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## Conceptions of Sovereignty

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## Abstract

This paper explores conceptions of sovereignty held by Canada's Indigenous and Western cultures. It seeks to determine what sovereignty entails and how the Crown-Indigenous relationship is affected by the judgments of Canada's courts. The study makes no attempt to compare the relative merits of Indigenous and Western sovereignty conceptions. Similarly, it does not examine nor attempt to reconcile sovereignty-related tensions that may exist between the Crown and Indigenous peoples.

The research is framed by a two-part question: (1) *What are the defining characteristics of Indigenous and Western conceptions of sovereignty; and (2) what impact do the sovereignty-related judgments of Canada's courts have on the Crown-Indigenous relationship?* I investigate sovereignty from the perspectives of theoretical first principles, contemporary interpretations, and Canadian jurisprudence, principally *Delgamuukw v British Columbia*, a landmark case that established key legal principles pertaining to Indigenous title, evidentiary rules, and the powers of extinguishment.

I conclude that the lack of political will is the principal impediment to achieving a just, harmonious relationship between the Crown and Canada's Indigenous peoples, regardless of their respective conceptions of sovereignty.

## Keywords

Indigenous, Aboriginal, First Nations, sovereignty, diversity, self-determination, constitutions, jurisprudence, *Delgamuukw v British Columbia*

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## Chapter 1

### 1 Scope and Methodology

*The conquest of the Earth, which mostly means taking it away from those who have different complexions or slightly flatter noses than ourselves is not a pretty thing when you look into it too much.*

- Joseph Conrad, *'Heart of Darkness'* 1925.

#### 1.1 Introduction

Sovereignty lies at the heart of Indigenous aspirations to regain the dignity, identity, and rights appropriated by colonial powers since the 16<sup>th</sup> century.<sup>1</sup> What, however, does sovereignty entail? If there are different conceptions, how do they affect the relationship between Indigenous peoples and the Canadian Crown? Moreover, what aspects of the relationship are attributable to the judgments of Canada's courts?

Sovereignty and Indigenous self-determination are conspicuous topics in Canada's legal and political discourse: ones that have historically been addressed through rhetoric, analyses such as the 1996 *Royal Commission on Aboriginal Peoples*, or policy initiatives like the 1969 White Paper<sup>2</sup> or the 2005 Kelowna Accord.<sup>3</sup>

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<sup>1</sup> The terms "Aboriginal", "Indigenous", "Indian", "Métis", "Inuit" and "First Nation" are found throughout the legislation, literature, and case reports referenced in this research. In many cases the terms are used interchangeably, which can be misleading and insensitive to those being referenced. This paper acknowledges that the term "Aboriginal" is frequently used in contemporary discourse, but the term "Indian" is considered derogatory by many people. For the purposes of this paper, the term "Indigenous" is used to refer collectively to those who self-identify as First Nations, Métis, or Inuit peoples, notwithstanding their cultural and historical differences. Direct quotations and citations employ the terms included in the primary documents.

<sup>2</sup> Indigenous and Northern Affairs Canada, "Statement of the Government of Canada on Indian Policy" (1969). Online: <http://www.aadnc-aandc.gc.ca/eng/>.

<sup>3</sup> Parliament of Canada, "Strengthening Relationships and Closing the Gap Report" (2005). Online: <http://lop.parl.ca/content/lop/researchpublications/>.

It is popular to characterize such activities as attempts to ‘reconcile’ the historically troubled Crown-Indigenous relationship. However, achieving reconciliation has proven to be a profoundly elusive goal when one reflects on attempts to do so by governments dating back to Sir John A. Macdonald. Nevertheless, creating a relationship in which Indigenous and settler Canadians respect and accommodate the cultures of each is ranked among the current government’s highest priorities. Whether or not achieving that goal will qualify as reconciliation remains an open question. It is clear, however, that sovereignty issues are central to the process.

## 1.2 Scope and Methodology

The two-part research question investigated in this paper is: 1) What are the defining characteristics of Indigenous and Western conceptions of sovereignty; and (2) what impact do the sovereignty-related judgments of Canada’s courts have on the Crown-Indigenous relationship? To answer these questions, this paper investigates sovereignty from the perspectives of theoretical first principles, contemporary interpretations, and the role of Canadian jurisprudence. Notwithstanding sovereignty’s spiritual roots, the study’s focus is political rather than religious. Moreover, the paper is descriptive rather than argumentative. I make no attempt to judge the relative merits of the sovereignty conceptions studied. Nor do I consider the moral or legal validity of historic assertions of sovereignty in the Americas by foreign governments.

One cannot analyze a phenomenon like sovereignty without first establishing a broad understanding of its meaning and characteristics. Hence, Chapter-2 explores traditional and contemporary conceptions of sovereignty held by Indigenous and Western polities. In the absence of primary sources apart from jurisprudence, research into Indigenous beliefs relies on monographs, journal articles, and transcriptions of oral histories that can sometimes be inconsistent or coloured by the reporter. The significance of the Indigenous oral tradition is discussed in the context of its role in the intergenerational transfer of customs, laws, and history; and its evidentiary acceptance in Canada’s common and civil law courts. I conclude the discussion of traditional Indigenous sovereignty with commentaries by Taiaiake Alfred, Dale Turner, John Borrows, Jean Cohen, and Bruce



Clark, each of whom offers unique, controversial, and sometimes disputed insights into sovereignty's meaning to Indigenous peoples.

Researching Western sovereignty is facilitated by the availability of primary documents ranging from the just war (*jus bellum*) theories articulated by Augustine and Aquinas, through 15<sup>th</sup> to 19<sup>th</sup> century proclamations and statutes, to recent rulings by Canada's courts. This study's primary sources include the 15<sup>th</sup> century Papal bulls (*Dum Diversas* and *Inter Caetera*), the Peace of Westphalia, Royal Proclamation, Indian Act, and historic agreements including the Covenant Chain Alliance, and the Treaty of Niagara. The paper also explores secondary sources including monographs and peer-reviewed articles in which sovereignty and self-determination are central issues.

The third chapter, entitled 'The New World' describes the arrival, distribution, and settlement of America's original inhabitants, followed by a brief summary of Europe's early exploration, exploitation, and settlement of the east coast and St Lawrence River valley. Of particular interest are the authorities and justifications employed by Columbus, Cabot, Cartier, and others who claimed sovereignty over North American territories – sometimes by gestures no more significant than raising a flag or planting coins in the sand. This material provides an understanding the different conceptions of sovereignty held by and between the European occupiers, and how each group interacted with the Indigenous peoples they encountered. The chapter highlights the efforts to address Crown-Indigenous relations made by selected Canadian Prime Ministers over the past 150-year period. The observations provide a snapshot of the Crown's history of making but not keeping promises concerning Indigenous peoples and their rights.

The fourth chapter, entitled 'Sovereignty and the Law', has three subsections. The first introduces four instruments that largely define the Crown-Indigenous relationship. Each of these instrument is sufficiently complex to merit a research paper in its own right. Hence, for the purposes of this study they are summarized and presented strictly as background information. The second section examines sovereignty from a jurisprudential context. At a very general level it conflates Indigenous sovereignty with the tenets of natural law, and western sovereignty with those of positivism. It briefly discusses

customary law and the challenge faced by courts attempting to balance customary and statutory law in their judgments.

*Delgamuukw v British Columbia*, a landmark case involving Indigenous rights and sovereignty is explored to demonstrate differences in the trial, appeal, and Supreme Court pleadings, particularly how each court interpreted identical facts. Analyses of *Delgamuukw* by three scholars are offered to demonstrate differing interpretations of the Court's findings and how they affect Indigenous acceptance of the courts as arbiters in Crown-Indigenous disputes.

The fifth and final chapter consolidates the paper's principal findings and suggests two areas where additional research may be valuable. My research reveals a fundamental gap between traditional Indigenous and Western understandings of sovereignty at the philosophical level. However, to the extent that contemporary Indigenous leaders employ sovereignty as an analogue for self-determination, the philosophical differences might play a relatively minor role in the overall relationship improvement project.

It would be naïve to assume that any outcome other than granting absolute Indigenous autonomy, including radical title to all disputed lands, will satisfy the demands of the most ardent nationalists, activists, or traditional leaders. Although their voices are important, they should not derail good faith negotiations or impede progress towards improving the relationship. The same admonition applies to political leaders and Crown officials whose commitment is essential to moving the reconciliation process forward.

## Chapter 2

### 2 Sovereignty

“A rose by any other name would smell as sweet”

- William Shakespeare, *Romeo and Juliete* (1599).

#### 2.1 Introduction

Humans have a long history, one might say an obsession, with naming things. We appear motivated by the belief that objects, even fictitious ones, can be named, given meaning, and assigned to classes that describe what words represent and how they are perceived by different cultures.<sup>4</sup> The naming of tangible objects is a universal practice. For example, subject to local translation, a *cat* is a *cat*, a *tree* is a *tree*, and so forth. However, when labels are assigned to concepts that lack normative definitions, the outcome can be problematic, as may be observed in terms like *democracy*, *freedom*, *reconciliation*, and *law* that can be contextual, culturally sensitive, and ideologically-anchored. Sovereignty is one of those complex terms. It has a historically-situated definition in Western jurisprudence and political discourse, *i.e.* supreme authority within a territory.<sup>5</sup> However, in the context of authority being vested in an individual, an institution, or a body of laws, sovereignty *per se* does not appear in the Indigenous lexicon.<sup>6</sup>

Sovereignty’s meaning is arguably more malleable than explicit or universal. For example, an Indigenous person might perceive one’s right to make life path choices as a manifestation of personal sovereignty; whereas, in international law sovereignty is

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<sup>4</sup> Ludwig Wittgenstein, *Philosophical Investigations* (New York: Macmillan, 1953) at 43. Wittgenstein postulates that definitions are products of the culture and society in which a word is used. He uses the phrase “language games” to describe how we assign conventional names to words even though they may not describe their meanings to all observers.

<sup>5</sup> Daniel Philpott “A Definition of Sovereignty” in *The Stanford Encyclopedia of Philosophy* (Stanford, Calif: Center for the Study of Language and Information) Online: <https://plato.stanford.edu/>.

<sup>6</sup> The Ojibwe Peoples Dictionary, *sub verbo* “sovereignty”. Online: <<http://ojibwe.lib.umn.edu>>.

traditionally conflated with the authority of states to manage their affairs unimpeded by other jurisdictions.<sup>7</sup> In that respect, sovereignty may be perceived by both Indigenous persons and nation states as a ‘shield’ against external influence, and a foundation upon which other rights are based. All interpretations are equally valid in the circumstances and epistemology of the claimant.

Lassa Oppenheim is regarded by many as the father of the modern international law. He writes “...there exists perhaps no conception...more controversial than that of sovereignty...until this present day [there] has never been a meaning which was universally agreed upon.”<sup>8</sup> Kent McNeil observes “sovereignty is a European concept...care needs to be taken in applying [it] in other parts of the world where societies were not necessarily organized on the nation-state model”.<sup>9</sup>

A particularly insightful observation concerning differing conceptions of sovereignty was offered by the *Royal Commission on Aboriginal Peoples* which, in its final report concluded:

Any detailed examination of sovereignty is ultimately a distraction from the issues our mandate requires us to address. Differences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence rather than attempting to persuade the adherents of opposing positions that their beliefs are misguided.<sup>10</sup>

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<sup>7</sup> The concepts of ‘choice’ and ‘non-interference’ at personal, community, or state levels permeate sovereignty and are recurring themes throughout this paper.

<sup>8</sup> Lassa Oppenheim, *International Law: A Treatise*, 3<sup>rd</sup> ed by Ronald Roxburgh (London UK: Longmans, Green and Co, 1920) at 129.

<sup>9</sup> Kent McNeil, “Sovereignty on the Northern Plains: European, American and Canadian Claims” (2000) 39 *Journal of the West* 10 at 11.

<sup>10</sup> *Report of the Royal Commission on Aboriginal Peoples* (2004) Volume 2: Restructuring the Relationship, Part 1, Chapter 2, Section 1.3. Online: [http://www.ainc-inac.gc.ca/ch/rcap/sg/ch2\\_e.pdf](http://www.ainc-inac.gc.ca/ch/rcap/sg/ch2_e.pdf).

These observations can lead one to conclude that sovereignty is a fluid concept that serves a particular purpose at a particular point in time. This idea is underscored in the context of Indigenous diversity and the consequential homogeneity assumption.

Whether viewed on a personal or international scale, sovereignty involves fundamental issues of power and authority. To understand it as a cultural concept and legal doctrine it is appropriate to examine it from perspectives that include: (1) its Indigenous and Western foundations; (2) how it is situated in the context of legal theory; and (3) its evolution from a spiritual to a predominantly secular form. Above all, as evinced throughout this paper, one should understand that sovereignty is an elusive concept that is highly dependent on the context in which the term is used: There is no ‘best’ conception or definition.

This chapter begins with an overview of Indigenous sovereignty focusing on three subtopics: (1) the role of oral history; (2) the assumed homogeneity problem; and (3) conflicting visions of property rights. It then explores Western sovereignty from its beginnings as a religious maxim through its transition to Westphalian sovereignty with particular reference to the importance of territoriality and international recognition. Of note is the distinction between Western sovereignty, which embodies the concept of a ‘Sovereign’ (supreme power) and the traditional Indigenous conception in which sovereignty is an inherent (personal right) in which one is implicitly his or her own “Sovereign”.

After exploring the historical foundations of sovereignty, the paper proffers an interpretation of Indigenous sovereignty as an analogue for communal self-determination. The development of Indigenous constitutions is examined from the perspective of their contribution to self-government agreements and their relationship to Canada’s Constitution Acts. Modern treaties are introduced as instruments that may contribute to a less adversarial Crown-Indigenous relationship. They are not examined in detail in the scope of this paper.

The chapter then traces the evolution of Westphalian sovereignty from a doctrine of supreme (vertical) territorial control to the contemporary (horizontal) model in which

sovereignty is voluntarily shared among otherwise independent nations. The shared sovereignty model may provide opportunities for bringing Crown-Indigenous relations into greater harmony by establishing First Nations as a third order of government within Canada's current constitutional framework.

The chapter concludes with descriptions of two emerging challenges to nation-state sovereignty. First, promotion of cosmopolitan world government as an alternative to the Westphalian state centric model, and second, introduction of doctrines such as the United Nations' *Responsibility to Protect* that permit international intervention to protect citizens from abuse or neglect by their governments.<sup>11</sup>

## 2.2 Traditional Indigenous Sovereignty

*I don't even like the word sovereignty...it denotes the idea that there is a sovereign, a king, or a head honcho, whatever. I think native peoples' government was more of a consultative process where everyone was involved – women, men and children.*

- Greg Johnson, Eskasoni, Nova Scotia, May 1992<sup>12</sup>

To understand traditional Indigenous sovereignty, one must first accept its conflation with spirituality and personal choice. In traditional Indigenous culture, there is no defined Sovereign in the sense of there being an individual or institution with supreme jurisdiction over the temporal affairs of individuals or communities. That said, belief in a Creator whose vision establishes the principles necessary for a 'good life' and defines the relationship between all living things and the earth, permeates Indigenous culture.<sup>13</sup>

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<sup>11</sup> United Nations "Responsibility to Protect Doctrine" (2005) A/RES/60/1 at paras 138 and 139. Online: [www.un.org/en/genocideprevention/responsibilitytoprotect/html](http://www.un.org/en/genocideprevention/responsibilitytoprotect/html).

<sup>12</sup> Dave Courchene Jr, quoted in John Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary* 4<sup>th</sup> ed. (Toronto: LexisNexis Canada, 2012) at 5.

<sup>13</sup> John Borrows, *Canada's Indigenous Constitution*, 1<sup>st</sup> ed. (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitutions*] at 79, 85, 91, 119 and 241. Borrows describes the creation stories of Anishinabek, Cree, Carrier, and Mi'kmaq traditions. Although each is unique to individual cultures, they

Traditional Indigenous sovereignty is interpreted by some as a personal freedom that “can neither be given nor taken away, nor can its basic terms be negotiated.”<sup>14</sup> It celebrates one’s ability to make personal choices about their life path and the consequences arising therefrom in a culture of non-interference rather than being subjected to the political authority of sovereign rulers or legislative assemblies. John Borrows observes “[h]uman beings are born with the inherent freedom to discover who and what they are...this is perhaps the most basic definition of sovereignty”.<sup>15</sup> Roger Jones, an Elder with Ontario’s Shawanaga First Nation, echoes Borrows’ assertion, adding “[s]overeignty is difficult to define because it is intangible, it cannot be seen or touched. It is very much inherent, an awesome power, a strong feeling of belief of a people”.<sup>16</sup> Taiaiake Alfred postulates “Indigenous concepts of political relations (sovereignty) are rooted in notions of freedom, respect, and autonomy”.<sup>17</sup> Indigenous sovereignty may therefore be broadly regarded as the right of individuals to control their lives and destiny in accordance with the culture, economy, and political institutions of their nations. Traditional Indigenous sovereignty is thus a permissive construct that enables rather than constrains personal freedom.

There is some international consensus that sovereignty and self-determination begin at the personal level. In Australia, for example, the National Aboriginal and Islander Health Organization defines sovereignty as “Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action”.<sup>18</sup> In that regard, one might also

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share a common theme in terms of the relationships among all things, and the responsibilities of individuals to themselves and each other.

<sup>14</sup> John Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary* 4<sup>th</sup> ed. (Toronto: LexisNexis Canada, 2012) [*Aboriginal Legal Issues*] at 4.

<sup>15</sup> Royal Commission on Aboriginal Peoples (RCAP) 1992-1996, as reported in Canada Communication Group, *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship* at 105-6, 108-14. Quoted in Borrows, *Aboriginal Legal Issues* *supra* note 14 at 3.

<sup>16</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 3.

<sup>17</sup> Alfred, Taiaiake, *From Sovereignty to Freedom. Toward an Indigenous Political Discourse* (2004). Online: <<http://www.taiaiake.com/pdf/spf.pdf>> at 1.

<sup>18</sup> National Aboriginal and Islander Health Organization “Sovereignty” (1983). Online: <[www.kooriweb.org/foley/news/story8.html](http://www.kooriweb.org/foley/news/story8.html)>. Quoted in Larissa Behrendt, *Achieving Social*

draw a parallel to the libertarian school of western political thought in which adherents seek to maximize personal choice and accept ownership of the consequences arising from their decisions.

### 2.2.1 Pre-contact Governance

The cultural precepts of personal choice and responsibility should not be interpreted as the absence or rejection of social organization or a leadership model in early First Nations. To the contrary, evidence of sophisticated pre-contact governance systems is well-documented in the literature and acknowledged in court transcripts and judgments. For example, Borrows provides an overview of Anishinabek legal traditions in *Canada's Indigenous Constitution* in which he describes how localized clans formed “loose confederacies” that managed resources, regulated behaviour, and settled disputes in a consensual rather than ‘top down’ manner.<sup>19</sup>

The Haudenosaunee peoples of the southern Ontario, Quebec, New York and Wisconsin, *i.e.* the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscaroras; generally referred to as the Iroquois Confederacy, established complex governance and legal orders under the spiritually-based Great Law of Peace (*Kaianerekowa*)<sup>20</sup>. In its founding legend the Creator sends a messenger referred to as the Peacemaker, who is the progeny of a virgin birth, to spread the principles of “Peace, Power, and Righteousness, and to establish the Haudenosaunee longhouse as a metaphor for the Great Law.”<sup>21</sup> Many Haudenosaunee Nation members still reject being labelled as Canadian citizens, arguing that their Confederacy’s treaties with the Crown established an alliance rather than a hierarchical

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*Justice: Indigenous Rights and Australia's Future* (Annandale NSW: Federation Press, 2003) at 100.

<sup>19</sup> Borrows, *Indigenous Constitutions*, *supra* note 13 at 77.

<sup>20</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 35.

<sup>21</sup> While drawing no conclusions, one cannot avoid the similarity between the Haudenosaunee Great Law Peacemaker story, and the Christian belief that God dispatched Jesus, also the progeny of a virgin birth, to bring peace and cooperation to the people of what is now the Middle East. See also, Taiaiake Alfred, *Peace Power, Righteousness – An Indigenous Manifesto* (Toronto: Oxford University Press, 1999).



relationship.<sup>22</sup> As an enduring expression of their independence the Haudenosaunee have issued passports to reinforce their status as sovereign nations since 1923. However, the passports enjoy limited international recognition beyond their role as identification documents.

The issue of Indigenous governance has a direct bearing on the sovereignty and court-related questions examined in this paper. For example, in *R v Sparrow*<sup>23</sup>, a case involving alleged violation of British Columbia's fishing regulations, Dickson CJC acknowledged long-established Indigenous governance traditions in his observation "...the Musqueam lived in the area as an organized society long before the coming of the European settlers" noting scholar Dr. Suttles' assertion "the Musqueam were part of a regional social network...and were themselves an organized social group".<sup>24</sup> Both Sparrow's appeal and the Province's cross-appeal were dismissed by the Court and a new trial was ordered.

The longstanding Iroquois governance structure was acknowledged in *Mitchell v MNR*<sup>25</sup>, a landmark case involving cross-border importation rights. At trial, McKeown J observed "...the Mohawks had achieved for themselves the most remarkable civil organization in the New World."<sup>26</sup> At the SCC, McLachlin CJC took judicial notice of McKeown's assertion, stating "The Iroquois Confederacy is thought to have been formed around 1450", which history records as more than a century before Jacques Cartier explored the St Lawrence River valley on behalf of the French.<sup>27</sup>

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<sup>22</sup> Borrows, *Indigenous Constitutions*, *supra* note 13 at 27.

<sup>23</sup> *R v Sparrow*, [1990] SCJ No 49, [1990] 1 SCR 1075.

<sup>24</sup> *Ibid* at para 29.

<sup>25</sup> *Mitchell v MNR*, 2001 SCC33, [2001] 1 SCR 911 [*Mitchell*].

<sup>26</sup> *Ibid* at para 112.

<sup>27</sup> *Ibid*.

Despite Mitchell's Iroquoian claims of autonomy within the broad framework of Canadian sovereignty<sup>28</sup> the Court relied upon the doctrine of sovereign succession defined in British colonial law and allowed the Minister of National Revenue's appeal.<sup>29</sup> The claim that Indigenous rights exist because Indigenous peoples were self-governing, independent polities prior to arrival of European settlers, received support in *R v Van der Peet* which states "s. 35(1) [of the *Constitution Act 1982*] recognizes and affirms the doctrine of aboriginal rights...because...when Europeans arrived in North America, aboriginal peoples were already here".<sup>30</sup>

The Courts have not always been sympathetic to arguments concerning pre-contact Indigenous governance and legal orders. For example, in *R v Syliboy*<sup>31</sup> an early Nova Scotia out-of-season hunting case, Patterson (Acting) Co Ct J, ruled "The Indians were never regarded as an independent power...The savages' right of sovereignty, even of ownership were never recognized".<sup>32</sup> More recently, in *Delgamuukw v British Columbia*<sup>33</sup> McEachern BCCJ denied the existence of an Indigenous legal and political system, referring to their culture as being primarily based on "commonsense subsistence practices".<sup>34</sup> With respect to the nature of the Gitksan and Wet'suweten legal order, he

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<sup>28</sup> *Ibid* at para 113.

<sup>29</sup> *Ibid* at para 173. "...the claimed aboriginal right never came into existence..."

<sup>30</sup> *R v Van der Peet* [1996] SCJ No 77, [1996] SCR 507 [*Van der Peet*] "...the doctrine of aboriginal Rights exists and is recognized and affirmed by s. 35(1), because...when Europeans arrived in North America, aboriginal peoples were already here" at para 30. Also, *Haida Nation v British Columbia* 2004 SCC 73, [2004] 3 SCR 511 "Canada's Aboriginal peoples were here when Europeans arrived and were never conquered" at para 25.

<sup>31</sup> *R v Syliboy*, [1929] DLR 307.

<sup>32</sup> *Ibid* at 313. Patterson's comments are reflective of the sentiments of the time and inconsistent with contemporary mores or language.

<sup>33</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>34</sup> *Ibid* at para 18.

described it as a “... most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves”.<sup>35</sup>

Hence, to the extent that sovereignty is associated with social structure and governance, there are mixed views among Indigenous and Western observers and within the courts themselves. Although the debate over the existence of pre-contact Indigenous governance and legal structures may appear settled superficially, the evidentiary weight it is afforded at trial remains uncertain. Moreover, as articulated in *Sparrow* and *Mitchell*, social structure is not necessarily perceived as a definitive marker of Indigenous sovereignty in common law.

### 2.2.2 Contributing Factors

Beyond its spiritual and personal aspects, there are three additional factors one should consider when examining Indigenous sovereignty. The first concerns verifiability. The history and tenets of Western sovereignty are well documented, whereas Indigenous beliefs and history are mostly unwritten, orally disseminated, and interpreted by revered Elders within each nation. Consequently, although there may be similarities among Indigenous beliefs and history, narratives such as creation stories and laws are localized and vary between communities.<sup>36</sup> Oral history becomes particularly important in sovereignty-based litigation where evidentiary rules in the common law tradition favour documentation and first person testimony.

The second factor concerns the diversity that exists among the 630 plus Canadian First Nations, and the challenges it presents to those involved in policy formulation or negotiations. I refer to this as ‘the homogeneity assumption’. Along with redressing

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<sup>35</sup> *Ibid* at para 20.

<sup>36</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 63, 79, 85, and 92. Borrows observes that although Indigenous creation stories typically embody elements of nature and spirituality, they vary widely among nations like the Anishinabek, Carrier, Cree and Mi’kmaq. From the same source, see also “Sacred Relationships: The Earth and Anishinabek Spiritual Beliefs” at 241-242.

historic wrongs and accommodating ideological differences, I characterize diversity accommodation as a major impediment to improving the Crown-Indigenous relationship.

The third and arguably most complex issue concerns land. Land, as it relates to title, rights, usage, and communal versus individual ownership, underpins sovereignty regardless of the definition one chooses to endorse. Resolving land-related issues is a major challenge faced by First Nations and the Crown alike. It is an issue that is arguably irreconcilable to ardent nationalists, be they Indigenous or settler Canadians in origin.

Although the broad land issue is discussed briefly, its comprehensive analysis is beyond the scope of this paper. There is, however, a specific aspect of land ownership that is addressed herein, *vis.* the ability of Indigenous communities to manage land interests within their designated reserves. In that regard, this research reveals competing land ownership arguments within First Nations themselves. Those competing interests contributed to rejection of Pierre Trudeau's 1969 offer to transfer radical title to all reserve land to First Nations communities to manage in accordance with their individual customs and traditions.<sup>37</sup>

### 2.2.3 Oral Traditions

Asserting claims to sovereignty in the context of Canadian land issues has historically required the presentation of arguments and materials in accordance with common law evidentiary rules. However, Indigenous history is less well documented than that of Western cultures in which the recording of historic events and cultural traditions has existed for centuries.<sup>38</sup> Consequently, one wishing to investigate Indigenous perspectives

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<sup>37</sup> Indigenous and Northern Affairs Canada, "Statement of the Government of Canada on Indian Policy" (1969). Online: <http://www.aadnc-aandc.gc.ca/eng/>. Article 6 declared the Crown's intent to end its role as trustee, and to transfer radical title to all Reserve lands to the respective Band Councils. Under the proposed arrangement, it would be up to individual Bands to determine how title would be held and the conditions under which sales could be made and to whom.

<sup>38</sup> The Greek historian Thucydides (460-404 BCE) is widely recognized as the originator of applying strict standards of evidence-gathering and analysis of cause and effect without reference to intervention by the gods or mystic forces in the course of human events. Ancient Egyptian hieroglyphic writing systems can be

in courts or scholarship endeavours must often rely on transcriptions of oral histories shared with contemporary reporters by tribal Elders.<sup>39</sup>

Although there was no evidence of a formal written language system in early Indigenous societies, its absence should not be interpreted as the inability to record significant events. For example, in northern Ontario, archeologist John Norder interprets rock art and pictographs as memorialization of significant events and important locations.<sup>40</sup> Similarly, First Nations on the Pacific coast represent family history and significant events on totem poles and through feasting ceremonies that existed hundreds of years before first contact. Notwithstanding these exceptions, there is no debate that the oral tradition dominates Indigenous history and legal traditions.

There is no suggestion here that Indigenous oral history is less accurate than documented western history, which itself is often criticised as being “written by the victors” and hence reflects their biases and perceptions.<sup>41</sup> Moreover, there are ways other than reliance on written records to verify orally-reported events. For example, the archeological record is often useful in verifying past events such as the settlement patterns and territorial control claims of First Nations. Similarly, trap line and territorial boundary maps drawn by First Nation hunters and subsequently verified by professional surveyors can verify land claims and usage patterns over extended time.<sup>42</sup> Moreover, information gathered by

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traced as far back as 4000 BCE. Harappan scripts from the Indus River region have been estimated to originate as early as 3000 BCE, but to date, none have been successfully interpreted.

<sup>39</sup> See John Borrows, *Drawing Out Law: A Spirit's Guide*, 1<sup>st</sup> ed. (Toronto: University of Toronto Press, 2010). In this innovative work, John Borrows employs the Indigenous storytelling tradition to explore Aboriginal and Western interpretations of law and political relationships.

<sup>40</sup> John Norder, “The Creation and Endurance of Memory and Place Among First Nations of Northwestern Ontario, Canada” (2012) 16:2 *International Journal of Historical Archeology* 335.

<sup>41</sup> This widely used aphorism has been attributed to Winston Churchill and other prominent political and literary figures. It suggests that historical records are subjective in the absence of independent supporting evidence. Among the most glaring examples of historic falsehoods is the claim that Columbus ‘discovered’ the Americas.

<sup>42</sup> Hugh Brody, *Maps and Dreams – Indians and the British Columbia Frontier* (Vancouver: Douglas and McIntyre, 2004). Chapter 10 at 146.

anthropologists over wide areas can reveal consistencies, which when correlated with archeological evidence is helpful in confirming oral accounts.

Although some may question the reliability of oral history, its role was acknowledged by the SCC in *Delgamuukw* in which Lamer CJC dedicated twenty-nine paragraphs of the judgment to an analysis of Indigenous oral history as a reliable form of evidence, ultimately concluding:

The aboriginal perspective on their practices, traditions and on their relationship with the land are given due weight by the courts...[which] in practical terms, requires courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations are the only record of their past.<sup>43</sup>

and in *Van der Peet*:

The courts must not undervalue the evidence presented by aboriginal claimants simply because the evidence does not conform precisely with the evidentiary standards that would be applied in for example, a private law torts case.<sup>44</sup>

There are indications that some Indigenous commentators resist or at least caution against documentation of their sacred beliefs, laws, and history. For example, resistance to committing Indigenous history to writing can be found in the words of the outspoken Lakota activist Russell Means who proclaims "I detest writing. The process epitomizes the European concept of "legitimate" thinking. It is one of the white world's ways of destroying the cultures of non-European peoples".<sup>45</sup> Means is clearly exploiting his status as an Indigenous activist and thought-leader to express a politicized personal opinion, *i.e.* that Western historians intentionally corrupt Indigenous history and traditions through the

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<sup>43</sup> *Delgamuukw*, *supra* note 33 at para 84.

<sup>44</sup> *Van der Peet*, *supra* note 30 at para 68.

<sup>45</sup> Russell Means "Marxism is as Alien to My Culture as Capitalism" (2011). Speech given to the Black Hills International Survival Gathering, in the Black Hills of South Dakota. Online: <[www.filmsforaction.org/news](http://www.filmsforaction.org/news)>.

documentation process. John Borrows shares Mean's concern about recording Indigenous history in a more civil tone, stating "when oral traditions are expressed in written form it is important that steps be taken to ensure their flexibility is not lost [and] to preserve greater context".<sup>46</sup> Although Means and other activists are entitled to their personal beliefs, they should not be interpreted as objective representations of Indigenous culture or widely held beliefs.<sup>47</sup>

The importance of oral history as a vehicle for intergenerational knowledge transfer within and among First Nations is firmly established in Canadian law. As articulated by the SCC in *Delgamuukw* and *Van der Peet*, courts must adapt the common law rules, particularly those pertaining to hearsay evidence, and come to terms with the oral histories of Indigenous societies. The utility of oral evidence and a test for its acceptance was further confirmed in *Mitchell*<sup>48</sup> in which McLachlin CJC ruled:

Aboriginal oral histories may meet the test of usefulness if...no other means of obtaining the same evidence may exist...[and] the witness [is] a reliable source of the particular people's history ... [Moreover] judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions.<sup>49</sup>

Thus, notwithstanding issues of reporter bias and the lack of confirmational evidence, courts have validated the role of Indigenous oral history in legal proceedings - particularly in cases that deal with issues linked to sovereignty. However, the weight assigned to orally-given evidence compared to traditionally-compliant common law evidence can be subjective and circumstantially dependent.

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<sup>46</sup> Borrows, *Indigenous Constitution*, *supra* note 13 at 144.

<sup>47</sup> John Borrows is a respected advocate for Indigenous causes, but not an outspoken, 'activist' in the manner of Russell Means, Pamela Palmater, Bruce Clark or others.

<sup>48</sup> *Mitchell*, *supra* note 25.

<sup>49</sup> *Ibid* at paras 31-34.

It is difficult to overcome the challenge of making a sovereignty argument in a judicial setting if the (oral) evidence in support of your assertions is afforded less weight than the documentation presented by the opposing side. An additional problem arises in the context of linguistic differences between regions and First Nation communities. In that regard, Edward Hedican offers the caveat that social and scientific evidence is often misinterpreted in legal cases due to the diversity of Indigenous languages as opposed to verifiable documentary representations of history and traditions.<sup>50</sup>

#### 2.2.4 Homogeneity

A significant sovereignty issue arises from the cultural and geographic diversity of Canada's Indigenous peoples, and the consequent challenge of accommodating their needs, including their conceptions of sovereignty, on an equitable basis. Avoiding the homogeneity assumption, *i.e.* accommodating diversity, is particularly important in policy areas such as family services, health, education, and housing, where the needs are often urgent but rarely common. It is no less important in matters concerning sovereignty, where the traditions and aspirations of First Nations across Canada can vary widely. Accommodating diversity is arguably among the greatest challenges faced by courts and Crown agencies.

The homogeneity challenge is exacerbated by the division of responsibilities mandated by the *Constitution Act 1867*, the *Indian Act*, and provincial legislation, all of which impact communities whose needs may be different but are not harmonized among jurisdictions. A classic example of interjurisdictional conflict occurred in *St Catherine's Milling & Lumber Co v R*, a landmark land title dispute between the Province of Ontario and the Dominion of Canada over the ownership of former 'Indian lands' and the rights to harvest timber.<sup>51</sup> This case was ultimately settled by the Justice Committee of the

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<sup>50</sup> Edward Hedican, "Eurocentrism in Aboriginal Studies: A Review of Issues and Conceptual Problems" (2014) 34:1 *The Canadian Journal of Native Studies*. "Few people are aware that at the time of initial European colonization, there were over fifty distinct Aboriginal languages spoken in Canada" at 24.

<sup>51</sup> *St. Catherine's Milling & Lumber Co v R*, (14 App Cas 46 (JCPC)).



Privy Council (JCPC), interestingly, without participation by representatives of the Indigenous peoples whose rights were directly impinged.

The Assembly of First Nations (AFN) ostensibly advocates for Canada's Indigenous peoples, while Councils of Chiefs represent regional needs, but there is no entity that effectively represents the needs of the wealthy, politically-sophisticated Indigenous communities in Western Canada, small impoverished bands in northern Ontario, or isolated Inuit communities in the Arctic region. Moreover, the existence of pseudo-national coordinating organizations like the AFN does not assure acceptance of proposed or negotiated programs. For example, the Harper government's Bill C-33<sup>52</sup>, which proposed a \$2 billion increase in Indigenous education funding, was rejected by a vocal minority of Indigenous representatives, including AFN Regional Chief and current Canadian Justice Minister Jody Raybould-Wilson, with the result that the agreement failed and AFN Grand Chief Shawn Atleo was forced to resign his position -- in part because he was perceived by some as being too close to the Conservative government to effectively advocate Indigenous concerns. One might argue that internal politics led to the initiative's failure, but it underscores the diversity of opinion evident in the Indigenous milieu, and the challenge of creating nationally-scoped policies and programs.

The problems arising from homogeneity assumptions are neither new nor unique. They have been extensively addressed by scholars who uniformly criticize the practice. Michael Coyle, for example, warns "one must be careful not to universalize the rules of one group as being consistently applicable to others"<sup>53</sup> Edward Hedican asserts that Indigenous societies have historically been misunderstood and misclassified, leading to cultural stereotyping.<sup>54</sup> He is particularly critical of the 'distinctive culture' tests

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<sup>52</sup> Canada C-33: *First Nations Control of First Nations Education Act*. Online: <https://www.aadnc-aandc.gc.ca/eng/1358798070439/1358798420982>.

<sup>53</sup> Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall LJ 605. Quoted by John Borrows in *Aboriginal Legal Issues*, *supra* note 14 at 1072.

<sup>54</sup> Edward Hedican, *supra* note 50 at 87.

enunciated in *Van der Peet* and *Delgamuukw* that in his opinion fail to accommodate the cultural differences that exist between communities. Moreover, he argues that there is no universal Indigenous culture and hence, “Eurocentrism...is the imaginative and institutional context that informs contemporary scholarship, opinion, and law...[and] postulates the superiority of Europeans over non-Europeans”.<sup>55</sup>

With regard to *Van der Peet* and *Delgamuukw*, Hedican argues that Lamer CJC, “despite his intelligence and education...had absolutely no idea [as to] what is culture”<sup>56</sup> even though the Court’s distinctiveness tests rely on criteria based on cultural traditions. He argues further that few non-Indigenous people, including scholars and jurists, acknowledge the wide range of cultural and sociological differences that exist among Canada’s Indigenous peoples.

Michael Asch echoes Hedican’s criticism of the Court, asserting “the Court is in conflict with contemporary understandings about the nature of culture when it suggests that rights do not include abstract political rights, such as the right to self-determination”.<sup>57</sup> The negative outcome of cultural stereotyping is frequently reflected in public policy. For example, the *Indian Act*, which effectively governs Indigenous affairs in Canada, takes an entirely homogeneous view of Indigenous peoples.<sup>58</sup>

In *Terms of Coexistence* (2013), Sébastien Grammond asserts that Canadian law has adopted rules relating to Indigenous peoples which “obscure significant differences ...not only in terms of language, culture, and worldview, but also with respect to their current

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* at 93.

<sup>57</sup> Michael Asch, “The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*” (2000) 5.2 Review of Constitutional Studies 119 at 126.

<sup>58</sup> Edward Hedican, *supra* note 50 “This concept of homogeneity is especially reinforced in the *Indian Act* in which all status Aboriginal persons are treated the same, regardless of any cultural differences that may distinguish one from another” at 90.

living condition.”<sup>59</sup> Asch, Grammond and Hedican thus bring the problem of developing Indigenous-focused public policy, particularly policies relating to self-government and self-determination (sovereignty) into sharp relief. They argue that Crown policy makers and Indigenous leaders must acknowledge the extent to which their decisions impact members of all First Nation bands, the Inuit of northern Canada and the Métis people, each of which has different backgrounds, cultures, customs and understandings of sovereignty. Policy makers must also learn to accommodate the diversity of Indigenous languages which, as evident in the interpretation of terms like ‘sovereignty’, can have a significant effect on the understanding of the laws under which people live, and the transmission of cultural norms.<sup>60</sup>

### 2.2.5 The Land Dilemma

Unlike in the Western tradition, most Indigenous peoples do not normally regard land as a private commodity that can be divided, fenced, or sold for profit. To the contrary, land is perceived by many First Nations as a source of life – the “mother” that Anishinabek Elder Basil Johnston claims cannot be owned or sold.<sup>61</sup> Many members of Indigenous communities, particularly those who practice traditional beliefs, characterize themselves as stewards rather than owners of land, which for them John Borrows claims “holds many secrets”.<sup>62</sup>

The land dilemma has strategic and tactical dimensions which are complex and inextricably linked to issues of sovereignty. At the strategic level is the Crown’s claim of ownership and radical title to the lands reserved for First Nations, as well as surrounding

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<sup>59</sup> Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Thomson-Reuters, 2013) at 13.

<sup>60</sup> *Ibid* at 15.

<sup>61</sup> Dr. Basil Johnston quoted in Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 187.

<sup>62</sup> John Borrows, *Drawing Out Law: A Spirit’s Guide*, 1<sup>st</sup> ed. (Toronto: University of Toronto Press, 2010). “He wanted to kindle a reverence and excitement about the secrets the land still held...He was aware there was much we could learn from that which was hidden by the rocks, soil, grass, and trees that piled one upon another throughout our territory.” at 72.

lands in vacant or sparsely populated areas. The Court addressed, but did not fully resolve the issues of land title and sovereignty in *Calder v AG*<sup>63</sup>, *Delgamuukw*<sup>64</sup>, *R v Marshall; R v Bernard*<sup>65</sup>, and most recently in *Tsilhqot'in Nation v British Columbia*<sup>66</sup>. An indication of the challenges associated with resolving this issue may be observed in the Six Nations of the Grand River land rights dispute that has been ongoing since the early 18<sup>th</sup> century, with no resolution in site.<sup>67</sup> The extremely complex land title issue is well documented in the literature and case reports, and as previously noted is beyond scope of this paper.

At a more tactical level is the issue of individual versus communal interest of lands that have been specifically designated as reserves. Here, there is a contradiction between some First Nations practices and traditional beliefs concerning the communal ownership and sanctity of land, *i.e.* the right of individual members of Indigenous communities to control the land on which they live or conduct business. The courts affirmed the communal nature of land ownership in *Joe v Findlay*<sup>68</sup> stating the land on which Indigenous people live is communal and is to be shared.

However, under Section 20(2) of the *Indian Act*, members of a First Nation may be given land allotments for their exclusive personal use.<sup>69</sup> An allotment, which must be approved by the Band Council and the Minister, conveys the right to exclusive use and occupation

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<sup>63</sup> *Calder v AG*, [1973] SCR 313.

<sup>64</sup> *Delgamuukw*, supra note 33.

<sup>65</sup> *R v Marshall; R v Bernard*, 2005 SCC 43.

<sup>66</sup> *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

<sup>67</sup> For a detailed description of this dispute see: "Land Rights of the Six Nations of the Grand River" report. Online: <http://www.sixnations.ca/SNGlobalSolutionsBookletFinal.pdf>.

<sup>68</sup> *Joe v Findlay*, [1987] BCJ No 20 "The statutory right to the use and benefit of reserve lands was a collective right in common conferred upon and accruing to the band members as a body, not individually" at para 379.

<sup>69</sup> The *Indian Act*, RSC 1985 C1-5 s 20. "The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a *Certificate of Possession*, as evidence of his right to possession of the land described therein."

of a parcel of reserve land to individual band members. Once approved, the allotment holder has permanent "lawful possession" of the designated parcel of land and will be issued a *Certificate of Possession* (originally called a 'location ticket'), as evidence of their rights thereto. A certificate holder may use the property for personal or commercial purposes, including building a home or any other structure permitted by the band's land use bylaw. He or she may also lease or sell the allotment to a third party for a profit, or may leave the allotment to another person in his or her Will, but cannot sell, lease, or transfer the land to a non-member of the Reserve. The *de facto* ability of certificate holders to profit from the sale of communal land can be a source of tension within Indigenous communities.

The *Certificate of Possession* system is similar to *fee simple* ownership in terms of usage rights, but radical title of Reserve lands remains with the Crown under terms of the *Royal Proclamation* assertion "We do further ... reserve under our Sovereignty ... all the lands and territories lying [within numerous defined areas] ... (and further) ... no private person do presume to make any purchase from the said Indians of any lands reserved for said Indians". Additionally, s 37 of the *Indian Act* states "Land in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty"<sup>70</sup>

The 1969 *Government of Canada Statement on Indian Policy*<sup>71</sup> (the White Paper) proposed changes to the reserve land ownership doctrine, including abandonment of the radical title provisions of the *Royal Proclamation* and the *Indian Act*. The policy proposed to transfer land title and allocation authority to the individual bands that would subsequently be able to hold or distribute individual plots in accordance with their customs and beliefs. The Crown's intent was articulated in the White Paper's Article 6

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<sup>70</sup> *Royal Proclamation* of 7 October, 1763, RSC 1985, App II, No 1. Also the *Indian Act*, RSC 1985, c I-5, s 37.

<sup>71</sup> Indigenous and Northern Affairs Canada, "Statement of the Government of Canada on Indian Policy" (1969). Online: <http://www.aadnc-aandc.gc.ca/eng/>. The 1969 *Government of Canada Statement on Indian Policy* (the White Paper) proposed elimination of the distinct legal status of Indigenous peoples as a step to achieving equality among all Canadians.

which states: “the present system under which the Government must execute all leases, supervise and control procedures and surrenders, and generally act as trustee, must be brought to an end.”<sup>72</sup> Indigenous activists, particularly Harold Cardinal speaking for the Chiefs of Alberta, rejected the proposal outright, declaring it “a thinly disguised programme of extermination through assimilation”.<sup>73</sup> Some 150 years earlier, Shawnee leader Tecumseh observed:

No tribe has the right to sell [the land], even to each other, much less to strangers. Sell a country! Why not sell the great sea, as well as the earth? Did not the Great Spirit make them all for the use of his children?<sup>74</sup>

Land is a sacred element of traditional Indigenous culture – one linked to spirituality and longstanding practices such as fishing, hunting and trapping; activities that have supported life in Indigenous communities since time immemorial. The negative reaction to making reserve land available for sale is understandable in the context of community preservation. However, one might argue it is no more egregious than selling reserve land for individual or communal profit under the provisions of s 20(2) of the *Indian Act*. Nevertheless, strongly stated concerns that movement to a *fee simple* ownership model would lead to the ruination of traditional reserves by allowing ‘outsiders’ to acquire land within them, contributed to the White Paper being withdrawn in 1970.

Indigenous land rights are consistently embodied in historic Crown-Indigenous treaties and have been tested in common law courts on several occasions.<sup>75</sup> For example, it *Delgamuukw*, La Forest J characterizes Aboriginal title as *sui generis* and inconsistent

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<sup>72</sup> *Ibid.* Article-6, at para 6.

<sup>73</sup> Harold Cardinal, *Unjust Society*, revised ed (Vancouver: Douglas & McIntyre, 1999). Cardinal (1945-2005) was a Cree writer, lawyer, and activist whose seminal work *Unjust Society* was a response to the Trudeau (Sr.) 1969 White Paper. *Unjust Society* was instrumental in causing the Canadian government to abandon the policy of the 1969 White Paper.

<sup>74</sup> F.W. Turner III, ed, *The Portable North American Indian Reader* (1977) at 246. Quoted by Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 181.

<sup>75</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 180.

with traditional (*fee simple*) property law concepts.<sup>76</sup> In *Tsilhqot'in Nation*, McLachlin CJC describes Aboriginal title as “...the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to economic benefits of the land; and the right to pro-actively use and manage the land”<sup>77</sup> Despite these declarations by Canada’s highest court, as a practical matter, the nature and rights associated with Aboriginal title remain controversial.

Although agreements may be reached in individual circumstances, such as *Tsilhqot'in Nation* and the *Nisga'a Final Agreement* (NFA)<sup>78</sup>, it seems unlikely that the underlying issue of land rights and title will be settled from the perspectives of Indigenous and Western worldviews, or their respective interpretations of sovereignty. Moreover, in the context of the second part of this paper’s research question, one might reasonably argue that the land-related judgments of Canada’s courts since 1982 have had little impact in terms of improving the Crown-Indigenous relationship.

## 2.3 Traditional Western Sovereignty

There are conflicting theories of Western sovereignty’s origins and the reasons for its ubiquity among western nations. Did it originate in 1648 or did the Peace of Westphalia simply give effect to its formalization as a European international relations doctrine? Is sovereignty a doctrine that shields nations from interference by others, or one that constrains the ability to protect those living under despotic regimes? Further, to what extent is the ongoing transition from the autonomous (internal/vertical) to shared (external/horizontal) sovereignty affecting the concept’s future?

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<sup>76</sup> *Delgamuukw*, *supra* note 33 at para 190.

<sup>77</sup> *Tsilhqot'in Nation v British Columbia*, *supra* note 66 at para 73.

<sup>78</sup> *Nisga'a Final Agreement Act*, SBC, 1999. See also, Thomas Isaac *Aboriginal Law*, 5<sup>th</sup> ed (Toronto: Thomson-Reuters Canada, 2016) “...under the NFA approximately 2000 sq km of Crown and reserve land were transferred to the Nisga'a to hold in fee simple, with full ownership of the subsurface mineral title” at 193.

In the 3<sup>rd</sup> and 4<sup>th</sup> centuries BCE, Plato and Aristotle referred to some sovereigns as philosopher-kings and magistrates. Sovereignty references can also be found in St. Augustine's 4<sup>th</sup> century *jus bellum* narrative, and in 11<sup>th</sup> to 15<sup>th</sup> century Crusade histories that record the Church's involvement in international affairs and invasion of other peoples' territories.<sup>79</sup> Under the theological and legal doctrines of the 12<sup>th</sup> to 15<sup>th</sup> century, non-Christians were characterized by the (Catholic) Church as being less than human.<sup>80</sup> They were often considered enemies of the Faith and subjected to inquisitions, torture, and death in the name of God and the protection of Christianity.<sup>81</sup>

In 1452, as the Crusades drew to a close and trade-related exploration accelerated, Pope Nicholas V issued *Dum Diversas*, a Papal bull<sup>82</sup> that directed Portugal's King Alfonso to "capture, vanquish, and subdue the pagans, and other enemies of Christ ... to put them into perpetual slavery ... [and] to take all their possessions and property" – a clear declaration of sovereignty albeit in the name of God.<sup>83</sup> In 1493, following Columbus' first voyage to the Americas, Nicolas issued a further bull entitled *Inter Caetera*, which

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<sup>79</sup> Reid, Jennifer, "The Doctrine of Discovery and Canadian Law" (2010) 30.2 Canadian Journal of Native Studies 335 at 336.

<sup>80</sup> Paul Ormerod, "The Medieval Inquisition: Scale-free networks and the suppression of heresy" (2004) 339:3 *Physica A: Statistical Mechanics and its Applications* 645 at 645. "From the perspective of the Church, heresy was seen as an infectious disease. ... Initial attempts by the inquisition to suppress heresy by general persecution, or even mass slaughter, of populations thought to harbour the 'disease' failed. ... Eventually, a policy of targeting key individuals was implemented, which proved to be much more successful."

<sup>81</sup> *Ibid.*

<sup>82</sup> A Papal bull is a specific kind of public decree, letters patent, or charter issued by a pope of the Roman Catholic Church. It is named after the leaden seal (*bull*) that was traditionally appended to the end in order to authenticate it. Online: [www.wikipedia.org/wiki/papal-bull](http://www.wikipedia.org/wiki/papal-bull).

<sup>83</sup> Pope Nicholas V *Dum Diversas* (1452) "We grant you [Kings of Spain and Portugal] by these present documents, with our Apostolic Authority, full and free permission to invade, search out, capture, and subjugate the Saracens and pagans and any other unbelievers and enemies of Christ wherever they may be, as well as their kingdoms, duchies, counties, principalities, and other property [...] and to reduce their persons into perpetual slavery." Online: <[www.doctrineofdiscovery.org/dumdiversas.htm](http://www.doctrineofdiscovery.org/dumdiversas.htm)>.



granted Spain authority to assert sovereignty throughout the ‘new world’<sup>84</sup> and “to acquire territory and trade in the lands lying west of the meridian situated one hundred leagues west of the Azores and Cape Verde Islands.”<sup>85</sup> The 1452 *Dum Diversas* and 1493 *Inter Caetera* bulls were the authorities some European explorers relied upon in claiming sovereignty, settling non-Christian lands, and subjugating their inhabitants.<sup>86</sup> Hence, Western sovereignty’s roots are inextricably linked to 15<sup>th</sup> century religious doctrine, particularly the Church’s attempt to spread Christianity throughout Europe and the new world.

## 2.4 Westphalian Sovereignty

Westphalian sovereignty, was an outcome of Church intervention in the affairs of Europe’s feudal states. It remains the cornerstone of western politics and international relations, an analogue for authority in legal and political discourse, and the mechanism through which control is exercised over people and space.<sup>87</sup> Its fundamental tenets have not changed materially since they were operationalized by the 1648 *Peace (Treaties) of Westphalia*.<sup>88</sup> They are currently codified in the *United Nations Charter* Articles 2(4) and

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<sup>84</sup> *Inter Caetera*, Papal bull, 1493. Online: [www.nativeweb.org/pages/legal/indig-inter-caetera/html](http://www.nativeweb.org/pages/legal/indig-inter-caetera/html).

<sup>85</sup> *Ibid.*

<sup>86</sup> “The 15<sup>th</sup> century Papal bulls gave Christian explorers the right to claim lands they ‘discovered’ and lay claim to those lands for their Christian Monarchs. Any land that was not inhabited by Christians was available to be ‘discovered’, claimed, and exploited. If the ‘pagan’ inhabitants could be converted, they might be spared. If not, they could be enslaved or killed.” The English, Dutch and Germans were influenced but not committed to the Papal bulls as justification of their discoveries and conquests. Online: <[www.doctrineofdiscovery.org](http://www.doctrineofdiscovery.org)>.

<sup>87</sup> Sovereignty’s essential characteristics have been investigated by philosophers, scholars, and political theorists including Aristotle (*Politics*), Machiavelli (*The Prince*), Bodin (*De la République*), Hobbes (*Leviathan*), and many others from ancient to modern times. Each examiner, depending on the context in which they were writing, offers variants, but rarely strays far from the essential relationship that exists between sovereignty and power.

<sup>88</sup> Although normally referred to as the *Treaty of Westphalia* there were actually several treaties signed to resolve the various conflicts of the European wars. For a full account of the individual treaties and the political order they produced, readers are referred to the Oxford Bibliographies, Online: <[www.oxfordbibliographies.com/view/document](http://www.oxfordbibliographies.com/view/document)>.

2(7), which *inter alia* forbid attacks on other nations and restrict intervention in their internal affairs.<sup>89</sup>

The *Peace of Westphalia* ended more than thirty years of religious and territorial wars among European feudal states in which authority was diffuse and often based on personal loyalty rather than territory.<sup>90</sup> The treaties arising from the *Peace of Westphalia* formalized the concept of statehood that became known as Westphalian sovereignty: a doctrine based on the right of states to manage their internal political affairs without external interference. It is noteworthy that the Westphalian non-interference principle was assiduously ignored by European nations during their exploitation and settlement of the Americas, and frequently within Europe as well.

Although Westphalian sovereignty is best known for creating autonomous territorial states, its arguably greatest achievement was securing emancipation from the temporal control of the Church.<sup>91</sup> Not surprisingly, considering the Church's loss of power and wealth, Pope Innocent X condemned the Westphalian treaties as "null, void, damnable, reprobate, empty of meaning and effect, for all time".<sup>92</sup> Contemporary Indigenous activist Russell Means appears to endorse Pope Innocent's appraisal of secular state governance in his 1980 declaration "We don't want power over white institutions: We want white institutions to disappear".<sup>93</sup>

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<sup>89</sup> United Nations, *Charter of the United Nations*. Online: <[www.treaties.un.org/doc](http://www.treaties.un.org/doc)>.

<sup>90</sup> Maryann Love, "Global Problems, Global Solutions" in *Beyond Sovereignty: Issues for a Global Agenda* (Toronto: Nelson Thomson Learning, 2003) 1 at 10.

<sup>91</sup> Harold Laski, *The Foundations of Sovereignty and Other Essays* (New York: Lawbook Exchange Ltd, 2014). Reference this volume for a comprehensive analysis of sovereignty's evolution from Aristotle to Augustine and forward to the modern era.

<sup>92</sup> David Maland, *Europe in the Seventeenth Century* (London: Macmillan Publishing, 1966). at 16

<sup>93</sup> Russell Means, *Marxism is as Alien to My Culture as Capitalism* (1980). Online: <[www.filmsforaction.org/news/revolution-and-american-indians-marxism-is-as-alien-to-my-culture-as-capitalism](http://www.filmsforaction.org/news/revolution-and-american-indians-marxism-is-as-alien-to-my-culture-as-capitalism)>.

Under the tenets of Westphalian sovereignty, inter-state aggression is constrained by prohibitions against interference in another state's domestic affairs.<sup>94</sup> However, no viable mechanism to sanction those who violate the doctrine's protocols has yet been established -- a condition that facilitated colonialization of the American and African continents and led to the demise of the post-World War I League of Nations.

One might argue that economic sanctions mandated by the United Nations serve to 'punish' states that violate international conventions or the territorial integrity of others. Additionally, some states' leaders who initiate or support such violations risk being brought before the International Criminal Court (ICC) to account for their actions. However, UN sanctions and trade embargoes have a long history of impotence, as evidenced by their futility in dealing with North Korea, the recent Russian annexation of the Crimea, and their tepid effect in the Middle East.<sup>95</sup>

In the same sense, the ICC's processes are politicized and cumbersome to the extent that their threat is often ignored by those prepared to flout international conventions. For example, Philippine President Rodrigo Duterte, who currently stands accused of killing thousands of drug dealers and other 'criminals' without due process, claims "[I am] not afraid of the International Criminal Court" and when asked about the possibility of an ICC investigation "he dismissed it with a curse ... and told them to go ahead".<sup>96</sup>

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<sup>94</sup> The Westphalian treaties did not bring an end to interstate conflict as evidenced by a series of wars among neighbouring and distant states over territory, trade routes, political ideology, and other matters, culminating in the 20<sup>th</sup> century World Wars I & II in which millions of military and civilian personnel were killed or permanently displaced.

<sup>95</sup> CNN "Money". Online:<<http://money.cnn.com/2017/04/25/news/north-korea-economy-sanctions/index.html>>.

<sup>96</sup> "Duterte Says the International Criminal Court Doesn't Worry Him". (June 2017) The Washington Post Online: <[www.washingtonpost.com/world/asia\\_pacific/2017/06/03](http://www.washingtonpost.com/world/asia_pacific/2017/06/03)>.

Even the highly regarded *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),<sup>97</sup> which has almost unanimous support by the world's nations, lacks an enforcement mechanism beyond the ability to cite those who fail to comply with its Articles. Hence, the frailty of international control mechanisms persists despite the well-intentioned but largely ineffectual efforts of organizations like the United Nations and the International Criminal Court.

A 2006 collection of essays edited by Neil Walker<sup>98</sup> addresses the complex issue of non-compliance, and the effect of evolving interpretations of sovereignty on intergovernmental relationships. From different perspectives, the contributors suggest that traditional interpretations of sovereignty must evolve to meet changing social and economic conditions in which nations operate cooperatively yet independently in a shared geographic environment. A fundamental requirement of effective intergovernmental relationships is the existence of viable enforcement processes – something that in large measure is missing in the current international environment.

Notwithstanding regular violation of its principles by enterprising nations, and condemnation by the Church, Westphalian sovereignty inexorably expanded over the past three centuries to become the universal paradigm of territorial supremacy. Hendrick Spruyt attributes the success of Westphalian sovereignty to three principal factors: (1) the ability of sovereign states to extract resources and rationalize their economies without interference by others; (2) the efficiency with which states are able to make trading commitments with other states who respect their autonomy; and (3) the manner in which

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<sup>97</sup> United Nations, Declaration on the Rights of Indigenous People (UNDRIP). Online: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>98</sup> Walker, Neil, *Sovereignty in Transition – Essays in European Law* (Portland: Hart Publishing, 2006). Although the articles in this volume focus on the European environment, the underlying concepts are equally applicable globally.

sovereign states segregate and delegitimize communities (nations) that are not recognized as sovereign states.<sup>99</sup>

By necessity, Westphalian sovereignty will evolve to accommodate changing world conditions, but it is relentlessly defended by its proponents and unlikely to lose its dominance as a political organizing force in the foreseeable future. The following subsections explore three dimensions of Westphalian sovereignty relevant to this investigation.

### 2.4.1 Sovereign Power

In Middle Age Europe, sovereignty was typically held by hereditary rulers who possessed life and death power over their citizens. They demanded the unfettered right to command and the absolute obligation to be obeyed. By today's standards, such rulers would be characterized as 'power wielders' rather than political leaders. Nevertheless, several influential 16<sup>th</sup> to 18<sup>th</sup> century scholars promoted the all-powerful sovereign concept as the most effective way to ensure peace, order, and good governance. For example, the French theorist Jean Bodin (1525-1596) argued that sovereignty was indivisible and absolute.<sup>100</sup> Thomas Hobbes (1588-1679), an English absolutist and founding member of the contractual school of political philosophy, characterized sovereigns as being above the law. He endorsed but did not insist upon the indivisibility assertion.<sup>101</sup> John Austin

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<sup>99</sup> Hendrick Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1996), quoted by Maryann Love, "Global Problems, Global Solutions" in *Beyond Sovereignty: Issues for a Global Agenda* (Toronto: Nelson Thomson Learning, 2003) at 12.

<sup>100</sup> "Majesty or sovereignty is the highest, absolute, and perpetual power over the citizens and subjects in a Commonwealth, which the Latins call *Majestas*" (*République*, I, 84)." Bodin's discussion of tyrannicide [sic] is consistent with his political theory. For instance, while he states that there are instances when it is justified (for example against tyrannical usurpers), killing a prince presumed to be a tyrant is forbidden if "the prince is an absolute sovereign." (*République* II, 5). Stanford Encyclopedia of Philosophy. Online: <[www.plato.stanford.edu/entries/bodin/#4](http://www.plato.stanford.edu/entries/bodin/#4)>.

<sup>101</sup> Miller, David, *Political Philosophy: A Very Short Introduction* (Oxford UK: Oxford University Press, 2003). "It was not essential that this sovereign body be a single person but Hobbes thought this was preferable" at 37.

(1790-1859), a British positivist, promulgated the arguments of Machiavelli, Hobbes and Bodin, asserting sovereignty was generally without limits and indivisible.<sup>102</sup>

By the middle 18<sup>th</sup> century, sovereign indivisibility arguments fell out of favour as people endorsed rule by the aristocracy (the well-born and educated) and ultimately moved towards democratic forms of government which provided a modicum of political control to the average citizen.<sup>103</sup> Contemporary political philosophy reasonably characterizes indivisible sovereignty as a manifestation of fascism as witnessed during the 20<sup>th</sup> century rule of Italy's Mussolini, or more recently, Iraq's experience under Saddam Hussein.

Today, most absolute monarchs have been recast as 'constitutional monarchs' whose role is essentially ceremonial. For example, Britain's Queen Elizabeth II is available to 'advise' the government, but she is strictly forbidden from commenting on Britain's political affairs. A few absolute monarchs, often located in the Middle East or African nations, remain. For example, the Sultans of Brunei and Oman, the Kings of Saudi Arabia and Swaziland; and arguably, the Pope who although elected by his peers has virtually unchecked power within the Vatican City State throughout his life.

With notable exceptions, such as Great Britain and New Zealand, contemporary sovereignty now resides in formal written constitutions that are overseen by courts, enacted by parliaments and administered by civil agencies.<sup>104</sup> One might argue that there

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<sup>102</sup> Niccolò Machiavelli, *The Prince on the Art of Power – The New Illustrated Edition*, (London UK: Duncan Baird Publishers, 2007). Machiavelli advises his students that Princes "ought to inspire fear in such a way that, if he does not win love, he [at least] avoids hatred".

<sup>103</sup> David Miller, *Political Philosophy*, *supra* note 101. "Trusting everything to an absolute monarch is simply too risky. As an alternative, placing authority in the hands of those we know to be wise and virtuous, and have the best interests of the people at heart" at 38, and "Democracy is not an all-or-nothing matter, but a continuing struggle to give people as a whole final authority over the affairs of the state" at 48.

<sup>104</sup> Great Britain and New Zealand have 'unwritten' constitutions. Their 'constitutional' laws are embedded in Acts of Parliament or court judgments. A cardinal aspect of these unwritten constitutions is that in law, Parliament is sovereign in the sense of being the supreme legislative body. Since there is no documented constitution containing laws that are superior to ordinary Acts of Parliament, the courts may only interpret parliamentary statutes. Online: <[www.bl.uk/magna-carta/articles/britains-unwritten-constitution](http://www.bl.uk/magna-carta/articles/britains-unwritten-constitution)>.

has always been a degree of delegated authority within nation states and monarchies. However, in modern democracies, no individual possesses supreme authority in the manner of the ancient monarchs.<sup>105</sup> In Canada, the Prime Minister enjoys the status of *primus inter pares*, but retention of his authority is dependent on the support of government ministers and caucus members. Notable examples of leaders losing power by attempting to exercise monarchal authority include Canadian Prime Minister John Diefenbaker and British Prime Minister Margaret Thatcher whose vulnerability to the goodwill of their peers was underscored when they attempted to force unpopular national defense and economic policies on their Cabinets, quickly leading to their political demise.<sup>106</sup>

#### 2.4.2 Territoriality

A potentially confusing element of western sovereignty is the concept of territoriality, *i.e.* the principle by which members of a community are identified by geographic boundaries regardless of their cultural, political, or ethnic affiliation. However, the borders of a sovereign state do not necessarily circumscribe a people or a nation, as is evident in Canadian and American First Nations whose traditional territories and hunting patterns often cross modern international boundaries.<sup>107</sup> Under the territoriality doctrine it is one's location within politically-defined borders that confers membership in a state regardless of their history or preferences.

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<sup>105</sup> For example, the authority of the President of the United States (often referred to as the “world’s most powerful person”) is limited by a system of checks and balances based on a separation of powers doctrine under which the Congress and judiciary can override Presidential policies they believe exceed his constitutional authority or are contrary to national interests.

<sup>106</sup> In 1963 John Diefenbaker faced a cabinet revolt over national defense (nuclear) policy that resulted in the resignations of six cabinet ministers and chaos within the Conservative caucus, ultimately leading to his defeat in the general election and replacement as party leader. In 1990, Margaret Thatcher faced a cabinet revolt over economic policy that led to the resignation of key ministers and a call for a leadership convention, which she lost, ending her political career.

<sup>107</sup> For example, the first Anishinaabeg (Odawa, Ojibwe, Potawatomi, Oji-Cree, Mississaugas, and Algonquin) nations to encounter European settlers were those of the *Three Fires Confederation*, within the states of Illinois, Indiana, Michigan, Ohio, and Pennsylvania in the present-day United States, and southern Ontario and Quebec of Canada.

The negative consequences of assigning people to arbitrarily-defined territories are underscored by Hugh Brody who in reference to British Columbia's settlement writes "[t]he presence of Europeans brought shock waves [and] forced redistribution of Indian populations"<sup>108</sup> Chief Thomas Bressette of the Kettle and Stony Point First Nation believes that territorial and cultural displacement contributed to the loss of Indigenous identity which he cites as a contributor to the social problems ravaging some contemporary First Nations.<sup>109</sup>

The Supreme Court addressed the question of borders and territorial rights in *Mitchell* in which Mohawk Grand Chief Michael Mitchell claimed the right to travel freely between Canada and the United States and return with goods without having to pay cross-border duties. The Court rejected his claim, confirming the Government's assertion that "such a right would be contrary to Canadian sovereignty".<sup>110</sup> In 2015, an application, also involving members of the Mohawk Nation, was heard by the Ontario Court of Justice in *Her Majesty the Queen and Alicia Shenandoah and Elaine Thompson*.<sup>111</sup> The application sought exemption from the need to appear for examination by Canada Border Services on entry into Canada.

In that incident, the applicants had been charged with not reporting to a border agent on a return trip from the USA. They were fined and their vehicle was seized by the border agent at the scene. In their application, the accused claimed that they had a constitutionally guaranteed right to travel freely within Mohawk territory (which straddles the International Boundary) without the requirement to report in person at

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<sup>108</sup> Hugh Brody, *Maps and Dreams* (Vancouver: Douglas & McIntyre, 2004) at 22.

<sup>109</sup> Chief Thomas Bressette, Chippewas of Kettle and Stony Point First Nation. Comments made to University of Western Ontario Faculty of Law students in Course 9871B: Indigenous Legal Traditions, April 2017.

<sup>110</sup> *Mitchell*, *supra* note 25 at para 1.

<sup>111</sup> *Her Majesty the Queen and Alicia Shenandoah and Elaine Thompson*, 2015 ONCJ 541, [2015] OJ No 5184.



Border Stations.<sup>112</sup> The court rejected the application, ruling that the required inspection “represented a minimal intrusion and was consistent with the principles of fundamental justice when balanced against societal interest in maintaining integrity of Canada’s borders.”<sup>113</sup> Hence, territoriality and the right of nations to establish and maintain borders regardless of historical migration patterns remains a fundamental tenet of Westphalian sovereignty.

### 2.4.3 International Recognition

A third relevant dimension of Westphalian sovereignty concerns the importance of international recognition. Sovereign authority is normally exercised by independent states subject to voluntary arrangements negotiated to promote common interests. Within that construct, it is necessary that the legitimacy of a sovereign states is formally acknowledged by other states. In that regard, membership in the United Nations is helpful, but not a definitive indicator of state legitimacy. That phenomenon may be observed in the case of Palestine whose status as a sovereign nation remains a contentious issue, despite being tacitly endorsed by the United Nations.<sup>114</sup>

Absent international recognition, emerging and unrecognized states may lack the ability to enter into the economic, defense, and cultural agreements that are prevalent in the increasingly globalized world. For example, one may recall that during the 1995 efforts

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<sup>112</sup> During the application hearing it was revealed that the individuals were not attempting to make a historic assertion of Indigenous treaty rights. The truth was that one of the parties, an American citizen, had ‘forgotten’ her identification at home and avoiding the Border Agents was simply an attempt to enter Canada without the required documentation.

<sup>113</sup> *Shenandoah and Thompson*, *supra* note 111. The applicants’ claimed that s 18(1) of the *Immigration and Refugee Protection Act* (SC 2001 c 27) violated their s. 7 and s. 15 constitutional rights. Their application was rejected.

<sup>114</sup> In 2012 the State of Palestine was granted ‘non-member observer’ status in the United Nations despite the wishes of Canada, eight other nations, and 41 nations that abstained from voting. United Nations press release. Online: [www.un.org/press/en/2012/ga11317.doc.htm](http://www.un.org/press/en/2012/ga11317.doc.htm).

by Quebec nationalists to gain independence from Canada<sup>115</sup> a controversial issue was the extent to which an independent Quebec would receive international recognition and the benefits arising therefrom.<sup>116</sup> A similar situation exists with regard to Palestinians who, in the absence of formal recognition of the Palestinian Authority, must often travel on citizenship documents issued by Jordan or Israel.<sup>117</sup>

First Nations seeking to achieve independence (sovereignty) from Canada will face similar challenges. For example, the Haudenosaunee (Iroquois) Nation began issuing passports to its members as early as 1923 and continues to do so, with mixed success in terms of international recognition. Canada, Great Britain, the United States refuse to recognize the Haudenosaunee passport as a valid document for entry into their countries, thus requiring Haudenosaunee ‘nationals’ to travel on Canadian passports.

The issue of national recognition became particularly critical in the aftermath of the 2001 terrorist attacks on New York City. Since then, internationally recognized passports or travel visas have become the only acceptable form of documentation for those wishing to cross the Canada-USA border. The Haudenosaunee Confederacy acknowledges the increased security requirements and is working on upgrading its passports to the level expected by border security, but there is no assurance that the upgraded passports will be

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<sup>115</sup> 1995 Quebec Referendum. Online: <http://www.thecanadianencyclopedia.ca/en/article/quebec-referendum-1995/>.

<sup>116</sup> Peter Radan, “Constitutional Law and Secession: The Case of Quebec” (1998) 2 Macarthur LR 69 “Although recognition is not necessary to achieve statehood, the Court (SCC) recognized that, in the context of secession, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states” at 83.

<sup>117</sup> The Palestinian passport, based on the 1995 Oslo Accords reached between the Israeli government and the Palestinian Liberation Organization, is essentially a travel document and does not stipulate that its owner is a citizen of Palestine. All Palestinians residing in the areas under PA rule are entitled to a Palestinian Authority passport. However, those Palestinians living in East Jerusalem, can only hold a *laissez-passer*, the travel document issued to them by Israel. If they wish to travel to Arab countries that don't recognize Israel, they must apply for a temporary Jordanian passport. Published by Jerusalem Post Online: <[www.jpost.com/middle-east/palestinian-passports-rejected](http://www.jpost.com/middle-east/palestinian-passports-rejected)>.

accepted as legitimate proof of citizenship.<sup>118</sup> The challenge of obtaining international recognition could be a major stumbling block for First Nations seeking independent sovereignty outside the Canadian confederation. Moreover, one must question the likelihood that independent First Nations or even regional confederacies would want or be able to establish the bureaucracies and mechanisms required to administer an internationally recognized passport control system.

## 2.5 Evolving Indigenous Sovereignty

If there is a secular conception of Indigenous sovereignty, to what extent, if at all, does it reflect the tenets of Western (Westphalian) sovereignty? Does a secular interpretation of sovereignty devalue traditional Indigenous beliefs or culture? Moreover, what, if any, evidence exists to support the assertion that secularity is gaining acceptance among Indigenous peoples?

At the outset of this research I anticipated encountering significant differences between Indigenous and Western conceptions of sovereignty. Those expectations were met at the philosophical level, particularly in the context of the Indigenous ‘permissive’ versus the Western ‘restrictive’ sovereignty paradigms.<sup>119</sup> Perhaps the most striking difference concerns the absence of a ‘sovereign entity’ in the Indigenous culture, as opposed to the Western concept of supreme territorial authority being vested in a sovereign authority that may be embodied in an individual, constitution, or body of laws.<sup>120</sup>

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<sup>118</sup> “Our passports have become a casualty of a tighter world security environment. New Haudenosaunee passports will meet those [security] requirements, but their recognition by other nations will continue to be a challenge. Fewer countries – and airlines – are recognizing them as valid travel documents.” Notice posted by the Haudenosaunee Documentation Committee. Online: <[www.haudenosauneeconfederacy.com](http://www.haudenosauneeconfederacy.com)>.

<sup>119</sup> The ‘permissive’ and ‘restrictive’ characteristics of sovereignty are introduced in Section 2.1 Traditional Indigenous Sovereignty above.

<sup>120</sup> *Borrows, Aboriginal Legal Issues, supra* note 5. Although an argument might be made that “the Creator” is perceived as the ultimate sovereign in Indigenous culture, there is no comparable figure in the temporal sense.

Accordingly, in the context of the first element of this paper's research question, *i.e.* sovereignty's defining characteristics, there are significant conceptual differences at the historical/philosophical level. The previous sections of this chapter might lead one to conclude that the gap between the conceptions is unbridgeable. However, one must ask if what are essentially philosophical differences have a material effect on the lived lives of Indigenous peoples or the Crown-Indigenous relationship writ large.

Despite differences between traditional Indigenous and Western conceptions of sovereignty, the term is now used by some Indigenous leaders as a synonym for self-determination and self-government – a right acknowledged in the Federal government's 1995 policy statement on implementation of Aboriginal self-government:

The Government of Canada recognizes the inherent right of self-government...based on the view that the Indigenous peoples of Canada have the right to govern themselves in matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions and with respect to their special relationship to their land and their resources.<sup>121</sup>

Notably, the policy statement only refers to lands situated within existing reserves, which falls well short of Indigenous concerns relative to other unceded lands still under dispute. In that regard, John Borrows' suggests that many leaders continue to assert that Indigenous 'sovereignty' includes Indigenous ownership of disputed lands that in their view has never been surrendered.<sup>122</sup> That perspective receives support in the *Report from the Royal Commission on Aboriginal Peoples* (RCAP) which states in part:

The arguments for recognizing that Aboriginal peoples are nations spring from the past and the present. They were nations when they forged military and trade alliances with European nations. They were nations when they signed treaties to share their lands and resources. And they are

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<sup>121</sup> Borrows, *Indigenous Constitutions*, *supra* note 13 at 188. Borrows quotes from *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* 1995. Online: [www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html).

<sup>122</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 5-8.

nations today - in their coherence, their distinctiveness and their understanding of themselves.<sup>123</sup>

Exercising the rights of self-government, and self-determination are core elements of the contemporary Indigenous quest for sovereignty. However, as Borrows explains, due to the diversity of Indigenous nations, one should not assume that self-government will be uniformly interpreted or exercised.<sup>124</sup> To the contrary, one should assume that Indigenous self-government will inevitably reflect the customs and traditions of the nations involved, perhaps on a regional basis, but unlikely on the national scale.

Diversity among First Nation governments should not present a challenge to Canadian federalism, which currently accommodates the unique characteristics of the federation's 13 provinces and territories. In that regard, Patrick Macklem observes that the forms of government most amenable to Indigenous societies can be accommodated within a federal structure in which Indigenous nations, like Canadian provinces, are empowered to make and administer the laws that affect their daily lives.<sup>125</sup>

In 2002, in an effort to facilitate the movement towards Indigenous self-government, the Federal Government proposed the *First Nations Governance Act* (Bill C-7)<sup>126</sup> which proposed revised governance structures for Canada's Indigenous peoples. Intended to strengthen and 'democratize' Indigenous governments by giving citizens a greater voice in how their communities would be run, and making it easier for First Nations to respond

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<sup>123</sup> *Highlights from The Royal Commission on Aboriginal Peoples* (1996). Online: <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>.

<sup>124</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14. Borrows acknowledges the diversity and different approaches to sovereignty and self-government. "A number of treaty nations used the term 'shared sovereignty' and maintained that their treaties created a confederal relationship with the Crown, or a form of treaty federalism." at 6.

<sup>125</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 180.

<sup>126</sup> First Nations Governance Act, Bill C-7. Online: [https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=c7&Parl=37&Ses=2](https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c7&Parl=37&Ses=2).

to the needs of their citizens, the Bill sought to build capacity within First Nations and reduce the power of the Minister and Federal Government.<sup>127</sup>

However, as with the 1969 White Paper,<sup>128</sup> the Bill was rejected by some Indigenous groups as an infringement on their inherent right to self-government, *vis*, an attempt to dictate how First Nations should be governed. The Assembly of First Nations (AFN) denounced the Bill as “dictating how First Nations must administer the business of their communities...it infringes on Aboriginal rights as recognized in section 35 of Canada’s *Constitution Act*, 1982”.<sup>129</sup>

Bill C-7 was an attempt by the Crown to improve its relationship with Canada’s Indigenous nations by transferring governance powers to Band Councils while increasing governance transparency and giving greater control to citizens. However, in addition to the political challenges it encountered, there were two fundamental flaws in the legislation: (1) it assumed that First Nations would embrace democratization as a governance precept; and (2) its attempt to define a uniform governance model perpetuated the ‘one size fits all’ homogeneity assumption. In effect, the Bill proposed to transform the Minister’s mandate from one of direct control under the *Indian Act*, to one of guidance and oversight.

From the perspective of First Nations, the Bill failed to provide the sovereignty declaration they desired, and reinforced their subordinate position to the Crown. Based on their resistance Bill C-7 was not presented for Royal Assent and consequently died on the

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<sup>127</sup> Minister of Indian and Northern Development, *First Nations Governance Act* (July 2003): *A Guide to Understanding Bill C7*. “The objectives of this new legislation are to put in place provisions that reflect current realities, that would serve as an interim step towards self-government and put the power on reserves back where it belongs – in the hands of the people. (Robert Nault, Minister of Indian Affairs and Northern Development). Online: [www.fng-gpn.gc.ca/pdf/files/crarevju\\_e.pdf](http://www.fng-gpn.gc.ca/pdf/files/crarevju_e.pdf).

<sup>128</sup> Indigenous and Northern Affairs Canada, “Statement of the Government of Canada on Indian Policy” (1969). Online: <http://www.aadnc-aandc.gc.ca/eng/>.

<sup>129</sup> Assembly of First Nations, *The Assembly of First Nations Position on Bill C-7 The First Nations Governance Act*. [www.afn.ca/Legislation%20Info](http://www.afn.ca/Legislation%20Info). (12 June 2003).

Parliamentary Order Paper. It would be reasonable to characterize the AFN response as a manifestation of the argument that Indigenous sovereignty is inherent - has never been surrendered or extinguished, and therefore cannot be mandated by the Crown.<sup>130</sup>

To the extent that future Indigenous self-governments may exhibit commonality, one can predict that it may be seen first in the assertion of territorial control, *i.e.* freedom from interference in their affairs by other jurisdictions. Paradoxically, the right of self-determination demanded by the AFN in response to Bill C-7 is also a central tenet of Westphalian sovereignty. From that, one might conclude that contemporary Indigenous sovereignty reflects a desire for self-government in a form similar to that of its early Westphalian counterparts.

### 2.5.1 Indigenous Constitutions

Another indicator of the desire for self-government (sovereignty) may be observed in the development of Indigenous constitutional instruments which, in addition to affirming traditional beliefs and values, outline the founding principles, laws, and the manner in which they will be applied within individual nations.<sup>131</sup>

Considered broadly, constitutions are bodies of rules that establish the basic functions of a polity and delineate the authority of its agencies. They typically define the manner in which governing bodies are structured, the rules that regulate their authority, and importantly, the rights of citizens living within the governed territories. John Borrows describes constitutions as “society’s central organizing principles [that] convey overarching legal standards for judgment in order to elevate a political society’s future

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<sup>130</sup> *Supra* note 122.

<sup>131</sup> Christopher Alcantara and Greg Whitfield “Aboriginal Self-Government through Constitutional Design” 44.2 *Journal of Canadian Studies* Spring 2010.

development”.<sup>132</sup> He claims further that constitutions can serve as a primary source of regulation, decision-making, and dispute resolution in Indigenous communities.<sup>133</sup>

In most Western nations, constitutions are superior to ordinary legislation and immune to *ad hoc* adjustments.<sup>134</sup> Changing national constitutions normally requires compliance with a process designed to discourage opportunistic political tampering.<sup>135</sup> Hence, constitutions provide a measure of political stability and protection against the will of the government of the day, particularly in majority government circumstances. As evidenced in the 2007 *Tsawwassen First Nation Final Agreement*, Indigenous constitutions are important elements in self-government agreements.<sup>136</sup>

Creating distinctive Indigenous constitutions may be an important step towards self-determination and the resurgence of traditional values, but at this time there is no national initiative to promote or coordinate their development. Although there may be templates available for sharing among First Nations there is no definitive model, which may be a reflection of the homogeneity issue discussed above. To that point, one might ask why

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<sup>132</sup> Borrows, *Indigenous Constitution*, *supra* note 13 at 181.

<sup>133</sup> *Ibid.*

<sup>134</sup> Great Britain and New Zealand have ‘unwritten’ constitutions. Their ‘constitutional’ laws are embedded in Acts of Parliament or court judgments. A key aspect of unwritten constitutions is that Parliament is sovereign in the sense of being the supreme legislative body. Since there is no documented constitution containing laws that are superior to ordinary Acts of Parliament, the courts may only interpret parliamentary statutes.

<sup>135</sup> A detailed description of the Canadian constitutional amending formula, often referred to as the ‘7/50’ process, may be reviewed in the Canadian Department of Intergovernmental Affairs website: <[www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=canada&doc=modif-eng.htm](http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=canada&doc=modif-eng.htm)>.

<sup>136</sup> *Tsawwassen First Nation Final Agreement* (2007) “Tsawwassen First Nation will have a Constitution, consistent with this Agreement, which will provide for a democratic Tsawwassen Government, including its duties, composition and membership.” Article 16, para 8. Online: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa\\_1100100022707\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf).



the Assembly of First Nations, in its role as a First Nations advocate, has not established a policy committee to create a constitutional template for use across the country.<sup>137</sup>

A risk associated with locally-crafted constitutions, even if they are prepared with the assistance of ‘experts’, is the potential for conflict with the *Constitution Act 1982*, specifically the *Charter of Rights and Freedoms*. For example, a constitution currently under development by Ontario’s Chippewa of the Thames First Nation (and possibly others) contains an article that declares its primacy over all other laws and constitutions, including the *Canadian Constitution Acts of 1867 and 1982*.<sup>138</sup> If the Chippewa constitution is passed in its current form it will be interesting to observe the proceedings of a possible future legal case in which an Indigenous person living on the Chippewa reserve seeks the protection of the *Constitution Act* s.2 or s.15 provisions, only to discover that the constitution governing their nation may not provide comparable rights.<sup>139</sup> Moreover, s 52(1) of the *Constitution Act, 1982* negates the authority of any instrument asserting primacy in constitutional affairs – a hurdle that could only be overcome by a constitutional amendment, which is something Canadian governments have been reluctant to consider since failure of the 1992 Charlottetown Accord.<sup>140</sup> On the other hand, one cannot discount the possibility that the Chippewa or other Indigenous

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<sup>137</sup> The Assembly of First Nations lists 25 policy areas in its mandate, none of which address Indigenous constitutions. See, Assembly of First Nations Policy Areas, Online: < <http://www.afn.ca/en/policy-areas/accountability>>.

<sup>138</sup> Draft constitution under development by the Chippewa of the Thames First Nation. Quoted by John Borrows at the University of Western Ontario Faculty of Law Indigenous Law Camp (May 23-26, 2017). Chippewa of the Thames Community Centre, Ontario.

<sup>139</sup> *Constitution Act 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11. Section 2 of the *Constitution Act, 1982* defines the fundamental freedoms to be enjoyed by “everyone”. These include the freedoms of: conscience and religion, thought, belief, and expression, peaceful assembly and association. Section 15 guarantees equal protection under the law without discrimination based on race, ethnic origin, colour, religion, sex, age, or mental or physical disability. Section 25 guarantees continuity of Aboriginal rights arising from the Royal Proclamation, settled and future land claims and treaties. Online: <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>.

<sup>140</sup> *Ibid.* Section 52(1) states: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

constitutions may provide rights and duties not included in the *Canadian Charter of Rights and Freedoms*.

Brian Slattery argues that a *de facto* Indigenous Constitution that binds the Crown already exists in the three element Aboriginal law framework established in *Haida Nation* and *Manitoba Métis*<sup>141</sup> - specifically, the honour of the Crown, the *Royal Proclamation*, and Aboriginal Treaties negotiated throughout the years.<sup>142</sup> He postulates the Indigenous constitution “parallels the federal pact between the provinces in the *Constitution Act, 1867* [and thus] provides the Constitution of Canada with its most ancient and enduring roots”.<sup>143</sup> In effect, Slattery argues that Canada’s constitutional order is best seen as the conflation of Imperial statutes, historic treaties, Indigenous traditions and “ancient relations between the Crown and Aboriginal peoples”<sup>144</sup> Slattery’s conception provides a provocative insight to the interpretation of Canada’s founding instruments and contemporary jurisprudence based upon them.

Indigenous constitutions are also components of modern treaties, which are important to the process of moving toward Indigenous self-government.<sup>145</sup> Nuri Frame, a Toronto-based lawyer and Osgoode Law lecturer focused on Indigenous rights, claims “modern treaties negotiated over the past 40 years have profoundly changed the relationship between First Nations and the Crown” even though a substantial divide exists between

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<sup>141</sup> *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511. *Manitoba Métis Federation Inc v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623.

<sup>142</sup> Brian Slattery, “The Aboriginal Constitution” (2014) from “Selected Works of Brian Slattery” Osgoode Hall Law School of York University. Originally published in 67 *Supreme Court Law Review* (2d) 319 at 319.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid* at 336.

<sup>145</sup> Aboriginal Affairs and Northern Development Canada “Comprehensive Claims” (2015). “The 30 modern treaties [concluded as at July 2015] include four self-government agreements and 26 comprehensive land claims, 18 of which include provisions related to self-government.”

Crown and Indigenous understandings of modern treaties as evidence of fully reconciled relationships.<sup>146</sup>

## 2.5.2 Modern Treaties

The 1999 *Nisga'a Final Agreement*<sup>147</sup> is an early example of how Indigenous sovereignty and self-government can be implemented within the Canadian constitutional order. It is an example of the type of negotiated settlements encouraged in *Delgamuukw*, where Lamer CJC stressed the preference of negotiation over litigation in all matters concerning Indigenous rights and land title. Although the *Nisga'a* agreement is a step towards self-determination, it falls short of creating a third order of government with the same rights and privileges allocated to the provinces, territories and national government in sections 91 through 95 of the *Constitution Act, 1867*.<sup>148</sup> Other agreements, such as the *Labrador Inuit Final Agreement*<sup>149</sup>, the *Nunavut Final Agreement*<sup>150</sup>, and the *Yukon First Nations Umbrella Final Agreement*<sup>151</sup> reflect experience gained with *Nisga'a* and a somewhat more enlightened attitude towards self-determination by the federal and provincial governments.

The *Nisga'a Final Agreement* is not without its critics. Although it was supported by Phil Fontaine, National Chief of the Assembly of First Nations, it was rejected by First

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<sup>146</sup> Nuri Frame, “The Modern Treaties – The Yukon and Tlicho Agreements” (2015). Presentation at York University Osgoode Hall (November 2015). Speaker’s notes.

<sup>147</sup> *Nisga'a Final Agreement*, 2001. Online: <http://www.aadnc-aandc.gc.ca/eng/1100100031292/1100100031293>.

<sup>148</sup> Canada Department of Indigenous and Northern Affairs. “Nisga'a Final Agreement” online: <[www.aadnc-aandc.gc.ca/eng](http://www.aadnc-aandc.gc.ca/eng)>.

<sup>149</sup> *Labrador Inuit Final Agreement*. Online: <<http://www.nunatsiavut.com/labrador-inuit-land-claims-agreement-3/>>.

<sup>150</sup> *Nunavut Final Agreement*. Online: <http://www.aadnc-aandc.gc.ca/eng/1100100030601/1100100030602>.

<sup>151</sup> *Yukon First Nations Umbrella Final Agreement*. Online: <<https://cyfn.ca/agreements/umbrella-final-agreement/>>.

Nations activists who referred to it as a ‘custodial agreement’ and the ‘BC Indian Act’.<sup>152</sup> Formal challenges were filed against the agreement by: Nisga’a members claiming their leaders lacked the authority to enter into the agreement; the Gitanyow First Nation claiming a boundary violation; the Fisheries Survival Coalition – a persistent critic of Indigenous fishing rights; and the BC Liberal Party claiming the agreement was inconsistent with the division of powers provisions of the *Constitution Act, 1867*. None of the challenges was successful. Other critics, including Christopher Roth, have characterized the Nisga’a and similar agreements as “certificates of conquest” and “lessons in ‘how not to do it’ rather than templates”.<sup>153</sup>

## 2.6 Evolving Westphalian Sovereignty

Despite its domination as a political order in western nations, Westphalian sovereignty is frequently criticized by activists and political theorists seeking to create a unified world order based on the political concept of cosmopolitanism.<sup>154</sup> Sovereignty’s territorial autonomy principle is also being tested by globalization’s economic, social, and environmental effects. Further, the political stability of sovereign states is being challenged by minority groups demanding a voice in domestic policies and governance.<sup>155</sup>

Some observers argue that globalization and the influence of supranational entities like the United Nations are rendering Westphalian sovereignty obsolete. For example, Kenichi Ohmae claims “although it may still be politically correct to talk about states as

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<sup>152</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 76.

<sup>153</sup> Christopher Roth, “Without Treaty: Without Conquest: Indigenous Sovereignty in Post Delgamuukw British Columbia” (2002) 17:2 *Wicazo Sa Review* 143 at 151.

<sup>154</sup> Harold Wilensky, *American Political Economy in Global Perspective* (New York: Cambridge University Press, 2012).

<sup>155</sup> For example, consider the turmoil experienced following the 1991 breakup of the former Soviet Union, the Sandinista revolt in Nicaragua, the civil war conditions currently being experienced in the Ukraine, and threats to European solidarity following Britain’s recent decision to leave the EU.

important actors, it is a bald-faced economic lie”.<sup>156</sup> In a similar frame, in his compilation of articles on the evolution of traditional sovereignty, Neil Walker observes that consolidation of governmental authority is being increasingly looked upon as the death knell of traditional state-centric sovereignty and sovereign rights.<sup>157</sup>

How are proponents of Westphalian sovereignty responding to these pressures? What is the outlook for state-based sovereignty writ large? To what extent does Westphalian sovereignty’s evolution provide guidance to the Canadian Crown and First Nations seeking to reconcile their respective goals of national coherence and self-determination? These questions may be seen as aspects of Westphalian sovereignty’s evolving conception of authority, and the desire by some to replace nation-state sovereignty with a unified world government based on the political doctrine of cosmopolitanism.

### 2.6.1 Scope of Authority

At the state level, sovereignty can be either absolute or non-absolute, which on its face may appear to contradict the concept of territorial supremacy. In reality, however, much of the power once exercised by sovereign nations has been ceded voluntarily in international treaties such as: the EU and NATO alliances<sup>158</sup>; global conventions, including UNCLOS and the UDHR<sup>159</sup>; economic agreements and regulatory agencies such as NAFTA, the WTO, and IMF<sup>160</sup>; and, supranational legal forums including the ICJ and ICC.<sup>161</sup> The possibility of formal re-examination of the state sovereignty concept

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<sup>156</sup> Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York: Free Press, 1995), quoted in *Beyond Sovereignty: Issues for a Global Agenda*, at 29 note 66.

<sup>157</sup> Neil Walker, *Essays in European Law* (Portland: Hart Publishing, 2006).

<sup>158</sup> European Union (EU), North Atlantic Treaty Organization (NATO)

<sup>159</sup> United Nations Convention of the Law of the Seas (UNCLOS), Universal Declaration of Human Rights (UDHR).

<sup>160</sup> North American Free Trade Agreement (NAFTA), World Trade Organization (WTO), International Monetary Fund (IMF)

<sup>161</sup> International Court of Justice (ICJ), International Criminal Court (ICC).

was raised in 2001 when United Nations Secretary-General Kofi Annan observed “in the 21<sup>st</sup> century I believe the mission of the United Nations will require us to look beyond the framework of sovereign states”, thus acknowledging the growing violability of sovereign independence.<sup>162</sup>

A further indication of the erosion of traditional state autonomy occurred in 2005 when the United Nations adopted the *Responsibility to Protect* (RTP) doctrine that affirms:

Protection of its people rests first and foremost with the State itself, but a ‘residual responsibility’ exists within with the broader community of states, that can be ‘activated’ when a particular state is either unwilling or unable to protect its citizens, or becomes the perpetrator of crimes or atrocities within its borders.<sup>163</sup>

The RTP explicitly grants the UN authority to intervene, even militarily, in situations where a state is violating the rights of its citizens, thus overriding the non-interference principle on which Westphalian sovereignty is anchored.<sup>164</sup>

## 2.6.2 Cosmopolitanism

Westphalian sovereignty has evolved over time in response to changing conditions such as economic globalization and the demands of political minorities for greater influence over public policy. It is inevitable that the doctrine will continue to adjust to reflect changing international circumstances. If, however, it is destabilized or diluted to the point of becoming redundant, one might ask what would replace it and what consequences may arise from doing so. A frequently discussed alternative to state sovereignty is the creation of a ‘world government’ in which global policies are developed on a consensual basis by

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<sup>162</sup> UN Secretary-General Kofi Annan, Nobel Peace Prize acceptance speech, December 10, 2001. Published by the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*. Online: <[www.iciss-ciise.gc.ca/pdfs/commission-report.pdf](http://www.iciss-ciise.gc.ca/pdfs/commission-report.pdf)>.

<sup>163</sup> United Nations, Office on Genocide Prevention. Online: <[www.un.org/en/genocideprevention/about-responsibility-to-protect.html](http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html)>.

<sup>164</sup> The conflict in Libya, where Libyan rebels sought to overthrow Colonel Muammar Al-Qadhafi, is an example of use of the R2P protocol including the use of military force. Online: <[www.unric.org/en/responsibility-to-protect/26988-the-responsibly-to-protect-on-a-case-by-case-basis](http://www.unric.org/en/responsibility-to-protect/26988-the-responsibly-to-protect-on-a-case-by-case-basis)>.

an organization such as the United Nations. Known in political science as ‘cosmopolitanism’, such a system, in its extreme application, would replace the world’s approximately 200 independent nations with a unitary political authority – a concept regarded as ‘fantasy’ by many observers.<sup>165</sup>

Western University’s Richard Vernon, perceives cosmopolitanism as a moral rather than organizational order, arguing that what happens to people anywhere in the world should concern everyone else. Vernon thus challenges Westphalian sovereignty’s state-centric paradigm’s ability to provide a just, moral environment for global citizens.<sup>166</sup> In his analysis of cosmopolitanism, David Miller, identifies serious problems such as the loss of democracy, the rise of global tyranny, an unmanageable bureaucracy, and the formidable challenge of reconciling the world’s many cultures and values.<sup>167</sup> Without specifically saying so, Miller equates cosmopolitanism to historically discredited political philosophies based on the concentration of power and the suppression of individual rights. One might observe that Canada’s 250-year attempt to assimilate First Nations into the mainstream Canadian political order, or treat them as a homogeneous political entity provides a compelling example of the challenge of implementing cosmopolitanism on a broad scale.

## 2.7 Discussion

Scholars representing the vast sovereignty and Indigenous rights literature offer perspectives that embrace critical theory, historical analysis, and formalism. The following paragraphs sample offerings from five contributors and discuss their approaches to reclaiming Indigenous rights and heritage. In several areas, their arguments are challenged to demonstrate the hurdles they would encounter in attempting to

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<sup>165</sup> Science fiction fans will recognize the cosmopolitan governance model in the *Star Trek* television and movie series’ portrayal of the “United Federation of Planets” – a multi-cultural assemblage of entities committed to universal peace and cooperation. See <[www.startrek.com/database\\_article/united-federation-of-planets](http://www.startrek.com/database_article/united-federation-of-planets)>.

<sup>166</sup> Richard Vernon, *Cosmopolitan Regard: Political Membership and Global Justice* (New York: Cambridge University Press, 2010) at 2.

<sup>167</sup> David Miller, *Political Philosophy*, *supra* note 101 at 120.

implement or gain widespread acceptance of their proposals. As noted, these selections are drawn from an expansive literature to demonstrate the diversity that exists within the academy rather than to reinforce specific conclusions concerning the nature of Indigenous or Westphalian conceptions of sovereignty.

### 2.7.1 Jean Cohen

Jean Cohen is the Columbia University Nell and Herbert M. Singer Professor of Political Thought and Contemporary Civilization. She teaches contemporary political and legal theory, constitutional democracy, and international political theory with particular interest in sovereignty and human rights.

Cohen posits that while defending their own sovereignty, the United States and other western countries are covertly promoting globalized governance to justify their intervention into the affairs of smaller, independent nations.<sup>168</sup> One may infer an analogy between Cohen's assessment of the current global political environment and that of the expansionary 16<sup>th</sup> to 18<sup>th</sup> century era when Europeans sought to increase their power asserting sovereignty over new world cultures under the guise of the doctrine of discovery. Cohen claims that "[c]osmopolitan and legal theorists...are eager to abandon the concept of sovereignty...but their perspective is seriously flawed."<sup>169</sup> Sovereignty, she argues, "involves normative principles and symbolic meanings worth preserving"<sup>170</sup>

Cohen's argument reflects Indigenous assertions that successive Canadian governments have attempted to achieve assimilation and cultural genocide of Canada's First Nations in direct violation of the tenets of Westphalian sovereignty that prohibit interference in the affairs of other nations. Although Cohen does not claim a direct parallel to Indigenous peoples, her violation assertion reflects the argument that First Nations historically

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<sup>168</sup> Jean Cohen, "Whose Sovereignty? Empire Versus International Law" (2004) 18:3 Ethics & International Affairs 1, at 13.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid* at 14.



negotiated with the Europeans on a nation-to-nation basis and should thereby have been immune to interference by colonizing nations. Thus, any attempt to regulate their internal affairs is a direct violation of the Westphalian non-interference precept. In that regard, the literature is replete with examples of interference by English, French, and Canadian governments in the affairs of Indigenous nations, including the *Indian Act* which is arguably the most invasive statute enacted by the Canadian Crown to date.

Although supported by historical documents and treaties, First Nations sovereignty was frequently rejected by pre-1982 courts, which sometimes employed overtly racialized language in their decisions. For example, in *R v Syliboy*, a Quebec out-of-season hunting case in which the defendant claimed a treaty-based exemption from the regulations, Patterson (Acting) Co Ct J, ruled “The Indians were never regarded as in independent power...The savages’ right of sovereignty even of ownership were never recognized.”<sup>171</sup>

### 2.7.2 Taiaiake Alfred<sup>172</sup>

Taiaiake Alfred is a Kahnawake (Mohawk) scholar and political activist who employs critical theory in his analyses. Alfred implicitly equates sovereignty to self-determination. In essence, he seeks to reset the clock to the time before arrival of the European when First Nations thrived as independent, self-sufficient polities governed by the traditional values of equality, respect, and consensus decision-making. His passion is apparent, but his calls to action lack pragmatism in the 21<sup>st</sup> century environment.

Alfred shows particular disdain for Indigenous leaders who have accepted colonialism’s tenets at the expense of traditional culture. He argues that assimilated leaders “model themselves on the most vulgar European-style power-wielders”<sup>173</sup> and demands that they

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<sup>171</sup> *R v Syliboy*, [1929] DLR 307 at 313. Quoted by Dickson CJC in *Simon v The Queen*, [1985] SCJ No 67. The language used by Patterson in *Syliboy* reflected the attitudes of the time and is unacceptable in the modern Court.

<sup>172</sup> Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto*, (Toronto: Oxford University Press, 1999).

<sup>173</sup> *Ibid* at xvi.

abandon the ways of mainstream politicians by returning to traditional Indigenous governance and rejecting foreign values. Alfred adamantly rejects the concept of large, homogeneous governments, arguing that they fail to accommodate Indigenous values and are the source of most of the factionalism that exists in Native communities.<sup>174</sup>

As a practical matter, there are numerous problems with Alfred's propositions. To begin, his suggestion that there is an Indigenous leadership model that is applicable across Canada ignores the diversity that exists among Canada's First Nations, *i.e.* the "homogeneity challenge". The flaw in his argument is evident when one considers the highly developed confederal structure of the Iroquois nations to which he belongs. No other pre-contact Indigenous community or confederacy, including the well-established governments of the Pacific Coast First Nations, exhibited comparable complexity or sophistication.<sup>175</sup> It is unrealistic for Alfred to recommend adopting an Iroquoian-style governance system on a national basis as he appears anxious to do. Moreover, one might reasonably argue that the multi-level shared power Iroquoian Confederacy was in many ways a reflection of the large scale Canadian federalist system he disdains and seeks to replace.<sup>176</sup>

Alfred's Indigenous renewal program is built on four pillars. First, he calls for structural reform of First Nations and the return to traditional decision making processes without interference by non-native advisors and overseers. Arbitrary restructuring of First Nation bands would put them into conflict with s 74 of the *Indian Act* which assigns leadership responsibility and specific authorities to an elected band council, and as ruled in *Paul Band (Indian Reserve No 133) v R* and *Whitebear Band v Carpenters Provincial Council*

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<sup>174</sup> *Ibid* at 26-27.

<sup>175</sup> Constitution of the Haudenosaunee (Iroquois) Confederacy. Online: <http://www.constitution.org/cons/iroquois.htm>.

<sup>176</sup> *Supra* note 174.

(*Saskatchewan*), limits the ability of bands to create processes or policies beyond those allowed by the Act.<sup>177</sup>

Alfred calls for the revival of native languages, particularly by community leaders when conducting community business. Re-establishing traditional languages is an admirable objective that would contribute to restoration of the Indigenous culture, perhaps alleviating some of the tensions created by the loss of identity and sense of nationhood resulting from colonialization. However, reestablishing traditional linguistic usage may take decades and will require modification of band attitudes and the educational curricula, particularly in communities that have abandoned and possibly forgotten their traditional languages. Efforts to restore traditional language use are currently underway in some Indigenous communities. For example, Ontario's Chippewa of the Thames band actively promotes use of the Anishinaabe language in its civic meetings, public school curriculum, local signage, and community communications. However, when asked about implementing a similar program in the nearby Kettle and Stony Point First Nation, Chief Thomas Bressette was less enthusiastic, claiming that band members have shown little interest in such an initiative.<sup>178</sup> Once again, diversity of beliefs among First Nations limits the implementation of broadly-based initiatives including language reinstatement.

Alfred advocates economic self-sufficiency based on expansion of land bases and reduced dependence on government funding. Although commendable, this objective may prove impractical for small or remote communities that are dependent on government funding in the absence of opportunities for industrial or commercial enterprises. It may be a viable strategy for communities willing to partner with resource companies on

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<sup>177</sup> *Paul Band (Indian Reserve No 133) v R (1983)*, 1983 CarswellAlta 212. The Alberta Court of Appeal ruled "Band Councils are created under the *Indian Act* and derive their authority to operate qua band councils exclusively from the Act...they have no other powers." See also, *Whitebear Band v Carpenters Provincial Council (Saskatchewan)*, 1982 CarswellSask 153 (CA). The Saskatchewan Court of Appeal ruled "an Indian band council is an elected public authority dependent on Parliament for its existence, powers and responsibilities...to exercise municipal and government power.

<sup>178</sup> Kettle and Stony Point First Nation, Chief Thomas Bressette (2017). Comments made to University of Western Ontario Faculty of Law students (Course 9871B: Indigenous Legal Traditions) April 2017.

infrastructure and resource development projects, but doing so would reduce the Indigenous independence Alfred advocates.<sup>179</sup> A case might be made for aggregation of small First Nations into consortia that would share resources and avoid duplication of services among them. For example, the Ontario government implemented a municipal consolidation program in the 1990s and 2000s, reducing the number of cities, towns, and hamlets by several hundred. In terms of funding, one might consider creation of a program similar to the federal-provincial equalization program in which wealthy First Nations could contribute to the well-being of those lacking resources or economic opportunities. Such a program would reduce the fiscal capability discrepancies that exist between First Nations and reduce dependency on Crown funding, but would likely encounter significant resistance and be seen as abandonment of the federal government's s 91(24) responsibilities.

Alfred can be commended for his passion and commitment to the cause of cultural preservation and self-determination. Although his recommendations will be difficult to achieve in the 'real world' in which the majority of Indigenous communities exist, they are worthy of consideration, further study and debate.

### 2.7.3 Dale Turner<sup>180</sup>

Dale Turner is a member of the Teme-Augama First Nation of Northern Ontario, and an Associate Professor at Dartmouth College. He is an activist in the tradition Alfred, Cohen, Sullivan, and Valverde, who employs critical theory in his analyses of sovereignty, and Indigenous nationhood. In this work, Turner issues a 'call to arms' to Indigenous scholars and intellectuals, asking them to express, forcibly if necessary, an

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<sup>179</sup> First Nations located in territories where oil, mineral, or forestry resources are plentiful are increasingly negotiating Impact Benefit Agreements with development companies to bring substantial wealth, employment, and infrastructure benefits to their communities. However, small, isolated communities, with no industrial or resource bases remain dependent on government assistance for their survival.

<sup>180</sup> Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy*, (Toronto: University of Toronto Press 2006).

Indigenous voice to overcome the ongoing effects of colonialism in political and legal affairs.

Turner outlines a three-point mandate for Indigenous intellectuals. Specifically, they: (1) must continue to resist colonialism by deconstructing its presence and expression in the contemporary discourse; (2) they must promote and defend the concept of ‘indigeneity’ as opposed to any expressions or attempts at assimilation; and (3) they must continuously engage the ‘state’ in legal and political discourses. He calls upon intellectual activists to become “word warriors... [whose] primary function is to engage the legal and political discourses of the state...and to make greater inroads into the Canadian legal and political practices while generating a more vigorous intellectual community”.<sup>181</sup>

Turner offers compelling arguments and a well-considered program for intensification of the Indigenous voice, particularly that of intellectuals engaged in legal and political discourse. One wonders, however, if he is ‘preaching to the choir’ in his encouragement of intellectuals while failing to encourage non-Indigenous scholars to join his project. One might also wonder if his ‘call to arms’ implies that there is consistency among Indigenous scholars in terms of their ideas and approaches, particularly when one considers the diverse circumstances experienced by Indigenous communities, some of which are highly sophisticated, prosperous, and well-integrated into the Canadian economy without being assimilated, and others that are impoverished, with limited prospects, and poorly led.

#### 2.7.4 John Borrows

John Borrows is a professor and Law Foundation Chair in Aboriginal Justice in the Faculty of Law at the University of Victoria. He is one of the academy’s most prolific and respected scholars on issues relating to Indigenous traditions and the intersection of common and customary law. In this 1999 article, which has been cited by more than 140

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<sup>181</sup> *Ibid* at 72.

jurists and scholars, he addresses the core issue posed in this research, *i.e.* the Supreme Court of Canada's interpretation of sovereignty.<sup>182</sup>

Borrows observes that when British Columbia entered Confederation in 1871 through the *Act (Terms) of Union*<sup>183</sup> its population was overwhelmingly Indigenous. Despite their large numbers and well-established communities, Indigenous peoples were neither invited to participate in the province's creation nor given an opportunity to assert title to their traditional lands. Consequently, England's unilateral assertion of sovereignty prevailed and was thus entrenched in the *Terms of Union*. In fact, the only reference to Indigenous interests in the Terms of Union is found in Clause 13 which acknowledges the Dominion Government's "charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit".<sup>184</sup>

In 1871 there were few formal treaties in place with the First Nations of British Columbia. At issue therefore, is the question of how and by what authority did British Columbia's Indigenous population fall under the sovereignty of the Dominion of Canada as it was known at that time. A tentative answer, was offered by British Columbia Supreme Court Chief Justice McEachern who, in *Delgamuukw*, held:

It is because they became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not or could not compete" and "[at the time of Union] all legislative jurisdiction was divided between Canada and the province, and there was no room for jurisdiction or sovereignty which would be recognized by the law or the courts."<sup>185</sup>

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<sup>182</sup> John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall Law Journal 537.

<sup>183</sup> *British Columbia Terms of Union*. Online: [http://www.constitutional-law.net/index.php?option=com\\_mtree&task=viewlink&link\\_id=319&Itemid=9](http://www.constitutional-law.net/index.php?option=com_mtree&task=viewlink&link_id=319&Itemid=9).

<sup>184</sup> *Ibid* at Clause 13.

<sup>185</sup> *Delgamuukw v British Columbia*, [1997] SCJ No 108, [1997] SCR 1010 [*Delgamuukw*] at para 20.

Borrows concludes that no genuine reconciliation can occur between Indigenous and non-native views in the absence of a revised, consensual understanding of sovereignty. To that point, in a 2015 review of *Tsilhqot'in Nation V British Columbia*, he underscores the contradiction created by the Supreme Court which granted a declaration of Aboriginal title over Tsilhqot'in land while simultaneously affirming the Provincial Crown's overriding sovereignty and underlying title to the same lands.<sup>186</sup> He asserts that the parties can only reconcile their differences through a jointly conducted, objective examination of the underlying issues, proceeding from a common understanding of key issues and definitions.

### 2.7.5 Bruce Clark<sup>187</sup>

Bruce Clark is a controversial writer, and activist. He was a 1969 UWO Faculty of Law graduate who earned a PhD in comparative law from the University of Aberdeen in 1990 and represented Indigenous interests in more than 40 cases beginning in 1972.<sup>188</sup> Despite his academic qualifications, Clark's behaviour in trials and hearings was characterized as 'unconventional' and 'unprofessional' resulting in numerous sanctions by the courts.

Notwithstanding his personal and professional issues, Clark offers a unique sovereignty-related argument for consideration. Written at the time of his PhD dissertation, Clark employs legal formalism to argue that historic doctrines and legal precedents nullify Crown assertions of sovereignty. His central premise is that Indigenous peoples had jurisdictional self-governance long before European contact. He argues that their 'sovereignty' was acknowledged in the *Royal Proclamation* and hence, no colonial government had the jurisdictional authority to set aside that Crown-granted right.

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<sup>186</sup> John Borrows, "The durability of terra nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48.3 University of British Columbia Law Review 701 at 724.

<sup>187</sup> Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queens University Press, 1990).

<sup>188</sup> Wikipedia. Bruce Allan Clark (Lawyer) biography. Online: [https://en.wikipedia.org/wiki/bruce\\_allan\\_clark\\_\(lawyer\)](https://en.wikipedia.org/wiki/bruce_allan_clark_(lawyer)).

He argues that strict interpretation of the *Constitution Acts, 1867 and 1982* verifies that Indigenous treaty rights are *de jure* guarantees of Indigenous sovereignty; and further, the Indigenous right of self-government is embedded in the *Constitution Act, 1982* s. 35 and the *Constitution Act, 1867* sections 91(24) 109, and 146.<sup>189</sup> Moreover, Clark claims that Indigenous sovereignty is confirmed by Imperial legislation including the *Royal Proclamation* (1763) and British Privy Council decisions taken during the 1631 to 1931 period, but not repealed by Britain before its authority to do so was relinquished in the *Statute of Westminster* (1931), or by the Canadian government during its drafting of the *Constitution Act, 1982*.

Finally, he argues further that the Crown does not have legal authority to extinguish rights through court decisions, legislation or regulations, and that delegation of municipal-style powers by the *Indian Act* was done without legal foundation. In effect, Clark is making legal formalism arguments that characterize the majority of Indigenous court decisions and government policies as *ultra vires*, thus challenging the extinguishment of Indigenous rights and the legitimacy of British claims of sovereignty based on Westphalian principles and Imperial statutes.

Clark's assertions have received limited support in the academy. His activism has been discredited by the Assembly of First Nations, the Bar Association of British Columbia and the Law Society of Upper Canada. He was disbarred in 1999.

### 2.7.6 Summary

There are several common themes among these scholars that can also be found throughout the literature. They promote a return to traditional Indigenous values and resurgence of the pride that has suffered under centuries of colonialism. Cohen accuses

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<sup>189</sup> *Constitution Act, 1982*, *supra* note 139. Section 35 recognizes the rights of the Aboriginal peoples of Canada, including treaty rights that now exist by way of land claim agreements or may so be acquired. *Constitution Act, 1867*, *UK 30 & 31 Victoria c3*. Section 91(24) grants Parliament exclusive powers over "Indians, and Land reserved for the Indians". Section 109 grants ownership of all lands, mines and minerals to the provinces subject to them being located within the provinces and any non-provincial claims upon them. Section 146 allows for admission of additional colonies or provinces into the (Canadian) Union.



European explorers of violating the Westphalian rules that protect them from each other. Alfred and Turner call for the resurgence of indigeneity and traditional governance regimes. Turner approaches the issue from an intellectual, persuasive perspective while Alfred is more inclined to take direct action. Borrows and Clark focus on judicial processes and outcomes. Borrows analyzes the *Delgamuukw* trials to demonstrate the courts' willful ignorance of Indigenous history and traditions. Clark rejects most Indigenous law court decisions as *ultra vires* based on his formalist interpretation of historical documents, statutes, and proclamations. The patterns exhibited by this small sample of the scholarship reflect a divide between those who support direct action, and those whose approach is somewhat more reflective and open to reasoned discussion and negotiation.

## Chapter 3

### 3 The New World

#### 3.1 Discovery and Settlement

#### 3.2 First Inhabitants

Archeological evidence and genetic sequencing confirms that America's first inhabitants (Paleo-Indians) followed game herds across the Beringia ice bridge from Asia 20,000 to 10,000 years before arrival of the first European explorers.<sup>190</sup> Over the ensuing millennia they spread across the continent, eventually settling into six geographic regions in Canada: (1) the Woodland First Nations in the eastern part of the country: expert hunters and fishers who lived in communities of 100 or so individuals who were often 'led' by the band's most successful hunter; (2) the Iroquoian First Nations, who inhabited the area surrounding the Great Lakes: expert farmers, fishers, and hunters who established substantial permanent communities and a sophisticated governance structure within the Iroquoian Confederacy; (3) the Plains First Nations, who lived on the grasslands of the Prairies: semi-nomadic small bands that followed game migration routes; (4) the Plateau First Nations, whose geography ranged from semi-desert conditions in the south to high mountains and dense forest in the north: hunters who engaged in trading relationship with other bands, including Plateau First Nations (5) the Pacific Coast First Nations who enjoyed a moderate climate and abundant food supply that allowed them to develop clan-based communities (houses) and sophisticated hierarchical governance structures; and (6) the First Nations of the Mackenzie and Yukon River Basins, whose harsh environment consisted of forests, barren lands and swampy terrain. This grouping included isolated Inuit familial groups scattered across the Arctic, living as subsistence hunters whose

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<sup>190</sup> "Sequencing DNA from the 12,600-year-old skeleton of an infant found in central Montana, scientists have confirmed that early Native Americans descended from ancient Asians" Online: [www.the-scientist.com/?articles.view/articleNo/39153/title/First-Ancient-North-American-Genome-Sequenced](http://www.the-scientist.com/?articles.view/articleNo/39153/title/First-Ancient-North-American-Genome-Sequenced).

principal occupation was survival.<sup>191</sup> There is no indication of substantial contact among the regions although intra-regional interactions, including disputes over territorial boundaries and hunting rights no doubt occurred throughout the millennia.

Although there is no written record of the settlement or history of the original peoples, there is no debate that substantial Indigenous communities with well-established laws and customs existed throughout the pre-colonial period.<sup>192</sup> The Court acknowledged the organized nature of First Nations communities in *Calder*, ruling “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”<sup>193</sup>

Canada’s First Nations enjoyed uncontested control over their territories and the resources that sustained them for millennia before first contact. However, this does not imply there were no conflicts among aboriginal communities prior to European contact. John Borrows notes that North America’s aboriginal communities experienced inter-tribal disputes over hunting grounds, territorial boundaries, and political issues, just as occurred in Europe, and between other nations throughout history.<sup>194</sup>

### 3.2.1 The Europeans

With respect to European settlement of the Americas, archeological evidence confirms that Norse explorers, not Christopher Columbus, ‘discovered’ the Americas and

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<sup>191</sup> Extract from Aboriginal and Northern Development Canada website. Online: <[www.aadnc-aadnc.gc.ca/eng](http://www.aadnc-aadnc.gc.ca/eng)>.

<sup>192</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 1.

<sup>193</sup> *Calder*, *supra* note 63 at 156. Also *Mitchell*, *supra* note 25 at para 9. “Aboriginal people have been living in organized distinctive societies with their own social and political structures since long before Europeans arrived”.

<sup>194</sup> Borrows, *Indigenous Constitutions*, *supra* note 13 at 10. “...indigenous peoples are just as susceptible to petty squabbles and large scale controversies as other societies in the world”.

established permanent settlements in what is now Newfoundland, in the 11<sup>th</sup> century.<sup>195</sup> Until the end of the 15<sup>th</sup> century the Americas were unknown to the Europeans, who were principally concerned with establishing sea routes to facilitate trade in spices and silks with Asia.

When Columbus ‘encountered’ the Americas in 1492, he was actually searching for a western sea route from Europe to Asia. His arrival in the Bahamian Islands was a fortuitous accident. However, under the authority of the 1492 *Dum Diversas* Papal bull, Columbus, despite not knowing where he was, immediately claimed sovereignty in the name of the King and Queen of Castile. At that time, sovereignty was established by performing symbolic acts such as “the planting of a cross or flag, burying coins, or the reading of an official pronouncement called the ‘Requerimiento’ (requirement).”<sup>196</sup> Bearing in mind that the Americas were unknown and uncharted prior to Columbus’ arrival, a key question concerned how much territory Columbus and future explorers were entitled to claim by performing these symbolic acts.

Although under the influence of the Catholic Church at the time, advisors to Britain’s Henry VII (1487-1509) determined that England would not be in violation of the 1493 Papal bull if he claimed sovereignty over lands not already discovered by Portugal or Spain. His decision to follow their advice had the effect of instituting a race among European nations to expand their foothold in the Americas.<sup>197</sup> Following Henry VIII’s split with the Catholic Church in 1534, his daughter, Elizabeth I (1533-1603) proclaimed that nations could only assert sovereignty over newly discovered lands by actual

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<sup>195</sup> “The first Europeans known to set foot in Newfoundland [America] were the Norse. Beginning in the eighth century, they burst out of their cultural homeland in Scandinavia (particularly Norway) in a series of expansionist waves of migration” Online: <[www.heritage.nf.ca/articles/exploration/Norse](http://www.heritage.nf.ca/articles/exploration/Norse)>.

<sup>196</sup> Jennifer Reid, “The Doctrine of Discovery and Canadian Law” (2010) 30.2 *The Canadian Journal of Native Studies* 335 at 337. Also see, Borrows *supra* note 14 at 196.

<sup>197</sup> Several of the most notable exploratory voyages, including those of John Cabot and Jacques Cartier, were continuations of the European quest to find an eastern sea route to Asia. For a concise chronological summary of the early exploration of America, particularly Canada and the Northeast coast, please refer to <[www.thecanadianencyclopedia.ca/en/article/exploration](http://www.thecanadianencyclopedia.ca/en/article/exploration)>.

occupation of a territory rather than by performing symbolic acts. Her proclamation had no force in international law, but provided a solution to the issue of territorial boundaries, *i.e.* a nation must demonstrate the ability to defend circumscribed geographic areas in order to claim sovereignty over them. Notably, Queen Elizabeth's proclamation preceded by a half century the *Treaties of Westphalia*, which established a similar requirement.

The voyages of John Cabot (1450-1500), particularly his 1496 expedition<sup>198</sup>, saw England claim ownership of much of America's Eastern coast. Many of England's claims, which ranged from Florida to New England, violated Elizabeth's occupation mandate.<sup>199</sup> France was equally anxious to discover a new route to Asia and to acquire sovereign territories in the Americas. In 1534, it sponsored Jacques Cartier's voyages along the St. Lawrence river and establishment of settlements as far west as Hochelaga as modern day Montreal was known to the area's indigenous Iroquoians.<sup>200</sup>

### 3.2.2 Early Indigenous Relations

History records that the first European settlers, who were greatly outnumbered by First Nations inhabitants, depended on Indigenous communities for shelter, sustenance and protection. Indigenous warriors were also used with great effect during the American war of independence and the ongoing conflicts between the English and French in Canada. Although it is beyond the scope of this paper to provide a full account of the early

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<sup>198</sup> Cabot's voyage was enthusiastically endorsed by Henry VII who issued Letters Patent stating: "[I grant] ... free authority, faculty and power to sail to all parts, regions and coasts of the eastern, western and northern sea, under our banners, flags and ensigns...to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians". Extract from Henry VII's Letter Patent granted to John Cabot in March 1496. Online: [www.bris.ac.uk/Depts/History/Maritime/Sources](http://www.bris.ac.uk/Depts/History/Maritime/Sources).

<sup>199</sup> Jennifer Reid, *supra* note 196 at 337. Notwithstanding England's assertion that sovereignty must be based on occupation, the pace of discovery by Cabot along the eastern coast and Cartier along the St. Lawrence River led to re-instatement of the practice of claiming sovereignty through symbolic acts...most frequently involving the planting of national flags and/or religious crosses.

<sup>200</sup> "In 1534, Jacques Cartier received a royal commission from King Francis I of France to explore the New World in order to find a passage to China and to find precious metals in the area around Newfoundland. Cartier outfitted two ships and sailed from Saint-Malo on April 20, 1534." Online: <[www.exploratiionn.marinersmuseum.org/subject/Jacques-cartier](http://www.exploratiionn.marinersmuseum.org/subject/Jacques-cartier)>.

settlement of Canada and the manner in which relationships with First Nations evolved, it is noteworthy that the contributions made by the Indigenous peoples were critical elements of Canada's settlement and political history.<sup>201</sup>

Throughout the formative years, interaction between Indigenous groups and European settlers led to 'treaties' that ensured peace, facilitated trade, and created alliances against threats from outside forces. For example, the *Covenant Chain Alliance* (1744) established the general parameters that governed British-Indigenous relations; the *Robinson Treaties* (1850) established title rights over much of Northern Ontario; the *Treaty of Albany* (1664) defined the relationship between the British and Iroquois peoples in the former Dutch colonies of New Netherland (New York); and the *Treaty of Niagara* (1764) confirmed the nation-to-nation relationship between settlers and First Nations peoples. Other agreements, some more formal than others, were created during the settlement period. The validity and interpretation of these treaties are key elements in contemporary court cases involving aboriginal rights throughout Canada.<sup>202</sup>

In 1763, without negotiation and notwithstanding formal treaties with Indigenous peoples and representations to protect their interests, England arbitrarily declared sovereignty over all the lands and peoples their officials encountered as they colonized the Canadian territories, as well as those in Florida and Grenada.<sup>203</sup> Many Indigenous leaders continue to reject Britain's sovereignty and dispute the grounds upon which it is based.

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<sup>201</sup> There are numerous sources of Canada's early development and the interaction of settlers, traders and missionaries with First Nations communities. For a summary account one might reference Indigenous and Northern Affairs Canada (INAC) website at [www.aadnc-aandc.gc.ca/eng](http://www.aadnc-aandc.gc.ca/eng). For a comprehensive analysis, particularly as it relates to the conflict between English and French settlement efforts, I recommend Conrad Black's, *Rise to Greatness: The History of Canada from the Vikings to the Present* (Toronto: McClelland & Stewart, 2014).

<sup>202</sup> See, for example, *R v Marshall*, [1999] SCJ No 55; *Simon v R*, [1985] SCJ No 67; or *R v Sioui*, [1990] SCJ No 48.

<sup>203</sup> *The Royal Proclamation of October 7, 1763* RSC 1985, App II, No 1, was issued by Britain's King George III in October 1763. Although positioned to suggest protection of aboriginal rights, it can be reasonably interpreted as a *de jure* assertion of sovereignty by its inclusion of the phrase "And We do further declare it to be Our Royal Will and Pleasure, for the present as foresaid, to reserve under Our Sovereignty, Protection, and Dominion..." at para. 3, [emphasis added].

Consequently, more than 250 years on, sovereignty disputes occupy Canadian courts and exacerbate feelings of ill-will within many indigenous communities.<sup>204</sup> Referring to the nature of Indigenous sovereignty at the time of contact, Elder Moses Smith, of the Nuu-chah-nulth Nation captures the contemporary sentiments of many Indigenous and First Nations people in his comment:

What we have (had) – the big thing within our system ... is Ha Houlthee, which is, we might say...is true sovereignty. That is absolutely the key, the key of why we are today now, is that we have always been. That was never taken away from us.<sup>205</sup>

The most cursory examination of Canada’s judicial history confirms that the concerns of Indigenous peoples were often ignored outright or adjudicated in favour of the Crown with minimal consideration of their interests or rights.<sup>206</sup> Moreover, case judgments such as *Van der Peet* confirm that differing conceptions of aboriginal rights between and within the courts may be affecting judicial outcomes.<sup>207</sup>

### 3.3 Politics, Policies and Promises

Political scientists rank the historically troubled Crown-Indigenous relationship as one of Canada’s greatest cleavages. Successive governments from Sir John A. Macdonald to

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<sup>204</sup> Thomas Isaac, *Aboriginal Law: Supreme Court of Canada Decisions* (Toronto: Thomson Reuters, 2016). Isaac identifies 61 “landmark” Supreme Court of Canada Indigenous cases, representing at least 121 lower court judgments. Each of the referenced Supreme Court cases involved submissions associated with Section 35 of the *Constitution Act 1982*, which recognizes and affirms the existing rights of the aboriginal peoples of Canada, and declares that the federal and provincial governments are committed to the principle that no changes will be made to s 91(24), s 25, or to s 35 without participation by aboriginal peoples.

<sup>205</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 quoted at 8.

<sup>206</sup> In recent years there have been a number of decisions in favour of Indigenous litigants that in previous generations might have been less likely to succeed. See for example: *Tsilqot’in Nation v British Columbia*, *supra* note 66 - the most recent and significant SCC decision on the issue of aboriginal title.

<sup>207</sup> See: *R v Van der Peet*, *supra* note 44 [1996]. Writing for the majority Lamer CJC held that the appellant failed to demonstrate her rights and dismissed her appeal. In strong dissents, L’Heureaux-Dubé J and McLachlin J offered different interpretations of the majority’s ‘distinctive culture’ concept and the importance of the “...ancestral customs and laws observed by the indigenous peoples of the territory” McLachlin J, at para. 248. See also: *This Is Not a Peace Pipe – Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 57.

Justin Trudeau have committed to repairing, renewing, and reconciling the relationship with limited success, as may be seen in the following examples, many of which were essentially attempts to affect assimilation. Canada's record of following through on commitments to improve Crown-Indigenous relations is disappointing. To the extent that these initiatives addressed Indigenous rights, particularly rights associated with the degree to which they could exercise self-government – an essential marker of sovereignty, one might reasonably conclude that limited, if any, real progress has been achieved.

For example, in 1885, Prime Minister Macdonald enacted the *Electoral Franchise Act*<sup>208</sup>, declaring that Indians "...should be granted the right to become enfranchised...to place Indians on a footing of equality with their white brethren." Macdonald was an unapologetic advocate of assimilation. The *Franchise Act* would have the effect of exchanging Indigenous sovereignty for participation (assimilation) in Canadian civil society. Thirteen years later, the Macdonald *Franchise Act* was scrapped by the Laurier government that denounced it as "...an insult to the free white people of this country to place them on a level with pagan and barbarian Indians".<sup>209</sup> Laurier's action was an example of overt racism – certainly not an attempt to support Indigenous sovereignty.

In 1969, after six years of consultations, Prime Minister Pierre Trudeau, published the *Statement of the Government of Canada on Indian Policy*.<sup>210</sup> The *1969 White Paper*, somewhat echoed Macdonald's assimilation policy by recommending elimination of the distinct legal status of Indigenous peoples as a step to achieving equality among all Canadians. Although promoted as a policy designed to allow the development of Indigenous culture in an environment of legal, social and economic equality with other

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<sup>208</sup> *Electoral Franchise Act 1885*. Online: <http://www.thecanadianencyclopedia.ca/en/article/sir-john-alexander-macdonald/>.

<sup>209</sup> Richard Gwyn, *Nation Maker: Sir John A. Macdonald: His Life, Our Times, Volume Two: 1967-1891* (Toronto: Random House Canada, 2011) at 419-421.

<sup>210</sup> Canada, *Statement of the Government of Canada on Indian Policy* (1969). Online: <https://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>.



Canadians, it was viewed by critics as an overt attempt at total assimilation of the indigenous population and was withdrawn in 1970 without formal debate by Parliament.

In July 1990, Prime Minister Brian Mulroney faced an uprising by Mohawk Warriors at Oka Quebec over plans to expand a golf course on disputed land. The Mohawk stance was an unequivocal assertion of their sovereign rights over the disputed territory. The incident, which lasted 78 days and resulted in the death of a Quebec police officer, threatened to become even more violent. Contingency plans were made for a full military assault that in the appraisal of Chief of the Defence Staff, General John de Chastelain, would result in civilian and possibly military deaths. Mulroney defused the situation through a mediation process backed by the threat of military involvement. Speaking in Parliament, he pledged “to place native concerns at the top of my government’s agenda...to create a new relationship between aboriginal and non-aboriginal Canadians”<sup>211</sup> The Oka crisis was defused, but no measurable improvement occurred in terms of the relationship writ large.

In 2005, after 18 months of negotiation, Prime Minister Paul Martin announced an agreement between the federal, provincial, territorial governments, and five national Indigenous organizations designed to equalize the standard of living between Indigenous and non-indigenous Canadians through cooperative programming and a \$5 billion funding boost over a five-year period. The funding would focus on health, education, housing, infrastructure and economic development. Despite its commitment to move forward with implementation, the Liberal government failed to allocate funding in the 2006 budget, with the result that when Martin’s government was defeated later that year, the program effectively died on the Order Paper. Implementation of the Kelowna Accord<sup>212</sup> would have been a positive step towards Indigenous sovereignty in the sense

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<sup>211</sup> Brian Mulroney, *Memoirs 1939-1993* (Toronto: McClelland & Stewart, 2007).at 798-799. “I give Canadians the assurance of the Government of Canada that ever effort will be deployed to ensure that it will be done.

<sup>212</sup> Kelowna Accord. Online: <<http://www.thecanadianencyclopedia.ca/en/article/kelowna-accord>>.

that Indigenous participation in the design and delivery of the programs could be perceived as a step toward self-determination and self-government on a national scale.

Stephen Harper's Conservative government was less active on the Indigenous file than his predecessors. In 2008, Prime Minister Harper formally apologized for the residential school program stating "I stand before you, in this chamber so central to our life as a country, to apologize to Aboriginal peoples for Canada's role in the Indian residential school system".<sup>213</sup> Although the apology was well-received, the government did not follow-through on the commitments of the Kelowna Accord that were negotiated but not funded by the Martin government. This failure might suggest that the apology was a political rather than policy initiative. Following the international financial crisis of 2008, the government's focus shifted to economic recovery and Indigenous affairs slipped off the agenda almost completely.

During the 2015 Federal election campaign Justin Trudeau, promised to set reconciliation with Canada's First Nations as a government priority, including allocating funding for the Kelowna Accord. Following his election, he initiated the Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG)<sup>214</sup>; promised to implement all 94 recommendations included in the Truth and Reconciliation Report; and committed his government to adopting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). At this writing, the MMIWG inquiry is in disarray with delays, design controversy, resignations, and a call by some for a "hard reset".<sup>215</sup> There has been no significant progress on the Truth and Reconciliation Report recommendation implementation, and the promise to implement UNDRIP is not moving forward except for a vague commitment to examine federal legislation for conflicts and resolve them

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<sup>213</sup> Indigenous and Northern Affairs Canada. Online: [www.aadnc-aandc.gc.ca/eng/](http://www.aadnc-aandc.gc.ca/eng/).

<sup>214</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls. Online: <http://www.mmiwg-ffada.ca>.

<sup>215</sup> CBC National News. Online: <http://www.cbc.ca/news/indigenous/mmiwg-commissioners-afn-meeting-regina-1.4223304>.

where possible. Although limited progress has been made to date the Prime Minister Trudeau's promises remain high on the government priority list.<sup>216</sup>

Each of these Prime Ministers has promised, but failed to renew the relationship, eliminate inequities, and move forward in the spirit of cooperation, respect, and justice. It is striking that none of the initiatives achieved their goals and in some cases have exacerbated rather than mitigated the longstanding distrust and negativity without materially achieving or advancing the reclamation of Indigenous sovereignty.

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<sup>216</sup> See Canada Department of Justice Statement on the Indigenous Relationship. Online: >[https://www.canada.ca/en/departement-justice/news/2017/07/government\\_of\\_canadasetsaprincipledfoundationforadvancingrenewed.html](https://www.canada.ca/en/departement-justice/news/2017/07/government_of_canadasetsaprincipledfoundationforadvancingrenewed.html)>.

## Chapter 4

### 4 Sovereignty and the Law

*“Failure of existing rules is the prelude to a search for new ones.”*

- *Thomas Kuhn, the Structure of Scientific Revolutions 1962*<sup>217</sup>

#### 4.1 Introduction

The previous chapters explored sovereignty’s historical and philosophical foundations, concluding that the philosophical gap between traditional Indigenous and Westphalian understandings was wide and possibly irreconcilable. Chapter 2 introduced a contemporary interpretation of Indigenous sovereignty based on self-government and self-determination. Chapter 3 concluded with brief reflections on the attempts of several Prime Ministers to address the historically troubled Crown-Indigenous relationship – attempts that history reveals had little positive effect.

This chapter explores sovereignty in the context of Canadian jurisprudence, particularly cases adjudicated since 1982. Four legal instruments: The *Royal Proclamation*, the *Constitution Act 1867*, the *Indian Act*, and the *Constitution Act 1982* are introduced to establish their role in framing Canadian law and imposing Eurocentric sovereignty on Indigenous peoples. The chapter then examines *Delgamuukw v British Columbia* (1997), a landmark case that considered Indigenous title in the context of s 35 of the *Constitution Act 1982*, defined a specific test for ‘proving’ Aboriginal title, and established definitive guidelines concerning oral and traditional evidence.<sup>218</sup>

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<sup>217</sup> Thomas Kuhn, *The Structure of Scientific Revolutions: 50<sup>th</sup> Anniversary Edition* (Chicago, University of Chicago Press, 2012). Referenced by Grace Li Xiu Woo in *Ghost Dancing with Colonialism* (Vancouver: UBC Press, 2011) at 27.

<sup>218</sup> *Delgamuukw v British Columbia* supra note 33.

## 4.2 Principal Legal Instruments

In addition to the role of precedents arising from similar cases, courts adjudicating Indigenous cases are guided by four principal legal instruments: the *Royal Proclamation 1763*,<sup>219</sup> the *Constitution Act 1867*,<sup>220</sup> the *Constitution Act 1982*,<sup>221</sup> and the *Indian Act*.<sup>222</sup> Although not explored in detail, it is useful to introduce them here as background information, and to identify the elements of each that most frequently influence case outcomes.

### 4.2.1 The Royal Proclamation, 1763

The Royal Proclamation was issued by Britain's King George III in October 1763 for three main purposes: (1) to reinforce British authority over the lands and peoples of the British colonies in eastern Canada, Florida, and Grenada -- particularly over the French occupants of the Quebec area who had ceded control over their lands in the 1763 Treaty of Paris; (2) to ameliorate growing discontent and militarism among Indigenous peoples whose land was being exploited by European settlers; and (3) to declare Crown sovereignty over all lands not previously granted to individuals or reserved for Indigenous communities, i.e. all such lands became 'property' of the Crown and could not be settled, sold to, or exploited by any private party even if agreement was reached in advance with the Indigenous occupants. Although positioned to suggest protection of Indigenous rights, it can be reasonably interpreted as a de facto assertion of sovereignty by inclusion of the phrase "And We do further declare it to be Our Royal Will and Pleasure, for the present as foresaid, to reserve under Our Sovereignty, Protection, and Dominion".<sup>223</sup>

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<sup>219</sup> *The Royal Proclamation of October 7, 1763* RSC 1985, App II, No 1.

<sup>220</sup> *The Constitution Act, 1867* (UK), 30 & 31, reprinted in RSC 1985, Appendix II No 5.

<sup>221</sup> *Constitution Act, 1982, being Schedule B to the Canada Act 1982* (UK).

<sup>222</sup> *Indian Act*, RSC 1985, c 1-5.

<sup>223</sup> *Supra* at note 147.

In *Delgamuukw*, British Columbia argued that the Royal Proclamation only applied to the British colonies in eastern Canada at the time of its enactment. On appeal, Lambert JA declined to express an opinion on the question,<sup>224</sup> but at the Supreme Court, Lamer CJC, supported by L'Heureaux-Dubé J and La Forest J, wrote "Aboriginal peoples had the right to possess the lands reserved for them...which were applied in principle to aboriginal peoples across the country"<sup>225</sup> thereby establishing a precedent that would defeat similar claims made in future litigation. The Royal Proclamation is arguably ambiguous, and subject to 'interpretations of convenience' by Indigenous and Crown representatives alike.

#### 4.2.2 Constitution Act, 1867

Originally the British North America Act<sup>226</sup> (the BNA Act), this was one of a series of British statutes that addressed Canada's desire to become an autonomous political entity. Although the Act established Canada's basic bicameral, federalist form of government and permitted Canada's parliament to enact legislation without British intervention, de facto independence was not achieved until 1931 when the Statute of Westminster<sup>227</sup> gave all former colonies equal status as members of the British Commonwealth. It was not until 1949 that the Supreme Court of Canada, originally founded in 1857, replaced Britain's Justice Committee of the Privy Council (JCPC) as the final court of appeal in the Canadian judicial system. Of most significance to this research is s 91(24) which allocates responsibility for "Indians and Lands reserved for the Indians" to the legislative jurisdiction of the federal government.

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<sup>224</sup> *Delgamuukw supra* note 33 at para 61.

<sup>225</sup> *Ibid* at para 200.

<sup>226</sup> *British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)*.

<sup>227</sup> *Statute of Westminster* 1931 c 4 22 and 23 Geo 5.

### 4.2.3 Constitution Act, 1982

Enactment of the Constitution Act, 1982 in April 1982 officially terminated any residual authority the United Kingdom had over Canada, provided the constitutional amending formula that was omitted from the original BNA Act, and adopted the Canadian Charter of Rights and Freedoms. The Act's authority is established in s 52(1) which declares "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".<sup>228</sup> Section 52(2) defines the Constitution of Canada's components.<sup>229</sup> The doctrine of constitutional supremacy established in s 52(1) has the potential to become a point of contention in the context of Indigenous constitutions which, may claim primacy for themselves.<sup>230</sup>

With respect to Indigenous affairs, Sections 25 and 35 are the most important clauses of the Constitution Act, 1982. Section 25 confirms the Charter of Rights and Freedoms does not extinguish the rights of Indigenous peoples arising from treaties, the Royal Proclamation, or settled land claims. Sections 35 and 35(1) affirm the existing rights of the Aboriginal peoples of Canada, and declare that the federal and provincial governments are committed to the principle that no changes will be made to s 91(24), s 25, or to s 35 without participation by Indigenous peoples, thus giving them unique status as participants in the constitutional amendment process.

In compliance with s 52(2) of the Constitution Act, 1982, s 35 is an element of the supreme law of Canada thereby creating the potential for conflicts with federal, provincial or territorial legislation that may violate established or asserted Aboriginal rights. Arguably, the s 35 rights of Indigenous Canadians and the obligations owed to

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<sup>228</sup> The Constitution Act, 1982, *supra* note 139. Section 52(1) Primacy of Constitution of Canada.

<sup>229</sup> *Ibid.* Section 52(2) "The Constitution of Canada includes (a) the Canada Act 1982 included in this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b).

<sup>230</sup> *Supra* note 138.

them by the Crown and Canada's legislatures fundamentally changed the legal framework in which Indigenous and settler cultures co-exist. For example, since 1982 the Supreme Court has adjudicated at least sixty-five Indigenous cases that were based on s 35 claims. Speaking specifically to the importance of s 35 to the future of Indigenous relations, McLachlin CJC observed "...the way forward in Canada is thus not in conquest and assimilation, but in recognition and reconciliation".<sup>231</sup>

#### 4.2.4 Indian Act, RSC (1985) c 1-5

The Indian Act, 1985 regulates most aspects of First Nations governance, including property rights, the structure and authority of band councils, the method of council election, financial management procedures, and other items which indigenous constitutions and modern treaties may ultimately replace. The Act is a consolidation of earlier colonial laws and ordinances associated with the administration of Indigenous affairs, including management of reserve lands and finances.

The Indian Act's original and arguably continuing purpose is assimilation of Indigenous societies into mainstream Canadian culture. In one of the most reviled statements in Crown-Indigenous relations, in 1920, Deputy Secretary of Indian Affairs Duncan Campbell Scott, wrote:

I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.<sup>232</sup>

The Indian Act, gives Indigenous communities powers similar to those allocated to Canadian municipalities, thus granting a limited form of self-governance, that is closely

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<sup>231</sup> Right Honourable Beverly McLachlin, P.C., "Aboriginal Peoples and Reconciliation" (Public address at the University of Canterbury, April 28, 2003), (2003) Canterbury L. Rev 240 at 241.

<sup>232</sup> Duncan Scott Campbell (1920) National Archives of Canada Record Group 10, Volume 6810, File 470-2-3 at 55. Scott's comments referenced the proposed *Residential Schools Act*.



controlled by the Federal Crown.<sup>233</sup> A key feature of the Act concerns band leadership. Under s 74, members can elect a Band Council by either customary methods including hereditary appointment, or through democratic elections.<sup>234</sup> Not all First Nations accept the ‘restrictions’ placed on their governance by s 74. For example, in 2010, the Barriere Lake Algonquin First Nation characterized the council election provisions as “a draconian, last ditch attempt to sever the community’s connection to the land, which is at the heart of their governance system” and launched a series of protests and letter-writing campaigns designed to overturn the section’s provisions.<sup>235</sup>

Under the Act, band councils have four basic functions: (1) operation of the band (municipal) government; (2) acting as an agent for the Minister of Indigenous and Northern Affairs (INAC); (3) acting as a communication instrument between the band and other levels of government; and (4) acting in an advisory capacity to the Minister.<sup>236</sup> Despite protests against interference in band governance, as at 2007, 252 bands hold bi-annual elections, 334 follow traditional customs in electing their leadership, and 29 self-governing First Nations select their leaders in accordance with their constitutions.<sup>237</sup>

Section 81 of the Act grants band councils the authority to create by-laws in much the same way as municipal councils, even though Canadian municipal councils are under provincial jurisdiction. As with the territorial restrictions on municipal councils, band by-laws have no effect outside the reserves and do not govern the actions of band members

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<sup>233</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 47-49.

<sup>234</sup> *Indian Act*, *supra* note 69, s.74 “Whenever he deems it advisable for good governance of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a Chief and Councillors, shall be selected by elections to be held in accordance with this Act.”

<sup>235</sup> Barriere Lake Algonquin First Nation (2010). Online: <[https:// ipsmo.wordpress.com/2010/07/21/say-no-to-indian-act-section-74](https://ipsmo.wordpress.com/2010/07/21/say-no-to-indian-act-section-74)>.

<sup>236</sup> See *First Nations Governance Handbook – A Resource Guide for Effective Councils* (Ottawa: Department of Supply and Services, 2003). Also, *Whitebear Band v Carpenters Provincial Council (Saskatchewan)*, [1982] 3 WWR 554 (Sask CA) at 550-561.

<sup>237</sup> Indian and Northern Affairs Canada General Band Report (2007/11/28).

living off reserve on traditional or disputed lands. In addition to their wide-ranging powers under the Indian Act, band councils also have a fiduciary duty to treat all members equally and protect their interests as individuals and band members.<sup>238</sup>

However, s 82(2) allows the Minister to disallow any by-law enacted by a band council without the requirement to give reason or permit appeal. The Indian Act's provisions are arguably Canada's most extreme examples of imposed sovereignty.

The delegation of rights similar to those of tertiary government entities is particularly offensive to Indigenous leaders who argue that historic agreements with the Crown were always made on a nation-to-nation basis – not through the paternalistic tiered arrangement embodied in the Act. The Indian Act is a principal irritant in Indigenous communities and an undeniable representation of the Crown's exercise of sovereignty over Indigenous peoples, their lands and affairs. Its interpretation and application by the Crown and its agencies can be characterized as bureaucratic and inflexibly formalistic.

Over the years there have been suggestions that the Indian Act should be eliminated, but all such attempts have been resisted by Indigenous and settler groups alike. In 1969, Prime Minister Pierre Trudeau and the Minister of Indian Affairs, Jean Chretien, proposed ending the special legal relationship that existed between Canada and Indigenous peoples. A centrepiece of the policy was the proposed dismantling of the Indian Act in an attempt to achieve equality among all Canadians. The policy paper was fiercely opposed by Indigenous groups who characterized it as being contrary to the process of reconciliation and settlement of historic grievances. It was withdrawn by the government in 1970, but it sparked an unintended increase in political activity among

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<sup>238</sup> *Samson Cree Nation v Canada (Minister of Indian Affairs and Northern Development)* 2002 FCT 1299, 2002 CFPI 1299. “The Band and the Band Council are under an obligation which has sometimes be characterized as being a fiduciary obligation towards Band members to deal with them fairly.” at para 11. See also, *Williams Lake Indian Band v Abbey*, [1992] 4 CNLR 21 (BCSC). “There can be no question that a duly-elected Chief as well as the members of a Band Council are fiduciaries as far as all other members of the Band are concerned. The Chief upon being elected, undertakes to act in the interests of all members of the band” at para 14.

Indigenous leaders, particularly young, highly-regarded Indigenous advocates such as Alberta's Harold Cardinal.

### 4.3 Sovereignty, Courts, and Laws

When sovereignty is considered from a jurisprudential perspective, my research suggests two distinct orientations: (1) a Western 'state' perspective that reflects the principles of legal positivism expounded by Austin, Bentham, and Hart<sup>239</sup>; and (2) an Indigenous 'personal' perspective that aligns with principles of natural law expressed by Finnis, Grotius, and Kant.<sup>240</sup> The Indigenous literature also incorporates elements of postmodern and critical theory.<sup>241</sup>

These broad classifications are necessarily generalizations because within every community there exists a range of political, and ideological perspectives. Hence, it would be folly to characterize all courts and Crown agencies as positivists, and equally incorrect to characterize all Indigenous people as proponents of natural law. Nevertheless, common law's reliance on statutes, precedents, and formal procedures suggests a positivistic orientation, whereas the literature on Indigenous legal traditions frequently reflects connections to spirituality, moral propositions, and the role of individuals in communal life.<sup>242</sup>

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<sup>239</sup> John Austin (1790-1859), an English legal theorist and positivist who advocated separation of law and morals, thus breaking with traditional 'natural law' tenets. Jeremy Bentham (1748-1832), an English philosopher and founder of utilitarianism as a philosophical school. H.L.A. Hart (1907-1992), a British legal philosopher and defender of positive legal theory who was influenced by Austin and Bentham.

<sup>240</sup> John Finnis (1940- ), an Australian legal scholar whose work focused on natural law theory, morality and ethics. Hugo Grotius (1583-1645), a Dutch philosopher and political theorist renowned for his work in the areas of natural law, particularly their source and impact of personal preservation. Immanuel Kant (1724-1804), a German philosopher whose interests included studies in ethics, political theory and morality.

<sup>241</sup> For example, see: Mariana Valverde "The Crown in a Multicultural Age: The Changing Epistemology of (Post-colonial Sovereignty)" (2012) 21:1 Social and Legal Studies 3.

<sup>242</sup> Michael Freeman ed, *Lloyd's Introduction to Jurisprudence*, 9<sup>th</sup> ed (London, UK: Sweet & Maxwell, 2014) at 77. In Chapter 2 – Natural Law "What is Natural Law". Freeman references John Finnis, in 4 American Journal of Jurisprudence 2:97 (1997). The concept of individuals striving for "basic good" in the context of a community of humans is explored by Finnis as an extension of Aquinas' *Lex naturalis*

Underlying these generalizations is a difference that presents a potentially significant barrier to improving the Crown-Indigenous relationship. Traditional Indigenous sovereignty is perceived as an inherent, inalienable personal right, thus making its focus ‘permissive’.<sup>243</sup> Western sovereignty, on the other hand, is a control mechanism – an international legal doctrine that is by definition ‘restrictive’. The Western conception and application of sovereignty is therefore anathema to traditional Indigenous beliefs. It is, however, the paradigm most frequently recognized by the courts in their deliberations and judgments.

Characterizing traditional Indigenous sovereignty as ‘permissive’ and Westphalian sovereignty as ‘controlling’ does not imply that First Nations operated without governance structures or legal orders, or that nations operating under the Westphalian doctrine unduly restrict the rights of their citizens. It does, however, highlight a challenge faced by courts, negotiators, and policy-makers, i.e. the need to accommodate both perspectives in the development of public policy and settlement of disputes. The challenge is exacerbated by the previously discussed Indigenous homogeneity assumption and the lack of an authoritative voice to represent Indigenous interests.<sup>244</sup>

Supreme Court judgments rendered during the thirty-five-year period since the Constitution Act, 1982 was enacted have attempted to bring meaning to s 35(1)’s intent which, as ruled in *R v Van der Peet*, seeks “reconciliation of the pre-existence of distinctive societies with the assertion of Crown sovereignty”<sup>245</sup> and subsequently in *Taku River Tlingit First Nation v British Columbia* “the purpose of s. 35(1) is to facilitate

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worldview. Also see, John Borrows, *Indigenous Constitutions* *supra* note 13, “Indigenous people also find and develop law from observations of the physical world around them.” at 28.

<sup>243</sup> *Supra* note 14. See previously offered explanation of my claim that traditional Indigenous sovereignty is ‘permissive’ whereas the Westphalian conception is more ‘restrictive’ in nature.

<sup>244</sup> *Supra* note 53. Coyle warns against universalizing the rules of one group as being applicable to others. Also *supra* note 54. Hedican comments on the effect of cultural stereotyping on Indigenous societies.

<sup>245</sup> *R v Van der Peet*, *supra* note 30 at para 49. At para 50, the Court underscores the importance of accommodating the Aboriginal perspective in efforts to achieve reconciliation.

the ultimate reconciliation of prior occupation with de facto Crown sovereignty.”<sup>246</sup>  
 Their efforts have not always been successful.

Accommodating differing conceptions of reconciliation, the law and sovereignty, is a challenge for courts, which must strike a balance that accommodates both customary and statutory law in their judgments. They must decide, for example, when customary norms qualify as ‘laws’ that can be administered by the courts and civil agencies on a consistent basis. Moreover, they must determine if a ‘law’ must be codified and “clothed with legal sanction”<sup>247</sup> to be acknowledged as enforceable. And critically, they must ask if the legitimacy of a legal system depends on the endorsement of a sovereign authority and the tenets of legal positivism?<sup>248</sup>

Borrows defines customary law as “practices developed through repetitive patterns of social interaction...that are accepted as binding on those who participate in them.”<sup>249</sup>

Although not suggesting that Indigenous legal orders rely exclusively on customary law, he asserts that customary law “can be very effective in producing strong and healthy community relationships”.<sup>250</sup> Jeremy Webber, building on the work of Lon Fuller, posits that all law is grounded in societal practices and “even statutes are conceived as ‘punctual interventions’ comprehensible only against a background of customary norms”.<sup>251</sup> Such

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<sup>246</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at para 42.

<sup>247</sup> John Borrows, *Indigenous Constitutions* supra note 30 at page 12, note 47. Borrows quotes John Austin, *The Province of Jurisprudence Determined* (1832, reprinted 1995).

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid* at 51. See also, *Black’s Law Dictionary*, 4<sup>th</sup> ed, (St Paul Mn: West, 2011) *sub verbo* “customary law” at 194.

<sup>250</sup> *Ibid* at 52. Borrows characterizes customary law as one source of Indigenous legal traditions, along with sacred law, natural law, deliberative law, and positivistic law – essentially the same components that to varying degrees comprise (contribute to) the tenets of the common (Imperial and Colonial) and civil code law in Western legal orders.

<sup>251</sup> Jeremy Webber, “The Grammar of Customary Law” (2009) 54 McGill LJ at 579. Webber quotes Lon Fuller “Human Interaction and the Law” (1969) 14 Am J Juris 1.

assertions are troubling to legal positivists who rely upon codified statutes, and formalists who prefer narrowly-construed interpretations of statutes and regulations.

#### 4.4 Relevant Cases

In *Ghost Dancing with Colonialism*, Grace Woo identifies sixty-five Indigenous cases adjudicated by the Supreme Court of Canada (SCC) between 1982 and 2006. Each of the cases involves s 35 of the Constitution Act, 1982.<sup>252</sup> Several of the cases are the most frequently referenced adjudications concerning Indigenous rights and sovereignty, and are thus the foundation cases courts look to for guidance in their deliberations. For example, *R v Sparrow*, the SCC's first major s 35 decision, addresses the "purposive" meaning of s 35 and affirms that "ultimate sovereignty rests with the Crown".<sup>253</sup> *R v Van der Peet* articulates a two part 'distinctive culture' test for establishing Indigenous rights. Notably, the *Van der Peet* distinctive culture test, written by Lamer CJC, produced strong dissents by McLachlin J and L'Heureux-Dubé J.<sup>254</sup> Other important sovereignty cases, include *R v Pamajewon* (the right to operated gambling casinos), *Mitchell v MNR* (the right to duty-free importation of personal use and commercial goods) and most recently *Tsilhqot' in Nation v British Columbia* (the validity of Indigenous title and the rights attached thereto).

#### 4.5 *Delgamuukw v British Columbia*

*Delgamuukw v British Columbia*<sup>255</sup>, was the first post-1982 case to consider the question of Indigenous title, establish a definitive test for proving title, and address the use of oral and traditional evidence in court proceedings. Hence, although built on the Indigenous rights precepts established in *Sparrow* and *Van der Peet*, and considered *St Catherines*

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<sup>252</sup> Grace Li Xiu Woo, *Ghost Dancing with Colonialism* (Vancouver: UBC Press, 2011) at 107.

<sup>253</sup> *R v Sparrow*, [1990] SJC No 49 at para 49, "...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."

<sup>254</sup> *R v Van der Peet supra* note 30 at para 44.

<sup>255</sup> *Delgamuukw supra* note 33.

Milling & Lumber Co v R, Calder v British Columbia, Baker Lake v Canada, Guerin v R, and Sioui v Quebec it is arguably the leading SCC case in terms of sovereignty-related issues. It has been cited 789 times and judicially referenced 465 times at the time of this writing.<sup>256</sup>

#### 4.5.1 Background

Unlike most of Canada, British Columbia has only negotiated a few formal treaties with its First Nations inhabitants.<sup>257</sup> In 1987, the hereditary chiefs of the Gitksan and Wet'suwet'en sued the Canadian and British Columbia governments for recognition of their absolute ownership and legal jurisdiction over approximately 58,000 square kilometres of territory historically occupied by 71 clan Houses representing 4000 to 5000 individuals. At the British Columbia Supreme Court, McEachern CJ heard 374 days of evidence and argument including testimony from genealogists, linguistic experts, archeologists, anthropologists, and geographers. The plaintiffs, representing the Gitksan and Wet'suwet'en peoples, sued for ownership of the territory and jurisdiction over it – essentially a claim for Aboriginal title. The province of British Columbia counterclaimed for a declaration that the plaintiffs' had no right or interest in the territory or in the alternative, should be seeking compensation from the Government of Canada.<sup>258</sup>

#### 4.5.2 Trial Court

At trial, the claimants built their case on customary laws, arguing that traditions such as ceremonial feasting and the exchange of gifts were coherent representations of the political traditions and sovereign authority that were central to the Gitksan and Wet'suwet'en political and legal orders.<sup>259</sup> Many of their representations were offered

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<sup>256</sup> Source: NextCanada-Westlaw. Online: < <https://nextcanada.westlaw.com> >.

<sup>257</sup> The British Columbia exceptions include the Vancouver Island Douglas Treaties, a northeastern area included in Alberta's Treaty 8, the 2000 Nisga'a Treaty and the landmark 2014 Tsilhqot'in settlement.

<sup>258</sup> *Delgamuukw supra* note 33 at paras 5 & 7.

<sup>259</sup> Christopher Roth, *supra* note 153 at 146.

orally and in songs that in their culture memorialize the laws and protocols that govern their societies.<sup>260</sup> The Gitksan Houses described the histories of their ancestors and territories through an ‘adaawk’ – a collection of sacred oral traditions. For their part, the Wet’suwet’en Houses offered a ‘kungax’ – a spiritual song or dance that ties them to the land.<sup>261</sup> Perhaps most importantly, the appellants explained how ceremonial feasting has been used by generations of Gitksan and Wet’suwet’en people as a forum for telling stories that reinforce laws, their sacred relationship to the land, and describe the territorial boundaries.<sup>262</sup> From the appellants’ perspective, these demonstrations of long occupation and governance of the territory through the adaawk, kungax and feasting traditions satisfied the requirements for Aboriginal title protected by s 35(1) of the Constitution Act, 1982 – the caveat being acceptance of their oral representations by the court.

In 1991, after more than three years of investigation and deliberation, McEachern CJ ruled against the claimants, dismissing their claims for ownership and jurisdiction of the disputed territory, and subjecting their use of vacant lands to the “general law of the Province”<sup>263</sup> Moreover, he dismissed the Gitksan and Wet’suwet’en legal system as a “most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves.”<sup>264</sup> His ruling effectively “denied the existence of an Indigenous

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<sup>260</sup> *Delgamuukw supra* note 33 at para 89. “61 witnesses gave evidence at the trial many using translators... [known as] “word spellers’...there were 318 days of testimony and over 50,000 pages of exhibits... [leading to] a judgment of over 400 pages in length”.

<sup>261</sup> *Supra*, Borrows, *Indigenous Constitutions* note 13. “[t]he Adaawk records property rights such as fishing sites, hunting territories, and gathering grounds” at 97. Also “[t]he Kungax tell of the land’s creation. The people’s earliest history, territorial boundaries, major battles, and significant past events” at 92.

<sup>262</sup> *Ibid*. “[t]he feast has formed their law...the feast structure has built-in procedures to seal and validate rights and obligations” at 95.

<sup>263</sup> *Delgamuukw, supra* at para 30.

<sup>264</sup> *Ibid* at para 20.



legal and political system – even the existence of a ‘civilization’ before the arrival of the Europeans”<sup>265</sup>

With respect to the claimants’ self-government rights, Justice McEachern ruled that all legislative jurisdiction was divided between Canada and the Province in accordance with s 91 and 92 of the Constitution Act 1867, leaving no opportunity for Indigenous jurisdiction or sovereignty.<sup>266</sup>

To further reinforce the Crown’s authority, McEachern CJ ruled “aboriginal rights are not proprietary in nature, but rather “personal and usufructuary” and dependent on the goodwill of the Sovereign”.<sup>267</sup> Accordingly, although he didn’t dispute evidence that the claimants’ ancestors occupied communal villages adjacent to their fishing and hunting sites in the disputed territories, he was not satisfied that they ‘owned’ the territory “in any sense that would be recognized by law”<sup>268</sup> The significance of this aspect of the ruling is its explicit endorsement of British Imperial law as the only legitimate authority on which he could reach judgment. From the perspective of sovereignty, McEachern CJ denies the existence of a viable Indigenous claim to sovereignty over the disputed territory on the grounds that their conception, based on longstanding exclusive occupation validated by traditional laws and customs lacked merit in the context of common law and the overriding right of European settlers and explorers to assert sovereignty in accordance with their formal doctrines and traditions.

#### 4.5.3 Court of Appeal

In large measure, the British Columbia Court of Appeal decision, written by Macfarlane JA and Taggart JA, concurred with the trial judge’s rulings with the exception of those

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<sup>265</sup> *Ibid* at para 22.

<sup>266</sup> *Ibid* at para 20.

<sup>267</sup> *Ibid* at para 17.

<sup>268</sup> *Ibid*. Restatement of the McEachern CJ analysis by the Lamer CJC.

concerning the extinguishment of Indigenous rights. In that regard, Macfarlane JA ruled that McEachern CJ mischaracterized colonial instruments by referring to them as “the clear and plain intention to extinguish all aboriginal interests in land”.<sup>269</sup> To the contrary, Macfarlane JA declared “negotiation” was the most effective way to resolve any such issues.<sup>270</sup>

Macfarlane JA agreed with McEachern CJ that the appellants’ use of the term “ownership” conflicted with *Guerin*<sup>271</sup> that specifically held that “aboriginal interest does not amount to beneficial ownership”.<sup>272</sup> Critically, Macfarlane JA held that s 88 of the Indian Act did not give the Province authority to extinguish common law aboriginal rights...[although] it may authorize provincial regulation of and interference with aboriginal rights”.<sup>273</sup>

The appeal court’s decision was not unanimous. Lambert JA, disagreed with Macfarlane JA on the question of Indigenous title and rights, characterizing them as “sui generis, and not easily explicable in terms of ordinary western jurisprudential analysis or common law concepts”<sup>274</sup> Lambert JA reviewed all the key points made at trial and generally showed greater deference than his appeal court colleagues or the trial judge to the Indigenous perspective. He ruled that McEachern CJ erred in his treatment of occupation and

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<sup>269</sup> *Ibid* at 36. “The purpose of the colonial instruments in question was to facilitate an orderly settlement of the province...[not] that the aboriginal interest was to be disregarded.”

<sup>270</sup> See also para 35 “Treaty-making is the most desirable way to resolve aboriginal land issues”. It is apparent that Macfarlane JA was reluctant to overturn the trial judge’s rulings. However, he appeared to be putting the province ‘on notice’ that negotiation and treaty-making were preferable to arbitrary acts concerning the rights of First Nations.

<sup>271</sup> *Ibid* at para 32. Macfarlane JA references *Guerin v R* [1984] SCJ No 45.

<sup>272</sup> *Ibid*. “Use of the term “ownership” (by the plaintiffs in their pleadings) was unfortunate”.

<sup>273</sup> *Ibid* at para 37. “If the effect of provincial regulation were to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction”.

<sup>274</sup> *Ibid* at para 48. “Aboriginal rights are neither abrogated by the fact that similar rights may be held by non-aboriginal people nor because the holders of the rights participate in the wage and cash economy”.

possession, in his analysis of Indigenous commercial and trading practices, on the question of exclusivity, and the role of the wage and cash economy in terms of Indigenous title.<sup>275</sup>

On the issue of jurisdiction over the disputed territory, Lambert JA confirmed McEachern CJ's ruling that although the Gitksan and Wet'suwet'en people had the right of internal self-regulation, the court lacked the authority to grant them jurisdiction over the land, resources, and peoples within a territory where legislative powers were granted to a province under the Constitution Act, 1867. Hence, he ruled, that the aboriginal people of British Columbia were subject to Canadian and Provincial legislative authority, i.e. the Gitksan and Wet'suwet'en people had no jurisdiction, except internal band regulation, and therefore no sovereignty over their traditional lands.<sup>276</sup>

Both Lambert JA and Hutcheon JA would have allowed the appeal. Moreover, Lambert JA and Hutcheon JA would have awarded the appellants their costs throughout the proceedings.

#### 4.5.4 Supreme Court of Canada

In 1998, the Court sat as a seven Justice panel to consider the submissions and judgments in *Delgamuukw*, a case that had been in the system for 11 years. In its judgment, the Court articulated several legal principles that guide litigants in Aboriginal rights and title cases today.

First, it established the importance and potential reliability of oral evidence despite the difficulties it posed when compared to conventional evidentiary practices and rules. Oral

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<sup>275</sup> *Ibid* at para 57.

<sup>276</sup> *Ibid* at para 34.

evidence in Indigenous cases must now be treated on an equal footing to traditional documentary evidence.<sup>277</sup>

In agreement with Lambert JA, the Court ruled that “aboriginal title is the right to the land itself [and] aboriginal title includes the right to determine the use to which a piece of land may be put, including the right to manage the land’s mineral rights and usage.”<sup>278</sup> An important caveat on determination of land usage was that the nature of the land as it was traditionally enjoyed by the community must be respected and preserved for the use and enjoyment of future generations, i.e. a community cannot decide to use the land for strip mining or clear cut forestry unless they first surrender those lands to the Crown and convert them to non-title lands.<sup>279</sup> Thus, although expressing the desire to maintain land in its traditional form for future generations, the Court ruled that the continuity of the relationship between an aboriginal community and its land, and the non-economic value of the land should not prevent the community from exchanging the land for consideration such as a cash payment or acceptance of another land allotment, to the Crown.<sup>280</sup>

Third, the Court established the definitive criteria a First Nation must prove when making a title claim: (1) the land must have been occupied prior to declaration of European sovereignty, which in British Columbia occurred in 1846; (2) there must be demonstrable proof of pre-sovereignty occupation and continuity to the present day; and (3) at the declaration of sovereignty, the occupation must be exclusive.<sup>281</sup>

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<sup>277</sup> *Ibid* at para 87. “The laws of evidence must be adapted in order that this type of evidence can be accommodated”.

<sup>278</sup> *Ibid* at para 138 re: the right to land, and para 166 re: the right to determine land’s use.

<sup>279</sup> *Ibid* at paras 131 & 132. “The foregoing amounts to a general limitation on the use of lands held by virtue of *aboriginal title*”.

<sup>280</sup> *Ibid*.

<sup>281</sup> *Ibid* at para 143. Exclusive occupation does not preclude allowing others to use the land for hunting or fishing with the permission of the controlling community. The test’s emphasis is on effective control rather than total exclusion of neighbouring communities.

Finally, with respect to a province's right to extinguish Indigenous rights prior to enactment of the Constitution Act, 1982, the Court held that the federal government had exclusive jurisdiction to extinguish Aboriginal rights from Confederation until 1982 based on s 91(24) of the British North America Act; and further, that the provinces do not have the jurisdiction to enact any laws in relation to Indigenous rights, including laws that may affect Indigenous title. British Columbia argued that under s 109 of the Constitution Act, 1867 "the Crown in right of the province has the underlying title to lands held by Aboriginal title...which by implication grants it the right to extinguish Aboriginal title".<sup>282</sup> Lamer CJC rejected the Province's argument stating "although on extinguishment of aboriginal title the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government".<sup>283</sup> This finding was a major blow to the Province's longstanding assumption that it could extinguish Aboriginal title at its discretion without consent or compensation to Indigenous communities.

In his conclusion, Lamer CJC stated his reluctance to interfere in the findings of the trial judge, particularly because many of the appellant's objections were characterized as disagreements with decisions rather than disagreements on facts. He did, however, cite the judge for making a serious errors relating to the acceptance of expert testimony and his treatment of oral history. In light of the evidentiary errors made by the trial judge, the Court ruled that the trial's "factual findings cannot stand", and ordered a new trial.<sup>284</sup>

## 4.6 Discussion

Delgamuukw moved Indigenous rights forward in terms of giving clear judicial guidance in areas that had been contentious and adjudicated inconsistently in previous cases. However, responses to the Court's judgment were mixed. Gitksan chief negotiator Mas

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<sup>282</sup> Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan, 2001) at 259.

<sup>283</sup> *Ibid.* McNeil quotes Lamer CJC from *Delgamuukw* at 260.

<sup>284</sup> *Delgamuukw supra* note 33 at para 108.

Gak stated “This is the judgment the Gitksan people have worked towards...[for] over 130 years ... “We are extremely happy.”<sup>285</sup> A less enthusiastic response was offered by Federal Opposition Leader Preston Manning, an Albertan, who called the decision “a breathtaking mistake” while observing that the Court had overstepped its authority by making laws – a privilege that rightfully belongs to Parliament...not unelected Judges.<sup>286</sup> Other observers, on both sides of the issue, offered equally candid comments.

For example, Christopher Roth, an Indigenous activist, claims *Delgamuukw* reset the legal clock to the moment of European contact and “the implications of the decision are so monumental that many [observers]...have not yet fully comprehended how far reaching the new legal dispensation is for aboriginal people”.<sup>287</sup> In the main, Roth argues that Indigenous title has never been extinguished and thus, their sovereignty over the lands and peoples of the disputed territories is beyond question.<sup>288</sup> From that foundation, he postulates “what we know as British Columbia has not been ceded to the Crown and is thus not part of Canada.”<sup>289</sup>

He concludes that *Delgamuukw* does not attribute aboriginal title per se to any contemporary group [but] provides guidelines for proving aboriginal title...all of which were abundantly met in the course of the plaintiffs’ evidence at trial.<sup>290</sup> Implicitly, British Columbia’s Indigenous peoples have legitimate title and sovereignty over all land in the province not specifically ceded by treaty. Roth’s interpretation of *Delgamuukw* is arguably more sanguine than rational despite the enthusiasm with which he presents it,

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<sup>285</sup> Quoted by Borrows in “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*” (1999) 37 *Osgoode Hall Law Journal* 537 at 543.

<sup>286</sup> *Ibid.*

<sup>287</sup> Christopher Roth, *supra* note 153 at 143.

<sup>288</sup> *Supra* note 151.

<sup>289</sup> *Ibid* at 150.

<sup>290</sup> *Ibid.*

particularly in light of Lambert JA's ruling that the sovereignty claimed in *Delgamuukw* was limited to jurisdiction over internal matters – not the land itself.<sup>291</sup>

Grace Woo characterizes *Delgamuukw* as a continuing expression of colonialism declaring “Lamer resorted to a personal standard. Instead of grounding his analysis in a legality created with the consent of the people concerned, he sought to impose his own ill-defined beliefs, giving his reasoning a colonial tinge”<sup>292</sup> Her analysis mirrors that of Edward Hedican who, as previously reported, claims “Lamer... had absolutely no idea [as to] what is culture”.<sup>293</sup>

Woo is concerned that the Crown and courts rely on colonial laws to the exclusion of those of the Indigenous people being judged in what she refers to as “a morality that plainly violates both modern standards and those of the early contact era”.<sup>294</sup> Implicitly, Woo characterizes the courts as agents of the Crown's conception of sovereignty based on historic doctrines and self-justifying precedents at the expense of Indigenous laws, customs and traditions, as evidenced in *Delgamuukw* where at trial McEachern CJ dismissed evidence of Indigenous traditional governance and legal orders, and on appeal, Lambert reinforced the doctrine of Crown sovereignty over all but internal band administrative matters.

In a more reflective vein, John Borrows argues that although *Delgamuukw* changed the law to protect Aboriginal title, it simultaneously undermined their rights through promulgation of colonial assertions of Crown sovereignty that infringe upon all Indigenous rights. In this regard, he concurs with Grace Woo that colonial precepts are afforded priority over Indigenous traditions and Aboriginal rights.

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<sup>291</sup> *Delgamuukw supra* note 276.

<sup>292</sup> Grace Li Xiu Woo, *Ghost Dancing with Colonialism* (2011) at 166.

<sup>293</sup> Edward Hedican, *supra* note 50 at 93.

<sup>294</sup> *Supra* at 196.

Borrows' Delgamuukw analysis is arguably the most comprehensive article written on the case to date.<sup>295</sup> Two aspects of his analysis are particularly relevant to this research. The first concerns the method of establishing Indigenous title. Borrows has two principal concerns in this area: (1) basing title on the date of the Crown's "non-consensual" assertion of sovereignty (1846 in British Columbia) reinforces the Province's "colonial heritage"<sup>296</sup>; and (2) the requirement to prove occupation of the land prior to the sovereignty assertion, and that occupation was continuous and exclusive. At issue here is the requirement that Indigenous groups should have to 'prove' anything. Borrows argues that not requiring the Crown to offer similar proofs represents a double standard that is "deeply discriminatory and unjust".<sup>297</sup> On this point, Borrows receives strong support from Manitoba Court Associate Chief Justice Alvin Hamilton who, taking exception to the Supreme Court, writes:

Aboriginal people should not have to prove the extent of their territory, their trading practices and lifestyle. The onus should be upon subsequently established governments to show that those attributes do not extend to the lands claimed by them and to prove any limitation they can on the extent of Aboriginal sovereignty.<sup>298</sup>

It is difficult to dispute Borrows' and Hamilton's concerns when the Court rules that Canada's original inhabitants must prove their rights while the Crown attains theirs through a simple assertion.

Borrows' second criticism concerns the Court's acceptance of oral and traditional evidence in pleadings. He argues that although the ruling facilitates the representation of Indigenous perspectives, the Court's procedural rules diminish the role of Indigenous

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<sup>295</sup> John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall Law Journal 537.

<sup>296</sup> *Ibid* at 544.

<sup>297</sup> *Ibid* at 573.

<sup>298</sup> Hon. Alvin Hamilton, *A Feather Not a Gavel: Working towards Aboriginal Justice* (2001) at 81.



legal traditions, making the Court and implicitly its “Western” conception of sovereignty “the final arbiter in the interpretation of facts”.<sup>299</sup> Here, Borrows observes that Indigenous beliefs and history are embodied in language, stories, and songs that create meaning and shape the structures upon which the Indigenous culture is based. Sharing these narratives diminishes their “power ... [in terms of] self-definition and self-determination”.<sup>300</sup>

Moreover, Borrows postulates that the ruling, although well-intentioned, risks “perpetuating the historical injustice suffered by Aboriginal peoples at the hands of the colonizers who failed to respect the distinctive cultures of pre-existing Aboriginal societies.”<sup>301</sup> One might argue that Borrows’ evidentiary assertions ‘paint him into a corner’ in the sense that he argues that Indigenous litigants have the right and need to present evidence according to their customs and traditions, while simultaneously arguing that doing so violates the privacy and uniqueness of their culture. In Canada’s Indigenous Constitution he supports increasing accessibility to Indigenous law to both “Indigenous peoples and the broader Canadian Society”<sup>302</sup> but states “not all laws should be written...where writing Indigenous law would deprive it of its force”.<sup>303</sup> From that, one might conclude that he is prepared to document the ‘ordinary’ laws that govern Indigenous society, but reserves the right to keep secret the ‘important’ laws that underpin Indigenous social norms based on spiritual or traditional tenets.

Borrows concludes his analysis with the assertion that uneven application of the law, in the sense that Indigenous litigants are held to higher standards than the Crown, negatively

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<sup>299</sup> *Ibid* at 549.

<sup>300</sup> *Ibid* at 554.

<sup>301</sup> *Ibid* at 557.

<sup>302</sup> Borrows, *Indigenous Legal Traditions supra* note 13 at 143.

<sup>303</sup> *Ibid*.

impacts the relationship between Indigenous peoples and the Canadian state and was neither resolved nor advanced in *Delgamuukw*.

## 4.7 Summary

*Delgamuukw* gave the Court an opportunity to articulate a number of principles and put to rest several questions that had troubled cases such as *Calder*, *Sparrow*, *Van de Peet*, and others. Its judgment directly affects sovereignty issues, particularly as they relate to land title and the relative responsibilities of the Crown and Indigenous societies regarding jurisdiction. Importantly, *Delgamuukw* legitimized the value of Indigenous oral evidence, although the relative weight given to oral and common law evidence at trial remains an open question.

The decision to place oral history on an equal footing with traditional documentary evidence was a victory for Indigenous litigants who had often been disadvantaged in court proceedings. However, McLachlin CJC qualified the utility of oral evidence in *Mitchell* when she ruled “Aboriginal oral histories may meet the test of usefulness... if no other means of obtaining the same evidence may exist...[and] the witness [is] a reliable source of the particular people’s history”.<sup>304</sup> Moreover, as observed by Borrows, acceptance of oral history may be a moot victory if Indigenous leaders and elders are reluctant to reveal their histories and legal traditions in court proceedings they perceive as manifestations of colonialism that are biased and disrespectful of Indigenous customs.

Equally important was the holding that Indigenous interest in land is ‘general’ and includes an economic dimension that encompasses sub-surface mineral rights and forestry management, albeit with restrictions on non-traditional land use, i.e. its protection for future generations. With respect to infringements by provincial or federal authorities wishing to use Indigenous land for their purposes, the Court affirmed that Indigenous communities must be consulted, accommodated, and compensated for the development of their resources. Importantly, the honour of the Crown doctrine obligates

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<sup>304</sup> *Mitchell*, *supra* note 25 at para 31-34.

it to negotiate infringements in good faith, and may give Indigenous communities the right to withhold their consent.

In the context of sovereignty, neither Indigenous nor settler perspectives received outstanding support from *Delgamuukw*. The Court endorsed England's sovereignty in the context of the Royal Proclamation which it ruled applied across Canada – not solely in the original colonial possessions. The historic significance of Indigenous traditions and sovereignty claims was acknowledged, but the Court's judgment, although affirming their rights, did not grant the title and self-government rights they sought. In the final analysis, in terms of improving the Crown-Indigenous relationship or definitively resolving sovereignty-based disputes, *Delgamuukw* may be best considered a draw -- a neutral contributor that at the end of the day failed to fully satisfy any of the parties involved.

## Chapter 5

### 5 Conclusion

Sovereignty, like democracy, law, and reconciliation, is a term that conjures different meanings depending on the context in which it is used and the socio-economic-ideological orientation of the user. This research has documented four interpretations: (1) the traditional Indigenous conception of sovereignty as an inherent personal right – a gift from the Creator that can neither be given, taken away, nor negotiated; (2) the traditional western interpretation based on the Westphalian tenet of supreme territorial sovereignty; (3) an evolving Indigenous conception that perceives sovereignty as an analogue for self-government and self-determination; and (4) an evolving Westphalian interpretation in which international cooperation is transforming territorial supremacy into a shared sovereignty paradigm in response to the challenges of globalization and supranational governmental entities.

Prior to the 16<sup>th</sup> century, Canada's inhabitants lived relatively peaceful, relatively comfortable lives in regions stretching from the Pacific to Atlantic coasts, with scattered family-based groups in the far north. Over thousands of years, each group established political, legal, and social orders that matched their territorial circumstances. The Iroquoian and Pacific coast nations developed sophisticated systems within and among their substantial, permanent communities. Others, particularly the Inuit, subsisted in environments more akin to those of hunter-gatherers who were more concerned with survival than political structure.<sup>305</sup>

The differences among First Nations is a recurring theme throughout this research. It is a reality that cannot be disputed, but has historically been misunderstood by politicians, courts, and Crown agencies, resulting in policies based on the deeply flawed 'one size fits all' mindset held since first contact. The Indian Act is an example of the homogeneity

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<sup>305</sup> Aboriginal and Northern Affairs, *supra* note 191. "...Inuit familial groups scattered across the Arctic, lived as subsistence hunters whose principal occupation was survival".

assumption used as the foundation for legislation that is arguably the cornerstone of the Crown's expression of sovereignty over Indigenous peoples. A reasonable argument can be made that the historic failures to improve Crown-Indigenous relations outlined in this paper are at least in part a consequence of misunderstanding the diversity and uniqueness of indigeneity writ large.

The Court has identified 'reconciliation' as a principal objective of s 35(1) of the Constitution Act, 1982.<sup>306</sup> Successive Parliaments have pledged to reconcile the relationship on a priority basis, albeit with limited success. Although one should remain optimistic, it is difficult to anticipate 'reconciliation' as the most likely outcome of relationship improvement efforts by Indigenous peoples, the Crown and courts, due to fundamental differences in their conceptions of sovereignty, justice, and reconciliation itself. In that regard, Nuri Frame, a Toronto-based lawyer who specializes in cases involving Indigenous interests, asserts that reconciliation is challenged by a significant gap between Crown and Indigenous understandings of the term.

The Crown appears to conceive of reconciliation as something to be achieved once and for all time [whereas] peoples, in contrast, conceive of reconciliation as something to be strived for continuously [and] signing a modern treaty means entering into a relationship of reconciliation – one that is generative, dynamic, and necessarily partial.<sup>307</sup>

Borrows agrees that treaties are perceived by First Nations as compacts that must be renewed on an occasional basis and adjusted to reflect current circumstances.<sup>308</sup> Thomas

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<sup>306</sup> See *R v Van der Peet* (1996). "One of the fundamental purposes of s 35 (1) is the reconciliation of the pre-existence of distinctive Aboriginal societies with the assertion of Crown Sovereignty" at para 49. Also, in *Taku River Tlingit* (2004) "The purpose of s 35...is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty" at para 42. And, in *Haida Nation* (2004) "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" at para 20.

<sup>307</sup> Nuri Frame, "The Modern Treaties – The Yukon Agreements" (2015). Presentation at Osgoode Hall – Fundamentals of Aboriginal Law. Speaker's notes at 2.

<sup>308</sup> Borrows, *Aboriginal Legal Issues*, *supra* note 14 at 298. Also, in reference to the Covenant Chain Alliance, "It was expected that nations would regularly renew their perspective undertakings...to remind the parties of the solemn compact they had entered into." at 17.

Isaac endorses the continuous engagement paradigm, describing reconciliation as a process “the objective of which is to reach a mutual, respectful understanding among peoples.”<sup>309</sup>

One can immediately see that Indigenous conceptions of reconciliation are consistent with their understandings of treaties and accords writ large, i.e. they are symbols of relationships that must be affirmed and renewed on an ongoing basis. They are not, as Frame observes, ‘transactions’ that can be concluded and considered final for all time. It therefore seems apparent that before reconciliation can be achieved, the Crown must replace its transactional negotiating strategy with a relationship-based paradigm that is respectful of Indigenous customs and beliefs.

At this point it is reasonable to ask how, in an environment burdened by conceptual contradictions, can reconciliation – itself a disputed term - be achieved? A potential answer may be found in the Indigenous self-government project, i.e. establishing a third order of government within the Canadian constitutional framework.

The challenge, of course, is how to implement Indigenous self-government. Can it be done with a ‘stroke of a pen’ or does it require a constitutional amendment? Moreover, does self-government imply full independence in the nature of early Westphalian treaties, or is it a variant of the sovereignty association concept promoted by separatists in the 1980 Quebec independence referendum?

This research has identified a number of issues associated with sovereignty, self-determination, and reconciliation that are inextricably linked and possibly insoluble at a philosophical level. There are, in truth, many complex issues to resolve along the path to reconciliation, some of which may elude the sincere good faith efforts of all parties. It is possible that in the fullness of time, the Federal government’s efforts may lead to a more trusting and respectful atmosphere which some might characterize as reconciliation. In

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<sup>309</sup> Thomas Isaac, *Aboriginal Law*, 5<sup>th</sup> ed (Toronto: Thomson-Reuters Canada, 2016) at 5.

the meantime, I believe that the following areas should be considered for additional research in the coming years:

**The Homogeneity Challenge.** Canada's First Nations exhibit great diversity in customs, governance, economics, and future prospects. There is a pressing opportunity to address the diversity challenges to better align public policy with the circumstances of the large, politically and economically sophisticated First Nations that are capable of self-funding and governance; and small, isolated nations that will unlikely ever become economically viable or capable of self-government. Developing a comprehensive understanding of the issue and specific recommendations to address it is an area that would benefit from additional scholarly research.

**Constitutional and Legal Pluralism.** The development of distinctive Indigenous constitutions has been addressed by John Borrows and others, but there is an opportunity for additional research regarding the interaction between emerging Indigenous constitutions and Canada's present constitution acts. Moreover, there is an opportunity for research leading to avoidance of the potential s 52 primacy contradiction, i.e. the assertions that each e.g. the Constitution Act, 1982 and future Indigenous constitutions has primacy. There is also an opportunity to extend the current research on the creation of third government and legal orders, leading to fully empowered Indigenous polities within Canada's federalist paradigm.

An important aspect of the 'third order' concept concerns creation of formal institutions for resolving legal disputes in accordance with Indigenous legal traditions. The proposed institutions could operate in parallel to the court systems currently in provinces and territories. The Indigenous institutions could have the same status and authority as existing Provincial superior or appellate Courts. The issue of first and final venues of appeal will require additional study, as will the challenge of populating the 'courts' with qualified Indigenous adjudicators.

At its outset, this paper postulated that sovereignty lies at the heart of Indigenous aspirations to regain the dignity, identity, and rights lost to the effects of colonialism and oppression. I have considered sovereignty from philosophical and practical perspectives,

and demonstrated how the Crown and courts have sometimes worked against each other, thus diminishing the opportunity for achieving a mutually acceptable interpretation of sovereignty – one that will satisfy the respective needs of the Crown and Indigenous nations. Finally, I have two potential research topics that may lead to improved public policy development and a more effective legal order within the current federal paradigm.

Contemporary Crown-Indigenous relationship problems cannot be solved without efforts on all sides to move past deeply entrenched distrust and historic failures. The Crown must change its perception of First Nations from being ‘wards of the state’ under the control of federal agencies, to being fully empowered confederal partners, equal in every sense to the provinces and territories. That said, the many small, isolated and economically challenged First Nations must continue to receive governance and financial support, possibly through an Indigenous-funded equalization system such as that established for the provinces in s 36(2) of the *Constitution Act, 1982*. There may also be opportunities to bring small nations together into large, aggregated entities in the same manner as Ontario consolidated many of its small municipalities into regional entities to increase efficiency and expand the range of services available to the smallest communities.

There will be serious challenges to the concept of creating a third order of government in Canada: some will be irrational assertions from nationalists who refuse to accept First Nations as equals; some will relate to the size, sophistication and economic circumstances of some First Nations; and others based on fear of losing identity through consolidation or amalgamation of small First Nations. One can also anticipate resistance from Indigenous leaders and activists who reject the notion that their inherent rights were ever ceded to British sovereignty, and will resist any initiatives that perpetuate or deepen that relationship either through the Indian Act, modern treaties, or self-government agreements. To that point, as previously discussed, fully independent First Nations would face innumerable self-sufficiency issues, particularly those arising from their lack of international recognition.



I believe the greatest challenge to moving forward is not overcoming philosophical, economic, legal, or structural problems: It is mustering the political will to do so. Canadian governments from Sir John A. Macdonald to Justin Trudeau have continually pledged to reconcile the Crown-Indigenous relationship, although in retrospect, Macdonald was primarily interested in assimilation, whereas Trudeau speaks and has directed his ministry to focus on renewal based on self-governance, respect for historic treaties, and resetting the relationship.

Much has been written and said about sovereignty and reconciliation of Crown-Indigenous relationship from the moment of Confederation. Many programs, commissions, and enquiries have been empowered to study the issue. Little has been achieved. I respectfully submit it is time for all sides to stop political grandstanding and embark on the real work required to achieve results.

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