

The Emerging Equality Paradigm

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Abstract

The existing “rights” paradigm in Aboriginal law accepts Crown sovereignty claims grounded in ethnocentric conceptions of *terra nullius* and discovery, and views Aboriginal rights as arising out of prior occupation. The Supreme Court of Canada has shaken this paradigm by characterizing Crown sovereignty as merely *de facto* until reconciled with Aboriginal sovereignty and legitimated by a treaty, by developing the duty to consult, and by characterizing reconciliation as a process that is part of a generative constitutional order. The moves the Court toward a new paradigm rooted in the principle of the equality of peoples in which treaties provide a framework for sharing sovereignty. As part of the Canadian federation, Aboriginal sovereignty can strengthen Canada’s territorial integrity and contribute to Canada’s economic development.

In the past, courts allowed the “act of state” doctrine to shield Crown assertions of sovereignty from scrutiny. This doctrine protects Canada’s territorial integrity, but does not shield the Crown’s actions from legal and constitutional scrutiny. The fundamental constitutional principle of rule of law and the *de facto* doctrine will protect interests that relied on assumptions of Crown sovereignty that lacked constitutional legitimacy.

The transformation in the fundamental principles of Aboriginal law has parallels to Thomas Kuhn’s description of a paradigm shift in the natural sciences. The rights paradigm is in a “crisis” with moral and practical dimensions. It is incommensurable with the equality paradigm, and therefore the choice of paradigms will depend on normative criteria. Fundamental principles of the Canadian constitution, international standards of human rights and the perspectives of growing numbers of practitioners in the field that are of Aboriginal ancestry are all forces that will complete the shift to the equality paradigm.

An equality paradigm will result in the abandonment of some Aboriginal law doctrines, and the modification of others. Aboriginal title is inconsistent with an equality paradigm because it assumes the legitimacy of the Crown’s claims to sovereignty, gives the Crown a superior title, and limits Aboriginal nations to a “burden” of only limited and subordinate rights. The fiduciary relationship rooted in the “honour of the Crown” will grow into a non-hierarchical relationship with reciprocal obligations.

Decisions of courts can play a supporting role, but only negotiations and treaties can build a genuine partnership, effective and equitable sharing of sovereignty and ultimately reconciliation between Aboriginal and non-Aboriginal peoples in Canada.

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Introduction

The dominant paradigm in Aboriginal law assumes that courts cannot question Crown sovereignty claims and that Aboriginal rights arise out of prior occupation.¹ In two seminal decisions, the Supreme Court of Canada undermined this paradigm by qualifying Crown sovereignty as *de facto* until reconciled with Aboriginal sovereignty and legitimated by a treaty.² This qualification is consistent with an emerging paradigm that accepts the equality of Aboriginal and settler peoples and requires these peoples to negotiate how they will share sovereignty in Canada.³

This paper offers evidence of a growing sense that for both principled and practical reasons the existing paradigm (“the rights paradigm”) of Aboriginal law should be replaced. This paradigm views Aboriginal peoples as morally and legally inferior to European peoples because it is grounded in the “settlement thesis”, which apparently views Aboriginal peoples as too uncivilized to be considered sovereign entities. This paradigm allows the Crown to fill this jurisdictional vacuum by default and without need to establish its sovereignty through conquest or cession. While this paradigm recognizes some Aboriginal rights, including Aboriginal title, these flow from the operation of the Crown’s laws, and are therefore inferior to the Crown’s sovereign powers.

¹ See below, text accompanying notes 17 to 24.

² *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku River*].

³ See also Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 Sup. Ct. L. Rev. (2d) 433 at 436-443, [Slattery, “Honour of the Crown”]. Slattery stated, at 436, that the *Haida Nation* and *Taku River* decisions mark the emergence of “a new constitutional paradigm governing Aboriginal rights”. For further discussion of Slattery’s view of the implications of this paradigm, see below, text accompanying notes 157 to 160.

The Supreme Court's statement that treaties are necessary to reconcile sovereignties offers the promise of a new paradigm that views Aboriginal and non-Aboriginal peoples as equals, and therefore recognizes Aboriginal sovereignty ("the equality paradigm").⁴ The equality paradigm recognizes Aboriginal peoples as partners in a modern Canada – a Canada founded on treaties, a Canada that rejects the racism and injustices of the past and that can fulfil the promise of reconciliation inherent in the affirmation of Aboriginal rights in section 35(1) of the *Constitution Act, 1982*.⁵

Aboriginal peoples have always maintained that they have not foregone or ceded their sovereignty, and leading scholars of Aboriginal law have long recognized that these claims have merit. Two decades have passed since Michael Asch and Patrick Macklem commented on the Supreme Court of Canada's first consideration of section 35(1) in *R. v. Sparrow*,⁶ including, in particular, the Court's apparently uncritical acceptance of the Crown's claims of sovereignty over Aboriginal peoples and their territories. In their view

⁴ The label "equality" does not refer to the equality rights provision in the Australian *Racial Discrimination Act*, although the use of the label is consistent with the spirit of the Australian High Court's ruling that this provision was not consistent with Queensland's attempt to extinguish native title rights (*Mabo v. Queensland*, [1988] HCA 69, 166 C.L.R. 186). The High Court found that the equality rights provision was 'a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights' (*ibid.* at 216). For a discussion of the first *Mabo* decision see Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005) at 207-213 [Russell, *The Mabo Case*].

Since this label for the new paradigm refers to the equality of peoples it is consistent with the conclusion of the Australian High Court in *Mabo v. Queensland (No. 2)*, [1992] HCA 23, 175 C.L.R. 1 at 57-58 [*Mabo No. 2*] that continuing to allow the common law to rely on Crown sovereignty and *terra nullius* to deny Aboriginal rights would "...destroy the equality of all Australian citizens before the law. The common law of this country would perpetrate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land..." In *Mabo No. 2* the Court rejected *terra nullius* as a ground for finding that native title did not survive the Crown's acquisition of sovereignty, but it did not shift to a paradigm that fully respected the equality of peoples because it believed that the 'act of state' doctrine precluded the court from questioning the Crown's use of the *terra nullius* doctrine to deny Aboriginal sovereignty. See the discussion of the 'act of state' doctrine in Chapter 2, below.

⁵ Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*, cited to S.C.R.].

the assertion of Canadian sovereignty over [A]boriginal peoples, as well as the contingent theory of [A]boriginal right[s] that it generates, ultimately rest on unacceptable notions about the inherent superiority of European nations... We believe it abhorrent that Canada was constituted in part by reliance on a belief in the inequality of peoples and that such belief continues to inform political and legal practice...”⁷

Asch and Macklem challenged the “legal imagination” to reject the settlement thesis and to construct a new foundation for Canadian federalism and Canadian sovereignty. They acknowledged that even though this approach holds great promise it may generate apprehensions, such as a concern that recognizing Aboriginal sovereignty might lead to a “constitutional hiatus”.⁸

The Supreme Court’s acknowledgement that Crown sovereignty lacks legitimacy unless rooted in a treaty is only one of a number of cracks in the foundation of the rights paradigm. The Royal Commission on Aboriginal Peoples called for the removal of racist and ethnocentric doctrines from Canada’s foundations and called for recognition of shared sovereignty.⁹ In the Declaration on the Rights of Indigenous Peoples, the United Nations General Assembly also affirmed the principle that indigenous peoples are equal to all other peoples and condemned doctrines that conflict with this principle. Justice Binnie foreshadowed a reframing of Canadian sovereignty by the Supreme Court when he stated “Aboriginal peoples do not stand in opposition to, nor are they subjected by, Canadian sovereignty. They are part of it.”¹⁰

⁷ Michael Asch & Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 Alta. L. Rev. 498 at 510. See also Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L.J. 382 [Macklem, “Legal Imagination”] and Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45 Stan. L. Rev. 1311 [Macklem, “Distributing Sovereignty”]. For an analysis of how the content of the Aboriginal title doctrine fails to comply with principles of equality see Richard Bartlett, “The Content of Aboriginal Title and Equality Before the Law” (1998) 61 Sask. L. Rev. 377.

⁸ *Ibid.* at 512-517.

⁹ See below, text accompanying notes 397-398.

¹⁰ *Mitchell v. Minister of National Revenue.*, 2001 SCC 33 at para. 135, [2001] 1 S.C.R. 911 [Mitchell].

All of these developments make it easier for the Canadian “legal imagination”¹¹ to rise to Asch and Macklem’s challenge than it was two decades ago. While the Supreme Court has not formally pronounced the death of the old paradigm, its formulation of the duty to consult and accommodate and its recognition that Aboriginal societies’ cultural security and continuity deserve protection demonstrate that the new paradigm is already leaving its mark on the law.

This paper reviews the roots of the rights paradigm and outlines some of the broader implications of the new equality paradigm. It considers how the territory of Aboriginal nations came to be reduced to Aboriginal title, a doctrine premised on the superiority of European peoples, and argues that replacing Aboriginal title with a renewed respect for Aboriginal sovereignty is consistent with the continued integrity of Canada as a state and is an approach that holds the greatest promise for reconciliation.

As the power balance in North America shifted toward European settler nations and their successors, the initial respect of the settler states for Aboriginal sovereignty and a government-to-government relationship dissipated. In Canada, courts presumed that Crown sovereignty had displaced Aboriginal sovereignty, even though courts in the United States continued to recognize Aboriginal sovereignty, albeit in a “diminished” form.

Even though Canadian courts did not acknowledge continuing Aboriginal sovereignty, this did not leave Aboriginal peoples without common law rights, rooted in pre-existing Aboriginal culture and customs. In particular, Aboriginal rights to land, or “Aboriginal title” could arise from Aboriginal occupancy that predated Crown sovereignty. Nevertheless, Aboriginal rights were eclipsed by the dominance of the settler society until the Supreme Court’s

¹¹ Asch & Macklem, *supra* note 7 at 512-517, and above, text accompanying notes 7-8; see generally Macklem, “Legal Imagination”, *supra* note 7.

decision in *Calder v. British Columbia (Attorney-General)*¹² became a catalyst for the development of the law of Aboriginal rights and, in particular, Aboriginal title. This was reinforced by the entrenchment of Aboriginal rights in section 35 of the *Constitution Act, 1982*.¹³ Nevertheless, the doctrine of Aboriginal title that has emerged combines a high evidentiary burden with only limited rights that are vulnerable to public interest considerations.

In *Haida Nation* and *Taku River* the Supreme Court recognized that Aboriginal peoples were sovereign and that the Crown's assertions of sovereignty could only achieve legitimacy after honourable negotiations with Aboriginal peoples. Recognition of the equal sovereign status of Aboriginal peoples and their nations forms the legal and constitutional foundation of the equality paradigm. By applying fundamental constitutional principles to limit the scope of the 'act of state' doctrine it is possible to scrutinize the legitimacy of Crown sovereignty without threatening the unity or territorial integrity of Canada. A court can recognize the continuing sovereignty of an Aboriginal nation and declare the need for a treaty to legitimize the Crown's sovereignty over the nation's territory without creating a legal "hiatus" or vacuum. Even though treaty negotiations take time, courts can protect the interests of third parties in the interim by applying the *de facto* doctrine and the constitutional guarantee of the rule of law. The Supreme Court did not combine its recognition of Aboriginal sovereignty in *Haida Nation* and *Taku River* with explicit recourse to the *de facto* doctrine, but it did impose a duty to consult and, if necessary, accommodate. This duty parallels the *de facto* doctrine by preserving the rule of law and existing third party interests, and it does so in a manner that is respectful of the interests and sovereignty of Aboriginal peoples until sovereignty claims are reconciled.

¹² [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder* cited to S.C.R.].

¹³ *Supra* note 5.

Aboriginal sovereignty is compatible with Canada's constitution and with federalism. Fears that recognizing Aboriginal sovereignty and then legitimizing Crown sovereignty would be costly or that the interests of Aboriginal and non-Aboriginal peoples will inevitably conflict are unwarranted. In particular, they fail to take into account the benefits a just settlement will bring to all Canadians. Affirming the sovereignty of Aboriginal nations and recognizing their right to self-determination in treaties negotiated in accordance with the principle of the equality of peoples will also strengthen Canada's claim to territorial integrity in international law.

The Supreme Court has not expressly returned to the objective of reconciling sovereignty claims since *Haida Nation* and *Taku River*. Subsequent decisions did not conflict with this aim and enhanced some aspects of the legal foundation for recognizing Aboriginal sovereignty. In particular, the Supreme Court's most recent formulations of the purpose of section 35 offers strong evidence that the Court's perspective has matured beyond the rights paradigm that favours the sovereign powers of the Crown to one that places Aboriginal peoples and the Crown on an equal plane.¹⁴ The Court has expressed its agreement with Brian Slattery's conception of section 35 as a "generative" constitutional order in which section 35 serves a "dynamic and not merely a static function."¹⁵ This understanding of section 35 holds greater potential for achieving reconciliation between Aboriginal and non-Aboriginal peoples than the doctrines of Aboriginal rights and title as previously formulated. Indeed, if the Supreme Court is prepared to apply the fundamental features of Slattery's theory of the generative structure of Aboriginal rights,¹⁶ then

¹⁴ See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*] and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] and discussion of these decisions below.

¹⁵ *Rio Tinto*, *ibid.* at para. 38, quoting Slattery, "Honour of the Crown", *supra* note 3 at 440.

¹⁶ See Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Sup. Ct. L. Rev. (2d) 595 [Slattery, "Generative Structure"] and Brian Slattery "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar. Rev. 255 [Slattery, "Metamorphosis"].

this would preclude a concept of Aboriginal title that relies on the doctrine of discovery to provide the Crown with its underlying title.

Until the Supreme Court of Canada expressly disavows any further reliance on the doctrines of discovery and *terra nullius* and the priority these doctrines afford to Crown sovereignty the adoption of a new paradigm in Aboriginal law will be incomplete. This paper will argue that the Supreme Court must continue on the path to a new Aboriginal law, because refusing to scrutinize unilateral assertions of sovereignty by the Crown would be contrary to fundamental principles of the Constitution and international law. Moreover, the Supreme Court's renewal of the foundations of Aboriginal law is a necessary response to a crisis in Aboriginal law that bears many similarities to a process first described by Thomas Kuhn with respect to how a "paradigm shift" occurs in the natural sciences. Kuhn's description of a paradigm in crisis illuminates the parallel processes occurring in Aboriginal law. Founding Aboriginal law on an assumed superiority of settler peoples and states has created a moral crisis. Attempting to alleviate the resulting injustices through the paradigm of Aboriginal rights and title has proved impractical and ineffective and is causing a crisis in application.

Although it would be premature to attempt to describe the full range of consequences of grounding Aboriginal law in the principle of the equality of peoples, it is apparent that a claim to Aboriginal title sells short the full range of sovereign powers still possessed by Aboriginal peoples, and that a number of other doctrines that arose from the rights paradigm will also need to be reconsidered. These doctrines include the inalienability of Aboriginal land, the extinguishment of Aboriginal rights, and the nature of the fiduciary relationship between Aboriginal peoples and the Crown. Most importantly, the process of legitimizing Crown sovereignty holds the promise of reconciliation between Aboriginal and non-Aboriginal peoples.

Chapter 1: From Sovereignty to Aboriginal Title

The history of European recognition of Aboriginal sovereignty and the development of Aboriginal title reveals that imperial attitudes toward Aboriginal sovereignty were determined more by expediency than law. Aboriginal nations were treated as sovereign nations as long as this suited the Crown's purposes. Thereafter, only the prior occupation of land by Aboriginal societies was recognized through the doctrine of Aboriginal title. The rights to land recognized by this doctrine were subject to the superior rights and title of the settler state, and vulnerable to extinguishment.

1.1 Early Respect for Aboriginal Sovereignty

The extent to which European powers viewed Aboriginal nations as sovereign in law during the early days of settlement remains controversial. At minimum, however, initial assertions of sovereignty were not accompanied by serious efforts to govern or conquer Aboriginal peoples. In those early days, since Aboriginal nations “were well able to defend themselves”, relations with them were “conducted on a basis of rough equality”.¹⁷

Since at least early in the 17th century, English courts had legal principles to govern imperial law, as distinct from the “municipal law”, which applied to the internal affairs of England, and systems of “colonial municipal law” that applied in imperial possessions. The

¹⁷ Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 733 [Slattery, “Aboriginal Rights”]. For a description of the “government to government” relationship between First Nations and the British in the years leading up to the Royal Proclamation of 1763 (*infra*, note 33) and the associated Treaty of Niagara, see also John Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 U.B.C. L. Rev. 1 at 11-15 [Borrows, “Royal Proclamation”]. On the Crown's respect for inherent Aboriginal rights of self-determination and the “nation to nation” relationship reflected in the negotiation and content of the Georgian and Victorian treaties see generally James [sákéj] Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 241 [Henderson, “Treaty Federalism”], and see especially *ibid.* at 250-258.

sources of imperial law included statutes of Parliament, instruments issued under the royal prerogative, Crown usage and practice, and the Roman law of nations, or *jus gentium*.¹⁸

At least some British observers and officials acknowledged that “discovery” gave Britain only a right of “pre-emption”, “an exclusive right as amongst European states of acquiring sovereignty over native peoples and lands by conquest or cession.”¹⁹ Also, colonial statutes, judges and commentators of the late 17th and early 18th centuries operated on the premise that discovery alone did not end the sovereignty of Aboriginal peoples but considered it to have been surrendered only after conquest or through the consent of the Aboriginal nation by treaty.²⁰

Even though imperial law supported assertions of Crown sovereignty, it accepted that Aboriginal customary law and certain property rights continued after the assumption of Crown sovereignty unless specifically abrogated, inconsistent with British sovereignty, or unconscionable.²¹ The colonial law doctrine of sovereign succession presumed that the British Crown respected the rights and property of inhabitants, and the purpose of this law was to “reconcile the interests of local inhabitants across the empire to a change in sovereignty”²² Similarly, the “doctrine of continuity” presumed that Aboriginal laws, customs and property rights continued after a change in sovereignty unless extinguished, voluntarily surrendered by treaty, or inconsistent with the sovereignty of the new regime.²³

¹⁸ Mark D. Walters, “*Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in North America*” (1995) 33 Osgoode Hall L.J. 785 at 789-90 [Walters, “*Mohegan Indians*”]. See also, generally, Slattery, “Aboriginal Rights”, *ibid.* at 736-741. Slattery referred to the same body of law as “colonial law” or “imperial constitutional law”, *ibid.* at 737.

¹⁹ *Ibid.* at 793.

²⁰ *Ibid.* at 792-95.

²¹ Slattery, “Aboriginal Rights”, *supra* note 17 at 737-39 and N.K. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” [1984] 4 C.N.L.R. 1.

²² Mitchell, *supra* note 10 at para. 144, Binnie J. See also the discussion at *ibid.* paras. 145-150.

²³ *Ibid.* at paras. 10, 61 and 62 and sources cited therein including Slattery, “Aboriginal Rights”, *supra* note 17 at 738 and Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1989) [McNeil, *Aboriginal Title*] at 171-74.

For rights to land, or Aboriginal title, imperial law only provided the foundation. The group's customs determined how the right was expressed and how those rights were allocated among the members of the group. Therefore, Slattery has described Aboriginal title as “an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and embraces these systems, without forming part of them.”²⁴

A case that may support early judicial recognition of Aboriginal sovereignty, and at least illustrates the continuity of pre-existing Aboriginal laws in territories claimed by Britain is the protracted 18th century case of *Mohegan Indians, by their Guardians v. The Governor and Company of Connecticut*.²⁵ The Mohegan claimed that the colony of Connecticut had wrongfully deprived them of land reserved to them by treaty. The governor and council of Massachusetts, having been commissioned by the Crown to hear the dispute, ruled in favour of the Mohegan in 1705. This was followed by a complex series of events that resulted in several decisions of Commissions of Review and two decisions of the Appellate Committee of the Privy Council, and the proceedings did not end until the final Appellate Committee decision was approved by the Crown in 1773.²⁶

Mark D. Walters' detailed review of *Mohegan Indians* found that the relevant rulings were equivocal, at best, on whether British law recognized Aboriginal nations on reserved lands as internationally sovereign states.²⁷ In his view, assessments that took the case as judicial

²⁴ Slattery, “Aboriginal Rights”, *ibid.* at 744-45.

²⁵ (1705-73), unreported [*Mohegan Indians*], cited in Walters, “Mohegan Indians”, *supra* note 18 at 786.

²⁶ Walters, “Mohegan Indians”, *ibid.* at 805.

²⁷ *Ibid.* at 820, 829. Walters cites as advocates of the position that the case supports recognition of full sovereignty, *inter alia*, R.L. Barsh & J. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) at 32 and B.A. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal; Kingston: McGill-Queen's University Press, 1990) at 39-45. See also Robert

support for Aboriginal sovereignty placed too much weight on the reasons of Commissioner Daniel Horsmanden in a 1743 interim ruling on jurisdiction. In that ruling, Horsmanden described the Indians as “a Separate and Distinct People...they are treated with as Such, they have a Polity of their own, they make Peace and War with any Nation of Indians when they think fit, without controul from the English.”²⁸ However, he agreed that the case demonstrated recognition of Aboriginal customary laws and government in reserved lands within colonial boundaries, and at least some measure of Aboriginal independence from local colonial governments and courts.²⁹

Two decisions in the proceedings provide particularly strong support for Walter’s conclusion. First, the Appellate Committee of the Privy Council rejected the colony’s argument that the Crown’s commissioning of an imperial court to hear the land dispute violated the colony’s charter. This demonstrated that the Privy Council considered the Mohegan a national unit under the Crown’s imperial sovereignty even though the Mohegan nation was located within the boundaries of the colony. Second, a Commission of Review ruling in 1738 recognized the continuity of Aboriginal government and customary law by acknowledging the Mohegan government and applying customary law to determine that one Ben Uncas, who signed a release of all Mohegan claims, was the rightful “sachem” (chief or king) of the Mohegan.³⁰

When the English needed Aboriginal nations as allies, they respected their sovereignty, as they did during and after the Seven Years War, which ended with the Treaty of Paris in 1763. In

N. Clinton, “Book Review of *The Road: Indian Tribes and Political Liberty* by Russell Lawrence Barsh and James Youngblood Henderson” (1979-1980) 47 U. Chicago L. Rev. 846 at 852, where Clinton concluded that *Mohegan Indians* affirmed “the autonomous and sovereign status of the Indian tribes.”

²⁸ *Ibid.* at 820, quoting *Governour & Company of Connecticut & Mohegan Indians by their Guardians; Certified Copy of Book of Proceedings, before Commissrs. of Review, 1743* in Colonial Office Records, Public Record Office (Kew), London, England 323/20 at 192.

²⁹ *Ibid.* at 829.

³⁰ *Ibid.* at 813-18.

R. v. Sioui,³¹ Justice Lamer (as he then was) considered the relationship between First Nations and European powers in 1760 to determine whether a document that guaranteed the Huron certain rights was a treaty. He found that after the English suffered crushing defeats at the hands of the French in 1755, they realized that they needed the co-operation of the Aboriginal peoples if they wished to control North America, and that hostile Aboriginal peoples would compromise the safety and development of colonies. European powers pursued a “generous policy” and “did everything in their power” to secure the alliance or neutrality of Indian nations in treaties. They recognized certain Aboriginal ownership rights over land, sought terms of trade that would give Aboriginals a fair return, and limited interference in the internal affairs of Aboriginal nations. All of this indicated that they regarded Aboriginal nations as independent.³²

The Royal Proclamation of 1763 reflected this “generous” policy and recognized some Aboriginal rights. To foster positive relations with Aboriginal nations, Britain promised to respect their territories and to reserve to them land that had not been purchased by the Crown:

[I]t is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...³³

³¹ [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 [*Sioui* cited to S.C.R.].

³² *Ibid.* at 1053-55. See also Borrows, “Royal Proclamation”, *supra* note 17 at 14. Borrows observed that although the Articles of Capitulation at the end of the Seven Years War were apparently drafted without the input of Aboriginal nations, the power possessed by those nations in 1760 resulted in terms that reflected the interests of Aboriginal nations “as much as if they were present and in agreement at the signing”. Article 40 stated that the “Indian allies” would have liberty of religion and “shall be maintained in the Lands they inhabit, if they chose to remain there; they shall not be molested on any pretence whatever”, Borrows, “Royal Proclamation” *ibid.*, quoting J. Sullivan, ed., *The Papers of William Johnson*, vol. 3 (Albany: New York State University Press, 1921-1962) at 457.

³³ George R., Proclamation, 7 October 1763 (3 Geo. III), as reproduced in Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at Appendix D [*Report*, vol. 1]. The Royal Commission found that this text is truer to the original text of the Proclamation printed by the King’s Printer, Mark Baskett, London, 1763, than the reproduction at R.S.C., 1985, App. II, No. 1 [Royal Proclamation].

The Proclamation also declared that only the Crown could purchase reserved lands, and it barred anyone else, including colonial governments, from doing so.³⁴

At the same time, however, the Royal Proclamation favoured British perspectives not shared by Aboriginal people. Statements in the Proclamation that implied sovereignty over the territories of Aboriginal nations did not accord with the Aboriginal understanding of a “government to government” relationship with the Crown.³⁵ In addition, although Aboriginal nations wanted their territories to be free from encroachment by Europeans, the Proclamation set out a process for removing land from Aboriginal nations.³⁶

Although the Royal Proclamation began as a unilateral declaration of the Crown, this changed with the Treaty of Niagara of 1764.³⁷ In the winter that followed the Royal Proclamation, people of the Algonquins and Nippising Nations acted as messengers for the British. Bearing the Royal Proclamation, they summoned numerous First Nations to a “peace council” at Niagara in the summer of 1764. Approximately 2,000 chiefs, representing over 24 Aboriginal nations, attended. They had come from at least as far as Nova Scotia, Hudson Bay, and the Mississippi.³⁸

At the conference, Superintendent of Indian Affairs William Johnson read the terms of the Royal Proclamation, but the terms of the treaty itself were recorded through a Covenant Chain and the exchange of wampum belts. The “Gus-Wen-Tah”, or Two-Row Wampum symbolized the nature of the relationship between the parties that the treaty established, and this

³⁴ *Ibid.*

³⁵ Borrows, “Royal Proclamation”, *supra* note 17 at 12-13.

³⁶ *Ibid.* at 16-19.

³⁷ *Ibid.* at 20, citing E.B. O’Callaghan, ed. *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons and Co., 1856) at 648. In *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 leave to appeal dismissed (2001), 158 O.A.C. 199 (S.C.C.) [*Chippewas of Sarnia*] at para. 56, the Ontario Court of Appeal described the Treaty of Niagara as a “watershed” event in Crown-First Nations relations.

³⁸ *Ibid.* at 20-23 (citations omitted). For a similar account, see *Chippewas of Sarnia*, *ibid.* at para. 54.

wampum had been used previously between the Haudonosaunee (Iroquois) and Europeans.³⁹ In 1983, the Haudenosaunee described this wampum to the Parliamentary Special Committee on Indian Self-Government:

There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.

These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.⁴⁰

Therefore, while the Treaty of Niagara accepted the Royal Proclamation's guarantee of Aboriginal possession of unceded lands, it did not accept the Royal Proclamation's assertions of British sovereignty over Aboriginal territory. Accordingly, Superintendent William Johnson, who had read the Proclamation at Niagara, was dismayed when he learned of a treaty completed about a year later, which included an "expression of subjection". He stated that the same people "had subscribed to a Treaty with me at Niagara", that he was convinced that they "never mean or intend anything like this", that this must have resulted from poor interpretation or some other mistake, and "that they can not be brought under our laws, for some Centuries."⁴¹ He added that the Aboriginals did not have any word for anything like "subjection", and "if it were fully explained to them...it might produce infinite harm.... I dread its consequences, as I recollect that

³⁹ *Ibid.* at 23-24. See also *Mitchell*, *supra* note 10 at paras. 127-28. The British deliberately chose this method of recording the treaty because they believed that it would tie Aboriginals to the terms of the peace treaty "according to their own forms of which they take the most notice...", Borrows, "Royal Proclamation", *ibid.* at 22, quoting C. Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany, N.Y.: The University of the State of New York, 1925) at 329.

⁴⁰ *Mitchell*, *ibid.* at para. 127, citing House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer for Canada, 1983) back cover. This passage is also quoted in Borrows, "Royal Proclamation", *ibid.* at 24.

⁴¹ Borrows, "Royal Proclamation", *ibid.* at 24-25, citing P. Williams, *The Chain* (LL.M. Thesis, York University, 1982) [unpublished] at 83.

some attempts toward Sovereignty not long ago, was one of the principal causes of all our troubles...”⁴² The Treaty of Niagara, therefore, did not accept the premise of superior Crown sovereignty that was implicit in the Royal Proclamation. Instead, as symbolized by Two-Row Wampum, the Crown and First Nations recognized each other as equal and autonomous and pledged peaceful co-existence.

1.2 Sovereignty is Denied; Aboriginal Title is Born

Despite Johnson’s protestations and the long history of treaties and alliances that dealt with Aboriginal nations as sovereign entities, the ascending power of the British and their successors in North America eventually caused claims of continuing Aboriginal sovereignty to be cast aside or demoted.

This was evident in the decisions rendered by Chief Justice Marshall of the United States Supreme Court early in the 19th century,⁴³ which remain the best-known and most influential treatments of the discovery doctrine and its implications for Aboriginal sovereignty and Aboriginal title. Although the Marshall Court did not recognize Indian nations as retaining a sovereignty that was equal to that of the United States, it did recognize some residual sovereignty, and acknowledged that the laws and rights of North America’s “ancient possessors”, its Aboriginal peoples, had not been annulled by assertions of sovereignty by powerful newcomers from Europe.⁴⁴

⁴² *Ibid.*

⁴³ *Johnson v. McIntosh*, 21 U.S. 543, 5 L.Ed. 681 (1823) [*McIntosh*, cited to U.S.], *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831) [*Cherokee*, cited to U.S.] and *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832) [*Worcester* cited to U.S.].

⁴⁴ *Worcester*, *ibid.* at 543-544.

Since the tension between ancient possession and the assertion of sovereignty by newcomers continues to be a central challenge for courts when applying s. 35 of the *Constitution Act, 1982*, Marshall's exposition of the law that flowed from this tension remains important. This is especially true because Marshall's judgments were grounded in British imperial law,⁴⁵ not law particular to the United States, and because they continue to be cited by Canadian judges. For example, Justice Hall's dissenting reasons in *Calder* referred to *McIntosh* as "the *locus classicus* of the principles governing [A]boriginal title" and also quoted extensively from *Worcester*.⁴⁶ In *R. v. Van der Peet*, Chief Justice Lamer said that the Marshall decisions are "as relevant to Canada as they are to the United States".⁴⁷

The issue of sovereignty was squarely before the Marshall court in *Cherokee Nation v. Georgia*.⁴⁸ The State of Georgia had adopted Draconian laws directed against the Cherokee Nation, and, if valid, those laws would have dispossessed the Cherokees from their land and made them subject to Georgian state law instead of their own laws. The Cherokee Nation brought an action in the Supreme Court, claiming that the Georgian laws at issue were contrary

⁴⁵ It has also been suggested that Marshall grounded his findings on Indian title on long-term custom or usage, especially long-term statutory usage; see Eric Kades, "History and Interpretation of the Great Case of *Johnson v. McIntosh*" (2001) 19 L.H.R. 67 at 107-110. However, since these are also sources of imperial law, the distinction may be of little consequence. For the nature of imperial law and its sources, see *supra* note 18 and accompanying text. For Marshall's judgments being grounded in imperial law, see *Calder*, *supra* note 12 at 382-383, quoting Norris J.A. in *R. v. White and Bob* (1965), 52 W.W.R. 193 at 212-13, *aff'd* (1965) 52 D.L.R. (2d) 481 (S.C.C.), and at 387-88, citing reliance by Marshall C.J. on *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045. See also Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 35-36. The roots of the discovery doctrine have been traced to Spanish theologian and jurist Francisco de Vitoria, professor of theology at the University of Salamanca and advisor to the Spanish Crown, and a proclamation of Pope Paul III in 1537 that Indians and other peoples discovered by Christians should be allowed to maintain their liberty and the possession of their property. See Michael C. Blumm, "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making in the United States" (2003-2004) 28 Vt. L. Rev. 713 at 719-721 citing, *inter alia*, Felix S. Cohen, *Original Indian Title* (1947) 32 Minn. L. Rev. 28 at 45, citing Bull *Sublimis Deus* (1537).

⁴⁶ *Calder*, *supra* note 12 at 380-85.

⁴⁷ [1996] 2 S.C.R. 507 at para. 35, 137 D.L.R. (4th) 289 [*Van der Peet*], citing Slattery, "Aboriginal Rights" *supra* note 17 at 759.

⁴⁸ *Supra* note 43.

to a treaty between the United States and the Cherokee Nation, and sought an injunction to restrain Georgia from enforcing its laws within Cherokee territory.

The Supreme Court could only deal with the Cherokees' claim under its original jurisdiction if the Cherokee Nation could show that it qualified as a "foreign state". It is not surprising that the Cherokees lost their argument that they were a sovereign foreign state; it is surprising that they only lost it by a margin of three to two, with the Chief Justice siding with the majority. After all, the Cherokees had asked the settlers' court, the *United States* Supreme Court, to rule on the ambit of their nation's power and territory. Although the Chief Justice took a moderate position, the other majority decisions were much less kind to the Cherokees' claim.

Chief Justice Marshall stated that a majority of the court accepted arguments that the Cherokees were "a distinct political society, separated from others, capable of managing its own affairs and governing itself".⁴⁹ This was evident from the treaties made with the Cherokees, which recognized them as capable of "maintaining the relations of peace and war" and of being responsible, as a political entity, for treaty violations "or for any aggression committed on the citizens of the United States by any individual of their community."⁵⁰ For Marshall, C.J., however, this was not enough to make the Cherokee Nation a "foreign state". He did not ground his conclusion on the nature of the Cherokee Nation or the content of treaties made with the Cherokees. Instead, he considered the general status of "Indians" and "Indian territories", and determined that they were "domestic dependent nations" that were "in a state of pupilage". The relationship between the United States and Indian Nations resembled that "of a ward to his guardian".⁵¹

⁴⁹ *Ibid.* at 16.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 16-17.

Marshall's characterization of Indian Nations has been criticized as "...ahistorical, made up out of whole cloth".⁵² Indeed, the Chief Justice seems to have come to his conclusion about the status of Indian Nations more from an early sense of "manifest destiny"⁵³ than an analysis of the status of Indian Nations in law. He stated that Indian territory is "admitted to compose a part of the United States", and that "[i]n all our maps, geographical treatises, histories, and laws, it is so considered."⁵⁴

The concurring judgment of Justice Johnson ridiculed the notion that people "so low in the grade of organized society as our Indian tribes most generally are" could be a "state".⁵⁵ Moreover, Indian tribes are "unknown to the books that treat of states" and would be regarded by the law of nations as "nothing more than wandering hordes... and having neither laws or government."⁵⁶ In his view, the Cherokee treaty rights only amounted to the ability to occupy, "as hunting grounds, just what territory we chose to allot them."⁵⁷

According to Justice Baldwin, also concurring, if the Cherokee Nation could not be considered a foreign state, because otherwise "the sovereign power of the people of the United States and union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority."⁵⁸ This, however, overlooked numerous treaties in which the United States government had expressly promised not to enter Indian Territory except as expressly permitted by treaty or by the Indian nation. Only Justice

⁵² Blumm, *supra* note 45 at 750.

⁵³ For the relationship between the doctrine of discovery and the principle of manifest destiny see Robert J. Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) at 82-83.

⁵⁴ *Cherokee*, *supra* note 43 at 17.

⁵⁵ *Ibid.* at 21.

⁵⁶ *Ibid.* at 27-28.

⁵⁷ *Ibid.* at 24.

⁵⁸ *Ibid.* at 49.

Thompson's dissent, with which Justice Story concurred, considered the significance of these treaties, including several with the Cherokee Nation.

Justice Thompson found that these treaties were open to no other interpretation than that the United States considered at least some Indian Nations within its borders as fully sovereign foreign nations. He referred to treaty terms that gave express permission for United States troops to pass through the Aboriginal nation, that included terms for the exchange of prisoners, and that contained extradition provisions that were analogous to terms the United States had entered into with England. He also observed that a treaty with the Cherokees declared that any citizens of the United States that settled in Cherokee territory would forfeit the protection of the United States and that the Cherokees could punish them as they pleased. Thompson J. also observed that the ratification process for this treaty was identical to the process that the United States used to ratify all treaties with sovereign nations.⁵⁹

Canadian courts have focused most of their attention on Marshall's decisions in *McIntosh*⁶⁰ and *Worcester*,⁶¹ which considered Aboriginal rights to land. In *McIntosh*, Marshall said that European powers adhered to a "discovery principle", whereby "discovery gave title... against all other European governments, which title might be consummated by possession" and which "gave to the nation making the discovery the sole right of acquiring the soil from the natives..." Marshall C.J. acknowledged that the rights of Aboriginal peoples, though not disregarded, were impaired. They were "admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily

⁵⁹ *Ibid.* at 61, 65, 70-71.

⁶⁰ *Supra* note 43.

⁶¹ *Supra* note 43.

diminished...” They could not sell their land to anyone they pleased, because “discovery gave exclusive title to those who made it.”⁶²

Chief Justice Marshall elaborated on the discovery principle and the land rights of Aboriginal peoples in *Worcester*.⁶³ He began by ridiculing the presumption behind the discovery principle that he had recognized in *McIntosh*:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws*. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.⁶⁴

The lack of “rightful claims of dominion” of Europeans over Aboriginal peoples or their land was not determinative for the Chief Justice, who, seemingly reluctantly and without explanation, invoked the principle of “might makes right”:

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.⁶⁵

Nevertheless, the rights of the Aboriginal peoples sounded more robust in *Worcester* than they had in *McIntosh*. The discovery principle “did not affect the rights of those already in possession, either as [A]boriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.”⁶⁶

⁶² *McIntosh*, *supra* note 43 at 573-74.

⁶³ *Supra* note 43.

⁶⁴ *Ibid.* at 543 [emphasis added].

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at 544.

*Mitchel v. United States*⁶⁷ offers a good overview of the law of Aboriginal title that emerged from the trilogy. In *Mitchel*, the Court found that a transfer of Indian title directly to a non-Indian that was subsequently ratified by the Crown should be exempted from the general rule that Indian land was alienable only to the Crown. Justice Baldwin reviewed the law as it stood when the subject land was under the dominion of Great Britain, and found that this law accorded with what the Court had found in *McIntosh*.⁶⁸ In summary, he described Aboriginal title as follows:

1) **Nature of the Interest:** Indian title was a right to exclusive enjoyment “in their own way and for their own purposes.” Indians were “considered as owning” the lands they occupied, and the law protected their possession. The ultimate fee was in the Crown. The Crown could grant the fee while the land remained in the possession of the Indians, but possession could not be taken without their consent. It was a “settled principle, that their right of occupancy was “as sacred as the fee simple of the whites.”⁶⁹

2) **Collective nature of the right:** Indians owned the land “by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots”.⁷⁰

3) **Test for Aboriginal title:** Whether land was possessed or occupied by Indians should be considered “with reference to their habits and modes of life”. Therefore, “their hunting grounds were as much in their actual possession as the cleared fields of the whites”.⁷¹

4) **Extinction:** Indian title was extinguished if the land was abandoned, ceded to the government, or if there was an “authorized” sale to individuals. The land could then be granted disencumbered of the right of occupancy, “or enjoyed in full dominion by the purchasers from the Indians.”⁷²

⁶⁷ 34 U.S. 711, 9 L.Ed. 283 at 758-59 (1835) [*Mitchel*, cited to U.S.]. Chief Justice Marshall remained on the bench, but the judgment of the court was delivered by Justice Baldwin.

⁶⁸ *Ibid* at 746.

⁶⁹ *Ibid.* at 745-46. Baldwin J. had already referred to the interest being akin to owning and “as sacred as the fee” in *obiter* in *Cherokee*, *supra* note 43 at 48.

⁷⁰ *Ibid.* at 745.

⁷¹ *Ibid.* at 746.

⁷² *Ibid.* at 746.

Even though Justice Baldwin viewed these principles as having been established in the colonies before they were “adopted by the king in the Royal Proclamation”⁷³ they recognized greater rights than Canadian courts have included in the modern doctrine of Aboriginal title, as outlined in the following section. Also, in the United States these principles operated in a context of the Supreme Court’s recognition of Indian sovereignty, even though it did not recognize Indian nations as foreign states. Full Indian sovereignty would not have been compatible with stipulations that the ultimate fee is with the government and that the Indian interest can be “extinguished” in favour of the government.

1.3 Aboriginal Title in Canada

Canadian courts considered the Royal Proclamation and Aboriginal title not long after Confederation in *St. Catherine’s Milling and Lumber Company v. The Queen*.⁷⁴ At issue was whether the federal government or the Province of Ontario had control of land and resources on land that had been ceded by treaty in 1873. The outcome depended on the nature of the interest Aboriginal nations had in the land at the time of the union and before the land was ceded.⁷⁵ The Privy Council observed that if the Aboriginal group held the fee simple in the territory that they had surrendered by treaty then Ontario could not have benefited from the cession because the land would not have been vested in the Crown at the time of the union. In that case, the land

⁷³ *Ibid* at 746.

⁷⁴ (1885), 10 O.R. 196 (Ch.), aff’d (1886), 13 O.A.R. 148, aff’d (1887), 13 S.C.R. 577, aff’d (1888), 14 App. Cas. 46 (P.C.) [*St. Catherine’s Milling*].

⁷⁵ See e.g. arguments of counsel, *ibid.* at 199-203 (Ch.) and Patterson J.A.’s observation, *ibid.* at 168, that counsel on both sides appealed to opposing views of the “recognition or disregard by European powers of the rights of natives of the countries they discovered or conquered or seized on this continent...”

would not have been caught by s. 109 of the *British North America Act, 1867*⁷⁶ which gave to each province the beneficial interest of the Crown in all lands in that province which were vested in the Crown at the time of the union. The Privy Council found that this, however, “was not the character of the Indian interest. The Crown has all along had a present proprietary interest in the land, upon which the Indian title was a mere burden.”⁷⁷ If Aboriginal title is a “mere burden” on the Crown’s underlying title it is a weak interest that is inferior to the Crown’s “ultimate title”. The essence of this unflattering 19th century characterization of Aboriginal title remains intact in the 21st century.

Of course, in the 19th century there was no duty to consult Aboriginal peoples about decisions that affected their interests, and so the peoples whose rights were at issue in the litigation in *St. Catherine’s Milling* had no voice in these proceedings.⁷⁸ While the Privy Council did not describe a robust Aboriginal interest, at least it acknowledged that a legal interest of some sort existed. The argument that Aboriginal title contained any substantive and enforceable right to unceded lands had received little traction in the Canadian courts that considered *St. Catherine’s Milling*. At first instance, the Chancellor found that Great Britain’s colonial policy toward Aboriginal populations was that they were “heathens and barbarians”⁷⁹ who had no proprietary title nor “any such claim thereto as to interfere with the plantations, and the general

⁷⁶ 30 & 31 Victoria, c. 3 (U.K.).

⁷⁷ *St. Catherine’s Milling*, *supra* note 74 at 552-554 (P.C.)

⁷⁸ The Royal Commission on Aboriginal Peoples observed that *St. Catherine’s Milling* was decided without any participation by the Aboriginal peoples whose rights were affected (Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) [Report, vol. 2] Part One, Section 2.2 Treaties: Legal Context of the Treaty Relationship, note 50).

⁷⁹ *St. Catherine’s Milling*, *supra* note 74 at 206 (Ch.).

prosecution of colonization.”⁸⁰ He ruled in favour of the Province’s ownership of the land, a ruling that was upheld in all subsequent appeals and finally by the Privy Council.

It was not until the appeal reached the Supreme Court of Canada that the view that the Royal Proclamation had reserved to Aboriginal peoples a “title” that included a proprietary interest received any judicial support, and then only from the two dissenting Justices, Strong and Gwynne JJ., who were outnumbered by four Justices who ruled that the appeal should be dismissed. The judgment of Justice Henry is notable for the candour with which he acknowledged that the practice of treating with Aboriginal nations was not grounded in the honour of the Crown or Aboriginal sovereignty. It was just an expedient measure to mollify Aboriginal nations while they were powerful: “In the first settlement of the country to assert sovereignty and to put that assertion into operation would have caused war, and it was necessary to treat with the Indians from time to time in order to facilitate settlement.”⁸¹

Lord Watson delivered the decision of the Judicial Committee of the Privy Council that dismissed the further appeal. He emphasized the Proclamation’s description of the reserved lands as “part of Our dominions and territories” and characterized the tenure of the Indians as “a personal and usufructuary right, dependent on the good will of the Sovereign”.⁸² He did not consider it necessary to express an opinion on “the precise quality of the Indian right”.⁸³

This was not much of an endorsement for Aboriginal title from the Privy Council. Given the climate of the times, however, the result could have been worse. European imperialism was

⁸⁰ *Ibid.*

⁸¹ *St. Catherine’s Milling, supra* note 74 at 640-42 (S.C.C.).

⁸² *St. Catherine’s Milling, supra* note 74 at 54 (P.C.).

⁸³ *Ibid.* at 55.

at its most powerful, and had become infused with racism.⁸⁴ This was reflected in *Cooper v. Stuart*,⁸⁵ a decision that the Privy Council delivered only a year after its decision in *St. Catherine's Milling*. In that case, Lord Watson, again speaking for the Judicial Committee of the Privy Council, treated the interests of native inhabitants of the Colony of New South Wales as undeserving of legal significance by finding that the territory was "...practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions."⁸⁶ This *terra nullius* doctrine still prevailed in Australia when the Australian High Court first recognized Aboriginal title in 1992, in *Mabo v. Queensland (No. 2)*.⁸⁷

For much of the 20th Century, Canadian law remained indifferent, at best, to the rights of Aboriginal peoples. The litigation of land claims was hindered by a 1927 amendment to the *Indian Act* that required a license for soliciting funds for legal claims. This remained in force until 1951.⁸⁸ In 1990, the Supreme Court of Canada observed that for fifty years after the publication of a 1916 constitutional textbook, Aboriginal rights to land were not even the subject of academic literature.⁸⁹ By the late 1960s both the policy and actions of Canadian governments presumed that Aboriginal land claims were not legally enforceable. It was mainly the *Calder* decision in 1973 that caused a reassessment of this position.⁹⁰

⁸⁴ See Russell, *The Mabo Case*, *supra* note 4 at 113-114, citing Eric Hobsbawm, *The Age of Empire, 1875-1914* (New York: Vintage Books, 1989).

⁸⁵ (1889), 14 App. Cas. 286.

⁸⁶ *Ibid.* at 291.

⁸⁷ *Supra* note 4.

⁸⁸ R.S.C. 1927, c. 98, s. 141, as am. by S.C. 1927, c. 32, s. 6, and repealed by S.C. 1951, c. 29, s. 123(2). See Hamar Foster, Heather Raven and Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 70, and Russell, *The Mabo Case*, *supra* note 4 at 116 and *Report*, vol. 1, *supra* note 33 at Chapter 9 – The Indian Act, 9.9 “Indian Legal Claims”.

⁸⁹ *Sparrow*, *supra* note 6 at 1103.

⁹⁰ *Ibid.*

The Supreme Court's decision in *Calder*⁹¹ was a chapter in the long struggle of British Columbia's Nisga'a for recognition of their rights to land. The Nisga'a's aims were modest. They did not seek to have their rights to land determined; they only sought a declaration that those rights had not been extinguished. Their action was unsuccessful, and their appeals were dismissed.

Judson J. (Martland and Ritchie JJ. concurring) found that the Nishga'a retained some sort of rights to the land after sovereignty, but that the Crown had extinguished their rights by enacting legislation to open their lands to settlement and by alienating some of the Nishga'a land on terms that were inconsistent with the continued existence of their interest. These findings were fatal to the claim when they were combined with the concurrence of these Justices with Justice Pigeon's opinion that the appeal had to be dismissed on procedural grounds.⁹²

Although the court did not need to rule on the nature of Aboriginal title, Judson J. concluded that Aboriginal title existed independently of the Royal Proclamation, because "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'".⁹³ This re-characterization of Aboriginal title was of lasting significance because it placed the source of Aboriginal title in the common law and not in the good graces of the Crown, and it framed it as an interest in land and not as merely a personal interest. However, in spite of the recognition that Indians were "organized in societies" the Court did not acknowledge that the land was the territory of a sovereign Aboriginal nation, for that would not have been consistent with the rights

⁹¹ *Supra* note 12.

⁹² *Ibid.* at 337, 344, 423-27.

⁹³ *Ibid.* at 328.

paradigm that recognized only the Crown's sovereignty. However, by recognizing the collective dimension to Aboriginal title the Court tacitly acknowledged that the society must have had had some capacity to regulate the use of its land.⁹⁴

The spirited dissent of Justice Hall (Spence and Laskin JJ. concurring), also breathed life into the doctrine of Aboriginal title by contending that the Aboriginal title of the Nisga'a had not been extinguished. Their title did not depend on treaty, executive order or legislative enactment, and Hall J. observed that at common law, possession itself was proof of ownership, and "[u]nchallenged possession is admitted here."⁹⁵ He described Aboriginal title as a claim for "an equitable title or interest, a usufructuary right and a right to occupy the lands...which does not in any way deny the Crown's paramount title".⁹⁶ Hall J. found that the Crown bore the onus of proving extinguishment, which would require a statute that demonstrated a "clear and plain" intent to extinguish, and the Crown did not discharge this onus.⁹⁷ This criterion for extinguishment was later adopted by the Supreme Court for determining whether extinguishment had occurred before constitutional entrenchment of Aboriginal rights.⁹⁸ Justice Hall's dissent motivated governments to return to land claims negotiations, which ultimately resulted in a settlement for the Nisga'a.⁹⁹

⁹⁴ Kent McNeil has argued that "the judicial seeds of an inherent right of self-government" were planted in *Calder* because the Court's view of Aboriginal title as a communal right that arose out of prior occupancy by Aboriginal societies implies that there was some form of government competent to regulate this title. See Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done* (Vancouver, UBC Press, 2007) at 130-31 [McNeil, "Judicial Approaches"]

⁹⁵ *Calder*, *supra* note 12 at 368.

⁹⁶ *Ibid.* at 352, 368, 390.

⁹⁷ *Ibid.* at 401-04.

⁹⁸ *Sparrow*, *supra* note 6 at 1099.

⁹⁹ For the catalytic effect of *Calder*, see Norman K. Zlotkin, "Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference" (Discussion Paper No. 15, Institute of Intergovernmental Relations, Queen's University, 1984) at 20-21 and Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247 at 259-60 [Russell, "High Courts"].

The Supreme Court revisited the law of Aboriginal title in *Guerin v. R.*¹⁰⁰ It found that the Crown had breached its fiduciary duty to the Musqueam Indian Band by leasing surrendered reserve land on much less favourable terms than had been approved by the Band. The Musqueam Band could not transfer its interest directly to a third party, and so the Band had to surrender the land and then have the Crown lease the land. Justice Dickson stated that the Crown was under an equitable obligation, a trust-like fiduciary duty, to deal with the land for the benefit of the Indian Band. The fiduciary relationship arose from the nature of Aboriginal title, and its inalienability except to the Crown. A breach of the duty resulted in the same liability as would have been assessed for a breach of trust.¹⁰¹

As to the nature of Aboriginal title itself, Dickson J. said that while it “does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right.”¹⁰² The unique qualities of Aboriginal title and the historical relationship between the Crown and Aboriginal peoples caused the court to describe the interest itself and the fiduciary relationship it gives rise to as *sui generis*.¹⁰³

In *Delgamuukw v. British Columbia*¹⁰⁴ the Supreme Court of Canada heard an appeal brought by the Gitksan and Wet'suwet'en peoples. They had initially claimed ownership of their territory and jurisdiction over it, but the appeal to the Supreme Court was limited to a claim for Aboriginal title and self-government. The Supreme Court of Canada ordered a new trial because of defects in the pleadings and errors in the trial judgment. To give guidance to the judge at a new trial, the Court considered the nature of Aboriginal title.

¹⁰⁰ [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

¹⁰¹ *Ibid.* at 376.

¹⁰² *Ibid.* at 382.

¹⁰³ *Ibid.* at 382, 385, 387.

¹⁰⁴ [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw*].

Chief Justice Lamer, in a judgment concurred in by the majority of the Court, acknowledged that Aboriginal title was now protected by s. 35(1) of the *Constitution Act, 1982*, and remained subject to the traditional limitation that Aboriginal title lands were inalienable except to the Crown.¹⁰⁵ It “arises out of the prior occupation of land by [A]boriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law, and is a burden on the Crown’s underlying title.”¹⁰⁶ In summary, he found:

1) **Nature of the Interest:** Aboriginal title is a “right to the land itself” which “confers the right to use land for a variety of activities.” However, it is “subject to an inherent limit that the activities may not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s attachment to that land.” Since the Crown did not gain its underlying title until it “asserted sovereignty” and a burden on that title could not have existed before the Crown had title, Aboriginal title “crystallized” when sovereignty was asserted.¹⁰⁷

2) **Collective nature of the right:** Aboriginal title is held by all members of an Aboriginal group. That “community” makes decisions with respect to the land.¹⁰⁸

3) **Test for Aboriginal title:** An Aboriginal group must show that “their connection with the piece of land was of central significance to their distinctive culture”. The court will presume that this is met if the Aboriginal group can demonstrate “exclusive” occupation of the land pre-sovereignty and that the group has maintained a substantial connection with the land since that time.¹⁰⁹

Present occupation can be relied on as proof of pre-sovereignty occupation if there is continuity with pre-sovereignty occupation, and an “unbroken chain of continuity” need not be shown. Both the common law and the Aboriginal perspective on land should be taken into account in the test for occupancy.¹¹⁰

The Aboriginal group must show “exclusive” occupation “at sovereignty”. “Exclusivity” is a common law principle and this requirement should be applied with caution, and in a manner that places equal weight on Aboriginal and common law perspectives.¹¹¹

(4) **Extinction:** Following *Sparrow*, the Court found that extinguishment of Aboriginal title prior to 1982 required legislation with “clear and plain” intent to extinguish, and that since Confederation only the federal government held this power.¹¹²

¹⁰⁵ *Ibid.* at paras. 129, 133.

¹⁰⁶ *Ibid.* at para. 145.

¹⁰⁷ *Ibid.* at para. 117, 140, 145.

¹⁰⁸ *Ibid.* at para. 115.

¹⁰⁹ *Ibid.* at paras. 143, 150-151.

¹¹⁰ *Ibid.* at paras. 143, 147-49, 152-53.

¹¹¹ *Ibid.* at paras. 155-56.

The foregoing describes an Aboriginal title that is but a shadow of the Indian title that emerged from Marshall's decisions.¹¹³ Moreover, *Delgamuukw* foresaw that a broad range of legislative objectives could provide grounds for an infringement of this constitutionally protected right,¹¹⁴ albeit subject to compensation.¹¹⁵

Canadian courts have applied Marshall's "discovery" theory in support of the Crown's ultimate title to the land, but have neglected Marshall's finding that Aboriginal peoples retained a form of internal sovereignty.¹¹⁶ Without the sovereignty component, "the moral coherence of his theory collapses and we are left with the old story that Marshall sought to deny – that the Crown obtained full sovereignty over [A]boriginal peoples by mere discovery."¹¹⁷ The Marshall decisions led to American law acknowledging that Indian sovereignty is residual, which meant that the United States government bore the onus of showing it had been diminished.¹¹⁸ Canadian courts acknowledged only that Aboriginal peoples' property rights survived Crown sovereignty; they were silent on what happened to Aboriginal sovereignty.

Courts in the United States have not always followed the principles established by the Marshall Court. This has caused an erosion of the domestic sovereignty of Aboriginal nations,

¹¹² *Ibid.* at paras. 178, 180.

¹¹³ See above, text accompanying notes 69-72.

¹¹⁴ According to Lamer C.J., (*Delgamuukw*, *supra* note 104 at para 165) these included "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims." Justice La Forest agreed with the examples that the Chief Justice had provided, *ibid.* at para. 202.

¹¹⁵ *Ibid.* at para. 169.

¹¹⁶ Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L.J. 470 at 509-510 [Walters, "Morality"].

¹¹⁷ *Ibid.* at 508-09.

¹¹⁸ McNeil, "Judicial Approaches", *supra* note 94 at 152. McNeil contrasts this with the approach taken by the Supreme Court in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204, where the Court took a narrow approach to rights of self-government that confined it to pre-contact practices, customs and traditions. Accordingly, the Court declined to find that conducting high stakes gambling was within the scope of Aboriginal rights recognized in s. 35 (*ibid.*).

and compensation for takings of Indian lands has been limited to lands recognized by treaty or statute.¹¹⁹ However, this does not take away from Marshall's conception of Indian title, which Canadian courts have cited repeatedly but have not fully implemented. In effect, Marshall recognized that Indians maintained full ownership rights over their land, subject only to the federal government's overriding sovereignty. This gave the federal government the underlying title but not beneficial ownership, and the only practical consequence of this was the restriction on the alienability of the land.¹²⁰ Therefore, Indian title did not include an inherent limit,¹²¹ and the test for occupancy was straightforward and referred only to the "habits and modes of life"¹²² of the Indians, not a combination of common law and Aboriginal perspectives. The prejudice that can result to Aboriginal title claims from the latter approach has been underlined by the Supreme Court's decision in *R. v. Marshall; R. v. Bernard*.¹²³ Marshall's simpler approach may well have been due to his having recognized a continuing, though diminished Aboriginal sovereignty. Therefore, as long as the territorial limits of the Aboriginal nation were not in dispute, the land within that territory would be subject to Indian title.

1.4 Aboriginal Title – A Subordinate Right

Since *Delgamuukw* confirmed that the Aboriginal interest "does not amount to beneficial ownership"¹²⁴ it is not surprising that the Court did not describe its status in terms as glowing as the American court's description of Indian title being "as sacred as the fee simple of the

¹¹⁹ See Blumm, *supra* note 45 at 758-761.

¹²⁰ See, generally, Cohen, *supra* note 45. Marshall's conception of Indian title approaches the fee simple interest that Kent McNeil has found should, according to English law, vest in pre-sovereignty occupants of territory that the Crown acquires by settlement. See Kent McNeil, *Aboriginal Title*, *supra* note 23 at 221.

¹²¹ See above, text accompanying note 107.

¹²² *Supra* note 71 and accompanying text.

¹²³ 2005 SCC 43, [2005] 2 S.C.R. 220 [*Marshall/Bernard*]. For criticism of this decision, see *infra* note 297 and accompanying text.

¹²⁴ *Supra* note 104 at para. 32.

whites.”¹²⁵ Indeed, Justice La Forest opined that the amount of compensation for infringement would not be determined based on the value of the land in fee simple, but would depend on what was required to preserve the Honour of the Crown.¹²⁶ Contrast this with the view taken of Indian title by the United States Supreme Court in 1938, that “[f]or all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee.”¹²⁷ Therefore, in addition to being subordinate to the Crown’s ultimate title, in Canada Aboriginal title is a lesser interest than the fee simple interest that other landowners take for granted.

The American Supreme Court has quashed federal grants that ignored Indian title because the United States government could not grant what it did not have.¹²⁸ While it is too early to say whether the Canadian version of Aboriginal title can withstand a direct conflict with a Crown grant to a private party, it is unlikely to be hardy enough to survive. Thomas Isaac has offered a plausible rationale for why a fee simple interest would defeat Aboriginal title. This rationale is based in part on the Supreme Court’s holding in *Delgamuukw* that the government can infringe Aboriginal title, and that compensation would be payable for the infringement.¹²⁹ Isaac’s view is consistent with the Ontario Court of Appeal’s decision in *Chippewas of Sarnia*,¹³⁰ even though the Court did not ground its decision on justifiable infringement. The Court held that fee simple

¹²⁵ See *supra* note 69 and accompanying text.

¹²⁶ *Delgamuukw*, *supra* note 104 at para. 203.

¹²⁷ *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 at 116-17; see also the discussion of this decision in Cohen, *supra* note 45 at 54-55.

¹²⁸ See Cohen, *ibid.* at 28-34, 55-56, citing *Jones v. Meehan*, 175 U.S. 1 (1899), *Cramer v. United States*, 261 U.S. 219 (1923), *United States as Guardian of the Hualpai Indians v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), and *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946).

¹²⁹ Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (Saskatoon: Purich Publishing, 2004) at 14-18.

¹³⁰ *Supra* note 37.

interests were valid even though the Crown patents on which they were based had been issued without a valid surrender of Indian reserve lands. As Isaac noted, the Court stated that it favoured the interests of the third party purchasers because “[a]pparently valid acts of public officials are relied on by the members of the public at large in planning their affairs... The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration.”¹³¹ Moreover, Aboriginal rights “...do not and cannot exist in a vacuum. In the Canadian legal tradition, no right is absolute, not even constitutionally protected Aboriginal rights.”¹³² Although it is difficult to argue with the Court’s desire to balance the interests of affected parties, Aboriginal title emerges from the ruling not as a robust property right but as a fragile interest that is vulnerable to public interest considerations.

Kent McNeil described *Chippewas of Sarnia* as amounting to “judicial extinguishment” of Aboriginal title by “present-day judicial discretion”, notwithstanding that section 35(1) had been understood to bar extinguishment of Aboriginal title without the consent of the title holders.¹³³ He observed that the Court’s views on the validity of Crown patents and on the application of the good faith purchaser rule to legal interests contradicted entrenched legal principles and jurisprudence,¹³⁴ and that the Court used the *sui generis* nature of Aboriginal title as an “additional justification for applying equitable principles to deny remedies against the present possessors of the disputed lands.”¹³⁵ Accordingly, the decision indicated that “*regardless of the legal validity of [Aboriginal title] claims, judges will not necessarily allow those claims to prevail if they conflict with the claims of other Canadians who did not participate in and were*

¹³¹ *Ibid.* at para. 258.

¹³² *Ibid.* at para. 263.

¹³³ Kent McNeil “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa L. Rev.* 301 at 344 [McNeil, “Extinguishment”].

¹³⁴ *Ibid.* at 342.

¹³⁵ *Ibid.* at 338.

not aware of the wrongs that were committed.”¹³⁶ Although McNeil acknowledged the need for the courts to balance Aboriginal rights with the rights of innocent third parties, he criticized the Court for failing to achieve a balance in *Chippewas of Sarnia*, and for ignoring the Chippewas’ willingness to negotiate and to waive claims of possession or damages against most of the possessors.¹³⁷

McNeil’s concerns about the Court’s disposition and its departures from established law led him to suggest that this decision invites a reappraisal of the role of the courts in the adjudication of Aboriginal claims.¹³⁸ Slattery echoed these concerns when he commented that problematic aspects of the rejection of Aboriginal title claims in *Marshall/Bernard*¹³⁹ might be due to courts being “torn between a desire to right a great historical wrong – the dispossession of Indigenous peoples – and deep misgivings about doing so at the expense of third parties and the larger society.”¹⁴⁰ These misgivings suggest that the problem is not with the terms in which the doctrine of Aboriginal title is formulated or applied, but rather lies in viewing the issue as property claims in conflict when it is really one of sovereignties in need of reconciliation. While the courts are competent to adjudicate the former, the latter must ultimately be resolved through a political process.

Aboriginal title recognizes rights that arise out of prior occupation of land, but it does not acknowledge that this land was the territory of sovereign Aboriginal *nations*. Courts constructed the doctrine of Aboriginal title as a means of affirming that assertions of Crown sovereignty did not extinguish all property rights, but this failed to acknowledge that these assertions also did not

¹³⁶ *Ibid.* at 344 [emphasis in original].

¹³⁷ *Ibid.* at 345.

¹³⁸ McNeil, “Extinguishment”, *supra* note 133 at 345.

¹³⁹ *Supra* note 123. For criticism of this decision, see also *infra* note 297 and accompanying text.

¹⁴⁰ Slattery, “Metamorphosis”, *supra* note 16 at 256-57.

extinguish Aboriginal sovereignty. Although the conception of Indian title developed by the United States Supreme Court under Chief Justice Marshall attempted to maintain Indian sovereignty and ownership rights as much as possible without denying the overriding sovereignty of the settler state, Canadian courts have traditionally not recognized Aboriginal sovereignty at all. They have acknowledged Aboriginal title as only a quasi-ownership right that is subject to limitations that serve the interests of the new sovereign.

The foregoing discussion has shown that as the settler society's power grew it no longer respected Aboriginal nations as equals but instead recognized only limited rights arising out of prior occupation. This is consistent with J.C. Smith's hierarchical characterization of Aboriginal title as the result of the domination of one political system over another. Peaceful occupation of servient (Aboriginal) political systems could only be achieved if the dominant European settler states recognized a property relationship between the servient system and at least some of the land it was occupying. However, the property relationship of the servient system was not fully incorporated into the dominant legal system. The result is that Aboriginal title straddles the legal systems of both societies, and courts have difficulties dealing with it. The only solution, Smith writes, is a political settlement.¹⁴¹

Today's Canadian courts reject notions of the innate superiority of European nations, but they have not yet rejected the hierarchical legal doctrines that rest on such notions. They would not tolerate the characterization of Indian tribes offered by Justice Johnson in *Cherokee*,¹⁴² as uncivilized and lacking in laws or government. They should be equally uncomfortable with how closely his characterization of the land rights the Cherokee Nation had retained under treaty

¹⁴¹ J.C. Smith, "The Concept of Native Title" (1974), 24 U.T.L.J. 1 at 4-5, 15-16.

¹⁴² *Supra* note 43 at 21 and 27-28; see also above, text accompanying notes 55-57.

corresponds to the contemporary Canadian doctrine of Aboriginal title: “...for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence.”¹⁴³ Justice Hall, dissenting in *Calder*, observed that at an earlier time Aboriginal peoples were erroneously viewed as “wholly without cohesion, laws or culture, in effect a subhuman species”¹⁴⁴ and he observed that even though Chief Justice Marshall had enlightened views on Aboriginal rights in other respects, the Chief Justice nevertheless described Indian tribes as “fierce savages whose occupation was war...”.¹⁴⁵ Before Canadian courts can truly claim to have rejected these racist or ethnocentric sentiments of the past, they must also reject the assumption of the Crown’s underlying title upon which the doctrine of Aboriginal title depends.

It follows that Aboriginal title is a poor vehicle for taking Canada to the reconciliation promised by s. 35(1). Aboriginal title serves the hierarchical relationship between settler and Aboriginal societies. This contradicts fundamental principles of the equality of peoples. The doctrine of Aboriginal title depends on inequality for its foundation because it defines Aboriginal title as a *sui generis* burden on the *Crown’s* ultimate title. Unless granted by treaty, however, the Crown’s hold on the ultimate title depends on an ethnocentric perspective that assumed that Aboriginal peoples were too primitive to be recognized as sovereign nations and that therefore pre-contact North America was a *terra nullius*.¹⁴⁶

¹⁴³ *Ibid.* at 27. See also John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37 Osgoode Hall L.J. 537 [Borrows, “Sovereignty’s Alchemy”] at 568-572. Borrows argued that Aboriginal title has more characteristics analogous to a feudal relationship than just that the Crown holds the underlying title. These include the inalienability of the title except to the Crown, and the requirement that the title must be surrendered to the Crown before it can be put to uses that would be inconsistent with the inherent limit that prevents use of the land in a manner that would conflict with traditional uses that defined that group’s attachment to the land. See also Macklem, “Legal Imagination”, *supra* note 7 at 412, suggesting that the assumption that the Crown holds underlying title means that the common law of Aboriginal title “accepts the fact that one party is at the mercy of the other’s discretion.”

¹⁴⁴ *Calder*, *supra* note 12 at 346.

¹⁴⁵ *Ibid.* citing *McIntosh*, *supra* note 43.

¹⁴⁶ On the doctrine of *terra nullius* see also below, text accompanying notes 378-385.

The doctrine of Aboriginal title cannot be part of an Aboriginal law that is rooted in the principle of the equality of peoples and that allows courts to question the legitimacy of Crown assertions of sovereignty. The next chapter examines how recent decisions of the Supreme Court of Canada are consistent with an equality paradigm that places the sovereignty claims of Aboriginal peoples and the Crown on an equal plane and that allows Crown assertions of sovereignty to be questioned.

Chapter 2: A New Recognition of Sovereignty and Equality

2.1 Sovereignty in *Haida Nation* and *Taku River*

The transformative nature of the decisions in *Haida Nation*¹⁴⁷ and *Taku River*¹⁴⁸ has prompted commentators to describe them as introducing “a new constitutional paradigm governing Aboriginal rights”,¹⁴⁹ and to suggest that “a fundamental restructuring of Canadian [A]boriginal law may be underway”¹⁵⁰ in which “the *form* of the law might be restructured to ensure meaningful constitutional dialogue on substantive matters between [A]boriginal nations and non-[A]boriginal governments”.¹⁵¹ These comments were prompted by the statements in *Haida Nation* and *Taku River* that indicated that the Supreme Court would no longer defer to Crown assertions of sovereignty over Aboriginal nations that had not entered into a treaty with the Crown.¹⁵² This was particularly remarkable because in earlier cases the Supreme Court had granted Crown sovereignty a decisive and pivotal role in defining the rights “recognized and affirmed” by s. 35(1). This included incorporating occupancy of land at the time the Crown “asserted sovereignty” into the test for establishing Aboriginal title,¹⁵³ and describing the

¹⁴⁷ *Supra* note 2.

¹⁴⁸ *Supra* note 2.

¹⁴⁹ Slattery, “Honour of the Crown” *supra* note 3 at 436-37; Slattery, “Metamorphosis” *supra* note 16 at 285.

¹⁵⁰ Walters, “Morality”, *supra* note 116 at 514.

¹⁵¹ *Ibid.* at 516-17 [emphasis in original].

¹⁵² See Slattery, “Aboriginal Rights”, *supra* note 17 at 735-36, who wrote that courts felt bound “to defer to official territorial claims without inquiring into the facts supporting them or their validity in international law.” See also the refusal of the Australian High Court, grounded in the “act of state” doctrine, to question Crown sovereignty in *Mabo (No. 2)*, *supra* note 4 at 31-34. See also below on the “act of state” doctrine, text accompanying notes 178-200.

¹⁵³ *Delgamuukw*, *supra* note 104 at para. 145.

purpose of the constitutional entrenchment of Aboriginal rights as providing a framework for reconciling the prior occupation of Canada by Aboriginal peoples “with Crown sovereignty.”¹⁵⁴

Chief Justice McLachlin delivered the judgment of the Court in both of the concurrently released judgments. In *Taku River*, she departed from earlier statements of the purpose of s. 35(1). She said that the purpose of this section “is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”¹⁵⁵ Similarly, in *Haida Nation*, she said that the Crown’s duty of honourable dealing toward Aboriginal peoples arose “from the Crown’s assertion of sovereignty over Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”¹⁵⁶ Notably, McLachlin C.J.C. referred to *control*, not *ownership* of the land and resources, thus using terminology more consistent with governmental jurisdiction than with rights. If the Crown’s sovereignty were not in question, its control of land and resources would be legal, not just *de facto*.

Brian Slattery contrasted the meaning of *de facto* (“illegal or illegitimate but accepted for practical purposes”) with *de jure* (“rightful, legitimate, just or constitutional, and ...[in] full compliance with all legal requirements”).¹⁵⁷ He concluded that the Court’s “choice of language” indicates that Crown claims of sovereignty will be “legally deficient until there has been a just settlement of [Aboriginal] rights through negotiated treaties”,¹⁵⁸ which, as Slattery also pointed

¹⁵⁴ See Walters, “Morality”, *supra* note 116 at 499 and 501, where he observed that even after *Haida Nation* and *Taku River*, the weight of authority still supports this formulation of the purpose of s. 35, and citing its invocation in *Van der Peet*, *supra* note 47 at paras. 42, 50, Lamer, C.J.C., 230, McLachlin J.; *Delgamuukw*, *supra* note 104, at paras. 81-82, 186; *Mitchell*, *infra* note 167 at para. 12.

¹⁵⁵ *Taku River*, *supra* note 2 at para. 42.

¹⁵⁶ *Haida Nation*, *supra* note 2 at para. 32.

¹⁵⁷ Slattery, “Honour of the Crown”, *supra* note 3 at 437-38, citing *Black’s Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979), at 375, 382.

¹⁵⁸ *Ibid.* at 438.

out, was confirmed by the Chief Justice's description of the role of treaties.¹⁵⁹ This description came in a passage that also expressly recognized the sovereignty of Aboriginal nations:

Treaties serve to reconcile *pre-existing Aboriginal sovereignty with assumed Crown sovereignty*, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition... This promise is realized and *sovereignty claims reconciled* through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

...

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.¹⁶⁰

Mark D. Walters described this passage as “one of the most important Canadian judicial statements on [A]boriginal rights since 1982”. He also observed that “for the first time, the Court has recognized that it is ‘Aboriginal sovereignty’, not just distinctive [A]boriginal societies or [A]boriginal occupation, that must be reconciled with Crown sovereignty.”¹⁶¹

Walters observed that the full implications of the ideas from *Haida Nation* and *Taku River* remain unclear.¹⁶² Recognizing Aboriginal sovereignty has profound implications for Aboriginal rights, since it implies rights to self-determination and to jurisdiction over the territory to which that sovereignty applies. It will undoubtedly also affect the interpretation of past and future treaties. This is because the Chief Justice's comment indicated that Aboriginal sovereignty not only pre-existed “assumed Crown sovereignty”, but continues at least until

¹⁵⁹ *Ibid.*, citing *Haida Nation*, *supra* note 2 at para. 20.

¹⁶⁰ *Haida Nation*, *ibid.*, at paras. 20 and 25 [emphasis added].

¹⁶¹ Walters, “Morality”, *supra* note 116 at 514.

¹⁶² *Ibid.* at 516.

sovereignty claims are reconciled through negotiation. It is highly unlikely that Aboriginal peoples will voluntarily relinquish their sovereignty in future negotiations,¹⁶³ and there are good reasons to believe that Aboriginal nations did not do so in past treaties.¹⁶⁴ It follows that Canada is, and will continue to be, a country with a sharing of sovereignty between federal, provincial, and Aboriginal governments.¹⁶⁵ The belief that there is room for both Aboriginal sovereignty and Crown sovereignty in a federal Canada comes with a solid pedigree, which can be traced at least to the Treaty of Niagara of 1764. It was endorsed by the Royal Commission on Aboriginal Peoples (RCAP), has academic support,¹⁶⁶ and the Supreme Court's movement toward this vision of Canadian federalism was foreshadowed by the concurring judgment of Justices Binnie and Major in *Mitchell*.¹⁶⁷

¹⁶³ Aboriginal peoples overwhelmingly see historic and modern treaties as a means of “establishing ongoing political and legal relationships” and not as fixed contracts. They often express ‘sharing’ with non-Aboriginal people as a goal of a negotiated settlement: Michael Asch & Norman Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations” in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 208 at 216.

¹⁶⁴ See *supra* note 42 and accompanying text. See also Asch & Macklem, *supra* note 7 at 512-14 and Mark D. Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall” (2001) 24 Dal. L.J. 75 [Walters, “Covenant Chain”]. See also John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 113 [Borrows, *Recovering Canada*] and sources therein cited.

¹⁶⁵ The idea that sovereignty can be shared is not unique to Canada. The sharing of sovereignty has given the European Union the capacity to pursue common goals while preserving national, regional and ethnic identities; see John Richardson, “The European Union in the World – A Community of Values” (2002) 26 *Fordham Int'l L.J.* 12 at 23-24.

¹⁶⁶ See e.g. Asch & Macklem, *supra* note 7 at 514-17; Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 *Osgoode Hall L.J.* 681 [Slattery, “Imperial Claims”].at 701; Borrows, “Royal Proclamation”, *supra* note 17 at 20-24; Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) *Osgoode Hall L.J.* 101 at 108-112 [Slattery, “Organic Constitution”]; Kent McNeil, “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty” (1997-1998) 5 *Tul. J. Comp. & Int'l L.* 253 at 291-98; Borrows, “Sovereignty’s Alchemy”, *supra* note 143 at 585, n. 242; Michael Asch, “From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution” (2002) 17:2 *Can. J.L. & Soc'y* 23 [Asch, “Affirmation”], Asch & Zlotkin, *supra* note 163, Russell, “High Courts”, *supra* note 99 at 275-76; Douglas C. Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery” (2000-2001) 34 *U.B.C. L. Rev.* 195; Doug Moodie, “Thinking Outside the 20th Century Box: Revisiting 'Mitchell' - Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government” (2003-2004) 35 *Ottawa L. Rev.* 1.

¹⁶⁷ *Supra* note 10 at paras. 127-135, 164-67, citing *inter alia*, *Report*, vol. 2, *supra* note 78 at 166, 214, 216, 240-41.

The facts in *Haida Nation* and *Taku River* presented the Supreme Court with an opportunity to consider the question of sovereignty. In both cases, Aboriginal groups with no prior treaty with the Crown were involved in treaty negotiations. Although framed in terms of claims to Aboriginal title and Aboriginal rights, these applications did not seek an interlocutory injunction, but sought judicial review of the jurisdiction of the government to make certain decisions affecting the land without adequate consultation or accommodation.

In *Haida Nation*, the Haida people's opposition to the government's grant to Weyerhaeuser of a right to harvest certain old-growth forests was, on one level, as the Court said, a conflict between the title claimed by the Haida people and the Crown's legal title. On another level, however, it was a conflict about jurisdiction. The Court implicitly recognized this when it asked whether the government was required to consult with the Haida about "*decisions to harvest the forest*" and to accommodate Haida concerns about "what if any forests in Block 6 *should be harvested...*".¹⁶⁸ The Province of British Columbia held legal title to the land,¹⁶⁹ and these decisions could be viewed as the exercise of managerial rights that are an incident of ownership. However, since the subject of the Aboriginal title claim of the Haida people was their "traditional homeland",¹⁷⁰ the claim amounted to more than just a claim to title, or ownership of land. The claim amounted to an assertion of jurisdiction to regulate logging, and so the underlying issue was whether that jurisdiction belonged to the Haida Nation or the Province of British Columbia.¹⁷¹

¹⁶⁸ *Haida Nation*, *supra* note 2 at para. 6.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, at para. 1.

¹⁷¹ See also Harris, *supra* note 166, describing the litigation that culminated in the Supreme Court of Canada's decision in *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 as an attempt by the Heiltsuk people to assert their jurisdiction to manage the herring spawn-on-kelp fishery within their traditional territory. Although the Court recognized an Aboriginal right to trade herring spawn-on-kelp, it did not recognize the territorial nature of the

The Supreme Court found that the Province had a duty to consult and accommodate, which is “part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.”¹⁷² McLachlin C.J. observed in *Haida Nation* that the case was “the first of its kind” to reach the Supreme Court, and that the court’s task was to establish a “general framework for the duty to consult, and accommodate, where indicated, before Aboriginal title or rights claims have been decided.”¹⁷³ She concluded that the Province had failed to engage in meaningful consultation.¹⁷⁴ Earlier in the judgment, she had acknowledged that the “[t]he stakes are huge” and that the Haida feared that without consultation and accommodation, they may be deprived of forests that are vital to them. Although the Haida’s claim is strong, it may take many years to prove.¹⁷⁵

The chambers judge had determined that the evidence showed that certain conclusions were “inescapable”. Among other things, the Haida had inhabited the Haida Gwaii¹⁷⁶ continuously since at least 1774, they had never been conquered, and they had never surrendered their rights by treaty.¹⁷⁷ Although not pleaded as such, these facts, combined with the Crown having acknowledged that the Haida were qualified to engage in treaty negotiations should all be strong grounds for the Haida to claim that they remain sovereign.

Heiltsuk claim. The struggle of the Heiltsuk for recognition of their authority to regulate the fishery within its traditional territory continued. Harris observed that the Heiltsuk’s assertion of jurisdiction over the herring fishery is only part of a larger struggle to gain recognition of their legal system (*ibid.* at 236-37).

¹⁷² *Ibid.* at para. 32.

¹⁷³ *Ibid.* at para. 11.

¹⁷⁴ *Ibid.* at paras. 32 and 79.

¹⁷⁵ *Ibid.* at paras. 7-8.

¹⁷⁶ “Haida Gwaii” is used in this discussion in lieu of the name “Queen Charlotte Islands” which appeared in the judgments in this case. The Supreme Court’s judgment predated the 2009 agreement between the Province of British Columbia and the Haida Nation to officially change the name to Haida Gwaii, which translates as “islands of the people” in the Haida language. “Queen Charlotte Islands renamed Haida Gwaii in historic deal” (December 11, 2009), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2009/12/11/bc-queen-charlottle-islands-renamed-haida-gwaii.html>>.

¹⁷⁷ *Haida Nation*, *supra* note 2 at para. 69.

2.2 Sovereignty, Legitimacy and the Act of State Doctrine

What if the Haida Nation obtained a declaration confirming their continuing sovereignty? Would this trump Canada's *de facto* sovereignty, and amount to a declaration that the Haida Nation is a foreign state, and that the Haida Gwaii are no longer not part of Canada?

The answer to this question is “no”. The act of state doctrine places limits on the justiciability of the validity of Crown assertions of sovereignty over a foreign land or people. It has been said that “it is simply not the business of Canadian judges to start dismantling the Canadian state”.¹⁷⁸ At the same time, however, recognizing Haida sovereignty would have profound significance for issues relating to legal rights and obligations *within* Canada, and these issues are within the jurisdiction of Canadian courts. Accordingly, “... it is possible to subject Crown sovereignty to critical reinterpretation without denying its existence.”¹⁷⁹ In *Sparrow*, the Supreme Court quoted with approval Professor Lyon's view that section 35 “calls for a just settlement for Aboriginal peoples” and “renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”¹⁸⁰ Hence, the act of state doctrine only prevents a court from declaring that the Haida Gwaii are outside of Canada; it cannot be used to shield the Crown from claims that do not seek to dismantle Canada but rather to unite it by furthering the reconciliation sought by section 35.

¹⁷⁸ Walters, “Morality”, *supra* note 116 at 502, citing, *inter alia*, *Vajesingji Joravarsingji and others v. Secretary of State or India in Council*, [1924] L.R. 51 Ind. App. 357 (P.C.) at 360, Lord Dunedin.

¹⁷⁹ *Ibid.* at 502-03.

¹⁸⁰ *Sparrow*, *supra* note 6 at 1105-06, citing Noel Lyon “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall L.J. 95 at 100. Walters also makes this point: *ibid.* at 503. The Supreme Court appears to have implicitly renewed its approval of Lyon's bold interpretation of section 35 in *Haida Nation*, *supra* note 2 at para. 20: “Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at pp. 1105-6”. Although Lyon is not named, the quotation of his passage straddles the pages cited and provides the best support for the proposition it is cited for.

The Australian High Court considered itself bound by Crown claims of sovereignty when it recognized native title for the first time in 1992.¹⁸¹ None of the High Court Justices dissented from Justice Brennan's description of the "act of state" doctrine as barring any dispute between the judicial and executive branches of government as to whether a territory is within the dominion of the Crown. This meant that the question of whether a territory has been acquired by the Crown is not justiciable in domestic courts, and is exclusively a matter for international law.¹⁸² Brennan J. distinguished, however, between the fact of acquisition of territory from the legal consequences of that acquisition under domestic law, such as the body of law that is in force in the new territory. The latter falls within the jurisdiction of domestic courts.¹⁸³

The position taken by the Australian High Court is consistent with English law, which accepted Crown assertions of sovereignty as conclusive even if they were inconsistent with international law.¹⁸⁴ Justice Hall addressed the act of state doctrine in *Calder*,¹⁸⁵ but he did not challenge the doctrine itself, only its application by the Court of Appeal to deny the survival of Aboriginal title after sovereignty. He found that "the Court of Appeal completely ignored the rationale of the doctrine which is no more than recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court."¹⁸⁶

According to John Borrows, Hall J.'s comments in *Calder* suggest that he would have allowed Crown assertions of sovereignty to be scrutinized if there were a treaty with an Aboriginal nation. He based this argument specifically on Hall J.'s statement that the act of state doctrine applies when a "Sovereign, in dealings with another Sovereign (by treaty of cession or

¹⁸¹ *Mabo (No. 2)*, *supra* note 4.

¹⁸² *Ibid.* at 31-32.

¹⁸³ *Ibid.* at 32.

¹⁸⁴ McNeil, *Aboriginal Title*, *supra* note 23 at 111, citing *R. v. Kent Justices* [1967] 1 All E.R. 560.

¹⁸⁵ *Calder*, *supra* note 12 at 404-06.

¹⁸⁶ *Ibid.* at 406.

conquest) acquires land.”¹⁸⁷ He discounted Hall J.’s statement that the use of the Crown’s prerogative “cannot be later challenged” as contrary to the history of parliamentary democracy’s development as an “attempt to restrict and constrain the Crown’s prerogative powers”.¹⁸⁸ Borrows also argued that the act of state doctrine must yield to the primacy of the constitution, including, in particular, constitutional principles of judicial independence and the rule of law.¹⁸⁹

In Macklem’s view, Crown claims of sovereignty must fall within the purview of domestic constitutional law because the content of Aboriginal rights recognized and affirmed in section 35(1) of the *Constitution Act, 1982* depend on the legitimacy of those claims.¹⁹⁰

The act of state doctrine did not deter Chief Justice McLachlin from scrutinizing the Crown’s assertion of sovereignty to the extent necessary to conclude that, in the absence of a treaty, Crown sovereignty was only *de facto* and not *de jure*. However, she did not deny Crown sovereignty altogether. Having recognized “pre-existing” Aboriginal sovereignty, she could have said that in the absence of a treaty Aboriginal sovereignty continued, and that there was no basis for Crown sovereignty. Instead, she recognized that that the Crown was sovereign at the same time that she described it as lacking in legal legitimacy.

The Supreme Court’s approval of Lyon’s view that courts may question sovereign claims made by the Crown offers an answer to why the act of state doctrine does not prevent the Court from questioning the legitimacy of the Crown’s sovereignty. If Lyon is right, then the act of state doctrine must yield to the constitutional entrenchment of Aboriginal rights in s. 35 at least to the extent necessary to achieve the purpose of section 35, which he described as “a just settlement

¹⁸⁷ Borrows, “Sovereignty’s Alchemy”, *supra* note 143 at 576-77, citing *Calder, ibid.* at 405. See also John Borrows, *Recovering Canada*, *supra* note 164 at 119-121.

¹⁸⁸ Borrows, “Sovereignty’s Alchemy”, *ibid.* at 577, n. 212, citing C. Hill, *The Century of Revolution, 1603-1714* (New York: Norton, 1980) at 34-74, 119-44, 221-41, 275-90.

¹⁸⁹ *Ibid.* at 578.

¹⁹⁰ Macklem, “Legal Imagination”, *supra* note 7 at 451-52.

for [A]boriginal peoples.”¹⁹¹ That is, while the act of state doctrine prevents courts from “dismantling the Canadian state”,¹⁹² for the purposes of domestic Canadian law it cannot be used to shield the Crown’s assertion of sovereignty from legal and constitutional scrutiny.

This interpretation of Lyon’s assertion is consistent with the context in which it appears. Lyon understood that one of the “ground rules” of the courts before 1982 was that Aboriginal land claims were always subject to Crown assertions of sovereignty and title, but he challenged the Supreme Court of Canada to determine Aboriginal rights in accordance with higher standards of constitutional and international law.¹⁹³ Anticipating the Supreme Court’s distinction between legality and legitimacy in *Reference re Secession of Quebec*,¹⁹⁴ Lyon argued that established legal doctrines must yield to constitutional principles and constitutional standards of legitimacy.¹⁹⁵

If the purpose of the act of state doctrine is to prevent the judiciary from interfering with executive powers over foreign policy,¹⁹⁶ then its ability to fulfill this purpose is not compromised by limiting its application to that realm. This is consistent with the Supreme Court’s conclusion that it had jurisdiction to address the question of whether Quebec has a right to secede from Canada unilaterally. The Supreme Court found that this was not a matter of “pure” international

¹⁹¹ *Sparrow*, *supra* note 6 at 1105-06, citing Lyon, *supra* note 180 at 100.

¹⁹² See *supra* note 178 and accompanying text.

¹⁹³ Lyon, *supra* note 180 at 101-102, citing Mel Watkins, *Dene Nation, The Colony Within* (Toronto: University of Toronto Press, 1977). Lyon illustrated this with a refusal of the Dene Nation of the Northwest Territories to bring their land claims before Canadian courts, which they viewed as “established by an intruding foreign government with no legitimate authority over the Dene territory.” He credited the Dene with “a full understanding of what was at stake in the intense battle to have [A]boriginal rights entrenched in the constitution.”

¹⁹⁴ [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Quebec Secession Reference*].

¹⁹⁵ Lyon, *supra* note 180 at 123-24. See also Slattery, “Imperial Claims”, *supra* note 166 at 692, who argues that with respect to the legal histories of their own countries, courts “cannot take refuge in the act of state doctrine without forfeiting their moral authority and acting as passive instruments of colonial rule. In this context, the act of state doctrine is mischievous and should be modified.”

¹⁹⁶ See Slattery, “Imperial Claims”, *ibid.*

law, which would be beyond the Court's jurisdiction.¹⁹⁷ The question did not require the Court to "purport to act as an arbiter between sovereign states or more generally within the international community."¹⁹⁸ Moreover, the Court was only giving an opinion on "certain legal aspects of the continued existence of the Canadian federation."¹⁹⁹ The Court also said that although it was wary about speculating about certain political matters, "the Reference questions are directed only to the legal framework within which the political actors discharge their various mandates."²⁰⁰ The same reasoning would allow the Court to conclude that it can question Crown assertions of sovereignty to the extent necessary to achieve the purposes of section 35.

The Supreme Court recently confirmed that not even the Crown's prerogative power over foreign relations is immune from constitutional scrutiny. In *Canada (Prime Minister) v. Khadr*²⁰¹ the Court held:

The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" ... It is a limited source of non-statutory administrative power accorded by the common law to the Crown.

...

In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* or other constitutional norms.²⁰²

Since Canada is a constitutional democracy, every exercise of governmental power must be consistent with the constitution. At the same time, courts must respect that it is the

¹⁹⁷ *Quebec Secession Reference*, *supra* note 194 at paras. 21-23, 109.

¹⁹⁸ *Ibid* at para. 109.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid*. at para. 110.

²⁰¹ 2010 SCC 3, [2010] 1 S.C.R. 44 [*Khadr*].

²⁰² *Ibid*. at paras. 34 and 36 [citations omitted].

responsibility of the executive to choose among a range of constitutional options.²⁰³ The Court concluded that the conduct of Canadian officials in the course of interrogations had contributed to Mr. Khadr's ongoing detention at Guantanamo Bay, Cuba by the United States government. This conduct violated Canada's international human rights obligations and Mr. Khadr's rights under section 7 of the *Canadian Charter of Rights and Freedoms*.²⁰⁴ The Court limited the remedy to a declaration that Mr. Khadr's *Charter* rights had been infringed. It allowed the Prime Minister's appeal of the Federal Court of Appeal's order that the Canadian government must ask the United States to return Mr. Khadr to Canada, in view of the Court's respect for the executive's prerogative powers, the limits of the Court's institutional competence and the responsibility of the executive. The Court was satisfied that the declaration would provide a legal framework for the executive to consider the appropriate action to take in respect of Mr. Khadr.²⁰⁵

If all actions of the government of a constitutional democracy must conform to the constitution then it is difficult to see why even a seizure of territory, if unconstitutional, could be saved by the act of state doctrine. However, it is not necessary, for the purpose of this analysis, to determine that question. By qualifying Crown's sovereignty as *de facto*, McLachlin C.J. was not addressing Canada's territorial integrity in the manner that this might be viewed by international law. She was only referring to deficiencies in the *legitimacy* of the sovereignty of the Crown over Aboriginal peoples and their territories, based on standards of legitimacy in Canada's constitution. Only treaties that reconcile "pre-existing Aboriginal sovereignty with assumed Crown sovereignty"²⁰⁶ can remedy those deficiencies.

²⁰³ *Ibid.* at para. 37.

²⁰⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

²⁰⁵ *Khadr*, *supra* note 201 at paras. 46-47.

²⁰⁶ *Haida Nation*, *supra* note 2 at para. 20. See also text accompanying note 160 above.

The extent to which section 35 allows assertions of Crown sovereignty to be challenged notwithstanding the act of state doctrine must be limited by the objectives of section 35 itself, which include “the reconciliation of [A]boriginal peoples and non-[A]boriginal peoples”.²⁰⁷ This means that Canada’s territorial integrity must be immune from challenge. A judicial declaration that purported to remove from Canada some of its territory, along with the Aboriginal or non-Aboriginal Canadian citizens who occupy that territory, would evoke among many Canadians negative emotions that would be inconsistent with furthering the objective of reconciliation.

Therefore, any declaration that Crown sovereignty over a particular Aboriginal nation was only *de facto* and not *de jure* would not demonstrate a deficiency in the Crown’s sovereignty in international law; it would only determine that the Crown’s assertion of sovereignty failed to meet Canadian constitutional standards of legitimacy. The consequences of this declaration and an accompanying finding that the Aboriginal nation’s “pre-existing” sovereignty remained intact would therefore be limited by their purpose and context. However, these declarations would affect the legal relationship between the Aboriginal nation and the Crown, as will be considered in chapter 4, below.

2.3 The *De Facto* Doctrine and the Rule of Law

A declaration that Canadian sovereignty over a particular territory lacks legitimacy might cause concern about the security of property and other interests in the territory. For example, would the declaration invalidate all Crown acts, such as the permission to re-open a mine that

²⁰⁷ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *infra* note 291 at para. 1.

was contested in *Taku River*, or would it jeopardize the fee simple interest of a suburban homeowner?

By characterizing the Crown's sovereignty as *de facto*, Chief Justice McLachlin has reminded us that the the *de facto* doctrine and the constitutional guarantee of the rule of law will ensure that interests based on more than a century of reliance on Crown sovereignty will not suddenly vanish. The most important precedent for protecting existing interests after existing laws are declared invalid is the Supreme Court of Canada's decision in *Reference re: Manitoba Language Rights*.²⁰⁸ Since 1890 all of Manitoba's laws had been enacted exclusively in English, contrary to mandatory constitutional requirements. This meant that all of these laws were invalid, but the Court recognized that simply declaring this, without more, would create a "legal vacuum...with consequent legal chaos in the Province of Manitoba."²⁰⁹ This would have violated the rule of law, a fundamental principle of the Constitution. The rule of law "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life."²¹⁰ Therefore, although Manitoba's laws lacked legal legitimacy they could not simply be quashed; they had to remain in place until they could be replaced with laws that were constitutionally legitimate.

The Supreme Court therefore ordered that rights and obligations that arose under Manitoba's invalid unilingual laws would continue to have the same effect as if they had arisen

²⁰⁸ [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 [*Manitoba Language Reference* cited to S.C.R.]. John Borrows has also cited *Manitoba Language Reference* in support of the proposition that if Crown assertions of sovereignty were considered invalid the rule of law would require Canadian laws to nevertheless continue in effect until they can be placed in a valid legal framework after negotiations with First Nations. See Borrows, *Recovering Canada*, *supra* note 164 at 119.

²⁰⁹ *Ibid.* at 747.

²¹⁰ *Ibid.* at 749.

under valid enactments, and that this would continue for as long as necessary for Manitoba to enact its laws in a valid form. In addition, since Manitoba needed a valid legal system while Manitoba complied with its obligations, the Court deemed all laws that would be in force but for their constitutional defect “temporarily valid”.²¹¹

In support of these measures, the Court relied on the *de facto* doctrine and the “constitutional guarantee of the rule of law”.²¹² The Court adopted Judge Albert Constantineau’s definition of the *de facto* doctrine:

The *de facto* doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and, thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage.²¹³

Accordingly, the Court found that the *de facto* doctrine protected “justified expectations” of those who had relied on the acts of administrators of invalid laws and on the efficacy of public and private corporations that owed their existence to those laws.²¹⁴ However, the doctrine did not “...validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconstitutional laws.”²¹⁵ Since the *de facto* doctrine did not validate the authority under which the acts took place, as soon as the Supreme Court rendered its judgment and

²¹¹ *Ibid.* at 758-59.

²¹² *Ibid.* at 758.

²¹³ *Ibid.* at 755, quoting A. Constantineau, *The De Facto Doctrine* (Toronto: Canada Law Book Co., 1910) at 3-4.

²¹⁴ *Ibid.* at 757.

²¹⁵ *Ibid.* at 756-57.

declared Manitoba's unilingual laws invalid, officials and entities in Manitoba could no longer derive any "colour of authority" from these laws.²¹⁶ This meant that the *de facto* doctrine could only offer a partial solution to the prospect of a legal vacuum.

Nevertheless, the Court granted temporary validity to the unilingual laws of Manitoba. It did this by combining the *de facto* doctrine with the constitutional rule of law guarantee. It stated that this guarantee would not tolerate the absence, in Manitoba, of a "valid and effectual legal system for the present and future". This guarantee required that the rights and obligations that arose under invalid Manitoba Acts and which would not be saved by the *de facto* or other doctrines²¹⁷ would have the same force they would have had if they had arisen under valid laws "for that minimum period of time during which it would be impossible for Manitoba to comply with its constitutional duty...".²¹⁸

Though in essence the Court only relied on the constitutional rule of law guarantee to expand the traditional scope of the *de facto* doctrine, it observed that "analogous support" for doing so was available in cases that applied the doctrine of state necessity, which allows governments to justify otherwise illegal conduct on the grounds of a public emergency.²¹⁹ In that situation, "...to ensure the rule of law, the Courts will recognize as valid the constitutionally invalid Acts of the Legislature."²²⁰ Courts have done this in circumstances where "a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law".²²¹ Although this doctrine has more often been invoked to uphold actions taken by the executive or

²¹⁶ *Ibid.* at 757.

²¹⁷ The Court offered *res judicata* and mistake of law as examples of other doctrines that might provide some relief from the consequences of invalid laws (*ibid.* at 757).

²¹⁸ *Ibid.* at 758.

²¹⁹ *Ibid.*

²²⁰ *Ibid.* at 758-59.

²²¹ *Ibid.* at 766.

the legislative branch of government in emergency situations, the Supreme Court found that the doctrine will also apply where the the Constitution could otherwise be used to create “chaos and disorder”,²²² and that a legal void created by judicial invalidation of unconstitutional laws can qualify as a situation of state necessity.²²³

The honour of the Crown requires the Crown to negotiate a just settlement,²²⁴ but reaching such a settlement would take some time. To preserve law and order in the interim it would not be enough to grant temporary validity to unconstitutional laws, as in *Manitoba Language Reference*, because the defect would lie not just in the validity of laws, but in the invalidity of the law-maker: in the constitutional legitimacy of the Crown’s sovereignty over the territory in question. In *Manitoba Language Reference*, the Court observed that its declaration of validity of most laws of Manitoba passed after 1890 did not affect the legality of the Manitoba Legislature or its powers, since these derive from the Constitution.²²⁵

As observed in *Haida Nation*, in the absence of a treaty the Crown can have no more than *de facto* sovereignty over territory subject to a pre-existing Aboriginal sovereign.²²⁶ If a court found that the Crown’s sovereignty over a particular territory lacked legitimacy, preserving the rule of law until a *de jure* sovereign could assume power may require granting temporary validity to the Crown’s sovereignty. Simply giving effect to invalid laws for a temporary period

²²² *Ibid.*

²²³ *Ibid.* at 764, citing *Special Reference No. 1 of 1955*, P.L.R. 1956 W.P. 598.

²²⁴ *Haida Nation*, *supra* note 2 at para. 20, citing *R. v. Sparrow*, *supra* note 5 at 1105-06.

²²⁵ *Manitoba Language Reference*, *supra* note 208 at 748, citing *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 92, 92A [en. *Constitution Act, 1982*, s. 50], 93, 95; *Manitoba Act, 1870*, s. 2. At the same time, the Court observed (at 748 and 758) that the unilingual laws granted temporary validity included laws governing the size and composition of the Manitoba Legislature, and this made it possible for the Legislature to re-enact, print and publish laws in accordance with Constitutional requirements. In this limited sense the declaration in *Manitoba Language Reference* gave temporary validity not just to laws but also to the existing government.

²²⁶ *Haida Nation*, *supra* note 2 at paras. 20 and 25, reproduced in part above, text accompanying note 160.

would not be enough, for this would confer no authority to govern. Maintaining law and order, even temporarily, requires an ability to adopt new legislation to respond to changing needs.

In *Manitoba Language Reference* the Supreme Court did not grant even temporary authority to govern in a manner that would include enacting further unconstitutional legislation. The Court expressly precluded unconstitutional Acts passed after the date of the judgment from having even temporary validity.²²⁷ However, it does not appear that Manitoba attempted to persuade the Court that it had a continuing need to legislate in English only; instead, the Court's reference to laws that had recently been enacted in both languages suggested the contrary.²²⁸ We cannot be sure, therefore, that the Supreme Court would not have allowed Manitoba to enact new unconstitutional laws if Manitoba had demonstrated a pressing need to do so.

When *Manitoba Language Reference* is considered as a whole, it provides significant support for at least a conditional power to grant temporary authority to an unconstitutional sovereign. The definition the Court quoted for the *de facto* doctrine placed recognizing the authority of unconstitutional *governments* at the heart of the *de facto* doctrine: "...[t]he *de facto* doctrine...in the first place, justifies the recognition of *the authority of governments* established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government."²²⁹ Aboriginal peoples that have not reconciled their sovereignty with the Crown's sovereignty have had their sovereignty usurped by the Crown. Even though the Crown did not conquer those peoples,²³⁰ it is prepared to back its assertions of sovereignty with force and arms. The Supreme Court also observed that

²²⁷ *Manitoba Language Reference*, *supra* note 208 at 767.

²²⁸ *Ibid.* at 766-67.

²²⁹ *Ibid.* at 755, quoting A. Constantineau, *supra* note 213 at 3-4 [emphasis added].

²³⁰ A fact acknowledged by the Supreme Court in *Haida Nation*, *supra* note 2 at para. 210.

“[l]aw and order are indispensable elements of civilized life”,²³¹ and quoted with approval the proposition that “... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions.”²³²

Leaving a power vacuum or considerable uncertainty with respect to where the authority to govern lies would bring a heightened risk of anarchy and strife, and so would not be consistent with maintaining the rule of law. Therefore, if convinced of the pressing need to give temporary validity to a *de facto* government, a Court could ground a decision to do so on analogous grounds to those applied to give temporary validity to unconstitutional laws in *Manitoba Language Reference*.

If the *de facto* doctrine was not enough to give temporary validity to unconstitutional laws in *Manitoba Language Reference*, this doctrine would not be enough to give temporary validity to an unconstitutional sovereign. To give continuing effect to either unconstitutional laws or governments, a court must invoke an enlarged *de facto* doctrine that is supported by the constitutional guarantee of the rule of law in a manner analogous to the doctrine of state necessity.²³³

Perhaps the most cogent argument in support of the ability of a court to give temporary validity to an unconstitutional sovereign is that the Supreme Court of Canada did this in *Haida Nation*. The Court noted that based on “voluminous” evidence the chambers judge had found, as “inescapable conclusions”, that the Haida had inhabited the Haida Gwaii continuously since at least 1774, and that they “had never been conquered [and] never surrendered their rights by

²³¹ *Manitoba Language Reference*, *supra* note 208 at 749.

²³² *Ibid.*, quoting E.C.S. Wade and G.G. Phillips, *Constitutional and Administrative Law*, 9th ed. by A.W. Bradley (London: Longman, 1977) at 89.

²³³ *Manitoba Language Reference*, *supra* note 208 at 758. See also above, text accompanying notes 219-223.

treaty.”²³⁴ Although the chambers judge had not reached firm conclusions on the extent to which the Haida would establish Aboriginal title, the Supreme Court noted that he thought it “fair to say that the Haida claim goes far beyond the mere ‘assertion’ of Aboriginal title”.²³⁵ The chamber judge’s findings that the Haida had never been conquered and had never surrendered their rights by treaty were particularly significant because this meant that the Haida’s pre-existing Aboriginal sovereignty had not yet been reconciled with assumed Crown sovereignty,²³⁶ that the Crown had only *de facto* control of land and resources that were formerly in the control of the Haida,²³⁷ and that the purpose of section 35(1) of the *Constitution* remained unsatisfied because prior Haida occupation had not been reconciled with *de facto* Crown sovereignty.²³⁸

In *Manitoba Language Reference* the Supreme Court carefully considered how unconstitutional unilingual laws could be granted temporary validity until the constitution could be complied with, and found that this could be done with an enlarged *de facto* doctrine. In *Haida Nation*, however, the Supreme Court took for granted that the unconstitutional, *de facto* nature of the Crown’s sovereignty over the Haida people and their territory could continue indefinitely. To be sure, the Court did not entirely overlook the lack of constitutional legitimacy of the Crown’s sovereignty, because it imposed obligations on the Crown to negotiate treaties to reconcile sovereignties,²³⁹ to fulfil “a promise of rights recognition” in section 35²⁴⁰ and to consult and, if appropriate, accommodate.²⁴¹ However, conspicuous by its absence was any overt consideration of whether the extraordinary measure of granting temporary validity to a *de facto* and

²³⁴ *Haida Nation*, *supra* note 2 at para. 69.

²³⁵ *Ibid.* at para. 70, quoting 2000 BCSC 1280, [2001] 2 C.N.L.R. 83 at para. 50..

²³⁶ See *ibid.* at para. 20.

²³⁷ See *ibid.* at para. 32.

²³⁸ See *Taku River*, *supra* note 2 at para. 42.

²³⁹ *Ibid.* at para. 20.

²⁴⁰ *Ibid.* at para. 20; accord para. 25.

²⁴¹ *Ibid.* at para. 20; accord paras. 25 and 32.

unconstitutional sovereign was justified, and, if so, for how long this could continue to be justified.

A set of criteria for granting temporary validity to unconstitutional laws was set out in *Attorney General of the Republic v. Mustafa Ibrahim*,²⁴² and these were reproduced by the Supreme Court in its discussion of this case in *Manitoba Language Reference*. The Supreme Court observed that the issue in *Ibrahim* was different from the issue it had to decide. At issue in *Ibrahim* was the validity of an unconstitutional law passed to meet the needs of an emergency, while the issue in *Manitoba Language Reference* was whether unconstitutional laws could be given temporary validity to avoid an emergency.²⁴³ Nevertheless, the Supreme Court considered it useful to quote the following conditions applied in *Ibrahim*:

- (a) an imperative and inevitable necessity or exceptional circumstances;
- (b) no other remedy to apply;
- (c) the measure taken must be proportionate to the necessity; and
- (d) it must be of a temporary character limited to the duration of the exceptional circumstances.²⁴⁴

These conditions for validating an unconstitutional law should apply at least as strongly for validating an unconstitutional sovereign. Even assuming that the first three conditions could be met in the context of *Haida Nation*, to satisfy the fourth condition a court must consider the duration of the exceptional circumstances. That is, how long will the existing *de facto* sovereign and the laws promulgated under the authority of that sovereign be allowed to remain in place? In *Manitoba Language Reference*, the Court concluded that the unconstitutional laws could remain effective for only “the minimum period necessary for translation, re-enactment, printing and publishing of the unilingual Acts of the Manitoba legislature” and reserved the issue of how long

²⁴² [1964] Cyprus Law Reports 195 (Cyprus Court of Appeal) [*Ibrahim*].

²⁴³ *Manitoba Language Reference*, *supra* note 208 at 762-63.

²⁴⁴ *Ibid.* at 762-63, citing *Ibrahim*, *supra* note 242 at 265.

constitutionally invalid laws could remain in place.²⁴⁵ The Court later determined that question based on an agreement between the parties and the interveners.²⁴⁶ The length of time complex negotiations will take cannot be known from the outset, but as in *Manitoba Language Reference* the time the temporary validity is allowed to continue should remain within the supervision of the Court and limited to the minimum time necessary to correct the constitutional deficiency and in a manner consistent with the constitutional guarantee of the rule of law.

Another important issue is whether the *de facto* doctrine will extend permanent protection to vested third party interests, and this will be addressed further in Chapter 4. In *Manitoba Language Reference*, the Supreme Court found that the doctrine saved “rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts...by public and private bodies corporate, courts, judges, persons exercising statutory authority powers and public officials. *Such rights, obligations and other effects are, and will always be, enforceable and unassailable.*”²⁴⁷ According to the Court, the doctrine only protected the reliance of third parties on official acts, not the invalid laws themselves.²⁴⁸ However, Dale Gibson and Kristin Lercher suggest that the doctrine extends to all *legal consequences* of invalid laws.²⁴⁹ In the United States, for example, Confederate governments were referred to as ‘*de facto*’ governments and the protection given to the actions of *de facto* public officers was extended to the consequences of laws enacted by *de facto* governments.²⁵⁰

²⁴⁵ *Ibid.* at 768-69.

²⁴⁶ See supplemental reasons to *Manitoba Language Reference*, *supra* note 208, at [1985] 2 S.C.R. 347, 26 D.L.R. (4th) 767.

²⁴⁷ *Manitoba Language Reference*, *supra* note 208 at 756-57 [emphasis added].

²⁴⁸ *Ibid.* at 757.

²⁴⁹ Dale Gibson and Kristin Lercher, "Reliance on Unconstitutional Laws: The Saving Doctrines and Other Protections" (1986) 15 Man. L.J. 305.

²⁵⁰ *Ibid.* at 314, citing *United States v. Insurance Companies*, 89 U.S. 99 (1874) at 101.

2.4 The Duty to Consult and the Equality Paradigm

So far, this discussion of *Haida Nation* and *Taku River* has focussed on the Supreme Court's treatment of sovereignty, in particular its description of Crown sovereignty as only *de facto*, and the Court's requirement for treaties to reconcile Crown sovereignty and Aboriginal sovereignty. However, together with *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*²⁵¹ these cases are best known for their contribution to the foundations of the Crown's duty to consult.

Others have written about the duty to consult, and this paper will not attempt to canvas all of its implications,²⁵² nor will it consider all of the possible theoretical foundations for this emerging doctrine.²⁵³ Instead, this discussion will posit that it was no accident that issues of sovereignty and the duty of consult coincided in *Haida Nation* and *Taku River*. These issues are linked because the duty to consult and accommodate is a direct result of the Crown's unilateral assertion of sovereignty over Aboriginal nations.

In *Haida Nation*, McLachlin C.J.C. explained that the duty to consult Aboriginal peoples and accommodate their interests "is grounded in the honour of the Crown".²⁵⁴ In turn, the Crown's obligation to treat Aboriginal peoples honourably flows from its assertion of sovereignty over those peoples and their territories:

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the

²⁵¹ *Infra* note 291.

²⁵² See e.g. Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009), and Sarah Burningham, "Relationships and Remedies: How the Duty to Consult Can Contribute to a Renewed Aboriginal-Crown Relationship", Johnson Shoyama School of Public Policy, online: <<http://www.schoolofpublicpolicy.sk.ca/research/Student-Public-Policy-Essay.php>>.

²⁵³ On this question, see Newman, *ibid.*, at 15-22.

²⁵⁴ *Haida Nation*, *supra* note 2 at para. 16.

assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).²⁵⁵

This reinforces what the Court had already said about the need to reconcile Crown sovereignty with Aboriginal sovereignty in the pivotal passages in paragraphs 20 and 25 of *Haida Nation* quoted above.²⁵⁶ By recognizing Aboriginal sovereignty and by acknowledging that Crown sovereignty lacked constitutional legitimacy the Court contradicted the rights paradigm. Consequently, it was appropriate for the Court to consider whether remedies available for rights enforcement would be adequate when the need to "reconcile sovereignties" implied that the conflict was between competing claims of *jurisdiction* over land and resources.

McLachlin C.J.C. acknowledged that the Haida could seek an interlocutory injunction for breach of an alleged Aboriginal right, but she also found that this may not be an adequate or optimal remedy. She allowed that an injunction "may not capture the full obligation on the government alleged by the Haida".²⁵⁷ Moreover, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests." For these and other reasons, she concluded that interlocutory injunctions would not adequately secure Aboriginal interests.²⁵⁸

²⁵⁵ *Ibid.* at para 32 [emphasis added by McLachlin C.J.C.]

²⁵⁶ *Haida Nation*, *supra* note 2 at paras. 20 and 25, quoted above, text accompanying note 160.

²⁵⁷ *Haida Nation*, *supra* note 2 at para. 14.

²⁵⁸ *Ibid.*

Thus, by asserting sovereignty and taking control of land and resources formerly in control of an Aboriginal people the Crown has assumed a duty to act honourably. The Supreme Court appears to take for granted that the Crown's *de facto* sovereignty is sufficient to allow it to continue to govern until a treaty can reconcile the competing sovereignties, though, as discussed above, this position may be defensible as consistent with the constitutional guarantee of the rule of law. In the meantime, in its exercise of *de facto* control the Crown must have due regard to the interests of the Aboriginal people whose sovereignty has never been legitimately relinquished or compromised. This must happen immediately, and cannot await the negotiation of a treaty or proof of an Aboriginal right:

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.²⁵⁹

Although the Court is still using the language of "rights and title", the duty to consult and accommodate is a remedy that befits the Court's recognition of a clash of jurisdiction between sovereign peoples. One is the Aboriginal nation that has a constitutionally protected claim to continuing sovereignty, and the other is the Canadian state that is in *de facto* control but lacks a treaty that could lend constitutional legitimacy to that control. This state of affairs obligates the Crown to negotiate a treaty – and in the meantime it must respect the legitimate interests of the

²⁵⁹ *Ibid.* at para. 33.

Aboriginal nation.²⁶⁰ These obligations flow from the honour of the Crown, which the Court has described as a constitutional principle in its own right.²⁶¹

2.5 Aboriginal Sovereignty Today

The proposition that Aboriginal sovereignty can be part of the federal fabric of Canada, interwoven with federal and provincial sovereignty, is neither new nor radical.²⁶² In fact, it is more than a proposition; it is already embodied in the Canadian constitution. In *Campbell v. British Columbia (Attorney General)*, the British Columbia Supreme Court rejected a constitutional challenge to the Nisga'a Final Agreement and the settlement legislation passed by Parliament and the Legislative Assembly of the Province of British Columbia, and found that the Agreement constituted a "treaty" under section 35 of the *Constitution Act, 1982*.²⁶³ The plaintiffs alleged that the treaty violated the Constitution because it purported to give the Nisga'a government legislative jurisdiction. The treaty provided for limited circumstances in which laws made by the Nisga'a government would prevail over federal or provincial laws.²⁶⁴

²⁶⁰ See also *Rio Tinto*, *supra* note 14 at para. 48: "The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are under way."

²⁶¹ *Beckman*, *supra* note 14 at para. 42.

²⁶² See above, notes 164 to 167 and accompanying text.

²⁶³ 2000 BCSC 1123, 79 B.C.L.R. (3d) 122, at para. 185 [*Campbell*]. Williamson J. concluded at *ibid.*, para. 183, that limitations set out in the Nisga'a Final Agreement and the limited guarantee of s. 35 meant that the Nisga'a government did not have "absolute or sovereign powers". However, since the Agreement is protected by s. 35 and allows some Nisga'a laws to prevail over the laws of other Canadian governments it seems to set out the terms upon which sovereignty will be shared.

²⁶⁴ *Ibid.* at para. 12. Nisga'a laws that can prevail over federal or provincial laws relate to matters that concern Nisga'a identity, culture, education, the use of land and resources, and the means by which decisions will be made. However, some of those laws, such as laws concerning child welfare and education, only prevail if they are consistent with comparable standards established by Parliament, the Legislative Assembly, or administrative tribunals, as applicable, *ibid.* at paras. 45-46.

The most significant challenge to the jurisdiction of the Nisga'a government²⁶⁵ alleged that the power to make laws that prevail over federal or provincial laws was unconstitutional because the *Constitution Act, 1867*²⁶⁶ had distributed all legislative power between Parliament and the legislative assemblies, and that this distribution was "exhaustive". Therefore, the plaintiffs argued, an Aboriginal government could not make laws that prevailed over federal or provincial laws without first amending the constitution to authorize this.

The Court found that the distribution of powers in the *Constitution Act, 1867* was limited to powers that had previously belonged to the provinces, and no more.²⁶⁷ It found support for this in *Mitchell v. Peguis Indian Band*,²⁶⁸ where Dickson C.J. said that the relationship between Aboriginal peoples and the sovereign had never depended on who the particular representatives of the Crown were. Dickson said that "... federal-provincial divisions that the Crown has imposed on itself are internal to itself"²⁶⁹ and therefore these divisions could not alter the relationship between the sovereign and Aboriginal peoples.²⁷⁰

Therefore, there is no constitutional barrier to judicial recognition of the sovereignty of an Aboriginal nation. Nevertheless, some non-Aboriginals may still be apprehensive; they may

²⁶⁵ The plaintiffs also alleged that the legislative powers of the Nisga'a violated the concept of royal assent, and violated section 3 of the *Charter*, *supra* note 204, by denying non-Nisga'a Canadian citizens that are subject to Nisga'a laws the right to vote for the members of the institutions that make those laws, or to stand as candidates for election to those institutions. The court also rejected these submissions.

²⁶⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5.

²⁶⁷ *Campbell*, *supra* note 263 at paras. 71, 73-76, citing *Ontario (Attorney General) v. Canada (Attorney General)*, [1912] A.C. 571 (P.C.) at 584 and *Maritime Bank (Liquidators of) v. New Brunswick (Receiver General)*, [1892] A.C. 437 (P.C.), at 441-42.

²⁶⁸ [1990] 2 S.C.R. 85 at 108-09, 71 D.L.R. (4th) 193 [*Peguis Indian Band*].

²⁶⁹ *Campbell*, *supra* note 263 at para. 80, quoting *Peguis Indian Band*, *ibid.*

²⁷⁰ *Ibid.*

worry about the costs of reconciling this sovereignty with *de facto* Crown sovereignty, or they may fear that the negotiations themselves might “destabilize the state”.²⁷¹

The concern about the costs of recognizing Aboriginal sovereignty must be weighed against the importance of respecting constitutional principles and the value in having a foundation for the Canadian state consistent with the principle of the equality of peoples. Canada and its imperial predecessors chose long ago to pave the way for settlement by treating with Aboriginal nations instead of attempting to conquer them in war. This was a wise choice, but the project of honourable treaty making remains incomplete.

In his classic article *Original Indian Title*, Felix S. Cohen debunked the myth that the history of land settlement in the United States was a history of “whole-sale robbery.”²⁷² Although Cohen acknowledged that the record is not without its “dark pages”, it also reflected a policy that recognized Aboriginal property rights and purchased land from Aboriginal peoples with their consent.²⁷³ He observed that the policy of purchase persisted even after the military strength and numbers of the settlers might have enabled them to take the land by force. He attributed the continuation of this policy in spite of this shift in power to “our national proclamation that all men were created equal”.²⁷⁴

American purchases of Indian lands often came at a high price to the federal treasury. In 1835, the federal government spent 5 million dollars, out of a total annual budget of only 17.6

²⁷¹ Michael Ash has acknowledged that such fears would follow an acknowledgement that Canadian sovereignty must derive from honourable negotiations with Indigenous nations. However, he showed that there is good reason for optimism, and for believing that Aboriginal peoples seek to negotiate a permanent relationship based on sharing. He illustrated this with a quote from a Dene leader that contrasted Dene goals with those of separatists in Quebec: “While others are trying to negotiate their way out of Confederation, we are trying to negotiate our way in.” Ash, “Affirmation”, *supra* note 387 at 36-37, citing M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen Publishers, 1984) at 105.

²⁷² *Supra* note 45 at 34-43.

²⁷³ *Ibid.* at 36-37, 42.

²⁷⁴ *Ibid.* at 41.

million dollars, to purchase a tract of land from the Cherokee.²⁷⁵ Cohen observed that the expenditures made for the sake of fair dealing with Indians were probably the wisest investments the United States could ever have made. They "...cemented the loyalty of Indians to the United States, a loyalty which has been an important factor in every war we have fought, and as well in all our years of peace...Each year Indian contributions to our economy run to many times the amount we have paid the Indians for their lands..."²⁷⁶

Similarly, gains for Aboriginal peoples in Canada will benefit the greater Canadian society. Recent Canadian history has produced ample evidence of this. In 1992, the Saskatchewan and federal governments concluded the Treaty Land Entitlement Framework Agreement with twenty-eight entitlement bands. It settled unfulfilled promises of land under Treaties 4 and 6, as well as illegal or unethical government conduct that had resulted in reserve land being expropriated without compensation. The Agreement included \$445 million in compensation, which entitlement bands could use to purchase additional reserve land from private owners or the Crown. The Agreement allowed some of the land to be purchased in urban municipalities, and included a procedure for establishing reserves in urban centres.²⁷⁷

Entitlement bands viewed urban reserves as instruments of economic and social development, that would facilitate new employment opportunities and enhanced services to band members.²⁷⁸ These hopes are being realized, together with a 'bonus' of benefits to the larger

²⁷⁵ *Ibid.* at 42 and note 28, citing the Treaty of December 29, 1835, 7 Stat. 478 and Report of Secretary of the Treasury (1946), p. 366.

²⁷⁶ *Ibid.* at 46.

²⁷⁷ F. Laurie Barron & Joseph Garcea, "The Genesis of Urban Reserves and the Role of Governmental Self-Interest" in F. Laurie Barron & Joseph Garcea, eds., *Urban Indian Reserves: Forging New Relationships in Saskatchewan* (Saskatoon: Purich Publishing, 1999) 22 at 25.

²⁷⁸ Joseph Garcea, "The FSIN and FSIN/SUMA Task Force Reports: Purposes, Processes and Provisions" in Barron & Garcea, *ibid.*, 132 at 145.

community. Municipal leaders from Prince Albert and Saskatoon have hailed the social and economic benefits that urban reserves have brought to their communities.²⁷⁹

The mutuality of interests exemplified by the Saskatchewan experience with land claims settlement and urban reserves helps to dispel the popular notion that Aboriginal peoples and the larger society have competing values that will inevitably lead to conflicts over land use and resource management, because Aboriginal peoples are opposed to “development”.²⁸⁰

Another well-known example of conflict dissolving into co-operation once Aboriginal interests are respected and Aboriginal peoples are accepted as partners is the Mackenzie Valley natural gas pipeline project. Aboriginal opposition stopped this massive development proposal in the 1970s, but the project has now been revived as a business partnership between the Aboriginal Pipeline Group, the Mackenzie Valley Aboriginal Pipeline Corporation and four oil and gas companies.²⁸¹ Therefore, while it is true that Aboriginal peoples typically feel a strong bond to the land and have an ethic of stewardship, they also seek development to improve their economic and social conditions. Conversely, Canadian society as a whole is increasingly recognizing the need for stewardship of the natural environment and the importance of a healthy ecology.

²⁷⁹ Denton Yeo, “Municipal Perspectives from Prince Albert” in Barron & Garcea, *ibid.*, 177 at 179; Marty Irwin, “Municipal Perspectives from Saskatoon” in Barron & Garcea, *ibid.* 213 at 223. Irwin, *ibid.*, observed that urban reserves have enhanced the co-operation of governmental, non-governmental and Aboriginal representatives in social development initiatives that benefited both Aboriginal and non-Aboriginal populations.

²⁸⁰ See, e.g. Verónica Potes, “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” (2006) 17 J. Env. L. & Prac. 27 at 39-40. I am not suggesting that this conflict does not exist in the context discussed by Potes, in which the rights of an Aboriginal nation over its territory are limited to being consulted and accommodated. This limits the Aboriginal nation to a reactive role, since it lacks authority to initiate and govern. This power imbalance probably plays a greater role in engendering this sort of conflict than different views about the value of development.

²⁸¹The four oil and gas companies and the Aboriginal Pipeline Group (APG) have agreed to be co-owners of the pipeline. The APG was formed to represent the interests of Aboriginal peoples of the Northwest Territories and would operate in conjunction with related organizations. Participating Aboriginal Peoples include the Deh Cho, Sahtu, Gwich’in and Inuvialuit. See Mackenzie Gas Project, “Who We Are” Information Sheet (January 2004), online: <<http://www.mackenziegasproject.com>> and “The Mackenzie Valley pipeline”, CBC News (12 March, 2007), online: <http://www.cbc.ca/news/background/mackenzievalley_pipeline/index.html>.

Recognizing Aboriginal sovereignty will also demonstrate respect for the right of Aboriginal peoples to self-determination, and this will strengthen the legitimacy of Canada's territorial integrity in the eyes of international law. In *Reference re Secession of Quebec*, the Supreme Court found that the right of a people to self-determination is now so entrenched that it has a status beyond 'convention' "...and is considered a general principle of international law."²⁸² The Supreme Court found that "peoples" that have this right may consist of only a portion of the population of an existing state that share a common culture and language. Normally, a people will realize its right to self-determination, including pursuit of its political, economic, social and cultural development, within an existing state. However, a right to external self-determination, which includes the establishment of an independent state, can arise under some extraordinary circumstances. It may be claimed by peoples under colonial rule or foreign occupation, whose "... 'territorial integrity', all but destroyed by the colonialist or occupying [p]ower, should be fully restored..."²⁸³

There is little doubt that Aboriginal peoples in Canada have a right to self-determination under international law, a right recently underlined by article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²⁸⁴ It is not clear whether the

²⁸² *Quebec Secession Reference*, *supra* note 194 at para. 114, citing Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 171-72 and Karl Doehring, "Self-Determination", in Bruno Simma, ed., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994) at 70. For discussion of the right of Aboriginal peoples in Canada to self-determination in international law and after the *Quebec Secession Reference* see also Borrows, "Sovereignty's Alchemy", *supra* note 143 at 594-96, Borrows, *Recovering Canada*, *supra* note 164 at 135-37 and Paul Joffe, "Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec", (2000) 45 McGill L.J. 155 at 174-188.

²⁸³ *Ibid.* at paras. 124, 126, 131, quoting Cassese, *supra* note 282 at 334.

²⁸⁴ GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/61/L.67 (2007). This resolution was opposed by Canada and only three other countries. The Government of Canada has since publicly endorsed the *Declaration*: see "Canada's

circumstances of Canada's Aboriginal peoples support a right to external self-determination. The answer may well depend on Canadian law and the Canadian government. International law entitles a state to maintain its territorial integrity and to have that integrity recognized by other states so long as its government "represents the whole of the people or peoples resident within its territory, *on the basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements.*"²⁸⁵ Sheltering Crown assertions of sovereignty over Aboriginal peoples from scrutiny and then allowing those assertions to limit Aboriginal rights does not treat those peoples "on the basis of equality" and does not respect their right of internal self-determination. Accordingly, adopting an equality paradigm that places Crown and Aboriginal sovereignty on an equal footing would strengthen the support for its territorial integrity that Canada can expect from international law.

Recent criticism of Canada's record by two United Nations committees should concern Canada. The United Nations Human Rights Committee expressed concerns that RCAP's recommendations have not been implemented, and noted that RCAP observed that Aboriginal governments would not be viable without a greater share of lands and resources. The Committee emphasized that the right of self-determination required that all peoples must be able to "...freely dispose of their natural wealth and resources and must not be deprived of their own means of subsistence." The Committee on the Elimination of Racial Discrimination stated that it was concerned that Aboriginal peoples were experiencing difficulties establishing Aboriginal title over land, and that no Aboriginal group had yet proven Aboriginal title.²⁸⁶

Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", online: Indian and Northern Affairs Canada <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>>.

²⁸⁵ *Quebec Secession Reference*, *supra* note 194 at para. 130 [emphasis added].

²⁸⁶ Paul L.A.H. Chartrand, "R. v. Marshall; R v. Bernard: The Return of the Native" (2006) 55 U.N.B.L.J. 135 at 144-45, citing United Nations, *Convention on Civil and Political Rights* (Human Rights Committee, Sixty fifth

Crown assertions of sovereignty can only be legitimate, and “sovereignties reconciled” after negotiations founded on principles consistent with the equality of peoples. Compared to litigation, negotiation also provides more flexibility for crafting mutually acceptable outcomes that enhance the relationship between the parties, and poses fewer risks to societal peace. A framework that focuses on rights rather than sovereignty tends to force courts to resolve conflicts between Aboriginal rights claims and other interests. Solutions imposed by courts tend to create winners and losers, and may not necessarily be conducive to furthering reconciliation.²⁸⁷

2. 6 The Supreme Court and the Equality Paradigm Since *Haida Nation* and *Taku River*

If the statements about sovereignty in *Haida Nation* and *Taku River* marked such a fundamental shift in Aboriginal law, why is this not obvious in all of the Court’s subsequent decisions on Aboriginal rights?

Most likely, this is just due to the method of the common law. As McLachlin J. (as she then was) said in *Van der Peet*, “legal principles evolve on an incremental, pragmatic basis.”²⁸⁸ This would also be consistent with Cass Sunstein’s advice that when confronted with “nationally crucial issues” the courts should act as catalysts for democratic debate and deliberation instead of attempting to settle debates with sweeping decisions.²⁸⁹ In three of the decisions that are of

session CCPR/C/79/Add.105, 7 April 1999) at para. 8, and United Nations, *Convention on the Elimination of Racial Discrimination* (Committee on the Elimination of Racial Discrimination, Sixty-first session (5-23 Aug. 2002), A/57/18) at para. 330. See also Jennifer E. Dalton, “Aboriginal Self-Determination in Canada: Protection Afforded by the Judiciary and Government” (2006) 21Can. J.L. & Soc. 11 at 24-28.

²⁸⁷ Brian Slattery appears to share this view. He warns that applying historical Aboriginal title rights in a modern context without regard for the broader social impact would “...remedy one grave injustice by committing another.” See discussion below, especially text accompanying note 340, citing Slattery, “Metamorphosis”, *supra* note 16 at 282.

²⁸⁸ *Van der Peet*, *supra* note 47 at para. 261.

²⁸⁹ Cass R. Sunstein, “The Dred Scott Case, With Notes on Affirmative Action, the Right to Die, and Same-Sex Marriage” (1997) 1 Green Bag 2d 39 at 52-53.

interest, *R. v. Marshall*; *R. v. Bernard*,²⁹⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*²⁹¹ and *R. v. Sappier*; *R. v. Gray*,²⁹² it was not necessary for the Court to consider the legitimacy of assertions of Crown sovereignty, and the court did not comment on this issue. None of these cases involved an Aboriginal nation that had not signed any treaty with the Crown. Although an existing treaty is consistent with the continuation of Aboriginal sovereignty, it suggests that at least some degree of mutual recognition and reconciliation of sovereignties has occurred.

The Supreme Court's two most recent decisions that consider the foundations of Aboriginal law disclose further indications of a paradigm shift. In both *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*²⁹³ and *Beckman v. Little Salmon/Carmacks First Nation*²⁹⁴ the court applies and refines the duty to consult, a doctrine that is consistent with an equality paradigm. The Court's language and approach to the issues continues to demonstrate a shift away from the old rights paradigm, most notably with the approval the Court expressed for Brian Slattery's theory of a "generative" constitutional role for section 35.²⁹⁵

2.6.1 Marshall/Bernard

Marshall/Bernard concerned members of the Mi'kmaq people in Nova Scotia and New Brunswick who had been charged with violating provincial legislation by engaging in commercial logging on Crown lands without authorization. The accused defended these charges on the grounds that their activities came within the scope of the treaty rights or Aboriginal title rights of the Mi'kmaq people. There was no suggestion that the "Peace and Friendship" treaties

²⁹⁰ *Supra* note 123.

²⁹¹ 2005 SCC 69; [2005] 3 S.C.R. 388 [*Mikisew Cree*].

²⁹² 2006 SCC 54, [2006] 2 S.C.R. 686 [*Sappier/Gray*].

²⁹³ *Supra* note 14.

²⁹⁴ *Supra* note 14.

²⁹⁵ *Rio Tinto*, *supra* note 14 at para. 38.

between the Mi'kmaq and the British Crown had ceded land. Nevertheless, the Supreme Court found that the convictions entered by the trial judges should be upheld because the evidence of occupation did not establish Aboriginal title. Sovereignty was not in issue because, by definition, Aboriginal title is a burden on the *Crown's* underlying title. The date of the Crown's assertion of sovereignty was relevant to the analysis, however, because the test for occupancy is applied as of that date. Hence, the Court observed that the courts below had accepted that the British had established sovereignty in the middle of the 18th century.²⁹⁶

The Supreme Court's decision in *Marshall/Bernard* has been criticized for giving insufficient weight to Aboriginal laws and perspectives.²⁹⁷ This reminds us of the difficulties that courts face when attempting to determine rights in land by applying an inequitable doctrine that straddles two different legal systems and cultural perspectives.²⁹⁸ If it were acknowledged that Aboriginal title claims are really conflicts between competing sovereignties, then it would be apparent that the issues between the sovereigns can only be resolved through negotiations. The court's role would be limited to recognizing that Aboriginal sovereignty continues, and to providing a framework for negotiations that defines the rights and duties of the parties until a settlement is reached (see Chapter 4, below). This would be consistent with Justice LeBel's observation that the questions of Aboriginal title and access to resources are complex, and are important to all communities in New Brunswick and Nova Scotia. He wrote that all interested

²⁹⁶ *Marshall/Bernard*, *supra* note 123 at para. 71.

²⁹⁷ See Nigel Bankes "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006) 55 U.N.B.L.J. 120; Chartrand, *supra* note 286, and Kent McNeil "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L. Rev. 281.

²⁹⁸ See Smith, *supra* note 141 at 4-5, 15-16 and above, text accompanying note 141.

parties should have an opportunity to be involved in any litigation or negotiation, and that summary conviction proceedings are not well-suited to resolving these issues.²⁹⁹

2.6.2 Mikisew Cree and Sappier/Gray

If *Haida Nation* and *Taku River* truly mark a new approach to section 35, then the Court's previous focus on Crown sovereignty in its formulation of the section's purpose³⁰⁰ needs a more egalitarian and inspiring replacement. A year later, the Court appeared to offer the needed makeover in the first paragraph of its judgment in *Mikisew Cree*. Justice Binnie, delivering the judgment of the Court, stated that "[t]he fundamental objective of the modern law of [A]boriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."³⁰¹

Unfortunately, another year later, in *Sappier/Gray*³⁰² the Court did not repeat Justice Binnie's formulation of the purpose of s. 35. Moreover, Justice Bastarache repeated the "reconciliation with the sovereignty of the Crown" formulation. Perhaps this was another instance where exclusive Crown sovereignty was accepted without reflection because of the facts and issues of the two appeals that the Court heard together. The three respondents were individual Aboriginal persons who had been charged with unlawfully possessing or cutting Crown timber. The Supreme Court upheld their defence of these charges based on an Aboriginal right to harvest wood for personal use that was exercised on lands that their respective First Nations had traditionally harvested. Therefore, although the respondents invoked their rights as members of Aboriginal groups, they did so in a manner that was consistent with the existing

²⁹⁹ *Marshall/Bernard*, *supra* note 123 at para. 144.

³⁰⁰ See *supra* note 154 and accompanying text.

³⁰¹ *Mikisew Cree*, *supra* note 291 at para. 1.

³⁰² *Supra* note 292.

rights paradigm. Moreover, the respondents had also advanced a treaty right to harvest timber. The Supreme Court did not have to decide the validity of this argument because one of the respondents had not pursued it on appeal and because the Court considered it unnecessary to do so for the others since it had found in favour of the claimed Aboriginal right. The Court also observed that the Crown had admitted that the latter defendants were the beneficiaries of valid treaties, and that the defendants relied on this admission.³⁰³ While it would be wrong to assume that a treaty extinguishes the sovereignty of either party to the treaty, it is reasonable to view it as a signal that some reconciliation of sovereignties has occurred. In sum, the issues and the factual context of these cases made it much less likely that the Court would consider sovereignty than in the context of *Haida Nation*. In *Haida Nation* there was no treaty and an Aboriginal title claim was brought in the context of a jurisdictional dispute between the Crown and an Aboriginal people over the management of resources.

On closer examination, however, *Sappier/Gray* reveals a formulation of the purpose of section 35 that elevates the discussion beyond just a preoccupation with rights that remain in the face of Crown sovereignty to a focus on the territory and jurisdiction of Aboriginal nations. In *Van der Peet*³⁰⁴ the Supreme Court had said that to qualify as an Aboriginal right, an activity had to be "...an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right".³⁰⁵ The limitations of the *Van der Peet* test were criticized by separate dissenting reasons of Justices L'Heureux-Dubé and McLachlin (as she then was), and by academics.³⁰⁶ A common criticism was that limiting Aboriginal rights to activities that were

³⁰³ *Ibid.* at paras. 62-63.

³⁰⁴ *Supra* note 47.

³⁰⁵ *Ibid.* at para. 46.

³⁰⁶ See e.g. John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37; Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in

integral to an Aboriginal culture prior to first contact with Europeans was too restrictive. In *Sappier/Gray* Justice Bastarache stated that the *Van der Peet* analysis needed flexibility “because the object is to provide cultural security and continuity for the particular [A]boriginal society.”³⁰⁷ He also offered the first explanation of what the Court means by “culture” in this context,³⁰⁸ and explained that this refers to “...an inquiry into the pre-contact way of life of a particular [A]boriginal community, including *their means of survival, their socialization methods, their legal system, and, potentially, their trading habits.*”³⁰⁹ Further, a practice undertaken for survival purposes, such as sustenance, can meet the test, although it would be the distinctive “*means of sustenance*”, not sustenance itself, that could qualify as integral to a distinctive culture.³¹⁰

Justice Bastarache’s reformulation of the *Van der Peet* test enjoyed the unanimous support of the Court. It recognized that section 35 protects the cultural security of these societies, including their means of survival and their legal system.³¹¹ However, the Court continued to limit its discussion, as it did before *Haida Nation* and *Taku River*, to Aboriginal *societies* without recognizing that these societies were *nations*. This seems to ignore that the elements of culture identified by the court, especially the society’s means of survival and its legal system, depend on the society’s jurisdiction over its territory, which is an incident of sovereignty. The best way to protect the culture of an Aboriginal nation is to recognize that nation’s sovereignty.

R. v. Pamajewon (1997) 42 McGill L.J.1011 at 1030-37; Russell, "High Courts", *supra* note 99; Kent McNeil, "The Inherent Right of Self-Government: Emerging Directions for Legal Research," research paper prepared for the First Nations Governance Centre, November, 2004 at 3-5, online: National Centre for First Nations Governance <<http://www.fngovernance.org/pdf/KentMcNeilInherent0105.pdf>> [McNeil, "Emerging Directions"].

³⁰⁷ *Sappier/Gray*, *supra* note 292 at para. 33.

³⁰⁸ See Neil Vallance, “The misuse of ‘culture’ by the Supreme Court of Canada” in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97.

³⁰⁹ *Sappier/Gray*, *supra* note 292 at para. 45 [emphasis added].

³¹⁰ *Ibid.* at paras. 35-38 [emphasis in original].

³¹¹ According to Brian Slattery, *Sappier/Gray* affirmed a right of livelihood, which he described as an “intermediate generic right”, which is included in the “generic right of cultural integrity.” See Slattery, “Generative Structure”, *supra* note 16 at 608-09.

Perhaps the Court was not prepared, without more evidence, to accept the proposition that all pre-contact Aboriginal societies were sovereign nations with jurisdiction over territory. If so, two responses to this can be offered. The first is that more evidence for this proposition is not needed because its truth is self-evident and has already been implicitly acknowledged by the Court. The second response is that the court's hesitancy to acknowledge that all Aboriginal societies are nations can be overcome by bridging the gap between the disciplines of law and anthropology so that the former can recognize what the latter has demonstrated.

Support for the first response is outlined by Brian Slattery, who has demonstrated that Aboriginal societies have a right to their territories. This right flows from the "Principle of Territoriality", which holds that "every human society whose members draw the essentials of life from territories in their possession ...has a right to these territories as against other societies and individuals."³¹² He defends this principle on the grounds that were it untrue, then a society would not have the right to protect its territories, even though they are essential to the survival of the society. This, however, would violate fundamental rights to life and to the "necessaries of life".³¹³ Slattery elaborates that we know that the well-being of all individuals is integrally connected to their membership in a social group. To advance the well-being of its members, a social group must have the capacity to act in the interests of its members and to defend them from attack. Hence, Aboriginal societies "had rights to the territories they occupied at the time of European contact, to the extent they needed them to survive and flourish..."³¹⁴

³¹² Slattery, "Imperial Claims", *supra* note 166 at 697.

³¹³ *Ibid.* at 697-98.

³¹⁴ *Ibid.* at 697-99. For an illuminating discussion of the weaknesses of "prior occupation" as a rationale for ownership in the context of Aboriginal title claims see Dwight G. Newman, "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2007) 44 *Alta. L. Rev.* 779. Newman argues that prior occupation "serves and ought to serve as a proxy for community connections to land, which should be the primary matter at stake." This appears to fit well with the formulation of the purpose of Aboriginal rights in

The Supreme Court implicitly accepted Slattery's view in *Haida Nation*, when it acknowledged "pre-existing Aboriginal sovereignty" and called for honourable negotiations and treaties to reconcile sovereignties. We ordinarily understand both sovereignty and the capacity to enter into treaties as residing in nations or states that have jurisdiction over territories.³¹⁵

In her dissent in *Van der Peet*, Justice McLachlin (as she then was) had already expressed the view that Aboriginal peoples have a right not to be deprived of their territories. She said that a "fundamental understanding – the *Grundnorm* of settlement in Canada – was that the [A]boriginal people could only be deprived of the sustenance they derived from the land and adjacent waters by solemn treaty with the Crown" on terms that would provide a replacement source for their livelihood.³¹⁶ Here, too, McLachlin J. posits a right of Aboriginal peoples not to be deprived of their territories without consent. Her use of the term "*Grundnorm*" is revealing, because of its association with the work of Hans Kelsen, a legal theorist in the area of international law. He used this term to denote the most "fundamental norm", or "norm of norms" and it reflects an ideology of a state based on the rule of law.³¹⁷ This is consistent with an interpretation of her later comments in *Haida Nation* and *Taku River* that Crown sovereignty is not constitutionally valid unless based on a treaty.

Sappier/Gray – to provide "cultural security and continuity" for the Aboriginal society. Both conceptions appear to capture some features of why an Aboriginal nation would wish to preserve its territory. See also Patrick Macklem, "Distributing Sovereignty", *supra* note 7 at 1327-1335, who also rejected prior occupancy as providing a theoretical foundation for Aboriginal government, but considered prior sovereignty to be a stronger candidate.

³¹⁵ Justice Bastarache implicitly accepted the continued existence of Aboriginal sovereignty and territories in *R. v. Kapp*, 2008 SCC 41 at para. 103, [2008] 2 S.C.R. 483. He concurred with the result reached by the majority but departed from their reasons by applying section 25 of the *Charter*. In his view, the shield offered by this section against *Charter* scrutiny should protect "interests associated with [A]boriginal culture, territory, sovereignty or the treaty process."

³¹⁶ *Van der Peet*, *supra* note 47 at para 272 [emphasis in original].

³¹⁷ Norberto Bobbio & Danilo Zolo, "Hans Kelsen, the Theory of Law and the International Legal System – A Talk" online: (1998) 9 E.J.I.L. 355 at 1-2 (PDF).

The second response to the Supreme Court's hesitancy to acknowledge that all Aboriginal societies were sovereign nations draws from anthropology. Catherine Bell and Michael Asch have called for the courts to shed the controlling influence of precedents grounded in a limited and ethnocentric understanding of Aboriginal peoples.³¹⁸ In particular, they reviewed two introductory textbooks in anthropology written by leaders in the discipline but each representing opposing schools of thought within the discipline.³¹⁹ Therefore, propositions agreed to by both of these authors could be presumed to have wide acceptance in the field of anthropology. Bell and Asch show that both authors agree on four basic propositions that are vital to formulating Aboriginal rights but that the courts have not yet fully incorporated into their understanding of Aboriginal peoples. In short, these propositions are 1) that it is not possible for human beings to live in groups without living in a society with cultural attributes, 2) that all societies are organized groups of people, in the sense that they are organized with respect to all aspects of social life and depend on each other for survival and well-being, 3) *that no society exists that does not have jurisdiction over its members and its territory, and that this is exercised through a political system that includes institutions of law and leadership*, and 4) that individual ownership of movable objects exists in all societies, and some form of land ownership exists in every society, though this ownership may be collective, not individual.³²⁰ Therefore, we need only remove the Court's unwarranted hesitation about acknowledging that all Aboriginal societies were sovereign nations to find that the object, identified in *Sappier/Gray*, of providing cultural security and continuity to Aboriginal *societies* must be applied to Aboriginal *nations*. To

³¹⁸ Catherine Bell & Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 38.

³¹⁹ *Ibid.* at 66. These textbooks were M. Harris, *Culture, People, Nature*, 2nd ed. (New York: Thomas Crowell 1975 [1971]) and L. Mair, *An Introduction to Social Anthropology* (London: Oxford University Press, 1965).

³²⁰ *Ibid.* at 66-71.

provide Aboriginal nations with this security, we must recognize that they exist and affirm their territorial jurisdiction.

2.6.3 *Beckman and Rio Tinto*

The Supreme Court did adopt language appropriate to a relationship between nations in its most recent decision on point, *Beckman v. Little Salmon/Carmacks First Nation*.³²¹ The Court described the historical role of treaties as

the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations. The objective was not only to build alliances with First Nations but to keep the peace and to open up the major part of those territories to colonization and settlement.³²²

We could read the reference to “what is now Canada” as a nod to the “act of state” doctrine and the *de facto* sovereignty that it protects, all of which flowed from “the assertion of European sovereignty.” Nevertheless, it is gratifying that the Court acknowledged the existence of “territories traditionally occupied by First Nations”.

The Supreme Court’s references in *Beckman* to First Nations and their territories rather than just to Aboriginal “societies” may have been influenced by the dispute in *Beckman* having been related to the interpretation and effect of a modern treaty that recognized the existence and the traditional territory of the Little Salmon/Carmacks First Nation. However, this is not the only indication that the Supreme Court is moving toward viewing the relationship between the Crown and First Nations as one between equals, to be managed as a continuing relationship between sovereigns. Justice Binnie, delivering the judgement for seven of the nine Justices,³²³ expressed

³²¹ *Supra* note 14.

³²² *Ibid.* at para. 8.

³²³ The others were McLachlin C.J.C., and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ. Justice Deschamps (LeBel concurring) gave separate reasons. They agreed that the appeal should be dismissed but

the “grand purpose” of section 35 as “[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship.”³²⁴ This purpose is furthered by modern treaties, such as the 1997 treaty between these parties, “...by creating a legal basis for fostering a positive long-term relationship between Aboriginal and non-Aboriginal communities.”³²⁵ A treaty will not achieve this if it is interpreted “...as if it were a commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances.”³²⁶ This passage is consistent with a perspective that sees the parties as equals for two reasons. First, it is a useful reminder that treaties bind sovereign nations, and this means that fostering the relationships between the parties is more important than in a commercial contract. Second, the Supreme Court pointed out that the Little Salmon/Carmacks First Nation received substantial benefits in exchange for surrendering “all undefined Aboriginal rights, title and interests in its traditional territories”.³²⁷ These benefits included title to “settlement land”, financial compensation, as well as sharing in land use planning, resource management, and resource exploitation in non-settlement lands. With these benefits came “duties and obligations” and “...the long-term interdependent relationship thus created will require work and good will on both sides for its success.”³²⁸ Therefore, a treaty is not simply a fixed exchange of property rights

disagreed with the majority’s view that the common law duty to consult can be superimposed on the treaty in the absence of a gap or omission in the treaty on the subject of consultation.

³²⁴ *Beckman*, *supra* note 14 at para. 10.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.* at para. 36.

³²⁸ *Ibid.* Binnie J. also stated that the Yukon Treaty was not a “complete code” (*ibid.*, at para. 38), that the duty to consult and the honour of the Crown give rise to obligations independently of treaties (*ibid.* at para. 52) and that “...the Crown cannot contract out of its duty of honourable dealing with Aboriginal people” (*ibid.* at para.61). He also recalled that in *Haida Nation* the Court stated that the Crown must act honourably “In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties” (*ibid.* at para. 62, emphasis added by Binnie J.).

that is spent once the exchange is complete; it is a means by which sovereign nations share jurisdiction.

Two weeks before releasing *Beckman*, the Supreme Court appeared to confirm the arrival of a new era for Aboriginal law in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.³²⁹ It did so in passing, in the context of a discussion about the source and context of the duty to consult, which it described as embodying “what Brian Slattery has described as a ‘generative’ constitutional order which sees ‘section 35 as serving a dynamic and not simply static function’”.³³⁰ According to Slattery, this means that

...section 35 does not simply recognize a static body of specific Aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances – *historical* rights for short. Rather, the section binds the Crown to take positive steps to identify Aboriginal rights in a contemporary form, with the consent of the Indigenous parties concerned – what we may call *settlement rights*. First, they represent contemporary restatements of Aboriginal rights in a form that renders them useful and commodious for indigenous groups in modern conditions. Second, settlement rights perforce take account of the interests of the broader society, of which Aboriginal people are members.”³³¹

Slattery views this as consistent with the Court’s comment in *Haida Nation* that reconciliation “is not a final legal remedy in the usual sense. Rather, it is a *process* flowing from rights guaranteed by s. 35(1)...”³³² Although he observes that the Court’s “choice of language” in *Haida Nation* indicates that the Court will consider the Crown’s sovereignty over Aboriginal peoples “legally deficient” without a just treaty,³³³ and though he views this as one aspect of a paradigm shift by the Court,³³⁴ the continuing sovereignty of Aboriginal peoples does not play a

³²⁹ *Supra* note 14.

³³⁰ *Ibid.* at para. 38, citing Slattery, “Honour of the Crown”, *supra* note 3 at 440.

³³¹ Slattery, “Honour of the Crown”, *ibid.* [emphasis in original].

³³² *Ibid.* at 440, quoting *Haida Nation*, *supra* note 2 at para 32 [emphasis added by Slattery].

³³³ *Ibid.* at 438.

³³⁴ *Ibid.* at 436-38.

direct role in Slattery's description of the generative structure of Aboriginal rights. However, Slattery views the conflict between pre-existing Aboriginal sovereignty and *de facto* Crown sovereignty as creating a "tension" that requires the Crown to deal honourably with Aboriginal peoples.³³⁵ In addition, when he elaborated on the contours of his "generative" theory³³⁶ he described it as including "Principles of Recognition", which "represent the nature and scope of [A]boriginal title at the time of Crown sovereignty", and "Principles of Reconciliation" that "govern the legal effects of [A]boriginal title in modern times."³³⁷ When these principles are examined in conjunction with the process Slattery foresees for applying them, the fundamental principles and practical consequences parallel those that would flow from respecting the continued sovereignty of Aboriginal peoples in accordance with the equality paradigm described in this paper.

"Principles of Recognition" recognize rights of Aboriginal peoples that resemble the powers of a sovereign people. For example, the first basic characteristic Slattery envisages for principles of recognition is that

they should acknowledge that *all* of the Indigenous peoples in Canada had historical rights to their homelands – the lands from which they drew their material livelihood, social identity, and spiritual nourishment – regardless whether they had developed conceptions of "ownership", "property," or "exclusivity," and without forcing their practices into conceptual boxes derived from English or French law."³³⁸

They also proceed from the premise that Aboriginal peoples are entitled to equal status in international law:

They should draw inspiration from fundamental principles of international law and justice, principles that are truly universal, and not grounded simply in rules that European

³³⁵ Slattery, "Metamorphosis", *supra* note 16 at 285.

³³⁶ See Slattery, "Generative Structure", *supra* note 16 and Slattery "Metamorphosis", *supra* note 16.

³³⁷ Slattery, "Metamorphosis", *ibid.* at 281-82.

³³⁸ *Ibid.* at 283 [emphasis in original].

imperial powers formulated to suit their own convenience, such as the supposed “principle of discovery.”³³⁹

Therefore, in relation to Aboriginal title, this would include “*the full unstinting recognition of the historical reality of [A]boriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands.*”³⁴⁰ Slattery argues that this precludes, for example, limiting the Aboriginal title rights of nomadic peoples “to only a fraction of their ancestral hunting territories”.³⁴¹ However, Slattery acknowledges that *reconciliation* must consider other factors, because “to suggest that historical [A]boriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.”³⁴²

To resolve this dilemma, Slattery invokes the Supreme Court’s decisions in *Haida Nation* and *Taku River*

which mark the emergence of a new constitutional paradigm governing Aboriginal rights. This paradigm views section 35 of the *Constitution Act, 1982* as the basis of a generative constitutional order – one that mandates the Crown to negotiate with Indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with the needs and interests of the broader society.³⁴³

Although Slattery does not cast the new paradigm in the sovereignty mold, his “historical title” closely resembles the territory of a sovereign nation because, as noted above, it equates to the “homelands” of Indigenous peoples, land which was important to their livelihood, their identity and their spirituality. Moreover, he considers recognition of the full scope of historical rights a prerequisite for reconciliation. Accordingly, Slattery’s call for recognition of Aboriginal

³³⁹ *Ibid.* at 284.

³⁴⁰ *Ibid.* at 282 [emphasis in original].

³⁴¹ *Ibid.*

³⁴² *Ibid.* at 282.

³⁴³ *Ibid.* at 285.

title, as quoted above, goes far beyond the scope of the doctrine of Aboriginal title because it includes “*full unstinting recognition of ...the true scope and effects of Indigenous dispossession*” and it also exists today in the form of “*...continuing links between an Indigenous people and its traditional lands.*”³⁴⁴ Elsewhere, Slattery has written that Aboriginal peoples “held sovereign status and title to the territories they occupied at the time of European contact and ... this fundamental fact transforms our understanding of everything that followed”.³⁴⁵ Perhaps Slattery views “Indigenous dispossession” as including a loss of sovereignty, but it seems more likely that it continues to live in the “continuing links between an Indigenous people and its traditional lands.”³⁴⁶

If Slattery’s “Principles of Recognition” amount to recognition of Aboriginal sovereignty and the equality of peoples, his “Principles of Reconciliation” contemplate a process that allows the reconciliation of Aboriginal sovereignty and Crown sovereignty. Hence, Slattery writes “*the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors.*”³⁴⁷ The “Principles of Reconciliation” will only use the historical rights of Aboriginal peoples as the “essential starting point” for a modern settlement, and courts could only implement an “inner core” of these rights without negotiation.³⁴⁸ Other rights must be subject to

³⁴⁴ Slattery, “Metamorphosis”, *supra* note 16 at 282 [emphasis in original].

³⁴⁵ Slattery, “Imperial Claims”, *supra* note 166 at 690.

³⁴⁶ Slattery, “Metamorphosis”, *supra* note 16 at 282. Note that Slattery does not himself draw parallels between “historical aboriginal title” and sovereignty. He defines Aboriginal title as “a distinctive common law right grounded in intersocietal relations between Indigenous peoples and the Crown in the early centuries of colonization” (*ibid.*).

³⁴⁷ Slattery, “Metamorphosis”, *supra* note 16 at 282 [emphasis in original].

³⁴⁸ *Ibid.* at 284. For the distinction between an inner core and a negotiated “penumbra” as applied to Aboriginal government rights, Slattery refers readers to Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa): Minister of Supply and Services Canada, 1993) at 36-48 and to *Report*, vol. 2, *supra* note 78 at 213-24. This author speculates that the difference could be viewed as the distinction between the narrower conception of Aboriginal rights and title as understood under the rights paradigm and the broader scope of jurisdiction of Aboriginal governments that may be negotiated under an equality

the outcome of treaty negotiations. The Principles developed by the Court should also include guidelines for accommodating the rights and interests that third parties hold within traditional territories and they should create “strong incentives for negotiated settlements to be reached within a reasonable period of time.”³⁴⁹

Therefore, while the doctrine of Aboriginal title is part of Slattery’s understanding of the new paradigm, it has indeed undergone a “metamorphosis”. When framed in a manner adapted to his Principles of Recognition it is a more complete representation of the “ancestral homeland” of an Aboriginal people than it would be under the common law doctrine of Aboriginal title, because it can serve the same function as recognizing Aboriginal sovereignty. While reconciliation requires recognition of this historical title, it also requires negotiation – and here Slattery’s framework is also consistent with a need to reconcile sovereignties, since in his view courts can do no more than to enforce a core of Aboriginal rights and to provide incentives for reaching negotiated settlements.³⁵⁰

At first blush this may seem to unduly limit the involvement of courts in the adjudication of Aboriginal rights, but on closer examination, it only recognizes the traditional limits of the courts’ appropriate role in a democracy. Courts are suited to adjudicating disputes about procedural and substantive rights. They have neither the political mandate nor the capacity to negotiate treaties, and as the Supreme Court has pointed out, this is what resolution of significant claims to land or territory requires.

In conclusion, the Supreme Court has taken us to the threshold of a new paradigm for Aboriginal law that rejects discovery and *terra nullius*, accepts that Aboriginal sovereignty

paradigm. See also below, text accompanying note 492, for a list of orders that Slattery anticipates a court could make while a “generative” Aboriginal title claim is being negotiated.

³⁴⁹ *Ibid.* at 284-85.

³⁵⁰ *Ibid.*

continues, and that holds that only treaties can elevate the Crown's role from *de facto* sovereignty to a *de jure* sovereignty that is shared with Aboriginal peoples. To date its signals, while strong – especially in *Haida Nation* and *Rio Tinto* – are perhaps not beyond debate. In view of the huge cost of litigation and negotiation of claims it would be helpful for all parties in the process to have a clearer understanding of what fundamental rules should guide their efforts. Although a new paradigm brings new problems, an unambiguous adoption of the equality paradigm will provide needed answers to the pressing moral and practical crises that plague the rights paradigm and that are explored in the following Chapter.

2.7 Asserting Aboriginal Sovereignty

When the Gitksan and Wet'suwet'en peoples brought their claim for ownership and jurisdiction in *Delgamuukw*³⁵¹ they lacked the jurisprudential foundation to assert Aboriginal sovereignty that the Supreme Court has since provided in *Haida Nation*, *Taku River*, and subsequent decisions. Their claim also predated the moral support for scrutinizing Crown assertions of sovereignty that was offered in RCAP's *Report*, and its repudiation of the acceptance of Crown assertions of sovereignty based on concepts of *terra nullius* and discovery.³⁵² An Aboriginal nation, especially one that has not yet entered into a treaty with the Crown, has a solid legal and constitutional foundation for asserting its continuing sovereignty, as well as concomitant rights to territory and jurisdiction. It can also claim that Crown sovereignty

³⁵¹ *Supra* note 104. These claims were withdrawn before the appeal was heard by the Supreme Court of Canada.

³⁵² *Report*, vol. 1, *supra* note 397 at Chapter 16. See also Commission recommendation 1.16.2, and see discussion of the foregoing in the next Chapter.

is not legitimate, and therefore remains only *de facto*, until a treaty reconciles the sovereignty of the Aboriginal nation with Canadian sovereignty.

Aboriginal sovereignty can also rely on the Supreme Court's decision in *Quebec Secession Reference*, where the Court elaborated on the "foundational constitutional principles" of "federalism, democracy, constitutionalism and respect for minority rights"³⁵³ and also considered the right of a people to self-determination as a general principle of international law.

As noted above, the Supreme Court has already accepted that Aboriginal nations were sovereign when the Europeans arrived, and it called for sovereignty claims to be reconciled through the process of honourable negotiation.³⁵⁴ To the extent this has already occurred when past treaties were negotiated, this has given Aboriginal sovereignty a place in the Canadian federation, but this reconciliation needs to continue. The principle of federalism gives courts the responsibility "to control the limits of the respective sovereignties",³⁵⁵ and a challenge of the Crown's unilateral assertion of sovereignty appeals to this responsibility of the court.

Aboriginal sovereignty can also find support in the principle of democracy, because "...democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities...Put another way, a sovereign people exercises its right to self-government through the democratic process."³⁵⁶ The values of democracy also include a commitment to social justice and equality.³⁵⁷ The Court also identified the protection of Aboriginal rights as an important underlying constitutional value.³⁵⁸

³⁵³ *Supra* note 194 at para. 49. See, generally, Borrows, *Recovering Canada*, *supra* note 164 at 122-137, Borrows, "Sovereignty's Alchemy", *supra* note 143, esp. at 585-595, and Joffe, *supra* note 282 at 163-188.

³⁵⁴ *Haida Nation*, *supra* note 2 at para. 20.

³⁵⁵ *Quebec Secession Reference*, *supra* note 194 at para. 56.

³⁵⁶ *Ibid.* at para. 64.

³⁵⁷ *Ibid.*, quoting *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

³⁵⁸ *Ibid.* at para. 82.

Particularly helpful for rebutting arguments that the Crown has “effectively” established sovereignty over Aboriginal territories and peoples is the Supreme Court’s response to an attempt to invoke the “principle of effectivity” in support of an argument that Quebec could unilaterally secede from Canada.³⁵⁹ The Court observed that this argument failed to distinguish the right to act from the power to do so. The ability to act in a certain way does not determine the legal status or consequences of the act.³⁶⁰ Quebec is not entitled to act without regard to Canadian or international law just because it asserts the power to do so.³⁶¹ The Court acknowledged that a successful unilateral secession would create a new legal order, but replied that this was an assertion of fact, not a statement of law. If it was being asserted as a matter of law, then “it simply amounts to the contention that the law can be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.”³⁶²

Just as it would not be lawful for Quebec to act without regard to Canadian or international law just because it asserts the power to do so, it is not consistent with the rule of law for the Crown to assert sovereignty over Aboriginal peoples by virtue of having achieved *de facto* or “effective” sovereignty. What is needed, therefore, to satisfy section 35 and the constitutional guarantee of the rule of law are negotiations aimed at reconciling Crown and Aboriginal sovereignties.

³⁵⁹ *Ibid.* at paras. 106-108.

³⁶⁰ *Ibid.* at para. 106.

³⁶¹ *Ibid.* at para. 107.

³⁶² *Ibid.* at para. 108.

Chapter 3: The Emerging Equality Paradigm

The last chapter argued that the Supreme Court’s recognition of Aboriginal sovereignty and the need to legitimize Crown sovereignty lays the foundation for a new equality paradigm of Aboriginal law. This chapter looks beyond these decisions and finds that prominent voices from a variety of perspectives are identifying moral and practical flaws in the rights paradigm, and are joining with Aboriginal leaders to call for a re-examination of fundamental principles of Aboriginal law.

3.1 Are They Really Opposing “Paradigms”?

This paper is obviously not using the term “paradigm” in its classical sense,³⁶³ but in the sense in which it was famously used by Thomas Kuhn in relation to the natural sciences.³⁶⁴

While it may not be prudent to attempt a holus-bolus transfer of Kuhn’s notion of a paradigm to Aboriginal law,³⁶⁵ some reflection on Kuhn’s paradigm may indicate whether apparent changes

³⁶³ *The Concise Oxford Dictionary*, 6th ed. defines “paradigm” as “example or pattern, esp. of inflection of noun, verb, etc....”

³⁶⁴ Thomas Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago: University of Chicago Press, 1970). The following discussion also draws on the summary of Kuhn’s analysis and a consideration of its usefulness outside of the natural sciences in James Iain Gow and Caroline Dufour, “Is the New Public Management a Paradigm? Does it Matter?” (2000) 66 *International Review of Administrative Sciences* 573.

³⁶⁵ Kuhn doubted that the social sciences had matured enough to have acquired paradigms (*ibid.* at 15). He also expected that the process of accepting a paradigm would proceed differently in fields such as medicine, technology and law, “of which the principal *raison d’être* is an external social need” (Kuhn, *ibid.* at 19). At the same time, Kuhn said that it should not be surprising that his main theses should be considered applicable to fields other than the sciences since he borrowed them from other fields such as literature, music, politics and the arts in which “[p]eriodization in terms of revolutionary breaks in style, taste and institutional structure have been among their standard tools” (*ibid.* at 208).

in Aboriginal law amount to something as fundamental as a paradigm shift, and some potential parallels in the process of change may be worth considering.

According to Kuhn, a paradigm governs, “in the first instance, not a subject matter but rather a group of practitioners”.³⁶⁶ It consists of “the entire constellation of beliefs, values and techniques shared by members of a given community”.³⁶⁷ At the same time, it also refers to “one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science” or “exemplars”.³⁶⁸ Learning these exemplars allows students to discover a way to see a new problem in the discipline as analogous to one seen before, “to see a variety of situations as like each other” and to develop “a time-tested and group-licensed way of seeing”.³⁶⁹

Kuhn also described paradigms as scientific achievements that “some particular scientific community acknowledged for a time as supplying the foundation for its further practice” and that were sufficiently open-ended to leave many problems to resolve.³⁷⁰ To the extent that a paradigm is grounded in a theory, the theory must “seem better than its competitors”.³⁷¹ An accepted paradigm allows a scientist to take first principles, and an “accepted model or pattern” for granted rather than having to construct them. It operates “like an accepted judicial decision in the common law...an object for further articulation and specification under new or stringent conditions.”³⁷²

³⁶⁶ *Ibid.* at 180.

³⁶⁷ *Ibid.* at 175.

³⁶⁸ *Ibid.* at 187.

³⁶⁹ *Ibid.* at 189.

³⁷⁰ *Ibid.* at 10.

³⁷¹ *Ibid.* at 17.

³⁷² *Ibid.* at 19-20 and 23.

A paradigm continues to govern a discipline until scientists perceive that there is a gap between theory and nature in the form of a significant “anomaly”, such as an anomaly that “will clearly call into question explicit and fundamental generalizations of the paradigm.” The anomaly begins to receive attention by some of the eminent scholars of the discipline, though only rarely will scientists explicitly acknowledge the breakdown of the existing paradigm. Sometimes a stubborn anomaly will ultimately be solved within the scope of an existing paradigm, sometimes the anomaly is set aside for future consideration, but sometimes a paradigm in crisis will be replaced with a new paradigm. A new paradigm will be “a reconstruction of the field from new fundamentals, a reconstruction that changes some of the field’s most elementary generalizations as well as many of its paradigm methods and applications....When the transition is complete, the profession will have changed its view of the field, its methods and its goals.”³⁷³

If a new theory resolves a gap between the old theory and nature, then the new theory must make predictions that are different from the old. This means that the two must be logically incompatible – the new must replace the old.³⁷⁴ A controversial aspect of Kuhn’s view of paradigms and “scientific revolutions” was his claim that a new paradigm is not only incompatible but also *incommensurable* with the previous one. Thus, Kuhn ascribed “normative functions” to paradigms, such that the choice between competing paradigms could not be resolved by the objective criteria of normal science because each paradigm will satisfy its own criteria and will fail the criteria of its opponent. Different paradigms will generally have different

³⁷³ *Ibid.* at 81-85.

³⁷⁴ *Ibid.* at 97.

criteria for the legitimacy of problems and proposed solutions, and this may be their most distinguishing feature:

...[S]ince no two paradigms leave all the same problems unsolved, paradigm debates always involve the question: Which problems are more significant to have solved? Like the issue of competing standards, that question of values can be answered only in terms of criteria that lie outside of normal science altogether, and it is that recourse to external criteria that most obviously makes paradigms revolutionary.³⁷⁵

Although rudimentary, at least at first blush this sketch of Kuhn's description of paradigms suggests that the contest between grounding Aboriginal law on rights flowing from occupancy before Crown sovereignty and viewing it as a means of reconciling competing sovereignties is in many respects analogous to a contest between paradigms in the natural sciences. Defining Aboriginal rights as certain Aboriginal laws, customs and property rights that arise out of occupancy prior to Crown sovereignty³⁷⁶ is incommensurate with a paradigm for Aboriginal law that recognizes the sovereignty of Aboriginal nations and does not assume the legitimacy of Crown sovereignty.

A paradigm grounded in the principle of the equality of peoples will indeed force a reconstruction of Aboriginal law "that will change some of the field's most elementary generalizations" – it will cause many existing doctrines to be re-examined or discarded. In particular, the doctrine of Aboriginal title relies on the assumption that the Crown holds the ultimate title, and that prior occupation forms a *sui generis* burden on that title in favour of the Aboriginal occupants. In the past, the Crown's hold on the ultimate title relied on its assertions of sovereignty being accepted by courts without question. If these assertions must now find their validity elsewhere, then their mere utterance will not establish in the Crown a legitimate title that

³⁷⁵ *Ibid.* at 103 and 109-110.

³⁷⁶ See above, text accompanying notes 17 to 24.

is automatically superior to any claim Aboriginal peoples may make to the land. Therefore, it is no longer appropriate to class Aboriginal claims to land as “burdens” because they are necessarily inferior to the Crown’s superior interest. Under a new paradigm that relies on treaties to reconcile sovereignty claims, the respective rights and jurisdiction of the Crown and Aboriginal peoples will be determined by the treaty, not by the doctrine of Aboriginal title.

Under the rights paradigm, Crown sovereignty claims were not open to question, which limited Aboriginal peoples to rights that arose out of prior *occupation*. Once the continuing *sovereignty* of Aboriginal peoples is recognized it becomes necessary to secure the consent of Aboriginal peoples, in treaties, to just terms for sharing sovereignty in a federal Canada. True consent will not be compatible with *a priori* doctrinal limitations on Aboriginal title or on the scope of Aboriginal rights in general. Indeed, the focus of the discussion under the equality paradigm will naturally shift from defining the “rights” of Aboriginal peoples versus the Crown’s exclusive sovereignty to ways sovereignty, and hence jurisdiction, should be shared between the Crown and Aboriginal nations. This, in turn, will have important implications for the role of the courts in defining the relationship between Aboriginal peoples and Canadians as a whole.

3.2 What’s Wrong With the Old Paradigm?

If there is indeed a contest between paradigms within Aboriginal law, then they must meet Kuhn’s expectation that they will be incommensurable. There is no objective means to determine the superiority of one over the other, and the choice will ultimately be normative. Each paradigm is valid if judged by its own criteria. The existing paradigm can claim that although the territories

of Aboriginal peoples were not validly acquired by the standards of international law,³⁷⁷ Crown sovereignty exists in Canada as a practical reality. Aboriginal peoples, though no longer sovereign, have such rights as are recognized by the common law and treaties, and it is these rights that are affirmed by section 35 of the Constitution.

Discomfort with the old paradigm does not principally originate with a flaw in its internal logic, though, as will be discussed below, there is increasing discomfort with difficulties in its practical application. The biggest objection to the existing paradigm is that it is incommensurate with modern international and Canadian norms that reject the proposition that European peoples were superior to Aboriginal peoples and that their superiority allowed them to simply *assume* sovereignty over lands occupied by the latter.

3.2.1 A Moral Crisis

Before European settlers arrived in North America, the continent was not a land that belonged to no one, a *terra nullius*. The continent belonged to the Aboriginal nations that occupied it. These nations were sovereign - they governed themselves and the territories they occupied without being subject to the control of any other nation. This picture of North America before Europeans arrived is no longer controversial and is accepted by Canadian courts.³⁷⁸

What is more controversial than the initial sovereignty of Aboriginal nations is the question of whether or how the Crown gained sovereignty over Aboriginal nations and their

³⁷⁷ See below, text accompanying notes 382-387.

³⁷⁸ See *Sioui*, *supra* note 31 at 1053, and discussion of the comments of Lamer J. (as he then was) in this case above, text accompanying notes 31-32. In *Van der Peet*, *supra* note 47 at para. 106, Justice L'Heureux-Dubé (dissenting) described the Aboriginal peoples of North America before first contact with Europeans as “independent nations, occupying and controlling their own territories...” See also *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 at para. 47-48 [*Côté*], in which the Court relates that the position taken by the French in 18th century diplomatic relations was that Aboriginal peoples were sovereign nations and not subjects of the French Crown. Brian Slattery observed that even though some Europeans may not have recognized the sovereignty of Aboriginal peoples, under “universal” international law the Indigenous peoples of North America were sovereign entities and, as such, held title to the territories they occupied. See Slattery “Metamorphosis”, *supra* note 16 at 257.

territories. At least until *Haida Nation and Taku River*, Canadian courts avoided this question, and simply deferred to Crown assertions of sovereignty.³⁷⁹ If the courts had examined these assertions, they would have found that they rely on an assumption that Aboriginal peoples were inherently inferior to European settler states, and were not worthy of the status and rights Europeans otherwise afforded to sovereign states.³⁸⁰

Assertions of sovereignty that do not rely on cession or conquest presume that Aboriginal nations are inferior to European nations.³⁸¹ Methods invoked in North America to assert sovereignty, such as “discovery”, symbolic acts of planting a cross or a flag, or occupying a territory and gaining effective control over it would not have displaced a prior sovereign power according to European standards of international law at the time of colonization.³⁸² Consequently, assertions of sovereignty by these methods rested on the premise that North America, if not vacant in fact, was “juridicially” a vacant territory, or *terra nullius*,³⁸³ a premise also known as the “settlement thesis”.³⁸⁴

The Eurocentric views that formed the basis for *terra nullius* included seeing non-European lands as either completely or virtually vacant of inhabitants, and devaluing the culture of the Indigenous inhabitants that were there. They assumed that Indigenous peoples were nomadic and

³⁷⁹ Slattery, “Aboriginal Rights”, *supra* note 17 at 734-36. See also above on the “act of state” doctrine, text accompanying notes 178-200.

³⁸⁰ See Asch & Macklem, *supra* note 7 at 512. For criticism of the Supreme Court’s unquestioning acceptance of Crown assertions of sovereignty in *Delgamuukw v. British Columbia*, *infra* note 104, see Borrows, “Sovereignty’s Alchemy”, *supra* note 143.

³⁸¹ On the Eurocentric world view that drove colonialism in the Americas see James (Sa’kej) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving U.N Recognition* (Saskatoon: Purich, 2008) [Henderson, “Indigenous Diplomacy”] at 13-23. See generally Russell, *The Mabo Case*, *supra* note 4 at 30-50 and Miller et al, *supra* note 53.

³⁸² Slattery, “Imperial Claims”, *supra* note 166 at 686.

³⁸³ *Ibid.* at 685.

³⁸⁴ On the settlement thesis and its assumptions of superiority of Christians over heathens, agriculture over hunting and gathering, or the superiority of certain conceptions of property or skin colours, see also Asch & Macklem, *supra* note 7 at 511 and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 113ff.

that this foreclosed any claims to sovereignty or a territory. They also denied that Indigenous peoples had cultures that included property rights and spiritual values. Sometimes Europeans even denied the “rationality” of Indigenous peoples.³⁸⁵

Although this premise hardly requires rebuttal in view of present-day understandings of Aboriginal cultures and societies, it cannot be justified by either positive or natural law,³⁸⁶ and it is contrary to international law.³⁸⁷

Patrick Macklem has shown that when the distribution of sovereignty in North America is viewed in terms of the formal and substantive equality of peoples, justice requires recognition of Aboriginal sovereignty. Aboriginal nations were denied formal equality because international law and European powers viewed them as “insufficiently Christian or civilized to justify recognizing them as entitled to enjoy sovereignty over their lands and people.” Macklem observed that since this proposition is “racist and ethnocentrist” it cannot stand as a valid reason for this denial. Therefore:

...[b]oth excluding indigenous communities from the community of nations entitled to assert sovereignty over North America and continually refusing to recognize the inherent sovereignty of North America’s indigenous population offends a commitment to formal equality of peoples. Respecting the formal equality of indigenous peoples entails placing them in the position they would have been in had they been treated formally equal to settling nations in the distribution of sovereignty...formal equality demands recognition of Indian government as an expression of inherent Indian sovereignty. Laws that facilitate the exercise of Indian governmental authority thus obtain some measure of normative validity from the ideal of formal equality of peoples.³⁸⁸

³⁸⁵ Henderson, “Indigenous Diplomacy”, *supra* note 381 at 19-20.

³⁸⁶ Slattery, “Imperial Claims”, *supra* note 166 at 700.

³⁸⁷ Asch, “Affirmation”, *supra* note 166 at 30-31, citing, *inter alia*, *Western Sahara: Advisory Opinion* [1975] 1 I. C. J. R. 12 at 14.

³⁸⁸ Macklem, “Distributing Sovereignty”, *supra* note 7 at 1358-59.

While formal equality merely asks whether like have been treated alike, substantive equality considers the effect of laws on social and economic circumstances. Macklem found that substantive equality concerns also support the case for Aboriginal sovereignty:

Indian nations in North America constitute identifiable communities that have been and continue to be oppressed by a variety of social and economic forces. Regardless of the reasons behind such oppression, it has had a profound effect on the social and economic status of Indian people. A commitment to substantive equality suggests that the state attempt to remedy the oppression experienced by Indian nations. More specifically, the state ought to remove alien forms of economic, social, political, and legal organization that have been imposed on Aboriginal societies. Acknowledging a measure of sovereignty by the recognition and reconstruction of forms of Indian government would allow Indian nations to obtain greater control over their individual and collective identities. Such initiatives need not aim for equality of result, i.e., placing indigenous people in exactly the same position as nonindigenous people. Instead, the objective can be cast in terms of equality of resources; along the lines proposed by Kymlicka, the goal is to relieve indigenous people of many of the costs associated with reproducing their culture in the face of alien institutional structures.³⁸⁹

A legal positivist might object that applying the doctrine of *terra nullius* to land that was occupied by Aboriginal peoples was considered “perfectly legal” when it was used to dispossess those peoples of their land, and that therefore the international law rule of intertemporal law (whereby facts have to be judged by their contemporary standards) presents a legal barrier to challenging this dispossession.³⁹⁰ However, even the rule of intertemporal law may need to yield to current standards of human rights if past wrongs have continuing effects – if, for example, a link can be established between colonization and the current plight of an indigenous people. The rule of intertemporal law might not shelter “past and ongoing wrongs”, because “a past violation

³⁸⁹ *Ibid.* at 1361-62, referring to Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 182-206.

³⁹⁰ Jérémie Gilbert, “Historical Indigenous Peoples’ Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title” (2007) 56 I.C.L.Q. 583 at 592-94.

may have ongoing and continuing effects that are presently justiciable”.³⁹¹ Based on similar sentiments, the Australian High Court soundly rejected the *terra nullius* doctrine, even though it considered issues of sovereignty as beyond its jurisdiction. Justice Brennan stated that the common law should “neither be nor be seen to be frozen in an age of racial discrimination.”³⁹²

In short, what is wrong with the old paradigm is that it rests on a theory of the assumption of Crown sovereignty that viewed Aboriginal peoples as inferior to Europeans. To be sure, some time has passed since the underlying events occurred. Joseph William Singer recently suggested that time, in conjunction with political reality, may be the best argument to affirm current non-Indian titles to land held in the United States, with its sole flaw being a lack of justice.³⁹³ He reviewed positivist, utilitarian and natural justice arguments in support of the status quo and found these lacking as well. He concluded that this leaves us “*in an uncomfortable place*”.³⁹⁴ He recalled that “[b]oth the great philosophers and our property law casebooks argue that the origins of property rights are crucial to determining their legitimacy but if our land titles have no legitimate root of title, then the whole system is placed in doubt.”³⁹⁵ He writes that an answer will only come from rejecting “the path of denial and repression. We must tell our history and tell it accurately – the good and the bad... We cannot trace our land titles to a just origin and we should stop pretending we can...”³⁹⁶ Under the equality paradigm a legitimate title must show

³⁹¹ *Ibid.* at 594, citing Fergus MacKay, *Addressing Past Wrongs, Indigenous Peoples and Protected Areas: The Right to Restitution of Land and Resources* (October 2002), online:

http://www.forestpeoples.org/documents/law_hr/ips_restitution_protected_areas_oct02a_eng.pdf.

³⁹² *Mabo No. 2*, *supra* note 4 at 41-42 .

³⁹³ Joseph William Singer, “Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity” (2010) Ind. L.J.forthcoming; Harvard Public Law Working Paper No. 10-28. Available at SSRN: <http://ssrn.com/abstract=1587363>.

³⁹⁴ *Ibid.*, emphasis in original.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

more than a Crown assertion of sovereignty at its root – it must also be able to demonstrate a just derivation from Aboriginal sovereignty.

RCAP also recognized that a paradigmatic shift is needed that repeals the doctrines on which Canada’s foundations have rested, and that such a shift is a prerequisite for building a renewed relationship with Aboriginal peoples:

To state that the Americas at the point of first contact with Europeans were empty uninhabited lands is, of course, factually incorrect. To the extent that concepts such as *terra nullius* and discovery also carry with them the baggage of racism and ethnocentrism, they are morally wrong as well. To the extent that court decisions have relied on these fallacies, they are in error. These concepts have no legitimate place in characterizing the foundations of this country, or in contemporary policy making, legislation or jurisprudence. If we are to build a renewed relationship between Aboriginal and non-Aboriginal people in Canada, we cannot do it by unilateral and demeaning assertions. Rather, we have to find or rediscover other ways to describe the foundations of this country, to recognize rather than dismiss the rights and contributions of Aboriginal peoples, and to undertake the difficult task of renewal through dialogue and agreement.³⁹⁷

Accordingly, the Commission’s recommendation 1.16.2 called on the federal, provincial and territorial governments to acknowledge the fallacy of concepts such as *terra nullius* and the doctrine of discovery, declare that these concepts will play no further part in law making, policy development, or arguments presented to courts. It also asked that these governments commit to renewing the federation “through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation” and including a declaration to these same ends in a new Royal Proclamation and accompanying legislation.³⁹⁸

As has already been alluded to, the existing paradigm also lacks consistency with international law. In 2007 the United Nations General Assembly approved the Declaration on the

³⁹⁷ See *Report*, vol. 1, *supra* note 33 at 695.

³⁹⁸ *Ibid.* at 696.

Rights of Indigenous Peoples.³⁹⁹ The recitals and articles of this Declaration are consistent with RCAP's recommendation that racist and ethnocentrist doctrines must be discarded and replaced with a new foundation. The preamble to the Declaration affirmed, among other things, "that indigenous peoples are equal to all other peoples..." and "...that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust..." It also expressed concern that colonization and dispossession of their lands and territories have prevented indigenous peoples from exercising "their right to development in accordance with their rights and interests," and acknowledged a variety of international legal instruments that affirmed the right to self-determination of all peoples. Accordingly, the Declaration included the following:

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination...

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The existing Aboriginal rights paradigm in Canadian Aboriginal law is not consistent with these principles because it includes doctrines that rest on racist and ethnocentric assumptions that are inconsistent with the equality of peoples. When courts apply these doctrines, then these assumptions cannot be considered as solely the source of past injustices because they continue to be given effect, and so continue to limit the development of Aboriginal

³⁹⁹ *Supra* note 284.

peoples. The doctrine of Aboriginal title continues to assume that the interest of Aboriginal peoples is only a burden on the Crown's underlying title and subject to criteria, limits and qualifications imposed by the common law rather than Aboriginal peoples themselves.⁴⁰⁰ A judge recently remarked on one such inequity after a lengthy but inconclusive trial of an Aboriginal title claim. He observed that while Aboriginal interests are necessarily confined to the pleadings that frame the claim, when attempting to meet the test for justification of infringement of Aboriginal title the Crown is not confined to the pleadings when advancing the interests of the broader society. This means, "the adversarial system restricts the examination of Aboriginal interests that is needed to achieve a fair and just reconciliation."⁴⁰¹

Since the assumptions underlying the doctrines of discovery and *terra nullius* are inconsistent with fundamental principles of the Canadian constitution⁴⁰² and, as observed by Justice Brennan, the modern common law, then it is not difficult to see that this kind of contradiction between legal doctrine and the contemporary legal environment constitutes the equivalent, in law, of the kind of gap between theory and nature that Kuhn labelled an "anomaly" that will call the old paradigm into question.

In law, the "group of practitioners" governed by a paradigm will include lawyers and judges, but, as in the natural sciences, a crisis in the acceptance of the old paradigm should also be evident to at least some leading scholars. Indeed, there are so many examples of the latter that it is not possible to list them all here.⁴⁰³ A recent and particularly powerful expression of the

⁴⁰⁰ See Chapter 1, above.

⁴⁰¹ *Tsilhqot'in Nation v. British Columbia*, *infra* note 430 at para. 1362. On this point, see also Dwight G. Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*, (2008) 41 U.B.C. L. Rev. 249 at 257.

⁴⁰² See Chapter 2, above.

⁴⁰³ For an incomplete list of scholars that acknowledge the continuing importance of Aboriginal sovereignty in Canada, see *supra* note 166.

crisis caused by this failure of the existing paradigm has come from Métis Professor Larry Chartrand,⁴⁰⁴ and it includes the following comment on the Supreme Court's acceptance of England having "magically" acquired sovereignty over territory already occupied by Aboriginal nations:

The implications of England's asserted sovereignty are profound. It means that peoples indigenous to the territory were not regarded as human enough to possess an independent sovereign "interest" in the territory that England needed to recognize. Any interest that such uncivilized peoples possessed would be entirely dependent on the domestic law of England and not on any principles of mutual respect as between independent nations. All Canadian Aboriginal rights law flows from this misguided, discriminatory and ultimately genocidal understanding of the relationship and ought no longer to be tolerated.⁴⁰⁵

Professor Chartrand also recalled the comments of Asch and Macklem⁴⁰⁶ that it is intolerable that a premise of the inherent superiority of European nations should form a foundation for Canadian sovereignty and the prevailing doctrine of Aboriginal rights. He calls for this doctrine to be abandoned in favour of a new one that eshews "...colonial legal thought that displaces, discriminates, reduces and eliminates Aboriginal peoples' political and legal existence."⁴⁰⁷ He disagreed with Justice Binnie's comment in *Mitchell* that section 35 of the Constitution only began a new chapter, not a new book: "A new chapter will not change the overall theme of the book or alter its direction in any significant or meaningful way. We need a new book."⁴⁰⁸

⁴⁰⁴ Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Métis Professor's Journey," (2010) 50 Sup. Ct. L. Rev. 89; also published in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and the Achievement of Social Justice: Commitment, Retrenchment or Retreat* (Markham: Lexis-Nexis Canada, 2010).

⁴⁰⁵ *Ibid.* at 96-97.

⁴⁰⁶ *Supra* notes 6-8 and accompanying text.

⁴⁰⁷ Chartrand, *supra* note 405 at 113.

⁴⁰⁸ *Ibid.*

We need not read further than the title of Professor Chartrand's article, "...A *Métis* Professor's Journey", to appreciate that his call for a new paradigm for Aboriginal law is connected to his Aboriginal identity. While it would normally be considered illogical, unpersuasive, or even unprofessional for a legal practitioner to invoke his or her ethnic or cultural heritage in aid of a legal argument, Kuhn's framework for paradigm shifts helps us to understand why such personal factors would influence the adoption or rejection of a new paradigm. First, we should recall that a new paradigm will be incommensurable with the previous one, and that the choice of paradigms must be made on criteria that lie outside the "normal science altogether", criteria that are not objective but rather are normative and so tend to be value choices.⁴⁰⁹ In fact, Kuhn goes further than this, and says that the most fundamental aspect of incommensurability is that "...in a sense ... the proponents of competing paradigms practice their trades in different worlds."⁴¹⁰ The sense in which Kuhn speaks of the proponents being in different worlds may be better understood with reference to some of the examples he offers. Kuhn argues that those who objected to Einstein's general theory of relativity because they did not believe that space could be "curved" because "it was not that sort of thing" were not wrong or mistaken.⁴¹¹ What had previously been meant by space was flat and unaffected by matter, for this was necessary for Newtonian physics to work. To accept Einstein's theory

...the whole conceptual web whose strands are space, time, matter, force, and so on, had to be shifted and laid down again on nature whole. Only men who had together undergone or failed to undergo that transformation would be able to discover precisely what they agreed or disagreed about. Communication across the revolutionary divide is necessarily partial."⁴¹²

⁴⁰⁹ See above, notes 374-375 and accompanying text.

⁴¹⁰ Kuhn, *supra* note 364 at 150.

⁴¹¹ *Ibid.* at 149.

⁴¹² *Ibid.*

Similarly, those who rejected Copernicus' claim that the earth moved were not wrong because to them the meaning of "earth" included fixed position, so their "earth" did not move.⁴¹³ It is in this sense that Kuhn considers the proponents of competing paradigms to be practicing in different worlds:

...[T]he two groups of scientists see different things when they look from the same point in the same direction. Again, this is not to say that they can see anything they please. Both are looking at the world, and what they look at has not changed. But in some areas they see different things, and they see them in different relations one to the other. *That is why a law that cannot even be demonstrated to one group of scientists may occasionally seem intuitively obvious to another.* Equally, it is why, before they can hope to communicate fully, one group or another must experience the conversion that we have been calling a paradigm shift. Just because it is a transition between incommensurables, the transition between competing paradigms cannot be made one step at a time, forced by logic and neutral experience. Like the gestalt switch, it must occur all at once (though not necessarily in an instant) or not at all.⁴¹⁴

Aboriginal practitioners come from different cultural worlds than non-Aboriginal practitioners, and so it is to be expected that their view of what should be the "obvious" fundamentals of Aboriginal law will be intuitively different than their non-Aboriginal counterparts. Such formative influences are illustrated by the Aboriginal scholar John Borrows:

How can Canada claim to own Indigenous peoples' land and resources? My grandfather asked me questions like this when I was still in grade school. My mother echoed these questions throughout my childhood. Neither was legally trained, but both spent their formative years on the Cape Croker Indian Reserve in southern Ontario. They knew from experience, and that of their community, that something was not right about how Canada purported to take our homelands. Their questions about Canada's claims were a natural and common part of my young everyday life. They wanted answers, and they would ask anyone for help in their quest, including their children.⁴¹⁵

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.* at 150 [emphasis added].

⁴¹⁵ John Borrows, "Foreword", in Miller et al., *supra* note 53 at v (Borrows, "Foreword"). James (Sa'ke'j) Youngblood Henderson is another renowned scholar who has acknowledged that his Aboriginal heritage has influenced his post-colonial "treaty" perspective on Aboriginal law. See Henderson, "Treaty Federalism", *supra* note 17 at 245.

Borrows observes that these kinds of questions have been circulating within Aboriginal communities for generations, but that it has really only been in the past 30 years that Indigenous peoples have gained a legal education,⁴¹⁶ and that the first generation of Aboriginal law professors are only now beginning to be able to bring their influence to bear.⁴¹⁷ Borrows made these comments in the foreword of a recent book that offers a critical analysis of the doctrine of discovery and its continuing influence in four countries, which is a collaboration of four Indigenous authors: Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg. The authors have impressive academic credentials but make no apology for not taking an “objective” or detached view of the law and call for the doctrine to be overruled. If competition between paradigms cannot be resolved by sheer force of logic in the natural sciences it is even less likely that this would be possible in law. It follows that the voices of Aboriginal scholars are particularly valuable in this debate because they are the most likely to be able to persuade their colleagues that there is a moral problem with the foundations of the discipline.

Finally, it should be a matter of pressing concern to all practitioners of Aboriginal law that their Aboriginal colleagues find that they need to find ways to function within a framework that they see as not only false but demeaning to their peoples. Larry Chartrand wrote that he considers Aboriginal rights doctrine “unjust and inconsistent with fundamental human rights.”⁴¹⁸

⁴¹⁶ In Canada the most significant effort to facilitate access to legal education for Aboriginal people has been the Program of Legal Studies for Native People, offered by the Native Law Centre of Canada at the University of Saskatchewan. The Program prepares Aboriginal students for law school. When it began in 1973 there were only four Aboriginal lawyers in Canada. By 2005 there were 1000 Aboriginal law graduates, though this number still falls far short of the number that would be proportionate to the Aboriginal population in Canada. Graduates from the Program have entered the legal profession as practitioners, and some have become judges, government officials and professors. See “Program of Legal Studies for Native People”, online: Native Law Centre of Canada <<http://www.usask.ca/nativelaw/programs/plsnp.php>>.

⁴¹⁷ Borrows, “Foreword”, *supra* note 415 at v.

⁴¹⁸ Chartrand, *supra* note 405 at 119.

This means that when his professional work forces him to function within the rights paradigm as a legal academic he is compelled to disclaim his own work:

Although this paper is about applying the doctrine of Aboriginal rights and title as it is currently understood, I do so with the greatest hesitation because of a growing critical perspective of the jurisprudence surrounding this field of law and the fact that by uncritically applying Aboriginal rights doctrine I am indirectly supporting an inequitable legal regime. This paper does not intend to address the problem of inequality of peoples and how this inequality continues to be manifest in Canadian Aboriginal rights jurisprudence. Nor will I attempt to expose how Aboriginal law doctrine continues to be grounded in colonial ideology that, notwithstanding certain “favourable decisions”, ultimately continues to deny Aboriginal peoples true equality among the peoples of the world...I will assume, for the purposes of this paper that the current state of the law regarding Aboriginal rights and title in Canada is legitimate, *even though I know it not to be*.⁴¹⁹

As the foregoing discussion indicates, calls to address the moral crisis of the rights paradigm has come from a variety of sources, not solely Aboriginal practitioners, although the latter no doubt experience it most acutely. Modern Canadian and international law would not tolerate any attempt to introduce doctrines that are grounded in racism and ethnocentrism. Building Aboriginal law on a foundation free of “discovery” and *terra nullius* will relieve a burden of hypocrisy that is becoming increasingly difficult for all practitioners of Aboriginal law to bear.

3.2.2 A Crisis in Application

According to the existing Aboriginal rights paradigm, the greatest entitlement that an Aboriginal nation can have to its own territory under Canadian law is Aboriginal title, which, in spite of its shortcomings,⁴²⁰ may be a highly valuable right. However, even though some Aboriginal peoples have expended great effort, through litigation, to establish this right, to date it

⁴¹⁹ *Ibid.*, quoting Larry Chartrand, “Métis Aboriginal Title in Canada: Achieving Equality in Aboriginal Rights Doctrine” in Kerry Wilkins, ed., *Advancing Aboriginal Claims* (Saskatoon: Purich, 2004) [emphasis added by Chartrand].

remains largely theoretical, since no action for Aboriginal title has yet succeeded in establishing the claim.⁴²¹

Brian Slattery has acknowledged fundamental moral and conceptual problems with the doctrine of Aboriginal title, describing it as “a legal riddle wrapped in a constitutional enigma inside a moral conundrum.”⁴²² In his view the shortcomings in the doctrine are at least in part due to the courts’ concerns about the practical consequences of recognizing Aboriginal title:

The courts are torn between a desire to right a great historical wrong – the unlawful dispossession of Indigenous peoples – and deep misgivings about doing so at the expense of third parties and the larger society...⁴²³

Slattery warns that this conflict may cause courts to attempt to protect third party and societal interests by taking an excessively narrow approach to the content of Aboriginal title or by taking an overly generous view of how Aboriginal title may have been extinguished.⁴²⁴ This, however, will conflict with the goal of reconciliation. As discussed elsewhere in this paper, according to Slattery this challenge can only be overcome through a paradigmatic shift to a generative structure of Aboriginal rights that must be negotiated,⁴²⁵ with the involvement of courts limited largely to issues that cannot await the outcome of negotiations.⁴²⁶

Attempts to establish Aboriginal title through litigation have shown that this strains the capacity of the courts and the litigants. The Supreme Court’s decision in *Delgamuukw*⁴²⁷ added

⁴²⁰ See Chapter 2, above.

⁴²¹ As discussed in the following pages, two cases which ultimately failed on legal grounds in spite of particularly lengthy trials and judicial acknowledgment of evidence that supported at least partial success on the merits of the claim are *Delgamuukw*, *supra* note 104 and *Tsilhqot’in Nation v. British Columbia*, *infra* note 430. See also above, *supra* note 286 and accompanying text on the concern the Committee on the Elimination of Racial Discrimination expressed about the lack of success of Aboriginal title claims.

⁴²² Slattery, “Metamorphosis”, *supra* note 16 at 256, adapting Churchill’s remark.

⁴²³ *Ibid.* at 256-57.

⁴²⁴ *Ibid.* at 282.

⁴²⁵ See above, text accompanying notes 330 to 348.

⁴²⁶ See below, text accompanying note 349.

⁴²⁷ *Supra* note 104 at paras. 73-77 and 107.

much to our understanding of the doctrine of Aboriginal title, but it left the merits of the claims at issue undetermined. The Court concluded that it could not consider the merits of the claims to Aboriginal title and self-government because of shortcomings in the trial judge's treatment of oral histories and because of procedural defects. The latter resulted from the amalgamation on appeal of claims brought by individual Houses of the Gitksan and Wet'suwet'en nations into collective claims by the Aboriginal nations. The original trial had lasted over three years, and included 318 days of evidence and 56 days of legal argument.⁴²⁸ Although the Supreme Court ordered a new trial, the Justices unanimously urged the parties to seek a negotiated resolution because of the complex and competing interests at stake and in the interest of reconciliation.⁴²⁹

Although the guidance provided by *Delgamuukw* might allow more efficient litigation, it has not considerably lessened the daunting nature of the task faced by an Aboriginal nation that seeks to assert an Aboriginal title claim in court. In *Tsilhqot'in Nation v. British Columbia*⁴³⁰ the British Columbia Supreme Court heard the plaintiff Nation's claim to Aboriginal title and other Aboriginal rights relating to land. The trial lasted over 339 days over the years 2002 to 2007. Justice Vickers found that he had to dismiss the claim because the law did not allow the plaintiff to reframe its case to seek declarations over only portions of an area claimed as a whole in the pleadings, although he expressed an unbinding opinion that Aboriginal title exists in a number of specified areas.⁴³¹

⁴²⁸ *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, 79 D.L.R. (4th) 185 (B.C.S.C.) at paras. 53-55.

⁴²⁹ *Infra*, note 104 at para 186, Lamer J. and paras. 207-08, La Forest J. At the time of writing negotiations have continued but no agreement in principle has yet been reached (British Columbia Treaty Commission, online: <<http://www.bctreaty.net/files/updates.php>>, accessed August 10, 2010).

⁴³⁰ 2007 BCSC 1700, [2008] 1 C.N.L.R. 112. On the importance of this decision, see generally Newman & Schweitzer, *supra* note 401. At the time of writing, an appeal of this decision is pending. For the report of an the order lifting a stay of proceedings of this appeal that had been ordered to allow time for negotiations see *William v. British Columbia*, 2009 BCCA 83, [2009] 2 C.N.L.R. 385.

⁴³¹ *Ibid.* at paras. 102-129 and 957-962.

Justice Vickers recognized that the Court had a role in the process of reconciliation,⁴³² and concluded his judgment by commenting on this process. These comments followed 1,333 paragraphs of applying the law to the evidence that had been heard in this lengthy trial. Having expended such a considerable effort attempting to operate within the confines of the existing Aboriginal rights paradigm, Justice Vickers expressed his conviction that an entirely different approach is needed:

I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago.

At the end of the trial, a concession concerning an Aboriginal hunting and trapping right in the Claim Area was made by both defendants. As I have already noted, that concession brings with it an admission of the presence of Tsilhqot'in people in the Claim Area for over 200 years. This leaves the central question unanswered: what are the consequences of this centuries old occupation in the short term and in the long term, for Tsilhqot'in and Xenigwet'in people?⁴³³

Justice Vickers did not expect the existing Aboriginal rights paradigm to offer a means to answer this question. He agreed with Professor Slattery that section 35 “does not simply recognize a static body of [A]boriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances”⁴³⁴ and he commented specifically on the shortcomings of the doctrine of Aboriginal title:

What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to

⁴³² *Ibid.* at para. 1375.

⁴³³ *Ibid.* at paras. 1373-74.

⁴³⁴ *Ibid.* at para. 1364, citing Slattery, “Metamorphosis”, *supra* note 16 at 286.

title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.

A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.⁴³⁵

Once again, Justice Vickers appeared to be observing the futility of debating whether the evidence satisfied the finer points of the doctrine of Aboriginal title. Although he stopped short of describing this "historical fact" as the territory of a *sovereign* Tsilhqot'in people⁴³⁶ his prescription echoes his earlier quotation of Chief Justice McLachlin's call in *Haida Nation* to fulfil the promise of section 35 by reconciling sovereignties through honourable negotiation and treaties.⁴³⁷

Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia.

As a consequence of colonization and government policy, Tsilhqot'in people can no longer live on the land as their forefathers did. How is a former semi-nomadic existence, one that cannot be replicated in a modern Canada, to be given "cultural security and continuity" in this twenty-first century and beyond? *Governments and Tsilhqot'in people must find an accommodation that reconciles the historical Tsilhqot'in place in Canada with the place of their neighbours who come from all corners of the world.*⁴³⁸

The form that Justice Vickers expects "accommodation" to take is not found within the doctrine of Aboriginal title. Instead, he agreed with Slattery that section 35 recognizes a body of

⁴³⁵ *Ibid.* at para. 1374-75.

⁴³⁶ Earlier in his judgment, Justice Vickers identified the "Tsilhqot'in Nation" as the proper rights holder. At paragraph 458 he characterized an Aboriginal nation as analogous to seeing French speaking Canadians as a nation: "a group of people sharing a common language, culture and historical experience." He distinguished this from a "nation state" which is "a self-governing political entity that has sovereignty and external recognition."

⁴³⁷ *Ibid.* at para. 1353, quoting *Haida Nation*, *supra* note 2 at para. 20.

⁴³⁸ *Ibid.* at paras. 1378-79 [emphasis added].

“generative” rights,⁴³⁹ and that therefore even full recognition of “historical” title is not a sufficient condition for reconciliation. He echoed Slattery’s concern that implementing historical title to the detriment of third party and public interests would create new injustices. He laments that “[c]ourts should not be placed in this invidious position merely because governments at all levels, for successive generations, have failed in the discharge of their constitutional obligations. Inevitably this decision and others like it run the risk of rubbing salt into open wounds.”⁴⁴⁰

Justice Vickers’ conviction that the doctrine of Aboriginal title will not provide a path to reconciliation is apparent from his comments on a preferred course. He advocated recognizing the rights of Aboriginal peoples to their ancestral homelands so that the process quickly moves to applying Slattery’s “Principles of Reconciliation”.⁴⁴¹ As noted above, those principles leave most substantive issues to negotiation, with courts playing largely a supporting role.⁴⁴²

It is obvious from the above that after a truly gargantuan effort to do justice within the rights paradigm Justice Vickers concluded that its flaws meant that its application would not lead to a just solution, and that therefore it needed to be replaced with a fundamentally different approach. The co-authors of one commentary concluded that *Tsilhqot’in Nation* demonstrated that the problems in applying the Aboriginal title doctrine were so severe that that “the very fabric of the law is torn.”⁴⁴³ In their view, Justice Vickers was torn between his desire to promote reconciliation, the underlying objective of section 35, and the sometimes conflicting “legally established rules.”⁴⁴⁴

⁴³⁹ *Ibid.* at para. 1364, foreshadowing the Supreme Court of Canada’s later approval of the generative structure of Aboriginal rights in *Rio Tinto*, *supra* note 14. See above, text accompanying notes 329 to 330.

⁴⁴⁰ *Ibid.* at paras. 1367-68.

⁴⁴¹ *Ibid.* at paras. 1371-72.

⁴⁴² See above, text accompanying notes 348 to 349.

⁴⁴³ Newman & Schweitzer, *supra* note 401 at 258.

⁴⁴⁴ *Ibid.* at 250.

Not all who see problems with the application of the current paradigm see the answer in a fundamental change that includes recognition of Aboriginal sovereignty. Thomas Flanagan has recommended a radical strengthening of the property rights of Aboriginal peoples for pragmatic reasons. Flanagan is a well-known critic of the existing Aboriginal rights paradigm,⁴⁴⁵ but his criticism of the existing paradigm is not based on the Crown's sovereignty originating with the doctrines of discovery or *terra nullius*. He considers the morality of the historical use of these doctrines as irrelevant in the face of the long-continued possession by the settler states. In his view, the reality is simply that "...Canada, the United States and all the other states of the Americas exist and their sovereignty is recognized throughout the world" and when Aboriginal leaders refer to their inherent sovereignty "...this is only a rhetorical turn of phrase."⁴⁴⁶

Flanagan criticized the framework for Aboriginal title set out in *Delgamuukw* for maintaining constraints that have kept Canada's Aboriginal peoples from obtaining "a workable system of property rights" and have "conspired to imprison them within a regime of collective rights that fit badly with the needs of a market economy."⁴⁴⁷ Indeed, Flanagan's central objection to Aboriginal title is that he believes it will discourage the economic development of Aboriginal peoples. Its collective nature makes it more cumbersome to manage, and the principle of inalienability except to the Crown will make it more difficult to raise investment capital because the land cannot be sold or mortgaged. The "inherent limit" on the use of Aboriginal title land will also reduce its value by restricting its use and by introducing uncertainty about the range of valid uses.⁴⁴⁸ While Flanagan acknowledged Kent McNeil's principled and constitutional objection to

⁴⁴⁵ For his best known critique, see Thomas Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill – Queen's University Press, 2000).

⁴⁴⁶ *Ibid.* at 60-61.

⁴⁴⁷ *Ibid.* at 133.

⁴⁴⁸ *Ibid.* at 131-32.

the conditions under which the Crown could infringe Aboriginal title,⁴⁴⁹ most of Flanagan's objections relate to economics. Since only governments can infringe Aboriginal title:

...the blockages imposed by one collectivist institution – aboriginal title – can be overcome only by another collectivist institution – government. In this scenario, politics is likely to trump economic rationality as elected officials use the power of government to make allocative decisions that ought to emerge from market transactions.⁴⁵⁰

In his most recent book, *Beyond the Indian Act: Restoring Aboriginal Property Rights*,⁴⁵¹

Flanagan advocates a solution to the pragmatic difficulties he sees that bears a superficial resemblance to the equality paradigm because it rejects the rights paradigm's axiomatic assumption that the underlying title lies with the Crown. Flanagan and his co-authors Alcantara and Le Dressay ("Flanagan et al.") advocate an underlying title for Aboriginal Nations, a prescription they base on pragmatism, not principle.⁴⁵² In support, they invoke the bestselling works of Hernando de Soto, which blame much of the poverty in the third world on an inability to gain title to land. Those excluded from holding title cannot partake of opportunities open only to those with capital.⁴⁵³

The flaw in the approach taken by Flanagan et al. is that rather than questioning the causes of the limited property rights of Aboriginal peoples they would use a statute to try to patch over some holes in the existing regime. Their proposal consists of a "First Nations Property Ownership Act" (FNPA) that would allow First Nations to adopt a regime that mimics

⁴⁴⁹ *Ibid.* at 132, citing Kent McNeil, "Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?" Twelfth Annual Robarts Lecture, 25 March, 1998, York University, Toronto, Ontario (Toronto: Robarts Centre for Canadian Studies) at 19.

⁴⁵⁰ *Ibid.*

⁴⁵¹ Tom Flanagan, Christopher Alcantara and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal and Kingston: McGill-Queen's University Press, 2010).

⁴⁵² See e.g. *ibid.* at xii where Manny Jules, author of the foreword to the book, writes that "This is a book about pragmatism."

⁴⁵³ *Ibid.* at 7, 125 and 160, citing Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989) and Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

sovereignty by providing for fee simple ownership of reserve lands combined with powers to regulate, to expropriate, and to have an “ultimate” or underlying title to land. This proposal denies the inherent rights of sovereignty and self-determination of Aboriginal peoples, and merely supplements the *Indian Act* with another layer of paternalistic legislation. The FNPA will always be subject to amendment and repeal, and so even if it gave First Nations something labelled “underlying title”, the Crown would still retain an “ultimate” underlying title.

Since the sovereignty of Aboriginal nations has not been extinguished, there is no need for legislation such as the FNPA. Indeed, even though most of the work of Flanagan et al. focuses on the need for the federal government to delegate greater powers over reserve lands to First Nations, important elements of their discussion appear to amount to an unintended endorsement of continuing Aboriginal sovereignty, and the book’s concluding comments implicitly accept the sovereignty of Aboriginal nations. First, they recall that First Nations had property rights before first contact and they assert that the FNPA would “recognize and implement underlying First Nations title”.⁴⁵⁴ If the underlying title already exists then legislation could at best produce a weak imitation of what only awaits affirmation under section 35(1) of *The Constitution Act, 1982*.⁴⁵⁵ Second, the final paragraphs consist of a lengthy quotation from a presentation made by Manny Jules in which he expressed a vision of a “real partnership between Canada and First Nations” in which the Indian Act has been replaced by “First Nation legislation” and the Department of Indian Affairs has been replaced by “our own First Nation public institutions that protect national standards and provide a third order of government.”⁴⁵⁶ Finally, their praise of the

⁴⁵⁴ *Ibid.* at 180.

⁴⁵⁵ On the utility of affirming underlying Aboriginal title, see Asch & Zlotkin, *infra* note 163 and below, notes 507 to 509 and accompanying text.

⁴⁵⁶ Flanagan, Alcantara & Le Dressay, *supra* note 451 at 181, citing Parliament of Canada, Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources (37th Parliament, Second Session, 5 February

Nisga'a Final Agreement for giving the Nisga'a Nation an underlying title and therefore providing a model for achieving the same ends as the FNPA⁴⁵⁷ amounts to an implicit acceptance of continuing Aboriginal sovereignty, since treaties are normally understood to be instruments concluded between sovereign nations.

The Nisga'a Final Agreement merits attention in its own right in this discussion. The people of the Nisga'a Nation live in the Nass River Valley on the northwest coast of British Columbia. They had been seeking a treaty virtually since first contact with Europeans, and these efforts motivated the litigation that resulted in the seminal decision in *Calder*.⁴⁵⁸ A treaty, the Nisga'a Final Agreement ("NFA"), was finally concluded in the year 2000.⁴⁵⁹

Some elements of this Agreement reflect the equality paradigm, which recognizes the continuing sovereignty of Aboriginal nations. For example, the Agreement allows some Nisga'a laws to prevail over conflicting federal or provincial laws.⁴⁶⁰ In addition, the Agreement confers land rights that exceed common law Aboriginal title rights because the Nisga'a hold their land in fee simple, which the Agreement acknowledges is "the largest estate known in law".⁴⁶¹ Several provisions in the Agreement appear to affirm that Nisga'a jurisdiction over their land includes some form of underlying title. First, no Nisga'a land may be expropriated except as permitted by the Agreement, thus limiting a usual incident of Crown sovereignty.⁴⁶² Second, the Agreement

2003), www.parl.gc.ca. See also *ibid.* at 175, where the authors claim that adopting their recommendations would "signal to the world a new stage in the evolution of federalism."

⁴⁵⁷ See *ibid.* at 155, where the authors state that it cost an estimated \$150 million to negotiate the Nisga'a Final Agreement over 24 years, but that the benefits of this agreement would far exceed its costs if it produces a model for "indefeasible individual title on First Nations lands".

⁴⁵⁸ *Supra* note 5.

⁴⁵⁹ The Nisga'a Final Agreement and background information are available online: <<http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nfa/nfa-eng.asp>>.

⁴⁶⁰ See above, note 264 and accompanying text.

⁴⁶¹ NFA, *supra* note 459, c. 3, para. 3.

⁴⁶² See *ibid.* at c. 3, paras. 49 and 55-84 for detailed provisions governing the purpose and conditions of permissible provincial and federal expropriation of Nisga'a land.

allows the Nisga'a Nation to dispose of lands held in fee simple with respect to either the whole of the estate in fee simple or any lesser estate, but "[a] parcel of Nisga'a Lands does not cease to be Nisga'a Lands as a result of any change in ownership of an estate or interest in that parcel".⁴⁶³ This means that the land will remain "Nisga'a land" and will remain under Nisga'a jurisdiction even if the Nisga'a Nation disposes of the whole of its fee simple interest.⁴⁶⁴ McNeil posed (but did not answer) the question of what interest the Nisga'a Nation retains in that land.⁴⁶⁵ Whatever it may be, it certainly has the appearance of an ultimate or underlying title.⁴⁶⁶ Through the exercise of Nisga'a jurisdiction in areas such as estates, land management and taxation this title will either revert to the Nisga'a Nation or can be expropriated by it.⁴⁶⁷ The inclusion of a power to expropriate is a logical counterpart to the Nisga'a Nations' ability to part with some or all of the fee simple estate because it allows the Nation some ability to regain the estate if needed in the future.

The NFA does not expressly state whether the underlying title belongs to the Nisga'a Nation, so this is a matter of interpretation. Opposing such a construction is the fact that the Agreement expressly contemplates that land may escheat to the Crown. However, even this reference is ambiguous because it provides that if any estate or interest in Nisga'a land should "finally escheat to the Crown, the Crown will transfer, at no charge, that parcel, estate or interest to the Nisga'a Nation."⁴⁶⁸ It could be argued that having been deprived of escheat, the last remaining

⁴⁶³ *Ibid.*, at c. 3, paras. 3, 4 and 5.

⁴⁶⁴ Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2001-2002) 47 McGill L.J. 473 at 507, n. 151 [McNeil, "Inalienability"].

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Flanagan et al. are satisfied that it qualifies as such. They suggest that this underlying title could be called "the Crown in the right of the Nisga'a, or Nisga'a [A]boriginal title, Nisga'a treaty title, or simply Nisga'a" (*supra* note 451 at 162).

⁴⁶⁷ *Ibid.* at 165. See NFA, *supra* note 459, at c. 11, para. 50c., allowing the Nisga'a Lisims Government to make laws in respect of expropriation "for public purposes or public works".

⁴⁶⁸ NFA, *ibid.*, c. 3, para. 7.

feudal incident, the Crown's underlying title remains as no more than a legal fiction that has lost all practical significance. On the other hand, since federal and provincial governments do retain some limited power to expropriate Nisga'a lands⁴⁶⁹ perhaps a better characterization would be that the underlying title is shared – a conceptualization that would best fit a new paradigm of Aboriginal law that envisions a sharing of sovereignty between Aboriginal peoples and existing Canadian governments.

In October 2009, in accordance with its rights under the NFA and after having established a modified Torrens title system, the Nisga'a Lisims Government adopted the *Nisga'a Landholding Transition Act*.⁴⁷⁰ This Act allowed Nisga'a citizens to hold their residential properties in fee simple. This legislation followed three years of consultations aimed at replacing the previous system of granting only possessory rights, known as "entitlements" to Nisga'a citizens. The Wilp Si'ayuukhl Nisga'a (the legislative body of the Nisga'a Limis Government) considered the previous system a barrier to economic development. Although the fee simple owner will be able to mortgage, transfer, bequeath, lease or sell the property to any person, the Nisga'a Limis Government's news release emphasized that the property "will always remain Nisga'a Lands and be subject to Nisga'a Laws under the Nisga'a Final Agreement."⁴⁷¹

It should be kept in mind, however, that the Nisga'a Agreement was negotiated based on the paradigm of Aboriginal law that was dominant before the Supreme Court's decisions in *Haida Nation* and *Taku River* acknowledged that treaties are needed to reconcile sovereignties. Negotiators seeking to maximize their position will naturally consider what remedies Canadian

⁴⁶⁹ See *supra*, note 462.

⁴⁷⁰ Registry of Nisga'a Laws: Nisga'a Lisims Government, online: <<http://nisgaalisims.ca>>.

⁴⁷¹ D.E. Cragg, Registrar of Land Titles, Nisga'a Lisims Government, "Announcement of the Nisga'a Landholding Transition Act" and Nisga'a Lisims Government, News Release, "Nisga'a Landholding Transition Act", October 30, 2009, as reproduced in Flanagan, Alcantara & Le Dressay, *supra* note 451 at 183-184.

courts could provide if negotiations broke down. At that time the best indication the Nisga'a had of their rights would have been the decision in *Delgamuukw*,⁴⁷² a decision which held only the promise of an Aboriginal title interest that was no more than a burden on the *Crown's* underlying title and was subject to numerous limitations.

Perhaps the Nisga'a Agreement illustrates the most important weakness in applying the existing paradigm of Aboriginal law: while the leaders of Aboriginal nations maintain that their nations are sovereign the Crown refuses to recognize that they are sovereign and therefore have legal status that is equal to the Crown's. A treaty that does not express a genuine mutual recognition of sovereignty is likely to leave lingering questions about its fairness and this will compromise its capacity to foster reconciliation. In a critical view of the NFA as a model for modern treaties the Union of British Columbia Indian Chiefs (UBCIC) observed that the Nisga'a Agreement "extinguishes all Aboriginal Title of the Nisga'a Nation to the entirety of their traditional territory, and converts Nisga'a original title to 'fee simple' title. Nisga'a settlement lands will be approximately 1990 km², or roughly 8% of the Nisga'a original territory..."⁴⁷³ This demonstrates the incommensurable nature of the opposing paradigms. The parties have opposing understandings of crucial matters that lie at the heart of treaty negotiations. The UBCIC uses "Aboriginal title" in the sense of an "original title" that is paramount and to which Crown title is subject – a reversal of the priority from the common law position which considers "Aboriginal title" as merely a burden on the Crown's underlying title. Hence, according to the same UBCIC document:

Aboriginal title to lands and resources existed at the time that the Crown asserted

⁴⁷² *Supra* note 104.

⁴⁷³ Union of British Columbia Indian Chiefs, "Modern Land Claim Agreements: Through the Nisga'a Looking Glass", Draft 7, September 1998 at 5, online: <http://www.ubcic.bc.ca/files/PDF/UBCIC_ModernAgreements_LookingGlass.pdf>.

sovereignty. This title was never extinguished. This is why Crown title is uncertain and remains subject to Aboriginal Title. Consequently, there is an air of illegality about any transactions the Crown makes or authorizes with respect to Lands and Resources. These transactions do not acknowledge that Indigenous Peoples own the Lands. This policy violates the legal principle that, "You cannot give that which you do not own."⁴⁷⁴

The Nisga'a Final Agreement does not acknowledge the full extent of the Nisga'a Nation's territorial rights and does not recognize the Nisga'a Nation's sovereignty as equal to the Crown's sovereignty. The word "sovereignty" appears only once in the Agreement, and that is a reference to the call by Canadian courts for reconciliation between "the prior presence of Aboriginal peoples and the assertion of sovereignty by the Crown". This one-sided view of sovereignty does not sit comfortably with another clause in the Preamble that professes the lofty goal of a relationship between the parties that is "based on a new approach to mutual recognition and sharing and to achieve this mutual recognition and sharing by agreeing on rights, rather than by the extinguishment of rights". If the Agreement had truly been premised on a paradigm consistent with the equality of peoples it should have included a mutual recognition of sovereignty, combined with terms that truly reflect a philosophy of sharing rather than extinguishment.

⁴⁷⁴ *Ibid.* at 2.

Chapter 4: The Implications and Vision of an Equality Paradigm

Since this paper submits that an equality paradigm will promote reconciliation between Aboriginal and non-Aboriginal Canadians, the final chapter will consider some of the new paradigm's wider implications for Aboriginal law. Although the discussion that follows must necessarily be tentative, it suggests that the new paradigm will produce a path that is workable and likely to be effective.

As observed above, under the equality paradigm the courts will allow Crown claims of sovereignty to be examined for legitimacy. The "act of state" doctrine will not limit this examination except in a manner that is consistent with section 35 of the Constitution.⁴⁷⁵ Indeed, in *Haida Nation* the Court appeared to be looking through the lens of the new paradigm when it developed the Crown's duty to consult and accommodate as a consequence of "...the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."⁴⁷⁶

Kuhn predicted that a new paradigm would cause a field to be reconstructed from its fundamentals, causing a change in its generalizations, as well as its methods and applications.⁴⁷⁷ We should expect, therefore, that in addition to offering an answer to the moral crisis resulting from a theory in which Crown sovereignty derives support from ethnocentric assumptions, the equality paradigm should also facilitate new methods and applications that will be consistent with the reconciliation between Aboriginal and non-Aboriginal peoples promised by section 35.

⁴⁷⁵ See Chapter 2 above, text accompanying notes 178-207.

⁴⁷⁶ *Haida Nation*, *supra* note 2 at para. 32. See also the discussion of why the duty to consult could be viewed as the "*de facto*" doctrine in action at Chapter 2 above, text accompanying notes 251-259.

⁴⁷⁷ Kuhn, *supra* note 364 at 81-85, and see discussion above in Chapter 3.

While the shift to an equality paradigm will no doubt bring with it countless subtle changes, the discussion in this Chapter will contemplate what might follow if courts applied the equality paradigm by ending their unquestioning acceptance of Crown sovereignty and affirming that Aboriginal peoples were sovereign entities with claims to jurisdiction and territory that may continue to exist.

4.1 Proof of Sovereignty

The equality paradigm recognizes the sovereignty of Aboriginal nations generally, but to establish sovereignty in a particular context an Aboriginal nation would have to demonstrate its existence and the boundaries of its territories.⁴⁷⁸ For the reasons discussed above, courts should presumptively accept that all Aboriginal peoples have historically lived in nations.⁴⁷⁹ Establishing the extent of the nation's territory should be less onerous than the test for establishing "exclusive occupancy" that the courts have developed for Aboriginal title. Slattery's "Principle of Territoriality" indicates that the Aboriginal nation, at minimum, "had rights to the territories they occupied at the time of European contact, to the extent they needed them to survive and flourish."⁴⁸⁰ or, putting it only slightly differently, all Aboriginal peoples have a "presumptive generic right to an ancestral territory."⁴⁸¹ Recognizing the Aboriginal nation and its territories is consistent with the objective of protecting the nation's "cultural security"

⁴⁷⁸ This discussion assumes that an Aboriginal nation could bring an action seeking a declaration of sovereignty, subject only to such constraints on questioning Crown sovereignty that are imposed by the act of state doctrine and that are consistent with section 35. The procedural issues that are raised by such an action, such as who would have standing to bring it, are beyond the scope of this paper.

⁴⁷⁹ See above, text accompanying notes 312-320.

⁴⁸⁰ Slattery, "Imperial Claims", *supra* note 166 at 697 and see text accompanying note 314 above.

⁴⁸¹ Slattery, "Honour of the Crown", *supra* note 3 at 339-440.

recognized in *Sappier/Gray*, as well as the *Grundnorm* posited by Justice McLachlin. It follows that an Aboriginal nation's territory may be larger than necessary for mere survival, and evidence in support of this might include the recognition of boundaries by neighbouring Aboriginal nations. Conversely, overlapping claims to territory may arise among Aboriginal nations just as may occur under the rights paradigm in relation to Aboriginal title claims.⁴⁸²

The onus of proof for claims of sovereignty over territory should reflect the principle of the equality of peoples. This means that Crown sovereignty cannot be assumed, as it has been in Aboriginal title claims, with the principal onus falling on the Aboriginal nation.⁴⁸³ In Canadian courts the plaintiff normally bears the onus of proof, and if the Aboriginal nation occupies that role in the litigation then this would suggest that the onus should lie with that nation. However, giving the Crown's sovereignty claim a presumptive advantage over the claim of the Aboriginal nation is not consistent with the principle of the equality of peoples. A solution to this may be to only require the Aboriginal nation to make a *prima facie* case of sovereignty before the onus shifts to the Crown to establish its sovereignty in accordance with fundamental constitutional principles. If the Crown cannot meet its onus then a *prima facie* case of sovereignty should suffice to establish sovereignty for the Aboriginal nation, on grounds of both prior Aboriginal occupation and the need to avoid a legal vacuum.

⁴⁸² The Nisga'a Nation reached overlap agreements with the Tahltan Nation and the Tsimshian Nation before the Nisga'a Final Agreement was signed. When negotiating modern treaties the federal government's approach has been to let First Nations work out issues arising from overlapping claims between themselves. See Tom Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House, 2000) at 54-55, citing Department of Indian Affairs and Northern Development, "Federal Guidelines for the Settlement of Overlapping Comprehensive Claims or Treaties," Ottawa, June 15, 1994.

⁴⁸³ For a discussion of the onus of proof in Aboriginal title claims, see Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999), 37 Osgoode Hall L. J. 775.

4.2 Fiduciary Duties during Negotiations

A court may conclude that the Crown's assumption of sovereignty over the territory of an Aboriginal nation lacks legitimacy. Although this scenario of competing sovereignties would present some challenges, it would also have the constructive effect of compelling negotiations to reconcile sovereignties. As observed above, a court that found that Crown sovereignty over a particular territory was not legitimate could make an interim order that includes a declaration similar to that granted in the *Manitoba Language Reference* to preserve the rule of law ("the interim order"). This interim order could grant temporary authority to the existing legal regime, and it could last as long as it takes to finalize a treaty. A court should only make an interim order that grants temporary validity to the Crown's *de facto* government if this is consistent with the requirements of the constitutional guarantee of the rule of law. When considering this it should apply the conditions for granting temporary validity to unconstitutional laws set out in *Ibrahim*.⁴⁸⁴ It is likely that the conditions precedent to maintaining the *de facto* government of the Crown will be met, since failing to do so would, among other things, cause uncertainty with respect to property and other rights.

Borrows agrees that if the Crown's assertion of sovereignty were held invalid the rule of law would necessitate a temporary recognition of the existing laws, but he reminds us that Aboriginal peoples are also entitled to the benefit of the constitutional rule of law guarantee, and that the Crown's longstanding suppression of Aboriginal governments violates this guarantee. Accordingly, even though he concedes that existing laws will need to remain in effect until

⁴⁸⁴ *Supra* note 242 at 265. See also discussion of same above, text accompanying notes 242-244.

defects in the Crown's sovereignty are rectified, Aboriginal powers of governance should also be permitted to promote orderliness within Aboriginal communities."⁴⁸⁵

Although an interim order that extends the effectiveness of the existing *de facto* regime will secure legal stability, there must be some changes in the manner in which governments exercise their authority in an interim period following a declaration that Crown sovereignty lacks legitimacy ("the interim period") while negotiations are in progress. During the interim period, the existing *de facto* sovereign and its governments will remain in place only as a matter of temporary necessity. As confirmed in *Haida Nation*, when the Crown assumes discretionary control over specific Aboriginal interests, it has a fiduciary duty that requires it to act in the Aboriginal group's best interests when it exercises that control, although the content of that duty may take into account the Crown's broader obligations.⁴⁸⁶

An interim order that requires the consent of the Aboriginal nation for every decision of *de facto* governments during the interim period would be the strongest possible expression of the Crown's fiduciary duty and it would provide the greatest motivation for the parties to negotiate a more efficient means of sharing sovereignty and jurisdiction. However, this would come with a risk of being so cumbersome and subject to stalemate that it might threaten to defeat the purpose of the interim order of preventing a legal vacuum and allowing the *de facto* authority of the existing regime to temporarily continue. As to what a more appropriate content of the fiduciary duty should be, neither the context of an unproven claim considered in *Haida Nation*⁴⁸⁷ nor the context of an infringement of an established Aboriginal title claim discussed in *Delgamuukw*⁴⁸⁸ is perfectly analogous. Since Aboriginal sovereignty, not just the right of Aboriginal title would

⁴⁸⁵ Borrows, "Sovereignty's Alchemy", *supra* note 143 at 583-84.

⁴⁸⁶ *Haida Nation*, *supra* note 2 at para. 18.

⁴⁸⁷ *Ibid.* at paras. 39-51.

⁴⁸⁸ *Supra* note 104 paras. 165-169.

have been established and would be infringed throughout the interim period, the content of the fiduciary duty should be as strict or stricter than was outlined in *Delgamuukw*. Although the Supreme Court has left for another day the question of whether the duty to consult applies to legislative action as well as other government conduct,⁴⁸⁹ this duty must apply to legislative conduct if Aboriginal sovereignty has been established. A *de facto* government must demonstrate that its temporary legitimacy is consistent with the constitutional guarantee of the rule of law, and a failure to consult with respect to legislative action that affects Aboriginal interests would not be consistent with minimal impairment of this guarantee, just as it would not be consistent with the criteria of proportionality of measures criterion for validating an unconstitutional law.⁴⁹⁰ It follows that the constitutional principles of the rule of law and the honour of the Crown would demand that the scope of the measures requiring consultation would be broad. Further, for significant decisions that affect Aboriginal interests, the duty will require more than mere consultation and some decisions may be so important that the consent of the Aboriginal nation must be obtained.

Underlying or continuing breaches of rights associated with Aboriginal sovereignty would not be subject to a duty to consult or accommodate during the interim period because this would not be consistent with the purpose of granting temporary legitimacy to the Crown's sovereignty. This is consistent with the *ratio* in *Rio Tinto*, in which the Court held that the duty arose only when a claim or right may be affected by "current" government conduct.⁴⁹¹

Brian Slattery's theory of the generative structure of Aboriginal rights courts also requires negotiation to determine the content of Aboriginal rights. He has proposed that while

⁴⁸⁹ *Rio Tinto*, *supra* note 14 at para. 44.

⁴⁹⁰ *Ibrahim*, *supra* note 242. For a list of these criteria see above, text accompanying note 244.

⁴⁹¹ *Rio Tinto*, *supra* note 14 at paras. 48-49 and 53-54. The Court allowed that this does not preclude other remedies for past and continuing breaches, including the awarding of damages (*ibid.* at para. 49).

these negotiations to determine a “generative Aboriginal title claim” are in progress the court could only do the following:

- (1) recognize the historical title of the claimant group as it existed at the time of Crown sovereignty, as a baseline for modern negotiations;
- (2) issue such orders as are necessary and appropriate to protect the historical title from further erosion and invasion, while taking account of existing private and public interests;
- (3) recognize the right of the claimant group to use and possess certain portions of its historical territory, either immediately or after the lapse of a specified period of time;
- (4) enjoin the parties to enter into negotiations aimed at defining the modern scope of aboriginal title, as a generative right.⁴⁹²

However, if the generative structure of Aboriginal rights amounts to recognition of continuing Aboriginal sovereignty and the need to reconcile it with Crown sovereignty, then negotiations must always address jurisdiction and governance. Therefore, while Slattery’s proposal may be reasonable in relation to the use and occupation of land in the interim period, it does not address the potential role of the courts with respect to the full range of issues that are at stake.

Perhaps an Aboriginal nation that has established its continuing sovereignty should be entitled to exercise its inherent right of self-government.⁴⁹³ To be sure, if it exercised that right under s. 35(1) before the declaration, this right would not be weakened by the interim order. However, to the extent that any new powers of self-government would need to be grounded in sovereignty, the fundamental principle of the rule of law would demand that citizens not be subject to conflicting laws and duties. Therefore, new governmental powers should not be assumed unilaterally during the interim period.

⁴⁹² Slattery “Metamorphosis”, *supra* note 16 at 263.

⁴⁹³ This appears to be Borrows’ position: see *supra* note 485 and accompanying text. Borrows appears to contemplate governance within Aboriginal communities but on a larger scale existing laws would remain in place temporarily.

Onerous fiduciary duties will make governing cumbersome during the interim period. Extensive consultation processes will also be costly, and the costs to the Aboriginal nation of participating in these processes should be the responsibility of the Crown, since it was the Crown's unilateral assertion of sovereignty that necessitated the process. These costs, and a desire for a more efficient system that allows each of the Crown and Aboriginal peoples to be primarily responsible for matters within their own spheres of interest, will serve as incentives for the timely completion of a treaty that reconciles sovereignties.

The ultimate content of the treaty and a "just settlement" must be determined by the parties themselves, and cannot be imposed by a court. In *Quebec Secession Reference* the Supreme Court explained why the Court could not take a supervisory role over the political aspects of constitutional negotiations. Negotiation is the responsibility of the representatives of the parties, who are responsible to their constituents, and the reconciliation of the parties' legitimate constitutional interests "...can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences."⁴⁹⁴ Similarly, the courts could not take a supervisory role over the *political* aspects of negotiations between the Crown and Aboriginal peoples.

It follows from this that a court cannot force the parties to come to an agreement, nor can it impose terms of an agreement if the parties are unable to reach one. However, for all of the foregoing reasons and particularly for the sake of "reconciliation between Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions"⁴⁹⁵ it will be in

⁴⁹⁴ *Supra* note 194 at para. 101.

⁴⁹⁵ *Mikisew Cree*, *supra* note 291 at para. 1.

the best interests of both parties to reach mutually accepted treaty terms. The Crown should also be mindful of its obligation at international law to respect the right of internal self-determination of the Aboriginal people.

While a court could not take a supervisory role over the political aspects of constitutional negotiations, the court's duty to uphold the rule of law requires it to reserve some jurisdiction throughout the interim period. If negotiations drag on too long it may be that maintaining the unconstitutional *de facto* regime can no longer be justified according to the criteria in *Ibrahim*⁴⁹⁶ or when weighed against the cost to the rule of law arising from the suppression of Aboriginal governments. If maintaining the temporary authority of the *de facto* regime can no longer be justified this need not result in chaos and a legal vacuum. A *de jure* sovereign may be ready to accept a transfer of governmental responsibilities, subject to any restrictions on the ability of that sovereign to interfere with existing third party interests that the rule of law guarantee may still justify. Once a treaty is concluded and valid laws are in place, the interim order will expire. Thereafter spheres of jurisdiction and, likely, some ongoing consultation and accommodation requirements will be specified in the treaty. This will not end the reconciliation process, as a positive relationship needs to be nurtured. The wisdom of doing this is recognized by the Aboriginal tradition of the annual brightening of the covenant chain.⁴⁹⁷ Amendments may be needed from time to time as conditions change. All of this would be consistent with Aboriginal conceptions of 'treaty-making' as a process, not a one-time agreement.⁴⁹⁸

⁴⁹⁶ *Supra* note 242. These criteria are discussed above, text accompanying notes 242-245.

⁴⁹⁷ See Walters, "Covenant Chain", *supra* note 164.

⁴⁹⁸ Asch & Zlotkin, *supra* note 163 at 216. This appears to be consistent with the discussion of the role of treaties in *Beckman*, *supra* note 14. See *supra* notes 324-328 and accompanying text.

4.3 Existing Treaties

This discussion has focused on the consequences of recognizing Aboriginal sovereignty in the absence of an existing treaty. The same principles should apply where treaties exist, because the extent to which the Crown's sovereignty is legitimate or only *de facto* will depend on the interpretation and legitimacy of the treaty. Matters not determined by the treaty would have to be resolved through negotiations.

While a thorough consideration of the effect of an equality paradigm on the interpretation and application of existing treaties is beyond the scope of this work, First Nations frequently assert that treaties only facilitated sharing the land, and did not relinquish sovereignty.⁴⁹⁹ Patrick Macklem's suggestion for how an apparent surrender of land in a treaty should be viewed is also consistent with treaties serving as a framework for sharing sovereignty. It should be "...treated as the granting of consent to a system whereby land could be shared by native and non-native people, with priority of use attaching to one party by virtue of the surrender."⁵⁰⁰ RCAP recommended that when historical treaties are implemented they should be guided by a set of

⁴⁹⁹ See Chapter 1 above, text accompanying notes 35-42. See also Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 173. Venne describes the teaching of Elders about the role of women in Cree society, and the strong spiritual connection that women have to the land. Women have a special link to the Creator and Mother Earth because they give forth life, and therefore they own the land. Women can authorize a man to use the land, but they cannot pass on ownership or "the life of the earth". This meant that the Chiefs only had authority to share the land, not to sell or surrender it (*ibid* at 191). See generally Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000). See especially at 58, which cites First Nation Elders from Saskatchewan as rejecting any consistency between First Nations oral history and understanding of the treaties and "extinguishment clauses" in the text of treaties 4,5,6, 8 and 10. See also Henderson, "Treaty Federalism", *supra* note 17 at 262-265.

⁵⁰⁰ Macklem, "Legal Imagination", *supra* note 7 at 444.

presumptions of their “spirit and intent”⁵⁰¹ that reflect sharing of land and jurisdiction between treaty nations and the Crown. In particular:

- treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship.
- treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and
- treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.⁵⁰²

These presumptions are consistent with an equality paradigm that views treaties as having been made between sovereigns that intended to share land and jurisdiction; they are not consistent with a rights paradigm that views the Crown as the sole sovereign by virtue of the “discovery” principle, with treaties serving only to surrender any usufructuary or other rights that remained with the Aboriginal peoples.

The Office of the Treaty Commissioner of Saskatchewan appreciated the significance of the Supreme Court’s description of the purpose of treaties as reconciling sovereignties⁵⁰³ when it observed that “in future treaty parties will have to “reach an understanding on *how* the treaties reconciled sovereignties, and further, what this reconciliation implies for future governance arrangements.”⁵⁰⁴ Further, it puts sovereignty within a framework that emphasizes “sharing, accommodation and mutuality...”, a framework of treaty implementation known as “treaty federalism”.⁵⁰⁵ The Office of the Treaty Commissioner anticipated that this will raise issues that

⁵⁰¹ *Report*, vol. 2, *supra* note 78 at 58, recommendation 2.2.4.

⁵⁰² *Ibid.*, recommendation 2.2.4(d).

⁵⁰³ *Haida Nation*, *supra* note 2 at paras. 20 and 25.

⁵⁰⁴ Saskatchewan, Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant*, (Saskatoon: Office of the Treaty Commissioner, 2007) at 142.

⁵⁰⁵ *Ibid.* at 143. On treaty federalism, see generally Henderson “Treaty Federalism”, *supra* note 17 and Slattery, “Organic Constitution”, *supra* note 166.

must be negotiated because they are political and therefore non-justiciable,⁵⁰⁶ but this does not preclude a role for courts in treaty interpretation and implementation that parallels their role in division of power disputes between provinces and the federal government.

4.4 Aboriginal Title or Ultimate Title?

Another implication of the equality paradigm is that a sovereign Aboriginal nation has jurisdiction over its territory, subject only to jurisdiction that it has agreed to share. The Crown does not hold ultimate title to land that falls within the territory of a sovereign First Nation unless the latter has agreed to cede the ultimate title to the Crown. This means the Aboriginal nation cannot also have ‘Aboriginal title’ in the land as that term has traditionally been understood, because, by definition, Aboriginal title is a burden on the *Crown’s* ultimate title. Although third party rights may be preserved by the *de facto* doctrine (see below) the Aboriginal nation is not in the category of a “third party” and its “reasonable expectations” have not been defeated by the loss of its Aboriginal title or other Aboriginal rights, since those rights have been replaced with more fundamental rights as a result of the successful assertion of sovereignty.

In negotiations aimed at reconciling sovereignties, neither the sovereignty nor the system of land tenure of either sovereign presumptively takes precedence. Therefore, it cannot be presumed that after negotiations either the Crown or the Aboriginal nation will hold the ultimate title to any particular land in the territory. This is helpful, because it opens the widest possible range of options for finding creative solutions that will accommodate the interests of both parties.

⁵⁰⁶ *Ibid* at 142-43.

Asch and Zlotkin have observed that historically federal government policies seeking extinguishment of Aboriginal rights and title have been a barrier to reaching comprehensive claims settlements because many Aboriginal peoples seek recognition and affirmation of their rights and refuse to agree to extinguishment.⁵⁰⁷ RCAP has also observed that Aboriginal nations that are parties to historical treaties are practically unanimous in holding that they did not agree to extinguish their rights to their traditional territories but agreed to share them in an equitable fashion.⁵⁰⁸

The solution Asch and Zlotkin proposed is to recognize that Aboriginal peoples possess the underlying title, except where they have consented to an alternative. If the equality of peoples is accepted as a self-evident truth, then the underlying title of the Aboriginal nation derives from its prior jurisdiction over the land. Recognizing the Aboriginal nation's ultimate title would

...move the discussion away from a focus on title and towards the development of political relationships. Aboriginal people have, from the time of European contact, promoted a political relationship that is based on sharing and mutual accommodation. This approach is based on the philosophical premise that underlying title was gifted to Aboriginal people by the Creator, but only on the basis that they maintain an ethic of sharing.”⁵⁰⁹

Negotiations that proceed from principles that are consistent with the fundamental ethic and principles of Aboriginal peoples are more likely to be fruitful and to contribute to reconciliation and therefore to fulfilling the purpose of section 35. The option of an Aboriginal underlying title exemplifies how the equality paradigm will facilitate methods and applications that will promote the reconciliation promised by section 35 that are not available under the rights paradigm.

⁵⁰⁷ Asch & Zlotkin, *supra* note 163 at 211-14.

⁵⁰⁸ RCAP vol. 2, *supra* note 78 at Chapter 2 – Treaties, at section 3.8, Aboriginal Rights and Treaty Sharing. For other commentary critical of extinguishment policies, see Joffe, *supra* note 282 at 182-86. See also McNeil, “Extinguishment”, *supra* note 133. McNeil argues that that voluntary extinguishment may not be permissible under Aboriginal law, and Aboriginal parties to treaties did not intend to surrender their entire interest to the Crown. *Ibid.* at 304-307.

⁵⁰⁹ Asch and Zlotkin, *supra* note 163 at 225-26, 228.

As discussed above, it appears that the Nisga'a Nation already holds a form of ultimate title, or at least that the Nisga'a Final Agreement has used some aspects of the concept of an underlying title to give the Nisga'a Nation more practical flexibility in how it exercises its jurisdiction over land.⁵¹⁰ The Agreement does this implicitly, and does not deliberately delineate a new conception of the ownership of the underlying title. In view of the importance that Aboriginal nations place on a continuing recognition of their sovereignty, an express acknowledgement that the underlying title belongs to the Aboriginal nation or is shared with the Crown may be a valuable aid to negotiations and ultimately to reconciliation.

4.5 Protection of Third Party Rights

Whether the *de facto* doctrine would operate to *permanently* protect interests that were acquired by third parties that relied, in good faith, on the acts of the Crown is an important question.⁵¹¹ Of course, like any doctrine, the *de facto* principle will only be given effect insofar as it is in accordance with the text of the Constitution and fundamental constitutional principles. Therefore, it should yield to section 35 and the underlying constitutional value of Aboriginal rights if it violates these principles, or violates the rule of law by unjustly dispossessing Aboriginal nations of territory or property. This, however, presents a conundrum, because the *de facto* doctrine is itself grounded in the foundational principle of the rule of law.⁵¹² The Supreme Court has stated that the defining principles of the Constitution function “in symbiosis” and that

⁵¹⁰ See above, text accompanying notes 462-467.

⁵¹¹ See above, text accompanying notes 248 to 250.

⁵¹² See above, text accompanying notes 210 to 215.

“[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.”⁵¹³

Two approaches to how long rights acquired by third parties that relied on Crown assertions of sovereignty ought to be protected appear to be available. The first would attempt to justify permanent protection of third party interests on the grounds of a symbiosis between 1) the rule of law and the protection of “justified expectations” of the *de facto* doctrine, and 2) the purpose of reconciliation of s. 35. The second approach would guarantee third party interests only for the duration of the interim period, and would argue that their ultimate fate should be a matter for treaty negotiations.

The first option receives some support from the view that reconciliation is reciprocal, and, as the Supreme Court said in *Mikisew Cree*, it must take into account the claims, interests and ambitions of both Aboriginal peoples and non-Aboriginal peoples, and that it would fail to do this if innocent third parties had to fear being dispossessed of their property. Moreover, reconciliation is concerned with “social cohesion, political stability and civic peace” and “implies a search for a middle ground,”⁵¹⁴ and failing to safeguard third party interests is not consistent with realizing these aspects of reconciliation. This approach would also remove a thorny and politically-charged issue from the bargaining table which might otherwise make it more difficult to reach an overall settlement.

⁵¹³ *Quebec Constitution Reference*, *supra* note 194 at para. 49. On the lack of any single overriding constitutional principle, see Mark Carter, “An Analysis of the ‘No Hierarchy of Constitutional Rights Doctrine’” (2006) 12 Rev. Const. Stud. 19. Carter expressed the view that “the rights of sovereignty and self-governance contained in section 35 point to rationales for the engagement of the no hierarchy of rights doctrine that are more closely related to the respect for national sovereignty that one state owes to another” (*ibid.* at 47-48). This perspective is consistent with the conclusion reached below that the only appropriate means of finding permanent solutions to issues arising from third party interests is through negotiations between the Crown and Aboriginal nations.

⁵¹⁴ John Borrows, “Uncertain Citizens: Aboriginal Peoples and the Supreme Court” (2001) 80 Can. Bar. Rev. 15 at 32 [Borrows, “Uncertain Citizens”].

The cost of this first approach, however, is that permanent protection of third party interests would amount to permanent dispossession of the original Aboriginal interest. The *Chippewas of Sarnia* decision indicates an Aboriginal nation may be no worse off under this approach than if it had only an Aboriginal title claim under the rights paradigm – since under the rights paradigm courts appeared to favour the rights of innocent third parties over Aboriginal title rights even if they had to stretch or contort long-standing legal principles to do so.⁵¹⁵ However, any defence that must ultimately rely on a rejected paradigm must fail.

In spite of any merits it may have, the first approach repeats on a smaller scale the injustice and arrogance of the Crown's unilateral assertion of sovereignty that created the problem of third party interests in the first place. It does not heed Borrows' warning that an appeal to the interests of the broader community "potentially strips Aboriginal peoples of their constitutional protection in the toughest cases, when the majority's interests are arrayed against them, at the very time they might require the greatest protection", and that yielding to such appeals may hold the greatest risk to civic peace.⁵¹⁶

Therefore, it appears that greater wisdom and justice lie in a second approach, which views protection of third party rights during the interim period as adequate for preserving the rule of law and civic peace, and leaves a final resolution of this issue to negotiations. In negotiations land in the hands of third parties that is of importance to Aboriginal nations can be addressed with sensitivity to the interests of all affected parties, and solutions may be found that a court could not impose. For example, the parties might agree to leave existing property rights of third parties in place while transferring the ultimate title to an Aboriginal nation, or otherwise

⁵¹⁵ See above, notes 130-140 and accompanying text.

⁵¹⁶ Borrows, "Uncertain Citizens", *supra* note 514 at 35-36.

placing the land under the Aboriginal nation's jurisdiction. The agreement may allow the Aboriginal nation to expropriate the property subject to paying compensation to the "owner".⁵¹⁷

4.6 Extinguishment of Aboriginal Rights

Section 35 prevents legislation from extinguishing Aboriginal rights unless the Crown could demonstrate that this would be a justified infringement of a constitutional right. However, Canadian law continues to recognize that prior to 1982 the federal government could extinguish Aboriginal rights by legislation that demonstrated a "clear and plain" intent to do so.⁵¹⁸ Borrows criticized *Delgamuukw*'s unquestioning affirmation of a pre-1982 power to extinguish, and was concerned that "this case leaves a very wide door open" for an argument that Aboriginal title was quashed before British Columbia entered Confederation in 1871.⁵¹⁹ He questioned how it would be consistent with constitutional principles for "an alien government [to] give itself the exclusive authority to extinguish the distinct rights of another people, without their consent."⁵²⁰

The grounds for challenging the Crown's authority to extinguish Aboriginal rights and title are, in essence, identical to grounds for challenging the validity of unilateral assertions of Crown sovereignty; the two stand or fall together. If the Crown's sovereignty was not legitimate, it had no authority to extinguish any Aboriginal rights. More to the point, once the hierarchical relationship of the rights paradigm is replaced with recognition that Aboriginal peoples were as much sovereign as Europeans, unilateral extinguishment no longer has a place in the discussion.

⁵¹⁷ For example, the Nisga'a Final Agreement includes a power of expropriation. The Nisga'a Government can exercise this power for public purposes and public works over certain lands specified in the Agreement as "Nisga'a land". See above, *supra* note 467 and accompanying text.

⁵¹⁸ After Confederation, this power was limited to the federal government. See *Sparrow*, *supra* note 6 at 1099.

⁵¹⁹ Borrows, "Sovereignty's Alchemy", *supra* note 143 at 586, n. 252.

⁵²⁰ *Ibid.* at 588. See generally McNeil, "Extinguishment", *supra* note 133.

Unlike the Nisga'a Agreement, a modern treaty negotiated under the new paradigm should include clauses wherein each party recognizes the sovereignty of the other. Although many difficult practical issues of how that sovereignty will be shared will remain, such an acknowledgement should establish a foundation for other provisions which would not amount to an extinguishment of Aboriginal title in parts of the Aboriginal nation's territory that is shared with other Canadians. By avoiding extinguishment in this fashion, the treaty would address a major criticism the Union of British Columbia Indian Chiefs levelled against the Nisga'a Final Agreement.⁵²¹

4.7 Inalienability of Land

The inalienability of Aboriginal land except to the Crown was a limitation imposed by the colonial power asserting sovereignty. If the assertion is invalid this limitation cannot survive. Rationales for inalienability have included the inability of settlers to derive their title from other than the Crown, and a desire to protect Aboriginal peoples from unscrupulous European settlers.⁵²² After the recognition of Aboriginal sovereignty, limitations on alienability no longer have a legal foundation unless imposed by an Aboriginal nation on itself.⁵²³

⁵²¹ See above, *supra* note 473 and accompanying text.

⁵²² See McNeil, "Inalienability", *supra* note 464 at 477-78.

⁵²³ The *Nishga Final Agreement* allows the Nishga'a Nation to freely alienate Nishga'a land while retaining a form of ultimate title. See above, text accompanying notes 462 to 469 .

4.8 Fiduciary Duties and Limitations on Sovereignty

If Canadian laws that infringe Aboriginal sovereignty are necessarily invalid for exceeding Canada's sovereign authority,⁵²⁴ then Aboriginal laws that infringe Canada's sovereignty would also be invalid. Although the justificatory analysis related to s. 35(1)⁵²⁵ may not be appropriate for determining the limitations on the sovereignty of Aboriginal governments, Aboriginal sovereignty is no more immune from scrutiny for consistency with fundamental constitutional principles, including federalism, than the federal and provincial governments with which they share sovereignty. Just as these principles allow assertions of Canadian sovereignty to be scrutinized, they would allow limitations to be placed on Aboriginal sovereignty.

In *Mitchell*,⁵²⁶ Justice Binnie recalled that prior to *Calder*,⁵²⁷ the doctrine of sovereign incompatibility had been given excessive scope in a manner that denied Aboriginal rights, and though it still exists it should be applied with caution.⁵²⁸ The manner in which he would have applied it in that case may be sufficiently free of hierarchical assumptions that it could work in the context of the Crown and Aboriginal peoples sharing sovereignty. At issue was a claim of an international trading and mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy. Justice Binnie would have found that this right, even if otherwise established, was incompatible with "national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an Aboriginal community."⁵²⁹ He also considered whether upholding the claimed Aboriginal rights would be

⁵²⁴ Asch & Macklem, *supra* note 380 at 514-15.

⁵²⁵ *Supra* note 114 and accompanying text; *Sparrow*, *supra* note 6 at 1109-1121.

⁵²⁶ *Supra* note 10.

⁵²⁷ *Supra* note 12.

⁵²⁸ *Supra* note 10 at para. 151.

⁵²⁹ *Ibid.* at paras. 164.

consistent with the purpose of section 35. He expressed the purpose of section 35 as “reconciliation of the interests of [A]boriginal peoples and Crown sovereignty...” and he noted that that Aboriginal people “are themselves part of Canadian sovereignty”.⁵³⁰ He concluded that in this case, “reconciliation of these interests... favours an affirmation of our collective sovereignty.”⁵³¹ Accordingly, it appears that in Justice Binnie’s view, sovereign incompatibility can only be invoked a) to protect interests that all Canadians, including Aboriginal peoples, have in common, and b) to further reconciliation, which lies at the heart of the purpose of section 35.

Any method used to set limits on sovereignty should be guided by principles consistent with partnership and the obligations that partners have toward each other when considering decisions or actions that can reasonably be expected to affect other partners. A partnership of sovereigns suggests a fiduciary relationship similar to the one that flows from the “honour of the Crown” that the Courts have developed since *Guerin*.⁵³² However, the nature of the fiduciary relationship should evolve to one based on equality, rather than a hierarchical conception of the duty. This may be a fiduciary relationship similar (but not identical) to a business partnership, such that each party has a duty to “act in good faith, fairly, reasonably and honourably towards the other.”⁵³³

Aboriginal sovereignty and jurisdiction over territory are not compatible with any limit on the use of the territory of an Aboriginal nation that would parallel the inherent limit imposed

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

⁵³² *Supra* note 100.

⁵³³ This phrase is borrowed from *Te Runanga O Wharekaui Rekohu Inc v. Attorney-General*, [1993] 2 N.Z.L.R. 301 (C.A.) at 304, summarizing the *ratio* of the New Zealand Court of Appeal decision in *Maori Council v Attorney-General*, [1987] 1 N.Z.L.R. 641 with respect to the fiduciary relationship created by the Waitangi Treaty, and in which Cooke P. described the Treaty as signifying “a partnership between races”, *ibid.* at 664. See also the discussion of the treaty relationship in Canada and New Zealand in *Report* vol. 2, *supra* note 78 at Chapter 2 – Treaties, 3.7 “The Fiduciary Relationship: Restoring the Treaty Partnership”.

by *Delgamuukw*.⁵³⁴ In *Campbell v. B.C.*, in the context of a discussion of inherent powers of Aboriginal self-government, Justice Williamson stated “manifestly, the choice of how one’s political leaders are to be selected is an exercise of self-government.”⁵³⁵ Similarly, the choice of how land will be used is manifestly an exercise in territorial jurisdiction.

4.9 Sharing Sovereignty

Recognizing Aboriginal sovereignty and requiring the Crown to find a legitimate source for its sovereignty affirms the principle of equality of Aboriginal and non-Aboriginal peoples. These steps will, finally, shed racist and ethnocentrist conceptions of *terra nullius* and discovery, in accordance with RCAP’s recommendation that such unilateral assertions must be rejected if a renewed relationship between Aboriginal and non-Aboriginal peoples is to be achieved.⁵³⁶

Rejecting unilateral Crown assertions of sovereignty will facilitate honourable negotiations by establishing a foundation of mutual respect. These negotiations will need to work out just terms for accepting Aboriginal nations into Canada as equal sovereign partners – and an Aboriginal nation might see the purpose of the negotiations as seeking just terms for sharing its sovereignty with the Crown. The vision offered here of sharing Canadian sovereignty between Aboriginal, federal and provincial governments is essentially the same as the vision expressed by

⁵³⁴ See text accompanying note 107.

⁵³⁵ *Campbell*, *supra* note 263 at para. 103, referring to *McLeod Lake Indian Band v. Chingee* (1998), 165 D.L.R. (4th) 358, [1999] 1 C.N.L.R. 106 (Fed. T.D.).

⁵³⁶ *Supra* notes 397-398 and accompanying text.

RCAP and endorsed by Justice Binnie in *Mitchell*,⁵³⁷ who quoted the following passage from RCAP's *Report* with approval:

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.⁵³⁸

Justice Binnie envisaged a partnership between peoples, not a subordination of Aboriginal sovereignty. He referred to this as “partnership without assimilation”.⁵³⁹ He invoked the “two-row” wampum from the Iroquois tradition, which also symbolized the Treaty of Niagara.⁵⁴⁰ He observed that RCAP's proposal differs from the doctrine of a “domestic dependant nation” in the United States, in which the powers of tribal governments, “whatever their theoretical sovereignty” can be overridden by Congress.⁵⁴¹ Rather, “the Royal Commission itself sees [A]boriginal peoples as full participants with non-[A]boriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.”⁵⁴²

Although the vision is the same, there are differences of process between the proposal described by RCAP and Binnie and the proposal outlined here. If the relationship that is envisaged is a true partnership, then the terms of that partnership cannot be imposed; they must be negotiated and freely accepted. More than one commentator has observed that neither Justice Binnie nor RCAP had focused on the need for full consent from Aboriginal peoples to the

⁵³⁷ *Supra* note 10. For a thoughtful analysis of Binnie J.'s view of shared sovereignty and a review of critiques of that view see Moodie, *supra* note 166 at 27-41.

⁵³⁸ *Mitchell*, *supra* note 10 at para. 130, citing RCAP, vol. 2, *supra* note 78 at 240-41.

⁵³⁹ *Mitchell*, *ibid.*

⁵⁴⁰ *Ibid.* at paras. 127-130.

⁵⁴¹ *Ibid.* at para. 167.

⁵⁴² *Ibid.* at para. 135.

partnership and to its terms.⁵⁴³ It is no longer possible for Aboriginal peoples to reject any kind of partnership – per Chief Justice Lamer, “...we are all here to stay”.⁵⁴⁴ We cannot deny that the Crown has assumed *de facto* sovereignty, but we can initiate a process that recognizes Aboriginal sovereignty and that seeks to reconcile the peoples and sovereignties in Canada by negotiating the *terms* of the partnership.

This vision of Canada has also been described as “shared” or “merged” sovereignty, but this discussion has favoured the present tense of “sharing sovereignty”. While ‘merged’ describes a Canada that contains multiple sources of sovereignty, it leaves the continuing existence of those sources unstated. Describing sovereignty as ‘shared’ recognizes the ongoing vitality of separate sovereignties and identities within a united Canada. Referring to this in the present tense as ‘sharing’ captures the dynamic nature of the relationship and the need to nurture it with ongoing co-operation and renewal. It also accords with the general view of Aboriginal peoples that treaty making is an ongoing process.

By acknowledging that Crown sovereignty is only *de facto* sovereignty until it gains legitimacy through a treaty, the Supreme Court has acknowledged the need for consent from Aboriginal nations to the terms of sharing and reconciling sovereignties. Consent can only be obtained through honourable treaty negotiations based on the principle of the equality of peoples. An examination of existing treaties may reveal some measure of consent to sharing sovereignty, but where this is incomplete or where it was not voluntary, further negotiations will be required.⁵⁴⁵ It is in this process that the real work of reconciliation will take place.

⁵⁴³ See Asch, “Affirmation”, *supra* note 166 at 35-38 and Walters, “Morality” *supra* note 116 at 511-512.

⁵⁴⁴ *Delgamuukw*, *supra* note 104 at para. 186.

⁵⁴⁵ Asch makes a similar proposal, see Asch, “Affirmation”, *supra* note 166 at 35-37, a proposal which he calls “affirmation”, and in turn citing for this proposal Asch & Zlotkin, *supra* note 163.

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