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Centre for International
Governance Innovation

Reconciliation beyond the Box

The UN Declaration and Plurinational Federalism in Canada



Sarah Morales and Joshua Nichols



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Preface

Charlie Foran, CEO, Institute for Canadian Citizenship

Rohinton Medhora, President, Centre for International Governance Innovation (CIGI)

Oonagh E. Fitzgerald, Director, International Law Research Program, CIGI

To address the “work in progress”¹ that is Canada, undoing the legacy of colonialism and creating new nation-to-nation relationships with Indigenous peoples requires at least as much philosophy and humanity as law. For Canadians to embrace the re-visioning necessary for reconciliation between settler communities and Indigenous peoples, we must be open to Indigenous ways of thinking, belonging and being on this land. Laws can move societies toward justice or perpetuate past injustices by constraining efforts at reform. Ultimately, the argument for a plurinational, post-Westphalian or simply “new” Canada is not just legal. It is for a freshly conceptualized political space with a philosophy of recognition, inclusion and belonging to match that conception. To change laws to advance the cause of justice, our spirits must be engaged.

How to get from here to there is the challenge. For Indigenous peoples, a starting point could be an overarching framework that provides space for their own laws and governance systems, allowing for self-determination as well as engagement in the Canadian body politic as a whole. As co-authors Sarah Morales and Joshua Nichols explain in this report, Indigenous laws derive from “the Creator, the land, and their own customs and decision-making processes.” That is a framework so different from European constructs, offering new possibilities to be recognized and applied going forward.

For both the Institute for Canadian Citizenship and the Centre for International Governance and Innovation, encouraging these conversations is a task undertaken with both excitement and humility. We are pleased to partner on this report, and want to thank Sarah Morales and Joshua Nichols for their excellent work. We are also grateful to John Borrows for his foreword, including his reminder that plurinationalism is hardly new to Canada. It may even be in our nature, however imperfect that nature has been in the past. There is precedent for our succeeding in this reconception, and much is riding on our capacity to be adaptive and open. It is almost certainly the only way to find the right path forward. Referring to Haida sculptor Bill Reid’s masterpiece, James Tully expresses all Canada’s chagrin, “*The Spirit of Haida Gwaii* invokes a boundless sense of wonder. It is the mystical...The sheer, manifest presence of the myth creatures confronts and calls into question the overweening sense of superiority which, since first contact, has rendered us deaf and blind to the multiplicity of spirits who constitute this place and its ways and led us to impose alien constitutions and interpretations over them.”² In Bill Reid’s own words, explaining his iconic sculpture, “we are all in the same boat.”³

1 “Prime Minister Justin Trudeau’s Address to the 72nd Session of the United Nations General Assembly” (21 September 2017), online: <<https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeau-address-72th-session-united-nations-general-assembly>>.

2 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (The Seeley Lectures) (New York: Cambridge University Press, 1995) at 22.

3 Bill Reid, Bill Reid Foundation, online: <www.billreidfoundation.ca/banknote/spirit.htm>.



Foreword

John Borrows, Canada Research Chair in Indigenous Law,
University of Victoria Faculty of Law

Plurinational states have failed in the recent past. Czechoslovakia, the Soviet Union and Yugoslavia come to mind. At the same time, plurinationalism has been a continuing fact of life for countries such as Belgium, Bolivia, Canada, India, Russia and the United Kingdom, to name a few. One prominent feature of plurinationalism is the existence of two or more national groups within a national boundary. What determines the precise success or failure of these states is not easy to predict. However, as Michael Burgess, emeritus professor of federal studies at the University of Kent, has reminded us, success and failure can be relative terms, being contingent and conditional, rather than fixed, eternal and absolute.¹

The plurinational nature of Canada is evident if we consider French, Acadian, English, Indigenous and other participants in its national order. Canada might be considered a success for and by English Canada, so much so that English Canada may not even regard its political power and influence as being embedded as a pervasive and fundamental fact of our political life. Canada might also be considered somewhat of a success for and by French Canada, although those who seek greater sovereignty may beg to differ. Nevertheless, French language, law and culture are protected through constitutional means in both section 92 of the Constitution Act, 1867, and through national structures that facilitate bilingualism and bijuridicalism. On the other hand, Acadians and Indigenous peoples might have more negative views regarding plurinational life in Canada. In fact, they might say that the state has largely failed to recognize and protect their political, legal, economic, social and cultural rights and interests.

In the following paper, Sarah Morales and Joshua Nichols discuss Canada's failure to embrace plurinationalism beyond shallow promises of reconciliation. Treaty relationships rarely rise to the level of nation-to-nation agreements, despite historic and contemporary pledges that suggest otherwise. Moreover, Aboriginal rights and title are constrained by conceptions of Crown sovereignty that leave very little room for plurinationalism. For example, federal and provincial governments receive the jurisdictional power to override Indigenous rights through a justificatory process that makes Indigenous peoples the "junior power" in national terms. Finally, legislative action through the Indian Act and other instruments largely treats Indigenous governments as possessing limited municipal-style powers, which can again be overridden by provincial and federal governments.

In the light of these challenges, the authors suggest that plurinationalism as it relates to Indigenous peoples will not grow without the Crown explicitly recognizing and at times deferring to Indigenous self-determination, in particular as expressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Legislative initiatives pursued by the current

¹ Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford, UK: Oxford University Press, 2012) at 221.

Image:
*I Remember an Old Man Who
Knew the Language of Birds* (detail),
Jim Logan

government, such as Bill C-262² (which the authors discuss), could significantly enhance Canada's move toward plurinationalism with Indigenous peoples, if implemented in robust ways. Bill C-262 sows the seeds for better relationships with Indigenous peoples through nation-to-nation relationships, because it commits Canada to making its laws consistent with UNDRIP, through a national action plan, developed through consultation and cooperation with Indigenous peoples in Canada, with annual reporting obligations.

Bill C-262 will only be successful in implementing UNDRIP and moving Canada toward being a plurinational state if further legislation recognizes the inherent nature of Indigenous self-determination in specific jurisdictional fields.³ This should occur in fields such as child welfare, education, governance, economic development, environmental protection, administration of justice, intellectual and cultural property, and so forth.⁴ In these circumstances, it is vital that success be measured by Indigenous norms, values, principles, authorities and ideas, as the authors suggest.

This means Indigenous law will play an important role in facilitating Indigenous plurinationalism, because it is only through Indigenous law that standards can be identified that demonstrate the success or failure of these efforts from Indigenous political perspectives. If Indigenous peoples, using their legal principles and processes, do not judge Canada to be receptive to Indigenous plurinationalism, then plurinationalism can never be considered a success as it relates to Indigenous peoples. This means that governments cannot continue to suppress Indigenous law making: if they do so, we will never get to know how plurinationalism is received or interpreted by Indigenous peoples without Indigenous law makers' own authoritative pronouncements. Governments must recognize Indigenous law for Canadian plurinationalism to be successful as it relates to Indigenous peoples.

In this respect, I would place a slightly different emphasis on the role of state recognition in the facilitation of plurinationalism than is the case in the following paper. The authors write that "Indigenous peoples...are not seeking their rights to self-determination, or land, from the Canadian state or the international community. Their laws derive from many sources: from the Creator, the land, and their own customs and decision-making processes. These laws and legal processes do not require an act of the state to make them meaningful in the lives of the community members who follow them." While I agree that Indigenous self-determination derives from sources external to Canadian political and legal authority, and is not created by the nation-state, in my view, Canada's recognition and implementation of this fact are necessary to move to a more plurinational existence. There can be no effective plurinational

2 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018).

3 For my views on legislation and Indigenous self-determination, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 161–79.

4 One recent attempt at identifying these fields is found in sections 84–104 of the *ASSEMBLÉE CONSTITUANTE DU CANADA/ CONSTITUENT ASSEMBLY OF CANADA 2017/ CONSTITUTION DU CANADA DE 2017/ THE CONSTITUTION OF CANADA, 2017 PROJET / BILL (Version du 1er juillet 2017 / July 1st, 2017 Version)*, online: <www.mcgill.ca/federalism/files/federalism/constitution_du_canada_2017-constitution_of_canada_2017-studentproject.pdf>. The authors of the text write: "This constitutional text was drafted by students of a course offered jointly by the Law Faculties of the University of Montreal and McGill, under the leadership of Professors Daniel Turp and Johanne Poirier in Jan-April 2017. It was written and adopted through a constituent assembly (with a final sitting on Parliament Hill in Ottawa). It is, of course, a pedagogical exercise: the result of negotiations and compromises." While I would not agree with everything included in the draft, it provides a useful conversation point for moving Canada into a plurinational relationship with Indigenous peoples.

relationships between Indigenous nations and the rest of Canada without Indigenous participation through their own governments and legal institutions.

However, in making this claim, this foreword will conclude with a thought foreshadowed at the beginning of this piece, to further nuance my own views. Success or failure cannot be measured on one axis alone; such measures are contingent, fluid and dynamic. The subjective views of Indigenous peoples may not be the only way to judge the success of Canada's plurinationalism. While I argue they are necessary, others may be content to see the longevity of Canada's existence as a nation-state as a measure of its success. Others may be happy to call plurinationalism a success if it enhances economic opportunities for the majority or leads to innovation or adaptability in international and social affairs.⁵

While readers might disagree with the authors of this report, and with me, regarding the necessity of Indigenous self-determination, the point being made more generally here is that the success or failure of Canadian plurinationalism in regard to Indigenous communities should itself be subject to debate. No one party (including English, French, Acadian or Indigenous Canada) should have the ability to set the entire terms of this engagement or exclude other points of view. We must also be attentive to the power dynamics structuring these debates. We should not pretend that each group has equal economic, political or social access to the institutions of power that manufacture and replicate our deliberations about plurinationalism. To be clear, Indigenous peoples face discrimination, racism and domination in struggling to have their voices count in Canadian affairs, as numerous government reports and court cases have made clear over the years.⁶

Plurinationalism institutionalizes conflict, competition and cooperation, and there is no doubt that Canada has generated a great deal of conflict for Indigenous peoples, evidenced by catastrophic socio-economic conditions for some, and oppressive political conditions for nearly every First Nation, Inuit and Métis community. The authors persuasively write that self-determination, in accordance with Indigenous laws and legal orders, is necessary for a healthy plurinationalism in Canada. I would agree, and would suggest that if Canada fails to recognize the power and legitimacy of Indigenous law-making authority, plurinationalism — even as problematically practised at present — would not be a failure if it led Indigenous peoples to seek other arrangements more consistent with international and Indigenous legal principles.

5 Burgess, *supra* note 1 at 187.

6 See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols 1–5 (Ottawa: Public Works and Government Services Canada, 1996); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>.



Reconciliation beyond the Box

The UN Declaration and Plurinational Federalism in Canada

Sarah Morales and Joshua Nichols

In his speech to the United Nations General Assembly on September 21, 2017, on the 150th anniversary of the Canadian Constitution, Prime Minister Justin Trudeau sketched a vision of a plurinational state — that is, a state made up of many nations, rather than a single nation-state — brought about through truth and reconciliation.¹ He portrayed the Canadian nation as “a work in progress,” founded upon many grave mistakes and injustices in the treatment of Indigenous peoples. He expressed hope that Canadians were ready to rectify past wrongs and finally undo the legacy of colonialism and the paternalistic Indian Act by using the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)² as “a way forward” to achieve self-determination, dignity and respect for Indigenous peoples, so they are free to decide how they represent and organize themselves. In this way, Trudeau said, Canada would achieve reconciliation where Indigenous nation-to-nation, government-to-government and Crown relations are transformed.

Since that speech, many have questioned the government’s commitment to reconciliation built upon nation-to-nation and government-to-government relationships. Governmental support of major development projects such as the Trans Mountain Pipeline Expansion, against strong opposition from some Indigenous voices, has created skepticism. Recently, many Indigenous leaders have expressed concerns about how changes to a number of laws currently making their way through Parliament will impact Indigenous people — and whether their concerns are being fully heard by government. Finally, with respect to the government’s rights recognition and implementation framework, some Indigenous communities argue that the focus should be on the *affirmation* rather than the mere *recognition* of rights that are already enshrined in the UN Declaration.³ In addressing these concerns during a May 2018 annual general meeting of the Assembly of First Nations, Prime Minister Trudeau stated:

We are all impatient to move forward in concrete, tangible, real ways that turn the page decisively and comprehensively on the broken relationships of the past, on the empty promises of the past, on the failed policies of the past.... We can do this quickly, or we can do this right — and I know that those two are mutually exclusive....It means new policies developed together will replace rights-denying measures...so communities can exercise their

1 “Prime Minister Justin Trudeau’s Address to the 72nd Session of the United Nations General Assembly” (21 September 2017), online: <<https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>>.

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP], online: <www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf>.

3 See generally Hayden King & Shiri Pasternak, *Canada’s Emerging Indigenous Rights Framework: A Critical Analysis*, online: <<https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>>; Teresa Wright, “Trudeau asks First Nations chiefs for patience on Ottawa’s vow to Indigenous peoples”, *The Globe and Mail* (2 May 2018), online: <www.theglobeandmail.com/politics/article-trudeau-asks-first-nations-chiefs-for-patience-on-ottawas-vows-to/>.

Image:
Jigging on Thin Ice,
Pitaloosie Saila

**Prime Minister
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inherent rights to self-determination and self-government....
These are some of the essential and overdue steps we are taking
to ensure Indigenous peoples have full control over their own
destiny and make their own decisions about their future.⁴

Again, these remarks seem to suggest that Canada is committed to
reconciling past actions with future promises. However, the question
of whether or not this can, or will, be achieved is still to be decided.

Reconciliation is a process. The end result is not a settlement, but the creation
of a new relationship. Nowhere is this more evident than in comprehensive
land claims agreements, which settle long outstanding grievances and provide
for recognition of Indigenous property rights and self-determination. Since
1975, with the signing of the James Bay and Northern Quebec Agreement,
26 other modern-day treaties have been negotiated between the Crown and
Indigenous peoples. These agreements have provided for Indigenous ownership
of more than 600,000 square kilometres of land, fiscal transfers of more than
\$3.2 billion, systems of co-management, resource revenue sharing agreements
and law-making powers.⁵ In writing about the success of these types of
agreements, Kim Baird, former chief of Tsawwassen First Nation stated:

These modern day treaties are fundamentally reshaping Canada
for the better. We say this because modern treaties and self-
government agreements are actually working. These agreements
enable indigenous peoples to begin to rebuild their communities
or nations on their own terms, with a solid constitutional,
legal, economic and governance foundation....These agreements
also allow for internal reconciliation to occur through better
governance systems that increase transparency and rebalance
accountability to indigenous citizens — not to officials in Ottawa.

Equally important, these agreements create real nation-to-nation
relationships. They establish effective multilateral arrangements
between all levels of government — indigenous, federal, provincial,
territorial, and municipal. These types of inter-governmental
approaches make sense in a federation like Canada.⁶

However, regardless of the experience of the Tsawwassen First Nation,
currently there are 65 First Nations, representing more than half of all Indian
Act bands in British Columbia, engaged in the treaty process and only three
have negotiated a final agreement⁷ — in a period of more than 20 years.
Although there are many reasons for these delays,⁸ the fact that the Crown,
through these negotiations, is working toward the complete extinguishment
of Indigenous title over the majority of ancestral territories, where First
Nations would instead have municipal-style Indigenous governance and

⁴ *Ibid.*

⁵ Kim Baird, Clint Davis & Jason Madden, “Modern day treaties fundamentally reshaping Canada for the better”, *CBC News* (13 February 2016), online: <www.cbc.ca/news/indigenous/modern-day-treaties-reshaping-canada-1.3440267>.

⁶ *Ibid.*

⁷ The Nisga'a Final Agreement was negotiated outside of the British Columbia Treaty Commission (BCTC) process. The Tsawwassen Final Agreement, Maa-nulth Final Agreement and Tla'amin Final Agreement were all negotiated in accordance with the BCTC process.

⁸ Sarah Morales, “(Re)Defining ‘Good Faith’ through *Snuw’uyulh*” in J Borrows & M Coyle, eds, *The Right Relationship* (Toronto: University of Toronto Press, 2017).

limited authority to administer some social services, remains a major impediment.⁹ For example, although First Nations would obtain ownership over some of their traditional territory (as described by Kim Baird above), in some instances, due to a lack of available Crown lands within the traditional territories, some Indigenous nations are being asked to “negotiate away” their rights and title to more than 80 percent of their lands and resources.¹⁰

In thinking about how modern-day treaties and self-government agreements could be used to create a more plurinational Canada, it is useful to consider how the implementation of the UN Declaration could work to realize the goal of self-determination in a more comprehensive manner than the current municipal-style Indigenous governance model. In this paper, we argue that meaningful implementation of the UN Declaration requires the state, and the courts, to move away from the Charter-like lens of the current constitutional framework of section 35 and move toward a jurisdictional division of powers with Indigenous peoples. Treaties and self-government agreements, negotiated or interpreted in this manner, can lead to the creation of new nation-to-nation relationships in Canada, and to reconciliation.

In the first section of this paper, we discuss the history of Indigenous treaty making in Canada. Starting with a brief description of Indigenous-to-Indigenous treaty making prior to colonization, we illustrate how Canada was always a country built on the recognition of many distinct and self-determining nations. We then consider Canada’s history of treaty making, from the eighteenth to the early twentieth century, and examine the concept of Crown sovereignty that was then current and used by the courts. Finally, we discuss how a robust implementation of today’s UN Declaration could influence the interpretation of these historical treaties.

In the second section of this paper, we provide for a brief history of the courts’ statements regarding Crown sovereignty, underlying title (also referred to as radical title or ultimate title)¹¹ and legislative power. Relying upon these statements, we consider how Canada’s jurisprudence (that is, law developed by the courts as opposed to legislation) has influenced the plurinational character of Canada.

In the final section of this paper, we look more closely at the UN Declaration and the right to self-determination. In doing so, we consider how the UN Declaration can lead us toward a more plurinational state. We speak to how this is more in keeping with Indigenous laws regarding autonomy and self-determination. Finally, we provide a few suggestions about what policy changes might have to occur in order for Canada to move toward nation-to-nation relationships.



Canadian Prime Minister Justin Trudeau at the UN General Assembly, September 21, 2017. (Richard Drew, AP Photo)

⁹ *Ibid* at 281.

¹⁰ *Ibid*.

¹¹ It is known in Canadian Aboriginal law as underlying title because Aboriginal title has been described as a “burden” on the title of the Crown. For more on Aboriginal title as a burden on the title of the Crown, see note 49.

The History of Indigenous Treaty Making in Canada

Plurinationalism or Single Sovereign?

In thinking about the potential for Canada to become a plurinational state, one that recognizes nation-to-nation relationships with its Indigenous peoples, it is useful to consider the history of treaty making in Canada. Canada has a long history of recognizing and respecting the self-determination of the nations that inhabit its current borders, both prior to and after European contact. This is evidenced by the numerous treaties entered into between Indigenous nations with other Indigenous nations and Indigenous nations with non-Indigenous nations.

Indigenous peoples have been self-determining since long before their rights were “recognized” or captured by Canada’s constitutional documents or international treaties and declarations. Since time immemorial, they have “developed systems to maintain and regulate their relations.”¹² Living as independent nations across the land, they developed norms and practices to govern their societal relations, manage territories, regulate trade, resolve disputes and govern the relationships between different nations.¹³ Over time, these diverse norms and practices developed into legal traditions that guided these nations for centuries in the governance of community, the environment and relationships between people.¹⁴ Accordingly, there was plurality of legal traditions in Canada, both within and between Indigenous nations, prior to colonization.

Indigenous-to-Indigenous Relationships and Treaties

There are more than 630 First Nations communities in Canada, which represent more than 50 nations and 50 Indigenous languages. Since time immemorial, these nations have co-existed and recognized that each had its own distinct laws and legal orders.¹⁵ These teachings about self-determination continue today.

In speaking about the importance of shared territories, and addressing the question of whose laws were to be followed — the visitor’s or the host’s — Cowichan elder Luschiim stated: “For me, I need to respect the people and the place that I am visiting. So, for me, if I was hunting in another people’s territory, I use my ways, but I also have to respect their ways for treating that animal that I just caught. I try to use both teachings. I’ll do the things I have to do, but I’ll visibly show the people I’m visiting that I am using and respecting their ways also.”¹⁶

12 Sarah Morales, “Speakers, Witnesses and Blanketing: The Need to Look Beyond the Courts to Achieve Reconciliation” (2017) 78 SCLR (2d) 139 at 145.

13 Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) at 1.

14 See John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2012) at 51 [Borrows, *Canada’s Indigenous Constitution*].

15 It is important to recognize that there are dangers in focusing on discrete nations when trying to learn about Indigenous law(s). We must be careful not to oversimplify Indigenous societies by presenting one group’s laws as if they described the laws of all groups. We must also recognize that these legal traditions are capable of change, and are permeable and subject to crosscutting influences. See *ibid* at 59.

16 Interview of Luschiim (Arvid Charlie) by Sarah Morales (29 December 2015) in S Morales, “*stl’nup*: Legal Landscapes of the Hul’qumi’num Mustimuhw” (2016) 33 Windsor YB Access Just 103 at 121.

This illustrates that there was, and continues to be, a recognition of shared sovereignty within Indigenous nations. While abiding by their own laws is imperative, as illustrated by Luschiim's statement "I'll do the things I have to do," there is also an acknowledgment that there are other legitimate laws living within the territory that also deserve respect.

Sometimes these visible acknowledgments of shared sovereignty were solidified through treaties. One of the most important Indigenous-to-Indigenous treaties occurred between the Haudenosaunee and the Anishinaabe nations in 1701. Oftentimes referred to as the One Dish One Spoon treaty, the agreement was made orally and recorded on a wampum belt that has an image of a bowl with one spoon. It recognizes the shared understanding that both nations would share hunting grounds, and that no weapons or sharp edges would be allowed in the shared territory, as this could lead to bloodshed.¹⁷ This agreement, and the implied acknowledgement of each other's sovereignty, is still respected by the Haudenosaunee and the Anishinaabe today.¹⁸

The right of each individual Indigenous nation to be self-determining, create their own laws and enter into treaties is recognized throughout the UN Declaration. In particular, article 3 recognizes the right of Indigenous peoples to "determine their political status" and "freely pursue their economic, social and cultural development," such as entering into agreements regarding hunting and fishing. Furthermore, article 4 recognizes the diversity of Indigenous nations and envisions a plurality of self-determining nations by stating, "In exercising their right to self-determination, [Indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs."¹⁹ Accordingly, the UN Declaration recognizes a right to self-determination in a manner that reflects the laws of Indigenous peoples.

Indigenous-to-Crown Relationships and Treaties

As the previous section has illustrated, Indigenous peoples were self-determining, and exercised powers of governance, for millennia prior to the arrival of Europeans and others in North America. However, the arrival of others has challenged the legal authority, and sovereignty, of Indigenous nations in Canada. Internally, the diversity of values and governing structures provided new options for Indigenous nations. While some chose to depart from or alter their traditions in response to outside influences, others had little choice and were forced to surrender their traditional governing systems and laws.²⁰

The early treaties provide us with some examples of the perceptions regarding sovereignty and self-determination at the time. These perceptions varied, depending on the type of treaty formed. "Peace and friendship treaties" were the predominant form of treaty making in the late seventeenth to mid-eighteenth century. The French, British and Indigenous nations relied on peace and friendship treaties to help advance their political and economic interests.²¹ Similar to the reasons why they formed treaties with other Indigenous nations, Indigenous peoples used treaties with Europeans to

17 J Borrows & L Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: LexisNexis, 2018) at 282.

18 *Ibid* at 283.

19 UNDRIP, *supra* note 2, art 4.

20 Borrows & Rotman, *supra* note 17.

21 *Ibid* at 285.

There are more than 630 First Nations communities in Canada, which represent more than 50 nations and 50 Indigenous languages. Since time immemorial, these nations have co-existed and recognized that each had its own distinct laws and legal orders.

maintain and strengthen their territorial and commercial relationships and gain powerful allies.²² Arguably, during this time period Indigenous peoples assumed that their sovereignty was recognized, hence the need for the British and French to make treaties with them in the first place.

In the mid-eighteenth century, the Crown began experimenting with another type of treaty, which involved territory-wide transactions. Beginning with the Robinson-Huron and Robinson-Superior Treaties, and culminating in the post-Confederation numbered treaties (Treaties 1 to 11), these treaties reveal contrasting ideas about the purpose and effect of such agreements, especially in relation to the notion of sovereignty. Whereas Indigenous peoples in these treaty areas often viewed these treaties as agreements to “share the top six inches of soil with the Crown and provide them with benefits in return, such as education, health care and other assistance,”²³ their counterparts viewed them as land transfers and a set of promises that the Crown could choose to keep or break.²⁴ Early cases that came before the courts²⁵ illustrate that, despite the intentions of the signatories, these treaties were not for long regarded as binding documents negotiated between two sovereign nations with legally enforceable rights. As such, the Crown could, and did, readily ignore the treaty terms, either by failing to perform its obligations or by passing legislation that was inconsistent with its treaty obligations.²⁶

With the constitutional entrenchment of Aboriginal and treaty rights in section 35(1) of the Constitution Act, 1982, treaty rights have been given recognition and affirmation by Canadian law. However, there is still a lot of criticism levied against the court’s approach to treaty interpretation in cases such as *Horse*²⁷ and *Howard*,²⁸ its subsequent reaffirmation in *Marshall; Bernard*²⁹ and in *Badger*,³⁰ and the court’s failure to refer to them in the *Grassy Narrows*³¹ decision. These canons fail to recognize and respect the fact that Indigenous peoples were, and continue to be, self-determining, according to Indigenous legal traditions, international human rights law and arguably under section 35, and that treaties were not a granting away of that right. Indigenous peoples’ own laws, and the UN Declaration, recognize that these treaties are the manifestation of the right to self-determination and the ability of these nations to make internal governance decisions.³² Accordingly, if Canada is honest in its statements about nation-to-nation relationships, then Indigenous-to-Crown treaties must be interpreted in a manner that recognizes an Indigenous right to self-determination.

As previously mentioned, Indigenous peoples continue to negotiate treaties with the Canadian state through Canada’s comprehensive claims policy.

22 *Ibid.*

23 *Ibid* at 286.

24 *Ibid.*

25 See *R v Syliboy*, [1929] 1 DLR 307, 50 CCC 389 (NS Co Ct); *R v White and Bob* (1964), 50 DLR (2d) 613, 52 WWR 193 (BCCA).

26 *Borrows & Rotman*, *supra* note 17 at 287.

27 *R v Horse*, [1988] 1 SCR 187.

28 *R v Howard*, [1994] 2 SCR 299.

29 *R v Marshall*, [1999] 3 SCR 456; *R v Bernard*, [2005] 2 SCR 220 [*Marshall; Bernard*].

30 *R v Badger*, [1996] 1 SCR 771 [*Badger*].

31 *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447.

32 See generally Harold Johnson, *Two Families: Treaties and Government* (Purich Publishing, 2007); Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishnabe Understanding of Treaty One* (Vancouver, BC: UBC Press, 2013); Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).



There are what we could call *thick and thin* versions of Crown sovereignty. A thick version is one that enlarges the legal consequences or attributes that are attached to or bundled with Crown sovereignty, whereas a thin version minimizes them.

We believe that these modern treaties and self-government agreements could be useful in creating a more plurinational Canada. However, given the history of treaty negotiation and treaty interpretation detailed above, we are cognizant that a different approach must be taken if this national project of reconciliation is to be successful. The next section of our paper will examine how the court's statements on sovereignty could serve as an impediment to rebuilding these nation-to-nation relationships.

Crown Sovereignty, the Courts and Plurinationalism

The purpose of this section is to provide a brief survey of the courts' statements regarding Crown sovereignty and then, with this survey in mind, to examine how these statements influence the interpretation of modern treaties or self-government agreements. This task may appear to be a straightforward one. After all, it is by no means difficult to locate the statements themselves. The list of key cases is easily assembled: *St. Catherine's Milling*,³³ *Calder*³⁴ and *Sparrow*.³⁵ These cases span more than a century (from 1888 to 1990) and are regularly cited as authority for today's dominant version of Crown sovereignty. Given this, one would naturally assume that cobbling together a brief survey would require little more than citing the statements in these cases. But when we do this, we notice something that is somewhat puzzling. The qualities that are used to define Crown sovereignty are strikingly similar, so similar that it is easy to accept the statements at face value, as if they were little more than definitions. This is a cause for concern when one considers that these statements came to be the foundation for Crown sovereignty that would be understood and used in Canada's courts of law for generations. The court's interpretation of the concept of Crown sovereignty determines the constitutional character of the relationship between the Crown and Indigenous peoples. What is noteworthy here is not merely that the definition is so constant over time, but that its repetition seems to lend it the appearance of an *objective* definition.

Put another way, the conception of Crown sovereignty establishes the "background rules" that determine the structure of the constitutional order. It creates these background rules precisely because the question of whether the Crown actually has sovereignty is "non-justiciable" in Canadian courts — that is, it's a question that can't be addressed.³⁶ Since the Canadian courts derive their jurisdiction from the Crown, if they were to entertain this question they could undo their own legal authority. This means that if the Crown says it has sovereignty, the courts have to accept this assertion at face value. This principle adds significant legal consequences to precisely how the courts conceptualize Crown sovereignty. There is, strictly speaking, no neutral or objective standard for this concept. It can and does vary. There are what we could call thick and thin versions of Crown sovereignty. A thick version is one that enlarges the legal consequences or attributes that

33 *St Catherine's Milling and Lumber Co v R*, [1888] UKPC 70, 14 App Cas 46 [*St Catherine's Milling*].

34 *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 328 [*Calder*].

35 *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

36 The non-justiciable nature of Crown sovereignty can be seen in how the presumption operates within the courts: Crown sovereignty is presumed in a manner that effectively immunizes it from question. For example, see Justice Wilfred Judson's words from *Calder*: "There can be no question that this right was 'dependent on the goodwill of the Sovereign'" (*supra* note 34 at 328); see also *Sparrow* (*supra* note 35).

are attached to or bundled with Crown sovereignty, whereas a thin version minimizes them. If a thick version is used, then Crown sovereignty takes up more space within the constitutional order and this naturally leaves less room within this order for Indigenous peoples. The non-justiciable nature of Crown sovereignty then operates to persuade courts that the constitutional order is fixed in such a way that they cannot change it. The legal significance of this is difficult to overstate: if a thick version is used, the courts will see Indigenous peoples as subjects (or even wards) of the Crown; whereas a thin version can enable the courts to see Indigenous peoples as equal partners in Confederation with the Crown. With this in mind, let's turn to the statements.

In *St. Catherine's Milling*, Lord Watson defines Aboriginal title as being “a personal and usufructuary right” that is “dependent upon the good will of the Sovereign.”³⁷ The significance of this statement requires a little unpacking. By “a personal and usufructuary right” he means that Indigenous peoples have a legal right to “use and enjoy” the lands they have a claim to. We can get a better sense of this when we compare it to the Crown's claim to lands, which he characterizes as “a substantial and paramount estate, underlying the Indian title.” In other words, Aboriginal title is conceived as a legal right to *use lands*, whereas the Crown actually *owns them*. The constitutional structure of this relationship is further clarified when Lord Watson states that Aboriginal title is a “mere burden.” The phrase “mere burden” brings us back to his understanding of Crown sovereignty. Remember that Aboriginal title is said to be “dependent upon the good will of the Sovereign.”³⁸ This means that Aboriginal title can be *removed* whenever the Crown chooses, by means of its legislative power (a practice known as extinguishment). This picture of the constitutional order begins with the presumption of a thick concept of Crown sovereignty as it includes underlying title and the legislative power to extinguish Indigenous peoples' legal interests in lands. This leaves Indigenous peoples with very little space indeed: they have a legal claim to the “use and enjoyment” of their lands, but the source of this claim is the Crown and it retains the power to unilaterally extinguish it.

Now let's turn our attention to the Supreme Court of Canada's decision in *Calder*. Justice Wilfred Judson outlines a version of the concept of Crown sovereignty nearly identical to the one we saw in *St. Catherine's Milling*. Once again, the Crown has a version of sovereignty that is bundled with underlying title and legislative power.³⁹ The difference here is that the source of Aboriginal title is no longer the Crown. Rather, Aboriginal title is recognized as pre-existing the arrival of settlers, since, “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”⁴⁰ Put another way, the pre-

37 *St. Catherine's Milling*, *supra* note 33 at 49.

38 *Ibid* at 54–55.

39 *Calder*, *supra* note 34 at 328 [emphasis added].

40 *Ibid*.

existing social, legal and political practices of Indigenous peoples were now legally significant within the constitutional order of the settler-state.⁴¹

In *Sparrow*, the court was faced with the task of interpreting section 35 of the Constitution Act, 1982.⁴² This was not simply a new constitutional provision. In both *St. Catherine's Milling and Calder*, the courts made their decisions under the rule of Parliamentary supremacy. After the patriation of the Constitution in 1982, the Canadian system of government was transformed to one of constitutional supremacy. The court provides us with a clear account of the significance of this change in the *Secession Reference*.

The Constitution binds all governments, both federal and provincial, including the executive branch. They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.⁴³

The task before the *Sparrow* court was thus to provide a conception of Crown sovereignty that fit within the confines of a system based on the principle of constitutional supremacy. Nevertheless, Chief Justice Brian Dickson and Justice Gérard La Forest found 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.”⁴⁴ This effectively carried over the thick version of Crown sovereignty found in *St. Catherine's Milling and Calder*. The court then used this thick concept of Crown sovereignty to ground its interpretation of federal “power” under section 91(24), thereby justifying its treatment of section 35 as if it were within the Charter.⁴⁵ This effectively makes the Aboriginal and treaty rights that are “recognized and affirmed” by section 35 subject to the reasonable limitations of section 1.⁴⁶ Put differently, following *Sparrow*, the court’s section 35 framework has been built upon the presumption of thick Crown sovereignty. Since this case in 1990, all tests the courts have designed to determine the limits of these rights have been built with this background presumption in mind. As a result, proven Aboriginal and treaty rights are effectively made to measure this picture of the constitutional order. These made-to-measure rights are then provided with constitutional protections, but these are Charter-like protections. They presume a sovereign-to-subject relationship in which the court places reasonable limits on the Crown’s exercise of sovereign authority.

41 This conceptual shift in understanding the source of Aboriginal title was a rather late arrival in Canadian jurisprudence. The 1888 decision in *St. Catherine's Milling* maintained that Indian title had no pre-existence, but this had been undone by the Judicial Committee of the Privy Council by 1921. *Re Southern Rhodesia Land and Amodu Tijani v Secretary, Southern Nigeria* retained the notion that Aboriginal title is susceptible to unilateral extinguishment and, in that sense, they agree with Lord Watson’s view of Crown sovereignty in *St. Catherine's Milling*. But these decisions also altered the source of Aboriginal title. That is, they maintained that Aboriginal title pre-existed British authority. See *Re Southern Rhodesia Land* (1918), 88 LJC 1; *Amodu Tijani v Secretary, Southern Nigeria*, [1921] 2 AC 399.

42 Section 35(1) of the Constitution Act, 1982 states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

43 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72 [*Reference re Secession of Quebec*].

44 *Sparrow*, *supra* note 34 at 1103 [emphasis added].

45 Section 91(24) of the Constitution Act, 1867 extends the exclusive legislative authority of the Parliament of Canada to “Indians, and Lands reserved for the Indians.”

46 Section 1 of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” It is known as the reasonable limitations clause, or the justifiable infringement clause, as it allows the Crown to limit an individual’s Charter rights. These limitations are subject to judicial scrutiny. The primary test that is used to determine whether a given infringement of a Charter right is justifiable under section 1 is set out in *R v Oakes*, [1986] 1 SCR 103.

The problem here is not simply that this version of section 35 lacks meaningful protections, but that it provides categorically the wrong type of protections. Indigenous peoples are *peoples* and the courts should not be reconciling them to the position of a cultural minority within the state. Put differently, by accepting the thick version of Crown sovereignty, the courts have committed a category mistake, which has fitted Indigenous peoples with the very constitutional straitjacket into which the Supreme Court of Canada conscientiously avoided placing Quebec in the *Secession Reference*.⁴⁷

The Quasi-municipal Position and the Interpretation of Modern Treaties

The constitutional consequences of the thick version of Crown sovereignty can be clearly seen when we consider where the right of self-government would fit within the division of powers. As we have seen, the court's presumption of thick Crown sovereignty fills the constitutional frame in such a way that the only jurisdictional space left for self-governing Aboriginal peoples is a quasi-municipal one.

By “quasi-municipal,” we mean that there is a considerable degree of resemblance between the municipal model and the existing models of Indigenous governance. The resemblance between these models is by no means accidental. The band council system of the Indian Act was based on the one first set out in the Gradual Enfranchisement Act in 1868, which was designed to replace the traditional political systems of Indigenous nations with “simple municipal institutions” that would serve to prepare them for “responsible government.”⁴⁸ The original purpose of this municipal model was transitional. This simplified municipal model was a vehicle for enfranchisement.⁴⁹ The defining feature of a municipal government is that it is bounded by its enabling legislation, or to use a common but evocative legal phrase, a municipal government is a “creature of statute.” This use of the municipal model clearly shows where Indigenous governments were meant to fit within the Canadian constitutional order. There is no single and continuous version of the constitutional order; it can change, and has changed in many significant ways over the last 150 years. But

Indigenous peoples are peoples and the courts should not be reconciling them to the position of a cultural minority within the state.

47 *Reference re Secession of Quebec*, *supra* note 43 at para 150.

48 “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; *Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 31st Vict, c 42, SC 1869, c 6.

49 “Enfranchisement” has a kind of grey and lifeless taste to it, reminiscent of mouldering, outdated bureaucratic forms. On its face it refers to the process of granting citizenship to an individual or group; we can talk of extending the franchise of the state. It is in this sense the granting of a privilege, status or right; it was, as its etymology clearly shows, *liberatory*. Given the wide-ranging debates over the extension of the franchise in Britain in the nineteenth century, the use of the term was clearly one that drew on this positive and progressive sense. It recalls the notion of a uniform body-politic of the nation-state; the group that could speak with one voice as “we the people.” The problem was determining the criteria for who counted as part of this “we” and who did not. In the nineteenth century (and well into the twentieth) it was clear that “Indians” were outside of this “we” of the Canadian body-politic. While Lord Watson used the phrase “mere burden” to characterize the legal interests of Aboriginal peoples – not, strictly speaking, the peoples themselves – it captured just this problem: Aboriginal peoples were a *burden* on the body-politic. Their legal interests inhibited the uniform legal possession of territory and their diverse legal, political and social orders did not fit into the mould of the nation-state with its singular sense of “we the people.” The “Indians” needed to be *enfranchised*, to be liberated, freed from this burdensome difference. They needed to cease being Indians altogether. In this way, the “simple municipal institutions” of the Indian Act were cut from the same cloth as the residential school system. See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015).



there are aspects of this picture that have remained *more constant* than others and the position of Indigenous governments is one of those.

There is an unmistakable resemblance between Indigenous and municipal governments, but it is by no means an exact match. It is a resemblance; there are both similarities and differences. Prior to 1982, the scope of administrative powers that the federal government exercised over Indigenous peoples extended far beyond those in municipal governments. The administrative order established under the authority of section 91(24) existed as a parallel system within the broader frame of the Canadian constitutional order. It is difficult to adequately describe the features of this parallel system, but a rough and ready comparison can be made between it and the more familiar constitutional concept of the “state of emergency.” Like a state of emergency, the Indian Act and its assemblage of institutional and administrative mechanisms blurred the lines of the constitutional order. It became difficult to see the legal lines that legitimate the exercise of administrative authority. Unlike the state of emergency, the trigger was not a set of exigent circumstances (such as war, rebellion, disaster, and so on) but the presence of diverse peoples whose legal interests both pre-exist and complicate the constitutional order. The nature of this trigger also shaped the aim of this quasi-state of emergency; its purpose was to lift this burden on the constitutional order by assimilating Indigenous peoples into the singular mould of the nation-state.

In making the comparison between the legal and administrative system that was built upon the thick version of Crown sovereignty and section 91(24), we are not arguing that this was the *sole feature* of Canadian policy from 1867 to 1982. Rather, this is one aspect among others within a complicated pattern of overlapping and crisscrossing principles and policies. The relative strength of this particular aspect changes over time, but it serves to show how Indigenous governments were positioned within the constitutional frame, that is, in a quasi-municipal position that is somehow both subsumed within and excluded from the division of powers. In each case, Indigenous jurisdiction seems to evaporate.

In the post-1982 constitutional order, this picture has significantly changed. The powers of Indigenous governments could no longer be simply revoked by legislation; rather, the framework of section 35 provides a Charter-like constitutional protection to these governments. But even this limited protection is only available where these rights can be proven in the courts. In other words, the courts require a level of reasonable justification for infringements. But these Charter-like protections are limited to Aboriginal and treaty rights that are “recognized and affirmed.”

Cases that have come before the courts have demonstrated that the terms of treaties are subject to interpretive tests that assume a thick version of Crown sovereignty and so ensure that the outcome reaffirms and fits within this picture of the constitutional order (for example, *Marshall*; *Bernard*, and *Badger*).⁵⁰ As well, the protections of section 35 are only afforded to those rights that are *proven* through the *Van der Peet* test. This means that when Aboriginal governments attempt to use their inherent right of self-government to act outside of the bounds of the Indian Act, they must first prove that these rights exist.⁵¹

⁵⁰ *Marshall*; *Bernard*, *supra* note 29; *Badger*, *supra* note 30.

⁵¹ *R v Pamajewon*, [1996] 2 SCR 821.

Image:
Do Never (detail),
Jared Boechler

Indigenous governments are stuck in a constitutional netherworld that lacks the basic procedural clarity and legal certainty that enables governments to legally function.

The limitations of this “quasi-municipal” model of Indigenous self-government are obvious. In place of a clear division of powers within a federal constitutional structure, we are left with a confused hodgepodge of statutes and convoluted constitutional jurisprudence.⁵² Indigenous governments are stuck in a constitutional netherworld that lacks the basic procedural clarity and legal certainty that enable governments to legally function.

Given this, it is unsurprising that many Indigenous peoples who did not have prior treaties with the Crown opted to enter the modern treaty process. In modern treaties (also known as final agreements) it is possible to directly negotiate the terms of self-government. But how have the courts interpreted these agreements so far?

In *Beckman v Little Salmon/Carmacks*, Justice Ian Binnie articulated the purpose of modern treaties. He stated that they are a means to address “grievances over the land claims” and create the “legal basis” that is necessary to “foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.”⁵³ This characterization of the purpose of modern treaties is cited in the Supreme Court of Canada’s recent decision in *Nacho Nyak Dun*. Justice Andromache Karakatsanis explain: “As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act*, 1982, they have assumed a vital place in our constitutional fabric. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples.”⁵⁴

These statements demonstrate that the courts have begun to see modern treaties as a means of solving the problem of “reconciliation” between Indigenous and non-Indigenous Canadians. But it is unclear where Indigenous peoples are situated in the “constitutional fabric.” This problem can be addressed in two categorically distinct ways. If the court presumes thick Crown sovereignty, then it situates both Indigenous and non-Indigenous people as subjects whose grievances can be addressed by a mix of land claim agreements and Charter-like rights. This is precisely what the current framework for section 35 does. But if the court presumes a thin version of Crown sovereignty, then Aboriginal peoples are equal partners in Confederation and the question before the courts is how to guide constitutional negotiations between the partners. This is the model of internal self-determination the court so clearly articulated for Quebec in the *Secession Reference*.

So far, court decisions on modern treaties have retained the presumption of thick Crown sovereignty. The courts have largely opted to avoid specific questions regarding the “place” of Indigenous peoples “in our constitutional fabric.”

The question has come up in the lower courts and yielded some interesting lines of argument. The lower courts were asked to determine the validity of the Nisga’a Final Agreement and this resulted in some curious approaches

⁵² The Indian Act remains the predominant statute of Aboriginal governments (that is, band councils), but it has been recently modified by certain other opt-in statutory schemes. Examples of this type of legislation include the *First Nations Land Management Act*, SC 1999, c 24, the *First Nations Fiscal Management Act*, SC 2005, c 9, and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

⁵³ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10 [Beckman].

⁵⁴ *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 1 [Nacho Nyak Dun].

to the question of “sovereign incompatibility.”⁵⁵ In *Campbell*,⁵⁶ Justice Paul Williamson found that “the *Constitution Act, 1867* did not distribute all legislative power to the Parliament and the legislatures.”⁵⁷ The gist of this argument is that the powers set out in sections 91 and 92 were not exhaustive: “[W]hat remains [is] 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.”⁵⁸ This opens up a picture of federalism that allows Indigenous peoples access to the powers that could persist between the lines of sections 91 and 92. The precise dimensions of these spaces is uncertain, as it depends on exactly how the courts interpret the content of the explicit provisions. But it does offer an argument that moves toward thinning the concept of Crown sovereignty.

The same line of reasoning was not followed by the British Columbia Court of Appeal. In *Chief Mountain*,⁵⁹ Justice David C. Harris found that it was unnecessary to determine the source of self-government rights because at least one party to the agreement had the necessary capacity and authority to delegate powers to the other.⁶⁰ Simply put, the fact that the Crown could delegate the governance powers in the Nisga’a Final Agreement meant that the courts could avoid any further investigation into validity.

At first glance the difference between *Campbell* and *Chief Mountain* seems to be a rather stark one. In *Campbell*, Justice Williamson addresses the issue of sovereign incompatibility directly and finds that Aboriginal peoples have a “diminished” form of sovereignty that exists between the lines of sections 91 and 92 of the *Constitution Act, 1867*, whereas in *Chief Mountain*, Justice Harris sidesteps this issue altogether by offering the “valid delegation” argument. But when we begin to examine the actual legal effects of these decisions we find that they are more similar than they first appear to be. In each, the Nisga’a Final Agreement is found to be constitutionally valid and the *Sparrow/Badger* test for infringement is found to apply. The residual spaces argument in *Campbell* can be seen as an initial step toward thinning Crown sovereignty in a way that could actually shift the modern treaties out of the quasi-municipal position in our “constitutional fabric,” but the continued use of the section 35 framework constrains it.

The courts have begun to see modern treaties as a means of solving the problem of “reconciliation” between Indigenous and non-Indigenous Canadians.

55 There are a number of lower court decisions where the doctrine of sovereign incompatibility has been adopted. See RO: RI: WI: *IO v Canada (AG)*, 2007 ONCA 100; *R v Pena*, 103 BCAC 273; *R v David*, 2000 CarswellOnt 540 (Sup Ct); *R v Cook*, 2010 ONSC 675; *R v Francis*, 2007 CarswellOnt 1548 (Sup Ct). In *Beaver v Hill*, 2017 ONSC 7245 at para 111, Judge Chappel provides a helpful overview of how this doctrine has been received in Canada: “[T]he notion of one, all-encompassing sovereignty that is vested in the Crown has been revisited in the aboriginal rights jurisprudence in the past two decades.” She continues to note that while *Sparrow* has been used to lend support to arguments of sovereign incompatibility, “a careful review of that decision indicates that the court questioned the notion that aboriginal rights claims could be summarily dismissed on the basis of arguments based on an exclusive sovereignty vesting in the Crown” (*ibid*). After a detailed review of the last 20 years of Supreme Court of Canada jurisprudence, she concludes that the court has acknowledged that “aboriginal self-governance claims can fall within the purview of aboriginal rights protected by s. 35(1). Furthermore, the court appears to have accepted a vision of ‘Canadian’ sovereignty that includes elements of aboriginal sovereignty that may be officially defined and recognized through either the voluntary treaty process or alternatively, recognized by the courts as aboriginal rights pursuant to s. 35(1). The doctrine of sovereign incompatibility is in my view antithetical to this vision. It derived from the common law of succession and was based on the historical all-encompassing concept of sovereignty that did not allow room for any form of aboriginal sovereignty” (*ibid* at para 121).

56 *Campbell v British Columbia (AG)*, 2000 BCSC 1123.

57 *Ibid* at para 180.

58 *Ibid*.

59 *Chief Mountain v Canada (AG)*, 2013 BCCA 49.

60 *Ibid* at para 51.

It is still possible for the courts to make the initial step toward changing this colonial picture of our shared constitutional order.

By viewing the modern treaties through the Charter-like lens of the current framework of section 35, the courts have made a categorical mistake and this has led our constitutional jurisprudence down a blind alley. Within a system of constitutional supremacy, the Constitution binds all governments and this binding only has meaning if the powers of those governments are grounded in the Constitution. This means legitimacy is not simply a political question; as the court rightly states in the *Reference re Secession of Quebec*, “[i]n our constitutional tradition, legality and legitimacy are linked.”⁶¹ This poses a particularly troubling problem, given the fact that the courts have grounded their interpretation of federal “power” under section 91(24) on a thick version of Crown sovereignty. This is the hinge of the current section 35 framework. It is how the court explains its use of a Charter-like reasonableness test for unilateral Crown infringement. It generates the current picture of the federal order, which is one that excludes Indigenous peoples and their governments from the division of powers. The problem is that the constitutional foundations cannot bear the weight of the thick version of Crown sovereignty. Thus far, the courts have avoided this problem by using the non-justiciability of Crown sovereignty as a makeshift stalking horse. This strategy has left them in the unenviable position of attempting to characterize a constitutional stalemate as a work-in-progress. The courts have repeatedly emphasized that the process of reconciliation compels a forward-looking perspective. But if the constitutional roots of the problem are left unexamined, then the distinction between reconciliation and evasion is lost.

This does not mean that the current position is hopeless. It is still possible for the courts to make the initial step toward changing this colonial picture of our shared constitutional order. As we have seen, by bundling Crown sovereignty with legislative power and underlying title, the court falls into two related errors. First, it extends the non-justiciable status of Crown sovereignty to legislative power and underlying title. Second, this inflated version of Crown sovereignty fills the constitutional framework in such a manner that the only remaining position for Indigenous peoples is as subjects. The way out of this problem is to adopt a thin notion of Crown sovereignty. This thin version of sovereignty is restricted to minimal settings (i.e., it is not coupled with underlying title and legislative power, but still retains features of state sovereignty such as external legal personality and territorial integrity). This places legislative power and underlying title within the arena of constitutional law and negotiation. This is by no means a novel move. It is one that can be seen (at least in part) in the *Marshall Trilogy*⁶² in the United States, there are the initial steps toward it in *Campbell*, and it is clearly presented in the Penner Report⁶³ and the Royal Commission on Aboriginal Peoples.⁶⁴

61 *Reference re Secession of Quebec*, *supra* note 43 at para 33.

62 *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515, 8 L Ed 483 (1832).

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

64 Report of the Royal Commission on Aboriginal Peoples, *Volume 1: Looking Forward Looking Back* (Ottawa: Public Works and Government Services Canada, 1996); Report of the Royal Commission on Aboriginal Peoples, *Volume 2: Restructuring the Relationship* (Ottawa: Public Works and Government Services Canada, 1996).

The UN Declaration and Plurinationalism

As the previous section has explained, a thick version of Crown sovereignty can create real challenges for realizing a plurinational state because it leaves very little space for Indigenous peoples to be self-determining. We believe that a thin version of Crown sovereignty is more conducive to ensuring that modern-day treaties and self-government agreements are implemented in accordance with Canada's obligations under international human rights law. We now discuss how using the UN Declaration to interpret the rights found in section 35, such as the right to self-government, can create more space for Indigenous self-determination within the constitutional order and work to reconcile Indigenous legal orders with the Canadian state.

Before we discuss how international human rights law, in particular the UN Declaration, can work to achieve plurinationalism, we feel it is important to acknowledge the role that international law has played in diminishing Indigenous legal orders in the past. Many foundational doctrines of international law were formulated to exclude non-European peoples and their legal systems. For example, the "doctrine of discovery" was a key provision accepted in international law that enabled European states to justify their conquest of the Americas. As Indigenous historian Vine Deloria Jr. states, "the theory meant that the discoverer of unoccupied lands in the rest of the world gained a right to the land titles as against the claims of other European nations."⁶⁵ This doctrine supported — and perpetuated — the false assumptions that Indigenous peoples were savages, inferior and uncivilized, among other constructs the colonizers used to subjugate, dominate and exploit the lands, territories and resources of Indigenous peoples. Sovereignty itself was a result of colonial encounters, created in order to affirm European power over invaded and colonized territories.⁶⁶ As a result, many Indigenous peoples take issue with using the term "sovereignty" to describe their right to be self-determining, choosing instead to rely on their own vocabularies and teachings.⁶⁷ Furthermore, many Indigenous peoples remain skeptical of international law, recognizing that although it can be used to constrain violence, it can also be used to legitimize it.⁶⁸

The concerns mentioned above illustrate the importance of implementing international law, such as the UN Declaration, according to Indigenous peoples' own laws and legal traditions. Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*,⁶⁹ attempts to do just that. Introduced by Indigenous Member of Parliament Romeo Saganash, this bill requires Canada, in consultation and cooperation with Indigenous peoples in Canada, to "take all measures

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65 Vine Deloria, Jr, *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin, TX: University of Texas Press, 1985) at 86.

66 Antony Anghie, "Western Discourses of Sovereignty" in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013) at 22–23.

67 Irene Watson, "First Nations, Indigenous Peoples: Our laws have always been here" in Irene Watson, ed, *Indigenous Peoples as Subjects of International Law* (New York: Routledge, 2018) at 103.

68 *Ibid.*

69 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), [Bill C-262].

Indigenous peoples derive their laws from many sources: from the Creator, the land, and their own customs and decision-making processes.

necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.”⁷⁰ It also requires Canada to develop and implement a national action plan to achieve the objectives of the UN Declaration, “in consultation and cooperation with [I]ndigenous peoples.”⁷¹ This is significant because the extent to which other countries that signed the UN Declaration will acknowledge and respect its standards is yet to be seen. There are no enforcement mechanisms attached to the UN Declaration that could bring the state to account for any action taken that would be in conflict with the rights and obligations set out in the declaration, so it is meaningful that Bill C-262 not only requires Canada to take positive measures to implement the UN Declaration, but also obliges the state to do so in “consultation and cooperation” with Indigenous peoples.

For many Indigenous peoples, “the advancement of rights recognition through standards set by the UNDRIP is considered a high water mark of international law.”⁷² The UN Declaration takes a human rights approach to Indigenous peoples’ struggle to survive, and it is important to consider how this approach translates into Indigenous ways of knowing and ways of being in the world.⁷³ Article 3 of the UN Declaration states that Indigenous peoples have the right to self-determination;⁷⁴ however, states must ensure that domestic law does not limit the right in such a way that it renders the principle merely rhetorical and practically inoperable. From a Canadian perspective, this means that Canada must adopt a thin notion of Crown sovereignty — one that recognizes that both the state and its Indigenous peoples are legitimate actors within the constitutional framework and provides space for Indigenous laws to govern Indigenous peoples within their jurisdictions.

As a result, meaningful implementation of the UN Declaration requires the state, and the courts, to move away from the Charter-like lens of the current framework of section 35 and toward a jurisdictional division of powers with Indigenous peoples. Such an approach is contemplated in the preamble of Bill C-262:

Whereas all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust;

Where, in regard to indigenous peoples, it is important for Canada to reject colonialism and engage in a contemporary approach based on good faith and on principles of justice, democracy, equality, non-discrimination, good governance and respect for human rights.⁷⁵

⁷⁰ *Ibid*, s 4.

⁷¹ *Ibid*, s 5.

⁷² Watson, *supra* note 67 at 109.

⁷³ *Ibid* at 109–10.

⁷⁴ UNDRIP, *supra* note 2, Preamble: “Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development. Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law” [emphasis in original].

⁷⁵ Bill C-262, *supra* note 69, Preamble.

As one can imagine, certain statements from the court — such as this excerpt from *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*”⁷⁶ — would be rejected if the UN Declaration were implemented according to Indigenous legal traditions through Bill C-262. This would further entail that section 35 would no longer be subject to a Charter-like standard of justifiable infringement or reasonable limitation. The presumption of Crown sovereignty would remain in place, but it would be decoupled from legislative power and underlying title. This changes the constitutional paradigm of section 35 from Charter rights to jurisdiction. And furthermore, it changes the position of Indigenous peoples from governed *subjects* to self-governing peoples who are equal partners in Confederation. It is by no means a single and uncomplicated move. While section 35 is jurisdictional in character (that is, not subject to section 1 or section 33), it lacks the specific content of sections 91 and 92. This means that the thinning of Crown sovereignty allows the courts to properly facilitate the ongoing processes of constitutional negotiations with Indigenous peoples. That is, it enables the courts to offer all parties a clear constitutional playing field. It lifts the jurisprudential fog that has left the parties stuck in the nebulous quasi-municipal model and enables them to sit at the negotiating table as equal partners working toward a functional plurinational constitutional order.

As previously stated, Indigenous peoples developed systems of law, and abided by them, long before the introduction of foreign legal systems by Europeans and others. Therefore, they are not seeking their rights to self-determination, or land, from the Canadian state or the international community. Their laws derive from many sources: from the Creator, the land, and their own customs and decision-making processes.⁷⁷ These laws and legal processes do not require an act of the state to make them meaningful in the lives of the community members who follow them. Rather, implementing the UN Declaration is viewed by many Indigenous peoples as “a mechanism which will provide relief from the processes of the colonial state”⁷⁸ through recognition.

This could occur in a variety of ways. Since the legislature is presumed to act in compliance with Canada’s international obligations, unless there is a clear justification for doing otherwise,⁷⁹ any future treaty or self-government agreement should be interpreted as though it accords with the obligations of the UN Declaration. In addition, through section 25 of the Constitution Act, 1982, and our unwritten constitution, the Royal Proclamation of 1763 and Indigenous-Crown treaties can also be viewed as constitutional sources. As such, they should also be interpreted through the lens of the UN Declaration. Furthermore, Canadian courts could use the UN Declaration to interpret domestic law,⁸⁰ and find it to be a persuasive authority articulating Canada’s obligations to Indigenous peoples. Additionally, in common law countries that derive from the British legal tradition, customary international law is generally understood to be part of the common law that is applicable by common law courts. Therefore, if the UN Declaration is recognized as reflecting customary international law, Canadian courts could apply it

76 *Sparrow*, *supra* note 35 at 1103 [emphasis added].

77 Borrows, *Canada’s Indigenous Constitution*, *supra* note 14.

78 Watson, *supra* note 67 at 115.

79 *R v Hape*, [2007] 2 SCR 292 at para 53.

80 *Taku River Tlingit First Nation v Canada (AG)*, 2016 YKSC 7 at para 100.

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directly. As explained by former United Nations Special Rapporteur on the Rights of Indigenous Peoples S. James Anaya, the UN Declaration “can be seen as embodying to some extent the general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the Declaration can also be considered as a reflection of norms of customary international law.”⁸¹

Currently, there is much debate about the status of the UN Declaration. While some scholars would make the claim that some aspects of the declaration already constitute customary international law, others have met those claims with caution, given the conservative nature of international law, especially the complexity surrounding the formation of custom.⁸² Those in support of the declaration being customary international law argue that when it was in draft form, it was used extensively by Indigenous advocates and by international bodies and organizations and governments in municipal contexts, and therefore demonstrates the notion that “explicit communication among authoritative acts is a form of practice that may bring about a convergence of understanding and expectation that builds customary rules.”⁸³ As such, even in its draft form it was suggested that the normative statement of Indigenous rights had developed, in part, “sufficient ‘belief’ and practice apropos customary international law.”⁸⁴

Understood in this manner, arguably the UN Declaration could prove to be a very useful tool for the courts to rely on to support the reconceptualization of Crown sovereignty. Nevertheless, there is also the argument that statements by the CANZUS countries (Canada, Australia, New Zealand and the United States), which originally voted against ratification of the UN Declaration, signify persistent objectors and nullify the declaration’s status as customary international law. Although some scholars have suggested that the concern over the CANZUS dissenters may be overstated,⁸⁵ others have cautioned that “just as participation in a treaty does not necessarily allow inferences about the views of States parties regarding customary international law, we have some reason to doubt whether GA [UN General Assembly] votes can tell us that much about the views of voting States on international custom.”⁸⁶

What the literature seems to suggest, therefore, is that the starting point for any such analysis is to look at the UN Declaration, right by right, and determine if there is widespread and representative state practice in support of the purported new rule, as well as an understanding that they are obligated to support it.

In thinking about reconciliation and working toward a plurinational state, the right to self-determination⁸⁷ is of central importance. In fact, it is considered the founding principle of Indigenous peoples’ rights and the central guiding

81 Human Rights Council, Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UNHRC, 9th Sess, UN Doc A/HRC/9/9 (2008).

82 Megan Davis, “To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On” (2012) 19 *Austl ILJ* 17 at 19.

83 *Ibid* at 42.

84 *Ibid*.

85 See Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 *ICLQ* 957.

86 Emmanuel Voyiakis, “Voting in the General Assembly as Evidence of Customary International Law?” in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, UK: Hart, 2011) at 210.

87 *UNDRIP*, *supra* note 2, arts 3–5, 10–12, 14, 15, 17–19, 22, 23, 26–28, 30–32, 36, 38, 40, 41.

Image:
They Stole My Sister (detail),
Jim Logan



principle of the UN Declaration.⁸⁸ Article 3 states: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁸⁹ Self-determination has, at its core, the idea that peoples should collectively have control over, and be able to make decisions about, their own lives. Consequently, there are a number of related concepts also associated with this right, including group autonomy, independence, democracy, jurisdiction and law-making authority. However, as previously discussed, there is a plurality of Indigenous legal traditions in Canada. Derived from different sources, in response to different landscapes, cultures and histories, each of these legal traditions deserves recognition within Canada’s constitutional order, and the UN Declaration requires this. The result will be nation-to-nation relationships.

Nation-to-nation relationships, however, do not mean that Indigenous nations have a right to secession and independent statehood.⁹⁰ Self-determination, as far as the UN Declaration is concerned, must be exercised within the state.⁹¹ However, self-determination entails rights of autonomy, self-governance and political participation⁹² — rights typically associated with the concept of self-determination — but also rights in relation to lands, territories and resources,⁹³ and numerous economic, social and cultural rights.⁹⁴ The result would be a plurinational nation-state made up of a composite of multiple Indigenous nations, each of which has a recognized right to self-determination. This is in keeping with the federal government’s recognition of a rights approach, which seeks to recognize Indigenous rights in order to rebuild strong, self-determining Indigenous nations.⁹⁵

Modern-day treaties and/or self-government agreements provide a useful tool to create these nation-to-nation relationships. Treaty making is an Indigenous tradition that has been used since time immemorial to foster relations between different nations. However, in order to be effective in achieving reconciliation, these agreements must be negotiated and implemented according to the obligations outlined in the UN Declaration, and, more importantly, according to the laws and legal processes of the Indigenous peoples entering into them. By thinning Crown sovereignty, and thereby dismantling the *Sparrow* framework for section 35, real nation-to-nation reconciliation becomes possible within Canada’s existing constitutional order. In essence, the third order of government has always been here, hiding in plain sight: it is simply that the courts have mistaken it for a municipal order, a creature of statute, when its character is — and has always been — constitutional. As such, what we are advocating is not the dismantling or destruction of a constitutional order, but a change in how we see and understand it.

88 Bartolomé Clavero, “The Indigenous Rights of Participation and International Development Policies” (2005) 22 *Ariz J Intl & Comp L* 41 at 42.

89 *UNDRIP*, *supra* note 2, art 3.

90 Nor does it necessarily shut the door. In *Reference re Secession of Quebec* (*supra* note 43), the court determined that if Quebec finds that it cannot achieve internal self-determination, then the court cannot use the Constitution as a straitjacket to hold them back. The point is that there must be an attempt at making internal self-determination work before secession is legally pursued; however, secession is not off the table as a viable option.

91 *UNDRIP*, *supra* note 2, art 46.

92 *Ibid*, arts 4–5, 18–20, 34.

93 *Ibid*, arts 24–30.

94 *Ibid*, arts 21–23.

95 Canada, Indigenous and Northern Affairs Canada, “Recognition and Implementation of Indigenous Rights: Engagement guide”, online: <www.aadnc-aandc.gc.ca/eng/1518535062273/1518535094530>.

Conclusion

On February 14, 2018, Prime Minister Justin Trudeau delivered a statement in the House of Commons about the recognition and implementation of Indigenous rights. It confirmed the Government of Canada's commitment to fostering a new relationship with its Indigenous peoples — one based on recognition. In describing the significance of this shift in policy, Prime Minister Trudeau stated: "In such a relationship we do not start from a place of denial, but from a place where we recognize that Indigenous peoples have inherent, treaty, and constitutionally protected rights, that these rights are affirmed by the United Nations Declaration on the Rights of Indigenous Peoples, and are collaboratively recognized and implemented in partnership."⁹⁶ As we have described, the only way to recognize these rights is to thin Crown sovereignty, and recognize Indigenous peoples' right to be self-determining according to their own laws and legal orders.

The results of such a shift will be transformative. It will create a plurinational state where Indigenous peoples will determine the process of rebuilding their nations and governments. They will do this not as mere quasi-municipal bodies, but as recognized constitutional actors with powers equal to that of the federal and provincial governments. To repeat, since early treaties were built on this recognition, such a shift does not represent a dismantling of Canada's constitutional order. Rather, the UN Declaration offers a new lens through which to view the relationship between Canada and the Indigenous peoples of Canada.

What we are advocating is not the dismantling or destruction of a constitutional order, but a change in how we see and understand it.

⁹⁶ *Ibid.*

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