovereignty

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CIGI Masthead

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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Joshua Nichols is a fellow with CIGI's ILRP. In this role, he is exploring the potential implications for constitutional law of implementing the United Nations Declaration on the Rights of Indigenous Peoples. Joshua will also consult with Indigenous peoples in workshops and other fora as part of his research.

Prior to becoming a fellow, Joshua was contributing to CIGI's research on international Indigenous law. He has researched wise practices in Indigenous community-based economies at the University of Victoria, and is the author of *The End(s) of Community: History, Sovereignty, and the Question of Law* (Wilfrid Laurier University Press, 2013). He is also the author of a forthcoming University of Toronto Press publication investigating the foundations of Aboriginal law.

Joshua has a bachelor of political science and an M.A. in sociology from the University of Alberta, a Ph.D. in philosophy from the University of Toronto, a J.D. in law from the University of British Columbia, and a Ph.D. in law from the University of Victoria. He is a member of the Law Society of British Columbia and the Indigenous Bar Association, as well as an assistant professor at the School for Public Administration at Dalhousie University.

Introduction

This paper explores how the classical Westphalian model of the state (the state as a politically self-contained and legally autonomous unit) has both set and continues to set the boundaries of treaty interpretation. Chief Justice Marshall articulated the Westphalian model in *Johnson v McIntosh* as this: “An absolute title to lands cannot exist at the same time in different persons or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.”¹

This paper views the Westphalian model as the basis for distinguishing the treaties with Aboriginal peoples from international legal instruments. The model sets a bright either/or line between domestic and international law that continues to distort the reality of the treaties. This same reasoning can be found in Canada’s official response to the Six Nations appeal to the League of Nations in 1923 and again in Canada’s arguments in response to the Mi’kmaw Nation’s complaint to the United

Nations Human Rights Committee in 1980.² Canada’s 1923 response is a clear example of a blind commitment to the Westphalian model: “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.”³

The unstated presumption of the Westphalian model strictly determines the bounds of what is natural and obvious and separates that from what is untenable and inconceivable. This same line remains fixed within the Canadian jurisprudence on treaty interpretation.

The body of case law on this issue can be divided into two related doctrines. The first was expressed by Lord Watson in *St Catharine’s Milling & Lumber Co v The Queen*⁴ when he characterized Treaty 3 as a contract that effected the “release and surrender” of the “whole right and title” of the Ojibwe’s lands to the Crown for “certain considerations.”⁵ The very basis of this view stems from the notion that Indian treaties are unlike treaties in the usual sense of the term (for example, in international law) because Indians cannot own the lands that they occupy. This means that agreements made with Indians are simply surrenders of the residual “personal and usufructory” rights that remain.

1 21 US (8 Wheat) 543 (1823) at 588. It is important to point out that Chief Justice Marshall went on to reject this position in *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) at 544–45 [*Worcester*]. This, to my mind, should serve as an indication of the fundamental instability of the Westphalian model in settler-colonial contexts. This paper uses the term “Indian” when dealing with cases that adopted this as the terminology, and the terms “Aboriginal” or “Indigenous” in modern contexts. The intent here is to highlight that the term “Indian” was (and remains in Canada) a legal term of art that was imposed on Indigenous peoples by settler governments and courts. It must be retained in these contexts, as it was used to diminish the legal and political rights of Indigenous peoples; to replace it with appropriate modern terms is to cover over the pernicious and racist legal effects of the term “Indian.” As such, when this paper uses the term “Indian,” it is not to be understood as interchangeable with the terms “Aboriginal” or “Indigenous.”

2 Duncan Campbell Scott (head of the Department of Indian Affairs from 1913 to 1932) argued that the treaties are not treaties “in the meaning comprehended by international law” but are simply part of 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.” See Government of Canada, “Appeal of the ‘Six Nations’ to the League” (1924) 5:6 League of Nations OJ 829 at 835–36 [Government of Canada]. Canada’s response to the Mi’kmaw Nation’s complaint was simple: first, self-determination “cannot affect the national unity and territorial integrity of Canada” and, second, the treaties “are merely considered to be nothing more than contracts between a sovereign and a group of its subjects.” See *The Mikmaq Tribal Society v Canada*, Communication No 78/1980, Supp No 40, UN Doc A/39/40 at 2–6 and James Sákéj Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon, SK: Purich Publishing, 2008) at 38–39.

3 Government of Canada, *supra* note 2 at 836.

4 [1888] UKPC 70, 14 App Cas 46 [*St Catharine’s Milling* cited to App Cas].

5 *Ibid* at 49.

In the treaties, the Crown removes the “mere burden” (which it could always unilaterally remove via legislation) and thereby converts its title to a *plenum dominium*. This minimal remnant of legal binding force was fully removed in 1929 in *R v Syliboy*.⁶ Justice Patterson held that the Mi’kmaq Treaty of 1752 was “not a treaty at all,”⁷ but “at best a mere agreement made by the Governor and council with a handful of Indians.”⁸ The precise legal character of these “mere agreements” can be clearly seen when they are interpreted in relation to statutes. As Justice Patterson unequivocally states, “[w]here a statute and treaty conflict a British Court must follow the statute.”⁹

This first doctrine begins to collapse (at least partially) with the *Calder et al v Attorney-General of British Columbia*¹⁰ decision in 1973 in which a majority of the Supreme Court of Canada (SCC) found that the rights of Indigenous peoples were not solely derived from the Crown, but were inherent in the fact that Indigenous peoples were here before the Europeans arrived. The modern approach to treaty interpretation took shape in a series of cases stretching from *R v White and Bob*,¹¹ *R v Taylor and Williams*¹² and *Nowegijick v The Queen*,¹³ through to its formalization by Chief Justice Dickson in *Simon v The Queen*.¹⁴ The gist of this change is found in the principle of large and liberal construction, which holds that ambiguities should be interpreted in favour of the Indians so as to maintain the honour of the Crown. This flexible (and highly variable) interpretive approach is anchored by the finding that treaties with Indians cannot be interpreted in the same manner as international treaties because treaties with Indians are *sui generis*.¹⁵ The authorities that Chief Justice Dickson cited to support this definition

(*Francis v The Queen*,¹⁶ *White and Bob*¹⁷ and *Pawis v The Queen*¹⁸) make it clear that the *sui generis* qualification on the treaties arises from the fact that Indians are legally defined and governed by the Indian Act,¹⁹ which is legislated by Parliament under section 91(24) of the Constitution Act, 1867.²⁰

This anchoring point remains the centre of the court’s approach to treaty interpretation in all the subsequent cases, from *R v Sioui*²¹ and *R v Badger*²² to the recent decision in *Grassy Narrows First Nation v Ontario (Natural Resources)*.²³ This is the consistent thread of argument that connects the two doctrines: the Crown is *unquestionably and absolutely* sovereign and so Indians *must* be a type of subject. The problem is that once this logic is accepted, the argument is confined to a kind of magic circle that begins and ends with the unilateral and absolute interpretation of section 91(24). Drawing out the conceptual underpinning of this thread means that the possibilities that have been hiding in plain sight can begin to be explored: the treaties (as documents of inter-societal law) present a conceptual challenge to the Westphalian model, which calls for the disaggregation of the terms “state” and “nation.”²⁴ This means that the treaties have implications far beyond the confines of Canadian constitutional law. They offer a way to reimagine what a plurinational state could be.

6 [1929] 1 DLR 307 (NSSC).

7 *Ibid* at 313.

8 *Ibid*.

9 *Ibid*.

10 [1973] SCR 313.

11 [1964], 50 DLR (2d) 613 at 652, 52 WWR 193 (BCCA) [*White and Bob* cited to DLR], *aff’d* [1965] SCR vi, 52 DLR (2d) 481n.

12 [1981], 34 OR (2d) 360 (CA), leave to appeal to SCC refused, [1981] 2 SCR xi.

13 [1983] 1 SCR 29.

14 [1985] 2 SCR 387.

15 *Ibid* at 403.

16 [1956] SCR 618.

17 *White and Bob*, *supra* note 11.

18 [1980] 2 FC 18, 102 DLR (3d) 602.

19 RSC 1985, c 1-5.

20 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

21 [1990] 1 SCR 1025.

22 [1996] 1 SCR 771.

23 2014 SCC 48, [2014] 2 SCR 447.

24 Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford, UK: Oxford University Press, 2004) at 5.

The Problem of Settler-State Legitimacy

The doctrine of discovery has been built into the constitutional machinery in such a way that it can be hard to imagine how one would go about removing it. It seems to be so entangled with constitutional law that there is simply nothing to do. This pessimism can quickly lead to an appeal to any political philosophy that could normalize this situation. David Hume provided one of the best examples of this pessimism in *A Treatise of Human Nature* when he argued that governments are not founded on consent, but on usurpation and conquest.²⁵ This position is tempting because, if it is accepted as true, then the foundational problem can be simply dismissed as something that is normal. This paper submits that there was also a version of this kind of argument at the base of Canada's response to the Six Nations status appeal in 1923. In the response, Canada asserted that it was natural and obvious that the purpose of the treaties was not to "recognize or infer the existence of any independent or sovereign status of the Indians concerned."²⁶ The logic here implied that the treaties were surrender documents whose content was either explicit (and so consent was obtained via force) or implicit (and so consent was obtained via fraud). Maintaining that all political societies are founded by fraud and violence may make the issue seem somehow normalized. This would allow the dominant party some sense of relief, but really it does little more than narrow the dominant party's ability to respond. Once coercion is normalized as the basis for political organization, the available tools to respond to grievances are reduced to force and fraud. One cannot expect any group of people with a grievance against the state to be satisfied by this response. As James Tully rightly argues, this is little more than a "recipe for perpetual resistance and counter-insurgency wars."²⁷

The problems with this position do not stop there. At best, all that the argument offers is an

explanation of the de facto foundations of states. It says nothing about the normative or de jure foundations. The argument leads the reader to infer that the question of legitimacy is somehow resolved via a description of historical facts, but this inference asks the reader to commit to the naturalistic fallacy (i.e., it trades on deriving normative content from factual description, or to use Hume's famous phrasing, "the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason"²⁸). Tully provides a perspicacious view of the problem with Hume's reasoning: "Just because a particular practice of consent, such as a treaty with non-European authority, is surrounded by force and fraud, it does not follow that the practice of treaty making loses its authority.... If anything, the very fact that one can distinguish between a consensual treaty and force and fraud strengthens, rather than weakens, the practice of treaty making."²⁹

The SCC made a very similar point 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."³⁰

The common ground between these two points is that once the constitutional structures are seen as not absolute and not capable of being absolute (in the sense of being beyond question and contestation), it is possible to work together within the existing set of conditions. This is possible precisely because the existing conditions are not *fixed* in advance, and so it is possible to see those conditions from different perspectives and alter them accordingly. This means that the reasoning is not caught on the false either/or of ignoring the absence of a de jure foundation in Canada and pushing blindly forward to a horizon that is always beyond reach (i.e., the project of reconciliation)

25 David Hume, *A Treatise of Human Nature* (Oxford, UK: Oxford University Press, 2000) at 354.

26 Government of Canada, *supra* note 2.

27 James Tully, "Consent, Hegemony, and Dissent in Treaty Negotiations" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver, BC: University of British Columbia Press, 2010) at 241.

28 I am indebted to Tully's critique of Hume's argument: *ibid* at 238–40; Hume, *supra* note 25 at 302.

29 Tully, *supra* note 27 at 238.

30 [1998] 2 SCR 217 at para 150.

or demolishing the entire constitutional structure and starting again (this is the idealistic view of revolution and/or secession). To assume that these are the only options available is like assuming that there is no gradation between absolute light and absolute darkness, when the truth is that both are blinding. What can be seen is only in the gradations between these absolute theoretical positions. In other words, there is a space between the fictions of the absolute sovereign and the legal vacuum. This is the space in which the agonism of everyday politics occurs.

In reality, this picture of a collection of quasi-federal states is not as “untenable and inconceivable” as it first appears. It only appears to be so if it is assumed that sovereignty must be indivisible, but this is simply not the case. This version of the concept of sovereignty has a history that stretches back to seventeenth-century Europe and the Thirty Years’ War. Through the Peace of Westphalia,³¹ the European powers managed to end the war by introducing a new system of equal, mutually independent and territorially discrete sovereign states.³² The concept of absolute sovereignty was a central component of this new system. It drew a clear line between the spheres of domestic and international law.³³ Within the state, the legal system was grounded on a single and indivisible sovereign and, outside

of the state, a kind of anarchic community of sovereigns bound by lateral treaties. This system of absolute sovereignty was further refined within the political philosophies of Thomas Hobbes and Jean Bodin.³⁴ It was then taken up again in the nineteenth century by John Austin in his highly influential philosophy of “positive” law.³⁵

However, the Westphalian system is only one part of the historical picture. As soon as the gaze is turned from Europe toward the imperial and colonial systems of law and governance that extended out to the non-European world, the picture is very different. In this system, sovereignty is radically divisible. Any cursory consideration of the history of British imperialism will demonstrate this fact: the decentralized and ad hoc structure of the systems of colonial governance were made up of a seemingly endless profusion of companies, colonial governments, imperial administrators, church missions and relationships with Indigenous nations.³⁶ H. S. Maine, contra John Austin, drove this point home in 1887:

It is necessary to the Austinian theory that the all-powerful portion of the community which make laws should not be divisible, that it should not share its power with anybody else, and Austin himself speaks with some contempt of the semi-sovereign or demi-sovereign states which are recognized by the classical writers on International Law. But this indivisibility of Sovereignty, though it belongs to Austin’s system, does not belong to International

31 *Treaty of Westphalia*, 24 October 1648, 1 Parry 271, 1 Parry 119 (entered into force 24 October 1648).

32 This principle of respect for the absolute sovereignty of each state was reinforced by two further elements: first, a policy for church/state relations in which the religion of each state would be determined by the sovereign, and, second, a new idea of reason that is modelled on the system of Euclidian geometry (for example, Descartes and Leibniz) and views any form of reasoning that does not share this abstract and theoretical basis as being mere opinion. As Stephen Toulmin points out, these three aspects of the Westphalian system – absolute sovereignty, state religion and logical demonstration – form a single “ideological package.” The connections between them can be seen as soon as we consider their relationship in practical terms. As Toulmin maintains, in practical terms, these three aspects all “operated top-down, and gave power to oligarchies – political, ecclesiastical, or academic – that supported one another.” See Stephen Toulmin, *Return to Reason* (Cambridge, MA: Harvard University Press, 2001) at 156.

33 In many European states (including Great Britain), this new Westphalian system was imposed over a pre-existing system that can be best described as composite monarchy. As David Armitage explains, typical early-modern monarchies were composite territorial states that “combined diverse territories acquired by inheritance, conquest, cession or incorporation under the rule of a single sovereign. Such territories could either be absorbed juridically into the state or they could remain more or less distinct from it by retaining their own laws, claiming various immunities, possessing separate ecclesiastical establishments or maintaining representative institutions within a federal or confederal structure.” See David Armitage, *The Ideological Origins of the British Empire* (Cambridge, UK: Cambridge University Press, 2000) at 26.

34 See Thomas Hobbes, *Leviathan* (Cambridge, UK: Cambridge University Press, 1991) and Jean Bodin, *On Sovereignty* (Cambridge, UK: Cambridge University Press, 1992). There is an extensive body of excellent scholarly literature on both Hobbes and Bodin, but among the most helpful that I have found are the second volume of Quentin Skinner’s epic two-volume work, *The Foundations of Modern Political Thought* (Cambridge, UK: Cambridge University Press, 1978) and Richard Tuck’s recent *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge, UK: Cambridge University Press, 2016). Also, for the specific focus here, see chapter 4 of Edward Keene’s excellent book *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, UK: Cambridge University Press, 2002).

35 John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 4th ed (London, UK: John Murray, 1879).

36 For insight into the position of Indigenous peoples within this system, from the seventeenth century through to the nineteenth century, see the chapter titled “Conquest, Settlement, Purchase, and Concession: Justifying the English Occupation of the Americas” in Anthony Pagden, *The Burdens of Empire 1539 to the Present* (Cambridge, UK: Cambridge University Press, 2015) and, for a more expansive treatment, see Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York, NY: Oxford University Press, 1990).

Law. The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another. Thus a ruler may administer civil and criminal justice, may make laws for his subjects and for his territory, may exercise power over life and death, and may levy taxes and dues, but nevertheless he may be debarred from making war and peace, and from having foreign relations with any authority outside his territory.³⁷

This contrast between these two concepts of sovereignty has wide-ranging implications for the systems of law and governance that spring from them. In the nineteenth century, the contrast became especially stark. The British Empire was undergoing a period of systemic reorganization following the War of 1812. This saw it shift from a more flexible system of treaty alliances with Indigenous peoples to a “civilizing” approach. The sharp turn to an invasive and unilateral approach to governance led to many colonial rebellions (for example, Upper Canada in 1837, Ireland in 1848, India in 1857 and Jamaica in 1865). The mounting administrative and military costs of the civilizing approach led to a second shift in imperial policy in the mid-nineteenth century as the indirect rule model advanced by Henry Sumner Maine was broadly adopted.³⁸

The shift to this decentralized and divisible model of sovereignty had obvious benefits for the administration of the colonial possessions as, by respecting the limited sovereignty of local leaders, the colonies could serve as “safety valves in order to provide for the security of British

rule.”³⁹ The consequences of this policy shift for the settler colonies was somewhat different, as the devolution of powers gave them the responsibility of administering the relationship between the Crown and Indigenous nations. This transition from the imperial system and ultimate exclusion of any form of Indigenous self-government began to occur through a gradual process of imperial reorganization and devolution following the War of 1812.⁴⁰ In British North America, 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, when it was transferred to the local settler colonies.⁴¹ The transfer was formalized with the creation of the Dominion of Canada in the Constitution Act, 1867.⁴² In effect, what occurred within the settler colonies was that the logic of the Westphalian system was introduced into a context where there was

39 SR Ashton, *British Policy Towards the Princely States, 1905–1939* (London, UK: Curzon Press, 1982) at 14. This system of indirect rule was, to my mind, best described by M. Yanagihita (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 assist in the work of the mandatory government and will be content with the empty title and modest stipend”; League of Nations, *Permanent Mandates Commission, Minutes of the Third Session* (Geneva, Switzerland: League of Nations Publications, 1923) at 283. I want to note here that, in my view, the difference between indirect rule and federal or confederal models is that the former is predicated on concealing the actual lines of power and authority whereas the latter make these lines open and explicit. A similar problem to that which exists in the Westphalian system can also take hold in an imperial system when a concept such as paramountcy is used to enable one member to unilaterally distribute and revoke sovereign powers.

40 I say a “type” of Westphalian system because the transformation of the settler colonies to a dominion still situates the absolute source of sovereignty in the imperial Parliament. Nevertheless, in this process of nation building, Indigenous peoples are entirely excluded from the division of powers via a combination of unilateral legislative action and judicial interpretation.

41 The text of the act 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.” *An Act respecting the Management of the Indian Lands and Property*, S Prov C 1860 (23 Vict), c 151, s 1.

42 In his recent book, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto, ON: University of Toronto Press, 2014), Michael Asch makes the important point that this transfer was not complete. Rather, he argues that the treaties are with the Crown in the person of the governor general, not with the federal government. This means that the role of the governor general is to maintain these nation-to-nation relationships by restraining the federal and provincial governments. This is a promising argument and offers us ways to utilize pre-existing elements of the constitutional structure while maintaining functions that have for the last 150 years been honoured only in the breach.

37 Henry Sumner Maine, *International Law: The Whewell Lectures of 1887*, 2nd ed (London, UK: John Murray, 1915) at 58.

38 For a detailed account, see Karuna Matena, *Alibis of Empire: Henry Maine and the End of Liberal Imperialism* (Princeton, NJ: Princeton University Press, 2010). While this text is invaluable, it does not address how this policy shift affected the settler colonies. For a response that focuses on the importance of the settler colonies, see Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton, NJ: Princeton University Press, 2016).

a long-standing set of quasi-federal relationships between the Crown and Indigenous peoples. The presumption of absolute sovereignty was then used (along with the doctrine of discovery) in foundational cases such as *Johnson v M'Intosh* and *St Catharine's Milling* to reinterpret the constitutional structure of the settler colonies along Westphalian lines. As a result, Indigenous peoples were entirely excluded from the division of powers and situated as a special category of subjects.

The point that can be taken from this brief historical summary is that the concept of absolute sovereignty belongs within a particular historical context. It was unilaterally imposed over a pre-existing system of divisible sovereignty during a period of imperial administrative organization in the mid-nineteenth century. This means that it is not solid all the way through. Rather, it is a legal fiction that has been (and continues to be) operationalized by a form of Austinian positivism. This has enabled judges to read legal documents on the assumption that absolute and unquestionable sovereignty was always in place (i.e., without an inquiry into the wider historical context of the documents). The cost of this has been to introduce absurdity and circularity into the jurisprudence, as the courts have been unable to produce any convincing interpretation of any of the legal and political practices that do not fit within this particular picture of sovereignty.

For example, how did the Crown acquire absolute sovereignty over Indigenous peoples? Was it through surrender following a conquest? As the historical record does not bear this out in all cases, did the Indigenous peoples simply cede all their rights in perpetuity because they were (to borrow the words of Justice Norris) “uneducated savages”?⁴³ This does not hold up to even the most minimal scrutiny. If one party lacks the ability to understand the basic terms of an agreement, how can that party be deemed to have the representative capacity needed to essentially cede and surrender lands and the ability to self-govern? When judges are faced with the task of interpreting the treaties, they can avoid these questions by simply resorting to the magical diminishing powers that are supplied by the doctrine of discovery. This enables them to argue that the treaties are not to be read as treaties in the international sense because Indigenous peoples were either

somehow already subjects of the Crown or were a type of subject that could not own land due to their “character and habits.” It is as if the court took a page from *The Surprising Adventures of Baron Munchausen*⁴⁴ in believing that the Crown could lift itself from the swamp of its contested historical and legal obligations by pulling its own hair.

To remove this pernicious fiction, the SCC must fully and explicitly reject the continued use of the doctrine of discovery via its unilateral, unquestioning and absolute interpretation of section 91(24). The court must face the fact that this provision cannot be read as an *unquestionable* grant of absolute sovereignty due to the simple fact that the imperial Crown could not give the dominion what it did not have.⁴⁵ What remains when this fiction is removed is not a legal vacuum or a state of nature. Rather, the Crown is, as the courts have maintained, undeniably in possession of de facto sovereignty, but the only course of action available to legitimize this sovereignty (i.e., to make it de jure) is to fully recognize that the Crown’s sovereignty is *sui generis* in nature (when compared to a Westphalian nation-state).⁴⁶ This means abandoning the current judicially mediated procedural justification for a de jure sovereignty-to-come. This “reconciling” of sovereignties under section 35 of the Constitution Act, 1982⁴⁷ relies on the de facto unilateral power of the Crown under

44 Rudolf Erich Raspe, *Baron Munchausen's Narrative of his Marvellous Travels and Campaigns in Russia* (Germany: 1785).

45 See *Worcester*, *supra* note 1 at 544–45.

46 The SCC has recognized the de facto nature of Crown sovereignty in a number of recent cases. In *Haida Nation*, Chief Justice McLachlin stated 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. This reasoning 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 reasoning is supported by the decision in *Taku River Tlingit* in which Chief Justice McLachlin stated: “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 SCR 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. Naturally, the problem with this model of reconciliation is that it is predicated on a picture of Crown absolute sovereignty under section 91(24) for which the only possible foundation is the doctrine of discovery.

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

43 *White and Bob*, *supra* note 11 at 649.

section 91(24), which is necessarily based on the sovereign-to-subjects model, and so cannot hope to achieve a nation-to-nation relationship. The sovereignty of the Crown can only ever become legitimate when the constitutional processes are based on the same principles that sovereignty is designed to achieve. That is, sovereignty must be predicated on a shared constitutional order that includes Aboriginal peoples as self-determining peoples.⁴⁸ The minimal conditions of this order are, first, that section 91(24) is interpreted as a “treaty power” that continues the pre-existing power-sharing relationship between the imperial Crown and Aboriginal peoples, and, second, that sections 25 and 35 of the Constitution Act, 1982 serve to extend clear jurisdictional lines into the Canadian constitutional order (i.e., lines not subject to unilateral infringement under either section 1 of the Charter⁴⁹ or section 33 of the Constitution Act, 1982).⁵⁰ While this may appear to be a radical change, it is simply a recognition of the *sui generis* nature of Crown sovereignty in Canada (and, as this paper sees it, in the settler colonies, generally). Once the treaties are seen in their proper light (as constitutional documents that are not subject to either unilateral extinguishment or infringement), they can serve as a source of the shared constitutional grammars and diplomatic practices that can be drawn on as the process of decolonizing the Canadian Constitution begins.

48 This point was recently adopted as one of the 10 principles respecting the government of Canada’s relationship with Indigenous peoples. See Canada, Department of Justice, “Principles respecting the Government of Canada’s relationship with Indigenous peoples”, online: <www.justice.gc.ca/eng/cs/sjc/principles-principes.html>. While promising, these principles also still caught in a procedural model of reconciliation and rights, which are, as currently conceived, entangled in the unilateral sovereignty of section 91(24). Removing this hinge from the process will mean moving from a notion of Aboriginal rights to Indigenous jurisdictions, which cannot be defined by a process in which the court is able to unilaterally determine the limits of jurisdiction. At best, the court can hold both parties to a duty to negotiate jurisdictions in good faith.

49 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

50 I adopt Larry Chartrand’s use of the term “treaty power” in “The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy” (2013) 50:1 *Alta L Rev* 181.

A Measured Separation: The UN Declaration on the Rights of Indigenous Peoples; Aboriginal Constitutions; and the Divisions of Sovereignty

This section will quickly draw out some of the implications that follow from this shift from the British imperial system of divisible sovereignty to the mid-nineteenth century transition to a Westphalian system of absolute sovereignty. The particular conceptual axis that this paper will focus on connects the concept of “the people” (or *demos*) as the building block of the state and the distinction between domestic and international law. This axis is seen by some as being the bright line that serves to divide politics and law. H. L. A. Hart provided a particularly detailed example:

[I]f a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established. But coercive power, thus established on its basis of authority, may be used in two principle ways. It may be exerted only against malefactors who, though they are afforded the protection of rules, yet selfishly break them. On the other hand, it may be used to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large or small, depending on the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize the former. For those thus oppressed there may be nothing in the system to command their loyalty but only things to fear. They are its victims, not its beneficiaries.⁵¹

51 HLA Hart, *The Concept of Law*, 2nd ed (Oxford, UK: Oxford University Press, 1994) at 201 [emphasis in original].

At first glance, it may seem as though this picture captures the essential nature of the struggle of all oppressed minorities. It is certainly true that settler legal systems have been (and continue to be) used to subdue and oppress Indigenous peoples, but this is only one aspect of a much more complicated history. Shifting from this more general and abstract picture to a specific example allows things to be seen more clearly. In the settler colonies, one could not think of a single consistent system of rules being imposed at some given point in time. Nor could one think of a period anterior to the existence of a system of rules in which there was simply the struggle of all against all (or in Hobbes' phrasing, the *bellum omnium contra omnes*). This is because these are the abstract coordinates of a thought experiment, and so if one attempts to use them to try to find a way through the existing legal systems in settler colonies, one gets lost.

The history of the settler colonies shows that systems of rules are not closed and complete unto themselves. They develop slowly, in a process that is largely haphazard, ad hoc and adaptive. Nowhere is this clearer than in the British imperial system of divisible sovereignty. It was an open-ended legal system (meaning that the lines between law and politics were far from clear) that was well suited to cobbling together loose networks of chartered companies, settlers and diverse Indigenous peoples. The system could rapidly adapt its legal machinery in response to specific problems, but the life of these components did not end there. They accumulated over time in a process that was analogous to sedimentation, but the foundations that this process formed were not a series of neatly divisible layers. Rather, the structure was volcanic, as fissures cut across and between layers. This is because the ordering principle of this imperial system of divisible sovereignty (the principle by which sovereign rights of *imperium* and *dominium* were distributed) was made up of a series of legal fictions that could not withstand criticism, due to their lack of de jure foundations.

Whether one appeals to the doctrine of discovery or *terra nullius*, the ultimate grounding can only ever be the absolute and unquestionable proclamation

of divine right.⁵² It is this haphazard and unstable system of quasi-federal relationships that was folded into a more recognizably (but still by no means orthodox) Westphalian system in the mid-nineteenth century. The wording "folded into" is used precisely because the old system was not simply dissolved. Rather, it was reconfigured: the quasi-federal relationship between the imperial Crown and Indigenous peoples that was set out in the Royal Proclamation of 1763⁵³ and the practice of treaty making became a unilateral assertion of *imperium* and *dominium* and a set of surrender documents. In effect, what was once imperial international law was subsumed within a domestic legal system that claimed to be closed. The magic that made this unilateral reconfiguration possible was supplied by the same legal fictions that had animated the previous empires (discovery, *terra nullius*, divine right and so on). This "sovereign alchemy" (as John Borrows terms it) enabled the newly empowered settler colonies (whether dominion or revolutionary state) to unilaterally transform the quasi-federal imperial administrative system of treaties into a Westphalian system with one single and absolute source of authority (i.e., the people possess both *dominium* and *imperium*).⁵⁴ However, they recognize that this cannot happen all at once. Indigenous peoples were legislatively defined as Indians and confined to a despotic administrative system that was geared to simultaneously take their lands and fuse them into the body politic. The fundamental contradiction between this system of civilizing and the liberal constitutional order was immediately obvious, but

52 The *locus classicus* for the problem of acquiring *dominium* is Cicero's *De Officiis*. Cicero held that "there is no private property by nature" and so it could only be legitimately acquired via a limited set of methods. These methods are "long occupation (as when moved into some empty property in the past), or by victory (when they acquired it in war, or by law, by settlement, by agreement, or by lot"; Cicero, *On Duties* (Cambridge, UK: Cambridge University Press, 1991) at 9. As Armitage notes, this passage has been cited "by almost every later theorist of property"; Armitage, *supra* note 33 at 103. It is mirrored by the set of methods that have been used by the European imperial powers to acquire *dominium* over foreign lands. Richard Hakluyt (one of the leading promoters of English colonization in the mid-sixteenth century) provides us with a typical example of this set of methods (minus, of course, papal authority): "Discoverie...the Sword, Prescription, subjection of the Inhabitants, long and quiet Possession"; Richard Hakluyt, *A Particular Discourse Concerning the Greate Necessitie and Manifold Commodities that are Like to Growe to this Realme of Englande by the Western Discoveries Lately Attempted...Known as Discourse of Western Planting* (1584) (London, UK: Hakluyt Society, 1993) at 100.

53 *Royal Proclamation, 1763* (3 Geo III), reprinted in RSC 1985, Appendix II, No 1.

54 John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall LJ* 537.

it was avoided via the claim that the former was a temporary necessity (akin to a state of emergency, but distinct in its object) whose ultimate end was the formation of a unified body politic with a *plenum dominium* over its territory (one unburdened by the rights of Indigenous peoples).⁵⁵

This returns the argument to the problem of the connection between the people and the state. As Stephen Tierney points out, the Westphalian notion of absolute sovereignty

has been a central ideological device in legitimizing the dominant, monistic vision with which the plurinational state has masqueraded as *the* nation of the state. This vision has allowed dominant societies to renege upon the commitments made at the time of the state's formation. The dominant society has been able to crystalize political power at the center of the state, presenting it in the guise of legal legitimacy, and hence entrenching political hegemony in purportedly constitutional form. In this task, states consolidate each other in a collectively supportive structure; this conceptualization of unified internal sovereignty has been indulged externally by the sovereignty of "nation"-states under an international legal order which is itself the progeny of the very entity it suckles.⁵⁶

As this paper sees it, this provides a far more detailed picture than Hart's stark and abstract vision of a single system populated by victims and beneficiaries. It provides a clear view of the *sui generis* position that Indigenous peoples in settler colonies have been caught in from the mid-nineteenth century on (they are neither minorities within a singular body politic nor are they separate nation-states). While there are doubtlessly numerous points of distinction that exist between the legacies of the European composite monarchies that Tierney focuses his attention on (for example, Spain and Great Britain) and the European imperial system of colonial administration, they are also marked by many similarities. In other words, through these criss-crossing and overlapping patterns of similarities

and differences, they exhibit a rather striking family resemblance. They both feature a divisible notion of sovereignty that was distributed over a diverse set of peoples and non-contiguous sets of territories. They also both underwent a period of systemic reorganization in the wake of the Napoleonic Wars that led to the ascendance of an institutional and normative framework predicated on the absolute sovereignty of the people. These projects of national unification (via the development of disciplinary institutions of education, punishment and public health) were unable to deliver on their promise of normalizing the body politic. The sub-state national societies (to use Tierney's terminology) did not dissolve. Rather, they have proven to be incredibly resilient. This has resulted in the formation of many tactics and strategies of resistance that cannot be broken down on a simplistic political-legal distinction. As Tierney puts it,

In the absence of any serious possibility of improving their constitutional positions through international legal channels, nationalists in Catalonia, Quebec and Scotland and elsewhere realise that the only route to improved institutional accommodation, falling short of secession, is through the internal mechanisms of the very host state constitution which they find to be unsatisfactory. The new constitutional challenge presented by sub-state nationalists is, therefore, one which calls not simply for substantive constitutional reform; it is one that in a broader way seeks the generation of a new constitutional culture within deeply diverse liberal democracies; it challenges these states to pluralise their conception both of the *demos* and hence, through a recognition of the historical foundations of the constitution, of the sources of supreme legal authority which underpin the origins and continuing legitimacy of the state.⁵⁷

This applies equally to Indigenous peoples in the settler colonies. The path to this "new constitutional culture" is to move past the narrow formalism that has enabled the Canadian courts to freeze the constitutional meaning of section 91(24) and bring us back to the fissured and unstable historical foundations. What we discover once we push past the formal surface of the Constitution is a rather

⁵⁵ In *St Catharine's Milling*, *supra* note 4 at 54, Lord Watson states that what remains after the "mere burden" of Aboriginal rights and title is removed is a *plenum dominium*.

⁵⁶ Tierney, *supra* note 24 at 16 [emphasis in original].

⁵⁷ *Ibid.*

haphazard assemblage of imperial principles that inform an array of legal, administrative and diplomatic practices. On the one hand, there are the legal fictions that were employed to legitimate the European acquisition of *imperium* and *dominium* by unilateral proclamation (i.e., discovery, *terra nullius*, divine right and so on) and, on the other, there is a diverse set of inter-societal practices of law and diplomacy that inform the treaties. They do not form a consistent and interdependent closed system. It is possible to remove one component from the “logic of authority,”⁵⁸ and thereby rearrange the others into a different configuration. That is, it is entirely possible to remove the doctrine of discovery and its associated legal fictions from the constitutional structure of settler colonies such as Canada without engaging in historical revisionism. It is not necessary to reorder or redact the beliefs of historical actors that are disagreed with; the historical actors must simply no longer be granted the legal authority to determine the structure of the present and future. In fact, by doing so, one is not confronted by a legal vacuum, but by an abundant

wealth of practical resources that can help give shape to the “new constitutional culture.”⁵⁹

The move toward this new constitutional culture begins by coming to grips with the fact that the current approach to both the treaties and the interpretation of the Constitution are indefensible. A perspicacious view of the connection between section 91(24) and the treaties shows that while the language of savagery and civilization has been removed, its legal force has been retained. The courts can no longer maintain an equation that begins by assuming that the Crown has sovereignty, legislative power and underlying title, and then positions the treaties as *sui generis* agreements without explicitly endorsing the doctrine of discovery. This move lacks any semblance of legal legitimacy. The path forward is, thus, not to attempt to reconcile Aboriginal peoples to the de facto sovereignty of the Crown via a continually shifting labyrinth of judicial procedures that remain grounded in the very assumption of legal authority that is being contested. Instead, there is a need to recognize that if the treaties are *sui generis* in nature, then Canadian sovereignty is as well. That is, Canada is not a nation-state with a consistent and closed legal system. It never was.

The practical implications of this can be seen through a consideration of what is at stake with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶⁰ First, implementation cannot be seen through the Westphalian lens of domestic and international law. If a settler state assumes that it has absolute sovereignty to interpret the meaning of UNDRIP without the consent of Indigenous peoples, then it does so on the basis of de facto sovereignty

58 I am referring here to F. W. Maitland’s warning to not “mix up two different logics, the logic of authority, and the logic of evidence” (FW Maitland, “Why the History of English Law is Not Written”, in HAL Fisher, ed, *The Collected Papers of Frederic William Maitland*, col 1 (Cambridge, UK: Cambridge University Press, 1911) at 491). This problem bears a striking resemblance to the perennial debates over the fact/value distinction. The problem here is that while it may be a historical fact that the doctrine of discovery was employed to deprive Aboriginal peoples of their lands, this fact cannot be meaningfully separated from the perspective that interpreted or “valued” it. If it is introduced as a fact via the logic of evidence, then its use as such has to be carefully watched. If it is used to explain a given historical set of relationships, it could well be confined within fact/evidence, but if it is used as the basis for the Crown’s claim for sovereignty and underlying title, then it is necessarily part of the “logic of authority” and the pernicious “values” that it contains are given a continuing purchase on living relationships. The gist of this paper’s position is that the boundaries that divide the logic of evidence from that of authority are (much like those that divide fact and value) blurred and slippery. Any position that predicates itself on being able to draw absolute lines between them is little more than a castle built on sand.

59 This wealth is found both in the past (for example, the inter-societal practices of law and diplomacy we find in the treaties and the interdependent relationship between the systems of Westphalian and imperial sovereignty) and the present; the European Union provides us with a way of thinking about supranational federations, and transnational corporations show us that subnational systems can wield forms of legal and political power that can overwhelm states by co-opting their representative systems of governance. Within Canada, we could see the 2011 agreement between the Haida Nation and the British Columbia provincial legislature as a step in the right direction as it, at least, acknowledges conflicting views of sovereignty in the preamble, thus bracketing the dispute and moving forward (see *Haida Gwaii Reconciliation Act*, SBC 2010, online: <www.bclaws.ca/civix/document/id/lc/statreg/10017_01>. The problem is that it still exists in a constitutional framework that is structured around a sovereign-to-subjects model.

60 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), online: <www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf>.

alone and thus extends the colonial project. Second, self-determination cannot be defined by the norms of the Westphalian nation-state (i.e., full self-determination does not necessarily entail a unitary nation-state). While the first wave of decolonization in the 1950s and 1960s took place through the replication of this model of political association, the model cannot be seen as achieving its ends. Rather, it has effectively reinforced the normative and institutional framework of settler-state colonization by increasing the number of nation-states supporting the Westphalian model of absolute sovereignty. This has left Indigenous peoples stuck in a kind of *sui generis* or neither/nor position between individuals and states. In other words, they have effectively been marooned by the conceptual limits of the so-called “saltwater thesis.”⁶¹ The way out of this position is to disaggregate the terms “state” and “nation” by remembering that the term “nation” represents not a category of analysis, but of practice.⁶² With these two points in mind, it can be seen how the international legal norms that are given expression in UNDRIP are not strictly confined to some kind of nebulous aspirational declaration, but rather provide settler states with the normative framework that can replace the nineteenth-century international norms that currently inform the settler states’ constitutional frameworks.

If this path is chosen, then the current limitation on Indigenous self-determination will be removed, and Indigenous peoples will no longer be unilaterally positioned within the division of powers as a kind of federal municipality. Instead, Canada will move toward the vision of diverse governmental styles that the Penner Report⁶³ advocated for in 1983. As this paper has shown, the courts could

do this by drawing on precedents in their own common law tradition and in international law, federalism and Indigenous traditions of understanding treaties. The result would closely resemble the styles of government that the Special Committee on Indian Self-Government described: “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.”⁶⁴

This description of diverse and cooperative federalism shows us the work that remains to be done if the “measured separatism” that existed prior to the introduction of section 91(24) is going to be found.⁶⁵

61 “The right of peoples and nations to self-determination,” GA Res 637 (VII), UNGAOR, 7th Sess, 403rd Plenary Meeting (16 December 1952).

62 Tierney, *supra* note 24 at 5. The claim that a nation is a category of practice is made by Roger Brubaker in *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge, UK: Cambridge University Press, 1996) at 10. As for what self-determination could or should mean outside of this either/or conception of absolute sovereignty, I would argue that Tierney provides us with a workable principle: “The principle of self-determination is that each demos within the state possesses a qualified right to determine its own constitutional future”; Tierney, *supra* note 24 at 124. This principle is qualified by its relationship to four other principles (representation, recognition, reciprocity and democracy) and four issues that relate to normative and practical challenges that are associated with the project of constitutional accommodation (cultural pluralism, fluid identity patterns, host-state societal dominance and dispersed governance).

63 House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (October 1983) (Chair: Keith Penner).

64 *Ibid* at 56.

65 Charles Wilkinson argues that the primary purpose of the treaties signed between Indigenous peoples and the United States in the eighteenth and nineteenth centuries “was to create a measure of separatism. That is, the reservation system was intended to establish home lands for the tribes, islands of tribalism largely free from interference by non-Indians or future state governments. This separatism is measured, rather than absolute, because it contemplates the supervision and support by the United States.” See Charles F Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987) at 14–19.


ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

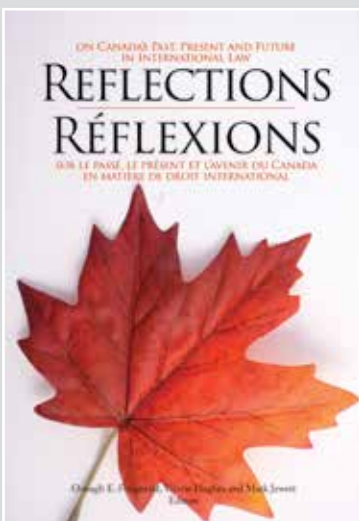
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Editors



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