

**THE POLITICAL THEORY OF ABORIGINAL
RIGHTS LAW IN CANADA:
PROSPECTS FOR RECONCILIATION**

S. Ronald Stevenson

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Faculty of Law
University of Ottawa

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Abstract

While the thesis will proceed with a step by step development of the core arguments from the political theory literature, followed by a detailed analysis of corresponding issues in the jurisprudence, it may help the reader to have a summary statement of the thesis argument from the very start. The core argument is that the Canadian approach to constitutionalism reflected in the model centered on Section 35 of the Constitution Act, 1982, provides a framework, a methodology and a model for practice that could lead the Crown and aboriginal peoples within Canada towards the elusive goal of reconciliation. This framework, rooted firmly in the obligations of the nation-state, is materially different from most normative and legal literature that tends to gravitate to positions that emphasize either the lack of legitimacy of the nation-state or the lack of legitimacy of efforts to recognize aboriginal claims. In other words, this thesis develops an argument for the practical utility of a “middle-ground” approach. This middle-ground approach will depend on a novel interpretation of the foundational methodology adopted by the Supreme Court of Canada to animate Section 35, a particular interpretation of the “nested” relationship between Canadian domestic law, international law and indigenous legal systems and a development of the embryonic emphasis placed on dialogical processes to resolve deep disagreement about fundamentally disparate ontological and epistemological assumptions about attachments to land. In other words, the thesis attempts to develop a constitutional framework to support a practical blueprint to achieve a morally and politically defensible conception of aboriginal rights. Rather than simply defending the constitutional status quo, the thesis will develop what is intended to be a unified approach to Section 35 that will point the way towards several crucial additions to the jurisprudential framework so it can enable the deep deliberation that lies at the very heart of the best aspirations of Canadian constitutionalism.

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PART I – THE POLITICAL THEORY OF RECONCILIATION

CHAPTER 1 - INTRODUCTION

Canadian law pertaining to the rights of aboriginal peoples in Canada is in the midst of a period of unprecedented and rapid change. From a legal perspective, the primary catalyst for change has been the enactment of Section 35 of the Constitution Act, 1982¹. This thesis shall focus on the legal developments that have followed the recognition and affirmation of the existing aboriginal and treaty rights of the aboriginal peoples of Canada. While these developments are regarded as extremely important both within Canada and the international community², they must be placed in a broader context. The response of the law to the claims of aboriginal people is just one part of a much more complicated story about efforts to improve the relationship between aboriginal and non-aboriginal Canadians.

There is increasing attention being paid to addressing the consequences of unfortunate legacies in the historical treatment of aboriginal people in Canada. The most prominent, and arguably promising, example is the apology and global settlement of many claims³ flowing from the operation of residential schools in Canada.⁴ There is also a continuing recognition that the current social and economic conditions of many aboriginal peoples across the country cry out for attention.⁵ Most importantly, there is a strong tradition of advocacy by aboriginal peoples for redress of their historical grievances.⁶ This advocacy played a large role in the domestic constitutional recognition of aboriginal and treaty rights as well as a growing and powerful recognition of indigenous claims at the international level.⁷

Because this thesis is primarily directed to the legal developments following the constitutional recognition of existing aboriginal and treaty rights, it will be focussed on how the normative evaluation of claims is related to the development of the jurisprudential framework. It can be argued that there is no other area of the law where the relation between the jurisprudence and theory is so complex and contested.

This thesis is an extended reflection on the question posed implicitly by Chief Justice Lamer in the Van der Peet decision from the Supreme Court of Canada⁸

“...In his comment on *Delgamuukw v. British Columbia* (“British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992), 17 Queen’s L.J. 350), Mark Walters suggests at pp. 412-413 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

“The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures, consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. ...a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.”⁹

What are the prospects of finding a morally and politically defensible notion of aboriginal rights within Canadian constitutionalism? Now that we are well over a decade past that seminal decision, and a full three decades after the enactment of Section 35 of the Constitution Act, 1982, it is opportune to assess the degree of success of the Canadian domestic legal framework in developing “a morally and politically defensible conception of aboriginal rights”¹⁰. It is highly interesting, and rather ironic, that the central focus of sometimes scathing critique of the normative and legal framework developed by the Supreme Court of Canada for the interpretation of Section 35 aboriginal rights has been the Van der Peet decision itself.¹¹ There is now a huge literature that takes up the challenge reflected in the quotation from Mark Walters¹². The question of the relationship between theory and law has become even more important with the increasing prominence of concepts such as reconciliation and the honour of the Crown¹³. Canadian law is already highly engaged with theory and builds as much from normative analysis as it does from precedent. It will be argued that this is one of the reasons that Canadian aboriginal law is so complex and attracts such disparate and conflicting normative evaluations.

The challenge faced in this thesis is the assessment of two loosely connected but discrete bodies of literature and practice. Strictly on the jurisprudential side, there is a massive body of critical

literature that engages with the emerging jurisprudential framework¹⁴. On the theory side, primarily within the disciplines of philosophy and political theory, there is an even more expansive literature that takes up the question of what is required to do justice with respect to the moral and political claims of aboriginal peoples in what are frequently called “settler states”.¹⁵

There is certainly overlap between the two literatures. Analysis of jurisprudence is frequently conducted in normative terms.¹⁶ On the other side, philosophers and political theorists make frequent use of judicial decisions in developing normative arguments.¹⁷ In light of this overlap, choices have to be made about exposition of material and development of argument. Given that the primary argument of this thesis is that attention to the normative analysis of aboriginal claims offers a powerful tool for the resolution of jurisprudential disputes, the first part of the thesis will deal primarily with the normative framework. To set the context for this exposition, it might be helpful to set out what areas of the jurisprudence are currently unsettled. It would be a potentially important result if normative analysis could provide a vehicle to clarify and resolve some of these legal issues. This is particularly the case when one notes the breadth of the issues that remain unresolved in Canadian aboriginal law. Among the questions that remain unresolved are:

- What is the fundamental nature of an aboriginal right?
- Does aboriginal title cover large traditional territories of aboriginal groups or is it limited to areas of highly intensive use and occupation?
- Does an inherent right of self-government or sovereignty fall within the constitutional recognition and affirmation accorded by Section 35 of the Constitution Act, 1982?
- What role do indigenous legal traditions play in Canadian law?
- Do provincial laws of general application apply to Indians and lands reserved for the Indians absent federal incorporation?
- How are aboriginal and treaty rights reconciled with Charter equality norms?

- What must governments do to justify infringements of Section 35 aboriginal and treaty rights?

These are just a sub-set of the questions that are currently being adjudicated in Canadian courts.¹⁸ It will also be seen that for each of these issues, and many others, there are an incredibly disparate number of approaches prescribing a preferred resolution. And yet, while the questions, at first glance, seem highly technical, it will be shown that their resolution is directly tied to important questions of underlying theory. Indeed, one of the notable features of the Canadian aboriginal law jurisprudence is that the Supreme Court of Canada has demonstrated an awareness of the close linkage between theory and practice. This has had a profound impact on the articulation of the constitutional framework governing the relationship between the Crown and the aboriginal peoples of Canada. This has become increasingly the case with the prominent use of the idea of reconciliation (and the related concept of the honour of the Crown) as a guiding principle in the search for a normatively and politically defensible conception of this relationship. Given the invitation to infuse legal analysis with insights from theory, and the reliance on a theory-infused concept such as reconciliation¹⁹, it is reasonable to ask whether work in philosophy, political theory and other disciplines can assist in the resolution of contested issues in the law.

The bulk of the thesis analysis will be devoted to the analysis of key issues of Canadian constitutional law pertaining to the nature and scope of aboriginal rights, the nature and scope of aboriginal title, the protection of an inherent right of self-government, the application of provincial law to Indians and their lands, the inter-relationship between the Charter of Rights and Freedoms and the rights of the aboriginal peoples of Canada and, the proper approach to the justification of infringements of the rights protected by Section 35 of the Constitution Act, 1982. These issues were chosen in part for their intrinsic importance but also because they help demonstrate important linkages between theory and practice.

Lying behind all of these issues is a fundamental argument about the importance of the decision of the Supreme Court of Canada in *Haida Nation v. British Columbia*²⁰ in developing a fresh understanding of the promise of Canadian law to deliver a distinctive and meaningful approach to reconciliation. While the introduction of a duty to consult and a duty to accommodate, where appropriate, is extremely important in its own right, a range of deeper connections can be drawn between this decision and key trends in the normative literature. The core argument will be that Canadian law is capable of developing a distinctive approach to reconciliation by building on the principles that are immanent in the *Haida* decision. An attempt will be made to link these principles with some of the more promising developments in the normative literature in order to argue that the decision may act as a springboard to move Canadian aboriginal law in a direction that has a stronger normative foundation.

A cross-cutting theme throughout the thesis as a whole is how the methodology adopted by the Supreme Court of Canada in the adjudication of Section 35 claims supports this focus on modern dialogue by situating the interpretation of Section 35 aboriginal rights, including title, on modern claims that are informed by, but not determined by, the historical content of the common law. It will be argued that a truly distinctive approach to aboriginal rights, grounded in the key values of reconciliation and the honour of the Crown, is designed to guide the Crown and aboriginal peoples towards negotiated resolution of current claims and resolution of historical grievances.²¹

Some caveats are in order. First, it would be reasonable to question whether the issue has been framed in an overly court-centered fashion. This is especially so since the courts themselves have clearly expressed a preference that issues relating to reconciliation be worked out at the negotiating table rather than in the courtroom.²² While there is merit to this concern, there are a number of reasons to start with a focus on the jurisprudential framework. All of the activities that are directed to the goal of reconciliation occur within an overall constitutional architecture that is best discerned by close examination of the jurisprudence.²³ Indeed, many of the normative critiques levelled at Canadian law are directed to the alleged limitations and contradictions of this constitutional architecture. As a result, one of the key arguments in this thesis will be that

movement towards reconciliation, assuming that aboriginal and non-aboriginal peoples can develop a mutually acceptable conception of reconciliation, depends upon the existence of a supportive architecture developed through the jurisprudence. That said, it must be remembered that court decisions can fairly be described as “epi-phenomena” and huge normative issues must be addressed about the role of the courts and the state in general in terms of the claims of indigenous peoples.²⁴

Second, a focus on the jurisprudence should not be seen as undermining the importance of the key achievements that have already occurred in Canada. There have been a number of important negotiated resolutions of long-standing claims.²⁵ A public government providing a space for Inuit self-government is now in operation in the territory of Nunavut.²⁶ Literally hundreds of negotiating tables addressing various aspects of aboriginal claims are active.²⁷ A major Royal Commission has addressed the position of aboriginal peoples in Canada in a comprehensive fashion.²⁸ However, while these achievements are frequently cited with admiration by observers external to Canada, there is a pervasive sense in Canada that achievement still lags far behind aspiration.²⁹

Third, it is important to be cognizant of the limits of theory-based arguments in understanding the development of the law. The common law, in particular, is notoriously resistant to the influence of theory.³⁰ At best, our understanding of the development of a complex and highly interactive system can be, and perhaps only should be, partially theorized.³¹ While theory can elucidate and inspire, as well as expose limits and blind-spots, it is highly doubtful that it would be sufficient to move a complex system closer to the achievement of justice.³²

Fourth, even if an argument can be developed for a conception of reconciliation that is a net improvement in terms of normative justification, one still has to envisage the long process of implementation in practice.³³ Reconciliation is not an idea that is self-executing. Its satisfaction requires much work based on mutual good faith. Even if a model is developed that offers fresh

approaches to reconciliation, it will only be meaningful if it produces actual resolution of claims and the active support of aboriginal peoples in Canada. While this thesis can hardly aspire to deliver a practical blueprint for the implementation of reconciliation in Canada, it is hoped that the analysis of principle and the exploration of jurisprudential and constitutional possibilities will at least act as guideposts to assist the journey.

Fifth, this thesis will be directed almost exclusively to the domestic law of Canada. This means that the primary focus will be on the obligations of Canada as a nation state. However, this does not mean that international law and indigenous law will be ignored. It will be argued that indigenous law, Canadian domestic law and international law exist in a nested relationship that offers opportunities for mutually reinforcing development.³⁴ This may prove to be controversial to those who see the resolution of the claims of indigenous peoples lying more exclusively in the indigenous or international realm.³⁵

Sixth, some important areas in the jurisprudence will not be discussed in detail, the most significant being treaties and the fiduciary relationship between the Crown and aboriginal peoples. With respect to treaties, their core importance will be addressed in relation to treaty federalism theory³⁶, but the current doctrine of treaty interpretation will not be addressed in detail.³⁷ The great divide between the parties concerning interpretations of particular treaties requires extensive focus on the negotiating history of those specific treaties.³⁸ With respect to the fiduciary relationship, this shall be discussed in the context of the partial displacement of fiduciary doctrine by new approaches to the honour of the Crown and the duty to consult³⁹. Nor will be the important issue of scope of the authority of Parliament to legislate for Indians and Lands reserved for the Indians receive detailed consideration.⁴⁰

Seventh, this work will neither be a work of political theory or philosophy nor traditional legal analysis. It will generally not make predictions of where the courts seem to heading or make recommendations concerning what they should do. The focus shall be on bringing two disparate

but overlapping bodies of work into conversation. In this light, it will primarily constitute a reflection on possibilities and a consideration of their normative implications. It will be argued that this work can frame a distinctive response to the challenge of finding a mutually acceptable approach to reconciliation.

Eighth, care has to be taken to be mindful of the frequent dangers that can flow from mixing normative and legal analysis. For example, Hendrix argues that existing law, even in a legal system with extensive elaboration of the constitutional framework, "...will clearly not be sufficient to cover anything like the full range of reasons that might be offered on either side."⁴¹ He argues, however, that legal analysis can provide conceptual tools to frame inter-cultural debate, though this will cease to be effective if one of the participants in the debate wishes to challenge the very legitimacy of the legal and political system.⁴² It will be seen that legal analysis and normative analysis are frequently blurred in practice. As previously noted, political theorists very frequently use judicial decisions as case-studies to develop normative analysis.⁴³ Constitutional law arguments, in particular, frequently take the form of normative argumentation. It will be seen that several prominent theorists, from the humanities and law, present arguments that amount to complex admixture of legal and normative reasoning.⁴⁴

With these caveats in mind, while there are no shortage of opinions as to the best manner in which to build on current achievements or to respond to failures to address what all admit are pressing challenges, the range of options put forward are often radically inconsistent. An examination of the theory literature will provide a partial explanation of why debate in this field is so heavily contested and largely expressed in starkly binary terms. It is hoped that an understanding of the intellectual factors that lie behind the public debates will provide tools to reduce the distance between radically incommensurable solutions. While no single solution can ever emerge out of such a process, it will be argued that close attention to the relationship between theory and jurisprudence will pay dividends in terms of a better understanding of the norm of reconciliation.

The argument of the thesis will be divided into three parts. The first part will look at the rich body of literature dealing with the normative assessment of the claims of aboriginal peoples. This literature is situated within a broader body of literature dealing with multiculturalism.⁴⁵ The second part will focus more specifically on the jurisprudence that has emerged and is developing under Section 35 of the Constitution Act, 1982. A distinction will be drawn between core questions pertaining to the interpretation of Section 35 and a second set of questions dealing with other issues of Canadian constitutional law. The second set of questions will be dealt with more briefly in Part III of the thesis and largely with the purpose of developing the argument about the normative possibilities set in motion by the Haida line of cases. The basic argument is that there are ample resources within Canadian constitutionalism to provide robust responses to the claims of indigenous peoples in Canada.

While the thesis will proceed with a step by step development of the core arguments from the political theory literature, followed by a detailed analysis of corresponding issues in the jurisprudence, it may help the reader to have a summary statement of the thesis argument from the very start. The core argument is that the Canadian approach to constitutionalism reflected in the model centered on Section 35 of the Constitution Act, 1982, provides a framework, a methodology and a model for practice that could lead the Crown and aboriginal peoples within Canada towards the elusive goal of reconciliation. This framework, rooted firmly in the obligations of the nation-state, is materially different from most normative and legal literature that tends to gravitate to positions that emphasize either the lack of legitimacy of the nation-state or the lack of legitimacy of efforts to recognize aboriginal claims. In other words, this thesis develops an argument for the practical utility of a “middle-ground” approach. This middle-ground approach will depend on a novel interpretation of the foundational methodology adopted by the Supreme Court of Canada to animate Section 35, a particular interpretation of the “nested” relationship between Canadian domestic law, international law and indigenous legal systems and a development of the embryonic emphasis placed on dialogical processes to resolve deep disagreement about fundamentally disparate ontological and epistemological assumptions about attachments to land. In other words, the thesis attempts to develop a constitutional framework to support a practical blueprint to achieve a morally and politically defensible conception of aboriginal rights. Rather than simply defending the constitutional status quo, the thesis will

develop what is intended to be a unified approach to Section 35 that will point the way towards several crucial additions to the jurisprudential framework so it can enable the deep deliberation that lies at the very heart of the best aspirations of Canadian constitutionalism.

An overlapping theme developed in this work is that the introduction of a constitutional duty to consult and accommodate the potential rights of the aboriginal peoples of Canada has dramatically increased the possibility of generating a positive response to the question raised by Chief Justice Lamer.⁴⁶ The literature from other disciplines, particularly political theory and philosophy, will be drawn upon frequently as it provides a useful frame to assess the opportunities and constraints of Canadian constitutionalism. It will be seen that some of this literature, particularly when read with the emergence of a new paradigm based on the Haida line of cases, helps to provide normatively attractive answers to some of the most important unresolved legal and constitutional questions pertaining to the relationship between the Crown and aboriginal peoples in Canada today.⁴⁷

CHAPTER 2 – EXPLORING THE POLITICAL THEORY OF RECONCILIATION

2.1 Introduction

It is notable that Canadians have played a global leadership role in the development of the literature on the implications of recognition and multiculturalism. Among the most influential contributors include Charles Taylor, Will Kymlicka and James Tully.⁴⁸ More recently, an important cadre of indigenous scholars, such as Sakej Henderson and John Borrows, have broadened this contribution.⁴⁹ However, it is important to reflect on the critique of Mark Francis that this work has limited potential for export because it tends to be too narrowly tied to the structure of constitutional and political debates that are particular to Canada.⁵⁰ However, the focus of this thesis is less the potential export of Canadian normative analysis and more the particular normative possibilities that can be generated within the Canadian constitutional order.

The approach that will be adopted in this part of the thesis will be to first explore the main lines of critique raising doubts about the possibility of meaningful reconciliation in a “settler state” such as Canada, to be followed by an assessment of the writers who argue that existing accommodations of indigenous difference may have already gone too far.⁵¹ This introduction of several complex bodies of literature is designed to make the point that a deep binary divide exists on normative analysis and that this largely reflects a similar divide that is easily perceived in legal and constitutional debate involving aboriginal issues. It is submitted that a clear diagnosis of the nature of this divide, and the fact that it plays an overriding role in both normative and legal analysis, is an essential first step towards developing ways forward.

One of the key techniques to move forward will be the analysis of several key concepts that help draw out the fundamental differences that dominate the literature and practice.⁵² These include the role of culture, the importance of pluralism, the nature of constitutionalism, the status of claims to remedy historic injustice, the relationship between values such as reconciliation,

recognition and redistribution, the relevance of social theories about the causation of harm and the importance of dialogue.

The final section of this part will provide a transition from a consideration of the normative literature to an examination of the doctrinal choices that are available within the architecture of Canadian constitutional law. Though other approaches have been proposed, it will be argued that it is appropriate to regard the state as primarily responsible for providing a response to indigenous grievances. This approach will directly affect the interpretation that is offered in this thesis of fundamental values such as legitimacy, equality and sovereignty. It will be seen that the same themes are addressed within Canadian constitutional law but from a different disciplinary perspective. Frequently, the issues will be precisely the same. For example, how does the law respond to deep attachments that aboriginal peoples have to the land? How does Canadian constitutional law respond to the continuing existence and relevance of indigenous legal traditions? What steps must be taken to respect the distinctive traditions of aboriginal peoples? Is the application of the Charter of Rights and Freedoms to aboriginal peoples an unwarranted intrusion? It is hoped that addressing such questions, and others that are equally intractable, immediately after a thorough review of the normative literature, will open up previously unseen possibilities. A consistent theme will be the importance of dialogue as a vehicle to uncover and maximize the normative potential of these possibilities⁵³. It is also hoped that a demonstration of how some of these difficult issues might be worked out in the context of a developed constitutional order might offer some insights into the normative analysis as well, aided by more paying more explicit attention to the relationship between normative and legal analysis. In totality, this thesis is an exercise in “second best” analysis.⁵⁴ Granted that no immediate blueprint exists for a perfect normative or legal resolution of the deeply intractable problems which are reflected in the unresolved relationship between aboriginal peoples and the Canadian state, it is hoped that, in the useful metaphor provided by Kiera Ladner, “stepping stones” might be provided to ease our way over the turbulent waters.⁵⁵

2.2 Critical Thinking on the Possibility of a Just Reconciliation within a Settler State

There is a massive literature that develops a common theme expressing deep scepticism about the possibility of finding any meaningful reconciliation of the claims of indigenous peoples in what are frequently called “settler states”.⁵⁶ Much of this literature can be associated with the “left” of the political spectrum, though there is good reason to be sceptical about the utility of a simplistic left-right divide when dealing with the claims of indigenous peoples. It will be seen that some scholars who claim to speak from the political left adopt a set of principles which are not sympathetic to the claims of indigenous peoples.⁵⁷ Likewise, there are strands of thinking often affiliated with the political left which do not offer much support for protection of indigenous difference.⁵⁸ After all, these are just labels. The most that can be said is that there is a very loose correlation between identification with the political left or right and support for or scepticism about indigenous claims.

There is rich diversity in this literature but the key focus of thinking goes back to an argument about the illegitimacy of the original dispossession of indigenous peoples by various European powers. Ross Poole has called this the “original sin” of the settler state⁵⁹. Core and recurrent ideas include the lack of indigenous consent to the current authority of the state, the lack of a moral justification for the legitimate acquisition of sovereignty and territory and the failure to accord equality to indigenous and non-indigenous nations. Even the use of the word “of” in Section 35 which refers to the Aboriginal peoples of Canada would be problematic from this critical perspective. Many commentators would dispute, from a variety of perspectives, the explicit assumption that the indigenous peoples who currently reside within the boundaries of Canada are included within its constitutional framework. Others would dispute the ability of Canadian constitutional law to make such inclusion meaningful. While the argument takes many forms, it is common-place to see deep scepticism about the redemptive possibilities of the law of a settler state.

It is useful to contrast the core themes of this critical thought with the perspective reflected in the oft-quoted foundational observation of Will Kymlicka, usually described as “Kymlicka’s constraint”

“For better or worse, it is predominantly non-Aboriginal judges and politicians who have the ultimate power to protect and enforce Aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand. Aboriginal people have their own understanding of self-government drawn from their own experience and that is important. But it is also important, politically, to know how non-Aboriginal Canadians- Supreme Court Justices, for example- will understand Aboriginal rights and relate them to their own experiences and traditions... On the standard interpretation of liberalism, Aboriginal rights are viewed as matters of discrimination and/or privilege, not of equality. They will always, therefore, be viewed with the same kind of suspicion that led liberals like Trudeau to advocate their abolition. Aboriginal rights, at least in their robust form, will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.”⁶⁰

Many of the writers examined in this section would balk at the normative appropriateness of framing the problem in this way.⁶¹ For example, Dwight Newman argues that this approach gives insufficient weight to the need to engage in deep intercultural dialogue to address important grievances.⁶²

The recurring theme is that the state is an instrument of injustice and not reform. Whether drawn from post-colonial, post-modern or critical race theory, there is a strong presumption that the state is a product and captive of deep structural imperatives that prevent radical change.⁶³ Within this model, reform is often seen as something that is primarily motivated to ward off pressure for more far-reaching change. While there is a huge literature to draw from, the work of James Tully and Karena Shaw will be explored in more detail in order to develop some of the key themes from this literature.⁶⁴ Recent indigenous thought shows much commonality with various critical theories but is generally best seen as genuinely autonomous. The key elements of this thought will be introduced in the discussion of the author Taiaiake Alfred, as well as several other scholars who write within a “resistance” paradigm.⁶⁵

Before turning to these authors, the following is an attempt to draw out some of the key ideas that dominate the part of the critical literature on indigenous claims that is sceptical of the normative possibilities available within the “settler state”. These ideas will be presented in summary form and various nuances will be developed in the footnotes.⁶⁶ Some of these include:

1. *Ideas, in particular ideas linked to liberal theory, played a prominent role in the justification of dispossession of indigenous peoples.*

There is a huge body of literature on the role that emerging liberal theory played in the justification of the dispossession of indigenous peoples.⁶⁷ Key examples include the development of Locke’s labour theory of property acquisition which was used to privilege agricultural uses of land and to dismiss claims to title based on less intensive indigenous uses of territory.⁶⁸ These ideas eventually were associated with doctrines such as the Discovery Doctrine⁶⁹ and fed the impression that lands were terra nullius in a legal sense though they were clearly occupied by indigenous peoples.⁷⁰ Some scholars go further and argue that the encounter of Europeans with indigenous peoples was actually constitutive of modern liberal theory.⁷¹

2. *Racist and false views of indigenous societies, often based on narrow evolutionary theory and racist notions of progress and hierarchy, lay at the heart of indigenous dispossession.*

From the very early debates at Valladolid, there were continuing controversies about the status and prospects for spiritual salvation of indigenous people.⁷² By the 19th century, these attitudes had hardened into evolutionary theory that contrasted the ways of life of indigenous people with the civilized societies of Western Europe.⁷³ Words such as “savagery” and “barbarism” entered common parlance and public policy was oriented to the goal of assimilation.⁷⁴

3. *Early international law was contaminated and its development was constrained by these views.*

In addition to not fully recognizing the human status of indigenous individuals, the state system and the international law that it generated fell short of recognizing the collective status of indigenous societies and, indeed, developed doctrines to support European expansion. Westra argues that “Conquest, colonisation and confiscation were based on these doctrines”⁷⁵. In turn, “This practice led to a Eurocentric positivist school of international law in the nineteenth century justifying the dispossession of the indigenous peoples.”⁷⁶ International law supported the stable expansion of European powers at the cost of the indigenous peoples who had occupied and governed these lands. Though there are significant variations in emphasis, the core claim is that the colonial acquisition of indigenous territory is irreparably flawed by reliance on tainted doctrines such as discovery, terra nullius and settlement.⁷⁷ Some argue that even if these acquisitions could be regarded as legitimate based on the international norms that were extant at the time, once those norms are exposed as inextricably tied to factual mistakes and racist assumptions about the nature of indigenous societies, they should not be relied upon to prevent modern redress for the claims of indigenous peoples who have been seriously prejudiced by the application of and reliance on this international law framework⁷⁸. Some go further to argue that the suspect doctrines were not even supported by the international law of the period during which indigenous territories were taken.⁷⁹

4. *Practices of consolidation of power and attempted assimilation of indigenous peoples rapidly followed.*

Though there are differences in practice in various parts of the world, the development of colonial governments and the consolidation of power eventually gave way to aggressive programs of assimilation and elimination.⁸⁰

5. *This origin constitutes a continuing stain on the legitimacy of the settler state.*

The core idea that is expressed here is that an illegitimate foundation of a nation is a permanent blot on its ability to claim legitimacy today.⁸¹ It is frequently asserted that this legitimacy gap has legal as well as normative consequences⁸².

6. *The present constitutional structure of “settler states” is irreparably founded on these ideas.*

The ideas that supported the dispossession of indigenous peoples are alleged to be still operative in the functioning of the constitutional order of the settler state. The doctrine of discovery, the depreciation of indigenous occupation of lands and the inability to see indigenous legal orders are still playing a regulative role today.⁸³ While one can dispute these particular assertions, it must fairly be acknowledged that a proponent of the reconciliatory possibilities of Canadian law has a tough challenge to meet. After all, Canadian law, or its predecessors, certainly played a foundational role in the gradual displacement of aboriginal peoples from their territories, in the suppression of their forms of governance and social organization and in their current position at the bottom of most scales of social, health and economic performance.⁸⁴

7. *The rigidity of existing structures is reinforced by capitalist imperatives.*

Though this idea is not given equal weight by all authors, there is a significant undercurrent dealing with the adverse effect on indigenous peoples caused by the alignment of state interests with the interests of global capital.⁸⁵

8. *The net effect of all of these factors is that there are very limited possibilities for reform within the settler state, and that any attempts at reform tend to have the effect of reinforcing unjust colonial relations.*

Because of the structural factors that create huge constraints on the ability of settler states to respond positively to indigenous claims, many scholars tend to regard attempts at reform as

deepening and reinforcing colonial relationships. Elizabeth Povinelli has coined the evocative phrase “the cunning of recognition” to capture the essence of this idea.⁸⁶ From this perspective, it is necessary to look past what is characterized as an effort to respond to indigenous claims, or the claims of other marginalized groups, to see the real purpose of the reform. This is usually seen as deflection of attention away from pressure for more radical and transformative change.⁸⁷

9. Incommensurable cultural differences tend to stand in the way of adequate conversations to address issues of historical and present injustice.

Particularly in the case of indigenous claims, fundamental dichotomies in ontology, theories of knowledge and spiritual worldview are alleged to make truly mutual inter-cultural conversation difficult, if not impossible.⁸⁸ The difficulties of mutual comprehension and translation are highlighted by the notion of cultural relativism that dominates modern anthropology and the observation that “all knowledge is local” from post-modern theory.⁸⁹

10. Any conversations are further hampered by deep disparities in access to resources and power.

Even when it is possible to get over the conceptual barriers to effective inter-cultural dialogue, the indigenous participants in the dialogue are constrained by fundamental inequalities in negotiating power.⁹⁰ This is seen to be particularly compelling when representatives of the state sit on the other side of the table.

11. The backdrop of such conversations is a narrative of national origin that leaves little space for indigenous peoples.

Recent political theory has sharpened the focus on the importance of narrative.⁹¹ The nation is conceived of as an imagined community.⁹² Our imagination and the possibilities we can see are greatly coloured by our narratives of origin or commencement. It is frequently alleged that the

participation of indigenous peoples in the creation of the country is erased in the story that the settler state tells about itself.⁹³ These narratives are exposed as based on pernicious assumptions about the primitivism and savagery of aboriginal peoples.⁹⁴ These national narratives massively constrain the recognition of possibilities in the present. As Borrows has observed “There is nothing that could be more arbitrary than one nation taking half a continent from other nations, and then leaving them with next to nothing to show for it, all without an elementarily persuasive legal explanation.”⁹⁵ We will see that James Tully has played a key role in explaining how social contract theory provided ideological cover for the dispossession of indigenous peoples by European powers.⁹⁶ Michael Asch has developed this theme by arguing consistently that assumptions of primitivism continue to operate in the contemporary adjudication of aboriginal claims.⁹⁷

12. Particular problems of legitimacy are present for adjudicative mechanisms such as the courts.

One of the consequences of the role of the law in the justification for and development of a colonial relationship with indigenous peoples within the settler state is that the courts of that state are seen as having no ability to discharge their functions in an independent manner in a dispute between an indigenous people and the state itself.⁹⁸ This point is part of a larger normative and political debate about the appropriate role of the courts in a liberal democracy but the problems are more acute when indigenous claims are in issue.⁹⁹

13. The net effect of all of the above is that there is a double standard with respect to the rights of nations without states and nations with states.

The notion of a double standard is one of the most frequently pressed themes in the critical literature.¹⁰⁰ Nations with statehood status are argued to have access to rights, authorities and powers that are denied to nations without states. The only way to justly redress this double standard is to take steps to extend the same rights, authorities and powers to indigenous

nations.¹⁰¹ The mere fact that indigenous nations do not act through a state form is consistently regarded as an arbitrary and unjust basis to refuse such an extension.

*14. This notion of “double standard” is also reflected in the frequent reliance on “immanent critique”*¹⁰²

In addition to being unjust simply on the basis of formal egalitarian arguments (like must be treated alike), the double standard argument is bolstered by the observation that states have made normative commitments that are often reflected in constitutional text and constitutional principle. Denial of indigenous claims is seen to breach these normative commitments. Critique is “immanent” because it is drawn from the core precepts that animate the constitutional order.¹⁰³

15. The effect of these problems is that indigenous peoples’ claims are misrecognized as equivalent to those of cultural minorities.

The counterpart to Aristotle’s injunction that likes be treated alike is that those who are unlike should be treated differently.¹⁰⁴ While the indigenous nation and the non-indigenous nation with a state must be treated alike, an indigenous nation and a cultural minority must be treated differently¹⁰⁵. The fact of prior occupation and governance makes an indigenous nation fundamentally unlike a cultural minority. To equate their position in a settler state is a very fundamental act of mis-recognition.¹⁰⁶

16. These propositions lead inexorably to the conclusion that reform, accommodation or reconciliation is simply not possible within the state structure of a country like Canada.

There is an internal logic to a pattern of thinking which isolates the flaws in the commencement of a system, sees these flaws as embedded in the continued development of the system and postulates an overriding intention for the system to preserve itself. While a functioning liberal

democracy is rather more complex than a singular “system”, there are deep currents in the literature that reduce this complexity to a simple dichotomy between support for a system or wholesale rejection of a system.¹⁰⁷ This logic model simply leaves no room for reform.¹⁰⁸

17. In the absence of any expectation that reform can be generated within the nation-state and its system of constitutional law, resistance, oppositional tactics and coalition building are preferred remedies.

As we elaborate on these propositions, we will see some large intellectual shadows looming over the debate.¹⁰⁹ The rise of post-colonial thought, post-modern and structuralist critique of modernity, critical race studies and critical legal studies all combine to reinforce the deep scepticism about the possibility of “reform from within”.¹¹⁰ It is common to see cautions to avoid using the “master’s tools”¹¹¹. Political theory, within this family of work, is written from the perspective of the disadvantaged.¹¹²

18. These lines of argument are reinforced by the emergence of strong traditions of pluralism in legal analysis.

Scholars have begun documenting indigenous forms of governance not as historical artefact but as modes of social organization that compete with the nation-state for the allegiance of members. This is accompanied by a strong normative critique of the assumption that the nation-state provides a unitary focus for the legal regulation of complex, multicultural communities. Much of the renewed focus on legal pluralism comes from Quebec, but it is gaining traction in other parts of the country as well.”¹¹³

Though there is considerable variation as to the extent that various writers endorse all elements of this logic chain, the conclusion that is almost universally reached is that the massive legitimacy gap can only be addressed by full recognition of the inherent right of indigenous peoples to freely choose their own form of democratic accountability, up to and including full

secession from the settler state.¹¹⁴ Though emphasis differs between different authors, recommendations usually cover the recognition of the prior and continuing sovereignty of indigenous peoples, acceptance that Canadian laws cannot legitimately apply without the explicit consent of indigenous nations, the adoption of fundamentally different theories of constitutional foundations such as “treaty federalism”, the recognition of the continued application and priority of indigenous law or a call to regulate relations solely by reference to principles of international law.¹¹⁵ A few go further and suggest that “newcomers” should commit to a “leap of faith” and place the question of whether and on what terms they can stay squarely in the hands of the indigenous peoples who own the land.¹¹⁶ Another important strand in the literature is the exhortation by non-Indigenous people to undergo a process of personal decolonization.¹¹⁷

It can be seen that these lines of critique, while worthy of careful reflection, are highly binary in nature. Any attempt at change can be read as a mask for the avoidance of deeper challenges or changes. Justice cannot emerge from within the state system. A state can only do justice within its authority by renouncing its very sovereignty. In order to develop these themes with more precision, several authors who have had a particularly strong influence in developing these lines of critique shall be considered more comprehensively.

2.3 Case Studies of Key Writers

James Tully

James Tully is one of the most prolific and influential writers who addresses the position of indigenous peoples within settler states. Tully’s work is particularly important because it has had a demonstrable influence on the development of the theory of indigenous rights in multiple jurisdictions and clearly has played a large role in the development of thinking among academics and activists in Canada, and beyond.¹¹⁸ Tully has also played a direct role in the development of public policy as a leader on the staff of the Royal Commission on Aboriginal Peoples¹¹⁹ and his

engagement with critique of existing claims processes.¹²⁰ His work is also particularly interesting for this study because he is far more inclined to engage directly with legal materials than many other political theorists who write about indigenous issues.¹²¹

The contribution of James Tully is developed in a number of highly influential books and articles.¹²² While his interest initially focussed on the history of political thought, the work is deeply influenced by modern moral and political challenges. His intellectual influences include the Cambridge school¹²³, republican theory¹²⁴, deliberative democratic theory¹²⁵ and continental philosophy.¹²⁶ The two aspects of his work that are particularly important for this study are his consistent focus on the formative role played by the idea of constitutionalism and the development of his argument through a careful examination of the claims of indigenous peoples. While it shall be seen that there has been significant development in his view of the reconciliation of indigenous and non-indigenous claims, it is necessary to start with what many regard as his masterwork: *Strange Multiplicity: Constitutionalism in an Age of Diversity*, which was published in 1995.¹²⁷ This is an eloquent and evocative book that reflects on the political and normative implications of the narrative that is inspired by the key work of the Haida sculptor Bill Reid: *The Spirit of Haida Gwaii*.¹²⁸ From this work, he develops an image of a “multi-logue” of voices, clamouring for recognition and seeking to continue a common journey. It takes the form of an extended reflection on the idea of constitutionalism. He seeks to contrast the stifling uniformity that is created by what he calls “modern constitutionalism” with a more subtle, dialogical model that he calls “ancient constitutionalism”.¹²⁹ Modern constitutionalism is linked to the core idea of classical liberal thought that organizes politics around equal individuals living under and governed by equal states.¹³⁰ This approach to constitutionalism is characterized by a bias towards norms of equal treatment of all individuals, regardless of their personal characteristics.¹³¹ The emergence of an “empire of uniformity” is closely associated with the historical evolution of European Imperial power.¹³² Indeed, one of the strengths of Tully’s analysis is the careful exposition of the role that theorists such as John Locke played in providing the ideological justification for the colonial expansion of European powers in lands that were occupied and governed by indigenous nations.¹³³

Tully argues that seven features of modern constitutionalism “...have been woven into the constitutional fabric of constitutionalism over the past three centuries.”¹³⁴ First, “...the people are taken to be a society of equal individuals in a state of nature, behind a veil of ignorance or in a quasi-transcendental speech situation prior to the constitution, and with the aim of constituting one uniform political association.”¹³⁵ This is linked to the idea that “...the people are seen as a community bound together by an implicit and substantive common good and a shared set of authoritative European institutions, manners and traditions of interpretation.”¹³⁶ The second feature of modern constitutionalism is that “...it is defined in contrast to an ancient or historically earlier constitution.”¹³⁷ This earlier order is described as “...in a state of nature, primitive, rude, savage, traditional or underdeveloped, depending on the theorist.”¹³⁸ The third feature of modern constitutionalism is that its uniformity is contrasted with the irregularity of the earlier order.¹³⁹ The fourth feature is that modern constitutionalism relies on a theory of progress to explain the movement from reliance on custom to the creation of a uniform legislative order.¹⁴⁰ The fifth feature is that “...a modern constitution is identified with a specific set of European institutions; what Kant calls a ‘republican constitution’.”¹⁴¹ The sixth feature is that “...a constitutional state possesses an individual identity as a ‘nation’”¹⁴² The seventh and final feature of modern constitutionalism is that it “...comes into being at some founding moment and stands behind- and provides the rules for- democratic politics.”¹⁴³

From these seven features, we see a more carefully articulated version of the approach to constitutionalism that most practicing lawyers in the common law tradition bring to the law.¹⁴⁴ Tully contrasts this approach with what he calls “ancient constitutionalism”. This version of constitutionalism is illustrated by the forms of inter-cultural dialogue that characterized the interactions between indigenous peoples and Europeans in the early years of their contact. Legal scholars have described these norms as a form of inter-societal law.¹⁴⁵ Tully argues that our loss of this constitutional language and our implicit reliance on the homogenizing tendencies of modern constitutionalism have occluded perception of injustice and prevented the emergence of practices to legitimately recognize deep diversity. He argues that “... (T)his hidden constitutional language can be reconstructed to change our vision of a constitution and dissolve the impasse.”¹⁴⁶

As a matter of legal history, the more flexible norms of ancient constitutionalism were eclipsed by the “empire of uniformity”.¹⁴⁷ However, he argues that it would be a mistake to regard constitutional traditions as solely imperial.¹⁴⁸ The more flexible norms of the past are available for “rediscovery” and to be pressed into service to provide modern solutions to deeply rooted problems.¹⁴⁹ As a matter of intellectual history, he points out that humanist theorists had provided an alternative, relying on commitments to dialogue, to the monolithic theory of Thomas Hobbes. Quentin Skinner reflects on the results of this debate by observing the emergence of “...the shift from a dialogical to a monological style of moral [and political] reasoning”.¹⁵⁰ Tully closes this circle by arguing that the “...theorists of modern constitutionalism followed on Hobbes’ footsteps so that ‘the very idea of presenting a moral and political theory in the form of a dialogue has long since lost any serious place in philosophy’ (even though, ironically, the successive monological theories have been accompanied by debate and disagreement that only the humanist approach can explain.”¹⁵¹

Tully is examining very modern issues of exclusion, domination and injustice. Rather than seeking an abstract way to reflect on these problems and possible solutions, he seeks to tap the roots of Western constitutional traditions to find signposts to guide a pathway to justice in the present. In his view:

“The great tragedy of modern constitutionalism is that most European philosophers followed Hobbes and turned their backs on dialogue just when non-European peoples were encountered and dialogue and mediation were needed to avert the misunderstanding and inhumanity that followed.”¹⁵²

Though the strong trend was against the recognition of indigenous peoples, and the bulk of intellectual effort was directed to justifying the appropriation of their lands, Tully sees hope in what he calls the “three conventions of common constitutionalism: mutual recognition, continuity and consent.”¹⁵³ These conventions are the backbone of a practice of treaty constitutionalism.¹⁵⁴ It applies at a very fundamental level as the very legitimacy of the Canadian state is argued to be dependent on securing arrangements that comply with the conventions of treaty constitutionalism. By returning to the norms that governed the earliest interactions

between indigenous peoples and newcomers, inter-cultural dialogue that is based on these three principles, and which respects the agonistic interplay of radically different value systems, can support meaningful ethical and political pluralism. This produces an understanding of Canadian constitutionalism that operates on two planes: the federal-provincial plane and the Crown-indigenous plane. The whole point is to direct our understanding of doing justice to indigenous peoples away from the model of claims against the state. A true dialogue, conducted in the languages and in the forms comfortable to each side, is to be conducted in a mutually respectful fashion. The three conventions play a guiding role in these deliberations- they “...are also already to some extent the norms of justification appealed to by both sides in these struggles”¹⁵⁵. Most importantly, he conceives of a dialogue that does not skip the first step of justifying the sovereign claims of the state.¹⁵⁶ This provides a radical break from the conception of the indigenous group petitioning the state for recognition, as would a cultural minority or other interest group. Rather a deeper dialogue about the norms of recognition themselves is called for. This reflects the assessment that the indigenous group is “equal in status, though not in form to the Canadian state.”¹⁵⁷ For Tully, this deeper dialogue can only produce results that are provisional in nature. The norms of recognition between the parties are always open to challenge and, for this reason, no attempt at reconciliation can purport to be final.

It may be worthwhile to step back a little and ask how Tully’s broader theoretical allegiances affect his advice on the very practical issue of indigenous-non-indigenous reconciliation. His key objective is to deflect the centre of attention away from the state and towards the incorporation of the voices that have previously struggled to be heard. In his view, it is the state that should be making rather than responding to land claims from indigenous peoples. His view is unapologetically utopian.¹⁵⁸

This is accompanied by a consistent rejection of mainstream theories with universalist aspirations. Habermas’ influential model is rejected because its very generality “...tends to occlude the ways of reasoning that actually bring peace to the conflict”¹⁵⁹ Modern theorists of “difference”, such as Kymlicka, are rejected as they “...misrecognize Aboriginal property claims

as demands for the recognition of difference within, against, some overarching framework of non-Aboriginal institutions and modes of argument, not as an independent system of property and authoritative traditions.”¹⁶⁰ The rejection of these approaches is a product of a broader rejection of the possibility of a theory of reconciliation of differences based on abstract principles. Returning to the foundational image of the Spirit of Haida Gwai, there is no “transcendent standard beyond the conversation in the boat.”¹⁶¹

The rejection of broad theory is associated with an agonistic conception of society and a participatory conception of the value of democracy.¹⁶² Agonism is often associated with the thought of Hannah Arendt and Karl Schmitt and reflects a pervasive belief in the inevitability of conflict in a complex society.¹⁶³ Hope for consensus is illusory. Disputes are inevitable because of deep value pluralism and, invoking the indigenous borrowing of the parable of the turtle sustaining the Earth, these disputes go all the way down.¹⁶⁴ Within this view of political society, the best that can be hoped for is the peaceable interaction of contending points of view. Citizenship cannot be equated to simple access to a set of uniform rights and duties. The republican and democratic traditions value the active participation of “free citizens” in the process of self-rule.¹⁶⁵ This participatory activity is not restricted to formal electoral procedures but extends to “oppositional practices” of the marginalized in a society.¹⁶⁶ Participation is not evaluated simply in instrumental terms but is argued to have a “world-disclosing” function.¹⁶⁷

These broader theoretical strands predispose Tully to look at political struggles from the perspective of the marginalized and oppressed. They also lead to a clear sympathy with legal pluralist models that see room for the complex interaction of multiple legal systems over a given territory. In terms of the interaction between indigenous and non-indigenous peoples within Canada, Tully treats their respective legal systems on equal terms but holds the mainstream system to the standard of honouring commitments he argues have been made in the early norms of interaction that governed the clash of indigenous sovereigns with the newcomers. Any disputes that emerge must be resolved through true intercultural deliberation.

There is a strong binary flavour to much of Tully's analysis. He perceives two types of reconciliation- treaty and colonial. Accommodation within the Canadian legal system is classified as colonial. Internal self-determination is described as not a form of self-determination at all¹⁶⁸. The framework for achieving reconciliation, through treaties, is described as the "only way"¹⁶⁹ and the "only one just way".¹⁷⁰ This negative view of the prospect of finding reconciliation within the mainstream system is reflected in Tully's evaluation of agreements reached under existing claims processes in Canada. He has been highly critical of the Nisga'a Agreement.¹⁷¹ One of the key reasons is that it operates solely within the Canadian constitutional system.

This tendency to reject negotiations that are conducted under the rubric of Canadian law is somewhat surprising given that Tully is more open to the law than most political theorists. For example, he regards reasoned judicial decisions as important deliberative materials to be considered by political scientists.¹⁷² He frequently incorporates Canadian constitutional vocabulary into his analysis.¹⁷³ For example, the operative phrase "recognize and affirm" from Section 35 of the Constitution Act, 1982 appears frequently in his writing.¹⁷⁴ Unlike some other writers, he argues that aboriginal people have a conditional obligation to obey valid Canadian laws pending resolution of issues between their nation and the Crown.¹⁷⁵ These issues will now be considered in more detail in relation to his most recent restatement of his overall prescription for addressing the claims of Indigenous peoples in Canada.¹⁷⁶ The core of Tully's more recent argument is that the rationale for the need for a new approach is the continuing dominance of colonial values over the values that animated the early relationship between the Crown and aboriginal peoples:

"If this dangerous confrontation is to be overcome, two questions must be answered. What is the just form of recognition of Aboriginal peoples and what is the practical form of accommodation of this recognition by the former colonising society? I would like to argue now that they should be recognised as equal, coexisting and self-governing nations and accommodated by renewing the treaty relationship."¹⁷⁷

The prescription as to what should happen now is dictated by his position on what should have happened at contact. Europeans should have been treated as immigrants to lands that were governed by a sovereign power and should have sought consent to enter those lands. Treaties should have formed the basis for mutual relations.¹⁷⁸ As Tully states, neither the Aboriginal peoples nor international law acknowledge the conquest, assimilation or suppression of First Nations.¹⁷⁹ However, Tully recognises that there is a constitutional order currently in place and, notwithstanding the shortcomings in its legitimacy because of the circumstances of its foundation, movement towards legitimacy must occur in an orderly fashion:

“Canada is far from being a just confederation today. Nevertheless, all societies are unjust to some extent. Justice and legitimacy are not equivalent. A society is legitimate and worthy of obedience if and only if the members suffering an injustice have the right to initiative political, legal or constitutional change and that other members have a duty to enter into negotiations in good faith to rectify the injustice. This is the test of legitimacy articulated by the Supreme Court of Canada and it applies generally. Consequently, as long as Canada recognises the injustice and enters into negotiations over decolonisation and reconciliation with Aboriginal peoples in good faith, as the Court enjoins in *Delgam’uukw*, then Aboriginal peoples have a duty to obey existing laws unless and until they are changed or replaced by Aboriginal legislation.”¹⁸⁰

While at one level these conditions are arguably already being met, Tully argues that current negotiations processes are currently framed by a legal and constitutional structure that is dominated by colonial principles. That is, Aboriginal peoples are treated as if they were already legitimately subject to the laws of the federal-provincial confederation.¹⁸¹

What would be the likely result of the negotiations over decolonisation and reconciliation that Tully envisages? The vision he proposes bears strong resemblance to the recommendations of the Royal Commission on Aboriginal peoples, which is not surprising considering the role that Tully played as one of two research directors for the Commission during its deliberations¹⁸²:

“As a long-overdue act of justice and gratitude to initiate the new relationship, Aboriginal communities should have access to ancestral lands that were unjustly taken from them, sufficient for self-reliance where possible, and in a way that respects the rights of non-Aboriginal Canadians as well. These land claims need to be worked out through treaty negotiations “reinforced by judgments” of the Supreme Court. Aboriginal societies should be assisted in developing economic self-reliance through new relations of economic cooperation, resource development and the sharing of knowledge and technologies, just as they once helped non-Aboriginal people. For the partners to engage in productive relations together, and as an act of reciprocal justice, the appalling social and economic inequalities of Aboriginal peoples need to be levelled up to the Canadian equalisation norm, by channelling public funding into policies of economic cooperation and self-reliance, rather than dependency, welfare and despair. These mutually agreeable policies should aim at the development of Aboriginal economic self-sufficiency, through partnership arrangements in resource management and development, and so the phasing out of federal financial support.”¹⁸³

When Tully shifts back to the normative problem, it is expressed in terms of mutually inconsistent claims to the same territory:

“The practical problem is the relation between the establishment and development of Western societies and the pre-existence and continuing resistance of Indigenous societies on the same territory.”¹⁸⁴

Stated in another way:

“The problematic and unresolved contradiction and constant provocation at the foundation of internal colonisation, therefore, is that the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that the Indigenous peoples refuse to surrender.”¹⁸⁵

Linking the notion of this “unresolved contradiction” with the earlier observation that there is only “one just way” to resolve the impasse over the clash of constitutional visions leaves Tully with a highly binary approach to what counts as movement towards legitimacy and reconciliation. Existing processes are seen to be animated by a neo-colonial approach, commonly

called reconciliation, which replaces calls for recognition on an equal basis with rights that are fully housed in the Canadian constitutional structure.¹⁸⁶ This tendency to frame the problem in a highly binary fashion is also brought out when Tully writes about the responsibilities of political theorists in dealing with internal colonialism. Their efforts either have the effect of legitimating or de-legitimizing the existing order. In other words, they are either participating in practices of governance or resistance. In Tully's view, the dominant contribution of political theory has been to contribute to the legitimation of the system of colonial rule.¹⁸⁷ For Tully, there is a practical way out of this impasse:

“...Indigenous peoples and settler peoples can recognise each other as free and equal on the same territory because jurisdiction can be shared as well as exclusive.”¹⁸⁸

Tully makes this proposition very tangible by offering his view of what precisely is required to put into practice this notion of sharing of jurisdictions:

“Under these circumstances, the Indigenous peoples were and are willing to give their consent to the assertion of the continuing sovereignty of the Crown on three conditions. The Indigenous peoples continue to exercise their own stateless, popular sovereignty on the territories they reserve for themselves and the newcomers are not to interfere. The settlers can establish their own governments and jurisdictions on territories that are unoccupied or are given to them by Indigenous peoples in return for being left alone on their own territories. Thirdly, Indigenous peoples agree to share jurisdictions with the newcomers over the remaining, overlapping territories. That is, one party to a treaty does not extinguish its rights or subordinate itself to the other. Instead, they treat each other as equal, self-governing and coexisting entities. They set up negotiation procedures to work out consensual and mutually binding relations of autonomy and interdependence and to deal multilaterally rather than unilaterally with the legitimate objectives of the larger society. These are subject to review and renegotiation when necessary, as circumstances change and differences arise.”¹⁸⁹

For the reasons that Tully has already set out, all of this must somehow be orchestrated outside the current constitutional framework of the Canadian state. To make this point he draws on the authority of the Supreme Court of Canada:

“The Constitution functions exactly as the kind of “straightjacket” that Supreme Court of Canada condemned in *Reference re the Secession of Quebec*. Indigenous peoples will be free and self-determining when they govern themselves by their own constitutions, and these are equal in international status to Western constitutions.”¹⁹⁰

At a later stage, the most recent developments in Tully’s work will be examined.¹⁹¹ He has shown a guarded appreciation of the possibilities of the duty to consult. While not resiling from his sceptical position on how justice can emerge in a settler state, he recognises that creative engagement with the legal system, and consultation on the ground, might have positive consequences. In this he shares the recent move by important scholars such as Boaventura Sousa Santos who also support engagement with the legal system as a way of resisting oppression.¹⁹²

We will see in the later elaboration of the work of treaty federalists and treaty constitutionalists how important the basic image or picture of the constitution is to understand the wide opinion gulf that exists on these issues. At this stage, it might suffice to reflect on Tully’s borrowing of the metaphor of the Constitution as a straightjacket from the Supreme Court of Canada’s opinion in the *Secession Reference*.¹⁹³ This metaphor was intended to capture the idea that a constitution cannot be read in a fashion that prevents dealing with emergencies or extreme situations. It is in the same genre as the frequently quoted notion that the Constitution is not a suicide pact.¹⁹⁴ However, Tully extends this notion to the overall pattern of engagements under the authority of the Constitution. While Tully is clearly attuned to recent developments in Canadian law, this perspective might have the impact of devaluing the very significant gains that have been made since the enactment of Section 35. Without attempting to be exhaustive, these include the elimination of the doctrine of extinguishment,¹⁹⁵ the commitment to consult with aboriginal peoples about further constitutional amendments that affect them¹⁹⁶, the emergence of political practices of engagement at senior levels with indigenous leaders¹⁹⁷, the emergence of clear duties relating to negotiation, funding and accommodation,¹⁹⁸ the emergence of strong evaluative standards such as the honour of the Crown and reconciliation and the global settlement and apology for the major historical grievance related to the creation, maintenance and operation of residential schools.¹⁹⁹ These help establish the difference between a binary theory of legitimacy and the recognition that legitimacy is a process, a matter of degree and, most importantly, a matter that grows through respectful dialogue.²⁰⁰

Indigenous Critical Scholarship

While much of the critical literature is written by non-indigenous scholars, we are starting to see a strong body of work that is distinctly indigenous in origin and in message. Indigenous thinkers situate the authority of indigenous law in worldviews that are heavily imbued with spirituality. They often focus on the continuing reality of indigenous law as reflecting a caretaking role that has been mandated by the Creator. This movement is often described as a philosophy of indigenism and is sometimes associated with calls for disengagement from the broader society in favour of a refocused commitment to traditional ways. The work of Gerald Taiaiake Alfred provides an important example of this literature.²⁰¹ He argues that:

“Aboriginal rights” are in fact the benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state. After a while, indigenous freedoms become circumscribed and indigenous rights get defined not with respect to what exists in the minds and cultures of Native people, but in relation to the demands, interests, and opinions of the millions of other people who are also members of the single-sovereign community.”²⁰²

And:

“In choosing between revitalizing indigenous forms of government and maintaining the European forms imposed upon them, Native communities have a choice between two radically different forms of social organization: one based on conscience and the authority of the good, the other on coercion and authoritarianism.”²⁰³

Alfred has recently described his work as representing “indigenist anarchism”.²⁰⁴ Unlike Tully, who calls for a form of constitutional engagement with the state, Alfred is the chief theorist of withdrawal of aboriginal people from the Canadian mainstream. He is one of the leading advocates of the “resurgence” paradigm.²⁰⁵ There are many parallels to other work in social movement theory and oppositional practice.²⁰⁶ However, what differentiates many of the indigenous scholars from other advocates of resistance is the deeply spiritual foundation that animates much indigenous philosophy. A crucial feature of the indigenous conception of governance, as developed by Alfred, is its respect for individual autonomy. This respect

precludes the notion of ‘sovereignty’ - the idea that there can be a permanent transference of power or authority from the individual to an abstraction of the collective called the ‘government’.²⁰⁷

Two other very important indigenous scholars from Canada are Sakej Henderson and John Borrows.²⁰⁸ Their work will be presented later in relation to treaty federalism and indigenous legal traditions. In contrast to Alfred, their work advocates closer engagement with the Canadian state but is also highly critical in nature. Dale Turner, while somewhat more skeptical that indigenous visions can be reconciled with Canadian constitutional law and practice, speaks to the importance of “word warriors” who can engage in the intellectual work of finding points of contact between indigenous and non-indigenous worldviews.²⁰⁹ While not intending to present a complete overview of the rich variety of indigenous political and legal thought, the work of two other indigenous scholars will be considered as they illustrate important aspects of the resurgence movement that has been championed by Alfred- Tracey Lindberg and Glen Coulthard.²¹⁰ In addition, the work of a non-indigenous scholar, Karena Shaw, will be considered as she helps situate indigenous work on resurgence within the broader debate within mainstream political theory on indigenous issues.

Tracey Lindberg

The work of Tracey Lindberg is an excellent place to start in attempting to understand a distinctly indigenous perspective on reconciliation. This perspective is developed most completely in her doctoral dissertation, though it is also found in published work.²¹¹ In a highly complex argument that combines reflections on indigenous philosophy, critique of Canadian legal practice and personal reflection, Lindberg paints a bleak picture of the prospects for finding reconciliation within the Canadian legal order. Her project is directed to rejuvenation of indigenous communities and greater awareness of the present efficacy of distinctive indigenous legal orders. She argues that “...only through grounding resistant thought in age old Indigenous

philosophies and ethical traditions will we be able to address meaningful and revolutionary resistant and transformative action.”²¹²

The consistent rhetorical message that is developed throughout the work is that it is illegitimate to start from a presumption of the application of Canadian law in addressing the current relationship between indigenous people and what she calls the newcomers or the occupier. She points out that “...We rarely discuss the Indigenous laws that are being broken by the occupier.”²¹³ Her solution to this problem is to begin a project of deepening understanding of the requirements of indigenous law- “...With no understanding of the laws, principles, and understandings that exist in an indigenous context, non-Indigenous peoples will continue to break our laws, conduct themselves in a way which contravenes our codes of conduct, and fail to participate in our shared relationship in a way which is meaningful to Indigenous or non-Indigenous peoples.”²¹⁴

The heart of her thesis is an extended comparison of the basic nature of Indigenous law and Western law. The latter is seen to be a malleable, man-made, and ultimately contingent set of rules that are constructed based on changing needs of the society that they govern. However, indigenous law is presented in a much more uncompromising fashion. It is “...based on our inalienable relationship with an Original source.”²¹⁵ The very concept of Western sovereignty over the lands that are subject to this relationship is simply inconceivable- “...since we know we have been endowed with Original instructions, last forever, from our sovereign.”²¹⁶ It “...cannot be impacted and has not been impacted by foreign constitutional, legal or governmental systems.”²¹⁷ Because the responsibilities of the Indigenous peoples flow from instructions given from the Creator, they cannot be given up.²¹⁸ From this perspective, it is impossible to conceive of treaties that cede, surrender or release the rights of Indigenous people.²¹⁹ To attempt to do so would break a sacred covenant with the Creator. The net effect is that Indigenous peoples need to understand themselves as “...actors subscribing to laws which are completely valid, relevant and binding.”²²⁰ This picture of Indigenous law is contrasted with a consistently deprecatory depiction of the laws of the colonialist. These laws are an “amorphous blob”²²¹ and are evaluated primarily by their role in displacing and continuing to oppress indigenous peoples.²²² Special

attention is paid to the role that Canadian law has played in facilitating the abusive treatment of indigenous women.²²³

There are two consequences of this construction of a wide moral gulf between indigenous and mainstream law. The first is that the concept of “translation” as a device to incorporate indigenous perspective into the interpretation of mainstream law is unlikely to be useful. The second is that Canadian courts cannot be trusted to contribute to the restoration of a respectful relationship between indigenous and non-indigenous peoples. She argues that “Legitimacy requires lawful authority. It has not been vested in the Canadian courts. We have not assigned it to them. Not actual express or implied authority.”²²⁴

Lindberg argues that the cumulative effect of years of colonialism and judicial activity is that Indigenous rights get progressively restricted to a narrow and residual protection of “traditional” activities that bear no relation to the original instructions that govern Indigenous peoples:

“Indigenous “rights” become defined in the context of what is left over once Canadian legal determinism and imperialism assert the powers, authorities and rights presumptively (and I would argue ostensibly) held by Canada. We find our Canadian rights relegated to a category and catalogue of “burdens” on the self-proclaimed list of Canadian rights.”²²⁵

It is not surprising that Lindberg is pessimistic about the prospects for reconciliation. It is “...problematical given the demonstrated constraints on the Canadian legal imagination and the rigidity of the natural laws governing Indigenous nations.”²²⁶ She is also reluctant to venture very far without an inclusive Indigenous debate about assertions of dominion and oppression.²²⁷

While she does venture some tentative suggestions for developing common ground between indigenous law and Canadian law, these suggestions appear in the context of a work that tends to push for greater separation between indigenous and non-indigenous peoples.²²⁸ The primary

thrust of the work is the advocacy of rejuvenation projects among indigenous peoples to restore connections with original modes of complying with the instructions of the Creator. These will be complemented by supportive work from teams of scholars to develop understandings of indigenous legal and constitutional orders. This work will also include a strong contribution from critical race theorists, especially those who focus on “whiteness studies”.²²⁹ While there are some olive branches that are offered, the overall thrust of the argument is reflected in the aphorism “Radicalism is the new realism.”²³⁰

Glen Coulthard

Glen Coulthard has emerged as one of the most important critics of the politics of recognition in Canada. He writes within a Marxist paradigm and advocates retrenchment from the state and nurturing what he calls “critical traditionalism”.²³¹ Though he has written several important articles, the most complete elaboration of his line of argument is found in his 2010 doctoral thesis.²³² His work can be characterized as an uncompromising critique of the notion that reconciliation can be found within a settler society through a politics of recognition. He argues that recognition inevitably reinscribes the basic structures of colonial domination that are founded on the original expropriation of indigenous lands. He presents the alternative of “self-recognition” in a manner which revitalizes community norms and authority structures.²³³ Though he only offers “glimpses” of how this may play out, this work of revitalization will “...seek to pre-figure alternatives to colonial social relations.”²³⁴ In summary, Coulthard proposes to “...engage a multiplicity of diverse anti-imperialist traditions and practices- most notably Marxist, feminist, anarchist and Indigenous- to challenge the increasingly common-place idea that the colonial relationship between Indigenous peoples and the Canadian state can be adequately transformed via such a politics of recognition.”²³⁵

Coulthard’s argument is strongly structuralist and tends to be developed through rather stark binary distinctions. The core insight is that land plays a dual role in providing the foundation for disparate and conflicting models of thought, action and being. Modern disputes involve:

“...access to the land that contradictorily provides the material and spiritual sustenance of Indigenous societies on the one hand, and the foundation of colonial state-formation, settlement and capitalist development on the other.”²³⁶

The entire problematic of the relationship between indigenous peoples and the state pertains to the resolution of this contradiction. Coulthard argues that state attempts at recognition and accommodation are always thinly veiled attempts to advance the agenda of “colonial state-formation, settlement and capitalist development”.²³⁷ He argues that it is “...reasonable to conclude that disciplining Indigenous life to the cold rationality of market principles will remain on state and industry’s agenda for some time to follow.”²³⁸ Faced with this deeply structural tendency to reproduce colonial relations, the question is what steps can be taken to advance the “material and spiritual sustenance of Indigenous societies”?²³⁹ Coulthard’s recommended strategy is based on resistance and revitalization.

The primary intellectual antecedents for his recommended approach are Marx, Foucault and Fanon.²⁴⁰ While noting that the early writings of Marx tended to reflect a need for societies to advance through all stages in the ultimate path to socialism, Coulthard notes that the later writings opened up radical alternatives by envisioning the possibility that societies need not pass through the “distributive phase of capitalism”²⁴¹. This opens the possibility that indigenous thought might provide “...invaluable glimpses into the ethical practices and preconditions required of a more humane and sustainable world order.”²⁴² This is linked to the insight of Foucault that power in late capitalism is never total, thereby leaving room for resistant thought and action²⁴³. Finally, the work of Fanon demonstrates how oppressed people tend to draw aspects of their identity from the images that are perpetuated by their oppressors.²⁴⁴ With this background, Coulthard looks both backward and forward. Looking back to the origins of the Canadian state, he argues that the role of the state in attempting to resolve the core contradiction between indigenous and non-indigenous connections to land is flawed because “...the presumably legitimate role assigned to the state in mitigating these struggles is itself premised on a profoundly essentialist (not to mention racist) understanding that Indigenous peoples were too uncivilized to constitute equal and self-determining nations when they first encountered

colonizing powers in North America.”²⁴⁵ Looking forward, Coulthard sees great promise in the “...substantive role that critically revised cultural practices might play in the constitution of Indigenous alternatives to the social relations that structure the colonial present.”²⁴⁶

The notion of self-conscious traditionalism has become a very prominent idea in Canadian indigenous thought.²⁴⁷ In Coulthard’s view, the revival of “previously disparaged traditions” plays several important roles.²⁴⁸ Most importantly, they can counteract the tendency of oppressed individuals to form identities that internalize attitudes and behaviours that favour the interests of the colonizer. They can also provide a catalyst for the development of more resistant individual and collective identities. While state recognition leads to subjection, self-conscious traditionalism provides a step to a critical alternative “...by first recognizing themselves as free, dignified and distinct contributors to humanity.”²⁴⁹

Two key tools are used to develop this argument- pre-figuration and strategic essentialism.²⁵⁰ The idea of pre-figuration is drawn largely from Marxist thought and is intended to capture patterns of action that point the way to alternatives that are currently unavailable. The basic idea is that transformative possibilities are embedded in action and are developed through resistance to established patterns of power. The notion of strategic essentialism is that certain aspects of identity can be intentionally exaggerated to argue for changes that transcend rather than reinforce oppressive structures of thought or action.²⁵¹ Taken together, Coulthard presents a picture of collective identity formation, facilitating resistant action, underpinning critique of colonialism and developing shared practices that model a different future. No clear lines are drawn between these various components. The underlying idea is that “...things we do to achieve social change can subtly change who we become as a result of these efforts.”²⁵² It is important to note that Coulthard is not advocating return to traditions in their original form. He argues for a process of internal assessment that weeds out traditions that tend to oppress vulnerable members within the indigenous communities.²⁵³

The strongly binary cast of the argument is illustrated by the reaction to economic development within indigenous communities.²⁵⁴ Noting the emergence of a “new breed of Aboriginal property owner”,²⁵⁵ Coulthard argues that the lure of economic development risks undermining the traditionally egalitarian aspects of indigenous ways of life. There is a strong structuralist orientation that suggests that any measure that comes from the state or industry must be motivated by a desire to further entrench colonial relations. On the other hand, mobilization from within the community and linked to strong traditions of autonomous use and governance of the land promises to identify alternatives that are not dictated by the colonizer. Unless such efforts are undertaken, “...this loss of diversity necessarily limits our possibilities in terms of both thinking of and potentially building non-exploitative and non-dominating alternatives to colonialism today.”²⁵⁶ While there are frequent references to the “pre-figuring” of alternatives in resistant practice, no more than “glimpses” are offered of what these alternatives might look like.²⁵⁷ There is a strong sense that the internal democratic practice of dialogue about the revitalization of traditions is the goal as much as the means for achieving a goal. However, one clear goal that pervades all of Coulthard’s work is the desire to shine a light on the original injustice of dispossession.

Not all indigenous scholars advocate the degree of retrenchment from the state and mainstream society that is pressed by Coulthard. Indeed, at one point, Coulthard presents a more compromising opening:

“...My point here is that an approach that is explicitly oriented around dialogue and listening ought to be more sensitive to the claims and challenges emanating from these dissenting Indigenous voices.”²⁵⁸

Even if one were to assume that the views expressed by Coulthard reflect a small minority of indigenous views in Canada, there are strong reasons of pragmatism and principle to take up this invitation. From a pragmatic perspective, resort to direct action has a strong and continuing history in Canada.²⁵⁹ The intellectual leadership of many activist movements frequently adopt

positions very similar to those advanced by the critical traditionalism movement.²⁶⁰ Any effort to find ways to respond to key grievances in a fashion that avoids direct action will have to grapple with the perspective of the opinion leaders behind this strategy. More importantly, there is a strong connection between critical traditionalism and recent social science work that links community well-being with the nurturing of culturally appropriate governance practices.²⁶¹ Listening to dissenting Indigenous voices may well be a key mechanism for identifying effective and mutually acceptable solutions to deeply entrenched problems. This may also generate ways of responding to the continuing grievance associated with the very founding of Canada. While it will be argued in this thesis that the complex question of legitimacy must respond to a far greater range of factors than the circumstances of the original founding of the country, listening and dialogue may generate innovative responses to this grievance. While the list can only be partial, apologies modelled on the Residential Schools apology, changes to the preamble to the constitution similar to the proposal currently under consideration in Australia or shared institutions designed to re-position indigenous voices in the governance structure of Canada might flow from this dialogue.²⁶²

Karena Shaw

The final theorist that will be considered in this chapter is Karena Shaw. She presents a highly original assessment of the role that engagement with indigenous peoples played in the very development of liberal ideas.²⁶³ While other theorists have focussed on the seminal role of Locke in the justification of aboriginal dispossession, Shaw argues that Hobbes used the contrast between indigenous peoples and European societies to create the very idea of sovereignty.²⁶⁴ By referring to the popular image of indigenous peoples in the New World, Hobbes was able to argue that "...both inside- order, culture, art, science, time- and outside- nasty, poor, brutish, short life- are possible results of our nature; the only key difference is the authority of the sovereign."²⁶⁵ The discourse of sovereignty that he created not only misrepresented indigenous peoples but has "...ensured that they must be misrepresented."²⁶⁶ They live beyond the pale- outside history, literally outside time.

Shaw meticulously traces the discourse of sovereignty through the writings of Toqueville and the evolution of Canadian Indian policy from the 19th century to the present. Strong echoes of Hobbes resonate in the text of *Democracy in America*.²⁶⁷ Indigenous peoples do not own the land but merely "...hold it for the real owners to arrive."²⁶⁸ The settlers effectively "...bring the land into history."²⁶⁹ From the colonial policy of the 19th century to recent judicial decisions, the Canadian state reproduces its sovereignty by repeating the same discourses and practices that were developed by Hobbes.²⁷⁰ Indeed, the principle of reconciliation is seen to be a mechanism to occlude perception of the inherent violence of sovereignty²⁷¹. Canadian sovereignty is "...a sovereignty that is itself produced through the rendering of other ontologies as primitive, non-sovereign, illegitimate..."²⁷² On the other hand, indigenous peoples:

"...are struggling to create legitimate authorities- sovereignties- within and across spatial, temporal and discursive conditions that may be at odds with those that have created modern sovereignty. They are many ways to characterize these ambitions, leading us to a variety of different literatures: they seek to establish sovereignties within sovereignties, they seek to create post-colonial sovereignties, they seek to create economically viable "local" sovereignties within and through processes of globalization, and so on. Thus, Indigenous peoples form a microcosm in which one can see elements of struggles faced by a large percentage of the world's population."²⁷³

Shaw presents a critique of the work of Tully on the basis that he is alleged to be overly complacent in accepting the authority of the state and viewing the claims of indigenous peoples through the lens of culture.²⁷⁴ She worries that his approach may leave insufficient room for radical critique or the work of oppositional movements. She draws heavily from writers who work within the revitalization paradigm. While the programmatic recommendations of Tully may seem far-reaching to some, Shaw fears that he might be "...reinscribing the problem in his search for a solution."²⁷⁵

2.4 Critical Thinking on the Risks of Responding to Indigenous Difference

Though it is fair to say that most of the academic writing addressing the claims of indigenous peoples develops the critical themes that are examined in the previous section, there are also arguments that advocate a completely different approach. It is very important to grapple with these arguments since they have a powerful hold over much discussion in the media and the development of general public opinion. It is not uncommon to describe these arguments as being affiliated with the ‘right’ of the political spectrum, but as noted previously, it is potentially misleading to regard arguments about indigenous claims as aligned along a simple left-right divide.²⁷⁶ Furthermore, it will be argued that these contributions can play an important role in developing a theory of reconciliation.²⁷⁷

The fundamental model that emerges from this perspective is that of equal individuals living under the authority of equal states. The existence and legitimacy of the state is taken as a given, at least for developed liberal democracies such as Canada, provided it continues to provide protection to key, universally held rights, liberties and freedoms. A key priority is generally placed on economic liberty. Within this framework, there is often little room for recognition or accommodation of cultural difference. The normal prescription for how a state is to interact with its citizens is difference-blind liberalism. This focus on liberal universalism is reflected in much of the most important work in political theory of the last generation. Rawls, Dworkin and Habermas each argue for universal application of rights and procedures of justice and against the recognition of cultural difference.²⁷⁸ Other writers, such as Brian Barry, have strenuously argued against the acceptance of multiculturalism as a core feature of modern liberal democracies.²⁷⁹

To this point, a fairly uncompromising picture has been painted. While there are many advocates for the classical approach to liberalism set out above, there is a strong movement in liberal theory to develop approaches that are more open to indigenous difference. Led by the work of Will Kymlicka, this body of literature tends to support differentiated rights and other forms of protection for indigenous difference.²⁸⁰ However, most of this work falls well short of the

demands for change that are reflected in much of the critical literature. As noted previously, the reaction of scholars to ‘Kymlicka’s constraint’ constitutes an important dividing line between two broad bodies of thought.²⁸¹ The body of thought that is being considered now heeds the warning that change ultimately needs the support of key decision-makers such as national courts and reflects confidence that legitimate change can proceed within the four corners of a developed constitutional order such as Canada’s.²⁸² However, while some stress the need to convince mainstream courts of the rationale for departing from formally equal treatment of individuals and groups, this is tempered by the concern of others that to do so might strain consistency with constitutional and political norms that are regarded as foundational.²⁸³ On this line of reasoning, special privileges based on ethnic heritage are anathema to liberal norms of equality. As most serious thinkers in the liberal political tradition have moved away from such a formalistic approach to equality it would be easy to regard such critique as limited to a small minority but for the clear influence that such ideas have on public opinion and media commentary.²⁸⁴

As with the thinkers who are highly critical of the redemptive possibilities of liberalism in the settler state, this group of scholars also does not reflect uniform views. In the same vein as the previous section, an attempt will be made to highlight the main themes of analysis, leaving nuance and greater exposition to the footnotes. Several key thinkers will be examined in some more detail to draw out some of the key themes.

Among the ideas that are common to this line of critique are:

1. *Cultural protections tend to breach equality norms and cannot be justified.*

The traditional approach of classical liberalism is that culture is to be treated as a private matter and that the state ought not to draw distinctions between individuals because of their culture or other ascriptive characteristics.²⁸⁵ Though the idea is reflected less frequently in recent political theory it is still commonly seen in public discourse.²⁸⁶

2. *Care must be taken to avoid division and threats to stability within the nation-state.*

One of the reasons for the sceptical attitude to state-sanctioned difference in classical liberal thought is that rifts in a society might challenge stability and undermine the secure and uniform identity that maintains the nation-state.²⁸⁷ This is also related to the need to maintain solidarity and commitment to address shared goals within the community.²⁸⁸

3. *It is especially important to avoid activist interventions by the judiciary on aboriginal matters.*

As noted previously, this is linked to a much broader literature.²⁸⁹ When expressed within this critical tradition the concern is less that the courts are inclined to reinforce the status quo but rather that they will be tempted to “invent” new law rather than applying established legal norms.²⁹⁰

4. *Special treatment tends to reinforce dependency.*

There is a wide variety of views on this issue, but a recurrent theme is that singling out individuals or groups for special treatment tends to result merely in isolation, estrangement from the mainstream society and economy and the development of dysfunctional ways of living and coping with adversity.²⁹¹

5. *Justice is a matter for the living and efforts to address needs should be focused on the individual rather than the group.*

The key issue is the primacy of the individual. The promotion of justice should focus on the needs of individuals. The separate needs of the group, if these are recognized at all, are accorded far less priority.²⁹² Some writers express a deeper concern about the wisdom and likely effectiveness of any state program designed to promote distributive justice.²⁹³ Fair allocation of individual rights and protection of entitlements plays a far more prominent role in these theories.

6. *Attempts to redress historical injustice amount to a desire to revert to a distant and irretrievable past.*

While it is expressed in different ways, a common theme is that claims of historical injustice are regarded as far less compelling than present claims.²⁹⁴ This may relate to the sheer inability to correct the wrongs of history or a more forgiving attitude to the degree of wrong that is alleged to have occurred. Attempts to redress the wrongs of history can be painted as hopelessly utopian.

7. *The market tends to be a better mechanism for allocating economic resources and adjudicating different claims than state intervention.*

This is an absolutely core dividing line between different styles of thought. Many of the scholars considered in the previous section display a high degree of scepticism about the role of the market.²⁹⁵ Emphasis is placed on the negative consequences of capitalist expansion, its linkages to broader projects of imperialism and the supportive role it plays in maintaining the power of the state. In contrast, many of the scholars considered in this section see the market as the best tool for advancing human freedom, addressing fundamental needs and supporting the prosperity of the overall society.²⁹⁶

8. *What some perceive as historical injustice can also be perceived as the inevitable result of technological superiority and progress.*

This position is linked to broad narratives about the ‘march of history’ or the ‘advancement of civilization’. Very similar themes are developed in the recent book *Civilization: The West and the Rest* by the historian Niall Ferguson.²⁹⁷ A less benign version of the same idea is reflected in the following quote from Winston Churchill:

“...I do not admit, however, that a great wrong has been done to the Red Indians of North America, or the black people of Australia. I do not admit that a wrong has been done to these people by the fact that a stronger race, a more world-wise race, to put it that way, has come in and taken its place.”²⁹⁸

This complex body of opinion, while very diverse, does provide some clues why there is such deep public resistance to aboriginal claims, particularly when there are expressed in terms of the stronger and uncompromising language expressed in the previous section. It is hoped that insight into this resistance can be secured by considering some recent writing in more detail:

2.5 Case Studies of Key Writers

Tom Flanagan

While it is now more than a decade old, Tom Flanagan’s *First Nations, Second Thoughts* is still a good place to start in order to understand a strand of thinking that continues to be very prevalent in Canada.²⁹⁹ Flanagan attacks what he calls a “New Orthodoxy” of left-leaning activists and academics which have advocated a consistent vision on topics such as land claims, self-government and treaties.³⁰⁰ In the view of Flanagan, this “new orthodoxy” promotes a particular image of Canada:

“Canada will be redefined as a multinational state embracing an archipelago of aboriginal nations that own a third of Canada’s land mass, are immune from federal and provincial taxation, are supported by transfer payments from citizens who do pay taxes, are able to

opt out of federal and provincial legislation, and engage in “nation to nation” diplomacy with whatever is left of Canada.”³⁰¹

Flanagan develops his argument with reference to eight core propositions that he regards as articles of faith for the new orthodoxy.³⁰² These include topics such as the importance of prior indigenous occupancy of Canada, the cultural equality of aboriginal and non-aboriginal nations, the continued possession of sovereignty, the associated status of nationhood, the ability to exercise sovereignty on Indian reserves, the breadth of indigenous property rights, the need to modernize and recognize the “spirit and intent” of treaties and the material foundations for indigenous prosperity.³⁰³ While devoting a chapter to each of these propositions, taken as an aggregate he sees a “stop sign for human progress.”³⁰⁴ While part of his analysis turns on a prior commitment to the market as the primary mechanism to address human needs, there is also a core normative component to his thesis. A differentiated approach to rights in a liberal democracy is rejected because “...it is at variance with liberal democracy because it makes race the constitutive factor of the political order.”³⁰⁵ In addition, it “...would redefine Canada as an association of racial communities rather than a polity whose members are individual human beings”³⁰⁶ In Flanagan’s view, this leads to an erroneous view of the causation of social dysfunction in aboriginal communities and “...encourages aboriginal people to withdraw into themselves.”³⁰⁷ In an oft-quoted clarion call to resist pressure for the accommodation of aboriginal difference, Flanagan says “Call it assimilation, call it integration, call it adaptation, call it whatever you want, it has to happen.”³⁰⁸

When he turns to recommendations for a path forward, Flanagan stays true to his aversion to central planning. He favours an incremental approach to change, what he calls small steps in the right direction.³⁰⁹ Reflecting on recent demographic trends of mobility away from the reserves, he argues that the “...substantial majority...are already on their way towards integration.”³¹⁰ For those who stay on the reserve, Flanagan argues that transparent governance and clear accountability are important safeguards for Indian people.³¹¹ In addition to an attachment to a particularly stringent conception of classical liberalism, two dominant themes emerge from Flanagan’s work. He is deeply committed to a model of incremental change- a model that has

dominated much public administration scholarship in North America.³¹² The other big idea is that public policy interventions should be tailored to “...creating the conditions for civil society to emerge”.³¹³

In the second edition of the book,³¹⁴ Flanagan presents an even sharper sense of two conflicting ideologies vying for attention on the aboriginal policy agenda- “The current situation of aboriginal people thus involves a mix of two incompatible visions.”³¹⁵ He describes the “self-government” or “autonomy” vision as based on a model of nation-to-nation interactions “...which continues to animate the aboriginal political leadership in Canada.”³¹⁶ This is incompatible with another vision that he claims is held by most Canadians:

“The other vision bearing on native issues is held widely but inarticulately by most Canadians. It could be called integration or assimilation. It holds that aboriginal people are not separate nations but Canadian citizens and should have all the obligations, rights, and opportunities that citizenship brings to Canadians. They should be able to vote in Canadian elections and serve in Canadian public office. They should have the same opportunities as others to make decent life for themselves by working and investing in the economy. To that end, aboriginal people should receive an education similar to that of other Canadians in our schools and universities.”³¹⁷

He paints a picture of the former vision as being advanced by a minority of highly organized people and organizations. In contrast, “...The assimilationist vision is not organized in the same way, but it represents the inarticulate beliefs of most voters, who are sympathetic to native people and see them as victims of oppression and neglect, but envision them entering Canadian society rather than withdrawing from it.”³¹⁸ Flanagan’s conclusion is that the clash of these two incompatible visions has produced a policy impasse. He links the proposed First Nations Governance Act amendments to the Indian Act to the vision of assimilation and the Kelowna Accord proposals to the vision of autonomy.³¹⁹ Each failed because the proponents of the other vision could mobilize sufficient opposition to block the initiative. He concludes that “...sweeping reform of the aboriginal situation is politically impossible.”³²⁰ There are “...simply too many constitutional difficulties and too many veto groups inspired by conflicting visions.”³²¹

The primary benefit of his work, particularly in the more recent revised version, is the clear picture that it paints of the political dynamic in Canada and the explanation it provides for why fundamental reform in any direction is so difficult to implement. This leads Flanagan to the pessimistic conclusion that "...Inertia is the dominant fact of the aboriginal situation, and no grand scheme capable of changing it has much chance of being legislated.³²² Public policy, then, should be occupied with trying to make small improvements rather than attempting global reform. He maintains that the three most promising areas of focus are more flexible property rights, more accountable and transparent local government and better education.³²³

Flanagan's most recent work, published jointly with Le Dressay and Alcantara, is clearly motivated to stimulate incremental interventions that might break down the policy stalemate.³²⁴ They argue that reform of individual property rights might appeal to both right and left. They argue that the key to economic development is ensuring that aboriginal groups have the underlying title to their lands. If band governments can retain sufficient control over the disposition of lands to avoid the massive dispossession that occurred under the United States Dawes Act, marketable individual property rights might set in motion forces that could materially improve social and economic conditions on reserves. In an eloquent foreword, Manny Jules argues that "...We are trying to build a system of First Nations government that allows aboriginal individuals to have the freedom to pursue their creativity, have access to capital, and be entrepreneurial. This system also has to generate sufficient revenues for us to be self-reliant."³²⁵

The initiative is described as voluntary and First Nations led. It is also viewed as "...the single most useful reform of the aboriginal condition that is constitutionally and politically possible at the present time."³²⁶ In the course of developing this proposal, fascinating insights are offered in the historical development of aboriginal property rights. While inspired by an evolutionary framework that sees property rights as emerging only in conditions of scarcity, and usually not until after the development of intensive agriculture, a picture is painted of widespread individual and family property rights in indigenous legal systems- a picture that was completely

misrecognized by the focus on collective property rights under the Royal Proclamation of 1763.³²⁷ Looked at from today's perspective, "...It is ironic and tragic that this original European conception of Indians as natural communists has now been accepted by many aboriginal leaders and thinkers and become a barrier to native participation in the modern economy."³²⁸ They link this problem back to the Royal Proclamation, which rather than engaging with the "full spectrum" of Indian property rights, "...reduced them all to the simple category of occupation as "hunting grounds". At one stroke, the Proclamation merged individual and collective property rights while reducing the status of both from ownership to occupation."³²⁹ This conception of property is linked directly to the characterization of Indian property rights as "usufructary" in the St. Catherine's Milling case and, more generally, as entrenching a restrictive Lockean notion of Indian property in 19th century thought and policy:

"In practice, the Lockean version of Australia, Canada and US officials led to a dualistic view of Indian property rights. Ignorant of the vast array of property rights that Indians had evolved for themselves in the New World, they tended to see Indians as hunting and fishing on the land, but not otherwise owning it- in short, people without property. They saw property rights not as an outgrowth of the Indian's own culture but as something wholly new that would have to be introduced to them as part of the civilizing process."³³⁰

The distinguishing feature of Flanagan's work remains the strong faith that is placed on market mechanisms and his commitment to classical liberalism. The primary motivation for assessing the limits of existing private property protection and exploring a new voluntary approach to entrenching such rights is to set in place conditions that might help attract private investment on Indian lands. This is seen as "the key" for First Nations to escape poverty.³³¹ There is clearly a broader ambition to address the underlying policy impasse- "...With the stroke of a pen, First Nations land values could rise to those prevailing in the rest of Canada. It would recognize the underlying First Nations title, and thus formally bring First Nations governments into the federation."³³² In response to the critics who fear a Canadian sequel to the American Dawes Act, the enabling legislation "...would ensure that it is impossible for a First Nation to alienate the land. It would always retain its underlying, aboriginal or Treaty title to its lands."³³³

This book introduces a thoughtful proposal to the public debate, as yet rather short on details. For example, it is quite unclear how the idea of securing an underlying Aboriginal title to land will achieve the benefits that are described.³³⁴ Nor is it obvious how this proposal would work beyond the relatively narrow context of statutory Indian reserves.³³⁵ Most importantly, early reactions to the book tend to confirm the deep binary divide and policy paralysis that Flanagan sets out so clearly in his earlier work.³³⁶

Gordon Gibson

Gibson writes within a tradition fairly similar to that of Flanagan but what distinguishes his work is the high value that he places on individual and collective choice. He views the conditions in aboriginal communities as "...the most important moral issue in federal politics."³³⁷ Gibson calls for major reforms, including substantial refocusing of public policy on the needs of the individual rather than the collective.³³⁸ This is in part motivated by a firm commitment to classical liberalism and the primacy of the individual as a moral and political unit. It is also motivated by a deeper analysis that links the present situation in aboriginal communities to progressive denial of choice and increasing isolation from the mainstream economy and society. An interesting addition is the role that he ascribes to the courts after the failure of the 1969 White Paper. In part because of these interventions "...attention shifted from outcomes and realities to process and entitlements."³³⁹ For Gibson, "...the moral response is clear. Whenever the government has a choice, it should reduce the legal differences between Canadians, and certainly should not cause these differences to grow. Governments should celebrate what we have in common and leave it to the individual to celebrate diversity with neither penalty nor subsidy."³⁴⁰

While his general remedy is to extend individual choice wherever possible, he does believe that there is a moral obligation to retain, at least as a transitional measure, some variation of the parallel system. He argues that historical reliance justifies the retention of the reserve-based system of collective governance—"...Our moral obligation arises out of the fact that we have created that parallel society and we are hung with the consequences."³⁴¹ This would allow

individuals a clear choice as to the path they wish to follow. Gibson stresses that the past treatment of Indians should not be described as assimilatory in nature- "...the actual operational policy was not assimilation. It was isolation."³⁴² Indeed, he argues that the White Paper "explicitly rejects assimilation."³⁴³

A core theme of Gibson's analysis is that the balance of power has largely shifted to the courts in setting the policy agenda in the field. He describes Section 35 as an "...innocuous section put in for political correctness".³⁴⁴ In his view, the courts have simply ignored the plain meaning of the provision and are inventing new law through a stream of decisions, so much so that he sees the balance of power as having shifted in favour of aboriginal peoples.³⁴⁵ When faced with the task of interpreting Section 35 "...language is loose enough that the Supreme Court of Canada has the power to either follow the intent of the framers or to make a great deal of new law indeed."³⁴⁶ This is seen most conclusively in the duty to consult where aboriginal groups are enabled to engage in "toll-gating" to extract a fee to permit economic development projects to go ahead.³⁴⁷

The strong binary dynamic that pervades so much of the literature is powerfully displayed in the work of Gibson. The mindset of mainstream Canada is described as "positive, constructive and focussed on the future"³⁴⁸. For some Indians, seemingly excluding the vast number that he sees as already having made the choice to migrate to the mainstream, the mindset is "not positive, constructive, and focussed on the future."³⁴⁹ In the world of stark divisions that he creates "One mindset leads to progress, the other leads to despair."³⁵⁰

While the work of Gibson is generally critical of the shift of attention he sees away from the material circumstances of aboriginal peoples to the law, he is not shy about offering opinions about the state of Canadian law. He is very critical of any arguments supporting the continuing existence of aboriginal self-government under the Constitution of Canada and equally critical of "process" rules like the duty to consult.³⁵¹ He has also been associated with a proposal by the Gitskan to resolve their comprehensive land claim by relying primarily on their Aboriginal title

rights, foregoing the layers of protection and statutory powers that are frequently conferred by legislation.³⁵² In fact, one of the deep uncertainties in Gibson's analysis is the contradictory treatment of aboriginal title. He refers on several occasions to the importance of respecting vested aboriginal rights³⁵³, and expresses confidence that the relatively generous approach to title in the Tsilquotin decision will stand but calls on governments to adopt an aggressive litigation strategy seeking declarations of clear title to public lands.³⁵⁴

As this work is primarily directed to mainstream governments, the key policy prescriptions include transitional programs, managed by provinces but funded by the federal government, to aid the movement of aboriginal individuals away from the reserves. These would be supplemented by an enhanced focus on education and targeted training programs.³⁵⁵ While the reserve option would continue to be available, it is clear that Gibson believes that the remnants of a parallel society would be eroded over time as individuals make the choice to join what he sees as a better life for themselves and their families.

John Richards

The work of John Richards is illustrative of a growing literature that attempts to shift the focus from normative to empirical analysis.³⁵⁶ His key interest is analysis which is directed to the isolation of the primary causes of gaps in welfare between aboriginal and non-aboriginal Canadians. He argues that a more substantive and pragmatic dialogue is long overdue. He uses the example of a highly polarized academic debate about the implications of an important treaty rights decision involving a claim for treaty tax exemption as it "...helps to illustrate the gulf between Aboriginal and non-Aboriginal perceptions of what is and what should be, and why Aboriginal policy is the most intractable conundrum the country now faces."³⁵⁷ He presents a useful gloss on the debate by introducing a distinction between pessimistic and optimistic anthropology- "Earlier writers had found Aboriginal culture to be dysfunctional for life in modern society; now, many insist that it is indispensable."³⁵⁸ Starting from a position that truth can not be found at either extreme, and rejecting both paternalism and romanticism, he argues

that policy proposals should be judged by actual performance.³⁵⁹ His focus is on performance measures such as education outcomes, health outcomes and average income levels.³⁶⁰

In a carefully documented account of the published literature on disparities in health outcomes, Richards presents a compelling case that educational performance is the most important proximate causal variable in explaining socio-economic disparities, including health outcomes such as prevalence of diabetes.³⁶¹ He uses the distinction between a proximate cause and a root cause to good effect.³⁶² Even if one characterizes the original cause of major disparities as rooted in the colonial experience, educational policy is something that can be affected by immediate, targeted and evidence-based measures. He presents a wide range of options for improving educational outcomes, but, importantly, resists the idea that solid educational performance cannot be delivered in a culturally appropriate fashion. In his words “...there is no inherent contradiction in studying the importance of Louis Riel in Prairie history and mastering geometry.”³⁶³

Richard’s work can be read as an extended elaboration of the dilemma posed by Kymlicka’s constraint.³⁶⁴ Some recognition of difference is required to deal justly with the claims of aboriginal peoples, but this must be supported by major policy interventions that deal with the legacies of history in a way that can be sustained in the long-run. Like Cairns, he argues that the stress on “otherness” can pose a barrier to the maintenance of public support.³⁶⁵ More fundamentally, it can skew priorities in a fashion that raises a barrier to policy innovation and does not take into account the demographic realities in aboriginal communities. Stated concisely “...the stress on “otherness” among reserve-based aboriginal leaders encourages many of them to abdicate their responsibility to assess “what works and what does not work” among on-reserve programs, and to under-estimate the extent to which many Aboriginals wish to live in the mainstream of individualistic society.”³⁶⁶

Though it is not developed in great detail, Richards is effectively carving out an operational distinction between the realm of ideas and normative standards and the realm of practical policy innovation. Issues like negotiation of treaties and interpretation of existing treaties are located in the realm of ideas and are primarily guided by the need to maintain cultural identity and a sense of place. The realm of practical policy innovation, in contrast, is directed to evidence-based policy interventions to deal with pressing problems like disparities in incidence of major diseases, prevalence of suicide and gaps in employment and educational performance. Richards makes clear that the identification and management of such targeted policy initiatives is a shared responsibility of federal, provincial and band-based leadership.³⁶⁷ In all cases, their performance should be judged by the results they achieve.

Frances Widdowson

In contrast to the work of Richards, which makes some effort to find bridges across a deep binary divide of ideas, Frances Widdowson develops a line of argument that is not amenable to compromise. Widdowson, who sometimes writes with Albert Howard, has developed a rather stern version of the critique of state responses to aboriginal difference.³⁶⁸ She describes herself as writing from a Marxist or materialist perspective and is perhaps the most extreme advocate of the idea that the fundamental cause of existing aboriginal poverty is the dependency that flows from isolation and lack of skills that are required to integrate into a market economy. Some caution is required when approaching the work of Widdowson as some of her ideas can be expressed in highly offensive terms.³⁶⁹ As an example, she critiques the notion of traditional knowledge of indigenous peoples by describing it as “honouring the ignorance of our ancestors”.³⁷⁰ However, it is important to study her work as there are clear echoes of the line of thinking she presents in much media and public debate.³⁷¹

The following two passages from the book co-authored with Howard gives a sense of the core line of argument that Widdowson develops in her whole body of writing³⁷²:

“...adoption of low standards hides the fact that most native people have not developed the skills, knowledge or values to survive in the modern world.”³⁷³

“...has meant that a number of Neolithic cultural features, including undisciplined work habits, tribal forms of political identification, animistic beliefs, and difficulty in developing abstract reasoning, persist despite hundreds of years of contact.”³⁷⁴

The basic line of argument can be summarized in propositional form:

- Only economic participation in the broader economy can promote development.³⁷⁵
- Aboriginal peoples, just like everybody else, are motivated by this goal.
- Certain cultural characteristics possessed by aboriginal peoples are obstacles to participation in the broader economy.³⁷⁶
- These cultural characteristics are not only obstacles to current participation in the broader economy but are the best explanation of the cause of current dependency and community pathology.³⁷⁷
- The best intellectual framework for understanding the causes and potential remedies to the current situation is a Marxian paradigm of uneven development.³⁷⁸
- When approached in this light, the only available and potentially effective remedy is a policy of assimilation that requires aboriginal peoples to relinquish traditions that stand in the way of participation in the modern economy.³⁷⁹
- In contrast, policies like land claims and self-government operate to increase isolation, and by extension dependency.³⁸⁰
- The measure of progress away from dependency is whether aboriginal communities have become economically productive.³⁸¹
- The entire reasoning process is conducted within a binary model that contrasts materialist and idealist understandings of reality.³⁸²

While a thorough critique of this reasoning process would take far more space than is available, a number of points can be made to highlight some of the important weaknesses in argument that

are apparent.³⁸³ As a start, one can question the assumption that economic development and participation in the broader economy is the sole legitimate goal of aboriginal peoples. Preservation and flourishing of culture and a distinctive way of life are accepted by most people as legitimate social goals. Furthermore, to the extent that an argument is made that cultural characteristics have inhibited past or present participation in the economy, the evidence that is marshalled is woefully weak.³⁸⁴ As for the theory of causation, there is no serious effort to engage with other available theories of the social foundations of individual and community dislocation, including, for example, the devastating experience of many aboriginal peoples in residential schools. The intellectual veneer provided by the Marxian theory of uneven development must be considered alongside the unanimous rejection of this framework by other authors who write within this tradition.³⁸⁵ Finally, even when considered by reference to tests of internal coherence it is notable that the analysis impermissibly shifts from cultural traits to differences in size, productivity and complexity in assessing the economic prospects of indigenous communities.³⁸⁶ As a result, even when it is recognized that the vast majority of Canadians work in the service sector of the economy, aboriginal economies are critiqued as non-productive because of the high proportion of employment in the service sector.³⁸⁷ Even accepting the thesis at face value, employment in the service sector provides the same opportunity to develop the traits that are alleged to be necessary for participation in the broader economy.

While there has been a clear reluctance of the academy to engage with the arguments presented by Widdowson and Howard,³⁸⁸ if one believes that echoes of these arguments in fact play a role in the ferment of ideas in Canada, it is important to engage with them respectfully and thoroughly.

Alan Cairns³⁸⁹

Alan Cairns has long been regarded as one of Canada's most influential political scientists. One of the many areas of public policy where he has made a substantial contribution is the area of Crown-aboriginal relations.³⁹⁰ Most notably, his work *Citizens Plus*, published in 2000, like the

work of Kymlicka, has acted as a lightning rod for reactions from varied perspectives.³⁹¹ This work may be read as an extended critique of the public policy recommendations of the Royal Commission on Aboriginal Peoples as well as a critique of the proponents of more traditional difference-blind liberalism. Cairns work does not build from a clearly articulated theoretical foundation but it shares many affinities with the work of Kymlicka. Like Kymlicka he recognizes the importance of cultural protections for aboriginal peoples and rejects the normative acceptability of assimilation policies. His primary argument is that Canada has been plagued by sharp policy shifts between advocacy of assimilation and parallelism- a view he shares with Flanagan.³⁹² He chides the authors of the White Paper of 1969 for not having followed the pragmatic recommendations of the recently published Hawthorne Report.³⁹³ Likewise, he criticizes the Royal Commission for endorsing a model of nation-to-nation co-existence.³⁹⁴ He sees the assimilation model as unjust and the co-existence model as unworkable. Concerning the co-existence model, his argument is partly empirical and partly normative. On the empirical side, he doubts that the complex and varied life-situations of aboriginal people in Canada are consistent with the image of separate and homogenous nations.³⁹⁵ On the normative side, he doubts whether the bonds of solidarity that are necessary to hold a society together and maintain the willingness to maintain redistributive policies are possible in the type of society suggested by the co-existence model underlying the work of the Commission.³⁹⁶

While independently valuable for its clear articulation of the trajectory of Canadian public policy on aboriginal-state relations and the possible paths that are available in the future development of this policy, one of the most important reasons to study the contribution of Alan Cairns is to examine the reactions that it has spawned.³⁹⁷ While there are very clear differences with the work of Flanagan, the clear trend in the critical commentary has been to place the work of Cairns at the same end of the spectrum as Flanagan. His work has been described as neo-conservative and as supportive of the assimilation of aboriginal peoples into mainstream Canadian society. It is not uncommon to see Cairns described as exhorting aboriginal peoples to forget the past.³⁹⁸ This trend is indicative of a broad tendency for debate to polarize around clearly demarcated binary poles.

The work of Cairns is also useful as an exemplar of the role of citizenship in thinking about the place of indigenous peoples in liberal democratic society. Seen in this light, the primary injustice has been the long-standing denial of citizenship to aboriginal peoples. Indeed, even when citizenship has formally been extended to aboriginal peoples, it is still possible to argue that effective worth of indigenous citizenship has been degraded by legacies of discrimination, marginalization and isolation.³⁹⁹ Seen from this perspective, the goal is the extension of equality of citizenship status. For some, this will mean undifferentiated citizenship. For others, this will mean extension of extra rights to protect cultural difference. From the opposite end of the spectrum, the core injustice is the original extension of citizenship to indigenous peoples. This is regarded as an illegitimate incorporation of indigenous peoples into the settler state without indigenous consent.⁴⁰⁰

To summarize, the work of Cairns helps to draw out the importance of different conceptions of citizenship, the sharply binary nature of debate about just treatment of aboriginal peoples in Canadian public debate and the importance of solidarity and fraternity in determining the scope and limits of a just response to aboriginal claims⁴⁰¹

2.6 Can These Critiques be Reconciled?

While the first set of critical comments are more common in the academic literature, some of the ideas canvassed on the other end of the spectrum can be seen almost daily in media and public discourse.⁴⁰² It is important to understand these latter arguments in some depth even if one is committed to the general project of supporting constitutional accommodations of aboriginal peoples in Canada, including some of the more far-reaching accommodations proposed by a variety of scholars. Both sets of views offer important critical insights and both perspectives have to be considered and respected if there is any hope of finding ways forward.

When taken at face value, the divide between these two bodies of literature appears to be unbridgeable. However, there are some points of commonality. With a few exceptions, there is a generalized desire to address historical wrongs, though the diagnosis and remedies might differ. There is also a shared concern for individual welfare and autonomy, though there are differences as to the role that the group plays in mediating these values. There is at least some overlap on the role that is played by market mechanisms in a liberal democratic society, though this is more contentious. Unless an effort is made to bridge this broad gulf in perspective there is a risk that we will continue to talk past each other and miss the opportunity to address what all agree is an intolerable situation.

It is necessary to underline that this is not an abstract issue for academic or policy debate. The gross disparity in most major economic, social and health indicators between aboriginal and non-aboriginal Canadians is a national shame.⁴⁰³ Massive disparities in likelihood to commit suicide, particularly among young people, make some kind of response obligatory. The situation in aboriginal communities has rightfully been labelled Canada's number one unresolved human rights issue.⁴⁰⁴ However, the previous exposition has shown that there are radically inconsistent suggestions for remedying the situation, resulting in a state of impasse. To the extent that developing creative options at the level of constitutional and legal analysis can generate ways to break this impasse, the effort is justified by the high stakes that are in play. The limits of such an effort can not be over-estimated- both general bodies of thought canvassed to this point share a general scepticism about the role of law, especially constitutional law, to generate meaningful change. However, the key theme of this thesis is that constitutional change and innovation can provide a framework for the development of broader social and economic reconciliation.

My work is directed to the search for ways to break down what appears to be a seemingly intractable divide and apparently irreconcilable clash of normative frameworks. We will see that this divide is replicated with precision in how unresolved legal and constitutional issues are framed and argued.⁴⁰⁵ As noted previously, Flanagan provides an even-handed summary of the policy impasse that currently prevails in Canada. The key intuition that lies behind the core

argument of this thesis is that accommodations that can be developed in practice on intractable issues can frequently be found more readily than accommodations in theory. Such accommodations can provide possibilities of breaking the policy impasse.

A good place to start is the work of Janet Halley.⁴⁰⁶ She writes about the role that theory has played in the development of feminist thinking about political action promoting the interests of women.⁴⁰⁷ Her argument is that theory is often directed to the defence of a theoretical perspective rather than the defence of the interests of the individuals and groups who are the object of the theory work. She controversially argues for “taking a break” from feminism, by which she means taking a conscious step away from the internecine battles of the theoreticians and towards restoring the role of theory as a guide to practice. She argues that one should use aspects of various theories, which she calls “theory fragments” in order to construct useful advocacy arguments.⁴⁰⁸ This closely parallels the role that theory will play in the construction of this thesis. Various theory fragments will be used in order to construct an argument that responds to disparate challenges to the legitimacy of the constitutional framework governing the relations between aboriginal peoples and the Crown. While it is hoped that the contribution of the various theory fragments will be transparent, the key issue is the persuasiveness of the overall package of arguments.

Another important inspiration for the approach taken in this thesis is the idea of “nested opposition” developed by the American legal scholar Jack Balkin.⁴⁰⁹ He argues that ideas which appear to be in a relation of radical opposition are often in fact in a relation of nested opposition. By this he means that apparently contradictory ideas can be explored to find commonalities and syntheses that can generate productive alternatives. Drawing on the methodology of Jacques Derrida, Balkin demonstrates that normative and legal analysis can benefit from an explicit engagement with the internal relations between ideas which appear to be mutually exclusive. Though the methodology suggested by Balkin for understanding concepts in nested opposition will not be directly explored in this thesis, the core idea is helpful for understanding the deep

divisions that are apparent in the literature on the meaning of deeply contested concepts such as “legitimacy” and “sovereignty”.⁴¹⁰

Finally, the work of Amanda Anderson provides another intellectual touchstone to the work engaged in this thesis.⁴¹¹ She endeavours to show that post-modern critical analysis has been too quick to jettison the contributions of universalist liberal theory. Drawing primarily from the work of Jurgen Habermas, she argues that the critical insights of post-modernism can be combined with aspects of the liberal enlightenment.⁴¹² This is an important way of closing the gap between traditional liberalism and its critics. Her work is illustrative of an approach that is highly influenced by liberal thought but leaves ample room for the recognition of the claims and interests of subordinated groups in a liberal society.

Prior to the examination of the “promises” of Canadian law, it may be worthwhile to reflect a little longer on the continued binary dynamic that pervades much academic and public debate about aboriginal issues. It will be argued that this engages important questions about the nature and role of theory. Similar guidance is taken from the numerous scholars who argue that patterns of binary thought can frequently stand in the way of achieving justice, just as Voltaire argued that the perfect can be the enemy of the good.⁴¹³ As a key example, Duncan Ivison has published widely on the normative issues raised by indigenous claims.⁴¹⁴ However, the work that reflects the full complexity of his argument is the 2002 book *Postcolonial Liberalism*.⁴¹⁵ The question he poses for himself is whether the justificatory project of egalitarian liberalism can be redeemed given the deep history of injustice, extending over five centuries, between indigenous peoples and the state?⁴¹⁶ He notes that the history of liberalism is deeply entangled with empire. The neutrality of the state has come under withering attack. The body of work produced by post-colonial theorists is deeply sceptical of any prospect of meaningful reconciliation. Ivison’s work is especially useful for the current project because it takes seriously the relationship between normative theory and the task of working out relationships on the ground. It has been described as work which operates “...below abstract theory and above the level of particular legal and political initiatives”⁴¹⁷

Among the core normative arguments of the book are the inevitable frailty of justifications of rights that are founded on cultural difference. Indeed, he argues for reliance on the capabilities approach, most notably developed by Martha Nussbaum as an alternative to liberal theories of rights.⁴¹⁸ He also argues that the appropriate forum for resolution of normative claims is the public sphere and not the courtroom. Ivison also criticizes the over reliance on consent in much recent theorizing about state-indigenous relations and examines arguments about claims based on historical entitlements.⁴¹⁹ These issues will be examined more fully at a later stage of this thesis. Among the key themes that are developed in his book are the normative and political consequences of complex mutual co-existence, the idea of reconciling different perspectives through processes of public reasoning, the advocacy of less imperious practices of mutual translation and the development of shared practices of mutual justification. There is a strong emphasis on deliberative democracy through the whole body of this work. He concisely states his ambition in writing the book: “My hope is that in engaging with the claims of Aboriginal peoples to some form of “coordinate” or shared sovereignty, we might arrive at an attractive account of liberal association, of what I shall call the post-colonial state.”⁴²⁰

The aspect of his work that is most relevant for immediate purposes is his strongly expressed concern about normative reasoning that adopts an overly binary form. He singles out the all-or-nothing aspect of Tully’s treatment of sovereignty:

“..Either the state exercises exclusive jurisdiction or the indigenous nation does- there is no in-between, no shared or co-ordinate form of sovereignty possible. To find a successful way of dealing with the issues we have been discussing, our thinking must change.”⁴²¹

He invokes capability theory as a way to develop a normative language that breaks down this tendency to revert to binary distinctions based on competing claims to rights. The capabilities approach underlines the broader objectives that are satisfied by responding fairly to Aboriginal peoples interests in land, cultural protection and sovereignty.⁴²² In contrast, much scholarship has tended to frame choices as between binary options with no possibility of compromise, for

example a choice between self-government or assimilation into the broader community. Ivison argues that this is precisely the dynamic that must change:

“But as Ayelet Shachar and others have argued recently, it is precisely this either-or dichotomy that needs to be challenged. For it ignores the way situated individuals are subject to concurrent and simultaneous multiple affiliations- to their cultural group, their gender, religion, family, class and state- which can both overlap and conflict at different points in time. This is particularly true of indigenous peoples. For they are both citizens of the wider state and yet also members of particular, internally-differentiated indigenous communities, with specific norms, rules and laws inherent to them. They make claims based on their own customs and laws, as well as with reference to liberal-democratic legal and political instruments. So how should those different normative orders be managed and arranged?”⁴²³

He adds:

“It is this dual process of accommodation and change between and within indigenous and non-indigenous normative orders and institutions that post-colonial liberalism seeks to acknowledge, encourage and learn from. But it also highlights the inherent complexity and difficulty of developing appropriate forms of recognition and accommodation. These points of accommodation and recognition cannot be prescribed in advance of the understandings and choices of the indigenous people themselves. And yet these forms of self-understanding and the choices they make cannot help but be shaped by the wider legal and political system in which they are located.”⁴²⁴

This leads to a concise statement of the notion of aboriginal rights:

“Aboriginal rights are thus a complex bundle of capacities, both collective and individual, that enable indigenous peoples to live, as much as possible, according to their own customs and practices, and especially to negotiate the always-evolving interface between indigenous and non-indigenous worlds.”⁴²⁵

Iverson leaves open the question of the extent to which the state will be expected to intervene to promote individual capacities. He argues that states have a mixed record in intervening in the associative life of cultural communities. While he clearly advocates a leading role for the communities themselves in setting their own priorities and charting their own development, it is important that he sees an important role for the state under post-colonial liberalism.

“...this inevitably involves more than simply recognizing indigenous legal and normative orders. Hence the need for a negotiated and always contestable set of entry, exit and reversal points between liberal and indigenous normative orders that can help structure these interactions, extended along both domestic and possibly international lines”⁴²⁶

While a role for the state is seen, the ultimate architects for the way forward have to be indigenous peoples, based on inclusive dialogues within their communities. States have a duty to negotiate in good faith about the arrangements chosen by indigenous peoples.⁴²⁷ Iverson ends by calling for what may be styled a form of “constitutional patriotism”- a recognition of the “shared fate” that indigenous and non-indigenous peoples have inherited and a hope that mutual pride might emerge in the overall effectiveness of processes of inter-cultural accommodation and dialogue⁴²⁸:

“So what binds multinational societies together, if anything? In the end, nothing less than a commitment to that multinational identity; to the ideal of a political order in which different national groups, with different modes of belonging and different conceptions of the good and the right, nevertheless share a willingness to live under political arrangements that reflect this plurality.”⁴²⁹

Iverson’s work is pitched at a fairly high level of generality, but offers interesting conceptual tools to attempt to bridge gaps that are so apparent in the general literature, political practice and legal discourse. It might be helpful to turn to some discrete suggestions from an indigenous scholar for building bridges across divided terrain. It is worth quoting in full the effort of Lindberg to reflect on the common ground that might provide the basis for a deeper dialogue:

“It seems to me though that both Canada and Indigenous nations have a demonstrated commitment to the notion of freedom of religion that is a shared principle (with differential practice, acknowledgement, and histories related to the same). There are also indicators of some common understandings in relationship to egalitarianism and equality that offer a springboard to invigorating shared understandings. There is widespread acknowledgement that there are rights inherent in Indigenous peoples by virtue of being Original peoples in our territories. The differentiation is usually in regard to degree and definition, not the actuality. In terms of the Canadian legal discussion related to sovereignty, there may be some parallels, ironically between the broader source of Canadian assertions of sovereignty (from a higher, if human, power) and that reciprocal relationship that Indigenous peoples have with the land (from a higher power) that may have more commonalities than we have imagined. The theory of “crystallization” has something fantastic about it and while I adamantly disagree with the Canadian legal findings with respect to the same, examining the source of that alleged mystical construction might be interesting and provide context for discussion. Indigenous laws related to the source of our inherent rights may also appear to some to be fantastic and there is context required here as well for an informed understanding of the basis of the assertions made. Protection and conservation of resources seems like an area where Indigenous values and laws may be reconciled with Canadian values and laws.”⁴³⁰

A core theme, in both the theory and legal literature, is that dialogue is the sole mechanism that can reliably address intractable differences in normative and legal perspective. This will be seen to be the most important point of connection between theory and practice, especially after the emergence of the theory and practice launched by the Haida line of cases.⁴³¹ The core argument that is developed in this thesis is that the particular and specific forms of dialogue mandated by the Haida line of cases provide the best hope for the emergence of the conditions that will support the broader inter-societal reconciliation that is called for in much of the critical literature. As noted previously, the changes that have been set in motion with the Haida line of cases merit the over-used description of a “paradigm shift”.⁴³²

2.7 Focus on Specific Tools to Break Down the Divide

We have seen that the literature reflects wildly disparate approaches to legitimacy, the role of the nation-state, the legacy of liberal thought, the importance of stability, the role of the market economy, the role that is played by immanent critique and many other points of divergence.

What follows is an attempt to focus on several dimensions that seem particularly important to understand the stark differences that can be seen between many thinkers. As this thesis has a practical orientation, the examination of these dimensions will be conducted in the spirit of finding approaches that move towards finding common ground. This will be done in the manner of finding “theory fragments” that help move forward and possibly resolve some of the most pressing problems involving the relations between the Crown and aboriginal peoples in Canada.⁴³³ It is important to note from the outset that these various dimensions inter-relate and overlap in very complex ways. However, it will be argued that a separate examination of the role of culture, pluralism, constitutionalism, historical claims, the relationship between reconciliation, recognition and redistribution, causation and dialogue offer discrete vantage points to consider a very complex dynamic.⁴³⁴

CHAPTER 3 – CULTURE

3.1 The Dominant Impact of the Work of Will Kymlicka

A key dividing line exists between those who see “culture” as a legitimate basis for understanding and protecting the rights of indigenous peoples and those who regard this notion as an instable and unjust foundation for understanding and protection. An assessment of these differing viewpoints will be necessary to support an evaluation of the legal debate about the appropriateness of culture as a foundation for constitutional rights in Canada. A particularly important basis for beginning an assessment of the accommodation of cultural difference within liberal thought is the work of Will Kymlicka.⁴³⁵ He builds a careful argument for the consistency of the protection of group rights of national minorities with the core tenets of liberalism.⁴³⁶ It is notable that he builds this recognition notwithstanding a general scepticism about the conceptual and normative soundness of group rights.⁴³⁷ He also demonstrates some scepticism about the moral basis of historical claims, preferring to conceptualize justice issues as firmly based on current distributions of goods, resources and opportunities.⁴³⁸ It is also notable that his theoretical work is supplemented by a heavy reliance on empirical observations about the actual measures of accommodation that have become common-place in many liberal democracies.

Kymlicka has developed his arguments in a number of books and articles.⁴³⁹ A rich critical literature has emerged.⁴⁴⁰ His work has acted as a lightning rod for critics of multicultural policies as well as those who argue that the accommodative measures supported by his theoretical framework are insufficiently respectful of genuine difference and the true basis for indigenous claims. While his theoretical framework has developed significantly in response to these debates and a changed assessment of the intellectual environment, several core concepts have stayed relatively stable. These include a critique of liberal neutrality, the derivation of group-differentiated measures from the value of liberal autonomy and the distinction between external protections and internal restrictions.

Critique of liberal neutrality

Much of Kymlicka's work has centered on undermining the previously common notion that liberal states were or could be neutral to the claims of culture. As stated by Owen and Laden:

“Thus, liberalism's response to religious diversity involves a general theoretical solution to the problem that emphasizes human equality as a result of human similarity; and thus conceives equality in terms of similar treatment, treats religious belief as a matter of individual conscience, and advocates state neutrality and the protection of individual liberties as the just response to diversity.”⁴⁴¹

Liberal states tend to demonstrate clear partiality for majority cultures and to create barriers for minority cultures.⁴⁴² Seen in this light, an allegation of state neutrality is factually false and normatively suspect. In large part because of the pioneering work of Kymlicka, Owen and Laden are able to conclude:

“...by the end of the twentieth century, it was manifestly clear that both of these forms of political struggle were directed to a goal of equality as non-domination that could not adequately be captured in terms of either a model of equal status as independent sovereign states nor of equal citizenship as in identical sets of rights and opportunities.”⁴⁴³

Derivation of group-differentiated measures from the value of individual autonomy

Kymlicka's overall project is to show that group-differentiated measures need not conflict with the fundamental tenets of liberalism. Writing within a generally Rawlsian framework, he argues that respect for the primary good of individual autonomy entails respect for cultural difference. It is important to understand that it is not culture itself which provides the fundamental normative grounding for differential treatment but the individual autonomy which it supports. In this sense, cultural protections are derived from a particular theory of individual flourishing and are

instrumentally justified by the individual goods that they secure. As Shaw concludes, culture “...provides a backdrop of meaning for them.”⁴⁴⁴ Others argue that protection of cultural rights can be justified in a non-instrumental way.⁴⁴⁵ For example, Festenstein emphasizes the non-instrumental value of culture for groups- “good lies in participating in the practice.”⁴⁴⁶

Concept of a societal culture

An important element of the systematic presentation of Kymlicka’s liberal theory is the concept of a societal culture.⁴⁴⁷ These are relatively bounded communities that are marked by common experiences of language, cultural practice and a shared way of life. Festenstein raises a concern that the notion of societal culture suggests that a political or economic system cannot be shared.⁴⁴⁸ Some argue that the concept is artificial and excludes too many legitimate claimants.⁴⁴⁹ Others argue that it tends to over-generalize the experiences and history of particular groups and, in particular, fails to capture the specific nature of indigenous claims to sovereignty and governance.⁴⁵⁰

Distinction between cultural minorities and national minorities⁴⁵¹

This distinction is the primary tool for making broad claims about inclusion and exclusion. Cultural minorities, while needing special supports particularly by way of transitional assistance, generally desire to be fully amalgamated as equals within the overall nation-state.⁴⁵² National minorities, a category which includes indigenous peoples, are seeking political and legal assurances that their differences will be respected and supported by constitutional accommodations.⁴⁵³ Even with this effort to separate indigenous peoples from cultural minorities more generally, Kymlicka is frequently accused of paying insufficient attention to the fundamental nature of indigenous claims.⁴⁵⁴

Distinction between external protections and internal restrictions

Another controversial and contested distinction is made between external protections and internal restrictions.⁴⁵⁵ The former generally describe the rights that are provided to create boundaries and a measure of protection for the way of life of national minorities. The latter are restrictions that are imposed by those groups on their own members. Kymlicka generally sees such restrictions as incompatible with a commitment to liberal values, though he counsels strongly against outside interference to compel compliance with these values.⁴⁵⁶

Critical Evaluation of Kymlicka's Contribution

Kymlicka certainly recognizes the anomalous situation of indigenous groups when compared to cultural minorities or immigrant groups, especially in settler states, and makes great efforts to distinguish the claims of these groups.⁴⁵⁷ While he has suggested that some indigenous groups may be able to present valid claims to sovereign status, on the whole he regards the fates of indigenous peoples to be firmly encased in the states where they are found.⁴⁵⁸ A more pointed criticism is that Kymlicka effectively “mis-recognises” indigenous claims as being about cultural difference rather than as more fundamental claims to national equality and sovereignty.⁴⁵⁹ This is related to an even broader concern about the sheer difficulty of using culture as a basis for a rights regime and the related concern about the tendency of cultural assessments to devolve into essentialized and stereotypical notions.

Before getting deeper into some of these questions, it is important to emphasize that Kymlicka's focus is primarily intra-paradigmatic. He is attempting to convince other liberals that distinctive rights for aboriginal people do not run afoul of traditional liberal egalitarianism- indeed they are required to respect a full account of individual flourishing and autonomy. His argument also reflects the clear movement in constitutional practice away from notions of formal equality

towards substantive conceptions of equality that take difference seriously.⁴⁶⁰ However, a number of critics have argued that the essentially pragmatic focus has led to an overly truncated conception of legitimate aboriginal claims. It is not surprising that Kymlicka's work does not support a detailed articulation of the precise rights that are appropriately claimed by indigenous peoples in a liberal democracy such as Canada. His arguments are mainly directed to the normative justification for any such group differentiated rights. While his arguments are certainly supportive of many aboriginal claims such as land claims, self-government and cultural protection, it does not engage directly in the complex architectural questions involving the precise constitutional position of the aboriginal peoples of Canada.

A huge critical literature has emerged concerning Kymlicka's basic model and that model has evolved over time as Kymlicka responded to the critical commentary and extended his focus to a wide range of empirical examples.⁴⁶¹ It is useful to get a sense of the debate by analysing the general reaction to the work of Kymlicka. Some, most notably Brian Barry, argue that he has departed without adequate justification from traditional tenets of liberalism.⁴⁶² Others, such as Chandran Kukathas, build a liberal theory on the value of toleration as opposed to the value of autonomy.⁴⁶³ Still others, such as Dwight Newman and Andrew Robinson, suggest that the foundational role of autonomy needs to be supplemented by focus on other values, such as living a meaningful life.⁴⁶⁴ Finally, some, such as Monique Deveaux, attempt to shift the debate away from liberal rights to liberal deliberation.⁴⁶⁵ More fundamentally, some argue that Kymlicka's work fails to satisfy the normative demands for just treatment of cultural and national difference precisely because it relies on liberalism with all of its inherent limitations.⁴⁶⁶

His work is usefully contrasted to the multinational liberalism⁴⁶⁷, difference theory⁴⁶⁸ and *modus vivendi* approaches.⁴⁶⁹ The most extensive recent treatment of multinational liberalism, by Stephen Tierney, places more emphasis on the kinds of constitutional accommodations that are required to support different nations within a single state. Difference theory, often associated with the work of Iris Marion Young, looks to the structures of injustice that dictate the way that difference can fail to be properly accommodated within a liberal democracy.⁴⁷⁰ *Modus vivendi*

approaches tend to look at the negotiations and compromises that support moving forward in the face of deep difference.⁴⁷¹

A solid understanding of Kymlicka's contribution is essential to navigating the complex waters of liberal thought on cultural diversity. A direct product of the earlier debate between Rawlsian liberalism and communitarianism, Kymlicka's work is widely regarded as having tipped the debate in favour of liberalism by effectively incorporating key communitarian concerns into the fabric of liberal theory.⁴⁷² A particularly interesting aspect of the overall body of work by Kymlicka is its consistent reliance on empirical practice in the development of an overall model. It is not hard to see how advocates of stronger versions of multicultural rights, as well as indigenous rights, would feel that this approach will simply replicate the existing practices of states rather than set normative standards to be met in practice. Andrew Robinson, in particular, has attributed this tendency to a deep resistance to broad theory.⁴⁷³ What is clear is that no treatment of the role of theory in assessing the challenges of accommodating indigenous difference within a liberal state can ignore the seminal work of Will Kymlicka and the vast literature he has inspired. Before turning to the work of Courtney Jung to explore some of the difficulties with cultural protection, some broader issues will be considered, including the contested question of defining culture.⁴⁷⁴

3.2 Can Culture be Defined?

Political theorists have pointed out that culture is one of the most complicated words in the English language.⁴⁷⁵ Festenstein argues that it is an "immensely slippery term".⁴⁷⁶ While it used to be commonplace to think of different national cultures and to see various cultural groups as separate and self-contained, it is now more common to see culture described as shifting, malleable and established through dialogue.⁴⁷⁷ Culture is constructed. It is a process and not a thing. Some, such as Brian Barry, argue that an appeal to culture adds nothing to a claim.⁴⁷⁸ The only thing that is clear is that a bare appeal to culture is not likely to generate much agreement, not only on any particular proposal but on broader projects of social renewal. But as Burke

Hendrix notes “...any approach that ignores cultural difference entirely seems likely to run roughshod over too many complex realities.”⁴⁷⁹

3.3 What is the Connection between Culture and Identity?

A key preoccupation of the literature is the nature of identity formation. Whereas it had previously been common to think of identity groups as clearly bounded and exclusive, it is now more common to think of identity formation as a fluid and dynamic process.⁴⁸⁰ It is not uncommon for personal identity to rest on several foundations and for it to change over time. This idea is reflected in the injunction to avoid “essentializing” identities such as aboriginal identities.⁴⁸¹ Feminist political theory has made a huge contribution to this more complex view of identity formation and retention, as has modern anthropological theory.⁴⁸² Kymlicka does not speak about identity very much as his primary object of analysis is autonomy.⁴⁸³ In contrast, Panagos provides an example of a scholar who stresses the importance of identity formation and maintenance.⁴⁸⁴ He argues that three principle typologies of identity are available in the Canadian context- all oriented around the relationship between aboriginal peoples and the Canadian state. He argues that the Supreme Court of Canada has acted unjustly by interpreting Section 35 in a fashion that does not respect the form of identity that is put forward by aboriginal peoples themselves- a nation to nation identity. A nation to nation relationship is regarded as the most secure foundation for aboriginal identity. This can be seen to be a particular case of a more general concern, reflected in Shaw’s reliance on Alfred and Corntassel for the view that indigenous peoples struggle against forms of identity that are not their own, but are imposed on them by the state.⁴⁸⁵

3.4 Does the Nature and Degree of Cultural Difference Matter?

It is not uncommon to see assertions that because the cultures of aboriginal peoples are converging with their non-aboriginal neighbours, there is less justification for providing special

rights protections. For example, Gibson has argued that cultural overlap surely exceeds 95% in this society and is growing.⁴⁸⁶ On the other hand, we see frequent assertions of strong cultural incommensurability and the impossibility of “translation” across the cultural divide.⁴⁸⁷ Both the issue of overlap and the challenges to translation have important empirical components. For example, it is surely relevant to the legal status of a claim of harvesting rights if members of the community have not engaged in any hunting and fishing over an extended period of time.⁴⁸⁸ However, consideration of the issue by political theorists tends to take a different approach. The most even-handed analysis of the relationship between the empirical analysis of cultural difference and the normative status of rights claims may be that provided by Hendrix, who sees no normative issue in the “revival” of once dormant practices.⁴⁸⁹

3.5 What is the Relationship between Culture and Race?⁴⁹⁰

It is common to see arguments based on “inter-sectionality” in the literature.⁴⁹¹ This occurs when more than one ground of potential discrimination overlap and interact in complex ways. An interesting example is provided by Charles Mills in his analysis of the relationship between culture and race.⁴⁹² He argues that there is not much engagement with race in current theory work but that “...’culture by contrast is a vaunted celebratory one, still strongly associated emotionally and nostalgically with a distinctive way of life.’”⁴⁹³

Mills main project of showing how race is a fundamental structural determinant of power and public policy in a liberal democracy is demonstrated with great poignancy in his retelling of the tragic story of the Cherokee Trail of Tears.⁴⁹⁴ He highlights the great effort that the Cherokee made to shift their way of life in a fashion that would be culturally consonant with the surrounding Euro-American cultural norms, quoting from a Cherokee representative in 1831:

“You asked us to throw off the hunter and warrior state. We did so- you asked us to form a republican government. We did so- adopting your own as a model. You asked us to cultivate the earth, and learn the mechanic arts. We did so. You asked us to learn to read. We did so. You asked us to cast away our idols, and worship your God. We did so.”⁴⁹⁵

However, Mills notes that attempts at cultural imitation and assimilation were in vain.⁴⁹⁶ |At the end of the day the Cherokee were still racially identifiable as Indians and for that reason excludable from protections accorded to the mainstream, notwithstanding their efforts to adopt mainstream values.⁴⁹⁷

Mills argues that a theory that focuses on cultural difference runs the risk of obscuring deep structural racial divisions. In the case of indigenous peoples it can also situate them as one ethnic group among others, misrecognizing the claims based on prior occupancy and sovereignty. For these reasons, a politics that focuses on “recognition” will “...necessarily be a politics that changes very little.”⁴⁹⁸ He is reacting to a history of liberalism that has been complicit in racial exclusion and a modern political theory, exemplified in the work of theorists like Rawls, who have failed to deal with race. Mills argues that:

“Reracializing liberalism would require an end to the idealizing abstractions that sabotage philosophy’s pretensions to describe generally the human condition and prescribe generally for its improvement. The non-ideal needs to be theorized in its own right. Abstracting away from race (and likewise, of course, for class and gender) only guarantees philosophy’s increasing marginality and irrelevance to the real world.”⁴⁹⁹

This applies with particular force to “...white settler states....established on the basis of the exploitation and expropriation of Aboriginal peoples not seen as equals.”⁵⁰⁰ Mills asks “...what juridical reasons, what retelling of history, what public atonement would not be justified to restore their dignity.”⁵⁰¹

3.6 Is Essentialism a Problem?

Particularly in light of the modern understanding of culture as shifting, dynamic and established in dialogue with others, there is a deep concern expressed by most theorists of the risk for notions of culture to become “essentialized” when they are used in public debate or even in

scholarly work.⁵⁰² The risk is that a fluid notion can be reduced to an inventory of fixed traits. When that reduction is made by an agent of the state such as a judge there is a particular danger that such an inventory of traits will be chosen based on stereotypical associations. In the next part of this thesis, the notion of essentialism will play a key role in the analysis of the Van der Peet decision and the reaction to the decision.⁵⁰³ Academics are now paying more attention to the notion of essentialism. Mason, for example, demonstrates how a notion that a group possesses shared characteristics may shift to an assumption that the group is separate, closed and internally uniform. This can be related to an assumption that a culture can be authentic or inauthentic. Mason argues that both of these assumptions are problematic.⁵⁰⁴ However, Owen and Laden summarize his conclusion that all forms of essentialism are to be rejected “...except for a version of the first one which maintains that a group shares a culture in virtue of sharing a way of life that makes it the particular culture that it is. He maintains that if this idea is essentialist, then it is an unobjectionable form of essentialism.”⁵⁰⁵ As noted previously, Coulthard goes further to argue that essentialist notions of culture may be deployed in political struggles insofar as they are intended to transcend rather than reinforce dominant structures.⁵⁰⁶ This is called “strategic essentialism”. Karena Shaw refers to the construction of essentialized Indigenous identity through oppositional practices, including resistance to state oppression.⁵⁰⁷

3.7 Problems with a Cultural Foundation of Rights

It will be seen that the debate has carried over into the legal literature with the massive critical response to the use of culture by the Supreme Court of Canada in the Van der Peet case in 1996.⁵⁰⁸ This literature will be canvassed more thoroughly in the chapter on rights, but a few references may help situate the problem. For example, Murphy argues that adequate foundation for indigenous rights to self-determination cannot be based on cultural difference- “This democratic feature of self-determination is the expression of a political rather than a cultural practice. It is the principle that political legitimacy flows from the consent of the governed.”⁵⁰⁹ Murphy and Vallance further argue that this cultural focus is a result of an impermissible double standard- no other group is called upon to prove elements of their culture to lay a foundation for rights claims.⁵¹⁰ Another very influential authority on the issue of cultural protections and

aboriginal rights is Michael Asch. He has argued consistently against linking indigenous rights to “way of life” protections.⁵¹¹ He argues that these tend to occlude the real claims that are being made by indigenous peoples- claims to be accorded equal access to what he calls “the rights of the liberal Enlightenment”. They are rights to be accorded equal national status and sovereignty. These are rights that are common to all peoples and are linked to the norm of self-determination. He traces the equation of indigenous rights and way of life protections to the continuing effect of early assumptions by Europeans that indigenous cultures were primitive and uncivilized. As an anthropologist, he argues, by contrast, that we should be guided by the norm of cultural relativism.⁵¹²

As noted previously, Shaw has seen similar problems in the model presented by James Tully. In addition to regarding his work as cleaving too close to the nation state, Shaw worries that his fundamental model is unduly culturist.⁵¹³ She states that “...the claim that the recognition of cultural diversity is the question of the day, providing an adequate and appropriate reading of not only Indigenous but a wide range of other struggles, is asserted by an act of authorial sovereignty”.⁵¹⁴

3.8 Case Study of Work by Courtney Jung

An especially trenchant critique on the normative use of culture as a foundation for indigenous claims is found in the work of Courtney Jung.⁵¹⁵ Her work is a tour de force as both a work of theory and as an empirical examination of the emergence of Indigenous consciousness and activism in Mexico. The theory goes well beyond the counsel to avoid culture as a foundation for indigenous rights, offering a fundamentally original grounding for claims against the state. The approach is called “critical liberalism” and shares deep affinities with theorists of structural injustice such as Mills and Young⁵¹⁶. Her core argument is that normative claims against the state are based on the exclusions and harms that are introduced by the state itself. The task of liberalism in generating and resolving claims of unjust treatment is an ever unfolding process of systematically redressing these claims of exclusion. Her argument is linked to the empirical

claim that identities of marginalized groups, including indigenous groups, are forged in the very process of state exclusion and resistance to that exclusion. This broad framework permits a reaction to the claims of culture and a broad set of remedies for the current inheritors of historical wrongs who continue to suffer the consequences of those wrongs. We will see that Jung's ideas have proven controversial but they offer a fresh perspective on what are admittedly complex and contested issues.

For Jung, the moral force of indigenous identity is not found in the sheer fact that those identities differ from other identities in a society or in different cultural practices and worldviews that support these identities but in the historical events that forged these identities. In other words, "...The moral force of indigenous claims rests not on the existence of cultural differences, or identity, but on the history of exclusion and selective inclusion that constitutes indigenous identity."⁵¹⁷ In the particular case of Mexican indigenous claims, she "...locates indigenous identity in the history of Mexican state formation."⁵¹⁸

In the course of developing this argument, Jung provides an excellent overview of the state of multicultural theory.⁵¹⁹ She makes a distinction between privatizers and protectionists. The former group wishes to insulate cultural practices from the reach of the state and the latter group wishes to place a positive obligation on the state to preserve and protect such practices. Both have the paradoxical effect of insulating groups identified by cultural practices from normal politics. There can also be an unwanted accretion of power to state organizations in defining the legitimacy or authenticity of cultural practices, as when a Supreme Court adjudicates on what counts as a cultural practice for the purposes of defining constitutional rights.⁵²⁰ A deeper danger is that culture may tend to play a stronger role in organizing political debate than other factors such as class, race or gender.

This still leaves intact the issue of how we understand the proper response to claims that are made by groups, often ostensibly supported by invocation of cultural difference. Her response is

that "...theorists who are concerned with determining the scope of state obligations toward ethnic minorities should look behind the claims of culture to the structural conditions that have constituted the group. What they are owed depends not on who they are, or claim to be, but on the history of exclusions and selective inclusions that is the condition of their political presence."⁵²¹ This is a strong version of constructivism- the identities and claims of various groups reflect the structural conditions that led to their emergence and create the conditions of legibility within the political process. One of the reasons that cultural practices and the identities that are associated with them are regarded as less important is that they are less foundational- "Culture itself is a process and an outcome, insufficiently foundational to offer ground for assessing the obligations of the state."⁵²² This is grounded in a broader movement across the social sciences to see culture as a less stable object for analysis because it is "...so multiple, cross-cutting, hybrid, shifting, and unstable that it would be impossible even to identify, much less to protect, the frameworks of human consciousness. If we are to think of culture the way anthropologists and many others now do, as just such a field of instabilities and destabilizations, the concept is clearly mismatched with normative theories of democratic obligation."⁵²³

There are many implications that flow from this theoretical grounding. Justice is contextual, procedural, structural and marked by contestation.⁵²⁴ Justice claims have to be examined within the particular context of a society rather than on a more universal basis. There is a clear implication to think about justice in procedural terms. Claims for just treatment are more properly made using the language of structural injustice rather than cultural difference. Contestation is more like to be found in a functioning democratic polity than consensus.⁵²⁵ Approaches to rights emerge from this theory which permits a variegated approach to claims based on exclusion or unsatisfactory inclusion. Jung's theory puts the role of rights claims in a broader perspective and interestingly echoes some of the language of the Supreme Court of Canada that has been used to describe Section 35 aboriginal and treaty rights- "...Over the course of the twentieth century, the language of rights has often established the leverage of opposition. Rights extend a promise. They behave as a formal acknowledgement that some particular category of people- children, women, workers, or indigenous peoples- are harmed by the existing configuration of power and interests and are deserving of special attention and

protection. The language of rights constitutes the terms of struggle, offering standing and political access to many people who have most often been denied political presence.”⁵²⁶

Again echoing the language used in describing Section 35 aboriginal and treaty rights, Jung elaborates on how rights extend a promise rather than act as a guarantee. They are designed to open up the space for politics rather than shutting it down.⁵²⁷ They are an invitation to dialogue, a request to be heard, a demand for exchange of reasons, a tool to hold a society to meet its highest ideals. While the strong structural aspects of her work stand in sharp contrast to most modern liberal theory, Jung argues that the commitment to rights establishes the liberal orientation of critical liberalism.

One of the interesting aspects of Jung’s work is that it helps to break down some of the binary divides that are very common in the general literature. Are indigenous claims best conceived of as individual rights or collective rights? Is the fundamental grounding of indigenous claims based on the original inclusion of indigenous polities within the liberal order or the continued exclusion from the full benefits of this order? Should primacy be given to lack of recognition or inadequate distribution of resources? Jung’s notion of membership rights offers a way to respond to the full normative dimensions of claims that are often blurred by these binary distinctions.⁵²⁸ They provide a basis for immanent critique of the liberal order based on the promises that are reflected in rights claims.⁵²⁹ Most importantly, they entail a “...responsibility to engage in sustained engagement.”⁵³⁰ These points are consistently framed against an alternative that sees such engagement as limited to cultural difference and cultural protection:

“Ethnic groups do not deserve protection from democratic politics on the basis of their cultural differences. The legitimacy of their claims derives from the fact that the state has used differences of alleged phenotype and cultural practice to exclude certain groups of people from full rights in citizenship. The very conditions that lead to the formation of the group offer the terms of its political engagement and fix the legitimacy of its claims. The political standing of groups flows not from who they are, but from what has been done to them.”⁵³¹

Jung argues that states make distinctions that have the effect of selectively including or excluding individuals over time. In the case of Canada, it is not necessary to go any further than the history of the definition of “Indian” under the Indian Act to understand this point.⁵³² Jung goes further to suggest that the cumulative effect of these distinctions has a direct influence on the formation of identities. Again, Canadian history provides an excellent example with the gradual emergence of Métis identity.⁵³³ The link between the formation of these identities through the process of selective inclusion and exclusion and the establishment of political “presence” is the gradual emergence of “rights” to articulate the gap between democratic promise and continuing exclusion or inadequate inclusion. These rights have a strong participatory element and have effect by demanding dialogue about the gap between aspiration and practice- “...Rights provide no guarantee, but by anchoring political identities they offer a framework for participation and voice.”⁵³⁴

Rights have both a signalling and transformative function. They signal the continuing existence of an injustice and initiate a dialogue about possible mechanisms to transcend this injustice. Rights claims do not fall under a single category- Jung identifies four discrete types of rights claims that are contemplated within critical liberalism- “...participation and representation, access to resources, autonomy and self-government, and the protection of language and culture.”⁵³⁵ Jung argues that indigenous claims bear a particularly high risk of being limited to the sphere of culture. While her analysis is limited to the emergence of the Zapatista movement, she claims to offer a general framework “...to break out of the cultural straight-jacket.”⁵³⁶

A particularly relevant aspect of Jung’s work is that while she looks to the history of state exclusion and selective inclusion as the source of structural injustice and identity formation, she is less sympathetic to arguments about the normative implications of prior indigenous occupation of land.⁵³⁷ She is sympathetic to the “supercession” thesis developed by Jeremy Waldron but would limit it to land and sees it as having less expansive implications in countries like Canada and Australia.⁵³⁸ Jung observes that the world order is built on past injustices and that it would

risk opening a Pandora's box if we were to attempt to derive present obligations from past injustices, instead appealing to common sense for a statute of limitations.⁵³⁹

However, indigenous peoples are "...still suffering from the continuing impact of the historical injustices that were perpetuated against their ancestors that they have grounds for making claims against redress."⁵⁴⁰ Jung situates her work by reference to the argument developed by Spinner-Halev⁵⁴¹, an argument she suggests places more emphasis on the need to generally extend liberal rights as a key remedy for enduring injustice:

"From the perspective of critical liberalism, the cause of enduring injustice is instead the same as its normative force, namely, injustices not because they are immune to liberal solutions but rather because they have structural, systemic roots. They are woven into the fabric of a society's political institutions and laws, through their norms and mores, and into the very texture of daily life. On this account, enduring injustice is caused by the failure of actually existing liberal democratic history, rather than the failure of liberal democratic theory, as Spinner-Halev suggests. We can call this type of injustice "structural injustice".⁵⁴²

While the issue of historical injustice will be considered in more detail in a subsequent section, it is hard to see how her general endorsement of a statute of limitations can be squared with her overall approach.⁵⁴³ One of the strengths of the work is that Jung does not limit her focus to rights claims that are rooted in historical injustice and based on exclusion from the general society. She argues that claims that pull in the direction of greater inclusion, such as claims based on racism, exclusion from full citizenship and denial of access to social benefits and education, carry as much moral weight as claims based on past injustice.⁵⁴⁴

This broader range of claims, and the most nuanced engagement with the legacies of history, lead to a more complex universe of potential indigenous claims and a more open-ended politics- "...Unlike the cultural difference frame...does not offer a guarantee of protection from democratic politics. Instead, it proposes a line of obligation that kicks group claims back into the arena of politics by insisting that the state engage and offer restitution to the groups that it has

constituted through structural injustice.”⁵⁴⁵ Restitution could take different forms depending on the particular histories that support a claim.⁵⁴⁶

One of the strengths of the work is the clear commitment to procedural justice that is rooted in dialogue. It will be seen that there are many points of connection to the dialogical approach reflected in the Haida line of cases in Canadian law.⁵⁴⁷ A core component of critical liberalism is the “requirement of public reason-giving”.⁵⁴⁸ It is also crucial that the register of public reasons respond to fundamental differences in worldview- “If indigenous people simply start to make demands and claims using the framework of already existing public reasons, they may abandon much of the potential political leverage they are afforded by indigenous identity.”⁵⁴⁹ The construction of an indigenous identity has an intimate relationship with the process of making claims against the state:

“Forging an indigenous identity is not only about establishing that indigenous rights exist, but also involves constructing a conceptual framework that locates them as original inhabitants, possessed of a unique relationship to the earth, with ancient and vulnerable cultural heritages, oppressed by colonial conquest, and further marginalized by a continuing experience of structural exclusion from the post-colonial state. It is only from this particular standpoint that they count as indigenous peoples at all.”⁵⁵⁰

A highly nuanced relationship emerges between indigenous rights and state obligations. The goal is to “...recast oppositional politics as the duty of a state to fulfill an obligation. As such, rights can structure politics as an immanent critique, harnessing the prevailing, *de jure* ideology against the *de facto* inequalities it sustains.”⁵⁵¹ This re-conceptualization of rights as a promise holds the state accountable for the gap between aspiration and actuality, particularly when seen from the perspective of the state role in forging present conditions of injustice.⁵⁵² These rights have a strong procedural dimension which is directed to prodding and sustaining dialogue about continuing injustice. They are “...aimed at shaping democratic deliberation.”⁵⁵³

It is against this broad background that the problems of grounding indigenous claims in culture become apparent:

“Lodging indigenous politics in culture and identity is not only logically inconsistent but also politically precarious. Indigenous politics has moved beyond demands for bilingual education and cultural group recognition, but the normative framework of indigenous rights is still rooted in cultural difference. Critical liberalism offers a new normative framework that extends the reach of indigenous politics and ends the need for such political tactics as strategic essentialism. Acknowledging the political constructedness of identities may be a valuable political tool.”⁵⁵⁴

Jung does not rule out the continued relevance of legal protections for cultural protection- her concern is that culture cannot be the exclusive focus of indigenous rights or state obligations⁵⁵⁵. It will be seen that Jung’s theory resonates very strongly with many aspects of the emerging Section 35 framework- the idea of rights as a promise, the strong emphasis on dialogue, the heavy procedural dimension of rights adjudication and the focus on modern as opposed to historical claims.⁵⁵⁶

Eisenberg has been critical of the strong constructivism of Jung’s critical liberalism and expresses a concern that it reflects excessive focus on the activities of the state.⁵⁵⁷ In her view, insufficient attention is paid to what is important to indigenous peoples, including their concerns about threats to their way of life. At a deeper level, there is strong resistance to the notion that indigenous identity has been forged primarily through reaction to state exclusionary measures- this sits in strong contrast with worldviews that source indigenous identity in autonomous nations that long predate the creation of modern liberal states. Some perceive critical liberalism as taking away the agency of oppressed groups.⁵⁵⁸ While these aspects will continue to generate debate, there is no doubt that Jung’s innovative approach to indigenous claims will be an important contribution. From the perspective of this thesis, the key points of interest are the tools it offers to diffuse a generally binary dynamic and the support it offers for a more diversified remedial program.

In summary, an overview has been provided to explain both the importance and the perils of culture as a key value in the debate about indigenous rights. It will be important to link the clearly apparent trend away from culture as a justification for aboriginal rights with the central role it continues to play in the elaboration of Canada's constitutional framework.⁵⁵⁹

CHAPTER 4 – PLURALISM

4.1 Introduction

There is a strong trend in the academic literature to consider indigenous law on its own terms. We have seen a proliferation of work, mostly by indigenous scholars, outlining the rich legal traditions of many Canadian indigenous groups.⁵⁶⁰ What differentiates this work is that it no longer comes exclusively from such disciplines as anthropology but is framed as legal analysis written by lawyers. This is a very complex topic that engages very difficult political questions, especially with the prominence of the “resurgence” and “revitalization” paradigms for understanding indigenous legal traditions.⁵⁶¹ It also engages extremely complex legal and constitutional questions about the precise mode of interaction between indigenous law and mainstream Canadian law. The latter questions will be addressed in more detail in the second Part of this thesis, but will be generally introduced in this chapter.

At this stage, it will be useful to introduce the concept of pluralism, expand on the “resurgence” and “revitalization” paradigms that have already been considered in the work of Alfred, Lindberg and Coulthard, explore in more detail the ground-breaking work of John Borrows on indigenous legal traditions and, finally, turn to the multiple ways that an indigenous legal system can interact with a host legal system, with special attention to the helpful tools that are provided by Nicole Roughen.⁵⁶²

The treatment of indigenous law by the Canadian legal system will be addressed primarily in Part II of this thesis. First, the related topic of reception of elder testimony in Canadian courts will be assessed in order to get a flavour of some of the practical challenges that are associated with legal pluralism.⁵⁶³ Second, the relevance of indigenous law for the adjudication of Section 35 aboriginal and treaty rights, including aboriginal title, shall be considered.⁵⁶⁴ Finally, a model

will be developed in order to explain how indigenous law might lie at the heart of a distinctive approach to aboriginal self-government.⁵⁶⁵

To foreshadow some of the conclusions of this work, an argument will be developed here for maximum separation between indigenous legal systems and mainstream Canadian law. More particularly, the goal that is advocated is maximal conceptual separation combined with maximal practical integration. Rather than equating the two or regarding one as absorbed by the other, these two forms of law will be described as existing in a nested relationship. There will be points of contact and overlap but there is merit in dealing with such contact and overlap with great specificity and clarity. Many questions that arise under indigenous law simply are beyond the reach of the Canadian legal system. However, the rights and obligations that are generated under indigenous legal systems are potentially very relevant to the rights that may be claimed by individuals or groups under mainstream Canadian law, including Section 35 of the Constitution Act, 1982.

4.2 What is Pluralism?

It is initially important to distinguish between pluralism and legal pluralism. Pluralism is a much broader body of thought with a deep and varied history⁵⁶⁶. Legal pluralism is a more specialized variant of this line of thought that deals with the co-existence of and relationship between legal systems.⁵⁶⁷ Pluralism has played an important role in North American political and legal thought. It is a broad and diverse body of thought that deals with the dispersal of power and authority within a society. It has evolved more recently to provide a counter to the idea that all law derives from the state.⁵⁶⁸ Though there are many authors who write from a pluralist model about the relationship between aboriginal peoples and the Crown in Canada, special attention shall be paid to the work of Timothy Schouls.⁵⁶⁹ The work of Schouls is especially illuminating in developing insights from the notion of “relational pluralism”. He argues that pluralism as a political model is well-suited to respond to the increasing salience of identity in modern politics at the same time that different groups within a society live lives that are increasingly inter-dependent.⁵⁷⁰ This

work highlights the varied contributions that can be made by pluralist theory to the challenging task of imagining a just relationship between indigenous and non-indigenous communities in a settler state. His focus is primarily on Canadian self-government challenges, but the elaboration of the theory clearly has much broader ramifications.

Schouls' fundamental argument is that a relational approach to pluralism, wedded to a focus on identity, bears the most promise of providing maximum scope for the protection of aboriginal self-government within the constraints imposed by the highly interdependent relationships between Aboriginal and non-Aboriginal Canadians. It is the focus on the normative consequences of inter-dependence, a theme that was already emphasized by Cairns,⁵⁷¹ that is the most relevant aspect for the purposes of this study.⁵⁷²

The two most important building blocks for the development of his argument are the exposition of a theory of pluralism and the assessment of liberal culturalist political theory. He argues that there are three forms of pluralism: communitarian, individualist and relational.⁵⁷³ An overlapping distinction is drawn between difference and identity approaches. He argues that Kymlicka, Macklem, Taylor and Tully write within the difference approach.⁵⁷⁴ It is reasonable to be sceptical about a binary distinction that finds these thinkers on the same side of the divide, but he argues that the same assumption is shared in their work- the assumption that individual identity ultimately flows from cultural or national identity.⁵⁷⁵ The identity approach espoused by Shouls is said to rest on a more malleable, more shifting concept of cultural attachment.⁵⁷⁶ Many scholars have emphasized the fluidity, contingency and flexibility of identity but the contributions of Clifford Geertz in anthropology and Seyla Benhabib in political theory are good examples of this shift in focus in how culture is theorized.⁵⁷⁷ Seen in this light, a person's culture is not a characteristic to be ascribed but a broadly constructed social process that overlaps with many other such practices. The focus is very much on the interpersonal process of self-definition. It is a relational phenomenon.

There are some difficulties with the foundational distinction made by Schouls between difference and identity approaches. First, none of the theorists that are placed in the difference category and contrasted with an identity approach seem to adopt a static or non-relational conception of culture. Indeed, Tully has been one of the more important voices advocating abandonment of “billiard ball” conceptions of culture that conceive of cultures as having discrete and non-overlapping boundaries that collide from time to time in the course of social interaction.⁵⁷⁸

Concerns about the distinction can be put to one side as the main aspects of Schouls’ argument are considered. Schouls exhibits a strong commitment to self-government- indigenous peoples “should be free to choose their own destiny with Canada free of external compulsion”.⁵⁷⁹ However, he argues that there are great dangers in tying self-government too closely to culture⁵⁸⁰ In addition to the danger of undermining the argument for self-government as cultural differences erode between indigenous and non-indigenous peoples, Schouls argues that the cultural model tends to default too frequently to an oppositional stance.⁵⁸¹ An important empirical argument developed by Schouls highlights the rapid demographic changes occurring in the aboriginal community and increasing diversity of aboriginal opinion on issues of key importance.⁵⁸² From the perspective of relational pluralism, a chasm can be seen to emerge between a literature “...dominated by themes fixated on appropriation, dispossession, and the Aboriginal right to restitution through land claims and political self-determination.”⁵⁸³, and a lived reality, as described by Schouls, which reflects “...a significant broadening and deepening of relations between Aboriginal peoples and the Canadian polity”.⁵⁸⁴

Focus on claims and exaggeration of difference leads to an overly adversarial approach and a sense of a zero-sum game. The parties become locked into the model of oppressor and oppressed. “What gets lost in the process is the possibility of developing models of politics that are less antagonistic and identities that are more complex, layered, and overlapping: a condition that economic circumstances seem to require and that political circumstances could promote.”⁵⁸⁵

Schouls paints a picture of exaggerated differences, essentialized cultures, rigid boundaries and inevitable conflict. He is well aware of the history of the treatment of aboriginal parties, including the lack of clear aboriginal consent to the settler constitutional order.⁵⁸⁶ He is not denying the fact of aboriginal difference, but he suggests that a predominant focus on difference has the unfortunate impact of occluding perception of the rich diversity of aboriginal life in Canada. Schouls wishes to shift attention away from a binary aboriginal-non-aboriginal comparison to a deeper appreciation of the multitude of relationships within aboriginal life and between aboriginal and non-aboriginal communities. He argues for a focus on identity that is disconnected from cultural or national difference.⁵⁸⁷ Identity is just a political fact that does not require external validation. There is a clear connection to the idea of self-identification. Aboriginal identity is arrayed along a continuum.⁵⁸⁸ It is a social and political fact and not something that ascertainable by cultural or national factors.

For Schouls, the perspective of relational pluralism generates an ethic of reciprocity- “....for Canadians to meet the just demands of Aboriginal peoples now, they should reasonably be able to expect that Aboriginal peoples will be responsive to the just demands of their non-Aboriginal counterparts if and when they arise. But this responsiveness requires trust, and trust requires solidarity “not merely within groups but across them”.⁵⁸⁹

Schouls finds support for this approach in the appreciation that aboriginal people do not generally seek separation from the Canadian state and generally seek more productive relationships with proximate communities.⁵⁹⁰ The actual contours of the intergovernmental relationship on the ground cannot be captured by a rigid list of jurisdictions and powers but must be worked out dialogically between representatives of the various parties. This will normally involve a tripartite process. The net result should be the development of clear and consensual boundaries that will secure the ability of aboriginal communities to direct their own community life. Schouls presents this model as being consistent with models of treaty federalism.⁵⁹¹ It involves a “commitment to reciprocity” and entails a “deeper political integration into the Canadian state”.⁵⁹²

He sees many commonalities with Tully's programmatic recommendations for building a just relationship with aboriginal peoples, but he parts company with what he perceives to be Tully's overreliance on culture difference. He wishes to focus on systemic injustices that go beyond protection of culture.⁵⁹³ This is intended to leave room for any substantive arrangements with the Canadian state that promote the interests of aboriginal peoples. What differentiates his theoretical perspective from others is the clear emphasis on "developing deeper relations of cooperation and interdependence"⁵⁹⁴. Schouls regards the key contours of this relationship as reflected in the requirement to justify interferences with aboriginal rights. He links the notion of justification with ideas of non-interference with internal matters and reciprocity in the governance of external matters.

While he sees many structural parallels between relational pluralism and treaty federalism, he is less fixated on the particular modality of the treaty. In his view, "(W)hat is paramount are the actual relationships..."⁵⁹⁵ These relationships should be based on the full participation and consent of both parties, but the forms that these relationships can take are open-ended. This is also reflected in his evaluation of negotiations that have already taken place. For example, while he is aware of the thrust of academic criticism of the Nisga'a Agreement, he argues that it is generally moving in the direction of relational pluralism.⁵⁹⁶

He concludes by arguing that aboriginal identity must be conceived in terms broader than cultural difference. This feeds the argument that self-government rests on broader foundations than the protection of cultural difference. It is better conceived to flow from the need to address a broad range of structural inequalities in resources and bargaining power that cannot be captured in a simple model of cultural difference.⁵⁹⁷ He also argues that this broader focus assists in resolving the vexing problem of what limitations aboriginal communities can place on their own members.⁵⁹⁸ Relational pluralism casts attention to the need to develop balanced relations between aboriginal communities and the state as well as within those communities.⁵⁹⁹

One of the consequences of Schouls' analysis is that the task of establishing relevant boundaries between communities is more important than the empirical differences that exist between those communities. The focus is less on the cultural differences between indigenous and non-indigenous Canadians and more on the degree of independence and self-direction that is accorded to aboriginal communities.⁶⁰⁰ The overall picture of the brand of pluralism advanced by Schouls is pragmatic, recognizing that boundaries will be overlapping and complex⁶⁰¹. He focuses on participation in internal decision-making processes. He recognizes that the model he proposes will not solve all problems and that change is inevitable:

“The central insights of the identification approach to ethnic identity and relational pluralism not only make this change more tangible and explicit but also give us useful normative guidelines about how to respond to the political challenges contained within that change.”⁶⁰²

There are many other approaches to pluralism beyond the relational theory advocated by Schouls.⁶⁰³ In addition to the close affinities to the analysis of Jung,⁶⁰⁴ the relational approach is important because it casts attention to the deep inter-dependence that exists between aboriginal and non-aboriginal Canadians. The next sections will look at some of the important developments in the literature on legal pluralism and explore some tools and mechanisms that might aid both normative and legal analysis.

4.3 What is Legal Pluralism?

In the same manner that Schouls could not be regarded as the sole exemplar of pluralist thought in political science, legal pluralism comes in many forms. Distinctions are made between strong and weak legal pluralism, as well as between legal pluralism and critical legal pluralism.⁶⁰⁵ The basic idea is that several legal systems operate over the same territory. McDonald describes a legal pluralist order as “...multiple, overlapping, often non-geographically defined legal systems”.⁶⁰⁶ Legal pluralism “opens inquiry into the impact of often conflicting normative

frameworks.⁶⁰⁷ This means that “...non-conforming behaviour in any particular regime is not simply a failure of enforcement or civil disobedience. It may be a reflection of an alternative conception of legal normativity.”⁶⁰⁸

Establishing the fact that different legal systems are in operation over the same territory is a key theme of legal pluralism. The next question is how these legal systems engage with one another. Much legal pluralist writing takes the view that “...normative regimes can never be a relationship of hierarchy, close-integration and vertical discipline.”⁶⁰⁹ While this may be a valuable normative objective, it would not be a valid empirical statement. Most traditional legal scholarship, by equating indigenous legal orders with customary law, would regard statute law or constitutional law as being hierarchically superior.⁶¹⁰ Scholars such as Lindberg clearly situate indigenous law at the top of a hierarchy on the basis that it emanates from a more fundamental source.⁶¹¹ In either case, strong arguments have been made about the normative difficulties faced by any purely hierarchical approach to the relationship between legal systems.⁶¹² An argument will be presented in this thesis for an approach to indigenous law that is contextual, supported by Section 35 and engaged in a much more variegated relationship with mainstream Canadian law.

There are many important sources available to develop this argument. Some scholars question the gap that is often perceived between state law and customary law. Both Jeremy Webber and Andrée Boiselle have argued that all law ultimately has a customary foundation and is based on practice, casting doubt on strict separation between the two categories of law.⁶¹³ Other scholars develop the argument that English law reflects a highly pluralistic foundation which admits the possibility of various sources and forms of law.⁶¹⁴ Westra argues that “Comprising legal subcultures, customary law gave a quintessentially pluralist basis to English law and was not dissimilar to the local law practiced in the law of England’s colonies.”⁶¹⁵ David Yarrow draws on similar sources to argue that pluralism is a better foundation for legal protection of distinctive indigenous connections to land than the rules of reception that made unfortunate distinctions among groups based on their perceived level of ‘civilization’:

But the reception of such law is, in my view, a fragment of the past. It developed at the height of the British colonial period to facilitate colonial expansion. Where indigenous law continues to be observed and applied by indigenous peoples, resort to colonial-era rules that purport to nullify, or at least minimize, their laws fails to give equal respect and concern to Indigenous peoples as citizens. Rather than invoke rules of reception, the English history of legal pluralism suggests that the common law can coexist side by side with heterodox bodies of local law.⁶¹⁶

In Canada, a richly expanding scholarship is developing with respect to the legal systems of various indigenous groups. Scholars such as Val Napoleon, Dawn Mills, Darlene Johnson and a wide variety of emerging academic work have carefully focussed on legal rules from the dominantly indigenous perspective.⁶¹⁷ There is also a rich body of scholarship on the blending and mutual development of legal rules in the early relationship between indigenous peoples and Europeans.⁶¹⁸ Though lines are hard to draw, a rough divide exists between those who counsel the study and development of indigenous law as a basis for resurgence or revitalization and those who wish to see indigenous law take a respected place within a more pluralistic Canadian legal system. Alfred has been a clear leader with respect to the first position and Borrows has been the leader with respect to the second position.⁶¹⁹

The stronger brand of legal pluralism situates indigenous and mainstream legal systems as engaging in a competition for allegiance and respect. A particularly important strand of scholarship has been developing in Quebec, focusing primarily on indigenous legal systems, which deserves more widespread consideration across Canada.⁶²⁰ There are strong linkages between this scholarship and the normative literature which expresses deep reservations about the transformative possibilities of mainstream Canadian law. This scholarship pays scant attention to issues of points of contact between indigenous and mainstream Canadian law.⁶²¹ The focus is on resurgence, resistance and community and individual revitalization. Shaw calls this movement “self-conscious traditionalism”⁶²² and sees “an ambition to create the preconditions of a shared order; an autonomous, internally resonant core of authority and resilience.”⁶²³ She notes that “The political terrain that Alfred and Coulthard seek to mobilize is not one that will be comfortable to the state.”⁶²⁴ Shaw perceptively contrasts this line of thought with the work of Sakej Henderson who shares the goal of revitalizing and mobilizing indigenous

knowledge while conceding that it “...necessarily passes through engagement with Eurocentric knowledge.”⁶²⁵ He is “...seeking not only to revitalize Indigenous worldviews but to carve out space for them.”⁶²⁶ This is similar to the work of Lisa Streilen who has developed Noel Pearson’s idea of a “recognition space” for indigenous law.⁶²⁷

It is certainly understandable that prominent indigenous scholars would place a priority on the development and valorization of indigenous legal systems. These are systems that served various indigenous nations well over many thousands of years. It is not hard to link the weakening of normative orders that are culturally relevant with the tragic conditions that exist in many indigenous communities today.⁶²⁸ It is also easy to understand that communities would opt to build strength on their own terms before tackling questions of broader constitutional engagement. However, it is also important to reflect on the message that Borrows delivers to the “strict isolationists”, suggesting that they might be missing opportunities to improve conditions in their communities.⁶²⁹

For this reason, the arguments that are developed in this thesis are based on the assumption that some kind of rapprochement between mainstream Canadian law and various systems of indigenous law is a key ingredient to meaningful reconciliation. At a later stage, this relationship will be described as a ‘nested’ relationship. Ideally, it may be possible to develop a constitutional approach that leaves maximum room for projects of revitalization for those indigenous groups that see this as a key community priority.

It is important to pause and ask three inter-related questions. First, as an empirical question, to what extent are indigenous norms vital in indigenous communities today? Second, if there has been a lapse or deterioration in the application of indigenous legal norms, does it matter from a normative or legal point of view? Third, what arguments support or detract from the effort to reinvigorate indigenous law as a practical reality in communities today?

One cannot expect a uniform answer to the first question. Degree of isolation from non-indigenous communities, language retention, relative impact of residential schools and other factors will be relevant. There certainly is a widespread recognition that serious harm has been done to indigenous legal traditions, both in Canada and more generally. We have to recognize that cultural and legal practices were expressly targeted by Canadian law, including the abolition of the potlatch and spirit dancing, as well as historical restrictions on traditional forms of government.⁶³⁰ Williams, speaking about the experience of the Maori in New Zealand argues that the search for authentic norms represents wishful thinking and political futility.⁶³¹ Alison Vivian, speaking about Australia, argues that it "...must be acknowledged that the resolution of disputes is hampered by loss of cultural identity and the weakening of protocols dealing with land of cultural authority."⁶³² Malcolm Fletcher has concluded on the basis of a study of tribal courts decisions in the United States that surprisingly little tribal law finds its way into the rulings of tribal courts.⁶³³ It is reasonable to ask whether the experience may be expected to be any different in Canada.⁶³⁴

The second question has generated different answers in different jurisdictions. It will be seen that Australia, in particular, has adopted an approach which makes it very difficult to maintain a claim for native title when there has been a lapse in recognition and adherence to traditional laws and practices.⁶³⁵ One of the key themes that will be developed in this thesis is that this approach need not, and should not be applied in Canada. It may help that strong arguments have been made from a normative perspective that "revitalization" causes no moral problems.⁶³⁶ Hendrix has dealt explicitly with the problem of revitalized or reconstructed traditions. He concludes that there is no moral barrier to such projects. There is no normative requirement to privilege "authentic" traditions over traditions that contribute to the well-being of a current community but lack correspondence with the traditions of the past.⁶³⁷ As he puts it, "invention" raises no moral concern. It may "open up space...to be different...and to change". Indeed, there may be positive reasons for the state to value the space for choice, the state- "...should take seriously the intellectual engagement that will be possible with indigenous peoples."⁶³⁸ While he cautions "...nor is there any guarantee that the Indigenous viewpoint really does have something to teach"⁶³⁹, it can provide sources of creative tension and revised ideas."⁶⁴⁰

The third question also engages a range of deeply complex issues. From a legal perspective, the main issue is the precise relationship between Canadian mainstream law and an indigenous legal system. This frequently plays out in terms of choice between various theories of aboriginal rights law, including theories of reception of law. It will be seen that this relationship is actually quite unsettled so there is room to advocate a fresh approach. This approach will have to take into account the palpable resistance of the Canadian legal system to the direct incorporation of indigenous law as well as the reluctance to endorse a general right of self-government.⁶⁴¹ The Supreme Court of Canada has also shown a clear leaning to uniform approaches to Section 35 rights that apply on a national basis. It will be argued that one of the most effective ways to deal with this resistance is to demonstrate the non-legal gains that can flow from the legal support for indigenous legal traditions, including the ability to strengthen communities and individuals within those communities.⁶⁴² It may also enhance arguments for the legitimacy of the Canadian legal system.⁶⁴³ Such an argument will be developed in a subsequent chapter⁶⁴⁴. Mark Walters, referring to the deep historical resistance to recognition of indigenous legal systems, has argued that generating space for indigenous law in Canada will be “no easy task”.⁶⁴⁵ Other scholars stress the key role of education, especially legal education, as a vehicle to deal with resistance to the role that indigenous legal systems can play in Canada.⁶⁴⁶

4.4 How is Comparative Experience Relevant to these Issues?

The comparative experience that exists with respect to the relationship between indigenous legal traditions and the laws of a settler state demonstrates the sheer complexity of the issue. Australia provides a good example. Though a great deal of attention is paid to the existence and current vitality of indigenous legal traditions, the law has developed in a fashion that has proven very detrimental to the holders of those traditions. Lisa Streilein has demonstrated that Australian law has never approached indigenous law on an equal footing⁶⁴⁷, but after the *Yorta Yorta* decision in the High Court it became clear that the failure to continuously maintain such traditions could prove fatal to an aboriginal title claim.⁶⁴⁸ The earlier decision in *Walker* had already indicated that continuity doctrine as applied in *Mabo* did not operate to protect indigenous sovereignty as a matter of Australian law.⁶⁴⁹ Several important law reform projects on indigenous law have also

been completed in Australia but there has been very little support for the recommendations of the reports in the Australian legal system.⁶⁵⁰ It will be seen that one of the motivating factors behind the distinctive approach taken to indigenous legal traditions in this thesis is designed, in part, to avoid some of the problems that have emerged in Australian practice.

Two other jurisdictions offer considerable experience with indigenous law but will be relied upon less in this thesis.⁶⁵¹ The United States, with its model of retained tribal sovereignty, has developed a jurisdictional framework based on the twin features of tribal law and the Congressional plenary power.⁶⁵² What is interesting for present purposes is that there is clear separation between tribal law and mainstream law. Tribal laws do not become United States law but are accorded a carapace of protection, particularly from state law, by the constitutional relationship between tribes and the surrounding society.⁶⁵³ A similar model of jurisprudential or structural separation is one of the features of the Section 35 framework that will be developed in this thesis. South Africa expressly provides constitutional recognition to customary law, but as the Rictersveld litigation demonstrated, it is still necessary to file a claim with the Land Court or to negotiate to secure full protection for the rights that are reflected in customary law.⁶⁵⁴

4.5 What has been the Contribution of John Borrows to the Consideration of Indigenous Legal Traditions?

The recent and ground-breaking work of John Borrows in *Canada's Indigenous Constitution* has developed the idea that Canada's legal framework is comprised of three separate but overlapping legal traditions- common, civil and indigenous law.⁶⁵⁵ While he has long played a ground-breaking role in the consideration of indigenous legal traditions, his recent pair of books on the topic have reached a new level of sophistication.⁶⁵⁶ The core argument is ultimately about the foundations for a secure and just brand of Canadian constitutionalism. He presents a compelling case that many indigenous communities continue to be governed, at least in part, by deeply rooted systems of indigenous law. They derive from many sources and are at various stages of completeness in different indigenous communities. He recognises that in some

communities recourse to indigenous law involves an exercise in retrieval and revitalization. In either case, these legal systems “...can be positive forces in our communities.”⁶⁵⁷

The main argument appears to be directed at mainstream Canada and is a strong example of the technique of immanent critique.⁶⁵⁸ A clear recognition of the original and continuing importance of indigenous legal traditions can solidly moor Canada’s constitution to a stronger, more inclusive and more historically resonant foundation. All of the reasons that support a bi-jural Canada are brought to bear on the argument that Canada is and should be seen as having a multi-jural foundation.

The other core argument of the book is directed at traditionalists within indigenous communities who resist any alteration of indigenous legal norms. Borrows advocates forcefully and eloquently against the protection of tradition for its own sake or on the basis of its antiquity. Traditions that are “romanticised” or “essentialized” are unlikely to contribute to positive relations in modern communities.⁶⁵⁹ All members of the community “...must guard against rigidly fundamentalist and oppressive ideas and practices.”⁶⁶⁰ The recognition of the normative role of these traditions, including the core role that they can play in anchoring the Constitution as a whole, when updated to avoid oppression, “...can do a better job of building our country upon our highest ideals.”⁶⁶¹ He argues that this insight has important implications for how we conceive and interpret aboriginal and treaty rights.⁶⁶²

A recurrent theme throughout the work is the strong critique of the hierarchical foundation of mainstream constitutional law- “...Colonialism is not a strong place to rest the foundation of Canada’s laws. It creates a fiction that continues to erase indigenous legal systems as a source of law in Canada.”⁶⁶³ There are places where the model of constitutionalism that is advocated comes close to a treaty federalist model.⁶⁶⁴ This aspect of Borrows’ work will be revisited in the section on Constitutionalism.⁶⁶⁵

Borrows contrasts a notion of hierarchical and positive mainstream law with a model of indigenous law that draws from various sources. These include sacred law, natural law, deliberative law, positivistic law and customary law.⁶⁶⁶ Indeed, the companion work *Drawing Out Law* captures the essence of indigenous law in far more poetic terms- “These laws are sourced in the thunder and lightning, in animal creation narratives, individual’s efforts, educational creativity, community resistance, Canadian legal doctrines, comparative law’s insights, family members’ relationships, Community deliberations, Windigo stories, and our experiences with and reflections on the Great Mystery.”⁶⁶⁷ Law is something that is “drawn out” of experience and is highly dynamic and emergent.⁶⁶⁸ In language that is strongly evocative of Tully’s description of the interplay of different constitutional orders within the same territory, Borrows argues that even after numerous attempts to extinguish indigenous law, it continues to bubble up through the cracks of its overlying cover.⁶⁶⁹

Borrows’ work is partially expository- he provides concise descriptions of eight different examples of indigenous legal orders⁶⁷⁰ and analyses concerns that are frequently raised about intelligibility, equality, applicability and legitimacy⁶⁷¹. The backdrop to the work is the strong role that he sees indigenous law as having played in the formation of Canada as a nation:

“When Europeans and others came to North America, they found themselves in this complex socio-legal landscape. Although it has not been sufficiently acknowledged outside those who specialize in the area, contemporary Canadian law concerning indigenous peoples partially originates in, and is extracted from, these legal systems. While care must be taken not to overstate the point, evidence exists to show that Indigenous peoples were an important force in the Constitution of Canada.”⁶⁷²

Borrows wishes to build on this historical insight by weaving indigenous legal traditions into a tri-partite legal order in Canada. Important lessons can be learned that build on the experience of respecting bijuralism between the common law and civil law. Recognizing a multi-juridical legal culture is made both more difficult and more necessary because of the deep inter-dependence of the lives lived by people operating under one or more legal cultures in Canada. This involves a

strong commitment to three overlapping but equally foundational legal systems. In Borrows' view, indigenous legal traditions "...continue as part of the law of Canada today."⁶⁷³ He consciously decides to forego making specific recommendations about modes of interaction or specific rules of priority, preferring to concentrate on making both a normative and legal case for equal treatment for indigenous legal traditions, on the same footing as the common law and civil law.⁶⁷⁴ This involves taking the first steps away from domination and control.⁶⁷⁵

Borrows aptly observes that law is never as tidy as we would like⁶⁷⁶, and his primary objective is to make the case for equal treatment of indigenous legal orders. However, an alternative case can be made that progress is more likely to be made by focussing on modes of interaction and rules of priority. In this thesis, it will be argued that gains can be made by conceiving of indigenous and non-indigenous legal systems as conceptually distinct in order to find ways to encourage maximal practical integration. A contrast will be drawn with the few cases where Borrows does analyse the interaction of an indigenous law and mainstream constitutional law.⁶⁷⁷ It may be helpful to examine the work of Nicole Roughen who looks at modes of interaction between mainstream and indigenous law in far more detail.

4.6 How Can Nicole Roughen's Work on Legal Pluralism Help?

Nicole Roughen's important article- "The Association of State and Indigenous Law: A Case Study of Legal Association" pays careful attention to the various modes with which indigenous law can interact with the law of a host state.⁶⁷⁸ Her analysis is largely drawn by reference to New Zealand examples but the normative and conceptual analysis surely is relevant for a broader range of jurisdictions. It provides an extremely illuminating framework that focuses on diverse modes of interaction between indigenous and non-indigenous systems of law. It also provides a useful set of tools to understand this interaction than are normally found in the analysis of legal decisions and commentators. This allows a more fine-grained analysis and a clearer perception of the normative problems engaged by purely hierarchical models.

This model may better explain the frequent incorporation of aboriginal legal norms to resolve questions about family status and adoption, the limited use of such norms to flesh out the content of Section 35 rights and the general unwillingness to regard indigenous norms as broadly justiciable in the Canadian courts.⁶⁷⁹

Roughen's model suggests that legal association is best understood by reference to three dimensions- structural, substantive and operational⁶⁸⁰. She says that "The practice of legal association develops out of a recognition of legal pluralism and involves opening a legal system's borders to other legal systems."⁶⁸¹ It is an attempt "...to make sense of the idea that one system interacts with another."⁶⁸² However, the particular legal system she is considering, that of New Zealand, falls short because of its excessively hierarchical orientation, though there are also problems at the substantive and operational level:

"I suggest that many decisions including Maori legal concepts are presently guided by a model of association that is hierarchically structured and operates through diffusion but oscillates between a substantive association of words, of concepts, and of rules- depending on who is doing the interpreting. Most strikingly, this model provides that the limits of association be set and guided by the state, with indigenous legal practice assumed to be inferior. I conclude that when it comes to a normative evaluation, this model of association risks distorting or even depriving the possibilities that legal association holds for inter-cultural justice, at least as this plays out in the New Zealand context."⁶⁸³

Roughen argues that we tend to operate with a mental frame that takes the relationship between international law and municipal law as the working model of association. She argues that this is a "...blinkered approach to the issue of legal association. This approach ought instead to be widened to reconsider the possibility of non-hierarchical, more dialogical models of legal association."⁶⁸⁴ She draws from modern political theory to present the attractions of a dialogue based model:

“Whereas hierarchy involves one system controlling the interaction with another, allocating room for the other to operate only where it permits, a dialogue is a two-way interaction wherein neither side has complete control over the other or over their association. In the specific context of the relationships between state and indigenous legal systems, the dialogical model has attracted significant support in the realm of political theory but, because of the self-regarding intuition of bounded legal systems, has yet to receive sustained attention in Anglo-American legal theory or practice.”⁶⁸⁵

One of the benefits of a dialogical model is that it enables richer notions of mutual translation.⁶⁸⁶ This will in part depend on the substantive dimension- a question of “what is being associated” could include legal terms, different concepts, rules or normative practices or “...at the deepest level, the association might be not only between specific rules from different systems but between the different systems themselves, with their respective authority structures and collections of secondary rules.”⁶⁸⁷ (At the operational level, these associations might occur through translation, diffusion (merging or blending that leaves neither source in its original form⁶⁸⁸ or deference). As an aside, Roughen’s model presents an extremely thoughtful account of translation- a topic that will be seen to be quite important in assessing recent Canadian developments on aboriginal title.⁶⁸⁹

Roughen is providing a general model which is meant to be suggestive, but it does provide a language which allows consideration of the precise points of contact between two systems. This is potentially far more valuable than the current tendency to see references to one system being “absorbed” by the other, or being “merged” in an undifferentiated way or for the rules of one system automatically accepted to be rules in the other system.⁶⁹⁰ Roughen calls for a model which keeps moving parts along the structural, substantive and operational dimensions all in play:

“Evaluations of which approach is preferable for a particular state-indigenous association will turn on the political theory and account of social or inter-cultural justice one relies upon and how that account establishes the domain of legitimate state authority relative to the legitimate authority and rights of the indigenous groups. These questions will need to be explored in further research, beyond the scope of this study, but the contribution of the legal association model is to force that evaluation to take account of all three inputs or dimensions of the associative models available.”⁶⁹¹

Roughen's work is dominated by a clear normative preference for dialogical solutions to complex problems. She argues that exchange of reasons, guided by translation of culturally-bound concepts, will produce stable foundations for living together in conditions of deep pluralism.⁶⁹² People will associate together for different reasons, and will offer a range of reasons for their preferred resolution to particular disputes. Roughen's key point is that "Whatever the reasons for the association (and there will be disputes over which reasons can count, and with what strength), the concept of legal association offers a clearer starting picture of just what is going on, and just what should be evaluated."⁶⁹³

The focus on the complexity of legal association and the options with respect to modes of interaction is very helpful for casting light on the Canadian situation as we have seen a huge variety of proposals for understanding the relationship between indigenous law and mainstream law.⁶⁹⁴ This diversity is reflected in the sheer number of verb forms that are used to capture that relationship: absorbed, recognized, incorporated, affirmed, adopted etc. We have seen that Borrows is guardedly optimistic that a form of normatively acceptable association between indigenous legal systems and mainstream Canadian law can be developed.⁶⁹⁵ Dale Turner, as one example, is much less optimistic that this goal can be met.⁶⁹⁶

4.7 What Role does Legal Pluralism Play in Developing a Morally and Politically Defensible Conception of Canadian Constitutionalism?

To look ahead, the treatment of indigenous law is a very important part of the normative assessment of the Canadian legal system. There are a variety of arguments for the extensive incorporation of indigenous legal norms directly into Canadian law, including, for example, by directly providing the content of Section 35 aboriginal rights or independently locating the contours of a group's aboriginal title. There are also arguments, rooted in critical legal pluralism, that support the vitality of indigenous law without any requirement to pass through the Canadian legal system. This thesis will support a different argument. Indigenous law and Canadian mainstream law are fundamentally different in nature. As a consequence, Canadian mainstream

law does not look directly to an indigenous legal system to provide the content of constitutionally protected aboriginal rights but looks to a state of facts that can only be placed in a proper context by reference to indigenous law. This is a nuance that can only be properly understood by drawing out the evidence-based methodology and modern focus of Canadian aboriginal rights law.⁶⁹⁷ Canadian law also has the potential to provide independent protection to the right to maintain and develop an indigenous legal system that can regulate matters that are internal to the aboriginal group.⁶⁹⁸ These are key ingredients to the development of a more complete theory of reconciliation of Canadian and indigenous legal systems.

To the extent there are points of contact between mainstream and indigenous law, the rules of engagement that govern such contact, and the impact of the evidence-based methodology of the modern Canadian approach to the interpretation of Section 35, should be clearly understood and articulated. There are five key advantages that might flow from this approach. First, while an internal perspective to these practices can be offered to the courts, the domestic court is not asked, nor is it generally equipped, to engage in such an internal assessment of the practice. Second, the lack of a requirement to explore an internal perspective allows for a doctrine of aboriginal rights to be developed for a variety of aboriginal societies without any requirement to demonstrate comparable or compatible internal perspectives. It is enough to show the presence of similar pre-contact practices. This characteristic is related to the clear orientation of the Canadian courts to develop generally uniform approaches to rights. Third, this technique allows for an expressly forward-looking but historically sensitive mode of rights analysis. Fourth, the approach allows a safe detour around the dangers of the more internally focussed perspective of the Australian jurisprudence. In Australian law, the lack of continued adherence to indigenous legal norms has resulted in the loss of corresponding common law rights. The alternative approach may facilitate the adoption of modern adaptations and forms of indigenous law. Finally, it avoids judicial engagement with the far more difficult task of undertaking an assessment of the modern cultural needs of complex, overlapping and inter-penetrated societies.

These ideas will be explored more thoroughly in the chapters dealing with the interpretation of Section 35, and play a role in the analysis of aboriginal rights, aboriginal title, oral testimony and self-government. It will be argued that a distinctive approach to indigenous legal traditions is available to support and enrich this task. Important divisions naturally remain as to the preferred direction of Canadian legal development, including strong voices that reject the very idea of mutually framed development. One of the features that have made this debate especially complex is the fact that different, and highly disparate, positions have been expressed through the complex language of constitutionalism.⁶⁹⁹ The next chapter considers this aspect of the Canadian debate.

CHAPTER 5 - CONSTITUTIONALISM

5.1 Introduction

One of the deeper currents running through much of the critical literature is the frequent reference to fundamentally disparate theories of the basic nature of the Canadian constitution. On one hand, constitutional traditionalists see the written Constitution as the foundation for the Canadian legal system and view the relations between aboriginal peoples and the state as fundamentally governed by that constitutional framework. On the other hand, there is a very significant body of thought which sees the constitution in a starkly different light, viewing treaties between aboriginal peoples and the Crown as the most fundamental documents in the Canadian constitutional order. This body of thought is frequently described either as treaty federalism or treaty constitutionalism. For this reason, developing a clear sense of the role of treaties in Canadian constitutional law and practice is indispensable to understanding the frequent differences in perspective that appear in the literature and in practice.⁷⁰⁰

Before addressing the strong influence of treaty federalist thought, it is essential to stress that this thesis will not address the interpretation of particular treaties in detail. This does not mean that treaties will not be discussed. The idea of negotiated resolution of grievances, both historical and modern, is at the very heart of current conceptions of aboriginal law in Canada.⁷⁰¹ It will be seen that this notion is very important to understanding the emergence and the promise of the duty to consult.⁷⁰² That said, questions about the interpretation of treaties are growing in number and complexity, particularly in relation to the “taking up” of lands by governments.⁷⁰³ While these broad issues will be discussed, it is necessary to underscore that the interpretation of any particular treaty must be undertaken on a contextual basis in light of the particular negotiating history for that treaty.⁷⁰⁴

It is now quite clear that there is a fundamental gulf between the general view of the treaties presented by aboriginal people and the view generally adopted by the Crown. Aboriginal people frequently describe the historic treaties as documents of sharing and peace and friendship.⁷⁰⁵ The “cede, surrender and release” clauses are often described as ineffective on the basis that the aboriginal signatories to the treaties would not have been capable of articulating the concept of “surrender” of lands, particularly because of strong spiritual injunctions to maintain connection with and stewardship over lands traditionally occupied by that group.⁷⁰⁶ It is frequently asserted that any surrender could only be effective to the “depth of the plough”.⁷⁰⁷ These treaties, in this view, are less about the past and more about the framework which governs the current relationship between the parties⁷⁰⁸. Governments, on the other hand, and in a global sense, regard the treaties as having surrendered aboriginal title and land-based aboriginal rights in return for the rights that are set out in the treaty document.⁷⁰⁹ Even with respect to these rights, there are strong differences in view. Aboriginal signatories insist that treaties protect rights in a fashion that respects the “spirit and intent” of the agreements, while governments, acknowledging the important role of oral commitments and principles of liberal interpretation, focus on the mutual intention of the parties.⁷¹⁰

It is likely that such strong differences in view can only be worked out through intensive dialogue in relation to particular treaties, with the courts providing assistance as required by the parties. Treaty commissions also play a strong role in Canadian practice.⁷¹¹ However, the focus of this thesis is less on the resolution of these differences of view than on the impact they have had on the broader theoretical framework and models of constitutionalism that are current in Canadian discourse.

There is strong academic support for the aboriginal understanding of the treaties. For example, Knafla observes that the treaties were “...framed in narrow terms, with much that was left unsaid.”⁷¹² This is reflected in the position that lies at the core of the recommendations of the 1996 Royal Commission on Aboriginal Peoples. The Commission recommended that the aboriginal view of the treaties guide the overall relationship between aboriginal peoples and the

Crown.⁷¹³ The Royal Commission is said to have been influenced by the view of Harold Cardinal that the government “...must accept the Indian point of view on treaties”.⁷¹⁴ Others argue that the fundamental divergence of views about the core meaning of the treaties might lead to their being opened up in the future.⁷¹⁵ Others have perceived a “threat to the entire legal framework if one element is not upheld by the state.”⁷¹⁶

This is perhaps one of the biggest divides in Canadian aboriginal law. When paired with the continuing and deep divide about the scope of aboriginal title, it explains why perspectives so frequently are split along highly binary lines. It is for this reason it is important to consider how differences of view about the treaty relationship are reflected in, and partially explained by, fundamentally different notions of constitutionalism. Before turning to these differences, it may be helpful to briefly review the concept of constitutionalism.

5.2 Concept of Constitutionalism

There is a burgeoning literature on the concept of constitutionalism.⁷¹⁷ It is increasingly becoming a concept that is used to express different views of the preferred relationship between aboriginal peoples and the Crown. It is a concept that is closely linked to the notion of the rule of law.⁷¹⁸ It can refer to the system of distribution of power and institutional counter-balances, including balance and separation of power, to ensure that power is not abused.⁷¹⁹ It can also refer, more generally, to the terms of co-existence within a state. In the context of indigenous affairs, a constitutionalist settlement is one that seeks “just terms of co-existence”.⁷²⁰ Levy has argued that the primary concern of constitutionalism should be to build institutional counter-balances to the tendency of states to centralize and engage in projects of unjust and coercive colonialism. He cautions that constitutionalism is best not conceived as a “first-best institutional arrangement”, but rather a mechanism to accommodate intractable differences within a society.⁷²¹ Rather – “constitutionalism attempts to maximize the generation of just policies, whose justice is defined more or less contextually, and a *modus vivendi* scales back the claims of justice.”⁷²² Karena Shaw argues that constitutionalism is not grand theory.⁷²³ Tully argues that a

political approach to justice generates a possible constitutionalist settlement.⁷²⁴ Moore sees constitutionalism as the most promising way to address continuing challenges to the legitimacy of the liberal state.⁷²⁵ It is notable that there is such a clear convergence to the concept of constitutionalism as a potential solution to problems of legitimacy.⁷²⁶

It is important to recognize the deep linkages between constitutionalist and republican thought.⁷²⁷ Republicans stress the value of democratic participation and the importance of checks and balances in the operation of the various branches of government. It is interesting that American scholars have attempted to develop justifications for tribal self-government that rest on explicitly republican foundations.⁷²⁸ The recent work of John Borrows, in particular, is heavily influenced by constitutionalist and republican themes.⁷²⁹

There are other ideas that are commonly associated with constitutionalism in Canada, some of which have potentially restrictive ramifications. Notions of a hierarchy of sources of law, primacy of the written constitutional text, frequent reliance on the notion of the intention of the framers and unitary notions of sovereignty and legislative supremacy are all part of the common lexicon of constitutional interpretation in Canada.⁷³⁰ It will be seen that modern approaches to constitutionalism in Canada have developed considerably more flexibility, but it is doubtful whether this flexibility can extend to support for notions of treaty federalism or treaty constitutionalism.⁷³¹ Before assessing the constitutional tools that promote more flexibility in finding “just terms of co-existence”, the notions of treaty federalism and treaty constitutionalism will be set out in some detail, after considering the illuminating recent work of Laurence Tribe.

Lawrence Tribe’s book *The Invisible Constitution* is a necessary corrective to any monistic view of constitutional interpretation.⁷³² He shows that constitutional interpretation can fall along a variety of axes that he describes in spatially-oriented terms- geometric, geodesic, geological, global, gravitational and gyroscopic.⁷³³ This model can be contrasted with other approaches that tend to focus on a single modality, such as the intent of the original framers. The net effect of

Tribe's approach is to show that constitutionalism can be remarkably creative, within limits that are generated by the constitutional system itself. It is an interesting corrective to over-reliance on either the text or original intention and provides a fascinating comparative source for reflection on the possibilities of the Canadian constitution as a vehicle for finding just terms of co-existence. The core message is that we need to look outside the text of the Constitution and, in a message that will be particularly interesting to Canadian constitutionalists,⁷³⁴ to be attentive to the workings of what he calls the invisible principles of the Constitution:

“...readers are compelled to look outside of and beyond the text- to various possible historical accounts, to political and moral philosophy, to theories of language and meaning (i.e. to hermeneutics, to functional and pragmatic considerations of how well various alternatives would work, to institutional factors (who's asking and why?), and to a host of other factors beyond the Constitution that we can all see and read. Indeed, one of the ways the Constitution works is that it puts us all to work, pushing us to look more deeply into our shared and separate histories and values, making us confront what we might otherwise not notice or might even positively avoid. In reading it, we discover matters beyond its horizons that we must take into account in deciding who we are to become, or avoid becoming.”⁷³⁵

Tribe is not asserting that the invisible constitution is infinitely malleable. It follows a path that has been dictated by history⁷³⁶ and is not “...radically indeterminate- we cannot find in the invisible Constitution anything and everything we might wish.”⁷³⁷

5.3 Treaty Federalism and Treaty Constitutionalism

The deep divide that has been seen on the nature and interpretation of the historic treaties is reflected in an equally fundamental divide about the basic nature of the Canadian constitution. The key touchstone for this view of the constitution has been the scholarship of Sakej Henderson on, first, treaty federalism⁷³⁸ and, in his later work, treaty constitutionalism.⁷³⁹ The notion of treaty federalism reflects a complex body of thought which regards federalism as divided along two overlapping planes- an aboriginal- Crown division of power and authority and a federal-

provincial division of power and authority.⁷⁴⁰ The aboriginal-Crown division of power and authority is seen as both temporally prior to and hierarchically superior to the federal-provincial division of power and authority.⁷⁴¹ From this perspective, the treaties are the most fundamental foundation for the Constitution of Canada.⁷⁴² There is a second constitutional order that is designed to regulate internal relations within what he calls the “colonial order”, but the “treaty order” is temporally and substantively prior to that order.⁷⁴³ The treaties are conceived as sacred covenants between aboriginal nations, the Crown and the Creator.⁷⁴⁴ The relationship between the Indian nations and the Crown is conceived in terms of a personal relationship with the British monarch.⁷⁴⁵ The federal Crown has assumed the place of the Imperial Crown in the treaty relationship.⁷⁴⁶ The treaties provide the foundation for a nation to nation relationship.⁷⁴⁷ Treaty federalism is seen as the foundation upon which the Canadian state has been erected.⁷⁴⁸ The treaties are seen as a formal vehicle for making room for newcomers but they do not impinge upon or limit the authority of indigenous nations unless they have expressly consented to that limitation.⁷⁴⁹ Aboriginal nations retained any powers that were not expressly delegated or ceded in the treaties and non-aboriginal governments draw their authority solely from the powers that have been delegated or ceded.⁷⁵⁰ The role of the provinces is quite subsidiary in this model.⁷⁵¹ The successful completion of a treaty is a legal precondition to the application of Canadian law to an aboriginal nation.⁷⁵² In the absence of a treaty, the aboriginal nations retain their entire power and authority.⁷⁵³

Through a number of significant recent publications, Henderson has started to unveil a substantial revision in the basic approach to treaty federalism.⁷⁵⁴ He now argues that the enactment of Section 35 has effected a merger of constitutional orders.⁷⁵⁵ The constitutional provision is seen to be a new “constitutional moment” which entrenches a form of shared sovereignty between aboriginal and non-aboriginal Canadians.⁷⁵⁶ Whereas prior to 1982, a treaty order and a colonial order existed in parallel fashion, with the enactment of Section 35 constitutional theory could comprehend a merger of both orders within a single structure. This structure supports a dialogue between largely incommensurable legal traditions.⁷⁵⁷ Henderson makes the case that Section 35 reflects a veritable legal revolution. Indeed, this feature is seen as

the core foundation of Canadian constitutionalism. He looks at this from a First Nations jurisprudential perspective:

“The constitutional recognition of Aboriginal and treaty rights united the First Nations treaty delegation of jurisdiction to the British sovereign to create settlements in Aboriginal territories with belated nationhood. Hereafter, it confined constitutional value choices to a seminal political process that recognized and legitimated the foundational acts of the Imperial Crown and First Nations.”⁷⁵⁸

This act of bringing First Nations perspectives into the constitutional order must be contrasted with the previous strategy of positioning First Nations law as outside the legal order- “...The positioning of undeclared rights of First Nations as outside of Confederation has been the ideological justification and instrument of colonial power that generated injustice and poverty.”⁷⁵⁹

While this new constitutional technique showed more openness to finding space for First Nations legal orders, it did not diminish the difficulty of the challenge facing mainstream law in understanding and dealing with diverse First Nations legal orders. Henderson sees part of this difficulty as flowing from the sheer challenge of bridging cultural and knowledge barriers but he also concludes that the prior role of the courts in upholding the colonial legal regime casts doubts on their current ability to legitimately adjudicate disputes.⁷⁶⁰ He is also critical of the efforts of the courts to develop systemic theories of the nature of the rights that are protected by Section 35. He consistently argues that the underlying theory must be found in the indigenous legal systems that give substance to the rights that are protected by the common law. He is emphatic that aboriginal rights are not absorbed into the common law, but that the common law merely protects the pre-existing legal orders and the rights that flow from them.⁷⁶¹

The core argument about the effect of Section 35 is reflected in the following passage:

“...could be strongly argued that the repatriation of the Canadian constitution in 1982 is the appropriate time of sovereign succession, with Aboriginal peoples under Section 35 becoming an essential part of the Canadian federation’s sovereignty. This innovative

notion of shared sovereignty in the Constitution of Canada generates a convergence rather than a juxtaposition of sovereignty over Canadian territories; the converged sovereignty was supposed to protect Aboriginal rights under Imperial and Canadian law, a task that the common law failed to accomplish when it created the idea of extinguishment of Aboriginal rights by cession, conquest, or legislation.”⁷⁶²

Like many other scholars, he argues that it is a mistake to place culture at the core of the concept of aboriginal rights.⁷⁶³ He argues that the preferred approach would be to take the vantage point of First Nations jurisprudence. The actual content of aboriginal rights would be provided by how First Nations interpret and apply their own distinctive jurisprudential traditions. The role of Section 35 would simply be to specify that Canadian law must respect these traditions and the interpretations that emerge from processes that are internal to the First Nations involved. He sees some support for this approach in the dissenting opinions in the *Van der Peet* decision.⁷⁶⁴

Henderson stresses the diversity of the jurisprudence of various First Nations, though he argues that they share some broad characteristics. He describes First Nations jurisprudence as comprised of “diverse spontaneous or organic orders...”⁷⁶⁵ The primary argument that is developed by Henderson is that the legal traditions of First Nations are embedded in linguistic and conceptual orders that are radically incommensurable with the forms of thought of the Western intellectual tradition. For this reason, he consistently argues against the concept of “translation” that appears in Canadian legal analysis.⁷⁶⁶ He argues that “...First Nations jurisprudence stands beyond the borders of the English language, the common law tradition, and modern methods of knowing.”⁷⁶⁷ Part of the reason that the intellectual barrier is so hard to cross is that First Nations jurisprudence is so heavily bound up with indigenous spiritual and mystical traditions.

While Henderson emphasises the great distance between mainstream law and indigenous legal regimes, he argues that the indigenous legal systems are a “...distinct part of the Constitution of Canada.”⁷⁶⁸ His objective is to argue for revision of current approaches that rest misguidedly on the goal of translating indigenous concepts into terms cognizable by mainstream law:

“Rather than deferring to First Nations jurisprudence, however, the Supreme Court in *Van der Peet* has assumed authority to determine from extrinsic evidence – and centuries after the fact- what made each Aboriginal society what it was. By this means, the Court has discarded the traditional British Commonwealth framework, whereby First Nations retained the rights defined by their own distinct First Nations jurisprudence, replacing it with a doctrine of ex post facto judicial extinguishment by definition.”⁷⁶⁹

Henderson frames the task of reconciliation as requiring the merger of two distinct legal traditions. While his previous work had stressed the foundational role of the treaties and that the reconciliation between two societies is to be found in those treaties, he is now advocating a form of treaty constitutionalism that sees Section 35 as a lynchpin securing the mutual operation of two distinct sets of principles of constitutional ordering.⁷⁷⁰ From the First Nations perspective that he advocates, the key to the success of this model is to ensure that First Nations themselves make the decisions about the content and operation of First Nations law:

“Without the guidance of First Nations jurisprudence, with its beliefs, values, principles, and multisensory procedures, much of the Court’s analysis of Aboriginal rights is inconsistent with the purposes of constitutional reform. Fundamentally lacking is an understanding of the “Aboriginal” in the Aboriginal rights.”⁷⁷¹

The normative vision found in treaty constitutionalism is that of two parallel orders jointly governing the same space. However, while Canadian law has been built on notions of parliamentary sovereignty and supremacy, treaty constitutionalism attempts to explicitly reverse the norms of paramouncy. It “...affirms a constitutional order of First Nations, independent of European discourses, by which Aboriginal rights are legally controlling; the Constitution requires federal and provincial law to be consistent and correct with them.”⁷⁷²

Like Tully, Henderson finds support for his model of constitutional federalism in the *Quebec Secession Reference*.⁷⁷³ He envisages an interpretation of Canada’s constitutional architecture which provides respect for First Nations worldviews and legal systems as well as providing a solid foundation for effective cross-cultural dialogue and deliberation.⁷⁷⁴

It is easy to see the role that treaty federalist thought has played in the increasingly apparent divide between Indian nations and the Crown about the interpretation and fundamental effect of the historic treaties. It constitutes a genuine attempt to describe the Canadian constitutional order as seen from an indigenous perspective. As Shaw observes, it is clearly related to the strong and organic relationship of indigenous nations with their legal systems, general presumptions based on the intention of the Creator and fundamental differences of worldview.⁷⁷⁵ What is not so easy to discern is how much the various authors regard their work as a description of the actual operation of the Canadian constitution or as a normative vision of how the constitution ought to operate. There are certainly rhetorical aspects, including the frequently repeated aphorism- “We are all Treaty People”.⁷⁷⁶ There is also a strong linkage with explicitly normative writing, most notably the work of James Tully.⁷⁷⁷ Panagoes argues that a nation-to-nation perspective allows the development non-coercive relations and mutual recognition.⁷⁷⁸ Annis May Timpson, referring to the work of Kiera Ladner, captures some of the normative content of the idea of treaty federalism- “...As a result, Ladner argues that “Canadians need to step beyond the myth of lawful acquisition and sovereignty” to understand that the “true magic” of the colonial period “lies in the relationships that were established between Indigenous peoples and the Crown that recognized and affirmed the sovereignty and rights of both nations and, in so doing, enabled the creation of Canada.”⁷⁷⁹ Indeed, Karena Shaw explains how the image of Canadians of themselves has always been framed by reference to their relationship with indigenous people. - “Indigenous peoples have always been central to and constitutive of Canada’s subjectivity, if primarily as its shadow.”⁷⁸⁰ Treaty federalist ideas offer a way to broaden our conception of the constitution and provide a way to place the constitution on a more secure normative foundation.⁷⁸¹

It may be helpful to compare this work with the work of John Borrows, which has been previously introduced in the section on legal pluralism.⁷⁸² His most recent work on indigenous legal traditions shares many parallels with the constitutional model developed by Henderson. As noted previously, he argues that colonialism provides a poor foundation for Canada’s legal system, seeking an alternative approach that does not erase the contribution that has been and can be made by indigenous legal systems.⁷⁸³

His views on the role played by the treaties and their proper interpretation are also consistent with the treaty federalist model.⁷⁸⁴ Very close affinities to the treaty federalist model are reflected throughout his work:

“The Constitution Act and First Nations laws continue to construct our countries as they develop through time; but treaties also continue to construct them as new agreements are signed and historic treaties implemented. Without treaties, the so-called reception of common law remains an act of forced dispossession.”⁷⁸⁵

He adds:

“Legal certainty is strengthened when Canadian law is built on decisions that acknowledge the flaws of these older justifications. The recognition of Indigenous legal traditions places Canadian law within a firmer foundation because Indigenous laws provide ways to allocate or share land within their communities and with others that are more consistent with the demands of justice.”⁷⁸⁶

However, Borrows recognizes that “...the notion that non-Indigenous peoples might trace certain rights to land or governance through the treaties is, for many, an emergent concept.”⁷⁸⁷ As noted previously, he also takes a less forceful position on the impact of early agreements between indigenous peoples and Europeans, stressing their importance without insisting that they are the only source of legitimate authority within the Canadian legal system.⁷⁸⁸

What differentiates Borrows’ work from many other aboriginal scholars, particularly those who write from a revitalization perspective, is that he sees more room for the mutual operation of different legal systems. He sees indigenous legal systems as more firmly embedded in the broader constitutional framework. Indeed, he calls for Parliamentary recognition of indigenous legal systems and more explicit mutual recognition and cooperation.⁷⁸⁹ For example:

Parliament could affirm that Indigenous governance includes the right of Indigenous peoples to implement their unique laws in order to continually strengthen their cultures, identities, traditions, languages, and institutions and thereby nurture their special relationships with lands and resources.⁷⁹⁰

This appears to be related to a strong republican flavour that pervades *Canada's Indigenous Constitution*.⁷⁹¹ Different legal systems are framed as working together to support individual and collective choices and in a manner that balances power and authority. He is also inclined to rely upon the unwritten principles of Canada's constitution as a support for the recognition of indigenous legal systems.⁷⁹²

It is consistent with the country's constitutional ideals to enhance a flexible political federalism that included recognition and cooperation between Indigenous peoples legal systems and those of other governments.⁷⁹³

There is a rich body of constitutional theory, largely developed in Canada and with reference to Canada's constitution, which draws on values of constitutionalism to stimulate fresh thinking about finding a just accommodation of indigenous aspirations within the Constitution of Canada. It will be argued that the approach of Borrows offers a more plausible foundation for finding such an accommodation than other approaches. This, at least in part, flows from his recognition that the deep interdependence of aboriginal and non-aboriginal Canadians has important normative and constitutional implications.

5.4 Alternative Approach to Constitutionalism

It should not be surprising that parties that start from such disparate views of a treaty relationship might have some difficulty finding common ground. While it is maintained that there is no textual or jurisprudential support for a strong treaty federalist viewpoint, emerging notions of constitutionalism in Canadian law support the incorporation of several of the key insights of

treaty federalist thought. Taken together, an increasingly complex vision of constitutionalism is emerging in Canada which supports a fresh vision of the relationship between aboriginal peoples and the Crown.

Some of the reasons for rejecting a pure treaty federalist model in Canada are reflected in a number of “black letter” rulings from the Canadian and English courts. The most important rulings are associated with the rejection of the challenge to the patriation of the Constitution prior to 1982⁷⁹⁴. The English courts rejected the notion that the nation to nation relationship required consent of the treaty First Nations as a precondition to the termination of the role of the English Crown. The core elements of treaty federalism have been more explicitly rejected in a series of cases, responding to the argument developed by Bruce Clark that Canadian law was and is not applicable beyond a “treaty frontier”.⁷⁹⁵ Finally, the Supreme Court of Canada has tended to accept the Crown view as to the legal effect of the “cede, surrender and release” clauses, though it must be pointed out that the issue has not been extensively argued in any appeal to this point.⁷⁹⁶

Though the argument cannot be developed in full at this point⁷⁹⁷, a key theme in this thesis is that a different notion of constitutionalism that recognises the disparate normative perspectives that are maintained by the treaty partners, recognizes the creativity that is enabled by the line of cases supporting the “unwritten principles of the Constitution”, especially the Secession Reference, and builds on the dialogical core of that opinion is more likely to lead to a just accommodation than other approaches that are available.⁷⁹⁸ The key element is the impact that the duty to consult must have in entrenching the notion of inter-cultural dialogue and modelling effective practices to build on such dialogue.

Jung has argued that her model of critical liberalism “offers a legitimating framework...to break out of the cultural straightjacket.”⁷⁹⁹ Likewise, the Supreme Court of Canada appears to be inching towards a legitimating framework that might accomplish a similar goal. It is based on an

understanding of the “constitutional architecture” that elaborates the fundamental role that can be played by the “unwritten principles of constitutional law”.⁸⁰⁰ We now know, after the *Little Salmon* decision, that the principle of the honour of the Crown is such an unwritten principle.⁸⁰¹ It gives rise to a number of duties that are structured to promote dialogue and encourage accommodation. It is thoroughly modern in its operation but is calibrated to respond to perceptions of deep historical injustice in the creation of Canada and the development of its constitutional framework.⁸⁰² It is interesting that the very first Supreme Court of Canada decision that introduced the notion of unwritten principles of constitutional law, the Judges Remuneration reference, used the same language to describe those principles that is used in Section 35 to describe the protection of aboriginal and treaty rights:

“(T)he express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, the preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.”⁸⁰³

This reliance on the preamble is picked up in the *Campbell* decision that upholds the Nisga’a Treaty by holding that the unwritten principles carried forward in the preamble were sufficient to rebut an argument that the exhaustive distribution of legislative power in Canada between the federal and provincial orders of government was sufficient to eliminate room for aboriginal self-government.⁸⁰⁴

Several academics have stressed this new development to advocate fresh approaches to Canadian constitutionalism in relation to indigenous rights. Mark Walters has used the unwritten principles of the constitution to develop the notion of law as a moral idea that supports recognition of indigenous claims.⁸⁰⁵ Ian Peach has also attempted to invoke constitutional principles in aid of a fresh approach to Canadian constitutionalism.⁸⁰⁶ Like Jean Leclair, he argues that these principles might support a federal foundation for indigenous jurisdictions which bypasses the

need to rely on Section 35 rights.⁸⁰⁷ This argument will be addressed at a later stage, but at this stage it suffices to illustrate the creativity that can be engendered by reliance on unwritten constitutional principles.⁸⁰⁸

The most important development has been the express incorporation of constitutional principles into the resolution of complex problems of aboriginal law in the *Little Salmon* decision.⁸⁰⁹ Both majority and minority decisions agreed that the honour of the Crown was a constitutional principle but the notion received more extensive analysis in the dissenting judgment.⁸¹⁰ This will be addressed more completely in the chapter dealing with the duty to consult, but at this stage it can be argued that the linkage of the honour of the Crown to the unwritten principles of the Constitution opens up fresh resources for thinking about the Crown-Aboriginal relationship. It might give rise to new duties, beyond the duty to consult. It might also frame a new way of thinking about constitutionalism.

While the categories of new constitutional principles are not closed⁸¹¹, it is important not to overstate their creative potential. The Supreme Court of Canada has been very clear that the constitutional text has retained its primacy and the Supreme Court of Canada has been resistant to the independent application of these principles.⁸¹² They generally play the role of guiding interpretation and filling gaps in the written text of the Constitution.⁸¹³ There are also strands of development in Canadian constitutional law that are more restrictive in their application. Mark Carter sees an increasingly positivistic outlook in cases such as *Authorson and Imperial Tobacco*.⁸¹⁴

The key point that must be made here is that Canadian law has resources to move beyond the binary divisions that are initially apparent in the discourse. The stark division as to the meaning of the treaties, as well as the more foundational differences as to the role of the treaties in the functioning of the Canadian constitution, might give way to more flexible and productive models of constitutionalism. These might emphasize dialogue, pluralism and a more flexible architecture

to support the exercise of authority. It will be seen that this emerging and distinctively Canadian approach to constitutionalism is being forged largely through the development of the duty to consult.

At the end of the day, while a treaty federalist perspective does pose a critical alternative to thinking about constitutional history and a necessary corrective to the exclusively European narrative that sustains its interpretation, there are clear limits that a Canadian court must respect if it is to remain faithful to the Constitution. Among the reasons that help in understanding the alternatives to treaty federalism are notions of hierarchy of sources, the primacy of the text in constitutional law, the limited resort to originalism in Canadian constitutional thought and the unitary notion of sovereignty that pervades Canadian constitutional analysis.⁸¹⁵ The broader normative challenge is to determine how effective deliberation can occur between parties who frequently adopt such disparate interpretations of the foundational relationship. It will be argued that the duty to consult jurisprudence offers a fresh perspective to reframe fundamental norms of constitutionalism in a fashion which draws from different strands but reinforces the fundamental importance of dialogue and deliberation.

CHAPTER 6 – HISTORICAL CLAIMS

6.1 Introduction

Just as there are deep divides as to the claims of culture, pluralism and constitutionalism, the issue of redress for historical wrongs demonstrates great cleavages in the critical literature. In a similar fashion to how political theory is alleged to have played in key role in the dispossession of indigenous peoples, the discipline of history is also implicated. Robin Jarvis Brownlie has shown the role that theories of history have played in this displacement.⁸¹⁶

There is a strong body of thought which maintains that historical events, such as dispossession from land and the suppression of separate and sovereign political orders, bear immediate consequences for the modern distribution of power and resources- this, of course, is at the heart of most aboriginal grievances in Canada today.⁸¹⁷ At the other end of the spectrum, there are voices that call for an end to claims of historical wrong-doing. As Calvin Helin says “It is time for indigenous peoples to stop dwelling on the rancorous injustices of the past...no matter how unfairly or badly indigenous peoples were treated in the past, we cannot do anything about history. Our actions now, however, can impact the future.”⁸¹⁸ Gibson adds that the fact that aboriginal peoples ancestors were here before others has no logical or moral import. He calls this the “...single most important argument of what I call the System”.⁸¹⁹ According to Gibson, “For people in a successful, forward-looking life, history matters less.”⁸²⁰

But for Gibson, history does matter:

To move in a useful way from beginning to end will require an analysis not just of where we are but how we got there. Many problems in human relationships are “path dependent”. To take two intractable issues of our times, Northern Ireland and Palestine, solutions have been severely constrained by historical baggage of conflict and suffering.

In other words, history matters. It is impossible to dismiss the past. The challenge is to avoid becoming its prisoner. Many who would discuss Indian issues in the twenty-first century would prefer to only look to the future. That is convenient for the mainstream side of the table. It theoretically makes the questions easier and more accessible to rational discussion and trade-offs. But any search for agreement must address the concerns of all sides of the table and that will necessarily summon up the past. This cannot be avoided ...⁸²¹

In addition to clearly finding resonance in broader public opinion, we see echoes of these sentiments in judicial decisions. There are frequent references to the “tide of history” sweeping away ancient claims.⁸²² This is linked to the philosophical viewpoint that the moral force of any grievance diminishes with time.⁸²³

This chapter will attempt to demonstrate that history and time play a very complex role in the consideration of aboriginal grievances.⁸²⁴ It is important to pay careful attention to both the normative structure of claims based on historical wrongs and how the common law deals with change over time. Two key sources of literature will be relied upon to develop a distinctive approach to historical wrongs that resonates with the emerging model for interpretation of Section 35 of the Constitution Act, 1982. The first body of literature deals with the rich debate about the status of historical wrongs, developed in a modern form by Jeremy Waldron.⁸²⁵ The second body of literature is the work of what has been called the New Zealand School of legal history, led by the work of Paul McHugh.⁸²⁶

The impact of the first body of literature is to challenge the idea that the moral force of an historical grievance does not change with time. It also introduces a language which shifts focus more directly to the current consequences of the historical wrong. The impact of the second body of literature is to challenge the notion of a continuous body of common law. It will be argued that the doctrine of continuity combined with the declaratory theory of the common law has led to the presumption that the protections offered by the common law at the start and the protections offered by the modern recognition and affirmation of aboriginal and treaty rights now are largely the same. In fact, the New Zealand School raises serious doubts about this notion of a continuous

common law. Both of these bodies of literature enable a fresh look at how the common law deals with historical claims.

While the argument will be developed in full in the second part of this thesis, the insights offered by these two bodies of literature enable a consideration of Section 35 aboriginal rights that frees them, to a degree⁸²⁷, from their common law moorings. These rights are thoroughly modern rights, though their purpose and content is largely derived from a careful analysis of history. However, this analysis is guided by the constitutional purposes of Section 35, particularly the honour of the Crown, and motivated by the constitutional policy of encouraging the negotiation of a just accommodation between aboriginal and non-aboriginal peoples in Canada today. It does not align with the sentiments of Helin and Gibson, but suggests a different route to deal with historical grievances in a fashion that resonates with current constitutional values.

6.2 The Political Theory of Historical Claims ⁸²⁸

The idea that historical grievances become less compelling with the passage of time was first explored by Kant but has recently been developed in rather controversial fashion by Jeremy Waldron.⁸²⁹ With a focus expressly on indigenous claims to land, he argues that demographic and other changes have the effect of “superceding” these claims over time. His argument is based, in part, on the subsequent use of land by others outside the indigenous group and the incorporation of the use of such land in the life plans of those people. He argues that the dispossession of others who have formed a later attachment to the land would simply resolve one injustice by the commission of another injustice.⁸³⁰ The “supercession thesis” developed by Waldron has met with sustained and vociferous criticism.⁸³¹

Waldron’s work does seem to fall prey to a troubling all or nothing character. He argues that with each successive generation, there are opportunities for the emergence of legitimate expectations and greater interdependence that makes simple restitution of aboriginal interests

impossible. Indeed, an attempt to do so might do moral harm. Rather than arguing that some aboriginal claims to land based on past possession might have to be scrutinized more carefully because of the emergence of a range of other legitimate expectations over time, Waldron often writes as if he is advocating the rejection of all such indigenous claims. It is arguable that this conclusion follows from Waldron's commitment to traditional liberalism, his sympathy for cosmopolitan arguments and his preference for arguments of social justice that pertain to distribution rather than historical entitlement.⁸³²

While Waldron's arguments do require careful critical scrutiny, it will be argued that they provide an invaluable reference point for the consideration of the role that is played by the passage of time when dealing with conflicting claims of moral and legal entitlement. There appear to be two broad factors at work in this branch of the literature. The first relates to a careful tracing of a moral claim over time to determine what intervening factors might alter the normative assessment of the original claim. The second is whether a theorist is writing from an entitlement or distributive approach to justice. In the modern context, the ground between these two approaches to justice was staked out by Robert Nozick and John Rawls.⁸³³ Several have noted the structural similarity between aboriginal claims based on past dispossession of land and Nozick's theory of entitlements.⁸³⁴ Many others have demonstrated a desire to place priority on the distributive claims based on current injustice rather than claims based on past injustice.⁸³⁵ Waldron certainly exemplifies this preference for dealing with modern distributive justice.

Kymlicka also argues strongly for the primacy of modern distributive justice over entitlement theories of justice.⁸³⁶ Short puts his view in context:

“Despite the apparent self-evident logic of such sentiments, the grounding of “equality” in the needs of the present is an approach common not just to right-wing politicians, but also to some of the more “progressive” academics from the liberal tradition. Kymlicka, for example, concedes that historical arguments may have some force, yet the only arguments concerning indigenous peoples he explicitly considers are those that are based on a treaty and even then considerations relating to the present form the substance of his argument.”⁸³⁷

Short draws upon Ross Poole's image of the "original sin" of the settler state to respond:

"...indigenous peoples represent the expropriation- the original sin- on which settler societies have been founded. Far from this injustice having been "superceded" by the onward march of history, it continues in the material and cultural conditions of indigenous life. If we are to understand the present we must also come to terms with the past"⁸³⁸

As has already been seen, many scholars have explored the difficulties of "coming to terms with the past".⁸³⁹ One of the most stimulating recent works addressing the moral and political implications of the historic dispossession of aboriginal peoples in settler states is *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* by Burke Hendrix.⁸⁴⁰ What is particularly interesting about this work is that it addresses some of the most pressing problems that are occupying Canadian aboriginal law, such as the status and scope of aboriginal title claims, from a starkly original and different vantage point. The work also supports the general orientation of seeing indigenous claims as claims of present injustice and as primarily discharged through processes of intercultural dialogue.⁸⁴¹ In other words, there are many points of contact between the theory analysis of Hendrix and the general model of intercultural justice that appears to be emerging around Section 35. Putting aside the points of contact, the real benefit of a close examination of the detailed arguments of political theorists such as Hendrix is that fresh insights may be obtained about the structure and limits of legal argument pertaining to aboriginal rights claims.

Hendrix begins by noting the persistent legitimacy challenges that are presented to the right of the United States to govern lands that were unjustifiably taken from indigenous peoples⁸⁴². He draws an early distinction between international law and moral and political analysis.⁸⁴³ A careful analysis of international law leads to the conclusion that the overriding concern for the stability of existing states likely undermines hope for a remedy for historic dispossession in international adjudicative forums.⁸⁴⁴ However, he sees the grounds for political and moral argument to be far more promising. Taking seriously the challenge to legitimacy, he inquires into

the moral and political implications of the fact of unjustifiable confiscation of tribal land. His overall conclusion reflects a strong commitment to self-determination and contemplates the conceptual possibility of secession of indigenous groups from a settler state and envisages a moral requirement to return substantial amounts of public land to indigenous groups:

“...existing states should generally treat indigenous peoples as if they still retained a foundational moral status grounding rights to fully or partially separate political existence, so long as they are willing to choose political structures that will protect the rights of their members or otherwise able to demonstrate a firm social consensus on alternative arrangements. Surrounding states also seem required to return substantial amounts of public land to indigenous peoples, over which these peoples will then have the right to exercise political authority.”⁸⁴⁵

Hendrix builds a careful case “from the ground up” to support these conclusions. A key early distinction is made between those who envisage the possibility that claims to property may be founded on historic infringement of rights and those who favour redistribution of property based on current patterns of use and need. He generally favours the second class of claims for reasons that draw heavily from the work of Jeremy Waldron. The most compelling strategy for dealing with indigenous land claims is to focus on current injustice. Care must be taken to avoid interference with the entitlements of other people who have built their lives around a relationship with particular tracts of land. What differentiates Hendrix’s analysis from Waldron’s is his willingness to delve more deeply into the question of attachment to land⁸⁴⁶. State claims to land are regarded with deep scepticism as well as those of third parties who use land in a less intensive fashion. This is conjoined by what amounts to a presumption that historic indigenous claims are valid unless overridden by a competing contemporary use of sufficient strength. Hendrix develops a hierarchy to help think systematically about indigenous claims:

“Despite the likelihood that many historical property rights have faded under the most plausible derivation of natural property rights, then, it would seem deeply mistaken to suggest that all such rights have lost their relevance. The most obvious holdings to which they apply fully are public lands; followed at some distance by commercial properties, and then on to individual homes and farms where historical property rights have a far

more residual character. This is probably weaker than some indigenous peoples have in mind when they assert historical property claims, but it is also far stronger than many nonindigenous persons seem willing to admit.”⁸⁴⁷

It is important to remember that Hendrix is talking about natural property rights rather than any form of legal title. The primary purpose of the analysis is to provide a framework for addressing questions about the legitimacy of state regulation. He asks fundamental questions about the relationship between state authority and ownership of the land and the role of consent or social contract theory in justifying the legitimacy of the state. These are the perennial questions of classical political theory.⁸⁴⁸ They have particular relevance when indigenous rights in settler states are being considered as it is commonplace to see moral and legal arguments founded on the absence of indigenous consent to state authority.⁸⁴⁹ It is also commonplace to see responses to such claims being based on state ownership of lands within their boundaries.⁸⁵⁰ Hendrix develops his argument by asking whether indigenous peoples generally regard the state as having a legitimate right to govern the non-indigenous population- “...unless indigenous peoples are willing to see the authority of United States over its non-indigenous populations fragment, they will need to acknowledge other justifications for authority that may have implications for their case as well.”⁸⁵¹

It is extremely illuminating to see how Hendrix unpacks key components of the moral argumentation involving indigenous claims based on historic occupation and wrongful dispossession. He makes clear that the mere fact of historic occupation or even wrongful dispossession does not go very far in supporting a modern claim to land.⁸⁵² Equally importantly, he argues that state claims to land deserve far more scrutiny than they normally receive.⁸⁵³ He argues that from a purely normative perspective, states probably never had a solid claim to most of the lands within the territories they govern.⁸⁵⁴ The analysis is further complicated by the heavy involvement of indigenous peoples in processes of market exchange involving land.⁸⁵⁵ He concludes by offering general guidelines on restitution drawing from factors such as historical and current attachment to land, status of land as public or private and the general economic situation of the indigenous claimant:

“Where their historical lands are publicly held and therefore easily returned to them, it is these specific lands to which they retain property rights and that they should regain. Only when such lands are really unavailable do alternative arrangements become reasonable.”⁸⁵⁶

Hendrix does venture a tentative opinion on how much land should be returned to an indigenous claimant. He argues that the amount should be correlated with the relative prosperity of the indigenous group such that a norm would be a doubling of their current holdings with the possibility of more land for more severely impoverished groups⁸⁵⁷. He recognises that this would be far less than the demands of many indigenous claimants and certainly less than the lands they were traditionally associated with but would produce “...a political order with a far clearer indigenous cast to it.”⁸⁵⁸ A reading of the book as a whole suggests that Hendrix is building a general framework rather than offering an algorithm for determining the boundaries of legitimate indigenous claims to land. His main point is that such claims are less strong than many advocates presume but far more worthy of attention than many mainstream opinion leaders would recognize.

When Hendrix turns to the broader question of the right of a settler state to govern indigenous peoples within its borders, he likewise builds his argument from the ground up with minimal assumptions. A key argument is that individuals have a contingent obligation to support stable democracies.⁸⁵⁹ This is based on a rejection of philosophical anarchism and an empirical argument that states are better equipped to achieve important protective goals than other forms of social organization. His argument focuses on the justification of states as abstract entities.⁸⁶⁰ Tougher questions of legitimacy follow the establishment of the basic justification of the state. What is interesting for this work is that Hendrix takes a clear procedural turn in addressing fundamental questions about justification and legitimacy:

“Our duties thus seem to require that we work to change the unjust policies of democratic states while continuing to support the continued existence of such political institutions. As I will argue...this can be consistent with political separation- but separation of an orderly, procedural type.”⁸⁶¹

Much of the book addresses problems of procedural design to balance the concerns of disaffected groups such as indigenous groups with the presumptive ability of a stable democratic state to address questions of justice that are presented by claims of both historical and current injustice. However, in contrast to claims that are based on severe historical mistreatment and dispossession, the normative model that Hendrix is building is clearly prospective- “...for a natural-duty conception of political authority, past mistreatment matters only insofar as it is predictive of the present and future.”⁸⁶² The key focus is on fostering democratic debate about questions of justice. Progress is judged by the quality of the reasons that are provided for and against a proposal.

Hendrix does contemplate the possible separation of an indigenous group (indeed any disaffected group) from a stable democratic polity, but he argues that very strong procedural manner and form requirements must be satisfied to rebut the presumptive authority of the stable democratic state. He argues that a proposal for secession (including, in his view, what he calls partial secession⁸⁶³) must be popularly approved in a series of 2 or 3 referenda, based on a draft constitution to provide for an alternative governance arrangement with each referendum separated by 3-5 years to allow ample time for adequate democratic debate.⁸⁶⁴ The aim would be to “foster widespread social deliberation”.⁸⁶⁵ Importantly, “...the leaders of the separatist movement would be expected to present to the government of their current state a comprehensive document describing the dangers to that state from separation, the likely resources of the new country and the challenges it may face, and, perhaps most importantly, a detailed provisional constitution.”⁸⁶⁶

As a result of grappling with problems of small size, sustainability and the vulnerability of sub-groups, Hendrix concludes that such a procedure would be rather unlikely to succeed in practice.⁸⁶⁷ However, he argues that clear provision for possible secession might “...paradoxically make both the desire and need for it more rare.”⁸⁶⁸ The clear theme is that problems of conflicting perspectives about historical claims and about protection of cultural difference are best addressed through dialogical mechanisms.⁸⁶⁹ The argument for a presumption

in favour of existing state mechanisms is founded upon the framework they can provide for effective and orderly deliberation about questions of justice. To the extent that existing state mechanisms are unduly constrained in their ability to respond to the full scope of a normative challenge, Hendrix argues that the remedy lies in procedural reform.

Though the parallel is far from complete, it is hard not to think about the duty to consult when reading Hendrix's analysis of complex normative challenges arising within a settler state. He recognises that the core problem is that indigenous and non-indigenous peoples may rely on fundamentally different notions of relationship to territory. He argues that it is essential that the state consult in order to address the normative implications of these different connections to land. The state must listen carefully and be open to deliberative processes that ensure that a fair hearing is provided to all perspectives on the use of land. However, deliberation cannot go on forever and, insofar as fair processes have been developed and implemented, the state may have to exercise a veto to close the debate⁸⁷⁰. Short of such an extreme situation, there are strong benefits that can be expected to flow from the very process of deliberation, as there are- "...reasons to believe that processes of interaction and consultation can themselves be extremely valuable"⁸⁷¹, and be a "...source of creative tension and revised ideas"⁸⁷², such that "...dialogical interaction can take new and unexpected turns"⁸⁷³. Particularly because of the inter-cultural gulf that can separate indigenous and non-indigenous peoples, Hendrix argues that the state "...should take seriously the intellectual engagement that will be possible with indigenous peoples."⁸⁷⁴

This process of deliberation is set against a backdrop that challenges some assumptions that have become quite conventional in the literature-

"...indigenous groups do not have claims to separate status simply because their ancestors happened to live in those territories first, or because their status as sovereign nations was lost through violence and fraud. The natural duties that justify political authority leave little direct role for these sorts of historically based considerations. But if the arguments I have made here are correct, there is another kind of case for rights to a

separate status to be found in the combination of dissatisfaction and cultural difference, which may make it plausible for existing states to behave as if indigenous peoples still retained original sovereignty for many purposes. In those circumstances, the language of retained sovereignty might be regarded as a form of valuable shorthand- it can remind existing states that they should take seriously the dissatisfaction of the indigenous population they now rule and should acknowledge the rights of such groups to pursue something different if they so choose.”⁸⁷⁵

Hendrix develops in a more acute form the key intuition that indigenous claims are as much about justice in the present as they are about historical dispossession. He also captures in lucid fashion the importance of dialogue and procedural innovation as key tools to address deep cultural difference and dissatisfaction with current political and constitutional arrangements. Though he has limited himself to developing a general framework, the analysis provides important touchstones for developing thinking about crucial legal questions dealing with self-determination and sovereignty, claims to restitution of territory and cultural exemptions from laws of general application.

One area that may merit more attention is the rather cursory treatment of public lands in the general schema pertaining to restitution of lands previously held by aboriginal peoples. It is presumed that lands currently classified as public lands are available for immediate return to indigenous nations. However, this perspective tends to give insufficient weight to the strong dependency of economic systems and the welfare of non-indigenous peoples (as well as indigenous peoples) to continued access to public lands. It also renders invisible what may be a long history of the use of such lands by non-indigenous persons or a complete abandonment of such lands by the indigenous group. No mention is made of the frequent phenomenon of overlapping use by various indigenous groups. If a particular tract of land can become attached to the well-being of an individual non-indigenous person, it does not seem to be a large extension of the principle to ask how particular lands have become essential to the continued well-being of a broader group of people. It also seems relevant that the economic rent drawn from such lands might make an important contribution to significant economic transfers that benefit indigenous communities and individuals. What seems to be beyond serious doubt is that Hendrix is undoubtedly right in concluding that the appropriate response to such complexity is carefully

designed and responsive processes of dialogue. It will be argued at a later stage of this thesis that there are strong currents of development in Canadian constitutional law that map quite closely to some of the important normative insights provided by Hendrix.

Spinner-Halev, in an important article, has developed a distinction between historical and enduring injustice.⁸⁷⁶ While he tends to support the general thrust of the post-Waldron view of historical entitlements, and advocates a future orientation to questions of justice, he disagrees that a focus on current redistribution is sufficient. Nor would better enforcement of individual rights suffice to address the claims of justice. In a clear nod to Kymlicka's constraint he argues that "...The concept of enduring injustice that focuses responsibility on the present has, I think, a better chance of convincing liberal political commentators to respond to injustice than arguments that center on the history of the injustice and the responsibility for the past."⁸⁷⁷

While complex and contested, there appears to be a strong foundation for a "modern" focus on theories of rights and some tools to assess how past dispossessions are relevant to the development of this theory. The basic idea is that there is not necessarily a clear line between the past dispossession and present entitlement. Careful attention has to be paid to the numerous dealings with the land that have intervened. While the effects of past injustice "endure" and must be addressed, the longer the period of time between the dispossession and the present increases the likelihood that the moral calculus will be more complicated. What is interesting is that the common law has had to deal with time as well. Does it matter how the law treated a particular transaction in the past? Can we speculate how the law would have hypothetically treated a particular issue? What are the consequences of a change in the common law? How does the common law respond to changes in the Constitution? It will be seen that there are structural parallels between how these issues are addressed by political theorists, historians and lawyers, as well as some important points of difference.⁸⁷⁸

6.3 The Common Law and Time

We will see that interesting connections can be made with the treatment of time by the common law. The common law, as evidenced by the declaratory theory, is frequently thought of as having a certain timeless quality. According to this theory, when the common law is altered by a judicial decision, the judge is merely discovering the norm that has been present since the beginning.⁸⁷⁹ Strong elements of this kind of thinking dominate writing about common law aboriginal rights. For most writers, the common law provides for continuity in the protection of the rights that were held by indigenous peoples prior to the assertion and acquisition of English sovereignty and modern common law rights are held to be continuous with the rights that were present from the earliest days of interaction. A classic example of such thought is found in the writings of Brian Slattery⁸⁸⁰. He argues that the common law developed a set of inter-societal norms that accorded full protection to the lands and legal systems of indigenous peoples upon their incorporation into the British sphere of influence. Unless changed in an authoritative fashion, the rights continue to the present.

Paul McHugh, and more generally the New Zealand school of legal history, presents a direct challenge to this line of thinking⁸⁸¹. Indeed, an increasing body of legal historical work is making the case that the way we think about aboriginal legal rights today would be utterly foreign to the participants in legal and political processes at the time the common law rules are alleged to have emerged. He argues that the reliance on rules of reception is misplaced as they were only intended to regulate the status of colonists in relation to the Crown.⁸⁸² He paints a rather different picture of colonial authority and of several of the formal instruments that have received a great deal of attention in Canadian legal analysis.⁸⁸³ Most importantly, he argues that the legal relationship between the Crown and indigenous peoples was dominated by executive discretion and rules that were largely non-justiciable.⁸⁸⁴

An impressive historical case is made that certain rights, such as aboriginal title as a right to the land itself, have no secure foundation in the early history of the common law.⁸⁸⁵ McHugh's

arguments on aboriginal title will be explored more fully in the second part of this thesis. At this stage, it may suffice to point out that he argues that the modern doctrine of aboriginal title can be traced to effective advocacy by Canadian legal scholars.⁸⁸⁶

This line of historical analysis suggests that many lawyers, and some historians, are guilty of “presentism”.⁸⁸⁷ This can be defined as framing arguments about the past in terms that are designed to advance a point of view on a particular modern controversy, in this case the advancement of aboriginal land claims. This can result in attributing motivations and knowledge to historical actors that would have been utterly incomprehensible to them. In the memorable phrase of Jens Bartleman, this can amount to an effort to “re-educate the dead.”⁸⁸⁸

McHugh argues that there were two distinct phases in the interaction between the Crown and Indigenous peoples. First, the early stage was marked by purely personal engagements of a jurisdictional nature between representatives of the Crown and indigenous peoples.⁸⁸⁹ Second, the later stage was marked by a narrower form of engagement that was marked by greater integration into the public law norms of the emerging colonies.⁸⁹⁰ The notion of “periods” or “shifts” in engagement is reflected in the narrative presented by the Royal Commission on Aboriginal Peoples as well as the theory developed by Tully.⁸⁹¹

The following seem to be the key propositions advanced in McHugh’s legal history:

- the Crown, as a matter of policy, and up to a certain point in time, respected the ability of aboriginal groups to manage their internal affairs under their own customs and practices⁸⁹²
- the Crown would strive to deal directly with the Indians prior to opening up the land for general settlement⁸⁹³
- the Crown could choose to address Indian land and other interests directly by legislation⁸⁹⁴

-early actions under the prerogative were intended to be transitional and could be displaced by valid legislation⁸⁹⁵

-the courts had no jurisdiction to hear claims by Indians against the Crown⁸⁹⁶

-the question of Indian land rights was a broad question of policy rather than a justiciable legal issue⁸⁹⁷

While a critical reaction to the McHugh thesis will largely be reserved for the second part of the thesis, there are a few observations that can be made at this stage. McHugh's analysis of the earlier jurisdictional phase of the development of the common law is rather undeveloped. Why shouldn't the current law look back to this stage as a source of normative inspiration and guidance? There is also very little sustained analysis of the rules of reception cases that do explicitly deal with indigenous law. Cases like *Amodu Tijani*⁸⁹⁸ and *Re Southern Rhodesia*⁸⁹⁹ do provide rather cogent counter-examples to his core thesis. Some strands in the literature can be drawn upon to develop a distinction between cases of "indirect rule" and cases of direct imposition of a settler legal system, though this remains largely latent in McHugh's analysis.⁹⁰⁰ It would also be useful to see more analysis of the precise source of the non-justiciable duties that are in play in the 19th century. While his focus is comparative, there is also room to develop the analysis of the specific legal framework for the various common law settler states.

This scholarship appears to be at an early stage of development, with little engagement between representatives of the legal orthodoxy and this branch of legal history. One important exception has been the Canadian legal scholar Mark Walters who argues that a "redemptive" approach to the common law allows one to re-interpret the events of the past in order to secure progressively stronger fidelity to foundational values such as justice and the rule of law.⁹⁰¹ He notes that McHugh "...challenges some key assumptions about legal history that earlier legal scholarship had helped to make respected (perhaps even orthodox) for a generation of judges and civil lawyers, including the idea that a common law of Aboriginal rights existed historically."⁹⁰²

It is important to note that McHugh does not argue that a common law of Aboriginal rights did not exist historically. In contrast, he argues that the common law that would have been understood by historical actors would not bear a great deal of resemblance to the common law as it is described by many current legal scholars. He is, in fact, arguing against the assumption that a common law rule as it exists today must be read back in similar form to earlier periods of its development.⁹⁰³ In particular, he argues that the current doctrine of aboriginal title which accords a right to the land itself had no counter-part in the common law of the 19th century.⁹⁰⁴

Many scholars and judges have addressed the problem of change in the common law that is considered by McHugh. One mode of updating the law with the intention of rendering it more just is to assess legal rules against modern standards, as was the case in *Mabo*.⁹⁰⁵ Another approach is to assess modern practices against the normative achievements of the past. For example, many scholars look to the earlier, more cooperative patterns of engagement between indigenous and non-indigenous peoples as providing models for more normatively acceptable modes of engagement in the present.⁹⁰⁶ This is linked to the observation that the legacy of false assumptions about the nature of aboriginal societies has blinded us from seeing the critical role that they played in the creation of Canada.⁹⁰⁷ Robert Lee Nichols observes that that a careful examination of the early interaction between aboriginal and European peoples provides inspiration for "...a cooperative and multilayered constitutionalism..." He argues, based on a careful examination of the history of resistance of the international community to the diplomatic efforts of the Iroquois Confederacy, that:

"Given this complex tradition, perhaps the first step towards building more constructive relations between indigenous peoples and European-style nation states lies not in imagining or inventing new forms of political association, but rather, can be found already existing in the past."⁹⁰⁸

In one of the more systematic examinations of the normative foundations for indigenous claims to self-determination, Steven Curry argues that we must seek:

“...a retrospective re-imagining of the terms of engagement, such that we will conceive of a state as being built on indigenous possession and sovereignty, so that the relationship is reconstructed as if settler societies had sought and been granted permission to enter indigenous lands on agreed terms.”⁹⁰⁹

Part of this resurgence in interest in looking to earlier historical relations as a model for modern reconciliation can be attributed to the work of James Tully.⁹¹⁰ As Shaw describes this aspect of his work:

“This work marks a departure from his earlier work: rather than being primarily concerned with locating a work of political theory within its historical context in order to illuminate its meaning more appropriately and only secondarily using this analysis to shed light on contemporary political dilemmas, his problem here is reversed. He begins with a contemporary problem and reaches back into the history of political thought to unearth tools to more effectively respond to it.”⁹¹¹

Many scholars advocate return to early principles of engagement as a way of inspiring modern reconciliation.⁹¹² This can provide the basis for an important critique of the current jurisprudence of the Supreme Court of Canada on aboriginal rights. This jurisprudence focuses on aboriginal “practices” while the critical thrust of this literature is that it is to the “shared practices” of earlier periods that we must turn to for guidance.⁹¹³ However, it should be noted that there are multiple references in the jurisprudence of the Supreme Court of Canada to the contribution of indigenous peoples to the early building of Canada, including the Secession Reference.⁹¹⁴ As Karena Shaw notes “Indigenous cooperation was vital to European interests.”⁹¹⁵ This issue will be reassessed in the chapter on rights.

Richard Ogden develops an analysis of the Section 35 jurisprudence of the Supreme Court of Canada that offers important insights into the relationship between the common law of aboriginal rights that is developing in the Section 35 era with that which existed in the past.⁹¹⁶ He argues that the current approach to Section 35 aboriginal rights is strongly guided by the Court’s articulation of the purposes that are to be achieved by that provision.⁹¹⁷ This is aided by the

frequently-made observation that the coverage of Section 35 is not limited to recognition of rights that were previously known to the common law.⁹¹⁸ Indeed, the idea of a break between a modern doctrine of aboriginal rights and the doctrine as it has existed in the past is made quite explicit.⁹¹⁹

Shin Imai has also offered some interesting thoughts on the relationship between law and history.⁹²⁰ He is concerned that using history as a source for making current decisions about the allocation of rights and responsibilities tends to distort history, thereby impeding a full understanding of the historical record. He presents an argument for freeing history from the responsibility of determining the present by placing the assessment of history in the hands of a bi-national panel, leaving to the courts the role of assessing justification and encouraging negotiation. He draws substantially on New Zealand experience with the Waitangi Tribunal to develop this proposal.

We will see that there are strands in the recent jurisprudence of the Supreme Court of Canada that reflect the deep normative tensions and understandings of legal history that are reflected in this disparate literature. While there are clear references to the importance of continuity in the jurisprudence, there is a competing strand of emphasis on the emergence of a modern paradigm that is forward-looking and attuned to current circumstances, while remaining historically sensitive. The Supreme Court of Canada is clearly developing a uniquely Canadian approach that can be described as largely prospective in nature.⁹²¹ This trend is most clearly seen in the *Haida* line of cases. There are parallels that can be drawn between the generally prospective focus of the jurisprudence of the court in constitutional law more generally⁹²² and the clear receptivity of the Court to arguments that apply limitations periods to certain aboriginal claims for damages for past conduct.⁹²³

It will be argued that the courts are drawing from the past to develop normative standards for the present. There is no sense that the Court is encouraging a return to an earlier relationship but is

gently guiding the parties to a modern relationship that offers a better chance to balance aspirations and claims and to address the legacy of a difficult and contested history. An example can be seen on the jurisprudential commentaries on the Royal Proclamation of 1763- there is no suggestion that the instrument is directly applied as a matter of modern Canadian law, though the principles it embodies have clearly been incorporated into the common law.⁹²⁴ This is not the place to examine the development of the legal framework in detail, as that will be attempted in Part 2. The key point is that the deep tensions concerning how to understand history, the survival of claims, the foundation for normatively and legally sound claims and the relationship between time and the law are all related to modern choices about crafting the jurisprudence to respond to indigenous claims.

These various modes of engagement with the past are very important for understanding the judicial paradigm that appears to be emergent in the jurisprudence of the Supreme Court of Canada. This jurisprudence is strongly prospective, though historically sensitive, and primarily attuned to the interests and needs of people who are alive and deliberating today. While the Supreme Court of Canada frequently uses the language of continuity, the focus on “activities” and “practices” is simply not seen in the prior jurisprudence and academic commentary. These notions capture the facially contradictory notion of a “modern law of aboriginal rights”.⁹²⁵ The strands of scholarship that been considered to this point are united by the idea of turning to the past to develop normative standards for the present.

While the proposed “modern” theory of aboriginal rights will be set out in more detail in the second half of this thesis, it may be helpful to set out an interpretation of the theory of aboriginal rights as it may have been understood in the early years of Canada’s constitutional history.⁹²⁶ This will draw extensively on the work of the New Zealand School of legal history.⁹²⁷ It is important to register the immediate caveat that this account does not rely significantly on aboriginal visions of the nature of this legal framework. The primary reason for this is that the leading theories of common law aboriginal rights are built largely on the jurisprudential framework built up by courts in the common law tradition. The core argument, reflected best in

the seminal work of Brian Slattery, is that a body of Imperial constitutional law, in the nature of “inter-societal” rules emerged in the context of deciding the consequences of the reception of English common law into territories that were acquired by various methods such as conquest, cession or settlement.⁹²⁸ While there are differences between leading scholars, primarily pertaining to the prerogative authority of the Crown, related to the mode of acquisition, the general presumption is that a legal system that existed before the date of reception would continue in force unless changed by a valid colonial legal instrument.⁹²⁹ This is more generally called the doctrine of continuity. Common law scholars differ as to whether it is legal systems as a whole or the property rights that are created by those legal systems that are protected by the doctrine of continuity.⁹³⁰ It is generally interpreted as supporting a common law property right to the traditional lands of an aboriginal group that was present at the date of sovereignty.

This approach to the doctrine of continuity is reinforced by the effect of protective instruments such as the Royal Proclamation of 1763.⁹³¹ This instrument barred non-Indigenous subjects from acquiring title directly from an aboriginal group and set up protective procedures for the acquisition of title by the Crown. As a matter of colonial practice, we also see the Imperial government reserving authority to deal with Indian lands to the central administrators in London. The net effect of the common law and protective Imperial law and policy is that rights that were protected at the outset are continued unless they are expressly taken away. While extinguishment by a legislative act was legally possible, the normal mechanism for dealing with the continuing rights of aboriginal peoples was the treaty process.

The full implications of the theory of continuity were set out with conceptual rigour in the work of Slattery and have now become well-established as the “standard model” of the common law of aboriginal rights.⁹³² It is a compelling vision insofar as it assumes that the Crown was acting within a legal framework that corresponds with current thinking on just treatment. However, recent scholarship makes it clear that past legal practice did not always correspond to this vision.

An interesting alternative analysis is developed by David Yarrow.⁹³³ As noted previously, he argues that rules of reception operated so that “...it became a single body of law that limited or displaced the scope and possibility of indigenous law.”⁹³⁴ Walters has also shown that despite the initial discomfort with applying mainstream law to matters internal to an indigenous group, this discomfort was usually resolved on the basis that any indigenous law was unrecognizable to the mainstream system.⁹³⁵ This result was undoubtedly related to the increasing influence of an “evolutionist and stadial view of history”⁹³⁶. Yarrow recommends rejection of reliance on reception arguments in favour of a current pluralistic approach.⁹³⁷

As illustrated by the scholarship of McHugh, it now seems plausible, as a pure question of historical interpretation, that the rules of reception of English law were not intended to regulate the treatment of indigenous societies but were intended to regulate the relations of settlers inter se.⁹³⁸ The relations of the Crown with aboriginal peoples passed through two distinct stages, neither of which was regarded as creating enforceable rights that were justiciable in a common law court. The assertion of authority over indigenous peoples was regarded as a non-justiciable act of state. Such relations were regarded as a matter of policy and political expediency. In particular, the notion of a right to the land itself is now generally regarded as entirely modern.

Lisa Ford, in a landmark exploration of the early relations between settlers and the indigenous peoples of Georgia and New South Wales, charts the progress from a general acceptance of legal pluralism to a rapidly hardening notion of “perfect settler sovereignty”.⁹³⁹ Speaking of Georgia, but in a passage that would apply to both jurisdictions- “...Jurisdictional practices followed an older logic, premised on the contingencies of early modern empire rather than the modern notion of statehood, rooted in middle-ground conventions of indigenous-settler reciprocity, and in every way inconsistent in its conception and execution.”⁹⁴⁰ In each jurisdiction, and in each case largely by evolution of the operation of criminal law, a hardened notion of jurisdiction emerged which left little room for previous practices of legal pluralism- “These rights could be delegated to indigenous peoples as a matter of expedience or humanity, but indigenous sovereignty was an illusion, Indian land rights and jurisdiction derived wholly from the state.”⁹⁴¹

When we turn our attention back to Canada, the legal situation is rife with ambiguity. For example, there are deep disagreements as to whether the Royal Proclamation of 1763 continued as a binding legal instrument after the Quebec Act, 1774.⁹⁴² Whatever the answer to that question, there is no doubt that several of its key principles were absorbed into colonial practice and gradually came to be regarded as obligatory. However, it is important to remember that the Proclamation was clearly regarded as a transitional instrument “...until Our Further Pleasure be Known.”⁹⁴³ It was also clear that any rights arising from this instrument could be overridden by valid legislation. Many questions remain about the particular authority held by various colonial legislatures, the status of royal ordinances and the impact of the Colonial Laws Validity Act.⁹⁴⁴ However, we know from the early American case *Fletcher v. Peck* the protections accorded by the Proclamation and the common law did not prevent colonial authorities from dealing with lands prior to addressing the indigenous claims to such land.⁹⁴⁵

An important influence in how we think about aboriginal rights in Canada today is the trilogy of seminal cases rendered under the leadership of Chief Justice Marshall of the United States Supreme Court in the first half of the 19th century.⁹⁴⁶ Passages from these decisions are frequently cited as support for strong aboriginal land and self-government rights, but the judgments as a whole must be looked at with some caution.⁹⁴⁷ They are increasingly recognised as the source of the Doctrine of Discovery, are primarily oriented to restraining state, as opposed to federal, power over tribes and instituted a strong notion of Congressional plenary power over tribal matters. In the particularly tragic circumstances that led to the invocation of the Court’s authority, the decisions proved to be highly ineffective in preventing the expulsion of the Cherokee from Georgia.⁹⁴⁸ Though there are exceptions, the general trend in Canada has been away from recognising the “domestic dependent nations” approach in the leading jurisprudence.⁹⁴⁹

The Marshall trilogy is also a useful starting point for considering the issue of whether aboriginal rights are internal to the common law or external to its reach. Slattery can be generally seen as developing a legal and constitutional theory that regards indigenous rights as part of the common

law.⁹⁵⁰ Kent McNeil's early scholarship renders the picture more complex by arguing that indigenous peoples might assert collective rights based on generally applicable doctrines of property law, notably the doctrine of common law possession.⁹⁵¹ The seminal American cases rest on the assumption that indigenous legal systems are external to the American constitutional framework in important ways.⁹⁵² The Australian High Court, in *Mabo*, presents a model where indigenous legal systems are protected by the common law but are external to it.⁹⁵³ It will be seen in subsequent chapters that this distinction is very important for considering the scope of protection for indigenous self-government in Canadian law.⁹⁵⁴

The best evidence for how aboriginal rights were conceived in Canada in the early years of Confederation can be found in the various stages of proceedings in the *St. Catherine's Milling* case.⁹⁵⁵ The notable feature of this case is that it extended over several years with the complete absence of aboriginal participation at any stage of the litigation. It was primarily rooted in a federal-provincial dispute over land, reflecting a continuing dispute about the location of the boundary between Ontario and federal territorial lands. Canada presented the argument that land cession in a treaty was effective to convey the underlying title to the federal Crown.⁹⁵⁶ Ontario argued that the treaty removed a burden on the underlying title of the Crown to the benefit of the provincial Crown which had general administration of Crown lands. The judges at all levels responded sceptically to Canada's arguments, preferring to see the aboriginal interest as usufructuary in nature and certainly not sufficient to support a transfer to Canada. Several judges regarded the precise nature of the aboriginal interest to be ambiguous and unnecessary to specify with precision.⁹⁵⁷

Though it is beyond the scope of this thesis to contribute to the resolution of the historical question of precisely how aboriginal rights, including title, were conceived in the early years of Canada's constitutional development, it suffices to say that recent scholarship casts significant doubt on the orthodox view of the "standard model".⁹⁵⁸ Any recognition of strong aboriginal rights was limited, largely temporary and rapidly overtaken by the emergence of "perfect settler sovereignty".⁹⁵⁹ This more cautious approach to the historical reality of aboriginal rights is

supported by the clearly illiberal attitudes that prevailed among opinion leaders and the tepid articulation of aboriginal rights that emerged from cases such as *St. Catherine's Milling*.⁹⁶⁰ With the important exception of British Columbia, the treaty process continued across the country in a generally east to west direction and, as noted by Mr. Justice Hall in the *Calder* decision, it would be tantamount to a fraud if there were no underlying interest that required addressing in those treaties.⁹⁶¹ On balance, the best way to conceive of the aboriginal interest, from the point of view of colonial officials, may be as an inchoate but important barrier to the opening up of the land for general settlement.⁹⁶² When the Crown took surrenders, these were clearly motivated by excess of caution to capture remaining interests, in part to avoid conflict and facilitate the process of settlement, and subject to the ongoing right to exercise traditional activities on lands that were not taken up for public purposes.⁹⁶³ It is submitted that the “cede, surrender and release” clauses bear some analogy to the traditional proprietary instrument of a quit claim.⁹⁶⁴ The Crown accepted a surrender of whatever proprietary interest might be held by the aboriginal group without finding a necessity to define that interest with precision. Indeed, it may not be an inaccurate way to describe the general stance of Crown officials as one of “rights-neutrality”.⁹⁶⁵

However, the state of the law of aboriginal rights in the 19th century is hardly determinative of the content of aboriginal rights, including title, today. Indeed, there are great risks if it is necessary to characterise Canada's history as an unalloyed progression of rights recognition. As noted by the Supreme Court of Canada in *Sparrow*, whatever rights existed were often honoured in the breach.⁹⁶⁶ All that is attempted in this chapter is to demonstrate that recent scholarship casts some doubt on the propositions reflected in the “standard model”. As will be developed later in this thesis, this opens the way for a fresh approach to the notion of aboriginal rights that builds on the “modern” articulation that is increasingly prominent in the Supreme Court of Canada. This, it will be argued, supports a robust spectrum of rights under Section 35, including rights to the land itself in certain cases and a novel approach to aboriginal self-government.

While this thesis argues that there is room to make progress on redress of historical grievances by developing a modern, but historically sensitive, approach theory of Section 35 rights, it is necessary to remain acutely aware of the limits of the law in this field. As Ran Hirchl argues:

“...a polity’s coming to terms with its often less than admirable past, reflect primarily deep moral or political dilemmas, not judicial ones. As such, they ought - at least as a matter of principle- to be contemplated and decided by the populace itself, through its elected and accountable representatives. Adjudicating such matters is an inherently and substantively political exercise that extends beyond the application of rights provisions or basic procedural justice norms to various public policy realms.”⁹⁶⁷

Iverson has recently recommended a “deliberative turn” in efforts to address claims of historical injustice.⁹⁶⁸ Recognizing that there is often profound disagreement about the cause and consequences of historical injustice, he argues that historical injustice poses a deep challenge to deliberative democracy but one that can only be resolved through dialogue.⁹⁶⁹ It will be argued that there is much commonality between this approach and the requirements of “deep consultation” that are developed in the Section 35 Haida consultation framework.⁹⁷⁰

By way of summary, the sheer difficulty of responding to historical injustice has been explored from several disciplinary perspectives, producing conflicting remedial responses. It will be argued that these same dynamics are strongly in play in the development of the Canadian constitutional jurisprudential framework. It is against this backdrop that the development of a modern theory of aboriginal rights is best understood.

Chapter 7 - RECONCILIATION, RECOGNITION AND REDISTRIBUTION

7.1 Introduction

Reconciliation has emerged as a key organizing concept in Canadian aboriginal law.⁹⁷¹ However, it is more common to see emphasis placed on the related concepts of recognition and acknowledgement in the broader normative literature.⁹⁷² To the extent reconciliation is referred to, it is often to make the critical point that calls for reconciliation all too often re-inscribe or reproduce pre-existing power relations. Indeed, it is not too hard to make the case that reconciliation in Canadian law simply means the adjustment of aboriginal peoples to the requirements of the constitutional system of the Canadian state. To use the terminology offered by Mark Walters, what is envisaged is “one-way reconciliation” rather than the “two-way reconciliation” he argues is normatively required.⁹⁷³ Some others seem to blend the concept of reconciliation with the fuzzier concept of the balancing of conflicting rights claims. Others see reconciliation as more of a procedural ideal.⁹⁷⁴ In this sense, a reconciliatory process is one that depends on the direct negotiation of the affected parties rather than a non-reconciliatory process such as litigated contests about rights.⁹⁷⁵ On the other side of the debate, it is argued that reconciliation must refer to the mutual accommodation of indigenous and non-indigenous legal systems. Scholars from very different perspectives share some degree of scepticism about how much room for manoeuvre there is for the mutual reconciliation of these different systems.⁹⁷⁶ What is clear is that the ideal of reconciliation is hardly a self-executing norm and that a range of alternative interpretations are available. As a general normative principle, it will be argued that as much room as possible must be made for “two-way reconciliation” if the normative aspirations of aboriginal peoples are to be accorded proper respect.

In this section, the value of reconciliation will be assessed in tandem with two other closely related values- recognition and redistribution. A detailed consideration of how reconciliation has been characterized by the Canadian courts will be deferred to the next Part. At this stage, it suffices to say that while reconciliation has played a central role, it has been articulated in a

variety of potentially contradictory ways over time. It will also be important to reassess the importance of the value of reconciliation in light of the constitutional mandate to pursue recognition and affirmation of existing aboriginal and treaty rights.

7.2 The Concept of Reconciliation

Three key themes emerge from the political theory literature on reconciliation. First, it can be seen as an inherently conservative value that privileges the status quo and prevents fundamental challenges to prevailing political and social norms. Second, it is argued to be a concept that is so rife with inherent conceptual ambiguities that it has limited normative promise as a guiding ideal. Third, it is said to exist in a precarious relationship with arguably more fundamental values such as recognition and redistribution.

The inherent conceptual ambiguity of the concept of reconciliation is a good place to start. There are variable and conflicting meanings of reconciliation. There is obviously a huge difference between counselling an aboriginal group to reconcile themselves to the status quo, including the sovereignty of the Crown, and recommending the reconciliation of indigenous and mainstream systems of law. The conceptual looseness of the notion of reconciliation raises the question of whether it is what political theorists call an “essentially contested concept”.⁹⁷⁷ This may be one of the reasons that McHugh argues that we may “look back in scorn” on our reliance on the concept of reconciliation, just as we now do so with concepts such as assimilation.⁹⁷⁸

There is obviously a huge difference between the two reconciliatory possibilities set out above. The first is normatively quite unattractive and the second will be seen to be laden with extremely challenging questions about the interaction of complex, diverse, contested and rapidly changing legal systems. We are still struggling to develop both the normative and practical content of the goal of reconciliation. Sometimes it seems to amount to a broad injunction to simply “balance” conflicting interests.⁹⁷⁹

It is interesting that many of the most thoughtful analyses of reconciliation come from Australia.⁹⁸⁰ This is, without doubt, related to the key role that reconciliation has played in structuring public dialogue about the relationship between indigenous peoples and the state. It has also spawned concepts such as “practical reconciliation” which emphasize the priority of “closing the gap” on the social, economic and health conditions between indigenous and non-indigenous Australians.⁹⁸¹

P.E. Digressor argues that, with few exceptions, political theorists have ignored the concept of reconciliation.⁹⁸² When it is defined it tends to involve putting aside the past in a manner which is mutually agreeable.⁹⁸³ He contrasts this with the more agonistic conception of reconciliation developed by Schaap:

“The aspiration to pursue reconciliation is an essential condition for constituting and maintaining politics, but at the same time to achieve it is to preclude or circumscribe politics. Consequently, visions of reconciliation that rely on the metaphors of healing, restoration, or the settling of accounts abridge the space for an agonistic politics by claiming a final solution or settlement, or else they presuppose that which political reconciliation is trying to create (a political community). These visions seek to contain the risks of politics. In contrast, Schapp argues that political reconciliation is both an essential aspiration and an impossible achievement.”⁹⁸⁴

Schaap has written what appears to be the most comprehensive analysis of the value of reconciliation from a political theory perspective.⁹⁸⁵ His big concern is the tendency for participants in political practice to link notions of reconciliation with finding “consensus” and “putting aside the past”. He argues that

“...Rather than leading to reconciliation of social conflict, the privileging of consensus depoliticizes the terms within which politics is actually enacted. In particular, rather than understanding political conflict in terms of the drawing of constituencies of friend and enemy, political conflict is represented in moral terms of right and wrong. This contributes to increasing resentment and hostility on the part of those whose perspectives

are marginalized, excluded or assimilated by the hegemonic terms of political discourse.”⁹⁸⁶

Part of the process of privileging consensus is the narrowing of political debate to focus on matters which are cognizable under the local constitutional order. In this light, Schaap draws a firm distinction between constitutional law and what he calls “political reconciliation”. In the agonistic play of forces he is invoking, a dialogue about political reconciliation must be open to discussion about extra-constitutional matters:

“Constitutional law, in contrast, must represent the identity of the people as already existing in order to establish its own legitimacy. Law tends, in this way, to undercut political reconciliation by overdetermining the terms in which it can be enacted. Consequently, we cannot entrust the task of sustaining reconciliation to a legal constitution but must invoke the freedom exemplified in the act of constitution to sustain a reconciliatory politics in the future.”⁹⁸⁷

While the prose is rather opaque in this passage, Schaap seems to be invoking broader notions of political reconciliation to suggest processes that deeply challenge existing constitutional orders. He relies on examples from post-apartheid reconciliatory processes in South Africa and the Australian movement for adoption of a makaratta or national treaty.⁹⁸⁸ Useful comparisons might also be made to the advocacy of treaty federalism or treaty constitutionalism in Canada.⁹⁸⁹

For Schaap, a political conception of reconciliation is both a goal and a means to understand that the goal is ultimately unattainable. He works from a conception of political society that admits deep value pluralism and the likelihood of continued deep disagreements about fundamental issues. He regards the legitimacy challenge posed to the settler state as a paradigmatic example of agonistic conflict:

“If reconciliation is to be conceived politically, it should be conditioned by an awareness of its own impossibility. Consequently, it is a political mistake to think of reconciliation

in terms of the restoration of moral community. For, on this account, the transmundane memory of a prepolitical community is posited as an ideal future possibility towards which the existing political association should be brought as close as possible. The telos of a harmonious community (in which politics has been overcome once and for all) provides the rule by which the success of the reconciliation in the present is gauged. But positing reconciliation as the ultimate end of politics in this way obscures the political nature of the terms within which it is enacted- the exclusions on which it is predicated. In contrast, attending to the risk that a conflict might turn out to be irreconcilable brings the politics of reconciliation back into view.”⁹⁹⁰

Schaap relies on Patton for the argument that “if the abandonment of extended terra nullius in international law supports the case for Australian recognition of native title, it is difficult to see why the recognition of native title does not in turn threaten the legitimacy of the British claim to sovereignty.”⁹⁹¹ This produces the “...ongoing legitimization crisis of the post-colonial state: its inability to recognize Indigenous sovereignty in retrospect without thereby forfeiting its own claim to legitimacy ...and hence its right to decide that question in the first place”.⁹⁹² From the perspective of political reconciliation, the development of native title doctrine in Australia might be regarded as an expansion of social recognition, but “...from the perspective of aboriginal customary law it appears as violent appropriation.”⁹⁹³

Short also writes from a critical perspective that counsels against a tendency to link reconciliation with the building of consensus.⁹⁹⁴ His analysis is organized around a tripartite classification of approaches to reconciliation, which includes:

“Simple coexistence”, whereby former enemies merely cease hostilities.

“Liberal social solidarity” or “democratic reciprocity” which refers, not just to an end to hostilities, but to a situation where citizens respect each other and seek to create space to hear each other out, enter into give-and-take on public policy, build on areas common concern, and forge mutually acceptable compromises (Crocker, 2000, 108)

A “shared comprehensive vision of mutual healing, restoration and mutual forgiveness”. This “more robust” conception is often attributed to the South African and Chilean processes (Shriver cited in Crocker, 2000).⁹⁹⁵

These move progressively from “thin” to “thicker” conceptions of reconciliation. He argues that there are both moral and practical reasons to support the first conception in the case of indigenous-state reconciliation. Short is concerned that the “thicker” conceptions of reconciliation presume the legitimacy of the settler state and that “...such an approach presupposes exactly what is in question”.⁹⁹⁶ He is attracted to the notion of “genuine reconciliation” developed by Tully but concludes that there is “...little likelihood of such treaty federalism in Australia”.⁹⁹⁷ Ultimately, he calls for a new treaty which will be less concerned with addressing the “claims” of indigenous peoples but addressing the problems of settler state sovereignty.⁹⁹⁸ He concludes that there are no “conceptual obstacles” to this approach to reconciliation, though he is well aware of the practical challenges that are posed by such an ambitious conception of reconciliation.⁹⁹⁹

Muldoon, writing within post-colonial theory, shares the view that any notion of a final reconciliation of interests or positions of disparate participants is an illusion.¹⁰⁰⁰ However, he stresses the gains that may arise from the process of engagement itself. The parties might come to develop respect for one another and their disparate worldviews.¹⁰⁰¹ The “very performance” of agonistic debate might bind opponents together. It is a process of negotiation that aspires to but never achieves “mutual recognition and understanding.”¹⁰⁰² However, Muldoon cautions that great barriers prevent achievement of this aspiration-“The precondition for a genuine fusion of horizons between the self and the other is an emancipation from the larger structural constraints, the asymmetrical relations of power, that place unseen limits on the possibility of constructive dialogue.”¹⁰⁰³ These limits and this reality mean that there is “...no such thing as a post-colonial society in which the violence of the past can be finally forgotten or overcome.”¹⁰⁰⁴

As noted previously, Ivison argues that a dialogical approach is especially promising for dealing with grievances founded on historical injustice.¹⁰⁰⁵ He examines the specific issue of consideration of indigenous grievances in Australia:

“Although it may well have been founded unjustly (most states fall into that category) Australia has embedded in its public life a set of broadly legitimate rules of basic procedural justice and fairness enforceable by the state, its agencies and the legal system as a whole. It also has a relatively well-developed and robust civil society. However, from the perspective of indigenous peoples, at least as I understand their arguments, many of these background rules and norms have been shaped and distorted by historical injustice.”¹⁰⁰⁶

Iverson examines, as a case-study, the reconciliation movement in Australia, especially in light of the apology provided by the Prime Minister for the “stolen generations”.¹⁰⁰⁷ He does not hold much hope that dialogue under the rubric of reconciliation is likely to render forgiveness either an appropriate or an attainable goal.¹⁰⁰⁸ However, he adopts an explicitly forward-looking stance to how historic injustice should be considered- it “...should aim at promoting the conditions in which the legacy of historical injustice is not allowed to distort the capacities of present and future generations to lead decent lives.”¹⁰⁰⁹ He advocates the development of institutions to promote dialogue about the injustices of the past and suggests a broader range of deliberation, including various segments of civil society, which addresses issues both within and between groups.¹⁰¹⁰ His core argument is that this type of dialogue might create the conditions that could support deeper compromise and institutional innovation.¹⁰¹¹ His empirical examination of the debate in Australia does not support the conclusion that discussions about reconciliation have yet produced much movement in this direction.¹⁰¹² As a result, he calls for steps to be taken to broaden dialogue about reconciliation so that it encompasses a wider range of “decentred” public conversations, consideration of catalytic institutional changes such as a Truth and Reconciliation Commission and electoral reform to strengthen the indigenous voice and attention to the value of rebuilding trust.¹⁰¹³

The analysis of Australian scholars on reconciliation is clearly linked to deeper scepticism among many academics about the possibilities of finding justice for indigenous peoples within the settler state and rejection of state-sponsored solutions. The strong comments of Tully on the impossibility of internal self-determination come to mind.¹⁰¹⁴ The tentative suggestions by Iverson offer the most promising path forward, but even here there is a firm awareness of the difficulties in building the kind of trust that is required to move forward.

Returning to Canada, Walters and Newman have offered especially helpful analysis of the goal of reconciliation. Their comments on the development of the jurisprudence will be addressed in the next part of this thesis. Walters, in particular, focuses on the difficulties that are embedded in the concept of reconciliation. It is consistent with a notion of “resignation” and can evolve in a highly one-sided fashion.¹⁰¹⁵ In contrast, he calls for “two-way reconciliation”, which operates at a systemic level, and promotes a movement from governance by power to governance by law.¹⁰¹⁶ Reconciliation is a “moral idea” which reaches its apogee within a concept of law that is based on the normative promise of a society’s highest ideals:

“So long as law is premised upon a narrative to which its subjects cannot relate, one that refuses to respect their common humanity, then it is not “law” in any meaningful sense. Subjugated peoples cannot participate in or identify with the national moral narrative that founds legal meaning, and so the power that is brought to bear upon them in the form of law is only law in a thin or positivist sense.”¹⁰¹⁷

In contrast to reconciliation as resignation, Walters advocates a conception of reconciliation that is based on relationship.¹⁰¹⁸ Indeed, he argues that reconciliation is best conceived as an aspect of legality- a legality that recognizes the pluralistic foundations and reality of Canadian law.¹⁰¹⁹ In his later work, he stresses the importance of aspiring to the inter-dependent forms of shared legality that typified the earliest engagements between indigenous peoples and newcomers in Canada. In his view, these early engagements accorded only very limited rights to the Crown.¹⁰²⁰ While it is acknowledged to be only a step in the right direction, Walters stresses the importance of the duty to consult as a possible vehicle for promoting a relationship-based conception of reconciliation.¹⁰²¹

Likewise, Newman charts the emergence of various conceptions of reconciliation and strongly supports the linkage between reconciliation and the forging of relationships among people with disparate normative outlooks.¹⁰²² However, he warns that this “...presupposes a plurality of normative systems, but what we cannot meaningfully have is a plurality of simultaneously valid

approaches to the interaction of any such plurality of systems. We must develop shared principles...”¹⁰²³

In summary, a number of repeated concerns appear about the risks of the value of reconciliation. These include a concern about finality¹⁰²⁴, a concern with the tendency to support the status quo¹⁰²⁵, the presence of implicit hierarchies within the concept linked to conflicting linguistic nuances¹⁰²⁶, the risk of limiting reconciliation to a notion of resignation¹⁰²⁷, a tendency to equate reconciliation with any negotiated process¹⁰²⁸ and a related tendency to default to a narrow sense of balancing.¹⁰²⁹ What these concerns mean for the core role that reconciliation plays in the elaboration of Canadian law will be considered in more detail in Part 11 of this thesis. At this stage it will be important to consider values that are more frequently found at the heart of normative analysis- recognition and redistribution.

7.3 Recognition v. Redistribution

The influential writings of Charles Taylor are generally credited with the high degree of attention that has been paid to the value of recognition in modern political thought.¹⁰³⁰ Taylor sees recognition as essential to the development of personal autonomy, as developing in dialogue between individuals and as needing to be institutionalized to reflect the deep diversity that exists in most societies.

However, Festenstein notes that recognition is an ambiguous term.¹⁰³¹ It requires self-knowledge and knowledge of others. When it is genuine it can provide “the social basis of self-respect”.¹⁰³² He develops the wonderful metaphor that we “grow towards recognition”.¹⁰³³ Other theorists draw attention to other aspects of recognition. Political theorists often contrast “active” and “transformative” recognition.¹⁰³⁴ Jung argues that state recognition always transforms but recognition can only ever be partial.¹⁰³⁵ Indeed, her theory of critical liberalism implicates the state at a far more fundamental stage- “Politics constitutes difference long before it gets around

to reconciling difference.”¹⁰³⁶ A related concern can be that state recognition can amount to “misrecognition” if it is not responsive to the actual claims of the group that is recognized.¹⁰³⁷ A clear exposition of “recognition scepticism” can be found in the work of Patchen Markell who argues that acknowledgement is a preferable goal to recognition.¹⁰³⁸

A second aspect of the political theory of recognition is the heated debate involving its alleged conflict with redistribution. The central vehicle for the development of this alleged tension has been the Fraser- Honneth debate but the fundamental ideas have pervaded the entire literature.¹⁰³⁹ Fraser represented the traditional view that so-called “identity politics” could distract attention from the redistributive aims of progressive politics. Elizabeth Povinelli has broadened the point to argue that “the cunning of recognition” was to distract political attention from a broader agenda of transformative change.¹⁰⁴⁰ Honneth argued that the identity claims of marginalized groups required remedy, including recognition, and that those remedies invariably involved the redistribution of resources.

These are not merely academic debates. In states like Canada and Australia it is not uncommon to see assertions that the “rights-agenda” should be downplayed in favour of devoting proper attention to “closing the gap”¹⁰⁴¹. This has been a particularly prominent aspect of the political debate in Australia. It is at the heart of the development of the notion of “practical reconciliation”¹⁰⁴². In simple terms, it asserts a priority for distributive and well-being issues over resolutions of rights claims.

Owen and Tully provide an excellent recent analysis of the tensions that are seen between recognition and redistribution.¹⁰⁴³ They note that multiculturalism emerged at the same time as neo-liberal attacks on welfare- this makes it easy to slip in to concerns about diversion or complicity.¹⁰⁴⁴ They quote from one of the prominent political theory works challenging multiculturalism, Brian Barry’s *Equality and Difference*:

“Pursuit of the multiculturalist agenda makes the achievement of broadly based egalitarian policies more difficult in two ways. At a minimum, it diverts political effort away from universalistic goals. But a more serious problem is that multiculturalism may very well destroy the conditions for putting together a coalition in favour of across-the-board equalization of opportunities and resources.”¹⁰⁴⁵

Tully and Owen begin their analysis by contrasting struggles for recognition and struggles over recognition. The latter captures the notion of struggling over “...the prevailing inter-subjective norms of mutual recognition”.¹⁰⁴⁶ When seen in this broader way, it is a mistake to set up simple “either-or” choices between recognition and redistribution. Recognition always has a redistributive element and redistribution always has a recognition element.¹⁰⁴⁷

For Tully and Owen the key insights flow from the adoption of a political as opposed to a theoretical approach to politics. Because people “...do not pre-exist with their attributes and negotiate in some unmediated or ascriptive pre-dialogue realm”¹⁰⁴⁸, we must listen to the claims that people are making in actual cases. There is no theoretical solution to the proper balance between desirable goals. In addition to rejection of a theoretical approach, there is an “equally basic rejection of the presumption of finality.”¹⁰⁴⁹ The model recognizes that there are always asymmetries in power and that these can “...block the most oppressed groups from getting to negotiations in the first place and then structure the negotiations if they do.”¹⁰⁵⁰ But there is always a certain room for manoeuvre and when dialogue does occur it can modify the positions taken by the participants. For Tully and Owen, “Reconciliation is thus not a final end-state but an experiential and experimental activity that inevitably will be reactivated from time to time.”¹⁰⁵¹

In language that is strongly evocative of how Canadian courts have described the duty to consult and accommodate, Tully and Owen argue that it:

“...follows that the primary orientation of reconciliation should not be the search for definite and finite procedures and solutions but, rather, the institutionalization and protection of a specific kind of democratic or civic freedom. The primary aim will be to

ensure that those subject to and affected by any system of governance are always free to call its prevailing norms of recognition and action coordination into question, to present reasons for and against modifying it, to enter into dialogue with those who govern and have a positive duty to listen and respond, to be able to challenge the prevailing procedures of negotiation in the course of the discussions, to reach or fail to reach an imperfect agreement to amend (or overthrow) the norm in question, to implement the amendment, and then to ensure that the implementation is open to review and possible renegotiation in the future. This is the fundamental democratic or civic freedom of citizens- of having an effective say in a dialogue over the norms through which they are governed.”¹⁰⁵²

This is an approach to reconciliation that is capacious enough to place prevailing norms about recognition and redistribution firmly on the table. It binds the parties to dialogue unless and until failure of the democratic process justifies direct resistance. This political approach to dialogue holds the promise of generating a sense of belonging among citizens from very disparate backgrounds. This approach to reconciliation is advocated as strongly preferable to “legislating from above”.

In a response to his earlier work,¹⁰⁵³ Shaw argues that Tully is inappropriately bound to notions of “inclusion” and “recognition” in a fashion that limits the strategic options of indigenous peoples.¹⁰⁵⁴ This is linked to her earlier-noted criticism that his work is overly state-centric.¹⁰⁵⁵ Shaw draws inspiration from indigenous political theorists who counsel against engagement with the state.¹⁰⁵⁶ She zeros in on the value of reconciliation as a key basis for concern, especially as that notion has been used by the Supreme Court of Canada in cases like *Delgam’uukw*¹⁰⁵⁷:

“This reliance on the logic and principle of reconciliation, importantly, shifts the attention away from the tangle of assumptions that grounded the original decision. Rather than passing judgment on the historical treatment of Indigenous peoples – requiring engagement about their social and political systems, relative levels of “development”, and so on, - the emphasis shifts to the question of what procedures should be used now to recognize Aboriginal claims and to reconcile them with existing legal/sovereign discourse. The question faced by the court on these terms is not one of competing sovereignties, the sovereignty of the Crown is the assumed ground upon which Aboriginal title comes to have meaning...”¹⁰⁵⁸

“In other words, because Canada has committed itself to recognition and reconciliation in the Constitution, Canada (the Supreme Court, in this instance) must now develop a way to do this. What is not in issue, however, is Canadian sovereignty.”¹⁰⁵⁹

If the problem is seen as a contest between indigenous and Canadian sovereignty, the deployment of reconciliation is seen as an “elegant reframing of the problem.”¹⁰⁶⁰ It does so by seemingly opening up the possibility of claims against the state at the same time that it “brackets” how deep those claims can reach. By refusing to address the claims that are actually made by indigenous peoples, and in the terms they choose to present them,¹⁰⁶¹ the courts are engaging in an “archetypical practice of sovereignty.”¹⁰⁶²

Shaw does not conclude that these developments will necessarily work to the detriment of aboriginal peoples. Much will depend on how the precise contours of the doctrine of aboriginal title develop in subsequent jurisprudence¹⁰⁶³. She is concerned about the inherent limit on title and the possibility of justifiable infringement but sees possibility in the sovereign ability of aboriginal groups to control what happens on aboriginal title lands.¹⁰⁶⁴ At the end of the day, Shaw is concerned that it is the Canadian court system, not indigenous decision-making procedures, which will determine how aboriginal title lands are used.

Interestingly, Shaw also raises concerns that focus on rights claims might distract communities from more pressing issues:

“...Once again the concerns about the health of the communities and the immediate social and material solutions about the health of Indigenous peoples face would potentially be put on the back burner. In this way reading Indigenous demands as being for recognition rather than, say, for resources to address the material consequences of colonization, potentially has both immediate and long-term effects not only on the allocation of resources within these communities but also on the future political structures and possibilities for their communities.”¹⁰⁶⁵

This risk is linked to concerns about indigenous claims being equated with those of non-indigenous cultural groups, risks that communities might become dependent and even concern that the Canadian state might not be able to sustain the fiscal challenge of financing compensatory claims to indigenous groups.¹⁰⁶⁶ On balance, "...these groups are perhaps better served by insisting on their resistance to recognition, by remaining unrecognizable."¹⁰⁶⁷ This is not seen to be a resistance to politics, only a resistance to a particular type of politics that is largely controlled by state institutions.

The relationship between reconciliation, recognition and redistribution and the deep conceptual and practical overlap between these concepts helps to explain why it is so difficult to frame normative goals to evaluate the relationship between indigenous peoples and the state. At a very general level, notions such as treaty federalism and egalitarian liberalism can be used as regulative ideals, but the concepts explored in this section require more fine-grained analysis. Tully and Shaw, in particular, demonstrate that much will depend on how particular doctrines, such as those of aboriginal title and the duty to consult, actually evolve in practice.¹⁰⁶⁸ Theory analysis can help avoid predictable pitfalls, such as the false binary choice between recognition and redistribution. Fraser's more recent work attempts to break down this binary divide by showing that both recognition and redistribution contribute to the deeper normative value of effective participation.¹⁰⁶⁹ Jung expands further on the false dichotomy between recognition and redistribution by arguing that rights claims can properly be responsive to failures of inclusion just as much as improper exclusion.¹⁰⁷⁰ Most importantly, Walter's insistence that proper reconciliation can only be conceived as a two-way process of deep engagement helps to provide content to a normative goal.¹⁰⁷¹

When the relationship between reconciliation, recognition and redistribution is considered in this broader fashion, it makes sense to look closely to the duty to consult to assess whether it generates sufficient resources to support effective inter-cultural dialogue.¹⁰⁷² The political theorists that have been considered in this section would likely insist that this assessment must take the vantage point and worldviews of indigenous groups into account, including the role that

is played by indigenous legal traditions. Tully persuasively argues that there is no theoretical solution, no algorithm, which captures the appropriate balancing of the complex values that are in play. The solution can only be political. As Yarrow concludes "...Time is an essential resource for mutual comprehension..."¹⁰⁷³

CHAPTER 8 - CAUSATION

While it is not often treated as a subject of normative analysis, a striking common feature of much disparate normative analysis is the explicit and implicit reliance on theories of causation of harm. Particular approaches to normative theory, on closer examination, are highly dependent on hypotheses about the causation of harm experienced by aboriginal individuals and groups.

Gibson argues that it is very important to get causes right to find solutions to social policy challenges in the present:

“What about the insights available to ordinary people from plain common sense? Clearly there are problems here. What are the reasons? Theories of root causes can assist in the definition and understanding of problems, theories are not the appropriate ones this approach breaks down. Thus, if unsatisfactory outcomes are attributed to the conventional suspects – racism in white society, victimhood, history, and lacks of funding and of self-government – then that analysis leads to one direction. That is the one that governments have followed, as it happens. But what if the more important reasons are otherwise? If other “root causes” are suggested – constitutional treatment of Indian people differently from others in law, finance and incentives, concentrating governance in an elite, a soft racism society, disincentives to mobility, disincentives to work and the like – then completely different theories of response might follow. None of these possible explanations are new, but there is a great reluctance to pursue them.”¹⁰⁷⁴

The dominant position in the normative literature is that current harms are the direct legacy of hundreds of years of colonialism.¹⁰⁷⁵ As an example, Borrows’ recent treatise on indigenous legal traditions is replete with references to the causation of social harm in indigenous communities. It is variously described as economic dislocation as a result of colonialism¹⁰⁷⁶, thorough disconnection of First Nations from other Canadians by the Indian Act and associated policies¹⁰⁷⁷ and the disruption of indigenous legal systems making indigenous peoples “experience conditions that resemble a legal vacuum”¹⁰⁷⁸. The fact that Canada continues to benefit from the resources that were taken from indigenous peoples is described as “perhaps the underlying cause of conflict”.¹⁰⁷⁹ He describes the typical experience of an aboriginal person in

Canada as one of “trauma” and draws on expert social scientific opinion to support the remedy of encouraging aboriginal individuals and communities to return to healthy relationships in the present.¹⁰⁸⁰ Such remedies are designed to “heal the troubled relationship”¹⁰⁸¹ and to supply an “inner means to cope”.¹⁰⁸² In other words, Borrows firmly embeds his recommendations for greater mainstream acceptance of indigenous legal systems in a theory of cause and remediation of harm. However, he recognizes that “If Canadians do not recognize that indigenous peoples have experienced acute trauma they will likely dismiss much of this book’s thesis.”¹⁰⁸³ While he shares the view of commentators like Gibson that isolation of communities under the Indian Act and isolation from the mainstream economy are significant contributors to the conditions currently experienced in many aboriginal communities, he embeds these factors in a much broader theory of causation.¹⁰⁸⁴

In general terms, for a variety of commentators, measures that are designed to secure some reversal of colonial policies are presumed to have a commensurate impact on the reduction of harm. In other words, if the removal of self-governing authority led to the kinds of harms that indigenous peoples are suffering today, policies of restoring self-governing authority should set in motion processes to reverse that harm.¹⁰⁸⁵ A particularly influential variant of this type of social theory is the Harvard thesis, which postulates that economic growth is associated with policies promoting aboriginal self-government.¹⁰⁸⁶ Broader versions of this argument are resurgence models, including the revitalization of indigenous traditions, including legal traditions.¹⁰⁸⁷ A primary motivation for such resurgence or revitalization is that it would have a beneficial impact on individual and community well-being. A burgeoning literature, largely drawn from social work and psychology, makes important claims about linkages between strengthening or reverting to ancient indigenous ways of being and individual and collective healing.¹⁰⁸⁸ A competing literature makes similar claims about causation of social harm but identifies the key causal factor as the historical emergence of patterns of individual and community dependency.¹⁰⁸⁹ On this line of analysis, the primary cause of continuing dysfunction is the isolation of individuals and communities from mainstream society and economy. These models are quite unsympathetic to resurgence or revitalization models as this could well have the impact of deepening isolation or creating barriers to integration with the broader society.¹⁰⁹⁰ A

more focused approach to causation of harm relies on empirical research to argue that gaps in educational attainment provide the best explanation for the persistence of gaps in social well-being. We have previously seen that John Richards makes a detailed case for the importance of educational attainment as a key variable to predict social and economic success among aboriginal individuals.¹⁰⁹¹

It is clear that disparate views on causation of individual and community harm have direct impact on the advocacy for self-government or rejection of a “rights-agenda” for addressing pressing needs of individuals and communities. The unfortunate thing is that these prescriptions are in fundamental conflict.

The recent decision of the Supreme Court of Canada in *Ipellee*¹⁰⁹², in the course of confirming the *Gladue*¹⁰⁹³ principles for sentencing of aboriginal offenders, demonstrated a clear reliance on some of the various theories of causation of harm set out above. On the whole, the Supreme Court of Canada was prepared to see Canada’s colonial past, and particular policies such as the development of residential schools, as a contributor to the current social and economic malaise of many indigenous people in Canada.

It will be argued that it is important to address causation of harm less as a silent major premise of a normative or legal argument and more as an explicit component of such an argument. Both normative and legal arguments are directed to persuasion. An important aspect of an attempt to persuade, in the field of aboriginal claims and rights, is a social theory of causation and remediation of harm. It is notable that when the Supreme Court of Canada declined to rule on aboriginal self-government in the *Delgam’uukw* decision it essentially called for future litigants to bring social policy argumentation explicitly into their legal arguments concerning self-government.¹⁰⁹⁴ It can also be expected that social policy arguments about harm, both in terms of cause and remedy, will be relevant to debates about economic development in aboriginal

communities.¹⁰⁹⁵ They will also be relevant for any proposals that address property ownership on aboriginal lands.¹⁰⁹⁶

It is important, however, to be aware that the empirical research on theories of causation is at an early stage of development and that different theories of causation have strongly incompatible elements. Some empirical assessments of the Harvard Thesis have been undertaken but results are largely inconclusive.¹⁰⁹⁷ There has been very little empirical assessment of the impact of self-government arrangements in Canada, but scholars in Australia, while not looking specifically at self-government, have made little headway in isolating the factors that contribute to individual or community well-being.¹⁰⁹⁸

A strong argument can be made for the explicit consideration of “policy incubators” or opportunities to test the implications of different types of social organization on the well-being of individuals and communities.¹⁰⁹⁹ Questions about self-government, sovereignty and culture raise testable questions of social policy and ought not to be addressed solely as normative or legal issues. Borrows recommends that we adopt the spirit of a “social laboratory” to test innovative ways to address social harm.¹¹⁰⁰ Hendrix advocates a “sense of experimentation”.¹¹⁰¹

From this perspective, it would make sense to not reject (or for that matter, accept) a theory of causation and remedy without careful consideration of evidence. This suggests the need to keep as many possible plausible theories of causation on the table and to allow for their possible cumulative impact.

An important recent example of work which elaborates on the causation of social harm is *Finding Dassha* by Stephenie Irlbacher-Fox.¹¹⁰² She argues that the Canadian state has developed a “dysfunction theodicy” to explain the harms that are experienced by aboriginal peoples and to offer federal claims policies as the only redemptive possibility for addressing such harm.¹¹⁰³ The

work is a richly poetic and thought-provoking reflection on the importance of returning to cultural roots in order to “undo the causes of suffering”.¹¹⁰⁴ Irlbacher-Fox’s analysis can be usefully compared to the work of Australian anthropologist Peter Sutton who offers a starkly disparate diagnosis for the causes of aboriginal suffering.¹¹⁰⁵ This comparison, as well as a consideration of much of the general literature, shows a strong binary cast. Irlbacher-Fox advocates retrenchment from the state and a primary focus on individual and community revitalization of traditional norms of social regulation¹¹⁰⁶, while Sutton argues moving away from a focus on rights and towards highly targeted state interventions to break cycles of dependence.¹¹⁰⁷ In contrast, an argument will be made that stresses the complementary nature of good social policy and the “rights-agenda”. In particular, there is no inherent contradiction between economic development and the “revitalization” agenda.

The importance of theories of causation also lies in the compelling reasons they may provide in supporting innovation on self-government and sovereignty and justifying more systematic support for indigenous legal systems. Rather than being separate from legal analysis, an understanding of the dynamics of the politics of suffering provides sound support for advocacy arguments. It will also be argued that there are strong reasons to support theories of rights and jurisdiction that are fully embedded within the constitutional structure of Canada. This approach may support different but complementary strategies to respond to injustice, may be more likely to encourage cooperation in the search for mutually satisfactory approaches to legal structure and public policy and be more likely to support ties of solidarity and commitment that support long-term programs to address historic and modern injustice.¹¹⁰⁸ This can be seen as a more positive ramification of “Kymlicka’s constraint”.¹¹⁰⁹ Response to injustice is not seen as something that is somehow external to Canada’s constitutional structure but as requiring a range of complementary but different responses to various aspects of the harm that has been experienced by aboriginal peoples.

An interesting related development in Australia is the far more explicit linkage that is being drawn between the “rights-agenda” and the social policy goal of “closing the gap”.¹¹¹⁰

Government departments are now required to file annual reports to demonstrate progress on a wide variety of social policy indicators and the Government as a whole is required to file an annual report on progress towards “closing the gap”.¹¹¹¹ Rather than seeing the pursuit of rights as somehow inimical to this goal, overt efforts are now made to make rights negotiations consonant with good social policy. For example, native title agreements are under review to determine if there are ways to ensure that the recognition of rights contributes directly to the social, economic and health well-being of indigenous Australians.¹¹¹² This is another way of saying that recognition need not be regarded as in conflict with distribution and that both have an important role to play in aspiring to meaningful reconciliation.

In conclusion, different social theories about the causation and redress of individual and community harm might play a strong role in framing arguments about the development of legal and constitutional argument. Careful attention to such arguments might assist in developing a distinctive approach to reconciliation in Canadian law and practice.

CHAPTER 9 - DIALOGUE

One of the most important developments in modern theory is the strong shift that is made towards dialogue. James Tully, who has developed much of his argument through an intensive examination of the Crown-aboriginal relationship in Canada, argues for the preference of “political” theories over theories that have more universal aspirations or are “theoretical” in nature.¹¹¹³ “Political” theories focus on the actual claims that are made by groups seeking justice and stress the agonistic contestation over the rules of social organization. The literature is replete with calls for intercultural dialogue¹¹¹⁴, enhancing the value of participation¹¹¹⁵, and avoiding the risk that political theory can displace democratic dialogue.¹¹¹⁶

One of the key themes that is developed in this thesis is how much these concerns of normative theory resonate with the Haida framework and the duty to consult.¹¹¹⁷ The Supreme Court of Canada, as well as other courts in Canada, has long encouraged negotiated resolution of contested issues between the Crown and aboriginal peoples.¹¹¹⁸ This already moves some distance from the traditional notion of constitutional dialogue in Canada- the dialogue between Parliament and the courts, but something more fundamental seems to be in play¹¹¹⁹. It is easy to discern strands that support the intercultural aspect of the dialogue and insist that it be meaningful. This is connected to a robust debate about the appropriate role of the courts in aboriginal law in Canada.

It is particularly interesting that Tully’s later work makes explicit reference to the kinds of dialogue that are set in motion by the duty to consult as examples of measures that might improve the normative evaluation of a particular constitutional framework.¹¹²⁰ For Tully, it is essential to note that the Constitution cannot be regarded as fixed or final and that contestation is permanently available. But a certain “spirit” of dialogue pervades all of Tully’s work. The notion of intercultural engagement must be genuine. One party cannot set unreasonable preconditions for participation in negotiation processes on the other. The dialogue must be conducted with a real commitment to finding a mutually acceptable solution. It will be seen that these are all

potentially strong features of the duty to consult.¹¹²¹ Indeed, its normative promise largely turns on how much these features are embedded in mutual practice. A mere “check-list” or pure process approach would certainly undo many of the potential gains.

Further guidance on the nature of dialogue can be drawn from the work of Anthony Simon Laden.¹¹²² A key component of Laden’s model of constitutional engagement is the distinction between negotiation and deliberation.¹¹²³ In his model, the logic of negotiation promotes instrumental arguments that can be very detrimental in a highly pluralistic environment.¹¹²⁴ In contrast, “...deliberation involves an exchange of claims among people who regard themselves as partners working out a shared solution to a shared problem.”¹¹²⁵

Deliberation requires some element of trust and a commitment to the long-term maintenance of a relationship.¹¹²⁶ This can be contrasted with the dominant interpretation concerning the importance of compromise in finding a solution. Laden argues that this dominant approach is related to the general adherence to a “theoretical” approach to questions of cultural pluralism.¹¹²⁷ Like any other problem, cultural pluralism is “...a problem that admits of theoretical solution”.¹¹²⁸ Unless we endorse, like Tully, a “political” approach, we will continue to obscure the difference between the logics of negotiation and deliberation.¹¹²⁹ The logic of negotiation¹¹³⁰ is based on the idea that antagonists make claims against each other and these are conceived of as vectors to be resolved. This can provide an incentive for both sides to exaggerate their claims.¹¹³¹ A sense can develop that the claims are irreconcilable.¹¹³² It may generate a hostility to pluralism.¹¹³³ It may push to a perception that binary value choices have to be made- say between recognition and redistribution.¹¹³⁴

According to Laden, “Political approaches avoid these problems because they allow for a different interpretation of competing claims.”¹¹³⁵ Claims are conceived of as proto-reasons.¹¹³⁶ A participant in deliberation “...makes a claim that I think deserves a reasonable response.”

¹¹³⁷This “...opens up a rather different way to understand the role of cultural claims in politics,

and the role of political philosophy in the face of competing claims.”¹¹³⁸ This is because “...deliberation involves an exchange of claims among people who regard themselves as partners working out a shared solution to a shared problem.”¹¹³⁹ In this model “...all parties attempt to work out a shared set of reasons”.¹¹⁴⁰ It is based on relationship “...because of something in our relationship that supports the demand.”¹¹⁴¹ In a deliberative engagement “...the very process of deliberation may involve one or both of us changing our understanding of these matters and thus what claims have authority for us”.¹¹⁴²

Parties to a deliberation aspire to acknowledge the legitimacy of the other party- “Such recognition of legitimacy can, in certain cases, go a long way towards resolving issues generated by cultural pluralism by making those whose claims have been overridden at least feel that they are heard, and belong as full members of the polity.”¹¹⁴³ The agreement that emerges from a deliberation goes no further than expressing “...where each party now stands.”¹¹⁴⁴ It will ideally generate a “certain level of trust”.¹¹⁴⁵

Laden recognizes that there may be reasons, including a difficult historical relationship between the parties, that may prevent discussions having the full character of deliberation, or even may prevent reaching a final agreement on contested issues. There can be barriers that prevent true deliberation but the parties are motivated to generate the circumstances that will promote more deliberative exchanges.¹¹⁴⁶ This will not always be possible and there is no certainty that deliberation will produce an accord, even when there is sufficient trust between the parties.¹¹⁴⁷

The sheer activity of deliberation promises benefits that go far beyond the immediate engagement- “The internal dynamics of good faith deliberation serves to increase rather than erode what trust exists.”¹¹⁴⁸ And- “The very act of deliberation reflects a kind of agreement among the parties to resolve their differences cooperatively and on mutually acceptable terms, to find and develop shared identities that can support acceptable claims.”¹¹⁴⁹ They are engaging together in a shared project.

Laden makes a compelling case that reconciliation is far more likely to emerge from deliberation than negotiation.¹¹⁵⁰ There is no theoretical solution to how the parties should approach their engagement on difficult issues. Parties to deliberation need to work together to develop “...criteria for judging the reasonableness of deliberation”.¹¹⁵¹

The role of dialogue will emerge as a key theme in this thesis. We will see that many issues that have tended to be seen as paradigmatically “theoretical” or “jurisprudential” can only be resolved through dialogue. The work of political theory and philosophy also allows us to frame the interests that are at stake when the courts pronounce their preference for negotiated as opposed to litigated resolution of disputes. What kinds of engagements are more likely to produce mutually satisfactory results? What is the role of the courts in promoting, sometimes even supervising, discussions?

The core point of contact is of course the duty to consult. If the kinds of discussions that have been engendered by the duty to consult have indeed improved the normative landscape in Canada it may be worthwhile to ask how we can maximize the normative gains. The insights of Tully and Laden may be especially important here. Tully reminds us that final resolution of disputes in the presence of deep cultural pluralism might be far too much to hope for.¹¹⁵² Laden’s carefully developed distinction between negotiation and deliberation might be especially productive as a source for using the discharge of the duty to consult to generate trust.¹¹⁵³ Some of the language that the courts use is quite reminiscent of the logic of negotiation.¹¹⁵⁴ There is a lot of concern about the bargaining position of the parties and the need for balance and compromise.¹¹⁵⁵ However, there are also strong hints that the duty to consult is expected to engender the deeper kinds of engagement that might appropriately be described as deliberative in nature.¹¹⁵⁶

Michael Coyle has written extensively on negotiations between aboriginal peoples and the Crown.¹¹⁵⁷ He has argued that in addition to claims negotiations and the rather formal dialogue

that occurs in the courtroom, Canada has seen a rapid increase in a third kind of dialogue flowing from the introduction of the duty to consult.¹¹⁵⁸ While the Haida model is “still far from complete”, this line of jurisprudence has offered a “powerful incentive” and seems to be fostering discussions that open up a “prospect of a dialogue.”¹¹⁵⁹

Another consequence of a focus on dialogue and deliberation is that tools might appear to break down what first appear to be intractable binary choices. The recent work of Gabrielle Slowey on aboriginal economic development provides an excellent example.¹¹⁶⁰ There is a deep tradition in some aboriginal communities to regard economic development and cultural preservation as a binary choice. While recognizing that development can certainly come with costs, Slowey argues that the consultation process might offer opportunities that permit aboriginal groups to exercise agency in a fashion that allows both goals to be pursued simultaneously.¹¹⁶¹

Deliberation can generate commitment to the constitutional norms that the parties share but those norms are permanently contestable as well. It is important to examine the emerging contours of the duty to consult and accommodate in light of the distinction that Laden draws between negotiation and deliberation. Though there are features that fall short of his model, such as the asymmetry in the Crown making the final decision, there are other features that are strongly amenable to the idea of exchange of reasons and deliberation.

Political theory and philosophy offer valuable insights into how dialogue can foster stronger inter-cultural relations in a divided society. Hendrix offers a good example of an approach which places dialogue at the very heart of the quest for justice. The aim of a workable theory is to foster democratic deliberation. This requires exchange of reasons, a strong reliance on consultation with groups that challenge mainstream norms and, most importantly, that the state “...listen carefully and systematically to their concerns”.¹¹⁶² While he recognizes that it may be necessary that the state, from time to time, exercise a veto, the abiding hope is that “...dialogic interaction can take new and unexpected turns.”¹¹⁶³ In other words, rather than seeking abstract definition of

rights, greater promise lies in meaningful dialogue about different worldviews and attachment to land.¹¹⁶⁴

CHAPTER 10 – IS A SYNTHESIS POSSIBLE?

10.1 Introduction

To this point, we have seen that the claims of indigenous people in a so-called “settler” society have received extensive attention from political theorists and philosophers, among others. For a wide variety of interlocking reasons, the circumstances of the original foundation of the nation, and the claims to sovereignty and ownership that followed, have led to a withering critique that is designed to cast doubt on the current legitimacy of the Canadian state. These normative critiques are obviously also intended to create a blueprint for moving forward in a fashion that responds to historical injustice. The actual programmatic recommendations tend to be pitched at a very high level of generality- obtaining consent, engaging in unconstrained dialogue or referring to external standards such as international law.

On the other hand, there is a competing body of analysis that suggests that the accommodations of aboriginal claims have already gone too far and are best replaced by other approaches to dealing with the clear social and economic problems that dominate many, if not most, aboriginal communities. While less prevalent in the academic literature, these opinions have secured a stable foothold in public and media opinion.

This has produced a normative, policy and legal impasse.¹¹⁶⁵ The main objective of this part of the thesis has been to look beyond the fact of impasse to determine if there are ways to steer the debate in a more productive direction. A starting point has been to explore and examine the sheer fact of the binary divide, and scholarly efforts to move past this divide.¹¹⁶⁶ In addition, seven topics have been examined in far more detail. Starting with the issue of cultural difference, we have seen that culture is an insecure foundation as the sole justification for response to indigenous claims but cannot be completely ignored. Legal pluralism is a necessary contributor to any just response to indigenous claims but arguments have been developed to counsel a

careful and specific program of engagement between mainstream law and various indigenous systems of law. Constitutionalism has been portrayed as a key site of engagement and conflict, resulting in a recommendation to explore distinctively Canadian approaches to re-imagining constitutional ordering. History has been described as a key battleground of ideas- some lines of analysis that reflect the deep complexity of relying on arguments from history, especially in a legal context, have been explored. A close analysis was developed of the inter-related normative goals of reconciliation, recognition and redistribution. These ideas have been shown to be highly contested but capable of a form of articulation that will allow the development of standards to evaluate the progress towards an effective and just response to aboriginal claims. These values have also been shown to be inter-twined with contested theories of the cause of and the preferred remedies for the prevalence of social dysfunction and harm in aboriginal individuals and communities.¹¹⁶⁷ Finally, the notion of dialogue has been explored in a fashion that demonstrates how modern normative theory has taken a clear turn to “dialogue” but also provides tools for helping to guide dialogue in a fruitful direction.

This analysis is designed to provide a series of “theory fragments” that might provide a conceptual language to frame political choices.¹¹⁶⁸ It is hoped that particular tools might appeal to people on each side of the current normative divide. It is also hoped that these tools might suggest ways to resolve continuing disagreements at the level of legal and constitutional debate. One of the abiding convictions that has motivated the preparation of this thesis is that the process of legal and constitutional problem-solving has the potential to generate normative solutions that might be less apparent if the debates are limited to the realm of pure theory.

In this section, four key arguments will be developed in order to set the stage for the consideration of the legal framework in Canada. First, it will be argued that it is appropriate to regard the primary locus of responsibility for answering the claims of indigenous peoples as the nation-state, which in federal states is appropriately the national or central government. Second, it is important to balance this position by carving out a meaningful role for both international law and indigenous law and the development of appropriate “nesting principles” to govern the inter-

relationship between the three legal orders. Third, the argument that is developed concerning the role of the nation-state generates distinctive positions on important normative values such as consent, legitimacy and equality. Fourth, the deliberative model that is reflected in the Haida paradigm is a necessary component of the normative defence of the Canadian constitutional order and an important contribution to an answer to the search for a morally and politically defensible conception of aboriginal rights.

10.2 The Role of the Nation State

Scepticism about the nation-state, and the legal system that supports it, is an absolutely core article of faith in much of the critical literature involving indigenous peoples within settler states. It is those very states, aided by the fiat of law, which have effected dispossession and developed the structural determinants of the current conditions of indigenous peoples.¹¹⁶⁹ The literature is replete with suggestions that the states which inherit this past are not able to transcend their colonial roots.¹¹⁷⁰ For indigenous peoples to wield the “master’s tools” to try to effect change would be dubious at best.¹¹⁷¹

The logical extension of this perspective is the counsel of radical retrenchment from the nation-state that is advocated by Alfred, Coulthard and others.¹¹⁷² Others place greater confidence in the transformative possibilities of extra-state developments- including the flourishing of a new category of international collective rights of indigenous self-determination. Indigenous peoples are often more prone, especially after the development of the Declaration on the Rights of Indigenous Peoples, to look to international law or to their own legal systems as a way to secure their rights and protect their interests. While the argument that is developed herein will attempt to address each of these positions, a focus on the nation-state will be maintained. Scepticism runs deeper than this. Much of modern political theory is built around scepticism about the nation-state. Its position is not to be “privileged”.¹¹⁷³ As Jung states, there is “...no reason to privilege the state as an inviolable institutional unit”.¹¹⁷⁴ “Framing norms” are to be used to determine when a particular normative problem lies beyond the nation-state.¹¹⁷⁵ Turning away

from the state to build autonomous communities is often regarded as preferable to engagement. In the words of Karena Shaw, states “...function to constrain expression of political possibilities for Indigenous (and other forms of marginal politics)”.¹¹⁷⁶ In addition, globalisation and fragmentation of existing nation states have put great pressure on the state form.¹¹⁷⁷ Higher expectations are placed on the international realm as a vehicle for addressing key issues, including indigenous issues.

There are voices for a different, and more supportive, view of the state. Some take the view, following the early lead of Kant, that existing states have to be defended from divisive forces that threaten the stability of the political order.¹¹⁷⁸ Others, particularly liberal nationalists, rely on the important role that the nation-state plays in redistributing resources to achieve goals relating to justice and equality.¹¹⁷⁹ Liberal nationalists are unwilling to concede that the nation-state is necessarily arbitrary.

There is no need to go this far to support a model that claims by aboriginal groups need to be, *prima facie*, presented to the nation-state. This is especially so in a stable democracy like Canada. We can recall that Hendrix presents arguments for a duty to support stable democracies.¹¹⁸⁰ Margaret Moore also uses the distinction between the justification and legitimacy of a state to develop a similar line of argument.¹¹⁸¹ In her view, if a state were truly illegitimate, it would be so for all citizens not just vis-à-vis indigenous groups.¹¹⁸² We can also recall Tully’s guarded endorsement of a conditional and transitional duty to obey the laws of a state while continuing negotiations are in progress.¹¹⁸³

Rather than presenting a philosophical defence of the nation-state, the argument presented here will be more pragmatic in nature. The appropriate frame for addressing indigenous grievances is alternatively international law, domestic law or indigenous law. Five interlocking arguments will be presented to support a presumption of starting from domestic law. First, if international law is considered as an alternative to domestic law, it becomes clear that the very structure of

international law operates by placing obligations on states and that discharge of those obligations is expected to be achieved through bringing domestic law into compliance.¹¹⁸⁴ Second, if indigenous law is considered as an alternative to domestic law, there is even greater likelihood of practical overlap between indigenous law and domestic law. Indeed, many of the arguments that have been developed to support the continuing viability of indigenous law are drawn from domestic legal principles.¹¹⁸⁵ Third, starting with domestic law is fully consistent with the expressed views of the vast majority of indigenous peoples who wish to have their claims addressed within the nation-state.¹¹⁸⁶ Fourth, even taking into account important regional variations,¹¹⁸⁷ the degree of inter-dependence of aboriginal and non-aboriginal Canadians has now reached a point where conceptual separation for legal purposes becomes increasingly harder to justify or, perhaps, even to understand.¹¹⁸⁸ Finally, there are strong normative arguments based on the absence of a real “vantage point” beyond the apparatus of the state and the independent protection that is offered to indigenous peoples by a host system.¹¹⁸⁹

Considered cumulatively, these arguments support the importance of conceiving different legal systems as existing within a nested relationship. Canada’s domestic legal system operates within a broader international structure and there are relatively clear rules regulating the communication of obligations from one system to the other.¹¹⁹⁰ The argument that is proposed in this thesis is that a similar relationship can be conceived between domestic law and the various indigenous legal systems operating within the boundaries of Canada. They are conceptually autonomous but there are clear rules that determine the communication of obligations from one system to the other. These principles have clear implications for how we think about important notions like legitimacy, equality and sovereignty. These can be treated in a less binary fashion than sometimes occurs in the literature and political debate.¹¹⁹¹ Particularly with respect to legitimacy, the evaluation of a complex, multi-faceted nation like Canada, with a difficult and highly contested history, becomes less dichotomous. To borrow the metaphor of Festenstein, we have the capacity to grow towards legitimacy.¹¹⁹² Like reconciliation it may be one of the values that can never ultimately be obtained in any final form but that the continuous journey is, like that of Sisyphus, one that cannot be avoided.¹¹⁹³

International Law

In the case of international law, unless norms have attained the status of customary international law, Canadian law requires incorporation by Parliament in order to directly affect Canadian domestic law, though they can be turned to as a persuasive source for interpretation of Canadian legal provisions. With the enactment of the Declaration of the Rights of Indigenous Peoples, many have expressed the hope that direct appeal to the international community can address perceived inadequacies of Canadian domestic law.¹¹⁹⁴ However, there are clear limits to the authority of international law in this field. The Declaration, as a Declaration, lacks the force of treaty law.¹¹⁹⁵ Its terms are highly ambiguous and it is certainly not designed to pose a threat to the territorial integrity of the state.¹¹⁹⁶ Though it is beyond the scope of this thesis to examine the point in detail, an argument can be made that Canadian domestic law “meets or beats” the requirements expressed in the Declaration.¹¹⁹⁷ More fundamentally, the structure of international law presupposes that obligations will be discharged through the nation-state. Peach observes that indigenous self-determination is “...normally fulfilled by internal self-determination, within the existing state of which they are part, through the full and equal participation in the decision-making structures of the state.”¹¹⁹⁸

Indigenous Law

Similar points can be made about indigenous law. While there is a clear trend in favour of reliance on indigenous legal norms, and a dramatic upsurge of academic and activist interest in indigenous legal systems, the lines between indigenous law and Canadian domestic law can be understood as being quite clear. It is unlikely that indigenous legal systems are wholly incorporated into Canadian domestic law and, where incorporation occurs, it is usually on very specific terms. While not entirely free of controversy, the better view appears to be that Canadian aboriginal rights law does not directly incorporate any particular norms of indigenous law but refers to the independent indigenous legal system to provide context for the application of legal

tests that are drawn solely from Canadian textual and interpretative sources.¹¹⁹⁹ This argument will be developed in the second half of this thesis.

Expressed Views of Indigenous Peoples

Another reason to focus on the obligations of the nation-state is that this is most consistent with the expressed views of aboriginal peoples in Canada. The vast preponderance of aboriginal people who have expressed opinions is strongly in the camp of looking for internal accommodations within the Canadian constitutional order rather than secession.¹²⁰⁰ Festenstein observes that "...groups usually seek the capacity to maintain certain aspects of a traditional way of life and often control over a particular portion of territory, rather than a fully-fledged provincial status or statehood. This is frequently allied to a demand for recognition of their distinct history of oppression."¹²⁰¹

Consequences of Deep Interdependence

Another important reason to focus on the nation-state is that it is becoming increasingly difficult to conceive of aboriginal and non-aboriginal Canadians as living lives that can be neatly separated. Many commentators have focused on the deep inter-dependence that has emerged, in varying degrees from region to region, between aboriginal and non-aboriginal Canadians¹²⁰² an increasing number of aboriginal people live in urban communities.¹²⁰³ A very large number have close family relationships with non-indigenous people.¹²⁰⁴ Many aboriginal people move in and out of both worlds. While the degree and practical consequences of this growing inter-dependence raise empirical issues that are worthy of more sustained research and analysis, it is undeniable that inter-dependence has normative consequences as well.¹²⁰⁵ With recognition of widespread inter-dependence, it becomes harder to talk about jurisdictionally separate realms as the points of contact grow and deepen. There are certainly legal consequences as well. As noted in Sparrow "While it does not promise immunity from government regulation in a society that, in

the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).¹²⁰⁶ On the other hand, it is also important to recognize profound regional variation in the level of inter-penetration of indigenous and non-indigenous lives and the different levels of economic inter-dependence that exist in different parts of the country.¹²⁰⁷

Woons argues that Aboriginal and non-Aboriginal lives are sufficiently entwined as to create “...an unavoidable relationship that requires Aboriginal and non-Aboriginal people to participate jointly in shared institutions such as the courts, local governments, provincial legislatures and the House of Commons.”¹²⁰⁸ Support is frequently required to maintain language and culture as “...most endangered languages require external financial, academic and technical assistance.”¹²⁰⁹ As eloquently stated by Cairns, “...(b)oth our separateness and our togetherness need to be institutionally supported if the overall Canadian community is to survive.”¹²¹⁰ Woons, and others, depart from Cairns on a key point.¹²¹¹ Cairns argues that the normative goal that flows from deep inter-dependence is the development of a shared identity. Woons argues that it would be better to abandon this goal as unrealistic, in favour of the more attainable goal of developing institutions that provide a forum for resolution of disputes and the gradual building of trust.¹²¹²

Vantage Point and Support

Philosophy offers some guidance as well. As noted previously, Courtney Jung argues that obligations of justice are best conceived as state obligations because unjust structures and exclusions were the product of earlier state decisions.¹²¹³ Andrew Robinson presents the same issue in a slightly different fashion.¹²¹⁴ He argues that the ability of smaller groups to secure meaningful cultural protection and supports is best accomplished within a framework established by a host state.¹²¹⁵ Indeed, a liberal state should be judged by reference to success of efforts to

accommodate groups such as indigenous peoples within the broader constitutional framework.¹²¹⁶

A similar point is made by Karena Shaw, though for her it is presented as a matter of regret. There is simply no vantage point from which an independent critique of a social order can be rendered. In her words, "...there is no "outside" from which to render an "alternative"."¹²¹⁷ This resonates with the observation of Jung that "...We have inherited a set of imperfect practices and unequal conditions that we are compelled to redesign as we go, firmly rooted in where we are."¹²¹⁸

As noted previously, from a more pragmatic perspective, Borrows argues that indigenous legal systems may need to be supported by legislative, policy and financial initiatives that emanate from the mainstream legal system. This can involve Parliamentary recognition and the evolution of a single framework that makes room for common law, civil law and indigenous law.¹²¹⁹

For the remaining advocates of secession or radical retrenchment from the state, it is becoming increasingly hard to envisage how such goals could be satisfied in a society that has so many ties among its members, whether they are aboriginal or non-aboriginal. From a philosophical perspective, it becomes exceedingly difficult to imagine a vantage point from which discussions about mutual issues could even be undertaken. While its content is certainly not beyond challenge, the mainstream legal system at least provides a language, a procedure and institutions for the resolution of disputed issues.¹²²⁰

Nesting of Legal Orders

The foregoing analysis supports a distinctive conception of nesting of legal orders. Domestic Canadian law is nested within the broader realm of international law with specialized rules to

determine their mutual relations. Likewise, indigenous legal orders exist in a nested relationship with the Canadian constitutional order.¹²²¹ The argument that is developed in this thesis is that indigenous legal systems have neither been extinguished by mainstream law nor completely incorporated into mainstream law. There have been collisions between these systems in the past and these will undoubtedly occur in the future. However, Section 35 provides resources to support the continued existence, indeed strengthening, of indigenous legal systems, including by providing the possibility of an aboriginal right to maintain an indigenous system of law. When conflicts arise between an indigenous legal norm and a non-indigenous legal norm, the law can provide for mechanisms to adjudicate that conflict. In some cases, this will involve deference to the indigenous legal norm and, in other cases, mechanisms to resolve specific conflicts. It may also be necessary to consider modifications to the justification test to require governments alleging a justified infringement of an aboriginal or treaty right to take into account the general right of an indigenous group to maintain its own legal system. These are complex, and deeply contested, matters. It will be important to pay attention to the role of indigenous legal systems as an important component of any reconciliatory project under the auspices of Canadian constitutionalism.

Legitimacy, Equality and Sovereignty

One of the benefits of looking broadly at various normative perspectives on the relationship between indigenous peoples and the state is that it becomes obvious that words like legitimacy, sovereignty and equality are used in vastly disparate ways. It will be argued that a modern focus on these ideas, combined with an argument for the necessary involvement of the nation state, provide useful “theory fragments” to help move intractable disputes forward.

We have seen that many writers shine the lamp of legitimacy on the earliest moments of the founding of a state like Canada.¹²²² From this point of view, as no normatively convincing account can be given of why the indigenous inhabitants were justly displaced and with the solid evidence that thoroughly inappropriate attitudes and policies played a major role, Canada is still

presumed to be governing in an illegitimate manner unless its legitimacy can be shown to have been secured at some later date. The only acceptable mechanism for achieving legitimacy is consent.¹²²³ It is frequently asserted that aboriginal peoples did not consent to and still do not consent to the Canadian constitutional order.¹²²⁴ Some authors go so far as to suggest that this history renders the entire legal order invalid.¹²²⁵

This is to be contrasted to a more traditional approach to legitimacy which looks to the quality of the rights and freedoms that are extended to the members of the political community.¹²²⁶ A more complex approach to legitimacy would build on the traditional view by inquiring as to the response of the state to the special entitlements to rights and freedoms of the indigenous peoples within the political community, particularly taking into account the unresolved grievances pertaining to the treatment of indigenous peoples at contact and beyond. From this point of view, Canada enhanced its status as a legitimate state with the enactment of meaningful constitutional provisions for protection of existing aboriginal and treaty rights, and continues the advance to legitimacy with negotiated resolution of aboriginal grievances. Seen in this light, legitimacy is a question of degree rather than of kind. Legitimacy is assessed in the present, but must take account of the injustices of the past. While a history of unjust acquisition and displacement cannot be ignored, there is more potential to do justice by using theories of legitimacy that focus on justice in the present.

In much of the critical literature, consent is presented as the “gold-standard” test for legitimacy. Lack of consent is the reason for the legitimacy gap, and is the only solution possible to address this gap. There can be no doubt that the resolution of the normative claims of indigenous peoples is most effectively achieved by securing their consent to mutually acceptable constitutional arrangements. However, as has been noted by several scholars to this point, care must be taken not to stretch the ideal of consent beyond its appropriate reach.¹²²⁷ Much of the critical literature draws explicitly or implicitly on the social contract tradition in liberal political theory. It is notorious that such theories have been unable to rely on the actual consent of the members of the political community and have more commonly relied on notions of tacit or hypothetical

consent.¹²²⁸ Seen in this light, emphasis on actual consent shifts to a broader consideration of the overall social arrangements that meet the needs of the members of the political community.¹²²⁹ This approach could be modified to require a reference to whether the overall social arrangements meet the needs of both indigenous and non-indigenous members of the political community.¹²³⁰ However, in much of the critical literature on indigenous issues, consent is presented as a requirement of actual consent, absent which an indigenous person or group can legitimately take the position that a law does not apply.¹²³¹ This approach to consent is closely related to the analysis of legitimacy. While consent of aboriginal groups to the legitimate application of a constitutional order is a laudable normative ideal, the real focus should be on whether reasonable arrangements are in place to respond to the key concerns of indigenous peoples. The assessment of reasonableness is best determined by reference to movement of the society along the path towards legitimacy, including the quality of the dialogue that supports this movement.

To reiterate, rather than grapple with notions of tacit and hypothetical consent, many political theorists have come to think of legitimacy as a process rather than as an event. It is something that is best measured as a matter of degree rather than as a dichotomous and binary choice. From this point of view, Canada augmented its legitimacy when it enacted Section 35 in 1982 though serious legitimacy questions still remain. Legitimacy is an aspiration as much as it is an achievement.

Similar challenges occur when thinking about the notion of equality. Classical liberal theory tends to think of equality as a relation among individuals, but in the aboriginal field it is not uncommon to see more frequent reference to the notion of equality between nations.¹²³² It is seen to be fundamentally unjust to accord different rights to nations without states that are assumed naturally by nations with states.¹²³³ While this notion will be addressed more completely in relation to criticisms of Canada's model of aboriginal rights, it is hard to form a clear view about the equality of a group with as little as 100 members and a nation of 35 million people. The complexity of institutional structures and scope of responsibilities are vastly different. While

aboriginal groups are justly described as nations in light of their clear differences from cultural minorities and retention of their own internal legal systems, they do not operate through a nation-state.

Sovereignty poses special challenges as well. The very idea is under siege in today's intellectual climate.¹²³⁴ We have become more accustomed to the idea that several nations can co-exist within a single nation-state.¹²³⁵ Powerful international and transnational organizations also challenge the stability of the notion of state sovereignty. In the aboriginal field, doubts are expressed about the "magic" of Crown sovereignty and confidence is expressed about the continuing reality of indigenous sovereignty.¹²³⁶ This is paralleled by the emergence of powerful indigenous norms of indigenous self-determination.¹²³⁷ Some even see the Supreme Court of Canada as placing the sovereignty asserted by the Crown under close scrutiny.¹²³⁸ Powerful arguments are expressed about the normative necessity of "shared" sovereignty.¹²³⁹ At the end of the day, a choice has to be made between the binary approach that insists that aboriginal sovereignty must be accorded at the same level as the nation-state, with concomitant ability to challenge the authority of the nation-state, and a more nuanced approach that recognizes that a range of possible accommodations to claims of indigenous sovereignty are possible.

As this thesis is directly primarily to the normative possibilities of the Canadian constitutional order, it is presumed that the vast bulk of responsibility for responding to aboriginal claims lies with the Canadian state.¹²⁴⁰ This does not mean that international obligations and indigenous norms are not important but an onus is required to be met to show how these separate legal systems interact with domestic legal analysis.

Focussing on the nation-state does not minimize the serious legal and normative challenges that remain. This requires continued reliance on a Canadian judiciary that has not always reflected the most enlightened standards in its decisions.¹²⁴¹ It is also a judiciary that falls well short of representing aboriginal peoples. There is increasing interest in the idea of appointing an

aboriginal judge to the Supreme Court of Canada.¹²⁴² However, because of the regional function of representation at the Supreme Court of Canada it might be better to establish a goal of appointing an aboriginal judge on every appeal court in Canada below the level of the Supreme Court of Canada.¹²⁴³ This would create a pool of aboriginal judges with the experience of appellate judicial work and a wide base of expertise in the general law of the jurisdiction where he or she sits.

One of the consequences of the nesting approach advocated herein is that the notion of binary choices or zero-sum games begins to break down. It is not a matter of choosing international law or domestic law or indigenous law or domestic law. All have a role to play in the struggle toward legitimacy. It is highly likely that other binaries can be broken down as well. Culture or economic development? Indigenous self-government or state policy? It is easier to see a mutually supportive role for all of these alternatives. The question may be posed as how state policy can co-exist with or even enhance a progressive development of meaningful self-government? This is a theme that will be developed in the chapter dealing with self-government.

While the focus of this thesis is on the legal and constitutional framework, it is clear that the search for legitimacy extends well beyond the law. Improvements in aboriginal education, health care and support for language and culture are at least as important as legal and constitutional developments. Equally crucial are the work of the Truth and Reconciliation Commission and the ultimate response of the state to the recommendations that will be made by this Commission.¹²⁴⁴ The key point is that these matters are not somehow external to the law- they do not generally advance through the development of the jurisprudence but they are all conducted within an evolving constitutional structure which is animated by important shared societal goals.

One way of expressing the goal of this work is to ask whether the Canadian constitutional order can generate a form of constitutional patriotism. The idea of constitutional patriotism, rooted in the work of Jurgen Habermas¹²⁴⁵, is that disparate people find a shared identity in the processes

that have been developed by the constitutional order to resolve difficult questions.¹²⁴⁶ In the case of the relationship between aboriginal peoples and the Canadian state, the issue is whether a form of mutual reliance and respect can be built around the work of constitutional processes and dispute resolution. It will be argued that the duty to consult and accommodate offers the best seed for the eventual growth of such a notion. The development of a fresh paradigm of engagement opens up opportunities to enhance the legitimacy of the Canadian legal order.

10.3 Summary of Argument to this Point

To this point, an attempt has been made to reach beyond the strong binary cast of much of the literature and political debate in order to extract key principles that might be used to assist in the task of constructing a normatively defensible account of Canadian aboriginal law and practice. In broad outline, the following tentative conclusions have been offered:

It is likely that a solid foundation for aboriginal rights and reconciliation can be developed from a foundation that assumes a continuing viability and authority of the nation-state. However, this is dependent on the development of a particular kind of relationship between the nation-state and indigenous nations as well as effective principles for nesting indigenous, domestic and international law. It is also important to be aware of, and to act upon, the deep normative challenges that arise from a difficult history with clear consequences in the present.

A defence of aboriginal rights that rested solely on culture is bound to be inadequate but defining at least some aboriginal rights by reference to culture seems to be morally acceptable. A lot depends on how well the entire spectrum of rights responds to the core interests of aboriginal communities and their ongoing relationship with the land.

A proper articulation of a normatively and politically defensible theory of aboriginal rights requires a theory of constitutionalism, a vibrant response to legal pluralism, a respectful response to the claims of history, a proper and principled balancing of recognition, redistribution and reconciliation, careful weighing of viable theories of the causes of individual and community suffering with a commensurate engagement over mutually acceptable remedial courses of action and, most importantly, an over-riding commitment to deep and respectful inter-cultural dialogue. These are complex matters and will likely require some careful thinking and debate about the nature of legitimacy and sovereignty, the role of consent and the nature of equality. A careful consideration of these issues as well as a willingness to entertain serious dialogue about their implications can provide a very strong foundation for the assessment of ongoing legal and constitutional developments.

While there will inevitably be some element of overlap as a result of the organic relationship between normative and legal analysis, the focus in the subsequent chapters of this thesis will be more explicitly targeted to legal exposition, legal analysis and legal possibilities.

PART II – The Promise of Section 35 of the Constitutional Act, 1982

CHAPTER 11 – KEY PRELIMINARY QUESTIONS

11.1 Introduction

The central issue that is addressed in this thesis is whether Section 35 can be interpreted in a fashion that advances the normative justification of the doctrine of aboriginal rights in Canadian law. Five key issues, covering the most important doctrinal issues pertaining to the interpretation of Section 35, will be considered in the following chapters. These are: 1) whether the notion of “aboriginal rights” that has developed in Canada is unduly restrictive¹²⁴⁷, 2) whether a coherent doctrine of aboriginal title can be developed in Canada,¹²⁴⁸ 3) whether the emergence of the duty to consult and accommodate has enhanced the prospects for normative justification and legal coherence of Section 35,¹²⁴⁹ 4) whether indigenous legal norms are adequately dealt with by mainstream law and procedures, including as seen through the lens of treatment of elder testimony before the courts¹²⁵⁰ and 5) whether a clear conception of the proper role of the courts is emerging.¹²⁵¹ Globally, it will be argued that the consideration of these five issues helps to paint a picture of a dialogue-based model of Section 35 which has the potential to support a normatively and legally coherent account of the relationship between indigenous and non-indigenous Canadians. Most importantly, this account of the relationship is argued to resonate with the important value of reconciliation. Throughout this part, it will become apparent that legal analysis can be fruitfully nurtured by “theory fragments” drawn from the broader literature on indigenous-non-indigenous relationships.¹²⁵²

In Part III of this thesis, four discrete legal questions will be considered dealing with self-government and sovereignty, the Charter of Rights and Freedoms, the division of powers and the justification of infringements under Section 35. These will be considered in a less extensive

fashion that the core Section 35 interpretative issues and will be dealt with in a fashion that is designed to illustrate one key argument. This argument pertains to the ability of the dialogical and prospective focus of the Haida paradigm to generate non-traditional but effective answers to several long-standing conundrums of aboriginal constitutional law interpretation. Faced with starkly opposed binary advocacy arguments, careful consideration of the implications of the Haida paradigm, as supplemented by the methodological approach of the Supreme Court of Canada to the interpretation of Section 35, unlocks potential ways forward that depend more on dialogue than other proposed approaches. It is the cumulative effect of these disparate dialogues that paves the way towards reconciliation, and promotes growing towards legitimacy.

While most of the argument about the proper interpretation of Section 35 will be developed in relation to the five primary topics noted above, three discrete areas will be highlighted in this chapter to set the stage. After some introductory comments, the overriding role of reconciliation and the honour of the Crown shall be considered, followed by a consideration of the literature that suggests that Section 35 constitutes a net loss to the protection of indigenous rights. Finally, a synopsis of the overall argument developed in this thesis will be presented.

While there was a sparse jurisprudence on the doctrine of aboriginal rights in Canada prior to the enactment of Section 35¹²⁵³, it pales in comparison to the quantity and complexity of the evolving framework that has followed.¹²⁵⁴ While there are a variety of opinions on the intent of the framers of Section 35, most regard the largely inconclusive Section 37 conferences as the preferred vehicle to fill out the content of this relatively open-ended constitutional provision.¹²⁵⁵ When this mandate was left unfulfilled, the Supreme Court of Canada stepped into the breach with the Sparrow decision in 1990.¹²⁵⁶ All of the key concepts that have come to dominate the Section 35 jurisprudence are embedded in that judgment including doctrines of infringement and justification, the preference for negotiation over litigation, the importance of reconciliation and the honour of the Crown and the duty to consult. However, as the jurisprudential framework was broadened and deepened each of these elements took on a different colouration, leading ultimately to what now may be called a modern theory of Section 35. The aim of this thesis is to

provide an account of that modern theory and to demonstrate that it resonates with broader work on the normative assessment of the relationship between indigenous and non-indigenous peoples in what some call a “settler state”.

11.2 Reconciliation and the Honour of the Crown

One of the notable features of the rapid development of Canadian aboriginal law since the enactment of Section 35 has been the increasing prominence the courts have placed on the goal of reconciliation. After summarizing these developments, and guided by previous assessment of the political theory literature, questions will be asked, and to some extent have already been foreshadowed, about whether the concept, value or goal of reconciliation can bear the normative, if not legal, weight that has been placed upon it.

The classic statement of this value can be found in the first paragraph of the *Mikisew* decision:

“The fundamental objective of the modern law of aboriginal rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstandings. The multitude of smaller grievances caused by the indifference of some government officials has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.”¹²⁵⁷

While it is not mentioned in this passage, there is a clear linkage between reconciliation and the honour of the Crown. Sorting out the relationship between these two concepts is one of the most important challenges in Canadian aboriginal law. It is submitted that there are three reasons why this is a particularly complex problem. First, the jurisprudential development of the concept of reconciliation is marked by deep ambiguity. Second, this is compounded by the fact that reconciliation is variously used to describe an objective, a standard and a process. Third, as seen

in the discussion of the political theory analysis of reconciliation, the concept itself is driven by deep conceptual ambiguity.

The notion of reconciliation first gained prominence in the Section 35 jurisprudence with the decision in *Sparrow*: “...federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.”¹²⁵⁸

The *Van der Peet* decision is generally seen as the point at which the use of reconciliation took a dramatically different turn.¹²⁵⁹ The idea of reconciliation is tied explicitly to the purposes of Section 35, the dominant purpose being the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown:

“...More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall under this provision must be defined in light of this purpose, the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹²⁶⁰

A dissenting opinion by McLachlin J. tried to set the bar for reconciliation a little higher by recalling the linkage of reconciliation and a just and lasting settlement referred to in *Sparrow*:

“...seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal people.”¹²⁶¹

The objective of a just and lasting settlement is tied to a clearly modern approach to reconciliation that refers to different legal cultures and relies heavily on the treaty process. Among the goals of Section 35 is "...the achievement of a just and lasting settlement of aboriginal claims..."¹²⁶² which must be "...founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise..."¹²⁶³ This is aimed at reconciling "...the different legal cultures of aboriginal and non-aboriginal peoples".¹²⁶⁴ For McLachlin J. the judicial role in the process of reconciliation is clearly secondary:

"...Traditionally, this has been done through the treaty process, based on the concept of aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and other peoples of Canada to work out a just accommodation... This process... definition of the rights guaranteed by s. 35(1) followed by negotiated settlements- is the means envisaged in Sparrow, as I perceive it, for reconciling the aboriginal and non-aboriginal perspectives."¹²⁶⁵

The Gladstone and Delgam'Uukw decisions are generally seen as tipping the scales in favour of majority interests in the process of reconciliation.¹²⁶⁶ Gladstone, in particular, introduces the idea of justification as a key element of reconciliation"

"Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part, limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation."¹²⁶⁷

The majority judgment in Delgam'uukw builds on the theme from Gladstone-

"...In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to

the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty.”¹²⁶⁸

The final paragraph of the judgment includes the famous passage that stresses the predominant importance of negotiations and the contribution that might be made by the Supreme Court of Canada:

“...Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra. At par. 31, to be a basic purpose of s. 35(1)- “...the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let’s face it, we are all here to stay.”¹²⁶⁹

The *Mitchell* decision makes only cursory references to reconciliation.¹²⁷⁰ The majority decision states, in the form of a syllogism, the relationship between the constitutional purpose of reconciling prior occupation by aboriginal societies with the Crown’s assertion of sovereignty and the content of the test for establishing a right under Section 35:

“..Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown’s assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies.”¹²⁷¹

The concurring judgment of Binnie J. is notable for bringing forward the important “constitutional moment”¹²⁷² for reconciliation to the enactment of Section 35:

“Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established...(A) boriginal and non-aboriginal Canadians together form a sovereign entity with a measure of

common purpose and united effort. It is this new entity...with which existing aboriginal and treaty rights must be reconciled.”¹²⁷³

These judgments are the necessary backdrop to the far more complete exploration of the ideal of reconciliation in the Haida decision. The common theme running through the cases seems linked to what Sharon Williams has called “shared fate”¹²⁷⁴. We “...are irretrievably compelled to live together”¹²⁷⁵ and “are all here to stay”.¹²⁷⁶ There are strong echoes of the core messages in “Kymlicka’s constraint”.¹²⁷⁷ These notions play out in the elaboration of the constitutional purposes of Section 35, in the functioning of the justification test and in the determining of tests for the content of aboriginal rights. The temporal references oscillate wildly between past, present and future. Reconciliation seems to be doing so much that there is doubt that it is clearly doing anything.

These themes are largely repeated in Haida and related cases¹²⁷⁸, though there is far more elaboration and more explicit linkage to a model of the constitutional architecture of Section 35. Negotiation is again identified as the “preferred means for achieving ultimate reconciliation.”¹²⁷⁹ However, the following six passages lay out what amounts to a more complex notion of reconciliation:

“Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.”¹²⁸⁰

“In its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “...the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”¹²⁸¹

“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 its guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.”¹²⁸²

“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 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 the rights guaranteed by s. 35 (1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown’s duty of honourable dealing towards Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and de facto control of lands and resources that were formerly in control of that people.”¹²⁸³

“The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples... Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.”¹²⁸⁴

“The duty of honour derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the Constitution Act, 1982... In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour... must be given full effect in order to promote the process of reconciliation mandated by S. 35(1).”¹²⁸⁵

The complexity of the ideas that are advanced in these passages is partially obscured by the clarity of the prose. When the language is examined closely at least six key points are being made. First, the core formula involving reconciliation of pre-existence of aboriginal societies with the sovereignty of the Crown is retained. Second, emphasis is now placed on the land being formerly in the control of Aboriginal societies and the Crown assuming a de facto control. Third, a Crown duty to act honourably is derived from the assertion of sovereignty in the face of

Aboriginal occupation. Fourth, Section 35 is regarded as having made a promise of rights recognition. Treaties are described as the key vehicle for acting on this promise but a number of rights are implied from the promises that are embedded in Section 35. Fifth, the Crown is bound by its honour to balance competing rights pending settlement of claims. Finally, the honour of the Crown and reconciliation each imply a continuing process of addressing competing claims and a standard to assess progress towards that goal.

There is much ambiguity in these rather Delphic passages. What is the respective role of the two constitutional moments that are described- the assertion of sovereignty and the enactment of Section 35? When and how do the standards of honour of the Crown and reconciliation apply? What in fact changed with the enactment of Section 35? The core argument of this thesis is that these passages establish a broad normative framework for dealing with aboriginal claims within the boundaries of Canadian constitutionalism. The original legitimacy challenge based on the establishment of a new sovereignty in the face of a prior aboriginal presence is acknowledged but is transformed into a series of modern obligations. These obligations are placed on the Crown and are governed by the standard of the honour of the Crown. They provide the historical rationale and principled motivation for a modern theory of aboriginal rights. Ample resources are present to guide this modern theory in a direction of mutually acceptable reconciliation.

There is no doubt that there is much work to be done to flesh out this approach to Section 35. Some commentators have argued that the notion of reconciliation has no proper foundation in the jurisprudence¹²⁸⁶, is overly majoritarian¹²⁸⁷ and is prone to conceptual confusion.¹²⁸⁸ It is notable that several subsequent Supreme Court of Canada cases revert to earlier formulations of reconciliation.¹²⁸⁹ A comparison of the references of the trial judge and Court of Appeal to reconciliation in the *Tsilqot* case is telling.¹²⁹⁰ While the trial judge referred to the possibilities of dialogue based on reconciliation, the Court of Appeal stressed the importance of interpreting Section 35 rights in a fashion that did not impair mainstream interests. The retired judge Douglas Lambert has stressed the importance of the scope of aboriginal title to the possibilities for reconciliation.¹²⁹¹

When we turn away from the chronological development of the notion of reconciliation, we see that the change in how the concept is used is paralleled by the different functions it said to perform. It is an objective, a standard- a role shared with the honour of the Crown and a process. This has led to some debate about the respective roles of the treaty process and the duty to consult.¹²⁹² The large critical legal literature, especially that written by indigenous scholars¹²⁹³, focuses on this ambiguity and potential conceptual confusion. Political scientists have also stressed that different conceptions of reconciliation are in play at negotiating tables.¹²⁹⁴

Newman has argued that reconciliation is "...now something that structures the processes of interaction between the Crown and aboriginal peoples."¹²⁹⁵ This has had the effect of "...Transforming section 35 from a static guarantee to a bulwark of dynamic constitutional process."¹²⁹⁶ Importantly, Newman sees the work of developing a theoretical framework for the process of reconciliation as deeply contested and unresolved.¹²⁹⁷ Walters has focussed on the tendency of reconciliation to develop in an overly one-sided fashion that emphasises majority interests in the development of the Canadian jurisprudence.¹²⁹⁸ He sees this tendency as most marked in the "translation" approach to rights definition in Bernard and in the conception of shared sovereignty developed by Mr. Justice Binnie in Mitchell.¹²⁹⁹ However, he holds out hope that the development of the duty to consult offers the greatest promise of embodying a relationship-based conception of reconciliation.¹³⁰⁰

When we recall the deep suspicion that many political theorists have shown to the value of reconciliation we see many echoes in the development of the jurisprudence. Concerns about supporting the status quo, about an inappropriate search for finality, about linking reconciliation to resignation, about equating reconciliation with any process of negotiation and about defaulting to a narrow sense of balancing of interests can all be seen in the jurisprudence and the commentary.¹³⁰¹ Among these concerns, the linkage between reconciliation and negotiation is the one that merits most close attention. As noted by the Supreme Court of Canada in the Secession Reference, the solution "...is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved by 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.”¹³⁰² Many commentators on the development of aboriginal law have likewise doubted that litigation can support a reconciliatory outcome.¹³⁰³

Despite these concerns, there seems to be broad consensus that the Haida paradigm and the dialogue that it requires provide the best prospect of a normatively attractive form of reconciliation. It is forward-looking but expressly takes into account the normative questions about Canada’s early history. It is linked to a series of constitutional obligations that are anchored by Section 35 and governed by the standard of the honour of the Crown. It expressly resists the tendency to equate reconciliation with consensus and finality. It casts attention to the elaboration of a broad constitutional framework while leaving the detailed working out of mutually acceptable arrangements to the parties. As noted in the previous Part, the legal and constitutional developments are just part of the overall response to historical grievances. Apologies, the work of the Truth and Reconciliation Commission¹³⁰⁴, efforts to generate greater economic development, policies designed to “close the gap” on important social indicators¹³⁰⁵ and broader dialogue within civil society all contribute to a richer conception of reconciliation. While it is clear that great risks of reality falling short of promise are present, the constitutional framework at least offers a solid foundation to set objectives and measure progress.

11.3 Has Section 35 Provided a Net Gain for Aboriginal Peoples?

This thesis develops an argument that Section 35 can provide the foundation for the development of a constitutional framework that can support a morally and politically defensible theory of aboriginal rights. This theory depends on the role played by all rights that are arrayed along the Section 35 spectrum, conceives of the relationship between indigenous, mainstream and international law as nested and is animated by a rich conception of inter-cultural dialogue. However, there is an important segment of the literature that argues that the enactment of Section 35 has produced a net loss in the degree of protection accorded to aboriginal peoples. The core

themes seem to be that Section 35 has led the courts to move away from the doctrine of continuity, watered down protections that had been provided by the division of powers and exposed aboriginal and treaty rights to overly broad justification arguments. The response to these lines of argument that is developed in this thesis is provided in four ways. First, based on assessment of recent legal history work, there are doubts whether the doctrine of continuity that is reflected in the work of key legal academics has a strong historical foundation.¹³⁰⁶ Second, these arguments do not give adequate weight to the importance of providing a restraint to Parliamentary sovereignty.¹³⁰⁷ Third, these arguments may present an unsustainable division of powers argument.¹³⁰⁸ Fourth, and most importantly, these arguments do not give sufficient weight to the importance of the dialogical foundation of recent Section 35 theory.¹³⁰⁹

The debate about the impact of Section 35 ties back to once-common formulation of the provision being either an “empty” or “full” box.¹³¹⁰ This, in turn, is related to views about the content and scope of the pre-Section 35 common law of aboriginal rights. McNeil and Yarrow present the most comprehensive analysis of why Section 35 is alleged to have involved regression from the degree of protection provided by the common law.¹³¹¹ The core problem is tied to the linkage that is made in *Van der Peet* between the definition of Section 35 aboriginal rights and the purposes served by the constitutional provision.¹³¹² According to McNeil and Yarrow, the protection of “existing” aboriginal rights required development of a test that could have been applied before the enactment of the constitutional provision.¹³¹³ For McNeil and Yarrow, this is associated with the alleged elevation of reconciliation to the status of a governing principle that is used to limit the scope of Section 35.¹³¹⁴ Support is drawn from the analysis of Walters who sources aboriginal rights in the doctrine of continuity and the common law protection of aboriginal customary law.¹³¹⁵ Further derogation from the common law is seen in the particular elaboration of the test of integral connection to the distinctive culture of the aboriginal group at contact. In their view:

“...Nothing in the language of section 35(1), and no legal principle that we are aware of, justifies drawing a distinction between rights under Aboriginal legal systems that were integral to Aboriginal cultures, and rights which were not.”¹³¹⁶

The net result is that the definition and protection of aboriginal rights “...depends not on their existence in 1982, but on whether they meet a test that was subsequently formulated to provide specificity to the Aboriginal rights encompassed by section 35(1).”¹³¹⁷ A similar analysis is provided by Brian Donovan who focuses on the development of aboriginal title doctrine after the enactment of Section 35. He premises his argument on the existence of a clear right of aboriginal peoples to full title to their traditional territories to the extent they still occupy them.¹³¹⁸ In his view, the closest that Canadian law has come to recognizing this right has been the *Calder* decision.¹³¹⁹ However, the *Delgam’Uukw* decision creates a “...form of land tenure unknown to Canadian law prior to 1997.”¹³²⁰ He sees the analysis as creating a clean break from the previous development of Canadian, English and Commonwealth common law.¹³²¹

It is interesting that McNeil and Yarrow, Walters and Donovan all see the possibility of proceeding with traditional common law arguments even though they would not necessarily secure the protection of Section 35. This strand of literature reflects notions of parallel development of the common law and constitutional jurisprudence.¹³²² By way of analogy, some have argued that one way to escape restrictive rulings under the Native Title Act in Australia is to present a pure common law argument rather than a claim under the legislation.¹³²³ Though there is no need to reach a conclusion on this question, there are clear conceptual problems posed by the idea of separate Section 35 and common law rights claims.

The relationship between the aboriginal peoples of Canada and the Crown cannot be reduced to a simple algorithm or formula. Nor is it appropriate to see a legal or constitutional frame as capturing all that is important about that relationship. However, the vast amount of conflict, intellectual effort, negotiation and litigation that has been devoted to the law and the constitution merits careful reflection. Four features mark what amounts to a distinctive approach to Section 35. Though these features are developed in more detail in other parts of this work, it may be helpful to isolate the absolutely core arguments at this time. These four features fall under the headings of philosophical and methodological approach, approach to indigenous legal systems, analysis of sovereignty, and contours of a modern distribution of rights.

11.4 Philosophy and Methodology of Section 35

In what is probably the single most important difference between the approach taken in this thesis and the majority of academic writing about aboriginal rights in Canada, the argument is founded on a distinctive relationship between Section 35 and the common law. Most scholars view the common law as having preserved certain rights of aboriginal peoples at the earliest stages of the creation of Canada and that it is these rights that are recognized and affirmed as “existing rights” with the enactment of Section 35.¹³²⁴ The trajectory of thinking about aboriginal rights generally starts at sovereignty and assumes that rights are unaltered unless expressly taken away. This thesis argues that aboriginal rights are best thought of as modern rights whose content is informed by states of affairs from the past. In a sense, aboriginal rights thinking under the aegis of Section 35 operates like equity with the full benefit of hindsight. This retrospective model of aboriginal rights is largely drawn from the nearly uniform practice of the Supreme Court of Canada under Section 35 but is also offered as a general theory of aboriginal rights. It is argued that this approach offers numerous advantages, including greater flexibility in dealing with the needs of aboriginal peoples as current political actors in Canada. One of the reasons that support the adoption of this philosophical and methodological approach to aboriginal rights is the deep uncertainty that recent work in legal history raises about the historical status of aboriginal rights, including title, at common law.¹³²⁵ It also helps to avoid some of the pitfalls that jurisdictions such as Australia have encountered in adjudicating native title claims, including the tendency for native title claims to be defeated by demonstration of a failure to maintain continuance observance of customs and traditions.

A number of factors can be marshalled to support the modern theory of Section 35 rights:

- A. *In the entire body of Section 35 jurisprudence, Section 35 rights are expressly contrasted with common law rights.*

The clearest example is the Van der Peet decision where the lack of constitutional status and vulnerability to legislative override are described as features of common law rights-

“...it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law.”¹³²⁶

B. Section 35 rights are almost invariably described as modern rights.

While this notion is firmly embedded in Van der Peet, the Lax Kwa’laams decision also stresses the modern nature of Section 35 rights.¹³²⁷ The British Columbia Court of Appeal in Tsilqot’in, when looking at the rights jurisprudence of the Supreme Court of Canada, said it

“...marked the beginning of the Supreme Court of Canada’s construction of a modern comprehensive framework dealing with aboriginal rights and aboriginal title.”¹³²⁸

C. Common law rights are described as sufficient but not necessary.

This idea is repeated at numerous points in the development of the jurisprudence.¹³²⁹ From one point of view, the claimant has an option to present a common law argument or an independent argument to found the right solely under Section 35. It is also possible to present a common law argument but argue that the right supported by this argument should be supplemented or altered when considered under Section 35. However, it is notable that the Supreme Court of Canada has never framed a post-Section 35 decision as turning on the content of the pre-1982 common law. Even in Delgam’uukw, which scholars have argued falls closest to a traditional common law form of reasoning, Chief Justice Lamer expressly noted that no previous decision has relied on the existence of a right at common law.¹³³⁰ After 30 years of jurisprudence, the clear preference for adjudicating aboriginal rights claims predominantly within the framework developed under Section 35 is reflected in all decisions that have been rendered to date.

D. The methodology which is adopted is retrospective and empirical.

The clear trend is to generate modern rights that are founded in states of affairs in history.

The entire process is governed by the standard of the honour of the Crown, a notion that has deep roots in Canadian constitutional law but which acquired a different and more robust status as an unwritten constitutional principle with the enactment of Section 35. The tests operate by reference to facts, such as the fact of occupation at sovereignty or the existence of certain cultural patterns at contact. The *Lax Kwa'laams* decision provides the clearest example of this approach when it asked whether there is a “sufficient historical basis” for the declaration of a modern aboriginal right.¹³³¹

E. Little interest is displayed in traditional common law categories.

Much of the literature of aboriginal rights deals with analysis of the rules of reception in English colonial law. However, the *Coté* decision demonstrated a strong aversion to these types of argument. In that decision, the Court elected to avoid the “murky historical waters” of French and English colonial history.¹³³² It found that a focus on the ways of thinking that would have been dominant at the time would be to adopt a “static and retrospective” approach inconsistent with Section 35’s “noble and prospective” purpose.¹³³³ When considered in light of the entire body of Section 35 jurisprudence, the approach of the Supreme Court of Canada might be described as retrospective in terms of finding the foundations for rights and prospective in terms of governing the operation of those rights. One of the advantages of this approach is that the Court is not restricted by the limitations of the common law and can craft a constitutional framework that honours the promises that are seen to have been made with the enactment of Section 35.

F. The declaratory doctrine of the common law would likely be rejected in this context.

McHugh has said that “...judges declare the law that has always been there, and their reasoning is a demonstration of how the presence has been occurring, undetected or less noticed in the modern light, but there nonetheless.”¹³³⁴ Though the issue has not been directly considered in the context of Canadian aboriginal rights, the decision of the Supreme Court of Canada in *Hislop* is likely to prove authoritative.¹³³⁵ A constitutional principle will not be read back into the past if it

has an origin in a source that amounts to a “clear break from the past”.¹³³⁶ The enactment of Section 35 is likely to be regarded as such a break from the past.¹³³⁷

G. Aboriginal rights are to provide a foundation for modern dialogue.

The dominant theme that emerges in the entire body of jurisprudence under Section 35, but most notably after the development of the Haida paradigm, is that the object of Section 35 and the rights it protects is to provide a scaffold for modern dialogue about different claims and aspirations. This approach has been applied to claims for redress of historical grievances.¹³³⁸

These features, especially when considered collectively, strongly support a prospective theory of aboriginal rights that draws from history but is not committed to resolving controversy about the content of the common law in the past. Though the Court draws from academic writing very frequently, a strong sense is emerging that its actual practice is moving away from the focus on the common law that dominates Canadian academic writing. Indeed, the Court appears to be developing a fully blown theory of Section 35 constitutionalism that is built around values such as reconciliation and the honour of the Crown.¹³³⁹ This has had the effect of shifting emphasis towards the obligations of the Crown and the processes that are expected to move the parties closer to reconciliation.

It is unclear what would happen in the future if a claimant steadfastly attempted to prove an entitlement solely on the basis of the common law as it existed prior to the enactment of Section 35. While the Court has always said that this would be “sufficient” to prove a right, there is certainly a risk that the tests that have or will be developed for rights, title and self-government under Section 35 will be treated as comprehensive and exclusive.¹³⁴⁰ It is important to state that the position that is being adopted is not that the common law had no content prior to the enactment of Section 35. There clearly was an inchoate doctrine of aboriginal rights, though there has been and continues to be much debate as to its precise content. There is a growing body of research in legal history which is attempting to place emerging notions of aboriginal rights in historical context. It is certainly interesting to ask counter-factual questions about what likely would have occurred if certain questions had been clearly posed in the past. However, this thesis,

and arguably the Supreme Court of Canada, steps around these debates by grounding key developments in the constitutional principles associated with Section 35.

11.5 Approach to Indigenous Legal Systems

The second core argument that is made in this thesis is that the relationship between indigenous legal systems and mainstream Canadian law is one of nested independence and interdependence. The tendency in much academic writing is to see whole indigenous legal systems or particular rules from such a system as incorporated, as rules of Canadian law, into the corpus of Canadian law.¹³⁴¹ Alternatively, mainstream Canadian law is seen as deferring to the operation of an indigenous legal system as the *lex loci* for a particular territory.¹³⁴² However, to take an example, it is argued that Haida law and mainstream Canadian law are completely separate as legal systems. Haida law does not need the approval or support of the Canadian legal system in order to be a vibrant reality among the Haida. However, as indigenous legal systems and mainstream Canadian law overlap in operation along many planes, some rules for their interaction need to be developed. It will be argued that Section 35 provides a framework that can support an important role for indigenous legal systems within the fabric of Canadian constitutionalism. At a later stage, it will be argued that a Section 35 right to have and maintain a legal system could be an important contribution to this framework.¹³⁴³

11.6 Analysis of Sovereignty

There are two dominant approaches to thinking about sovereignty in the literature. The dominant mode of thinking in the critical literature focuses on the original establishment of Canadian sovereignty.¹³⁴⁴ As this did not take adequate account of a previous sovereign and proprietor, the initial acquisition of sovereignty was flawed and this flaw continues through to the present. It is not at all uncommon to see claims that Canada lacks sovereignty over lands where aboriginal consent to the application of Canadian laws has not been obtained.¹³⁴⁵ This contrasts with a style

of thinking which looks at sovereignty in terms of the present establishment of a constitutional order that has secured the recognition of the bulk of its citizenry and the acceptance of the international community. Within this model, flaws in the original acquisition of territory might provide the foundation for normative and legal arguments about “unfinished business”, but do not call into question the application of Canadian laws within its territory. The recent book *Competing Sovereignties* by Felix Hoehn falls into the first camp.¹³⁴⁶ This thesis operates very much within the intellectual space of the second camp. While Hoehn argues that the Supreme Court of Canada has cast doubt on the original foundation of Canadian sovereignty and the ultimate application of Canadian laws absent aboriginal consent, this thesis argues that cases like *Haida* create new constitutional obligations to attempt to redress the inadequacies of Canada’s original foundation without calling into question the entire fabric of Canadian constitutionalism.¹³⁴⁷

11.7 Modern Distribution of Rights

The foregoing foundational features establish a general orientation to the interpretation of Section 35 within the structure of the broader Canadian constitution. These enable a clear vision of how the various parts of the doctrine of Section 35 aboriginal rights interact to create a whole. Indeed, we are seeing the clear emergence of a distinctly Canadian rights paradigm. This theory can be thought of as arrayed along vertical, horizontal and temporal dimensions. The vertical dimension pertains to the clear shift in focus to Crown obligations with dialogue, consultation and negotiation being the preferred tools to meet these obligations. The horizontal dimension reflects the distribution of various rights along a spectrum where the whole distribution is intended to meet the constitutional goal of preserving an indigenous way of life. The temporal dimension embodies the predominantly modern focus of the enterprise. These dimensions interact in a fashion that should build trust through dialogue, support temporary and transitional arrangements to move closer to reconciliation and, ultimately, shared principles or at least acceptable *modus vivendi* for living together. Aboriginal rights, title and the consultation process are built around respect for indigenous sense of place and attachment to the land. This opens up the possibility of a distinctive approach to self-government, a culturally respectful role for the

Charter and a model of the division of powers that enables rather than constrains important dialogue between legitimate authorities in Canada. More speculatively, some conceptual rethinking of the justification process seems to follow the commitment to exchange of reasons and substantive dialogue.¹³⁴⁸ A more limited, but crucial, role for the courts emerges. The conceptual resources for a more profound understanding for the causes and potential remedies for the difficulties currently faced by aboriginal peoples in Canada are enhanced. Ultimately, the package of promises, dialogue, rights and obligations under Section 35 could support the gradual emergence of a form of shared sovereignty.¹³⁴⁹

Clear connections can be drawn to these possibilities and emerging legal and constitutional trends and the literature on the normative status of aboriginal claims. We can draw from conflicting conceptions of liberalism, the role of culture, divergent notions of pluralism, the importance of dialogue, the role of the nation-state, linkage to notions of equality and legitimacy and the issue of causation of modern harm as a key background driver. While this thesis develops an argument that rejects the binary extremes that tend to dominate the literature, it is hoped that the “theory fragments” which have been highlighted might provide support for the normative and legal model that is forming around Section 35 of the Constitution Act, 1982.¹³⁵⁰

CHAPTER 12 - VAN DER PEET AND ITS CRITICS

12.1 Introduction

The Van der Peet decision is the place where the Supreme Court of Canada set out its core statement of how existing aboriginal rights were to be interpreted under Section 35 of the Constitution Act, 1982. It is also where the famous challenge about the need for a morally and morally defensible theory of aboriginal rights was launched. A huge literature has emerged making the point that the Van der Peet decision fell well short of this high standard.¹³⁵¹ Among the criticisms that have been levelled at the Van der Peet decision include exclusion from the “rights of the Enlightenment” in terms of the rights that are conceded to nation-states, insufficient recognition of legal pluralism, inappropriate level of specificity in the application of the test and deeper problems with the very notion of rights. The test is also regarded as an insufficient paradigm to support indigenous jurisdiction and self-government. Most commonly, the focus on culture is seen to offer a foothold for the state to inappropriately judge the authenticity of tradition.¹³⁵² Many of these arguments resonate with treaty federalist and treaty constitutionalist frames of thought.

An attempt will be made to systematically deal with these arguments. While the arguments overlap and interrelate, there appear to be six severable strands that recur commonly in the critical literature. These include:

- Culture is not a sound source for rights.
- Aboriginal rights are flawed by falling short of rights accorded to nations that are nation-states.
- Aboriginal rights are flawed for not recognizing the primacy of a more fundamental underlying legal phenomenon- such as sovereignty, self-government or title.
- Aboriginal rights are flawed because they are overly specific and insufficiently generic.

- Aboriginal rights are flawed because they do not recognize the necessary linkage to the indigenous legal system which is the proper source of rights.
- Aboriginal rights are flawed because they share the frailty of any theory that relies on the notion of rights as a foundational notion.

These arguments will be dealt with in detail, proceeding in reverse order. Proceeding in this fashion will set the stage for consideration of the core arguments based on the inappropriateness of a cultural foundation for aboriginal rights. These arguments will also be considered before considering the impact of later jurisprudence which arguably responds positively to some of the concerns that had been raised about the Van der Peet decision. Before addressing these arguments in detail, it is necessary to look briefly at the Van der Peet decision itself.

The Van der Peet case involves a claim by Dorothy Van der Peet that Section 35 provided a defence to a charge relating to the sale of eight salmon.¹³⁵³ This claim was rejected and she was convicted. Close consideration of the reasoning of Chief Justice Lamer, who wrote the majority judgment of the Court, provides insights into how the problem was framed. At the start, the issue is described as to how the aboriginal rights protected under Section 35(1) are to be defined. What follows is a reasoning process that is largely disconnected from the consideration of prior judicial authorities on aboriginal rights doctrine. After noting the primary submission of the appellant that what Section 35 protects are rights and not just mere practices, the Chief Justice responds in two ways. First, he agrees that the mere existence of a practice is not sufficient to prove a right under Section 35.¹³⁵⁴ Second, he argues that the argument of the appellant would take Section 35 too far from its intended purpose as it “...must not be forgotten that the rights it recognizes and affirms are aboriginal.”¹³⁵⁵ Rights under the liberal enlightenment are generally held by all members of a society. When contrasted to Charter rights, aboriginal rights “...are held only by aboriginal members of Canadian society.”¹³⁵⁶ This leads to the conclusion that:

“The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are

rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.”¹³⁵⁷

It is notable that the reasoning proceeds almost entirely within a frame of comparing aboriginal rights with rights held by all Canadians. The net result veers close to tautology with the conclusion that aboriginal rights must be aboriginal. After considering the need to interpret Section 35 in a purposive fashion, the Chief Justice indicates that it is necessary to determine the basis for the special status of aboriginal peoples within Canadian society. He recognizes that Section 35 did not create the legal doctrine of aboriginal rights and indicates that the temptation to interpret Section 35 rights by reference to the reasons why they were elevated to constitutional status must be resisted. In contrast, what is required is an “...explanation for the basis for the legal doctrine of aboriginal rights”.¹³⁵⁸ This leads the Chief Justice to conclude:

“In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.”¹³⁵⁹

This provides the “...constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, and their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹³⁶⁰

An examination of the French version of Section 35 confirms that the focus is on the fact of pre-existence of aboriginal societies- “...must be temporally rooted in the historical presence-the

ancestry-of aboriginal peoples in North America.”¹³⁶¹ Aboriginal rights are “based in” this prior occupation.¹³⁶² This conclusion is described as being consistent with the main messages coming from key decisions from the United States and Australia.¹³⁶³ Likewise, academic commentators are seen as advocating the “basis and foundation” of Section 35 rights claims in aboriginal prior occupation.¹³⁶⁴ This allows the Chief Justice to summarize the analysis in the following fashion:

The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes...”¹³⁶⁵

On the basis of this conclusion, “...the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.”¹³⁶⁶

It is crucial to recognize that an important choice is made at this point. Rather than recognizing the prior legal systems of aboriginal societies the focus is placed on the “practices, traditions and customs” of those societies. This is the crucial shift away from how the issue is addressed in other jurisdictions such as Australia, as well as how the issue is frequently addressed by legal academics. This shift is compounded by the requirements that these “practices, traditions and customs” be both distinctive and central.

The test is restated in paragraph 46- “...In light of the suggestion of Sparrow, supra, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant

has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹³⁶⁷

A variety of other factors that are relevant to the administration of this test are addressed in paragraph 48, including the time period for the assessment of historical practices, customs or traditions, the approach to evidence, the requirement of specificity, the relationship with other rights and the standard of “integrality”. Of note is the conclusion that the evidence tendered “...simply needed to be directed at demonstrating which aspects of aboriginal community and society have their origins pre-contact.”¹³⁶⁸ But it is present practices that form the basis for the right.¹³⁶⁹ Section 35 rights “exist today”.¹³⁷⁰

It is important to note that an important methodological shift has occurred from the emphasis on the modes of acquisition and continuity to the assessment of discrete practices, customs or traditions. This approach was controversial from the start as shown by the two vigorous dissents that were generated in the decision.¹³⁷¹ McLachlin J. preferred a test that would have drawn rights from those that were historically recognized by the common law¹³⁷². She reserved her strongest comments for the justification test- highlighting the importance of resolving conflicts through negotiation. In the context of rights in the fishery, she emphasized the shared interest that aboriginal groups and the Crown have in conservation. L’Heureux-Dube J. also criticized the decision as overly majoritarian. She argued that it was important to look beyond the activities of aboriginal peoples in order to emphasize the significance of those activities to the aboriginal peoples themselves. She advocated a dynamic rather than frozen-rights approach and suggested that 20-50 years might be a sufficient time-frame to prove the existence of a right.¹³⁷³ Both dissenters would have sent the issue back for a new trial.

Having introduced the critical issues and set out the core elements of the Van der Peet decision, it is time to turn to the specific critiques that have been levelled at the decision. As noted

previously, it is convenient to deal with the six key elements in reverse order, ending with the foundational critique of excessive reliance on culture.

12.2 Inappropriateness of Reliance on Rights

Rights scepticism comes in many forms but one of the strongest sources has been communitarian thought which tends to place emphasis on obligation or duty over rights.¹³⁷⁴ Rights assertions are seen to be divisive and tending to excessive individualism. Other political theorists see rights as insufficient to capture the full range of normative claims that are at issue.¹³⁷⁵ Some, like Martha Nussbaum, develop a broader notion of “capabilities”.¹³⁷⁶ As previously noted, this strand has been picked up by Duncan Ivison in his influential work *Post-Colonial Indigenous Theory*.

¹³⁷⁷Others take the view that assertion of rights tends to embed indigenous peoples too deeply in the mainstream legal system.¹³⁷⁸

However, it is hard to come to terms with this critique as a matter of Canadian constitutional law, considering the clear focus of Section 35 on existing rights. It will be argued, in addition, that a broader focus on the full spectrum of Section 35 rights, and not just the activity-based rights that are the focus of the *Van der Peet* analysis, does allow some of the insights from communitarians and other rights sceptics to be taken into account. In particular, broader notions of rights, such as that developed by Jung, capture the idea of a rights claim as an invitation to dialogue, including dialogue about broader capability sets.¹³⁷⁹ Finally, the clear shift to duties that are derived from Section 35 blunts some of the critique of over-reliance on rights.¹³⁸⁰

12.3 Ignoring Necessary Linkages to Indigenous Legal Systems

It is commonly argued that rather than engage in an analysis of practices, customs and traditions to determine the content of indigenous law it is better to go directly to the indigenous legal

system itself. As exemplified by the scholarship of Henderson, a direct correspondence is seen between indigenous legal norms and Section 35 rights.¹³⁸¹ Aboriginal rights should be determined by indigenous norms that are applicable in a particular case. At a superficial level, this is how native title is conceptualized in Australia. A particular title has origin in and is given content by the indigenous norms that establish the basis of connection to land. For this reason, native title is not described as a rule of the common law. The indigenous legal system that gives rights to title in Australian law is separate from, and prior to, that body of law. The common law provides vehicles to protect certain indigenous rights but the conceptual separation between indigenous law and the common law is clear.¹³⁸² A similar position seems to be extant in the United States where tribal law is considered quite separate from either state or federal law.¹³⁸³

In Canada, much of the academic literature tends to forge direct links between indigenous law and mainstream Canadian law. This can be expressed in several different ways:

At sovereignty, indigenous legal systems were continued and incorporated as common law at sovereignty¹³⁸⁴

Different aspects of those indigenous legal systems were incorporated as generic rights under the common law¹³⁸⁵

Rights to land were “crystallized” at sovereignty under the common law¹³⁸⁶

Possessory interests were independently protected by a separate rule of real property law¹³⁸⁷

Various customs were independently brought into common law as localized common law custom¹³⁸⁸

Indigenous legal norms directly provide the content of rights and title under Section 35.¹³⁸⁹

Case Studies of Three Indigenous Scholars

Three indigenous scholars, Dawnis Kennedy, Jamie Battiste and John Borrows present accounts of the role of indigenous law in Canadian law. They differ in important respects and,

collectively, capture the immense difficulty of the legal and constitutional questions that are engaged. At the end of the day, the argument in this thesis suggests a different approach to the relationship between indigenous and mainstream Canadian law but there is agreement with the perspective offered by these scholars that indigenous law is fundamentally important to aboriginal peoples in Canada and providing a considered response is a key element of finding meaningful reconciliation.

Dawnis Kennedy writes from a broadly treaty federalist perspective, arguing that indigenous law is the ultimate foundation for Canadian constitutionalism and the source of legitimate authority for non-indigenous Canadians.¹³⁹⁰ She argues that limited patterns of recognition can be seen in the legal history of what she calls colonial law but that these fall well short of providing respect to indigenous legal systems.¹³⁹¹ They are “...only instances of limited, imperfect, and fleeting recognition of indigenous law.”¹³⁹² Kennedy’s main argument is that it is necessary to shift from discrete examples of recognition to considering the interaction of legal systems at the systemic level:

When Canadian courts contemplate the rights and status of Indigenous peoples within Canadian law, do they do so in a manner that allows them to participate in transforming their relations with Indigenous legal orders?¹³⁹³

The analysis is conducted by way of a close examination of four decisions from the Supreme Court of Canada which address or ought to have addressed indigenous law. While the Van der Peet decision arguably incorporated the approach to indigenous law signalled in the Mabo decision, the approach that was ultimately adopted falls well short of recognizing the dynamic nature of indigenous legal orders:

Legal orders, and therefore the laws within them, maintain a measure of continuity with the past and responsiveness to the present and future. They are therefore necessarily dynamic, whereas judicially constructed Aboriginal practices, in and of themselves, are not. To avoid rendering Aboriginal rights static by focussing on practices, the Court must

find a way to engage with the laws of Indigenous peoples as dynamic and existing laws.¹³⁹⁴

Kennedy is especially critical of the approach in *Van der Peet* as it reduces aboriginal rights to “facts” that are determined by a mainstream court. In addition to rendering indigenous law static and removing it from its proper context, it:

“...also leads Canadian judges to believe that they are in a position to define, construct, and control Indigenous laws, regardless of whether they hold any knowledge, training, or authority regarding these laws. As a result, any test that depends upon constructing Indigenous laws as “facts” makes it impossible for courts to engage respectfully with Indigenous law and reduces the potential of section 35, not to protecting what is “central and integral” to Indigenous societies but to preserving a constitutional space within which Indigenous people are able to perpetuate the cultural stereotypes held by Canadian judges.”¹³⁹⁵

Kennedy is especially critical of the decisions in *Mitchell* and *Bernard*. The efforts of Binnie J. in his concurring judgment in *Mitchell* to develop a notion of shared or merged sovereignty are rejected as they are interpreted to mean that indigenous peoples must “...reconcile themselves to their domination under Canadian sovereignty.”¹³⁹⁶ The approach to “absorption” of rights in the majority is dismissed as equivalent to assimilation.¹³⁹⁷ In *Bernard*, the Chief Justice is said to have “...went out of her way to remove any reference to Indigenous law.”¹³⁹⁸ The notion of “translation” is regarded as especially disrespectful of indigenous law as it forces indigenous worldviews to fit into established common law categories.¹³⁹⁹ The overall model of absorption of indigenous legal orders is rejected for three reasons:

“First it includes a temporal limitation constraining the influence of Indigenous law and Indigenous legal orders, rendering the Court unable to acknowledge their engagement with existing Indigenous legal orders. Second, it assumes that Canadian judges have the capacity and the authority to make determinative interpretations of Indigenous laws. And third, it presumes that Canadian law is capable of unilaterally determining what constitutes respectful (or just) relations between Indigenous peoples and the Canadian state, as well as between Indigenous and Canadian legal orders, ignoring the Indigenous laws that also speak to these relations.”¹⁴⁰⁰

For Kennedy, the important questions are not addressed within Canadian law but involve assessment of the relationship between indigenous and non-indigenous systems of law. In contrast, Jaime Battiste reflects the frequent tendency to equate indigenous law and aboriginal rights. He shares Kennedy's concern with the focus on "practices" in Canadian law- this prevents the courts from completely understanding the full ramifications of an indigenous rule.¹⁴⁰¹ While he is generally supportive of much that is found in the Sappier ruling, he laments that indigenous law was not fully before the courts.¹⁴⁰² It would have been preferable for elders to "give directions" to the court as to the requirements of indigenous law.¹⁴⁰³ Such rules are described as part of the Constitution of Canada. Battiste does not regard such law as limited to internal issues. With the movement towards reinvigoration of indigenous legal tradition, he hopes that the courts will come to fully understand the requirements of indigenous law.¹⁴⁰⁴

John Borrows presents a wide-ranging account of indigenous law that ultimately seems directed to encouraging conversation and dialogue between different legal traditions.¹⁴⁰⁵ He argues that indigenous legal systems "continue as part of the law of Canada today"¹⁴⁰⁶, but is well aware that their status differs dramatically from community to community: -

"...Many Indigenous peoples have only a limited knowledge of only some of their traditions, while others may have lost that knowledge completely. Colonial processes and individual choice have been hard on Indigenous cultures at certain levels. Therefore, while some members may find Indigenous traditions "intelligible", there may be a need to more broadly communicate them in different ways, with different cultural styles, if they are going to avoid being too vague for those expected to abide by them."¹⁴⁰⁷

Borrows argues that Canadian courts are aware that indigenous legal traditions continue to be practiced but have not developed the full implications of that practice.¹⁴⁰⁸ Very little actual indigenous law is cited in Canadian judicial decisions¹⁴⁰⁹. He has significant problems with relying on doctrines of reception of law¹⁴¹⁰ and generally describes indigenous legal systems as presumptively surviving or as being compatible with the Crown's assertion of sovereignty.¹⁴¹¹ Section 35 is seen as having shifted the focus to Crown obligations- including the obligation to

sort out the contribution of indigenous law to the overall framework of Canadian constitutionalism.¹⁴¹² A very good example of how indigenous traditions can be misunderstood is how the Supreme Court of Canada dealt with an argument involving ritual burning of deer meat. By concluding that frozen meat would suffice and that it was not necessary to kill a deer by hunting to perform the ritual, the Court failed to place the practice within its appropriate spiritual and cultural framework.¹⁴¹³ Borrows is also concerned that Canadian courts not overreach by adjudicating issues that do not properly belong before them.¹⁴¹⁴

The ultimate aim of the argument by Borrows appears to be to bring different legal cultures into “authoritative conversation”.¹⁴¹⁵ He argues that Canadian constitutionalism would rest on a more secure foundation if common law, civil law and indigenous law worked together in an overlapping but complementary way.¹⁴¹⁶ He appears to be loath to prejudge the result of that conversation, much less the conversations that are necessary within indigenous communities to revitalize and modernize indigenous law, but he regards the requirement to have such conversations as a matter of constitutional duty.¹⁴¹⁷

Analysis

As is the case for much of Canadian aboriginal law, the precise status of indigenous legal traditions in Canada is very unclear. Persuasive arguments have been developed to place indigenous legal traditions within theories of common law aboriginal rights or within common law approaches to custom. These are linked to the doctrine of continuity which can be interpreted to bring pre-existing legal systems within the fabric of the common law. Hall J. in the *Calder* case seemed to have this in mind when he referred to “...customs of ownership indigenous to their cultures and capable of articulation under the common law.”¹⁴¹⁸ The *Connolly v. Woolrich* case is frequently cited as 19th century recognition of indigenous legal systems.¹⁴¹⁹ This is followed by a long string of decisions incorporating or recognizing indigenous family status and electoral rules.¹⁴²⁰ The high water mark of this line of cases is likely the *Casimel* decision from the British Columbia Court of Appeal.¹⁴²¹ The trial judge had determined that the rules

governing family status of the Stellaquo Band gave rise to moral rights and obligations but not to legal rights and obligations. For this reason, it would not be appropriate to turn to these rules to determine who could be considered a “dependant parent”. The Court of Appeal disagreed and concluded that the appellants had clearly assumed the status of dependant parents of the deceased and were entitled to benefits under the statute. Mr. Justice Lambert, writing a unanimous judgment, referred to the decision of the British Columbia Court of Appeal in *Delgam’uukw* and observed that all five judges who participated concluded that “...aboriginal rights arose from such of the customs, traditions and practices of the aboriginal people in question as formed an integral part of their distinctive culture at the time of the sovereignty by the incoming power...and which were protected and nurtured by organized society of that aboriginal people. Those aboriginal rights were then recognized and affirmed by the common law when the common law became applicable following the assertion of sovereignty with the result that those rights became protected as aboriginal rights under the common law.”¹⁴²²

Much traditional analysis proceeds in a fashion consonant with *Casimel* and assumes that traditions and practices, indeed laws, are protected by the common law unless protection should be denied on the basis of incompatibility with fundamental public policy or the sovereignty of the Crown.¹⁴²³ However, this style of analysis has been remarkably absent from the majority of judgments of the Supreme Court of Canada after the enactment of Section 35.¹⁴²⁴ The focus has been on modern rights that are based on aboriginal practices and guided by the purposes of the constitutional provision. Indigenous law has frequently been relegated to the role of providing perspective.¹⁴²⁵ Mitchell signals this turn by referring to the absorption of traditions “as rights”.¹⁴²⁶ The Court clearly seems to be referring to rights that are proven in accordance with the tests that are established by the post-Section 35 jurisprudence.

There are both doctrinal and pragmatic reasons for embracing this approach. From a doctrinal perspective, much work in legal history supports the notion that indigenous legal systems would not have been regarded as incorporated into the common law.¹⁴²⁷ This conclusion is supported by Australian High Court jurisprudence.¹⁴²⁸ An alternative conclusion would be that indigenous

legal systems were not extinguished by the sovereign and were accepted as mechanisms to govern internal matters, at least at the start.¹⁴²⁹ Indigenous legal traditions existed in a precarious state, when considered in relation to mainstream legal systems, and certainly would not be regarded as binding on non-members of the group, as would a common law local customary rule. Many of the precedents that refer to indigenous traditions use them to provide content to open-ended terms in the mainstream system (i.e. the meaning of dependant parent or adopted child) rather than directly enforcing indigenous legal rules on their own terms.

With this background it may make more sense to think about how indigenous law is treated by Canadian law as opposed to whether it is part of the common law. The real focus, in a fashion consistent with the main argument of Borrows, should be on how indigenous law can play a stabilizing and integrative function in indigenous communities today. This might be a more productive line of inquiry than analysis of what traditions were recognized by the common law and what traditions were not recognized by the common law in the distant past. A focus on the role of indigenous law in the present is also consistent with the shift of the Supreme of Canada to a modern doctrine of Section 35 aboriginal rights. It is also consistent with the systemic separation of mainstream and indigenous law that is advocated by Kennedy.¹⁴³⁰

Three methodological techniques are relied upon in this thesis to assist working through this complexity. First, an indigenous legal system and the Canadian mainstream system are assumed to be conceptually separate. A rule of Haida law is no more an immediate part of the common law of the mainstream legal system than a rule of Canadian mainstream legal system is immediately part of Haida law.¹⁴³¹ Second, the exact mode of interaction between mainstream Canadian and particular indigenous norms should be specified with great care. There is a big difference between saying that a particular norm is a part of the common law and that it is provided protection by the common law. Questions of what can appropriately be considered by a Canadian court tend to be elided if the modes of interaction are dealt with too generally. Nicole Roughen's work underlines the importance of explicitly addressing the precise mechanisms that govern the interaction of indigenous law and a host system.¹⁴³² Also, the approach that is taken to

the task is different if a court is interpreting the meaning of a provision in statute law, determining if the common law provides some element of protection to a norm or practice, or determining if a constitutional right may be successfully asserted. Third, mainstream Canadian law has adopted a clearly evidence-based approach to the identification of particular aboriginal rights, including title. Origins are found in states of affairs that existed in the past but the object is to declare the existence of modern rights. The internal perspective provided by the indigenous normative system plays a big role in the assessment of these states of affairs but the Canadian courts are never simply borrowing a conclusion from an indigenous legal system. Finding rights within one system of law might follow a different logic than the other system, and in the case of Canadian aboriginal rights law, a broad approach to uniformity of rights governs what may be declared to have the protection of rights. To give an example, Canadian law will provide a test to determine whether a title as opposed to a harvesting right may be declared over a particular tract of land. It is highly unlikely that the test would be overridden or displaced if a particular indigenous legal system could be shown to disregard the distinction between title and harvesting. In other words, neither Canadian aboriginal law nor the indigenous legal norms would be determined by the content of the other, though it will be seen that there will be strong arguments for bringing these different perspectives into dialogue with one another.

Indigenous legal norms, while a highly relevant factor in Canadian domestic legal analysis, are not yet directly enforced as Canadian common law and, on the basis of the suggestions provided above, should not be directly enforced as Canadian law. Indeed, the precise modes of engagement or association between various systems of indigenous law and the mainstream Canadian legal system are still radically under-specified. It is for these reasons that it is argued that the Canadian approach to Section 35 should not be rejected simply because a conclusion about the content of a particular Section 35 right takes into account a different range of factors than would be considered by the indigenous legal system of the claimant. There are a number of pragmatic advantages that can be secured by this approach. It becomes easier to address matters of indigenous law that should simply be beyond the reach of the mainstream legal system or its courts.¹⁴³³ Each system of law will be considered on its own terms and not just in terms of how one relates to the other. Doctrines of infringement and justification can be conceptualized in

terms of collisions between separate legal systems. Judges in the mainstream system will not be forced to take an internal perspective on legal rules that can only be fully articulated within a cultural context. Most importantly, it becomes easier to think of legal systems as existing in a nested relationship. It becomes more natural to think of a Section 35 right to have and develop a modern indigenous legal system.¹⁴³⁴

As will be developed later, this approach allows a safe passage around some of the shoals created by the Australian jurisprudence. Indigenous legal norms will not be subject to tests of authenticity or antiquity. The centre of gravity will shift to the modern question of supporting legal norms that generate inter-cultural dialogue in the journey toward reconciliation. These are not questions that solely relate to the constitutional framework. Recent amendments to the Canadian Human Rights Act extend the ability to file complaints about matters arising under the federal Indian Act and require consideration of indigenous legal traditions in the course of considering these complaints.¹⁴³⁵ Recent comprehensive claims agreements also provide for the modern exercise of indigenous legal and customary norms.¹⁴³⁶

At this point, it should be clear that the Van der Peet framework should not be rejected simply because it fails to incorporate legal norms directly as aboriginal rights. The status and role of indigenous legal systems in Canadian constitutionalism is a far more complicated and contested question.

12.4 Aboriginal Rights are Secondary to Some More Fundamental Right

This line of attack develops the argument that the Supreme Court of Canada has focussed on the ephemera rather than on what is truly fundamental. This will only be briefly addressed at this time as the arguments can be more fully developed at later stages of the development of the thesis argument. It may suffice to say that the core argument is weakened by a general tendency not to give full weight to the fact that Section 35 rights are arrayed along a spectrum and co-exist

in a mutually reinforcing way. To take an example, rather than seeing aboriginal rights as properly flowing from a prior aboriginal title,¹⁴³⁷ it is the combination of aboriginal rights, aboriginal title and other Section 35 rights that provides the foundation for the protection of a way of life, and ultimately, an aggregate of protected activities that might meaningfully be described as aboriginal sovereignty. Therefore, while the activity-based focus of the Van der Peet test may be perceived as unduly narrow, it is essential to remember that it largely flows from the fact that the jurisprudence is generated by the search for exemptions from generally applicable criminal or regulatory laws. It will also be important to develop the argument that the Van der Peet approach, as illustrated by Pamejewan¹⁴³⁸, does not provide an insuperable barrier to Section 35 recognition of meaningful approaches to aboriginal self-government.¹⁴³⁹

12.5 Rights are Insufficiently Generic and Overly Specific

One of the most thoughtfully elaborated critiques of the Van der Peet framework is found in the work of Brian Slattery. He argues that the emphasis on specificity in the Van der Peet case gives insufficient weight to a distinction between specific, generic and generative rights.¹⁴⁴⁰ By focussing only on specific rights, only a small portion of the common law doctrine of aboriginal rights is captured by the Section 35 test. Slattery recommends a systematic move up one level of generality- from protection of discrete cultural practices, for example, toward more generic protection of a right to cultural preservation.¹⁴⁴¹ He also argues that the emphasis on generic aspects of aboriginal title in Delgam’uukw impliedly repealed the test elaborated in Van der Peet.¹⁴⁴² The theory not only focuses on aboriginal rights to cultural protection but develops an argument for six separate generic rights that collectively flesh out the content of the common law of aboriginal rights.¹⁴⁴³

From a doctrinal point of view, it is hard to maintain this view after the Sappier¹⁴⁴⁴ and Lax Kwa’laams¹⁴⁴⁵ decisions. There is no sign that Canadian law is moving away from specificity requirements, indeed that trend appears to be intensifying. That said, there is much to be gained by reflecting on the generic features of rights. Even though Canadian aboriginal rights, including

title, tend to be described as specific rights, they clearly have generic features. These can include the collective nature of rights, inalienability and the presence of an inherent limit on the use of rights. There is also merit in ascending the scale of generality in rights analysis to determine if broad patterns exist in the distribution of specific rights. It might be possible, and indeed is likely, to say that a right to hunt and fish for food is generally available to all aboriginal groups. The same thing cannot be said, on the present development of the jurisprudence, about a right to hunt or fish for commercial purposes. The prior focus on specificity is also a reflection of the deep heterogeneity of aboriginal experience in Canada. There is no reason in principle to expect to see the same generic rights extended to all aboriginal claimants.¹⁴⁴⁶

Adopting a generic approach to rights would also make it very difficult to grapple with questions about the evidentiary foundations for rights and the burden of proof for advancing such claims. The approach seems to render questions of proof and entitlement less relevant in favour of a standard package of rights that are extended to all aboriginal groups. A generic approach to rights seems particularly unlikely considering the overall approach that the Supreme Court of Canada has taken to the identification and proof of Section 35 aboriginal rights. Specificity is certainly called for in the process of generating modern rights from past states of affairs. It is even more important when assessing how mainstream and indigenous legal norms interact. Indeed, Slaterry does not appear to present a real test for the establishment of a particular generic right, preferring rather to follow an inductive method which draws the broadest possible propositional content from the key decisions and retrospectively assuming a general common law intention to protect that propositional content. As the work of the New Zealand school of legal history attests, it would be difficult to find historical evidence of common law protection for eight separate generic rights under the common law.¹⁴⁴⁷

While the generic component of Slaterry's analysis might be problematic, there is clear interest in the Canadian courts about the generative possibilities of Canadian constitutionalism.¹⁴⁴⁸ Section 35 clearly has the ability to generate reciprocal obligations to engage for the purpose of

generating new relationships, but even here the claims that are presented and the accommodations proposed are expected to be developed with some specificity.¹⁴⁴⁹

On balance, while the overall approach by Slattery to Section 35 reflects great subtlety and impressive scholarship, an insufficient case has been made against the Van der Peet test on the basis of insufficient generality and inappropriate specificity.

12.6 Aboriginal Rights are Flawed because they do not Accord Rights Available to Nation-States

One of the foundational criticisms of the Van der Peet case is the comparison it draws between aboriginal rights and the rights of the Enlightenment.¹⁴⁵⁰ Many argue that this comparison unduly limits the scope of aboriginal rights.¹⁴⁵¹ With respect to aboriginal rights, the test is limiting by categorizing aboriginal rights as exceptional and supplemental to the general set of liberal rights that are extended to all Canadians. With respect to the nation-state, the critique is that aboriginal rights should be defined by reference to the rights accorded to other nations, and, in the case of Canada, the nation-state.

As argued in Part 1 of this thesis, care must be taken with the rhetoric of equality of nationhood. While aboriginal nations differ in important respects from cultural minority groups, there are strong arguments to reject formal comparisons to the nation-state. This is particularly important because of the responsibilities that are placed upon the nation-state by the structure of both international and domestic law. The expressed views of many indigenous people and the normative consequences of the deep inter-dependence that exists between indigenous and non-indigenous peoples in a country like Canada also must be considered. Rather than a comparison between nations with and without states, an argument based on nesting of authority and respectful engagement between different legal perspectives may offer a more promising pathway to reconciliation.¹⁴⁵²

12.7 Inappropriateness of “Culture” as a Foundation for Rights

While the other arguments that have been considered to this point are all important, the accusation of over-reliance on cultural assessments is by far the most compelling. As we have seen in the portion of the theory chapter dealing with culture, culture alone provides a rather weak foundation for a normatively rich theory of rights.¹⁴⁵³ The critique is also linked to a pragmatic concern that the protection for rights tends to diminish as cultural distinctiveness wanes under the influence of assimilative pressures. The critique is developed in its most full form in the work of Courtney Jung.¹⁴⁵⁴

The literature on the impact of the Australian High Court decision in *Yorta Yorta* is also an important factor in considering the weakness of a cultural foundation for rights.¹⁴⁵⁵ In Australia, even the slightest break of continuous exercise of a cultural practice or the normative framework within which it is embedded, is enough to defeat a claim to native title.¹⁴⁵⁶ In the eyes of critics, such inherent problems with reliance on culture as a foundation for rights is compounded by a legal test which forces examination of cultural practices rooted in the distant past. This raises the problem of what anthropologists and philosophers call “essentialism”.¹⁴⁵⁷ Taken collectively, these concerns begin to paint a picture of the Van der Peet test as narrow, stereotypical, ethnocentric and static. This can be contrasted with modern, constructivist accounts of culture which stress adjectives such as hybrid, over-lapping and dynamic.

The Van der Peet test has been linked to difficulties of proof, unfair tethering of the rights claims of groups to the activities of their distant ancestors, minimizing the richness of modern indigenous cultures and downgrading the importance of the inevitable changes that occur over time within any culture. There is also a deep philosophical tension with the fundamental moral argument highlighted in the work of Jeremy Waldron.¹⁴⁵⁸ If it risks unfairness to base modern entitlements on past occupation of land, is it equally unjust to base other modern entitlements on a singular focus on what activities were pursued in the past?¹⁴⁵⁹

Other arguments related to the cultural critique are less foundational but turn more on the particular details of how the Section 35 test has been elaborated. For example, some argue that the assessment conducted under the Van der Peet test would better be conducted at the date of sovereignty or some other date such as effective control. This would allow the consideration of some practices that developed after contact, often by cooperative arrangements between aboriginal and non-aboriginal people.¹⁴⁶⁰

These are obviously powerful arguments and it is difficult to develop a global response. However, the following questions might help focus on the core issues:

- What alternatives exist to an assessment of the practices, customs and traditions of an aboriginal group at contact?
- What is the fundamental purpose achieved by this assessment?
- Is there a risk that the Van der Peet test unfairly limits Section 35 rights to cultural considerations?
- Does the Van der Peet test render nugatory or lessen the probability of protection of other important aboriginal claims, including those to land, self-government and treaty relationships?
- Does the Van der Peet test enhance risks of essentialism, historical fetishism or stereotyping?

We can start with the observation that shifting cultural assessment to the present would hardly improve the situation. It is increasingly difficult to draw clear cultural lines between aboriginal and non-aboriginal peoples in a society that has become markedly inter-dependent. A modern cultural assessment would not be up to the task of differentiating those parts of a cultural system

that ought to qualify as aboriginal rights and those that ought not. “Difference” and “identity” are likely too malleable to provide a reliable foundation to determine the content of existing aboriginal rights.¹⁴⁶¹ While there are problems with an assessment of practices and activities at a stage prior to extensive interaction with non-aboriginal societies, it would be far worse to try to work from some a priori theory of what is captured by aboriginality. This would be highly likely to push in the direction of essentialism and would tend to produce pan-Aboriginal generalizations.

This pushes us back to the core question that was posed in Van der Peet- what should be considered to give content to the “aboriginal” in aboriginal rights? The key to understanding the conundrum of aboriginal rights is that although the assessments called for by the legal tests focus on increasingly distant time periods, the basic object of the test is to identify areas where some immunity is required from laws of general application in order to permit the modern flourishing of a way of life, or, more precisely to permit room to indigenous peoples to adapt a way of life in a manner that is appropriate for them. A natural place to look in order to examine the foundations for such zones of immunity is the original way of life of the people at a time when it was untainted by the influence of other non-indigenous cultures. The strength of the Van der Peet test is that it is structured to pay careful attention to the history of a particular aboriginal group. The two key commitments that are made in the Van der Peet test are that practices which are embedded in the way of life of the aboriginal group are *prima facie* eligible for protection as modern Section 35 rights and practices which are induced by contact with other societies are not. The line between these two propositions is unavoidably fuzzy.

Two methodological choices are implicit in the basic framework established for identifying a Section 35 aboriginal right. First, an assessment of a way of life at contact is the best starting point if one of the objects is to limit the consideration of practices that are induced by other societies. Second, cultural growth and community agency is best dealt with by recognizing the possibility of adaptation of practices to allow for their exercise in different ways and different contexts. The combination of these two techniques- a broad and liberal attempt to understand the

practices, customs and traditions that embody the way of life of the aboriginal group and a generous approach to the adaptation and growth of these practices, customs and traditions- seems to be the best way to give content to the “aboriginal” part of aboriginal rights.

The test would be especially vulnerable to criticism if it were reduced to a search for a fixed inventory of traits.¹⁴⁶² It would be equally vulnerable to criticism if the examination of practices, customs and traditions did not adequately consider the aboriginal perspective in order to place what was done in the context of the deeper reasons of why it was done from an internal perspective. Much guidance can be derived from the richer notion of “practice” developed by Alastair McIntyre.¹⁴⁶³ Practices are given meaning by the way of life, usually with a deep spiritual component.¹⁴⁶⁴

Two key problems must be addressed. The first is the seemingly arbitrary nature of a temporal dividing line that may exclude early practices of indigenous-settler cooperation. The second is that the focus on specificity and the positivistic search for practice may exclude the types of rights claims that are necessarily more general in nature.¹⁴⁶⁵

With respect to early cooperation, a number of lines of analysis look promising. First, when the assessment of practices at contact is understood as primarily an evidentiary inquiry dictated by the need to establish a foundation for potential modern aboriginal rights, there is less reason to be concerned about flexibility in looking at patterns that emerged after contact as these may permit making inferences about the way of life of the aboriginal group. Second, the work of some anthropologists demonstrates a clear pattern of early modalities of interaction being based on pre-existing and ancient indigenous forms of social organization.¹⁴⁶⁶ Third, to the extent that the requisite connection to a pre-contact way of life cannot be established, later patterns of interaction, even if they amount to clean breaks from the past, may qualify for protection through some other route, such as the doctrine of treaties or other doctrines that are designed to enforce undertakings made to aboriginal peoples.

With respect to the frequently pressed observation that the Van der Peet test precludes broader rights such as self-government, this thesis will argue that an activities oriented test to the proof of aboriginal rights does not stand in the way of meaningful conceptions of self-government, title or other rights.¹⁴⁶⁷ The key point is that Section 35 protects a range of rights that are arrayed along a spectrum, only a sub-set of which are the modern activity-based rights that are designed to provide for possible exemptions from the application of laws of general application.

One of the implications of the focus on the overall spectrum of Section 35 rights is that all of the work of protecting a modern way of life need not be performed by the claims that are enabled by the Van der Peet line of cases. It is necessary to look at the impact of the full range of rights that are accorded protection, including those that are not constitutional in nature. These might include rights, title, treaties, other negotiated agreements and the products of consultation and accommodation. The work of Patrick Macklem assists in locating the various dimensions of the normative and legal claims that are made by aboriginal peoples.¹⁴⁶⁸ Therefore, an attack on Van der Peet as inappropriately tethered to culture, especially to the extent that it relies on cultural assessments at a time in the increasingly distant past, requires a multi-faceted response.

First, cultural protections are important as they permit exemptions from the application of laws of general application in the present. Second, as the analysis is designed to give rise to protections in the present, a methodology must be established to support the inevitable drawing of lines. Third, the Van der Peet methodology, to the extent that it seeks a foundation for rights in the way of life of the society as it existed prior to extensive inter-action with newcomers, but provides for a capability for growth and adaptation, seems to provide a coherent account of the “aboriginal” in aboriginal rights. This is especially the case if some of the more rigid features of the original test are weeded out, as will be argued has happened in some of the subsequent Supreme Court of Canada jurisprudence.¹⁴⁶⁹

The above arguments would clearly be less persuasive if Van der Peet had not been substantially modified by later decisions of the Supreme Court of Canada. It has become clear that the Supreme Court of Canada has had to refine the test to clarify its purpose and operation and, in particular, remove elements that might give rise to unduly narrow or essentialist results. The next important decision on the scope and content of aboriginal rights after the Van der Peet decision was the Sappier decision.¹⁴⁷⁰ This produced a decision that an aboriginal right to harvest wood for personal purposes was protected under Section 35. Many commentators have concluded that the Sappier decision successfully addressed many of the deficiencies that had been seen in the Van der Peet analysis, though this opinion is far from uniform.¹⁴⁷¹ There is a clear sense of dialogue with the academic community in that the Court attempts to respond to the core lines of criticism reflected in the commentary on Van der Peet. This led to a) revision of the definition of practices¹⁴⁷² b) elimination of the “survival” test¹⁴⁷³ c) alteration of the core and identity test¹⁴⁷⁴ d) abandonment of the “fundamentally altered” test¹⁴⁷⁵ e) recognition of the inherent difficulty of defining a culture¹⁴⁷⁶ f) acceptance that culture is a process and not a thing¹⁴⁷⁷ g) favourable incorporation of aspects of the dissenting opinions in Van der Peet¹⁴⁷⁸ and h) reminder of the necessity of avoiding racialized stereotypes.¹⁴⁷⁹

The clear tenor of the judgment as a whole is a focus on what the ancestors did and how that plays a role in a distinctive way of life. The judge is to attempt, as best as can be achieved, to “understand the way of life”.¹⁴⁸⁰ It is recognized that the notion of “distinctive culture” has generated much controversy but the Court expressly distances itself from viewing Aboriginality as “...interesting cultural practices and anthropological curiosities worthy only of a museum” or as a “fixed inventory of traits or characteristics.”¹⁴⁸¹

The core analysis of the Section 35 doctrine of aboriginal rights is found in paragraphs 44 and 45 of the decision. While recognizing that culture is an intrinsically difficult concept, indeed, as a concept which is itself inherently cultural, the notion of protection of a distinctive culture has to be considering in light of the constitutional purpose served by Section 35. It “...arises from the simple fact of prior occupation of the lands now forming Canada.”¹⁴⁸² In this light- “What is

meant by culture is really an inquiry into the pre-contact way of life of a particular community, including their means of survival, their socialization methods, their legal systems and, potentially, their trading habits.”¹⁴⁸³ The “...object is to provide cultural security and continuity for the particular aboriginal society. This objective gives content to the analysis.”¹⁴⁸⁴

Sappier reflects a broader focus on a way of life as a context for understanding practices, traditions and customs. While the core elements of the Van der Peet test remain the same, there is a clear attempt to respond to the key elements of the critique that had been levelled at the earlier decision.

The Lax Kwa’laams decision is the most recent restatement of the Van der Peet test for the proof of a Section 35 aboriginal right.¹⁴⁸⁵ The aboriginal group claimed that an established trade in oolichan provided a foundation for a more general right to fish and trade commercially in all species of fish. In the course of rejecting this claim, the Court provided clarification of the role that is played by the characterization of a right, provided important reinforcement of the need for specificity and compliance with the rules of pleading in aboriginal cases and rejection of an idea that the Sappier decision invited a “Commission of Inquiry” to mine for potential rights. The case provides strong confirmation that the ultimate objective of the analysis is to determine if an historical foundation exists for the declaration of a modern right. It also addresses in some detail how a Section 35 inquiry will be conducted in different procedural contexts, such as a criminal prosecution or a civil claim.

The focus is on assessing whether there is a “foundation” for a Section 35 right¹⁴⁸⁶, with a clear modern focus¹⁴⁸⁷ and asking whether there is a “sufficient historical basis” for a modern right¹⁴⁸⁸. In another usage, whether there is a “proper legal springboard to” a modern right¹⁴⁸⁹. The formal restatement of the test refers to the “existence” of the pre-contact practice and a “generous though realistic approach to matching pre-contact practices to the claimed modern right.”¹⁴⁹⁰ A separate element of the test is added to cases where a commercial right has been found to exist

which requires that the delineation of the right take into account the comments on justification in the Gladstone decision. In general, evolution of aboriginal practices is to be subject to both qualitative and quantitative limits. Overall, it is clear that the court is not declaring rights that were in existence in the past but looking at past practices as an “Aboriginal source”¹⁴⁹¹ or as basis for modern rights.¹⁴⁹²

12.8 Interim Conclusion

We have seen that there is an important role for the kinds of rights that are protected by the Van der Peet line of cases, but that the full spectrum of rights recognized and affirmed by Section 35 has to be considered in order to evaluate the effectiveness of that provision. On balance, there are strong arguments to support the emphasis on specificity as this respects the heterogeneity of aboriginal life in Canada and provides for clearer rules to regulate conflicts of rights. There is clearly a need to develop a nuanced consideration of indigenous legal systems. It is also unlikely that the approach to that aspect of Section 35 that regulates the protection of cultural practices from laws of general application prevents the evolution of other rights within the Section 35 spectrum. While there are great risks in tying rights too closely to culture, the Van der Peet test, especially as modified by subsequent jurisprudence, provides a solid foundation for developing the notion of “aboriginal” in aboriginal rights.

12.9 Emerging Rights Issues

Some of the issues canvassed above will likely be developed in the context of the exploration of several emerging issues such as the commercial component of harvesting rights, self-government and claims related to damages for historical grievances. They will certainly overlap with important questions about the content and scope of aboriginal title and the burgeoning jurisprudence about the discharge of the duty to consult. The core themes about the current

model for understanding Section 35 rights will be revisited frequently in the course of developing the arguments in this thesis.

Commerciality

One of the most important ongoing issues involving the scope of Section 35 rights is the question of the extent to which that provision supports commercial activities as a constitutional right. Some earlier case law had suggested that, but for the operation of the Natural Resources Transfer Agreement, a right to hunt for commercial purposes might have been upheld under Treaty # 8.¹⁴⁹³ Indeed, in the Gladstone case, the Supreme Court of Canada upheld a right to harvest and sell herring roe on kelp in commercial quantities.¹⁴⁹⁴ However, most of the decisions of the Supreme Court of Canada have limited fishing rights to food, social and ceremonial purposes.¹⁴⁹⁵

The key question is the degree to which practices and patterns of exchange in the way of life of an aboriginal group correspond to the modern practice that is put forward as the foundation for a modern right. The most recent elaboration of this test has been the *Lax Kwa'laams* decision which has held that the pattern of correspondence must be assessed in both quantitative and qualitative terms.¹⁴⁹⁶ In that case, an aspect of the way of life of the claimant involving harvesting and trade of oolichan was found to be an insufficient foundation for the finding of a modern commercial right to a broader range of species. The Supreme Court of Canada also added an extra element to the normal three-part test for proof of an aboriginal right to ensure the proper delineation of the right when a modern commercial practice is claimed.¹⁴⁹⁷

The most important current judicial test of claims for commercial harvesting and trading rights is the *Ahousaht* case.¹⁴⁹⁸ While that Court had originally upheld a finding of a commercial right, the case was reargued at the Court of Appeal under a remand from the Supreme Court of Canada for reconsideration in light of the principles set out in the *Lax Kwa'laams* decision. The British Columbia Court of Appeal has recently affirmed its original decision, but important questions

remain about the meaning and application of the “fourth stage” of the test set out in *Lax Kwa’laams*.¹⁴⁹⁹

The backdrop of this and other cases is that aboriginal peoples frequently exchanged fish and other products as an integral part of their distinctive culture. Sometimes they were exchanged within the group, other times with other groups with kinship ties and often with adjoining or distant aboriginal nations. Patterns of exchange also emerged with Europeans in the early years of contact. The issue frequently will be whether an evidentiary foundation that almost certainly gives rise to rights such as continuing social and ceremonial exchange, such as the potlatch, will also provide a foundation for harvesting and trading rights in a modern context but unconstrained by the original cultural foundations for the asserted modern right.

Self-Government

Most commentators take the view that the combination of the *Van der Peet* and *Pamejwon* decisions from the Supreme Court of Canada has firmly closed the door on claims for a Section 35 protected right to self-government.¹⁵⁰⁰ However, the reference to “legal systems” in *Sappier*, the references to internal sovereignty in *Mitchell* and the complex treatment of sovereignty in *Haida* create new jurisprudential springboards for the development of fresh arguments for aboriginal self-government.¹⁵⁰¹ In the chapter on aboriginal self-government, it will be argued that the very separateness of indigenous legal systems from domestic Canadian constitutional law and the notion of “nesting” of different legal systems can provide a unique foundation for the nurturing of aboriginal self-government within the fabric of Canadian constitutionalism.

Damages and Historical Grievances

Another area that can be expected to attract substantial attention is the status of damage claims for past interferences with Section 35 rights. This is a very complex issue- Australia has tended to reject the availability of damage claims for past interference with native title¹⁵⁰² and Canadian courts have strongly leaned towards deferring to the “standards of the day”.¹⁵⁰³ This is a more general trend in Canadian public law that limits damage claims against the state to a relatively narrow range of circumstances.¹⁵⁰⁴ However, these factors must be balanced against the recent suggestion from the Supreme Court of Canada in *Rio Tinto* that damage claims might be presented for past breaches of the duty to consult.¹⁵⁰⁵ Furthermore, the Specific Claims Tribunal is now in operation and has a mandate to deal with a wide variety of damage claims for historical grievances, though Section 35 rights are expressly excluded from its jurisdiction.¹⁵⁰⁶

While these questions will certainly attract a great deal of attention in the continuing development of the jurisprudence concerning Section 35 rights, it may be expected that the scope and nature of aboriginal title will dominate the jurisprudential agenda in the near future.

CHAPTER 13 - BREAKING DOWN THE BINARY DIVIDE ON TITLE

13.1 Introduction

The scope and content of aboriginal title remains one of the most contested issues of Canadian aboriginal law. The courts have shown clear reluctance to make a finding of aboriginal title and key parties remain very far apart as to their understanding of the practical implications of the doctrine of title. Aboriginal claimants generally regard their title as extending to cover vast areas, usually coterminous with how they describe their traditional lands. Governments generally see title, at best, as describing much narrower tracts of land, usually on the basis of an analogy drawn to common law fee simple title. This is not just a debate that has relevance only in the courtroom. The different views of the scope and content of aboriginal title have implications for the state of progress of comprehensive claims processes and the administration of the duty to consult.

This divide can be most clearly seen in the stark differences of approach to title that are reflected in the trial judgment in *Tsilqo'tin v. British Columbia* and the decision of the British Columbia Court of Appeal in the same case.¹⁵⁰⁷ The trial judgment offered significant commentary on the scope and nature of aboriginal title but as obiter dicta as the claim was dismissed on the basis of a flaw in the pleadings. This decision continued a trend which has resulted in a complete absence of binding decisions on aboriginal title since the seminal ruling of the Supreme Court of Canada in *Delgam'uukw*. To facilitate exposition and analysis, the assessment of the Court of Appeal decision will be deferred until after the presentation of the key elements of the test.

This chapter will present the outlines of a theory of title. One of the constraints to developing a theory of aboriginal title is that options cannot be developed independently of the decided jurisprudence. A theory of aboriginal title will be most effective when it can be genuinely presented as flowing from or immanent in the leading cases from the Supreme Court of Canada. A theory should aspire to develop and systematize the main lines of that jurisprudence. This may

be an especially difficult task in the case of aboriginal title as the guiding cases, at least on some readings, tend to point in rather different directions.

It is also extremely important to note that the actual development of aboriginal law doctrine on title can only effectively proceed by testing the law in various fact situations.¹⁵⁰⁸ The histories and cultures of aboriginal groups differ widely across Canada. This will certainly affect how claims of title will be considered and assessed. However, the notion of a theory captures the idea that certain guiding principles help frame the assessment of fact and the declaration or negotiation of rights. This chapter is devoted to setting out a proposed formulation of those principles that builds upon existing jurisprudence and would be persuasive to courts, and would fulfill the purposes of Section 35. Many of the elements that are contained in the proposed theory of title are drawn from or inspired by the literature that has been canvassed in the first part of this thesis.¹⁵⁰⁹ The proposed theory of aboriginal title will stress the modern nature of title claims, the implicit distinction that is emerging in Canadian law between aboriginal title and traditional lands, the importance of the placement of aboriginal title within a spectrum of rights and the importance of the contribution made by dialogue directed by the duty to consult. Taken collectively, these features permit the presentation of a distinctive approach to aboriginal title within the constitutional framework established by Section 35 of the Constitution Act, 1982. It is submitted that this alternative theory of aboriginal title serves to break down the binary divide noted above, support effective negotiations about connections to land and reinforce the crucial dialogues envisaged by the duty to consult.

13.2 Overview of the Development of Aboriginal Title Jurisprudence in Canada

St. Catherine's Milling

As noted previously, St. Catherine's Milling was the most authoritative statement of the content of aboriginal rights in Canada in the 19th century.¹⁵¹⁰ After a court battle where the governments of Canada and Ontario were the primary litigants, the Judicial Committee of the Privy Council decided that aboriginal rights could only be attributed to the provisions of the Royal Proclamation of 1763. Even those rights were described in relatively narrow terms as personal and usufructary rights held at the pleasure of the Crown. The limited effect of the rights described in this judgment is reflected in the assessment of Slaterry:

“However, as time passed, they became increasingly inadequate to deal with the changed situation of Indigenous peoples and consequently underwent a significant transformation. This change was precipitated by a number of factors. Most important by far was the fact that in some areas, such as in most of British Columbia, the local governments failed to negotiate valid treaties for the cession or sharing of indigenous lands. As the Crown gradually extended its effective rule, some colonial authorities started treating Indigenous homelands as if they were available for public use or disposition to private parties. Aboriginal title was ignored or actively suppressed.”¹⁵¹¹

A long gap was thus seen between the St. Catherine's Milling case and the next important Canadian case on aboriginal title- the Calder decision in 1973.¹⁵¹² By that time, as Foster notes “...in the early 1970's, many questioned whether there was any surviving Aboriginal title in Canada.”¹⁵¹³ Foster contrasts this situation with what he describes as an extensive pattern of recognition of aboriginal title until the early twentieth century.

Calder

It is particularly interesting to examine the ground-breaking Calder decision from the perspective of the history of the Nisga'a nation. They had a long history of petitioning for the recognition of their rights, yet were one of the few aboriginal supporters of the infamous White Paper.¹⁵¹⁴

Three judgments were rendered in the appeal decision, after two decisive losses by the Nisga'a in the British Columbia courts.¹⁵¹⁵ Judson J. ruled that an aboriginal interest existed but had been extinguished. Hall J. agreed that an aboriginal interest existed but concluded that it had not been extinguished. As two judges agreed with each opinion, the tie was broken in favour of the result supported by Judson J by Pigeon J who found that the suit failed on the procedural ground that the Nisga'a had failed to obtain a fiat from the provincial Crown to permit the lawsuit to be filed.

One of the notable features of the judgment of Judson J. is the careful recitation of facts that paints a very vivid picture of the way of life of the Nisga'a, including their long-term advocacy and resistance of threats to their land. A particularly interesting quote is included from a 1964 article by the famous anthropologist Wilson Duff:

“It is not correct to say that the Indians did not ‘own’ the land but only roamed over the face of it and ‘used’ it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn’t subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn’t subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping, and food gathering. Even if they didn’t sink mine shafts in the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognized territory of one or other of the Indian tribes.”¹⁵¹⁶

Quite appropriately, the legal analysis starts with what was then the leading case on aboriginal legal interests – *St. Catherine's Milling*. Judson J. ultimately rejects the conclusion that the Royal Proclamation of 1763 is the exclusive source of aboriginal title. This leads to the classic quote about the source of aboriginal title:

“Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one if the solution of this problem to call it a “personal or unfructuary right”. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was “dependent on the goodwill of the Sovereign”.¹⁵¹⁷

Rather than elaborating on the legal implications of this observation, Judson J. proceeds directly to the issue of extinguishment. He essentially applies an “adverse dominion” test, borrowed from American jurisprudence, to conclude that any Nisga’a aboriginal title had been extinguished by a series of pre-Confederation colonial ordinances establishing full control over the use and disposition of land.¹⁵¹⁸ On this view of the law, there was simply no room for aboriginal title within the legal regime for control of Crown lands in British Columbia.

The judgment of Hall J. begins with the observation that the Nishga have long pursued their interest in their lands, that they have not been conquered and that there has been very little activity pursuant to Crown grant in the territory.¹⁵¹⁹ The opinion provides a marked example of the frequently observed reluctance of the Supreme Court of Canada to venture an opinion on the nature and scope of aboriginal title as a legal interest. Hall J. remarks that it is not necessary to precisely state the exact nature and extent of aboriginal title in the litigation, as the only live issue before the Court is whether any interest has been extinguished.¹⁵²⁰ Some of this reluctance may be attributed to the fact that the case proceeded to trial on the basis of an agreed statement of facts. Hall J. also noted that the Nisga’a were careful to characterize their claim as being in the nature of an equitable title or interest rather than a claim to the fee in the land. While Hall J.

regarded extinguishment as the core issue in the appeal, there were a number of important observations made about the concept of aboriginal title. These observations were made in the context of a careful and scholarly overview of the Nisga'a way of life, leading to the following interim conclusion:

“In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands and have been in their possession from time immemorial and therefore, the burden of establishing that right has been extinguished rests squarely on the respondent.

What emerges from the foregoing evidence is the following: The Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law having, in the words of Dr. Duff, “developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico”. A remarkable confirmation of this statement comes from Captain Cook who, in 1778, at Cape Newenham claimed the land for Great Britain. He reported having gone ashore and entered one of the native houses which is said was 150 feet in length, 24 to 30 feet wide and 7 to 8 feet high and that “there were no native buildings to compare with these north of Mexico”. The report continues that Cook’s officers were full of admiration for the skill and patience required to erect these buildings which called for a considerable knowledge of engineering.

While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.”¹⁵²¹

The reference to common law recognition stands in stark contrast to the judgments of the two levels of court in British Columbia.¹⁵²² In each case, recognition was used to limit the ability of an aboriginal claimant to make a claim for land- absent formal recognition by the Crown. Moreover, Hall J. does give some weight to the limited practice of treaty-making in British Columbia, as well as the broader treaty process, as a conclusion that the treaties were not intended to extinguish Indian title would amount to a “gross fraud”, an assumption that he was unprepared to make.¹⁵²³

The most important statement made about aboriginal title in the Hall J. judgement is that “. . . Once aboriginal title is established, it is presumed to continue until the contrary is proven.”¹⁵²⁴ He also castigates the Judson J. approach as supporting the conclusion that Indians occupy lands at sufferance or as trespassers.¹⁵²⁵ Finally, Hall J. grapples with the conclusions of the two judges who issued the opinions that together supported the majority result in Calder. With respect to the Judson J. conclusion on extinguishment, he offers a different test for the extinguishment of a right, likewise relying extensively on American jurisprudence. Hall J. argued for a requirement of clear and plain intention, a requirement that was later adopted by the full Court in Sparrow.¹⁵²⁶ On the facts of this case, he concluded that the onus to establish extinguishment of an aboriginal title was not met. With respect to the Pigeon J. conclusion about the requirement to obtain a fiat, this could not have been intended to apply to a claim for declaratory remedy as this remedy only emerged during the 20th century.¹⁵²⁷

While the actual result of the case was not favourable to the Nisga’a, the consensus that aboriginal title could exist, at least in theory, send shock waves through the Canadian legal and political system.¹⁵²⁸ The Calder decision was undoubtedly a key factor in the creation of federal land claim policies and a fresh period of engagement. While there were several important judicial rulings about aboriginal land rights prior to the enactment of Section 35 of the Constitution Act, 1982, the jurisprudence under that provision has had a far deeper impact on the development of a distinctively Canadian approach to aboriginal title. We will see that there is some tension between that jurisprudence and some of the comments about title in Calder, especially in the judgment of Hall J.

Guerin

Guerin was not a case about the doctrine of aboriginal title and though it was considered by the Supreme Court of Canada after the enactment of Section 35 of the Constitution Act, 1982, it does not directly address the interpretation of that provision.¹⁵²⁹ It dealt with the failure of the federal Crown to satisfy explicit terms that had been established in the acceptance of a surrender of Indian reserve land. However, in the course of addressing this issue, Dickson J. made a number of important comments about the nature of aboriginal title, including the idea that title is a beneficial interest in land. He also equated the nature of the interest that Indians hold in statutory Indian reserves and aboriginal title lands. It will be seen that these ideas, as well as the continuing tendency to shy away from more definitive definitions of aboriginal title, continued to be influential in the development of the jurisprudence.

Adams and Côté

Neither Adams nor Côté involved a claim for aboriginal title.¹⁵³⁰ However, both cases have had a profound influence on the development of title doctrine. The Côté decision rejected an argument by the Attorney General of Quebec that the lack of recognition of a doctrine of aboriginal rights by the French regime that preceded the Conquest prevented the existence of such rights in current Canadian law. The Adams decision addressed another argument by the Attorney General of Quebec based on an alleged requirement to prove aboriginal title as a precondition for the assertion of a Section 35 harvesting right.¹⁵³¹ The argument was based on a notion of “Indian title” as a parent right and harvesting rights as subordinate to and dependent upon the existence of such a title. This argument was rejected by a complete inversion of the relationship between these two concepts. As informed by the purposes of Section 35 of the Constitution Act, 1982, the notion of aboriginal rights was regarded as the broader concept and aboriginal title was regarded as a distinctive but included conception of aboriginal right.

Introduction

Some significant time shall be spent elaborating on the reasoning in Delgam'uwkw as many of the key jurisprudential challenges in Canadian law involve the careful unpacking of some of this reasoning. It was an extremely lengthy trial and led to very complex appeals. The trial judgment attracted a great deal of controversy.¹⁵³² The lead judgment in the Supreme Court of Canada was prepared by Chief Justice Lamer. It is a judgment that is generally regarded by commentators as being a progressive contribution to the jurisprudence.¹⁵³³

It is notable that the ruling builds on the foundational distinction that was made in Adams between rights and title. Recalling that aboriginal title was described as a distinct species of a broader spectrum of Section 35 rights, the core issue before the Court was the specific content of aboriginal title and the manner in which the legal tests for proof of a right must be altered to account for the difference between a right to the land as opposed to the right to conduct certain activities.¹⁵³⁴

The five key issues that are considered in the appeal are a) Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government? b) What is the ability of this Court to interfere with the factual findings made by the trial judge? c) What is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof? d) Has a claim to self-government been made out by the applicant? and e) Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of *the Indian Act*?¹⁵³⁵

The ratio of the case is narrowly limited to a question of proper pleading of the civil action. The shift from a claim of individual entitlement by various hereditary chiefs to a collective claim was not supported by a change in the pleadings. This was found to provide insufficient notice to the defendants in the case and for this reason was sent back to trial.¹⁵³⁶ The issue of proper pleadings in an aboriginal title action shall be revisited later, but the approach of the Supreme Court of Canada is certainly debatable. On the one hand, it is true that the defendants might have conducted their trial strategy differently with a case that was pled differently, for example, by focussing on different themes in cross-examination. On the other hand, the focus on pleadings in *Delgam'uwkw* might be read as an example of a general trend for the courts to avoid binding rulings on the complex question of aboriginal title in favour of making broad pronouncements in the hope the parties will find a negotiated resolution. A key secondary ruling pertains to the consideration of oral testimony evidence. Following from the earlier ruling in *Van der Peet*, the Court established an “equal footing” standard for the consideration of oral history evidence presented by an aboriginal claimant.¹⁵³⁷ The failure to accord such treatment was a second reason for ordering a new trial.

Even though the lengthy ruling in *Delgam'uwkw* is technically obiter because of these two conclusions, an extensive analysis of the content and nature of aboriginal title is developed in the judgments in *Delgam'uwkw*. Some time will be spent on articulating this reasoning, with a particular focus on the lead judgment of Chief Justice Lamer.

Content of Aboriginal Title

The two primary parties to the litigation presented strongly opposed theories of aboriginal title. The claimants presented what may be called a traditional lands approach in the Supreme Court of Canada. British Columbia argued that aboriginal title was essentially a bundle of more specific activity rights. Chief Justice Lamer rejected both of these descriptions of aboriginal title. He introduces his understanding of the concept as follows:

“Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine’s Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin, supra*, Dickson J. described aboriginal title, at p. 376, as a “legal right derived from the Indians’ historic occupation and possession of their tribal lands”. What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, “The Meaning of Aboriginal Title”, in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that “aboriginal title pre-dated colonization by the British and survived British claims of sovereignty” (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law.”¹⁵³⁸

What is notable about this description is the relationship that is posited between the Royal Proclamation of 1763 and aboriginal title and an apparent endorsement of Professor McNeils’ common law possession view of aboriginal title. It also introduces the idea of a second possible source for aboriginal title by way of proof of indigenous law.

He follows by suggesting that the content of aboriginal title is best summarized in two propositions:

Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group’s attachment to that land. For the sake of clarity, I will discuss each of these propositions separately.¹⁵³⁹

The first task undertaken by Chief Justice Lamar is the rejection of the argument that aboriginal title can only be put to such uses that independently meet the test for establishment of aboriginal rights set out in *Van der Peet*. He develops four arguments to support the contrary conclusion.¹⁵⁴⁰ First, he notes that aboriginal title was described in broader terms in cases like *Guerin* and *Paul*. Second, he reasons backwards from the judicial characterization of the nature of the Indian interest in reserves under the Indian Act. Third, he draws a supportive inference from the inclusion of mineral rights in the Indian Oil and Gas Act. Finally, though this is described as “non determinative”, he notes that such a description of aboriginal title is not supported by the academic literature.

As an aside, it merits comment to dwell briefly on the frequent equation between aboriginal title and statutory reserves in the jurisprudence. The key source of this equation is the *Guerin* decision which dealt with the surrender of a statutory interest in reserve land under the Indian Act. It is submitted that an uncritical acceptance of the unity between the two interests led Chief Justice Lamar into rather questionable syllogistic reasoning. He argues that because statutory uses are largely unlimited, and because statutory uses and common law uses are largely similar, common law uses must be likewise unlimited. While there are certainly very broad structural similarities between the two interests, there are numerous differences in respect to detail. These differences are highlighted in the later judgment of the Court in *Osoyoos*, especially in the dissenting judgement of Gonthier J.¹⁵⁴¹

Returning to the reasoning in *Delgam’uukw*, Chief Justice Lamar elaborates on the idea of title having an inherent limit. One of the distinguishing features between aboriginal title and what are described as “normal” interests such as the fee simple is that the holder of an aboriginal title is precluded from using the land in a manner which is irreconcilable with the nature of the attachment to the land that gave rise to the aboriginal title.¹⁵⁴²

The following paragraphs arguably constitute the core of the judgment. They introduce all of the key elements that have led to tensions and conflict such as the nature of occupation, the role of

indigenous law, the nature of continuity and the protection of present occupation that have fuelled continuing disagreements about the nature and scope of aboriginal title:

126 I arrive at this conclusion by reference to the other dimensions of aboriginal title which are *sui generis* as well. I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

127 I develop this point below with respect to the test for aboriginal title. The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title

128 Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

It is important to note the frequent shifts in tense and temporal reference. It is not always easy to determine when the decision is referring to present or past states of affairs. At a later stage of this

chapter, it will be argued that this uncertainty about temporal application reflects a deeper ambiguity about whether title, as it is currently elaborated, is a modern or an ancient right. As with most such dichotomies, it will be argued that the doctrine of aboriginal title has both ancient and modern dimensions and that each have to be considered to flesh out the full doctrine.

Paragraph 129 follows with an explanation of the bar on alienation and reflection on the special bonds between aboriginal peoples and their lands. Alienation would bring an end to the relationship that the title holder would have with the land and supports the policy of the common law to bar direct acquisition of aboriginal lands by settlers in colonies. One of the reasons for this policy is the protection that is accorded to the non-economic aspects of the aboriginal connection to territory.

Having completed this summary of the nature of aboriginal title at common law, Chief Justice Lamer turns to Aboriginal title under Section 35. Citing *Calder*, he notes that aboriginal title was recognized long before the enactment of Section 35.¹⁵⁴³ However, he adds an important qualification “I hasten to add that the constitutionalization of common law rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1).”¹⁵⁴⁴ He recalls the rejection of the French regime argument in *Cote*, and goes further to point out none of the cases handed down by the Court under s. 35(1) has relied on the existence of the right at common law¹⁵⁴⁵. He notes that the existence of a common law right is sufficient but not necessary.¹⁵⁴⁶

These are an important set of observations as they introduce some degree of tension between the idea of aboriginal title as a common law right and aboriginal title as an interest accorded constitutional protection with the enactment of Section 35. It will be argued that this distinction can be sharpened by reflecting on some of the observations of Paul McHugh about the legal history of aboriginal title.¹⁵⁴⁷ While the *Delgam’uukw* decision is generally regarded as primarily focussing on the common law requirements for the existence and scope of aboriginal title, it is significant that this decision introduces a distinction between aboriginal title as a common law right and aboriginal title as a right protected by Section 35. It will be argued that

this is one of the features of the jurisprudence that permit some flexibility in the interpretation of aboriginal title as an existing Section 35 aboriginal right.

It is interesting that Chief Justice Lamer immediately turns to the relationship between title and rights and their respective placement along a spectrum of rights protected by Section 35. Reiterating the conclusion of Adams that aboriginal title was a separate species of aboriginal right situated within a broader spectrum of Section 35 rights, aboriginal title is nonetheless distinct from other aboriginal rights.¹⁵⁴⁸ When the spectrum is considered as whole, the evidence may support protection of activities on land, rights that are limited to particular pieces of land or a right to the land itself.¹⁵⁴⁹ With these broad architectural comments in hand, Chief Justice Lamer then turns to the practical task of laying out a test for proof of aboriginal title.

Proof of Title

The core aspects of the test for proof of aboriginal title are found at Paragraphs 140 – 142. In addition to being different from activity-based aboriginal rights because of the degree of connection to land, aboriginal title also differs because it confers a right to the land itself.¹⁵⁵⁰ Recalling that the Van der Peet decision had emphasized both the physical presence of aboriginal peoples on the land and the social organization and distinctive cultures of the aboriginal peoples, two modifications of the test laid out in the prior decision were required. First, the requirement that the land be integral to the distinctive culture of the group was regarded as subsumed by the requirement of occupancy. Second, the date for identification of aboriginal title is shifted from contact to the date that sovereignty was asserted by the Crown over the land.¹⁵⁵¹

These passages relate to the distinction between activity based rights and a right to the land itself. The distinction introduces some conceptual puzzles into the jurisprudence. The determination of the content of aboriginal rights at contact and the determination of exclusive occupation for the purposes of establishing an aboriginal title at sovereignty have attracted considerable criticism. These criticisms have only intensified with the introduction of the entirely different test of effective control for the identification of Métis rights.¹⁵⁵² There is also some discussion of the role of the integrality aspect of the Van der Peet test for proof of an aboriginal title. Lamer CJ concludes that the requirement of occupancy subsumes the requirement of integrality to a distinctive culture.¹⁵⁵³ After these broad ranging observations and reflections, Chief Justice Lamer lays out, in quite concise terms, the basic test for affirmation of a claim to aboriginal title:

143 In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The Land must have been occupied prior to Sovereignty

Chief Justice Lamer sets out a number of reasons why sovereignty is the appropriate time to consider land occupation for the purpose of assessing the first part of the test for proof of aboriginal title. First, sovereignty is argued to be more appropriate because the Crown did not gain title until it asserted sovereignty. Second, unlike aboriginal rights, title does not raise the problem of having to distinguish between practices, customs and traditions that are distinctive and integral from those that had been influenced by contact with Europeans. Finally, the date of sovereignty is argued to be more certain than the date of contact between the aboriginal society and Europeans.¹⁵⁵⁴ Chief Justice Lamer then returns to the two divergent sources for the proof of an aboriginal title:

147 This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. Indeed, there is precedent for doing so. In *Baker Lake*, *supra*, Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their “physical presence on the land they occupied” (at p. 561) and the existence “among [that group of] . . . a recognition of the claimed rights. . . . by the regime that prevailed before” (at p. 559).

Lamer CJ also makes particular reference to traditional laws governing land tenure and land use:

148 This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the “aboriginal perspective while at the same time taking into account the perspective of the common law” and that “[t]rue reconciliation will, equally, place weight on each”. I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not

exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

149 However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title*, *supra*, at p. 73; also see *Cheshire and Burn's Modern Law of Real Property*, *supra*, at p. 28; and Megarry and Wade, *The Law of Real Property*, *supra*, at p. 1006. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.

These passages go some way to explaining the deep ambiguity that has shrouded the evolution of the law of aboriginal title. Both indigenous laws and common law property notions are described as relevant to the establishment of an aboriginal title but neither is clearly determined to be independently capable of grounding such a title. By indicating that both are to be considered, the judgment occludes the particular role played by each element. This permits some to argue that indigenous legal rules, such as a land tenure system that is proven to be in place at sovereignty, is sufficient to prove an aboriginal title as a "second source" for the proof of such a title.¹⁵⁵⁵ Others argue, and the Supreme Court of Canada eventually seems to support, that such laws are merely to be considered as relevant material to assess occupation at sovereignty.¹⁵⁵⁶ The ambiguity with respect to the role of indigenous property laws is compounded by the frequent reliance on Professor McNeil's theory of common law possession¹⁵⁵⁷. It is important to remember that this theory is directed to an alternative foundation for aboriginal rights to land and was not intended to supplant the separate notion of aboriginal title.¹⁵⁵⁸

Closely related to the ambiguities that are introduced in relation to the role of indigenous law and the common law theory of possessory title is the way that Chief Justice Lamer addresses the notion of “central significance”. This notion is discounted because the Chief Justice found it hard to imagine that a case where occupancy has been proven and a substantial connection maintained would not also be regarded as centrally significant.¹⁵⁵⁹ It will be argued that this is another example of linguistic imprecision that has marred the development of a clear doctrine of aboriginal title.¹⁵⁶⁰

It is important to note that these paragraphs are the ones that tend to support the notion that the Delgam’uukw decision supports broad territorially based claims to title. Broad notions of occupation and possession, coupled with under-specified notions of exclusivity and the downplaying of the notion of central significance have tended to support broad interpretations of the scope of title. This has been reinforced by the idea that proof of an indigenous land tenure system might be an alternative source for the proof of an aboriginal title under Section 35.

Continuity

It has been noted that the summary version of the test for proof of aboriginal title suggested that continuity was only required for those cases where an aboriginal claimant wishes to work backwards from evidence of present possession. Many academic commentators take the position that continuity simply is not required as an element of proof when a claimant is relying solely on evidence of occupation at sovereignty.¹⁵⁶¹ While this is certainly available as a textual argument, it does not stand up to critical analysis. There are several other passages in the judgment that strongly suggest at least some minimal requirement of continuity.¹⁵⁶² This does not require proof of an unbroken chain of occupation. Rather, it requires some evidence of maintenance of connection to the land. The Supreme Court seems aware of the risks of applying a continuity requirement too strictly. However, a literal reading of the text does not eliminate the possibility that some evidence of continuity is required when not relying on present occupation, only that it

is absolutely required in those cases where present occupation is presented as the primary evidentiary foundation for a title claim.¹⁵⁶³

It will be seen in the consideration of the Bernard decision that the primary notion of continuity is that the modern claimant group establish some connection to the group that occupied the lands at sovereignty. However, there is nothing in the jurisprudence that says that this is the only notion of continuity that is relevant and much to suggest that some continuity in the practice is required. Nor is there any suggestion that the same type of continuity is required for different types of Section 35 right. It is reasonable to expect a different degree of continuous attachment to support a harvesting right or to establish a right to the land itself. In other cases it might be important to establish a different kind of continuous attachment- for example, continuous attachment to a spiritual site may not require an element of use or occupation in contrast to other site-specific rights. Finally, the explicit reference to continuity in Delgam'uukw might involve some of the temporal ambiguity that pervades the decision. If the object of aboriginal title is to contribute to the cultural continuity of the aboriginal group, exclusive occupation in the present might play as much or more important a role to such cultural continuity as exclusive occupation in the distant past. Seen in this light, a group which attempts to secure land that is currently occupying exclusively might reasonably be asked to link that exclusive occupation to how the group used this land in the past. By parity of reasoning, similar continuity would be required when they start with proof of exclusive occupation of lands at sovereignty.

Exclusivity

The section of the judgment dealing with exclusivity addresses such topics as aboriginal exclusive occupation, trespass, intention to protect and joint title. In addition, the notion of reliance on indigenous law is repeated in the discussion of exclusivity, particularly in relation to the role that trespass laws might play in reinforcing the exclusivity of the group that enacts and enforces these laws. These examples are presented as a reminder of the importance of considering the aboriginal perspective on the question of exclusivity of occupation.¹⁵⁶⁴ Lamer

closes the section on exclusivity by drawing together strands concerning the development of the common law, the importance of linking recognition to aboriginal practice or systems of governance, introducing the possibility of shared exclusive title and the notion that title might be limited to those portions that are necessary within the overall spectrum of rights:

159 “In my opinion, this accords with the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance. It also allows sufficient flexibility to deal with this highly complex and rapidly evolving area of the law.”

Infringement and Justification

Though these aspects of the judgment will be dealt with in more detail in Part 3 of this thesis, it may be useful to mention the clear shift to broader justification. Lamer CJ paints a picture of title that gives way to broad needs when the Sparrow test is applied. There does not appear to be any reflection as to whether this amounts to equal treatment of aboriginal title property holdings as compared to other property holdings. This is also the part of the judgment where the contradiction between provincial limitations based on the division of powers is paired with the observation that a wide variety of objectives under provincial jurisdiction provide the foundation for justified infringements.¹⁵⁶⁵

Concluding Observations

In the conclusion to the majority judgment in *Delgam’uukw*, Chief Justice Lamer pens one of the most oft-quoted passages in all of Canadian aboriginal law, invoking the notion that we are all here to stay. Considering the complexity and length of proceedings dealing with interpretation of the Section 35 framework, a firm preference for negotiated resolution of contested issues is stated. It is recognized that the courts will be required to intervene from time to time but that the Crown is under a duty, moral if not legal, to conduct negotiations in good faith to resolve

disputes about the meaning and application of the constitutional framework.¹⁵⁶⁶ It will be argued in this thesis that this passage is indicative of a general shift in the centre of gravity towards a more facilitative and less directive role for the courts in the resolution of issues involving Section 35.¹⁵⁶⁷

Other Opinions

Two other opinions were rendered in *Delgam'ukw*. LaForest J. (with L'Heureux-Dube J.) wrote a concurring judgment which resonates with the themes of precision, specificity, continuity and centrality that are found in the *Van der Peet* decision.¹⁵⁶⁸ He expresses concerns about the appropriateness of drawing inferences about the content of aboriginal title from a process of analogy to statutory provisions. He also suggests flexibility in the application of a title test in order to take account of the movements of aboriginal peoples because of post-sovereignty relocations. On balance, the LaForest ruling de-emphasizes the notion of title being a right to the land itself and seems to echo earlier notions of "Indian title". Indeed, he places far more emphasis on the compensable nature of the right:

204 In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown.

McLachlin J. simply indicated her support with the result reached by both Lamer CJ and LaForest J.¹⁵⁶⁹

While detailed comment on the application of the various aspects of the test of proof of aboriginal title shall be deferred to the conclusion of this chapter, some preliminary comments are in order. First, it is hard to discern precise differences between the two substantive opinions rendered in the case. It is notable that McLaughlin J. essentially agreed with both opinions. It may well be that the approach of LaForest J. is slightly more conservative in tone and implication. He attempts to close the gap between the concept of aboriginal title and other aboriginal rights. He may be foreshadowing the “procedural shift” we later see in *Haida*. As noted, there is a strong sense that he is focussing attention on the compensable nature of the right rather than the right to the land itself.

While both substantive judgments in *Delgam’Uukw* contain many ambiguities, most commentators equate the test for aboriginal title with a “traditional lands” approach.¹⁵⁷⁰ It is notable that McHugh, in *Aboriginal Societies and the Common Law*, described the *Delgam’uukw* reasoning as a “. . . more expansive approach towards aboriginal title.”^{xii} It is largely for this reason that the next judgment from the Supreme Court of Canada was regarded by many commentators as a shock.¹⁵⁷¹

Bernard and Marshall

These two cases were taken on appeal from the Courts of Appeal of New Brunswick and Nova Scotia.¹⁵⁷² The Nova Scotia Court of Appeal produced a ruling that were strongly influenced by McNeil’s concept of common law title based on possession.¹⁵⁷³ It has been noted that the judgment of Chief Justice Lamer in *Delgam’uukw* also described this approach to title in a favourable fashion. The notable feature of the Bernard judgment is that the Supreme Court of Canada has clearly placed greater emphasis on the importance of physical occupation.

The analysis beginnings with a statement of the three separate arguments made by the claimants to support their aboriginal title claim based on the common law, the Royal Proclamation of 1763 and Belcher's Proclamation.¹⁵⁷⁴ However, it is the common law claim that received primary attention. The following three paragraphs merit quotation as they carefully situate the notion of aboriginal title within the broader scheme of Section 35 rights:

38 Where title to lands formerly occupied by an aboriginal people has not been surrendered, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, give rights to continue those practices in today's world: see *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Nikal*, [1996] 1 S.C.R. 1013. Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights. The respondents do not assert an aboriginal right to harvest

39 The common law theory underlying recognition of aboriginal title holds that an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it. Prior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible. The Crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1113. This process can be seen as a way of reconciling aboriginal interests with the interests of the broader community

40 These principles were canvassed at length in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, which enunciated a test for aboriginal title based on exclusive occupation at the time of British sovereignty. Many of the details of how this principle applies to particular circumstances remain to be fully developed. In the cases now before us, issues arise as to the standard of occupation required to prove title, including the related issues of exclusivity of occupation, application of this requirement to nomadic peoples, and continuity. If title is found, issues also arise as to extinguishment, infringement and justification. Underlying all these questions are issues as to the type of evidence required, notably when and how orally transmitted evidence can be used.

It was recognized that the key issue was the standard of occupation. The Supreme Court of Canada preferred the stricter approach to occupation that was stated by the trial judge in each case. The essence of the test is set out in paragraph 48 of the majority judgment. It is important

to note the focus on “practices” and the introduction of the idea of “translation”. The test is subsequently reiterated, with a few modifications:

51 In summary, the court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way, the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.

The following paragraphs demonstrate the increasing reliance on the idea of a spectrum of rights:

52 The second underlying concept — the range of aboriginal rights — flows from the process of reconciliation just described. Taking the aboriginal perspective into account does not mean that a particular right, like title to the land, is established. The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.

53 Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 26; *R. v. Côté*, [1996] 3 S.C.R. 139, at paras. 35-39. It is more accurate to speak of a variety of independent aboriginal rights.

54 One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158.

One particularly interesting part of the analysis is the reliance on non-aboriginal case-law at paragraph 54. While it is clear that the common law does admit recognition of a title based on uses such as hunting and fishing, it is probably fair to say that no case in the common law reports extends to the large tracts of land that are frequently claimed under the doctrine of aboriginal title.

Following these introductory comments, Chief Justice McLachlin turns to a closer examination of the concepts of “occupation” and “exclusivity”. The general rule is established in paragraph 61:

61 The common law, over the centuries, has formalized title through a complicated matrix of legal edicts and conventions. The search for aboriginal title, by contrast, takes us back to the beginnings of the notion of title. Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land. It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.

She adds a comment on the relevance of acts of exclusion, concluding that evidence of acts of exclusion are not required to establish aboriginal title. It is sufficient to demonstrate effective control of the land, from which a reasonable inference can be drawn that others could have been excluded if the group had chosen.¹⁵⁷⁵

One of the more important observations in the judgment pertains to the claims of nomadic groups. It is interesting to recall the observations of Hall J. on the nature of the seasonal round for resource utilization by the Nisga’a in *Calder*.¹⁵⁷⁶ It would certainly be a matter of judicial notice that the vast majority of aboriginal groups organized their use of territory around seasonally organized patterns of using different resources at different times of the year.¹⁵⁷⁷ However, the comments of Chief Justice McLachlin certainly can be interpreted as suggesting that the pattern of the seasonal round might prove a significant barrier to the aboriginal title claims.

66 The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient “physical possession” to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (para. 27). On the other hand, *Delgamuukw* contemplates that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.

Chief Justice McLachlin then turns to the issue of continuity:

67 The third sub-issue is continuity. The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group’s connection with the land must be shown to have been “of a central significance to their distinctive culture”: *Adams*, at para. 26. If the group has “maintained a substantial connection” with the land since sovereignty, this establishes the required “central significance”: *Delgamuukw*, per Lamer C.J., at paras. 150-51.

An overall summary of the test is provided:

70 In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and

semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.

Application of the test as articulated to the facts was very straightforward. The findings of fact of the trial judges that there was no evidence of occupation at the sites of the offences were upheld. Notably, the reasoning of the Nova Scotia Court of Appeal, applying a broader standard of proximate occupation, was rejected.¹⁵⁷⁸

The dissenting reasons of Mr. Justice Lebel are extremely interesting. His key concern is that the re-statement of the test for proof of aboriginal title is overly "common law centric." It is notable that this observation comes from two of the members of the Court who are well-versed in the civil law tradition. While he offers a variety of reactions to the majority judgment in *Bernard*, the key reservations of Mr Justice Lebel are stated in the following paragraphs:

134 Nomadic peoples and their modes of occupancy of land cannot be ignored when defining the concept of aboriginal title to land in Canada. "The natural and inevitable consequence of rejecting enlarged *terra nullius* was not just recognition of indigenous occupants, but also acceptance of the validity of their prior possession and title" (Hepburn, at p. 79). To ignore their particular relationship to the land is to adopt the view that prior to the assertion of Crown sovereignty Canada was not occupied. Such an approach is clearly unacceptable and incongruent with the Crown's recognition that aboriginal peoples were in possession of the land when the Crown asserted sovereignty. Aboriginal title reflects this fact of prior use and occupation of the land together with the relationship of aboriginal peoples to the land and the customary laws of ownership. This aboriginal interest in the land is a burden on the Crown's underlying title.

135 This qualification or burden on the Crown's title has been characterized as a usufructuary right. The concept of a community usufruct over land was first

discussed by this Court in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577. Ritchie C.J. used this concept as an analogy to explain the relationship between Crown and aboriginal interests in the land. The usufruct concept is useful because it is premised on a right of property that is divided between an owner and a usufructuary. A usufructuary title to all unsurrendered lands is understood to protect aboriginal peoples in the absolute use and enjoyment of their lands.

We can see a clear leaning to the approach articulated by Professor McNeil.¹⁵⁷⁹ Lebel J. also offers fascinating reflections on the difficulties that can arise when the issue of aboriginal title comes before the courts in summary proceedings.¹⁵⁸⁰

Tsilqot'in Trial Judgement

Just as the Bernard decision was perceived as a dramatic retrenchment from the progressive promise that was seen in the Delgam'uukw decision, the trial judgment of the late Mr. Justice Vickers in *Tsilqot'in v. British Columbia* is generally seen as providing an interpretation of the Bernard judgment that permits relatively large claims to title lands.¹⁵⁸¹ In a fashion similar to the actual ruling in Delgam'uukw, Mr. Justice Vickers held that a pleadings defect prevented him from making an actual award of title in the case, but in the spirit of attempting to encourage reconciliation between the parties he indicated where he would have found the test for aboriginal title to be met if he had been free to overlook the pleadings defect. Though the award did not extend to the full traditional territory of the claimant, a very large entitlement to aboriginal title lands was signalled. Attempts to settle the dispute were unsuccessful and the British Columbia Court of Appeal has rendered a judgment overturning the trial judgment.¹⁵⁸² The effect of this judgment shall be considered in the final section of this chapter.

13.3 What is the Current State of Play?

After considering the development of the case law it is now appropriate to turn to a more detailed consideration of some of the elements of the test for aboriginal title. The key issue in

determining the scope of aboriginal title in Canada is the assessment of the relationship between the Supreme Court of Canada's decisions in *Delgamuukw*¹⁵⁸³ and *Bernard; Marshall*.¹⁵⁸⁴ The former decision is seen by many as providing support for the equation of title lands with the traditional lands of an aboriginal claimant.¹⁵⁸⁵ The latter decision is often portrayed as reflecting a much more narrow equation of aboriginal title with lands that are analogous to a common law fee simple title. Initial academic evaluations tended to support the view that *Bernard; Marshall* reflected a dramatic narrowing of the potential scope of aboriginal title.¹⁵⁸⁶ These evaluations tend to focus on the requirement that aboriginal practices be "translated" into rights known to the common law. For example, Mark Walters argues that:¹⁵⁸⁷

"...Although the process of legal translation is supposed to represent a "process of reconciliation", the result is that no aboriginal nation can assert aboriginal title to land unless prior to the Crown's assertion of sovereignty their relationship to land amounted to property as defined by "common law property rules" - which may mean that seasonal patterns of resource use are not sufficient to found a title claim...may claim non-exclusive rights...But this seems to take us right back to the way judges thought in the 1800's: aboriginal peoples only have a non-proprietary, non-exclusive right to use their hunting territories, which otherwise belong to the Crown."

However, more recent evaluations,¹⁵⁸⁸ perhaps fed by the trial judgment of Mr. Justice Vickers in *Tsilhqot'in*, have started to describe the *Bernard; Marshall* decision in far less restrictive terms. Most notably, in his recent book,¹⁵⁸⁹ Paul McHugh endorses the view that the *Bernard; Marshall* decision is consistent with an aboriginal title award to very large portions of the traditional lands of an aboriginal claimant. He draws from the comparative scholarship of Simon Young who thinks that *Bernard; Marshall* "perhaps re-aligned the tests", but still sees ample room for expansive title rulings.¹⁵⁹⁰

The core theme of the meaning of *Bernard; Marshall* will be revisited frequently in this chapter. In addition to clear debate about the requirements of the decision as a matter of precedent, there is also a broad academic scholarship critiquing aspects of the decision including the underplaying of the role of indigenous law, the one-way nature of the translation process and the

alleged ethnocentric focus on the forms of the common law. These criticisms can best be understood in light of what might be called a “standard academic model” of aboriginal title.

13.4 The Standard Academic Model¹⁵⁹¹

There is remarkable consistency in how the doctrine of aboriginal title is described by academic writers. Aboriginal title is generally described as a property right that crystallizes at sovereignty. It is often broadly equated to the traditional lands of the claimant. It is associated with the doctrine of continuity which assures that aboriginal property rights survived the process of assertion and acquisition of sovereignty. It is generally linked to the notion of an intention to exclude others. It only requires continuity of use after sovereignty (a different concept from the “doctrine of continuity”) if present occupation is used as the primary evidence for the existence of the title.

Title is seen as a uniform right. As Richard Bartlett notes:¹⁵⁹²

“The common law has developed a uniform doctrine of aboriginal title....it was the only possible accommodation of the rights of settlers and aboriginal peoples. It was what pragmatism demanded.”

Brian Slattery has become one of the most eloquent exponents of the standard model of title. He describes aboriginal title as a generic right and as an ancient right. He is particularly critical of recent scholarship which describes aspects of the doctrine of aboriginal title as a product of modern judicial decision-making:¹⁵⁹³

“To treat it as the product of modern judicial activity is to turn one’s back on several centuries of legal history.”

Seen from the perspective of the standard model, the *Bernard; Marshall* decision is “puzzling”. Slattery advocates a clear separation of the process of recognizing the title interest and the task of reconciling this title with claims of others to land. He calls for a “...full and unstinting recognition of the historical reality of aboriginal title” as the first step.¹⁵⁹⁴ The second step is the application of principles that deal with the reconciliatory aspects of modern law in order to determine where title should be declared to exist.

Armed with a clear vision of the degree of protection accorded by the common law to aboriginal title, the proponents of the standard view query why the courts had for so long lost sight of the title rights of aboriginal peoples. They frequently refer to the chilling effect of the 1927 amendment to the *Indian Act* prohibiting individuals (aboriginal or otherwise) from soliciting funds for aboriginal legal claims without special licence from the Superintendent General.¹⁵⁹⁵ This is seen as one of the reasons for the gradual retreat from the pattern of recognition of title that is seen as being exemplified by the Royal Proclamation of 1763 and the negotiation of numerous treaties across Canada.¹⁵⁹⁶ The proponents of the standard view lament the persistent tendency of many to conclude that little or no title remains. This is generally seen to be an accurate conclusion for the United States¹⁵⁹⁷ and New Zealand.¹⁵⁹⁸

The resistance to recognition of title in Canada is seen to be a product of the imbalance of power between aboriginal peoples and non-aboriginal peoples. As McNeil states:¹⁵⁹⁹

“...one reason why the Supreme Court probably has not relied on the Aboriginal perspective and the historical record to presume that Aboriginal people were in occupation of all of Canada, and so cast the burden on the Crown of rebutting that presumption by proving the opposite where particular lands are concerned, is that the Aboriginal peoples would then be presumed to have held all lands in Canada by Aboriginal title, and that might pose too great a threat to the economic, social and political stability of Canada.”

It is important to be very clear that there is compelling textual support, at least on a superficial level, for the key element of the standard model- the vesting of title at sovereignty. The reference in the Calder case to common law doctrine has already been noted.¹⁶⁰⁰ The Delgam’uukw decision refers to the “historic rights” of the claimant and the granting of “legal protection to prior occupation in the present day”¹⁶⁰¹. Most importantly, one interpretation of the notion of title “crystallizing” at sovereignty is that aboriginal title emerged as distinctive common law concept at, or by reference to, sovereignty.¹⁶⁰² This is supported by the leading case in New Zealand which holds that “If there were customary property interests at the outset, then these interests are part of New Zealand’s common law and “there is no room for a contrary presumption derived from common law.”¹⁶⁰³ In Australia, Lisa Stelein has observed that “Common law native title has a long history that did not commence with Mabo.”¹⁶⁰⁴

13.5 Core Questions to Guide Assessment of the Standard Model

Five questions will be asked in order to guide analysis of the development of aboriginal title doctrine in Canada:

1. Is aboriginal title a common law right, a constitutional right or both?
2. Is there one route or several available for the proof of an aboriginal title?
3. Are the elements of the test for an aboriginal title required to be met independently?
4. Has lack of clarity in judicial technique contributed to the current impasse over the scope of aboriginal title?
5. What are the generic features of aboriginal title?

Common Law Right, Constitutional Right or Both?

One of the reasons for the difficulty of interpreting the scope of aboriginal title in Canadian law is the inevitable blurring that occurs between established common law doctrines and the impact of the 1982 constitutional amendments that recognized and affirmed existing aboriginal rights. We will see that the Supreme Court of Canada has not restricted Section 35 protection to rights that had been traditionally protected by common law doctrines relating to real property and frequently refers to the purposes of Section 35 in the description of the rights that are protected by Section 35.

The Supreme Court of Canada in *Sparrow*¹⁶⁰⁵ quoted from the decision of the Federal Court of Canada in *Baker Lake*¹⁶⁰⁶ to capture the pre-Section 35 relationship between aboriginal title and an act of Parliament:

“...Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.”

What followed *Sparrow* were a series of decisions that developed a distinctively Canadian theory of the relationship between aboriginal title and other aboriginal rights, a clear tethering of the content of rights to the purposes of Section 35 and a distancing process from traditional ways of establishing common law property rights. Over time, there has emerged a clear sense that Section 35 rights were to be understood more by reference to the protective provisions of the constitution than they were by analysis of the history of the English common law. *Delgamuukw* is described in the literature on aboriginal title as a decision that is inspired by the common law whereas *Bernard; Marshall* is seen as more heavily influenced by the purposes of Section 35.¹⁶⁰⁷ However, as noted previously, *Delgamuukw* also contributed to the trend to create distance between common law notions of aboriginal rights and rights protected by Section 35. This

decision builds on the distinction drawn in *Adams* between aboriginal rights and aboriginal title and the inversion of the traditionally understood relationship between the two. It also notes that proof of a common law right is not necessary for entitlement to protection under Section 35. It continues the predominant focus on states of affairs that existed in the past as opposed to attempts to determine the common law that was in place at the time. Described in another way, we saw the emergence of a *sui generis* Canadian theory of aboriginal rights, including title.

A dominant aspect of this *sui generis* theory is the separation forged between the elaboration of the rights of aboriginal peoples and the obligations that are imposed on the state when those rights are infringed. The doctrine of extinguishment is abolished for the post-1982 period in favour of a notion of justification. More generally, the jurisprudence deals with the process of determining the content of the right, determining how that right might legitimately be regulated by the state and how infringements of the right might be justified by reference to broader public goods.

It will be crucially important to develop a detailed sense of how constitutional analysis of the Section 35 framework relates to the development of the common law. The court has made it clear that the elaboration of protected aboriginal rights draws from but is not limited to the common law of England. There is a clear relation that can be drawn to the broader tendency in Canadian constitutional law to develop the common law, in the general sense of the body of law developed by custom and usage and articulated in judicial decisions,¹⁶⁰⁸ with reference to “Charter values”.¹⁶⁰⁹ There is ample foundation to support the conclusion that the nature and content of Section 35 protected aboriginal rights, including title, will be heavily influenced by important “Section 35 values”, notably reconciliation and the honour of the Crown.

One Route or Several?

Determining the scope of aboriginal title in Canada requires us to clarify whether there are one or several ways to prove such title. It is proposed that there should just be one way. We will see that *Bernard; Marshall* tended to undermine reliance on the so-called “second way” to prove aboriginal title, which as described below, is through reliance on indigenous legal systems. Reference was made to the legal possibility of a title that was recognized by instruments such as the Royal Proclamation of 1763 or Belcher’s Proclamation, but this idea was firmly rejected on the facts of those cases.¹⁶¹⁰

Kent McNeil is the legal scholar who is the most persistent advocate for a multiplicity of ways to prove an aboriginal title. He argues that a claimant “...should be able to rely on the source of land rights that best suits their particular circumstances.”¹⁶¹¹ In the course of his voluminous writings on aboriginal title, McNeil’s scholarship has evolved from advocacy of the doctrine of common law possession as a source of title to an endorsement of what he sees as the “second way” to prove title by reliance on indigenous legal systems. This is related to a more general shift in his scholarship towards issues of aboriginal sovereignty.

The doctrine of common law possession as a possible way to prove aboriginal title has a long history in Canadian jurisprudence. It has been seen that this notion was a key part of the analysis of Mr. Justice Hall in *Calder* and figured prominently in the *Delgam’Uukw* decision as well. While McNeil has shifted toward a theoretical framework that relies more on indigenous legal norms as a source of title, the jurisprudence of the Supreme Court of Canada is replete with favourable references to McNeil’s work.¹⁶¹² It is never entirely clear in the literature or in the jurisprudence if common law notions of possession are referred to as direct sources of aboriginal interests in land or if they are put forward to provide analogical content to an inchoate doctrine of aboriginal rights or title. The most recent reference in the *Bernard; Marshall* decision appears to suggest the latter usage. McNeil is also very clear that he has been referring to common law real property arguments as an alternative to a common law aboriginal title claim.¹⁶¹³ It is notable

that the reference in *Bernard; Marshall* was coupled with rejection of two Court of Appeal judgments that relied on common law notions of possession in a more expansive fashion.¹⁶¹⁴ Moreover, when the cases supporting common law possession that are cited in the Supreme Court of Canada are examined closely, it is apparent that they provide scant support for the broader claims equating title to traditional lands.¹⁶¹⁵ Indeed, the cases involve very small areas of land, generally involving boundary disputes between adjacent occupiers of land and did not involve claims against the Crown. As a matter of general principle, it will be important to draw some lines of comparison between the decided cases on common law possession and claims for aboriginal title. The latter involve collective rather than individual claims, they are frequently based on past rather than current possession and they often purport to cover areas that lack proportionality with the quantum of lands that are covered by most cases in the decided jurisprudence. It is also notable that McNeil has recently expressed grave doubts about the present availability of common law possession arguments and has tended to support arguments that rely on indigenous legal systems.¹⁶¹⁶ Though it will be important to present a balanced assessment of common law real property concepts, it seems highly unlikely that common law possession will either operate as a supplementary argument to support a claim of aboriginal title or as a significant conceptual foundation for determining the content of aboriginal title.

What Kent McNeil describes as a “second way” to prove aboriginal title refers to an attempt to prove the existence of an indigenous tenure or real property law.¹⁶¹⁷ His argument, which has some textual connection to how Chief Justice Lamer described the contribution of prior occupation and prior social organization as sources of aboriginal title, essentially says that it is possible to regard as title lands any lands that are so protected under an indigenous legal system. Mark Walters says that an indigenous claimant has the option of proving title *de facto* or *de jure* according to their own traditions.¹⁶¹⁸ John Hunter,¹⁶¹⁹ on the other hand, doubts the textual support for such a dual approach to title. However one resolves the debate about the best reading of *Delgamuukw*, it seems very clear that *Bernard; Marshall* rejects this “second way” of proving title.¹⁶²⁰ The indigenous perspective, which can be expressed through proof of their legal norms, provides invaluable context but cannot be an independent source of title. Kent McNeil, while still advocating the multiple routes to the proof of title, shares the view that *Bernard; Marshall* raises

a rather large obstacle to direct reliance on indigenous land tenure systems.¹⁶²¹ He also casts an eye to Australia where he sees the sourcing of aboriginal title in indigenous laws and traditions as posing some risks for the native title claimants:¹⁶²²

“Sourcing Native title in traditional laws and customs can thus have a two-pronged negative impact for Indigenous Australians. It can narrow the content of their rights and interests from the exclusive possession, occupation, use, and enjoyment found to exist in *Mabo* to more limited rights and interests defined by their traditional laws and customs, and it can facilitate the loss their rights and interests through the disappearance of their traditional laws and customs as a result, for example, of cultural assimilation.”

Particularly after the publication of the ground-breaking work of John Borrows on indigenous legal traditions,¹⁶²³ it will be very important to carefully consider the precise role that proof of indigenous law, most notably indigenous land tenure and property regulation systems, will have on the articulation and scope of aboriginal title. This will require navigating the rather difficult waters of the precise relationship between Canadian constitutional law and the legal systems of the aboriginal peoples of Canada. The basic argument that is supported in this chapter is that indigenous legal systems are not directly incorporated into Canadian common or constitutional law, but can provide essential context for determining the content and scope of Section 35 aboriginal rights, including title, under Canadian constitutional law. In contrast to Australia, which builds rights from the foundations of indigenous normative systems, Canadian law takes a more positivistic look at the practices, customs and traditions that lie behind and are animated by those normative systems.¹⁶²⁴ There may be a more direct role for indigenous legal systems to play in the determination of matters that are purely internal to the aboriginal group, but that is a topic to be explored in a later chapter.

This is not to say that the existence of an indigenous tenure system is not relevant to the assessment of title claims. It may provide important linkages to connection to particular lands and, particularly as supplemented by oral history, a deeper explanation of why particular lands

have significance to the aboriginal society. A lot will depend on precisely how the Canadian legal system embraces the notion of legal pluralism and engages in the task of “nesting” indigenous legal systems within its legal structure. The only claim that is made at this point is that proof of an applicable indigenous law is not available as a supplemental argument in the sense that it may be relied upon in the face of an absence of sufficient occupation as required by mainstream Canadian law. It is not a “second way” to prove title.

Another approach to the content of native title can be found in the work of Ulla Secher.¹⁶²⁵ She pays careful attention to the place of native title in the fabric of Australian law of real property. Her focus is on how native title can create a constraint on the title of the Crown to lands. She has developed a distinctive approach to the reception of real property law in a settled colony such as Australia. In her view, the existence of native customary rights to land simply prevented the Crown from acquiring the radical title to the land subject to those customary rights. Although the Crown can acquire the rights to the land by exercise of its prerogative powers or benefit from the extinguishment of the title by the legislature, the limitation on the Crown’s real property rights is seen as a theoretically sound way to make room for native title interests in Australian law. We can see some echoes of Secher’s views on title in the recent trend in the Canadian literature to conceptualize title as jointly held by the Crown and aboriginal peoples.¹⁶²⁶ It will be important to form a clear view on how notions of radical title may have developed in a different way in Canada than Australia. The notion of an underlying Crown title is well accepted in Canada and aboriginal rights have long been characterized as burdens on that title. There may also be deeper jurisprudential distinctions at work. The Mabo decision in Australia is organized around the analysis of the implications of the English property law doctrine of tenure. While these considerations appear periodically in the Canadian jurisprudence, the focus is more generally on making room for aboriginal title as a matter of Canadian constitutional law rather than making room for aboriginal title within the fabric of Canadian real property law.

Aspects of Secher’s work are dramatically original. She argues that the doctrine of tenure that is received in Australia should be read as incorporating aspects of feudal and pre-feudal tenures,

such as folkland, that are arguably formally analogous to the rights held by native title claimants under their own law.¹⁶²⁷ However, one of the reasons that these ideas are likely not transportable to Canada is that the doctrine of reception of laws has simply lost its foothold in Canadian law.¹⁶²⁸ There is a strong tendency to see aboriginal rights as not being dependent in any way on the precise manner of acquisition of the territory as a matter of British constitutional law or English common law. This trend was initiated with the Côté decision and has been reinforced with each subsequent important decision on the impact of Section 35.

One of the key arguments of this chapter is that although the Canadian test for aboriginal title has clearly been influenced by common law notions of possession, increasing salience of indigenous legal norms and fundamental notions of Crown title to land, the distinctively Canadian doctrine of aboriginal title has not embraced these multiple sources. Common law notions of possessory title are used only by analogy rather than as a separate source of legal entitlement. Indigenous legal norms are used to provide context for the assessment of occupation at the date of sovereignty rather than as enforceable in their own right. Notions of Crown title help to explain the historical development of title doctrine but do not provide a separate basis for delineating the scope of aboriginal title. It will be subsequently argued that a number of factors, including the modern nature of aboriginal rights claims and the role of the entire spectrum of Section 35 rights, play a dominant role in the construction of the architecture of aboriginal title as a Section 35-protected right. These developments are clearly connected to the shift in orientation from notions of right to notions of obligation. In other words, the uniquely Canadian doctrines of consultation and justification have promoted a shift towards a more dynamic notion of aboriginal rights, including title, that resonates with the earlier focus of the common law on the obligations of the Crown.

While there continue to be debates about the precise contours of the Canadian test for proof of an aboriginal title, it is becoming increasingly clear that the test will take singular form and will not be developed through a series of alternative methods of proof.

One Component or Several?

Closely related to the question of whether aboriginal title has several sources or is to be determined by the application of a single test is the assessment of the relationship between the components of that single test. On their face, both *Delgamuukw* and *Bernard; Marshall* call for three components of the test to be met: occupation, exclusivity and continuity. However, continuity is described as only being required in limited circumstances. Exclusivity and occupation are described with considerable conceptual and practical overlap. These features permit two rather different ways of thinking about title. The standard model builds on the notion of “crystallization” to say that the title right vests at sovereignty and that the content of that title is tested by determining the intention of the aboriginal group to exclusively occupy their traditional lands at that time. The narrower interpretation of *Bernard; Marshall* tends to view all three of the components of the test as having separate operation. Occupation, in a sense that would be recognizable to the common law, must be proven at sovereignty. Exclusivity is a separate requirement that generally disentitles a claim if there are competing claimants. The claim for title cannot be maintained if the required continuity has not been maintained.

The difference between these two approaches may be seen, in essence, as the difference between a single test with no separate components or a single test with multiple components, each of which must be satisfied. This may sound technical but it has a profound impact on how we read the case-law. One reading is supported, at least in part, by para. 39 of the *Bernard; Marshall* decision, which summarizes the common law theory dealing with recognition of title.¹⁶²⁹ The reading that this paragraph supports is consistent with the standard model of aboriginal title. Title is something that crystallizes at sovereignty. It is presumed to continue unless it is taken away by valid legislation. But there is another way of reading this passage. It clearly is describing common law theory but it is not necessarily describing the practice that has developed after 1982. Post-1982, we see a clear pattern of describing aboriginal title as a claim for an aboriginal right. That right is assessed by reference to the state of affairs that existed at sovereignty but is not necessarily confirming that rights have existed since sovereignty. While occupation at sovereignty is an important part of the test, so is the requirement for some demonstration of

exclusivity and continuity. In other words, even if the first part of the test is met by the demonstration of the required level of occupation, there can be no title right declared if the exclusivity or the continuity parts of the test have not also been met. There are separate elements of the test, the failure of any element sufficient to defeat a claim to title. It is proposed in this chapter that the latter reading is the better one.

There are several elements that are mired with ambiguity in the key decisions. What precisely is meant by crystallization of the right at sovereignty? What is the relationship between the requirements of occupation and exclusivity? The majority in *Bernard; Marshall* demonstrated a tendency to blur the two concepts in its general summary of the tests, though it tended to revert to the primacy of occupation in the application of the test to the facts. For the blurring we can see the summary reference –“...exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title.” Deep ambiguity is also present as to the precise requirements of the continuity part of the test. Particularly after *Bernard*, in what sense does the test for aboriginal title reflect a notion of “inter-societal law”?¹⁶³⁰

Seen from the perspective of the general argument that is made in this thesis, aboriginal title is a modern claim that starts with an examination of practices, including occupancy practices, at sovereignty. A title award can be made if all elements of the test are satisfied, including the requirement for some element of continuity with the present. Some attention will have to be paid to each of the three elements that form part of the test stated in *Delgam’uukw* - occupation, exclusivity and continuity. We have seen that there has been a tendency to combine the elements of occupation and exclusivity. This has had the effect of allowing clear exclusivity to shore up perceived deficiencies in the nature and degree of occupation. Many commentators, including Lambert and Young, have urged the use of exclusivity as the determinative factor to separate occupation which supports title from occupation which does not support title.¹⁶³¹ This acts in an additive way to support arguments, often based on common law notions of possession or reliance on indigenous legal norms, for more expansive notions of occupation. Finally, as previously noted, the notion of continuity is also subject to deep debate. On a strictly textual basis, many

argue that continuity is only required if present occupation is the primary foundation for an argument in support of an aboriginal title claim. However, there are deeper conceptual puzzles at work. Does the notion of continuity reach beyond the narrow notion of forging a connection between the group that makes the claim and the group that existed at sovereignty? Does the requirement of continuity differ, in degree or kind, depending on the type of claim that is being pursued? Does the maintenance of a spiritual or cultural connection to the land suffice in all cases? These questions will come to the fore when the fundamental nature of an aboriginal title claim as a modern or ancient right is addressed.

Problems with Judicial Technique?

We will see that part of the problem with developing a coherent theory of aboriginal title is that both core decisions¹⁶³² are mired with conceptual ambiguity. Part of the problem flows from choices that are made with respect to judicial technique. The observation that nomadic occupation will result in an award of non-title harvesting rights “in most cases” is a good example of how judicial technique can lead to confusion. Governments may be likely to see this predictive statement as amounting to a general rule. Claimants, on the other hand, might see their claims as falling within the exceptions that are dictated by the fact that it is a mere prediction and not a rule. The line between the two is nothing but a subjective assessment of degree of occupation. The material that is examined to assign title and rights do not differ in kind but is arrayed along a continuous spectrum. The use of prediction as a technique to state a test can only cause problems- no real guidance is provided on how to separate the exception from the rule.

A similar problem can be seen in a close examination of the relationship between occupation and exclusivity. As noted above, in some passages the two concepts are effectively merged in a notion of exclusive possession. In other passages, the notion of occupancy is revealed to be the dominant part of the test. We see a clear pattern of some judges and most commentators placing great stress on the notions of exclusivity and intention to exclude whereas governments tend to

focus on the concept of occupation. It is not surprising that there is some element of continuing confusion. There is a deeper reason for this confusion. Exclusivity is part of the test for proving title and a core element of the description of the title that is proven. Some guidance in resolving some of these conceptual puzzles might be obtained by reliance on the work of property law scholar Larissa Katz.¹⁶³³ Professor Katz has attempted to tease out conceptual coherence in the fundamental conceptions of property that have developed in Canadian law and offers tools that might illustrate the similarities and differences between aboriginal title and other property interests. Though she has only briefly addressed aboriginal title as a property right, the deep conceptual analysis of the role of exclusivity in conceptions of property law offers useful insights for an aboriginal law lawyer. This is particularly important as the exclusivity aspect of the test for aboriginal title is heavily contested in Canadian aboriginal law.

We see a similar problem with conceptual confusion in the notion of continuity. It is both a description of the survival of aboriginal property rights and a component of the test to prove such rights.¹⁶³⁴ Continuity is both a doctrine and a requirement of the test for aboriginal title. To the extent that continuity is considered as a doctrine, it will become important to ask what precisely has been continued? Is it the entire legal system of the indigenous group in occupation and control of lands at sovereignty? Is it a title to the land itself? Is it a more general right to use and occupy- the notion of a usufruct? Is it best equated with a conclusion that an inchoate interest has not been extinguished? Is it better understood as a vesting of a procedural or substantive obligation in the state? To the extent that continuity addresses a component of the test for proof of an aboriginal title, a range of unanswered questions remain to be addressed.

A final example of conceptual imprecision being embedded in judicial technique is the notion that central significance is “subsumed by” the requirement of exclusive occupation. In *Adams*¹⁶³⁵ and *Côté*,¹⁶³⁶ there are references to aboriginal title being the appropriate right for lands that are of central significance to the aboriginal group. In *Delgamuukw*,¹⁶³⁷ this notion is downplayed by reference to the conclusion that lands that are found to have been occupied in the required sense will, by definition, meet the standard of central significance. The usefulness of

this observation is undermined when we remember that the line between the character of occupation that suffices to prove a title as opposed to a right is blurred, continuous and subjective. For this reason, the notion of central significance cannot appropriately be dismissed by reference to the conclusion that is reached after the line has been drawn.

The general point is that the test for aboriginal title is stated in Delphic terms, using words that are susceptible to multiple meanings and expressed through tests that are not developed with any level of precision. What we see is a conceptual framework that is rather under-determined, rife with inconsistencies and dependent on conceptual tools with multiple meanings. While these observations are not meant to act as critique of the jurisprudence, they do open up some avenues for adding precision to the general statement of tests that occur to this point.

Where this leaves us is a legal terrain that has room for multiple interpretations, even to the point of completely alternative, and heavily contested, sources for the existence of an aboriginal title. This thesis aims to provide an alternative to the standard model of title, as well as the elaboration of a single test with multiple components that must each be satisfied. It will reject the notion that there are several completely separate sources for aboriginal title in Canadian law. It proceeds in the spirit of the observation in *Bernard; Marshall* that the development and application of the test for aboriginal title is at a very early stage and must be approached with flexibility.¹⁶³⁸ The fundamental purpose for the development of this alternative model is to develop an approach to title which fits better with the focus on modern dialogue about different forms of connection to land that lies at the core of the emerging Haida paradigm.

Reflections on the Generic Features of Aboriginal Title?

One of the notable characteristics of the Delgam'uwkw decision is the emphasis it places on several generic features of an aboriginal title. These include the collective nature of the title, its feature of inalienability and its inclusion of an internal limit. It is in the analysis of these three

features that we see the closest affinity of Canadian aboriginal rights law analysis with the distinctions that Brian Slattery develops between specific, generic and generative rights.¹⁶³⁹ These three features are certainly presented as generic components of an aboriginal title, notwithstanding who holds the right or the proof that gave rise to its confirmation.¹⁶⁴⁰ It is also with respect to these features that the frequent equation of aboriginal title as a legal interest and statutory reserve interests can be most seriously questioned.¹⁶⁴¹

Collective Nature

Particular questions arise about the notion of aboriginal title as a collective right. This stands in stark contrast to the *Mabo* decision which held open the possibility that a particular native title could vest in the collective, a sub-group or an individual.¹⁶⁴² It also stands in some tension with the clear pattern in some aboriginal communities in Canada to regard significant rights as held by family groupings or clans.¹⁶⁴³ We also know that individuals can invoke collective aboriginal rights in the event that they are charged with regulatory or criminal defences.

The case of *Behn v. Moulton Contracting* had the potential to challenge the notion of aboriginal rights as collective rights.¹⁶⁴⁴ While a treaty right under Treaty 8 was invoked in this case, the general arguments accepted by the British Columbia Court of Appeal engaged the inability of an individual to have standing to raise a collective Section 35 right as a defence to a civil claim for damages and the inability of the individual to collaterally attack a permit that had been issued after consultation with the Indian Act band. This conclusion was reached notwithstanding the ability of an individual to raise a collective right as a defence to a criminal or regulatory charge and despite the position of the Indian Act band that the consultation for the particular permit was inadequate. The recent decision of the Supreme Court of Canada in this case left some of the fundamental questions about the generic features of a Section 35 right unresolved.¹⁶⁴⁵ Rather than decide the case by reference to standing or collateral attack the Supreme Court of Canada elected to address the case under the abuse of process doctrine, seemingly in part because of its more flexible nature. While the Court clearly held that the Crown could rely on discussions with

the collective in relation to the duty to consult, it left open the theoretical possibility of Section 35 rights vesting at some level other than the collective.¹⁶⁴⁶

Inalienable

The inalienability feature of aboriginal title has been heavily criticized by McNeil as paternalistic and unsupported by common law jurisprudence.¹⁶⁴⁷ The roots of the notion of inalienability are found in the Marshall trilogy¹⁶⁴⁸ and the requirements of the Royal Proclamation of 1763¹⁶⁴⁹. For this reason, there is ambiguity as to whether inalienability flows from the very nature of aboriginal title or whether it is a requirement that developed from imperial instruments. There are also echoes in the jurisprudence that concludes that aboriginal title is not an interest that can be registered under provincial land titles regimes.¹⁶⁵⁰ The notable feature in the *Delgam'ukw* decision with respect to this feature is the clear parallel that is drawn between inalienability and the inherent limit on the uses to which title lands can be put.

Inherent Limit

The imposition of an inherent limit on the use of aboriginal title lands has been heavily criticized in the literature.¹⁶⁵¹ Some even go so far as to suggest as it might amount to a pre-condition for the existence of the right rather than a limitation on how that right might be exercised.¹⁶⁵² Some analogy might be drawn to the *Mikisew* test for infringement of a treaty right- the onus to justify an infringement shifts to the government when the land can no longer be used in a fashion consistent with the right.¹⁶⁵³ While it appears to be described as a limit on the content of aboriginal title, there is no judicial guidance on how an internal limit would be enforced or even identified with any precision.

“Not Necessary to Decide the Precise Content”

We have seen that Canadian courts are highly reluctant to issue binding rulings in aboriginal title cases, frequently using procedural tools to push the underlying dispute back into the realm of negotiations. For a long time, Canadian courts have also stressed the lack of a need to decide the precise contours and parameters of aboriginal title doctrine.¹⁶⁵⁴ It can be argued that these tendencies are important harbingers of an underlying tendency to see disputes about use of land, especially considering the deep historical roots of these disputes, from a process or procedural lens. The concern is less the precise content of the right but rather whether duties of the Crown with respect to that right have been discharged. This leads to a strong sense that the focus is on questions of public law and administrative law. This harkens back to a 19th century notion of aboriginal rights as primarily engaging the non-justiciable responsibilities of the Crown.¹⁶⁵⁵ While the notion of a political trust is no longer supported in Canadian law, we can see important continuities in approach between the 19th century practice, the frequent reluctance of Canadian courts to address the content of the right in favour of analysis of how the right was considered and protected and the subsequent emergence of the duty to consult. When viewed through a longer lens, the concern appears less to be the establishment of boundaries and limits than finding ways to reconcile different forms of attachment to land.¹⁶⁵⁶

Summary

These five factors help cast light on the contours of the current Canadian doctrine of Section 35 aboriginal title, though a great deal of ambiguity remains as to the nature, scope and limits of this doctrine. It is submitted that careful attention to four contextual factors may shed some light on these important questions. Taken collectively, these contextual factors provide the foundation for a theory of aboriginal title that may assist the process of refining the doctrine. Therefore, the bulk of the analysis will be directed to establishing the idea that aboriginal title, like all other Section 35 rights is a modern right, that it differs from the broader notion of traditional lands, that it plays

an important role as part of a spectrum of Section 35 rights and it is developed and specified through processes of engagement and dialogue.

13.6 Foundations for Proposed Model for Title and its Proper Role within the Section 35 Framework

Aboriginal Title is a Modern Right

Is aboriginal title a modern claim or a modern recognition of an ancient right? When a title is recognized, is it presumed that the title has existed from the date of sovereignty unless defeated by some other legal argument? These questions engage some very complex issues. The argument that is developed in this chapter is that aboriginal title is a modern right that is supported by an examination of ancient patterns of use and occupation of land that have demonstrated continuity with the present. Therefore, as opposed to a binary choice between title as an ancient right or a modern right, it is a Section 35 right that has both ancient and modern dimensions. The argument has several key components that rely on several disparate sources.

Before turning to these sources, it may be useful to reflect on some fundamental concepts. It is clear that some form of rights involving lands existed prior to enactment of Section 35, even if these were primarily usufructuary in nature. It is also clear that forms of rights involving land are evolving after the enactment of Section 35. There is a tendency in the critical literature to regard these two sets of rights as having identical content, in part because of the use of the word “existing” in Section 35 and in part because of the intellectual shadow cast by the declaratory theory of the common law. Indeed, it is argued that there are strong reasons to resist this tendency to equate the two classes of rights. It is possible to highlight the differences between the rights that existed then and the rights that are recognized now. Among the differences are the injection of the protective force and animating principles of Section 35, the evidentiary and procedural advantages of adopting a modern focus on rights and, most importantly, the structural shift to a modern, though historically informed, dialogue about competing visions of land-use.

We can start with the notion of claiming an aboriginal right in Canadian law. While the test for proof of an aboriginal right under Section 35 requires an examination of “practices, customs and traditions” of aboriginal parties at various times in the distant past, there is no real doubt that the right that is declared is prospective in nature. The object of the test is not to determine what may have been recognized by English common law principles relating to real property at some point in the past, nor to grant a right long known to the English common law (*e.g.*, a fee simple title, a *profit à prendre*, an easement, etc.),¹⁶⁵⁷ but to determine what will be recognized at the time of the claim as an aboriginal right for the purpose of being accorded recognition and affirmation under Section 35. In other words, the Supreme Court of Canada engages in a retrospective examination of a state of affairs at various dates in the past in order to elaborate the content of rights that are “based on” practices, traditions and customs. This notion of linkage with or referral back to practices in the past is the dominant characteristic of the distinctive Canadian approach to Section 35 rights. While this is most clear in relation to Section 35 activity rights, there is no impediment in principle, and much support in precedent, for the application of the same approach to aboriginal title claims.

One of the implications of seeing the process of proving aboriginal rights in this fashion is that there is a strongly positivistic orientation in the Canadian jurisprudence. States of affairs in the past are used to provide an evidentiary foundation for the declaration of rights in the present. This evidentiary foundation is used to determine if there is support for declaring the existence of a right that may be claimed by the aboriginal group. However, other factors must be taken into account before an actual declaration is granted. Have the other elements of the test been met, such as continuity? Is the right claimed a natural extension of the pre-contact, pre-sovereignty or pre-effective control practice? Can it be said that no right ought to be declared to exist because the government extinguished all the potential rights in a particular area, or of a particular group, prior to the enactment of Section 35?¹⁶⁵⁸

As noted above, there is textual support for another view. The reference to “common law theory” from *Bernard; Marshall* could arguably support, at least superficially, an idea of title that

crystallizes at sovereignty and continues unless expressly taken away.¹⁶⁵⁹ There are statements in earlier cases like *Calder* that make this point with considerably more directness.¹⁶⁶⁰ This approach is certainly strongly supported by most Canadian legal literature. The strongest version is found in the influential writings of Brian Slattery who draws a firm distinction between rules for recognition of title and rules for reconciling that title with the rights and expectations of other Canadians.¹⁶⁶¹ Though he does not fully specify the content of the rules of reconciliation, it is clear that he has rules such as extinguishment, abandonment and justifiable infringement in mind. Slattery draws significant support from the majority judgment in *Mitchell* which certainly can be read as providing strong support for a traditional understanding of the doctrine of continuity.¹⁶⁶²

However, the jurisprudence does not focus on rights that are presumed to have survived the assertion and acquisition of sovereignty under a doctrine of continuity nor does it attempt to explain how such rights would intersect with or displace the Crown's underlying title. Nor does the doctrine appear to focus on trying to understand or apply a "common law" of aboriginal title which may have existed prior to 1982.¹⁶⁶³ Rather, it looks for the "rights" that are "absorbed" into the common law by way of tests that have been elaborated with reference to the purpose of Section 35. This is a rather different exercise from a search for rights that are presumed to have survived the process of assertion and acquisition of sovereignty. The Supreme Court of Canada has adopted an approach which avoids the traditional, and much criticized, focus on whether a colony was acquired through conquest or settlement. The focus is very much on the identification of modern rights that are based on ancient practices. While the Supreme Court of Canada has not expressly disavowed reliance on the doctrine of continuity, it has evolved towards an approach which shines the light more directly on the modern Section 35 right than the rights which may have previously been recognized under the common law. As will be seen shortly, this argument is aided by the recognition that there was, and continues to be, a great deal of uncertainty about the precise content of rights that were in fact recognized by the common law. For example, there is a strong body of opinion that rejects a conclusion that the common law vested title in lands at the date of sovereignty. While a clear burden was placed on the

Crown, it is becoming more common to see that burden through a public law rather than proprietary lens.

A recurrent theme of this thesis is that the methodology adopted by the Supreme Court of Canada is highly positivistic.¹⁶⁶⁴ In some quarters this might be regarded as having a negative connotation but it means no more than saying that the Court is attempting to base its rulings on facts rather than normative evaluations. Guided by the purposes of Section 35 it looks for practices, customs and traditions that can act as a foundation for the determination of modern aboriginal rights, including rights to the land itself. There is no doubt that these findings of fact are to be placed in the fullest possible context, including how they are seen from an indigenous perspective and through the norms of an indigenous legal system, but the search for a factual foundation is always retained as the laser focus of the various tests for Section 35 rights.

One of the springboards for this argument is that we can now benefit from a rich set of developments in the legal history of aboriginal title. Particularly under the New Zealand school of legal history, it is becoming increasingly commonplace to see aboriginal title described as a “modern right”.¹⁶⁶⁵ What is meant by this term is that the notion of aboriginal title as a right to the land itself has only become coherent with the modern jurisprudence spearheaded by Canadian decisions such as *Calder*¹⁶⁶⁶ and *Delgamuukw*.¹⁶⁶⁷ The dominant scholar in the New Zealand school has been Paul McHugh. He strongly argues that the modern notion of aboriginal title is dramatically at odds with how the concept would have been understood by the common lawyers of the past. We have seen recent judicial acceptance of the general theoretical approach of McHugh in the recent Ross River case dealing with the Rupert’s Land Proclamation.¹⁶⁶⁸ While this chapter will consider the writings of McHugh on aboriginal title in more detail shortly, the general point is that there are strong grounds to avoid the conclusion that there is a “golden thread” from the notion of aboriginal title as it would have been understood at early times of the establishment of the Canadian state to how it is understood today.¹⁶⁶⁹ Room may be opened up to think clearly about the concept of title by understanding its nature as a modern right.

It is also helpful to contrast the notion of title as a modern right with current scholarship on the historical development of norms within British imperial law and practice. Canadian thinking on these issues has been dominated by lawyers who tend to focus on notions of recognition and formal instruments such as the Royal Proclamation of 1763 and treaties. It is useful to draw a contrast with a recent description of the notion of aboriginal rights drawn from a doctoral thesis by Guy Charlton:¹⁶⁷⁰

“...Rather than a coherent set of principles and rules to be enforced by the courts, there was a vague notion that indigenous peoples had various claims, indeed “rights” to the territory they occupied and used, and that the government had an inchoate obligation to prevent the wholesale dispossession of these peoples by individual settlers. These claims and obligations were not “legal” despite being incorporated into the imperial policy, nor did they bind the Crown or national authorities. Common law rights solicitous to Indigenous peoples and treaty rights bargained between indigenous peoples and imperial or colonial authorities were only incorporated into the state legal system, i.e. became judicially recognized and the rule of decision, where their legal vindication also advanced some other non-aboriginal, usually governmental interest. Because constitutional and governmental structures varied and because judicial self-understandings of how settlement was to proceed and how the national polity was to exist differed, each state thus exhibits different permutations on the more general common law doctrine of aboriginal title as it exists today.”

There is now a huge literature on the development of the common law pertaining to aboriginal rights in several jurisdictions within the Anglo-American sphere. It helps explain such decisions as *St. Catherine's Milling*¹⁶⁷¹ as well as the late emergence of doctrines such as native or aboriginal title. It acts as an effective counterweight to the hugely influential body of legal academic literature, most especially the early works of Slattery and McNeil, which has so successfully led the intellectual framing of aboriginal issues for the last 40 years, especially with respect to the assumption that there is a continuous relation between the common law of the past and that of the present.

Several other sources are also helpful to reflect on the notion of aboriginal title as a modern right. Most generally, many political theorists have increasingly expressed doubts about the coherence

of arguments for the restitution of dispossessed aboriginal lands. As noted previously, Jeremy Waldron is the dominant writer in this genre of writing, though Burke Hendrix and Courtney Jung have also presented important variations of this argument.¹⁶⁷² There is a very strong literature that suggests that the focus of normative analysis should shift from the act of dispossession to the modern needs of the aboriginal claimant. A particularly interesting example of this line of thought is found in the writings of Dwight Newman.¹⁶⁷³ He argues against prior occupation as a normative requirement for an aboriginal title claim, preferring to see such occupation as a proxy for continuing aboriginal connections to land. Prior occupation, on this view, is neither necessary for nor sufficient to prove a normatively acceptable notion of aboriginal title. Prior occupation will not be sufficient if it no longer supports a meaningful continuing aboriginal connection to land and will not be necessary if a meaningful connection can be established without proof of prior occupation. He recognizes that his reflections might be used to "...limit some Aboriginal title claims", but argues that:

"...making normative sense of the prior occupation element in the Court's Aboriginal title test actually pushes one toward a significant reinterpretation of the same element. On my account, prior occupation serves and ought to serve as a proxy for community connections to land, which should be the primary matter at stake. Aboriginal title, as conceived within the Supreme Court of Canada's Aboriginal rights jurisprudence, then, is properly a particular form of Aboriginal right more than a particular property claim. Recognizing the prior occupation element for what it is enables greater consistency on the central point about the nature of Aboriginal title and opens up space for a normatively coherent account of the law. The prospect then arises of moving beyond a schism between historically-oriented and forward-looking principles to seeking a principled way of dealing with the real interests at stake, of finding principled reconciliations between Aboriginal cultural, political, and spiritual rootedness in Turtle Island and the simultaneously legitimate identity-based and justice-based claims of all Canadians."¹⁶⁷⁴

Just as the legal history literature helps us to understand that there has always been a rich and evolving debate about the precise content of the common law of aboriginal rights, the political theory literature stresses the deep normative problems with any doctrine that proceeds directly to restore lands that had been the subject of distant dispossession. Many theorists highlight the fact that others have built their life plans around those lands. The real focus should be on the "enduring injustice" that distorts the life chances of aboriginal peoples who are the present

inheritors of the consequences of such dispossession.¹⁶⁷⁵ Taken together, there is a strong trend in political theory to stress the primacy of present-day distributive injustice over restitution of long-distant deprivations of land. A full examination of the complex contours of this literature is beyond the scope of this chapter, but it does reinforce the point that a doctrine of aboriginal title should be as attuned to modern justice as much as it draws inspiration from historic injustice.

A related point is that when we examine the early legal academic writings that helped frame the modern unfolding of the doctrine of aboriginal title, we see that the key authors were primarily concerned with the protection of the extant occupation of aboriginal peoples.¹⁶⁷⁶ They were seeking a doctrine that would act as a bulwark against any further dispossession but were not seeking restitution of lands that had been the subject of distant dispossession.

A similar movement towards focussing on title as a modern right is starting to take root in Australia. Scholars are now calling attention to the “...unfortunate retrospective preoccupation of native title considerations.”¹⁶⁷⁷ Steven Ross and Neil Ward call for a “new paradigm” based on respect for the contemporary relationship of indigenous peoples with their country. They argue that “...an approach based on Indigenous peoples’ contemporary relationships with the land, should go a considerable distance towards ameliorating this predicament by reducing the need to justify a relationship with the land based on pre-colonial status.” This should “...shift the perceptions of non-Indigenous peoples away from viewing Indigenous people as pre-colonial, and towards an appreciation and understanding of their current and vital relationship to country.”¹⁶⁷⁸

All of these points are designed to facilitate the perception of aboriginal title as a modern right. However, there is an important doctrine of the common law that tends to regard even a modern doctrine as having implications for how we understand the past. This is the declaratory theory of the common law, often associated with Blackstone.¹⁶⁷⁹ The idea is that judges do not “make” common law but “find” it. When it is found, it is presumed to have always been there. In the case

of aboriginal title, it is the declaratory theory which has the implication that a modern court declaring aboriginal title to a particular tract of land is seen as also declaring that such title has been in place since the date of sovereignty. While the argument will shortly be developed in more detail, it is very clear that Canadian constitutional law no longer feels bound to adhere to the fiction of the eternal content of the common law. Canadian judges are far more prone to recognize that they are empowered to change the common law, particularly to accord with the Constitution, and that those changes will generally be prospective in nature. The doctrine still exerts a stronger pull in the United Kingdom as there is a powerful tendency to resist the notion that judges from time to time make the law, preferring to limit the responsibility to change the law to Parliament.¹⁶⁸⁰

To this point, we have seen that aboriginal title claims are, like any other claim to a Section 35 right, modern claims. They rely on tests which require careful attention to the historical use and occupation of lands by the aboriginal group claiming the protection of Section 35 it is in this sense that they are properly understood as ‘ancestral rights’ or ‘droits ancestraux’, as they are referred to in French. In their actual operation, they can be seen to work in a fashion that differs in dramatic ways from the standard model. The common law did not vest title to lands in aboriginal groups as the time of assertion of sovereignty. The linkage of aboriginal rights to title to land is a much more modern development in the law. Recent scholarship shows that the common law would have been understood as having had a much different focus in its early years. The focus would have been on the obligations of the Crown. Interestingly, in its efforts to give meaning to the “promises” of Section 35, the Supreme Court of Canada has come back to the idea that the assertion of sovereignty placed strong obligations on the Crown to act honourably with respect to aboriginal peoples:¹⁶⁸¹

“...The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of

aboriginal societies with the sovereignty of the Crown”, *Delgamuukw, supra.* at para. 186, quoting *Van der Peet, supra.*, at para. 31.”

We will return to the inter-relationship between Section 35 rights and the duty to consult at a later stage¹⁶⁸², but for now it is sufficient to summarize the argument to this point, which is that an aboriginal title claim is a modern claim that requires assessment of the “underlying realities from which it stems”.¹⁶⁸³ It is “based on” the fact of prior occupation and requires close examination of the parameters and context of such occupation. It considers the aboriginal perspective but does not regard the task as exhausted by finding and applying the most pertinent indigenous law. It frames a careful examination of the facts that exist at the assertion of sovereignty in order to determine whether the claimed Section 35 right is established. The entire exercise is framed by the purposes of Section 35.

On this view of the test for determining the existence of a Section 35 right to aboriginal title, use and occupation at the time of assertion of sovereignty is carefully examined to determine the “way of life” of the ancestors of the modern claimant in order to determine if it can be said to have continuity with the claimed modern right. This assessment sets the foundation, indeed “crystallizes” the general parameters of what might obtain Section 35 protection. All aspects of the test are applied with the full benefit of hindsight, including the continuity requirement. There will be clear cases where an award of title or rights will not be controversial. However, it will not be uncommon that a judgment call will have to be made. It is reasonable that this judgment call be made with full awareness of the modern situation of the claimant as well as the record of how the ancestors used and occupied the lands in the distant past. Even more importantly, when the issue is litigated, a judge can consider the record of intervening events to determine if there are factors that should influence its assessment of whether the modern right has been established.

It bears mentioning, finally, that the notion of Section 35 rights as modern rights helps to shift the focus away from having to establish minute details regarding the situation “on the ground” at distant points in the past.¹⁶⁸⁴ If the starting point is what is being claimed today and on the degree

of continuity that claim has with the relevant point in the past, the picture of what was happening at that point in time would not necessarily have to be crystal clear in order for an claimant group to discharge its evidentiary burden.

In the next section of this chapter, the distinction between traditional lands and aboriginal title will be developed. For now, it suffices to point out that the modern theory of title allows the presentation of evidence from three discrete time periods: the date of sovereignty, modern use and occupation and the often long intervening period. It may be possible to adjust the expectations for evidentiary proof for all three stages. At the date of sovereignty, the priority can shift to proof of an overall territory that supports the maintenance of a way of life. Rather than bearing the burden of showing that a strict test of occupation was met for discrete tracts of land, it may suffice to show the types of tracts of lands that would have been intensively used and occupied to support the way of life. Such proof would obviously be more persuasive the greater number of precise examples can be generated. From the modern perspective, it becomes highly relevant to lay an evidentiary foundation for tracts of land that are currently used and occupied to support the continuance of a way of life. It may also be possible to adduce evidence of an intention to use tracts of lands in such a fashion.¹⁶⁸⁵ As an aside, this approach offers a better explanation of the passage from Delgam'uwkw about the requirement to show continuity of use when modern use and occupation is presented as a foundation for a claim to aboriginal title. Another advantage of this approach is that it becomes more coherent to consider the details of the history of the lands in the intervening period. It becomes possible to give weight to a history of proven displacement or inducement to move areas of key and use and occupation to other areas. In total, the broader temporal foundation for a title claim allows for a richer account of the connections of an aboriginal group to the land.

One of the advantages of this approach is that the theory of aboriginal title can avoid some easily predictable anomalies. For example, it is not unlikely that areas that have been used and occupied in an intensive fashion at sovereignty play no current role in the modern way of life of an aboriginal group. At the other extreme, lands that are currently very important to the way of

life of an aboriginal group may have no connection to the activities of the predecessor group at sovereignty. It will also relax to some degree the massive evidentiary burden that is faced by a claimant. Even after more than 150 days at trial, it became clear in the Tsilqo'tin trial that only the most rudimentary forms of connection could be proven to most territories.¹⁶⁸⁶ However, the overall attachment to and importance of the various territories was proven in compelling fashion.

Though the topic is beyond the scope of this thesis, the notion of Section 35 as modern rights with deep historical roots both helps to explain the much-criticized differences in time frame for assessing aboriginal rights, title and Métis rights. When the object of the exercise is understood to be the choice of a time frame that is most relevant for the task at hand, the differences become easier to explain. While illogical results would certainly follow from any attempt to freeze patterns of use and occupation in place at a particular point in history, it makes sense to perform the inherently difficult task of assessing patterns of use and occupation with reference to particular time-frames in order to give content to the modern task of assigning rights along the Section 35 spectrum. For harvesting and other non-title rights, the focus is at contact as that provides the most direct way of asking the question of what practices, customs and traditions best capture the way of life of the modern claimant's ancestors prior to Western influence. It is not asking what the rights in Canadian law were then, but what rights in modern Canadian law are founded or based on the customs, practices, or traditions shown to exist in the past. Likewise, for title the focus shifts to practices (i.e., patterns of use and occupation of land) at sovereignty, an appropriate point of reference because sovereignty is the very latest point at which aboriginal and non-aboriginal histories became a shared one, and aboriginal and non-aboriginal peoples embarked on the joint project of building the country we now know as Canada. It is also the point at which, rightly or wrongly, our courts have accepted that Crown title came to underlie aboriginal rights and title to land. While some may regret this, it is certainly the point where we can start talking about what Sharon Williams has called "shared fate".¹⁶⁸⁷ The shift in time frame for the Métis simply recognizes the fact that the Métis as a separate entity would certainly not have been in existence at contact and likely not at the time of assertion of sovereignty either.

Relation Between Traditional Lands and Aboriginal Title

Recent litigation concerning aboriginal title has framed the choice as between full title to the claimant's traditional territory or to much smaller tracts of land based on an analogy to fee simple title. In addition to situating aboriginal title as a modern right, it is important to contextualize aboriginal title claims by describing the role that both conceptions of title play in Canadian law. It is important to remember that the notion of "Indian title" was the dominant descriptor of aboriginal attachment to land in the 18th and 19th centuries. Indian title seems to have been thought about as a generic description of the attachment to the land maintained by the aboriginal group. It was also thought of as the source of other aboriginal rights, such as harvesting rights. It is not surprising, given this history, that the government of Quebec presented the argument in *Adams* and *Coté* that an aboriginal title was a precondition to establishing a harvesting right over the same territory. The Supreme Court of Canada rejected this argument and held that rather than being the parent right, aboriginal title was one right among several that were arrayed along a spectrum. It amounted to a right to the land itself and it was not necessary to prove such a right in order to establish an activity-based aboriginal right.

We are now at a stage where it possible to resituate the notion of traditional lands within the spectrum of Section 35 rights. Rather than being equivalent to a right to aboriginal title, the traditional lands of an aboriginal group mark the general area where the group is entitled to exercise its established Section 35 rights. This has become a particularly important notion in the administration of treaty rights where the Supreme Court of Canada has invoked the notion of traditional lands to bound the responsibilities of the Crown to consult with a particular group even though the treaty harvesting rights of that group may well extend well beyond those traditional territories.¹⁶⁸⁸ Traditional lands have also been accorded an important role in determining the zone in which a right must be capable of meaningful exercise in the face of potential infringements of the right. Equally importantly, the traditional lands claimed by the group mark the area where it can be expected that the duty to consult will be engaged based on credible claims for rights or title, assuming that the required potential impact on a potential Section 35 right is proven. In other words, the concept of traditional lands plays an important

role in the administration of Section 35 rights. This does not mean that the traditional lands of a particular group are always clearly demarcated and in some cases there are overlaps and competing claims. The concept of traditional lands bears some analogy to the older concept of “Indian title”.¹⁶⁸⁹ We are seeing increasing references to the notion of traditional lands in jurisprudence dealing with treaties, the duty to consult and the negotiation of treaties. Because of the power of the duty to consult, traditional lands may also help to establish “zones of interest” for such negotiated matters as resource revenue sharing; may help to determine boundaries and areas of overlap between adjoining aboriginal groups; and, to use the Australian terminology, may properly be seen as areas in which aboriginal groups have an ability to “speak for country”.¹⁶⁹⁰

It is submitted that the presentation of a developed theory of the role that “traditional lands” play in the evolution and implementation of Canadian aboriginal law helps to place the issue of aboriginal title in proper perspective. Within its traditional territories, an aboriginal group can expect to be consulted about major developments, can exercise a range of established harvesting and other activity rights, can play a role in the management and stewardship of the broader territory and can perhaps acquire recognition of title interests to some portion of the lands within that broader territory. The key point is that recognition of traditional lands supports a much broader but very different function than the recognition of aboriginal title.

The recent work of Arthur (Skip) Ray on the historical development of claims processes in the 20th century helps cast a light on the conceptions of use of land that are in current practice today.¹⁶⁹¹ He focuses on the extremely dynamic and contested practice that emerged under the Indian Claims Commission in the United States. Starting with the legal necessity to demonstrate boundaries, claimants developed a “contiguous boundary theory” that was designed to support broad areas of claim that were used for various purposes, often on the basis of a seasonal round.¹⁶⁹² Governments countered with a “nuclear territory theory” which posited that “...boundaries were only poorly defined because land use intensity decreased outward from the centre, territories often overlapped and “no-mans lands” sometimes existed between tribal

areas.”¹⁶⁹³ Another area where claims processes overlapped with academic disciplines was the role that anthropologists played in offering opinions on the origin of indigenous land tenure systems. Government anthropologists argued that such systems were a direct result of contact with European traders as there was no need, in the absence of scarcity, to develop such systems prior to contact.¹⁶⁹⁴ Other anthropologists countered with the argument that European-aboriginal trade was more commonly modeled on ancient patterns developed by the aboriginal society but simply adapted to incorporate the new trading relationship. Ray also demonstrates that these debates continue to have great salience in modern disputes about aboriginal title. He is especially critical of the academic work of one of the Crown’s experts in *Delgamuukw* who “...offers a “lines and nodes” perspective” that recognized usage only in terms of cultural modifications to the physical landscape (villages, trails, developed fishing sites etc.). This was an outlook that echoes Lockean notions about property rights and was in keeping with the perspectives of successive colonial and provincial governments.”¹⁶⁹⁵

We also see a rich debate on the relevance of social science work to the law of native title in Australia. Alex Reilly argues that “...since the advent of native title, there has been an ongoing debate among anthropologists and geographers over the possibility of recording boundaries of Aboriginal lands; a debate from which Aboriginal voices have been largely absent.”¹⁶⁹⁶ He argues that while boundaries are a legal necessity in native title adjudication, aboriginal connections to the land might be far more complex and founded on radically different notion of boundaries.

The recognition that the concept of traditional lands plays an important role as a “framing norm” in Canadian aboriginal law is linked to the need to carefully consider aboriginal and non-aboriginal voices about connection to land.¹⁶⁹⁷ It is especially important to be aware of the intellectual history that has cast a large shadow on how we think of aboriginal relationships to land and models for how they can be incorporated into the mainstream legal system.

To recapitulate, rather than perceiving traditional lands and fee simple approaches as competing visions for the content of aboriginal title, the binary division can be at least partially broken down by describing a broader and more robust role for the notion of traditional lands. This approach gives credit for the important connections that are maintained by aboriginal peoples to their traditional territories, while recognizing that aboriginal title may be proven for those smaller areas of land that are centrally significant to the maintenance of a way of life.

Aboriginal Title and the Spectrum of Rights

Understanding, first, that there is a distinction between traditional lands and title lands, allows us to turn to the area where most of the hard decisions will be faced. This is the area where the key components of the test for aboriginal title (occupation, exclusivity and continuity) will be worked out. Mark Walters has captured the notion of a spectrum of rights in eloquent fashion-

“...Aboriginal title and non-title aboriginal rights, together with treaty rights, are woven together to provide a constitutional doctrine of aboriginal rights.”¹⁶⁹⁸

This notion of rights that are “woven together” embodies the inherent difficulty of assigning rights that are arrayed along a spectrum. The very concept of a spectrum captures the idea of a continuous line with end points where the description of the spectrum and the nature of the end points will point both to shared characteristics and distinguishing features. There will be blurred boundaries at points along the spectrum. We have already seen that the boundary between harvesting rights and title rights is rather blurred, though some guidelines are available to help the task of differentiating the two and, post-*Lax Kw'alaams*, much will likely depend upon how aboriginal groups choose to frame their claims.¹⁶⁹⁹

It will be argued that the very idea of the spectrum helps to add discipline to the task of fleshing out the content of the rights that may be claimed by any particular aboriginal group. The entire spectrum is framed by the geographical location of the traditional lands of the group. There is a

vertical form of engagement with the spectrum where all rights claims are assumed to have certain common elements. As noted by Peter Hogg (though dramatically resisted by Brian Slattery), the test for an aboriginal title is essentially the same *Van der Peet* test applied to a different context.¹⁷⁰⁰ In other words, the same general approach to rights governs the assessment of claims to any right along the Section 35 spectrum. They are all modern rights. They are all governed by the purposes of Section 35. They are all based on ancestral practices, whether it be harvesting practices or patterns of use and occupation. They are all oriented to the goal of reconciliation and the preservation of a distinct way of life. They are all governed by standards such as the requirement for continuity. They are all generally prospective in orientation. All of these features are seen especially clearly in more recent cases such as *Bernard; Marshall* and *Lax Kw'alaams*.¹⁷⁰¹

Another way to look at the relationship of the various rights along the Section 35 spectrum of rights is that aboriginal title is a subset of aboriginal rights. John Hunter is very critical of this notion but his real complaint is his disagreement with the conclusion that a title can accord a right to the land itself.¹⁷⁰² He sees the history of the common law as being more consistent with the non-exclusive rights that are described in the concurring opinion of Mr. Justice LaForest in *Delgamuukw*.

After *Bernard; Marshall*, it is quite clear that the idea of title as conferring a right to the land itself is well entrenched. The continuing challenge is to determine the principles that will govern the identification of such land. We know from *Delgamuukw* that title will be recognized “when necessary”¹⁷⁰³, but we are only given the most cryptic guidance on the precise dividing lines between title and non-title lands. It is clear that the primary zone of contest is the areas of use and occupation by nomadic and semi-nomadic aboriginal groups. While much has been written about nomadicism and title, the two endpoints might be occupied by John Hunter and the retired judge Douglas Lambert.¹⁷⁰⁴ Hunter argues that any element of seasonality defeats a claim for title while Lambert argues that a seasonal entry is enough to found title to land if the group maintained sufficient control over the land to block any other use of such land for the periods

beyond the seasonal use. His argument is buttressed by a claim that only aboriginal title to land can provide a sufficient foothold for reconciliation with the broader society.¹⁷⁰⁵

Lambert's argument is founded on key passages from *Bernard; Marshall* which blur the notions of occupation and exclusivity.¹⁷⁰⁶ Lambert has more recently buttressed his argument with an argument that the negotiation of the Douglas Treaties provides strong contemporaneous evidence of the colonial recognition of the ownership by the Salish of their entire traditional territories.¹⁷⁰⁷ There are certainly passages that highlight the intention to maintain exclusive control. For those groups that had little in the way of competition for the use of land in the pre-sovereignty era, it is not hard to develop the argument that there was a clear intention to occupy the full range of lands that were used in the seasonal round. As noted above, the *Bernard; Marshall* decision is certainly susceptible to alternative interpretations, but the better view would appear to that occasional use, even if within the context of an established seasonal round, is not sufficient to ground an aboriginal title. In rejecting the claim, the majority of the Court found that a lack of an exclusive right to control was the natural inference to be made from the findings of fact of both trial judges. There is no finding that some other group held such a right to control. While the matter is hardly beyond doubt, the bottom line appears to be that general assertions of a right to control broader tracts of land will not support a claim for title without a factual record of regular use and occupation.

After *Bernard; Marshall*, we know what is unlikely to support a finding of title. Something more than general use and occupation is clearly contemplated. What is that "something more"? The question is almost impossible to answer in the abstract but certain broad guidelines might be helpful. First, the question should only be answered after the determination of a record that paints a detailed picture of the way of life of the aboriginal group at the time of sovereignty. The description of the way of life of the Nisga'a in *Calder* might provide a template for such a record. That record should be understood as much as possible from the aboriginal perspective, guided by the testimony of elders and informed by the existence of aboriginal land tenure systems and other relevant indigenous laws. Second, some effort will have to be made to

distinguish lands that are subject to the seasonal round and the narrower class of lands that identify core areas or tracts of land with special cultural resonance or sensitivity, or special significance to the ability to continue that way of life. While the current jurisprudence focuses on notions of occupation, some adaptation may be required for lands of high spiritual significance. This may be expected to differ from group to group but the concept of “central significance” will probably be useful as a decision-making tool. In the context of a modern theory of aboriginal title, the notion of “central significance” plays two complimentary roles- it captures the types of land that play an especially important role in the conduct of a way of life and does so in a fashion that an award of title is necessary to maintain that centrally significant role into the future. Third, the identification of lands that might be considered for an award of title as opposed to rights will be done with the full benefit of hindsight. In other words, the continuity aspect of the title test will help guide where title determinations should be confirmed in the present. The doctrine of continuity will be expected to be responsive to the kind of right that is claimed. A general demonstration of connection would likely suffice for a declaration of a harvesting right, provided the lands fall within the traditional lands of the claimant group. For site-specific rights, and most certainly aboriginal title, a more exacting test of continuity should reasonably be required. At a minimum, continuity should be demonstrated to the point that the central significance of the land or sacred site remains plausible. While it would not necessarily form part of the test for title, one could expect that a judge might form a view of the necessity for a group to own the lands claimed in order to ensure the maintenance and survival of the distinct way of life and therefore could be more likely to find title to claimed lands. Indeed, as noted previously, there may be ways that clear proof of modern use and occupation might well play an important role in the development of the test for proof of an aboriginal title.

Some care should be taken in relying on notions of reconciliation to demarcate the line between rights and title. The protection of both title and other Section 35 rights can play an important role in the aspiration of reconciliation but care must be taken to avoid the conclusion that a title award is not reconciliatory because it impinges on the interests of others more than an award of harvesting rights. Reconciliation is best achieved when the lands which are truly centrally

significant to the continuance of a way of life are protected through title awards in appropriate cases.

The broad outline of the Section 35 methodology set out above is fully consistent with the leading cases. It shows how the courts are using a detailed understanding of the historic practices of aboriginal groups as a foundation for the declaration of modern rights. The process is always guided by the purposes of Section 35 and is always directed to the allocation of modern rights to peoples with ancient ties to the land. Decisions have to be made about the horizontal distribution of rights along the Section 35 spectrum but those decisions are guided by clear notions of presence on land, central significance and continuity. This process of rights allocation is expressly based on Section 35 constitutional protection and is not about the “discovery” of previously unrecognized common law rights. It is simply an important part of the more general renovation of the constitutional architecture of Canada to “make space for aboriginal peoples to be aboriginal.”¹⁷⁰⁸

Two particular issues deserve special attention. As previously noted, the above articulation of the Section 35 test does not incorporate the so-called “second route” to proof of an aboriginal title. It does not accept that proof an indigenous property tenure system is either necessary or sufficient for the proof of an aboriginal title. Canadian law does not insist on proof of a normative system to ground any Section 35 right. It is enough that “practices, customs and traditions” can be shown to provide a foundation for a modern right. Nor is it likely that proof of an indigenous tenure system will be sufficient to provide separate proof of an aboriginal title. While there is an argument that the case-law after *Delgamuukw* has simply departed from this suggestion, the deeper reason is that the methodology of the Supreme Court of Canada seems to express a fundamental commitment to a more normatively neutral, but uniform, approach to the proof of rights. Indigenous laws, and the testimony of elders, will provide invaluable evidence of cultural context but are not directly enforceable in Canadian law as Canadian legal norms. This is to say nothing more than that proof of a proposition as having content in Haida, Salish or Cree law does not automatically make that proposition one of Canadian law. Canadian law will have a

particular orientation to that proposition- it may be protective, it may draw conclusions from it, it might override its application or it may regard the proposition as simply beyond its reach. The precise relationship between Canadian law and a particular indigenous legal system is always a matter of context and can only be dealt with on a specific rather than a general basis. It will be important to be able to explain this evolving feature of Canadian constitutional law while at the same time accounting for the increasing salience of indigenous legal traditions in Canadian law.

Another feature of the model set out above is that flexibility is created to deal with some of the contingencies of history. The jurisprudence is replete with reference to inappropriate displacement of aboriginal peoples from their lands and the creation of new relationships with land because of inducements that were offered by non-aboriginal governments.¹⁷⁰⁹ In contrast to Australia, where any break in continuity tends to defeat a claim for native title, the recommended approach to Section 35 rights permits adjustments to be made to rights allocations that are responsive to patterns in the historical record. If an aboriginal group clearly occupied a particular tract of land at sovereignty but were displaced or induced such that similar occupation developed at another location there is potentially some flexibility in taking this history into account. Likewise, if core areas for harvesting of a particular species are proven to have existed at sovereignty, the shift in the biological patterns of that species should not in and of itself be a disabling factor in the allocation of modern rights, including title rights.

Another key benefit of taking a broader focus on the connection of aboriginal groups to their traditional lands is that it becomes easier to incorporate the insights that are provided by scholars who work in a wide variety of different disciplines. Avery Kolers writes about aboriginal title from a deep ecology perspective.¹⁷¹⁰ He argues that competing claims to ownership of land between an indigenous group and the state are to be addressed on the basis of the current needs of the indigenous group as compared to the broader population and that allocation decisions are to be assessed primarily on the basis of the value of “plenitude”.¹⁷¹¹ In part, this captures the notion that responsibilities for land ought to be mindful of the ecological security of the land and its long-term welfare. One of the interesting connections of his theory to the argument developed

in this thesis is that doctrines such as aboriginal title are best read as prospective in nature and should have little relation to states of affairs that existed in the distant past.

Another source for thinking through the issue of aboriginal title is the discipline of geography.¹⁷¹² Social geographers, in particular, have developed highly complex notions of “mapping” to chart different ontological connections to land, taking into account different forms of knowledge about land. This is useful work for a lawyer to read because the focus is less on “tests” and “evidence” that would be acceptable in a court than on the attempt to articulate and express in spatial form highly disparate ways of thinking about land.

It is not surprising that the discipline of anthropology offers invaluable sources for insight into the particular forms of attachment to land that are expressed by various aboriginal groups. Brian Thom, in his work on the connections of the Salish to land, paints a picture of connection that is dominated by kinship relations and spiritual insights.¹⁷¹³ It is particularly important that Canadian lawyers learn from these approaches because they could easily be rendered unseen with the strong focus on use and occupation that is reflected in the emerging Section 35 model for proof and declaration of aboriginal title and other rights.

The Duty to Consult and Aboriginal Title

While situating aboriginal rights as modern rights that are arrayed along a spectrum assists in fleshing out some of the details of the Canadian jurisprudence of aboriginal title, it is also important to account for the most important trend in Canadian aboriginal law in terms of developing an overall framework for Section 35. It is now becoming commonplace that the injection of a duty to consult into Canadian constitutional jurisprudence and practice has been paradigm-shifting. In recent years, we have seen a clear shift in attention away from the *Sparrow* paradigm and toward the *Haida* paradigm. This has resulted in both substantive and procedural innovation in the law.

It is not surprising that with this background there is increasing interest in how the duty to consult jurisprudence might impact on the evolving notions of title and rights in Canadian law. Paul McHugh has perhaps taken the boldest step in this direction by suggesting that the Supreme Court of Canada is on the verge of replacing the notion of aboriginal title as a right to land with the more procedurally oriented duty to consult.¹⁷¹⁴ This will be examined in more detail shortly when the McHugh analysis is specifically considered. It is also worth noting that Mark Hickford has published a very important work in legal history where he argues that historical common law notions of title and rights were best conceived as “processual rights”.¹⁷¹⁵ In other words, what we now call the doctrine of aboriginal rights was more properly considered as a loose body of rules and practices that governed how the Crown would interact with aboriginal occupants of land. The doctrine governed how the Crown would deal with the claims of aboriginal peoples but did not directly accord title to the land occupied by aboriginal peoples. With the insight of thinking about aboriginal title as process we can gain further insight into the frequent passages from the courts about their unwillingness to offer a definition of aboriginal title beyond key structural features. It is those very structural features that continue to guide the relationship between the Crown and the aboriginal peoples with respect to competing claims to land. Canadian law has now gone further to recognize the possibility of title to the land itself for lands that are of central significance and otherwise meet the test for proof of a modern aboriginal title.

It is not necessary to go as far as McHugh in order to argue that the evolving practice of the duty to consult will have real impacts on the evolving doctrine of title. Mr. Justice Binnie in *Wewaykum* recognized that land “...has generally played a central role in aboriginal economies and culture.”¹⁷¹⁶ We also see a general reaction to the *Bernard; Marshall* decision that the one-way idea of translation from aboriginal practice to common law rights is better conceived of as a two-way process of translation involving dialogue about competing visions of use of land. Most importantly, we are starting to see the clear development of lines of jurisprudence where claims of title are being considered in the context of the duty to consult. While it is clear that the discharge of the duty to consult does not engage a rights determination process, some conversations about competing visions about the status of rights claims seems inevitable. This is particularly so considering the rapidly evolving trend that requires the Crown to express a view

on the strength of claim of potential rights that are engaged in a particular consultation process.¹⁷¹⁷

While we are not there yet, it seems highly likely that the cases will eventually arrive to the point where the only reasonable accommodation of a rights claim will be, in essence, an acknowledgment of a strong claim of title to a site (for example, by moving the proposed location of a project or by disallowing a project altogether). This might be especially apparent where harm is threatened to a highly sacred site. The broader point is that the duty to consult will necessarily engage aboriginal claimants and the Crown in conversations and deeper dialogue about different visions of rights. It would be hard to believe that the sheer volume and importance of such conversations would not have some impact on the substantive development of the law of aboriginal title. While consultation case-law would not necessarily be taken into account directly in aboriginal title cases, the determinations regarding the relative strength or weakness of various claims will likely help to further shape the contours of the distinction between rights and title. Where courts find strong *prima facie* claims to title, repeatedly, this may influence courts asked to make declarations of title in other cases. We are also seeing more frequent examples of the courts addressing discrete areas of law related to the doctrine of aboriginal title in the course of addressing the duty to consult. For example, in the Halalt decision, the British Columbia Supreme Court addressed whether an aboriginal title could extend to an aquifer.¹⁷¹⁸ Other cases have explored the economic component of a title claim.¹⁷¹⁹ One of the key themes that will be expressed in the next chapter is that there has been and will be more cross-fertilization of the case-law emerging from the Sparrow and Haida frameworks. This will inevitably mean that rulings on the duty to consult will undoubtedly influence the development of the doctrine of aboriginal title, in part because these cases will occur far more frequently than civil claims for a declaration of title.

Conversations under the auspices of the duty to consult will also draw out some of the broader differences of perspective. They will provide an opportunity to discuss aboriginal conceptions of stewardship and connection to land. They will provide a forum for aboriginal groups to express how land use issues are conceived from the perspective of the framework of indigenous legal thinking. It will offer incentives to find practical ways to close gaps in perspectives. It will offer

an opportunity to discuss rights while at the same time building connections to mainstream society and economy. It is likely to engender a richer notion of translation. Most importantly, it seems certain that frequent conversations about rights and impact will do more to flesh out the spectrum of Section 35 rights than the mega-cases of the past.

The key legal point is that some structural connections might be seen between the tests that are developed for accommodation and the tests that are deployed to differentiate rights and title claims. It is not unreasonable to predict that factors will emerge that help determine when accommodation should involve an acknowledgment that title to a particular site is likely to exist. While the duty to consult should not lead to a determination of rights, some indicia will develop as to the significance and centrality of rights claims. These are the very same factors that might be expected to differentiate rights from title claims. The sheer volume of duty to consult claims, and the reciprocal duty borne by aboriginal groups to engage in dialogue, likely means that much of the conceptual work is likely to occur in the context of adjudicating such claims.

13.7 Comparative Analysis

Some of the complexities concerning aboriginal title can be explored by looking at the Australian jurisprudence a little more closely and by exploring the recent comparative analysis of Paul McHugh in *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*.¹⁷²⁰

Australian Case Law

One of the most effective ways to get a sense of the choices that are available in terms of providing more precision to the Canadian test for aboriginal title is to develop comparisons with a sister jurisdiction. Since the *Mabo* decision in 1992,¹⁷²¹ Australia has developed an elaborate jurisprudence on native title. It is important to remember that Australia has very significant differences in basic constitutional structure. The absence of any provision such as Section 35 is a

core difference but there are current movements in the direction of constitutional amendment in Australia.¹⁷²² The Australian jurisprudence also operates primarily by reference to interpretation of the *Native Title Act* rather than the common law. Several scholars have developed arguments that native title claimants should be able to frame their arguments alternatively under the legislation or the common law but it seems highly likely that the Australian courts will regard the *Native Title Act* as constituting a complete and exhaustive code for the proof of native title.¹⁷²³

The two primary differences between Canada and Australia are the kind of evidence that must be presented to prove and sustain a title and the susceptibility of the title to extinguishment. The rule that was introduced in the *Mabo* decision of the High Court of Australia requires the foundation of a native title in the laws and traditions of the aboriginal group. No distinction is drawn between a title and a right. Most importantly, onerous tests of continuity require the continued observance of the customs and traditions of the group in order for the title to be maintained. The *Yorta Yorta* case stands for the proposition that lack of continuous observance of aboriginal customary laws can result in the rejection of a claim for native title.¹⁷²⁴ The current Chief Justice of the High Court offers the following summary of the Australian model:¹⁷²⁵

“...Determination of the existence of traditional laws and customs requires more than the determination of behaviour patterns. They must derive from some norms or a normative system. Because there is a requirement that the rights and interests be recognized as common law, the relevant normative system must have had a “continuous existence and vitality since sovereignty”. A breach or interregnum in its existence causes the right or interest derived from it to cease beyond revival. It is on this point in particular that great difficulty can arise.”

He adds:

“...most sincere attempts at reconstruction ...seem to be of no avail.”¹⁷²⁶

Lisa Strelein provides another summary of the continuity requirement:¹⁷²⁷

“...These two elements were focussed on continuity: first, the age of the laws and customs, tracing their origins prior to the assertion of British sovereignty; second, their current observance and continuous existence and vitality, substantially uninterrupted, since sovereignty. The Court also introduced the idea of a “normative society” to clarify the sources of laws and customs, recognizing that laws and customs may change and adapt but must find their source in a pre-British normative society. Most recently in *Bennell*, the Full Court added the proviso that continuity must be added “for each generation”.”

Kent McNeil has commented on the risks that are attendant upon linking native title to indigenous legal systems. It can create huge difficulties of proof and even bigger risks of loss of title as traditional norms weaken over time.¹⁷²⁸ It is notable that Chief Justice French contrasts the Australian approach with the “determination of the existence of behaviour patterns.”¹⁷²⁹ The Canadian approach that is developed in *Van der Peet*, *Sappier* and *Lax Kw’alaams*, and applied to claims for aboriginal title in *Bernard*; *Marshall*, appears to focus to a high degree on the ascertaining of behaviour patterns. There is a strong effort to place those patterns in a context that makes sense from an indigenous perspective, but the identification of “practices, customs and traditions” appears to be the core of the Canadian test.

The other area that creates some distance between Canada and Australia is extinguishment. While it is no longer possible in Canada after the enactment of Section 35 of the *Constitution Act, 1982*, the Australian law has been highly supportive of extinguishment arguments. The Australian courts take a very formal approach to extinguishment. One must look at the legal nature of the occupancy that is permitted under statute in order to determine if it leaves room for the exercise of a native title right. If the answer is negative, the native title right is permanently extinguished. Some speculate that the ease of extinguishment is related to the comparative fragility of the bundle of rights that are associated with native title. It also can lead to “arcane argument over long dead town sites”.¹⁷³⁰

While a proper comparative examination would take more space than is available, some lessons for Canada can be discerned. Most importantly, the constitutional protection that is accorded by

Section 35 permits rather more creativity in developing tests for the existence and maintenance of title. It is, for example, useful to help avoid some of the risks that the Australian jurisprudence demonstrates when the content and continued existence of the laws and customs are in doubt. Kent McNeil has indicated that the Canadian law offers some advantages over the Australian model of native title:¹⁷³¹

“The Canadian approach to exclusive occupation, though deficient in some ways, is preferable because it is broader, makes it easier to prove Aboriginal title as a proprietary interest, and does not limit its content to traditional land uses.”

While there is reason to debate just how broad aboriginal title should be within the spectrum of Section 35 rights, the advantages pertaining to proof and content of the Canadian approach certainly merit careful reflection.

An examination of McHugh on “Aboriginal Title”

It is obviously important to devote substantial time to analysis of the recent work of Paul McHugh on aboriginal title.¹⁷³² It is the leading academic treatise on the topic, is admirably complete in its comparative focus and is impressively fortified by current research from a wide variety of academic disciplines. For the purposes of this chapter, two more specific points should be stressed. First, it is an important continuation of the primary theme of Paul McHugh’s work as a legal historian. It is an impressive elaboration of the idea that the early history of the common law does not disclose a coherent and uniform doctrine of aboriginal rights and, in particular, no doctrine of aboriginal title that is comparable to the product of the formative cases of the last generation. Second, it is notable that Paul McHugh takes a rather expansive view of the scope of aboriginal title in Canadian law.

There is no necessary inference from the premise that aboriginal title is a modern right to a conclusion that a modern aboriginal title is a narrow right. In an Australian context, and by reference to the leading cases of *Mabo* and *Wik*, Damen Ward makes the point that a temptation to make such an inference is fairly common:¹⁷³³

“...In presenting my analysis to various audiences, I have struck by the tendency – in some cases almost an eagerness-to hastily conclude that my conclusions fatally undermine the reasoning of the High Court of Australia in *Mabo* and *Wik*. Such an interpretation is mistaken. It presumes, just as Reynolds appear to do, that various parts of imperial policy can be easily treated as a homogenous legal entity. It fails to distinguish between normative legal analysis and descriptive historical analysis. Most importantly, it risks oversimplifying the relationship between historical analysis and legal analysis.”

The work of McHugh certainly confirms this point. While he does not resile from the conclusion that cases like *Delgamuukw* entrench a modern right to aboriginal title that would be utterly foreign to the common law in the early years of Canadian legal history, he is very critical of the

view that *Bernard; Marshall* necessarily refers to a title right of narrow scope. Indeed, he is repeatedly critical of the main elements of the Canadian jurisprudential framework, including the separation of rights and title. He is also clearly uncomfortable with the reliance that is placed in the key decisions on the purposes of Section 35.

The net effect is that the book has a strangely schizophrenic feel. While he sees no support for a doctrine of aboriginal title conferring a right to the land itself in early law or practice, and much that would contradict such a notion, he ends up interpreting the modern doctrine of title in a fashion that results in the retrospective projection of a broad theory of title back to the acquisition of sovereignty.¹⁷³⁴

“...Aboriginal title...relates to legal principles the courts will regard as operative from the time of and within the terms of the Crown’s proclaimed sovereignty. The rules of sovereignty cannot be modified or adapted in such a manner by post-foundation “local circumstances”. They explain the character of Crown sovereignty from the beginning.”

This appears to be related to an attachment, though not uniformly endorsed in the book, to the declaratory theory of the common law:¹⁷³⁵

“Immanence is a key element in common law reasoning. Judges declare the law that has always been there, and their meaning is a demonstration of how that presence had been occurring, undetected or less noticed as in the modern light, but there nonetheless. The common law thus identifies and articulates a golden thread of its own continuity. It is the repository of enduring legal truth as articulated in the instant case.”

The nuance that seems to motivate McHugh’s work is that it is not the declaratory theory itself that is problematic, but the lawyer’s tendency to assume that ideas seen from a modern perspective were available to historical actors if they just looked hard enough: Referring to the distinction between legal and historical method, McHugh argues:¹⁷³⁶

“...Even now it is one that some cannot grasp. Those unable to apprehend the distinction have tended to be lawyers, wedded (blinkered, more like) to the declaratory theory’s belief that contemporary doctrine articulates eternal verities as available to past (though, of course, less clever) actors as themselves- re-educating the dead, as Bartleson put it.”

In contrast to traditional common law theorizing which linked aboriginal rights to the mode of reception of an English colony, McHugh links the development of the theory of aboriginal rights to the modern unfolding of our understanding of the concept of sovereignty:¹⁷³⁷

“Common law aboriginal title is bound in with the character of Crown sovereignty. It articulates a set of principles that although finding latter-day articulation are regarded as having operated *ab initio*, from the moment of that sovereignty.”

When he turns away from the broad theory of the development of Crown sovereignty, McHugh offers opinions that support quite a broad scope of aboriginal title in Canadian law. He argues that the *Tsilhqot’in* decision has become an immovable object and is unlikely to be overturned because “...the late Justice Vickers’ judgment has become so feted and (literally) monumental that overruling it will be difficult despite his courageous venturing into rulings well beyond the pleadings.”¹⁷³⁸ He couples this with arguments that are designed to minimize restrictive readings of the Bernard; Marshall decision as a precedent, referring to the weak factual record, the broader reading that was developed in *Tsilhqot’in*, and the factual likelihood that aboriginal groups could show the completeness of their territorial dominion in their traditional lands.¹⁷³⁹ He places particular reliance on the ideas of Simon Young who emphasizes the notion of effective control and its ability to support rulings of title to very large portions of the traditional territory of an aboriginal group.¹⁷⁴⁰ McHugh believes that awards of entire traditional territories might not be available but might cover a good deal of such territories. On the other hand, there are contradictory passages where McHugh doubts awards of title for moderately nomadic groups or over areas that are highly contested.¹⁷⁴¹ But, at the end of the day, McHugh offers the capacity to exclude as the key legal test to differentiate title areas from areas that are subject only to protected activity rights.¹⁷⁴²

One of the key themes of McHugh's book is the elaboration of the transition that he sees as emerging in Canadian aboriginal law. He sees the Supreme Court of Canada showing increasing frustration with the proprietary paradigm launched in the *Delgamuukw* case and moving towards replacing aboriginal title as the heart of aboriginal law with the duty to consult. With respect to aboriginal title, he argues that:¹⁷⁴³

“...what had been the original strength...its proprietary character...increasingly became its constraint, limiting rather than enabling the doctrine to sail, so dampening the expectation of the breakthrough era.”

This is linked with the observation that the Court “...seemed very recently to be discarding the proprietary paradigm in favour of a public law route that was more fluid, situational and less constrictive.” This “...new pathway...was not overtly depicted as an alternative to aboriginal title but which nonetheless seemed increasingly like it.”¹⁷⁴⁴ McHugh falls short of making firm statements about the current state of the law, but is very clear in stating his views of the general trajectory it is taking:¹⁷⁴⁵

“...some Canadian lawyers see the emergent jurisprudence as a sign that the Supreme Court is unhappy with the straitened reasoning into which it has boxed itself on aboriginal rights....some feel that the devil was always lurking in the fine-grained detail of an inherently constricted proprietary paradigm. By the early twenty-first century, a mode of legal thought that had seemed so appealing a generation before was appearing threadbare and too rudimentary in its nuances. The consultation jurisprudence with its public law emphasis upon structured decision-making and procedural participation carried the fluidity to surpass and supersede the rigid compass of the private law property-rights one.”

This trend is seen as being reinforced by the two most recent Supreme Court of Canada decisions on the duty to consult:¹⁷⁴⁶

“...These cases signal the future direction of Canadian law in the new century, suggesting that the 1990’s proprietary paradigm of the *Van der Peet* trilogy and *Delgamuukw* is to be put on a backburner in favour of a more fluid and situational public law jurisprudence of consultation. They show that the obligation to consult will extend beyond rights that in the formal establishment remain unproven but that it will travel alongside modern treaty regimes, inhabit Provincial administrative structures and, in a right to compensation, even extend retrospectively to past failures and omissions. Has the common-law doctrine of proprietary aboriginal title/rights been quietly put to bed?”

It is difficult to evaluate this aspect of McHugh’s work. While it is certainly likely that the relative ease of access, timeliness and flexibility of remedy will make the duty to consult a more attractive route for many aboriginal groups, there is no real hint that this will replace the possibility of seeking declarations of rights, including title. As mentioned previously, it is reasonable to anticipate some overlap between the *Haida* and *Sparrow* frameworks, and some cross-fertilization of jurisprudential development. However, it is likely premature to say that this signals the demise of the Canadian approach to aboriginal title. It is particularly hard to see how the duty to consult evidences dissatisfaction with the proprietary framework for aboriginal title when the courts have yet to render a single decision finding such a title.

Similar difficulties occur with respect to the core theme about aboriginal title being bound up with an unfolding theory of Crown sovereignty. This idea seems overly mystical as a descriptor of the generally more pragmatic work that comes from Canadian courts. It also seems to depend on a declaratory theory of the common law which seems to have more currency in English law than it does in Canada. Most importantly, rather than ascribing a legal conclusion retroactively back to the early years of the development of Canadian common law, the Canadian courts appear to be reaching back retrospectively to draw from a factual foundation to support legal conclusions in the present. Rather than forming views of the common law as it would have been understood at the time, the Supreme Court of Canada seems to be drawing from the past to reach conclusions about modern rights. This is completely in line with the meaning of a retrospective legal operation in that prospective consequences are imposed based on past events. This process is aided by the generally positivistic examination of “practices, traditions and customs” rather

than a more normative source for indigenous laws and traditions. It helps to have a clear vision of the fundamental differences between the Canadian and Australian jurisprudence.

Two key factors seem to shape the different take that McHugh has on Canadian aboriginal law. First, he is very influenced by the work of Brian Slattery and develops a broad approach to title which appears to draw more from his work than from the rulings of the Supreme Court of Canada. Second, his primary motivation appears to be clear separation of job descriptions between the lawyer and the legal historian. He aspires to a “disinterested legal history” and is particularly concerned about scholarly work that “blurs the line” between such legal history and the practice of law. He seems to be particularly concerned about any form of legal reasoning that aspires intentions and motivations to historical actors that would not have been available to them.

One has to ask whether it makes sense to regard aboriginal groups as holding a crystallized title at sovereignty that would have been utterly unthinkable to the European actors of the day and likely not recognizable in that form to the aboriginal actors of that time? One also has to query whether McHugh fully appreciates the benefits of a largely prospective, but historically informed, approach to aboriginal title? This is particularly important when we consider the crucial role that the purposes of Section 35 play in the broader evolution of the constitutional architecture in Canada. The argument that is developed in this chapter is that it is more honest and fruitful to develop a modern doctrine that aims to rectify the past deficiencies of the common law than to interpret the doctrine in a fashion that effectively rewrites the past. One wonders if McHugh is falling into the trap of attempting to re-educate the dead.

13.8 Assessment of the British Court of Appeal Decision in Tsilqo'tin

Summary of Ruling

A unanimous decision of the British Columbia Court of Appeal, written by Mr. Justice Groberman, has rejected the approach to aboriginal title taken at trial in the Tsilqot'in decision.¹⁷⁴⁷ In fact, three separate appeals were dealt with by the Court of Appeal. An appeal from the Tsilqot'in on the pleadings issue was rejected, as was an appeal by Canada on the res judicata doctrine. A provincial appeal on the analysis of hunting rights, infringement and justification was also rejected. The core issue that is dealt with by the Court of Appeal is whether title is best described as a territorial right or a site specific right. The reasoning of the court strongly supports the notion of aboriginal title as a site specific right. The Supreme Court of Canada has granted leave to appeal the decision.¹⁷⁴⁸

The stage is set for the approach of the Court by rejection of the premise that the plaintiffs made an "all or nothing" claim.

"As the plaintiff points out, flexibility in the granting of a declaration is particularly important in a case where Aboriginal title is claimed. The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. This was particularly the case with groups such as the Tsil'qutin, who were semi-nomadic. To require proof of Aboriginal title precisely mirroring the Claim would be too exacting. Indeed, the trial judge recognized this, and discussed the difficulty of defining boundaries at paras 641-648 of his judgment"¹⁷⁴⁹

A somewhat laboured distinction is developed between scope of pleadings and the nature of the case as presented. It would be normal to see the case theory as bounded and defined by the

pleadings, but the Court of Appeal shifts the focus to the trial strategy of the plaintiffs. On this basis, he rejects that the plaintiffs had presented an “all-or-nothing” claim:

“It follows that if the territorial theory is the correct basis on which to assess Aboriginal title, the judge could properly have granted a declaration covering a more limited territory than the one claimed by the plaintiff, and should have done so. On the other hand, if Aboriginal title must be established on the basis of more intensive physical occupation of specific areas, the current litigation did not provide a proper basis for such a finding. I will discuss this issue further in my discussion of the nature of proof of Aboriginal title.”¹⁷⁵⁰

As a preliminary matter, the court addresses who is the proper rights holder. British Columbia’s argument was primarily based in the perceived practical need to clearly identify the group that the Crown must consult. The court concludes that these practical difficulties should not be allowed to override the recognition of the proper rights holder:

“It will, undoubtedly be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in this area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.”¹⁷⁵¹

One of the notable aspects of the analysis at this stage of the judgment is the incorporation of the concept of “caretaker” in assessing connection of an aboriginal group to territory.¹⁷⁵² This is an important recognition for the purposes of fleshing out the concept of traditional lands as distinct from aboriginal title.

When it turns to the doctrine of aboriginal title, the Court of Appeal starts with the traditional conception of aboriginal title as “...recognition of traditional rights that came into being before the reception of the common law”. This is linked to the notion of continuity:

“...The assertion of Crown sovereignty did not, as a matter of common law, serve to extinguish the pre-existing traditional rights of First Nations, and those rights survived. Aboriginal rights, then, are recognized rather than created by the common law.”¹⁷⁵³

This is followed by an important recognition that different common law jurisdictions have and can deal with the specific mechanisms of recognition in different ways:

“The general notion that Aboriginal rights survived the assertion of Crown sovereignty in common law jurisdictions is beyond doubt. The manner in which different common law jurisdictions deal with aboriginal rights, however, varies.” See Van der Peet, paras 36-42¹⁷⁵⁴

The two key planks in the argument of the Court of Appeal are provided by a theory of reconciliation and the importance of protecting traditional practices:

“As I will indicate, this fundamental aspect of Aboriginal rights must be kept in mind in defining the extent of Aboriginal title. The law must recognize and protect Aboriginal title where exclusive occupation of the land is critical to the traditional culture and identity of an Aboriginal group. This will usually be the case where the traditional use of land was intensive and regular.”¹⁷⁵⁵

This situation is to be contrasted with areas where traditional use and occupation was less intensive or regular:

“Where traditional use and occupation was less intensive or regular, however, recognition of Aboriginal rights other than title may be sufficient to fully preserve the ability of members of a First Nation to continue their traditional activities and lifestyles and may fully preserve Aboriginal culture. In such cases, the recognition of those other rights may be more commensurate with the reconciliation of Aboriginal rights with Crown sovereignty than would a broader recognition of Aboriginal title.”¹⁷⁵⁶

This approach to balancing aboriginal rights and aboriginal title is made possible by recent developments in the law of aboriginal rights and title:

“...only comparatively recently that the law has begun to develop a robust theory of Aboriginal rights, including Aboriginal title.”¹⁷⁵⁷

What follows is a careful examination of the approach of the parties to occupation.¹⁷⁵⁸ The plaintiffs treat occupation as synonymous with presence in territory and clearly rely on exclusivity as the dominant element of the test to separate occupation which is protected as a title from occupation which is not so protected. In contrast, the Court of Appeal seems to use the notion of reconciliation as the key tool to regulate the scope of title:

“...which demands that, as far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.”¹⁷⁵⁹

Groberman J. sees the same focus on intensivity of occupation in Delgam’uukw as is more explicitly present in Bernard.¹⁷⁶⁰ This is confirmed by the reference in Delgam’uukw to central significance:

“...this position is a sensible one if the occupation needed to found a claim to title is site-specific; it is not however, if undifferentiated land within a large territory is to be included in a title claim.”¹⁷⁶¹

The final piece of the puzzle is the placement of the ability to continue a traditional lifestyle at the heart of the purposes of Section 35.¹⁷⁶² It is for this reason that one must look to the entire package of rights protected by that provision:

“Aboriginal title, while forming part of the picture, is not the only –or even necessarily the dominant- part. Canadian law provides a robust framework for recognition of Aboriginal rights. The cultural security and continuity of First Nations can be preserved by recognizing their title to particular “definite tracts of land”, and by acknowledging that they hold other Aboriginal rights in much more extensive territories.”¹⁷⁶³

This means that the:

“...result for semi-nomadic First Nations...not a patchwork of unconnected “postage stamp” areas of title, but rather a network of specific sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised. This is entirely consistent with their traditional culture and with the objectives of s. 35.”¹⁷⁶⁴

The full implication of the reliance on the principle of reconciliation is brought out in the concluding comments on aboriginal title. The analysis is said to be:

- “...fully consistent with the case law...also consistent with the goal of reconciliation. There is a need to search out a practical compromise that will protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and the well-being of all Canadians. As I see it, overly broad recognition of aboriginal title is not conducive to these goals. We are all here to stay...was a recognition that, in the end, the reconciliation of Aboriginal rights with Crown sovereignty should minimize the damage to either of those principles.”¹⁷⁶⁵

While the territorial claim of the plaintiffs is rejected they are free to bring new proceedings making a claim for title to specific parcels to land. While the “site-specific” approach to title is not completely elaborated in the judgment, it is notable that the specific examples offered by Groberman J. tended to be fairly narrow (village sites, salt licks, narrow defiles). It can be argued that there is some peril in providing examples when the core of the judgment is directed to the rejection of a territorial approach to title rather than an elaboration of a site specific theory of title:¹⁷⁶⁶ Indeed, Groberman recognizes that this particular litigation would be a poor vehicle to conduct this elaboration:

“I do not doubt that there are specific sites within the Claim Area that may be of particular significance to the Tsilqot’in and on which they traditionally had a regular presence. As I have already indicated, the litigation was not structured so as to identify such specific sites as candidates for Aboriginal title. The Tsilqot’in should be entitled to pursue title claims to specific sites notwithstanding that the plaintiff’s territorial claim has been dismissed. Accordingly, I would also uphold the trial judge’s declaration that his dismissal of the title claim does not preclude new claims asserting title to lands within Tachlelach’ed and Trapline Territory.”¹⁷⁶⁷

Assessment

For the most part, the theory of aboriginal title that has been developed in this chapter is consistent with the views expressed by the British Columbia Court of Appeal. It is obvious, however, that this decision is very unlikely to prove to be the last word on the highly controversial topic of the scope of aboriginal title. One might have speculated that this particular decision was unlikely to be accepted by the Supreme Court of Canada on a leave application on the narrow issue of whether a territorial approach to aboriginal title is available as a matter of Canadian law. As clearly demonstrated by the Court of Appeal, the Supreme Court of Canada could have regarded this option as already foreclosed by its previous decisions. To the extent that arguments will be made that the approach suggested by the Court of Appeal is too narrow, it is crucial to remember that any comments beyond the rejection of the territorial approach are clearly obiter in nature. The two components of the ratio of the case are the rejection of the territorial approach and the authorization of the claimant to make a fresh claim for a site or sites that meet a site specific approach to title. Though the examples given by Mr. Justice Groberman tended to be fairly narrow, absolutely no fetters have been placed on the kinds of claims that may be advanced. It would certainly have been tempting for the highest appellate court to wait until an actual adjudication of a specific title claim has been completed before exercising its supervisory jurisdiction. The recent emphasis on the importance of a proper procedural foundation for complex aboriginal law litigation in *Lax Kwa’laams* is a major consideration.¹⁷⁶⁸

However, there are certainly aspects of the judgment that call out for critical examination and these may have contributed to the decision to grant leave to appeal. The invocation of the

doctrine of reconciliation to severely curtail the scope of a title claim will certainly receive attention. Likewise, the limitation of the purposes of Section 35 to the protection of traditional activities is a fairly narrow reading of the entire body of jurisprudence. For example, the previously noted “economic dimension” of the doctrine of aboriginal title is almost completely absent from the judgment.¹⁷⁶⁹ One can reasonably ask whether the right to exercise harvesting rights bears too much weight in an overall constitutional project of making space for Aboriginals to be Aboriginal.

It is submitted that the theory of aboriginal title that is laid out above offers four key tools to supplement and enrich the site-specific approach adopted by the British Columbia Court of Appeal. These include the modern nature of the right, the distinction between title and traditional lands, the role of the spectrum of Section 35 rights and the interrelationship with the duty to consult.

Modern nature: The Court of Appeal judgment lays bare some of the tensions between conceiving of title as an historic right and title as a modern right. Consistent with the overall theme of this thesis, it is likely a mistake to think of this question in a binary fashion. While the aboriginal title test does require consideration of the way of life of the claimant at the time of the assertion of sovereignty, the overall purpose of the title award is to further the ability of a modern aboriginal group to continue practicing a way of life into the present. The decision also makes transparent the difficulty of any trier of fact making findings about the precise patterns of land use and occupation in the distant past. If this is difficult for claims that are broadly territorial in nature, surely it will be far more difficult for claims that are directed to the occupation of particular sites. There will also be difficulties in accounting for natural and predictable shifts in patterns of land use and occupation, particularly when the driving force of such use and occupation is tied to the patterns of wildlife and the availability of habitat. Moreover, many of the changes in patterns of use and occupation may well have been precipitated by government action or compulsion. A theory that draws inspiration from historic patterns of occupation but

places emphasis on the specific sites that are currently centrally significant to the continuance of a traditional lifestyle through modern means and in a modern context is more likely to do justice.

Role of traditional lands: Another factor that can be used to flesh out the theory of title set out in the Court of Appeal judgment is the broader conception of traditional lands that is set out in the argument in the previous sections of the Chapter. Traditional lands are not just the places where activities such as harvesting occur. They are places where aboriginal groups maintain a special connection, may assert caretaker responsibilities and may “speak for” the land. There are many ways that the concept of traditional lands is permeating the jurisprudence under Section 35 in a fashion that opens up numerous creative opportunities and possibilities for engagement and dialogue. Therefore, in contrast to the binary opposition between title and harvesting rights that is set out in the Court of Appeal judgment, the notion of traditional lands opens up a more nuanced theory of connection that obviates the need to support a territorial approach to title. Aboriginal groups have rights and responsibilities within their traditional territories which are not exhausted by their rights to title and to harvesting rights. The recognition of the role as “caretaker” may be an important step in this direction.¹⁷⁷⁰

Section 35 spectrum of rights: The Court of Appeal judgment does capture the fact that Section 35 rights are arrayed along a spectrum, but there is room to inject a richer theory of the role of the spectrum. When we think about the spectrum of rights as providing for an overlay of protection for a vast array of indigenous legal norms, practices and activities, room is opened up to think about the overall satisfaction of the purposes of Section 35. It becomes easier to see how particular tracts of land might well be centrally significant to the continuation of a distinctive way of life. Focus is shifted away from particular categories such as village sites, cultivated areas and sacred sites to a more functional consideration of how a particular title claim fits with the satisfaction of the overall purposes of Section 35.

Relation to the duty to consult: This is the area where the greatest opportunity to supplement the ruling occurs. Recognizing that there will be continuing differences of view about the nature, content and scope of aboriginal title, as well as other Section 35 rights, the promise of deeper inter-cultural dialogue that is embedded in the duty to consult allows for a potentially more profound engagement beyond the application of discrete legal tests. It allows the parties to the dialogue to work from different epistemological and ontological foundations, while mutually seeking to reconcile different views of connection to and responsibility for land. It certainly allows for the economic dimension of Section 35 claims to be considered and addressed. By requiring the Crown to address the strength of claim as part of the administration of the duty to consult, it ensures that different views of rights and responsibilities will be on the table.¹⁷⁷¹ It may also provide a foundation for the expression of attachment to land from a perspective that differs from the mainstream Canadian legal perspective. In other words, it may allow for the inclusion of indigenous legal systems in the debates that necessarily occur about conflicting claims to land.

13.9 Extinguishment, Infringement, Justification and Compensation

There are a number of issues that frequently arise in the context of the adjudication of aboriginal title claims. These can include whether a title has been extinguished, whether a statute or Crown action infringes an un-extinguished title, whether such an infringement has been justified and whether compensation is owed. Consideration of infringement and justification will be deferred to a later chapter of this thesis, but important questions can be addressed about extinguishment and compensation.¹⁷⁷²

In particular, consideration of Section 35 rights as modern in nature but informed by history shines a fresh light on issues of extinguishment. There is some jurisprudence in Canada that suggests the issuance of a fee simple grant extinguishes an aboriginal right, including an aboriginal title.¹⁷⁷³ This may well be the case but a modern theory of aboriginal rights opens up a wide range of other possibilities. It may well be that title claims can be revived in the event that a

Crown issued title escheats to the Crown or otherwise comes back into Crown hands. It might be more appropriate to assess whether land has been in private hands for a sufficiently long time to impair the requirement that a claimant maintain a continuous attachment to land. It may well be that the particular current importance of the land to the maintenance of a way of life should receive more weight than the particular land titles or registry history of a particular tract of land. Considerations like these may suggest that notions of suspension of rights may be more appropriate than traditional notions of extinguishment.¹⁷⁷⁴ It seems reasonable to argue that the issuance of a Crown grant of a fee simple interest, for example, may oust an aboriginal claim to use and occupation of the land subject to that interest. However, different considerations might arise in the event that the land is no longer held subject to fee, is factually available for use and occupation and otherwise would meet a test for a Section 35 right.

These possibilities stand in sharp contrast to the approach to extinguishment that has developed in Australia. An assessment of extinguishment is made in Australia by a strictly formal analysis at the time of the issuance of a potentially extinguishing interest. It does not matter how the land is ultimately used and whether the instrument in fact remains extant. In the words of one commentator, this has led to arcane debates about the status of long-dead town sites.¹⁷⁷⁵ A comparative approach to aboriginal title allows us to recognize that the development of the law in Australia is heavily tied to the doctrine of tenure, whereas the distinctively Canadian approach that is founded on the purposes of Section 35 operates from profoundly different assumptions. This may admit more room for creativity and the development of a more variegated legal and policy toolkit for the resolution of different perspectives on the connection and use of land. While this does not mean that extinguishment cannot be regarded as the appropriate legal conclusion in cases where the aboriginal connection to a particular tract of land is irrevocably and permanently cut in a clear and plain fashion, there are other cases where a different set of options might be considered.

The analysis of extinguishment is presented primarily to demonstrate the options that are created by thinking of title as a modern but historically informed right. While a “reflective equilibrium”

must be sought between the way of life that is shown to have existed in the past and the way of life that is continued and protected in the present, it is possible to take a less formalistic approach to the myriad events that have occurred in the interim.¹⁷⁷⁶ A particular legal act may have had no impact on a right, may have suspended the exercise of that right or may have gone so far as to permanently extinguish the claim to exercise that right over a particular tract of land. Rather than a formal analysis of the legal operation of an instrument, more weight is given to the way of life that has been demonstrated to exist in the past and how Section 35 frames the protection for that way of life in the present.

A similar shift can be seen in the consideration of the issue of compensation. The traditional way of thinking about compensation under the standard model is that proof of an aboriginal title in the present implies the existence of a title at sovereignty and at all points in between. On this theory, any action which, in retrospect, is seen to be inconsistent with the title that is declared is, *prima facie*, support for a claim to compensation. There are clear linkages between this theory and the declaratory theory of the common law. However, the modern approach to the proof of an aboriginal title suggests that a different range of questions need to be asked. Was the Crown aware that a title claim could be made to a specific site? Were protests made and ignored? Were adequate opportunities available to aboriginal persons to maintain their way of life? More fundamentally, was the category of title that is claimed even cognizable to the actors at the time of the alleged breach? The approach to compensation that is suggested by a modern approach to title is more in line with generally applicable theories of Crown compensation which tend to be fault-based rather than rooted in strict liability.¹⁷⁷⁷ There is also a strong jurisprudential trend to limit liability to breach of “standards of the day”.¹⁷⁷⁸ While these arguments might weaken claims to compensation to some extent, it is submitted that they shift the focus to the most relevant features of the Crown-aboriginal relationship and bring aboriginal rights and title claims more in line with the approach to interference with statutory interests and treaty rights.

13.10 Conclusion

It should be clear that aboriginal title is not something that is amenable to assessment by reference to a simple test. There are exercises in line-drawing that rely inherently on subjective assessments. The purpose of this chapter is to develop some of the analytical and contextual tools in a manner which helps structure such line-drawing in a principled way. The core argument is that title is best seen as a modern right which is deeply informed by historic patterns of attachment to land. To recap, this theory involves:

Making the case that the development of the common law is appropriately guided by consideration of Section 35 values

Developing the argument that alternative routes to proof of aboriginal title are not available in Canada

Developing the argument that the three key elements of occupation, exclusivity and continuity are separate and additive requirements for proof of title

Addressing certain logical and linguistic problems with existing statements of the test in order to frame a clear relation between the key elements of the test

Developing the argument that four broad contextual factors help frame the overall inquiry in order to situate aboriginal title as a modern right that fits, in a principled fashion, with the overall spectrum of rights recognized and affirmed by Section 35

A distinctive role for occupation, exclusivity and continuity is developed in order to give detailed suggestions on the practical application of the test

The hardest questions will be expected to arise in relation to nomadic and semi-nomadic land use patterns, but the factor of central significance will play a very important role

Consideration of comparative experience and academic work helps to flesh out the details of the theory of title.

One of the implications of this theory is that the importance of land to indigenous peoples can be addressed in a fashion that allows better articulation and implementation of values such as reconciliation, recognition and redistribution. It has been argued that these issues are better addressed and understood when placed within a larger intellectual and comparative framework. A distinctive approach to Section 35 rights, including title, provides a solid foundation for the kinds of dialogue that move the relationship closer to the necessary but illusory goal of reconciliation.

CHAPTER 14 - ASSESSING THE PROMISE OF THE DUTY TO CONSULT

14.1 Introduction

It is crucial to the argument of this thesis to understand just how profound a shift has occurred in Canadian law with the emergence of the duty to consult in Haida Nation and related cases. Prior to this case many governments routinely argued that they had no obligation to take into account the possibility of aboriginal rights or title or treaty rights until those rights were definitively proven or acknowledged. It was also a common practice for governments to be agnostic or neutral as to the possible existence of rights in designing and applying government policies, including land claims policies.

There is no doubt that the mere fact that governments are now obliged to incorporate consultation and accommodation into the public decision-making process is itself an important improvement in the degree of protection that Canadian law provides to the rights of aboriginal peoples. In this sense, it unquestionably adds to the normative defence of the Canadian jurisprudential framework. However, it is argued that the normative implications go much deeper. Among the important changes that are introduced by this jurisprudence are the enhancement of the flexible concepts of the honour of the Crown and the promises of Section 35¹⁷⁷⁹ It also makes clear that the process duties of the Crown extend to rights definition and negotiation. The duties that are established are reciprocal. There are strong hints that concepts such as sovereignty are eligible for fundamental discussion. In the specific area of consultation, while the duty clearly vests with the Crown, processes of engagement with third parties are strongly encouraged. The entire decision is imbued with a spirit of dialogue and deliberative democracy. All of this is achieved while maintaining the leadership role, and responsibility, of the Crown in forging a new relationship.

In the same way that James Tully regarded the Quebec Secession reference as opening up a new path for the exploration of reconciliation between Quebec and the rest of Canada,¹⁷⁸⁰ the Haida decision creates a new language for discussing aboriginal and non-aboriginal reconciliation. There is a clear shift away from the binary architecture of infringement and justification. There is a clear message that the moral and ethical duties that are present in the relationship will have relevance for the development of the legal framework.

The longer term implications of Haida are only starting to be developed. It certainly will encourage deeper and broader connections between aboriginal and non-aboriginal Canadians. We are already seeing greater contacts between aboriginal communities and private industry, municipalities and provinces. In time, it will probably lead to greater involvement in the legislative process and more effective integration of aboriginal and environmental law. It has certainly solidified a trend away from Crown insistence on “certainty”. It will inevitably hasten consideration of resource revenue sharing. Most importantly, it will contribute to a rethinking of negotiations processes and the linkages between various processes. Of course, these positive developments need to be tempered with recognition of continuing disputes over implementation of treaties, including modern comprehensive claims agreements.

It will be argued that there are at least three other implications that are more speculative in nature. First, while reconciliation is an ongoing process, there is a need to develop what may be called the “teleology” of reconciliation.¹⁷⁸¹ This is because Haida invites a conversation about the goal or end-point of reconciliation, while recognizing that the task of reconciliation may never be fulfilled. In what direction is the process headed? How do we judge the steps that are taken along the way? It will be argued that careful consideration of the interface between theory and practice will be helpful to structure a conversation about these important questions. Second, it will be argued that Haida reflects a form of reasoning that will make it difficult for the Crown to draw too strict a separation between law and policy. For example, it will be difficult to maintain different positions in the courtroom and at the negotiating table. The Crown will be expected to articulate the underlying values behind the positions it takes and be prepared to provide reasons

that are consistent with the goal of reconciliation. Third, the reciprocity aspect of *Haida* implies some restrictions on the flexibility of aboriginal groups as well. In the same way that unilateral Crown action is checked, it is reasonable to expect some limits on unilateral aboriginal action. When an aboriginal government proposes to take action that might impact on an important external interest, it will likely be expected to engage in a process of dialogue and exchange of reasons.¹⁷⁸²

The shift towards process means that the courts will accord the Crown and aboriginal groups a fair measure of flexibility in how these fundamental principles are applied in practice, but there is no doubt that the underlying principles will be enforced. It is worthwhile emphasizing that one of the key principles will be that equality of bargaining power will be enforced as much as possible within the unavoidable hierarchy of the state structure.

To this point it has been argued that the dilemmas that are faced in the law as to the interpretation of complex constitutional provisions are closely paralleled by analogous debates in the theory literature. Just as the expression of positions in the law can tend to be polarized, likewise the positions expressed in the theory literature tend to gravitate to either end of the spectrum. A number of strategies have been pursued in this thesis to make a case for a normative model that lies between the extremes often reflected in the literature. It is also argued that this normative model can be constructed around the concept of reconciliation, properly understood.

The core argument of this thesis is that the line of jurisprudence initiated by *Haida* and *Taku River* holds great promise for delivering on the “promise” of Section 35. The duty to consult and accommodate stimulates a wide ranging set of dialogues that collectively promote the meaningful reconciliation of aboriginal groups within the fabric of the Canadian state. One of the reasons that the duty to consult is beginning to show this promise is that it resonates with the general approach adopted by the Supreme Court of Canada to the modern and prospective

understanding of Section 35 constitutional rights. This does not mean that history is not taken seriously as a source both for the normative justification and legal content of aboriginal rights.

We will see that the duty to consult has dramatically altered all aspects of the legal relations between the Crown and the aboriginal peoples of Canada. In this chapter, an attempt will be made to give a sense of the numerous strands of ongoing development that might tip the balance in favour of a positive answer to the famous question posed by Chief Justice Lamer pertaining to the normative justification of a doctrine of aboriginal rights.¹⁷⁸³ However, the net effect is that the legal doctrine captured by the duty to consult has set in motion a constitutional dynamic that can only strengthen the constitutional position of the aboriginal peoples of Canada. It is no longer necessary to undertake costly, risky and time-consuming litigation to prove the existence of disputed rights in order to seek remedies against the Crown. A more expeditious route through judicial review has permitted governments to be called to account when plans or actions might imperil a potential Section 35 right. This new remedy will also have implications for the process of proving and determining the scope of disputed rights. An example has already been provided in terms of how the determination of the nature and scope of aboriginal title is very much intertwined with the evolution of the duty to consult.¹⁷⁸⁴ Much more importantly, the duty calls for the types of conversations that could potentially lead to deeper cross-cultural dialogue that holds the highest promise for a just reconciliation.

It may be useful to start with a brief overview of the five key Supreme Court of Canada cases that ushered in such radical changes to the architecture of Canadian aboriginal and treaty rights. The *Haida* decision addresses the issue of whether there are remedies to address harm to an unproven Section 35 aboriginal right.¹⁷⁸⁵ The British Columbia Crown had argued that there was no remedy available directly under Section 35 though that provision might be relevant in supporting an administrative law argument. The Supreme Court of Canada unanimously disagreed, holding that a duty to consult, and possibly accommodate, can arise prior to proof and is triggered relatively easily. The scope of the duty lies along a spectrum, depending on both the strength of the Section 35 claim and the degree of potential impact. The duty can range from

mere provision of notice to deep consultation. It can generate a wide range of remedies, though a clear preference is indicated for remedies that are aimed at redressing the quality of dialogue between the parties. The duty does not extend to private parties and cannot be substantively delegated by the Crown. The Court carefully considers why injunctive relief was not a satisfactory alternative to sourcing the duty to consult within Section 35.

Beyond the details of the test that is elaborated, the overall tone of the judgment reflects a deeper reflection on the role of Section 35 in the development of Canadian constitutionalism. The duty to consult is housed within a broader architecture of obligations that reach back to promises that are deemed to have been made in the very creation of Canada. The overall relationship between the Crown and aboriginal peoples is to be judged against standards derived from the honour of the Crown and reconciliation.

The companion judgment to *Haida, Taku River*, focuses on how the duty can be discharged through the work of an environmental assessment body.¹⁷⁸⁶ The Court concluded that the duty had been met, in large part because of the participation of claimant in a working group that had been established under the provincial environment assessment legislation. The concerns of the claimant were fully considered and appropriate accommodating measures suggested. Most importantly, it was recognized that the duty applied in a continuous fashion such that there would be later opportunities to assess whether the concerns of the claimant were in fact properly accommodated.

Mikisew Cree was the first case to consider the *Haida* framework in the context of an alleged infringement of a historic treaty.¹⁷⁸⁷ The case involved a winter road that had been constructed near traplines of members of the First Nation. The Court concluded that the consultation process was inadequate and ordered a fresh round of consultation. In addition to providing the iconic statement on the meaning of reconciliation, the judgment is organized around a distinction between consulting about potential harm to a treaty right and establishing an infringement to

such a right. A duty to consult was found to be implicit in a treaty that simultaneously provided a right to exercise harvesting rights and a right to take up Crown lands for a variety of public purposes. When the Crown proposed to take up lands, it was necessary to consult and possibly accommodate the harvesting right under the treaty. If it were no longer possible to meaningfully exercise the right, this would constitute an infringement of the right which would cast the onus of justification to the Crown.

These first three cases set out the broad parameters of the duty to consult, including its constitutional foundation and extension to both aboriginal and treaty rights. The next two cases decided by the Supreme Court of Canada amount to a second phase of the development of the duty to consult in that they focus on broad issues of principle involving the integration of the duty to consult in the broader legal system. They address questions like the consistency of the duty to consult with administrative structures of decision-making, whether the duty to consult is triggered by past infringements and whether the duty to consult can co-exist with treaties negotiated in the modern era. Although these decisions are now only three years old, we are clearly progressing to a third wave of appellate-level cases that are addressing questions of even more specificity.¹⁷⁸⁸

The Rio Tinto case involves a claim that a provincial utility commission could not sanction a sale of power as it would not be in the public interest to do so without accommodating aboriginal concerns about the underlying power development.¹⁷⁸⁹ The decision clearly sees the duty to consult as applying pending the ultimate resolution of claims and observes:

“Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their differences. It also accommodates the reality that Aboriginal people are involved in exploiting the resource. Shutting down development by court injunction may serve the interests of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.”¹⁷⁹⁰

After referring favourably to Slattery's description of Section 35 as describing a "generative" order and as "...serving a dynamic and not simply static function", the Court turns to the three core elements of the duty 1) the knowledge by the Crown of a potential claim or right, 2) whether there is Crown conduct or a decision and 3) and whether there is an adverse impact by the proposed Crown conduct on an aboriginal claim or right. The two key observations that flow from this analysis are the express reservation for another day whether government conduct includes legislative action and the rejection of an argument that past government conduct is sufficient to trigger a breach of the duty to consult. In the course of addressing these issues, the Court made clear that it is concerned about reaching conclusions on the duty to consult that will offer a negotiating advantage to one side or the other.¹⁷⁹¹

The Court then turns to the role of tribunals in consultation. The issue will not be described in detail at this stage as it will be addressed more comprehensively shortly. The duty to consult is described as a constitutional duty that must be met. It is described as "...not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of the divergent Crown and Aboriginal interests."¹⁷⁹² On the facts of this case, the Court concluded that the Commission did not err in finding no adverse impacts of the type that would engage the duty but noted that the continuing involvement of the Crown in a joint operating committee would provide an opportunity to address consultation concerns if they were to arise in the future.

The Little Salmon case is notable for the deep division that appears between the members of the Court on the value of legal certainty.¹⁷⁹³ The majority concluded that the duty to consult could continue to be applicable after the completion of a modern comprehensive claims agreement but the minority strained against that conclusion as it feared that this could place the value of legal certainty in peril. The ultimate conclusion of the majority was that the duty to consult, while applicable, was met on the facts of the case. It is notable that the majority tended to use values such as "continuity, transparency and predictability" in place of the term "certainty".¹⁷⁹⁴

Two passages are particularly helpful to get a sense of the role that the Court sees being performed by the duty to consult and the underlying principle of the honour of the Crown, which is confirmed to be an unwritten principle of the Canadian constitution:

“The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the CA, 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forward, not backwards.”¹⁷⁹⁵

“The decision to entrench in s.35 of the CA, 1982 the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada’s political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. The duality is particularly striking in the Yukon, where about 25 percent of the population identify themselves as Aboriginal. The territorial government, elected in part by Aboriginal people, represents Aboriginal people as much as it does non-Aboriginal people, even though Aboriginal culture and tradition are and will remain distinctive.”¹⁷⁹⁶

There are some puzzling parts of the analysis, especially the suggestion that justification might be in play when consultation is at the deeper end of the spectrum¹⁷⁹⁷. However, the core of the majority judgment is the confirmation that the duty to consult is part of the essential legal framework for the negotiation of a treaty, that the honour of the Crown cannot be the subject of contracting out but that the courts will defer to reasonable products of detailed and balanced negotiations.

The dissent, representing two judges, adopts a completely different tone.¹⁷⁹⁸ It wonders whether the conclusion of the majority is consistent with the frequent invitations by the Court for the parties to resolve contested matters through negotiation. It goes so far as to suggest that the ruling permits one of the parties to renege on commitments that it has made through the treaty. Indeed, it is seen to be a breach of the shared commitment of parties to the goal of legal certainty. Interestingly, the dissenting judges paint a picture of Canadian constitutionalism that is strikingly consistent with the treaty federalism literature. It describes the Canadian constitution as embodying three overlapping compacts. These compacts capture the relation between the federal and provincial governments, aboriginal and non-aboriginal Canadians and individuals and the state. The second compact is expressly linked to the honour of the Crown, itself an unwritten principle of the Constitution.

These five cases reflect a developed body of jurisprudence on the duty to consult, though it is clear that many more issues await resolution. The broad framework has been set and we are now at the stage of more fine-grained analysis and problem solving.

14.2 Evaluation of the New Paradigm

Introduction

A wide variety of legal academics, and scholars from other disciplines, have drawn attention to the normative promise enabled by the Haida line of cases.¹⁷⁹⁹ It is notable that political theorists and philosophers have been particularly interested in the dialogical possibilities engendered by this legal development.¹⁸⁰⁰ Favourable comments have also been made by the judge leading the Ipperwash inquiry.¹⁸⁰¹ As this thesis is highlighting the positive contributions of the duty to consult and accommodate, it may be worthwhile to spend a little more time on commentators who see risks and traps in the introduction of this new duty. Critics of the duty tend to fall into one or more of three camps: theory, doctrine and practically-based critique.

Theory-based critique

There is already a rich literature that raises concerns about the duty to consult on the basis that it distracts attention from more fundamental injustices and away from more oppositional political strategies.¹⁸⁰² This is linked to the core element of critical theory that reform of a system is designed to hide inability to move in a more transformative direction.¹⁸⁰³ This is linked to the inability of the duty to redress disparities in bargaining power and access to resources.¹⁸⁰⁴ More fundamentally, dialogue under the auspices of the duty to consult falls short of the nation-to-nation engagement envisaged by treaty federalism and treaty constitutionalism. The state makes the final decision in the event dialogue does not produce agreement. Indeed, dialogue is often about third party use of the resource rather than a confirmation of indigenous entitlement to that resource.

Doctrinal critique

This form of critique can take several forms. Some regret the displacement of fiduciary law from a central position in Canadian aboriginal law.¹⁸⁰⁵ Others regard the duty as further entrenching an adversarial ethic of engagement.¹⁸⁰⁶ Many express the concern that the duty is oriented more to process than substance.¹⁸⁰⁷ Still others doubt the long-term implications of the duty as it is only engaged when Section 35 rights are potentially affected.¹⁸⁰⁸ This has distributive implications as some communities are not proximate to resource rich areas and are unlikely to reap any of the benefits that accrue to those communities who are more favourably situated.

Practical Critique

The practical critique, reflected well in a pair of articles by Ria Tzimas, stresses the overburden that consultation can place on aboriginal communities, especially considering the excessive complexity that can sometimes be associated with consultation processes.¹⁸⁰⁹ A related concern

is that implementation of the duty can sometimes become overly bureaucratic, defaulting to a “check-list” approach as opposed to a genuine dialogue.

There are valuable messages in all three form of critique. In the rest of this chapter a number of areas will be highlighted which provide opportunities to develop the normative and legal promise of the duty to consult but the critics certainly underline the risks that must be managed.

14.3 Practical Impact of the New Paradigm

While the focus of this work is not empirical, it is useful to get a sense of the range of initiatives that have been impacted by the introduction of the duty to consult. Literally thousands of discussions are held yearly about accommodation of rights. Consultation policies have been developed by federal, provincial, territorial, municipal, aboriginal and private bodies.¹⁸¹⁰ There is much stronger aboriginal participation in regulatory processes including those governing development of natural resources.¹⁸¹¹ There is emerging interest in the cumulative effect of decisions on aboriginal interests.¹⁸¹² There has been a clear impact on the evolution of claims negotiation policies.¹⁸¹³

One development that is of particular note has been the creation of the Major Projects Review Office at the federal level.¹⁸¹⁴ Though it deals with a broad range of regulatory and environmental issues, a major focus has been placed on the coordination of an effective response to aboriginal consultation for major projects. This has been accompanied by increased profile of aboriginal consultation before bodies such as the National Energy Board and the Canadian Nuclear Safety Commission. Experience has grown with respect to consultation about “mega-projects”- the assessment of the Mackenzie Valley Gas Pipeline proposal was completed without legal challenge.¹⁸¹⁵ The Gateway proposal, though more controversial, is currently under review.¹⁸¹⁶ The net result of these developments is that aboriginal groups have a formidable voice in natural resources policy in Canada.

Developments have been particularly promising in British Columbia. The duty to consult has clearly been the primary motivating factor in the development of a wide variety of creative initiatives. The “New Relationship” announced by the Government of British Columbia has led to a number of initiatives that increase the involvement of aboriginal peoples in the process of natural resource development, licensing and regulation.¹⁸¹⁷ It also has promoted a number of economic development opportunities for aboriginal people. The most notable developments have been on Haida Gwaii, including the Kunst’aa Buu-Kunst’aayah Reconciliation Protocol.¹⁸¹⁸ Though this initiative predated the introduction of the duty to consult, the Boreal Forest Agreement has also proceeded in a strong spirit of partnership with aboriginal peoples.¹⁸¹⁹

There have also been examples of project proposals that were rejected or severely curtailed because, at least in part, aboriginal concerns could not be adequately accommodated.¹⁸²⁰ Another area where aboriginal accommodation has become a major issue is the impact of disposal proposals for federal surplus land.¹⁸²¹

14.4 Developing Standards for Accommodation

While the jurisprudence dealing with accommodation is at a very early stage of development, we are starting to see the core questions emerge. There is a threshold question of whether accommodation can be adequate even if the consultation process that preceded it was flawed. The Supreme Court of Canada has tended to separate the analysis of consultation and accommodation.¹⁸²² However, the core meaning of accommodation continues to be consideration of necessary changes to a project to accommodate aboriginal interests and activities. This might mean, for example, moving a pipeline or a highway to avoid critical habitat or harvesting areas. This is different from economic accommodation which tends to be seen by aboriginal peoples as a form of compensation. This can take the form of impact benefit agreements, participation agreements, joint ventures or other forms of economic accommodation. An emerging body of jurisprudence in the Federal Court of Canada has considered the appropriate stance to accommodation when dealing with contested aboriginal title claims.¹⁸²³ This stands in some

tension with decisions like the Tsilqot'in decision from the British Columbia Court of Appeal which tended to downplay the economic dimension of aboriginal title in favour of the dimension of cultural protection.¹⁸²⁴

Some have criticized the emerging practice of potential accommodating measures such as resource revenue sharing, impact benefit agreements, participation in business ventures, co-management and involvement in environmental assessment processes on the basis that they can amount to “toll-gating”.¹⁸²⁵ The concern is that the focus has shifted away from adapting a project to accommodate aboriginal concerns to determining the price for allowing a project to proceed.

The leading case on accommodation is the West Moberly decision. The British Columbia Court of Appeal determined that the province was required to take steps to ensure the survival of a sub-species of caribou.¹⁸²⁶ Three separate judgments were rendered, each suggesting a different general model for approaching accommodation.

There are strong indications that tests for accommodation will be guided by notions of specificity and reciprocity. There will continue to be tension between the goals of adapting a project and enhancing aboriginal involvement and benefit from a project but that should not pose a serious concern if the accommodation measures meet the approval of the affected aboriginal groups.¹⁸²⁷

14.5 Impact on Environmental Law and Practice

One of the dominant trends in the practice under the duty to consult in the last decade has been the strong integration of aboriginal law and environmental law. In fact, the story of the duty to consult has largely involved the melding of aboriginal, environmental and administrative law. The overlapping contribution of administrative law will be considered in the next section.

As a result of the early decision in Taku River, governments have frequently relied on the work of environmental assessment bodies as the primary vehicle to discharge and satisfy the duty to consult.¹⁸²⁸ It is necessary to reassess the status of Taku River as some have argued that the Rio Tinto case places Crown reliance on environmental processes in some jeopardy.¹⁸²⁹ Rio Tinto looks at the responsibility of an administrative tribunal to address aspects of the discharge of the duty to consult. However, it is significant that it does not mention Taku River and characterizes the role of an administrative tribunal, including an environmental decision-making body, in a fashion that might be seen to undermine the previous reliance by the Crown on Taku River.

The core problem arises because of the duty that is placed on administrative bodies to assess the adequacy of Crown consultation. Does the notion of assessing the “adequacy of consultation” imply that consultation is something that has to happen outside the context of the regulatory hearing where such adequacy is assessed? In other words, is Crown consultation something that must be completed separately from or prior to the assessment by an environmental body? What happens when the regulatory body itself plays a role in assessing the adequacy of the response to impact on potential rights? It is crucial to understand that it will only be in the rarest of cases that the regulatory body will have the actual responsibility to consult conferred to it by the legislature, but its responsibility to assess adequacy has led to some significant uncertainty.

Before addressing this issue, and as a preliminary matter, a number of cases are starting to address some of the preliminary technical questions involving the overlap of aboriginal law and environmental law. These include the role that is played by impact benefit agreements in the consultation process,¹⁸³⁰ the degree to which consultation occurs inside or outside environmental review processes¹⁸³¹ and the requirement to properly scope a project to reflect the need for consultation.¹⁸³² Though these issues are important, the most important current issue is the foundational issue of providing some clarity on the precise role that is played by environmental bodies in the discharge of the duty to consult.

The notion of a “power to consider adequacy of consultation” is highly ambiguous. Does this focus on whether appropriate accommodations can be generated through the process of environmental assessment? Does this focus on adequacy of process? Does this refer to the process of the tribunal or to the processes followed by the Crown? If the latter, how broadly does this power of evaluation extend? To what extent can the tribunal identify and decide questions of law that emerge in the process of consultation? What is the relationship between the ability of the tribunal to decide questions of law about the duty to consult and the mandate of the tribunal? What is the relevance, more generally, of the limitations placed on the statutory jurisdiction of the Tribunal? These questions can occur in bodies other than environmental assessment bodies, but this is where some of the fundamental issues are currently under consideration.

While Rio Tinto may have muddied the water, it is strongly arguable that the fundamental approach set out in Taku River remains in place and that this provides a strong foundation for proper consideration of aboriginal concerns about development. Some care will have to be taken in determining the precise rule that emerges from Taku River. It may be argued that recent changes to British Columbia environmental assessment law might have an impact on reliance on environmental processes in that province.¹⁸³³ At the time of Taku River, the Tlingit had a right to participate in a formal deliberative body that played a key role in the consideration of the application of the proponent. Recent changes have downgraded the ability of aboriginal groups to participate in working groups such as those favourably evaluated by the Supreme Court of Canada in the decision.¹⁸³⁴

Whereas Taku River placed the primary responsibility for developing a plan to discharge the duty to consult on the Crown and endorsed the possibility of Crown reliance on the work of statutory tribunals such as environmental assessment bodies, Rio Tinto situates the tribunal more strongly in the position of being an evaluator of Crown decision-making. Is it possible to both be a participant in the Crown’s overall plan to discharge the duty to consult and an evaluator of the adequacy of part of that plan?¹⁸³⁵ The core argument that is developed in this section is that the Crown continues to bear the responsibility for the overall discharge of the duty to consult and

that it remains possible to rely on the work of tribunals to perform statutory functions that can be relied upon in part to discharge that overall responsibility.

This general perspective seems to have been endorsed in the subsequent decision of *Little Salmon* without any reference to the potentially conflicting propositions set out in *Rio Tinto*.¹⁸³⁶ Among the arguments that support the model of overall Crown responsibility and the lack of a requirement for a consultation process to duplicate and precede any environmental review are 1) the clearly expressed judicial approval of the goal of avoiding duplication and overlap and expeditious resolution of disputes¹⁸³⁷, 2) the patent rejection of any idea that existing statutory models be rendered completely external to the discharge of the duty to consult and 3) the recognition that tribunals are not free to exceed their statutory mandate, even if the object is the protection of a constitutionally protected duty.

Among the complex questions that remain are: 1) the temporal and subject matter ordering of complex and sequential consultation and environmental processes, 2) the role of strength of claim analysis in processes that have environmental and regulatory assessment at their core, 3) the nature of the remedies that may be claimed against the Crown in the event that issues arise which fall outside the jurisdiction of the Tribunal and 4) the judicial role in securing overall conformity to the goals of the duty to consult.

It can be expected that the interface between aboriginal law and environmental law is where many of these complex questions will be faced and resolved. Recent jurisprudence has started to confirm that an environmental assessment is an important part, but just one part, of a complex process of approving a project that potentially has an impact on Section 35 rights.¹⁸³⁸ While the duty is frequently triggered early, the ultimate responsibility to discharge the duty rests with the Crown. Environmental assessment will continue to be an important component of the discharge of the duty to consult in many cases involving natural resources.

Another particularly important substantive issue that will also become increasingly important is the issue of cumulative effects. This is both an important issue in aboriginal law and environmental assessment law, though the issue is framed in very different ways in the two discourses.¹⁸³⁹ The problem of cumulative effect arises in part because aboriginal law draws a distinction between the kind of impact that engages a consultation duty and the kind of impact (frequently cumulative) that engages the doctrine of infringement. This is paired with the fact that tribunals frequently are asked to make decisions on impacts that are defined in a narrow and discrete fashion and may not have jurisdiction to address a broader range of impacts that are presented in a deeper historical context.¹⁸⁴⁰ Finally, the exclusion of historical infringements as a potential trigger of fresh consultation duties in Rio Tinto poses some difficulties to the consideration of cumulative effects.

It is entirely possible that cumulative effects raise the kind of issues that fall outside the ambit of particular regulatory approval processes or the responsibility of particular proponents. However, the Crown undoubtedly retains the responsibility for managing these broader effects. We are at a very early stage of determining the jurisdictional, procedural and remedial concepts that are in play in a case where cumulative effects risk infringement of a Section 35 right. The decision of the British Columbia Court of Appeal in *West Moberly* helps to situate the role that historical context can play in framing how the duty to consult will be adjudicated even when no consultation is possible about past infringements

Taken collectively, the intersection of aboriginal and environmental law raises the prospects of new forms of engagement and better ways to consider the impact of natural resource and other development on important aboriginal interests. The emerging jurisprudence places the obligation on the Crown to demonstrate leadership in developing processes to assess impact on potential aboriginal rights and supports the increasing integration of aboriginal law and environmental law.

14.6 Administrative Law and the Duty to Consult

While one of the dominant issues in the practical development of the duty to consult in complex regulatory cases has been the precise role played by environmental assessment bodies, this is just a sub-set of the broader set of questions about the role of administrative law in the practical discharge of the duty to consult. There has been a trend in the legal literature to see the duty to consult as primarily procedural and, in this light, to see complex questions about responsibility for discharging the duty as determined in large part by principles of Crown agency.¹⁸⁴¹ In this model, responsibility for Crown consultation would be divided up between various Crown agents and Crown departments.¹⁸⁴² This trend may be seen as related to the broader tendency to see the emergence of the duty to consult as reflected in generic trends in the development of Commonwealth public law.¹⁸⁴³

An important administrative law and procedural question is what precisely is required to seek judicial review on the basis of an alleged failure to consult. While the traditional view is that only “decisions” are amenable to review, there is a trend in the jurisprudence permitting review in order to assess compliance with the constitutional duty in a broader fashion.¹⁸⁴⁴ Therefore, while it has been easier to get issues about consultation before a court, there is still much uncertainty about the precise division of responsibility between multiple actors. How do we sort through the respective responsibilities of the Crown, the proponent and one or more regulatory agencies that play a role in the ultimate approval or rejection of a development that may impact Section 35 rights? The linkages to administrative law are especially complicated when dealing with very complex regulatory processes that have multiple actors and very long time-lines. The Mackenzie Valley gas pipeline process provides a very good example.¹⁸⁴⁵

Both the British Columbia Court of Appeal and the Ontario Municipal Board have addressed proper practices for ensuring that the interests of aboriginal peoples are adequately considered in a complex regulatory process.¹⁸⁴⁶ This may involve the use of conditional orders or the retention of jurisdiction. As noted previously, Rio Tinto provided guidance on the role of tribunals but

significant uncertainty remains. The core test is that the legislature may expressly indicate that a Tribunal is responsible for conducting consultation itself, that it merely must assess the adequacy of consultation or that it has neither of these duties. The application of the guidelines set out in Rio Tinto are fraught with difficulty as they are premised on the notion of legislative intention but must be applied to legislative frameworks that were usually created long before the enunciation of the duty to consult. We now have a very limited jurisprudence dealing with the rare situation where a tribunal has been mandated to conduct consultation itself, but even here it is unclear if the legislature has accorded the full duty to the tribunal.¹⁸⁴⁷

These issues are crucial to the question of how the overall discharge of the Crown's duty will be assessed. The duty is usually triggered early, unfolds in depth over time, frequently involves multiple administrative actors with limited but overlapping mandates and can only be fully considered at the end of a long and complicated process of dialogue, assessment and decision. This means that different questions can appropriately be asked and answered at different stages of the consultation process. It is likely that the consultation jurisprudence will be nurtured by recent administrative law decisions such as *Dunsmuir*, which engage the difficult issue of policing boundaries between tribunals.¹⁸⁴⁸ While there is an administrative law dimension to these issues, it cannot be forgotten that the object of the inquiry is a constitutional duty that can never be substantively delegated by the Crown.

Important subsidiary questions are raised about the mechanics of administrative delegation to proponents and developing tests to determine the line between administrative and substantive delegation.¹⁸⁴⁹ It is highly likely that the inherent complexity that mars the overlap between administrative law and aboriginal law at this time will yield to the strong incentive placed on the Crown to develop clear and expeditious processes to ensure compliance with the duty to consult and to avoid lengthy and time-consuming judicial reviews.¹⁸⁵⁰ This may have the impact of "main-streaming" the duty to consult, but the gains in ensuring that effective processes are created to encourage substantive consideration of impact of decisions on aboriginal interests can be argued to exceed any risks.

The picture that is starting to emerge from the complexity flows from the dual observation that consultation is a complex constitutional process that is generally managed by the Crown and ultimate remedies are to be sought against the Crown. The Crown's responsibilities cannot be substantively delegated, though administrative delegation and reliance on the work of various statutory bodies can make an important contribution. The duty is usually triggered early, often at the stage of strategic decision-making, and for highly complex and high-impact decisions the process of discharging the duty may span a period of time with multiple actors. The Supreme Court of Canada is clearly drawing upon administrative law principles to balance access to justice, availability of expeditious and practical remedies and avoidance of duplication and overlap. It is usually the Crown that bears the ultimate responsibility for discharging the duty by defending the overall process and the substantive adequacy of the accommodations that have been developed. The jurisprudence has started to deal with the situation where a tribunal is not empowered to consider consultation and any remedies are expected to be obtained in the courts.¹⁸⁵¹ It can be expected that these complex questions will take a while to settle into clear patterns, perhaps aided by legislative interventions that promote clear processes and clear dispute resolution mechanisms. What is beyond doubt is that the constitutional nature of the duty means that the administrative structures that emerge from the jurisprudence or legislative action will be obliged to respect the protective purposes that animate the duty to consult.

14.7 Impact on the Legislative Process

Another potential salutary impact of the duty to consult may be an increase in aboriginal participation in legislative processes. The issue of whether there is a duty to consult about legislative decisions is still unresolved, indeed it was expressly left unresolved by the Supreme Court of Canada in *Rio Tinto*.¹⁸⁵² There is a trend of cases, primarily in the Alberta courts, that resists the application of the duty to consult for decisions that are legislative in nature.¹⁸⁵³ The historical rationale for judicial deference to legislative decision-making was the inappropriateness of judicial comment on the internal workings of the legislative branch of government.¹⁸⁵⁴ This builds on a republican idea of separation of powers that still plays a powerful role in Canadian legal thought.

It must be remembered, however, that consultation is an important part of the justification process in the event that a legislative infringement requires justification. There are also other dynamics, likely heightened by the introduction of the duty to consult, that have potential for increasing aboriginal engagement with legislative processes. For example, the recent Senate report on the use of non-derogation clauses in federal legislation addresses the more fundamental issues of improvement of aboriginal engagement with the work of Parliament.¹⁸⁵⁵ There is also a very important literature emerging in Canada that explores legislative processes as a way of furthering the goal of reconciliation.¹⁸⁵⁶ It is clear that the dialogical spirit of the duty to consult has been an important factor in the resurgence of interest in the improvement of aboriginal participation in legislative processes.

14.8 Impact on the Remedies, Forum and Procedure

The emergence of the duty to consult has clearly encouraged reflection on the role of the courts in moving towards the goal of reconciliation, especially as the duty to consult is quickly becoming the remedy of choice and is becoming the main driver in the development of the jurisprudential framework. Indeed, the Canadian experience provides an excellent example of the notion of negotiating in the shadow of the law.¹⁸⁵⁷

The entire emphasis in the body of jurisprudence as a whole is on the use of the law to encourage the parties to work out mutually acceptable solutions in a deliberative manner. The three key components to this approach are expeditious access to effective remedies, maintenance of the Crown's overall responsibility for managing the overall process of consultation and the reciprocal development of duties of participation for aboriginal parties. As of yet, there is no clear guidance on whether there is a "duty to fund" but access to funds is clearly regarded as a significant element in the evaluation of whether the Crown has provided for a reasonable consultation process.¹⁸⁵⁸ The courts have already demonstrated recognition of the importance of having practical access to an adjudicative remedy in the "advance costs" line of cases.¹⁸⁵⁹

The jurisprudence as a whole respects the role of the state in making final decisions about the use of land but establishes an objective standard as to how it must discharge its responsibilities. This can involve dialogue that engages different perspectives on the use of land, interim accommodations to deal with continuing uncertainty over legal rights involving that land and movement to more durable resolution of these disputes. Within this context, procedural and remedies issues are increasingly assessed against how decisions facilitate or hinder dialogue. This is illustrated by the predominant preference for less intrusive remedies that encourage conversations, limited use of judicial supervision or injunctive relief and prominent emphasis on the duty to give reasons.¹⁸⁶⁰

It is highly likely that the sharpened focus on effective use of procedural tools, including clear pleading, will have a strong impact on the development of the duty to consult jurisprudence.¹⁸⁶¹ This is particularly important where the need for consultation and accommodation extends over a lengthy period and involves multiple actors. It can be expected that the overall impact of the adjudication of this duty will be 1) recognition that the duty is often triggered quite early 2) availability of remedies by way of judicial review in the process of dialogue that are designed to keep that dialogue on track and 3) development of clear standards by which the overall discharge of the duty by the Crown can be supervised. It can be expected that as these clear principles emerge the temptation for the courts to step in and supervise the actual deliberations between the parties will wane.

An important unresolved issue is the suggestion in *Rio Tinto* that damages might be available for past breaches of the duty to consult.¹⁸⁶² The plain reading of the judgment certainly suggests that such damages are now available but a strong counter-interpretation can also be developed. This interpretation is that the Court is simply referring to the possibility of seeking damages for an unjustified infringement under the *Sparrow* test. This interpretation is more consistent with the view that the duty to consult is not retroactive to the period prior to the enactment of Section 35, that past actions are generally assessed against standards that were known to the decision-makers at the time of the decision and the generally prospective operation of the duty to consult.¹⁸⁶³

There is a strong body of case law that holds that the duty to consult is only in play up to the point of an irrevocable decision, at which time the Sparrow paradigm applies to judge the consequences of that decision and consistency with Section 35 obligations.¹⁸⁶⁴ This issue will undoubtedly hasten the assessment of the important question of constitutional theory of whether the duty to consult is retroactive or whether it was enforceable with the enactment of Section 35. One of the primary themes of this thesis is that the overall model for the operation of Section 35 being developed by the Supreme Court of Canada is strongly prospective in operation and generally aimed at modern dialogue about the resolution of historical grievances. However the issue of damages awards is resolved, the procedural and remedial implications of the duty to consult are perhaps as important as the substantive changes it has brought to Canadian constitutional law.

14.9 Impact on Negotiations and Claims Resolution

Perhaps the most significant long-term implication of the introduction of the duty to consult is the clear ramifications it has held for orthodox thinking about claims resolution. At least among governments, the treaty process was seen as a search for certainty and a desire to contain the relationship between the parties within the terms of a negotiated agreement. While the most important changes are seen in the Little Salmon decision, the duty to consult, especially when seen through the lens of reconciliation, had already had an impact on the dialogue pertaining to treaty processes.¹⁸⁶⁵ Many see the duty to consult as contributing to procedural innovations such as the development of “treaty-related measures” to secure interim protection pending the negotiation of a final treaty.¹⁸⁶⁶ There has also been a clear pattern of more favourable academic evaluations of the products of negotiations between aboriginal peoples and the Crown.¹⁸⁶⁷

Seen in this light, the Little Salmon decision is just the culmination of a process that had already cast significant doubt on the idea of certainty. However, the courts are also confirming that the results of negotiations will attract a large degree of judicial deference and that the courts will not re-write the product of fair negotiations processes.¹⁸⁶⁸ In the future, there will be need to assess

the consequences of the conclusion that parties cannot contract out of the obligations related to the honour of the Crown.¹⁸⁶⁹ These questions will be addressed against a backdrop where there remains some ambiguity in terms of how the Supreme Court of Canada frames the relationship between the treaty process and the duty to consult. There is a strong tendency to describe the duty to consult as transitional in nature, as a duty that is in place pending the negotiation of modern treaties that reconcile the respective interests of the parties. On the other hand, the majority in *Little Salmon* casts the duty to consult as something that lives beyond and apart from the final treaty agreement. It is highly likely that the courts will reach the conclusion proffered by Tully that a final statement of reconciliation is not conceptually possible.¹⁸⁷⁰ While the courts will defer to the agreements that are reached along the way, the deeper constitutional dynamic suggests that the notion of “continuing dialogue” that is highlighted in the *Secession Reference* will be a permanent reality.¹⁸⁷¹

All of this will be developed in the midst of continuing doctrinal tension among the judges in the Supreme Court of Canada. The sharp divides between majority and minority decisions in *Little Salmon* and *Moses* suggest continuing cleavages in terms of notions of certainty, the respective roles of the federal and provincial governments in the negotiation of modern treaties and the role of the courts.¹⁸⁷²

The net effect of these developments is that claims resolutions processes will be expected to respond generally to the overriding standard of the honour of the Crown but that subject to this fundamental constraint the courts will generally defer to the product of good faith negotiations. It seems reasonable to predict that treaty negotiations and discharge of the duty to consult will emerge as complementary rather than alternative pathways to reconciliation. One implication of this complementary role is that there might be a strong incentive for all parties negotiating a treaty to consider shorter term and sectoral agreements that balance the interests of the parties pending a treaty settlement.¹⁸⁷³ This might also provide productive options for improving relations with aboriginal groups that choose not to participate in comprehensive claims processes.

14.10 Impact on Broader Policy Development

While the impact on environmental and administrative law and practice and the administration of claims policies has unquestionably been impacted by the introduction and development of the duty to consult, there are prospects for a far broader range of impact. As the duty is triggered by strategic decisions that could lead to potential impacts on Section 35 rights, there is a prospect that this could lead to rethinking about how such decisions are made. It would not be unreasonable to expect that this would lead to more systematic consideration of an aboriginal perspective on strategic decisions at a very early stage of development. If this trend were to deepen it could provide a strong counter-weight to a tendency noted by many commentators for a clear separation to develop between policy processes and the so-called “rights-agenda”.¹⁸⁷⁴ This trend may be in the process of being broken down in Australia where there are numerous initiatives to link rights determination processes with efforts to “close the gap” with respect to socio-economic disparities between indigenous and non-indigenous Australians.¹⁸⁷⁵

A particular possibility, which will be discussed more completely shortly, is that shared interests in economic development may encourage stronger dialogue about Section 35 rights.¹⁸⁷⁶ As aboriginal groups are drawn more deeply into the planning process for land use and environmental impact there is a strong incentive to consider shared participation in regional processes and better horizontal linkages between various decision-makers. The net effect of these changes is that aboriginal peoples, certainly their governments, can gradually systematize their engagement with federal, provincial and territorial consultative processes.

We can trace changes in such areas as interim measures, the administration of treaty land entitlement agreements and resource revenue planning processes very directly to the impact of the duty to consult. The larger point is that these are just examples of a generic tendency for the issue of impact of strategic decisions to be considered earlier and in a more creative fashion than would have been likely without the duty.

14.11 Deepening Notion of Dialogue

In the first Part of this thesis the strong “dialogical turn” of modern political theory was noted.¹⁸⁷⁷ This is linked to the idea that “political” resolution of deep normative conflicts is preferable to attempted resolution through grand normative theory. This literature provides an excellent vehicle for understanding the deeper normative commitments that are engaged by the duty to consult. It is remarkable how much the Haida decision resonates with the core messages of many of the leading voices of modern political theory.

Tully, in particular, has signalled the special importance of both the Secession Reference and the Haida decision for showing how the constitutional framework can be understood as a frame and stimulus for normatively significant dialogue.¹⁸⁷⁸ In each case, he recognises that normative and legal analysis are very different, and that the constitution imposes constraints as well as providing a source of inspiration. However, he draws from Canadian constitutional law to demonstrate how deeply political disputes, fraught with fundamental cultural difference, can be worked out through dialogical processes.

It is important to note that the type of dialogue that is referenced here has little to do with the “dialogue theory” which has dominated much recent legal thinking in Canadian constitutional law.¹⁸⁷⁹ Rather than a dialogue between the judiciary and the legislature, the dialogue captured in Haida is between aboriginal peoples and the state, often involving civil society actors as well. In aboriginal law, the most interesting narratives about dialogue occur outside the courtrooms and legislatures. The recent case of West Moberly from the British Columbia provides an excellent example of how the underlying notion of dialogue in Haida is beginning to be fleshed out and made practical.¹⁸⁸⁰ This is seen particularly in the lead judgment of Mr. Justice Finch as he expresses very clearly the need for accommodations to flow from genuine dialogue between the Crown and the affected aboriginal group.¹⁸⁸¹

There are other aspects of the development of the jurisprudence that resonate strongly with the political theory literature. For example, an important theme is the increasingly insistent requirement to provide and exchange reasons.¹⁸⁸² This is matched by a clear emergence of a notion of aboriginal reciprocity.¹⁸⁸³ While the duty to consult has been forged as a duty that is placed on the Crown, it is increasingly clear that aboriginal parties have strong obligations as well as that these are expressly dialogical in nature.

The range of issues that can emerge in a complex consultation process can be daunting. These include questions about the triggering of the duty, the scope of decision that is to be assessed in terms of the duty, the relationship between multiple decision-makers, complex federal-provincial issues and the appropriateness of various remedial theories. However, there are a number of emerging themes that are all related to the objective of incremental improvements in the quality of dialogue under the auspices of the duty to consult.

The first such theme relates to the importance of strength of claim assessment. In the initial statement of the test in *Haida*, the depth of consultation required is related to the strength of the claimed right and the severity of the impact.¹⁸⁸⁴ A clear pattern had emerged in the early cases for the dialogue to focus on questions of impact rather than on questions of rights. A recent pattern has emerged, particularly from a number of cases from the British Columbia Supreme Court, supporting the idea that the Crown would normally have a requirement to prepare an analysis of the strength of the claims that were being made and be prepared to share that analysis with the claimant.¹⁸⁸⁵ The clear implication has been that the consultation process involves exchanging views about the strength of the potential rights that have been asserted. It would normally not be enough to simply assume that potential rights are in play, focussing almost entirely on the separate issue of impact.

From a normative perspective, one of the attractive features of a requirement for strength of claims analysis is that it provides a formal mechanism to ensure that the Crown and an affected

group will exchange views that support their potentially conflicting perspectives and worldviews concerning use of land. As Tully has said, the Crown would minimally at least have to listen to a different perspective from the one it already holds.¹⁸⁸⁶ This does not change the fact that a consultative process is not a rights-determining process. All it does is provide a mechanism for an exchange of views about different perspectives concerning those rights.

While from a normative perspective there are strong arguments supporting an exchange of views in order to explore underlying differences of perspective, there are legal reasons that might curtail the generic expansion of strength of claim analysis. The British Columbia Court of Appeal has recently confirmed that there is no mandatory requirement to file a strength of claim report, that solicitor-client privilege might restrain the ability of the parties to fully share views on potential legal rights and that a dialogue about strength of claim might be most appropriate in processes where deep consultation is engaged.¹⁸⁸⁷ It will also be important to consider the rather different approach to strength of claim analysis, one that focuses on the adequacy of the factual record before the decision maker, that has been emerging from the Federal Court of Canada.¹⁸⁸⁸

A core argument that is emerging in many of the cases is that it is impossible to assess impact on rights without having some shared notion of what rights are in play. There is no need to come to agreement on the nature and scope of rights, and the process is certainly not designed to be a rights determination process, but there clearly is a fresh focus on the importance of dialogue about rights. The focus on potential rights might keep contested perspectives on the table longer and provide incentives to find ways to close perspectives. While care will have to be taken to avoid a strength of claim requirement being reduced to one item on a long list for “checking”, and to avoid turning it into an overly bureaucratic requirement, there is obvious force in any requirement that directs the Crown and aboriginal peoples to exchange views and engage in dialogue about differing notions of rights. This may be particularly important in the interpretation of historical treaties and dialogue about the scope of aboriginal title, where the gap in views between the parties is frequently quite profound. It will also be very important to determine how strength of claim is worked out in processes where the Crown is relying on

regulatory bodies or joint review panels under environmental assessment legislation. In the past, assessments of impact on aboriginal peoples have been conducted in a “rights-neutral” way, preferring to consider impact on activities and interests. A key issue will be whether the agency has jurisdiction to assess the impact on rights or even to form a view on the strength of claim to potential rights. The Paul decision of the Supreme Court of Canada will provide some guidance but it must be remembered that this case dealt with a requirement to actually determine the existence of the right.¹⁸⁸⁹

A second factor that can have an impact in deepening dialogue is the rapidly evolving notion of what is meant by “impact”.¹⁸⁹⁰ This now extends to higher level priorities setting and long-term planning. Some of the impacts that have been accepted by the courts are intangible. Rio Tinto and Adams Lake are the current lead cases on the requirement to determine impact.¹⁸⁹¹ The expansion of the notion of impact is important because it engenders a corresponding broadening of the circumstances in which the duty to consult can be invoked. This issue is sometimes framed as what can “trigger” the duty to consult. On a generic basis, this means that consultation challenges can be raised earlier and in relation to higher level stages of the decision-making process. Like strength of claim analysis, the British Columbia Court of Appeal has recently offered important refinements on the issue of impact.¹⁸⁹² The Court has stressed that the impacts cannot be overly generalized but must reasonably flow from the actual decision that is under review. The fact that there may be a future decision that will engage future impacts should not be used to stretch a consultative process beyond its proper scope.

A third factor that assists in the deepening of the dialogue set in motion by the duty to consult is the continued elaboration of the notion of reciprocity of obligations. Aboriginal groups have strong obligations to be full partners in the discharge of the duty to consult, including an obligation to participate in processes sponsored by the Crown to discharge the duty, so long as those processes meet a standard of reasonableness.¹⁸⁹³ There is a clear evolution of standards of reasonableness, reciprocity and responsiveness that apply to the aboriginal participants in the consultation process as well as to the Crown.

A fourth factor that may enhance the dialogical nature of the consultation process is the utility of consultation to ease tension during “flash-point events” The notion of a “flash-point event” has emerged in academic discourse since the Oka crisis and suggests that protest and resistance activities might promote Crown responsiveness to underlying grievances and festering disputes.¹⁸⁹⁴ It seems likely that processes of consultation, if applied broadly and with good faith, might provide alternatives to direct confrontation and might generate mutually satisfactory accommodations. The conclusion reached by the Ipperwash Report was that the duty to consult “...offers the real potential to significantly reduce the number of Aboriginal occupations and protests.”¹⁸⁹⁵ The recent decision of the Supreme Court of Canada in *Moultou v. Behn* offered some important guidance on the issue of “direct action”.¹⁸⁹⁶ While there certainly is language in the decision that decries direct action as an affront to the rule of law, there is also a recognition that an aboriginal individuals or groups can take a variety of steps to ensure that their concerns are heard and addressed.¹⁸⁹⁷

A fifth factor is that dialogue is enhanced because the Crown bears the responsibility to sort out who must be consulted with.¹⁸⁹⁸ This is particularly important for consultation with groups that have less of a history of engagement with the Crown, for consultation with aggregate groups and tribal councils and groups that are struggling with internal differences about allocation of authority to act or speak for the group.

Finally, we have already seen that the conversations mandated by the duty to consult might provide opportunities to close the gap on contested issues such as the nature and scope of aboriginal title and the proper interpretation of historic treaties. We have seen some creative developments in various courts where accommodation measures have accepted the fact of fundamental differences of perspective but focussed on ways to bridge those gaps in a fashion that allows decision to move forward.¹⁸⁹⁹ While this is different from an adjudicative process to render a decision that addresses the underlying dispute, it bears promise in building trust and guiding the parties to see a dispute in a fresh light. For these reasons, a large part of maximizing

the normative potential of the promise of Section 35 might be related to the quality and nature of the conversations that are set in motion by the duty to consult.

14.12 Impact on Economic Development

One of the most important consequences of the implementation of the duty to consult has been the large number of economic development opportunities that it has enabled. Impact benefit agreements and accommodation measures have very frequently provided benefits to aboriginal groups as a result of consultation processes.¹⁹⁰⁰ The seeds are beginning to be sown for more linkages between the duty to consult and economic development, including resource revenue sharing and economic joint ventures. The Supreme Court of Canada and other courts have started to make the connections between the duty to consult and economic development more explicit.¹⁹⁰¹ The Ipperwash Report stressed the linkages between consultation and the desire to “...promote Aboriginal economic self-sufficiency”.¹⁹⁰²

Recent academic work, especially that of Gabrielle Slowey, has begun to systematically assess the role that economic development has played in the development of Aboriginal agency and movement towards self-government.¹⁹⁰³ This movement is sometimes described as “Red Capitalism”.¹⁹⁰⁴ A number of communities have very successfully embraced strategies of promotion of economic development¹⁹⁰⁵ though the issue remains controversial.¹⁹⁰⁶ These developments have not gone without controversy as many see engagement with the capitalist model of development as fundamentally inconsistent with indigenous ontologies and spiritual world-views.¹⁹⁰⁷ In addition, participation in economic development sponsored by proponents and supported by governments is regarded as decidedly second-best to aboriginal development of the resources themselves. There is also a deep fear of the “development trap” and the costs of engagement with mainstream economies in terms of loss of cultural traditions and values.¹⁹⁰⁸

Some of these concerns are mitigated when economic development opportunities and joint ventures are time-limited and do not involve surrender of competing rights claims. Short term arrangements provide an opportunity to secure benefit from the development of adjacent resources pending the resolution of claims or the determination of rights. A strong practice is developing in British Columbia, most notably on Haida Gwaii, of using short to medium term agreements to mobilize the opportunities engendered by the duty to consult to generate benefits from economic activities.¹⁹⁰⁹

The duty to consult has also been raised in several high-profile dispositions of surplus federal Crown land.¹⁹¹⁰ This at least raises the possibility that the interests of the parties might be better served by seeking mutually satisfactory economic arrangements to allow transactions to go forward with aboriginal participation in the re-development of the lands.

The paradigm shift that these examples call to mind involves seeing mutually beneficial economic development opportunities in cases that had previously been characterized as rights disputes. As noted previously, clearer linkages are being drawn in Australia between rights determination processes, such as awards of native title under the Native Title Act, and “closing the gap” initiatives.¹⁹¹¹ These initiatives promise to break down the tension that is frequently seen between the “rights agenda” and good social and economic policy.

A parallel tension is seen on the indigenous side between participation in economic development and development of an authentic indigenous community.¹⁹¹² Emerging practice shows that it is possible to use discussions about potential rights to generate mutually attractive engagement in economic development and sharing of benefits. Deepening inter-dependence, development of social capital and lessening sense of alienation from mainstream society do not require a commitment to assimilation.¹⁹¹³

At a deeper level, discussions that are built around a shared goal of economic development flesh out a conception of reconciliation that draws simultaneously from goals of recognition and redistribution.¹⁹¹⁴ Seen from the perspective of public opinion, a focus on a shared goal of economic development allows a shift away from notions of consultation being an impediment to development of natural resources to consultation being a vehicle to identify opportunities for shared participation in economic development. The tendency of the duty to consult to enhance a shared commitment to economic development makes an important normative contribution to the question of whether Canada has a politically and morally defensible conception of aboriginal rights.

14.13 Growing Merger of the Sparrow and Haida Frameworks

On of the most pressing issues in the evolution of the jurisprudential framework for the interpretation of Section 35 has been the relation between the Sparrow and Haida frameworks. On a superficial level, a clear distinction exists between a potential right and an established right.¹⁹¹⁵ This overlaps with a related distinction between a decision or process that is still underway and a decision or process that has been completed. Within this model, the Sparrow framework is seen as looking backward while the Haida framework is seen as looking forward. These distinctions are developed most clearly in the decisions of the Alberta Court of Appeal, most notably in the Lefthand decision.¹⁹¹⁶ However, we are starting to see a blurring of these distinctions and a combination of the tools that are available under each paradigm.

For example, there is no doubt that a duty to consult can be invoked to protect an established right. Reference has already been made to the Rio Tinto decision where the possibility of damage claims for past infringements of the duty to consult has been introduced, raising some ambiguity as to whether this is founded under the Sparrow or Haida approaches.¹⁹¹⁷ While consultation processes are not intended to be rights determining processes, important rulings on the nature and scope of rights, including aboriginal title, are already appearing.¹⁹¹⁸ Cases dealing with the taking up of lands under treaty, including Mikisew, West Moberly and Keewatin, demonstrate a

great deal of overlap between the Sparrow and Haida framework.¹⁹¹⁹ Faced with conflicting rights within a treaty document, courts are turning to consultation and dialogue as the preferred remedy for dealing with this conflict.

The best example of the growing overlap between the two adjudicative models may be the Ahousaht decision.¹⁹²⁰ While clearly styled as a Sparrow claim, the trial judge produced remedies ordering consultation about infringement and justification. This provides what is possibly the best example of structural merger between the two paradigms for dealing with Section 35 rights. In effect, issues of infringement and justification are being remitted back to the parties for resolution through consultation and negotiation. In other words, the courts are picking and choosing between the remedial options available under the models of infringement and consultation in order to promote dialogue between the parties about the resolution of the underlying dispute.¹⁹²¹

14.14 Are the Categories of the Honour of Crown Closed?

The key passage from Haida makes clear that the duty to consult is nested within two broader sets of duties, all united by the notion of the honour of the Crown.¹⁹²² At various stages of the judgment, reference is made to a duty to determine rights, a duty to recognize and respect rights, a duty to participate in processes of negotiation and duties to negotiate in good faith.¹⁹²³ There is some limited jurisprudence on these emerging duties, including some emerging cases from Australia.¹⁹²⁴

At this point it is impossible to predict how these other duties will inter-relate with the duty to consult, but it can be said with some confidence that the mere possibility of the invocation of such duties can only enhance processes for engagement between the Crown and aboriginal peoples. There are also passages in the jurisprudence that support the emergence of a duty to

implement. Some work will have to be done to tease out the relationship between the duty to interpret treaties and the duty to implement treaty obligations.

The most important recent development on the role and interpretation of the honour of the Crown has been the decision of the Supreme Court of Canada in *Manitoba Métis Federation*.¹⁹²⁵ A majority of the Court issued a general declaration that the federal Crown had breached an obligation to diligently implement parts of the land distribution provisions of the Manitoba Act in the late 19th century. This obligation was clearly rooted in the honour of the Crown. However, very little guidance was offered as to the implications of this declaration for the current relationship between the Crown and the Manitoba Métis. This was one of the reasons that a strongly worded minority judgment suggested that the majority approach risked creating imprecise obligations, with an unclear doctrinal source, leading to imprecise remedies.

While the focus of the evolving jurisprudence has been on the duty to consult, there are a wider range of duties that are potentially in play. All of these duties are related to the central insight that the broad constitutional architecture is oriented towards maximizing the possibilities of dialogue between aboriginal peoples and the Crown. While potential rights are an important part of this architecture, the most important innovation has been the creation of an evaluative standard based on the honour of the Crown. The Crown is expected to manage the sorting out of the relationship based on this standard, with the courts playing an important but less direct role. Seen in this light, the implementation of the duty to consult is an important part of a modern theory of Section 35 rights that shifts the centre of gravity away from rights claims to iterative dialogical processes that are oriented towards reconciling different conceptions of attachment to land. A broadening and deepening of Crown obligations, governed by flexible standards related to the purposes of Section 35, especially the honour of the Crown, is linked to a focussing of the judicial function on the narrower role of guiding effective inter-cultural dialogue.

14.15 Are we Seeing the Emergence of a New Constitutionalism?

Some have argued that the pattern of engagement that is emerging on the ground, largely under the aegis of treaty processes and the duty to consult, has promoted a de facto treaty federalist model.¹⁹²⁶ This insight allows the consideration of the broader question of the type of constitutional model that is envisaged with the introduction of the duty to consult. This can be done by placing the emergence of the duty in the context of the broader constitutional architecture of the Canadian constitution, including the enhancement of the role of unwritten principles of the Constitution with the Secession Reference.

This model can be tentatively reflected in the following propositions:

- Honour of the Crown is an unwritten principle of Canadian constitutional law.
- Its legal status is similar to the other unwritten principles described in the Secession Reference.
- The Crown has a broad discretion as to how it discharges its honour.
- Creation of reserves and the negotiation of treaties are examples of the exercise of this discretion.
- Section 35 added a significant remedial dimension to the honour of the Crown.
- The duty to consult, being derived from the honour of the Crown, shares these structural characteristics.

- A broad discretion is vested in the Crown as to how it discharges its honour in relation to the duties derived from the honour of the Crown, including the duty to consult.
- The duty can be modified, within constitutional limits, by the intervention of the legislature or negotiation of agreements (Ermineskin, Rio Tinto and Little Salmon)¹⁹²⁷
- Deference is owed to statutes that implement resolution regimes honourably.
- Deference is owed to agreements that implement resolution regimes honourably.
- The courts have a residual role to assess statutes, agreements and their implementation in terms of assessing compliance with the duty to consult.
- This model can be particularly helpful in thinking through the impacts on potential rights that are assessed through complex approval and regulatory processes.

The benefit of thinking about the role of the honour of the Crown and the duty to consult in a broader framework of constitutionalism is that it promotes reflection on the implications of the duties at a higher level of generality and in terms of the deeper constitutional principles that are engaged. It also promotes reflection on how the constitutional status of the duties and their description as unwritten principles of the constitution affects the practical unfolding of the relationship between the parties.¹⁹²⁸

14.16 Conclusion

An attempt has been made to stress the normative gains that have been made by the introduction of the duty to consult. It is clear that both the forums for engagement and the quantity and quality of such engagement have been greatly enhanced by the introduction and implementation of the duty. It shall be seen that these developments could have important consequences for the resolution of other important disputes about the interpretation of Section 35 and other key constitutional provisions. In subsequent chapters it will be argued that the dialogue-based understanding of Section 35 helps to generate normatively and legally attractive answers to long-standing disputes about self-government and sovereignty, the division of powers, the role of the Charter and the proper interpretation of the justification test.¹⁹²⁹

Though no one factor can clinch the argument that the introduction of a duty to consult has been a net gain for aboriginal peoples, it is important that new duties have been developed, that significant benefits have accrued to aboriginal peoples, that these duties are rooted in a fundamental way to the bedrock principles of the constitution, that a clear shift to considering the obligations of the Crown is occurring, that the honour of the Crown is emerging as a strong standard that guides the performance of these obligations and that practical, expeditious and effective dialogue is promoted about these obligations and the rights that are asserted by aboriginal peoples. These developments suggest a more restrained role for the courts but a stronger political engagement between the Crown and aboriginal peoples about continuing disagreements over attachment to land and response to historic injustice. The duty to consult paradigm has provided a new language to consider these important issues in a modern way.

CHAPTER 15 - ELDER TESTIMONY CASE STUDY

While the courts have spoken in a general way about the relevance of aboriginal perspective to the resolution of conflicts about the meaning and scope of aboriginal rights and treaties, there is rarely consideration of what this means in practice. One important forum, of course, is the courtroom. The reception of oral testimony and the treatment of elders has been an issue that has garnered a great deal of controversy.¹⁹³⁰ This chapter shall look at a recent initiative of the Federal Court of Canada to develop non-binding guidelines to deal with the reception of oral history before that court.¹⁹³¹

This is just one of many initiatives in Canada to deal with indigenous legal traditions, including the development of legal education programs that engage more explicitly with indigenous legal systems as holistic entities.¹⁹³² The most visionary programs contemplate granting joint degrees in mainstream and indigenous law. However, while the focus on elder testimony in the courtroom is a very small piece of the overall puzzle, it may provide valuable clues to help make all of the pieces fit together. To be clear, the treatment of presentation of oral testimony in the courtroom is not dispositive of the broader jurisprudential issues about the interaction of mainstream and indigenous law, but it seems prudent to pay careful attention to what must be one of the most important sites of interaction of different legal systems.

Starting with the basic legal framework, the Delgam'uwkw decision is seen as the leading authority in Canadian law on the reception of aboriginal oral evidence.¹⁹³³ It holds that such evidence should be considered on an equal footing with other evidence. The subsequent decision in Mitchell is generally regarded as clarifying that the general principles of evidence are still applicable, though it is clear that a straightforward reliance on the hearsay rule would be insufficient to prevent the reception of properly authenticated oral history.¹⁹³⁴ The subsequent jurisprudence has focussed on the development of preliminary processes for the reception of oral testimony.¹⁹³⁵ It is interesting that some commentators have argued that Delgam'uwkw was not a

large break from past practice as a body of common law had already developed to facilitate consideration of oral history testimony of aboriginal elders.¹⁹³⁶

While this chapter will focus on Canadian developments, there is an important body of experience from other countries with similar legal traditions that should be considered.¹⁹³⁷ In Australia, there have been procedural changes and proposals designed to facilitate the presentation of oral testimony but there is also a vibrant debate about how it should be presented. Some have suggested that there might be efficiency gains that can be accrued by reducing traditional evidence to written form¹⁹³⁸ and others suggest that the evidence is most likely to be favourably received when presented through an expert report¹⁹³⁹. The prevailing view among Australian judges is that oral evidence is to be preferred when it is available.¹⁹⁴⁰ Note should also be taken of the extensive experience of the Waitangi Tribunal in receiving detailed oral evidence from Maori.¹⁹⁴¹

While the law has developed a distinctive stance to oral history, there is a rich debate in anthropology and other disciplines about the reliability of oral testimony in terms of accurately capturing events that occurred in the past. The most prominent voice counselling caution about the uncritical acceptance of oral history is Alexander Von Gernet, though similar perspectives were expressed in the past by Bruce Trigger and Charles Fried.¹⁹⁴² Widdowson and Howard have written critically about the Canadian practice of reception of oral testimony.¹⁹⁴³ Interestingly, Jung has relied on a strand of critical literature that is highly sceptical of the reliability of much oral history.¹⁹⁴⁴ On the other hand, many scholars have responded by arguing that much of this work is unduly aligned with narrow evolutionary theories of development and insufficiently respectful of indigenous identity.¹⁹⁴⁵

It is well known that aboriginal societies are built on oral traditions and that many aspects of legal and community knowledge are passed down from generation to generation by the stories and narratives preserved by elders of the community.¹⁹⁴⁶ The practices that govern the

transmission, protection and interpretation of oral tradition differ among aboriginal groups. Many elders complain that their experiences in the courtroom have been demeaning and that their testimony is frequently under-valued. Walkem argues that Canadian courts have "...largely ignored the invitation in *Delgam'ukw* to sensitively engage with indigenous legal traditions."¹⁹⁴⁷ Westra concludes that while much oral testimony is presented in the courts, it is often not recognized by the bench.¹⁹⁴⁸ Borrows cites a number of examples to argue that the ruling on oral history in *Delgam'ukw* has not had much impact on actual judicial practice.¹⁹⁴⁹

A recent initiative sponsored by the Federal Court of Canada provides an opportunity to assess the foundations of these concerns and to determine if ways can be developed to ameliorate them.¹⁹⁵⁰ The initiative involves participation of the Canadian Bar Association, the Indigenous Bar Association and the Department of Justice.¹⁹⁵¹ Frequent opportunities have been made available to seek the input and guidance of a panel of Elders chosen to be broadly representative on a national basis.¹⁹⁵² The Chief Justice of the Federal Court released a set of guidelines in October 2012 that were based on the deliberations of the group.¹⁹⁵³ The guidelines provide a number of suggestions that are aimed at responding to some of the concerns that have been expressed by elders about the experience of appearing as a witness in court. The two most important issues have been cross-examination of elders and the provision of prior disclosure statements of anticipated elder testimony. It is frequently asserted that it is considered offensive to question an elder or to ask for a prior summary of proposed testimony.¹⁹⁵⁴ The Crown, on the other hand, maintains that cross-examination and disclosure are essential to the fairness of the trial process and to the "truth-finding" function of a trial.¹⁹⁵⁵ From the Crown's perspective steps can be taken to make the experience of testifying before the court more culturally sensitive and less foreign, but that the basic protections accorded to all litigants cannot be waived.

While it is sometimes said to be disrespectful to ask an Elder to give prior notice of what they intend to introduce in their oral testimony, there also appears to be a pragmatic concern that the testimony might stray from the traditional standard of disclosure that require a witness to provide a prior summary of proposed testimony, often called a "will say" or "can say" statement.¹⁹⁵⁶ The

issue has recently been litigated in Alberta leading to a dismissal of a leave application at the Supreme Court of Canada.¹⁹⁵⁷ The conclusion was that the failure to provide appropriate disclosure led to the dismissal of the claim. This is an illustration of the importance that is attached to the procedural protections accorded to litigants. Though not confined to aboriginal cases, a recent strand of jurisprudence has focused on the importance of a “trial narrative” and how the various procedural tools available to parties contribute to the development of such a narrative.¹⁹⁵⁸

This difference of view led to an impasse that produced an Elders Statement calling for a moratorium on the hearing of oral testimony before the Federal Court of Canada. They stressed that it would be unheard of to challenge or intensively analyse the teachings of an elder.

“With all due respect to the Federal Court, after careful deliberation, we the Elders submit that we cannot support the present court process with respect to oral history evidence as it is presently outlined by the Federal Court. We cannot continue to allow our Elders to be put in a position where their oral history testimony is subjected to cross-examination and extensive analysis. We therefore recommend that for now, oral testimony be excluded from the court process. This does not mean that we cannot continue to advance the position of Indigenous peoples in this country. Engaging in this process is leading us to a positive opportunity to share the richness of a knowledge that we evolved from as a unique and distinctive people in America.”

and

“It is considered unheard of in our communities to cross-examine or challenge the sacred teachings carried by an Elder. For us to endorse this practice in the courts would be in total opposition of how we treat our Elders.”¹⁹⁵⁹

Echoes of this approach can be found in the academic literature on indigenous legal traditions in that the focus is on the direction from Elders on the content of indigenous law rather than the use of Elder testimony to prove a point of fact or law under mainstream Canadian law. To take an example from the writing of Val Napoleon:

“There are several concerns about the treatment of the adaawk in future litigation, namely, having the judiciary apply a reductionist approach to the adaawk, and evaluate the adaawk according to the rules of court instead of those inherent in the adaawk. Given this, a future strategy might be to offer the adaawk as a complete system, and agree that their internal “truth” can be established only within that system. The only truth that a court would then look at is whether there is an adaawk. If there is an adaawk, then land ownership is established. If the adaawk does not record the land as having been lost, then it is still owned by the respective House. In other words, the adaawk, as a complete system, provides proof of title according to the aboriginal title test (ie legal occupation), but it should not be disassembled to provide proof of occupation. Rather, the adaawk, in and of itself, is proof of occupation.”¹⁹⁶⁰

Battiste adds that the role of the elder is to “give directions” to the court.¹⁹⁶¹ Panagos, drawing from the important writings of Henderson, likewise argues that it is the job of the court to simply apply what they are told by experts on the content of indigenous law.¹⁹⁶² Shaw adds that “...to hear the evidence presented but subject it to evaluation by Western epistemological standards would be to repeat the historical treatment of Aboriginal peoples as “less developed versions” of our selves, rather than recognizing and struggling with the reality of cultural difference.”¹⁹⁶³

It is unlikely that the development of the guidelines will resolve all of these complex questions. It is submitted that one way to clarify the issues at stake is to reflect on the different goals that might motivate the presentation of oral history evidence before a mainstream court. Authors who have addressed these issues frequently describe the goal as voice, giving directions or proving contested facts. With respect to voice, Peterson has argued that “...courts have become more useful as forums where Aborigines can tell their stories and influence policies through the public arena”.¹⁹⁶⁴ In this vein, courts “...provide a forum ...to tell their stories and achieve recognition...regardless of the outcome.”¹⁹⁶⁵ In Canada, the notion of giving directions has been far more prominent. However, this is frequently overlain with the objective of proving particular facts that are at issue in contested pleadings.

It is important to separate the issue of respectful cultural treatment from the substantive issue of how indigenous law relates to mainstream Canadian law. The approach of regarding elders as

“giving directions” to the courts assumes that there is a straight line between identifying the content of a proposition of law in an indigenous legal system to identifying the content of a proposition of law in mainstream Canadian constitutional law. This can be seen in assertions that indigenous law directly provides the contents of a Section 35 aboriginal right or that aboriginal title can be independently proven by demonstrating the existence and application of an indigenous land tenure system. One of the core arguments of this thesis is that the actual relationship between indigenous law and mainstream constitutional law is more complex and less linear. Both systems of law are conceptually autonomous, though there will be specific points of contact in their mutual operation. Seen from this light, though elders can give directions on the content of indigenous law, the court must take submissions and eventually decide on the content of related propositions of mainstream Canadian constitutional law.

This is complicated by the frequent pursuit of a third goal in a courtroom- use of oral testimony to prove facts that are contested by the parties. This might involve testimony about use of discrete parcels of land in the distant past. An aboriginal claimant might be submitting the testimony as proof of a fact that supports the legal conclusion that aboriginal title exists over a particular tract of land. The Crown might be advancing the legal conclusion that some other Section 35 right might be available over that tract of land but not an aboriginal title.

Seen in this light, the contested issues of prior disclosure and cross-examination take on a different colouration depending on the purpose for which the oral testimony is tendered. Though there will be overlap between the discrete purposes for which oral testimony is put forward, the rationale for prior disclosure and cross-examination is particularly, perhaps even uniquely, strong for oral testimony that is put forward to support a conclusion about a particular contested fact. To the extent that an elder is sharing a perspective or a unified world-view, there might be an implicit invitation to share in a conversation. However, such conversations can be difficult to structure in the formal environment of the courtroom. To the extent that there is a substantive dispute about the status of indigenous law in terms of determining the content of a proposition of Canadian constitutional law, this will usually depend on legal argument rather than factual

determinations. In the narrower situation where a judge is being urged by different parties to make a finding of fact, it is particularly appropriate that a claimant provide advance notice of the broad matrix of facts that it intends to rely upon and be prepared to answer questions about the facts that it alleges provide the foundation for their legal submissions. This is particularly important after the strong emphasis on the need for a proper procedural foundation for aboriginal claims in the *Lax Kwa'laams* decision.¹⁹⁶⁶

A very good example of the importance of disentangling the various purposes served by oral history can be seen in analysis by Borrows of the consideration of a disputed wampum belt in the *Bernard* litigation.¹⁹⁶⁷ The wampum belt had been put forward to support an aboriginal title claim, in part by demonstrating the antiquity of the form of governance structure of the Mik'maq. A Crown expert presented evidence that was supported by the trial judge who determined a much later date for the creation of this particular belt. Borrows' key argument is that it does not actually matter when the belt was created. What matters is how the belt helps structure the indigenous order of the community today.¹⁹⁶⁸ Indigenous law is a living and breathing manifestation of current identity and need not be founded on historical fact. This difference of focus may contribute to an explanation for why the parties can sometimes take such disparate approaches to oral history testimony. The Crown is generally focussed on the facts that are alleged to lie behind the oral history and the indigenous group is focussed on the role that the oral history plays in framing the current worldview of the group itself.

The Guidelines do not change the substantive law of evidence or civil procedure but call upon all parties to be innovative to find ways to respond to the sense that the courtroom has been felt to be an unwelcome environment by many aboriginal elders. The Guidelines set out a variety of principles and suggested mechanisms to assist the parties and the court deal with the cultural sensitivities that arise when oral history is tendered in a claim. These might include special efforts to explain the rules and practice of court, adoption of a general rule of not interrupting and delaying questions until the completion of the presentation of testimony or considering novel raises to present questions about the elder's testimony. Experience from Australia might consider

the more widespread use of joint testimony by experts, oral testimony on the land and in accordance with indigenous protocols and procedures to promote a clearer mutual understanding of why oral testimony is offered in the first place.¹⁹⁶⁹

As noted in the introduction, the mechanisms for reception of oral history in the courtroom are hardly likely to provide a groundswell of movement towards greater recognition of legal pluralism. However, they do invite consideration of some of the underlying legal issues about the precise role of indigenous law in making claims in a Canadian court, reflection on the various purposes that can be achieved when oral history is put forward in a court and the development of mechanisms to allow cross-cultural issues to be dealt with greatest possible sensitivity. The achievement of oral testimony guidelines after a lengthy and thorough consensual process may be an important contribution to the recognition of the deeper complexity of Canada's legal system.

CHAPTER 16 - THE ROLE OF THE COURTS IN ADJUDICATING DISPUTES INVOLVING SECTION 35

16.1 The Roles of the Courts

The net effect of the full range of judicial activity under Section 35 has been the development of a distinctly Canadian approach to the role of the courts. The core argument of this thesis is that after setting out the broader architectural parameters of the relationship between the Crown and aboriginal peoples, the courts are now moving towards a more limited facilitative role that leaves the primary direction that the relationship may take in the hands of the parties. Judicial remedies are aimed at reinforcing and prodding dialogue. In the broad jurisprudence involving Section 35 we see a generic shift to the modern and prospective purpose of the constitutional provision, the emergence of an inter-related structure of rights and obligations, loosely animated by the goals of reconciliation, honour of the Crown and reciprocity and a narrowing of the preferred role to be played by the courts.

These trends are particularly apparent in the strands of the jurisprudence dealing with rights and the duty to consult. After the original foundational opinions, the decisions of the Supreme Court of Canada have moved towards consolidation and fleshing out detail. In the rights jurisprudence this is most clearly seen in the development of precise requirements for characterization of rights and pleadings and the requirement to demonstrate a live dispute in order to engage the intervention of the courts.¹⁹⁷⁰ In the duty to consult jurisprudence, we see that case-law is moving into a “third generation” of cases that focus on the more detailed roles and responsibilities of the various parties in terms of constructing and implementing consultation processes that comply with the purposes of Section 35.¹⁹⁷¹ As noted previously, the courts are showing a clear movement towards breaking down barriers between the rights and duty to consult paradigms.

A case can be made that the courts are gradually moving back to the original intention of the framers which was reflected in a general statement of rights recognition and affirmation and a process to provide mutually acceptable content to the rights that are protected.¹⁹⁷² After the broad parameters have been addressed by the courts, it is the parties themselves that will work out the pathway to reconciliation. This goal is protected by a restrained role for the courts, support for negotiation processes and products, encouragement of broader and deeper dialogue, reciprocity and high standards demanded of the Crown.

One of the subsidiary purposes that can be achieved by this approach is that the parties can address a far broader range of matters than can be addressed by a court. It becomes possible to draw less sharp lines between a “rights-agenda” and “closing the gap”. The parties can build on shared interests in goals such as economic and community development. A broader range of social actors can be brought into the discussion. Creative ways might be considered to find redress for legitimate historical grievances. In other words, the parties are able to deal with the entire “capability set” capturing the broader range of interests of aboriginal peoples in Canada.¹⁹⁷³

It is very interesting that much recent political theory work paints a picture of the role of rights in a liberal democratic society that has close parallels to the gradual evolution of the case-law under Section 35. For example, Jung argues that a rights claim usually works by guiding the issue back to the arena of politics.¹⁹⁷⁴ Indeed, in language that is strikingly reminiscent of the Haida paradigm, she describes rights as possessing a strong procedural dimension and as being more analogous to a promise rather than a guarantee.¹⁹⁷⁵ Rights are aimed at shaping democratic deliberation¹⁹⁷⁶ and they “...have a procedural dimension to the extent that they animate politics without being able to determine the outcome of politics.”¹⁹⁷⁷ Seen in this light, constitutions, by enshrining rights, indicate the standards that a society can use to assess progress towards mutually desired goals.¹⁹⁷⁸

Hendrix brings out the purpose of fostering democratic deliberation with even greater emphasis.¹⁹⁷⁹ The process of making and responding to rights claims is seen as based on dialogue, dependant on the exchange of reasons¹⁹⁸⁰ and supported by broader processes of consultation¹⁹⁸¹. A nation-state is required to “...listen carefully and systematically to their concerns”¹⁹⁸², and while the state from time to time might have to exercise a veto¹⁹⁸³, “dialogic interaction can take new and unexpected turns.”¹⁹⁸⁴

16.2 Concluding Comments for Part II

The “promises” of Section 35 have unfolded with increasing clarity since the seminal decision of the Supreme Court of Canada in *Sparrow*.¹⁹⁸⁵ The model for proof and exercise of activity- based Section 35 rights is becoming increasingly transparent, though important questions remain about the extension of such rights to commercial trading practices and governance rights. Despite the current wide gulf between the competing views of governments and claimants, there is a strong prospect that a reasonable interpretation of aboriginal title as a modern and meaningful right will be confirmed by the courts. Finding a role within Canadian constitutionalism for indigenous legal traditions remains a pressing and unresolved challenge but the resources seem to exist to support an important role that does not fracture the skeleton of Canadian constitutionalism.

The most important development in the interpretation of the Canadian constitutional framework has been the introduction and rapid development of new duties pertaining to consultation and accommodation. These duties have opened up the prospect for meaningful dialogue and reconciliation on a number of important fronts and pose the best promise for a positive answer to the question of whether a morally and politically defensible conception of aboriginal rights can be developed within Section 35. These developments have also led to a refocusing of the role of the courts in Canada to one that facilitates and encourages dialogue and resolution between the Crown and Aboriginal parties.

The final part of this thesis will consider four areas of law that are crucial to the overall model of Section 35 constitutionalism. These include the role of governance, the impact of the Charter of Rights and Freedoms, the interaction of Section 35 with the division of powers between the federal and provincial governments and the justification of rights infringements. It will be argued that the modern approach to Section 35 rights, grounded in a notion of inter-cultural dialogue, provides a distinctive and mutually reinforcing way to resolve important and continuing jurisprudential disputes.

PART III - APPLICATION OF THE EMERGING SECTION 35 PARADIGM TO OTHER ISSUES

CHAPTER 17 – FOUR KEY DOCTRINAL ISSUES

17.1 Section 35 and the Protection of Aboriginal Self-Government

One of the most important challenges for any analysis of the content of Section 35 is the issue of aboriginal self-government. For present purposes, no hard distinction will be drawn between sovereignty and self-government. Most writers who address the topic tend to merge the two concepts, though it will be argued that significant progress on aboriginal self-government might support a fresh look at the notion of sovereignty. The 1995 Inherent Right Policy has led to a number of important self-government agreements and several comprehensive claims agreements have significant self-government chapters, but the focus of this chapter is on the common law and constitutional protection of self-government.¹⁹⁸⁶ The huge literature on self-government reflects the deep divergences that are seen in the theory literature.¹⁹⁸⁷ This literature is dominated by questions about the authority of the Canadian state. Aboriginal self-government is frequently tied to doubts that are raised about the legitimacy of the Canadian state and the circumstances of the establishment of Canadian sovereignty. There are strong overlaps with the literature highlighting incommensurable differences between indigenous and non-indigenous forms of governance and theories of deep legal pluralism.¹⁹⁸⁸

Three more specific arguments are often presented in support of an inherent right to self-government: the doctrine of continuity provided for the continuation of aboriginal legal systems as part of the common law, the negotiation of the treaties presumes a right of self-government as the very act of treating with a party implies recognition of their sovereignty and the recognition that aboriginal and treaty rights, especially aboriginal title, are collective in nature presupposes

the ability of the collective to regulate its own members, thereby implying a right of self-government.¹⁹⁸⁹ Three similarly specific arguments are generally presented against the existence of a right of self-government: the doctrine of continuity did not apply to indigenous legal systems or any protection beyond property rights, the exhaustive distribution of legislative power left no room under the Canadian constitution for an aboriginal right to self-government and any right of self-government that might have existed has been extinguished.¹⁹⁹⁰

The issue of the inclusion or exclusion of aboriginal self-government within Section 35 is unlikely to be resolved by reference to factors cast at this high level of generality. The doctrine of continuity is particularly unlikely to provide an answer to questions of self-government and sovereignty in light of the palpable shift of the Supreme Court of Canada to a modern doctrine of aboriginal rights.¹⁹⁹¹ Australian law also casts doubt on whether a doctrine of continuity protects a general right to self-government.¹⁹⁹² More work is required to assess the particular role that self-government plays within the Canadian constitutional structure, but the development of a particular argument drawing on the distinctive Canadian approach outlined for rights and title will be the priority in this chapter. A preliminary issue that must be addressed first is whether the existing jurisprudence prevents the issue from even getting off the ground. It is frequently stated that the combined effect of the *Van der Peet* and *Pamejewan* decisions make the likelihood of a ruling supporting aboriginal self-government rather low.¹⁹⁹³ The reasoning usually contrasts the focus on specific practices in those judgments with the fact that self-government is a practice which is best understood at a higher level of generality. The Supreme Court of Canada also rejected making a ruling on self-government and sovereignty in the *Delgam'ukw* case, calling for future submissions to address a number of legal policy questions that address the incorporation of aboriginal self-government in the broader constitutional structure of governance.¹⁹⁹⁴

An important strand in the legal literature has suggested moving away from Section 35 to find support for aboriginal self-government in the fundamental federal structure of Canada.¹⁹⁹⁵ The strategic motivation for much of this work appears to be a desire to move away from the

perceived constraints of the Van der Peet test and related jurisprudence. However, none of the proponents of this approach develops a clear rationale for a division of powers foundation for self-government without a constitutional amendment. For that reason, the emphasis in this thesis shall remain on the Section 35 protection of aboriginal self-government.

While the matter is certainly not free from doubt, there are at least three broad developments in the law that open up room for creative approaches to Section 35 interpretation. These are:

- The recognition of the possible protection of “practices of law-making” in *Sappier*.
- The exploration of the notion of “internal sovereignty” in the concurring judgment in *Mitchell*, and;
- The introduction of the notion of “competing sovereignties” in *Haida*.

It will be argued that these jurisprudential openings make most sense when juxtaposed with the emerging interest in indigenous legal systems. The vast bulk of the theory literature stresses the normative significance of indigenous peoples making fundamental decisions about their way of life in accordance with standards they have developed themselves.¹⁹⁹⁶ From a jurisprudential perspective, the most likely bases of indigenous self-government are found in the customs that define indigenous decision-making and dispute resolution processes, the ability to make decisions about lands subject to aboriginal title and the collective component of all aboriginal and treaty rights. Considered globally, these factors suggest a strong foundation for recognition of the ability of the community to govern significant aspects of its internal affairs.¹⁹⁹⁷

For the reasons set out above, it is not likely that a simple declaration of a generic right to self-government will generate much progress.¹⁹⁹⁸ This would still leave the hard questions about which groups would benefit from this right, what are the scope and contours of the generic right and how this right would interact with the broad body of federal and provincial law. Similar difficulties beset arguments based on a distinction between core and peripheral jurisdictions.¹⁹⁹⁹ Arguments have already been presented which cast doubt on arguments for indigenous sovereignty that are based in international law or broad normative arguments for not being subjected to the laws of the Canadian state.²⁰⁰⁰

This thesis has argued that the proper focus for assessing legitimacy of the Canadian state is less the circumstances of the original founding of the Canadian legal order and more the degree to which room is made available within that order for a genuine ability to exercise an aboriginal way of life.²⁰⁰¹ This approach will enable the development of a distinctive approach to aboriginal self-government. By implication, arguments pertaining to the exhaustive distribution of legislative authority, lack of common law recognition of aboriginal self-government or extinguishment will not be regarded as creating serious barriers to the development of a novel approach to self-government.²⁰⁰²

The starting point for an argument to support the existence of aboriginal self-government within the Canadian constitutional law framework is the Sappier decision.²⁰⁰³ That decision made reference to socialization methods, practices of law-making and perhaps their trading habits as possible contenders for Section 35 protection. These examples are pitched at a higher level of generality than the jurisprudence would usually support. In other words, at least this passage refers to the protection of the “system” rather than the cumulative protection of discrete practices within that system.

On this basis, the argument will proceed on the assumption that a “practice” of law-making is eligible for some level of protection under Canadian constitutional law. The next decision to

consider is the Mitchell decision.²⁰⁰⁴ This decision has generated a great deal more controversy than Sappier. Some have held out the concurring judgment of Mr. Justice Binnie as offering creative approaches to recognizing and building on the internal sovereignty of aboriginal groups.²⁰⁰⁵ Others have regarded the judgment harshly- seeing it as representing the complete constitutional assimilation of indigenous sovereignty into the domestic Canadian constitutional order.²⁰⁰⁶ It is particularly useful to compare the assessment of Moodie to those of Walters and Ladner.²⁰⁰⁷ Does this decision represent a “blueprint” or “trial run” for a more creative approach to aboriginal law-making authority or is it a continuation of the “never any doubt from the outset” approach of Sparrow?²⁰⁰⁸ The innovative references to sovereignty in the Haida decision can be seen as tipping the balance in favour of jurisprudential creativity.

Though it has generated less commentary, the frequent references to “competing”, “putative” or “assumed” sovereignty in Haida have to be brought into the mix.²⁰⁰⁹ The Supreme Court of Canada seems to be recognizing that the issue of sovereignty is not regarded as closed by all parties. At a minimum, the process of honourable dealing that is contemplated must envisage a respectful conversation that takes into account different perspectives. There appears to be no doubt that the actual sovereignty of the Crown is preserved as the final decision, assuming consultative duties have been discharged, stays with the Crown. While it was not necessary to resolve the issues before it in any way, the Court went some way to describe Canadian sovereignty as “de facto” and referred on several occasions to notions of “competing” sovereignties. In the absence of any rulings giving a definite account of the nature of aboriginal self-government or sovereignty, these references seem to amount to an invitation to address issues that relate to legitimacy as part of discussions that take place pursuant to the duty to consult.

The issue that lies behind all of these possibilities is the extent to which indigenous legal systems play a role in the ongoing development of Canadian constitutional law. A standard approach has been to regard such systems of law as having been “absorbed” into the Canadian legal system. A related argument is that one must turn to these legal systems to give content to the notion of

aboriginal rights or to demarcate where aboriginal title can be found. Looked at from a historical perspective, this is a sovereignty that is “retained”.

A modern approach to the doctrine of aboriginal rights enables a different way of thinking about legal possibilities. Just as activity-based rights look back to past practices to support the declaration of modern rights, so can the law look back on past practices of law-making in order to provide support to modern efforts to govern communities by reference to indigenous law. From this perspective, Sappier is used to simply establish the idea that a practice of law-making is itself a practice that merits consideration for Section 35 protection. Mitchell supports the modern continuation of such a practice of law-making as evidence of a form of “retained” sovereignty, though it is primarily directed to internal matters and exists in a form which is “merged” with the broader legal order. Haida, though more obliquely, seems to be capturing the idea that practices of governance, including relations between legal orders are brought into conversation or dialogue on an intercultural basis.

It will be recalled that the dominant methodological choice that is reflected in the Section 35 jurisprudence is that modern rights are determined by reference to findings of fact about historical states of affairs. The Supreme Court of Canada is not inquiring into the content of the common law in the past or limiting itself to declaring the content of the common law in the present. It is guided as much, or more, by the purposes of Section 35 as it is by theories of the content of the common law. An important contextual role is played by indigenous law, more apparent in some decisions than others, but a one-to-one correspondence between a rule of indigenous law and the determination of a Section 35 right is not supported. An argument has been made that an indigenous legal order and the mainstream Canadian legal order are conceptually separate but exist in a nested relationship. There are strong reasons to consider maximizing integration as a matter of practice, but the points of contact and rules for interaction should be developed with some precision and on the basis of transparent dialogue. The existence of multiple, separate but overlapping legal orders may enrich the notion of dialogue under the duty to consult. As the right to maintain an indigenous legal system is a modern right,

notwithstanding its deep historical roots, there is no reason to freeze that right to the kinds of regulation that would have been common in the past.

Careful attention has to be paid to the “points of contact” between indigenous and Canadian legal systems.²⁰¹⁰ For some issues, there may be no contact at all and no appropriate role for mainstream legal institutions of any kind. For other issues, there may be a contact that amounts to formal contradiction- the indigenous legal system permits x and the mainstream legal system requires not-x. If this amounts to an infringement of a right, the mainstream legal system will be put to the task of justifying the infringement. In the specialized case where the conflict involves the Charter of Rights or Freedoms, the special rules set out in Section 25 of the Constitution Act, 1982 will be in play.

Several consequences flow from this conception of aboriginal self-government. Indigenous legal authorities can change the content of indigenous law but cannot directly amend the coverage of Canadian aboriginal rights law. That does not mean, however, that the content of indigenous law has no implications for mainstream Canadian law. As will be developed in a subsequent chapter, there seems to be room to interpret the justification test to reflect the importance of respecting self-government. This can be achieved by recognizing that the dialogical values protected by the Haida decision require that one order of government be prepared to enter dialogue when it enacts a law having an impact on another order of government. In principle, this should apply on a reciprocal basis to indigenous governments. It is also implicit in this model that an indigenous government is an order of government that attracts a degree of deference. The degree of deference might be tempered by whether a matter is purely internal, whether it engages rights protections from other sources and whether it involves “externalities” that reach outside the group or its generally accepted territory. Likewise, there is a difference between a claim presented by an individual seeking immunity from a law of general application and a claim by the collective that its general law-making ability has been adversely affected. The latter claim is based on a different right, one that is based on the general practice of having and developing a system of law. It could conceivably attract a different approach to justification as well.

Effectively, this approach refers to two different, but closely related, rights on the Section 35 spectrum. An activity-based assertion of the existence of an aboriginal right can give rise to an argument that an application of a federal or provincial law that infringes the ability to exercise that activity generates a duty of justification. A broader practice of engaging in law-making also qualifies for Section 35 protection. It can be used to maintain and develop the indigenous legal system but cannot be directly used to modify the content of other Section 35 rights. For example, an institution operating under an indigenous legal system which is itself protected by Section 35 could not decide the question of the scope of an aboriginal title claim.²⁰¹¹

This approach may be best understood as a form of recognition that indigenous law continues to play an important role within Canadian constitutionalism. Prior to 1982 it was clearly a subordinate role. To the extent of any conflict, any statute that required something that might be regarded as inconsistent with an indigenous legal norm would certainly take effect.²⁰¹² After 1982, indigenous legal norms can play a more direct role. For example, they can influence, but not determine, the content of the aboriginal rights and title that are recognized as part of domestic Canadian law, guide the internal allocation of rights protected collectively by Section 35 or more simply, be protected by a right to have and maintain an indigenous legal system. This is significant because it would be a public law recognition that would be available to no other group within Canada, thereby creating a clear distinction between indigenous nations and cultural minorities.

One manner to help bring this about is to challenge the binary distinction between inherent law and delegated law. When one sees indigenous and mainstream legal systems existing in a nested relationship, there is no barrier and much normative support for mainstream law to provide support and protection for the operation of indigenous legal systems.²⁰¹³ As Borrows argues, this could take the form of Parliamentary recognition of indigenous legal systems, though this is not a necessary requirement.²⁰¹⁴ A way of testing these ideas is to reflect on a “thought experiment” about the effect of a conditional repeal of the Indian Act. This is certainly not a policy proposal but is developed to stimulate clear thinking about what would fill the gap in the event of such

repeal. The Indian Act could cease to apply to a particular group if a series of mutually acceptable pre-conditions were satisfied. These could be as simple as presentation of an acceptable indigenous constitution and demonstration of adequate community approval of the desired change. The immediate impact would be that less-encumbered room would exist for indigenous law to apply within that community. While the example is presented as a “thought-experiment” some parallel can be drawn to recent legislative initiatives such as the First Nations Land Management Act and legislated implementation of self-government agreements.

One of the consequences of a more explicit recognition of the operation of indigenous legal systems within the Canadian constitutional order is that a notion of shared sovereignty becomes more intelligible. There will be matters that are exclusively regulated by indigenous law, others that are regulated by mainstream law. Over time, principles can emerge to regulate the inter-relationship between different legal orders.

The topic of aboriginal self-government is very complex, but the proposed model has several normative advantages over key alternatives. It does not require the development of criteria of core and peripheral jurisdictions. It does not depend on state policy to determine the content of governance norms. It does not depend on case-by-case litigation about discrete governance practices. Most importantly, it creates a solid basis for aboriginal self-rule without denying the deep interdependence of aboriginal and non-aboriginal Canadians.

There is no clear need to develop an a priori theory of scope, content, application or limits. These are the kinds of things that could be worked out in practice, ideally by mutually acceptable negotiated accords. To the extent conflicts emerge between indigenous law and mainstream law, these could be worked out by application of standard rules that have been devised for this purpose. As Roughen has described, there are a number of modes of interaction between indigenous and non-indigenous legal systems.²⁰¹⁵ The lines of demarcation between indigenous law and Canadian law are appropriately drawn with some care and certainly should not be dealt

with on the generalized level of “absorption”. It would be reasonable to presume that norms of deference would emerge over time, particularly for those areas where it would be clearly inappropriate for the mainstream legal system, particularly mainstream courts, to intervene. As noted previously, there are potential benefits relating to privacy and the doubtful justiciability of many indigenous disputes. For example, would a dispute about the transmission of a chiefly name appropriately be considered before a mainstream court? This might provide a more salutary foundation for indigenous dispute resolution and a more restrained application of the Charter. This approach might also avoid some of the pitfalls which have emerged in the Australian jurisprudence. It would certainly be possible to reinvigorate ancient systems of law even if there have been gaps of adherence in the past.²⁰¹⁶

It would be reasonable to expect that continuity requirements would be far less relevant to support the constitutional protection of an indigenous legal system than they would be to support a claim to land or for an exemption from the requirements of a mainstream law. After all, the whole point of operating a legal system is to provide for change. This approach has several advantages. It reflects the primary claim of aboriginal peoples to govern themselves under standards that are consistent with their cultural traditions. However, it reflects the reality that aboriginal governance is conducted within broader social arrangements reflecting deep interdependence. This will also reflect the fact that aboriginal individuals (and non-aboriginal individuals as well, subject to greater difficulty in establishing a right to reside on a reserve) will move relatively freely between jurisdictions. It also leaves room for provincial and federal laws to apply, especially (but not exclusively) to support assistance programs and policies that reinforce self-government and economic independence.

Some aboriginal groups may elect not to move to governance under their own traditions. Some may even elect to remain subject to the Indian Act regime for the time being. The important thing is that this model will provide a choice. It could also facilitate aggregation of existing Indian Act bands along more traditional tribal lines. It is entirely possible that some aboriginal

groups would develop legal systems that are more syncretic in nature, drawing from other traditions, including mainstream legal traditions.

Though the issue is highly complex, it would seem reasonable to look to the experience of American tribes with their own courts.²⁰¹⁷ American law also provides models for handling complex procedural scenarios where matters can be removed from tribal courts to be determined in state or federal courts.²⁰¹⁸ Similar protocols will have to be developed in Canada.

On the model of this thought experiment, the legal gap that will be filled is limited to statutory Indian Act reserves. Extensive thought and dialogue will have to be devoted to the role of indigenous law outside these territories.²⁰¹⁹ Another area that will require careful consideration is the issue of membership and citizenship. It is particularly difficult to maintain a normative case for the state determining who is appropriately affiliated with an indigenous group. It can be argued that the *sine qua non* of self-government is the ability to decide who is a member of the self-governing group.²⁰²⁰ On the other hand, it is far less difficult for the state to justify the establishment of criteria to determine who is entitled to benefit from a variety of discretionary state funding programs, so long as the criteria of entitlement are framed in a non-discriminatory fashion. It may be prudent to regard the issue of citizenship as an important test case for how indigenous and mainstream norms can appropriately interact.

At this stage, only a minimal number of points are advanced. First, there appear to no jurisprudential impediments to mainstream acceptance of a right of an indigenous group to refer to its own indigenous legal system as a foundation for the regulation of its own internal affairs. Second, the entirely separate question of what rules the mainstream system develops to support possible exemption from the operation of mainstream legal requirements is something for that system to develop on its own terms. This will generally mean that indigenous law will prevail over the operation of a mainstream legal rule only with the assistance of Section 35 or by agreement. Third, to the extent that there is convergence between the two, indigenous and

mainstream law, the prospects for reconciliation and peace are likely enhanced. Like rights and title, this approach to self-government would encourage cross-cultural conversation but would potentially limit the role of the state in intervening in the internal law of the aboriginal nation.

The key point is that any recognition of an overlapping role for indigenous and mainstream law calls for a high degree of coordination and consultation. As the right to maintain an indigenous system of law would clearly be a Section 35 right, any proposal from a mainstream government that would infringe that right would call for justification. Conflicts between laws could be dealt with under a revised test of justification that is calibrated to require respect for aboriginal self-determination. Governments and aboriginal groups may well decide that negotiated governance arrangements provide a more secure foundation for respecting all of the interests in play, but those negotiations would start from a position of relative equality of bargaining power. There would be a strong incentive for indigenous and non-indigenous governments to work out agreements governing the interaction of their various legal systems. This would be far more efficient than working out conflicts on a case by case basis. This is undoubtedly what lies behind comments like those of Mr. Justice Teitlebaum in *Chief Victor Buffalo* that aboriginal self-government is undoubtedly something that can only be effectively regulated by mutual agreement.²⁰²¹

While past debates have been stalled by stark distinctions between inherency and delegation, it might be possible to use a creative combination of positive enactment and inherent law to take a fresh approach to indigenous self-government. It also builds on Borrows' notion that respect for indigenous legal systems can be developed within a distinctive model of Canadian constitutionalism that draws less of a stark contrast between inherent and delegated authority²⁰²². The Canadian legal system can be seen to operate in a fashion that supports the development of various indigenous systems of law. The search for effective and practical ways for indigenous communities to develop their own legal systems is a key to supporting the overall legitimacy of the Canadian constitutional model. This might be aided by promotion of an idea of "embedded inherency".²⁰²³

It must be recognized that some may regret the emphasis on indigenous regulation of internal matters or regard the model as unduly dependent on the support of the mainstream legal system. However, considering the strong trend in the courts to see self-government as something that only can emerge through negotiated agreements and considering the deep complexity that is always present when complex legal regimes interact and overlap, this modest proposal seems to be a way to build on the current level of interest in indigenous legal systems. It is interesting that a proposal with many similar elements was proposed by the Penner Report in the early years after the enactment of Section 35.²⁰²⁴ It also offers a way to test the hypothesis that communities that are governed by norms that are culturally appropriate are more likely to build the social capital and cultural confidence to thrive.²⁰²⁵ However, just as there will be indigenous people who feel the thought experiment relies too heavily on mainstream legal, policy and constitutional frameworks, they will be mainstream voices who are unwilling to move in the direction of greater accommodation of indigenous legal systems. Some may be unwilling to support the emergence of real difference. For example, an indigenous legal system might embrace methods of democratic accountability that diverge from one person- one vote. They might even move in the direction of hereditary forms of governance.²⁰²⁶ Rather, the preference might be to dictate, on a general basis, broad norms of good governance to be applied by all aboriginal governments.²⁰²⁷ There might be other concerns about the prominent role played by indigenous spirituality in many indigenous legal systems, as illustrated so profoundly by Borrows' work.²⁰²⁸ There might be concerns about the adoption of radically different methods for punishment or rehabilitation of offenders. There might be a more global concern with the sheer ability of a country like Canada to accommodate such a variety of potential indigenous legal orders.

Without taking away from the genuine nature of these concerns, three points can be made in response. First, to the extent the application of an indigenous norm breaches a right or freedom under the Charter of Rights and Freedoms, and assuming that the protective provisions of Section 25 do not operate to permit that breach, a clear remedy exists. Second, even if these concerns have merit it would seem to be preferable to address them through dialogue rather than unilateral action. Third, if receptivity to indigenous legal traditions is indeed the most effective way to build Canada's constitution on a more secure political and normative foundation, it is

very hard to limit recognition of indigenous law to those laws that otherwise meet mainstream approval. This is where a leap of faith may well be normatively required.

It is hoped that the analysis of self-government opens up legal possibilities that respect the normative complexity of the underlying issues. Rather than regarding self-government as a challenge to the Canadian state in an existential sense, it reframes the issue as a challenge to the Canadian state in a normative sense. It is not possible to go beyond the general structure of the jurisprudential framework, but the non-binary possibilities that are offered by the argument increase the likelihood of real progress at the negotiating table.

To fully develop a workable theory of self-government would take far more space than is possible at this time but the foregoing is an attempt to built on the modern understanding of Section 35 aboriginal rights, the greatly increased interest in indigenous legal traditions and the more nuanced relationship between indigenous and mainstream law that are considered to be in a “nested” relationship.

17.2 The Charter and Section 35

The application of the Charter and the interpretation of Section 25 have frequently been discussed in the theory literature on Crown-aboriginal relations. One of the constant themes of the normative literature on the position of indigenous peoples in settler states is the alleged incompatibility between the collective norms and values of indigenous peoples and the individualist norms of liberal democratic societies.²⁰²⁹ As for the application of the Charter, it is frequently argued that it is a Eurocentric document that is radically inconsistent with the cultural norms of aboriginal nations.²⁰³⁰ As for the interpretation of Section 25, it is often argued that it is best construed as a shield that blocks any possibility of a Charter right or freedom overriding the rights that are protected by Section 25.²⁰³¹

The core questions in Canada have been does the Charter apply to aboriginal governments, do the distinctions that are made in aboriginal law and practice comply with Charter guarantees and is the Charter philosophically consistent with aboriginal world-views and practices? There are a closely related set of questions pertaining to the scope and interpretation of Section 25 of the Constitution Act, 1982. The question of the application of the Charter has not been authoritatively resolved. Strong arguments, dominantly those of Kerry Wilkins, have argued that decisions that flow exclusively from the exercise of an inherent authority of an indigenous decision-maker should lie beyond the reach of the Charter.²⁰³² Section 32 certainly does cast attention to matters that fall under the authority of a Canadian legislature. On the other hand, the general jurisprudence dealing with Section 32 does suggest the need for a purposive interpretation.²⁰³³ However, it may be an exceedingly rare occasion for some aspect of mainstream law not to be engaged in a dispute. For example, the famous “spirit dancing” case involved allegations of breach of intentional torts and the Criminal Code of Canada.²⁰³⁴ This may be expected to be the norm considering the deep interdependence of aboriginal and non-aboriginal societies in Canada. It may be possible that certain disputes are so strictly internal to an indigenous legal order, for example the authority to transmit a chiefly name or to erect a totem, that they may be beyond the reach of mainstream Canadian law, including the Charter. These are issues best dealt with on a case-by-case basis. However, several aboriginal groups have already accepted the application of the Charter through comprehensive claims and other agreements.²⁰³⁵ Many aboriginal individuals would no doubt be reluctant to lose the ability to hold aboriginal governments to account through the Charter.²⁰³⁶

There has been only a limited jurisprudence testing the distinctions that are made in Canadian aboriginal law against the requirements of the Charter.²⁰³⁷ Section 15 equality rights have been the key vehicle to test the requirements of equality in the context of aboriginal distinctions. There has been a clear development of the idea that equality can support, indeed require, differential treatment.²⁰³⁸ There has been limited jurisprudence on the putative clash between the Charter and indigenous ways of living in the world. The major case has been *Kapp* and the major focus of discussion has been Section 25.²⁰³⁹ This decision continues the strong trend that recognises that equality does not require sameness of treatment.²⁰⁴⁰ While Section 25 is discussed more

comprehensively than any other case to date, the broader arguments on equality law theory probably make successful challenges to distinctions in the aboriginal field less likely. The general approach to subsection 15(2), which deals with ameliorative programs, is likely the most promising avenue to respond to challenges to a wide range of distinctions. The previous lead case of *Lovelace* took a fairly restrictive approach to this provision²⁰⁴¹, but the restatement in *Kapp* gave sub-section 15(2) strong and independent scope of application. After *Kapp*, both sub-sections of Section 15 play a complementary role in defending a substantive approach to equality. Sub-section (1) operates to challenge discriminatory distinctions. Importantly, sub-section (2) provides an independent authority for the state to make distinctions that are directed at ameliorating the substantive position of target groups. In common parlance, these are frequently called affirmative action programs but the range of potential application could be far wider. It may capture a wide range of measures that are designed to secure respect for substantive equality. Among others, it could well capture agreements that are intended to make accommodations in response to the discharge of the duty to consult. Particularly when read with the subsequent decision in *Peavine*,²⁰⁴² an important threshold question will be whether Sub-Section 15(2) might provide a more effective level of protection for distinctions made to advance aboriginal equality than Section 25.

For those cases where a breach of a Charter right, including an equality right, is shown, the protective provisions of Section 25 must be considered. The binary patterns that have been noted so frequently before play out very strongly in the case of Section 25. Some argue that the provision should be interpreted narrowly to impair as little as possible the application of the individual rights of the Charter.²⁰⁴³ Others argue that it should operate as a full shield for the benefit of the rights that it protects.²⁰⁴⁴ It will be argued that Section 25 should provide a meaningful though not absolute protection. As there will be a wide range of circumstances where Section 25 might be engaged, a careful contextual analysis will be required to determine the nature of the meaningful protection that it offers.

The dominant case involving the interpretation of Section 25 remains the Kapp decision.²⁰⁴⁵ However, the most complete analysis was written by Mr. Justice Bastarache and he did not secure the agreement of any other judge. While the minority judgment advocated a shield interpretation of Section 25, the majority in very terse comments signalled that it did not support such an interpretation. The majority calls for a meaningful alternative that is respectful of aboriginal traditions but does not provide much guidance on the possible contours of such an approach. It is submitted that the normative literature might provide some assistance in staking out some possible approaches to Section 25.

In the United States, much of the normative literature has developed around reaction to the Martinez case from the United States Supreme Court.²⁰⁴⁶ This case placed large jurisdictional obstacles to mainstream courts intervening in the membership decisions of a pueblo governed on theocratic principles. The decision spawned a huge reaction from feminist scholars and helped generate the model of protecting “minorities within minorities”.²⁰⁴⁷ One of the central concerns in the literature is whether accommodation of religious and cultural minorities allows practices that negatively impact on minorities within those groups. Feminist scholars have played a leading role in the development of this literature as there frequently is a concern about adverse treatment of women and children.²⁰⁴⁸ Others have reasoned that these concerns are without foundation if those adversely affected are free to leave the group.²⁰⁴⁹ Still others have expressed the view that voice is more effective than exit, and certainly exile, in responding to the problem of vulnerable minorities.²⁰⁵⁰

Two inter-related strands of the literature might prove to be especially helpful. One approach stresses the procedural dimension of complex normative challenges and argues that institutional checks and balances are likely to secure the best accommodation of both collective and individual interests. The other approach stresses the inherently dialogical nature of any fundamental clash of normative values. It should be noted, however, there are also strains of the literature that suggest more absolute deference to traditional practices and strong norms of non-interference within the framework of liberal thought.²⁰⁵¹

An interesting model of institutional balancing developed by Ayelet Shachar²⁰⁵² has great promise for thinking about institutional arrangements that might aid the position of “minorities within minorities”. She develops the idea that protection of rights might depend on the institutional arrangements that coordinate the role of over-lapping and interlocking legal systems. A cultural group and the state share authority and play roles at different decision points. Careful process design can allow the development of cultural traditions but permit dissenters to raise concerns in other ways, including limited use of the mainstream courts. Shachar demonstrates that well-chosen procedural mechanisms can encourage internal dialogue and stimulate balance between traditionalists and reformers.

Hendrix develops many of the same ideas from more of a pure theory perspective. He argues that liberals should be loathe to interfere in the internal affairs of a discrete group like an aboriginal community, even doubting whether it would be appropriate to raise concerns about an indigenous electoral process that only allowed men to vote.²⁰⁵³ However, he argues that procedural balance is absolutely essential. The morality of a particular internal measure should be evaluated in part by the quality of the dialogue that preceded its adoption.²⁰⁵⁴

Borrows places internal dialogue at the very heart of his exposition of the role of indigenous legal traditions in Canadian constitutionalism. He stresses the importance of weeding out oppressive traditions and imbuing the normative order of indigenous communities with modern sensibilities about treatment of vulnerable members of the community. He argues that Section 25 is not powerful enough to shield Aboriginal collectivities from majority pressures to assimilate.²⁰⁵⁵ However, he sees indigenous legal traditions as being modernized through processes of discussion within indigenous communities. There are hints that he sees the mainstream legal system playing a role in providing remedies to disaffected members who wish to resist the application of what they consider to be oppressive traditions but the overriding theme of his work is that these matters are best dealt with through inclusive deliberation within the community.²⁰⁵⁶

Sarah Song has developed a detailed theoretical perspective that can offer guidance for the interpretation of Section 25.²⁰⁵⁷ It will be interesting to draw parallels between her work and the treatment of the Charter by John Borrows. Both clearly envisage that conflicts between collective and individual rights, or more generally between traditional and modern understandings of equality, will necessarily be worked out through dialogue. This is another case where the “dialogic turn” reflected in *Haida* has broader ramifications for the development of broader constitutional law in Canada. These theories suggest that a debate involving the Charter and the rights protected by Section 25 will optimally be resolved through exchange of reasons.

To recapitulate, from the perspective of traditional legal interpretation a provision such as Section 25 tends to be seen from a perspective of a clash of collective and individual rights or an elemental tension between two inconsistent ontological frameworks. Interpretation tends to oscillate to the extremes, producing either a shield interpretation or a fairly limited role for the provision. What is notable is that a focus on the theoretical literature tends to bring out the importance of dialogue. One of the great insights of modern political theory is that fundamental clashes of value in a deeply pluralistic society tend not to be amenable to theoretical resolution. A dialogical solution is almost invariably recommended. In the case of the protection of aboriginal worldviews and practices, the dialogue is frequently strongly oriented to the aboriginal society itself. John Borrows stresses the importance of avoiding protection of essentialist, fundamentalist or oppressive practices.²⁰⁵⁸ Yet, this must be done in a fashion that nurtures and protects aboriginal difference.

The key legal question is whether the wording of Section 25 can be interpreted in a fashion to support this necessary dialogue. It can be an intra-aboriginal dialogue or one between the aboriginal community and the mainstream society. Particularly when imbued with the dialogical ethos that so strongly pervades the *Haida* decision, we can see linguistic cues that support notions of justification, exchange of reasons and institutional balance. The reference to a “guarantee” suggests interpretation influenced by Section 1. A notion of justification can be derived from “shall not abrogate or derogate” in a parallel fashion to the interpretative exercise

that inferred a justification test from the recognition and affirmation of rights. There are also a range of rights and freedoms that might be engaged by Section 25, especially considering the inclusion of “other rights and freedoms”. The level of scrutiny of a particular practice might well turn on how important it is to continuance of the way of life of the aboriginal group. On balance, there is ample room to develop an approach that encourages and tests the quality of dialogue. Have minority interests within a community been consulted and accommodated in the development of a particular traditional norm? Has the mainstream society listened carefully to the indigenous perspective before attempting to restrict the operation of an indigenous norm? Have efforts been made to develop interlocking institutional protections to ensure that the appropriate points of contact have been made between different normative systems? The general point is that moving beyond traditional legal interpretation to consider the theory literature opens up fresh possibilities to balance and reconcile important constitutional interests. The sheer complexity of the normative and legal questions dictates the necessity of a case-by-case or incremental approach, but the shift towards dialogue, deliberation and justification can go a long way to finding a balanced role for Section 25.

A recent trend, undoubtedly aided by the repeal of Section 67 of the Canadian Human Rights Act, has seen a large number of challenges to federal funding and other decisions by reference to non-discrimination norms.²⁰⁵⁹ The number of ways to raise fundamental egalitarian claims is increasing but the core notion of substantive equality that requires accommodation of difference is strongly entrenched in Canadian law. The increasing recognition of the ability of the state to direct ameliorative programming to aboriginal people, the waning of concerns about formal distinctions between aboriginal and non-aboriginal Canadians and the increasing salience of inter- and intra-aboriginal distinctions have all contributed to a more sophisticated notion of equality law in the aboriginal context. One core element is to heed the recommendation from the theory literature to reinforce the need for dialogue at all stages in equality analysis.

17.3 The Division of Powers and the Application of Provincial Law

The question of the application of provincial laws to Indians and lands reserved for the Indians initially appears to be a highly technical issue that seems out of place with the more rights-oriented focus of this thesis. It is, indeed, a very difficult technical issue that involves interpretation of a dense thicket of conflicting cases. There are very strong arguments for a very restricted provincial role where Section 35 rights are involved. These are consistent with how most people understand the original purpose of Section 91(24), as well as the case-law and critical commentary on the inter-jurisdictional immunity doctrine.²⁰⁶⁰ The primary issue for the purposes of this thesis is the extent to which division of powers may be construed in a fashion that blocks important cross-cultural conversations. *Haida* plays a very big role in the argument. This decision requires provinces to consult when decisions may adversely impact aboriginal peoples. However, the doctrine of interjurisdictional immunity suggests provincial laws cannot apply when they touch the core of federal jurisdiction.²⁰⁶¹

The *Morris* decision applied this doctrine in a fairly direct fashion in the context of treaties.²⁰⁶² It is not hard to develop the argument that aboriginal rights are as close to the core of Section 91(24) as treaty rights. However, there are strong reasons to resist this conclusion.²⁰⁶³ There are many references to the ability of provinces to present justification arguments when their laws infringe an aboriginal right.²⁰⁶⁴ Equally importantly, recent decisions of the Supreme Court of Canada have severely curtailed the scope of application of the inter-jurisdictional immunity doctrine.²⁰⁶⁵ While these arguments will be considered, the primary focus shall be on the normative argument that inter-dependence supports the continuance of conversations between provinces and aboriginal communities about the interaction of their laws. If the purpose of the *Haida* line of cases is to encourage dialogue as a way to facilitate the development of shared norms for dealing with the land, to avoid adverse impact on potential rights and to develop relationships that could eventually coalesce into meaningful reconciliation, the application of mechanical division of powers rules seems to be contrary to the emerging model that is unfolding in Canadian constitutional law. One of the implications of the deep interdependence that is referred to in relation to self-government is that there will inevitably be some overlap in

the application of laws of several jurisdictions. A commitment to the value of self-government implies that there be meaningful barriers to the application of federal and provincial laws to matters that are strictly within the primary responsibility of an aboriginal government. However, there is an ongoing controversy as to whether the division of powers creates a barrier of a different nature in relation to provincial laws.

The intellectual basis can be found in the ideas of treaty federalism which stress the unitary relationship between aboriginal nations and the federal Crown.²⁰⁶⁶ There have been recent attempts by legal theorists such as Jean Leclair²⁰⁶⁷ and Dwight Newman²⁰⁶⁸ to build federal protections for aboriginal autonomy, especially against the intrusion of provincial law. The argument developed in the thesis that a tri-partite conception of federalism that encourages the broad overlap of federal, provincial and aboriginal law is both normatively and constitutionally superior to the approaches that are traditionally advocated in the literature. From a legal policy perspective, it is hard to reconcile the strong provincial duties that are endorsed in *Haida* with a blanket limitation on the application of provincial law based on the inter-jurisdictional immunity doctrine. To the extent that it will be necessary to insulate aboriginal governments from inappropriate application of provincial, as well as federal law, the justification test provides a more flexible tool to balance the various interests that are involved in a conflict of laws in a highly complex legal system.

While the normative argument in favour of the application of provincial laws, provided they respect aboriginal rights, including self-government, is strong, the legal argument is far more complex. While a long line of cases support the application of provincial laws, the recent decision of *Morris v. Olsen* is broadly consistent with the dominant trend in the academic literature opposing the application of provincial laws to Indians and Lands Reserved for the Indians.²⁰⁶⁹ However, recent dramatic changes to the inter-jurisdictional immunity doctrine place pressure on the Canadian aboriginal case-law that relies on the doctrine.

The issue of the application of provincial laws will not ultimately be decided by reference to the interpretation of key precedents as there is ample authority to follow each fork in the road. It will be decided by overall fit with the broader architecture of aboriginal rights and interests within the fabric of Canadian constitutionalism. Seen in this light, the approach that best coheres with a normatively attractive model of self-government, mutual engagement and justification will be preferable.

The core contradiction in the jurisprudence is found within the four corners of the *Delgam'ukw* decision.²⁰⁷⁰ According to Chief Justice Lamer, provinces may justify infringements of aboriginal rights, indeed most of the justificatory purposes that were enumerated by the Supreme Court of Canada involve matters that are normally regulated by provinces, but Section 35 rights lie at the core of Section 91(24). As traditionally understood, provincial laws that “touch” matters that are at the core of federal jurisdiction are rendered inapplicable by the inter-jurisdictional immunity doctrine. This is particularly the case for “persons, places or things” that fall within federal jurisdiction. As noted above, the *Morris* decision applied this doctrine in a fairly orthodox way in the context of treaty rights.

The *LaFarge* decision is the dominant example of a string of Supreme Court of Canada cases that have refined the fundamental approach to the division of powers in Canadian constitutional law.²⁰⁷¹ It recommended a far less constraining approach to the inter-jurisdictional immunity doctrine, reciprocal application of the doctrine to federal and provincial orders of government, a general preference for paramountcy as a tool to resolve conflicts and overlaps between laws of different orders of government and a generic preference for a jurisdictional model that favours liberal overlap over notions of water-tight compartments. The doctrine was to be generally restricted to areas already bound by a body of precedent and to be governed by a less stringent approach to impairment.

A range of arguments will be introduced in this chapter to explore the possibility of minimizing the potential impact of the division of powers on potentially fruitful dialogue between provinces and aboriginal groups. While there is insufficient space to consider the full detail of the complex jurisprudential puzzle, the broad strategy will be to advocate the maximum interpretation of *LaFarge* and *Haida* and a more cautious interpretation of *Morris*. The key touchstone will always be the role of theory in helping to guide a pathway through the thicket of jurisprudence.

The key theme of this chapter is that the commitment of the Supreme Court of Canada to the dialogue based paradigm introduced by the *Haida* case entails an ability of a province to have the legislative tools to be a meaningful participant in the dialogues that are set in motion.²⁰⁷² While it is technically possible, and in fact has been suggested by *Leclair*, to maintain provincial power and duties to deal with potential Section 35 rights only to close the door when the right is established and an infringement has been proven²⁰⁷³, the constitutional policy behind the *Haida* paradigm seems to suggest a continuing provincial role.²⁰⁷⁴ It would be very surprising if the division of powers were invoked in a way to prematurely close off important cross-cultural conversations. This is particularly important as we recognize the deep inter-dependence of legal and economic interests between all three orders of government in Canada.

This analysis suggests a motivation for limiting the scope of application of the doctrine of inter-jurisdictional immunity but does not yet provide a fully developed legal argument. There are significant obstacles to the development of such an argument. The doctrine of inter-jurisdictional immunity is more likely to be vibrant when dealing with constitutional persons, places or things, where there is a body of established law, including the law that tends to equate reserve and off-reserve interests and where provincial actions can be read as fitting within a paradigm of “impairment”.

The argument proceeds by making space within aboriginal rights theory, making space within the precedents dealing with inter-jurisdictional immunity and addressing a possible need to treat

aboriginal rights and treaty rights cases differently. Space within aboriginal rights theory is found in three ways. First, the very notion of infringement is a creation of the post-1982 amendments and ought not to be accorded any division of powers significance. Second, as the doctrine governing Section 35 rights stresses their modern nature and the fact that their contours are governed by the purposes of the constitutional provision, there are opportunities to construct arguments about the modern inter-governmental relationship between federal, provincial and aboriginal governments. Indeed, there are opportunities to introduce a notion of “tri-partite federalism” that addresses the overlap between their respective legal systems. At a very fundamental level, if the aboriginal rights that are protected by Section 35 are the product of a modern interpretative exercise directed to the maintenance, even strengthening, of distinctive ways of life, it becomes important to find ways of removing barriers to the consultative process that so powerfully contributes to the same constitutional goal. Third, there are opportunities to argue that what is protected at the core of Section 91(24) is the rights regime itself and not the specific content of any particular right. Section 35 is the appropriate tool to govern the latter question. Some significant support for this argument is found in the Paul case in the Supreme Court of Canada.²⁰⁷⁵ This provides an example of a well-established technique in Canadian constitutional law to draw a distinction between the existence and the exercise of a right.²⁰⁷⁶ This opens up the way to turn to different constitutional tools to secure protection for the existence and the exercise of rights.

These arguments can be supported by reference to both majority and minority decisions in the recent Nil’tuo decision from the Supreme Court of Canada.²⁰⁷⁷ Though the minority decision provided a detailed list of examples of matters that would fall inside the core, both decisions support a narrow scope of reach for the inter-jurisdictional immunity doctrine in Canadian aboriginal law and reflect the broad constitutional policy of supporting overlap and mutual contribution of federal and provincial law.

Space within the authorities governing inter-jurisdictional immunity can also be found through close analysis of the reasoning process of the core cases dealing with that doctrine. First, the

“grand-fathering” of earlier precedents can be restricted to cases dealing with reserve lands.²⁰⁷⁸ The more difficult issues involving off-reserve rights and title are simply not directly addressed by the established jurisprudence. Second, the key authorities can be understood as primarily responding to the separate constitutional rule of paramountcy.²⁰⁷⁹ Third, it is recognized that the authority of *Morris* is the largest obstacle to the argument developed above.²⁰⁸⁰ However, there are fundamental differences between provincial laws that derogate from a treaty right and provincial laws that infringe an aboriginal right. The doctrine of inter-jurisdictional immunity was designed to protect the zone of discretion accorded to Parliament and the negotiation of a treaty, while effected by the executive, falls within that zone of discretion. In the case of an aboriginal right or title, it is the discretion of the rights-holder not Parliament that is protected. Section 35 is the appropriate basis for the protection of the discretion of the rights-holder. Even in the case of treaty rights, there are strong signals in the recent jurisprudence of the Supreme Court of Canada that inter-governmental arrangements could be negotiated to incorporate provincial laws of general application by reference.²⁰⁸¹

While the traditional purpose of Section 91(24) has been conceived as according legislative jurisdiction to Parliament over Indian matters to avoid the reach of local legislatures, the duty to consult paradigm suggests a completely different rationale for the respective role of federal, provincial and aboriginal governments. The far more complicated and rich constitutional landscape that recognizes a complementary and overlapping role for federal, provincial and indigenous law suggests a preference for flexible tools. The entire jurisprudential framework is clearly emerging in a fashion that underlines the need for dialogue and deliberation about conflicting jurisdictional interests about land use. The processes and obligations that are emerging within this framework are most likely to succeed when they provide balanced incentives to reach negotiated resolutions and protocols. Seen in this light, a rigid application of the inter-jurisdictional immunity doctrine to block provincial participation in the consultative process, as well as the broader process of forging positive steps towards reconciliation, seems to be swimming against the tide of strong constitutional currents.

17.4 Justification

The core argument of this thesis has been that a distinctive approach to the rights protected by Section 35 support the development of a morally and politically defensible approach to the doctrine of aboriginal rights. This argument is supplemented by the clear shift to dialogue and deliberation that animates the Canadian constitutional architecture governing the relationship between aboriginal peoples and the Crown. However, these normative gains might be to no avail if the rights were easily overridden in the interests of the non-aboriginal majority. An argument is developed in this chapter that supports the importation of some of the values that are immanent in the Haida line of cases into the justification test. Adaptation of the justification test in this manner would strongly contribute to the normative possibilities generated by Canadian constitutionalism.

While the basic contours of the justification test have been set out, there is very little jurisprudence on the precise operation of the test.²⁰⁸² Litigation about aboriginal and treaty rights rarely addresses justification, either because the right has not been proven, no infringement has been shown or, more commonly, the Crown elected not to present a justification argument.²⁰⁸³ For this reason, the arguments presented in this chapter involve some element of speculation but this is informed by the general stance towards Section 35 that appears to be evolving in Canada.

There have been three levels of criticism of the justification test in the general literature. First, some argue that the very possibility of justifying an infringement of an existing aboriginal right lacks textual or normative support.²⁰⁸⁴ Second, some criticize the ability of the provincial Crown to justify an infringement of a Section 35 right.²⁰⁸⁵ Third, some focus on the essentially utilitarian nature of the test as it has been described in key judgments of the Supreme Court of Canada, arguing that it will systematically work to the disadvantage of aboriginal peoples and provide for the priority of non-constitutional interests over constitutional rights.²⁰⁸⁶

The focus of this chapter is on the third concern. A facial reading of the Gladstone and Delgam'uwkw decisions does suggest that this concern might not be unwarranted.²⁰⁸⁷ This is

particularly so with the express linkage between limitations on Section 35 rights and the value of reconciliation. There is some concern that justification can be linked to a one-way conception of reconciliation where aboriginal and treaty rights are adjusted to take into account the interests of the broader society.²⁰⁸⁸ This has to be balanced with the fact that decided cases are rarely called upon to address the full Sparrow justification test- including consistency with the fiduciary relationship between the Crown and aboriginal peoples.

It can be argued that a systematic consideration of the very idea of justification, especially in the light of some of the political theory literature, provides some tools to flesh out the justification part of the Sparrow test in a fashion that enhances the normative promise of Canadian constitutionalism. These need not amount to dramatic changes in the test as it has already been stated but might allow a more transparent consideration of some of the values that underline the notion of justification. Importantly, these values can be shown to resonate with the core values that animate the Haida line of cases.

Political theory provides some tools to shift the basic elements of our understanding of justification. Key contributors to this possible shift include work on the nature of rights, the explicit emphasis on the importance of exchange of reasons, the importance of dialogue as an element of reconciliation, an analogy with the development of Section 1 and the shift in emphasis towards process values as reflected in Haida.

In essence, a claim to a right involves offering reasons why the underlying interests of the rights-holder ought to be respected.²⁰⁸⁹ The state should be expected to respond to those reasons, and if it decides to not validate the claim or override it in recognition of other interests, it must be expected to provide convincing reasons that stand up to adjudicative review. It is the quality of the reasons rather than the nature of the interests that supports justification of an infringement. This understanding of the process of rights-claiming leads to a conceptualization of justification which is more dialogical or deliberative than unilateral. The parties would normally be expected

to exchange reasons, deliberate and seek to respond to legitimate interests that arise in the exchange. In other words, the process of justification is heavily imbued with the same kind of process values that are in play with the duty to consult. The most elaborate exploration of the ideal of justification can be found in the work of Rainer Forst.²⁰⁹⁰ Embedded in a broader theory about the importance of toleration in a multicultural society, he argues that "...any morally relevant interference with other's actions, needs to be justified by reciprocally and generally non-rejectable reasons in order to be seen as legitimate."²⁰⁹¹ There is an intrinsic relationship between rights-claiming and demands for reasons. This is a consistent theme in recent political theory which can be drawn upon to think about justification as a mutual process.

Even when rights are overridden, it is reasonable to aspire to the notion of deliberation that is developed by Laden²⁰⁹². A key element of justifying an infringement of a right should be the demonstration that deliberative mechanisms were engaged. As Panagos argues, the aboriginal group "...must be included and accounted for".²⁰⁹³ This conceptualization of justification allows a number of structural features to be brought into the analysis. As McNeil argues, egalitarian values and consistency of treatment become legitimate questions in a justification context.²⁰⁹⁴ For example, is an aboriginal title holder treated in a fashion that is analogous to how other title holders are treated? If not, what reasons are provided to explain the difference in treatment? Some parallel consideration of Section 1 precedents should be considered, including the relevance of principles of minimal impairment that are developed in the *Osoyoos* decision.²⁰⁹⁵

The nature of the justificatory reasons should also be responsive to the right that has been infringed. For example, if the right that has been infringed is a self-government right, the reasons that are presented to support the justification of that infringement should demonstrate respect for the governance authority of the aboriginal group. They should offer cogent reasons why the exercise of self-governing authority was overridden or trumped. They might involve external impacts or broader social goals but should demonstrate why deference to the aboriginal authority was considered and rejected. Indeed, if the notion of dialogue that is introduced by the *Haida* line of cases is to have a real prospect of generating a sense of "constitutional patriotism", it is

precisely the area of justification that will require the most careful thought.²⁰⁹⁶ An infringement should set in motion a deliberative process that is designed to ensure that aboriginal concerns are heard, weighed and responded to in a respectful fashion. Justification should be considered less as a utilitarian override and more as a continuing of an intercultural conversation that contributes to the maintenance of a long-term relationship. This provides a more generous interpretation of the observation that we are all here to stay!

This approach to justification refers back to the original conception of reconciliation in *Sparrow* of reconciling power with duty. It is important to remember that the duties that are referred to in *Haida* all flow from the honour of the Crown which is now confirmed to be an unwritten principle of the Constitution. The justification of an infringement should be considered in light of this important development in Canadian constitutionalism.

The jurisprudence under the duty to consult is increasingly insistent about the importance of providing reasons and enhancing dialogue, especially when deep consultation is required. We have already seen that the courts are starting to mix and match from the *Sparrow* and *Haida* frameworks. For example, the trial judge in *Ahousaht* ordered that the parties consult about the application of the infringement and justification tests in the context of a dispute about entitlement to a commercial fishery.²⁰⁹⁷ While it can be argued that reconciliation might be better served by rendering rulings on infringement and justification, the generic shift to facilitating dialogue is certainly the most important development in the jurisprudence about Section 35 since the *Sparrow* decision. It does not seem unreasonable to look to the justification test itself through a deliberative lens.

CHAPTER 18 - CONCLUSION

Can Canada reconcile the interests of non-Aboriginal and aboriginal Canadians in a meaningful way? This thesis has demonstrated that there are myriad answers to this question, often mutually contradictory and deeply divided. Some would even challenge the way the question is posed. It is the task of the law, in particular constitutional law, to find at least provisional answers to the deeper questions that dominate the normative life of a country. With a dominant focus on Canadian law, this thesis has attempted to determine what inspiration can be drawn from several traditions of rich normative literature. The task has been to attempt to illuminate the most promising pathways, but the full map to the destination must remain largely elusive.

The first step is to recognize the commonalities between normative analysis and the law. The same issues are presented and similar proposed solutions tend to emerge. What is most notable is that a sorting mechanism seems to situate most proposals at one end or the other of a spectrum. This produces a clear tendency to binary thinking and an ineluctable assessment that resolution or reconciliation will remain beyond our grasp. This sense is largely confirmed by case studies of particularly important thinkers, from vastly disparate perspectives. A central tension between approaches advocating parallel sovereignties or undifferentiated citizenship dominates the literature and clearly can be seen to have an impact on political, legal and constitutional practice.

This thesis tends to shine a light on approaches and ideas that guide towards the middle path. This is driven by a conviction that continuing to talk past each other has very detrimental social consequences. The goal has been to find “theory fragments” that help guide practice away from binary division and towards mutually acceptable *modus vivendi*. A key technique has been to disaggregate the fact of division into a far more specific examination of seven areas where the divide can be assessed with more precision. These include the role of culture, the emergence of a strong tradition of legal pluralism, the foundational idea of constitutionalism, the differing approaches to grievances rooted in history, the complex inter-relationship of normative goals such as reconciliation, recognition and redistribution, the implicit reliance on theories of causation and the emerging dominant role played by dialogue. Reduced to its essentials, the picture that emerges from this examination is strongly anchored in a theory of constitutionalism,

influenced by pluralist thought and committed to dialogue as the only way to bridge the exceedingly complex array of conflicting values that are in play.

It is argued that this understanding of the normative picture does not logically require a focus on the nation-state but, in the case of Canada, the enactment of Section 35 provides a strong reason for fully exploring the normative and practical gains that can be made by pressing the limits of possibility of Canadian constitutionalism. A solution drawn solely from indigenous or international law does not seem achievable in the short run. Indeed, a model of regarding domestic law, indigenous law and international law as existing within a “nested” relationship offers real promise of drawing from the strengths of each legal system in combination.

The biggest difference between the approach offered in this thesis and other key alternatives is shown in the understanding of core values such as legitimacy, equality and sovereignty. To take the example of legitimacy, there are many serious thinkers who argue that legitimacy stands or falls with the details of how a society is formed or by how rights are uniformly distributed among the citizens of that society. In contrast, this thesis aligns with the emerging view of political scientists and philosophers that a value like legitimacy can only ever be a matter of degree. It is something that a society can grow towards, with commitment and hard work. It entails a recognition that mistakes have been made in the past, are being made today and cannot fully be avoided in the future. Legitimacy is an iterative process, and like reconciliation, is the destination that can be sought but never fully reached.

In addition to the less binary understanding of key values like legitimacy, equality and sovereignty, two other normative commitments emerge from the analysis in this thesis. First, justice is understood as being a responsibility for real people in real time- in others words, the pursuit of justice is a prospective exercise that takes on a different colouration with each succeeding generation within a society. Second, where deep differences persist in a society, as they do in every society, the only way to strive towards justice is dialogue. The commitment to a modern theory of justice certainly does not entail a rejection of the importance of historical wrongs. These wrongs tend to “endure”, to be carried forward to the present in a fashion that defines the most pressing justice challenges of the day. This is very strongly the case with

respect to aboriginal claims in Canada today. Likewise, the commitment to dialogue risks stating a rather obvious conclusion. However, much recent theory work contributes to a deeper understanding of what is involved in a genuine dialogical exchange. Laden's notion of "deliberation" comes closest to articulating the structural and normative characteristics that allow the development of a template to assess the quality of dialogue.²⁰⁹⁸

Can these ideas help structure our understanding of the very complex and deeply contested jurisprudential framework associated with Section 35 of the Constitution Act, 1982? We have seen that, even after 30 years of important jurisprudential development and a richly varied practice of negotiated settlements, far more remains unresolved than resolved. Two themes are developed throughout the thesis in relation to the most important areas that are still unresolved. First, the "theory fragments" that help point towards the middle path in the normative discourse can be adapted to provide legal understandings that help achieve the same goal. Second, the existing jurisprudence can be read as already taking some tentative steps along the very same path. In other words, when looked at through the right lens, one can see some element of normative and constitutional convergence.

The model of Section 35 that emerges from this analysis has several key contours. First, in contrast to some writers who allege that Section 35 has had a detrimental impact on the protection of aboriginal rights in Canada²⁰⁹⁹, the core argument developed in this thesis is that a framework has gradually emerged which bears promise for the achievement of meaningful reconciliation between aboriginal and non-aboriginal Canadians. Second, though there are countervailing pressures at work, the dominant trend in the jurisprudence has been away from exegesis of Commonwealth common law and towards development of a distinctive framework erected around the scaffolding provided by Section 35. Third, this framework has decidedly "modern" features. Fourth, a strong commitment to the resolution of differences through a range of deliberative mechanisms such as negotiation, consultation and accommodation has increasingly dominated the jurisprudential framework that is being crafted by the judges sitting on the Supreme Court of Canada. Fifth, this trend reflects a more modest conception of what can be achieved by remedies ordered by a court. Sixth, and most importantly, distinctive evaluative standards based on the honour of the Crown and reconciliation are shifting the focus away from

rights to duties and obligations. Finally, the emerging model involves a commitment to the varied contribution that can be made by each element of the full spectrum of Section 35 rights. Taken collectively, these features contribute to the gradual unfolding of a distinctive Canadian model of constitutionalism.

When applied to issues such as the protection of Section 35 rights, the scope and protection of aboriginal title and the continued evolution of the framework governing the duty to consult, including the duty to accommodate potential Section 35 rights, several conclusions emerge. First, in contrast to the broad thrust of the legal critical literature, the rights framework developed by the Supreme Court of Canada, especially when considered in light of the more recent decisions, is broadly defensible. This requires, however, recognition that cultural rights protection and exemptions from application of laws of general application are only a part of a broader spectrum of rights protected by Section 35. Second, the scope and nature of aboriginal title can be best understood in light of the broader structural features of the Section 35 framework- including the modern nature of all Section 35 rights, the placement of aboriginal title within a broad spectrum of rights, the contrasting roles that are played by the notion of traditional lands and that of aboriginal title and the strong dialogical aspect of all Section 35 rights. Third, the rapidly evolving jurisprudence under the duty to consult can be best understood as a concerted effort by the courts to stimulate the quantity, relevance and, most importantly, quality of dialogue between the Crown and aboriginal peoples.

Two underlying themes merit special mention. First, an important sub-theme in the thesis is the necessity to grapple with the groundswell of interest in indigenous legal systems. There are many theories that compete to explain the best normative and constitutional fit between indigenous and mainstream legal systems. These range from the measured separatism of the revitalization and resurgence movement, the generic rights approach of Slattery, federalist models, the constitutional merger advocated by treaty constitutionalism and the more absolutist model embedded in mainstream practice. In contrast, this thesis presents indigenous and mainstream law as largely independent. However, Section 35 provides opportunities to develop a more respectful relationship through the development of a constitutional right to have and maintain an indigenous legal system. Social science work, including theories of causation and remediation,

provides a strong motivation for considering innovative approaches to indigenous legal traditions. The challenge will be to provide mutually acceptable models to govern the points of contact and contrast between different legal systems on the ground. Second, the issue of sovereignty will likely accelerate in importance. Some advocate that sovereignty is unitary and indivisible. Others argue that it can be shared or rejected on the basis that its assertion is illegitimate. The contrast is made particularly transparent when one contrasts the “never any doubt” perspective emerging from the Sparrow decision with the strong critique based on the illegitimate foundations of Canadian sovereignty and the lack of displacement of pre-existing and continuing indigenous sovereignty. This thesis develops the idea that sovereignty is something that can be constructed or adapted within a vibrant theory and practice of constitutionalism. To the extent that Canadian constitutional law provides strong constraints on the authority of the state in relation to indigenous peoples, secure protections for a vigorous spectrum of rights, areas of protected discretion and strong consultative and deliberative obligations, it appears reasonable to describe the emerging reality as sovereignty. Aboriginal peoples are left with a distinctive place within Canadian constitutionalism, further supported by indigenous and international law. Though this is a sovereignty that is shared, and operates within the framework of Canadian external sovereignty, it can develop, nonetheless, to a form of meaningful sovereignty.

The remainder of the thesis is directed to a briefer demonstration of the utility of the general model to four important, largely unresolved issues of Canadian constitutional law. First, the issue of the inherent right of self-government is presented in a new light by reference to the modern right to have and maintain an indigenous legal system. Second, the deeply contested issue of the application and interpretation of the Charter in relation to indigenous peoples is demonstrated to be resolved through a focus on inter-cultural dialogue. Third, the technical issue of the application of provincial laws to Indians and Lands reserved for Indians is presented in a new light based on the overriding value of nurturing and supporting meaningful dialogue between indigenous, federal and provincial governments. Finally, the issue of justification of infringements of Section 35 rights is shown to be amenable to the broader objective of supporting effective dialogue about potential collisions between indigenous and mainstream values.

The net effect of this analysis is that a modern theory of Section 35 founded on dialogue begins to emerge from the mist. When properly anchored in the honour of the Crown and meaningful reconciliation, the resulting constitutional framework provides direct assistance in the promotion of badly needed dialogue about the contours and practical implications of Canadian constitutionalism. There will be some who would advocate that this model does not go far enough to account for aboriginal specificity and world-views. Others will argue that it goes too far by stretching what they understand to be the existing fabric of Canadian constitutionalism. However, the Supreme Court of Canada has recently highlighted that there is a rift in the national fabric that requires urgent attention.²¹⁰⁰

The practical assessment of any particular theory of constitutionalism requires more time and space than is available in any academic work. Indeed, movement towards progress is hardly something that can be achieved by analysis alone. As Washburn observes' "...Man thinking will continue to tell us what the law ought to be, man acting will tell us what the law is."²¹⁰¹ The types of actions that will be required engage an entirely different level of granularity. For example, in the administration of the duty to consult what standards are used to judge the effectiveness of dialogue? What precise steps must be taken to take seriously the requirements to assess strength of claim? How does the law set the balance between integration of the duty to consult in broad consultative and assessment processes without distracting attention from the special constitutional nature of aboriginal claims? What standards will emerge to govern accommodation measures? What steps should be taken to ensure that a distinctly aboriginal perspective is engaged, including hearing the voices of elders and truly attempting to understand different visions of attachment to land? Can we say, globally, that the overall efforts to consult and accommodate are consonant with Laden's ideal of deliberation?²¹⁰²

Similar questions can be asked about the justification test, the balancing of Charter norms with distinctively indigenous visions of normative order and the effectiveness of negotiations processes. The goal of this thesis is to develop a general model that contributes to a proper framing of these difficult questions. There is an implicit commitment to the flexibility and strength of the principles that underlie the Canadian constitutional order. As stated by Macklem,

“...Questioning the justice of the legal order does not imply scepticism about the possibility of justice nor the negation of everything that is of value in Canadian constitutional traditions, but rather commitment to and humility before a great unfinished task.”²¹⁰³

But as the distinguished American scholar Frank Pommersheim has observed;

“...Every new model finds its core within the shell of the old, especially when the old is viewed from a different perspective.”²¹⁰⁴

The challenge posed by former Chief Justice Lamer to strive toward a morally and politically defensible conception of aboriginal rights is certainly, like reconciliation, a journey with no clear destination or agreed itinerary. The basic argument of this thesis is that the fresh start provided by the Haida line of cases opens up strong legal and constitutional possibilities and that these possibilities resonate with deep themes explored in other disciplines, especially political theory and philosophy. As we are all here to stay, it is time to find ways to nurture conversations about what is truly important.

¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K) 1982, c 11.

² Warry, Wayne, *Ending Denial: Understanding Aboriginal Issues* (Broadview Press, 2007) at 125 (Warry states that Section 35 is regarded as very important internationally) ; Salée, Daniel (with the assistance of David Newhouse and Carole Lévesque), “Quality of Life of Aboriginal Peoples in Canada: An Analysis of Current Research” (2006) 12 IRPP Choices 1 at 1 (“...one of the country’s most pressing public policy questions”); Curry, Steven, *Indigenous Sovereignty and the Democratic Project* (Ashgate, 2004) at 159, (Canada is frequently held up as a model by international observers); see also Megan Davis, “The “S” Word and Indigenous Australia: A New Variation on an Old Theme: Review of Indigenous Sovereignty and the Democratic Project” (2006) 31 Australian J of Legal Phil 127 at 128. However, Damien Short, Review: Steven Curry, “Indigenous Sovereignty and the Democratic Project”: (2006) 5 Contemporary Political Theory 108 at 109 cautions that such evaluations can be based on a “...somewhat glorified view of Canada.” Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 2009) at 285 argues that Section 35 provides a useful model for consideration by the United States and also largely parallels emerging international law norms on land rights (pp. 285-286). Phillips, Anne, “Equality, Pluralism, Universality: current concerns in normative theory” (2000) 2 Brit J of Pol & Int’l Rels 237 at 245 argues that “The Canadian influence is strong...”

³ *Indian Residential Schools Settlement Agreement* (IRSSA), May 8, 2006. Other examples of positive changes are listed in Ian Peach, “The Power of a Single Feather: Indian Resistance and the Evolution of Indian Politics in Canada” (2011-2012) 10 Rev Constitutional Studies 1 at 3.

⁴ There are a range of claims that are proceeding, frequently through class actions, which deal with schools not covered by the Agreement and legislation. Prominent examples include ongoing class actions in Newfoundland and Labrador and Ontario. See *Canada (AG) v Anderson*, 2011 NLCA 82 and *Brown v Canada (AG)*, 2013 ONCA 18.

⁵ Jerry P White, Dan Beavon, & Nicholas Spence, eds, *Aboriginal Well-Being in Canada: Continuing Challenges* (Toronto: Thompson Educational Publishing, 2008). See also Salée et al, “Quality of Life”, *supra* note 2.

⁶ The advocacy by the Nisga'a in the early 20th century provides an excellent example. A good account of this advocacy can be found in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007). A broader treatment of early twentieth century of advocacy in British Columbia can be found in Hamar Foster and Benjamin L. Berger, "From Humble Prayer to Legal Demands: The Cowichin Petition of 1909 and the British Columbia Land Question" in Foster, Hamar, Berger, Benjamin & Buick, DR, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (University of British Columbia Press, 2008) at 240 (see especially pp. 237-238 which discusses the consideration of a reference to the Supreme Court of Canada and the refusal of British Columbia to have the matter adjudicated in the courts. The consideration of these options ended with the defeat of the Laurier government in Ottawa.)

⁷ Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Theytus Press, 2003) -this book provides a good overview of aboriginal advocacy for the enactment of Section 35 and reflects a predominant aboriginal view that results have fallen short of expectations.

⁸ The Van der Peet decision (*R v Van der Peet*, [1996] 2 SCR 507) will be considered in detail in Chapter 12 of this thesis. It is notable that the vast majority of commentators have argued that the decision itself fell well short of developing a notion of aboriginal rights which is morally and politically defensible.

⁹ Van Der Peet, *ibid* at para 42. For a discussion of this passage, see Borrows, John, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 60-70.

¹⁰ *Van Der Peet*, *ibid*.

¹¹ The critical reaction to this decision will be discussed in chapter 12.

¹² This literature will be considered primarily in Chapter 2 of this thesis, though the challenge posed by Walters and incorporated by Chief Justice Lamer in *Van der Peet*, *supra* note 8 will be the backdrop to the entire thesis.

¹³ The notions of "reconciliation" and "honour of the Crown" have become central to the emerging body of jurisprudence interpreting the meaning and application of Section 35 of the Constitution Act, 1982. Key cases include *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 and *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, and *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis Federation*], though it should be noted that the notion of the "honour of the Crown" played an important role in the previous development of the law, particularly with respect to treaties and the administration of Crown grants to land. See Borrows, John, "An Analysis of and Dialogue on Indigenous and Crown Blockades" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 117 (footnote 46). See also: Senwung Luk, "Not so Many Hats: The Crown's Fiduciary Duties to Aboriginal Communities Since Guerin" (2013) 76 Sask L Rev 1.

¹⁴ Leading works have been prepared by scholars such as Slattery, McNeil, Walters, Newman and Henderson., and the work of each scholar will be considered in some depth in this thesis. Collectively, these scholars have written over 50 articles on aboriginal law. It is important to note that many other scholars have contributed to the literature in the field of aboriginal law, increasingly including indigenous scholars. An attempt will be made to provide representative examples of the main lines of thought but it will not be possible to include references to all important scholars in the field.

¹⁵ The term "settler states" is commonly used to describe such countries as Canada, the United States, Australia and New Zealand which were occupied by various indigenous groups before the arrival of Europeans and the establishment of new states. It is also common in the literature to contrast indigenous peoples with "settlers" or "newcomers". While the author has some considerable discomfort with this terminology, it will be used where the context of the literature covered supports its use; Ravi de Costa, *New Relations, Old Certainties: Australia's Reconciliation and the Treaty Process in British Columbia* (PHD, Institute of Social Research, Swinburne University of Technology, 2002) in the Preface expresses similar discomfort with the term "settlers". On the other hand, William E Connolly, *Pluralism* (Duke, 2006) at 30 argues that settler societies "...can present a compelling case for constituting special spaces of territorial sovereignty." Luk, "Not so Many Hats", *supra* note 13 at 39 argues that "...it is useful to think of statute law as representative of the interests of the settler community, as statutes are made by legislatures, constituted through the politics of majoritarian settler communities."

¹⁶ One of the notable features of the Canadian jurisprudence on aboriginal and treaty rights is that terms such as "reconciliation" and "honour of the Crown" are used as much as normative guides as legal terms.

¹⁷ There are numerous examples where political theorists and philosophers use judicial decisions to advance their normative arguments. See for example the work of James Tully (considered in detail in Chapter 2, section 2.3 as well as Burke Hendrix, *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (Penn State Press, 2008), Jeff Spinner-Halev, "From Historical to Enduring Injustice" (2007) 35 Political Theory 574 and Andrew Robinson, "Cultural Rights and Internal Minorities: Of Pueblos and Protestants"(2003) 36

Can J Pol Science 107 but for a contrary view see: Mark Francis, “Canadian Indigenous Peoples and the Transformation of Political Theory into Cultural Identity” in Bruce Haddock & Peter Sutch, *Multiculturalism, Identity and Rights* (Routledge, 2003) (Francis is especially critical of the tendency of Canadian political theorists to rely on judicial decisions).

¹⁸ There have been well over 50 decisions rendered by the Supreme Court of Canada on aboriginal issues since the enactment of Section 35. A good overview of the developing jurisprudence is found in Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed (Purich, 2004) and, more recently, Sébastien Grammond, *Terms of Co-Existence: Indigenous Peoples and Canadian law* (Carswell, 2013). There are at least 400 active litigation cases involving the federal Crown proceeding through the courts at various stages.

¹⁹ It will also be important to consider the complex linkages that are developed in the jurisprudence between the notion of reconciliation and the idea of the honour of the Crown. An earlier attempt to make these linkages and argue for the redemptive possibilities of Canadian constitutionalism is found in S Ronald Stevenson, “Toward a Shared Narrative of Reconciliation: Developments in Canadian Aboriginal Rights Law” in Hester Lessard, Rebecca Johnson & Jeremy Webber, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Communities* (University of British Columbia Press, 2011) at 271.

²⁰ *Haida*, *supra* note 13.

²¹ These arguments will be developed primarily in the Part II of the thesis, but key elements will be introduced in Part I to establish the connections between normative and constitutional theory.

²² *Delgamuukw v British Columbia*, [1997] 3 SCR 14 [Delgamuukw].

²³ The concept of “constitutional architecture” plays a prominent role in the *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 50 [Secession Reference] and is a recurring theme throughout Canadian constitutional law. This metaphor plays a very important role in several systems of constitutional interpretation, including the American constitution- see Lawrence Tribe, *The Invisible Constitution* (Oxford University Press, 2008) at 54.

²⁴ The descriptor “epi-phenomenon” was suggested in a personal conversation with Professor Jeremy Webber of the University of Victoria. On the other hand, Tribe, *ibid*, speaking about the United States Supreme Court, states the argument for careful attention to court decisions very clearly at 50- “But the reason is that the Court has, as a matter of undeniable historical fact, been the institutional agent most deeply, consistently, and publicly engaged in explicating and making real the Constitution’s requirements.”

²⁵ *Nisga’a Final Agreement Act*, SC 2000, c 7; *Tlicho Land Claims and Self-Government Act*, SC 2005, c 1. A complete citation of recent settlements and an assessment of their effectiveness can be found in Borrows, “Blockades”, *supra* note 13 at 121.

²⁶ *Nunavut Act*, SC 1993, c 28; *Nunavut Land Claims Agreement Act*, SC 1993, c 29.

²⁷ While precise statistics are difficult to obtain, there have been over 20 comprehensive claims signed, primarily in Canada’s North, numerous other land claims negotiations are proceeding, hundreds of specific claims have been resolved or are in continuing negotiation, including almost 50 before the Indian Specific Claims Tribunal and several dozen self-government negotiations are proceeding, providing important agreements in Westbank, Sechelt and Sioux Valley. A useful overview of these agreements is provided in Paul McHugh, “A common law biography of section 35” (Paper presented at 35@30: Reflecting on 30 years of s. 35, Faculty of Law, University of Toronto, October 25-27, 2012).

²⁸ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa, Royal Commission on Aboriginal Peoples, 1996)

²⁹ While this thesis will focus on the development of the legal and constitutional framework, including the continuing uncertainty that dominates key legal debates, it is impossible to ignore fundamental concerns pertaining to the clear gap in most socio-economic indicators of success between aboriginal and non-aboriginal Canadians. Some of the frustration and anger that is clearly present is evidenced by the recent emergence of the “Idle no More” movement. Marc Woons, The “Idle No More” movement and global indifference to Indigenous nationalism” (2013) 3 *AlterNative: An international journal of Indigenous peoples* 172

³⁰ It is frequently claimed that common lawyers are particularly resistant to theory. See: Michael Lee Ross, *First Nations Sacred Sites in Canada’s Courts* (University of British Columbia Press, 2005) at preface (“...legal profession has little appetite for things theorized”).

³¹ Cass R Sunstein, “Incompletely Theorized Arguments in Constitutional Law” (2007) 74 *Social Research: An International Quarterly* 1; see also Cass R Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn’t Mean What it Meant Before* (Princeton University Press, 2009).

³² Some significant inspiration is drawn from the recent work of the eminent American legal scholar Laurence Tribe, “The Invisible Constitution”, *supra* note 23 at 153, who argues that constitutional theorizing can provide a “...network of rails that guide our thoughts” while recognizing that Godel’s theorem eliminates the possibility of a

totally self-contained constitution.” He adds, at page 171, that constitutional interpretation is “...not some magic key with which to unlock the secret of that dark matter but merely the simplest way to organize the points, lines, and planes into culturally meaningful forms- forms akin to the constellations the ancients superimposed on the starry sky.” See also: Mark Bennett, “Review of Law as a Moral Idea”, (2008) 87 Can Bar Rev 805 at 811 argues that “Doctrinal writing that seeks to systematize certain areas of law is of great importance to developing the ideal of law.” Such writing can constitute “...legitimate attempts to move the law towards the ideal of law.”

³³ As an example of the growing importance of implementation, see the ongoing litigation concerning the implementation of the Nunavut land claims agreement: Nunavut Tunngavik Incorporated and The Attorney General of Canada and the Commissioner of Nunavut as represented by the Government of Nunavut (Nunavut Court of Justice Action No. 08-06-713- CVC). A partial summary judgement has already been rendered and is under appeal: *NTI v Canada (AG)*, 2012 NUCJ 11.

³⁴ This will be discussed in Chapter 10.

³⁵ This will be discussed in Chapter 2.

³⁶ This will be discussed in Chapter 5.

³⁷ A useful and recent overview of treaty interpretation principles in Canada can be found in chapter 3 of Grammond, *Terms of Co-Existence*, *supra* note 18.

³⁸ *R v Marshall*, [1999] 3 SCR 533; *R v Marshall*; *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 and *R v Sundown*, [1999] 1 SCR 393.

³⁹ The key cases are *Haida Nation*, *supra* note 13 and *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 4 SCR 245 but an important development is the Keewatin case where a decision has recently been rendered by the Ontario Court of Appeal: *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158. Leave has been granted to the Supreme Court of Canada and argument has been tentatively scheduled for May 2014. (The decision of the Supreme Court of Canada in Keewatin is considered in the Addendum to this thesis.)

⁴⁰ An important decision has recently been released by the Federal Court of Canada on this issue: *Daniels v Canada*, 2013 FC 6. The Federal Court of Appeal, in *HMTQ v Daniels*, 2014 FCA 101, partially upheld the order of the trial judge, but vacated the declaration with respect to non-status Indians.

⁴¹ Hendrix, Burke, “Ownership, Authority and Self-Determination” *supra* note 17 at 7. (reasons offered by the law may not sufficient to capture all dimensions of a moral issue); Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 129 (Francis argues that reliance on legal discourse to solve problems of theoretical politics is misplaced)

⁴² Burke Hendrix, *ibid*. See also Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press, 2004) at 13.; Sal   & L  vesque, “Representing Aboriginal Self-Government in First Nations/State Relations: Political Agency and the Management of the Boreal Forest in Eeyou Istchee” (2010) 41 Intl J of Can Studies 99 “...trap them into accepting the institutions and constitutional parameters of the Canadian state”; Mark Bennett, ““Indigeneity” as Self-Determination” (2005) 4 Indigenous LJ 72 at 88 “...western constitutionalism is the frame in which the argument takes place”. A particularly insightful development of this theme is found in Emili  s A Christodoulidis, “Republican Constitutionalism and Reflexive Politics” (2006) Archiv fuer Rechts und Sozialphilosophie 371 who argues that while “...it is the Constitution which hosts politics” (p. 4) it also provides that “...not everything can be contested, not everything can find its way into legal categories.” (p. 7) In his view, “...Constitutional processes do allow for constitutional deliberation and self-determination but in a significantly limited and limiting way.” (p. 8). Paul Muldoon, “Thinking Responsibility Differently: Reconciliation and the Tragedy of Colonisation” (2005) 26 J of Intercultural Studies 237 at 251 argues that demands for reconciliation will likely exceed the capacities of Western law. David Schneiderman, “Theories of Difference and the Interpretation of Aboriginal and Treaty Rights” (1996) 14 Intl J Can Stud 35 at 47 argues that aboriginal nations “...are not simply to be treated as vestiges of cultural difference, but those of nations disinherited by the unquestioned operation of the colonizer’s constitutional law.”

⁴³ See Section 1.2.3 (James Tully) for an example of a political theorist who uses legal judgments as normative materials in his political theory work. See also: K  rena Shaw, *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (Routledge, 2008).

⁴⁴ Tully, Slattey, Walters and Henderson provide especially strong examples of scholars who straddle the boundary between law and theory.

⁴⁵ Anthony Simon Laden & David Owen, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007); Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, 2009).

⁴⁶ *Van der Peet*, *supra* note 8 at para 42.

⁴⁷ The role that “paradigms” play in the development of intellectual models was first developed in Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996). The notion has been frequently invoked

in recent works dealing with the development of Canadian aboriginal law: Grace Li Xiu Woo, *Ghost Dancing with Colonialism* (University of British Columbia Press, 2011); Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Native Law Centre, Saskatoon, 2012); Guy Charlton, *Constitutional Conflicts and Aboriginal Rights: hunting, fishing and gathering rights in Canada, New Zealand and the United States* (PhD, Law, University of Auckland, 2009), at 49. James (Sakej) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 Indigenous LJ 1 at 49 stresses that different paradigm choices can enable “...different ways of looking at one reality.”; Heidi Libesman, “In Search of a Postcolonial Theory of Normative Integration: Reflections on AC Cairns’ Theory of Citizens Plus” (2005) 38 CJPS 955at 962 speaks of “...the linguistic challenge that arises, more generally, in any paradigmatic transition, where the advocates of a counter-hegemonic vision speak in an inherited language of constitutionalism but are in fact imagining, or struggling to imagine, a meaning different from what the language has historically articulated.”

⁴⁸ The work of these leading Canadian scholars (Charles Taylor, Will Kymlicka and James Tully) is considered in Sections 7.3, 3.1 and 2.3, respectively, in this thesis.

⁴⁹ While the work of these two scholars is relied upon heavily in this thesis, there is a growing literature produced by indigenous legal scholars in Canada.

⁵⁰ Mark Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 126. (Francis makes the case that Canadian political theory on multicultural issues has focused unduly on local constitutional disputes and has become “odd and eccentric”); Andrew Robinson, *Multiculturalism and the Foundations of Meaningful Life: Reconciling Autonomy, Identity and Community* (University of British Columbia Press, 2005); Joseph Carens, *Culture, Citizenship, and Community: Contextual Political Theory and Justice* (Oxford University Press, 2000) at 5, makes much the same point when he says that Rawls could not have been a Canadian.

⁵¹ These are rough approximations only and must allow for a diversity of opinion within each group. For example, the work of Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (University of British Columbia Press, 2000), while placed within the second group envisages significant accommodation of aboriginal difference within Canada. Cairns clearly repudiates assimilation, but see also pages 59 and 65 which have been interpreted by some as supporting the goal of assimilation. These themes are developed further in Libesman, “Normative Integration”, *supra* note 47.

⁵² These key concepts will be addressed in Chapter 3 to 9, and include culture, pluralism, constitutionalism, redress of historical grievances, reconciliation, recognition and redistribution, causation of harm in indigenous communities and dialogue.

⁵³ A recurring theme in this thesis is the relation between theory and practice. More formally, it also engages the distinction that is made by political theorists between ideal and non-ideal theory. Short, Review: “Indigenous Sovereignty”, *supra* note 2 at 148 supports “...a policy or policy direction that takes us closer to the ideal than one that takes us further away.”

⁵⁴ Political theorists refer to the notion of a “second best” solution in a similar fashion to how they describe “non-ideal” theory. Both notions are linked to the idea that solutions are often found contextually, through political dialogue, and not through purely theoretical reflection. See Paul Patton, “Political Liberalism and Indigenous Rights” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 153 for an explanation of the difference between ideal and non-ideal theory.

⁵⁵ Kiera Ladner, “Take 35: Reconciling Constitutional Orders”, in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009) at 292-293. It is Timpson in the Introduction at 12 who uses the phrase “stepping stones” to describe Ladner’s approach to the Haida line of cases.

⁵⁶ This usage is very frequent in the critical literature but less so in practice. There are also many scholars who explicitly refrain from using the term “settler state”. See footnote 15 for discussion of the notion of a “settler state”.

⁵⁷ The best example might be the work of Frances Widdowson, addressed in Chapter 2, section 2.5, who writes from a perspective that is very unsympathetic to indigenous claims but asserts to be writing from a Marxist perspective.

⁵⁸ A good example is cosmopolitan thinking, which is generally affiliated with the political left but does not tend to support deep recognition of cultural difference within a polity: see Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2008).

⁵⁹ Ross Poole, “Justice or Appropriation? Indigenous Claims and Liberal Theory” (2000) *Radical Philosophy* (May/June) 5.

⁶⁰ Will Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press, 1989) at 154; see also: Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (University of Toronto Press, 2006) at 116, 120 (While Turner initially uses language that is very similar to Kymlicka, indeed he seems to have formulated the label “Kymlicka’s Constraint”, he ultimately provides a critique of the constraint); Robinson, *Multiculturalism*

and the *Foundations of Meaningful Life*, *supra* note 50 at 63 (Robinson quotes from David Miller in a passage that looks very similar to Kymlicka's constraint); Marc Joseph Woons, *Aboriginal Participation in Canada: Overcoming Alienation and Mistrust in a Situation of Complex Interdependence* (Master of Arts, Political Science, University of Northern British Columbia, 2009) at 9-10 (much of Cairns' analysis is framed by the concern for maintaining the commitment of mainstream Canadians and mobilizing political action in favour of reform); Matthew Festenstein, *Negotiating Diversity: Culture, Deliberation, Trust* (Polity Press, Oxford, 2005) at 48 (Festenstein expresses the concern a little differently by stressing the bonds of mutual identity that are necessary to prevent burdens from being seen as arbitrary). Likewise, Charlton, *supra* note 47 at 26 stresses the structural constraints that prevent courts from rendering decisions that are overwhelmingly opposed by mainstream society.

⁶¹ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 7 ("in practice only certain legalistic ways of arguing tend to have political resonance", other forms of arguing can tend to be "socially impotent"); Turner, *Peace Pipe*, *supra* note 60 at 59, 120 (Turner argues that so long as Kymlicka's constraint is operative it will not be possible to consider indigenous philosophy from a standpoint of equality); Bennett, Mark, "Indigeneity", *supra* note 42 at 87 (Kymlicka's constraint has the effect of silencing Indigenous voices). Libesman, "Normative Integration", *supra* note 47 at 966 – reconciliation is best seen- "...not, as a political reality, a self-executing norm...[but] depends on its recognition by, and practical support from, the non-Aboriginal Canadian community." Robert Murray, "Liberalism, Aboriginal Rights, and the Canadian Moral Identity" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 136 (Murray provides a detailed critique of Dale Turner's analysis of "Kymlicka's constraint". Murray broadens the analysis to suggest that "...Nowadays, many Aboriginal scholars and their supporters believe that subsuming Aboriginal rights under liberal principles of justice is a form of colonialism." (p. 143)

⁶² Dwight Newman, "You Still Know Nothin' Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights" (2007) 52 McGill LJ 725.

⁶³ Some of the overlapping literatures include post-colonial, post-modern and critical race theory: see Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Fernwood Publishing, 1999) -Aylward notes that while there is a strong body of critical indigenous theory emerging in Canada (p. 30), few explicit linkages are being made between critical race theory and indigenous theory. An interesting example of post-colonial theory applied to indigenous issues is Kevin Bruynell, *The Third Space of Sovereignty: The Post-Colonial Politics of US-Indian Relations* (University of Minnesota Press, 2007); see also Rebecca Tsosie, "Whiteness: Some Critical Perspectives: The New Challenge to Native Identity: An Essay on Indigeneity and "Whiteness"" (2005) 18 Wash UJL & Pol'y. Gordon Christie, "Critical Indigenous Philosophy" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 124 argues that post-modern thinking is playing an increasingly important role in critical indigenous scholarship- "...their power and influence seems to be on the rise, as a postmodern sensibility slowly creeps into contemporary legal scholarship." This sensibility focuses on "...unseen forces and mechanisms beyond the legal rhetoric" (p. 131). Meaning is always "up for grabs" and not guided by any grand narrative. (p.132) Christie recognizes that "...the same scene painted by a scholar differently placed may be composed within a palette of progress, reconciliation, multiculturalism, and the protection of human rights." (p. 134). Ronald Dworkin, *Justice for Hedgehogs* (Belknap: Harvard, 2011) at 143-144 takes the contrary view that the aim of critical legal studies is to debunk the very idea of the search for and emergence of coherence.

⁶⁴ The work of James Tully will be considered in Section 2.3 and the work of Karena Shaw will be considered in Section 2.3.

⁶⁵ Alfred, Taiaiake, *Wasase: Indigenous Pathways of action and freedom* (Broadview Press, 2005) ; Alfred, T & Cornthassel, J, "Being Indigenous : Resurgences Against Contemporary Colonialism" (2005) 40 Government and Opposition 597; Jeff Cornthassel, "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination" (2012) 1 Decolonization: Indigeneity, Education and Society 86; Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the "politics of recognition" in Canada" (2007) 3 Contemporary Political Theory 1; Glen Coulthard, "Beyond Recognition: Indigenous Self-Determination as Prefigurative Practice", in Simpson, Leanne, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Arbeiter Ring Publishing, 2008); Robert Alexander Innes, "Introduction: Native Studies and Native Cultural Preservation, Revitalization, and Persistence" (2010) 34 American Indian Culture and Research Journal 1; Ian Desjardins, "Sovereignty and Diversity: The New Relationship between the Crown and Aboriginal Peoples" (accessed on-line); Patricia Monture-Angus, *Journeying Forward: dreaming First Nations Independence* (Fernwood Publishing, 1999) at 160-161 (after describing the damage to the web of relationships important to indigenous peoples Monture-Angus states "...I no longer believe that Canadian law has a role to play in fixing the damage to this web." See also: Vanessa A Watts, *Towards Anishnabe Governance and Accountability: Rethinking our Relationships and Sacred Bimaadiziwin* (MA Thesis, Department of Human and Social Development, UVC, 2008)

(the core argument, expressed at page 93, is that revitalization is necessary for resisting oppression and is to be preferred to seeking recognition from the colonial state. See also p.97.)

⁶⁶ It is important to note that not all of the authors referred to here share each step of the linear narrative that is set out. However, most of the authors considered in this section develop lines of argument that rely on most of the points that are developed in this section.

⁶⁷ Turner, *Peace Pipe*, *supra* note 60 at 112 (law has played a large role in the dispossession of aboriginal people); Duncan Ivison, Paul Patton, Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) at 1-2 (complicity of western political theory in colonial expansion).; Seth Gordon, "Indigenous rights in Modern International Law from a Third World Perspective", (2006-2007) 31 *Am Indian L Rev* 401 at 402- (law was the "...most effective weapon- legal doctrines that would justify the taking of native lands as well as institutionalize political, cultural, economic, and spiritual hegemony.")

⁶⁸ James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press, 1982); Barbara Arneil, *John Locke and the Defence of English Colonialism* (Oxford University Press, 1996). DG Bell, "Was Amerindian Dispossession Lawful? The Response of the 19th Century Maritime Intellectuals" (2000) 23 *Dal LJ* 168 at 175- core argument was that they lacked property rights in the first place as they did not improve the soil. He notes, at page 182, that even those who dissented from this view did not go so far as to recognize any current title to lands. A classic treatment of this issue is Wilcomb F Washburn, "The Moral and Legal Justifications for Dispossession of the Indians" in James Morton Smith, ed, *Seventeenth-Century America: Essays in Colonial History* (Norton, 1972) at 17. While he locates the agricultural argument at the heart of the effort to justify dispossession (p. 22), he argues that the contemporary literature overlooked the clear importance of agriculture to Indians and the predominance of occupation in towns. (p. 23)

⁶⁹ Robert J Miller, Jacinta Ruru, Larissa Behrendt, Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010). A classic treatment of the development of the notion of discovery in the Marshall decisions is Washburn, "Moral and Legal Justifications", *supra* note 68 at 26ff. See also: David Schneiderman. "Theories of Difference" *supra* note 42 at 38ff for a discussion of the development of the notion of discovery. Elena Cirkovic, "Self-Determination and Indigenous Peoples in International Law" (2006-2007) 31 *Am Indian L Rev* 375 at 384 argues that the core of the Johnson decision was the "discovery doctrine". See also Rebecca Bratspies & Russell Miller, "Introduction", (2006-2007) 11 *Am Indian L Rev* 253 at 253 (presents current emerging international law as a "dramatic reversal" of the earlier doctrine of discovery).

⁷⁰ Côté, in his article on the reception of English law into new colonies, points out that aborigines of the New World were always disregarded for these purposes, no matter how numerous they might be. (Côté, JE, "Reception of English Law" (1977) 25 *Alta L Rev* 29 at 38); Julie Cassidy, "Sovereignty of Aboriginal Peoples" (1998) 9 *Ind Int'l & Comp L Rev* 65 at 71 argues that Lindley's 1926 international law text adopts the opposite point of view. See also: D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29 *Windsor YB Access Just* 55 at 58 (role of law in dispossession).

⁷¹ This is the difference between saying that the encounter of Europeans with indigenous peoples was affected by liberal theory and the stronger thesis that this actually created liberal theory. Recent theorists have stressed the indispensable role played by the indigenous "other" in the very creation of liberal theoretical frameworks of writers like Locke and Hobbes. See, for example, Karena Shaw, *supra* note 43, in relation to Thomas Hobbes in Chapter 2, section 2.3 of this thesis. Anthony Simon Laden & David Owen, Introduction in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) at 2- analysis of early contact with indigenous societies has been a "...crucial loci for the development of European legal and political thought." Also, at page 3- "...issues of the rights of indigenous peoples and national minorities has been a significant element in the articulation of Western legal and political theory." Jacob T. Levy, (with Iris Marion Young), *Colonialism and Its Legacies*, (Lexington Books, 2011) at 7 emphasises the "...new work that treats colonialism as shaping the history of European political thought."

⁷² Boyer, Patricia, "Felix Cohen and the Spanish Origin of Indian Rights" (2010) 8 *Law, Culture and the Humanities* 153; Boast, Richard, "The "Spanish" Origins of International Human Rights Law: A Historiographical Review" (2010) 41(2) *VUWLR* 235.

⁷³ A great deal of attention has been paid to the impact that 19th evolutionary thought had on both theory and practice in the treatment of indigenous peoples. Charles Mills, "Multiculturalism as/and/or anti-racism?" in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) and Michael Asch, "Getting Past Terra Nullius: Theories of Society and the Acquisition of Crown Sovereignty", in Noreau, Pierre, ed, *Gouvernance autochtone: réconfiguration d'un avenir collectif: nouvelles perspectives et processus émergents* (Les Éditions Thémis, 2010) provide especially good examples of this line of analysis.

⁷⁴ It will be seen that this terminology and frame of thought has been resuscitated in the work of Frances Widdowson- See Chapter 2, section 2.5. In the words of the current Chief Justice of Canada, the indigenous dispossession "...was justified by a philosophy of presumed superiority and rights." Right Honourable Beverly McLachlin, "Aboriginal Peoples and Reconciliation" (2003) 9 Canterbury L Rev 240 at 240. In the view of Schneiderman, "Theories of Difference", *supra* note 42 at 46 "...the hierarchy of cultures and powers established at colonization remain essentially intact." Sandra Tomsons, "Why Non-Aboriginal People Should Listen to Aboriginal Elders" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) 41 at 44-45 (the relationship is "...grounded in the mistaken inferior/superior assumption" and "still determines the relationship") Constance McIntosh, "From Judging Culture to Taxing "Indians": Tracing the Legal Discourse of the "Indian Mode of Life" (2009) 47 Osgoode Hall LJ 399 at 406-407- documents the emergence of evolutionary theory in the 19th century, including the impact it had on Karl Marx through the work of Lewis Henry Morgan.

⁷⁵ Haijo Westra, "The Defence of Native Title and Discovery in Sixteenth Century Mexico" in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010).

⁷⁶ *Op. cit.* at 28.

⁷⁷ Anghie, Anthony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2003). See also: Robert A Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990).

⁷⁸ Paul Keal, *European Conquest and the Backwardness of European Society* (Cambridge University Press, 2003).

⁷⁹ In addition to Anghie, *supra* note 77 and Keal, *supra* note 78, an important and innovative contribution to this debate has been made by Kent McNeil. See, in particular, "Indigenous Nations and the Legality of European Claims to Sovereignty over Canada", in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) and Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans, Anne Genovese, Alexander Reilly and Patrick Wolfe, "Sovereignty: Frontiers of Possibility (University of Hawaii Press, 2013)

⁸⁰ A number of historical works outline the precise steps towards development of a policy of assimilation in key jurisdictions- see, for example. Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia, 1788-1836* (Harvard University Press, 2011) and JR Miller, *Skyscrapers, Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000); JR Miller, *Lethal Legacies: Current Native Controversies in Canada* (McClelland-Stewart Ltd, 2004).

⁸¹ It is commonplace for scholars to fix the assessment of legitimacy at the time of the original acquisition of sovereignty by a settler state. For example, Joseph William Singer, "Original Acquisition of Property- From Conquest & Possession to Democracy & Equal Opportunity" (2011) 86 Indigenous LJ 763 – "If first possession is the legitimate origin of title, then we non-Indians cannot trace our titles to a just origin."

⁸² Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537 at para 40; Borrows, "Blockades", *supra* note 13 at 113.

⁸³ Mr. Justice Lebel, in his concurring judgment in *Bernard*, *supra* note 38 at paras 127, 134 argues that doctrines such as discovery and terra nullius continue to have an impact on the development of Canadian law.

⁸⁴ The law is frequently asserted to play a key role in dispossession of indigenous peoples. For example, Kyla Reid, "Political Legitimacy in the Wake of Indigenous Governance Claims" (2010) 35 Australian J of Legal Philosophy 85 at 88- argues that the status quo "rests a great deal on the dispossession of indigenous peoples". This is linked to the perception of many that the current role of law is the "containment of politics"- see Christodoulidis, "Republican Constitutionalism", *supra* note 42 at 5.

⁸⁵ Dimitrios Panagos, *Aboriginality, Existing Aboriginal Rights and State Accommodation in Canada* (PHD, Queen's University, 2008), see especially 156; see also: Dimitrios Panagos, "'The Plurality of Meanings Shouldered by the Term "Aboriginality": An Analysis of the *Delgamuukw* Decision" (2007) 40 Can J of Political Science 591. Christodoulidis, "Republican Constitutionalism", *supra* note 42 at 13-14 states that critical theorists are "...much more worried about the violence that capitalist economic structures are inflicting." Richard Day, "Who is that gives us this gift? Native-American Political Theory and the Western Tradition" (2001) 2 Critical Horizons 173 at 185 "...also contains a radical critique of capitalist social relations." He adds, at page 195, that much indigenous theory urges us to "...leave behind state-based liberal-capitalist federation, and focus on the development of a more heteronomous system." See also: Shaw, "Indigeneity", *supra* note 43 at 206 (role of the "capitalist axiomatic").

⁸⁶ Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002); Katherine Biber, "Being/Nothing: Native Title and Fantasy Fulfillment" (2004) 3 Indigenous LJ 1 at 1("nation is a fantasy "); Damien Short, "Australian "Aboriginal"

Reconciliation: The Latest Phase in the Colonial Project” (2003) 7 *Citizenship Studies* 291 at 309; Colin Samson, “The Dispossession of the Innu and the Colonial Magic of Canadian Liberalism” (1999) 3 *Cit Studies* 5 at 5 (Igliorte judgment questioning how Canada “magically acquired” sovereignty) and 18 (“...still derives its jurisdiction from a series of blatantly racist notions”); Henderson, “Postcolonial Indigenous Legal Consciousness”, *supra* note 47 at 22- role of national fantasies and theories of rights. See also: James (Sakej) Henderson, “Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada” (2010) 14 *AIKR* 24 at 29- role of “fairytales” in the development of national narratives; Lorenzo Veracini, “The Settler-Colonial Situation” (2010) 19 *Native Studies Review* 101 at 107, 110- further development of the idea of national fantasy; David McDonald, “Reconciliation after Genocide in Canada: Towards a Syncretic Model of Democracy” (2013) 9 *AlterNative: An International Journal of Indigenous Peoples* 59 at 65- continuance of “fantasy” of legitimate authority: Henry Reynolds, “Reviving Indigenous Sovereignty” (2006) 6 *Macquarie LJ* 5 at 6- “...But ultimately the Crown will be required to establish how and when Aboriginal sovereignty was overridden”- it is not enough to simply assert that it simply disappeared in the “blink of an eye”, and, “To advance such fanciful propositions would invite ridicule and all sense of intellectual reputation of the judiciary.”

⁸⁷ Short, “Australian “Aboriginal” Reconciliation”, *supra* note 86 at 301- This passage responds to the approach taken by the Australian High Court in *Mabo v Queensland (No 2)*, (1992) 175 *CLR* 1 [*Mabo*] and the native title legislation passed by the Keating government in 1991. Laden and Owen, “Introduction” in Laden and Owen “Multiculturalism and Political Theory”, *supra* note 71 at 10- they describe the theme of reform blocking more far-reaching transformation as a “...long-standing theme of radical theory of all stripes.”

⁸⁸ A rich literature has emerged on the challenges and opportunities posed by inter-cultural conversations: see Natalie Oman, “Theories of Inter-cultural Negotiation” in Catherine Edith Bell & David Joshua Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: University of British Columbia Press, 2005); Turner, *Peace Pipe*, *supra* note 60 at 73 (Turner is not claiming that views of aboriginal and non-aboriginal people are incommensurable); Valadez, Jorge, “The Implications of Incommensurability for Deliberative Democracy”, in Kahane, David, Weinstock, Daniel, Leydet, Dominique & Williams, Melissa, eds, *Deliberative Democracy in Practice* (University of British Columbia Press, 2010); Kiera Ladner & Michael McCrossan, “The Road not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order” in James B Kelly & Christopher B Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (University of British Columbia Press, 2009) at 286- aboriginal worldviews are “...quite incompatible with European traditions”; Mary Ellen Turpel, “Aboriginal Rights and the Canadian Charter: Interpretative Monopolies and Cultural Difference” (1989-1990) 1 *CHRYB* 3; John Lutz, *Makuk: A New History of Aboriginal-White Relations* (University of British Columbia Press, 2008) at 301- cross-cultural dialogue is always fraught with spaces for misrecognition. See also, Murray, “Liberal Principles”, in Tomsons and Mayer, *supra* note 61 at 145.

⁸⁹ Michael Asch writes, as an anthropologist, about the fundamental role that perceptions of a hierarchy of societies have played in the ongoing relationship between indigenous and non-indigenous peoples. Perceptions of primitivism were especially formative as evolutionary thought developed in the 19th century. This idea is expressed clearly in Michael Asch & Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 *Alta L Rev* (No. 2) 498.

⁹⁰ Certainly after the initial period of contact between indigenous and non-indigenous societies, increasing gaps in bargaining power have played an important role in the development of the relationship. See Michael Coyle, “ADR Processes and Indigenous Rights: A Comparative Analysis of Australia, Canada and New Zealand” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009); Michael Coyle, “Establishing Indigenous Governance: The Challenge of Confronting Mainstream Cultural Norms” in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l’Université Laval, 2013); See also: Anthony Simon Laden, “Negotiation, Deliberation, and the Claims of Politics” in Laden and Owen, “Multiculturalism and Political Theory”, *supra* note 45.

⁹¹ Hester Lessard et al. “Storied Communities”, *supra* note 19; Miranda Johnson, *Struggling Over the Past: Colonization and the Problem of History in Settler Societies* (PHD, University of Chicago, 2008) at 11, 23 (Johnson stresses the role of narrative in Markell’s preference for acknowledgement over recognition); Seyla Benhabib, *Another Cosmopolitanism*, *supra* note 58 develops Robert Cover’s famous distinction between jurisgenerative and jurispathic processes (pp. 49-50). John Lutz, “Makuk”, *supra* note 88 at 194-197- offers the narrative of the “vanishing” Indian as an example of a restrictive narrative. See assessment of the importance of narrative in Sakej Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Native Law Centre, University of Saskatchewan, 2006) at 124. MacDonald, “Reconciliation after Genocide” *supra* note 86 at p. 69 calls for “for activists and academics to infuse the country with coherent Aboriginal worldviews and narratives.

⁹² Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

⁹³ A primary flaw is often seen to be the exclusion of indigenous peoples from narratives of national origin. See: Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010) at 170. See also: John Lutz, "Myth Understandings: First Contact, Over and Over Again" introduction to John Lutz, *Myth and Memory: Rethinking Stories of Indigenous-European Contact* (University of British Columbia Press, 2007)

⁹⁴ See Panagos, "Aboriginality" *supra* note 84 at 88- explores the narrow evolutionary theory that led to project of assimilation

⁹⁵ Borrows, "Drawing Out Law", *supra* note 9 at 56.

⁹⁶ See Chapter 2, section 2.3. See also Shaw, *Indigeneity and Political Theory*, *supra* note 43 and Barbara Arneil, "John Locke", *supra* note 68.

⁹⁷ As noted previously, at note 89, Michael Asch has written extensively about the primitivism narrative and the misrecognition of indigenous normative orders. For example, see Michael Asch, "From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17 CJLS 23 at 27 (Asch contrasts racist evolutionary perspectives with cultural relativism); See also: Ronald Niezen, *The Rediscovered Self: Indigenous Identity and Cultural Justice* (Montreal: McGill-Queen's Press, 2009); Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003); Ronald Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18 CJLS 1.

⁹⁸ Peter Russell; "High Courts and the Rights of Aboriginal Peoples: the Limits of Judicial Independence" (1998) 61 Sask L Rev 247 at paras 3 and 8 – difficult to perceive "white man's courts" as independent and impartial; Michael Murphy, "Culture and Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?" (2001) 34 Canadian Journal of Political Science 109 at 128 "...truly just settlement from the federal government and not the courts". Scheiderman, "Theories of Difference", *supra* note 42 at 41 "...the judiciary has not moved much beyond the traditional common law understandings of Aboriginal title which justified the basis for colonial sovereignty. Despite these failings, the theorists of difference curiously portray the judiciary – the Courts of the colonizer- as a vehicle for challenging these dominant understandings." McIntosh, "Judging Culture", *supra* note 74 at 400- "The idea of lawyers making arguments about such matters in a courtroom, and a judge then judging the core features of an Aboriginal peoples' culture, seemed to be an extreme exercise in colonialism."

⁹⁹ Russell, "High Courts", *ibid*. The issue is cast in stark relief by the terms of Article 27 of the Declaration on the Rights of Indigenous Peoples which describes a state obligation to establish and implement "...a fair, impartial, open and transparent process...to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources..."

¹⁰⁰ Kiera Ladner & Caroline Dick, "Out of the Fires of Hell : Globalization as a Solution to Globalization: An Indigenist Perspective" (2008) 23 CJLS 63 (extended argument about the double standard that applies a cultural test for indigenous rights but not for mainstream rights).

¹⁰¹ Asch, "Getting Past Terra Nullius", *supra* note 74 at 46 ff. (summary of the cultural relativism model which is the core insight of modern anthropology) This idea is used to extend the argument based on double standard to critique the different treatment of nations without states compared to those who are said to control a state.

¹⁰² This is the failure of the state to meet the very standards that it sets for itself in a more general context; Michael Lee Ross, "First Nations' Sacred Sites" *supra* note 30 at 165-166- critique can be based on criteria that are internal to the Canadian legal system. Borrows, "Blockades", *supra* note 13 at 108 provides a particularly clear example of immanent critique- "...In line with my world view, I am judging the legal significance of the past actions by a standard that holds people to their word, viewed in the light of indigenous laws and in accord with Canadian legal principles that coincide with Indigenous legal standards, past and present."

¹⁰³ Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge University Press, 2008) at 27, 172, 235. (It should be noted that the notion of "immanent critique" is used in different ways in the literature but the focus in this thesis is on arguments that attempt to measure state response to indigenous claims by reference to principles that are foundational to the constitutional order.)

¹⁰⁴ Aristotle, in his *Nicomachean Ethics*, introduced the idea that equality is fundamentally comparative and involves treating likes alike and unalikes unlike. This core idea has matured into the idea of substantive equality in modern constitutionalism.

¹⁰⁵ Though it may be slightly unfair, the alleged equation of indigenous peoples with cultural minorities arises frequently in the critical literature concerning the work of Will Kymlicka, which is considered in more detail in Section 3.1. See also *Van der Peet*, *supra* note 8 - a key element of the Supreme Court of Canada decision is the attempt to distinguish aboriginal rights from other individual and collective rights in Canada.

¹⁰⁶ Murphy, "Culture and the Courts", *supra* note 98 at 123 "...treated more like cultural minorities than national minorities"; Tomsons, "Why Non-Aboriginal People Should Listen", *supra* note 74 at 61 "...liberal theory...misrepresents what they are"; Tomsons & Mayer, "Dialogue" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 174- Mayer accuses Kymlicka of "...lumping us in with national minorities".

¹⁰⁷ Damien Short draws attention to the simultaneous pessimism and optimism of much critical theory that addresses indigenous-state relations, in "Social Construction", *supra* note 86 at 868-869. Short observes that while critical theory is often pessimistic about the possibilities of "reform" there is frequent allusion in critical theory to the possibility of "transformation", sometimes drawn from idealized models of relationships at earlier stages of the encounter between indigenous peoples and newcomers. As Christodoulidis, "Republican Constitutionalism", *supra* note 42 at 8 argues, it is sufficient to establish that a relationship other than the one that is implied by existing constitutional commitments is possible in order to discharge the critical function of a theorist. This does not completely eliminate the tension raised by contradictory elements of some critical theory- for example, can early interactions between indigenous and non-indigenous peoples be both fatally undermined by Lockean ideas and evidence of a mutual intention to share lands? As an example, Sandra Tomsons, "Dialogue" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) asks whether individuals of European background would really have thought of themselves as submitting to indigenous law if their worldviews were infected with the thinking of the day? Andrew Schaap, "Political Theory and the Agony of Politics" (2007) 8 *Pol Studies Review* 56 at 63, drawing from Christodoulidis, argues in favour of the critical exercise of focusing on the changeability of existing social arrangements "...such that the claims of the right no longer register as persuasive or meaningful." Scheiderman, "Theories of Difference", *supra* note 42 at 43-44 argues that the "tainted basis of Canadian sovereignty" means that "...The abject legacy of colonialism remains intact." When directed to a review of Eisenberg's assessment of aboriginal rights- "...Eisenberg fails to take into account the tainted basis of Canadian sovereignty over Aboriginal peoples and their lands founded on the European discourse of Lockean productivity." This leaves us with the "...dual challenge of both discrediting and radically reconstructing the constitutional common law of Aboriginal rights." (p. 46) Cirkovic, *supra* note 69 at 399 argues that "...the test for international law's capacity to include indigenous peoples lies in being open to constant negotiation and contestation of its existing boundaries."

¹⁰⁸ James Tully provides one of the best examples of this form of reasoning- see Chapter 2, section 2.3. See also: Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 3; Taiaiake Alfred, "Wasase: Indigenous Resurgences" in Jacob T Levy, *Colonialism and Its Legacies* (Lexington Books, 2011) -settler states are "...congenitally incapable of overcoming their histories of violence and deception.", with the implication that "...change cannot be made from the colonial structure" (p. 83); Panagos, "Plurality of Meanings", *supra* note 84 at p. 604- critical of versions of the aboriginal-state relationship such as Cairns' citizen plus model for supporting a form of self-government that does not challenge the ultimate sovereignty of the Crown; Marc Hanvelt & Martin Papillon, "Parallel or Embedded: Self-Government and the Changing Nature of Citizenship in Canada" in Kernerman, Gerald & Resnick, Philip, *Insiders or Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship* (University of British Columbia Press, 2004) at 249- Cairns never challenges the lack of legitimacy of the Canadian state; ; Michael Murphy, "Culture and the Courts", *supra* note 98 at 110 "...a close reading of these cases makes it abundantly clear that the Court was not prepared to challenge the unilateral assertion of sovereignty over Aboriginal peoples and territories."

¹⁰⁹ It will obviously not be possible to explore the full range of this critical literature- the key point is that it is important to recognize the rich material that contemporary thought on indigenous issues is drawn from.

¹¹⁰ The shadow of a wide variety of critical literature falls over much of the literature on indigenous claims. Branches include structuralism, post-structuralism, post- modern theory, post-colonial theory, critical race studies and critical legal theory. As noted previously, two core themes pervade much of this literature. First, existing institutions tend to occlude perception of deep injustice, particularly injustice directed to groups and individuals that have been "othered". Second, theoretical reflection can help identify other ways of social organization that respond more completely to basic human needs in a more egalitarian fashion. These ideas lead to a deep distrust of the state, a tendency to see liberal theory as a cover for capitalist, imperialist and colonialist ambition and a methodology of evaluating a society from the perspective of disadvantaged groups.

¹¹¹ Audre Lorde, "The Master's Tools will Never Dismantle the Master's House" in Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press, 1984) and Christie, "Critical Indigenous Philosophy", *supra* note 63; Salée & Lévesque, "Representing Aboriginal Self-Government", *supra* note 42 at 104- use of the oppressors tools.

¹¹² Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 165 (Hendrix links the common tendency of political theorists to take the vantage point of the worst-off in a society to the methodological assumptions made by John Rawls in the construction of a general theory of justice).

¹¹³ Andrée Lajoie, Cecile Bergada et Eric Gelinias “Conceptions autochtones des droits ancestraux au Québec” (2005) 46 C de D 749 ; Lajoie, Andrée, “The Integration of Aboriginal Values and Interests into Canadian Judicial and Normative Discourse” in Christie, Gordon, ed, *Aboriginal Society and Aboriginal Rights: A Multidisciplinary Perspective from Quebec* (Theytus Books, 2006); Lajoie, Andrée, “Legal Pluralism in Kahnawake” in Christie, Gordon, ed, *Aboriginal Society and Aboriginal Rights: A Multidisciplinary Perspective from Quebec* (Theytus Books, 2006).

¹¹⁴ Secession is rarely advocated in the academic literature and it will be seen in Chapter 10, section 10.2 that it is also rarely advocated by indigenous peoples and their representatives in Canada and other “settler states”.

¹¹⁵ Among the many examples that are presented in the literature are obtaining the explicit consent of Aboriginal peoples to constitutional arrangements, developing a distinctive form of “treaty federalism”, and resort to international law. In contrast, this thesis advocates a form of “nesting” of authorities that builds on openings presented by recent developments in Canadian constitutionalism.

¹¹⁶ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 300 (quotation suggesting that newcomers must make a “leap of faith” and place trust in Maori who will determine their status on the land). See also Asch, “Getting Past Terra Nullius” *supra* note 73 at 42, 53.

¹¹⁷ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (University of British Columbia Press, 2011). Janice Greene, “What Mauchibinesse Taught me About Aboriginal Rights” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 24 (provides a good example of a focus on personal decolonization).

¹¹⁸ A dominant theme that emerges from the critical literature involving aboriginal claims is the powerful influence that James Tully has had on the way that the arguments are framed and assessed: Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 126 (says of Tully that “...his voice is heard everywhere”); Turner, *Peace Pipe*, *supra* note 60 at ix (Turner states that he owes a debt of gratitude to Tully for his work).

¹¹⁹ Tully acknowledges the formative impact his years as a senior research associate with the Royal Commission on Aboriginal Peoples had on his thinking about the aboriginal-non-aboriginal relationship in Canada- James Tully, *Public Philosophy in a New Key: Volume 1: Democracy and Civic Freedom* (Cambridge University Press, 2008) at 225.

¹²⁰ *Speaking Truth to Power: A Treaty Forum* (Law Commission of Canada, 2001) see especially James Tully “Reconsidering the BC Treaty Process”, in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum*, 2001.

¹²¹ Tully’s work is notable for deep consideration of the legal and constitutional dimensions of important conflicts within Canada, including those involving indigenous peoples and the Canadian state and Quebec and the rest of Canada. See Panagos, “Aboriginality” *supra* note 84 at 82 and 83 for definition of a nation to nation relationship. In addition to Kiera Ladner and James Tully in Canada, Panagos describes the impact that American scholars Miller, Washburn and Williams have played in the development of the notion of a nation to nation relationship; Ladner and Dick, *supra* note 100 provides an excellent summary of the treaty federalist perspective in the introduction to their article. The notion of treaty federalism will be considered in more detail in Chapter 5, section 5.3.

¹²² Though Tully has written numerous articles that address the normative standards that ought to govern the relations between the Crown and aboriginal peoples, his two most important contributions are James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) and Tully, *Public Philosophy in a New Key: Volume 1: Democracy and Civic Freedom; Volume II: Philosophy in a New Key: Imperialism and Civic Freedom* (Cambridge University Press, 2008).

¹²³ The Cambridge School is a branch of historiography that pays close attention to the historical context of canonical writings, and is generally associated with the work of Quentin Skinner. The debt of Tully to this branch of scholarship is seen especially in his work on the political philosophy of John Locke. See Tully, *ibid* at 35 and Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 137.

¹²⁴ Scaap, “Agony of Politics”, *supra* note 107 discusses the republican elements of Tully’s thought.

¹²⁵ Deliberative democratic theory advocates the deepening of citizen participation in governance within a nation. Tully’s “political” approach to the resolution of conflict within a society resonates deeply with the commitments of deliberative democrats. This perspective is explored fully in David Owen & James Tully, “Redistribution and recognition: two approaches” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007).

¹²⁶ Tully's engagement with continental philosophy is especially seen in his reliance on the thought of Foucault. The debt of Tully to Foucault and continental philosophy is explored in Katherine Smits, "Review: Tully, *Public Philosophy in a New Key*" (2011) 39 *Political Theory* 161, especially at 162.

¹²⁷ Tully, *Strange Multiplicity*, *supra* note 122.

¹²⁸ Versions of this work can be seen in Vancouver International Airport, in front of the Canadian Embassy in Washington, D.C. and at the newly named Museum of History in Gatineau, Quebec.

¹²⁹ There is a rich strain of common law historical thought which evokes the superior virtues of an "ancient" common law constitution. See William E Scheurman, "Constitutionalism and Difference" (1997) 47 *UTLJ* 263 at 264, 269 and Thomas Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 *Oxford J Legal Stud* 435 at 264, 269. Tully's evocation of an ancient constitution draws more inspiration from the local practices developed between indigenous peoples and newcomers in the earliest days of contact.

¹³⁰ Tully, *supra* note 127 at 11.

¹³¹ It will be seen that this historical description resonates strongly with the normative description of classical liberalism advocated by several scholars who are suspicious of state accommodation of aboriginal difference- see Chapter 2, sections 2.4 and 2.5.

¹³² Tully is drawing attention to the emergence of the bureaucratic state under a formal vision of the rule of law that is typified by the constitutional thought of Dicey and Austin.

¹³³ Tully, "Locke", *supra* note 68.

¹³⁴ Tully, *Strange Multiplicity*, *supra* note 122 at 62.

¹³⁵ *Ibid* at 63.

¹³⁶ *Ibid* at 64.

¹³⁷ *Ibid*.

¹³⁸ *Ibid* at 65.

¹³⁹ *Ibid* at 66.

¹⁴⁰ *Ibid* at 67.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at 68.

¹⁴³ *Ibid* at 69.

¹⁴⁴ Practicing lawyers generally work within a framework that assumes the authority of legislatures and courts and organizes legal materials on the basis of clear hierarchies of influence. The model tends to be highly positivistic and formal.

¹⁴⁵ Tully's theory work demonstrates a strong familiarity with the legal literature in Canada, most particularly the work of Brian Slattery.

¹⁴⁶ Tully, *Strange Multiplicity*, *supra* note 122 at 57.

¹⁴⁷ *Ibid* at 58.

¹⁴⁸ An interesting comparison can be made to the work of the legal historian Paul McHugh who also sees a clear shift in the development of public law in the 19th century that parallels Tully's account of the emergence of an "empire of uniformity": Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004).

¹⁴⁹ McHugh would describe this as a "presentist" use of legal history and the problems he sees with this type of account of legal history will be explored in Chapter 7.

¹⁵⁰ Tully, *Strange Multiplicity*, *supra* note 122 at 115.

¹⁵¹ *Ibid* at 115-116.

¹⁵² *Ibid* at 116.

¹⁵³ *Ibid*.

¹⁵⁴ It is not especially clear what relationship Tully is describing between "common constitutionalism" and the classic literature on "ancient constitutionalism", the idea that rich forms of practice that protect liberty can be found in pre-modern sources in England and North America. Henderson, "First Nations' Jurisprudence" *supra* note 91 at 190-role of the notion of ancient constitutionalism in the development of the common law.

¹⁵⁵ Tully, *Strange Multiplicity*, *supra* note 122 at 138, 166.

¹⁵⁶ *Ibid* at 53.

¹⁵⁷ Ivison, *Political Theory*, *supra* note 67, see also: Tully, *New Key, Volume 1*, *supra* note 119 at 279.

¹⁵⁸ Tully, *Strange Multiplicity*, *supra* note 122 at 88.

¹⁵⁹ *Ibid* at 173.

¹⁶⁰ Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground" (1994) 11 *Social Philosophy and Policy* 153 at 169

¹⁶¹ Tully, *Strange Multiplicity*, *supra* note 122 at 27.

¹⁶² James Tully, "Exclusion and Assimilation: Two Forms of Domination in Relation to Freedom", Chapter 8 in Melissa S. Williams and Stephen Macedo, *Political Exclusion and Domination*, NOMOS XLVI (NYU, 2005) at 191; James Tully, "The Agonistic Freedom of Citizens" (1999) 28 *Economy and Society* 161; James Tully, "The Unfreedom of the Moderns in Comparison to the Ideals of Constitutional Democracy", (2002) 65 *Modern L Review* 204; James Tully, "Political Philosophy as a Critical Activity". (2002) 30 *Political Theory* 333.

¹⁶³ The idea of agonism is rooted in the twentieth century work of Arendt and Schmitt and will be explored through consideration of Australian political theory work on the ideal of reconciliation. See Chapter 7- Reconciliation, Recognition and Redistribution, especially the consideration of the writings of Andrew Schaap at section 7.2.

¹⁶⁴ Tully, *Strange Multiplicity*, *supra* note 122 at 18.

¹⁶⁵ Tully, "Middle Ground", *supra* note 160 at 155.

¹⁶⁶ Tully, James, "The Practices of Lawmaking and the Problem of Difference", in Omid Payrow Shabani, ed, *Multiculturalism and the Law: Critical Debates* (University of Wales Press, 2007) at 19-41; James Tully, "Consent, Hegemony and Dissent in Treaty Negotiations" in Jeremy Webber & Colin McLeod, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010).

¹⁶⁷ Tully's work as a whole reflects the importance of the "world-disclosing" function of political theory. This is the notion that "thinking differently" can pave the way for the establishment of justice in political practice. There are many parallels to the work of Nicolas Kompridis, "Disclosing Possibility: The Past and Future of Political Theory" (2005) 13 *International J of Philosophical Studies* 325 and "Normativizing Hybridity/Neutralizing Culture", (2005) 33 *Political Theory* 318. See also Jung, "Moral Force", *supra* note 103 at 257.

¹⁶⁸ Tully draws a contrast between internal and external self-determination, only the latter meeting a standard of normative justification. This is reflected in his generally negative response to calls for internal reconciliation. For example see James Tully, "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", in Curtis Cook & Juan D Landau, *Aboriginal Rights and Self-Government* (McGill-Queen's Press, 2000) at 41.

¹⁶⁹ *Ibid* at 52-53.

¹⁷⁰ Tully, James, "Aboriginal Peoples: Negotiating Reconciliation", in James Bickerton & Alain-G Gagnon, *Canadian Politics*, 3rd ed, 2001.

¹⁷¹ Tully, James, "Speaking Truth to Power", *supra* note 120; Gabrielle Slowey has also criticized the 2002 Paix des Braves between the Quebec government and James Bay Cree as not reflecting an agreement between equals. See Salée & Lévesque, "Representing Aboriginal Self-Government", *supra* note 42 for a detailed critique of this branch of the literature, including the analysis of Slowey.

¹⁷² Tully, "Consent, Hegemony and Dissent", *supra* note 166 stresses the creative use of the law to promote effective inter-cultural dialogue and highlights the "whole new set of negotiations" that has emerged from the Haida line of cases in Canada. He perceives that a path has opened up in Canada to a "much broader and complex space of negotiations."

¹⁷³ James Tully, "Re-Imagining Belonging: A Citizen Approach" in Ulf Hereroft and Mette Hjort, *The Postnational Self: Belonging and Identity* (University of Minnesota Press, 2002) at 161ff- contrasts the notion of recognition and affirmation with that of mis-recognition and exclusion.

¹⁷⁴ James Tully, "Philosophy in the Age of Pluralism" in James Tully & Daniel M. Weinstock, eds, *Philosophy in an Age of Pluralism* (Cambridge University Press, 1995) at 211- both the notions of recognition and affirmation and the notion of reconciliation play a prominent role in his analysis. Armitage, in his comment on "Consent, Hegemony and Dissent", *supra* note 166 at 125-126 goes so far as to comment on "the difficulty even Tully faces in making claims on behalf of Indigenous peoples without falling into juridical language."

¹⁷⁵ Tully, *Public Philosophy in a New Key*, *supra* note 119 at 279-280.

¹⁷⁶ *Ibid*.

¹⁷⁷ *Ibid*, vol 1 at 228.

¹⁷⁸ *Ibid* at 234.

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid* at 235.

¹⁸¹ *Ibid* at 237.

¹⁸² Tully acknowledges his debt to his work with the Royal Commission on Aboriginal Peoples at Tully, *Ibid Volume 1* at 5.

¹⁸³ Tully, *supra* note 176, *Volume 1* at 247.

¹⁸⁴ *Ibid* at 259.

¹⁸⁵ *Ibid* at 262.

¹⁸⁶ *Ibid* at 264.

¹⁸⁷ *Ibid* at 266.

¹⁸⁸ *Ibid* at 277.

¹⁸⁹ *Ibid* at 279. He is calling for, in the terms used by Christodoulidis, “Republican Constitutionalism”, *supra* note 42 at 8 - a “...politics that keeps the question of its revisability always open.”

¹⁹⁰ *Ibid* at 286.

¹⁹¹ Tully’s openness to the potentially useful contribution of the duty to consult is reflected most fully in “Consent, Hegemony and Dissent”, *supra* note 166.

¹⁹² For a good review of the work of Sousa Santos, see Heidi Libesman, “Between Modernity and Post-Modernity” (2004) 16 *Yale JL & Human* 413 (see especially 423 where she challenges his assertion that democracy and capitalism are necessarily incompatible)

¹⁹³ Tully, James, *The Unattained yet Attainable Democracy: Canada and Quebec Facing a New Century* (Les Grandes Conférences Desjardins, 2000)

¹⁹⁴ The United States Supreme Court states in *Kennedy v Mendoza-Martinez* (1963) 372 US 144 “While the Constitution protects against invasions of individual liberties, it is not a suicide pact.”

¹⁹⁵ In the *Van der Peet*, *supra* note 8 at para 28, the Supreme Court of Canada concluded that unilateral extinguishment of aboriginal rights was no longer possible.

¹⁹⁶ *Constitution Act, 1982*, *supra* note 1, s 35.1.

¹⁹⁷ The January 24, 2012 Crown-First Nations Gathering involved 170 chiefs, the Governor General, the Prime Minister and 12 federal Cabinet Ministers.

¹⁹⁸ The *Haida* line of cases addresses the need to ensure that processes of consultation meet a standard of reasonableness, including that the aboriginal parties to the consultation have an ability to effectively engage in the dialogue. This may require consideration of provision of funding. In the litigation context, special rules have been developed to provide advance costs to aid the ability of aboriginal groups to bring claims before the courts: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan Indian Band*]. The most recent case on advanced costs, though not involving an aboriginal claimant is: *R v Caron*, 2011 SCC 5 [*Caron*].

¹⁹⁹ Residential schools agreement and legislation, *supra* note 3.

²⁰⁰ The core importance of the theory of legitimacy will be addressed in the chapter dealing with the role and evaluation of the nation-state- see Chapter 10, especially section 10.2.

²⁰¹ Salée et al, “Quality of Life”, *supra* note 2 at 5. (surveying the influence of revitalization theory in Canadian academic circles). See especially Alfred, “Wasase: Indigenous Resurgences”, *supra* note 108 at 80 “Fundamentally different relationships between Onkwehonwe and Settlers will emerge not from negotiations in state-sponsored, and government-regulated processes, but after Onkwehonwe resistance against white society’s entrenched privilege and the unreformed structure of the colonial state.” In his view, “...change cannot be made from within the colonial structure.” (p. 83) This means that “...it must be recognized that the cultural basis of our existence as Onkwehonwe has been nearly destroyed, and that the cultural foundations of our nations must be restored or reimagined if there is going to be a successful assertion of political or economic rights. Aboriginal peoples must “...chose to turn away from the legacies of colonialism and take on the challenge of creating a new reality for ourselves and our people.”

²⁰² Taiaiake Alfred, *Peace, Power, Righteousness: an indigenous manifesto* (Don Mills, Oxford University Press, 1999) at 140; for other pessimistic assessments of the promises of aboriginal rights see Dimitrios Panagos, “Aboriginality”, *supra* note 84 at 34.

²⁰³ Alfred, *ibid* at 25; Vicki Hseuh, “Under Negotiation: Empowering Treaty Constitutionalism” in Levy, Jacob T, (with Iris Marion Young), *Colonialism and Its Legacies* (Lexington Books, 2011) at 72- draws on Alfred to argue that a stance of contestation might be more appropriate than one of negotiation.

²⁰⁴ Gordon Gibson, *A New Look at Canadian Indian Policy* (Fraser Institute, 2009) at 121.

²⁰⁵ There is a rich, emerging literature on what might be called the “resurgence paradigm”: Salée, “Quality of Life”, *supra* note 2 provides a very good summary of various remedial strategies, including individual and community healing. The latter is said to have “...tremendous purchase in the scholarship on Aboriginal quality of life” and p. 13 “...if they are properly empowered with the opportunity to reclaim control over their lives and social worth, if, in other words they can reclaim social cohesion”

²⁰⁶ Lynne Davis, *Alliances: Re/Envisioning Indigenous-non-Indigenous Relations* (Toronto: University of Toronto Press, 2010); Karena Shaw, *supra* note 43; Austen L Parrish, “Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights” (2006-2007) 31 *Am Indian L Rev* 291 at 312 (stressing the importance of alliances in the advocacy of indigenous rights); Jack Balkin, *Living Originalism* (Belknap Press, Harvard University Press, 2011) also places great importance on the role of social movements in the development of constitutional law in a particular country.

²⁰⁷ Alfred, *Peace, Power and Righteousness*, *supra* note 210 at 78 (inappropriateness of the concept of sovereignty in indigenous thought)

²⁰⁸ The work of Henderson will be considered in a more detailed fashion in Chapter 5.3 and the work of Borrows in Chapter 4. 5

²⁰⁹ Dale Turner, *Peace Pipe*, *supra* note 60 at 79-93, especially 72.

²¹⁰ Tracey Lindberg, *Critical Indigenous Legal Theory* (PhD, Faculty of Law, 2007) and Glen Sean Coulthard, *Subjects of Empire? Indigenous Peoples and the "Politics of Recognition" in Canada* (Doctor of Philosophy, Department of Political Science, University of Victoria, 2010).

²¹¹ Miller et al, *Discovering Indigenous Lands*, *supra* note 69.

²¹² Lindberg, "Critical Indigenous Legal Theory", *supra* note 210 at 9. See also Tracey Lindberg, "What do you call an Aboriginal Women with a Law Degree? Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out" (1997) 9 Can J of Women and the Law 301.

²¹³ Lindberg, *supra* note 210 at 13

²¹⁴ *Ibid* at 23.

²¹⁵ *Ibid* at 46.

²¹⁶ *Ibid* at 98.

²¹⁷ *Ibid* at 48.

²¹⁸ *Ibid* at 45.

²¹⁹ *Ibid*.

²²⁰ *Ibid* at 118.

²²¹ *Ibid* at 27, 49.

²²² *Ibid*.

²²³ As pointed out to me by Professor Brad Morse, this depiction of indigenous law as "fixed and immutable" raises questions about the capacity to change an indigenous rule, especially when it operates outside the realm of the sacred.

²²⁴ Lindberg, "Critical Indigenous Legal Theory", *supra* note 210 at 347.

²²⁵ *Ibid* at 124.

²²⁶ *Ibid* (It is important to note that this thesis uses some basic terminology in a fashion which is very different from Lindberg's approach. A strong distinction is made between rights that arise under Canadian mainstream law and those that arise under an indigenous legal system. In particular, the characterization of indigenous rights as rights that are "left over" is not endorsed in this work.)

²²⁷ *Ibid*.

²²⁸ It will be seen in Chapter 12, section 3 that this is a primary point of contrast between several important indigenous legal scholars in Canada.

²²⁹ Whiteness studies is a branch of critical race studies that examines the establishment and maintenance of white privilege and power. An interesting adaptation of this branch of study to indigenous issues can be found in Tsosie, "Whiteness", *supra* note 63.

²³⁰ Lindberg, "Critical Indigenous Legal Theory", *supra* note 210 at 348.

²³¹ Coulthard, "Subjects of Empire?", *supra* note 210.

²³² *Ibid*.

²³³ *Ibid* at 156.

²³⁴ *Ibid* at iv.

²³⁵ *Ibid* at 4.

²³⁶ *Ibid* at 10.

²³⁷ *Ibid*.

²³⁸ *Ibid* at 19.

²³⁹ *Ibid* at 10.

²⁴⁰ *Ibid* at 10, 23.

²⁴¹ *Ibid* at 16-17.

²⁴² *Ibid* at iii, 18.

²⁴³ *Ibid* at 211.

²⁴⁴ *Ibid* at 23.

²⁴⁵ *Ibid* at 33, 152.

²⁴⁶ *Ibid* at 35.

²⁴⁷ *Ibid* at 35; See also Alfred, "Wawase", *supra* note 65 and Cornthassel, "Re-Envisioning Resurgence", *supra* note 65.

²⁴⁸ Coulthard, “Subjects of Empire?”, *supra* note 210 at 36, 205.

²⁴⁹ *Ibid* at 65, 71, 156.

²⁵⁰ Coulthard, “Subjects of Empire”, 2010, *supra* note 65 at iv, 28, 31f., 36, 155, 160. See also Jung, “Moral Force”, *supra* note 103 at 68 for a description of the notion of pre-figuring politics.

²⁵¹ The notion of strategic essentialism will be considered in more detail in Chapter 3 of this thesis. At this point, it may be helpful to look at the observations of Schneiderman, “Theories of Difference”, *supra* note 42 at 47 who describes the notion of strategic essentialism as rooted in the work of feminist scholarship. See also Rita Dhamoon, *Identity/Difference Politics: How Difference is Produced and Why it Matters* (University of British Columbia Press, 2009) at 43-44, 130 for an assessment of Coulthard’s deployment of strategic essentialism.

²⁵² Coulthard, “Subjects of Empire?”, *supra* note 210 at 187.

²⁵³ *Ibid* at 194.

²⁵⁴ The issue of economic development will be addressed in the chapter of this thesis dealing with the duty to consult, specifically in Section 14.12.

²⁵⁵ Coulthard, “Subjects of Empire?”, *supra* note 210 at 65.

²⁵⁶ *Ibid* at 215.

²⁵⁷ *Ibid* at 211.

²⁵⁸ *Ibid* at 55.

²⁵⁹ Leanne Simpson & Kiera Ladner, eds, *This is our Honour Song: Resurgence, and the Protection of Indigenous Nations* (Arbeiter Ring Press, 2010).

²⁶⁰ Coulthard, “Subjects of Empire?”, *supra* note 210 at 205.

²⁶¹ The topic of causation of harm, including the linkage that is made between revitalization of traditions and avoidance of harm, will be addressed in Chapter 8

²⁶² Residential schools Agreement and legislation, *supra* note 3; Australian constitutional reform proposals will be considered in Chapter 7 of this thesis, and Woons, “Aboriginal Participation”, *supra* note 60.

²⁶³ Shaw, *Indigeneity and Political Theory*, *supra* note 43. (While Shaw’s work shall be considered at various parts of this thesis, at this stage the main aspect that is considered concerns the role that liberal thought played in the very formation of ideas about the early contact between aboriginal peoples and Europeans.)

²⁶⁴ *Ibid* at 17ff.

²⁶⁵ *Ibid* at 38.

²⁶⁶ *Ibid* at 34.

²⁶⁷ *Ibid* at 40-50.

²⁶⁸ *Ibid* at 42.

²⁶⁹ *Ibid* at 43.

²⁷⁰ *Ibid* at 50ff.

²⁷¹ *Ibid* at 126.

²⁷² *Ibid* at 114.

²⁷³ *Ibid* at 5.

²⁷⁴ *Ibid* at 12, 139-142, 148; Francis, “Canadian Indigenous Peoples” *supra* note 17 at 131-132 (Francis also argues that Tully links self-government to tradition with the result that no room is left for cultural change).

²⁷⁵ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 146.

²⁷⁶ The best example is the work of Frances Widdowson who claims to be writing from the political left but supports programmatic recommendations that are usually associated with the far right of the political spectrum. See Chapter 2.5.

²⁷⁷ Some of the distinguishing features of a classical liberal framework include focus on the individual as the centre of analysis, strong importance placed on economic welfare, the value of stability and the equal distribution of rights; see also: Turner, *Peace Pipe*, *supra* note 60 at 28 (notion of free-market competitiveness woven into liberal theory)

²⁷⁸ It has frequently been observed that key liberal theorists like Dworkin, Habermas and Rawls have shown little or no sympathy for claims of national minorities, including indigenous groups. Dworkin, “Justice for Hedgehogs”, *supra* note 63 at 381 refers to “...the supposed right of ethnocultural groups to govern themselves.” He also adds, at 381, that there must be a “plausible statute of limitations” for claims based on historical grievances. Martin Blanchard, “Recognition and the case of indigenous reparations: A Habermasian critique of Habermas, 2005, CRUEM, University of Montreal, accessed on-line; Jurgen Habermas, “Equal Treatment of Cultures and the Limits of Postmodern Liberalism” (2005) 13 *The Journal of Political Philosophy* 1, especially at 23-24- rejection of indigenous treaties; Kyla Reid, “Political Legitimacy”, *supra* note 84 at 104-107-argues that Habermas is not favourable to indigenous claims. Robert J Miller, “Collective Discursive Democracy as the Indigenous Right to Self-Determination” (2006-2007) 31 *Am Indian L Rev* 341 at 359- while Habermas has not been favourable to the

development of relations between collectives, Miller uses the notion of discursive democracy to develop a model of self-determination that offers an alternative to the “radically different perspectives” that divide activists and certain states. (see also p. 341) See generally, Elazor Barkin, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (John Hopkins, 2000)

²⁷⁹ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2002)

²⁸⁰ The wide-ranging works of Will Kymlicka on multiculturalism and liberal theory will be addressed in Chapter 3.

²⁸¹ Kymlicka’s Constraint, *supra* note 60.

²⁸² It should be noted that some of the writers considered in this section are not supportive of any constitutional recognition of indigenous difference. The best example will be the writings of Frances Widdowson, who sometimes writes collaboratively with Albert Howard.

²⁸³ There is a rich literature which develops the core ideas of traditional liberalism, though the following sources are useful entry points; Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 127 (Francis provides a useful overview of the key tenets of traditional liberal philosophy); William C Curtis, Members Only? Critical Response to Herr’s “Defence of non-Liberal Nationalism” (2007) 35 Political Theory 334 - renewed commitment to liberalism is “only legitimate path”.

²⁸⁴ Warry, *Ending Denial*, *supra* note 2 at 69 (“The Media: Sustaining Stereotypes”).

²⁸⁵ The classical liberal position on culture is that it is best regarded as part of the private life of citizens within a liberal democracy and not something that is legitimately protected or promoted by state action. Jung, “Moral Force”, *supra* note 103 at 12 provides an excellent overview of the “privatizing” orientation of much traditional liberal thought.

²⁸⁶ It will be argued in Chapter 3 of this thesis dealing with Culture that the work of Will Kymlicka has had a major impact on the shifting of the liberal paradigm with respect to culture and cultural protections.

²⁸⁷ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 351.

²⁸⁸ Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 54 and Dwight Newman, “Reconciliation: Legal Concept(s) and the Faces of Justice” in John Whyte, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008) (significant weight given to political stability). Laden, “Negotiation, Deliberation and the Claims of Politics”, *supra* note 90 at 207- (conservative arguments about the need for political stability)

²⁸⁹ Mel Smith, *Our Home or Native Land?: What government’s aboriginal policy is doing to Canada* (Crown Western, 1995)

²⁹⁰ Gibson, *New Look*, *supra* note 204 at 220 (the courts are making rather than interpreting the law); David Ritter, “The Ideological Foundations of Arguments about Native Title” (2010) 45 Aust J of Pol Sci 191 at 200 (“indefensible activism” by the courts is a frequent theme in Australian public discourse).

²⁹¹ The theme of dependency as the root cause of difficulties in aboriginal communities is at the heart of the work of Frances Widdowson, (considered in Chapter 2. 5), but the same themes can be found in the work of Calvin Helin, especially *Dances with Dependency: Out of Poverty Through Self-Reliance* (Orca Spirit Publishing, 2006). Dale Turner, “White and Red Paper Liberalism” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 163 argues that the “role of dependence” has been a constant theme since the release of the White Paper in 1969.

²⁹² A commonly cited article denouncing the philosophical soundness of collective rights is Michael Hartney, “Some Confusions Concerning Collective Rights” (1991) 4 Can J of Law and Jurisprudence 293; See also: Brian Pfflerle, “The Indefensibility of Post-Colonial Aboriginal Rights” (2007) 70 Sask L Rev 393; Gibson, *A New Look*, Chapter 4, *supra* note 204 at 107 ff; Jung, “Moral Force”, *supra* note 103 at 282; Robert Edger, “Collective Rights” (2009) 72 Sask L Rev 1 at 20, 22 (Edger’s analysis has close affinities to that of Courtney Jung in that the rights he describes are not universal rights but particular rights that depend on the circumstances that gave rise to the claim.); Will Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995) at 46-47.

²⁹³ Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen’s University Press, 2000) at 4-5.

²⁹⁴ This will be considered in Chapter 6.

²⁹⁵ Coulthard, “Subjects of Empire?”, *supra* note 210. See also: Coulthard, “Beyond Recognition”, *supra* note 65 at 196.

²⁹⁶ John Richards, *Creating Choices: Rethinking Aboriginal Policy* (CD Howe Institute, 2007)

²⁹⁷ Niall Ferguson, *Civilization: The West and the Rest* (The Penguin Press, 2011); Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50 at 145- assessing the analysis of Charles Taylor that modernity is “inescapable”.

²⁹⁸ Gilbert, Martin, *Churchill and the Jews: A Lifelong Friendship* (Henry Holt, 2007) at 120. For Colin M Coates, “Multiculturalism in Colonial Society: Canadian Examples from the 17th and 18th Century” in Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007) at 225 such

views were quite common and reflected the teleological view “...in which Europeans were inevitably destined to supplant the aboriginals.” A further example of such attitudes is a passage from Theodore Roosevelt which is reproduced in Washburn, “Moral and Legal Justifications”, *supra* note 68 at 23- “...the settler and pioneer have at bottom had justice on their side; this great continent could not have been kept as nothing but a game preserve for squalid savages...”

²⁹⁹ Flanagan, *First Nations? Second Thoughts*, *supra* note 293.

³⁰⁰ *Ibid* at 3.

³⁰¹ *Ibid* at 6.

³⁰² *Ibid* at 5-8.

³⁰³ *Ibid*.

³⁰⁴ *Ibid* at 194.

³⁰⁵ *Ibid*.

³⁰⁶ *Ibid*.

³⁰⁷ *Ibid* at 195.

³⁰⁸ *Ibid*.

³⁰⁹ *Ibid* at 195-196.

³¹⁰ *Ibid* at 196.

³¹¹ *Ibid* at 198.

³¹² Charles E Lindblom, “The Science of ‘Muddling Through’” (1959) 19 *Public Administration Rev* 79; Charles E Lindblom, “Still Muddling, Not Yet Through” (1979) 39 *Public Administration Rev* 517.

³¹³ A key theme in this branch of the literature is the importance of the maintenance and development of social capital though volunteer and economic interactions. The classic work is Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000). For an interesting critique of the idea of social capital see: Barbara Arneil, *The Problem with Social Capital* (Cambridge University Press, 2006) at 13-14, Arneil highlights tensions that often occur between social capital theory and multicultural and feminist theory.

³¹⁴ Flanagan, *First Nations? Second Thoughts*, *supra* note 293.

³¹⁵ *Ibid* at 231.

³¹⁶ *Ibid*.

³¹⁷ *Ibid*.

³¹⁸ *Ibid* at 232.

³¹⁹ *Ibid* at 232-233.

³²⁰ *Ibid* at 233.

³²¹ *Ibid*.

³²² *Ibid*.

³²³ *Ibid* at 197-198.

³²⁴ Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen’s University Press, 2010).

³²⁵ *Ibid* at vii.

³²⁶ *Ibid* at 8.

³²⁷ *Royal Proclamation, 1763*, RSC, 1985, App 11, No 1.

³²⁸ Flanagan et.al, *Beyond the Indian Act*, *supra* note 324 at 59.

³²⁹ *Ibid* at 58.

³³⁰ *Ibid* at 61.

³³¹ *Ibid* at 5.

³³² *Ibid* at 161.

³³³ *Ibid* at 5, 55, 177.

³³⁴ One of the flaws of the book is that it does not address the variation in practice across the country in terms of which order of government holds the underlying title to statutory Indian reserves. While it is stated, at page 5, that the provincial Crown generally holds the underlying title, this title has typically been transferred to the administration and control of the federal Crown in most jurisdictions other than Quebec.

³³⁵ Another potential problem with the book is that it limits its focus almost exclusively to statutory Indian reserves created under the Indian Act and does not address potential land holdings of aboriginal peoples under the doctrine of aboriginal title.

³³⁶ Pamela Palmetter, “Opportunity or Temptation: Plans for Private Property on Reserves Could Cost First Nations Their Independence” (2010) *The Literary Review of Canada*; Daniel Millette, “Review of Beyond the Indian Act” (2010-2011) *BC Studies* 103.

³³⁷ Gibson, *A New Look*, *supra* note 204 at v.

³³⁸ *Ibid* at v. 6.

³³⁹ *Ibid* at 5-6, 182-183.

³⁴⁰ *Ibid* at 11.

³⁴¹ *Ibid* at 21.

³⁴² *Ibid* at 37.

³⁴³ *Ibid* at 45.

³⁴⁴ *Ibid* at 50.

³⁴⁵ *Ibid* at 53; See also Bill Gallagher, *Resource Rulers: Fortune & Folly on Canada’s Road to Resources* (Self-Published, 2012).

³⁴⁶ *Ibid* at 50, 78ff.

³⁴⁷ *Ibid* at 89.

³⁴⁸ *Ibid* at 33, 98.

³⁴⁹ *Ibid* at 99.

³⁵⁰ *Ibid*.

³⁵¹ *Ibid* at 89.

³⁵² Gordon Gibson, “The Gitksan Alternative” (2010) 27 *Inroads* 38; see also Gibson, *A New Look*, *supra* note 204 at 195.

³⁵³ Gibson, *A New Look*, *ibid* at 35.

³⁵⁴ *Ibid* at 230.

³⁵⁵ *Ibid* at 198, 208, 219.

³⁵⁶ Richards, *Creating Choices*, *supra* note 296.

³⁵⁷ *Ibid* at 7.

³⁵⁸ *Ibid* at 23.

³⁵⁹ *Ibid* at 24.

³⁶⁰ The focus of Richards on key indicators of measurable social improvement is similar to the “closing the gap” initiative that has been introduced in Australia.

³⁶¹ Richards, *Creating Choices*, *supra* note 296 at 118.

³⁶² *Ibid*

³⁶³ *Ibid* at 77.

³⁶⁴ *Ibid* at 110.

³⁶⁵ *Ibid* at 117.

³⁶⁶ *Ibid* at 107-108.

³⁶⁷ *Ibid* at 128.

³⁶⁸ Frances Widdowson & Albert Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen’s University Press, 2008).

³⁶⁹ The writings of Widdowson have been highly controversial as evidenced by a series of acrimonious confrontations at the annual meetings of the Canadian Political Science Association, especially the 2008 meeting in Vancouver. This meeting received media coverage in “Tough critique or hate speech”, *Maclean’s* (February 25, 2009). The author was also present at the key meetings of the Association where these confrontations occurred.

³⁷⁰ Widdowson & Howard, *Disrobing the Aboriginal Industry*, *supra* note 368 at 190.

³⁷¹ Warry, *Ending Denial*, *supra* note 2 assesses the influence of the media on public debate about aboriginal issues in Canada. See also Carole Blackburn, “Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada” (2007) 13 *Journal of the Royal Anthropological Institute* (NS) 621-referring to the strong current of public opinion that poses barriers to some aboriginal claims. Peach, “Single Feather”, *supra* note 3 at 22 refers to the evidence of declining public support for aboriginal self-government. In his view, expressed at 23, Canadians “...do not have much sustained interest in, or commitment to, indigenous issues.” Ken Coates, “The Marshall Decision and Legal Mediation of Multiculturalism: A Reflection on the Future of Relations Between Indigenous and Transplanted Societies in Canada” in Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007) at 281 also concludes that what he calls “transplanted” Canadians are losing interest in aboriginal issues.

³⁷² Widdowson & Howard, *Disrobing the Aboriginal Industry*, *supra* note 368 at 252 and 254.

³⁷³ *Ibid* at 9.

³⁷⁴ *Ibid* at 13.

³⁷⁵ Frances Widdowson, *The Political Economy of Aboriginal Dependency: A Critique of the Royal Commission on Aboriginal Peoples* (PHD, York University, 2006) at 67, 70, 130, 215, 385 and 592 (only participation in the broader economy can achieve development).

³⁷⁶ Widdowson, *Aboriginal Dependency*, *ibid* at 74, 93, 240 "...clinging to cultural traditions can get in the way of economic development", 280 and 331 such characteristics include "...task orientation, kinship role and resistance to abstract forms of instruction." "inhibited by the kinship and subsistence basis of aboriginal identity"; Similar themes are developed in Widdowson & Howard, *Disrobing the Aboriginal Industry*, *supra* note 369 at 12-13, 158, 167 and 253. Jeff Spinner-Halev, "Multiculturalism and its Critics", in John S. Dryzek, Bonnie Honig and Anne Phillips, *Oxford Handbook of Political Theory* (Oxford University Press, 2009) at 554- refers to a tradition in political theory of arguments based on the learning styles of different groups but he refers to it as a flawed argument; Murphy, "Cultural Rights", *supra* note 98...development of certain characteristics, traits or habits of mind"; Malcolm Gladwell, *Outliers: The Study of Success* (Little-Brown, 2008) at 219; Jennifer Pitts, "Empire, Progress, and the 'Savage Mind'", in Jacob T Levy, *Colonialism and its Legacies* (Lexington Books, 2011) at 21, 42, 47- focus on cultural traits was a recurring idea in the thought of key representatives of the Scottish Enlightenment.. Some thinkers in that tradition doubted whether the capacity for abstract thought was universal and concluded that what they regarded as less developed societies were "...cognitively limited, mired in error or enslaved in superstition, incapable of the abstract thought necessary for abiding by contracts or treaties, 'untrustworthy' and lacking in 'character', and incapable of participating in their own governance not simply because of illiteracy or lack of education but because of civilizational deficiencies deeply rooted in individual's minds and characters." (p. 42) For those thinkers, the only path forward was unconditional assimilation. (p. 46) Lutz, "Makuk", *supra* note 88 presents a labour history of aboriginal peoples in British Columbia which demonstrates that the opinions expressed by Widdowson with respect to aboriginal difficulties with wage labour, seasonal focus, task orientation and being "lazy" were common features of non-aboriginal opinion.

³⁷⁷ Widdowson, *Aboriginal Dependency*, *ibid* at 12.

³⁷⁸ *Ibid* at 258- root problem is the collision of two cultures in uneven development; an idea drawn from Marxian approach to evolutionary theory.

³⁷⁹ *Ibid* at 67- sensitive assimilation policies could have avoided dependency and widespread social pathology; and at 321- success may depend on overthrowing traditions.

³⁸⁰ *Ibid* at 133- land claims and self government actually isolate aboriginal peoples from Canadian society

³⁸¹ *Ibid* at 449-massive differences in size, productivity and complexity; 443- economic self-sufficiency; 449- public sector not productive; 532; 553- most Canadians work in the service sector; 687- productive economic activity and government transfers are not compatible.

³⁸² *Ibid* at 379. See also: Widdowson & Howard, *Disrobing the Aboriginal Industry*, *supra* note 368 at 259.

³⁸³ Daniel Salée, "Indigenous Peoples and Settler Angst in Canada: A Review Essay" (2010) 41 *International Journal of Canadian Studies* 315 at 318 "...met with howls of indignation", 318- some expressed the view that it would have been better if the work had not been published, 322- falls seriously short, 322- resonated far more positively with the general public than critics would have liked; Robert Alexander Innes, "Native Studies and Cultural Preservation", *supra* note 65; Hadley Friedland & Frederick C DeCoste, "Not so Naked After All: A Review Essay of *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* by Frances Widdowson & Albert Howard" (2010) 41 *Ottawa L Rev* 59.

³⁸⁴ Widdowson, *Aboriginal Dependency*, *supra* note 375 at 358 (the primary evidence provided is an extremely dated report and some anecdotal evidence)

³⁸⁵ Coulthard, "Subjects of Empire?", *supra* note 210.

³⁸⁶ Widdowson, *Aboriginal Dependency*, *supra* note 368 at 442, 449, 497 and 504 (shift in focus to productivity).

³⁸⁷ *Ibid* at 578, 499, 553-554 (importance of the service sector).

³⁸⁸ *Supra* note 369 (media coverage of debate within the Canadian Political Science Association).

³⁸⁹ The issue of citizenship for indigenous people has generated a large critical literature: Turner, *Peace Pipe*, *supra* note 60 at 38, 40, 42-43 (critical of unthinking assumption that aboriginal people have become Canadian citizens); Siobhan Harty & Michael Murphy, *In Defence of Multicultural Citizenship* (University of Wales Press, 2005) at 51- challenge to the "integrative function" of citizenship and at 97 (developing Sharon Williams' notion of citizenship as "shared fate").

³⁹⁰ Cairns, *Citizens Plus*, *supra* note 51; Alan Cairns, "First Nations and the Canadian State: In Search of Co-Existence", 2002 Kenneth A. MacGregor Lecturer, Institute of Intergovernmental Relations, School of Policy Studies, Queen's University.

³⁹¹ Cairns, *ibid* This book generated a significant critical literature, including: Turner, *Peace Pipe*, *supra* note 60 at 43 (Turner is critical of Cairns for suggesting that aboriginal people in Canada adopt Canadian citizenship as their primary identity)

³⁹² Flanagan, *First Nations? Second Thoughts*, *supra* note 293 at 230-234 (implications of policy impasse)

³⁹³ Cairns, *Citizens Plus*, *supra* note 51 at 51-53, 70-71, 117, 128-132.

³⁹⁴ *Ibid* at 120, 132-136, 137 and 142.

³⁹⁵ *Ibid* at 22-23, 90 (Métis issues) and 184-185 (non-status Indians). Rather than developing a grand theory, most of the arguments are made through careful analysis of empirical trends. Cairns spends considerable time documenting the shift of aboriginal residence from reserve to urban areas and the proliferation of different forms of aboriginal identity, particularly the emergence of Métis and non-status identities.

³⁹⁶ While very little of *Citizen's Plus* is devoted to explicitly normative argument, Libesman, "Normative Integration", *supra* note 47 does a good job of drawing out several of the key normative themes that pervade the book.

³⁹⁷ In addition to Turner, *Peace Pipe*, *supra* note 60, key comments include: Hanvelt & Papillon, "Parallel or Embedded", *supra* note 108; Richard Devlin & Alexandra Dobrowolsky, "Citizens Supplicant? Alan Cairns' *Citizen Plus* and the Politics of Aboriginal Constitutional Scholarship" (2002) 7 *Rev Const Stud* 79; Libesman, "Normative Integration" *supra* note 47 (see especially her attribution of profound differences to the adoption of radically different theories of legitimacy) and Alfred, T, "Editorial: Of White Heroes and Old Men talking: Eastern Door" (2000) June 4th, 2000 (accessed online); Gordon Christie, "Review of Alan C. Cairns, *Citizen Plus*" (2002) 40 *Osgoode Hall LJ* 189.

³⁹⁸ Turner, *Peace Pipe*, *supra* note 60 at 6.

³⁹⁹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) develops a distinction between a right and the effective worth of a right. It is in this sense that the effective worth of indigenous citizenship has been degraded by legacies of discrimination and marginalization.

⁴⁰⁰ Damien Short, "Reconciliation and the Problem of Internal Colonialism" (2005) 3 *Journal of Intercultural Studies* 267 at 296 (extension of citizenship as a form of internal colonialism). See also: Damien Short, "Reconciliation, Assimilation, and the Indigenous Peoples of Australia" (2003) 24 *International Political Science Rev* 491 at 499; Lindsay Te Ata O tu McDonald & Paul Muldoon, "Globalization, Neo-Liberalism and the Struggle for Indigenous Citizenship" (2006) 41 *Aust J of Pol Sci* 209 at 209-211 (referring to the "ambiguous achievement" of citizenship); Richard Bellamy, *Citizenship: A Very Short Introduction* (Oxford University Press, 2008) at 71 argues that at a minimum there must be a general acceptance of social structures within a country. A different notion of citizenship based on treaty membership is developed in James (Sakej) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 6 *Citizenship Studies* 415. Tomsons & Mayer, "Dialogue" in Tomsons and Mayer, "Philosophy and Aboriginal Rights", *supra* note 106- in their critique of Paul Patton's attempt to use the Rawlsian tool of a veil of ignorance to construct a theory of aboriginal rights on the basis that it assume they are citizens of the society- "The very thing that could lead to justice is what the veil of ignorance would deny." (p. 170)

⁴⁰¹ The importance of inter-dependence is shared by most of the writers who will be considered in this thesis, though widely disparate implications are drawn from the fact of inter-dependence. For example, the model of inter-dependence that is developed by Tully is rather different from the model developed by Alan Cairns- see Cairns, *Citizens Plus*, *supra* note 51 at 75. See also: Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 117.

⁴⁰² Warry, *Ending Denial*, *supra* note 2 (careful study of media discourse on aboriginal issues)

⁴⁰³ *Supra* note 5 (empirical work of type and levels in disparity in key measures of quality of life)

⁴⁰⁴ Salée et al, "Quality of Life", *supra* note 2 at 1 ("...one of the country's most pressing public policy question"); in addition, the situation of aboriginal peoples is routinely singled out in the Annual Report of the Canadian Human Rights Commission as the single most pressing human rights issue in Canada. See *Canadian Human Rights Report on Equality Rights of Aboriginal Peoples*, ISBN 978-100-22172-4 (2013).

⁴⁰⁵ The deep binary divides that are present in debates about legal and constitutional issues pertaining to Section 35 will be considered in Part II of this work.

⁴⁰⁶ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, 2006).

⁴⁰⁷ Halley does not appear to explicitly discuss indigenous issues.

⁴⁰⁸ Halley, *Split Decisions*, *supra* note 406 at 7-8.

⁴⁰⁹ Jack Balkin, "Nested Oppositions" (1990) 99 *Yale L Rev* 1660.

⁴¹⁰ These issues will be addressed in Section 11.6

⁴¹¹ Amanda Anderson, *The Way we Argue Now: A Study in the Culture of Theory* (Princeton, 2006) .

⁴¹² This is particularly interesting as it has been previously noted that Habermas is not generally regarded as particularly supportive of accommodation of cultural or sub-national claims, *supra* note 278.

⁴¹³ The maxim that the perfect can be the enemy of the good, often attributed to Voltaire, captures the notion that excessive focus on achieving perfection in an imperfect world can occlude opportunities to achieve good results.

⁴¹⁴ Duncan Ivison, *Postcolonial Liberalism* (Cambridge, 2002). Another similar argument is made by Salée et al, “Quality of Life”, *supra* note 2 (two branches of thought are fundamentally at odds- we “...must transcend this choice”; he also draws on Foucault’s observation that power is never one-sided to conclude it “...cannot be boiled down to a simple oppositional binary”); See also: Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 312; There are many examples of choices being presented in a highly binary fashion- e.g. Peter W Hutchins, “Cede, Release and Surrender: Treaty-Making, the Aboriginal Perspective and the Great Judicial Oxymoron or Let’s Face It- It Didn’t Happen” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 441- “...must choose between plodding forward or engaging in transformative reappraisal.” On the other hand, Leroy Little Bear, “An Elder Explains Indigenous Philosophy and Indigenous Sovereignty” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 6, argues the English language is all about binaries, in contrast to indigenous languages which are about relationship. Kevin Bruynell, *The Third Space of Sovereignty*, *supra* note 63 at 217 argues that indigenous people should refuse a false choice presented by an imperial binary based on distinctions between “assimilation or secession, inside or outside, modern or traditional”. He argues for a “third space of sovereignty” that falls between these extremes. (page xvi) and he “...refuses the idea that the options available result in either the destruction of state sovereignty or the denial of indigenous sovereignty.” Eric Jenson, *American Indian Tribes and Secession* (1993-1994) 29 Tulsa L J 385 at 391 argues that it is unreasonable to present a binary choice between race-based separatism or cultural genocide.

⁴¹⁵ Ivison, *Postcolonial Liberalism*, *ibid*.

⁴¹⁶ *Ibid* at 15.

⁴¹⁷ Arthur Glass, “Review of Post-Colonial Liberalism” (2003) 30 Australian Humanities Review (on-line publication).

⁴¹⁸ Nussbaum, Martha C, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press, Harvard, 2006), especially at ix (Nussbaum is highly critical of the Rawlsian version of the social contract approach and its ability to capture dimensions of moral experience)

⁴¹⁹ Ivison, *Postcolonial Liberalism*, *supra* note 414 at 18, 95ff, especially 99ff.

⁴²⁰ *Ibid* at 55-56.

⁴²¹ *Ibid* at 112.

⁴²² *Ibid* at 135.

⁴²³ *Ibid* at 141.

⁴²⁴ *Ibid* at 160.

⁴²⁵ *Ibid* at 161.

⁴²⁶ *Ibid* at 162.

⁴²⁷ *Ibid* at 165.

⁴²⁸ The search for a solution to effective dialogue within a constitutional system is deeply related to the notions of constitutional patriotism and shared fate. Nussbaum, *Frontiers of Justice*, *supra* note 418 at 6- capacities approach said to generate a form of attachment which resembles constitutional patriotism; Woons, “Aboriginal Participation”, *supra* note 60 at 9-1 calls for the development of a “...mutual sense of positive identity with the state without demonstrating a shared identity”; John Gray, *Two Faces of Liberalism* (New Press, 2000) at 121 suggests that “...It means having common institutions through which the conflicts of rival values can be mediated.” Laden, “Negotiation, Deliberation and the Claims of Politics”, *supra* note 90 at 213- argues that “...What leads citizens to feel allegiance to their shared political society is the precisely the way the society leaves room for those demands even when it does not satisfy them.”; David Miller, “Nationalism”, ch 25, Oxford Handbook at 529,537; However, Alain G Gagnon & Raffaele Iacovino, *Federal Citizenship and Quebec: Debating Multiculturalism* (University of Toronto Press, 2007) at 148 warn that constitutional patriotism might be somewhat harder to generate in a country where the constitution has come to be regarded as “something of a nuisance”!

⁴²⁹ Ivison, *Postcolonial Liberalism*, *supra* note 414 at 166.

⁴³⁰ Lindberg, “Critical Indigenous Theory”, *supra* note 211 at 125.

⁴³¹ *Haida*, *supra* note 13.

⁴³² Grace Li Xiu Woo, *Ghost Dancing with Colonialism*, *supra* note 47; Hoehn, *Reconciling Sovereignties*, *supra* note 47.

⁴³³ Halley, *Split Decisions*, *supra* note 406.

⁴³⁴ Recall reference to vantage point in *Van der Peet*, *supra* note 8.

⁴³⁵ Kymlicka, *Multicultural Odysseys*, *supra* note 43; Will Kymlicka, *Politics in the Vernacular* (Oxford University Press, 2001); Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford University

Press, 1998); Will Kymlicka, *Multicultural Citizenship*, *supra* note 292; Will Kymlicka, *Liberalism, Community, and Culture*, *supra* note 60.

⁴³⁶ This certainly complicates and greatly extends the vision of classical liberalism, but some argue it does not go far enough in pressing a deeper legitimacy challenge.

⁴³⁷ The philosophical status of groups or collective rights is the subject of a huge literature but will not be considered extensively in this thesis. As the primary focus of the work is the Canadian law of aboriginal rights, and as the concept of a collective right is solidly established, there will be no need to consider more skeptical arguments. For arguments in favour of the separate existence of collective rights see Dwight Newman, *Community and Collective Rights*, D. Phil (Laws) University of Oxford, 2005. For arguments against see Hartney, "Some Confusions Concerning Collective Rights", *supra* note 292.

⁴³⁸ Kymlicka, *Multicultural Citizenship*, *supra* note 435 at 116-129- resistance to historical claims.

⁴³⁹ Will Kymlicka, "The Good, the Bad, and the Intolerable: Minority Groups Rights" (1996) 43 *Dissent* 22; Will Kymlicka, "Theorizing Indigenous Rights" (1999) 49 *UTLJ* 281 ; Will Kymlicka, "Liberalism, dialogue and multiculturalism" (2001) 1 *Ethnicities* 128; Will Kymlicka, "The Rights of Minority Cultures: Reply to Kukathas" (1992) 20 *Political Theory* 140.

⁴⁴⁰ J Danley, "Liberalism, Aboriginal Rights, and Cultural Minorities", (1991) 20 *Philosophy and Public Affairs* 108; Perry Keller, "Justice and Ethnicity: review article for *Multicultural Citizenship*" (1996) 59 *Modern Law Rev* 903; Richard Spaulding, "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997) 47 *UTLJ* 35; Eric Metcalfe, "Illiberal Citizenship? A Critique of Will Kymlicka's Liberal Theory of Minority Rights" (1996) 22 *Queen's L J* 167; Bruce Walker, "Plural Cultures, Contested Territories: A Critique of Kymlicka" (1997) 30 *Can J of Pol Sci* 211; Joseph R Carens, "Liberalism and Culture" (1997) 4 *Constellations* 35; Robert Murray, "Liberalism, Culture, Aboriginal Rights: In Defence of Kymlicka" (1999) 29 *Can J of Philosophy* 109; Ivison et al, *Political Theory and the Rights of Indigenous Peoples*, *supra* note 67 at 6-7- the introduction provides a balanced assessment of the ideal of liberal neutrality and the efforts of Kymlicka to develop a theory of special rights that is consistent with liberalism. A recent assessment of the liberal response to Kymlicka's line of argument can be found in Christie, "Critical Indigenous Philosophy" in Tomsons and Mayer, *supra* note 63 at footnote 16.

⁴⁴¹ Laden & Owen, "Introduction", *supra* note 71 at 9.

⁴⁴² While it is a core argument in all of his work, the basic argument about the partiality of liberal states is developed by Kymlicka in *Liberalism, Community, and Culture*, *supra* note 60. As noted by Ritter, "Ideological Foundations", *supra* note 290 at 194 "The precise relationship between Indigenous groups' rights and liberalism is the subject of vast scholarly and political debate."

⁴⁴³ Laden & Owen, "Introduction", *supra* note 71 at 6-7.

⁴⁴⁴ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 30.

⁴⁴⁵ Stéphane Courtois, "A Liberal Defence of the Intrinsic Value of Cultures" (2008) 7 *Contemporary Political Theory* 31; Spinner-Halev, "Enduring Injustice", *supra* note 17- develops the contrast between intrinsic and instrumental respect for culture; Festenstein, *Negotiating Diversity*, *supra* note 60 at 43 ff ("good lies n participating in the practice").

⁴⁴⁶ Festenstein, *Negotiating Diversity*, *ibid*.

⁴⁴⁷ Kymlicka, "Liberalism, Community and Culture", *supra* note 60 (especially *Liberalism, Community, and Culture*; Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 30 (provides a background of meaning for members)

⁴⁴⁸ Festenstein, *Negotiating Diversity*, *supra* note 60 at 17-18.

⁴⁴⁹ One important area of critique focuses on the central role that is accorded to the concept of culture. For example, Harty & Murphy, "In Defence of Multicultural Citizenship", *supra* note 389 argue that a theory of multicultural justice ought not to be founded on cultural difference at all. This issue will be discussed in more detail in Chapter 12 of this thesis. Harty and Murphy argue, at 66-67, that "...A most just framing of the issue is to ask how the sub-state entities and the state can mutually accommodate their competing claims to self-determination." Others focus on the allegedly under inclusive extension of cultural rights, see Danley, "Liberalism, Cultural Rights and Internal Minorities", *supra* note 440

⁴⁵⁰ Turner, *Peace Pipe*, *supra* note 60.

⁴⁵¹ The key difference between the two categories is that cultural minorities are generally seeking accommodation as opposed indigenous peoples who additionally seek to secure a measure of self-government. Kymlicka, "Theorizing Indigenous Rights", *supra* note 439.

⁴⁵² Some critiques, e.g. Danley, "Liberalism, Cultural Rights and Internal Minorities", *supra* note 440 argue that Kymlicka gives insufficient weight to the claims of cultural minorities.

⁴⁵³ Some critiques, e.g. Tierney, *Constitutional Law and National Pluralism*, *supra* note 42 argue that Kymlicka gives insufficient weight to the claims of national minorities.

⁴⁵⁴ Indigenous critique of the notion of societal culture most frequently concentrates on the perceived tendency to equate indigenous claims with the claims of cultural groups within a liberal democracy, rather than as political groups with a continued claim to sovereignty. In his most recent book *Multicultural Odysseys*, *supra* note 45 at 33, Kymlicka acknowledges this critique and refers to the development of a philosophy of indigenism that contrasts with multiculturalism.

⁴⁵⁵ The distinction between external protections and internal claims has been a key component of Kymlicka's argument since the publication of *Liberalism, Community, and Culture*, *supra* note 60.; Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 6; Dwight Newman, "Putting Kymlicka in Perspective: Canadian Diversity and Collective Rights" in Tierney, Stephen, ed, *Accommodating Cultural Diversity* (Ashgate, 2007) argues that the distinction between internal and external restrictions is not stable, particularly in light of the difficulty in distinguishing a member from a non-member (especially at p. 64).

⁴⁵⁶ While Kymlicka has consistently maintained the illegitimacy of internal restrictions within indigenous groups, he has strongly counselled against intervention in their internal affairs, preferring advocacy and international monitoring. Kymlicka "The Good, the Bad, the Intolerable", *supra* note 439; Kymlicka, *Multicultural Citizenship*, *supra* note 292 at 169; Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 93, 153. See also Andrew Volmert, "Indigenous Self-Determination and Freedom from Rule" (2010) 19 *The Good Society* 53 at 57. (Volmert stresses the importance of providing deference to the decisions of indigenous societies); Duncan Ivison, "The Logic of Aboriginal Rights" (2003) 3 *Ethnicities* 321 at 332 presents arguments in support of a stance on non-interference. Caroline Dick, "The Politics of Intragroup Difference: First Nations Women and the Sawridge" (2006) 39 *CJPS* 97 explores the exception noted by Kymlicka for cases where the very existence of the group is threatened.

⁴⁵⁷ A further difficulty arises in trying to develop a clear distinction between external protections and internal restrictions, in part because the very definition of who is a member, and therefore on the inside, is often highly contested. See Newman, "Putting Kymlicka in Perspective", *supra* note 455.

⁴⁵⁸ Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 95 ("...contained within the boundaries of liberal democratic constitutionalism").

⁴⁵⁹ See Chapters 3 and 7 for assessment of authorities on the perceived pattern of misrecognizing aboriginal groups as cultural minorities.

⁴⁶⁰ Canadian equality law has developed through a rich series of decisions from the Supreme Court of Canada on Section 15 equality rights, as well as in equality commitments in other instruments such as federal and provincial human rights codes. The key cases, reflecting the commitment to the ideal of substantive equality, and the continuing debate about what precisely that means, are *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*], *R v Law*, 2002 SCC 10 [*Law*] and *R v Kapp*, 2008 SCC 18 [*Kapp*]. A recent case, *Quebec (AG) v A*, 2013 SCC 5, [2013] 1 SCR 61 is important for its suggestion that a broader range of justificatory circumstances will have to be considered at the stage of Section 1 justification rather than within the Section 15(1) analysis of discrimination.

⁴⁶¹ The evolution of Kymlicka's work, largely towards an empirical focus in different regional contexts, is seen in *Multicultural Odysseys*, *supra* note 45. In this book, at page 45, he argues that multicultural accommodations are frequently supported because they are perceived to promote universal norms.

⁴⁶² Barry, *Culture & Equality*, *supra* note 279 at 258 (appeal to culture is alleged to add nothing to support any particular concrete measure); Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 109.

⁴⁶³ Chandran Kukathas, *Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, 2003)

⁴⁶⁴ Newman, "Kymlicka in Perspective", *supra* note 455; Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50.

⁴⁶⁵ Monique Deveaux, *Gender and Justice in Multicultural States* (Oxford University Press, 2006); Monique Deveaux, "A Deliberative Approach to Conflicts of Culture" (2003) 31 *Political Theory* 780.

⁴⁶⁶ Shiraz Dhossa, "Liberal Imperialism? Natives, Muslims and Others" (2002) 30 *Political Theory* 738; and Shiraz Dhossa, "Liberal Posturing: Multiculturalism's Discreet Charm" (2001) 22 *Journal of Multilingual and Multicultural Development* 447.

⁴⁶⁷ Multinational theory is well illustrated in the work of Stephen Tierney, *Constitutional Law and National Pluralism*, *supra* note 42. He focuses on the existence of several distinct nations within the borders of a single nation-state, and assesses the normative and political implications for those nations.

⁴⁶⁸ Difference theory focuses on the accommodation of cultural and other differences and the structural factors that lead different social groups to experience exclusion and discrimination. Key authors include Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) and Courtney Jung, "Moral Force of Indigenous Politics",

supra note 103. See also Iris Marion Young, in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) at 60. The work of Avigail Eisenberg can also be situated within the broad parameters of difference theory, though she is also heavily influenced by pluralist thought: see Avigail Eisenberg, "Reasoning About the Identity of Aboriginal Peoples" in Stephen Tierney, ed, *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice* (Ashgate, 2007) at 79; Avigail Eisenberg "Reasoning about identity: Canada's distinctive culture test" in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006); Avigail Eisenberg, "Diversity and Equality: Three Approaches to Culture and Sexual Difference" (2003) 11 *Journal of Political Philosophy* 41.

⁴⁶⁹ Modus vivendi approaches, such as that of John Gray, offer the recommendation that the best way to deal with challenges of cultural diversity is to focus on practical accommodations rather than a futile search for an elusive consensus. See Gray, "Two Faces of Liberalism", *supra* note 438 at 101ff, especially at 105 where Gray describes liberalism's future as involving turning away from the idea of universalism or rational consensus towards one of modus vivendi. See also: Jacob Levy, "Contextualism, constitutionalism, and modus vivendi approaches" in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) at 173, Ivison, "Logic of Aboriginal Rights", *supra* note 456 at 336- aboriginal rights analysis very frequently leads to a recommendation for a modus vivendi approach.

⁴⁷⁰ Young, *Responsibility for Justice*, *supra* note 468.

⁴⁷¹ Gray, "Two Faces of Liberalism", *supra* note 438.

⁴⁷² Andrew Schaap, *Political Reconciliation* (Routledge, 2005).

⁴⁷³ Carens, "Culture, Citizenship and Community", *supra* note 50 at 556; Spinner-Halev, "Enduring Injustice", *supra* note 17 is also critical of the reluctance of Kymlicka to place his work in a broader theory perspective.

⁴⁷⁴ Courtney Jung, "Moral Force of Indigenous Politics", *supra* note 103.

⁴⁷⁵ Festenstein, *Negotiating Diversity*, *supra* note 60 at 162.

⁴⁷⁶ *Ibid* at 7.

⁴⁷⁷ The contributions of Benhabib and Scott are particularly notable: Seyla Benhabib, *The Claims of Culture, Equality and Diversity in the Global Era* (Princeton University Press, 2002), *Another Cosmopolitanism*, *supra* note 58; David Scott, "Culture in Political Theory", (2003) 31 *Political Theory* 93.

⁴⁷⁸ Barry, *Culture & Equality*, *supra* note 279 at 258.

⁴⁷⁹ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 29.

⁴⁸⁰ Benhabib, *supra* note 477.

⁴⁸¹ Rita Dhamoon, *Identity/Difference Politics*, *supra* note 251 at 360 (use of essentialized visions of culture as a "radical critique") and at p. 369- (foundation of strategic essentialism in the work of Spivak); Jocelyn Maclure, "Définir les droits constitutionnels des peuples autochtones: La "nouvelle" approche du Québec" 2005) 7 *éthique publique* 1 is also concerned about the risk of essentialism.; Ron Mallon, "Human Categories Beyond Non-Essentialism" (2007) 15 *Journal of Political Philosophy* 146; Andrew Mason, "Multiculturalism and the critique of essentialism" in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) at 221; Laden & Owen, "Introduction", *supra* note 71 at 17; Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 100 (construction of an indigenous identity through oppositional practices); Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 66, 239.

⁴⁸² The important body of feminist literature dealing with indigenous claims and intra-group relations will be discussed in Chapter 17.2.

⁴⁸³ Festenstein, *Negotiating Diversity*, *supra* note 60 at 17-18- (Kymlicka tends to eschew the language of identity)

⁴⁸⁴ Panagos, *supra* note 84.

⁴⁸⁵ Shaw, *Indigeneity and Political Theory*, *supra* note 43; Alfred, *supra* note 65 and Cornthassel, *supra* note 65.

⁴⁸⁶ Gibson, *A New Look*, *supra* note 204 at 200; Patton, "Political Liberalism and Indigenous Rights", *supra* note 54 at 152- also raises the empirical question of the extent to which indigenous cultures have survived. Christie, "Governance", *supra* note 113 at xiii quotes Ghislain Otis on the irrefutably modern characteristics of contemporary Aboriginal life.

⁴⁸⁷ Newman, "Reconciliation", *supra* note 288.

⁴⁸⁸ These issues can arise in legal analysis in relation to such doctrines as continuity and abandonment and is deeply related to the temporal analysis of when particular facts must be established to support a rights claim. It will be seen that this constellation of issues marks one of the most fundamental differences between the jurisprudence in Canada and Australia.

⁴⁸⁹ While Salée, "Quality of Life", *supra* note 2 at 2 argues that the cultural gap has indeed closed, the later detailed analysis, in Chapter 5, of the work of Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 171-

173 suggests that the existence of a closing gap does not raise moral considerations for at least some political theorists.

⁴⁹⁰The link between indigeneity and race has been a particularly important source of tension in the United States. After much uncertainty, the United States Supreme Court has tended to characterize Indian tribal claims as having a political rather than a racial foundation. See Constance McIntosh, “The Reconciliation Doctrine in Chief Justice McLachlin’s Court: From a “Final Legal Remedy” to a “Just and Lasting” Process” in Wright, David & Dodek, Adam, eds, *Public Law at the McLauchlin Court: The First Decade* (Irwin Law, 2011) and Sébastien Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queens University Press, 2009). As McIntosh notes in a case comment on the 2008 term of the Supreme Court of Canada, the loose language used by the Supreme Court of Canada in *Kapp*, *supra* note 460 describing indigenous claims in racial language might reinvigorate this debate in Canada; Constance McIntosh, “Developments in Aboriginal law: The 2008-2009 Term” (2009) 48 Sup Ct L Rev (2d) 1 at 2ff.

⁴⁹¹ Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics and Violence against Women” (1991) Stanford L Rev 1241.

⁴⁹² Charles Mills, “Multiculturalism as/and/or anti-racism?” in Laden and Owen, “Multiculturalism and Political Theory”, *supra* note 74 at 89.

⁴⁹³ *Ibid* at 94.

⁴⁹⁴ A comprehensive exposition of this tragic event in American 19th century history can be found in Lisa Ford, *supra* note 80.

⁴⁹⁵ Mills, “Multiculturalism”, *supra* note 74 at 97.

⁴⁹⁶ *Ibid* at 98.

⁴⁹⁷ Lisa Ford, *supra* note 80.

⁴⁹⁸ Mills, “Multiculturalism”, *supra* note 74 at 109.

⁴⁹⁹ *Ibid* at 113.

⁵⁰⁰ *Ibid*.

⁵⁰¹ *Ibid*.

⁵⁰² Grammond, “The Reception of Indigenous Legal Systems in Canada” in Breton, Albert, ed, *Multijuralism: Manifestations, Causes, and Consequences* (Ashgate Publishing, 2009) at 60, 64 and 66- linking the broad modern concept of culture with the concern that essentialized versions of a particular culture can emerge in practice.

⁵⁰³ *Van der Peet*, *supra* note 8.

⁵⁰⁴ Mason, “Critique of Essentialism”, *supra* note 481.

⁵⁰⁵ *Ibid*.

⁵⁰⁶ Coulthard, “Beyond Recognition”, *supra* note 65; Glen Coulthard, “Subjects of Empire?”, *supra* note 210; Rita Dhamoon, *supra* note 251; Paul Muldoon, “Between Speech and Silence: The Postcolonial Critic and the Idea of Emancipation” (2001) 2 Critical Horizons 33 at 34, 46- strategic essentialism.

⁵⁰⁷ Shaw, *supra* note 43 at 100.

⁵⁰⁸ *Van der Peet*, *supra* note 8.

⁵⁰⁹ Murphy, “Culture and the Courts”, *supra* note 98.

⁵¹⁰ *Ibid* and Neil Vallance, “The Misuse of “Culture” by the Supreme Court of Canada” in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006)

⁵¹¹ Michael Asch, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007); Michael Asch, “From Terra Nullius to Affirmation”, *supra* note 97; Michael Asch, “The Judicial Conception of Culture After Delgamuukw” (2000) Rev of Const Stud 119. An interesting legal analysis turning on the tendency of the legal system to reduce claims to narrow conceptions of “ways of life” is seen in Constance McIntosh, “Judging Culture”, *supra* note 74.

⁵¹² Ronald Niezen, “Culture and the Judiciary”, *supra* note 97 racist evolutionary theory v. cultural relativism; Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 12, 139-142, 148. (Tully adopts an unduly culturalist approach). A similar view is expressed by Steven Lukes, *Liberalism and Cannibals: The Implications of Diversity* (Verso, 2005) at 32- arguing that Tully develops an overly narrow view of culture. A related critique comes from Schneiderman, “Theories of Difference”, *supra* note 42 at 43-45 who argues that Tully places undue reliance on the Marshall decisions that rely on a discovery doctrine. In his view, Tully “...misreads the legal opinions which emerge from, and thereby misplaces his faith in the courts of the colonizer.”

⁵¹⁴ *Ibid*.

⁵¹⁵ Jung, “Moral Force of Indigenous Politics”, *supra* note 103.

⁵¹⁶ Laden & Owen, “Negotiation, Deliberation and the Claims of Politics”, *supra* note 90.

⁵¹⁷ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 in the Preface to the book.

⁵¹⁸ Jung, Courtney, “Moral Force of Indigenous Politics”, *supra* note 103 at xv.

⁵¹⁹ *Ibid* at 12.

⁵²⁰ *Ibid* at 14.

⁵²¹ *Ibid* at 15-16.

⁵²² *Ibid* at 16.

⁵²³ *Ibid* at 17.

⁵²⁴ An assessment of these four elements of Jung’s theory goes beyond the scope of this work but each element plays an important role in stimulating thinking about the evolution of the Canadian jurisprudence on aboriginal rights under Section 35. For example, the explanation for the importance of procedural rights provides a partial explanation for the development of the *Haida* line of cases in Canada. See also Kymlicka, “Multicultural Odysseys”, *supra* note 45 at 240.

⁵²⁵ Jung, *Moral Force of Indigenous Politics*, *supra* note 103 at 21.

⁵²⁶ *Ibid* at 25.

⁵²⁷ *Ibid*.

⁵²⁸ *Ibid* at 26.

⁵²⁹ *Ibid* at 27, 235.

⁵³⁰ *Ibid* at 28.

⁵³¹ *Ibid* at 33.

⁵³² *Ibid* at 57. The history of the shifting definition of Indian, particularly in relation to responses to equality rights challenges, is set out in the *McIvor* decision (*McIvor v Canada*, 2009 BCCA 152)

⁵³³ The ethnogenesis of the Métis as a separate aboriginal group in Canada is addressed in key decisions such as *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207, *Daniels*, *supra* note 40, *Manitoba Métis Federation*, *supra* note 13 and *R v Hirsekorn*, 2013 ABCA 242, leave to appeal to SCC refused, 35558 (January 23, 2014)

⁵³⁴ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 25-26, 73, 273.

⁵³⁵ *Ibid* at 73, 184 .

⁵³⁶ *Ibid* at 235.

⁵³⁷ *Ibid* at 238.

⁵³⁸ *Ibid* at 235ff. For a more complete discussion of Waldron’s arguments see Chapter 6.

⁵³⁹ *Ibid* at 242.

⁵⁴⁰ *Ibid* at 241.

⁵⁴¹ Spinner-Halev, “Enduring Injustice”, *supra* note 17.

⁵⁴² Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 242-243.

⁵⁴³ *Ibid* at 252, 253, 256, 292 - the call for a statute of limitations does not sit well with the focus on historical exclusion by state action, however, it is consistent with her strong emphasis on dealing with the modern consequences of those exclusions.

⁵⁴⁴ *Ibid* at 247-248.

⁵⁴⁵ *Ibid* at 243.

⁵⁴⁶ *Ibid* at 253; This openness to a broader range of claims is paralleled by the work of Iris Marion Young, *Justice and the Politics of Difference* (Princeton, 1990) at 183 stresses the importance of balancing special rights with opportunities for full inclusion within the broader society.

⁵⁴⁷ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 253.

⁵⁴⁸ *Ibid* at 256.

⁵⁴⁹ *Ibid* at 260.

⁵⁵⁰ *Ibid* at 38, 260, 274, 276. Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 138 (Francis also emphasizes the role that a history of state exclusion and opposition to the state can play in the formation of identity); Salée & Lévesque, “Representing Aboriginal Self-Government”, *supra* note 42 at 126- “...has helped to forge their identities”

⁵⁵¹ Jung, “Moral Force of Indigenous Politics”, *ibid* at 235.

⁵⁵² *Ibid* at 282.

⁵⁵³ *Ibid* at 292.

⁵⁵⁴ *Ibid* at 293.

⁵⁵⁵ *Ibid*.

⁵⁵⁶ *Ibid* at 252, 253, 256, 292. These themes will be developed more thoroughly in the analysis of the Section 35 constitutional framework in Part II of this thesis.

⁵⁵⁷ Eisenberg, Avigail, “Review of The Moral Force of Indigenous Politics” (2009) 23 Ethics and International Affairs 71 at 71. A similar point of view is expressed by Andrew Schaap, “The Absurd Proposition of Aboriginal Sovereignty” in Andrew Schaap, ed, *Law and Agonistic Politics* (Farnham, Ashgate, 2009) at 220- “Aboriginal people must rightly insist that they do not owe their identity to the settler society and that it was their identity as traditional owners of the land that they were asserting or reclaiming”. Muldoon, “Between Speech and Silence”, *supra* note 506 at 35 adds “To treat Aboriginality as nothing more than an effect of power, is to forfeit the very thing that makes the struggle for indigenous rights comprehensible and worthwhile.”

⁵⁵⁸ The author was present at a panel discussion at the Demcon conference (The Consortium for Democratic Constitutionalism) at the University of Victoria in 2008 that featured numerous critical questions concerning critical liberalism primarily on the core argument that state interventions constitute indigenous identity. Muldoon, “Between Speech and Silence”, *supra* note 506- seems to be raising similar concerns; Alfred, “Wawase”, *supra* note 108 at 80 expresses criticism of any approach to indigenous identity that expresses aboriginality in terms that are defined by opposition to the state.

⁵⁵⁹ This issue will be addressed in Chapter 12 of this thesis (*Van der Peet* and its critics).

⁵⁶⁰ There are a number of indigenous scholars conducting important work on pluralism, most notably Borrows, *Canada’s Indigenous Constitution*, *supra* note 93.

⁵⁶¹ This scholarship is also considered in Chapter 2.

⁵⁶² See in particular Chapter 2.3, 4.5 and 4.6.

⁵⁶³ These issues are discussed in Chapter 4 of this thesis.

⁵⁶⁴ These issues are discussed in Chapter 13 of this thesis.

⁵⁶⁵ These issues are discussed in Chapter 17.1 of this thesis.

⁵⁶⁶ Timothy Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Determination* (University of British Columbia Press, 2003)

⁵⁶⁷ Legal pluralism tends to focus on the co-existence of different legal systems in the same territory. See Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375 (Tamanaha notes that legal pluralist scholarship has been plagued by recurring disputes about the definition of “law” and “...has been marked by deep conceptual confusion and unusually heated disagreements.” (390)

⁵⁶⁸ In Canada, Roderick Macdonald has played a key role in forging a distinctively Canadian approach to legal pluralism. See Martha-Marie Kleinhans & Roderick A Macdonald, “What is a Critical Legal Pluralism?” (1997) 12 Can. J of Law and Society 25.

⁵⁶⁹ The political scientist Avigail Eisenberg has done important work on pluralist theory with a focus on the claims of indigenous people in Canada. See Eisenberg & Spinner-Halev, “Diversity and Equality”, *supra* note 510. A broad treatment of the practice of pluralism in the context of deep diversity is found in David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference and Environmentalism* (Oxford University Press, 1998)

⁵⁷⁰ It will become apparent that the key themes of Schouls are rather different from the work of many legal pluralists who tend to support the independent and competing nature of indigenous legal regimes.

⁵⁷¹ Many scholars that are considered in this thesis stress the importance of deep and deepening inter-dependence between aboriginal and non-aboriginal Canadians, and that this has normative as well as practical consequences. For example, Libesman, “Normative Integration”, *supra* note 47 at 971 usefully notes the “...need for a critical hermeneutics to distinguish between integrationist strategies that serve both Aboriginal and non-Aboriginal peoples and integrationist strategies that are culturally imperialistic.”

⁵⁷² The work of Cairns has been considered in Section 2.5 of this thesis.

⁵⁷³ Schouls, *Shifting Boundaries*, *supra* note 566 at 16.

⁵⁷⁴ *Ibid* at 19.

⁵⁷⁵ *Ibid*.

⁵⁷⁶ *Ibid* at 9.

⁵⁷⁷ A concise and incisive consideration of the role of modern conceptions of culture in political theory, including the deep influence of anthropological theory can be found in David Scott, “Culture in Political Theory”, *supra* note 477.

⁵⁷⁸ See Tully, *Strange Multiplicity*, *supra* note 122 at 10 for a discussion of the “billard ball” conception of culture.

⁵⁷⁹ *Ibid*.

⁵⁸⁰ See Chapter 3.8 for a full consideration of the work of Courtney Jung.

⁵⁸¹ *Ibid*.

⁵⁸² *Ibid*.

⁵⁸³ *Ibid*.

⁵⁸⁴ *Ibid* at 48.

⁵⁸⁵ *Ibid* at 49.

⁵⁸⁶ *Ibid* at 56.

⁵⁸⁷ *Ibid* at 59.

⁵⁸⁸ *Ibid* at 55.

⁵⁸⁹ Schouls, *Shifting Boundaries*, *supra* note 566 at 149, see also iii .

⁵⁹⁰ *Ibid*.

⁵⁹¹ *Ibid* at 125, 145, 161.

⁵⁹² This strongly resonates with the key messages in the Haida decision, *supra* note 13.

⁵⁹³ There are some strong parallels to the work of Courtney Jung, “Moral Force of Indigenous Politics” *supra* note 103.

⁵⁹⁴ Schouls, *Shifting Boundaries*, *supra* note 566 at 135.

⁵⁹⁵ *Ibid* at 141.

⁵⁹⁶ *Ibid* at 142-145.

⁵⁹⁷ *Ibid* at 172.

⁵⁹⁸ See Chapter 17.2.

⁵⁹⁹ Schouls, *Shifting Boundaries*, *supra* note 566 at 177 .

⁶⁰⁰ *Ibid* at 179, see also 120.

⁶⁰¹ *Ibid* at 131.

⁶⁰² *Ibid* at 182.

⁶⁰³ While there are many branches of pluralist theory, including associational pluralism and consociationalism, the most pertinent branch of thinking about pluralism in conditions of deep diversity may be found in *modus vivendi* approaches. See Schlosberg, *Environmental Justice and the New Pluralism*, *supra* note 566 and Schouls, *Shifting Boundaries*, *supra* note 563.

⁶⁰⁴ Jung, “Moral Force of Indigenous Politics”, *supra* note 103.

⁶⁰⁵ Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Richardson, Benjamin J, Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 198; Ryan Newell, “Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law” (2012) 11 Indigenous LJ 41; Lajoie, “Legal Pluralism at Kahnawake”, *supra* note 113; Lajoie, Brisson, Normand and Bissonette, *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville : Éditions Yvon Blais, 1996)

⁶⁰⁶ Roderick A Macdonald, “Metaphors of Multiplicity: Civil Society, Regions and Legal Pluralism” (1998) 15 *Ariz J Int’l & Comp L* 1 at 4.

⁶⁰⁷ *Ibid* at 6-7.

⁶⁰⁸ *Ibid* at 7.

⁶⁰⁹ *Ibid* at 13.

⁶¹⁰ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 13 (It should be noted that while Borrows describes this traditional mode of constitutional thinking, the entire thrust of his thinking is to develop less hierarchical relations between different systems of law).

⁶¹¹ Lindberg, “Critical Indigenous Theory”, *supra* note 211 at 44, 45 and 102 (presents an argument that indigenous law is hierarchically superior to mainstream law).

⁶¹² This would be strongly resisted by Nicole Roughen , “The Association of State and Indigenous Law: A Case Study in Legal Association” (2009) 59 *UTLJ* 135 but one must question whether a binary choice between two systems each of which assert supremacy is workable in a highly interdependent legal system.

⁶¹³ Jeremy Webber, “The Grammar of Customary Law” (2009) 54 *McGill LJ* 579; Boiselle, Andrée, “Beyond Consent and Disagreement: Why Law’s Authority is Not Just About Will”, in Webber, Jeremy & McLeod, Colin, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010) (each develop the argument that all law has a customary base).

⁶¹⁴ This is a staple of early legal history which stressed the plurality of the “ancient constitution”. This theme is developed in relation to Crown-aboriginal relations by Louis A Knafla, ““This is Our Land”: Aboriginal Title in Customary and Common Law in Comparative Contexts” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010).

⁶¹⁵ Knafla, *Aboriginal Title*, *supra* note 75 at 12 (quintessentially pluralistic basis of English law); Mary Liston, *Honest Counsel: Institutional Dialogue and the Canadian Rule of Law* (PhD, University of Toronto, 2007) (Liston makes the point that the implementation of the duty to consult might support a larger transition to plural orders of government by facilitating constitutional dynamics that encourage greater movement towards self-government.)

⁶¹⁶ David Yarrow, “Law’s Infidelity to Its Past: The Failure to Recognize Indigenous Jurisdiction in Australia and Canada” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010) (develops argument that it is inappropriate and unjust to rely on legal theories that are based on common law reception arguments)

⁶¹⁷ The doctoral thesis of Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy, University of Victoria, 2009) has become a standard reference work in the field. See also: Aaron Mills “Wapshkaa ma’ligan, Aki, Anishinnabeck, laye tahsh Crown” (2010) 9 Indigenous LJ 107.

⁶¹⁸ This will be dealt with more completely in Chapter 6.

⁶¹⁹ Alfred, “Wawase”, *supra* note 65 and Borrows, *Canada’s Indigenous Constitution*, *supra* note 93.

⁶²⁰ As noted previously, there is a vibrant scholarship, largely written in French, that explores notions of legal pluralism in Quebec. Andr  e Lajoie has been a major contributor to this scholarship. See also; Sal  e, “Quality of Life”, *supra* note 2- interesting survey of the distinctive features of French language literature on aboriginal issues. Gordon Christie, ed, *Aboriginality and Governance: A Multidisciplinary Perspective* (Theytus Books, 2006) at v argues that one can easily overlook a vast body of relevant research because of the language divide in Canada.

⁶²¹ Borrows comes closest to developing a view on precise interaction with the exception of the Henderson view that indigenous law directly provides the content of mainstream aboriginal rights provisions.

⁶²² Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 185.

⁶²³ *Ibid* at 187-188.

⁶²⁴ *Ibid* at 188.

⁶²⁵ *Ibid* at 189.

⁶²⁶ *Ibid* at 191.

⁶²⁷ Lisa Streilen, “Conceptualizing Native Title” (2001) 23 Sydney L Rev 95 (develops Noel Pearson’s idea of native title as a form of “recognition space”).

⁶²⁸ This will be addressed in Chapter 8

⁶²⁹ John Borrows, “Physical Philosophy: Mobility and the Future of Indigenous Rights” in Richardson, Benjamin J, Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 481 (expresses concerns about what he calls “strict isolationists”); Turner, *Peace Pipe*, *supra* note 60 at 69, 73, 98, 99 (in contrast to Alfred, Turner concludes that indigenous peoples must engage with dominant cultures); see also Henderson, “Postcolonial Indigenous Legal Consciousness”, *supra* note 47 at 46- criticizes the tendency of some indigenous scholars to work towards isolation from mainstream society.

⁶³⁰ In addition to the role of residential schools, a prominent example is the elimination of traditional forms of government at Six Nations in 1924. This story is told in Andrea Lucille Catapano, *The Rising of the Ongwehonwe: Sovereignty, Identity and Representation on the Six Nations Reserve* (Doctor of Philosophy, Stoney Brook University, 2007).

⁶³¹ David Williams, “Customary Rights and Crown Claims: Calder and Aboriginal Title in Aotearoa New Zealand” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007) at 165.

⁶³² Alison Vivian, “Conflict management in the native title system: A proposal for an Indigenous Dispute Resolution Tribunal” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009) at 2.

⁶³³ Malcolm Fletcher, “Rethinking the Role of Custom in Tribal Court Jurisprudence” (2007) 13 Michigan J of Race and Law 57 at 81 (little actual tribal law cited).

⁶³⁴ This will be explored more fully in Chapter 4.5.

⁶³⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria*, (2002) 77 AJLR 356 (High Court of Australia) [Yorta Yorta Aboriginal Community]; Kirsten Anker, *The Unofficial Law of Native Title: Indigenous Rights, State Recognition and Legal Pluralism in Australia* (PhD, University of Sydney, 2007); Kirsten Anker, “Law in the Present Tense: Continuity and Tradition in the Yorta Yorta Aboriginal Community v. Victoria” (2004) 28 Melbourne UL Rev. 1; Chief Justice Robert French, “Lifting the Burden of Native Title: Some Modest Proposals for Improvement” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

⁶³⁶ The work of Burke Hendrix will be discussed in more detail in Chapter 5.

⁶³⁷ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 3-4 (might possibly be reinvigorated), see also 169 ff.

⁶³⁸ *Ibid* at 173.

⁶³⁹ *Ibid*.

⁶⁴⁰ *Ibid* at 174.

⁶⁴¹ Thomas Isaac, “Striking a Balance: The Rights of Aboriginal Peoples and the Rule of Law in Canada” in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008) at 91 (Isaac positions legal pluralism as a threat to the rule of law. Claire Charters, “Do Maori Rights Racially Discriminate Against Non-Maori?” (2009) 40 VUWLR 649 at 652- refers to common view that indigenous traditions are not law. James (Sakej) Henderson & Jaime Battiste, “Indigenous Philosophy” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 67- indigenous law is generally not considered as law in Canadian practice. Grammond, “The Reception of Indigenous Legal Systems in Canada”, *supra* note 502 at 57 describes indigenous norms as closer to a set of values than as rules. (An exception to this sceptical view is provided by Mr Justice Douglas Lambert, “The Future of Indigenous Law in the Canadian Legal System” (2006) 64 The Advocate 217. He argues that, upon reception of English law, indigenous legal norms “...become part of the common law and entitled to its protection.” (218) Indeed, much English law would not be applicable in areas where an indigenous legal system was in operation because of the “local circumstances” rule. (218) A Canadian court, in his view would hear a claim based on an indigenous legal norm “if asked” (220)). A completely different approach to indigenous law is adopted by Lorne Sossin, “Indigenous Self-Determination and the Future of Administrative Law” (2012) 45 UBC L Rev 595. While he recognizes that the relationship between indigenous and mainstream systems of law is “largely unsettled”, he develops an approach of deference that would allow room for indigenous authorities to develop their own legal approaches to the resolution of issues. (600) He argues that disputes “...might look quite different than if those bodies and agencies are insulated from review and given the space to develop their own approaches to questions of procedural and substantive sufficiency.” (601) This approach is supplemental to the view that “Aboriginal law and custom has been incorporated to some extent into the rights recognized through Section 35...” (596)

⁶⁴² This is dealt with in Chapter 8 (Causation).

⁶⁴³ This is associated with an argument that looks at legitimacy from a predominantly modern perspective.

⁶⁴⁴ This will be dealt in Part 2- Chapter 12.3.

⁶⁴⁵ Mark Walters, “Promise and Paradox: The Emergence of Indigenous Rights Law in Canada” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 41.

⁶⁴⁶ A core theme of recent writing about indigenous legal traditions is the importance of public and professional education about these traditions. Knafla, “This is Our Land”, *supra* note 614; Borrows, *Canada’s Indigenous Constitution*, *supra* note 93, Chief Justice Lance S.C. Finch, “The Duty to Learn: Taking Account of Indigenous Legal Traditional Orders in Practice”, Continuing Legal Education Society of British Columbia, November 2012 and Christine Zuni Cruz, “Law of the Land- Recognition and Resurgence in Indigenous Law and Justice Systems” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009). Both Finch and Zuni Cruz single out innovative law school programs promoting joint studies in mainstream and indigenous law, including the recently launched program at the University of Victoria.

⁶⁴⁷ Streilen, “Conceptualizing Native Title”, *supra* note 627 (Role of indigenous traditions in the proof of native title)

⁶⁴⁸ Yorta Yorta Aboriginal Community, *supra* note 635

⁶⁴⁹ *Walker v New South Wales*, (1994) 182 CLR 45 (HCA) and *Coe v Commonwealth (No. 1)*, (1979) 24 ALR 118; *Coe v Commonwealth (No. 2)*, (1993) 118 ALR 193.

⁶⁵⁰ Several important studies of customary law have been prepared in Australia but there has been little response to these studies from the mainstream legal system - John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash UJL & Pol’y 167 at 216.

⁶⁵¹ There are naturally many other jurisdictions that offer relevant experience, including New Zealand and South Africa

⁶⁵² It should be noted that there is a rich literature critiquing both the legal foundations and the application of the plenary power- Robert A Clinton, “There is No Federal Supremacy Clause for Indian Tribes” (2002) 34 Ariz St LJ 113 and Alexander Alienikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, 2002).

⁶⁵³ Fletcher, “Tribal Law” *supra* note 633.

⁶⁵⁴ Westra, “Defence of Native Title”, *supra* note 75.

⁶⁵⁵ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93.

⁶⁵⁶ Borrows, “Drawing Out Law”, *supra* note 9.

⁶⁵⁷ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 8, 23. See also: John Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 650 at 197.

⁶⁵⁸ *Supra* note 102 (Notion of immanent critique).

⁶⁵⁹ Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 8.

⁶⁶⁰ *Ibid* at 8.

⁶⁶¹ *Ibid* at 7. See also: John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 Sup Ct L Rev (2d) 351 at 378.

⁶⁶² Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 185-186.

⁶⁶³ *Ibid* at 14. See also: Borrows, "(Ab)Originalism", *supra* note 663 at 358.

⁶⁶⁴ *Ibid* at 21- this topic will be addressed more completely in Chapter 5 (Constitutionalism)

⁶⁶⁵ See Chapter 5

⁶⁶⁶ Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 24ff, especially at 58.

⁶⁶⁷ Borrows, "Drawing Out Law", *supra* note 9 at xiii.

⁶⁶⁸ *Ibid* at 40.

⁶⁶⁹ *Ibid* at 68.

⁶⁷⁰ *Ibid* at 58ff.

⁶⁷¹ *Ibid* at 138ff.

⁶⁷² *Ibid* at 129.

⁶⁷³ *Ibid* at 132.

⁶⁷⁴ *Ibid* at 138.

⁶⁷⁵ *Ibid* at 154.

⁶⁷⁶ *Ibid* at 137.

⁶⁷⁷ *Ibid* at 66-67, especially 69, 70, 72. See also: Borrows, "(Ab)Originalism", *supra* note 661 at 379ff.

⁶⁷⁸ Roughen, "Association of State and Indigenous Law", *supra* note 612; see also: Tamanaha, "Understanding Legal Pluralism", *supra* note 567 at 400 ("...often they are silent about interaction")

⁶⁷⁹ Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 190. See also Ghislain Otis, « La protection constitutionnelle de la pluralité juridique : le cas de l'adoption coutumière autochtone au Québec » in Otis « L'adoption coutumière autochtone »

⁶⁸⁰ Roughen, *supra* note 612 at 135-136.

⁶⁸¹ *Ibid* at 136.

⁶⁸² *Ibid* at 138.

⁶⁸³ *Ibid* at 137.

⁶⁸⁴ *Ibid* at 152.

⁶⁸⁵ *Ibid* at 154.

⁶⁸⁶ *Ibid* at 156.

⁶⁸⁷ *Ibid*.

⁶⁸⁸ *Ibid* at 163.

⁶⁸⁹ *Ibid* at 158-163, see Chapter 13 of this thesis..

⁶⁹⁰ *Mitchell v MNR*, 2001 SCC 33[*Mitchell*].

⁶⁹¹ Roughen, "Association of State and Indigenous Law", *supra* note 612 at 175.

⁶⁹² *Ibid* at 154, 174-175.

⁶⁹³ *Ibid* at 178.

⁶⁹⁴ These proposals will be considered in some detail in Part 11, and a distinctive proposal will be presented in Part 111 of this work. It is important to pay attention to Tamanaha's warning, in "Legal Pluralism", *supra* note 567, to not go to the other extreme from absolutist conceptions of law in considering that "...other legal or normative systems are parallel to state law." (410) Tamanaha's point seems to be that different legal conceptions can interact in myriad ways in practice. Anker, *The Unofficial Law of Native Title*, *supra* note 635.

⁶⁹⁵ Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 116-117. Borrows is hopeful that Canadian constitutionalism is sufficiently capacious to show openness to indigenous legal norms in the same fashion that mutual accommodations have been worked out between the common law and civil law systems.

⁶⁹⁶ Turner, *Peace Pipe*, *supra* note 60 at 28-29; see also 111-112 for why he is sceptical that Canadian law has received whole indigenous legal orders.

⁶⁹⁷ This argument will be developed further in Chapter 12

⁶⁹⁸ This argument will be developed further in Chapter 5

⁶⁹⁹ Some of the themes based on constitutionalism have already emerged when considering the work of Hendrix, Jung, Schouls and Borrows.

⁷⁰⁰ One area where these differences in view about the fundamental nature and effect of the treaties has come to the fore has been the public discourse surrounding the emergence of the Idle No More movement.

⁷⁰¹ Among the many expressions of a judicial desire to have matters involving the Crown-aboriginal relationship to be resolved through negotiations rather than litigation are *Sparrow*, *supra* note 969 at 1105; *Delgamuukw*, *supra* note 22 at 1123-1124 and *Marshall*, *supra* note 38 at paras 22-23.

⁷⁰² This will be assessed in Chapter 14

⁷⁰³ See especially, *Keewatin*, *supra* note 39.

⁷⁰⁴ This contextual analysis is largely performed within the interpretative framework set out in *Marshall*, *supra* note 38.

⁷⁰⁵ The aboriginal perspective is that treaties were generally intended to provide for peace, friendship and sharing rather than surrender of rights. Kiera Ladner, "Negotiated Inferiority: The Royal Commission on Aboriginal Peoples' Vision of a Renewed Relationship" (2001) 31 *American Rev of Canadian Studies* 241- early treaty relations between indigenous groups were expanded to include the newcomers; Burke Hendrix, "Political Authority and Indigenous Sovereignty" (2010) 19 *The Good Society* 47 at 48- treaties "...were usually the product of coercion and fraud"; Singer, "Original Acquisition", *supra* note 81 at 771 "These treaties were less than voluntary."; Vicki Hseuh, "Under Negotiation", *supra* note 203 at 68 presents an argument for the fatally flawed nature of the treaties- "Many have argued that treaties between English and indigenous nations were fatally flawed from the start because treaty participants possessed such different- and, arguably, mutually exclusive -conceptions of land use and possession."; (Hseuh's argument also acts as something of a counter-weight to the frequently expressed view that the early treaties constitute a model of a more egalitarian relationship for modern emulation); David Berry, "Legal Anomalies, Indigenous Peoples and the New World" in Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007) at 241 "...certainly worked out the terms of treaties before even opening negotiations"; Hutchins, "Cede, Release and Surrender", *supra* note 414 at 431; Chief Justice McLachlin, "Aboriginal Peoples and Reconciliation", *supra* note 74 at 242 "...they sometimes were grounded in deception and misunderstanding"; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) at 132-144 (originally treaties were not legally enforceable and were vulnerable to unilateral parliamentary authority) ; Asch & Macklem, "Aboriginal Rights and Canadian Sovereignty", *supra* note 89 express "strong doubts" about the cession of sovereignty in the treaties- "...would be expected to negotiate treaties with the relevant indigenous population before it could legitimately assert sovereignty over that population."; Coulthard, "Subjects of Empire?", *supra* note 210 at 85 argues that that the Paulette trial judge found that it was highly unlikely that the Dene would have understood the treaty as involving them surrendering their title; Willie Ermine, "The Ethical Space of Engagement" (2007) 6 *Indigenous LJ* 193 at 197- "Unfortunately, meanings and interpretations to the agreement were divergent and as distanced as the worldviews and philosophies that informed them". Agreement "turned into a rift." From a more philosophical perspective, Tomsons & Mayer, "Dialogue", in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 175 argue that "Understanding Aboriginal rights requires that liberal theorists revisit their understanding of the treaty relationship." The Royal Commission on Aboriginal Peoples, in its separate "Partners" report at 19, refers to the treaties as creating a body of law which "states the presumptive terms under which Aboriginal nations entered into Confederal relations with the Crown." This means that "In effect, Section 35 serves to confirm and entrench the status of aboriginal peoples as original partners in Confederation."

⁷⁰⁶ Lindberg, "Critical Indigenous Theory", *supra* note 211; and Hutchins, "Cede, Release and Surrender", *supra* note 414; An extended development of an indigenous perspective on Treaty # 3 can be found in Sara J Mainville, "Treaty Councils and Mutual Reconciliation under Section 35" (2007) 6 *Indigenous LJ* 141 (p. 152- "As landlords, the Anisnabe views the treaty as a solemn agreement to share the land which was their mother."

⁷⁰⁷ It is commonly stated by treaty Indians that any surrender was limited to the "depth of a plow", see Arthur J Ray, Jim Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000). This stands in contrast to statements from the Supreme Court of Canada such as those in *R v Badger*, [1996] 1 SCR 771 [*Badger*] at para 39 which refer to the surrender of vast tracts of land in the treaties.

⁷⁰⁸ Borrows, "Physical Philosophy", *supra* note 629. (Treaties are best understood as being primarily about the current relationship of the parties- a similar view is developed in Borrows, "(Ab)Originalism and Canada's Constitution", *supra* note 661)

⁷⁰⁹ *Ontario (Attorney General) v Bear Island Foundation*, [1991] 2 SCR 570 [*Bear Island*]. Passages in recent decisions such as *Mikisew*, *supra* note 13 and *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 533 [*Little Salmon*] (also commonly known as Little Salmon) also support this view of the treaties, though neither of these cases considered the effect of the cede, surrender and release clauses in a focussed way.

⁷¹⁰ These arguments are frequently made in relation to the "medicine chest" clauses, education and treaty annuities.

⁷¹¹ *Report of the Treaty Commissioner of Saskatchewan*, 2012; Kyla Reid, “Political Legitimacy” *supra* note 84 at 89-90- cites numerous problems with the treaty process

⁷¹² Knafla, Louis A, Introduction, “This is our Land: Aboriginal Title at Customary and Common Law in Comparative Contexts” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010) at 5.

⁷¹³ Most notably, the Royal Commission on Aboriginal Peoples argued that the aboriginal view of the treaties should guide interpretation of those treaties.

⁷¹⁴ Richards, *Creating Choices*, *supra* note 296 at 21.

⁷¹⁵ Gibson, *A New Look*, *supra* note 204 at ix.

⁷¹⁶ Widdowson, *Aboriginal Dependency*, *supra* note 375 at 276 (referred to but apparently without her support)

⁷¹⁷ The classic definition of the notion of constitutionalism and the associated value of the rule of law in Canadian law is found in the *Secession Reference*, *supra* note 23 at paras 142, 144; This definition is used by Henderson & Battiste, “Indigenous Philosophy”, *supra* note 641 at 81. See also: Mark Walters, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) at 247- constitutionalism is defined as the subjection of state power to law. Heidi Libesman, “Review of Indigenous Difference and the Constitution of Canada by Patrick Macklem” (2002) 40 Osgoode Hall LJ 200 at 207 argues that Macklem is “...concerned with reintegrating law with justice and in so doing recovering the ethical integrity of Canadian constitutionalism from the betrayals of justice that Canadian law has incorporated into its own logic of sovereignty and to falsely universalized cultural preconceptions of humanity.” She gets to the heart of a constitutionalist perspective by arguing that “...It is these broader concerns that lead Macklem to move beyond questions of validity in positivist framework and engage questions of legitimacy in a constitutionalist framework.” (p. 204) She concludes that “...Macklem’s work can be understood as a response to the search for an intercultural jurisprudential logic capable of mediating and adjudicating differing approaches to the recognition of indigenous difference in the constitution of Canada as a matter of justice rather than power.” (p. 205) Hamar Foster, Benjamin Berger and D.R. Buick, *The Grand Experiment*, *supra* note 6 at 10 argue that relations between the state and aboriginal peoples are quintessentially about constitutionalism. Christodoulidis, “Republican Constitutionalism”, *supra* note 42 at 3 –“Constitutionalism is the name for an intersection of law and politics.”

⁷¹⁸ Mark Walters, “The Morality of Aboriginal Law” (2006) 31 Queen’s LJ 470 (the value of the rule of law, especially as understood in a more pluralistic way, is at the heart of Walters’ work); Colin Coates, “Multiculturalism in Colonial Society”, *supra* note 298 at 247 advocates a similar reliance on constitutionalist values- “The first step may be to create an internal view of constitutionalism that will allow actual recognition of difference and interdependence; one that reflects multiple sources of sovereignty.”

⁷¹⁹ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 (strong republican themes developed in his work)

⁷²⁰ Levy, “Constitutionalism and Modus Vivendi Approaches”, *supra* note 469.

⁷²¹ Jacob T Levy, “Indigenous Self-Determination”, in Macedo, Stephen & Buchanan, Allen, eds, *Secession and Self-Determination: Nomos XLV* (New York University Press, 2003).

⁷²² Levy, “Contextualism, Constitutionalism and Modus Vivendi Approaches”, *supra* note 469 at 190-191(modus vivendi).

⁷²³ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 142.

⁷²⁴ Owen & Tully, “Redistribution and recognition”, *supra* note 125 (primacy of a political approach)

⁷²⁵ Margaret Moore, “Indigenous Peoples and Political Legitimacy” in Jeremy Webber and Colin McLeod, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010)

⁷²⁶ This seems to be linked to the power of broad constitutional principles to set the framework for effective political dialogue.

⁷²⁷ Republicanism covers a wide variety of ideas but it is most commonly associated with institutional structures designed to provide checks and balances to ensure the value of political participation. See Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 47ff, 155, 179 and 187.

⁷²⁸ Bethany R Berger, “Liberalism and Republicanism in Federal Indian Law” (2005-2006) 38 Conn L Rev 813; Hope M Babcock, “A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered” (2005) 2005 Utah L Rev 441.

⁷²⁹ The deep links of the recent work of John Borrows to ideas of republicanism and constitutionalism will be explored in detail in chapter 5.

⁷³⁰ For a review of standard techniques of constitutional interpretation in Canada see Luanne Walton, “Making Sense of Canadian Constitutional Interpretation” (2000-2001) NJCL 315; Grant Huscroft & Bradley W Miller, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2012)

⁷³¹ There is some degree of conceptual restructuring in Canadian constitutional law as evidenced by the line of cases from *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 [OPSEU] to the recent revisiting of the interjurisdictional immunity doctrine (to be addressed in chapter 17.3). These cases express a strong preference for encouragement of overlap and cooperation between different orders of government. However, the fact that there are limits to this trend is evidenced by the decision of the Supreme Court of Canada to “grand-father” lines of jurisprudence, in the context of the inter-jurisdictional immunity doctrine, that have already been decided in Canada (see chapter 17.3)

⁷³² Tribe, “Invisible Constitution”, *supra* note 23.

⁷³³ *Ibid* at 155. The invisible constitution is animated by six modes of construction- “...six distinct between overlapping modes of construction in forming the invisible Constitution: geometric, geodesic, global, geological, gravitational, and gyroscopic. The first three are essentially constructive (in the sense that they entail building outward from or drawing links between portions of the Constitution’s text), the last three deconstructive (in the sense that they entail imagining how the Constitution would break down or fall apart unless certain assumptions are made).”

⁷³⁴ This is so because the notion of an invisible constitutional principle in the form of unwritten principles of the constitution is arguably much more highly developed in Canadian constitutional law.

⁷³⁵ Tribe, “Invisible Constitution”, *supra* note 23 at 8.

⁷³⁶ *Ibid* at 69.

⁷³⁷ *Ibid* at 34.

⁷³⁸ The leading proponent of treaty federalism theory has been James (Sakej) Youngblood Henderson. Developed as a theory of the Canadian constitutional framework from an indigenous perspective, the theory is elaborated most completely in James (Sakej) Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask L Rev 241, though signs of this theory are seen in his earlier work, including James (Sakej) Youngblood Henderson, “Unravelling the Riddle of Aboriginal Title” (1977) 5 Am Indian L Rev 75. See also: Henderson, “The Context of the State of Nature” in Battiste, Marie, ed, *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000). A number of other scholars demonstrate the strong influence of treaty federalism theory, including: Turner, *Peace Pipe*, *supra* note 60 at 8 (reliance on treaty federalism framework); Miranda Johnson, “Struggling Over the Past”, *supra* note 91 at 23 (Johnson raises the intriguing suggestion that research proposals in the 1970’s facilitated the development of treaty federalist thought); Grammond, “Reception of Indigenous Legal Systems” *supra* note 502 at 64 (useful summary of treaty federalist thinking); Gina Cosentino, “Treaty Federalism: Challenging Disciplinary Boundaries and Bridging Praxis, Theory, Research and Critical Pedagogy in Canadian Political Science”, in Nelson, Camille A & Nelson, Charmaine, *Racism Eh? A Critical Inter-Disciplinary Anthology of Race and Racism in Canada* (Captus Press, 2004) at 135 (Cosentino builds on the “transformative potential” of constitutionalism (p. 138) that is visualized from the perspective of Indian sovereignty (p. 136). Her argument is that a treaty federalist perspective allows for creative solutions and incorporation of indigenous perspectives (p. 141) and that the “...idea is also gaining jurisprudential currency.” (138)); Kiera Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalism” in Rocher, François & Smith, Miriam, *New Trends in Canadian Federalism* (Broadview Press, 2003) at 174 (excellent summary of treaty and constitutional federalism, which is stated to be the “only option” for Canada, including a clear statement of an indigenous perspective on Treaty #6)); For a more recent and extensive treatment of treaty federalism: see Ladner & McCrossan, “Road not Taken”, *supra* note 88; Murphy, “Culture and the Courts”, *supra* note 98 at 116-117 captures the essence of treaty federalist thought in eloquent terms- “Their relationship is best characterized not as one of strict dependence of one party on the other, but as one of complex interdependence, including a flexible sharing of the lands and resources based on principles of purchase and consent, and the principle of non-interference in each other’s internal affairs.” Patricia Monture-Angus, “Citizens Plus: Sensitivities versus solutions” in *Bridging the Divide: Aboriginal Peoples and the Canadian State*, The CRIC Papers, June 2001 at 10 states that the “relationship has already been defined” in the treaties; Vicki Hseuh, “Under Negotiation”, *supra* note 203 at 53- “The history of treaty-making...has spurred new and important thinking in political theory about the modes by which cultural difference can be adjudicated in the wake of colonization.”

⁷³⁹ The fullest statement of a “treaty constitutionalist” development of treaty federalism theory is found in James (Sakej) Youngblood Henderson, *First Nations Jurisprudence*, *supra* note 91. See also: Henderson, “Constitutional Vision and Judicial Commitment”, *supra* note 86. Very recently, Henderson has added a further refinement to his treaty constitutionalist perspective. In an article co-authored with Battiste, “How Aboriginal Philosophy Informs Aboriginal Rights”, *supra* note 641 at 66, the idea of aboriginal sovereignty is presented as a “constitutional grundnorm”. (p. 68) Drawing from the work of Hans Kelson, Henderson and Battiste draw normative implications from the pre-existing sovereignty of aboriginal nations; “This simple fact is more than historical description; it

creates the ultimate constitutional principle or grundnorm in Canada's Constitution. It displaces the previous concept of sovereignty..." (p. 68) It marks the "...beginning of a chain of normative validity of sui generis analysis." (p. 68) It also "...mandates a reorientation of the constitutional framework of Canada." (p. 69) This foundational grundnorm means that extinguishment was never possible in Canadian law and that a framework is provided for reconciling "imported jurisprudence" with Aboriginal jurisprudence. (p. 69) The notion of an aboriginal "grundnorm" of sovereignty is introduced but in a less developed fashion in Henderson, "Constitutional Vision and Judicial Commitment", *supra* note 86 at 29. Less ambitiously, as Philip Resnick, *The European Roots of Canadian Identity* (Broadview Press, 2009) at 17, argues, re-emphasizing the treaties "...can be seen as a long overdue recognition of the historical origins of the country."

⁷⁴⁰ Henderson, "Empowering Treaty Federalism", *supra* note 739 at 247.

⁷⁴¹ *Ibid* at 247; Henderson, *First Nations Jurisprudence*, *supra* note 91 at 61,79; Henderson, "Constitutional Vision and Judicial Commitment", *supra* note 86 at 28.

⁷⁴² Henderson, *First Nations Jurisprudence*, *ibid* at 90, 180; Henderson, "Constitutional Vision", *ibid* at 30, 31.

⁷⁴³ Henderson, *ibid* at 50. A particularly robust version of the intellectual model reflected in treaty federalist thought has been recently presented by the philosopher Sandra Tomsons. In "Why Aboriginal Elders should listen to Aboriginal Elders", *supra* note 91 and in several other articles in the volume co-edited with Lorraine Mayer, Tomsons presents a very strong theory of Aboriginal sovereignty- "To the extent that the notion of underlying or supreme sovereignty makes sense; the relationship means that only Indigenous people can have this right." (p. 46) This means that Canadians generally are "...mistaken in their presumption about the legitimacy of Canadian sovereignty." (p. 46). This leads Tomsons to conclude that "Canada is not a just nation-state. It is neither a nation nor just." (p. 47)

⁷⁴⁴ Henderson, *First Nations Jurisprudence*, *ibid* at 119.

⁷⁴⁵ Henderson, "Empowering Treaty Federalism", *supra* note 739 at 314; James (Sakej) Youngblood Henderson, "The Perspective of Aboriginal Peoples of Canada on the Monarchy: Reflections on the Occasion of the Queen's Golden Jubilee" (2003) 13 Constitutional Forum 9. See also: Miranda Johnson, "Struggling Over the Past", *supra* note 91 at 32 (assessment of Sarah Carter work on the personal relationship of aboriginal peoples with the Queen)

⁷⁴⁶ Henderson, "Empowering Treaty Federalism", *ibid* at 274.

⁷⁴⁷ *Ibid* at 277; Henderson, "Taking Equality into the 21st Century: An Aboriginal Commentary" (2000-2001) 12 NJCL 31; Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 47. Though it not logically required, many adherents of treaty federalist thought are also sceptical about aboriginal involvement in mainstream electoral politics- Henderson, "Empowering Treaty Federalism", *supra* note 739 at 58, 64.

⁷⁴⁸ Henderson, *First Nations Jurisprudence*, *supra* note 91 at 6. Henderson, "Empowering Treaty Federalism" *supra* note 739 at 277 (Entire federal structure is derived from a few treaty clauses). See also: Turner, *Peace Pipe*, *supra* note 60 at 32 (Suggests that the Canadian state gained its legitimacy through indigenous law); Joseph Eliot Magnet, "Multiculturalism and Collective Rights" (2005) 17 Sup Ct L Rev (2d) 431 at 462- (without the participation of aboriginal peoples Canada would not have been formed); Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalism", *supra* note 738 - "Treaty federalism is the foundation on which Canadian federalism was established."

⁷⁴⁹ Henderson, "Empowering Treaty Federalism" *supra* note 739 at 262 and Henderson *First Nations Jurisprudence*, *supra* note 91 at 82. See also Ladner and McCrossan, "Road not Taken", *supra* note 88 at 286- "Aboriginal sovereignty was unimpeded and could not be infringed upon by claims of Crown sovereignty except where explicitly agreed to by means of delegated authority or shared sovereignty."

⁷⁵⁰ Henderson, "Empowering Treaty Federalism", *supra* note 739 at 257, 261, 267; Henderson, *First Nations Jurisprudence*, *supra* note 91 at 82.

⁷⁵¹ Henderson, "Empowering Treaty Federalism", *ibid* at 274, 318-319; Henderson, "Constitutional Vision and Judicial Commitment", *supra* note 86 at 38.

⁷⁵² Henderson, *ibid* at 297.

⁷⁵³ Ladner, "Indigenous Vision", *supra* note 738 at 186 argues that where there are no treaties "...all rights and responsibilities for governance continue to be vested in Indigenous constitutional orders." More generally, treaty federalist thought is not limited to Canada. Prominent American scholars such as Williams, Miller and Washburn have developed frames of reference that resonate with treaty federalist notions of a nation-to-nation relationship. See also Vicki Hseuh, *Hybrid Constitutions: Making and Unmaking Power and Privilege in Colonial America* (Duke University Press, 2010) (Robert A. Williams and treaty federalist thought at 80, 85-86, 101 and 103) Hseuh's later work, especially "Under Negotiation", *supra* note 203, looks at the impact that treaty federalist thinking has had on various political theory attempts to understand the relationship between the state and indigenous peoples.

⁷⁵⁴ Henderson, *First Nations Jurisprudence*, *supra* note 91; Henderson, “Constitutional Vision and Judicial Commitment”, *supra* note 86.

⁷⁵⁵ Henderson, *First Nations Jurisprudence*, *ibid* at ix, 76, 87, 230, 231, 234.

⁷⁵⁶ *Ibid* at 227, 228; “Constitutional Vision and Judicial Commitment”, *supra* note 86 at 25. Henderson develops an argument that Section 35 constituted a convergence of different constitutional orders in a fashion that is reminiscent of Bruce Ackerman’s analysis of “constitutional moments” in American constitutional law and history. See Tribe, “Invisible Constitution”, *supra* note 23 at 52. Sunstein, “Constitution of Many Minds”, *supra* note 31 at 5.

⁷⁵⁷ James (Sakej) Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72 Sask L Rev 29.

⁷⁵⁸ Henderson, *First Nations Jurisprudence*, *supra* note 91 at 6.

⁷⁵⁹ *Ibid* at 27.

⁷⁶⁰ *Ibid* at 166, 176, 179, 202, 203.

⁷⁶¹ *Ibid* at 82-83.

⁷⁶² *Ibid* at 87.

⁷⁶³ This theme is shared with scholars such as Jung, Hendrix and Shaw.

⁷⁶⁴ Henderson, *First Nations Jurisprudence*, *supra* note 91 at 86, 101, 107, 111, 196-197, 220.

⁷⁶⁵ *Ibid* 43, 89, and especially, 116.

⁷⁶⁶ *Ibid* at 145, 204-205.

⁷⁶⁷ *Ibid* at 71; Henderson, “Constitutional Vision and Judicial Commitment”, *supra* note 86 at 31.

⁷⁶⁸ *Ibid* at 69, and especially 203.

⁷⁶⁹ Henderson, *First Nations Jurisprudence*, *supra* note 91 at 222.

⁷⁷⁰ *Ibid* at 87, 221, 240.

⁷⁷¹ *Ibid* at 222.

⁷⁷² *Ibid* at 228; Henderson, “Constitutional Vision and Judicial Commitment”, *supra* note 86 at 24.

⁷⁷³ A good source to see the basic ideas of treaty federalism expressed in a very clear fashion is the work of the political scientist Kiera Ladner. She has developed a version of treaty federalism that is faithful to the core ideas developed by Henderson but is expressed in a language that is far more accessible to non-specialists: Ladner, “Take 35”, *supra* note 55; Kiera Ladner, “Up the Creek: Fishing for a New Constitutional Order” (2005) 38 Can J of Pol Sci 923.

⁷⁷⁴ The reference to “constitutional architecture” is a recurring theme in most constitutional theory: See, for example, Tribe, “Invisible Constitution”, *supra* note 23 at 54. *Reference re Senate Reform*, 2014 SCC 32 (this reference opinion provides the most incisive commentary to date on the notion of constitutional architecture).

⁷⁷⁵ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 183-186, especially 188.

⁷⁷⁶ Though the phrase “we are all treaty people” pervades the literature, a particularly clear expression of this idea can be found in Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will one Day be Recognized as Nations* (Calgary: University of Calgary Press, 2000); Peach, “Power of a Single Feather”, *supra* note 3 at 17. “Unfortunately, as J.R. Miller notes, few non-Indigenous Canadians Canadian today appreciate that the treaties are a valuable part of the foundation of the Canadian state.”

⁷⁷⁷ There are many parallels between the political theory of James Tully and the treaty federalist framework. This is also an emerging critical literature dealing with treaty federalism. Francis, “Canadian Indigenous Peoples” *supra* note 17 at 127 (Francis is critical of the type of federalism advocated by Canadian scholars such as Kymlicka and Tully); Salée & Lévesque “Representing Aboriginal Self-Government”, *supra* note 42 at 126 (they express the point of view that much treaty federalist thought results in an “analytic dead end” which must be seen for what it is- an ideological or normative standard rather than an actual description of the operation of Canadian federalism); Libesman, “Normative Integration” , *supra* note 47 at 961 (Libesman places treaty federalist thought within an emerging paradigm of multinational democratic constitutionalism, in contrast she sees Cairns as being “...not interested in subordinating the interests of Canada to an exclusive imagination of the interests and rights of Aboriginal peoples” –p. 963) Ladner, “Indigenous Vision”, *supra* note 738 (Ladner refers to the substantial reservations of LaSelva about treaty federalism and concludes at p. 740 that it is unknown what treaty federalism will ultimately look like in practice); Gabrielle Slowey, “Federalism and First Nations: Finding Space for Aboriginal Governments” in Ian Peach and Roy Romanow, *Constructing Tomorrow’s Federalism: New Perspectives on Canadian Governance* (University of Manitoba Press, 2007) “...primarily a theoretical construct, set out a normative course of action” and p. 163 “...will likely be some time before this version of federalism moves from being a dream to becoming a reality.” However, Gagnon & Iacovino, *Federal Citizenship and Quebec*, *supra* note 428 at 83 argue that while treaty federalism might constitute a radical break it is one that will have to be faced in order to think of the Canadian constitution as a living tree.

⁷⁷⁸ Panagos, “Aboriginality” *supra* note 84 at 85.

⁷⁷⁹ Annis May Timpson, “Introduction: Indigenous Thought in Canada” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009) at 12.

⁷⁸⁰ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 179.

⁷⁸¹ *Ibid* at 12.

⁷⁸² See Chapter 4.5 for an assessment of the work of Borrows

⁷⁸³ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 14.

⁷⁸⁴ *Ibid* at 25-26, 56.

⁷⁸⁵ *Ibid* at 21.

⁷⁸⁶ *Ibid* at 123.

⁷⁸⁷ *Ibid* at 128.

⁷⁸⁸ *Ibid* at 129.

⁷⁸⁹ *Ibid* at 182, 189, 299.

⁷⁹⁰ *Ibid* at 189.

⁷⁹¹ *Ibid* at 36-37.

⁷⁹² *Ibid* at 107-108.

⁷⁹³ *Ibid* at 200.

⁷⁹⁴ *R v Secretary of State for Foreign and Commonwealth Affairs*, (1981) 4 CNLR 86 (Eng CA)- holding that the patriation of the Canadian constitution could not be prevented in the English courts.

⁷⁹⁵ Bruce Clark, *Indian Title in Canada* (Carswell, 1987) and Bruce Clark, *Native Liberty, Crown Sovereignty* (Montreal: McGill-Queen’s University Press, 1990). This work led to a series of unsuccessful court cases alleging a lack of Canadian sovereignty beyond the “treaty frontier”; e.g. *R v Williams*, (1994) 3 CNLR 173 at 175 (BCCA)

⁷⁹⁶ See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*], *Little Salmon*, *supra* note 711; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9; [2009] 1 SCR 222 [*Ermineskin*]

⁷⁹⁷ This will be addressed more completely in Chapter 11.

⁷⁹⁸ *Secession Reference*, *supra* note 23; see also Chapter 9 (Dialogue).

⁷⁹⁹ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 235.

⁸⁰⁰ A common theme in the jurisprudence of the Supreme Court of Canada is that these principles work at the level of the basic architecture of the Constitution to provide meaning and depth to the commitments that are embodied in the document

⁸⁰¹ *Little Salmon*, *supra* note 709- honour of the Crown is recognized as an unwritten principle in both majority and dissenting decisions (paras. 42 and 97).

⁸⁰² The recent decision of the Supreme Court of Canada in *Manitoba Métis Federation*, *supra* note 13 provides a strong illustration of this point.

⁸⁰³ Gibson, *A New Look*, *supra* note 204 at 60 argues that the Campbell decision creates an extremely tenuous basis for aboriginal self-government. It can also be noted that the British Columbia Court of Appeal elected to support the Nisga’a treaty on alternative grounds, though it did not impeach the authority of the Campbell decision in any way- *Sga’nisim Sim’aigit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 301.

⁸⁰⁶ *Campbell v British Columbia (AG)*, [2000] BCJ No 1524.

⁸⁰⁵ Mark Walters, “The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law” (2001) 51 UTLJ 91; Walters, “Written Constitutions and Unwritten Constitutionalism”, *supra* note 719; Walters, “The Morality of Aboriginal Law”, *supra* note 720.

⁸⁰⁶ Ian Laird Peach, *Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Determination and Indigenous Law* (Master of Laws, Queen’s University, 2009).

⁸⁰⁷ Jean Leclair, “Federal Constitutionalism and Aboriginal Difference” (2005-2006) 31 Queen’s LJ 521.

⁸⁰⁸ See Chapter 17.5.

⁸⁰⁹ *Little Salmon*, *supra* note 709, at paras. 42 and 97.

⁸¹⁰ *Ibid* at paras 42 and 97.

⁸¹¹ A clear demonstration that the categories of unwritten constitutional principles are not closed is found in the decision of the Ontario Court of Appeal in *Lalonde v Commission de restructuration des services de santé*, (2001), 208 DLR (4th) 577 (On CA)

⁸¹² The development of the jurisprudence on the unwritten principles of the constitution makes clear that they can be used to fill gaps or feed interpretation but cannot be used to override clear constitutional textual requirements

⁸¹³ *Kingstreet Investment Ltd v New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 SCR 3 -12, 34- 38 (introduced a new constitutional principle of no taxation without representation)

⁸¹⁴ Mark Carter, “The Rule of Law, Legal Rights in the Charter, and the Supreme Court’s New Positivism” (2007-2008) 33 *Queen’s LJ* 453.

⁸¹⁵ There is the added difficulty of ascertaining how much of treaty federalist thought is a bona fide attempt to explain an existing constitutional order and how much is intended to operate at the different level of normative inspiration. As Kymlicka has noted, in *Multicultural Odysseys*, *supra* note 45 at 153, 151, while the treaties have a “revered status” it is “...difficult to disentangle the rhetoric from the reality.”

⁸¹⁶ Robin Jarvis Brownlie, “First Nations Perspectives and Historical Thinking in Canada” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

⁸¹⁷ Paul Keal, *European Conquest*, *supra* note 78 at 168- link between historical injustice and identity

⁸¹⁸ Quoted in Flanagan, “Second Thoughts”, *supra* note 293 at 213.

⁸¹⁹ Gibson, *A New Look*, *supra* note 204 at 122- See also Widdowson, *Disrobing the Aboriginal Industry*, *supra* note 368 at 253ff- see especially the passage on reinterpreting the past at 353-354.

⁸²⁰ Gibson, *A New Look*, *supra* note 204 at 33.

⁸²¹ *Ibid* at 13. Another aspect of the relevance of history that is suggested by the Gibson quote is the notion of “path dependence” or the idea that where we have come from sets constraints on where we may go- see also Tribe, “Invisible Constitution”, *supra* note 23 at 69.

⁸²² The phrase was famously used in *Mabo*, *supra* note 87. The role that history plays in the adjudication of claims for historic dispossession is addressed in JW Singer, “Well-Settled?: The Increasing Weight of History in American Indian Land Claims” (1994) 28 *Ga L Rev* 481. See also the consideration of “tide of history” cases in Henderson, “Postcolonial Indigenous Legal Consciousness”, *supra* note 47 at 43.

⁸²³ The first extended treatment of the idea that moral claims dissipate with the passage of time was provided by Immanuel Kant. See Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 84.

⁸²⁴ Some inspiration has been drawn from the treatment of history in constitutional interpretation developed by Laurence Tribe, *supra* note 23 at 69. He develops the utility of the concept of path dependence to explain how history impacts on constitutional interpretation.

⁸²⁵ Jeremy Waldron has developed what he has called the “supercession thesis” in several key articles including: “Superceding Historic Injustice” (1992) 103 *Ethics* 4; “Redressing Historic Injustice” (2002), 52 *UTLJ* 1; “Indigeneity: First Peoples and Last Occupancy” (2003) 1 *NZPIL* 55; “Settlement, Return, and the Supercession Thesis” (2004) 5 *Theoretical Inquiries in Law* 237; Waldron, “Why is Indigeneity Important?” in Miller and Rahul “Reparations”. See also George Sher, “Ancient Wrongs and Modern Rights” (1981) 10 *Philosophy and Public Affairs* 3; David Lyons, “The New Indian Land Claims and the Original Rights to Land” (1977) 4 *Social Theory and Practice* 249 (claims based on historical occupancy are “highly doubtful”). Kymlicka, “Law, Culture and Community”, *supra* note 60 at 158-161.

⁸²⁶ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148. Other works developing these arguments include: PG McHugh, “New Dawn to Cold Light: Courts and Common Law Aboriginal Rights” (2005) *NZL Rev* 485; PG McHugh, “A History of the Modern Jurisprudence of Aboriginal Rights- Some Observations on the Journey So Far” in Dysenhaus, D, Hunt M & G Huscraft, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009); P.G. McHugh, “The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History, and the Tribes” in Stebbings, C & A Musson, A, eds, *Making Legal History: Approaches and Methodology* (Cambridge University Press, 2012). A broad body of scholarship has now come to be called the “New Zealand School”. A sample of this work includes: Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford: Oxford University Press, 2011), Mark Hickford, “Vague Native Rights to the Land: British Imperial Policy on Native Title and Custom in New Zealand, 1837-53” (2010) 38 *The Journal of Imperial and Commonwealth History* 175; Damen Ward, “A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia” (2003) *History Compass* 1; Damen Ward, “Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1846-60” (2006) 34 *The Journal of Imperial and Commonwealth History* 483; Lisa Ford, “Settler Sovereignty”, *supra* note 80; Ian Hunter, “Natural Law, Historiography, and Aboriginal Sovereignty (2007) 11 *Legal History* 137; Shaunnagh Dorsett, “Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of “Barbarous” Customs in New Zealand in the 1840’s” (2008) 30 *J Legal Hist* 175. For other works of legal history that are not necessarily associated with the New Zealand school see: Craig Yirush, “Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704-1743” (2011) 29 *LHR* 333; Eric Reiter, “Fact, Narrative, and the Judicial Uses of History: Delgamuukw and Beyond” (2010) 8 *Indigenous LJ* 55; Bain

Attwood, "In the Age of Testimony: The Stolen Generations Narrative, "Distance", and Public History" (2008) 20 Public Culture 75; Bain Attwood, "The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society" (2004) History Compass 1; Salila Belmessous, ed, *Native Claims: Indigenous Law Against Empire, 1500-1920* (Oxford: Oxford University Press, 2011) ; Shaunnagh Dorsett & Ian Hunter, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave-Macmillan, 2010)

⁸²⁷ It is important to reflect on the complex relationship between common law aboriginal rights and Section 35 aboriginal rights. It will be argued that they are conceptually distinct but linked in a complex fashion. In general terms, the Supreme Court of Canada seems to have developed tests for the existence and scope of aboriginal rights, including title, that are not dependent on the state of the common law prior to the enactment of Section 35 but that the generic features of the rights, such as collective nature, inalienability and the inherent limit, are drawn from analysis of the common law jurisprudence.

⁸²⁸ Bennett, Mark, "Indigeneity", *supra* note 42 at 79- argues that Waldron's argument omits the possibility of reconciling two different legal orders.

⁸²⁹ *Supra* note 825.

⁸³⁰ Waldron, "Redressing Historic Injustice", *supra* note 825 -Waldron argues that radically changed circumstances, including massive shifts in demographic trends and land use patterns, might mean that return of land would have unjust consequences for individuals who have formed an attachment to land since the original dispossession. Ritter, "Ideological Origins", *supra* note 290 at 201 seems to be getting at these difficulties when he observes that "...There is rarely any precision attached to how, exactly, the recognition of native title is meant to have a redemptive effect. ...which is unsurprising given the grave complexities associated with the ideal of doctrine attempting to make up for historical injustice, particularly across multiple generations."

⁸³¹ Paul Patton, "Historic Injustice and the Possibility of Supercession" (2005) 26 J of Intercultural Studies 255; Cara Nine, "Superceding Historic Injustice and Territorial Rights" (2008) 11 Critical Review of International Social and Political Philosophy 79; Cara Nine, "A Lockean Theory of Territory" (2008) 56 Political Studies 14; Susan Dodds, "Justice and Indigenous Land Rights" (1998) 41 Inquiry 187; Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation" (1991) 16 Yale J Int'l L 177; Turner, *Peace Pipe*, *supra* note 60 at 68-69 (Turner is very critical of Waldron's line of argument); Douglas Sanderson, "Against Supercession" (2011) 24 Can J L & Jurisprudence 155.

⁸³² Webber, Jeremy & McLeod, Colin, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010) at 11. (discusses the impact of the passage of time in normative argument).

⁸³³ Since the early 1970's the debate about rectification of historic wrongs has been often framed in terms of the distributive justice paradigm exemplified by John Rawls and the theory of historical entitlements developed by Robert Nozick. This is particularly interesting as neither devoted much attention to the problem of Indian land claims; Singer, "Original Acquisition of Property", *supra* note 81- (within the Nozick theory of property, if the origin of a property right is tainted, the whole system fails) Raymond Guess, *Philosophy and Real Politics* (Princeton University Press, 2008) at 89 explains this lack of focus on the basis that "...Rawls' work was an attempt to reconcile Americans to an idealized version of their own social order at the end of the twentieth century."

⁸³⁴ A philosophical source that is rather similar to the argument that is developed in this work with respect to identification of aboriginal title lands is A John Simmons, "Historical Rights and Fair Shares" (1995) 14 Law and Philosophy 149. He argues that a right of restitution of unjustly taken tribal lands might be to a share of currently available lands rather than to particular lands. This obligation operates notwithstanding a general perspective that "We cannot undo a past wrong, but we can try to minimize the effects of that wrong." (p. 153) This "...may require some special rights, based on the special vulnerability of their cultural context; but the tribes' historical standing as the original occupants of the Americas are irrelevant to their current moral claims." (p. 173ff) A similar point is made in Singer, *supra* note 81 at 772, where he argues that displaced aboriginal peoples might be entitled to "...some portion of their ancestral lands". Patton, "Political Liberalism and Indigenous Rights", *supra* note 54 at 151 attempts to deploy tools drawn from Rawls to generate a response to indigenous rights that is consistent with liberal theory. He concludes that "...it offers a form of justification compatible with the idea that they are historical and contingent rather than historical or inherent rights." Rather than a rejection of how most indigenous peoples understand indigenous rights, he seems to making a point similar to Courtney Jung about the importance of situating rights claims within the historical fabric of a particular society.

⁸³⁵ A recurring theme in the literature is that modern claims of distributive justice rank higher than historical claims based on past injustice. This is sometimes addressed as a matter of priority- it is more important to address well-being issues of living people, especially considering the dismal conditions in many indigenous communities, than to address what are perceived to be theoretical claims. The purest expression of this point of view is found in the

Australian notion of “practical reconciliation”. A deeper philosophical foundation for this view might be found in the posthumously published work of Iris Marion Young, “Responsibility for Justice”, *supra* note 468. She articulates a theory of justice that is strongly prospective in orientation (pp. 108-109) History matters in assessing obligations of justice but not for reproach or compensation. (pp. 171-183) It is her hope that the retelling of historical injustice will provide a stimulus for the development of more positive relationships in the present (p. 181) However, formal policies of equal treatment may fall well short of properly dealing with the modern legacies of historical injustice (p. 186).

⁸³⁶ Kymlicka, *Multicultural Citizenship*, *supra* note 292 at 116-119 and 219-220.

⁸³⁷ Short, “Australian “Aboriginal” Reconciliation”, *supra* note 86 at 303.

⁸³⁸ Poole, “Justice or appropriation?”, *supra* note 59 at 10.

⁸³⁹ Courtney Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 242 (Jung presents a distinctive approach to coming to terms with the past by placing the responsibility squarely on the state and calling for ameliorative measures to address the current consequences of past exclusions).

⁸⁴⁰ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17; An extremely useful assessment of Hendrix’s book can be found in Mira Bachvarova, Book Review of Hendrix, “Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims” (2010) 36 *Social Theory and Practice* 341; A more truncated version of the basic argument can be found in Hendrix, “Political Authority and Indigenous Sovereignty” *supra* note 705.

⁸⁴¹ The related question of the possible contours of effective intercultural dialogue will be dealt with in Chapter 9.

⁸⁴² Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 1.

⁸⁴³ *Ibid* at 15.

⁸⁴⁴ *Ibid* at 22, 29.

⁸⁴⁵ *Ibid* at 33.

⁸⁴⁶ *Ibid* at 44-50.

⁸⁴⁷ *Ibid* at 50.

⁸⁴⁸ DD Raphael, *Problems of Political Philosophy* (Pall Mall Press, 1970); John Plamenetz, *Consent, Freedom and Political Obligation* (Oxford University Press, 1968)

⁸⁴⁹ Hendrix, *supra* note 17 at 69-72.

⁸⁵⁰ *Ibid* at 76-77.

⁸⁵¹ *Ibid* at 100.

⁸⁵² *Ibid* at 41.

⁸⁵³ *Ibid* at 73, 79-80, 81 and 182.

⁸⁵⁴ *Ibid* at 74, 91.

⁸⁵⁵ *Ibid* at 122.

⁸⁵⁶ *Ibid* at 49, 55, 79-80.

⁸⁵⁷ *Ibid* at 79-80, 81.

⁸⁵⁸ *Ibid* at 81.

⁸⁵⁹ *Ibid* at 91, see also 65; Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 132 (general discussion of a duty to maintain the state in political theory).

⁸⁶⁰ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 100; Kyla Reid, “Political Legitimacy”, *supra* note 84 at 94 states are “...most capable of administering justice on the territory where we live”. However, she also argues that we must be careful not to be blind to “...other potential ways of organizing political authority”.

⁸⁶¹ Hendrix, *ibid* at 118, 133 and 117.

⁸⁶² *Ibid* at 121, see also 40, 41, 47 and 48.

⁸⁶³ *Ibid* at 123 (It should be noted that it appears awkward to describe all deviations from a universal norm that attempt to deal with indigenous claims as “partial separation”).

⁸⁶⁴ *Ibid* at 134-135.

⁸⁶⁵ *Ibid*.

⁸⁶⁶ *Ibid*.

⁸⁶⁷ *Ibid* at 136-137, see also 112.

⁸⁶⁸ *Ibid* at 138.

⁸⁶⁹ *Ibid* at 124 (the general importance of dialogical mechanisms will be explored more fully in Chapter 9 (Dialogue)

⁸⁷⁰ *Ibid* at 165-166.

⁸⁷¹ *Ibid* at 173-174.

⁸⁷² *Ibid* at 174.

⁸⁷³ *Ibid* at 179.

⁸⁷⁴ *Ibid* at 173.

⁸⁷⁵ *Ibid* at 183, see also 121.

⁸⁷⁶ Spinner-Halev, “From Historical to Enduring Injustice”, *supra* note 17.

⁸⁷⁷ *Ibid* at 592.

⁸⁷⁸ While these questions are of general relevance, it is in the context of discussions of the scope and impact of aboriginal title that there are most pertinent.

⁸⁷⁹ The declaratory doctrine will be considered in Chapter 13 (Title).

⁸⁸⁰ A distinguishing feature of Brian Slattery’s work has been a careful focus on the history of the common law. He has been a leading proponent of a protective theory of the common law rooted in British colonial practice and centred on the *Royal Proclamation of 1763*.

⁸⁸¹ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148.

⁸⁸² Paul McHugh, “The Common Law Status of Colonies and Aboriginal “Rights”: How Lawyers and Historians Treat the Past” (1998) 61 Sask L Rev 393 - rules of reception not directed to aboriginal peoples but are predominantly intended to regulate relations between the Crown and settlers. Hseuh, “Under Negotiation”, *supra* note 203 at 59 makes a similar point- “...were as much attempts to circumvent the restrictions of the Crown as they were attempts to consolidate power and influence in contested indigenous ground.”

⁸⁸³ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 at 45, 117, 132-134 and 108- status of formal instruments, especially the Royal Proclamation.

⁸⁸⁶ *Ibid* at 155-156, 158.

⁸⁸⁵ McHugh argues that the common law simply did not recognize a form of title to the land itself in the 19th century and legal theories that attempt to project this view back to that period are engaging in “presentism”- see McHugh, *ibid* at 16-23. See also Ian Hunter, “Natural Law, Historiography and Aboriginal Sovereignty”, *supra* note 828. See also: Michael Murphy, “Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada and New Zealand” (2008) 87 Can Bar Rev 357 at 357 (Murphy makes the point that it was not so long ago that land rights were seen as minimal or completely dismissed.)

⁸⁸⁶ This case is made especially forcefully in McHugh, “A History of the Modern Jurisprudence”, *supra* note 826.

⁸⁸⁷ McHugh on presentism; The intellectual background for this approach is found in Herbert Butterfield, *The Whig Interpretation of History* (Newton, 1965) at 16 – the subordination of the past to the needs of the present.

⁸⁸⁸ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 at 17 and 21.

⁸⁸⁹ *Ibid* at 67, 171, 181, 203-13, and Paul McHugh, *Aboriginal Title: the Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) at 18-19.

⁸⁹⁰ McHugh, *Aboriginal Societies and the Common Law*, *ibid* at 20, 55, 118, 156-156; McHugh, *Aboriginal Title*, *ibid* at 6 and Yirush, “Claiming the New World”, *supra* note 828 at 369-373.

⁸⁹¹ The notion of three distinct stages in the relationship between the Crown and aboriginal peoples moving from an era of relative equality and respect to an era of assimilation and oppression ending in an emerging era of decolonization is central to the narrative presented by the Royal Commission on Aboriginal Peoples and lies at the heart of the theoretical efforts of James Tully to recover terms of engagement for inter-cultural dialogue in the present from the earlier more respectful relationships that he perceives in the past. This has not gone without comment as, for example, Bonnie Honig, in her comment on “Consent, Hegemony and Dissent”, in Webber and McLeod, “Between Consenting Peoples”, *supra* note 613 at 140 says that “Tully keeps the focus not on the trail of tears but on the history of treaty-making, as if they could be prized apart, as if the tears and the treaties are not inextricably intertwined.”

⁸⁹² McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 at 47, 134, 149, 192-193 and 226-227. See also: McHugh, “Aboriginal Title”, *supra* note 889 at 105; Yirush, “Claiming the New World”, *supra* note 826. A very detailed study of this process of evolution is presented in Lisa Ford, “Settler Sovereignty”, *supra* note 80.

⁸⁹³ McHugh, *ibid* at 105.

⁸⁹⁴ McHugh, *Aboriginal Societies and the Common Law*, *ibid* at 139-142.

⁸⁹⁵ *Ibid* at 45, 133-134.

⁸⁹⁶ *Ibid* at 155-156, 158; McHugh, “Aboriginal Title”, *supra* note 889 at 111-112.

⁸⁹⁷ McHugh, *Aboriginal Societies and the Common Law*, *ibid* at 45, 130-142.

⁸⁹⁸ *Amodu Tijani v Southern Nigeria (Secretary)*, [1921] 2 AC.399 (JCPC).

⁸⁹⁹ *In re Southern Rhodesia*, [1919] AC 211 (JCPC).

⁹⁰⁰ Several historians draw a broad distinction between parts of the English empire where the Crown was comfortable with a limited legal presence and relied heavily on the continuation of existing legal authority and other parts where imperial law was gradually implemented with the intention of being the primary legal code for the colony. The first area is generally referred to as “indirect rule” while the second generally entailed direct ousting of

pre-existing legal authority. Tamanaha, "Legal Pluralism", *supra* note 567 at 382-386; Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press, 2010) at 134 (indirect rule); David Day, *Conquest: How Societies Overwhelm Others* (Oxford University Press, 2008) at 5- he notes the absence of a focus on treaties in Africa, presumably on the basis of the different colonial policy that was based on indirect rule.

⁹⁰¹ Mark Walters, "Histories of Colonialism, Legality and Aboriginality" (2007) 57 UT Fac L Rev 819 "redemptive approach". This approach is further developed in Walters, "Written Constitutions and Unwritten Constitutionalism", *supra* note 717 at 262, 269ff. Interesting parallels can be drawn to the body of constitutional theory that explores the notion of the common law representing a "higher order" branch of the law with greater moral content- See Thomas Poole, "Back to the Future?", *supra* note 129. Bennett, "Indigeneity", *supra* note 42 at 811 views the task of common law constitutionalism as developed by James Tully as "...to interpret the law consistently with fundamental human rights."

⁹⁰² Walters, "Histories of Colonialism", *ibid* at 823.

⁹⁰³ Interestingly McHugh seems to breach this rule in relation to aboriginal title- this will be discussed more completely in the chapter on aboriginal title (Chapter 13).

⁹⁰⁴ However, it will be argued at a later stage that McHugh's approach to aboriginal title seems to do precisely this by suggesting that aboriginal title is to be addressed by a retrospective application of an evolving notion of Crown sovereignty. See Chapter 13.7

⁹⁰⁵ A crucial feature of the *Mabo*, *supra* note 87 at 41-42, decision was the re-interpretation of the common law based, in part, on modern standards of human rights law.

⁹⁰⁶ John Ralson Saul, *A Fair Country: Telling Truths About Canada* (Viking Canada, 2008) - extended argument that past relationships between the Crown and aboriginal peoples might offer a template to construct more positive relationships in the present.

⁹⁰⁷ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 50-51-see also 65; Robert Lee Nichols, "Realizing the Social Contract: The Case of Colonialism and Indigenous Peoples", (2005) 4 Cont Pol Theory 42 - flawed recognition of actual historical relations; Magnet, "Multiculturalism and Collective Rights", *supra* note 750 at 462- without their participation Canada would not have been founded

⁹⁰⁸ Nichols, "Realizing the Social Contract", *ibid* at 57.

⁹⁰⁹ Curry, Stephen, "Indigenous Sovereignty", *supra* note 2 at 149.

⁹¹⁰ Tully, *Strange Multiplicity*, *supra* note 122, ch 4, see also 166. On past practice providing a model for present engagements; Ivison, "Logic of Aboriginal Rights", *supra* note 456 at 327- "History tells us that this did not occur, but the ideal serves a counterfactual for rethinking relations in the present."

⁹¹¹ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 139. See also 12, 148.

⁹¹² Curry, "Indigenous Sovereignty", *supra* note 2 at 4, Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate, 2008) at 303, the Royal Commission on Aboriginal Peoples also developed the key theme of drawing from earlier principles of respectful engagement. It is interesting to note that several commentators have criticized the version of history developed by Saul. For example, Salée, "Settler Angst", *supra* note 383 at 327 states that Saul's history is "largely inaccurate". David MacDonald, "Reconciliation after Genocide", *supra* note 86 at 61 alleges that Saul creates a "...dubious model of historical partnership." He also suggests that Saul is presenting a "white-washed" version of Canadian history, preferring the intellectual history developed by Resnick. (p. 63) (Resnick, "European Roots", *supra* note 739) It is clear from context that neither scholar would argue against movement towards more of a nation-to-nation relationship in the present, but they have difficulties with projecting such a laudable goal into the practice of the past. A more sympathetic reading comes from BER Edwards, "Who do we Think we Are? Writing on Citizenship and Identity in the Early Twenty First Century" (2010) 44 J of Canadian Studies 221 at 227- "In Saul's mind, the single greatest failure in the Canadian experiment to date has been our inability to normalize and consciously internalize Aboriginal culture as a founding pillar of our civilization."

⁹¹³ Van der Peet, *supra* note 8.

⁹¹⁴ *Secession Reference*, *supra* note 23 at para 82.

⁹¹⁵ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 50; Tully, *Strange Multiplicity*, *supra* note 122

⁹¹⁶ Richard Ogden, "'Existing' Aboriginal Rights in Section 35 of the Constitution Act, 1982" (2009) 88 Can Bar Rev 51.

⁹¹⁷ *Ibid* at 53.

⁹¹⁸ *Ibid* at 54-55.

⁹¹⁹ *Ibid* at 68, 70.

⁹²⁰ Shin Imai, “The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice Lebel” (2006) 55 UNBLJ 146.

⁹²¹ At first glance, the *Manitoba Métis Federation* decision, *supra* note 13 may be seen as going against this trend but the focus of the declaration that was granted is firmly linked to the encouragement of modern dialogue about reconciliation rather than providing a direct remedy for an historical wrong.

⁹²² There is ample evidence that the entire edifice of constitutional thinking about the 1982 amendments is strongly prospective in orientation. This is no less the case with aboriginal law even though there is a strong historical element in the various tests for Section 35 rights. See *Rio Tinto*, *supra* note 796; Borrows, “(Ab)Originalism”, *supra* note 661 at 356 “future oriented living tree”. Dwight Newman, “Institutional Roles and Chief Justice Lamer’s Aboriginal Rights Jurisprudence” in Dodek, Adam & Jutras, Daniel, *Le Feu Sacré: l’héritage d’Antonio Lamer/ The Sacred Fire: The Legacy of Antonio Lamer* (LexisNexus, 2009) at 80 “substantial forward looking component.”

⁹²³ *Blueberry River Indian Band v Canada (Department of Indian and Northern Affairs)*, [1995] 4 SCR 4; *Manitoba Métis Federation*, *supra* note 13; *Canada (Attorney-General) v Lameman*, 2008 SCC 14 *Wewaykum*, *supra* note 39.

⁹²⁴ The Supreme Court of Canada has considered the *Royal Proclamation of 1763* on numerous occasions. In addition to cases dealing with the geographical scope of application of the *Proclamation (Sigeareak EI-53 v The Queen*, [1966] SCR 645) and the linkage between the commitments made in *Royal Proclamation* and the fiduciary obligations of the Crown (see, in particular, *Guerin*, *supra* note 1529, *Mitchell*, *supra* note 690 and *Manitoba Métis Federation*, *supra* note 13), the most substantive consideration of the effect of the *Proclamation* can be found in *Marshall; Bernard*, *supra* note 38 at paras 85-96. In this case, the Supreme Court of Canada rejected an argument that the *Proclamation* had the effect of reserving the former colony of Nova Scotia for the Indians. Murphy, “Culture and the Courts”, *supra* note 98 at 116 provides a good summary of legal literature on the *Royal Proclamation*; Berry, “Legal Anomalies”, *supra* note 705 at 241- the *Proclamation* provided some benefits but it “...ultimately allowed the Crown slowly but inevitably to acquire title to their lands.” There is also a rich historical literature that frequently develops the theme that the *Royal Proclamation*, while protective on its face, worked to the ultimate disadvantage of indigenous peoples. See Ford, “Settler Sovereignty”, *supra* note 80 at 180.

⁹²⁵ Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can Bar Rev 255 at 280- aboriginal title is described as not being a modern right and to think of it as such is to turn one’s back on several centuries of legal history.

⁹²⁶ As this is not a work of legal history, it will not be asserted that there is a necessarily a preferable way of describing the attitudes and beliefs of the parties in the relevant periods of history. What will be presented is one possible way of understanding the practices and context that resonates with the author’s general impressions of the legal and historical materials from those periods.

⁹²⁷ *Supra* note 826 (Key citations for works associated with the New Zealand School of Legal History)

⁹²⁸ Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can Bar Rev 727 at 732.

⁹²⁹ While the primary focus in this work has been on the approach to legal continuity developed by Brian Slattery, mention should be made of the equally important contributions made by Kent McNeil and the late Geoffrey Lester. McNeil has focussed on the role of the traditional doctrines of English common law property law that emphasise the importance of possession as a foundation for a title while Lester argued for a different set of consequences depending on the form of acquisition of a colony under Imperial constitutional law.

⁹³⁰ After the *Mabo* decision, *supra* note 87, it has become commonplace to regard the doctrine of continuity as a uniform doctrine. A Canadian example of this approach can be seen in the judgment of Mr. Justice Lambert in the British Columbia Court of Appeal decision in *Delgamuukw v. British Columbia* (1993) B.C.A.C. 1. However, there are different variations that depend on the role that is accorded to recognition, on whether the doctrine extends beyond property rights to other legal interests and whether it supports the incorporation of whole indigenous legal systems. With the exception of the important work of Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014), which will be discussed in the chapter on aboriginal title, far less attention is now paid on the precise mode of acquisition of a colony.

⁹³¹ *Royal Proclamation*, *supra* note 327.

⁹³² While Slattery has been a major contributor to this standard model, Kent McNeil and Mark Walters have also made major contributions to the body of legal scholarship dealing with aboriginal rights and title

⁹³³ Yarrow, David, “Law’s Infidelity with its Past”, *supra* note 616 at 89.

⁹³⁴ *Ibid* at 96.

⁹³⁵ Mark Walters, “The “Golden Thread” of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill LJ 711 at 720 (incapable of recognition by colonial authorities)

⁹³⁶ Yarrow, “Law’s Infidelity with its Past”, *supra* note 616 at 80.

⁹³⁷ Yarrow, “Law’s Infidelity with its Past”, *supra* note 616 at 96.

⁹³⁸ Flanagan et al, “Beyond the Indian Act”, *supra* note 29 at 60- “After 1812, British policy gradually moved from...nation to nation relations to protection and civilization.”

⁹³⁹ Lisa Ford, “Settler Sovereignty”, *supra* note 80 at 2, 5, 42.

⁹⁴⁰ *Ibid* at 15, 30, 53, 209, and especially 129.

⁹⁴¹ *Ibid* at 142.

⁹⁴² As a matter of historical interpretation there are deep disagreements about the impact of the Quebec Act, 1774 on the continued viability of the Royal Proclamation. McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 at 45, 105, 539-541, 565-567 argues that it was abrogated by the Quebec Act, 1774, a conclusion that was recently supported by the historian Alain Beaulieu, “An equitable right to be compensated”: The Dispossession of Aboriginal Peoples in Quebec and the Emergence of a New Legal Rationale (1760-1860)” (2013) 94 *The Can Hist Review* 1 at 10;. Royal Commission on Aboriginal Peoples, “Partners”, *supra* note 28 at 60 offers a view on the effect of the Quebec Act which reaches a contrary conclusion. A recent example of a more idealistic approach to the Royal Proclamation can be found in Luk, “Not too Many Hats”, *supra* note 13 at 35- he argues that a history of alliances led to aboriginal action which “...secured the Proclamation as a promise to secure their rights.”; Secher, “Aboriginal Customary Law”, *supra* note 930 at 415 goes further to suggest that the Proclamation “...affirmed Aboriginal allodial title to all unpurchased land under English protection in North America.”; Borrows, “Blockades”, *supra* note 13 at 106- impact of the Treaty of Niagara of 1764 on the Royal Proclamation., arguing that the Proclamation has to be judged by reference to indigenous values (p. 112). Particularly when considered with the meetings at Niagara in 1764, much legal literature focuses on the protective aspects of the Royal Proclamation, whereas historical literature tends to focus on the role of the Proclamation in launching a process that resulted in land dispossession. See David Berry, “Legal Anomalies” in Saunders and Haljan, “Whither Multiculturalism?”, *supra* note 705 at 241 while the Proclamation provided some benefits it “...ultimately allowed the Crown slowly but inevitably to acquire their lands.”; Jennifer A. Brown, “*Our Native Peoples*”: *The Illegality of Canadian Citizenship and the Canadian Federation for Aboriginal Peoples* (MA, Carleton University, 2007) at 12- refers to arguments that the Royal Proclamation constituted a loss of sovereignty for aboriginal peoples. While these historical questions cannot be addressed in this thesis, at a minimum it is clear that recent jurisprudence has drawn from the principles reflected in the Proclamation to flesh out the structural features of common law obligations. See *Bernard*, *supra* note 38.

⁹⁴³ A feature that does not receive much emphasis in academic discourse is that the Royal Proclamation was expressly styled to be a temporary expedient in that it was to operate “until Our further Pleasure be Known.”

⁹⁴⁴ There is a burgeoning literature on a full range of topics pertaining to colonial law issues, including the authority of governors, disallowance and reservation powers, the precise status of prerogative instruments and the impact of the Colonial Laws Validity Act. A full study of the status and interpretation of colonial legal issues would have to take into account this broader literature.

⁹⁴⁵ *Fletcher v Peck*, (1810) 10 US 87; a complete analysis of all of the opinions offered in this case can be found in Cassidy, “Sovereignty”, *supra* note 70 at 216.

⁹⁴⁶ *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US (6 Pet) 515 (1832).

⁹⁴⁷ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 6-9 – (quoting from Chief Justice Marshall in the trilogy- title courts of the conqueror cannot deny) and at 18- (good summary of the authorities on terra nullius and discovery)

⁹⁴⁸ Mills, “Multiculturalism as/and/or anti-racism”, *supra* note 74 and Ford, “Settler Sovereignty”, *supra* note 80 on the Trail of Tears; Russell, “High Courts”, *supra* note 98 at para 9- favourable judgments did not save the Cherokee from forced dislocation.

⁹⁴⁹ Christopher D Jenkins, “John Marshall’s Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence” (2001) 35 *UBC L Rev* 1 (Jenkins presents an interpretation of the trilogy that is very limited and regards the Canadian jurisprudence, particularly with the Campbell decision, as having decisively rejected the Marshallian paradigm)

⁹⁵⁰ Slattery, “Understanding Aboriginal Rights”, *supra* note 928 at 739; *Royal Proclamation*, *supra* note 327.

⁹⁵¹ Though McNeil’s early writing, based on his doctoral thesis, focussed on the doctrine of common law possession, he has tended to move away from this doctrine in his later work.

⁹⁵² The Australian native title cases, starting with *Mabo*, *supra* note 87, clearly describe native title as not being a common law right, though it is given some measure of protection by the common law.

⁹⁵³ *Mabo*, *supra* note 87.

⁹⁵⁴ See Chapter 17.1.

⁹⁵⁵ *Province of Ontario v Dominion of Canada*, (1909) 42 SCR 1, per Idlington J, (described the law as “shadowy”). See also: Walters, “Promise and Paradox”, *supra* note 645; Christie, Gordon, “Critical Indigenous Philosophy” in

Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) at 125- aboriginal rights "...had some status...their status was unclear and ambiguous." In any case, according to Kent McNeil, "Judicial Approaches to Self-Government since Calder: Searching for Coherence" in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007) at 129- notwithstanding the Royal Proclamation and the treaties "...by the 1920's the Government of Canada was no longer prepared to acknowledge the legal validity of title to land."

⁹⁵⁶ *St Catherine's Milling and Lumber Co v The Queen*, (1888) 14 App Cas 46 [*St Catherine's Milling*] (Canada argued that by taking a transfer of the Indian interest it acquired a full beneficial right to the land)

⁹⁵⁷ Kerry Wilkins, "Whose Claim is it Anyway? Comment on Lax Kw'alaams" (2013) 11 Indigenous LJ 73- referring to the "inchoate condition" of rights prior to the enactment of Section 35; *St Catherine's Milling and Lumber Co v R* (1887) 13 SCR 577 at 588- "It is a rule of the common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations that could be considered laws."

⁹⁵⁸ The notion of a "standard model" of aboriginal rights will be addressed in the section dealing with aboriginal title. See Chapter 13.

⁹⁵⁹ Ford, "Settler Sovereignty", *supra* note 80 at 2,5,142.

⁹⁶⁰ *St Catherine's Milling*, *supra* note 956.

⁹⁶¹ Hall in *Calder v British Columbia (Attorney-General)*, [1973] SCR 313 at para 64.

⁹⁶² Just because the rights were regarded as inchoate and imprecise does not mean that they were ignored. Canada's colonial history does reflect a largely consistent pattern of Crown attempts to try to deal with the indigenous inhabitants of lands prior to opening them up for general settlement. However, the general law at the time does seem to support the proposition that the Crown was free to grant any particular parcel of lands prior to obtaining a treaty. In other words, a treaty was not a legal precondition for the exercise of the prerogative to grant lands. This is made especially clear in the scholarship of Secher, "Aboriginal Customary Law", *supra* note 930 who deals with Australian property law.

⁹⁶³ As noted above, the work of the New Zealand school of legal history tends to undermine the conclusion that the legal regime of the 19th century recognized what would be today regarded as a property interest to discrete parcels of land, much less title to the entire traditional territories of an indigenous group. Rather, a generic "Indian title" was recognized. This captured notions of aboriginal use and occupation, including harvesting rights. While this title gave rise to no justiciable legal duties, a political obligation vested in the Crown to deal with aboriginal peoples prior to making the lands subject to Indian title generally available for settlement. This was expressly stated to be a duty arising out of prudence. Beaulieu, "An equitable right to be compensated", *supra* note 942 at 10, underlines the importance of the policy dimension over the legal dimension as a driver of colonial policy. After the repeal of the protective provisions of the *Royal Proclamation* in Quebec, the historical evidence supports the conclusion that "In theory, the formal requirements to conclude treaties had disappeared. In practice, the British authorities did not expect to change their policy on this matter." He argues, at p. 23, that the practice of negotiating surrenders with aboriginal group was motivated by the "equitable right to be compensated for the loss of lands." Even in the case of the negotiation of the Douglas Treaties in Vancouver Island, which Douglas Lambert argues amounts to a recognition of land rights prior to the negotiation of the treaty, there is support for the view that British authorities were adopting measures to address the fundamental lack of certainty about the status of land rights. Rather than a recognition of a broad property right, Douglas writes that "I thought it advisable to purchase the whole of the Saanich Peninsula as a measure that would save much future trouble and expense". See Honourable Douglas Lambert, "Three Points about Aboriginal Title" (2012) 70 *The Advocate* 34.

⁹⁶⁴ A quit claim is a transfer instrument that removes uncertainty about a claim to land without recognizing the validity of that claim.

⁹⁶⁵ A link can be drawn between 20th and 19th Crown attitudes to treaty making. As in the past, Crown officials enter treaty-negotiations on a "rights-neutral" basis. Rather than engage in a directed enquiry as to the existence of particular aboriginal rights, the negotiations are framed in terms of interests and directed towards the ultimate release of undefined, but vague, pre-existing interests. One of the key themes of this thesis is that the Haida line of cases has required some degree of dialogue about the foundation and scope of Section 35 rights in a manner that never existed in Canadian law or practice.

⁹⁶⁶ *R v Sparrow*, [1990] 1 SCR 1075 at para 49.

⁹⁶⁷ Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 *Fordham L Rev* 721 at 727.

⁹⁶⁸ Duncan Ivison, “Deliberative Democracy and the Politics of Reconciliation” in Kahane, David, Weinstock, Daniel, Leydet, Dominique & Williams, Melissa, eds, *Deliberative Democracy in Practice* (University of British Columbia Press, 2010) at 116-117.

⁹⁶⁹ Ivison, “Deliberative Democracy”, *ibid* at 115.

⁹⁷⁰ “The notion of “deep consultation” will be considered in detail in Chapter 14, especially Section 14.11; Murphy, “Prisons of Culture” *supra* note 885 at 388 (strong endorsement of the promising nature of the reconciliation framework in Canadian jurisprudence).

⁹⁷¹ Mikisew, *supra* note 13-(classic statement of the Supreme Court of Canada’s approach to reconciliation). See also the legal treatment of reconciliation will be addressed in Chapter 11, especially in Section 11.2.

⁹⁷² Key exceptions are the work of Andrew Schaap, *Political Reconciliation*, *supra* note 472 and Walters, “Morality of Aboriginal Law”, *supra* note 718 and Mark Walters, “The Jurisprudence of Aboriginal Rights: Aboriginal Rights in Canada” in Kymlicka, W & Bashir, B, *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008). The seminal piece on recognition is Charles Taylor, “The Politics of Recognition” in Gutman, Amy, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, 1994) .

⁹⁷³ Walters, “Morality of Aboriginal Law”, *ibid* at 474.

⁹⁷⁴ Miranda Johnson, “Struggling Over the Past”, *supra* note 91, ch 3, 3. (reconciliation is the process of bringing discordant parties and individuals into agreement)

⁹⁷⁵ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 is a good example; Jocelyn Maclure, “The Politics of Recognition at an Impasse: Identity Politics and Democratic Citizenship” (2003) 36 CJPS 3 (only a negotiated resolution can lead to reconciliation); Murphy, “Prisons of Culture” *supra* note 885 at 389 (limited role of the courts in reconciliation).

⁹⁷⁶ It will be seen that many have doubts about reconciliation as a guiding norm, in part because it is amenable to such conflicting interpretations. Christie, “Critical Indigenous Philosophy”, for example, in Tomsons and Mayer, *supra* note 63 argues that “...words seem to serve different linguistic aims, suggesting that the rhetoric not only marks but advances other colonial projects.”

⁹⁷⁷ Rainer Forst, “A Critical Theory of Multicultural Toleration” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) at 293 argues that toleration is not an essentially contested concept as all variants share a core concept. This may not be so clear for reconciliation.

⁹⁷⁸ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 at viii (McHugh queries whether we may look back in scorn at our reliance on reconciliation); Ladner, “Take 35”, *supra* note 55 at 285-286- (reconciliation pertains more to the interests of Canadians than indigenous peoples. However, the Haida decision is seen as enabling a “...more nuanced, Aboriginal-friendly understanding of reconciliation.”) Alfred, “Wawase”, *supra* note 108 at 95 expresses a less nuanced view- “...Some of us believe in reconciliation, forgetting that the monster has a genocidal appetite.” Cirkovic, “Self-Determination and Indigenous Peoples”, *supra* note 69 at 376-377 argues that reconciliation is just another colonial strategy to achieve dispossession. She adds, at 398, -“Official reconciliation merely continues the assimilationist nation-building process through the language of citizenship rights and inclusion of victimized indigenous peoples.” Vermette, “Dizzying Dialogue”, *supra* note 70 at 56 adds his opinion that no actual reconciliation is taking place.

⁹⁷⁹ Alexander Alienikoff, “Constitutional Law in an Age of Balancing” (1987) 96 Yale LJ 943- (exploration of some of the difficulties with balancing); Andrew Robinson, “Of Protestants and Pueblos”, *supra* note 17 development of the idea that reconciliation involves balance; Frank Pommersheim, “At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty” (2010) 55 SDL Rev 48 at 53- American judicial decisions on Indian law “...often turn on a balancing of interests approach.”

⁹⁸⁰ This is undoubtedly related to the fact that the notion of reconciliation has become a prominent part of the political lexicon in Australia rather than being a term whose meaning is debated primarily in legal processes.

⁹⁸¹ One of the key elements of political debate in Australia has been the relative priority accorded to rights resolution and “closing the gap”. As noted previously, *supra*. 1112, Minister Jenny Macklin of the Australian federal government has initiated a debate about how rights resolutions processes can contribute to the political goal of equalizing socio-economic outcomes. It is still too soon to determine how the election of the government of Tony Abbott will impact on this debate.

⁹⁸² PE Digressor, “Review of Political Reconciliation by Andrew Schaap” (2006) 34 Political Theory 830 at 830.

⁹⁸³ *Ibid*.

⁹⁸⁴ *Ibid* at 831.

⁹⁸⁴ Ivison, “Politics of Reconciliation”, *supra* note 968 (recommendation of a deliberative turn, deep challenge to deliberative democracy).

⁹⁸⁴ *Ibid* at 115 (deep challenge to deliberative democracy).

- ⁹⁸⁴ See Chapter 14 for a discussion of the legal concept of “deep consultation”. *Haida*, *supra* note 13; Murphy, “Prisons of Culture”, *supra* note 885, strong endorsement of the promising nature of the reconciliation framework in Canadian jurisprudence. These themes are developed further by Michael Murphy, “Civilization, Self-Determination and Reconciliation” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009).
- ⁹⁸⁵ Andrew Schaap, “Political Reconciliation”, *supra* note 472; Andrew Schaap, “Reconciliation as Ideology and Politics” (2008) 2 *Constellations* 249; Andrew Schaap, “The proto-politics of reconciliation: Lefort and the aporia of forgiveness in Arendt and Derrida” (2006) 41 *Australian J of Political Science* 615; Andrew Schaap, “Political Reconciliation Through a Struggle for Recognition?” (2004) 13 *Social and Legal Studies* 523; Andrew Schaap, “Absurd Proposition of Aboriginal Sovereignty”, *supra* note 557.
- ⁹⁸⁶ Schaap, “Political Reconciliation”, *ibid* at 67.
- ⁹⁸⁷ *Ibid* at 7.
- ⁹⁸⁸ The South African experience is especially important because of the use of the value of reconciliation to guide achievement of transitional justice. In Australia, an important part of the history of reconciliatory proposals has been the advocacy for a Makarata, or national treaty between the state and indigenous peoples. See Andrew Schaap, “Absurd Proposition of Sovereignty”, *supra* note 957. In the absence of such a treaty, Schaap argues, at 19, that symbolic measures such as an “Aboriginal embassy” on the grounds of the Australian Parliament “...makes visible the dispossession.”
- ⁹⁸⁹ See Chapter 5 (Constitutionalism).
- ⁹⁹⁰ Schaap, “Political Reconciliation”, *supra* note 985 at 149.
- ⁹⁹¹ Schaap, “Proto-Politics”, *supra* note 985 at 617.
- ⁹⁹² *Ibid*.
- ⁹⁹³ Schaap, “Political Reconciliation” *supra* note 988 at 536.
- ⁹⁹⁴ Asch, “From Terra Nullius to Affirmation”, *supra* note 97 at 36 (an attempt to ground aboriginal claims on universal principles rather than “way of life” protections).
- ⁹⁹⁵ Damien Short, “When Sorry isn’t good enough: Official remembrance and reconciliation in Australia” (2012) 5 *Memory Studies* 293; Short, *Reconciliation and Colonial Power*, *supra* note 912; Short, “Social Construction”, *supra* note 86; Short, “Internal Colonialism”, *supra* note 400, Damien Short, “Reconciliation, Assimilation and the Indigenous Peoples of Australia”, *supra* note 400 at 504.
- ⁹⁹⁶ Short, “Internal Colonialism”, *supra* note 400 at 272.
- ⁹⁹⁷ Short, “Reconciliation and Internal Colonialism”, *supra* note 400 at 505.
- ⁹⁹⁸ Short, “Internal Colonialism”, *supra* note 400 at 277.
- ⁹⁹⁹ *Ibid* at 279.
- ¹⁰⁰⁰ Muldoon, Paul, “The Very Basis of Civility: On Agonism, Conquest and Reconciliation” in Kymlicka, W & Bashir, B, *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008) at 114.
- ¹⁰⁰¹ *Ibid*.
- ¹⁰⁰² Muldoon, “Between Speech and Silence”, *supra* note 506 at 52.
- ¹⁰⁰³ *Ibid* at 53.
- ¹⁰⁰⁴ Paul Muldoon, “The Sovereign Exception: Colonization and the Foundation of Society” (2008) 17 *Social Legal Studies* 59 at 73.
- ¹⁰⁰⁵ Ivison, “Politics of Reconciliation”, *supra* note 968.
- ¹⁰⁰⁶ *Ibid* on the importance of a robust civil society to support multicultural; deliberations; Salée et al, “Quality of Life”, *supra* note 2 (discusses the influence of Putnam and social capital theory among theorists who place less reliance on the responsibilities of the state).
- ¹⁰⁰⁷ Ivison, “Politics of Reconciliation”, *ibid*.
- ¹⁰⁰⁸ *Ibid* at 116- rejection of forgiveness as a goal.
- ¹⁰⁰⁹ *Ibid* at 117- distortion of capacities in the present.
- ¹⁰¹⁰ *Ibid* at 121ff- institutional development.
- ¹⁰¹¹ *Ibid* at 123- promotion of compromise and institutional innovation.
- ¹⁰¹² *Ibid* at 125ff, especially 129- negative evaluation of Australian developments.
- ¹⁰¹³ *Ibid* at 154- de-centred conversations.
- ¹⁰¹⁴ Tully, “New Key”, *supra* note 122 at 285 (while he describes self-determination as something that cannot be implemented on a purely internal basis within a settler state, it is clear that he would take the same position with respect to reconciliation.)

- ¹⁰¹⁵ Walters, "Morality of Aboriginal Law", *supra* note 718 at 500-501 - reconciliation as resignation- The idea is developed further in a later article in Kymlicka and Bashir, Walters, "Jurisprudence of Aboriginal Rights, *supra* note 972.
- ¹⁰¹⁶ Walters, "Morality of Aboriginal Law", *ibid*.
- ¹⁰¹⁷ *Ibid*. See also: Tribe, "Invisible Constitution", *supra* note at 111 (not all brute force is law)
- ¹⁰¹⁸ Walters, "Morality of Aboriginal Law", *supra* note 718 at 514-515 reconciliation as relationship.
- ¹⁰¹⁹ *Ibid* at 518-519- reconciliation as an aspect of legality.
- ¹⁰²⁰ Walters, "Promise and Paradox", *supra* note 648.
- ¹⁰²¹ Walters, "Morality of Aboriginal Law", *supra* note 720- favourable reaction to the duty to consult
- ¹⁰²² Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal People* (Purich, 2009).
- ¹⁰²³ Newman, "Reconciliation" Legal Conception(s)", *supra* note 288. John Borrows offers an alternative definition of reconciliation in "Uncertain Citizens: Aboriginal Peoples and the Supreme Court of Canada" (2001) 80 Can Bar Rev 15 at 32-33 "...the concept of reconciliation is defining a concept consistent with social cohesion, political stability and civic peace. It implies a search for a middle ground between conflicting positions." See also: Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 363.
- ¹⁰²⁴ A search for finality in negotiations is closely linked to the value of "certainty" in Canadian claims negotiations. The literature on reconciliation strongly suggests that such finality is likely illusory. This will be discussed more completely in Chapter 14.
- ¹⁰²⁵ David Getches, "Beyond Indian Law: the Rehnquist court's pursuit of states' rights, color-blind justice, and mainstream values" (2001) 86 Minn L Rev 267.
- ¹⁰²⁶ Walters, "Morality of Aboriginal Law", *supra* note 718 and Short, "Reconciliation", *supra* note 995.
- ¹⁰²⁷ *Ibid*.
- ¹⁰²⁸ Some authors tend to define any negotiation process as a reconciliatory process: McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148; Kathryn L Kickbush, "Can Section 35 Carry the Heavy Weight of Reconciliation?" (2010) 68 The Advocate 503. A useful counter-balance to a perspective that equates reconciliation with any negotiated process is that of Coates, "Marshall Decision", *supra* note 298 at 277 who offers an opinion on both what reconciliation cannot be and what it might encompass in the context of Crown-Aboriginal relations- "Confrontation is rarely a solid foundation for reconciliation, if indeed that is the goal of the exercise." And "The broader goals are complex: cultural survival, the preservation of indigenous languages, the right to manage local affairs without outside interference, economic opportunity, an end to a legacy of dependency, and an elimination of the pattern of abuse of alcohol and drugs that afflict most First Nations communities."
- ¹⁰²⁹ Some authors tend to describe reconciliation as a process of balancing of interests: McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148.
- ¹⁰³⁰ Taylor, "The Politics of Recognition", *supra* note 972.
- ¹⁰³¹ Festenstein, *Negotiating Diversity*, *supra* note 60 at 51-52.
- ¹⁰³² *Ibid* at 57.
- ¹⁰³³ *Ibid* at 53.
- ¹⁰³⁴ The notion of recognition being "transformative" is a recurring theme in the literature. A particularly eloquent example of this idea can be found in Anker, "The Unofficial Law of Native Title", *supra* note 635 at 238 "...the unofficial law of native title is dependent everywhere on larger semiotic habits that must always be rehearsed and performed and so are never final. This quality opens the common law up to the transformative power of the encounter with indigenous law."
- ¹⁰³⁵ Jung, "Moral Force of Indigenous Politics" *supra* note 103 at 244.
- ¹⁰³⁶ *Ibid* at 262.
- ¹⁰³⁷ Panagos, "Aboriginality", *supra* note 84 at 174.
- ¹⁰³⁸ Patchen Markell, *Bound by Recognition* (Princeton, 2003). For an excellent assessment of the full implications of Markell's account of recognition, including the extent to which it binds, defines and limits identities, see Lasse Thomassen, "Bound by Identity-Review Essay" (2005) 33 Political Theory 420 at 423. See also Patchen Markell, "Recognition and Redistribution", ch 25, Oxford Handbook at 450 at 451 and 456ff.
- ¹⁰³⁹ Nancy Fraser & Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso, 2003); Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 136.
- ¹⁰⁴⁰ Povinelli, "Cunning of Recognition", *supra* note 86.
- ¹⁰⁴¹ Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2009).
- ¹⁰⁴² The approach of "practical reconciliation" in Australia is clearly related to the relative weighting of historical and distributive justice. See also: Ivison, "Logic of Aboriginal Rights", *supra* note 456 at 323- reflection on the

concern expressed by indigenous advocate Noel Pearson that a focus on entitlement issues might distract from other, more pressing, material concerns. See also: book review of Alex Cameron, “Power without Law” (2011) 44 Can J of Political Science 250 at 251 citing passage where Cameron raises a distributive justice concern about litigation shifting resources away from more pressing problems in aboriginal communities. James L Gibson, “Land Redistribution/Restitution in South Africa: A Model of Multiple Values as the Past meets the Present” (2010) British J of Political Science 134 “...an example of historical injustice colliding with demands for contemporary fairness”; Alexander Reilly, “A Constitutional Framework for Indigenous Governance” (2006) 28 Sydney L Rev 403 at 423 offers the following balanced assessment- “There is nothing wrong with the Federal Government’s focus on “practical reconciliation” per se, what makes it objectionable is that it imposes policy responses that react to a particular commitment as one of Indigenous “disadvantage”. The concept of disadvantage reduces the difference of Indigenous Australians to a matter of economics and redress to solutions of affirmative mainstream resources and allocation.”

¹⁰⁴³ Owen and Tully, “Political Approach”, *supra* note 125.

¹⁰⁴⁴ *Ibid* at 265.

¹⁰⁴⁵ Owen and Tully, “Political Approach”, *supra* note 125 quote is from Barry, *Culture and Equality*, *supra* note 279 at 325.

¹⁰⁴⁶ Owen and Tully, *ibid* struggles over prevailing inter-subjective norms.

¹⁰⁴⁷ *Ibid* - mistake to see as either-or choice.

¹⁰⁴⁸ *Ibid* at 282.

¹⁰⁴⁹ *Ibid* - rejection of the principle of finality.

¹⁰⁵⁰ *Ibid* - block the most oppressed groups.

¹⁰⁵¹ *Ibid* at 286.

¹⁰⁵² Owen and Tully, *ibid* - fundamental democratic freedom.

¹⁰⁵³ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 136 (ch 7).

¹⁰⁵⁴ *Ibid* at 12.

¹⁰⁵⁵ *Ibid* at 12, 138-142, 148.

¹⁰⁵⁶ *Ibid* at 181-202.

¹⁰⁵⁷ Delgamuukw, *supra* note 22.

¹⁰⁵⁸ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 126.

¹⁰⁵⁹ *Ibid* at 126.

¹⁰⁶⁰ *Ibid* at 127.

¹⁰⁶¹ A similar approach is taken by Panagos, “Aboriginality”, *supra* note 84.

¹⁰⁶² Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 127.

¹⁰⁶³ *Ibid* at 127.

¹⁰⁶⁴ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 128 and 131.

¹⁰⁶⁵ *Ibid* at 149-150.

¹⁰⁶⁶ *Ibid* at 150.

¹⁰⁶⁷ *Ibid* -remaining unrecognizable.

¹⁰⁶⁸ See Chapters 12 (Rights), 13(Title) and 17.1 (Self-Government).

¹⁰⁶⁹ Fraser, Nancy, “Social Justice in the Age of Identity Politics” in Fraser, Nancy & Honneth, Axel, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso, 2003) at 36; Markell, “Recognition and Redistribution”, *supra* note 1038 at 458 (implications of parity of participation approach)

¹⁰⁷⁰ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 247.

¹⁰⁷¹ Walters, “Morality of Aboriginal Rights”, *supra* fn. 718- importance of two-way reconciliation. See also; Turner, “White and Red Paper Liberalism”, *supra* note 291 at 168- reconciliation “...must work in both directions; true equality demands that Crown sovereignty also be reconciled with Aboriginal nationhood.” He adds, at p. 168, that “One way of understanding the meaning of s. 35(1) is to see it as the reconciliation between the White and Red papers.”; Libesman, “Normative Integration”, *supra* note 47 at 958 expresses the idea of mutual reconciliation in particularly eloquent terms “...By reconciliation I do not mean the reduction of one perspective to the other but the meaningful relationship of self and other in a way that enriches the universe of meaning of both self and other.”

¹⁰⁷² This will be examined in Chapter 14 dealing with the duty to consult. It is important to remember the warning of Raymond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (Routledge, 1990) at 105 that it is a mistake to assume that reconciliation will be an easy process if people enter with open hearts.

¹⁰⁷³ Yarrow, “Law’s Infidelity to its Past”, *supra* note 616- Time must be considered as an essential resource in the process of dealing with historical injustice; Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 135 (Francis counsels against the faulty empirical assumption that time and effort will always lead to reconciliation) Tribe,

“Invisible Constitution”, *supra* note 23 at 164- time is a fourth dimension that is a necessary component to assess the gradual development of constitutional doctrine.

¹⁰⁷⁴ Gibson, *A New Look*, *supra* note 204 at 14, 42-43, 71, 75, 123, 168.

¹⁰⁷⁵ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 183 (history of colonialism and invasion that continues to shape the economic and social location of aboriginal populations); 167, 242 (“still suffering”); Ivison, “Deliberative Democracy and Historical Injustice”, *supra* note 971; Short, “Reconciliation and the Problem of Internal Colonization”, *supra* note 400 at 289; Alfred, “Wawase”, *supra* note 108 (causation). One of the clearest statements of this perspective comes from the current Chief Justice of Canada: McLachlin, “Aboriginal Peoples and Reconciliation”, *supra* note 74 at 241- “The resultant intergenerational demoralization and despair have given rise to a modern revival of the theory of aboriginal entitlement.” And “Aboriginal peoples everywhere in the world continue to suffer from the effects of post-colonial loss of identity, including the difficult legacy of having been uprooted from their lands and lifestyles, and the attendant educational and socioeconomic disadvantages they continue to face.” (p. 244) It is important to remember the observation of Ivison, in “Logic of Aboriginal Rights”, *supra* note 456 at 151-154 that claims about causation have a strong empirical component and are thus amenable to research and assessment.

¹⁰⁷⁶ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 143.

¹⁰⁷⁷ *Ibid* at 150.

¹⁰⁷⁸ *Ibid* at 208.

¹⁰⁷⁹ *Ibid* at 170.

¹⁰⁸⁰ *Ibid*.

¹⁰⁸¹ *Ibid* at 198.

¹⁰⁸² *Ibid* at 262.

¹⁰⁸³ *Ibid* at 116 (recognition of acute trauma); Salée et al, “Quality of Life”, *supra* note 2 at 16-19 (literature on “trauma of colonialism” and link to post-trauma shock disorder); Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50 at 61 (attribution of current difficulties to the inability of native people to make the transition from one form of way of life to another, resulting in alienation and poverty); Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 56; Lambert, “Aboriginal Title”, *supra* note 963 at 350; Tully, “New Key”, *supra* note 122 at 261; Alfred, “Wawase”, *supra* note 108 at 90- a spiritual crisis is present which flows from being “...disconnected from our lands and traditional ways of life.” –“Large scale statist solutions like self –government and land claims are not so much lies as they are irrelevant to the root problem.” (p. 90) He calls for a “...thoughtful process of reconstruction and a committed recommitment of our lives in a personal and collective sense” so as to “...cleanse our minds, our hearts, and our bodies of the colonial stain.” (p. 91), in a particularly chilling passage, Alfred says that many aboriginal people deal with these problems “...sometimes using mercifully quick and sometimes using painfully slow methods.” (p. 91) See also: Manny Jules, Preface in Flanagan, Tom, Alcantara, Christopher & Le Dressay, André, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen’s University Press, 2010). It is notable that these linkages have also been referenced by the Supreme Court of Canada- Kapp, *supra* note 460 at paras 16 and 39- disadvantage rooted in history; *R v Gladue*, [1999] 1 SCR 688 [*Gladue*] at para 64 “Parliament’s direction...to inquire into the causes of the problem”; see Henderson, “Postcolonial Indigenous Legal Consciousness”, *supra* note 47 at 46 for a comment on *Gladue* and causation; *R v Ipeelee*, 2012 SCC 58 at para 60 “...history of colonization, displacement at residential schools”; *McDiarmid Lumber Ltd v God’s Lake First Nation*, 2006 SCC 58 at para 106- “The history of Indian peoples in North America has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinct elements of their culture.”); international organizations such as the Economic and Social Council have identified the “discovery doctrine” as the root cause of current indigenous difficulties (22 April 2010).

¹⁰⁸⁴ The writings of Gordon Gibson are considered in more detail in Chapter 2 of this thesis.

¹⁰⁸⁵ Hendrix, “The Good Society”, *supra* note 17 at 50; Dale Turner, “White and Red Paper Liberalism”, *supra* note 291 makes the alleged causal connection very clear - “As the Canadian state came to exercise complete control over Indians, the quality of life in Indian communities deteriorated.” In a similar fashion, Benedict Kingsbury, “Reconciling Five Competing Conceptual Structures of Indigenous Peoples Claims in International or Comparative Law” (2001) 34 Int’l Law and Politics 189 at 237 suggests that a revival of historic sovereignty might bear the promise of reversing the consequences of wrong-doing.

¹⁰⁸⁶ The Harvard thesis is referred to frequently in the Canadian secondary literature. Examples include: Michael Murphy, “Looking Forward Without Looking Back: Jean Chretien’s Legacy for Aboriginal-State Relations” (2004) 9 Review of Constitutional Studies 151 at 166 (impact of the Harvard project in Canada); Murphy, “Prisons of Culture”, *supra* note 885 at 388. Shin Imai, “Indigenous Self-Determination and the State” in Richardson et al,

“Indigenous Peoples and the Law”, *supra* note at 309 argues that the combination of the Harvard studies and the Chandler empirical work “...should impel governments to recognize that self-government for Indigenous peoples is the only viable policy for the years ahead.” (See also p. 289) Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 46 argues that international agencies have embraced similar theories of causation. He takes a more restrained attitude, at page 148, by focussing on the limited amount of empirical research but signalling that there is at least some correlation between robust aboriginal rights and better socio-economic results. He argues, at p. 298, that there is a “...need to get a range of contending approaches on the table.” Others present different theories of causation- David Bedford, “Emancipation as Oppression: The Marshall Decision and Self-Government” (2010) 44 J of Can Studies 206 at 211 argues that current social problems are caused by imposed systems of government. While the primary authors of the Harvard work, Cornell and Kalt have produced a voluminous literature concerning their thesis, an accessible introduction can be found in Cornell, S & Kalt, JP, “Where’s the Glue? International and Cultural Foundations of American Indian Economic Development”, (2000) 29 The Journal of Socio-Economics 443 and Stephen Cornell & Joseph P Kalt, “Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache”, (1995) 33 Economic Inquiry 402. Miriam Jorgensen, *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) (series of essays on the Harvard project)

¹⁰⁸⁷ The broad and growing literature on “revitalization” is considered in Chapter 2 of this thesis. A very good summary can be found in Alfred, “Wawase: Indigenous Pathways”, *supra* note 65 at 83 (Analogizes aboriginal revitalization to a “mental awakening”).

¹⁰⁸⁸ The classic Canadian work on an empirical link between cultural continuity and individual and community health is Chandler, Michael J & Lalonde, Christopher, “Cultural Continuity as a Hedge Against Suicide in Canada’s First Nations” (1998) 38 Transcultural Psychiatry 191. An especially productive overview can be found in the background papers prepared for a symposium organized by the federal Department of Health entitled “In the Wake of a Storm- the Resilience of First Nations Communities”, August 26-27, 2009. These include Rupert Ross, “Exploring Emotional Suppression and Disconnection in Aboriginal Canada”, Taiaiake Alfred, “Colonialism and State Dependency”, Michael Tousignant and Nibisha Sioui, “Resilience and Aboriginal Communities in Crisis: Theory and Interventions”, Onowa McIvor and Art Napoleon, “Language and Culture as Protective Factors for At-Risk Communities”, Simon Brascoupe and Catherine Waters, “Cultural Safety, Exploring the Concept of Cultural Safety in Aboriginal Health and Community Wellness”, Health Canada- FNIHB- “Role of Economic Development and Resilience as a Key Dimension of First Nations Communities at Risk- Position Document and Strategic Issues-Discussion Paper, 2009”, Dr. Lori Haskell and Dr. Melanie Randell “Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada, Working Draft- A Critical Review of the Literature and Key Findings” and Dr. Kiera Ladner, “Understanding the Impact of Self-Determination on Communities in Crisis”.

¹⁰⁸⁹ There is an equally rich literature on dependency theory but in the context of aboriginal policy the theme is usually connected to the dependency of aboriginal peoples on social welfare and disconnection from the mainstream economy. A good example of such writing can be found in the work of Calvin Helin, “Dancing with Dependency”, *supra* note 291. See also Flanagan, “Second Thoughts”, *supra* note 324 at 120, Widdowson, *supra* note 204 at 120; Gibson, *A New Look*, *supra* note 204 at 40, 71, 73 and 98.

¹⁰⁹⁰ The work of Frances Widdowson, considered in more detail in chapter 2 of this thesis, is a particularly robust version of this line of argument.

¹⁰⁹¹ Richards, *Creating Choices*, *supra* note 296, presents a more nuanced approach to causation by rejecting the analytical usefulness of broad brush attributions of causation, preferring instead to develop empirically verifiable correlations between good outcomes and mid-range causal factors. He presents a strong argument that gaps in educational outcomes are the single biggest predictor of other measures of social success, including health outcomes. A similar argument is made in Flanagan, “Second Thoughts”, *supra* note 324 at 228.

¹⁰⁹² *Ipeelee*, *supra* note 1083.

¹⁰⁹³ *Gladue*, *supra* note 1083 at para 171.

¹⁰⁹⁴ *Delgamuukw*, *supra* note 22 at paras 170-171.

¹⁰⁹⁵ See Chapter 14 (Duty to Consult).

¹⁰⁹⁶ Property rights developments are considered in relation to the work of Tom Flanagan in section 2. 5 of this thesis.

¹⁰⁹⁷ Martin Mowbray, “What Matters? Policy Driven Evidence, Indigenous Government and the Harvard Project”, Australian Social Policy Conference 2005 at 20ff. (Mowbray is critical of the tendency of the authors of the Harvard Project work to overlook other causal factors); John Graham and Francois Lévesque, “First Nations Communities in Distress: Dealing with Causes, Not Symptoms”, Institute of Governance, April 2010 (general international evidence

on the impact of governance reforms is not promising); Christina Dowling, “The Applied Theory of First Nations Economic Development: A Critique” (2005) 4 *The Journal of Aboriginal Economic Development* 120 (critique based on an alleged failure to incorporate a larger vision of indigenous well-being); Nicholas Peterson, “Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Rights to Land” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010) at 181 (scepticism about the claims made by Harvard project proponents); Flanagan, “Second Thoughts”, *supra* note 293 at 229 (aboriginal self-government should not be seen as a cure-all); Salée, Newhouse and Lévesque, “Quality of Life”, *supra* note 2 (the authors present a balanced assessment of various social policy approaches to the causation and remediation of indigenous disadvantage). In a broader context, it is important to look to the work of Iris Marion Young, “Responsibility for Justice” *supra* note 468 at 96 which emphasizes the importance of retaining scepticism about any linear theories of causation in relation to complex social phenomenon that span over time and at p. 185 which stresses the difficulties of establishing direct linear causation.

¹⁰⁹⁸ Lucy Snowball and Don Weatherburn, “Theories of Indigenous Violence: A Preliminary Practical Assessment” (2008) 41 *Austl Crim & NZJ* 216; Ruth McCausland & Alison Vivian, “Why do Some Aboriginal Communities Have Lower Crime Rates than Others: A Pilot Study” (2000) 43 *Austl Crim & NZJ* 301. D. Caron et al, *ibid* - calls for more comparative work to explore issues of causation.

¹⁰⁹⁹ Challenging questions might be raised about “is” and “ought” and the role of empirical evidence in normative argument, however, at least for legal reasoning it appears obvious that general theories of cause and effect play at least an important supporting role in the elaboration of the legal framework.

¹¹⁰⁰ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 272.

¹¹⁰¹ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 166-167

¹¹⁰² Irlbacher-Fox, Stephanie, *Finding Dahshha: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (University of British Columbia Press, 2009).

¹¹⁰³ *Ibid* at 31.

¹¹⁰⁴ *Ibid* at 4.

¹¹⁰⁵ Sutton, *Politics of Suffering*, *supra* note 1041; Peter Sutton, “The politicization of disease and the disease of politicization: causal theories and Indigenous health differential”, National Rural Health Conference, 2004.

¹¹⁰⁶ Irlbacher-Fox, “Finding Dahshaa”, *supra* note 1102 at 4.

¹¹⁰⁷ Sutton, *Politics of Suffering*, *supra* note 1041 at 7-8, 12-13, 205.

¹¹⁰⁸ This thesis shares several of the key themes developed by Alan Cairns- the importance of growing inter-dependence between indigenous and non-indigenous populations, the need for state support to maintain culture and improve well-being and a concern about the increasingly legalistic focus of much analysis of state-indigenous relations. See Cairns, *Citizens Plus*, *supra* note 51 at 101, see also 212.

¹¹⁰⁹ Kymlicka’s constraint is considered in Chapter 1 of this thesis..

¹¹¹⁰ While the strong contrast of a “rights-agenda” and state policy was a hallmark of the indigenous policy of the Howard government, and is reflected in the work of Peter Sutton, there is a notable recent tendency to draw on both rights-determining processes and state policy in a united effort to “close the gap”. See “Closing the Gap: The Indigenous Reform Agenda”, May 21, 2013. This policy commits the Commonwealth Government to a multi-layered process of research, coordinated policy-making and accountability that involves Commonwealth, state, territorial and indigenous representatives. This initiative runs parallel to an important national debate on constitutional recognition of aboriginal peoples. As the Australian amendment process involves a public referendum, the process has now been delayed to allow further time to have an inclusive debate before a referendum is scheduled. The June 2013 Progress Report from the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples outline the postponement of a planned 2013 referendum on constitutional reform proposals and makes further recommendations to enhance constitutional dialogue in Australia on indigenous recognition.

¹¹¹¹ Among other initiatives, the “Closing the Gap” initiative requires the filing of yearly “Closing the Gap” reports by various ministries and departments and is supported by an inter-governmental process that monitors progress and develops metrics on closing the gap in key areas such as health and educational outcomes.

¹¹¹² Since the 2008 release of a discussion paper by Minister Jenny Macklin, “Can native title deliver more than a “modicum of justice”” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009 on the role of administration of native title agreements in the achievement of the goal of closing the gap, there has been a vibrant debate within Australia on the role such agreements can play in improving the well-being of indigenous Australians, the status of private impact-benefit agreements and the tax treatment of benefits

received from native title settlements. The important point is that there is a clear trend to regard the “rights-agenda” and social policy as broadly consistent and mutually reinforcing.

¹¹¹³ John Rawls, *A Theory of Justice* (Belknap Press, Harvard University, 1971). This work is generally seen as the high-water mark of Anglo-American political theory, and much of the current focus on dialogue is a response to the conceptual orientation of that work.

¹¹¹⁴ Walters, “Promise and Paradox”, *supra* note 645 at 421- Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 238 – “brought into authoritative conversation with each other”.

¹¹¹⁵ Nancy Fraser, “Abnormal Justice” (2008) 34 *Critical Inquiry* 393 (participatory values).

¹¹¹⁶ Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press, 1993); Chantal Mouffe, *The Democratic Paradox* (Verso, 2000).

¹¹¹⁷ This will be addressed in Chapter 14 dealing with the Duty to Consult.

¹¹¹⁸ See earlier reference to case-law on resolving issues through negotiations, *supra* note 701.

¹¹¹⁹ Peter W Hogg & Allison A Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Wasn’t Such a Bad Thing After All)” (1997), 35 *Osgoode Hall LJ* 75.

¹¹²⁰ As noted previously in Section 2.3 of this thesis, Tully’s later work demonstrates more openness to a wider range of dialogical opportunities, including those presented by the duty to consult. This is best seen in Owen and Tully, “Multicultural Theory”, *supra* note 125 where the notion of reconciliation is described as a political process which is never completely controlled by one side, where reconciliation is not conceived of as a final end-state and where provisional agreements will be reached through a variety of processes, such as those engaged by the duty to consult. In a recent unpublished address to a conference entitled “Deparochializing Political Theory: Beyond “East” and “West”, UVIC, August 2-4, 2012, Tully emphasized that engaging in a genuine dialogue is not an easy task. It always involves deep listening and is to be contrasted with simply presuming that our own views and concepts are applicable in all cases. Samson, “Colonial Magic”, *supra* note 86 at 23 looking at the encounter between the Innu and the state goes so far as to suggest that ideally the Innu would set the agenda for discussions “...entering into the Innu language, world views, cosmologies and institutions.” Christie, *Aboriginality and Governance*, *supra* note 620 describes the goal differently as an intercultural dialogue to support “...the emergence of new shared legality.” (p. xiii).

¹¹²¹ This will be addressed in Chapter 14 dealing with the Duty to Consult.

¹¹²² Laden, Anthony Simon, “Negotiation, Deliberation, and the Claims of Politics” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007) at 198; Owen & Tully, “Redistribution and recognition”, *supra* note 125 at 285 attribute the greater emphasis on dialogue to much deeper intellectual trends- “This insight has brought about the profound reconceptualization as a field of norms over which there is always ongoing reasonable disagreement, and this must be understood in terms of the norms of democracy and constitutionalism laid out above.” Jeff Spinner-Halev, “From Historic to Enduring Injustice”, *supra* note 17 writes about the generic tendency in modern political theory to recommend dialogue to resolve a range of practical problems; Dale Turner, *Peace Pipe*, *supra* note 60 at 108 insists that any process must be rooted in dialogue; Singer, “Original Acquisition of Property”, *supra* note 81 at 778- Singer presents an argument that redressing historical wrongs is best done through the focus on equal democracy that is reflected in a notion of “protective democracy”. This engages a dialogical solution to the problem of finding a just origin to current systems of property allocation in the United States, suggesting that this dialogue must be animated by a commitment to the democratic ideal of equal opportunity.; Schaap, “Agony of Politics”, *supra* note 107, describes the “turn to dialogue” in modern political theory; Fred Bennett, “Aboriginal Rights Deliberated” (2007) 10 *Critical Review of International Social and Political Philosophy* 319; David Kahane, Daniel Weinstock, Dominique Leydet and Melissa Williams (eds), *Deliberative Democracy in Practice* (University of British Columbia Press, 2010); The liberal theorist Robert Murray, “Liberalism, Aboriginal Rights, and the Canadian Moral Identity”, *supra* note 61 at 357 also calls for a “rational and reasonable dialogue.” Libesman, “Normative Integration”, *supra* note 47 at 971 suggests that “...It demands that we listen and relate ourselves to the other, from the other’s perspective, rather than simply reading ourselves into the other or presumptively locating the other in our preconceived, taken-for-granted frames of reference.”; Andrew Woolford, “Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process” (2004) 29 *Can J of Sociology* 111 at 124 argues that the participants in current treaty negotiations enter with very different visions of the basic enterprise- speaking of the Crown- “They construe the treaty process as a pragmatic exchange between parties who are firmly immersed in a shared reality, rather than as groups with competing visions of justice.”

¹¹²³ Laden, “Negotiation, Deliberation, and the Claims of Politics”, *supra* note 1122 at 208 - distinction between negotiation and deliberation; see also: Turner, *Peace Pipe*, *supra* note 60 at 67-68 (suggests that it matters greatly how a dialogue is held, in particular the extent to which it allows for effective aboriginal voices); Laden and Owen,

“Introduction”, *supra* note 87 at 16 deliberation offers a “broader set of accommodatory approaches”. Turner, “Peace Pipe”, *supra* note 60 at 121 (passing of the pipe is used as a metaphor for dialogue); Robert J Miller, “Collective Discursive Democracy”, *supra* note 278 at 357 draws from the discourse theory of Habermas to argue that the relationship between indigenous peoples and the state “...can be interpreted to require discourse and the procedures necessary to make discourse effective.” He describes the assumption that dialogue is enough to make progress as “dangerously optimistic”, (p. 366) but is trying to suggest the contours of an “...ideal procedure for deliberation and decision-making.” (p. 362); Lutz, “Myth Understandings”, *supra* note 93 at 14 (Lutz focuses on the difference between hearing and listening).

¹¹²⁴ Laden, “Negotiation, Deliberation and the Claims of Politics”, *supra* note 1122 at 204.

¹¹²⁵ *Ibid* at 208.

¹¹²⁶ *Ibid* at 209-210.

¹¹²⁷ *Ibid* at 208.

¹¹²⁸ *Ibid* at 200-201.

¹¹²⁹ *Ibid* at 201.

¹¹³⁰ *Ibid* at 204.

¹¹³¹ *Ibid* at 206.

¹¹³² *Ibid*.

¹¹³³ *Ibid*.

¹¹³⁴ *Ibid*.

¹¹³⁵ *Ibid* at 208.

¹¹³⁶ *Ibid* at 209.

¹¹³⁷ *Ibid*.

¹¹³⁸ *Ibid*.

¹¹³⁹ *Ibid* at 210.

¹¹⁴⁰ *Ibid*.

¹¹⁴¹ *Ibid*.

¹¹⁴² *Ibid* at 211.

¹¹⁴³ *Ibid* at 213.

¹¹⁴⁴ *Ibid* at 215.

¹¹⁴⁵ *Ibid* at 212.

¹¹⁴⁶ *Ibid* at 215.

¹¹⁴⁷ *Ibid* at 212.

¹¹⁴⁸ *Ibid* at 219.

¹¹⁴⁹ *Ibid* at 212, 215, 216 (It is useful to examine the critical commentary in Woons, “Aboriginal Participation in Canada”, *supra* note 60 and Winter, Stephen G, *In Dialogue with “Citizens Plus”: Towards a Different Model of Citizenship* (M.A., Dalhousie University, 2001) about the difficulty of aspiring to the goal of achieving shared reasons in relation to the work of Alan Cairns. The most that might be achieved is mutually acceptable processes to address contested issues.)

¹¹⁵⁰ It is obviously not the label that makes the difference but the structural features and attitude that is brought to the table.

¹¹⁵¹ Laden, “Negotiation, Deliberation and the Claims of Politics”, *supra* note 1122 at 216.

¹¹⁵² Tully, “New Key”, *supra* note 122 (impossibility of reaching a final resolution); as Lutz, “Makuk”, *supra* note 88 at 301 illustrates so clearly, cross-cultural dialogue is particularly fraught with spaces for misrecognition.

¹¹⁵³ Laden, “Negotiation, Deliberation and the Claims of Politics”, *supra* note 1122 at 215-216.

¹¹⁵⁴ *Rio Tinto*, *supra* note 798 provides an especially strong example.

¹¹⁵⁸ The concern about favouring the bargaining position of one side or the other is best seen in the pair of Supreme Court decisions on the duty to consult released in 2010 – *Rio Tinto*, *supra* note 798 and *Little Salmon*, *supra* note 709.

¹¹⁵⁶ This issue will be addressed in more detail in Chapter 14 of this thesis dealing with the duty to consult.

¹¹⁵⁷ Coyle, “ADR Processes and Indigenous Rights”, *supra* note 90; Coyle, Michael, “Addressing Aboriginal Land Rights in Ontario: An Assessment of Past Policies and Options for the Future- Part 1” (2005) 31 Queen’s LJ 75; “Part II”) (2006), 33 Queen’s LJ 796; a core theme of the literature on negotiation and dispute resolution is the notion of negotiating “in the shadow of the law”. As stated by Chief Justice McLachlin, “Aboriginal Peoples and Reconciliation”, *supra* note 74 at 245 “Yet before negotiations can succeed, legal parameters must be clarified.” See also: Dwight Newman, “Institutional Roles and Chief Justice Lamer’s Aboriginal Rights Jurisprudence” in Dodek and Jutras, “The Sacred Fire”, *supra* note 922 at 89 (negotiating in the shadow of the law-interestingly, Newman

gives an example of a case dealing with the duty to consult which actually made negotiations more difficult.) Luk, “Justified Infringement: A Minimal Impairment Approach” (2013) 25 J Env L & Pract 169 at 114 (importance of court decisions in setting the frame for deliberations); McNeil, “Judicial Approaches”, *supra* note 955 at 151- court judgments are necessary to support bargaining positions, especially for the more vulnerable party; Macklem, “Indigenous Difference”, *supra* note 705 at 95-98- role of the law in establishing base-line commitments to support negotiations; Other political theorists stress the benefits of negotiation over adjudication- Gray, “Two Faces of Liberalism”, *supra* note 438 at 117.

¹¹⁵⁸ Coyle, “ADR Processes and Indigenous Rights”, *supra* note 90 at 384.

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ Gabrielle Slowey, “Unfinished Business: Self-Government and the James Bay Northern Quebec Agreement Thirty Years Later” in Yale Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd (Purich Publishing, 2008) at 206; Gabrielle A Slowey, “A Fine Balance? Aboriginal Peoples in the Canadian North and the Dilemma of Development” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009) (Slowey emphasizes the new-found agency of indigenous groups in dealing with economic development opportunities and the crucial role played by the developing duty to consult and accommodate).

¹¹⁶¹ This issue is addressed in Section 14.12 of Part II of thesis.

¹¹⁶² Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 165-(at a minimum, the state has a duty to listen carefully).

¹¹⁶³ *Ibid* at 179.

¹¹⁶⁴ There are key points of contact to issues that are under development in the jurisprudence concerning the duty to consult, including the contours of deep consultation and the role that assessment of strength of claim plays in framing the dialogue between the Crown and aboriginal peoples.

¹¹⁶⁵ This is a core theme developed by Flanagan, *First Nations? Second Thoughts*, *supra* note 293; it is also reflected in the comments of Catherine J Iorns, “Indigenous Peoples and Self-Determination: Challenging Settler State Sovereignty” (1992) 24 Case W Res J Int’l L 199 that, at the international level, representatives of states and indigenous interests are often talking past each other.

¹¹⁶⁶ Ivison, *Postcolonial Liberalism*, *supra* note 414 and Schouls, *Shifting Boundaries*, *supra* note 566.

¹¹⁶⁷ This is, of course, not the situation in all aboriginal communities and while there is no intention to generalize there is a recognition that significant problems do exist in numerous aboriginal communities.

¹¹⁶⁸ Halley, *Split Decisions*, *supra* note 406.

¹¹⁶⁹ The role of the law in facilitating the dispossession of indigenous peoples is considered in Section 2.2 of this thesis. See also: Dhamoon, *Identity/Difference Politics*, *supra* note 251 at 69, 73, 125-126 (role of law in dispossession of indigenous peoples).

¹¹⁷⁰ The difficulty faced by the law in overcoming the oppressive roots of it foundation is addressed in Section 2.2 of this thesis. See also: Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (McGill-Queen’s University Press, 1994) at 221-222.

¹¹⁷¹ See Lord, “Master’s Tools”, *supra* note 171. Christie, among others, advocates the cautious use of the master’s tools, largely for the purpose of developing immanent critique and exposing flaws in the ideological structure of dominant ideologies. See Christie, “Critical Indigenous Philosophy”, *supra* note 63.

¹¹⁷² The body of scholarship on the revitalization of indigenous legal traditions is addressed in Section 2.3 of this thesis, but is reflected in the development of key themes in the thesis as a whole.

¹¹⁷³ It is commonplace to see references in the literature to the need to not privilege the nation-state form in analysis of political institutions. See, e.g.: Magnet, “Collective Rights”, *supra* note 171 at 171- trend away from the nation-state; Omid Hejazi, *Evaluating Nationalism in the Liberal Framework* (M.A., Philosophy, Queen’s University, 2007) refers to a tendency to assume that the nation-state is the default unit of analysis prior to the 1990’s

¹¹⁷⁴ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 285- no reason to privilege the nation-state.

¹¹⁷⁵ Nancy Fraser, “Abnormal Justice”, *supra* note 1115.

¹¹⁷⁶ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 59- function to constrain political possibilities

¹¹⁷⁷ Globalization and fragmentation putting pressure on the state form- Tierney, *Constitutional Law and National Pluralism*, *supra* note 42.

¹¹⁷⁸ See Christodoulidis, “Republican Constitutionalism”, *supra* note 42 at 2.

¹¹⁷⁹ *Supra* note 428.

¹¹⁸⁰ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 117-118- moral duty to support a stable state; Harty and Murphy, “Multicultural Citizenship”, *supra* note 389 at 139 (continuing importance of states).

¹¹⁸¹ Moore, “Indigenous Peoples and Political Legitimacy”, *supra* note 727.

¹¹⁸² *Ibid.*

¹¹⁸³ Tully, “New Key”, *supra* note 122 at 279-280.

¹¹⁸⁴ Peach, “Reconciling the Constitutional Order”, *supra* note 806 (International law is structured in a fashion that places obligations on nation-states); Macklem, “Indigenous Difference”, *supra* note 705 at 38.

¹¹⁸⁵ Indigenous legal systems are addressed in four parts of this thesis- Section 2.3 of Chapter 2, Chapter 4 (Pluralism), Section 11.5 of Chapter 11 (Approach to Indigenous Legal Systems) and Section 17.1 (Section 35 and the Protection of Aboriginal Self-Government).

¹¹⁸⁶ The literature is replete with claims by indigenous peoples and others describing their views that indigenous claims are generally not to separation but rather greater autonomy within the nation-state. For example, Turner, *Peace Pipe*, *supra* note 60 at 77-78 (legitimate secession is not seriously considered); (2006), Herr, “In Defence of Non-Liberal Nationalism”, *supra* note 1189 at 327 (claims generally do not include secession); Murphy, “Chrétien’s Legacy”, *supra* note 1086 at 154 (indigenous nationalism has never been about separatism); Murphy, “Culture and the Courts”, *supra* note 98 at 113 (“It is not a separatist claim, nor is it a desire for absolute and unconstrained authority”); Volmert, “Indigenous Self-Determination”, *supra* note 456 at 59 “...requires deep reform of existing institutions and laws”; Benhabib, “Cosmopolitanism”, *supra* note 58 at 66 (Benhabib develops the idea of “democratic iterations” as a way of expressing the gradual process of moving toward accommodation of different fundamental viewpoints. For Benhabib, “...every iteration transforms meaning, adds meaning to it, and enriches it in ever-so-subtle ways” (p. 47) This describes a process of “repositioning and rearticulating rights” in an iterative process that seems to have many commonalities with the work of Courtney Jung.)

¹¹⁸⁷ For example, the degree of interdependence, as a lived reality, will not be the same in some parts of Canada’s North, or remote areas, as it would be in areas where indigenous and non-indigenous populations live in close proximity.

¹¹⁸⁸ Many writers draw inferences from the increasing inter-dependence between aboriginal and non-aboriginal people within modern nation-states. For example, Murphy, “Chrétien’s Legacy”, *supra* note 1086 at 154 (“complex interdependence”). The articulation of this complex interdependence through electoral politics is addressed in Michael Murphy, “Representing Indigenous Self-Determination” (2008) 58 UTLJ 185.

¹¹⁸⁹ As noted previously, Mr. Justice Lamer in *Van der Peet*, *supra* note 8 at para 42, stressed the importance of finding a “vantage point” for assessing aboriginal and non-aboriginal perspectives in constructing a morally and political defensible conception of aboriginal rights in Canada.

¹¹⁹⁰ The leading Canadian case on reception of customary law is *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292, especially paras 36-39. Armand de Mestral & Evan Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008) 55 McGill LJ 573 at 542 argue that the effect of this decision is that the courts “...can take judicial notice of it without even requiring proof or evidence, which is necessary in the case of foreign law.”

¹¹⁹¹ See Section 2.7 for a discussion of several techniques that are used in the political theory literature to break down overly binary value choices into a range of possible options.

¹¹⁹² Festenstein, *Negotiating Diversity*, *supra* note 60 at 53; Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 67 describes this process as “...contained within the boundaries of liberal-democratic constitutionalism.”

¹¹⁹³ Albert Camus, *The Myth of Sisyphus* (Vintage Press, 1955).

¹¹⁹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007.

¹¹⁹⁵ Short, “Social Construction” *supra* note 86 at 872-873- international law as a “normative benchmark”; Keal, *European Conquest*, *supra* note 78 at 220; Henderson, “Constitutional Vision and Judicial Commitment”, *supra* note 86 at 75- the Declaration is a “just document” that expresses a minimum standard for respect of human rights; Roderic Pitty and Shanara Smith, “The Indigenous Challenge to Westphalian Sovereignty” (2011) 46 Australian J of Political Science 121 at 126 argue that the effect of the Declaration is less about the territorial sovereignty of the state and more on what they call it’s “Westphalian” sovereignty- the ability to be insulated from external scrutiny of domestic relations with indigenous peoples. They argue, at 133, that the real impact of the Declaration on Australia has been to provide “...a platform for the development of a constructive constitutional dialogue.” See, in this light, Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 210.

¹¹⁹⁶ Declaration on the Rights of Indigenous Peoples, *supra* note 1194, Article 46, nothing is to be interpreted or implying “...any action which would dismember or impair, totally, or in part, the territorial integrity or political unity of sovereign and independent States.”; Cindy L Holder & Jeff J Corntassel, “Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights”, (2002) 12 Contemporary Legal Issues 727 at 141 (Declaration is seen as a “global indigenous lens of restorative justice”). Note, however, that Kymlicka, “Multicultural Citizenship”, *supra* note 435 at 186 does envisage the possibility of peaceful secession in accordance with liberal principles.

¹¹⁹⁷ An important test case will be the relationship between the duty to consult and the principle of free, prior and informed consent referred to in the *Declaration*. At a general level, Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 275 argues that the terms of the Declaration are very close to the practices of Western democracies like Canada.

¹¹⁹⁸ Peach, “Reconciling the Constitutional Order”, *supra* note 806 at 164 “As a practical matter, the most promising basis for Indigenous self-determination is self-government within the existing Canadian state.” Patrick Macklem, “Indigenous Recognition in International Law: Theoretical Observations” in Noreau, Pierre, ed, *Gouvernance autochtone: réconfiguration d’un avenir collectif: nouvelles perspectives et processus émergents* (Les Éditions Thémis, 2010); McNeil, “Judicial Approaches to Self-Government”, *supra* note 955 at 148 – indigenous societies are “firmly located within our borders.” Berry, “Legal Anomalies”, *supra* note 705 at 249 modern international law “simply does not recognize continued sovereignty.” And “...most international lawyers would argue that in the eyes of international law, regardless of original improprieties, states of the New World gradually acquired title by one of these means.” (He is speaking of gradual consolidation of authority by accretion of practice but he stresses that there may be important questions of domestic law that will be affected by an analysis of the actual date that sovereignty was acquired.); Iorns, “Self-Determination”, *supra* note 1165 at 202-203- “Indigenous peoples are thus considered to be entitled to exercise of self-determination only as part of the state as a whole.” – “Their rights are trumped by the state’s right to territorial integrity and to non-intervention in its internal affairs, and to other attributes of sovereignty such as sovereignty over natural resources.” Singer, “Original Acquisition of Property”, *supra* note 81 also expresses reluctant sympathy for the idea that conquest can give rise to titles that are currently valid- “There is something to this. We live, after all, in the real world.” Federico Lenzerini, “Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples” (2006) 42 Texas International LJ 155, while developing an innovative argument for continuing and parallel sovereignty of indigenous peoples, concludes, at 174, that illegitimate origins has never been an obstacle in international law to the recognition of current sovereignty of states. He adds that while it is too soon to assess the development of customary international law (p. 176), any parallel or residual sovereignty must be “...exercised within the realm of the supreme sovereignty of the territorial state.” (p. 189). Parrish, “Changing Territoriality, Fading Sovereignty”, *supra* note 206 at 297 “...under a positivist view of international law, with the state as the primary unit, indigenous peoples had few rights.”; Siegfried Wiessner, “Indigenous Sovereignty: A Reassessment in Light of the U.N. Declaration on the Rights of Indigenous Peoples” (2008) 41 Vand J Transnat’l L 1141, while concluding, at 1169, that “...it seems unlikely that American tribes are true “third sovereigns” in a positive law sense”, careful attention to indigenous descriptions of what sovereignty actually means to them might open up possibilities for reconciliation with emerging international law. For example, measures such as strengthening indigenous language and culture might contribute to a suite of measures that would “...serve to maintain indigenous sovereignty in the sense indigenous people define it.”

¹¹⁹⁹ Though the matter is certainly not free of doubt, this conclusion is supported by the approach of the Supreme Court of Canada to the tests for the existence of aboriginal rights and title, addressed in Chapters 12 and 13.

¹²⁰⁰ The normative status of the nation-state is one of the perennial themes of modern political theory. However, in the aboriginal field the dominant view is that reconciliation of aboriginal claims is not inconsistent with a continuing role for the nation-state. See, for example, Miller, “Nationalism”, *supra* note 428 “...nation they are real, and people who identify with them are not simply deluded.”; Reilly, “Indigenous Governance”, *supra* note 1042 at 13- indigenous aspirations not necessarily equated to secession; Benjamin J Richardson, Shin Imai & Kent McNeil, “Indigenous Peoples and the Law- Historical, Comparative and Contextual Issues” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 14- self-government and autonomy is generally preferred to secession, which is not supported internationally in any case; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (McGill- Queen’s University Press, 1994) at 221-222-“Few indigenous peoples crave complete isolation. But they do not want their own sort of dealing with the world obliterated without having the opportunity to reach some synthesis of the traditional and non-traditional. Self-government is designed to create the space for that synthesis.”

¹²⁰¹ Festenstein, *Negotiating Diversity*, *supra* note 60 at 76.

¹²⁰² Cairns, *Citizens Plus*, *supra* note 51; Borrows, *Canada’s Indigenous Constitution*, *supra* note 93; Woons, “Aboriginal Participation in Canada”, *supra* note 60 and Harty and Murphy, “In Defence of Multicultural Citizenship”, *supra* note 389 at 100 (relations of inter-dependence).

¹²⁰³ Urban Aboriginal Task Force, December 2007- *Report Commissioned by the Ontario-Federation of Indian Friendship Centres*, the Ontario Métis Aboriginal Association and the Ontario Native Women’s Association; Cairns, *Citizens Plus*, *supra* note 51.

¹²⁰⁴ White et al, “Aboriginal Well-Being in Canada”, *supra* note 5; see also Woons, “Aboriginal Participation in Canada”, *supra* note 60.

¹²⁰⁵ A large number of journals have emerged to deal with social science research pertaining to indigenous peoples. These include the International Indigenous Policy Journal, Aboriginal Policy Studies Journal, American Indian Cultural and Research Journal and the Journal of Aboriginal Economic Development.

¹²⁰⁶ Sparrow, *supra* note 969 at para 3 (does not promise immunity).

¹²⁰⁷ I am indebted to Professor Brad Morse for pointing out this essential qualification to the general point about interdependence.

¹²⁰⁸ Woons, “Aboriginal Participation in Canada”, *supra* note 60 at 13.

¹²⁰⁹ *Ibid* at 29- support for endangered languages generally involves the participation of the broader society; Montserrat Guibernau, *The Identity of Nations* (Polity Press, 2007) at 133 notes the increasing trend for indigenous groups to turn to the state for material support that amount to “...increasing demands for more elaborate links between tribal communities and the surrounding society.”

¹²¹⁰ Cairns, *Citizens Plus*, *supra* note 51 at especially 188, 212, 204.

¹²¹¹ Woons, “Aboriginal Participation in Canada”, *supra* note 60 at 39; Stephen Winter, “In Dialogue with “Citizens Plus”, *supra* note 1149 develops the argument for the injustice of a “shared identity” in his Dalhousie University master’s thesis. The contrary argument is presented by Philip Resnick, “European Roots of Canadian Identity”, *supra* note 739 at 16- he observes that multiculturalism risks undercutting elements of shared citizenship in a country with a weaker sense of national unity, though he recognizes (at page 40) that there is deep resistance to any notion of shared citizenship in Canada. For representative passages on Cairns’ argument for a normative core that is necessary to maintain a shared community see Cairns, *Citizens Plus*, *supra* note 51 at 93, 95, 132, 134, 141 and 155. Kymlicka, *Multicultural Odyssey*, *supra* note 45 at 96 argues that “...The task of all liberal democracies has been to turn this catalogue of uncivil relations into relations of liberal-democratic citizenship.” see also p. 132.

¹²¹² Woons, “Aboriginal Participation in Canadian Society”, *supra* note 60- rejection of shared identity; An interesting perspective on this issue is offered by Benedict Kingsbury & Kirsty Gover, “Indigenous Groups and the Politics of Recognition in Asia: Cases from Japan, Taiwan, West Papua, Bali, the Peoples’ Republic of Canada and Gilgit” (2004) 11 International J on Minority and Group Rights 1 at 16- an “essentially oppositional” view of indigenous-state relations may need updating as “Indigeneity is now increasingly embedded in democratic settler states.” An overlapping view is expressed by Salée & Lévesque, “Representing Aboriginal Self-Government”, *supra* note 42 at 126 that oppositional approaches to building relationships might constitute an “analytical dead-end”.

¹²¹³ Jung’s theory of “critical liberalism” is discussed in Section 3.8 of this thesis.

¹²¹⁴ Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50.

¹²¹⁵ Robinson, “Multiculturalism and the Foundations of Meaningful Life”, *supra* note 50 at 63, 66, 168, 169 (best accomplished within a host state)- “...wider community should be understood as embodying a moral tradition that sustains the many purposive traditions on which all citizens rely.” “...recognition that the wider political community fulfills an important function for them” but “...equal respect requires the state to perform this role for all and not just the majority.” This view rests on a broad theory of the relationship between the state and individuals- “...wider political community should be treated as a social union of individuals united to facilitate the equal opportunity to pursue meaningful lives.” This is because all might be expected to accept the importance of the goal of living a meaningful life. These ideas produce the objective of promoting the most extensive recognition of different forms of meaningful live to the extent that this is consistent with the commitment to moral universalism. This framework produces an interesting observation on the authority of the state- “...The wider community must prevail not because it is always likely to be right, but because it embodies the moral traditions on which the survival of the many valuable sub-communities and traditions depends.” Harty and Murphy, “In Defence of Multicultural Citizenship”, *supra* note 389 at 94-95, 150 (Harty and Murphy develop a related idea that the larger society can be conceived as the means by which distinct identities can be protected); see also Kingsbury and Gover, “Indigenous Groups and the Politics of Recognition”, *supra* note 1212; Guibernau, “Identity of Nations”, *supra* note 1209; Owen & Tully, “Redistribution and Recognition”, *supra* note 125 at 282 (parties are not in a relationship that can be separated from the dialogue itself).

¹²¹⁶ An interesting comparison can be made to Amy Chua, *Days of Empire: How Hyperpowers Rise to Global Dominance and Why They Fall* (Doubleday, 2007) who argues that the most enduring empires from a broad historical perspective are the ones that treated minorities comparatively well.

¹²¹⁷ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 208-209 (there is no “outside” beyond the political process itself); at 84 (there is “no choice” but to work within established structures); and at 143 (an approach such as Tully’s is only feasible when sovereignty has already been established); Yet Tully also recognizes

the “embeddedness” of any dialogical process- Owen & Tully, “Redistribution and recognition”, *supra* note 125 at 282- “They do not pre-exist with the attributes and negotiate in some unmediated or ascriptive pre-dialogue realm.”

¹²¹⁸ Jung, “Moral Force of Indigenous Politics”, *ibid* at 250-251 (all societies have inherited imperfect practices and must find a way forward in spite of these imperfections), Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50 at 18 (reference to Taylor’s notion of the “social imaginary” beyond which it is virtually impossible to think); Alfred, “Opening Words” in Simpson, Leanne, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Arbeiter Ring Publishing, 2008) at 10 (“Settlers have serious difficulty thinking thoughts that are outside fundamental premises of their cultural background.”)

¹²¹⁹ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 160-161, 200, ch 7; Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 650 at 198 (respect for indigenous traditions may be supported by mechanisms of integration with mainstream legal and constitutional processes); Manny Jules, Foreword to Flanagan et al. “Property Rights”, *supra* note 324 (self-government might be “supported by legislation or institutions”).

¹²²⁰ Some of these benefits are highlighted in the analysis of Ivison in Section 2.7.

¹²²¹ It should be emphasized that this is the argument presented in this thesis and that there are others who maintain either the view that indigenous legal systems are completely independent from mainstream law or that there is no legal relation at all because they do not accept the legal relevance of indigenous systems of law. The concept of “nesting” is designed to capture the notion of a relationship that must be established as a matter of evidence rather than by an a priori theory of legal relations. Because indigenous legal systems are nested within the broader host domestic Canadian legal system, the precise mechanisms for assessing interaction between the two are determined on a case-by-case basis, often with reference to the role of Section 35 of the Constitution Act, 1982.

¹²²² It will be recalled that a core component of the critique of the position of indigenous peoples within a so-called “settler state” is the absence of legitimate rule because of the lack of indigenous consent to the current constitutional order; Patton, “Political Liberalism and Indigenous Rights”, *supra* note 54 at 155 argues that absence of explicit consent “...raises the prospect that legitimate governments will only be achieved in colonial societies once the injustices that attended their foundation and subsequent history have been removed.” Tomsons, “Why Non-Aboriginal People Should Listen to Aboriginal Elders”, *supra* note 74 at 46 adds that it is “...impossible for non-Aboriginal sovereignty to be underlying sovereignty in Aboriginal territory.”

¹²²³ The idea of consent playing such a formative role in liberal political theory flows from the dominance of the social contract tradition of Hobbes, Rousseau and Locke. This tradition was revitalized with the work of John Rawls with the publication of *A Theory of Justice* in 1971, *supra* note 1113.

¹²²⁴ The literature is replete with references to the absence of consent to the constitutional order of the settler state, e.g. Benhabib, *Another Cosmopolitanism*, *supra* note 58 at 47. Samson, “Dispossession of the Innu”, *supra* note 86 at 14 (most liberal theory ignores the issue of lack of indigenous consent to current constitutional arrangements); Brown, “Illegitimacy of Canadian Citizenship”, *supra* note 942 (extended argument based on the absence of aboriginal consent to the constitutional order).

¹²²⁵ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002), at 115- (absence of legitimate consent at the outset renders the entire legal order invalid); Turner, *Peace Pipe*, *supra* note 60 at 32 (serious legal challenges to the legitimacy of the Canadian state); Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50 - (leads to question of how existing states can be just rather than whether they could ever be just); Ladner, “Negotiated Inferiority”, *supra* note 705 (legitimacy depends on consent); Tully, *Strange Multiplicity*, *supra* note 122 at 124; Gray, “Two Faces of Liberalism”, *supra* note 438 at 107; Kymlicka, “Politics in the Vernacular”, *supra* note 435 at 122; Kymlicka, *Multicultural Odysseys*, *supra* note 45 at 151 and 153- (Many indigenous peoples do not believe that the legal system has any legitimate right to apply and have adopted an “oppositional project” in relation to the state); Flanagan et al, “Beyond the Indian Act”, *supra* note 324 at 25-26 (absence of consent may be the cause of profound regret and may ultimately lead to profound constitutional change).

¹²²⁶ More traditional approaches to legitimacy can be seen in classic political theory works by D.D. Raphael, “Problems of Political Philosophy”, *supra* note 848 and John Plamenetz, “Consent, Freedom and Political Obligation”, *supra* note 848.

¹²²⁷ Webber, “Consent”, *supra* note 832 at 69-70, 91; Ivison, “Postcolonial Liberalism”, *supra* note 414 at 54-55, Margaret Moore, “Natural Resources, Territorial Right and Global Justice” (2012) 40 *Political Theory* 84 and Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 104ff. (expresses concerns about the traditional approach to consent); Tribe, “Invisible Constitution”, *supra* note 23 at 88 (care must be taken not to over-extend consent arguments); Dworkin, “Justice for Hedgehogs”, *supra* note 63 at 318- concerns about the philosophical anarchist argument against obedience to the law.

¹²²⁸ The difficulties with hypothetical and tacit approaches to consent are explored in Ivison *Postcolonial Liberalism*, *supra* note 414 and Hendrix, “Ownership, Authority and Self-Determination”, *supra* note 17; see also Macklem, “Indigenous Difference”, *supra* note 705 at 60-61.

¹²²⁹ Laurence Tribe, “Invisible Constitution”, *supra* note 23 at 88.

¹²³⁰ Kyla Reid, “Political Legitimacy”, *supra* note 84 at 391-392- (“Rather, legitimacy is sustained by a process that allows citizens to constantly participate in and potentially contest the political decisions that affect their lives.”); Patton, “Political Liberalism and Indigenous Rights”, *supra* note 54 at 155-159 makes the point, drawing from Rawls, that all states are more or less just, and that legitimacy “...is a project to be carried out”. Legitimacy is consequently a question of degree and current efforts to address past injustices contribute to overall legitimacy of the state’ “...removing these injustices goes some way towards ensuring the legitimacy of the post-colonial state”. However, he expresses the opinion that “...liberal societies established by colonialism still have some way to go.” Patton adds, in “Response to Henry Reynolds” (2006) 6 *Macquarie Law Journal* 21 - “Contemporary liberal theory does not base legitimacy solely on the historical process followed but also on whether it would now be considered reasonable and just to consent to the principles expressed in the constitutional settlement.” However, he recognizes that the “...concept of legitimacy is at least as contentious as the concept of sovereignty.” Libesman, “Indigenous Difference”, *supra* note 717 at 208-209 argues that Macklem’s work supports the conclusion that potentially illegitimate foundations “...do not imply an irremediable illegitimacy in the constitution of Canada that necessitates either forgetting the past or being imprisoned by remembrance of past injustice. The status quo does not exercise a monopoly over the possibilities of stable legal order. Questioning sovereignty does not have to mean expulsion into a state of nature or suspension of the constitutional order in a revolutionary interregnum between the rejection of an old world and the foundation of a new order. Nor does it have to threaten the territorial integrity of the Canadian constitutional order.” see especially: Macklem, “Indigenous Difference”, *supra* note 705 at 288 and 108-112 (moving towards a more relational and less absolute notion of sovereignty to support legitimate options for distribution of authority); Gray, “Two Faces of Liberalism”, *supra* note 438 at 107 adds that no conceivable regime is fully legitimate; Dworkin, “Justice for Hedgehogs”, *supra* note 63 at 382- “...boundaries created by the accidents of history remain the default” and at 322- shares the view that legitimacy is always a matter of degree. The classic work of the origins of states is Franz Oppenheimer, *The State* (Black Rose Books, 2007) written at the turn of the last century. Oppenheimer claims that conquest played a role in most if not all state formation (p. xx) and that the state “...can have origin in no other way than through conquest and subjugation.” A similar perspective is expressed in David Day, *Conquest*, *supra* note 902 – state formation “...almost invariably involves the violent dispossession of pre-existing inhabitants.” (p. xii), “...People can reconcile themselves...by recognizing that no society has ever had the exclusive possession of their land for all time and by acknowledging that the world is not only ancestral land of all of us but will become the wider homeland of everyone.”

¹²³¹ While Tully stresses the absence of consent to the current constitutional order and the early adoption of practices based on consent in early indigenous-non-indigenous relations, his later work demonstrates a receptiveness for exploration of a wide range of vehicles to improve the quality of dialogue and the development of negotiated solutions to historical and current injustice.

¹²³² Short, “Australian “Aboriginal” Reconciliation”, *supra* note 86 at 301,304; Harty and Murphy, “Multicultural Citizenship”, *supra* note 389 at 60, 86, 163; Asch, “Indigenous Self-Government and Applied Anthropology in Canada” (2001) 43 *Anthropological* 201 (importance of a nation to nation relationship).

¹²³³ The notions of “immanent critique” and the injustice of treating nations without states differently from nations with states are considered in Section 2.1 of this thesis.

¹²³⁴ Jonathan Havercroft, *Captives of Sovereignty* (Cambridge University Press, 2011); Neal Walker, “The Idea of Constitutional Pluralism”, (2002) 66 *Mod L Rev* 317 and Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 114.

¹²³⁵ Tierney, *Constitutional Law and National Pluralism*, *supra* note 42 (develops the normative and legal consequences of the presence of several nations within a single nation-state)

¹²³⁶ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 562; Douglas Lambert, “Where to From Here: Reconciling Aboriginal Title with Crown Sovereignty” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 32; Hoehn, *Reconciling Sovereignties*, *supra* note 47. (The acquisition of Crown sovereignty is frequently described as a “magical” process that is countered by continuing Indigenous sovereignty)

¹²³⁷ James Anaya, “Indigenous Law and the Contribution to Global Pluralism” (2007) 96 *Yale LJ* 957.

¹²³⁸ Hoehn, *Reconciling Sovereignties*, *supra* note 47.

¹²³⁹ The notion of shared or coordinate sovereignty is highlighted in Ivison, *Postcolonial Liberalism*, *supra* note 414 at 413 and is also referred to in the concurring judgment of Mr. Justice Binnie in *Mitchell*, *supra* note 692. This notion will be assessed in more detail in the Section 17.1 on aboriginal self-government.

¹²⁴⁰ Arguments have also been presented which support the notion that the nation-state is necessarily implicated in responding to the moral and legal claims of indigenous peoples that reside within the boundaries of that nation-state. Salée and Levesque, “Representing Self-Government”, *supra* note 42 develop the argument that academic positions that deny the necessary implication of the nation-state constitute “an analytical dead-end”.

¹²⁴¹ Many Canadian judges have expressed rather inappropriate attitudes about aboriginal peoples over the course of history. A book length treatment of one important case, *R v Sylliboy*, is considered in William C Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928: The King v Gabriel Sylliboy*. See also: Douglas C Harris, “A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal” (2009) BC Studies 137 for relatively recent examples from the British Columbia courts, see trials in *Calder*, *supra* note 1515 and *Delgamuukw*, *supra* note 22

¹²⁴² Larry Chartrand, Lisa Chartrand, Bruce Feldthusen & Sarah Han, “Reconciliation and transformation in practice: Aboriginal judicial appointments to the Supreme Court” (2008) 51 Canadian Public Administration 143

¹²⁴³ Peach, “Reconciling the Constitutional Order”, *supra* note 808 at 158 argues that the balancing of an indigenous presence on the Supreme Court of Canada with the regional representation that has been entrenched as a matter of practice (if not by law) would require a substantial expansion in the size of the Supreme Court of Canada. This “...would secure to Indigenous law an equal status in the Canadian system...”

¹²⁴⁴ The creation of the Reconciliation Commission was negotiated as part of the *Indian Residential Schools Settlement Agreement*, *supra* note 3. Ivison, *Postcolonial Liberalism*, *supra* note 414 at 55-56.

¹²⁴⁵ Jurgen Habermas, “Equal Treatment of Cultures and the Limits of Postmodern Liberalism” (2005) 13 J of Political Philosophy 1, especially at 23-24; Miller, “Nationalism”, *supra* note 428 at 537 (while constitutional patriotism is a laudable goal it cannot be confused with a common identity which may be impossible); Laden & Owen, “Introduction”, *supra* note 71 at 8; Gray, “Two Faces of Liberalism”, *supra* note 438 at 121.

¹²⁴⁶ Festenstein, *Negotiating Diversity*, *supra* note 60 at 85- (discusses the patriotic commitment of a nation’s citizens to its institutions- a “...commitment about which the liberal state cannot be neutral.”)

¹²⁴⁷ Chapter 12 (Van Der Peet and Its Critics).

¹²⁴⁸ Chapter 13 (Breaking Down the Binary Divide on Title).

¹²⁴⁹ Chapter 14 (Assessing the Promise of the Duty to Consult).

¹²⁵⁰ Chapter 15 (Elder Testimony Case Study).

¹²⁵¹ Chapter 16 (The Role of the Courts in Adjudicating Disputes Involving Section 35).

¹²⁵² Halley, *Split Decisions*, *supra* note 406 - role of theory fragments.

¹²⁵³ In addition to the very important cases of St. Catherine’s Milling, *supra* note 956, and *Calder*, *supra* note 961, there were a series of important cases dealing with harvesting rights in the 1960’s that merit attention. These include *R. v. Sikyea* (1964) SCR 642 and *R. v. George* (1966) SCR 267.

¹²⁵⁴ Hoehn, *Reconciling Sovereignties*, *supra* note 47 and Gallagher, *Resource Rulers*, *supra* note 345 for comprehensive coverage of the key decided cases.

¹²⁵⁵ The intent of the framers of Section 35 will be discussed in the Second Part of this thesis, See also: Ladner and McCrossan, “The Road not Taken”, *supra* note 88 (discussion of an aboriginal perspective on what Section 35 was intended to achieve)

¹²⁵⁶ *Sparrow*, *supra* note 969.

¹²⁵⁷ *Mikisew*, *supra* note 13 at para 5; see also para 63.

¹²⁵⁸ *Sparrow*, *supra* note 969 at para 62 (reconciling power with duty).

¹²⁵⁹ *Van der Peet*, *supra* note 8.

¹²⁶⁰ *Ibid* at para 36 and 49-50 (repeated in a different formulation in terms of the reconciliation of pre-existing claims with the assertion of British sovereignty and the need to take aboriginal perspective into account but framed in terms cognizable to Canadian legal and constitutional structure).

¹²⁶¹ *Ibid* para 310, per McLachlin J.

¹²⁶² *Ibid* at para 310.

¹²⁶³ *Ibid*.

¹²⁶⁴ *Ibid*..

¹²⁶⁵ *Ibid* at para 313.

¹²⁶⁶ *R v Gladstone*, [1996] 2 SCR 723 and *Delgamuukw*, *supra* note 22.

¹²⁶⁷ *Gladstone*, *ibid* at para 73. See also para 75.

¹²⁶⁸ *Delgamuukw*, *supra* note 22 at para 165.

¹²⁶⁹ *Ibid* at para 186.

¹²⁷⁰ *Mitchell*, *supra* note 690.

¹²⁷¹ *Ibid* at para 12, see also para 29.

¹²⁷² The American constitutional theorist Bruce Akerman has postulated that a constitutional system is best understood through close understanding of the key “constitutional moments” or historical eras that have been most influential in determining its content. In the case of the United States he argues that ratification of the Constitution, the reconstruction era after the civil war and the New Deal were the key “moments” in American constitutional history. See Tribe, *Invisible Constitution*, *supra* note 23 at 51-52.

¹²⁷³ Mitchell, *supra* note 690 at paras 74, 123, 129, 155.

¹²⁷⁴ The notion of “shared fate” is developed in Sharon Williams, “Sharing the River: Aboriginal Representation in Canadian Political Institutions” in David Laycroft, ed, *Representation and Democratic Theory* (UBC Press, 2004). See also: Melissa S Williams, “The Uneasy Alliance of Group Representation and Deliberative Democracy” in Will Kymlicka and Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford University Press, 2000).

¹²⁷⁵ Van der Peet, *supra* note 8 at para 313

¹²⁷⁶ Delgamuukw, *supra* note 22- “all here to stay”.

¹²⁷⁷ Kymlicka’s constraint, *supra* note 60.

¹²⁷⁸ Repetition of the same goal in *Haida*, *supra* note 13 at paras 26 and 35 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 42 [*Taku River*].

¹²⁷⁹ *Haida*, *ibid* at para 14 (“preferred means for achieving ultimate reconciliation”) and para 3. See also *Taku River*, *ibid* at para 2.

¹²⁸⁰ *Haida*, *ibid* at para 50, *Taku River*, *ibid* at para 2.

¹²⁸¹ *Haida*, *ibid* at para 17.

¹²⁸² *Ibid* at para 39 (implication of duty to consult from other principles).

¹²⁸³ *Ibid* at para 32.

¹²⁸⁴ *Ibid* at para 45, see also *Taku River*, *supra* note 1278 at para 42.

¹²⁸⁵ *Taku River*, *ibid* at para 24.

¹²⁸⁶ Monture “Journeying Forward”, *supra* note 65 at 82 (“inversion of earlier discourse”); Russell Barsh & James Youngblood Henderson, “The Supreme Court’s Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand”, (1997) 42 McGill LJ 993 at 998-“...Reconciliation...was pulled from thin air, in defiance of the main trends in contemporary constitutional thought.”; Newman, “Reconciliation”, *supra* note 288 at 83 contests this as there were sources of inspiration from Australia -“They were certainly aware of the articles they cited, some of which, like those of André Émond, cast a challenge to how assertions of certain Aboriginal rights could be made consistently with the rule of law and the assertion of Crown sovereignty.” He sees the French language writing of scholars such as Émond as a reason why the court “...did redevelop reconciliation in light of further intellectual influences in the jurisprudence.”

¹²⁸⁷ It is notable that such disparate approaches were taken to the goal of reconciliation in the trial and Court of Appeal decisions in *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700. See also comments on Lambert, “The Tsilhqot’in Decision” (2012) *The Advocate* 311.

¹²⁸⁸ Gibson, *New Look*, *supra* note 204 at 64 and 160-161 doubts whether the job of reconciling interests, as opposed to reconciling the requirements of different legal systems, is one that is even appropriate for courts to undertake.

¹²⁸⁹ *R v Sappier*, 2008 SCC 54, [2008] 2 SCR 483 at para 22 [*Sappier*]- Section 35- “...seeks to provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that the prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown.”

¹²⁹⁰ The two judgments in *Tsilhqot’in* are cited by reference to the lead representative plaintiff Roger William; *William v British Columbia*, 2012 BCCA 285; *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700.

¹²⁹¹ Lambert, “Where to From Here”, *supra* note 1236.

¹²⁹² McIntosh, “Reconciliation Doctrine”, *supra* note 490.

¹²⁹³ Lindberg, “Critical Indigenous Legal Theory”, *supra* note 210 at 1, 14, 118; John Borrows, “Uncertain Citizens”, *supra* note 1026 at 36; Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 321- holds out some hope; John Borrows, “Sovereignty’s Alchemy”, *supra* note 82 at para 64-“...requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation.”; Battiste, “Understanding the Progression of Mi’kmaw Law” (2008) 31 Dalhousie LJ 311 at 326-327- Crown lagging behind the courts on reconciliation; Dale Turner, *Peace Pipe*, *supra* note 60 at 28-29- Borrows is optimistic that indigenous legal traditions can be reconciled with an expanded view of indigenous rights in Canadian law while Turner is less optimistic.

¹²⁹⁴ Blackburn, “Producing Legitimacy”, *supra* note 371 and Woolford, “Negotiating Affirmative Repair”, *supra* note 1124.

¹²⁹⁵ Newman, “Reconciliation: Legal Concept(s) and the Faces of Justice”, *supra* note 288 at 84-85.

¹²⁹⁶ *Ibid* at 84-85.

¹²⁹⁷ *Ibid* at 81.

¹²⁹⁸ Walters, "Morality of Aboriginal Law", *supra* note 718 at 510.

¹²⁹⁹ *Ibid* at 511-513. (The 'translation approach' will be explained in more detail in the discussion of the Bernard decision of the Supreme Court of Canada in Chapter 13.)

¹³⁰⁰ *Ibid* at 513-514.

¹³⁰¹ Nigel Bankes, "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120 (Bernard is seen to be compromising the reconciliatory project); Walters, "Jurisprudence of Aboriginal Rights", *supra* note 975 (...may only involve an agreement to disagree about the past without attribution of blame."); Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139 at 147-149; Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous LJ 1; McIntosh, "Reconciliation Doctrine", *supra* note 490

¹³⁰² *Secession Reference*, *supra* note 23 at para 101, see also para 153.

¹³⁰³ Paul McHugh comments frequently on reconciliation in his book *Aboriginal Societies and the Common Law*, *supra* note 148, including at 54 (reconciliation as a consensual process), 322 (captures basic essence of reconciliation); 430 (reconciliation implies including aboriginal voices in public policy making); 540 (governance and reconciliation closely linked); 541 (comment on imperfect percolation into practice); 544 (contrast between reconciliation and court-judgments); 542-543 (two thoughtful pages on reconciliation); 608-609 (real reconciliation should be associated with real improvements in living conditions and reduction of adversarial relations); see also; Kickbush, "Can Section 35 Carry the Heavy Weight of Reconciliation?", *supra* note 1028.

¹³⁰⁴ Truth and Reconciliation Commission, *supra* note 1249.

¹³⁰⁵ The Australian experience with the goal of reconciliation has been considered in Chapter 7 of the thesis.

¹³⁰⁶ Issues about the historical foundations of theories of continuous recognition of aboriginal rights were explored in relation to the work of the New Zealand school of legal history in Chapter 6 of this thesis.

¹³⁰⁷ *Sparrow*, *supra* note 969.

¹³⁰⁸ The relationship between protection of aboriginal rights and the division of powers in Canada will be considered in Section 17.3 of this thesis where it will be argued that the decline of the doctrine of inter-jurisdictional immunity and the increasing importance of dialogue between aboriginal peoples and provinces has had a profound influence on how the protective function of Section 35 is best understood.

¹³⁰⁹ See Chapter 14 of this thesis.

¹³¹⁰ Walkem et al, "Box of Treasures", *supra* note 7. See Chapter 14 (Assessing the Promise of the Duty to Consult).

¹³¹¹ Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 Sup Ct L Rev 177.

¹³¹² *Ibid* at 186.

¹³¹³ *Ibid* at 187.

¹³¹⁴ *Ibid* at 188.

¹³¹⁵ *Ibid* at 208-209, citing Walters, "The 'Golden Thread' of Continuity", *supra* note 935.

¹³¹⁶ McNeil and Yarrow, *ibid* at 211.

¹³¹⁷ *Ibid* at 209.

¹³¹⁸ Brian Donovan, "Common Law Origins of Aboriginal Entitlements to Land" (2002-2003) 29 Man LJ 289 at 329.

¹³¹⁹ Brian Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw" (2001-2002) 35 UBC L Rev 43 at 80.

¹³²⁰ Donovan, *ibid* at 80 (he describes the title described in Delgamuukw as "...an empty category of so-called sui generis Aboriginal title").

¹³²¹ *Ibid* at 80; Bruce Clark, "Indian Title in Canada", *supra* note 795 at 3, 4, 5(also argues that practice and law have diverged in Canada).

¹³²² See also David C Nahwegahbow & Nicole DO Redmond, Whether the Constitution Act has made a Difference for First Nations, Ontario Bar Association 6th Annual Charter Conference: the Charter at 25, September 2007- (focuses more on continued socio-economic disparities and a "...deep rooted culture of denial and extinguishment within government.")

¹³²³ Lisa Streilen, "A Captive of Statute" in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009 - argument on common law rather than native title, notwithstanding the apparently exclusive application of the *Native Title Act*).

¹³²⁴ In addition to the scholars that have been considered in the previous section, Ladner and McCrossan, "The Road Not Taken", *supra* note 88 at 274 argue that Section 35 protects rights but they are "not created by" that provision, that "they did not cede their sovereignty" and that it "...maintained a protection of the treaties". While their basic

argument is very similar to McNeil & Yarrow, “Has Constitutional Recognition Adversely Affected Their Definition?” *supra* note 1311, they recognize with some significant regret that the Supreme Court of Canada “...ultimately charted its own path.”

¹³²⁵ See Chapter 6 (Historical Claims).

¹³²⁶ *Van der Peet*, *supra* note 8 at para 28- See also *Mitchell*, *supra* note 690 at para 10, where indigenous systems are “absorbed as rights”. It is important to note that while the majority judgment in this case, at para 64, formally left open arguments based on the law of sovereign succession it “...would prefer to refrain from commenting on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue.”

¹³²⁷ *Lax Kwa’laams Indian Band v Canada (Attorney General)*, [2011] 3 SCR 535 [*Lax Kwa’laams*].

¹³²⁸ *Tsilhqot’in*, *supra* note 1290 para 182, see also paras 171 and 172; *Mitchell*, *supra* note 692 at paras 12 and 13.

¹³²⁹ Several Supreme Court of Canada decisions have stated that proof of a right at common law is a sufficient but not necessary condition for proof of a Section 35 right: *Van der Peet*, *supra* note 8 at para 31; *Delgamuukw*, *supra* note 22 and *Mitchell*, *supra* note 690 at para 11.

¹³³⁰ *Delgamuukw*, *ibid* at para 136.

¹³³¹ *Lax Kwa’laams*, *supra* note 1327 at para 7.

¹³³² *R v Côté*, [1996] 3 SCR 139 [*Côté*].

¹³³³ *Ibid*.

¹³³⁴ McHugh, *Aboriginal Title: The Modern Jurisprudence*, *supra* note 889 at x, 46, 106 and 147.

¹³³⁵ *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429.

¹³³⁶ *Ibid* at para 97 (clear break from the past).

¹³³⁷ Walters, “Golden Thread”, *supra* note 935 at 734, 749, 751 (Section 35 “potentially new foundation, but “golden thread of continuity”) See also: Ogden, ““Existing” Aboriginal Rights in Section 35”, *supra* note 916 at 53 and 75 (constitutionalized doctrine rather than individual rights).

¹³³⁸ A good example is the recent decision of the Supreme Court of Canada in *Manitoba Métis Federation*, *supra* note 13. The essence of the decision is that a claim to resolve an historical grievance about land was resolved by the issuance of a general declaration designed to promote modern deliberations between the parties.

¹³³⁹ This reliance on the honour of the Crown as a driving principle that feeds a notion of reconciliation is strongly reinforced with the recent decision of the Supreme Court of Canada in *Manitoba Métis Federation*, *ibid*.

¹³⁴⁰ A strong parallel can be drawn to developments in Australia where academics who are concerned about the restrictive interpretations applied to the Native Title Act have argued for the parallel invocation of an autonomous common law as an alternative to the statute. Though the issue has not been definitively resolved it appears likely that the statutory approach to native title will be authoritative and will oust a competing interpretation of the common law. See Streilen, “Captive of Statute”, *supra* note 1323 and Simon Young, *The Trouble with Tradition: Native Title and Cultural Changes* (The Federation Press, 2008).

¹³⁴¹ Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 731 at 736.

¹³⁴² Argument is developed most clearly by Russell Barsh, “Indigenous Rights and the Lex Loci in British Imperial Law” in Kerry Wilkins, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing, 2004) at 92 (legal pluralism is described as a core principle of the imperial legal system). See also Ladner and McCrossan, “The Road Not Taken”, *supra* note 88 at 273 – Canadian courts “...have stood steadfast in ignoring the lex loci, and, thus, denying legal orders, laws, and jurisdictions when rendering their decisions.”; According to Ladner and McCrossan, “...the reality is a reading of the common law that has privileged British/Canadian legal systems to the extent that it all but ignores Indigenous constitutional orders.”

¹³⁴³ This argument will be developed in Section 17.1 of this thesis

¹³⁴⁴ This dominant way of thinking about sovereignty is explored in Section 10.2 of this thesis.

¹³⁴⁵ Both prevalence and limits of arguments based on lack of consent are considered in Section 10.2 of this thesis.

¹³⁴⁶ Hoehn, *Reconciling Sovereignties*, *supra* note 47.

¹³⁴⁷ Ritter, “Native Title”, *supra* note 290 at 202-(non-justiciability of Australian sovereignty); *Sparrow*, *supra* note 969 at para 404 (this is the famous, and much criticized passage about there being “never any doubt” “from the outset” about title and sovereignty vesting in the Crown); see also: *De la Pena v Newfoundland*, (1986) 63 N & PEI Reports 356 (leave to appeal to the Supreme Court of Canada refused).

¹³⁴⁸ These issues are dealt with in Part III of this thesis.

¹³⁴⁹ Though several academics have spoken of the possibility of “shared” or “coordinate” sovereignty, e.g. Ivison, *Postcolonial Liberalism*, *supra* note 414 at 55-56, the idea is rarely defined with precision. One of the themes developed in this thesis is that an accumulation of legal and policy changes may result in sufficient authority, with constitutional protection, vested in aboriginal groups, that the resulting arrangement might appropriately be

described as one of shared sovereignty. This is consistent with the view expressed by Andrée Lajoie, “What Constitutional Law Does not Want to Hear about History” in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum* (2001), at 93 – the “...least irrational bet we can make is that the original Aboriginal orders have survived.” A combination of the protection of those surviving orders and development of other mechanisms to secure aboriginal autonomy can collectively support the conclusion that meaningful indigenous sovereignty exists within Canadian constitutionalism.

¹³⁵⁰ Halley, *Split Decisions*, *supra* note 406 (idea that theory should be used in a fashion to construct arguments that advance legitimate goals in practice).

¹³⁵¹ Critical commentary on the *Van der Peet* decision includes literally dozens of articles in the law, humanities and social science literature. Earlier citations can be found in Salée et al, “Quality of Life”, *supra* note 2. See also: Godlewska et al, “Aboriginal Title, Treaties, and the Nisga’a” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007). A recent recasting of some of the criticisms can be found in Clayton Cunningham, “Aboriginal Powers, Privileges, and Immunities of Self-Government” (2013) 76 Sask L Rev 315, especially at 316. Perhaps the most incisive critique comes from the political scientist Avigail Eisenberg, who goes beyond the perceived flaws of the test to sketch out a possible alternative- “Indigenous Identity Claims”, chapter 6 to her book *Reasons of Identity: A normative guide to the political and legal assessment of identity claims* (Oxford University Press, 2009) at 121 and 127.

¹³⁵² It will be seen in Chapter 12 of this thesis that this critique is particularly acute with respect to the interpretation of Section 35 offered by the Supreme Court of Canada in the *Van der Peet* decision, *supra* note 8.

¹³⁵³ *Van der Peet*, *supra* note 8.

¹³⁵⁴ *Ibid* at para 17.

¹³⁵⁵ *Ibid*.

¹³⁵⁶ *Ibid* at para 19.

¹³⁵⁷ *Ibid* at para 20.

¹³⁵⁸ It is important to note that Chief Justice Lamer seeks an explanation for the doctrine of aboriginal rights rather than an assessment of the content of common law aboriginal rights. This rhetorical move is a key step in the process of distancing Section 35 interpretation from the historical content of the common law and is a major explanation for the shift to a “modern” and largely autonomous theory of Section 35 rights.

¹³⁵⁹ *Van der Peet*, *supra* note 8 at para 30.

¹³⁶⁰ *Ibid* at para 31.

¹³⁶¹ *Ibid* at para 32.

¹³⁶² *Ibid* at para 35.

¹³⁶³ The key decisions cited were: *Johnson v M’Intosh*, *supra* note 949; *Worcester v Georgia*, 31 US (6 Pet) 515 (1832); *Mabo*, *supra* note 87.

¹³⁶⁴ The key academic works cited were: David Elliott, *Law and Aboriginal Peoples of Canada*, 2nd ed (Captus Press, 1994); Patrick Macklem, “Normative Dimensions of an Aboriginal Right of Self-Government” (1995) 21 Queen’s LJ 173 at 180; William Pentney, “The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II: The Substantive Guarantees” (1988), 22 UBC L Rev 207 at 258; Mark Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia” (1992) 17 Queen’s LJ 350 at 412-413; Brian Slaterry, “The Legal Basis of Aboriginal Title” in Frank Cassidy, ed, *Aboriginal Title in British Columbia* (Oolichan Books, 1992) at 120-121; Slaterry, “Understanding Aboriginal Rights”, *supra* note 930.

¹³⁶⁵ *Van der Peet*, *supra* note 8 at para 43.

¹³⁶⁶ *Ibid* at para 44.

¹³⁶⁷ *Ibid* at para 46.

¹³⁶⁸ *Ibid* at para 62.

¹³⁶⁹ *Ibid* at para 63.

¹³⁷⁰ *Ibid* at para 64.

¹³⁷¹ The two strong dissents filed by McLachlin J. and L’Heureux-Dube register very significant disagreement with the normative model for Section 35 interpretation that is set out in the majority judgment by Chief Justice Lamer.

¹³⁷² *Van der Peet*, *supra* note 8 at para 246.

¹³⁷³ *Ibid* at paras 171-172.

¹³⁷⁴ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 267- theories that are critical of the use of rights; Francis, “Canadian Indigenous Peoples”, *supra* note 17 at 137-138 (Francis describes the role of rights critique in the philosophy of Charles Taylor and generally argues that the reliance on rights in Canadian political theory is misplaced); Holder & Corntassel, “Indigenous Peoples and Multicultural Citizenship”, *supra* note 1196 at 128-129.

¹³⁷⁵ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17.

¹³⁷⁶ Nussbaum, *Frontiers of Justice*, *supra* note 418 (description of capabilities theory) .

¹³⁷⁷ Ivison, *Postcolonial Liberalism*, *supra* note 414.

¹³⁷⁸ Alfred, “Wawase”, *supra* note 65 and Lindberg, “Critical Indigenous Legal Theory”, *supra* note 210.

¹³⁷⁹ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 and Ivison, *Postcolonial Liberalism*, *supra* note 414.

¹³⁸⁰ W Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16 at 28-59.

¹³⁸¹ The work of Henderson is discussed in Section 5.3 of this thesis..

¹³⁸² The consequences of this separation between native title and the common law will be discussed in Chapter 15 of this thesis.

¹³⁸³ The focus in the United States jurisprudential framework is more on the status of tribes as “domestic dependent nations” and possessors of “retained sovereignty”. See Benjamin J Richardson, “The Dyadic Character of US Indian Law” in Benjamin J Richardson, Shim Imai and Kent McNeil, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009).

¹³⁸⁴ A number of scholars interpret the doctrine of continuity as incorporating indigenous legal systems as the *lex loci* of an indigenous territory, the best example being Barsch, “Lex Loci”, *supra* note 1345. Other scholars interpret the doctrine of continuity as protecting property rights but not continuing the ability to maintain a legal system- this appears to the conclusion reached in the Australian jurisprudence; *Coe and Walker*, *supra* note 649.

¹³⁸⁵ The generic rights approach to aboriginal rights will be discussed in Section 12.5 of this thesis.

¹³⁸⁶ *Delgamuukw*, *supra* note 22 at para 175 (“crystallization”).

¹³⁸⁷ This argument is most fully developed in Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989).

¹³⁸⁸ Walters, “Golden Thread”, *supra* note 935.

¹³⁸⁹ Henderson, *First Nations Jurisprudence*, *supra* note 91 at 106-109 (direct provision of content by indigenous legal norms)

¹³⁹⁰ Dawnis Kennedy, “Recognition without Respect? Section 35 and Indigenous Legal Orders” in Law Commission of Canada, *Indigenous Legal Traditions*, 2007 at 77-78.

¹³⁹¹ *Ibid* at 78-79.

¹³⁹² *Ibid* at 81.

¹³⁹³ *Ibid*.

¹³⁹⁴ *Ibid* at 87.

¹³⁹⁵ *Ibid* at 89.

¹³⁹⁶ *Ibid* at 93.

¹³⁹⁷ *Ibid* at 95.

¹³⁹⁸ *Ibid* at 97.

¹³⁹⁹ *Ibid* at 99.

¹⁴⁰⁰ *Ibid* at 101-102.

¹⁴⁰¹ Battiste, “Understanding the Progression of Mi’kmaw Law”, *supra* note 1293 at 322.

¹⁴⁰² *Ibid* at 320-321, 322 (supportive of the approach in Sappier but little evidence of direct use of indigenous law is apparent in the record of the case).

¹⁴⁰³ *Ibid* at 323.

¹⁴⁰⁴ *Ibid* at 336.

¹⁴⁰⁵ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 238, Borrows, “Drawing Out Law”, *supra* note 9 at xiv, 70.

¹⁴⁰⁶ Borrows, *Canada’s Indigenous Constitution*, *ibid* at 136.

¹⁴⁰⁷ *Ibid* at 362.

¹⁴⁰⁸ *Ibid* at 11.

¹⁴⁰⁹ *Ibid* at 260.

¹⁴¹⁰ *Ibid* at 123.

¹⁴¹¹ *Ibid* at 11, 136.

¹⁴¹² *Ibid* at 161, 375.

¹⁴¹³ *Ibid* at 251.

¹⁴¹⁴ *Ibid* at 207.

¹⁴¹⁵ *Ibid* at 238.

¹⁴¹⁶ The work of Borrows is considered more fully in Section 4.5 of this thesis.

¹⁴¹⁷ This reflects a core element in Borrows’ constitutional scholarship that sees at least equal weight placed on constitutional duties as compared to constitutional rights. This theme is developed in Borrows, “Let Obligations be

Done” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007).

¹⁴¹⁸ *Calder*, *supra* note 961 at para 115.

¹⁴¹⁹ *Connolly v Woolrich and Johnson et al*, (1867) 17 RJRQ 75 (also reported at 11 LC Jur 197). This case is cited in most Canadian scholarship on legal pluralism, for example, Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 650 at 181, Kennedy, “Recognition without Respect?”, *supra* note 1390 at 78. For a critical examination of the case and the propositions is said to article see Grammond, “Reception of Indigenous Legal Systems”, *supra* note 502).

¹⁴²⁰ There is a rich vein of authority on the recognition of aboriginal customary practices, particularly in the area of family law and traditional governance practices. Most of the authorities are collected and assessed in the British Columbia Court of Appeal decision in *Casimel*, *supra* note 1421.

¹⁴²¹ *Casimel v Insurance Corporation of British Columbia*, (1993) 106 DKR (4th) 720; see also: Borrows, *Recovering Canada*, *supra* note 1225 at 6.

¹⁴²² *Ibid*, *Casimel* at para 42.

¹⁴²³ The leading case in Canada on the incompatibility doctrine is *Mitchell*, *supra* note 690. For a comprehensive treatment of the doctrine as a whole see Kerry Wilkins, *Unchartered Territory: Fundamental Common Values and the Inherent Right of Aboriginal Self-Government* (LLM, University of Toronto, 1998)

¹⁴²⁴ These ideas are prominent in both decisions in the *Mitchell* case, *supra* note 690.

¹⁴²⁵ The Supreme Court of Canada frequently relies on an idea of “aboriginal perspective” in its jurisprudence. See *Van der Peet*, *supra* note 8 at paras 49-50; *Delgamuukw*, *supra* note 22 at paras 81-82 and *Marshall*, *supra* note 38 at para 19. See also: Henderson & Battiste, “Indigenous Philosophy”, *supra* note 641 at footnotes 74 and 75.

¹⁴²⁶ *Mitchell*, *supra* note 690 at para 10 (absorbed as rights).

¹⁴²⁷ The work of the New Zealand school of legal history is considered in Chapter 6 of this thesis.

¹⁴²⁸ *Mabo*, *supra* note 87 at para 68 (indigenous legal systems are not common law rights but are protected by the common law).

¹⁴²⁹ Lisa Ford’s legal history shows that this was the approach adopted in New South Wales and Georgia but colonial authorities gradually developed rules that left little or no room for indigenous legal systems to operate. Lisa Ford, “Settler Sovereignty”, *supra* note 80; it should be noted that there is much room for debate and further research on colonial constitutional law- Berry, “Legal Anomalies”, *supra* note 705 at 247 describes this law as displaying “puzzling heterogeneity”.

¹⁴³⁰ Kennedy, “Recognition without Respect?”, *supra* note 1390.

¹⁴³¹ The same point obviously applies to the relationship between mainstream Canadian law and any other indigenous system of law within Canada.

¹⁴³² The work of Nicole Roughen on the association of legal systems is considered in Section 4.6 of this thesis.

¹⁴³³ Examples could include resolution of disputes about the devolution of chiefly names or spiritual matters that are strictly internal to the group. While there is a deep resistance to seeing such disputes adjudicated in mainstream federal courts, an exception can be seen in Lambert, “Indigenous Law”, *supra* note 641.

¹⁴³⁴ This argument is developed further in Section 17.1 of this thesis.

¹⁴³⁵ *An Act to Amend the Canadian Human Rights Act*, SC 2008, c 30. This Act provides for the repeal of Section 67 and mandated interpretation and application of the Canadian Human Rights Act “...in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.”

¹⁴³⁶ While there are several examples of comprehensive claims agreements that attempt to incorporate aspects of indigenous customary law into the governance provisions of the agreements, the clearest example is the Land Claim Settlement Agreement between the Inuit of Labrador and the Governments of Newfoundland and Labrador and Canada. See Part 17.5 (Registry of Laws).

¹⁴³⁷ This possibility is expressly rejected in *R v Adams*, [1996] 3 SCR 101 [*Adams*].

¹⁴³⁸ *R v Pamajewon*, [1986] 2 SCR 321.

¹⁴³⁹ This argued is developed in Section 17.1 of this thesis.

¹⁴⁴⁰ Brian Slattery, “A Taxonomy of Aboriginal Rights” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007) ; Brian Slattery, “The Generative Structure of Aboriginal Rights” in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008); Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Sup Ct L Rev 1; “The Metamorphosis of Aboriginal Title” (2006) 85 Can Bar Rev 255.

¹⁴⁴¹ Slattery, “Generative Structure”, *ibid.*, at 5ff.

¹⁴⁴² *Ibid* at 4-5.

¹⁴⁴³ *Ibid* at 6- these rights include right to an ancestral territory, a right to cultural integrity, a right to conclude treaties, a right to customary law, a right to fiduciary protection from the Crown and a right to self-government.

¹⁴⁴⁴ *Sappier*, *supra* note 1289.

¹⁴⁴⁵ *Lax Kwa’laams*, *supra* note 1327.

¹⁴⁴⁶ A case in point is the Drew decision, *Drew v Newfoundland and Labrador (Minister of Government Services and Lands)*, 2006 NLCA 53, from the Newfoundland and Labrador Court of Appeal, leave denied by the Supreme Court of Canada, that a particular aboriginal group on the island of Newfoundland could not make a claim to aboriginal title.

¹⁴⁴⁷ The work of the New Zealand school of Legal History is considered in Chapter 6 of this thesis.

¹⁴⁴⁸ *Rio Tinto*, *supra* note 796 at para 38.

¹⁴⁴⁹ The requirement of specificity, both in terms of pleading and characterization of rights, is emphasized in *Lax Kwa’laams*, *supra* note 1327. It is also a key theme in the emerging jurisprudence on the duty to consult- see, for example, *Brokenhead First Nation v Canada*, 2009 FC 982.

¹⁴⁵⁰ *Van der Peet*, *supra* note 8 at paras 18-19 (rights of the Enlightenment).

¹⁴⁵¹ In addition to specific flaws that are alleged to flow from the Van Der Peet decision, several commentators have argued that the general approach of the court derogates from the traditional approach of the common law based on the doctrine of continuity. See, in particular, McNeil and Yarrow, *supra* note 1311 and Walters, “Golden Thread”, *supra* note 935.

¹⁴⁵² These arguments are developed in Chapter 11 of this thesis.

¹⁴⁵³ This argument was developed in Chapter 3 of this thesis.

¹⁴⁵⁴ Jung, “Moral Force of Indigenous Politics”, *supra* note 103.

¹⁴⁵⁵ Anker, “Law in the Present Tense”, *supra* note 635; Young, “Trouble with Tradition”, *supra* note 1340; Lisa Streilen, *Compromised Jurisprudence: Native Title Cases since Mabo*, 2d ed, (Aboriginal Studies Press, 2009).

¹⁴⁵⁶ Chief Justice French, “Lifting the Burden of Native Title”, *supra* note 635.

¹⁴⁵⁷ The danger of “essentialism” was explored in Section 3.6 of this thesis.

¹⁴⁵⁸ Waldron, “Supercession”, *supra* note 827.

¹⁴⁵⁹ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 (key importance of temporal issue in Borrows’ work- one of the most important themes is that indigenous legal systems are primarily useful to the extent that they structure good relations in contemporary communities).

¹⁴⁶⁰ The impact of the choice of different time periods for assessing various rights shall be considered in Chapter 13 of this thesis.

¹⁴⁶¹ Eisenberg, “Indigenous Identity Claims”, *supra* note 467 comes closest to developing an identity based alternative to the distinctive culture test. See also: Schouls, *Shifting Boundaries*, *supra* note 566.

¹⁴⁶² Asch, “Getting Past Terra Nullius”, *supra* note 73.

¹⁴⁶³ Alasdair McIntyre, *After Virtue* (University of Notre Dame Press, 1981) at 177 develops a notion of “practice” that is far richer than a simple description of actions. He describes a socially embedded notion of practice that aspires to the achievement of excellence. A particular acute analysis of the relevance of McIntyre’s notion of “practice” and the interpretation of the *Sappier* decision can be found in Clayton Cunningham, *Of Self-Government: Aboriginal Rights, Privileges, Powers and Immunities* (MA Thesis, University of Alberta, 2008) at 35 (McIntyre develops a philosophically rich notion of “practice” which embodies the shared normative content as much as the shared activity).

¹⁴⁶⁴ In *Jack and Charlie v The Queen*, [1985] 2 SCR 732, the Supreme Court of Canada arguably missed the deeper meaning of a practice of ritual burning of deer meat by concluding that using frozen meat would be equally meaningful to the participants.

¹⁴⁶⁵ This issue was addressed in Section 12.5 of this thesis, primarily in relation to a response to Slattery’s call for the recognition of a series of “generic” rights under Section 35.

¹⁴⁶⁶ The evolution of the controversy among anthropologists about the relationship between pre-existing economic patterns and the new relationships forged after contact is assessed in Arthur J Ray, “From the US Claims Commission Cases to Delgamuukw: Facts, Theories and Evidence in North American Land Claims” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010) at 42-43, 45. Ray observes that “Some, notably Steward, promoted the idea that most Indian notions of property were products of European contact.” Though it is now somewhat dated, a good source to understand the continuing debate is Tanner, “The New Hunting Territories Debate: An Introduction to Some Unresolved Issues” (1986) 28 *Anthropological* 19.

¹⁴⁶⁷ See Chapter 17.1

¹⁴⁶⁸ Macklem, “Indigenous Difference”, *supra* note 705 at 4 (multiple normative factors must be considered).

¹⁴⁶⁹ *Sappier*, *supra* note 1292 and *Lax Kwa’laams*, *supra* note 1330.

¹⁴⁷⁰ *Sappier*, *supra* note 1292.

¹⁴⁷¹ In contrast to the commentary on the *Van der Peet* decision, collected at footnote 1351, many commentators reacted favourably to the *Sappier* decision, in part because the Court clearly attempted to respond to the thrust of the academic commentary- see, for example, Guy Campion Charlton, “Letting Go of Culture: A Comment on R. v. Sappier, R. v. Grey” (2008) 39 Ottawa L Rev 317 at 332; Emily Luther, “Whose “Distinctive Culture”? Aboriginal Feminism and R. v. Van der Peet” (2010) 8 Indigenous LJ 27 at 33 and Battiste, “Understanding the Progression of Mi’kmaw Law”, *supra* note 1293 at 316ff and 327.

¹⁴⁷² *Sappier*, *supra* note 1292 at para 23- (The relevant practice was found to be the harvesting of wood. This broader characterization is linked to a general shift in orientation towards the assessment of whether the identified practice highlights an aspect of a way of life.)

¹⁴⁷³ *Sappier*, *ibid* at paras 35 ff, especially para 38.

¹⁴⁷⁴ *Ibid* at para 40.

¹⁴⁷⁵ *Ibid* at para 41.

¹⁴⁷⁶ *Ibid* at para 39.

¹⁴⁷⁷ *Ibid* at para 44.

¹⁴⁷⁸ *Ibid* at para 43.

¹⁴⁷⁹ *Ibid* at para 44.

¹⁴⁸⁰ *Ibid* at para 40.

¹⁴⁸¹ *Ibid* at para 42.

¹⁴⁸² *Ibid* at para 45.

¹⁴⁸³ *Ibid* at para 46.

¹⁴⁸⁴ *Ibid* at para 39.

¹⁴⁸⁵ *Lax Kwa’laams*, *supra* note 1327.

¹⁴⁸⁶ *Ibid* at para 2.

¹⁴⁸⁷ *Ibid* at para 8.

¹⁴⁸⁸ *Ibid* at para 30.

¹⁴⁸⁹ *Ibid* at para 38.

¹⁴⁹⁰ *Ibid* at para 46.

¹⁴⁹¹ *Ibid* at para 50.

¹⁴⁹² *Ibid* at para 56.

¹⁴⁹³ *R v Horseman*, [1995] 1 SCR 901.

¹⁴⁹⁴ *Gladstone*, *supra* note 1267.

¹⁴⁹⁵ *Sparrow*, *supra* note 969, *Van Der Peet*, *supra* note 8 and *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672.

¹⁴⁹⁶ *Lax Kwa’laams*, *supra* note 1327.

¹⁴⁹⁷ *Ibid* at para 46 (as the fourth element of the test is only used for potential findings of commercial rights, some parallels may be drawn to the suggestion in *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 at paras 44-45 that a different approach to incorporating provincial law might be appropriate when the laws touch on a commercial element of a treaty right.

¹⁴⁹⁸ *Ahousaht Indian Band v Canada (Attorney General)*, 2011 BCCA 237, leave to appeal to the Supreme Court of Canada refused: 34387 (August 17, 2011); *Ahousaht Indian Band v Canada (Attorney General)*, 2012 BCCA 404, leave to appeal to the SCC refused: 34387 (January 30, 2014).

¹⁴⁹⁹ Though it will not be considered in this thesis, an important ruling on the existence of commercial hunting rights was rendered in the *Tsilhqot’in* decision, *supra* note 1290.

¹⁵⁰⁰ The impact of *Van der Peet*, *supra* note 8 and *Pamajewon*, *supra* note 1438 on the status of a right to self-government under Section 35 of the *Constitution Act, 1982* will be addressed in Section 17.1 dealing with aboriginal self-government.

¹⁵⁰¹ *Sappier*, *supra* note 1289; *Mitchell*, *supra* note 690 and *Haida*, *supra* note 13.

¹⁵⁰² *Mabo*, *supra* note 87, at p 15 (the plurality opinion by Brennan J. strongly suggests that damages will not be available for past interferences with aboriginal title).

¹⁵⁰³ The Supreme Court of Canada has stated on numerous occasions that past conduct should be assessed in accordance with the “standards of the day”- *Wewaykum*, *supra* note 39; *Manitoba Métis Federation*, *supra* note 13 at para 189 (Rothstein J. in dissent) and *KLB v British Columbia*, [2003] 3 SCR 403 at para 45. See also: *Constant c Québec (PG)*, 2003 CanLII 47824 (QC CA); *Joly c Québec (PG)*, 2003 CanLII 47911 (QC CA); *Young c Quebec*

(PG), 22 Janvier 2003, Cour d'Appel du Qu/bec (see especially *Constant* at para 55); *Hislop*, *supra* note 1335 at para 101 and 103.

¹⁵⁰⁴ Administrative law does not generally provide monetary damages in public law cases, though a damages award is starting to emerge in jurisprudence under the Charter of Rights and Freedoms- *Vancouver (City) v Ward*, 2010 SCC 27.

¹⁵⁰⁵ *Rio Tinto*, *supra* note 796 at paras 49, 37 and 63 (damage claims).

¹⁵⁰⁶ *Specific Claims Tribunal Act*, SC 2008, c 22. Sub-Section 15(1) (f) of the Act precludes a First Nation from bringing a claim which is "...based on, or alleges, aboriginal rights or title".

¹⁵⁰⁷ *Tsilhqot'in*, *supra* note 1290.

¹⁵⁰⁸ Jung, "Moral Force of Indigenous Politics", *supra* note 103 at 28- "Not only does context matter, but theories need facts to render them persuasive."

¹⁵⁰⁹ Halley, "Taking a Break", *supra* note 406.

¹⁵¹⁰ *St Catherine's Milling*, *supra* note 956.

¹⁵¹¹ Slattery, "Metamorphosis of Aboriginal Title", *supra* note 927 at 261.

¹⁵¹² *Calder*, *supra* note 961.

¹⁵¹³ Godlewska et al, "Aboriginal Title, Treaties, and the Nisga'a", *supra* note 1351 at 3.

¹⁵¹⁴ Statement of the Government of Canada on Indian Policy (commonly referred to as the White Paper of 1969).

¹⁵¹⁵ *Nisgha Tribal Council v British Columbia (Attorney-General)*, [1969] BCJ No 53; *Calder et al v AG (BC)*, [1970] BCJ No 632.

¹⁵¹⁶ *Calder*, *supra* note 961 at para 6.

¹⁵¹⁷ *Ibid* at para 25.

¹⁵¹⁸ *Ibid* at para 46.

¹⁵¹⁹ *Ibid* at 21.

¹⁵²⁰ *Ibid* at para 96.

¹⁵²¹ *Ibid* at 44.

¹⁵²² See *Calder*, *supra* note 1515.

¹⁵²³ *Calder*, *supra* note 961 at 56.

¹⁵²⁴ *Ibid* at para 149.

¹⁵²⁵ *Ibid* at para 167, 168.

¹⁵²⁶ *Ibid* at para 151.

¹⁵²⁷ *Ibid* at para 167.

¹⁵²⁸ Murphy, "Culture and the Courts", *supra* note 98 at 117- "sent shockwaves".

¹⁵²⁹ *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*].

¹⁵³⁰ *Adams*, *supra* note 1437 and *Côté*, *supra* note 1332.

¹⁵³¹ Some sources, notably Renée Dupuis, *Tribus, Peuples et Nations: Les nouveaux enjeux des revendications autochtones au Canada* (Boréal, 1997) at 61 erroneously assert that the Attorney General of Canada took the same position on the impact of the French regime as the Quebec government in the *Côté* case.

¹⁵³² Simon Young, *The Trouble with Tradition: Native Title and Cultural Changes* (The Federation Press, 2008) – while Young generally sees *Delgamuukw* as representing a progressive development he criticizes the distinction between rights and title under Section 35 and the imposition of an inherent limit.

¹⁵³³ Young, "Trouble with Tradition", *supra* note 1340 sees *Delgamuukw* as progressive decision.

¹⁵³⁴ *Delgamuukw*, *supra* note 22 at para 2.

¹⁵³⁵ *Ibid* at para 72.

¹⁵³⁶ There has been no new trial in *Delgamuukw*.

¹⁵³⁷ This aspect of the decision will be dealt with in Chapter 15 of this thesis which deals with oral testimony by aboriginal elders.

¹⁵³⁸ *Delgamuukw*, *supra* note 22 at para 119.

¹⁵³⁹ *Ibid* at paras 116-118.

¹⁵⁴⁰ *Ibid* at paras 120-129, see critique in Laforest judgment at para 192.

¹⁵⁴¹ *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85; [2001] 3 SCR 746 [*Osoyoos*] especially passage from Gonthier J, paras 45-47.

¹⁵⁴² *Delgamuukw*, *supra* note 22 at paras 125-132.

¹⁵⁴³ This argument will be developed in Section 17.1 of this thesis.

¹⁵⁴⁴ *Ibid* at para 136.

¹⁵⁴⁵ *Ibid* at para 136.

¹⁵⁴⁶ *Ibid* at para 136.

¹⁵⁴⁷ The work of Paul McHugh and others associated with the New Zealand school of legal history is considered in Chapter 6 of this thesis.

¹⁵⁴⁸ Delgamuukw, *supra* note 22 at para. 2.

¹⁵⁴⁹ *Ibid.*

¹⁵⁵⁰ Delgamuukw, *supra* note 22 at para. 402.

¹⁵⁵¹ *Ibid.*

¹⁵⁵² Powley, *supra* note 533.

¹⁵⁵³ Delgamuukw, *supra* note 22 at para 142.

¹⁵⁵⁴ *Ibid* at para 145.

¹⁵⁵⁵ The argument for a “second” source of title drawing from the Delgamuukw decision is developed most fully by Kent McNeil, “Judicial Approaches to Self-Government”, *supra* note 955.

¹⁵⁵⁶ John JL Hunter, “Disappointed Expectations: Why Delgamuukw Has Failed to Achieve Results on the Ground” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009).

¹⁵⁵⁷ Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

¹⁵⁵⁸ No examples could be found of an aboriginal group seeking confirmation of a property right simply on the basis of general common law property law principles, such as those developed by Kent McNeil.

¹⁵⁵⁹ Delgamuukw, *supra* note 22 at para 151.

¹⁵⁶⁰ This will be discussed in section 13.5 of this thesis.

¹⁵⁶¹ Kent McNeil, “Continuity of Aboriginal Rights” in Wilkins, Kerry, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing, 2004).

¹⁵⁶² Bruce J McKinnon, “Aboriginal Title- After Bernard and Marshall: Part 1” (2007) 65 The Advocate 66 at 618-621 and Bruce J McKinnon, “Aboriginal Title- After Bernard and Marshall: Part 11” (2007) 65 The Advocate 513- two schools on continuity.

¹⁵⁶³ Some of the ambiguities connected to the elaboration of legal tests for aboriginal title will be further explored in Section 13.5 of this Chapter.

¹⁵⁶⁴ Delgamuukw, *supra* note 22 at para 157.

¹⁵⁶⁵ This potential contradiction will be explored more fully in Section 17.3 of the thesis dealing with the division of powers.

¹⁵⁶⁶ Delgamuukw, *supra* note 22 at para. 186.

¹⁵⁶⁷ These themes are developed in Chapter 16 of this thesis.

¹⁵⁶⁸ Delgamuukw, *supra* note 22 at paras 187ff, especially para 190- LaForest opinion.

¹⁵⁶⁹ *Ibid* at para 209 (McLachlin).

¹⁵⁷⁰ See Kent McNeil, “Aboriginal Title in Canada: Site-Specific or Territorial” (2014) 91 Can Bar Rev 745; Lambert, *The Tsilhqot’in Decision*, *supra* note 1287 at 83- Bernard did not deliver a common law right to occupy their traditional territory. Initial academic evaluations of the Bernard decision were quite negative, though more recent scholarship has turned to possible ways to distinguish the decision. See, in particular, Lambert, “Three Points”, *supra* note 963 at 354, Bankes, “Customary Property Laws”, *supra* note 1301 at 120, Hutchins, “Cede, Release and Surrender”, *supra* note 414 at 488, Larry Chartrand, “The Story in Aboriginal Law and the Aboriginal Law in the Story: A Metis Professors Journey” (2010) 50 Sup Ct L Rev 89 and Slattery, “Metamorphosis”, *supra* note 927 at 279.

¹⁵⁷¹ Bankes, “Customary Property Laws”, *supra* note 1301 at 120- regards the decision as seriously flawed. Hutchins, “Cede, Release and Surrender”, *supra* note 414 at 448 argues that the Supreme Court of Canada is “losing its compass” with *Bernard*.

¹⁵⁷² *Bernard; Marshall*, *supra* note 38.

¹⁵⁷³ Cromwell J is now on Supreme Court of Canada.

¹⁵⁷⁴ *Bernard*, *supra* note 38 at para 37.

¹⁵⁷⁵

¹⁵⁷⁶ *Calder*, *supra* note 961 at para 6

¹⁵⁷⁷ JV Wright, *A History of the Native People of Canada, Volume II 1,000B.C.- A.D. 500* (Canadian Museum of Civilization, 1999) & *Vol II, 1,000 BC – AD 500* (Canadian Museum of Civilization) – see, for example, the description of the harvesting patterns of the Late Plains Culture at 814-825.

¹⁵⁷⁸ *Bernard; Marshall*, *supra* note 38 at paras 42-45 (rejection of proximate occupation in the Nova Scotia Court of Appeal.)

¹⁵⁷⁹ McNeil, *Common Law Aboriginal Title*, *supra* note 1387.

¹⁵⁸⁰ *Bernard; Marshall*, *supra* note 38 at paras 142-144 (Lebel on summary proceedings)

¹⁵⁸¹ *Tsilhqot’in*, *supra* note 1290 (BCSC).

¹⁵⁸² *Tsilhqot'in*, *supra* note 1293 (BCCA).

¹⁵⁸³ *Delgamuukw*, *supra* note 22.

¹⁵⁸⁴ *Bernard; Marshall*, *supra* note 38.

¹⁵⁸⁵ McNeil, "Site-Specific or Territorial?", *supra* note 1570.

¹⁵⁸⁶ Key authorities are cited in footnote 1570.

¹⁵⁸⁷ Walters, "Promise and Paradox", *supra* note 647.

¹⁵⁸⁸ An earlier example is McKinnon, *supra* note 1562 at 627-630, who argues that Bernard/Marshall did not hear evidence of actual occupation, did not receive extensive evidence on the seasonal round and did not purport to lay down a binding rule. Bernard/Marshall is seen as leaving enough "loose-ends" to preserve room for arguments supporting larger awards of title.

¹⁵⁸⁹ McHugh, "Aboriginal Title", *supra* note 889.

¹⁵⁹⁰ Young, "Trouble with Tradition", *supra* note 1340; Francis, "Canadian Indigenous Peoples", *supra* note 17 at 132ff (Francis sees *Delgamuukw* as a particularly flawed decision from the perspective of general political theory. It is true that he is describing the much-maligned trial judgment but his reaction to Tully's critical response to the decision is equally negative.

¹⁵⁹¹ The notion of a "standard" model is meant to refer to the model that is most often encountered in academic discourse and has most often been picked up by courts in the past few decades.

¹⁵⁹² R Bartlett, quoted in G Nettheim in *New Visions for Native Title and Reconciliation* (Australian Law Reform Commission: 2009) at 1 – "The common law has developed a uniform jurisprudence upon native title... It was the only possible accommodation of the rights of settlers and aboriginal people. It was what pragmatism demanded".

¹⁵⁹³ Slattery, "Metamorphosis", *supra* note 927 at 280 .

¹⁵⁹⁴ *Ibid* at 282.

¹⁵⁹⁵ The 1927 amendment to the *Indian Act*, which prohibited raising funds for Indian claims and remained in force until 1951 is often alleged to have had a chilling effect on the development of aboriginal jurisprudence: see Hutchins, "Cede, Release and Surrender", *supra* note 414; Godlewska et al, "Aboriginal Title, Treaties and the Nisga'a", *supra* note 1351 at 1.

¹⁵⁹⁶ Godlewska and Webber, "Aboriginal Title, Treaties, and the Nisga'a", *supra* note 1351 at 3-4.

¹⁵⁹⁷ Benjamin J Richardson, "The Didactic Character of US Indian Law" in Richardson, Benjamin J, Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009).

¹⁵⁹⁸ Jacinta Ruru, "The Māori Encounter with Aotearoa: New Zealand's Legal System" in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009).

¹⁵⁹⁹ Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 35 Osgoode Hall LJ 775 at para 8.

¹⁶⁰⁰ *Calder*, *supra* note 961 at 376.

¹⁶⁰¹ *Delgamuukw*, *supra* note 22 at para 126.

¹⁶⁰² *Ibid* at para 145.

¹⁶⁰³ Streilen, "Captive of Statute", *supra* note 1323 at 5 - "Common law native title has a long history that did not commence with Mabo." Streilen relies on early English authorities such as Calvin's Case and the Case of Tannistry and refers to Canada as supporting a more just title doctrine

¹⁶⁰⁴ *Ibid*.

¹⁶⁰⁵ *Sparrow*, *supra* note 969 at para 37.

¹⁶⁰⁶ *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD) at 568 [*Baker Lake*].

¹⁶⁰⁷ Young, "Trouble with Tradition", *supra* note 1340.

¹⁶⁰⁸ Brian Slattery uses the term "common law" in this general sense as well in Slattery, "Metamorphosis", *supra* note 1585.

¹⁶⁰⁹ *R v Kang-Brown*, 2008 SCC 18, [2008] 1 SCR 456.

¹⁶¹⁰ *Bernard; Marshall*, *supra* note 38 at para 2.

¹⁶¹¹ Kent McNeil, "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010).

¹⁶¹² McNeil's later work has placed greater emphasis on aboriginal self-government and the importance of indigenous legal traditions, including land tenure systems, to prove aboriginal title.

¹⁶¹³ McNeil, "Sources and Content", *supra* note 1611 (clearly separating out common law possession from aboriginal title); see also: Godlewska and Webber, "Introduction" in Webber et al, "Let Right be Done", *supra* note 1351.

¹⁶¹⁴ *Bernard; Marshall*, *supra* note 38 at paras 42-45- rejection of account of possession in Courts of Appeal

¹⁶¹⁵ *Ibid* at para 54.

¹⁶¹⁶ McNeil has recently expressed doubts about the continued viability of arguments that are solely based on the common law doctrine of possession: Kent McNeil, “Judicial Treatment of Indigenous Land Rights in the Common Law World” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 271-272.

¹⁶¹⁷ McNeil has placed greater emphasis on the “second way” to prove title, though he recognizes that the *Bernard* decision stands as an obstacle to the earlier promise of that doctrine: Kent McNeil, “Indigenous land rights and self-government: inseparable entitlements” in Lisa Ford & Tim Rowse, *Between Indigenous and Settler Governance* (Routledge, 2011) (McNeil clearly regards the *Bernard* decision to be a major doctrinal barrier to the “second way” of proving aboriginal title that he originally perceived as an option under the *Delgamuukw* decision).

¹⁶¹⁸ Walters, “Golden Thread”, *supra* note 935.

¹⁶¹⁹ Hunter, “Disappointed Expectations”, *supra* note 1554.

¹⁶²⁰ The *Bernard; Marshall* decisions, *supra* note 38 does not explicitly reject the “second way” to prove aboriginal title but a reading of paras 68-70 suggests that a single test rather than two alternative tests is contemplated. This appears to be the view supported by most commentators on the decision.

¹⁶²¹ McNeil, “Judicial Treatment of Indigenous Land Rights”, *supra* note 1616 shares the view that *Bernard* raises a rather large obstacle to an argument based solely on proof of an aboriginal system of land tenure.

¹⁶²² *Ibid*.

¹⁶²³ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93.

¹⁶²⁴ The methodology of the Supreme Court of Canada has been described as “positivist” in several parts of this work. What is meant by the term is the sense of “positivism” evoked by JGA Pocock in “Theory in History: Problems in Context and Narrative” in *Oxford Handbook of Political Theory*, at 172. It may be called positivist in the sense that it offers its own conditions of validation and appeals only to them.”

¹⁶²⁵ See for example, U Secher, “The Reception of Land Law into the Australian Colonies Post-Mabo: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore” (2004) 27 UNSW LJ 703.

¹⁶²⁶ See for example Chamberlin, *If This is Your Land, Where are Your Stories? Finding Common Ground* (Vintage Press, 2004) at 230ff; Gordon Christie, “Aboriginal Title and Private Property” Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 203-204.

¹⁶²⁷ Secher, “Aboriginal Customary Law”, *supra* note 930 at 506-507 - reliance on folkland and ancient desmesne

¹⁶²⁸ Côté, *supra* note 1332.

¹⁶²⁹ *Bernard; Marshall*, *supra* note 38.

¹⁶³⁰ *Ibid*.

¹⁶³¹ Lambert, “Where to From Here”, *supra* note 1236 and Young, “Trouble with Tradition” *supra* note 1340.

¹⁶³² *Delgamuukw*, *supra* note 22 and *Bernard*, *supra* note 38.

¹⁶³³ Larissa Katz, “The Concept of Ownership and the Relativity of Title”, (2011) 2 Jurisprudence 191; “The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law” (2009) 55 McGill LJ 47; “Exclusion and Exclusivity in Property Law” 2008 Legal Studies Research Paper Series No. 08-02.

¹⁶³⁴ Murphy, “Prisons of Culture”, *supra* note 885 at 362- (contrasts cultural continuity and the common law doctrine of continuity).

¹⁶³⁵ *Adams*, *supra* note 1437.

¹⁶³⁶ Côté, *supra* note 1332 at paras 38, 51, 58.

¹⁶³⁷ *Delgamuukw*, *supra* note 22 at paras 145, 151.

¹⁶³⁸ *Bernard; Marshall*, *supra* note 38 at para 40.

¹⁶³⁹ The “generic rights” analysis of Brian Slattery is considered in Section 12.5 of this thesis.

¹⁶⁴⁰ A complicated aspect of aboriginal rights analysis is who may claim the right. It is now clear that a Section 35 right is a collective right, see *Behn v Moulton Contracting Ltd*, 2013 SCC 25, [2013] 2 SCR 227 [*Behn*], though there remains much controversy about the precise parameters governing when an individual may claim the benefit of the right and the procedural mechanisms for asserting the benefit of a right through representative actions and class actions.

¹⁶⁴¹ While the courts have been prone to reason by analogy from statutory reserve interests to the nature of aboriginal title outside of a statutory reserve, including in seminal cases such as *Guerin*, *supra* note 1529 and *Delgamuukw*, *supra* note 22, case must be taken to not overextend the analogy. Mr. Justice Gonthier, in *Osoyoos*, *supra* note 1541 at paras 45-47 points to some fundamental differences between the context of the statutory reserve and title under the common law, though each share broad generic characteristics.

¹⁶⁴² *Mabo*, *supra* note 87 at paras 69-71 (native title holder can be a collective, a group or an individual)

¹⁶⁴³ The most famous example is provided in the social structure of the Gitskan and Wetsuwetsun as described in the *Delgamuukw* decision but it seems to represent a pattern in several parts of the country. See Webber, Jeremy & Gover, Kirsty, “Proprietary Constitutionalism” in Tushnet et al. “Routledge Handbook of Constitutional Law”.

¹⁶⁴⁴ *Behn*, *supra* note 1640.

¹⁶⁴⁵ *Ibid.*

¹⁶⁴⁶ *Behn*, *supra* note 1640 at paras 30, 33, 36 and 42.

¹⁶⁴⁷ Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title”, (2002) 47 McGill LJ 473.

¹⁶⁴⁸ *Marshall*, *supra* note 38. Singer, “Original Acquisition”, *supra* note 81 at 773 “These opinions were not completely admirable; they contained offensive racist language and justified the discovery doctrine by claiming that Indians were savage and uncivilized. But they also tried to enact U.S. ideals.” See also *Marshall* trilogy from the United States, *M’Intosh*, *Cherokee Nation & Worcester*, *supra* note 949.

¹⁶⁴⁹ *Royal Proclamation*, *supra* note 327.

¹⁶⁵⁰ *Uukw et al v The Queen in Right of British Columbia and Registrar, Prince Rupert Land Title District*, [1988] 1 CNLR 173.

¹⁶⁵¹ There is a large critical literature questioning the notion of an inherent limit on aboriginal title. See; Borrows, “Sovereignty’s Alchemy”, *supra* note 82 at para 30; McNeil, “Judicial Approaches to Self-Government”, *supra*. 955 – it is described as paternalistic and unnecessary.

¹⁶⁵² Jennifer E. Dalton, “Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21 CJLS 11.

¹⁶⁵³ *Mikisew*, *supra* note 13.

¹⁶⁵⁴ Among the cases that reflect the persistent trend to avoid precise definition of aboriginal title include *Calder*, *supra* note 961, *Guerin*, *supra* note 1529.

¹⁶⁵⁵ The work of Paul McHugh is considered in Chapter 6 of this thesis.

¹⁶⁵⁶ These seem to be the very factors which have stimulated Paul McHugh in his recent book *Aboriginal Title*, *supra* note 889, to speculate whether the proprietary doctrine of aboriginal title is about to be eclipsed by the duty to consult in Canada.

¹⁶⁵⁷ Brian Slattery suggests that this is what the Supreme Court means in *Bernard*; *Marshall*, *supra* note 38 when it speaks about translation into the common law, but a different interpretation is offered in this work that depends more on the placement of a modern right within a spectrum of rights available under Section 35. See Slattery, “Metamorphosis”, *supra* note 1337 at 268.

¹⁶⁵⁸ For the purposes of this argument, we can put to one side the question of whether extinguishment is limited to acts of a competent legislature or can be achieved by prerogative actions of the Crown, such as the issuance of a Crown grant.

¹⁶⁵⁹ *Bernard*; *Marshall*, *supra* note 38 at paras 39, 61 (passages supporting common law theory).

¹⁶⁶⁰ *Calder*, *supra* note 961 at para 115.

¹⁶⁶¹ Slattery, “Metamorphosis”, *supra* note 1337 at 281ff (distinction between principles of recognition and reconciliation).

¹⁶⁶² *Mitchell*, *supra* note 690.

¹⁶⁶³ It is noteworthy that the transformation of aboriginal title from a “static right” to a “generative right” that Brian Slattery describes in “Metamorphosis”, *supra* note 1337 is premised largely upon “aboriginal title” having formed part of this alleged historical “common law” since a time even prior to the *Royal Proclamation of 1763*.

¹⁶⁶⁴ Refer to previous note about notion of positivism, *supra* note 1624.

¹⁶⁶⁵ The work of the New Zealand school of legal history, especially the work of Paul McHugh, is considered in Chapter 7 of this thesis.

¹⁶⁶⁶ *Calder*, *supra* note 961.

¹⁶⁶⁷ *Delgamuukw*, *supra* note 22.

¹⁶⁶⁸ *Ross River Dene Council v Attorney General of Canada*, 2012 YKSC 4 [Ross River], especially para 39. This ruling has recently been overturned by the Yukon Court of Appeal in *Ross River Council v Canada*, 2013 YKCA 6 [Ross River Council]. Whereas the trial judgment concluded that the commitments made in the Rupert’s Land Order were not intended to be enforceable at the time, drawing extensively from the expert opinion of the legal historian Paul McHugh, the Court of Appeal held unanimously that it was inappropriate to separate the question of original intention as a threshold question of law in favour of hearing all issues together, including the possible impact of the honour of the Crown on the claims made by the Ross River Dene Council.

¹⁶⁶⁹ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148.

- ¹⁶⁷⁰ G Charlton, *Constitutional Conflict and Aboriginal Law: Hunting, Fishing and Gathering Rights in Canada, New Zealand and the United States* (PhD, Law, University of Auckland, 2010) at 385.
- ¹⁶⁷¹ *St Catherine's Milling*, *supra* note 956.
- ¹⁶⁷² Waldron, "Superceding Historical Injustice", *supra* note 827; Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 and Jung, "Moral Force of Indigenous Claims", *supra* note 103.
- ¹⁶⁷³ Dwight Newman, "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2007) 44 *Alta L Rev* 779.
- ¹⁶⁷⁴ *Ibid* at para 56.
- ¹⁶⁷⁵ Spinner-Halev, "Enduring Injustice", *supra* note 17.
- ¹⁶⁷⁶ Argument is best developed in McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 and McHugh, "Aboriginal Title", *supra* note 889.
- ¹⁶⁷⁷ Stephen Ross & Neil Ward, "Mapping Indigenous Peoples' contemporary relationships to country: the way forward for native title & natural resource management:", in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation* (8 April 2009).
- ¹⁶⁷⁸ *Ibid* at 5.
- ¹⁶⁷⁹ The role of Blackstone in the development of the declaratory theory of the common law is considered in *Hislop*, *supra* note 1335.
- ¹⁶⁸⁰ McHugh, "Aboriginal Title", *supra* note 889 at 281-282; Ogden, "Existing Aboriginal Rights", *supra* note 916 at 66. An important decision from the English House of Lords provides a comprehensive review of the history and current application of the doctrine: *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others*, [2005] UKHL 41, [2005] 4 All ER 209.
- ¹⁶⁸¹ *Haida*, *supra* note 13.
- ¹⁶⁸² See Chapter 14 on the Duty to Consult.
- ¹⁶⁸³ *Haida*, *supra* note 13 at para 17.
- ¹⁶⁸⁴ The difficulty of adducing such evidence as a practical matter was highlighted in the *Van der Peet* decision, *supra* note 8.
- ¹⁶⁸⁵ Focus on "intention" is a key element of the theory of attachment to land developed by Avery Kolers, *Land, Conflict, and Justice: A Political Theory of Title* (Cambridge University Press, 2011)
- ¹⁶⁸⁶ *Tsilqot'in*, *supra* note 1290.
- ¹⁶⁸⁷ Williams, "Shared Fate", *supra* note 1277 .
- ¹⁶⁸⁸ *Mikisew*, *supra* note 13.
- ¹⁶⁸⁹ Though the issue merits more historical study, the term "Indian title" seems to have been used in conjunction with the notion of a usufructary right of use and occupation and does not appear to have described an interest similar to the current conception of aboriginal title.
- ¹⁶⁹⁰ The notion of "speaking for country" has been developed in Australian practice and has recently been used in the analysis of the British Court of Appeal in *Tsilqot'in*, *supra* note 1290 at paras 151-157 (actually uses the words "custodian" and "caretaker" rather than the closely related Australian notion of "speaking for country").
- ¹⁶⁹¹ Ray, "From the US Indian Claims Commission Cases to *Delgamuukw*: Facts, Theories and Evidence in North American Land Claims" in Louis A Knafla and Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010).
- ¹⁶⁹² *Ibid* at 40.
- ¹⁶⁹³ *Ibid* .
- ¹⁶⁹⁴ It is interesting to recall that Flanagan et al, "Beyond the Indian Act", *supra* note 324 at 31, endorses this functionalist account but ends up endorsing the existence of a wide variety of individual and group property rights in indigenous systems.
- ¹⁶⁹⁵ Ray, "From the US Indian Claims Commission Cases to *Delgamuukw*", *supra* note 942 at 47.
- ¹⁶⁹⁶ Alexander Reilly, "Native Title as a Cultural Phenomenon" in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation* (8 April 2009).
- ¹⁶⁹⁷ Fraser, "Abnormal Justice", *supra* note 1115 (importance of "framing norms" for situating complex questions of justice within the proper context); see also: Markell, "Recognition and Redistribution", *supra* note 1038 at 458.
- ¹⁶⁹⁸ Walters, "Promise and Paradox", *supra* note 645 at 38.
- ¹⁶⁹⁹ *Lax Kwa'laams*, *supra* note 1327.
- ¹⁷⁰⁰ Peter Hogg, "The Constitutional Basis of Aboriginal Rights" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 11.
- ¹⁷⁰¹ *Bernard*, *supra* note 38 and *Lax Kwa'laams*, *supra* note 1327.
- ¹⁷⁰² Hunter, "Disappointed Expectations", *supra* note 1556 at 38-39 .

- ¹⁷⁰³ *Delgamuukw*, *supra* note 22 at para 159 (“when necessary”).
- ¹⁷⁰⁴ Hunter, “Disappointed Expectations”, *supra* note 1554 and Lambert, “Where to From Here”, *supra* note 1236.
- ¹⁷⁰⁵ Hunter, *ibid*.
- ¹⁷⁰⁶ Lambert, “Where to From Here”, *supra* note 1236. See also Lambert, “Three Points about Aboriginal Title”, *supra* note 963.
- ¹⁷⁰⁷ *Ibid*.
- ¹⁷⁰⁸ *Little Salmon*, *supra* note 709 at para 33 (– make space to be aboriginal). See also: *Mitchell*, *supra* note 692 at para 102.
- ¹⁷⁰⁹ *Delgamuukw*, *supra* note 22 (per LaForest J.); *Mitchell v. MNR* 2001 SCC 33, at p 102.
- ¹⁷¹⁰ Kolers, “Land, Conflict, and Justice”, *supra* note 1685.
- ¹⁷¹¹ *Ibid* at 126 uses the concept of “plentitude” to capture a broader sense of occupation of land that considers the contribution of the occupant to environmental sustainability.
- ¹⁷¹² There is a strong emerging interest in the geography of aboriginal claims. Panagos, “Plurality of Meanings”, *supra* note 84 at 601 (centrality of land to indigenous peoples); Brian Thom, “The Paradox of Boundaries in Coast Salish Territories” (2009) 16 *Cultural Geographies* 179; Robin Roth, “The Challenges of Mapping Complex Indigenous Spatiality: From Abstract Space to Dwelling Space” (2009) 16 *Cultural Geographies* 207.
- ¹⁷¹³ Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Dissertation, Department of Anthropology, University of British Columbia, 2005)
- ¹⁷¹⁴ Paul McHugh, “Aboriginal Title”, *supra* note 889 at 148, 152, 154, 157, 330.
- ¹⁷¹⁵ Hickford, *Lords of the Land*, *supra* note 826.
- ¹⁷¹⁶ *Wewaykum*, *supra* note 39 at para. 81.
- ¹⁷¹⁷ *Adams Lake Indian Band v British Columbia*, 2011 BCSC 266 [Adams Lake]; *Halalt First Nation v BC (Environment)*, 2011 BCSC 945 [Halalt]; *Ah-Kwa-Mish First Nation v AG Canada et al*, 2012 FC 517 [Ah-Kwa-Mish].
- ¹⁷¹⁸ *Halalt*, *ibid*; *Halalt First Nation v British Columbia*, 2012 BCCA 472.
- ¹⁷¹⁹ Though claims have been made in duty to consult cases that accommodation must include a financial component to account for the economic interest of the aboriginal group in the land, no cases have yet directly addressed this issue. The recent decision of the Yukon Court of Appeal in *Ross River Council*, *supra* note 1668 at least explicitly notes the relevance of this economic interest.
- ¹⁷²⁰ McHugh, “Aboriginal Title”, *supra* note 889.
- ¹⁷²¹ *Mabo*, *supra* note 87.
- ¹⁷²² As noted at footnote 1112, there has been a great deal of activity in Australia in recent years about possible constitutional reforms to strengthen the position of indigenous people in that country, though no proposals under formal consideration go as far as Section 35 in the constitutionalisation of rights.
- ¹⁷²³ Streilen, “Compromised Jurisprudence”, *supra* note 1455.
- ¹⁷²⁴ *Yorta Yorta Aboriginal Community*, *supra* note 637.
- ¹⁷²⁵ French, “Lifting the Burden of Native Title”, *supra* note 635.
- ¹⁷²⁶ *Ibid*.
- ¹⁷²⁷ Streilen, “Captive of Statute”, *supra* note 1323.
- ¹⁷²⁸ McNeil, “Sources and Content of Indigenous Land Rights”, *supra* note 1611.
- ¹⁷²⁹ French, “Lifting the Burden of Native Title”, *supra* note 635.
- ¹⁷³⁰ *Ibid*.
- ¹⁷³¹ McNeil, “Sources and Content of Indigenous Land Rights”, *supra* note 1611.
- ¹⁷³² McHugh, “Aboriginal Title”, *supra* note 889.
- ¹⁷³³ Ward, “A Means and Measure of Civilisation”, *supra* note 828.
- ¹⁷³⁴ McHugh, “Aboriginal Title”, *supra* note 889 at 26.
- ¹⁷³⁵ *Ibid* at 13.
- ¹⁷³⁶ *Ibid* at 56, 57.
- ¹⁷³⁷ *Ibid* at 26.
- ¹⁷³⁸ *Ibid* at 138.
- ¹⁷³⁹ *Ibid* at 141.
- ¹⁷⁴⁰ *Ibid* at 142.
- ¹⁷⁴¹ *Ibid* at 143, 147.
- ¹⁷⁴² *Ibid* at 118, 134, 158.
- ¹⁷⁴³ *Ibid* at 23.
- ¹⁷⁴⁴ *Ibid* at 35.

¹⁷⁴⁵ *Ibid* at 36.

¹⁷⁴⁶ *Ibid* at 37.

¹⁷⁴⁷ *Tsilqot'in*, *supra* note 1290.

¹⁷⁴⁸ The Supreme Court of Canada has granted leave to hear the appeal of the decision of the British Columbia Court of Appeal and argument was heard on November 7, 2013. (A discussion of the Supreme Court of Canada decision can be found in the Addendum appended to this thesis.)

¹⁷⁴⁹ *Tsilqot'in*, *supra* note 1290 at para 118.

¹⁷⁵⁰ *Ibid* at para 126.

¹⁷⁵¹ *Ibid* at para 151.

¹⁷⁵² *Ibid* at paras 151-157.

¹⁷⁵³ *Ibid* at para 167.

¹⁷⁵⁴ *Ibid* at para 168.

¹⁷⁵⁵ *Ibid* at para 172.

¹⁷⁵⁶ *Ibid* at para 173.

¹⁷⁵⁷ *Ibid* at para 176.

¹⁷⁵⁸ *Ibid* at para 203.

¹⁷⁵⁹ *Ibid* at para 219.

¹⁷⁶⁰ *Ibid* at paras 151-157.

¹⁷⁶¹ *Ibid* at para 223.

¹⁷⁶² *Ibid* at para 231.

¹⁷⁶³ *Ibid* at para 237.

¹⁷⁶⁴ *Ibid* at para 238.

¹⁷⁶⁵ *Ibid* at para 239.

¹⁷⁶⁶ *Ibid* at paras 211, 216, 217, 221, 230.

¹⁷⁶⁷ *Ibid* at para 241.

¹⁷⁶⁸ The recent decision of the Supreme Court of Canada in *Manitoba Métis Federation*, *supra* note 13, stands in some tension with *Lax Kwa'laams*, *supra* note 1327. As opposed to ruling on an issue of law where a proper procedural foundation had been established, the Court resolved a contested issue on a basis that had not been dealt with extensively in argument and with no opportunity for the respondent to respond. These procedural concerns were expressed in a strong dissent to the majority ruling.

¹⁷⁶⁹ This is especially interesting considering the importance placed on economic engagement in the *Rio Tinto* decision, *supra* note 798.

¹⁷⁷⁰ *Tsilqot'in*, *supra* note 1290 at paras 151-157.

¹⁷⁷¹ The importance of strength of claim analysis will be addressed in Chapter 13 of this thesis. As a final comment of the decision it is an interesting quirk of history that a common name for the case “Roger William” is very close to the name of an important historical actor in early American history, Roger Williams, who was the most ardent and articulate advocate for native title to the lands in the 1630’s and 1640”- see Washburn, “Moral and Legal Justifications”, *supra* note 68 at 24-25.

¹⁷⁷² The issue of justification will be addressed in Section 17.4 of this thesis.

¹⁷⁷³ *Baker Lake*, *supra* note 1606, *Bear Island*, *supra* note 709 and *Osoyoos*, *supra* note 1541.

¹⁷⁷⁴ While the notion of suspension of rights has been constant theme in the Australian literature on the Native Title Act, recent jurisprudence from the High Court of Australia has moved towards a more formal distinction between extinguishing and non-extinguishing public acts, a distinction which is applied at the time of the public act. See *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*, [2013] HCA 33; *Karpanty v Dietman*, [2013] HCA 47; *Western Australia v Brown*, [2014] HCA 8.

¹⁷⁷⁵ French, “Lifting the Burden of Native Title”, *supra* note 635 at 6.

¹⁷⁷⁶ Rawls, *A Theory of Justice*, *supra* note 1113 used the notion of “reflective equilibrium” to capture a notion of reconciliation of different normative perspectives by a process of dialogue and exchange.

¹⁷⁷⁷ Public law has long favoured a fault-based approach to liability of public bodies. See Ghislain Otis.

“Constitutional Liability for the Infringement of Rights Per Se: A Misguided Theory” (1992) 26 UBC L Rev 21 especially at 33; Peter Hogg, “Compensation for Damage Caused by Governments” 6 National J of Constitutional L 7; *Lapierre v AG (Qc)*, [1985] 1 SCR 241; *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405 at paras 79 and 199. *Québec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 SCR 789 at para 19; *Mabo*, *supra* note 87 at 20.

¹⁷⁷⁸ *Supra* note 1506 (Standards of the day).

¹⁷⁷⁹ These are called enhancements as they were clearly present in Canadian law but their application and utility is dramatically enhanced.

¹⁷⁸⁰ Tully, “Unattained but Attainable Democracy”, *supra* note 193 (Secession Reference).

¹⁷⁸¹ In the course of oral argument in the *Little Salmon* hearing, *supra* note 711, Mr. Justice Binnie asked a question about the standards that should be used to judge the progress towards reconciliation and how we know when we have achieved this goal.

¹⁷⁸² *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council*, (2006) 82 OR (3d) 721; *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534; Newell, “Indigenous Land Disputes”, *supra* note 605.

¹⁷⁸³ *Van der Peet*, *supra* note 8 at para 42- normative justification.

¹⁷⁸⁴ See Chapter 13 (Breaking Down the Binary Divide on Title) where it is argued that the administration of the duty to consult will provide opportunities for dialogue about different perspectives on connection to land.

¹⁷⁸⁵ In addition to crafting a new remedy based on the duty to consult, the Supreme Court of Canada in *Haida* considers and rejects the possibility of primary reliance on injunctive relief to deal with threats to aboriginal and treaty rights. See *Haida*, *supra* note 13 at paras 12-15.

¹⁷⁸⁶ Taku, *supra* note 1278 at paras 46-47.

¹⁷⁸⁷ Mikisew, *supra* note 13.

¹⁷⁸⁸ Since the start of the 2011-2012 term, the Supreme Court of Canada has dismissed applications for leave in 23 cases involving aboriginal parties, has remanded one case for a rehearing and has granted leave to appeal in only four (*Behn, William, Keewatin and Chief Sheldon Taypotat et al v Louis Taypotat* (SCC 35518) (Statistics compiled from a review of Supreme Court of Canada bulletin).

¹⁷⁸⁹ *Rio Tinto*, *supra* note 796.

¹⁷⁹⁰ *Ibid* at para 31.

¹⁷⁹¹ *Ibid* at para 50.

¹⁷⁹² *Ibid* at para 60.

¹⁷⁹³ *Little Salmon*, *supra* note 709 at para 12.

¹⁷⁹⁴ *Ibid* at para 12.

¹⁷⁹⁵ *Ibid* at para 10.

¹⁷⁹⁶ *Ibid* at para 33.

¹⁷⁹⁷ *Ibid* at para 44.

¹⁷⁹⁸ *Ibid* at para 90 ff - Dissent in *Little Salmon*.

¹⁷⁹⁹ There is a very large literature exploring the normative promise of the duty to consult in Canada. Some notable examples include Walters, “Morality of Aboriginal Law”, *supra* note 718 at 514; Hogg, “The Constitutional Basis of Aboriginal Rights”, *supra* note 1700 at 12; Coyle, “ADR Processes and Indigenous Rights”, *supra* note 90 at 384; Ladner, “Take 35”, *supra* note 55 at 292-293.

¹⁸⁰⁰ Work from political theory and philosophy which stresses the importance of dialogue and deliberation is considered in Chapter 9 of this thesis.

¹⁸⁰¹ *The Ipperwash Inquiry Report, A road map to better relationships between Aboriginal people and the Ontario government* (Government of Ontario, 2007) by the Honourable Sidney B Linden- the duty to consult is described as extremely important, in part for its ability to avoid occupations and protests and to generate opportunities for economic development for aboriginal communities.

¹⁸⁰² Veronica Potes, “The Duty to Accommodate Aboriginal Peoples: Substantive Consultation?” (2006) 17 J Envtl L & Prac 27; Monique M Passelac-Ross & Veronica Potes. “Crown Consultation with Aboriginal Peoples in Oil Sands Development” Is it Adequate, Is it Legal?” CIRL Occasional Paper # 19, May 2007; Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 UBC L Rev 139; Gordon Christie, “A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation” (2005) 23 Windsor YB Access Just 17 ; Salée & Lévesque, “Representing Indigenous Self-Government”, *supra* note 42 at 25, 27 (Refers to the tendency in the literature to write off the importance of the duty to consult if does not come with significant self-determination).

¹⁸⁰³ These arguments are explored in Chapter 2 of this thesis, particularly in Section 2.2.

¹⁸⁰⁴ Bargaining power and access to resources, see Coyle, “ADR Processes and Indigenous Rights”, *supra* note 90.

¹⁸⁰⁵ Reynolds, Dr James I, “The Spectre of Spectra: The Evolution of the Crown’s Fiduciary Obligation to Aboriginal Peoples Since Delgamuukw” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 132: “The Court’s attempt to distinguish between a fiduciary obligation and a duty to act honourably was misguided and is likely to create frustration, and unnecessary confusion.”

- ¹⁸⁰⁶ McHugh, *Aboriginal Societies and the Common Law*, *supra* note 148 at 391, 542-543, 548-570.
- ¹⁸⁰⁷ David Mullan, “The Duty to Consult Aboriginal Peoples: The Canadian Example”, (2009) 32 CJALP 107; David Mullan, “The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog” (2011) 24 CJALP 255; Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 25 Can J Admin L & Prac 93; Lorne Sossin, “Indigenous Self-Determination”, *supra* note 643; Peter Carver, “Comparing Aboriginal and Other Duties to Consult in Canadian Law”, (2011-2012) 49 Alta L Rev 855; Janna Promislow & Lorne Sossin, “In Search of Aboriginal Administrative Law” in Flood, Colleen M & Sossin, Lorne, *Administrative Law in Context*, 2nd ed (Emond Montgomery Publications, 2012); Anthony Wicks, “Beyond Audi Alterum Partem: The Duty to Consult Aboriginal Peoples in Canada and New Zealand” (2009) 13 J S Pac L 40; Zena Charowsky, “The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals” (2011) 74 Sask L Rev 213.
- ¹⁸⁰⁸ McIntosh, “Reconciliation Doctrine”, *supra* note 490.
- ¹⁸⁰⁹ E Ria Tzimas, “To What End the Dialogue” (2011) 54 Sup Ct L Rev (2d) 493; E. Ria Tzimas, “Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation”, (2005) 28 Sup Ct L Rev 461.
- ¹⁸¹⁰ Dwight Newman, “The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector” in Macdonald-Laurier Institute, May 2014 (Newman provides examples of policy changes that have been encouraged by the development of the duty to consult within several levels of government).
- ¹⁸¹¹ This aspect of the duty to consult will be considered in Sections 14.5 and 14.6 of this thesis.
- ¹⁸¹² The overlap between environmental law and the duty to consult will be considered in Section 14.5 of this thesis.
- ¹⁸¹³ The impact of the duty to consult on claims policies and their administration will be considered in Section 14.9 of this thesis.
- ¹⁸¹⁴ The Major Projects Management Office, established in 2007, has a mandate “...1. To provide overarching project coordination, management and accountability for major resource projects within the context of the existing federal regulatory review process, and 2. To undertake research and identify options that drive further performance improvements to the federal regulatory system for major resource projects.”- <http://mpmo.gc.ca/8>.
- ¹⁸¹⁵ Mackenzie Gas Project- Reasons for Decision- National Energy Board- December 2010.
- ¹⁸¹⁶ *Gitxaala Nation v Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336.
- ¹⁸¹⁷ *New Relationships with Aboriginal Communities in British Columbia*, Annual Report on Progress, 2011-2012. Among other aspects, the New Relationship aspires to a new relationship, a transformative change accord, reconciliation protocols and special accords for Métis and non-status groups. A key component of this strategy involved recognition of aboriginal title but this foundered as the proposal was acceptable neither to aboriginal nor industry groups- See Louise I Mandell, “The Ghost” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 55.
- ¹⁸¹⁸ *Haida Gwaii Reconciliation Act*, SBC 2012, c 17; Kunst’aa guu-Kunst’aayah Reconciliation Protocol, December 11, 2009. The early stages of the negotiation of these arrangements is described in Ian Gill, *All That we Say is Ours: Guujaaw and the Reawakening of the Haida Nation* (Douglas & McIntyre, 2009).
- ¹⁸¹⁹ Margaret Low & Karena Shaw, “Indigenous Rights and Environmental Governance: Lessons from the Great Bear Rainforest” (2011-2012) 172 BC Studies 9.
- ¹⁸²⁰ Several examples of the delay, modification or cancellation of natural resource development proposals, including the controversial Prosperity Mines application, are provided in Newman, “Duty to Consult”, *supra* note 1802.
- ¹⁸²¹ *Brokenhead First Nation*, *supra* note 1449; *Canada v Brokenhead First Nation*, 2011 FCA 148; *Long Plain First Nation v Canada*, 2012 FC 1474; *Peguis First Nation v Canada (Attorney General)*, 2013 FC 276; *Tzeachten First Nation v Canada (Attorney General)*, 2009 FCA 337.
- ¹⁸²² *Little Salmon*, *supra* note 709 is the best example; Maclure, “Définir des Droits”, *supra* note 481: “la reconnaissance et la confirmation des droits des peuples autochtones ont ouverte une brèche dans l’ordre constitutionnel canadien...” ; Christopher Alcantara, “To treaty or not to treaty? Aboriginal peoples and comprehensive land claims negotiations in Canada” (2008) 38 Publius: The Journal of Federalism 343 at 363. Haida provides “greater leverage” and may support a broader and more just conception of aboriginal sovereignty within the Canadian state; Dwight Newman, “The Duty to Consult”, *supra* note 1022 at 9- aboriginal rights and aboriginal law are now on a fundamentally different course than they were prior to the duty to consult decisions. They have put in place a dynamic constitutional process rather than a static contest over rights.
- ¹⁸²³ Key decisions from aquaculture and claims policies include *K’omoks First Nation v Attorney General of Canada et al*, 2012 FC 1160 and *Sambaa K’e Dene Band v Duncan*, 2012 FC 204.
- ¹⁸²⁴ *Tsilqot’in*, *supra* note 1290 but see recent Ross River decision- *Ross River Dene Council*, *supra* note 1660.
- ¹⁸²⁵ Gibson, *A New Look*, *supra* note 204 at 89,166, 227-228 (toll-gating).

¹⁸²⁶ Leave to Supreme Court of Canada denied in *West Moberly First Nation v BC (Chief Inspector of Mines)*, 2011 BCCA 247; Liston, “Honest Counsel”, *supra* note 615 at 214-227 (makes the point that if the duty is properly developed and discharged it could facilitate broader political as well as legal accommodation)

¹⁸²⁷ Private sector agreements or “IBA’s” are also an important dimension of the issue. These agreements are usually private to the parties and are not disclosed to non-parties. See Sandra Gogal, “Aboriginal Impact and Benefit Agreements: Practical Considerations” (2005) 43 Alta L Rev 129 ; Gilmour, Brad & Mellett, Bruce, “The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations” (2013) 51 Alta L Rev 385.

¹⁸²⁸ *Taku River*, *supra* note 1278.

¹⁸²⁹ *Rio Tinto*, *supra* note 796.

¹⁸³⁰ *Nalcor Energy v Nunatukavut Community Council Inc*, 2012 NL TD(G) 175 [Nalcor]; *Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corp* (Nalcor Energy), 2011 NL TD(G) 44 [Nunatukavut Community Council].

¹⁸³¹ *Nlaka’pamux Native Tribal Council v Grigan*, 2009 BCSC 125 [Nlaka’pamux].

¹⁸³² *Halalt*, *supra* note 1709.

¹⁸³³ The project committee that played such an important role in the *Taku River* decision, *supra* note 1278, in the Supreme Court of Canada, is no longer a mandatory requirement in the British Columbia environmental assessment process. Environmental Law Centre, *Environmental Assessment in British Columbia*, University of Victoria, November 2010 at 70-75.

¹⁸³⁴ *Halalt*, *supra* note 1709.

¹⁸³⁵ A key theme of the factum of the Attorney General of Canada in the *Rio Tinto* appeal before the Supreme Court of Canada is that it is difficult for an administrative body to be both a participant in and an evaluator of a regulatory decision-making process.

¹⁸³⁶ *Little Salmon*, *supra* note 709 at para 39.

¹⁸³⁷ Environmental law jurisprudence on avoidance of duplication- The importance of federal-provincial coordination is highlighted in *Mining Watch v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 especially at paras 41-42. The same themes emerge in *Quebec (AG) v Moses*, 2010 SCC 17 [Moses].

¹⁸³⁸ *Gitksa*, *supra* note 1816; *Adams Lake Indian Band v Lieutenant Governor in Council*, 2012 BCCA 333 [Adams Lake IB]. These cases endorse the proposition that the discharge of the duty to consult can be iterative and anticipate processes, especially environmental assessment processes, at later stages of a decision-making process.

¹⁸³⁹ While aboriginal law and environmental law share the notion of cumulative effects, it is applied differently in the jurisprudence. In aboriginal law, cumulative effects are primarily raised to make a case for infringement of a right, whereas in environmental law the notion is more generally directed to the interaction of different environmental contaminants. While cases like *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 at para 75 speak of the role played by cumulative effects in the environmental law jurisprudence, there is a growing jurisprudence which addresses cumulative effects from a duty to consult and accommodate perspective. Key cases include *Rio Tinto*, *supra* note 796, *West Moberly First Nation v BC (Chief Inspector of Mines)*, 2011 BCCA 247; *Adams Lake Indian Band v British Columbia (Ministry of Forests, Lands and Natural Resources Operations)*, 2013 BCSC 977. An important test case involving Beaver Lake First Nation and the Cold Lake military base is also underway-*Lameman v. Alberta*, 2013 ABCA 148.

¹⁸⁴⁰ The decision of the British Columbia Court of Appeal in *Adams Lake IB*, *supra* note 1838 has become a leading decision on the requirement to assess impact.

¹⁸⁴¹ Mullan, *supra* note 1807 (especially his earlier articles).

¹⁸⁴² In other words, responsibility will be determined by asking the question “Who is the Crown?”

¹⁸⁴³ McHugh *Aboriginal Societies and the Common Law*, *supra* note 148 at 148, 152, 154, 157 and 330.

¹⁸⁴⁴ The clearest indication of this trend is found in the *Rio Tinto*, *supra* note 796. In this decision at paras 42, 44, 60, the focus shifts away from the decision under review and towards compliance with the broader constitutional duty. However, the same decision makes clear that it is the effects of the current decision, rather than the consequences of past decisions, that are to be reviewed by a court.

¹⁸⁴⁵ *Report of Mackenzie Valley Pipeline*, *supra* note 1815.

¹⁸⁴⁶ *Kwitkwetlum First Nation v BC (Utilities Commission)*, 2009 BCCA 68 and *Re Application by Hydro One Networks Inc for an Order granting leave to construct to upgrade existing transmission line facilities* (November 8, 2012) EB-2012-0082, online: http://www.hydroone.com/RegulatoryAffairs/Documents/EB-2012-0082/HONI_APPL_S92_Lambton_Longwood_20120328.pdf.

¹⁸⁴⁷ *Athabasca Regional Government v Canada (Attorney General)*, 2010 FC 948 [Athabasca]; *Yellowknives Dene First Nation v Canada (Attorney General)*, 2010 FC 1139 [Yellowknives Dene].

¹⁸⁴⁸ The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and a line of recent cases has strengthened the ability of administrative decisions makers to make decisions about the limits of their own jurisdiction.

¹⁸⁴⁹ *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708; *Wahgoshig First Nation v Solid Gold Resources Corp*, 2012 ONSC 2323 (Ont Div Ct). *Dunsmuir*, *ibid*, applied a standard of reasonableness to the determining of the lines between the authority of competing administrative decision-makers. See also: *Nor-man Regional Health Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59.

¹⁸⁵⁰ Called for early in *Haida*, *supra* note 13.

¹⁸⁵¹ *Métis Nation of Alberta Region 1 v Joint Review Panel*, 2012 ABCA 352; *Lameman v Alberta*, 2013 ABCA 148 [Lameman]; *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2010 ABCA 137 [Athabasca Chipewyan]; *Cold Lake First Nation v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 137; *Cold Lake First Nation v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304; *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12.

¹⁸⁵² *Rio Tinto*, *supra* note 796 at paras 40 and 60 (application to legislation left unresolved)

¹⁸⁵³ *R v Lefthand*, 2007 ABCA 206 [Lefthand], but see the recent *Ross River* decision from the Yukon Court of Appeal, *supra* note 1668 at para 39.

¹⁸⁵⁴ There is growing interest in aboriginal law aspects of administrative law as evidenced by the recent publications of noted administrative law scholars such as David Mullan, *supra* note 1807 and Lorne Sossin, *supra* note 1807..

¹⁸⁵⁵ *Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal Treaty Rights*, Final Report of the Senate Standing Committee on Legal and Constitutional Affairs, December 2007.

¹⁸⁵⁶ Woons, "Aboriginal Participation in Canada", *supra* note 60; Williams, "Shared Fate" *supra* note 1277. A recent assessment of the work of Sharon Williams on citizenship issues can be found in Marc Woons, "Decolonizing Canadian Citizenship: shared belonging, and shared identity" (2013) *Settler Colonial Studies* 1.

¹⁸⁵⁷ The idea of negotiating in the shadow of the law is explored in Chapter 9 of this thesis. The basic idea is that judicial decisions can forge an architecture or framework that facilitates the negotiated resolution of contested issues.

¹⁸⁵⁸ While there is no case yet that establishes an independent duty to fund, almost every case makes note of the absence or presence of funding as a factor that makes a major contribution to the assessment of reasonableness of the Crown's overall consultation process.

¹⁸⁵⁹ While the case *Chartrand v The District Manager*, 2010 BCSC 1068 makes clear that the Crown need not respond favourably to all funding requests, the trend in the cases is to regard appropriate funding as a part of the assessment of the overall reasonableness of the consultation process. *Okanagan Indian Band*, *supra* note 198; *Caron*, *supra* note 198.

¹⁸⁶⁰ *Brokenhead First Nation*, *supra* note 1449.

¹⁸⁶¹ *Lax Kwa'laams*, *supra* note 1327.

¹⁸⁶² *Rio Tinto*, *supra* note 796 at paras 49, 37 and 63 (damages).

¹⁸⁶³ *Supra* note 1503 (authorities on standards of the day).

¹⁸⁶⁴ *Lefthand*, *supra* note 1853.

¹⁸⁶⁵ *Little Salmon*, *supra* note 709.

¹⁸⁶⁶ Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas & McIntyre, 2006) at 371 (the role of the duty to consult in encouraging treaty related measures)

¹⁸⁶⁷ Numerous academic articles reporting more favourable evaluation of treaty negotiations; the core issue is likely the extent to which the duty to consult offers alternatives to the "certainty" paradigm: Alfred, "Peace, Power, Righteousness", *supra* note 202 at 123; Lajoie, Andrée, "Conceptions autochtones", *supra* note 113; Ravi de Costa, "New Relations, Old Certainties", *supra* note 15 at 5, see also 20-21; MacLure, "Politics of Recognition at an Impasse", *supra* note 481 at 17-18- politics of certainty; Paul Rynard, "Welcome In, But Check Your Rights at the Door: The James Bay and Nisga'a Agreements in Canada" (2000) 33 CJPS 211; Mark Stevenson, "Visions of Certainty" in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum*, (2001) at 113; Resnick, "European Roots of Canadian Identity", *supra* note 739 at 17 attributes what he calls the "sluggish progress of land claims" in British Columbia, in part, to disagreements over this issue.

¹⁸⁶⁸ *Little Salmon*, *supra* note 709 at para 54 (passage on deference).

¹⁸⁶⁹ *Ibid* at para 61 (on inability to contract out).

¹⁸⁷⁰ It will be recalled that the key message of James Tully in works such *Public Philosophy in A New Key*, *supra* note 122 is that inter-cultural dialogue is fundamentally agonistic and that it is conceptually impossible to frame a consensual resolution to matters of fundamental importance, failing which the best hope is respectful accommodations of different perspectives through dialogue.

¹⁸⁷¹ *Secession Reference*, *supra* note 23; *Moses*, *supra* note 1837 and Tzimas, “To What End”, *supra* note 1809.

¹⁸⁷² *Little Salmon*, *supra* note 711; *Moses*, *ibid* and Tzimas, *ibid*.

¹⁸⁷³ As noted previously, much innovation has been spurred by policy development in the province of British Columbia.

¹⁸⁷⁴ As noted in Chapter 7, the basic conflict between recognition and redistribution can be reflected in public disputes about the role of the “rights-agenda”. Some might see the pursuit of rights claims as misguided because of the presumed higher urgency of distributive issues such as access to resources or education. Others see the satisfaction of rights disputes as crucial to properly addressing these distributive issues.

¹⁸⁷⁵ Recent policy initiatives in Australia designed to streamline the policy process to deepen efforts to “close the gap” in living conditions between indigenous and non-indigenous Australians are considered at other places in this thesis. This effort need not fall into the narrower perspective described by Gaita, “A Common Humanity”, *supra* note 1072 so long as one acts to redress current misery, there is no need to brood over past wrongs. As noted at several places in this thesis, Australian developments merit close attention as they highlight the importance of linking attention to rights and the policy objective of “closing the gap”, the relatively high success in securing negotiated resolution of native title disputes and the significance of discussion about constitutional reform.

¹⁸⁷⁶ The Supreme Court of Canada shows particular awareness of the likelihood of a shared interest in economic development between aboriginal peoples and the Crown in the *Little Salmon* decision, *supra* note 709. This shared objective is brought out even more clearly in *Rio Tinto*, *supra* note 796 at para 34.

¹⁸⁷⁷ See Chapter 9 (Dialogue)

¹⁸⁷⁸ Tully, “Unattained but Attainable Democracy”, *supra* note 193; Owen & Tully, “Redistribution and recognition”, *supra* note 125.

¹⁸⁷⁹ Hogg and Bushnell, “The Charter Dialogue”, *supra* note 1119.

¹⁸⁸⁰ *West Moberly First Nation v BC (Chief Inspector of Mines)*, 2011 BCCA 247, leave to appeal to the SCC refused, 34403 (February 23, 2012).

¹⁸⁸¹ *Ibid*.

¹⁸⁸² The Federal Court of Appeal in *Brokenhead*, *supra* note 1409, while stating that the reasons of a trial judge must be sufficiently communicative to allow assessment of the decision, can also be read as supporting the exchange of reasons between the parties in a complex consultation process.

¹⁸⁸³ *Behn*, *supra* note 1640- this case is a strong affirmation of the reciprocal duties of aboriginal participants in consultation processes.

¹⁸⁸⁴ *Haida*, *supra* note 13 at para 39 on strength of claim assessment

¹⁸⁸⁵ *Wii’litwx v British Columbia (Minister of Forests)*, 2008 BCSC 1139 held that there was a need to prepare a strength of claim analysis and potential impact early in the consultation process. *Halalt*, *supra* note 1709 has added that the need to prepare such an analysis is not avoided by making a commitment to deeply consult. See also *Nlaka’pamux*, *supra* note 1830 at para 70; *Adams Lake*, *supra* note 1717 at paras 132ff; *Nalcor*, *supra* note 1822 at paras 11, 29, 38 (was too early to have expected a completed strength of claim analysis but the Crown ought to have admitted that it was consulting pursuant to a duty); *Adams Lake Indian Band*, (BCCA) *supra* note 1838 at para 75 (need not conduct a strength of claim assessment when impact is insubstantial); *Halalt* (BCCA), *supra* note 1718 at para 118 (in contrast to the trial judge, held that in a case where the Crown concedes consultation should be deep the real issue is whether the consultation that is conducted is actually deep consultation. If so, the lack of a formal assessment will not be fatal to the process.)

¹⁸⁸⁶ While Tully is clear that respectful dialogue engages, at a minimum a duty to listen, he calls for a form of listening that is genuinely receptive to deep difference and is embarked upon in a “disarmed, open and trusting way”- see Tully, “A Just Reconciliation”, *supra* note 167 at 480-481.

¹⁸⁸⁷ *Adams Lake Indian Band*, (BCCA) *supra* note 1838.

¹⁸⁸⁸ *Sambaa K’e Dene Band*, *supra* note 1823; See also *Ka’A’Gee Tu First Nation v Canada (AG)*, 2012 FC 297, especially at para 118.(The difference in approach may be explained by the focus of the Federal Court on judicial review of federal decisions, such that the primary interest of the judge is on the adequacy of the record before the decision-maker at the time of the decision.) and *Chief Lloyd Chicot et al. v. The Attorney General of Canada and Paramount Resources Ltd.* 2012 F.C. 297, especially at para. 118.

¹⁸⁸⁹ *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55.

¹⁸⁹⁰ Introduced in *Haida*, *supra* note 13.

¹⁸⁹¹ *Rio Tinto*, *supra* note 796 and *Adams Lake*, *supra* note 1838 are the current leading cases.

¹⁸⁹² *Adams Lake*, *ibid*.

¹⁸⁹³ The case-law has consistently supported the idea that the duty to consult gives rise to reciprocal duties of aboriginal groups to participate in good faith in consultation processes set up by the Crown. See, especially, *Behn*,

supra note 1640 . From the academic literature, see: Ross, “Sacred Site”, *supra* note 30 at 188- reciprocal nature of the duty to consult; Harty and Murphy, “Defence of Multicultural Citizenship”, *supra* note 389 at 100 (Harty and Murphy, drawing on Borrows, *Recovering Canada*, *supra* note 1225 at 106-107, develop the idea of “reciprocal respect”).

¹⁸⁹⁴ The term “flashpoint events” was developed by Peter Russell. See: Peter Russell, “Oka to Ipperwash: The Necessity of “Flashpoint Events”” in Leanne Simpson & Kiera Ladner, eds, *This is our Honour Song: Resurgence, and the Protection of Indigenous Nations* (Arbeiter Ring Press, 2010).

¹⁸⁹⁵ *Report of the Ipperwash Inquiry*, *supra* note 1801.

¹⁸⁹⁶ *Behn*, *supra* note 1640.

¹⁸⁹⁷ *Ibid* - while standing for the proposition that direct action will be a barrier to raising alleged failures in the discharge of the duty to consult, does hint that an aboriginal individual or group can take steps to ensure that its concerns are heard. This may involve notifying a private party or the government of its concerns. However, it is clearly expected that a judicial remedy will be necessary if its concerns are not addressed.

¹⁸⁹⁸ *Newfoundland and Labrador v Labrador Métis Association*, 2007 NLCA 75.

¹⁸⁹⁹ Remedies under the duty to consult tend to be oriented to maintaining a conversation such that the parties themselves will find a solution to their impasse. The relatively low threshold of what constitutes a “potential” claim establishes the need to engage even if the parties are far apart on their views of the strength of the claim.

¹⁹⁰⁰ Gogal, “Aboriginal Impact and Benefit Agreements”, *supra* note 1827.

¹⁹⁰¹ *Rio Tinto*, *supra* note 796.

¹⁹⁰² The Commissioner for the Ipperwash Inquiry noted the positive contribution that the administration of the duty to consult could make to the generation of economic development opportunities for aboriginal groups. See also; Salée et al, “Quality of Life”, *supra* note 2 (role of David Newhouse in developing the idea of “capitalism with a Red face”); Slowey, “Self-government and the James Bay Northern Quebec Agreement”, *supra* note 1160; Slowey, “A Fine Balance”, *supra* note 1160 at 243- writing of the James Bay Cree, concludes that they are not opposed to development but “...simply want a voice in how it proceeds and to share in any potential benefits”. In her view, indigenous peoples “...can no longer exist in isolation, or exclusively as a traditional people.” This notion is reflected in Reid, “Political Legitimacy”, *supra* note 84 at 108 “Rather, legitimacy is sustained by a process that allows citizens to constantly participate in and potentially contest the political decisions that affect their lives.”; Robert B Anderson, Bob Kayseas, Leo Paul Dana and Kevin Hindle, “Indigenous Land Claims and Economic Development: The Canadian Experience”, (2004) 28 *American Indian Quarterly* 634, especially at 644; John Loxley, *Aboriginal, Northern, and Community Economic Development: Papers and Retrospectives* (Arbeiter Ring Publishing, 2010).

¹⁹⁰³ Slowey, Gabrielle, *Navigating Neoliberalism: Self-Determination in an Era of Globalization: The Case of the Mikisew Cree* (University of British Columbia Press, 2007); Slowey, “Self-Government and the JBNQA: Thirty Years Later”, *supra* note 1160; Slowey, “Federalism and First Nations”, *supra* note 777.

¹⁹⁰⁴ Loxley, “Aboriginal, Northern, and Community Economic Development”, *supra* note 1902 at 85 attributes the term “Capitalism with a Red Face” to Professor David Newhouse from Trent University. See also Helin, *Dances with Dependency*, *supra* note 291. For a far less optimistic account of the impact of economic development see Coulthard, “Subjects of Empire?”, *supra* note 210.

¹⁹⁰⁵ Borrows, “Drawing Out Law”, *supra* note 9 at 211 provides a list of aboriginal communities as examples of successful promotion of economic development without adverse consequences for cultural security.

¹⁹⁰⁶ See *Sambaa K’e*, *supra* note 1823 as an example of a dispute involving three geographically proximate Indian communities taking very different positions on economic development

¹⁹⁰⁷ Coulthard, “Subjects of Empire?”, *supra* note 210.

¹⁹⁰⁸ Robert J Miller, *Reservation Capitalism: Economic Development in Indian Country* (University of Nebraska Press, 2012) (Miller provides a thorough assessment of many of the risks that are seen to accompany economic development on Indian lands, especially a 27-29 and 160-164, though he ultimately concludes that these risks can be managed in a fashion that avoids most serious risks).

¹⁹⁰⁹ The highest number of such agreements, pursuant to forestry management, land use planning and impact and benefit sharing have emerged from the New Relationship initiative in British Columbia. These developments were considered in Chapter 7 of this thesis and reflect an effort, primarily by the province of British Columbia, to harness the evolving duty to consult to generate short term agreements that build relationships and constitute a *modus vivendi* to allow development to proceed on mutually acceptable terms.

¹⁹¹⁰ See *Sambaa K’e*, *supra* note 1823.

¹⁹¹¹ A key theme in Australian political debate has been the effort to attempt to maximize the economic benefits that flow from the native title determination process. This is aided by the high rate of negotiated resolution of Native

Title disputes, the key role played by the Federal Courts in mediating possible solutions and the deep experience with the negotiation of impact and benefit agreements between industry and indigenous communities.

¹⁹¹² Coulthard, *supra* note 506.

¹⁹¹³ See Chapter 10.2 (Consequences of Deep Inter-Dependence).

¹⁹¹⁴ See Chapter 7 (Recognition, Reconciliation and Redistribution).

¹⁹¹⁵ It is not uncommon to see the expression of concern for the use of the phrase “potential right” as many indigenous people do not perceive their rights in this fashion.

¹⁹¹⁶ *Lefthand*, *supra* note 1853.

¹⁹¹⁷ *Rio Tinto*, *supra* note 796.

¹⁹¹⁸ *Halalt*, *supra* note 1718; *Sambaa K’e*, *supra* note 1823.

¹⁹¹⁹ *Mikisew*, *supra* note 13 and *Keewatin*, *supra* note 39.

¹⁹²⁰ *Ahousaht*, *supra* note 1498- Leave application to the Supreme Court of Canada dismissed, 34387 and case remanded to the British Columbia Court of Appeal for reconsideration in accordance with the decision of the Supreme Court of Canada in *Lax Kwa’laams*, *supra* note 1327. The reconsideration hearing has been held and a decision rendered by the British Columbia Court of Appeal. The decision largely affirms the original decision made by that Court- a second leave application has recently been dismissed by the Supreme Court of Canada: *Ahousaht*, *supra* note 1501.

¹⁹²¹ The recent decision of the British Columbia Court of Appeal does not disturb the order of the trial judge.

However, it arguably adds to confusion by suggesting that questions of continuity must be addressed in relation to discussions about justification. There is also some basis to question whether the right has been stated with sufficient specificity to meet the “delineation” standard set by the Supreme Court of Canada in *Lax Kwa’laams*, *supra* note 1330. A further trial date has currently been set down for late 2014 to address questions of justification.

¹⁹²² *Haida*, *supra* note 13 at para 20 sets out nested obligations, culminating in the duty to consult.

¹⁹²³ The *Manitoba Métis Federation* decision, *supra* note 13, has substantially developed the notion of a duty to implement. The honour of the Crown was held to support the existence of a duty to diligently implement a process of land distribution contemplated by the *Manitoba Act*.

¹⁹²⁴ There is very little Australian case law on the duty to negotiate. See Simon Young, “The troubled sequel: Canadian Aboriginal Title revisited in the BC Court of Appeal” (2012) 26 Australian Property Law Bulletin 147. For an application of the doctrine to the management of assets by a native title corporation see: *Leslie Weribone & Ors. On behalf of the Madandani People v The State of Queensland & Ors*, [2013] FCA 255.

¹⁹²⁵ *Manitoba Métis Federation*, *supra* note 13.

¹⁹²⁶ Papillon, Martin, “Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States” (2012) 42 *Publius* 289 and Graham White, “Treaty Federalism in Northern Canada and the United States” (2012) 32 *Publius* 89; Brian Slatery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1995) 34 *Osgoode Hall LJ* 101 at 111 (sees treaty federalism as recognized and consolidated with the enactment of Section 35)

¹⁹²⁷ *Ermineskin*, *supra* note 796; *Rio Tinto*, *supra* note 796 and *Little Salmon*, *supra* note 709.

¹⁹²⁸ There are many points of linkage and contrast with the notions of treaty federalism and treaty constitutionalism and the approach to constitutionalism that is developed in this argument. However, the key difference might be the greater prominence placed on the notion of the honour of the Crown rather than reliance on a formal instrument such as a treaty. In particular, rather than focussing on the treaties as foundational constitutional instruments, the Canadian model emerging largely through decisions of the Supreme Court of Canada seems to privilege modern obligations that are designed to encourage and evaluate deliberative processes between the Crown and aboriginal peoples. These may take the form of treaties but need not necessarily take this form.

¹⁹²⁹ These issues are all dealt with in Chapter 17.

¹⁹³⁰ The classic text on indigenous legal traditions has become John Borrows, *Canada’s Indigenous Constitution*, *supra* note 93. See also Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 659; David Milward, “Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence” (2010) 14 *E & P* 287; Drew Mildon, “A Bad Connection: First Nations Oral Histories in the Canadian Courts” in Hulan, Renée & Renate Eigenbrod, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Fernwood Publishing, 2008); Brian Calliou, “Methodology for Recording Oral Histories in the Aboriginal Community” (2004) 15 *Native Studies Review* 73; Hamar Foster, “One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada”, (2010) 37 *The Advocate’s Quarterly* 66; Val Napoleon, “Behind the Blockades” (2010) 9 *Indigenous LJ* 1; Gordon Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions” (2007) 6 *Indigenous LJ* 13; Fletcher, “Rethinking Tribal Customary Law”, *supra* note 633; Larry Chartrand, “The Story in Aboriginal Law and the Aboriginal Law in the

Story: A Métis Professor's Journey" (2010) 50 Sup Ct L Rev 89; Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Minister of Public Works and Government Services Canada, 2006); Anker, "Law in the Present Tense", *supra* note 635; Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (University of British Columbia Press, 2011).

¹⁹³¹ Federal Court, *Aboriginal Law Bar Liaison Committee- Aboriginal Litigation Practice Guidelines*, October 16, 2012, especially Part IV- Elder Testimony and Oral History.

¹⁹³² There have been several legal education initiatives that are designed to raise the profile of indigenous legal traditions in Canadian legal education. Akitsiraq Law School, based in Nunavut, offers degrees from the University of Ottawa which combine mainstream legal training with the indigenous legal traditions of the Inuit. The University of Victoria is launching an ambitious program that will offer a joint degree in Canadian and indigenous law.

¹⁹³³ *Delgamuukw*, *supra* note 22 at paras 84-88 (oral testimony)

¹⁹³⁴ *Mitchell*, *supra* note 690 at paras 27-35 (oral testimony), Dwight Newman "Tsihqot'in Nation v. British Columbia and Civil Justice: Analysing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History" (2005) 43 Alta L Rev 433, Flanagan, "Second Thoughts", *supra* note 324 at 214-215 sees *Mitchell* as having clarified the rules applicable to reception of oral testimony/

¹⁹³⁵ David M. Robbins and Jack Woodward, "Tsilhqot'in Nation v. British Columbia: A Decade After *Delgamuukw*" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) at 295- preliminary process for oral testimony did not prove to be onerous for the plaintiffs

¹⁹³⁶ Donovan, "Common Law Origins", *supra* note 1321 at 309-311 (argues that the common law already made ample provision for the reception of oral testimony).

¹⁹³⁷ Vance Hughston, "A practitioner's perspective of native title" in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009 and Chief Justice French, "Lifting the Burden of Native Title", *supra* note 635.

¹⁹³⁸ Practice suggestion from Vance Hughston, *ibid* at 2-3.- largely drawn from the Bennell case- questioning the assumption that oral testimony need always be presented orally.

¹⁹³⁹ Contrast with commentary by Bruce Rigsby, "Social Theory, Expert Evidence, and the Yorta Yorta Rights Appeal Decision" in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010) at 70 on the preference by some Australian judges for direct oral testimony as opposed to expert testimony. He argues, in contrast, that actions speak louder than words and that experts are often well placed to address this.

¹⁹⁴⁰ This is captured well in Rigsby paper on Australian native title processes, *ibid*.

¹⁹⁴¹ See Johnson, "Struggling Over the Past", *supra* note 91 on the Waitangi Tribunal.

¹⁹⁴² The approach of Alexander Von Gernet to oral history is the subject of a book-length critique by Bruce Granville Miller, *Oral History on Trial*, *supra* note 1922. Frances Widdowson, primarily in her doctoral thesis, relies heavily on the work of Bruce Trigger and Charles Fried to marshal an argument about the unreliability of oral testimony. See. Widdowson, *Aboriginal Dependency*, *supra* note 375.

¹⁹⁴³ Widdowson, *ibid* at 83.

¹⁹⁴⁴ Jung, "Moral Force of Indigenous Claims", *supra* note 103 at 51 (Jung refers to a line of authority from various social science disciplines, especially archaeology, which takes a critical stance to the reliability of oral tradition).

¹⁹⁴⁵ Judy Banks, *Taking Culture to Court: Anthropology, Expert Witnesses, and the Aboriginal Sense of Place in the Interior Plateau of British Columbia* (MA thesis, Simon Fraser University, 2008) and Miranda Johnson, "Struggling Over the Past", *supra* note 91 (both express criticism of several Crown expert witnesses)

¹⁹⁴⁶ Renée Hulan and Renate Eigenbrod, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Fernwood Publishing, 2008).

¹⁹⁴⁷ Ardith Walkem, "An Unfulfilled Promise: Still Fighting to Make Space for Indigenous Legal Traditions" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) (oral testimony said to be largely ignored), Ross, "Sacred Sites", *supra* note 30 at 134 ("Colonialism has not changed, just shifted, and it is now wearing the judicial robe of respect for "perspective"); Biber, "Fantasy", *supra* note 86 at 15-16 (rejection of oral testimony in the Yorta Yorta trial in Australia).

¹⁹⁴⁸ Knafla, "This is Our Land", *supra* note 614 at 26.

¹⁹⁴⁹ Borrows, "Physical Philosophy", *supra* note 629 at 415-416 -cites the alleged discrediting of Chief Potts as credible oral historian in Bear Island as an example that *Delgamuukw* has not changed much in judicial practice.

¹⁹⁵⁰ Federal Court initiative; *supra* note 1931 see also: Turner, *Peace Pipe*, *supra* note 60 at 6-7 (it matters greatly how indigenous law is brought into the courtroom)

¹⁹⁵¹ The author was involved in the development of this project as a member of the delegation representing the Federal Department of Justice.

¹⁹⁵² At crucial stages in the development of the guidelines, a panel of Elders, drawn from different traditions and regions, were consulted on the development of language and principles.

¹⁹⁵³ The Chief Justice of the Federal Court of Canada released the report in October, 2012.

¹⁹⁵⁴ Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, *supra* note 1910 at 13,66, 87,153, 173 argues that cross-examination can be problematic in that it subjects indigenous knowledge to Western standards of evaluation and fragment that knowledge so it would not be recognizable to the community that produced the knowledge; Johnson, “Struggling Over the Past”, *supra* note 91 at 43 (expresses concerns about tactic of cross-examination to determine consistency with elder’s statements made in the 1970’s). See also: Judy Banks, , *Taking Culture to Court: Anthropology, Expert Witnesses, and the Aboriginal Sense of Place in the Interior Plateau of British Columbia* (MA thesis, Simon Fraser University , 2008) at 35.

¹⁹⁵⁵ Kathleen Ring, *Discussion Paper on Oral History Evidence in the Federal Court*, Aboriginal Law Conference, February 21, 2008.

¹⁹⁵⁶ The requirement to generate “can-say” or “will-say” statements has also proven controversial in aboriginal litigation. Litigators for aboriginal groups find it difficult to provide this type of disclosure. This controversy is addressed by Bruce Granville Miller, *Oral Testimony on Trial*, *supra* note 1910 at 90.

¹⁹⁵⁷ Walter Twinn, *The Council of the Sawridge Band and The Sawridge Band v Elizabeth Bernadette Poitras and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development*, 2012 FCA 47.

¹⁹⁵⁸ A line of Ontario cases has developed the idea of a “trial narrative” that supports the role of the trial judge in maintaining procedural protections that allow each side of an adversarial proceeding to develop their version of the narrative. A good source for this line of cases is *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764, especially at paras 45-48.

¹⁹⁵⁹ Notes from meetings of the Federal Court Aboriginal Law initiative have been placed on the Court website, though the notes from this particular meeting have not yet been posted.

¹⁹⁶⁰ Val Napoleon, “Delgamuukw: A Legal Straitjacket for Oral Histories” (2005) 20 CJLS 123.

¹⁹⁶¹ Jaimie Battiste, “Understanding the Progression of Mi’kmaw Law”, *supra* note 1293 at 323 “give directions” to the court- linked to the argument that aboriginal and treaty rights are to be equated to indigenous law and are part of the Constitution of Canada. See discussion in Section 12.3 of this thesis.

¹⁹⁶² It is important to note the similarities between the arguments developed by Panagos and the core propositions adopted by treaty federalist scholars- for both it is the job of the courts to simply apply what they are told by the aboriginal experts on the content of indigenous law and indigenous identity. See Henderson, *First Nations Jurisprudence*, *supra* note 91; Panagos, “Aboriginality”, *supra* note 84 at 174ff.

¹⁹⁶³ Shaw, *Indigeneity and Political Theory*, *supra* note 43 at 111 (“...to hear the evidence presented but subject it to evaluation by Western epistemological standards, would be to repeat the historical treatment of Aboriginal peoples as “less-developed versions” of our selves, rather than recognizing and struggling with the reality of cultural difference.”)

¹⁹⁶⁴ Peterson, “Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Rights to Land”, *supra* note 1097 at 179 (“...courts have become more useful as forums where Aborigines can tell their stories and influence government policies through the public arena”; (They) “...provide a forum...to tell their stories and achieve recognition...regardless of the outcome.”)

¹⁹⁶⁵ *Ibid*.

¹⁹⁶⁶ *Lax Kwa’laams*, *supra* note 1327.

¹⁹⁶⁷ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 67ff. (on wampum belt)

¹⁹⁶⁸ *Ibid* at 69, 71-72- what matters is how it is used today.

¹⁹⁶⁹ Several contributions to the “New Visions” volume prepared by the Australian Law Reform Commission explore the rich Australian practice of considering aboriginal testimony in the native title claims validation process.

¹⁹⁷⁰ *Lax Kwa’laams*, *supra* note 1327; *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539.

¹⁹⁷¹ See the Discussion in Chapter 14 of this thesis, particularly Section 14.1.

¹⁹⁷² See Section 11.1 for a discussion of the original role that was intended to be played by the Section 37 constitutional discussions. To a large extent, the introduction of the duty to consult has placed the emphasis back on the participants to engage in dialogue to address differences of view about the contents of Section 35 rights.

¹⁹⁷³ Nussbaum, *Frontiers of Justice*, *supra* note 418 and Ivison, *Postcolonial Liberalism*, *supra* note 414.

¹⁹⁷⁴ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 253.

¹⁹⁷⁵ *Ibid* at 172.

¹⁹⁷⁶ *Ibid* at 292.

¹⁹⁷⁷ *Ibid* at 274.

¹⁹⁷⁸ *Ibid* at 273-274.

¹⁹⁷⁹ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 26, 28.

¹⁹⁸⁰ *Ibid* at 30.

¹⁹⁸¹ *Ibid*.

¹⁹⁸² *Ibid* at 165.

¹⁹⁸³ *Ibid* at 165.

¹⁹⁸⁴ *Ibid* at 179.

¹⁹⁸⁵ *Sparrow*, *supra* note 969.

¹⁹⁸⁶ Inherent Right of Self-Government Policy, Government of Canada, 1995.

¹⁹⁸⁷ Only a sample of the huge literature on aboriginal self-government can be addressed in this thesis. Emphasis has been placed on more recent work and key contributions which continue to frame the debate. See, for example: McNeil, "Judicial Approaches to Self-Government since Calder", *supra* note 955; Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2010) 41 *Ottawa L. Rev.* 101; Grammond, "The Reception of Indigenous Legal Systems in Canada", *supra* note 502 at 45; Kiera Ladner, "Indigenous Governance: Questioning the Status and Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights, Research Paper for National Centre for First Nations Governance, 2006; Gordon Christie, "Aboriginal Nationhood and the Inherent Right to Self-Government", Research Paper for the National Centre for First Nations Government, 2007; PW Hutchins, et al, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 *UBC L. Rev.* 251 (implication from treaties); Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 *Queen's LJ* 173; Royal Commission on Aboriginal Peoples. "Partners in Confederation", *supra* note 28; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1990-1991) 36 *McGill LJ* 308; Kerry Wilkins, "Take Your Time and Do it Right: Delgamuukw, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27 *Man LJ* 241; John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 *UBC L. Rev.* 285; James A O'Reilly, "Aboriginal Self-Government" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009); Shin Imai, "Indigenous Self-Determination and the State", *supra* note 1086 at 285.

¹⁹⁸⁸ These topics are addressed in Chapters 2, 3, 4 and 9 of this thesis.

¹⁹⁸⁹ Arguments for the existence of an inherent right to self-government generally fall into three classes, all of which are united by the concept of recognition. See, for example: Guibernau, "The Identity of Nations", *supra* note 1209 at 131 (recognition as distinct nations implies a right of self-government); Royal Commission on Aboriginal Peoples, "Partners in Confederation", *supra* note 28 at 13 ("...were generally recognized as autonomous political units capable of holding treaty relations with the Crown"; p. 17- Royal Proclamation presupposes an autonomous political structure); *R v Sioui*, (1990) 1 *SCR* 1025 at 1052-1053, quoting from the Chief Justice of the United States Supreme Court in *Worcester v State of Georgia*, *supra* note 1366, ("...she considered them as nations capable of maintaining the relations of war and peace, of governing themselves..."); *Van der Peet*, *supra* note 8 at para 106- ("were independent nations" L'HD dissent); Implied by collective nature of rights- *Delgamuukw*, *supra* note 22 at paras 115 and 166; McDiarmid, *supra* note 1083 at paras 51, 66, 94 and 95; - O'Reilly, "Aboriginal Self-Government", *supra* note 1987 at 383, see 381 as well ("...moving away from Crown paternalism"); Peach, "Reconciling the Constitutional Order", *supra* note 808 at 7ff- (comprehensive review of arguments in the literature); McNeil, "Judicial Approaches to Self-Government Since Calder" *supra* note 955 at 130- (title "necessarily entails authority"); see also 138, 143- (implied from treaty jurisprudence); Dalton, "Aboriginal Self-Determination in Canada", *supra* note 1652 at 22 (Williamson J. in Campbell relied on the communal nature of aboriginal title); Borrows, "Tracking Trajectories", *supra* note 1987 at 295- (recognition of self-government implied by the use of "people" in Section 35); Christie, "Aboriginal Nationhood", *supra* note 1997 at 9- (derivation of self-government from treaties).

¹⁹⁹⁰ Arguments that reject the existence of an inherent right of self-government tend to rely on an alleged incompatibility with the Canadian constitutional framework. See, for example: RCAP "Partners", *supra* note 28 at 32- (arguments based on the exhaustive distribution of powers is seen to be the primary reason for resistance to an inherent right of aboriginal self-government); Clayton Cunningham, *Of Self-Government: Aboriginal Rights, Privileges, Powers and Immunities* (MA Thesis, University of Alberta, 2008)- (comprehensive assessment of arguments against the existence of aboriginal self-government such as the impact of Crown assertion of sovereignty, the pattern of extensive regulation of aboriginal affairs and the exclusive distribution of legislative authority between federal and provincial legislatures. He generally finds these arguments to be unpersuasive.); Arguments presented in full form in Campbell, *supra* note 806- where Williamson J. found a limited form of self-government passed into

Confederation as an unwritten principle of the Constitution; Kenneth Lysyk, “The Unique Constitutional Position of the Canadian Indian” (1967) 45 Can Bar Rev 51 (Canadian common law does not support a right to self-government); Borrows, “Tracking Trajectories” *supra* note 1987 at 291- (interesting analysis of Kenneth Lysyk’s limited support for aboriginal self-government); WLC Binnie, “The Sparrow Doctrine: Beginning of the End or End of the Beginning?” (1990) 15 Queen’s LJ 217 at 218, 225-226, 234- (mere assertion of authority enough to extinguish); Imai, Shin “Indigenous Self-Determination and the State” in Richardson et al, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 294 (“Prior to 1982, the Canadian government and courts did not acknowledge that Indigenous peoples have inherent government powers.”); O’Reilly, *supra* note 1987 at 389- (analysis of treatment of self-government by 4 opinions in British Columbia Court of Appeal in *Delgamuukw* (*Delgamuukw v. British Columbia* (1993) B.C.A.C. 1) : Macfarlane and Taggart- extinguished, but no impediment to private revival, Wallace- extinguished, Lambert- could have been extinguished but wasn’t; Hutcheon- regulated but not extinguished); See para. 74 British Columbia Court of Appeal decision in *Sparrow*- self-government rejected outright; Edward M Morgan, “Self-Government and the Constitution: A Comparative Look at Native Americans” (1984) 12 Am Indian L Rev 39 at 55- despite Lord Denning’s comments, nothing in legal history to suggest recognition of tribal sovereignty; Thomas Isaac, “Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem” (1992) 30 Alta L Rev 708 at 709-712 “Aboriginal sovereignty, if not explicitly, then implicitly, has been extinguished for centuries.” In contrast, Short, “Australian “Aboriginal” Reconciliation”, *supra* note 87 at 309 quotes from a Canadian provincial court judge Joseph Igliorte questioning the “magical process” by which the Crown is alleged to have acquired sovereignty.

¹⁹⁹¹ This is a core argument of this thesis- while there are foundations for an inchoate common law doctrine of aboriginal rights; the jurisprudence of the Supreme Court of Canada has tended to support the development of a modern doctrine that is inspired by the principles protected by Section 35 of the *Constitution Act, 1982*.

¹⁹⁹² *Coe, supra* note 649. See also *Walker, supra* note 649.

¹⁹⁹³ Panagos, “Aboriginality”, *supra* note 84 at 128, 158; 168; Gibson, *A New Look, supra* note 204- describes the Supreme Court of Canada as “very sceptical” about aboriginal self-government; Charlton, “Constitutional Conflicts and Aboriginal Rights”, *supra* note 47 at 242.

¹⁹⁹⁴ *Delgamuukw, supra* note 22 at para 170-171.

¹⁹⁹⁵ Leclair, “Federal Constitutionalism and Aboriginal Difference”, *supra* note 807 at 533 (...not a mere aboriginal right...but a power conflict” [and] “...more appropriate ground than Section 35 on which to found the aboriginal non-aboriginal relationship”); Peach, “Reconciling the Constitutional Order”, *supra* note 808 especially at 18, 155, 158-158 “...rests on a foundation much stronger and deeper than simply section 35”); Dwight Newman, “Aboriginal ‘Rights’ as Powers: Section 35 and Federalism Theory” (2007) 37 Sup Ct L Rev (2d) 163.

¹⁹⁹⁶ The development of this argument by James Tully is considered in Section 2.3 of this thesis.

¹⁹⁹⁷ And may well justify some degree of external regulation as well, as for example when the governance authority is based on a finding of title to the lands in question.

¹⁹⁹⁸ Slattery’s development of the idea of a “generic” set of rights protected by the common law and Section 35 is considered in Section 12.5 of this thesis.

¹⁹⁹⁹ This was the approach adopted by the Royal Commission on Aboriginal Peoples, *supra* note 28.

²⁰⁰⁰ These arguments are considered in Chapter 10 of this thesis.

²⁰⁰¹ These arguments are considered in Chapter 2 of this thesis.

²⁰⁰² The reason for these implications is that a modern theory of Section 35 is far less likely to rule out the existence of a self-government right on the basis of the original content of the common law or the assumed consequences of the assignment of legislative authority to federal and provincial legislatures.

²⁰⁰³ *Sappier, supra* note 1289.

²⁰⁰⁴ *Mitchell, supra* note 693.

²⁰⁰⁵ Doug Moodie, “Thinking Outside the 20th Century Box: “Mitchell”- Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government” (2003-2004) 35 Ottawa L Rev 1 at 10 (aboriginal sovereignty at a “non-starter”; p. 20- Van der Peet as principle road-block; 31 “...laid the groundwork for a future full review”; 35- “The idea is not to forget the colonial past, but to somehow move beyond the debilitating rhetoric to enable real work that is useful and constructive.”; 40- morally and politically defensible conception “is precisely what this country needs”); Imai, “Indigenous Self-Determination and the State”, *supra* note 1086 at 164- (sees greater receptivity in Mitchell and Campbell); O’Reilly, “Aboriginal Self-Government”, *supra* note 1987 at 381 (“door has been left open”)

²⁰⁰⁶ Ladner and McCrossan, “The Road not Taken”, *supra* note 88; Peter W Hutchins & Anjali Choksi, “From Calder to Mitchell: Should the Court Control Cultural Borders?” (2002) 16 Sup Ct L Rev (2d) 241 at 260-66; Gordon Christie, “The Court’s Exercise of Plenary Power: Rewriting the Two-Row Wampum” (2002) 16 Sup Ct L

Rev 285 (He argues that Binnie writes as if reconciliation has already occurred); Leonard I. Rotman, “Developments in Aboriginal Law: The 2000-2001 Term” (2001) 15 Sup Ct L Rev 1 at 20; D’Arcy Vermette, “Dizzying Dialogue”, *supra* note 70 at 63ff.

²⁰⁰⁷ *Ibid.*

²⁰⁰⁸ *Sparrow*, *supra* note 969 at 404 “from the outset”.

²⁰⁰⁹ Hoehn, *Reconciling Sovereignties*, *supra* note 47.

²⁰¹⁰ Roughen, “The Association of State and Indigenous Law”, *supra* note 612.

²⁰¹¹ This is because there is no immediate equivalence between the norms that are applicable within an indigenous legal system with respect to use, occupation and title to land and the entirely separate right of aboriginal title which is protected under the mainstream Canadian legal system

²⁰¹² This result was explicitly confirmed in Supreme Court of Canada decision in *Sparrow*, *supra* note 969 at 1097-1098.

²⁰¹³ When the focus is less on whether one system or the other prevails in its entirety and more on the modes of interaction on the ground, there is more scope to consider ways in which the host system can offer mechanisms to reinforce and protect indigenous governance.

²⁰¹⁴ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 180, 188, 189 and 200.

²⁰¹⁵ Roughen, “The Association of State and Indigenous Law”, *supra* note 612.

²⁰¹⁶ Recall that the literature on indigenous legal systems suggests that it will be highly likely that such gaps will be present. The American scholar Matthew Fletcher, “Customary Law”, *supra* note 633 has found that very little authentic tribal tradition is used in the adjudication of tribal courts, at least the traditions of the particular tribe involved in that adjudication. Australian academics have also written about the lapse of many indigenous legal traditions, see Vivian, “Conflict management in the native title system”, *supra* note 632. Some Canadian evidence also supports this conclusion, see Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 and Christie, “Culture, Self-Determination and Colonialism”, *supra* note 1930.

²⁰¹⁷ Raymond D Austen, *Navaho Courts and the Navajo Common Law: A Tradition of Tribal Self-Governance* (Minnesota University Press, 2009).

²⁰¹⁸ *Santa Clara Pueblo v Martinez*, (1978) 436 US 49.

²⁰¹⁹ Ghislain Otis has argued that aboriginal self-governing authority need not be strictly limited to a territorial model but can follow a model of personal jurisdiction. The theme of non-territorial approaches to aboriginal self-government is developed in much of the work of Ghislain Otis, most recently in Ghislain Otis, “L’individu comme acteur relationnel: l’option de la loi dans le “fédéralisme personnel” en context autochtone” in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l’Université Laval, 2013)

²⁰²⁰ Grammond, “Identity Captured by Law”, *supra* note 490; Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Purich Press, 2011); (It will be important to avail of comparative experience from jurisdictions such as the United States which has long balanced respect for the ability of the group to freely define itself with the ability of the state to determine conditions of eligibility for public benefits.)

²⁰²¹ *Ermineskin*, *supra* note 796.

²⁰²² Borrows, “Drawing Out Law”, *supra* note 9 at 117- Borrows supports this blurring of the lines with his interpretation of the *Lara* decision of the United States Supreme Court about the relationship between tribal sovereignty and Congressional legislation-“...The Court seemed to be saying that Indigenous sovereignty could grow back as an inherent right even after harsh and severe judicial pruning.”

²⁰²³ Hendrix, *Ownership, Authority, and Self-Determination*, *supra* note 17 at 27-(contingent not an inherent right).

²⁰²⁴ Christian Loth, *The Inherent Right Policy: A Blending of Old and New Paradigm Ideas* (MA Thesis, Carleton University, 1996) at 25-26- (overview of Penner Report, which was never implemented); Diana Edith Ginn, *Aboriginal Self-Government* (MA Thesis, York University, 1987) at 45- (a description of the Penner Report is provided which demonstrates some close affinities to the approach to aboriginal self-government defended in this thesis); O’Reilly, “Aboriginal Self-Government”, *supra* note 1987 at 384. See also Kathy Lenore Brock, *The Theory and Practice of Aboriginal Self-Government: Canada in a Comparative Context* (D. Phil, University of Toronto, 1989).

²⁰²⁵ See Chapter 8 of this thesis.

²⁰²⁶ Ghislain Otis, « Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada » (2004) 49 McGill LJ 393.

²⁰²⁷ Gibson, *New Look*, *supra* note 204 at 66-68- (Auditor General critical of accountability); Richards, *Creating Choices*, *supra* note 296 at 123ff.

²⁰²⁸ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at c 9.

²⁰²⁹ Paul Chartrand, “Aboriginal Rights: the “race” for recognition in Canada” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010).

²⁰³⁰ Turpel, “Aboriginal Rights and the Canadian Charter”, *supra* note 88.

²⁰³¹ For articles generally supporting a shield interpretation of Section 25 see: Henderson, “Empowering Treaty Federalism”, *supra* note 740; James (Sakej) Youngblood Henderson, “Perspectives on Marshall: Constitutional Powers and Treaty Rights” (2000) 63 Sask L Rev 719; Thomas Isaac, “The Storm Over Aboriginal Self-Determination: Section 35 of the Constitution Act, 1982 and the Redefinition of the Inherent Right of Self-Government” (1992) 2 CNLR 6; Darlene Johnson, “Native Rights as Collective Rights: A Question of Group Self-Preservation” (1989) 1 Can J of Law and Jurisprudence 19; Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982) 8 Queen’s L J 232 at 262; Kent McNeil, “The Constitutional Rights of the Aboriginal Peoples of Canada” (1982) 4 Sup Ct L Rev 255 at 262. For non-shield interpretations of Section 25 see: Richard Bartlett, “Survey of Canadian Law: Indian and Native Law” (1983) 15 Ottawa L Rev 430 at 480; Renée Dupuis, *Le statut juridique des peuples autochtones en droit canadien* (Carswell, 1999) at 122.

²⁰³² Wilkins, “But we Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Self-Government” (1999) 49 UTLJ 53; Kerry Wilkins, “Take Your Time and Do It Right”, *supra* note 1987. For a contrary view, see: Hogg & Turpel, “Implementing Self-Government: Constitutional and Jurisdictional Issues” (1995) 74 Can Bar Rev 187 at 199, 217, 214, 215; Peter Hutchins et al. “Ghost in the Machine”, *supra* note 1987 at para 95.

²⁰³³ *Greater Vancouver Transportation Authority v Canadian Federation of Students- British Columbia Component*, 2009 SCC 31.

²⁰³⁴ *Thomas v Norris*, (1992) CNLR 139 (BCSC).

²⁰³⁵ Though it is sometimes attenuated or qualified, the application of the Charter has been confirmed in all comprehensive claims agreements. It has also been accepted in self-government agreements- see Yale Belanger, “Future Prospects for Aboriginal Self-Government in Canada” in Yale Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Purich Publishing Ltd, 2008); Robert J Sharpe and Kent Roach, *Brian Dickson: A Judge’s Journey* (Osgoode Society for Canadian Legal History, 2003) at 475ff. describe Chief Justice Dickson’s advocacy for the application of the *Charter* to self-government agreements after his retirement from the Bench.

²⁰³⁶ The best example is the Native Women’s Association of Canada which has traditionally called for the application of the Charter to ensure the protection of women’s equality rights. This history is described in Shaw, *Indigeneity and Political Theory*, *supra* note 43, ch 5 – “Resistance: negotiating the interstices of sovereignty”.

²⁰³⁷ Key cases include *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbière*]; *Lovelace v Ontario*, 2000 SCC 37; [2000] 1 SCR 950 [*Lovelace*]; *Kapp*, *supra* note 460 and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 [*Peavine*].

²⁰³⁸ Jung, “Moral Force of Indigenous Politics”, *supra* note 103 at 26, Panagoes, “Aboriginality”, *supra* note 85 at 178-quoting Gillian Brock.

²⁰³⁹ *Kapp*, *supra* note 460.

²⁰⁴⁰ *Kapp* returns to the core model established in the very first Section 15 case decided by the Supreme Court of Canada- *Andrews*, *supra* note 460.

²⁰⁴¹ *Lovelace*, *supra* note 2037.

²⁰⁴² *Peavine*, *supra* note 2037.

²⁰⁴³ Jane M Arbour, “The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms” (2003) 21 Sup Ct L Rev 3.

²⁰⁴⁴ *Supra* note 2031 for publications supporting a shield interpretation of Section 25.

²⁰⁴⁵ *Kapp*, *supra* note 460 at paras 94-95.

²⁰⁴⁶ Martinez. *Supra* note 2018.

²⁰⁴⁷ Susan Moller Okin, “Is Multiculturalism Bad for Women?” in J Cohen, M Howard & MC Nussbaum, *Is Multiculturalism Bad for Women?* (Princeton University Press, 1999) at 12, 22; Seyla Benhabib, “The Claims of Culture”, *supra* note 58 at 60; Jung, “Moral Force of Indigenous Politics” *supra* note 103 at 290; Avigail Eisenberg & Jeff Spinner-Halev, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press, 2005); Dwight Newman, “Value Collectivism, Collective Rights, and Self-Threatening Theory” (2013) 33 Oxford J Legal Stud 197; Angela R Riley, “(Tribal) Sovereignty and Illiberalism” (2007) 95 Cal L Rev 79; Response to Okin: Cindy Holder, “Liberalism and Illiberalism: Are Patriarchal Cultures Really a Problem” Rethinking Objections from Cultural Viciousness” (2002) 12 Contemporary Legal Issues 727; Charters, “Do Maori Rights Racially

Discriminate Against Non Maori?”, *supra* note 641; Holder and Cornthassel “Indigenous Peoples and Multicultural Citizenship”, *supra* note 1196.

²⁰⁴⁸ The work of Susan Moller Okin is especially notable in framing this problem. See Susan Moller Okin, “Multiculturalism and Feminism: No Simple Question, No Easy Answers” in Eisenberg and Spinner-Halev, “Minorities within Minorities”, *supra* note 290; Jeff Spinner-Halev develops a good analysis of feminist literature on minorities within minorities- Jeff Spinner-Halev, “Feminism, Multiculturalism, Oppression, and the State” (2001) 112 *Ethics* 84.

²⁰⁴⁹ Robinson, “Cultural Rights and Internal Minorities”, *supra* note 17 at 119-120 (role of exit).

²⁰⁵⁰ Eisenberg and Spinner-Halev, “Minorities within Minorities”, *supra* note 2040- (contains several approaches to the inter-relationship between exit, exile and voice)

²⁰⁵¹ Ranjoo Seodu Herr, “In Defence of Non-Liberal Nationalism”, (2006) *Political Theory* 304; Ranjoo Seodu Herr, “Liberal Multiculturalism: An Oxymoron?” (2007) 38 *Philosophical Forum* 23; Ranjoo Seodu Herr, “Liberal Presumptions: A Response to Curtis” (2007) 35 *Political Theory* 341; Ranjoo Seodu Herr, “Cultural Claims and the Limits of Liberal Democracy” (2008) 34 *Social Theory and Practice* 25.

²⁰⁵² Ayelet Shachar, “Reshaping the Multicultural Model: Group Accommodation and Individual Rights” (1998) 8 *Windsor Rev Legal Soc Issues* 83; Ayelet Shachar, “The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority” (2000) 35 *Harv CR-CLL Rev* 385; Ayelet Shachar, “Of Citizenship and Multicultural Vulnerability” (2000) 28 *Political Theory* 64; Ayelet Shachar, “Two Critiques of Multiculturalism” (2001) 25 *Cardozo L Rev* 253.

²⁰⁵³ Hendrix, “Ownership, Authority, Self-Determination”, *supra* note 17 at 160-162, 202.

²⁰⁵⁴ *Ibid* at 166.

²⁰⁵⁵ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93 at 379.

²⁰⁵⁶ *Ibid* at 36.

²⁰⁵⁷ Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (Cambridge University Press, 2007) – (strong advocacy of dialogue as the best solution to rights conflicts emerging in multicultural polities); Harty and Murphy, “In Defence of Multicultural Citizenship”, *supra* note 389 at 69 (Canadian experience of women advocating gender equality in discussions about aboriginal self-government); Dickson, Timothy, “Section 25 and Intercultural Judgement” (2003) 61 *UTLJ* 143.

²⁰⁵⁸ Borrows, *Canada’s Indigenous Constitution*, *supra* note 93- the assessment of contemporary practices from the modern perspective of the community is a core theme of the book.

²⁰⁵⁹ *Canadian Human Rights Act*, repeal of Section 67, *supra* note 1435.

²⁰⁶⁰ Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22 *Dal LJ* 185; Kerry Wilkins, “R v Morris: A Shot in the Dark and Its Repercussions” (2008) 7 *Indigenous LJ* 1; Key cases include: *Canadian Western Bank v Alberta*, 2007 SCC 22, *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 29; *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39; *Quebec (AG) v Lacombe*, 2010 SCC 38; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, especially at para 60 (the doctrine “...has never been applied to a broad and complex area of jurisdiction); *Quebec (AG) v Canada (Human Resources and Social Development)*, 2011 SCC 60; *Morris*, *supra* note 1500; *Paul*, *supra* note 1889, especially at paras 19, 24; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31; *NIL’TUO Child and Family Services Society v BC Government and Services Employees Union*, 2010 SCC 45; *Chaterjee v Ontario (AG)*, 2009 SCC 19; *Newfoundland and Labrador v Abitibi Bowater Inc*, 2012 SCC 67; *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancies)*, 2013 BCCA 262; *Marine Services International Ltd v Ryan Estates*, [2013] 3 SCR 53.

²⁰⁶¹ Jonathan Penner, “Curious History of the Interjurisdictional Immunity and its (Lack of) Application to Federal Legislation” (2011) 90 *Can Bar Rev* 1; Peter Hogg and Rahal Godil, “Narrowing Interjurisdictional Immunity” (2008) 42 *Sup Ct L Rev* (2d) 623; Robin Elliot, “Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc: The Supreme Court Muddies the Doctrinal Waters- Again” (2008) 43 *SupCt L Rev* 433; Elizabeth Edinger, “Back to the Future with Interjurisdictional Immunity: Canadian Western Bank v Alberta; British Columbia v. Lafarge” (2008) 66 *The Advocate* 553; John Furey, “Interjurisdictional Immunity” *The Pendulum Has Swung* (2008) 42 *Sup Ct L Rev* 597; Dwight Newman, “Canada’s re-emerging division of powers and the unrealized force of reciprocal interjurisdictional immunity” (2011) 20 *Constitutional Forum* 1; Hogg, “Constitutional Basis of Aboriginal Rights”, *supra* note 1700 at 4 (...certainly includes provincial laws that purport to extinguish or derogate from aboriginal or treaty rights.”

²⁰⁶² *Morris*, *supra* note 1497.

²⁰⁶³ Interesting arguments might be available based on the recent decision of the Ontario Court of Appeal in *Keewatin*, *supra* note 39. The Court emphasizes that the treaty is not made with the federal government but with the

Crown and goes to great lengths to ensure that the province is free to develop a direct relationship under the treaty. It is equally bound by the duty to consult and the treaty must be interpreted in a fashion that accommodates the movement to a more flexible federalism that embodies more overlap between federal and provincial legislative authority. Cases that support a stronger federal role in the treaty process include: *R v Howard*, [1994] 2 SCR 299 (treaty process is federal in nature); *R v White and Bob*, [1965] SCJ No 80 (treaty rights go to the core of Section 91(24)); *Simon v The Queen*, [1985] 1 SCR 387 at para 54 (exclusive federal power to derogate from treaty rights) and *Moosehunter v The Queen*, [1981] 1 SCR 282 at 293 (Government of Canada can alter treaty rights). The Supreme Court of Canada decision in the Keewatin appeal is discussed in the Addendum appended to this thesis.)²⁰⁶⁴ *Delgamuukw*, *supra* note 22 at paras 160 and 165; *Marshall (No I)*, *supra* note 38 at para 56, *Marshall (No II)*, *supra* note 38 at para 24; *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 at paras 24-25, 36; *Sparrow*, *supra* note 969 at 1105; *Badger*, *supra* note 707 at para 85; *Côté*, *supra* note 1332 at paras 74 and 78; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 62.

²⁰⁶⁵ *Canadian Western Bank*, *supra* note 2060; *PHS Community Services*, *supra* note 2060.

²⁰⁶⁶ See Chapter 5 of this thesis.

²⁰⁶⁷ Leclair, “Federal Constitutionalism and Aboriginal Difference”, *supra* note 807.

²⁰⁶⁸ Newman, “Aboriginal Rights as Powers”, *supra* note 1987.

²⁰⁶⁹ *Morris*, *supra* note 1497. See, in particular, para 58 which states that the provincial measure “completely eliminates” the ability to exercise the right. A further complication which not be addressed here is the role played by Section 88 of the *Indian Act* other than to note that the passage at para 55 which states that the division of powers is “dealt with” in Section 88 seems to raise apparent doctrinal problems.

²⁰⁷⁰ *Delgamuukw*, *supra* note 22.

²⁰⁷¹ *Lafarge*, *supra* note 2060.

²⁰⁶⁴ The potential utility of the Haida framework in promoting useful dialogue between aboriginal peoples and the Crown has been explored in Chapters 9 and 14, especially Section 14.11.

²⁰⁷³ Jean Leclair, “The Kitkatla Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters” (2003) 21 Sup Ct L Rev 73.

²⁰⁷⁴ *Ibid.*

²⁰⁷⁵ *Paul*, *supra* note 1889.

²⁰⁷⁶ This technique was used by McLachlin J. in her dissenting opinion in *Van der Peet*, *supra* note 8.

²⁰⁷⁷ *NIL TUO*, *supra* note 2060.

²⁰⁷⁸ The observations of the Court on grand-fathering existing jurisprudential approaches are particularly salient for questions about the application of provincial laws to statutory Indian reserves, especially when read functionally as a desire to not upset existing expectations that have developed over time. The legal regime for the reserves should be preserved but it may not be necessary to rely on inter-jurisdictional immunity to reach this result. Also, the long-standing role of provincial legislatures in regulating activities on Crown lands also has led to reasonable expectations. As stated in *Canadian Western Bank*, *supra* note 2060 at para 52 it is more important to look at what courts do than what they say. An important issue is the extent to which the “grand-fathering” of precedents dealing with Indian reserves should be applied to situations outside statutory Indian reserves. This is particularly so if the underlying rationale of applying these precedents is to not upset expectations that have developed over a long period of time.

²⁰⁷⁹ An important issue is the degree to which federal paramountcy provides an alternative to reliance on inter-jurisdictional immunity and a better explanation for prior precedents that have often been explained in terms of inter-jurisdictional immunity. In the context of Section 91(24), key cases such as *Derrickson v Derrickson*, [1986] 1 SCR 285, seem particularly amenable to a reinterpretation based on paramountcy. See also: *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 at para 54 (paramountcy is “more supple” as a tool); *Chaterjee*, *supra* note 2060 at para 30 (previous case reassessed in terms of present understanding of the constitutional jurisprudence); *Osoyoos*, *supra* note 1541 at paras 45-47 (reminder of the similarities and differences between reserve lands and title lands)

²⁰⁸⁰ *Morris*, *supra* note 1497.

²⁰⁸¹ *Moses*, *supra* note 1829; *Mining Watch*, *supra* note 1829, *Haida*, *supra* note 13 at para 51- strong support of federal-provincial cooperation and inter-delegation arrangements; *Fédération des producteurs de volailles du Québec v Pelland*, (2005) 1 SCR 292 at paras 4, 38.

²⁰⁸² *Sparrow*, *supra* note 969; *Gladstone*, *supra* note 1267; *Delgamuukw*, *supra* note 22; *Tsilhqot'in*, *supra* note 1290; *Ahousaht*, *supra* note 1501.

²⁰⁸³ There have been very few cases where justification arguments have been assessed. Most cases do not reach the justification stage or arguments have not been presented - *Marshall*, *supra* note 38; *Van der Peet*, *supra* note 8; *Sappier*, *supra* note 1289.

²⁰⁸⁴ Newman, "Reconciliation", *supra* note 288 at 81- derivation of justification test from Slaterry article, though he doubts it is textually supported by the article. Ross, "Sacred Sites", *supra* note 30 at 186- (evolution of the justification test)

²⁰⁸⁵ This issue is dealt with in Section 17.3 of this thesis.

²⁰⁸⁶ This issue can be considered both from a legal and constitutional perspective and from the perspective of political theory and philosophy. It will be seen that a shared theme of dialogue emerges from each body of literature.

²⁰⁸⁷ *Gladstone*, *supra* note 1267 at para 73; *Delgamuukw*, *supra* note 22 at paras 160-168, see also *Powley*, *supra* note 533 at paras 40, 44, 49, 50; *Bernard*; *Marshall*, *supra* note 38 at paras 31, 39; *Badger*, *supra* note 707 at para 93.

²⁰⁸⁸ Walters, "Morality of Aboriginal Law", *supra* note 720 (strong argument that reconciliation should be a two way street is deeply connected to the idea that justification should have a dialogical foundation); Walters, Mark, "Reconciliation", *supra* note 972 at 33 (further development of this idea); McNeil, Kent, "Envisaging Space for Aboriginal Government", (1993) 19 Queen's L.J. 95; Kent McNeil "How can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8 Constitutional Forum 33; Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17(2) C.J.L.S 41 at 70; Jenkins, "Marshall Court", *supra* note 952 at 24; Borrows, *Canada's Indigenous Constitution*, *supra* note 93 at 209; Newman, "Reconciliation", *supra* note 288 at 81; Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests" (1999), 62 Sask L Rev 543; Lambert, "Aboriginal Title", *supra* note 963 at 34, 41 (interesting because of the effort made to incorporate Haida principles into the justification test); McIntosh, "Reconciliation Doctrine", *supra* note 490 at 11 ("...erosion of Aboriginal rights for the general social good"); Lisa Dufraimont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 UT Fac L Rev 1.

²⁰⁸⁹ The work of Robert Pildes is very helpful in understanding this structural elements of rights claims- see Richard H Pildes, "The Structural Conception of Rights and Judicial Balancing" (2002) 6 Rev of Constitutional Studies 179

²⁰⁹⁰ Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, 2007); Rainer Forst "First Things First: Redistribution, Recognition and Justification (2007) 6 European J. Political Theory 291; Rainer Forst, "Foundations of a Theory of Multicultural Justice" (1997) 4 Constellations 63; see also Liston, "Honest Counsel" *supra* note 615 (development of an ethos of justification in Canadian law); There are many parallels with Robinson's notion of "justificatory reciprocity"- see generally: Robinson, *Multiculturalism and the Foundations of Meaningful Life*, *supra* note 50.

²⁰⁹¹ Forst, "Foundations", *ibid* at 63-64 (the requirement to justify is triggered by any morally relevant interference)

²⁰⁹² Laden, "Negotiation, Deliberation and the Claims of Politics" *supra* note 90.

²⁰⁹³ Panagos, "Plurality of Meanings", *supra* note 84 at 608 (link between justification and reconciliation)

²⁰⁹⁴ A theme that pervades the whole body of Kent McNeil's work is the normative need to provide equal treatment to aboriginal and non-aboriginal property interests. This is particularly clear in his arguments against the restriction on alienability and the imposition of an internal limit on aboriginal title, restrictions that do not apply to non-aboriginal interests.

²⁰⁹⁵ The notion of minimal impairment that is an established part of the Section 1 *Oakes* test (*R v Oakes*, [1986] 1 SCR 103) in Canadian constitutional jurisprudence is also seen in *Osoyoos*, *supra* note 1591 which deals with the permissible scope of expropriation of a reserve interest under the Indian Act. See also, Senwung Luk, "Justified Infringement: A Minimal Impairment Approach" (2013) 25 J Env L & Pract 169.

²⁰⁹⁶ The notion of constitutional patriotism is discussed in Section 10.2 of this thesis.

²⁰⁹⁷ *Ahousaht*, *supra* note 1498.

²⁰⁹⁸ The work of Laden on dialogue and deliberation is considered in Chapter 9 of this thesis.

²⁰⁹⁹ McNeil and Yarrow, "Has the Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?", *supra* note 1311.

²¹⁰⁰ *Manitoba Métis Federation*, *supra* note 13 at para 215 - rift in national fabric.

²¹⁰¹ Washburn, "Moral and Legal Justifications", *supra* note 68.

²¹⁰² Laden, "Negotiation, Deliberation and the Claims of Politics", *supra* note 90 at 3- notion of deliberation.

²¹⁰³ Macklem, "Indigenous Difference", *supra* note 705 at 208-209

²¹⁰⁴ Pommersheim, "At the Crossroads", *supra* note 979 at 48

²¹⁰⁴ *Constitution Act, 1982*, *supra* note 1.

BIBLIOGRAPHY

LEGISLATION

An Act to Amend the Canadian Human Rights Act, SC 2008, c 30.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K) 1982, c 11, ss. 25, 35, 35.1, 37.

Indian Act, RSC 1927, c 98.

Indian Residential Schools Settlement Agreement (IRSSA), May 8, 2006.

Labrador Inuit Land Claims Agreement Act, SC 2005, c 27.

Nisga'a Final Agreement Act, SC 2000, c 7.

Nunavut Act, SC 1993, c 28.

Nunavut Land Claims Agreement Act, SC 1993, c 29.

Royal Proclamation, 1763, RSC, 1985, App 11, No 1.

Specific Claims Tribunal Act, SC 2008, c 22.

Tlicho Land Claims and Self-Government Act, SC 2005, c 1.

JURISPRUDENCE

Ah-Kwa-Mish First Nation v AG Canada et al, 2012 FC 517.

Adams Lake Indian Band v British Columbia, 2011 BCSC 266.

Adams Lake Indian Band v Lieutenant Governor in Council, 2012 BCCA 333.

Adams Lake Indian Band v British Columbia (Ministry of Forests, Lands and Natural Resources Operations), 2013 BCSC 977.

Ahousaht Indian Band v Canada (Attorney General), 2011 BCCA 237.

Ahousaht Indian Band v Canada (Attorney General), 2012 BCCA 404.

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia, [2013] HCA 33.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37.

Amodu Tijani v Southern Nigeria (Secretary), [1921] 2 AC 399 (JCPC).

Andrews v Law Society of British Columbia, [1989] 1 SCR 143.

Athabasca Chipewyan First Nation v Alberta (Minister of Energy), 2010 ABCA 137.

Athabasca Regional Government v Canada (Attorney General), 2010 FC 948.

Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development, [1980] 1 FC 518 (TD)

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 533, [2010] 3 SCR 103.

Behn v Moulton Contracting Ltd, 2013 SCC 25, [2013] 2 SCR 227.

Blueberry River Indian Band v Canada (Department of Indian and Northern Affairs), [1995] 4 SCR 4.

British Columbia (Attorney General) v Lafarge Canada Inc, 2007 SCC 29.

British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71.

Brokenhead First Nation v Canada, 2009 FC 982.

Brown v Canada (Attorney General), 2013 ONCA 18.

Calder v British Columbia (Attorney-General), [1973] SCR 313.

Calder et al v AG (BC), [1970] BCJ No 632.

Campbell v British Columbia (AG), [2000] BCJ No 1524

Canada (AG) v Anderson, 2011 NLCA 82.

Canada v Brokenhead First Nation, 2011 FCA 148.

Canada (Attorney General) v Hislop, [2007] 1 SCR 429 .

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44.

Canada (Attorney General) v Lameman, 2008 SCC 14.

Canadian Western Bank v Alberta, 2007 SCC 22.

Casimel v Insurance Corporation of British Columbia, (1993) 106 DLR (4th) 720.

Chartrand v The District Manager, 2010 BCSC 1068.

Chaterjee v Ontario (Attorney General), 2009 SCC 19.

Cherokee Nation v Georgia, 30 US (6 Pet) 515 (1832).

Cheslatta Carrier Nation v British Columbia, 2000 BCCA 539

Coe v Commonwealth (No.1), (1979) 24 ALR 118.

Coe v Commonwealth (No. 2), (1993) 118 ALR 193.

Constant c Québec (PG), 2003 CanLII 47824 (QC CA)

Cold Lake First Nation v Alberta (Energy Resources Conservation Board), 2012 ABCA 137.

Cold Lake First Nation v Alberta (Energy Resources Conservation Board), 2012 ABCA 304.

Combined Air Mechanical Services Inc v Flesch, 2011 ONCA 764.

Connolly v Woolrich and Johnson et al, (1867) 17 RJRQ 75.

Corbière v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203.

Daniels v Canada, 2013 FC 6.

De la Pena v Newfoundland, (1986) 63 N & PEI Reports 356.

Delgamuukw v British Columbia, [1997] 3 SCR 14.

Derrickson v Derrickson, [1986] 1 SCR 285.

Drew v Newfoundland and Labrador (Minister of Government Services and Lands), 2006 NLCA 5.

Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.

Ermineskin Indian Band and Nation v Canada, 2009 SCC 9; [2009] 1 SCR 222.

Fédération des producteurs de volailles du Québec v Pelland, (2005) 1 SCR 292.

Fletcher v Peck, (1810) 10 US 87.

Frontenac Ventures Corporation v Ardoch Algonquin First Nation, 2008 ONCA 534.

Gitxaala Nation v Canada (Transport, Infrastructure and Communities), 2012 FC 1336.

Greater Vancouver Transportation Authority v Canadian Federation of Students- British Columbia Component, 2009 SCC 31, [2009] 2 SCR 295.

Guerin v The Queen, [1984] 2 SCR 335.

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73.

Halalt First Nation v BC (Environment), 2011 BCSC 945.

Halalt First Nation v British Columbia, 2012 BCCA 472.

Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council, (2006) 82 OR (3d) 721.

L'Hirondelle v Alberta (Sustainable Resource Development), 2013 ABCA 12.

In re Southern Rhodesia, [1919] AC 211 (JCPC).

Jack and Charlie v The Queen, [1985] 2 SCR 732.

Johnson v M'Intosh, 21 US (8 Wheat) 523 (1823).

Joly c Québec (PG), 2003 CanLII 47911 (QC CA).

Ka'A'Gee Tu First Nation v Canada (AG), 2012 FC 297

KLB v British Columbia, [2003] 3 SCR 403

Keewatin v Ontario (Natural Resources), 2013 ONCA 158.

Kennedy v Mendoza-Martinez, (1963) 372 US 144.

Kingstreet Investment Ltd v New Brunswick (Finance), 2007 SCC 1, [2007] 1 SCR 3.

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31.

K'omoks First Nation v Attorney General of Canada et al, 2012 FC 1160 .

Kwtkwetlum First Nation v BC (Utilities Commission), 2009 BCCA 68.

Lalonde v Commission de restructuration des services de santé, (2001) 208 DLR (4th) 577 (On CA)

Lameman v Alberta, 2013 ABCA 148.

Lapierre v AG (QC), [1985] 1 SCR 241.

Law Society of British Columbia v Mangat, 2001 SCC 67, [2001] 3 SCR 113.

Lax Kwa'laams Indian Band v Canada (Attorney General), [2011] 3 SCR 535.

Leslie Weribone & Ors. On behalf of the Madandangi People v The State of Queensland & Ors, [2013] FCA 255

Long Plain First Nation v Canada, 2012 FC 1474.

Lovelace v Ontario, 2000 SCC 37; [2000] 1 SCR 950.

Mabo v Queensland (No 2), (1992) 175 CLR 1.

Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick, 2002 SCC 13, [2002] 1 SCR 405.

Manitoba Métis Federation Inc v Canada (Attorney General), 2013 SCC 14, [2013] 1 SCR 623.

Marine Services International Ltd v Ryan Estates, [2013] 3 SCR 53.

McDiarmid Lumber Ltd v God's Lake First Nation, 2006 SCC 58.

McIvor v Canada, 2009 BCCA 152.

Members of the Yorta Yorta Aboriginal Community v Victoria, (2002) 77 ALJR 356 (High Ct Aust)

Métis Nation of Alberta Region 1 v Joint Review Panel, 2012 ABCA 352.

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69.

Mining Watch Canada v Canada (Fisheries and Oceans), 2010 SCC 2, [2010] 1 SCR 6.

Mitchell v MNR, 2001 SCC 33, [2001] 1 SCR 911.

Moosehunter v The Queen, [1981] 1 SCR 282.

Nalcor Energy v Nunatukavut Community Council Inc, 2012 NL TD(G) 175.

Newfoundland and Labrador v Abitibi Bowater Inc, 2012 SCC 67.

Newfoundland and Labrador v Labrador Métis Association, 2007 NLCA 75.

NIL 'TU, O Child and Family Services Society v BC Government and Services Employees Union, 2010 SCC 45, [201] 2 SCR 698.

Nisgha Tribal Council v British Columbia (Attorney-General), [1969] BCJ No 53.

Nlaka'pamux Native Tribal Council v Grigan, 2009 BCSC 125.

NTI v Canada (AG), 2012 NUCJ 11.

Nor-man Regional Health Inc v Manitoba Association of Health Care Professionals, 2011 SCC 59.

Nunavut Tunngavik Incorporated and The Attorney General of Canada and the Commissioner of Nunavut as represented by the Government of Nunavut, 08-06-713- CVC (Nunavut Court of Justice).

Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corp (Nalcor Energy), 2011 NL TD(G) 44.

Ontario (Attorney General) v Bear Island Foundation, [1991] 2 SCR 570.

Ontario (Attorney General) v OPSEU, [1987] 2 SCR 2.

Osoyoos Indian Band v Oliver (Town), 2001 SCC 85; [2001] 3 SCR 746.

Paul v British Columbia (Forest Appeals Commission), 2003 SCC 55, [2003] 2 SCR 585.

Peguis First Nation v Canada (Attorney General), 2013 FC 276.

Province of Ontario v Dominion of Canada, (1909) 42 SCR 1

Quebec (AG) v A, 2013 SCC 5, [2013] 1 SCR 61.

Quebec (AG) v Lacombe, 2010 SCC 38.

Quebec (AG) v Canada (Human Resources and Social Development), 2011 SCC 60.

Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39.

Quebec (Attorney General) v Moses, 2010 SCC 17.

Québec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal, 2004 SCC 30, [2004] 1 SCR 789.

R v Adams, [1996] 3 SCR 101.

R v Badger, [1996] 1 SCR 771.

R v Bernard, 2003 NBCA 55.

R v Caron, 2011 SCC 5.

R v Côté, [1996] 3 SCR 139.

R v Gladstone, [1996] 2 SCR 723.

R v Gladue, [1999] 1 SCR 688.

R v Hape, 2007 SCC 26, [2007] 2 SCR 292.

R v Hirsekorn, 2013 ABCA 242

R v Horseman, [1995] 1 SCR 901.

R v Howard, [1994] 2 SCR 299.

R v Ipeelee, 2012 SCC 58.

R v Kang-Brown, 2008 SCC 18, [2008] 1 SCR 456.

R v Kapp, 2008 SCC 41, [2008] 2 SCR 483.

R v Law, 2002 SCC 10, [2002] 1 SCR 227.

R v Lefthand, 2007 ABCA 206.

R v Marshall, [1999] 3 SCR 533.

R v Marshall; R v Bernard, 2005 SCC 43, [2005] 2 SCR 220.

R v Morris, 2006 SCC 59, [2006] 2 SCR 915.

R v NTC Smokehouse Ltd, [1996] 2 SCR 672.

R v Oakes, [1986] 1 SCR 103.

R v Pamajewon, [1986] 2 SCR 321.

R v Powley, 2003 SCC 43, [2003] 2 SCR 207.

R v Sappier, 2008 SCC 54, [2008] 2 SCR 483.

R v Secretary of State for Foreign and Commonwealth Affairs, [1981] 4 CNLR 86 (Eng CA)

R v Sioui, (1990) 1 SCR 1025.

R v Sparrow, [1990] 1 SCR 1075.

R v Sundown, [1999] 1 SCR 393.

R v Van der Peet, [1996] 2 SCR 509.

R v Williams, (1994) 3 CNLR 173 at 175 (BCCA).

R v White and Bob, [1965] SCJ No 80.

Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others, [2005] UKHL 41, [2005] 4 All ER 209.

Re Application by Hydro One Networks Inc for an Order granting leave to construct to upgrade existing transmission line facilities (November 8, 2012) EB-2012-0082, online: OEB <http://www.hydroone.com/Projects/Lambton/Documents/dec_order_HONI_20121108.pdf>

Reference re Secession of Quebec, [1998] 2 SCR 217.

Reference re Senate Reform, 2014 SCC 32.

Rice v New Brunswick, 2002 SCC 13.

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 SCR 650.

Ross River Council v Canada, 2013 YKCA 6.

Ross River Dene Council v Attorney General of Canada, 2012 YKSC 4.

Ross River Dene Council v Government of Yukon, 2012 YKCA 14.

Sga'nisim Sim'aigit (Chief Mountain) v Canada (Attorney General), 2013 BCCA 301.

Sambaa K'e Dene Band v Duncan, 2012 FC 204.

Santa Clara Pueblo v Martinez, (1978) 436 US 49.

Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancies), 2013 BCCA 262.

Simon v The Queen, [1985] 1 SCR 387.

St Catherine's Milling and Lumber Co v The Queen, (1888) 14 App Cas 46.

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550.

Thomas v Norris, (1992) CNLR 139 (BCSC) .

Tsilhqot'in Nation v British Columbia, 2007 BCSC 1700.

Tzeachten First Nation v Canada (Attorney General), 2009 FCA 337.

Uukw et al v The Queen in Right of British Columbia and Registrar, Prince Rupert Land Title District, [1988] 1 CNLR 173.

Vancouver (City) v Ward, 2010 SCC 27.

Wahgoshig First Nation v Ontario, 2011 ONSC 7708; *Wahgoshig First Nation v Solid Gold Resources Corp*, 2012 ONSC 2323 (Ont Div Ct).

Walker v New South Wales, (1994) 182 CLR 45 (HCA).

Walter Twinn, The Council of the Sawridge Band and The Sawridge Band v Elizabeth Bernadette Poitras and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, 2012 FCA 47.

West Moberly First Nation v BC (Chief Inspector of Mines), 2011 BCCA 247, leave to appeal to the SCC refused, 34403 (February 23, 2012).

Western Australia v Brown, [2014] HCA 8.

Wewaykum Indian Band v Canada, 2003 SCC 45, [2003] 4 SCR 245.

William v British Columbia, 2012 BCCA 285.

Wii'litswx v British Columbia (Minister of Forests), 2008 BCSC 1139

Worcester v Georgia, 31 US (6 Pet) 515 (1832).

Yellowknives Dene First Nation v Canada (Attorney General), 2010 FC 1139.

Québec (PG) c Young, 2003 CanLII 47908 (QC CA).

SECONDARY MATERIALS: MONOGRAPHS

Alienikoff, Alexander, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, 2002)

Alfred, Taiaiake, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Oxford University Press, 1999)

Alfred, Taiaiake, *Wasase: Indigenous Pathways of action and freedom* (Broadview Press, 2005)

Anderson, Amanda, *The Way we Argue Now: A Study in the Culture of Theory* (Princeton, 2006)

Anderson, Benedict, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991)

Anghie, Anthony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2003)

Arneil, Barbara, *John Locke and the Defence of English Colonialism* (Oxford University Press, 1996)

Arneil, Barbara, *The Problem with Social Capital* (Cambridge University Press, 2006)

Austin, Raymond D, *Navaho Courts and the Navajo Common Law: A Tradition of Tribal Self-Governance* (Minnesota University Press, 2009)

Aylward, Carol A, *Canadian Critical Race Theory: Racism and the Law* (Fernwood Publishing, 1999)

Balkin, Jack, *Living Originalism* (Belknap Press, Harvard University Press, 2011)

Bankes, Nigel & Koivurova, Tino, eds, *The Proposed Nordic Sami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, 2013)

Barkin, Elazor, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (John Hopkins, 2000)

Barry, Brian, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2002)

Battiste, Marie, ed, *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000)

Bélanger, Yale, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Purich Publishing, 2008)

- Bell, Catherine Edith & Kahane, David Joshua, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (University of British Columbia Press, 2005)
- Benton, Lauren, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press, 2010)
- Richard Bellamy, *Citizenship: A Very Short Introduction* (Oxford University Press, 2008)
- Belmessous, Salila, ed, *Native Claims: Indigenous Law Against Empire, 1500-1920* (Oxford: Oxford University Press, 2011)
- Benhabib, Seyla, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002)
- Benhabib, Seyla, *Another Cosmopolitanism* (Oxford University Press, 2008)
- Bickerton, James & Gagnon, Alain G, *Canadian Politics*, 3d ed (Toronto: University of Toronto Press, 2001)
- Borrows, John, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002)
- Borrows, John, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010)
- Borrows, John, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). 116
- Breton, Albert, ed, *Multijuralism: Manifestations, Causes, and Consequences* (Ashgate Publishing, 2009)
- Bruynell, Kevin, *The Third Space of Sovereignty: The Post-Colonial Politics of US-Indian Relations* (University of Minnesota Press, 2007)
- Butterfield, Herbert, *The Whig Interpretation of History* (Newton, 1965)
- Cairns, Alan, *Citizens Plus: Aboriginal Peoples and the Canadian State* (University of British Columbia Press, 2000)
- Cairns, Alan, "First Nations and the Canadian State: In Search of Co-Existence", 2002 Kenneth A. MacGregor Lecturer, Institute of Intergovernmental Relations, School of Policy Studies, Queen's University
- Cardinal, Harold & Hildebrandt, Walter, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will one Day be Recognized as Nations* (Calgary: University of Calgary Press, 2000)

Carens, Joseph, *Culture, Citizenship, and Community: Contextual Political Theory and Justice* (Oxford: Oxford University Press, 2000)

Cassidy, Frank, ed, *Aboriginal Title in British Columbia* (Oolichan Books, 1992)

Chamberlin, J Edward, *If this is your land, where are your stories? Finding Common Ground* (Knopf Canada, 2003)

Christie, Gordon, ed, *Aboriginality and Governance: A Multidisciplinary Perspective* (Theytus Books, 2006)

Christie, Gordon, ed, *Aboriginal Society and Aboriginal Rights: A Multidisciplinary Perspective from Quebec* (Theytus Books, 2006)

Christie, Gordon, *Aboriginal Nationhood and the Inherent Right to Self-Government*, Research Paper for the National Centre for First Nations Government, 2007

Chua, Amy, *Days of Empire: How Hyperpowers Rise to Global Dominance an- and Why they Fall* (Doubleday, 2007)

Clark, Bruce, *Indian Title in Canada* (Carswell, 1987)

Clark, Bruce, *Native Liberty, Crown Sovereignty* (Montreal: McGill-Queen's University Press, 1990)

Cohen, JM Howard & MC Nussbaum, *Is Multiculturalism Bad for Women?* (Princeton University Press, 1999)

Connolly, William E, *Pluralism* (Duke, 2006)

Cook, Curtis & Landau, Juan D, *Aboriginal Rights and Self-Government* (Montreal: McGill-Queen's Press, 2000)

Curry, Steven, *Indigenous Sovereignty and the Democratic Project* (Ashgate, 2004)

Davis, Lynne, *Alliances: Re/Envisioning Indigenous-non-Indigenous Relations* (Toronto: University of Toronto Press, 2010)

Day, David, *Conquest: How Societies Overwhelm Others* (Oxford: Oxford University Press, 2008)

Deveaux, Monique, *Gender and Justice in Multicultural States* (Oxford: Oxford University Press, 2006)

Dhamoon, Rita, *Identity/Difference Politics: How Difference is Produced and Why it Matters* (University of British Columbia Press, 2009)

Dodek, Adam & Jutras, Daniel, *Le Feu Sacré: l'héritage d'Antonio Lamer/ The Sacred Fire: The Legacy of Antonio Lamer* (LexisNexus, 2009)

Dorsett, Shaunnagh & Hunter, Ian, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave-Macmillan, 2010)

Dupuis, Renée, *Le statut juridique des peuples autochtones en droit canadien* (Carswell, 1999)

Dupuis, Renée, *Tribus, Peuples et Nations: Les nouveaux enjeux des revendications autochtones au Canada* (Boréal, 1997)

Dworkin, Ronald, *Justice for Hedgehogs* (Belknap: Harvard, 2011)

Dworkin, Ronald, *Taking Rights Seriously* (Harvard University Press, 1978)

Dysenhaus, D, Hunt M & Huscraft, G, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009)

Eisenberg, Avigail & Spinner-Halev, Jeff, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press, 2005)

Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006)

Eisenberg, Avigail, *Reasons of Identity: A normative guide to the political and legal assessment of identity claims* (Oxford: Oxford University Press, 2009)

Elliott, David, *Law and Aboriginal Peoples of Canada*, 2nd ed (Captus Press, 1994)

Evans, Julie, Genovese, Reilly & Alexander Wolfe, Patrick, *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013)

Ferguson, Niall, *Civilization: The West and the Rest* (The Penguin Press, 2011)

Festenstein, Matthew, *Negotiating Diversity: Culture, Deliberation, Trust* (Polity Press, Oxford, 2005)

Flanagan, Tom, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000)

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

Ford, Lisa, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia, 1788-1836* (Harvard University Press, 2011)

- Ford, Lisa & Rowse, Tim, *Between Indigenous and Settler Governance* (Routledge, 2011)
- Forst, Rainer, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, 2007)
- Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)
- Foster, Hamar, Berger, Benjamin & Buick, DR, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (University of British Columbia Press, 2008)
- Fraser, Nancy & Honneth, Axel, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso, 2003)
- Gagnon, Alain G & Iacovino, Raffaele, *Federal Citizenship and Quebec: Debating Multiculturalism* (Toronto: University of Toronto Press, 2007)
- Gaita, Raymond, *A Common Humanity: Thinking about Love and Truth and Justice* (Routledge, 1990)
- Gallagher, Bill, *Resource Rulers: Fortune & Folly on Canada's Road to Resources* (Self-Published, 2012)
- Gibson, Gordon, *A New Look at Canadian Indian Policy* (Fraser Institute, 2009)
- Gilbert, Martin, *Churchill and the Jews: A Lifelong Friendship* (Henry Holt, 2007)
- Gill, Ian, *All That we Say is Ours: Guujaaw and the Reawakening of the Haida Nation* (Douglas & McIntyre, 2009)
- Gladwell, Malcolm, *Outliers: The Study of Success* (Little-Brown, 2008)
- Gover, Kirsty, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, 2010)
- Grammond, Sébastien, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queens University Press, 2009)
- Grammond, Sébastien, *Terms of Co-Existence: Indigenous Peoples and Canadian Law* (Carswell, 2013)
- Graham, John & Lévesque, François, *First Nations Communities in Distress: Dealing with Causes, Not Symptoms*, (Institute of Governance, 2010)
- Gray, John, *Two Faces of Liberalism* (New Press, 2000)
- Guess, Raymond, *Philosophy and Real Politics* (Princeton University Press, 2008)

- Guibernau, Monserrat, *The Identity of Nations* (Polity Press, 2007)
- Gutman, Amy, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, 1994)
- Haddock, Bruce & Sutch, Peter, *Multiculturalism, Identity and Rights* (Routledge, 2003)
- Halley, Janet, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, 2006).
- Harty, Siobhan & Murphy, Michael, *In Defence of Multicultural Citizenship* (University of Wales Press, 2005)
- Havercroft, Jonathan, *Captives of Sovereignty* (Cambridge University Press, 2011)
- Helin, Calvin, *Dances with Dependency: Out of Poverty Through Self-Reliance* (Orca Spirit Publishing, 2006)
- Henderson, Sakej, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Native Law Centre, University of Saskatchewan, 2006)
- Hendrix, Burke, *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (Penn State Press, 2008)
- Hickford, Mark, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, 2011)
- Hoehn, Felix, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Native Law Centre, Saskatoon, 2012)
- Honig, Bonnie, *Political Theory and the Displacement of Politics* (Cornell University Press, 1993)
- Hseuh, Vicki, *Hybrid Constitutions: Making and Unmaking Power and Privilege in Colonial America* (Duke University Press, 2010)
- Hulan, Renée & Renate Eigenbrod, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Fernwood Publishing, 2008)
- Huscroft, Grant, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008)
- Huscroft, Grant & Miller, Bradley W, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2012)
- Irlbacker-Fox, Stephanie, *Finding Dahshha: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (University of British Columbia Press, 2009)
- Isaac, Thomas, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed (Purich, 2004)

Iverson, Duncan, Patton, Paul & Sanders, Will, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000)

Iverson, Duncan, *Postcolonial Liberalism* (Cambridge, 2002)

Jorgensen, Miriam, *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007)

Jung, Courtney, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge University Press, 2008)

Kahane, David, Weinstock, Daniel, Leydet, Dominique & Williams, Melissa, eds, *Deliberative Democracy in Practice* (University of British Columbia Press, 2010)

Katz, Larissa, *Exclusion and Exclusivity in Property Law*, 2008 Legal Studies Research Paper Series No. 08-02.

Keal, Paul, *European Conquest and the Backwardness of European Society* (Cambridge University Press, 2003)

Kelly, James B & Manfredi, Christopher B, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (University of British Columbia Press, 2009)

Kernerman, Gerald & Resnick, Philip, *Insiders or Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship* (University of British Columbia Press, 2004)

Kernerman, Gerald, *Multicultural Nationalism: Civilizing Difference, Constituting Community* (University of British Columbia Press, 2005)

Knafla, Louis A & Westra, Haijo, eds, *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (University of British Columbia Press, 2010)

Kolers, Avery, *Land, Conflict, and Justice: A Political Theory of Title* (Cambridge, 2011)

Kuhn, Thomas, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996)

Kukathas, Chandran, *Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, 2003)

Kymlicka, Will, *Liberalism, Community, and Culture* (Oxford University Press, 1989)

Kymlicka, Will, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford University Press, 1998)

Kymlicka, Will, *Multicultural Citizenship* (Oxford University Press, 1995)

Kymlicka, Will, *Politics in the Vernacular* (Oxford University Press, 2001)

Kymlicka, W & Bashir, B, *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008)

Kymlicka, Will, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, 2009)

Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Ladner, Kiera, *Indigenous Governance: Questioning the Status and Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights*, Research Paper for National Centre for First Nations Governance, 2006

Lajoie, Brisson, Normand & Bissonette, *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville : Éditions Yvon Blais, 1996)

Lajoie, Andrée, *Conceptions autochtones des droits ancestraux au Québec* (LGDJ/Les Éditions Themis, 2008).

Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum* (2001)

Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Minister of Public Works and Government Services, 2006)

Lessard, Hester, Johnson, Rebecca & Webber, Jeremy, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: University of British Columbia Press, 2011)

Levy, Jacob T, (with Iris Marion Young), *Colonialism and Its Legacies* (Lexington Books, 2011)

Loxley, John, *Aboriginal, Northern, and Community Economic Development: Papers and Retrospectives* (Arbeiter Ring Publishing, 2010)

Lukes, Steven, *Liberalism and Cannibals: The Implications of Diversity* (Verso, 2005)

Lutz, John, *Myth Understandings: First Contact, Over and Over Again: Rethinking Stories of Indigenous-European Contact* (University of British Columbia Press, 2007)

Lutz, John, *Makuk: A New History of Aboriginal-White Relations* (Vancouver: University of British Columbia Press, 2008)

Macedo, Stephen & Buchanan, Allen, eds, *Secession and Self-Determination: Nomos XLV* (New York University Press, 2003)

Macklem, Patrick, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001)

- Markell, Patchen, *Bound by Recognition* (Princeton, 2003)
- McHugh, Paul G, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004)
- McHugh, Paul G, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press: Oxford, 2011)
- Alasdair McIntyre, *After Virtue* (University of Notre Dame Press, 1981)
- Miller, Bradley W, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2012)
- Miller, Bruce Granville, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (University of British Columbia Press, 2011)
- Miller, JR, *Skyscrapers, Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000)
- Miller, JR, *Lethal Legacies: Current Native Controversies in Canada* (McClelland-Stewart Ltd, 2004)
- Miller JR, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (McClelland-Stewart Ltd, 2004)
- Miller, Jon & Kumar, Rahul, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007)
- Miller, Robert J, Ruru, Jacinta, Behrendt, Larissa & Lindberg, Tracey, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010)
- Miller, Robert J, *Reservation Capitalism: Economic Development in Indian Country* (University of Nebraska Press, 2012)
- Monture-Angus, Patricia, *Journeying Forward: dreaming First Nations Independence* (Fernwood Publishing, 1999)
- Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)
- Mouffe, Chantal, *The Democratic Paradox* (Verso, 2000)
- Nelson, Camille A & Nelson, Charmaine, *Racism Eh? A Critical Inter-Disciplinary Anthology of Race and Racism in Canada* (Captus Press, 2004)

Newman, Dwight, *The Duty to Consult: New Relationships with Aboriginal People* (Purich, 2009)

Niezen, Ronald, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003)

Niezen, Ronald, *The Rediscovered Self: Indigenous Identity and Cultural Justice* (Montreal: McGill-Queen's Press, 2009)

Noreau, Pierre, ed, *Gouvernance autochtone: réconfiguration d'un avenir collectif: nouvelles perspectives et processus émergents* (Les Éditions Thémis, 2010)

Nozick, Robert, *Anarchy, State and Utopia* (Blackwell Publishers, 1974)

Nussbaum, Martha C, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press, Harvard, 2006)

Oppenheimer, Franz, *The State* (Black Rose Books, 2007)

Otis, Ghislain, *L'adoption coutumière autochtone et les défis du pluralisme juridique* (Presses de l'Université Laval, 2013)

Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l'Université Laval, 2013)

Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Purich Press, 2011)

Passelac-Ross, Monique M & Veronica Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development" Is it Adequate, Is it Legal?*, CIRL Occasional Paper # 19, May 2007

Peach, Ian & Romanow, eds, *Constructing Tomorrow's Federalism: New Perspectives on Canadian Governance* (University of Manitoba Press, 2007)

Penikett, Tony, *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas & McIntyre, 2006)

Plamenetz, John, *Consent, Freedom and Political Obligation* (Oxford University Press, 1968)

Pommersheim, Frank, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 2009)

Povinelli, Elizabeth, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002)

Putnam, Robert D, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000)

- Raphael, DD, *Problems of Political Philosophy* (Pall Mall Press, 1970)
- Rawls, John, *A Theory of Justice* (Belknap Press, Harvard University, 1971)
- Ray, Arthur J, Miller, Jim & Tough, Frank, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2001)
- Ray, Arthur J, *Telling it to the Judge: Taking Native History to Court* (Montreal: McGill-Queen's University Press, 2011)
- Regan, Paulette, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (University of British Columbia Press, 2011)
- Resnick, Philip, *The European Roots of Canadian Identity* (Broadview Press, 2009)
- Richards, John, *Creating Choices: Rethinking Aboriginal Policy* (CD Howe Institute, 2007)
- Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)
- Robinson, Andrew, *Multiculturalism and the Foundations of Meaningful Life: Reconciling Autonomy, Identity and Community* (University of British Columbia Press, 2005)
- Rocher, François & Smith, Miriam, *New Trends in Canadian Federalism* (Broadview Press, 2003)
- Ross, Michael Lee, *First Nations Sacred Sites in Canada's Courts* (University of British Columbia Press, 2005)
- Rotman, Leonard I, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996)
- Saul, John Ralston, *A Fair Country: Telling Truths About Canada* (Viking Canada, 2008)
- Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007)
- Schaap, Andrew, *Political Reconciliation* (Routledge, 2005)
- Schaap, Andrew, ed, *Law and Agonistic Politics* (Farnham, Ashgate, 2009)
- Schlosberg, David, *Environmental Justice and the New Pluralism: The Challenge of Difference and Environmentalism* (Oxford University Press, 1998)
- Schouls, Timothy, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Determination* (University of British Columbia Press, 2003)

Secher, Ulla, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014)

Shabani, Omid Payrow, ed, *Multiculturalism and Law: A Critical Debate* (University of Wales Press, 2007)

Sharpe, Robert J & Kent Roach, *Brian Dickson: A Judge's Journey* (Osgoode Society for Canadian Legal History, 2003)

Shaw, Karena, *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (Routledge, 2008)

Simpson, Leanne, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Arbeiter Ring Publishing, 2008)

Simpson, Leanne & Ladner, Keira L, *This is our Honour Song: Twenty Years Since the Blockades* (Arbeiter Ring Publishing, 2010)

Slowey, Gabrielle, *Navigating Neoliberalism: Self-Determination in an Era of Globalization: The Case of the Mikisew Cree* (University of British Columbia Press, 2007)

Smith, James Morton, ed, *Seventeenth-Century America: Essays in Colonial History* (Norton, 1972)

Smith, Mel, *Our Home or Native Land?: What government's aboriginal policy is doing to Canada* (Crown Western, 1995)

Song, Sarah Justice, *Gender, and the Politics of Multiculturalism* (Cambridge University Press, 2007)

Stebbing, C & A Musson, A, eds, *Making Legal History: Approaches and Methodology* (Cambridge University Press, 2012)

Streilein, Lisa, *Compromised Jurisprudence: Native Title Cases since Mabo*, 2d ed, (Aboriginal Studies Press, 2009)

Sunstein, Cass R, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What it Meant Before* (Princeton University Press, 2009)

Sutton, Peter, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Publishing, 2009)

Taylor, Charles, *Modern Social Imaginaries* (Duke University Press, 2004)

Tierney, Stephen, *Constitutional Law and National Pluralism* (Oxford University Press, 2004)

Tierney, Stephen, ed, *Accommodating Cultural Diversity* (Ashgate, 2007)

- Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)
- Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)
- Tribe, Laurence, *The Invisible Constitution* (Oxford University Press, 2008)
- Tully, James, *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press, 1982)
- Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995)
- Tully, James, *The Unattained yet Attainable Democracy: Canada and Quebec Facing a New Century* (Les Grandes Conférences Desjardins, 2000)
- Tully, James, *Public Philosophy in a New Key: Volume 1: Democracy and Civic Freedom; Volume II: Public Philosophy in a New Key: Imperialism and Civic Freedom* (Cambridge University Press, 2008)
- Turner, Dale, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (University of Toronto Press, 2006)
- Walkem, Ardith & Bruce, Halie, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Theytus Press, 2003)
- Warry, Wayne, *Ending Denial: Understanding Aboriginal Issues* (Broadview Press, 2007)
- Webber, Jeremy & McLeod, Colin, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010)
- Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (McGill-Queen's University Press, 1994)
- White, Jerry P, Beavon, Dan & Nicholas Spence, eds, *Aboriginal Well-Being in Canada: Continuing Challenges* (Toronto: Thompson Educational Publishing, 2008)
- Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)
- Widdowson, Frances & Howard, Albert, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen's University Press, 2008)
- Wilkins, Kerry, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing, 2004)
- Williams, Melissa S & Macedo, Stephen, *Political Exclusion and Domination*, NOMOS XLVI (NYU, 2005)

Williams, Robert A, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990)

Woo, Grace Li Xiu, *Ghost Dancing with Colonialism* (University of British Columbia Press, 2011)

Woons, Marc, The “Idle No More movement and global indifference to Indigenous nationalism” (2013) 3 *AlterNative: An international journal of Indigenous peoples* 172

Wright, David & Dodek, Adam, eds, *Public Law at the McLaughlin Court: The First Decade* (Irwin Law, 2011)

Wright, JV, *A History of the Native People of Canada, Volume II 1,000 B.C. – A.D. 500* (Canadian Museum of Civilization, 1999)

Young, Iris Marion, *Responsibility for Justice* (Oxford University Press, 2011)

Young, Iris Marion, *Who in Justice and the Politics of Difference* (Princeton, 1990)

Young, Simon, *The Trouble with Tradition: Native Title and Cultural Changes* (The Federation Press, 2008)

Chapters in Books

Alfred, Taiaike, “Wasase: Indigenous Resurgences” in Jacob T Levy, *Colonialism and Its Legacies* (Lexington Books, 2011)

Alfred, Taiaike, “Opening Words” in Simpson, Leanne, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Arbeiter Ring Publishing, 2008)

Anghie, Antony, “Western Discourses of Sovereignty” in Evans, Julie, Genovese, Reilly & Alexander Wolfe, Patrick, *Sovereignty: Frontiers of Possibility* (University of Hawai’i Press, 2013)

Asch, Michael, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)

Asch, Michael, “Getting Past Terra Nullius: Theories of Society and the Acquisition of Crown Sovereignty” in Noreau, Pierre, ed, *Gouvernance autochtone: réconfiguration d’un avenir collectif: nouvelles perspectives et processus émergents* (Les Éditions Thémis, 2010)

Barsh, Russell, “Indigenous Rights and the Lex Loci in British Imperial Law” in Kerry Wilkins, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing, 2004)

Berry, David, "Legal Anomalies, Indigenous Peoples and the New World" in Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007)

Behrendt, Larissa, "Aboriginal Sovereignty: A Practical Roadmap" in Evans, Julie, Genovese, Reilly & Alexander Wolfe, Patrick, *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013)

Blanchard, Martin, "Looking Ahead: A Pragmatic Outlook on Aboriginal Self-Rule" in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)

Boiselle, Andrée, "Beyond Consent and Disagreement: Why Law's Authority is Not Just About Will" in Webber, Jeremy & McLeod, Colin, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010)

Borrows, John, "Physical Philosophy: Mobility and the Future of Indigenous Rights" in Richardson, Benjamin J, Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Borrows, John, "Let Obligations be Done" in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)

Borrows, John, "An Analysis of and Dialogue on Indigenous and Crown Blockades" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Browne, Murray, "The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Brownlie, Robin Jarvis, "First Nations Perspectives and Historical Thinking in Canada" in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

Cairns, Alan C, "The Royal Commission on Aboriginal Peoples: A Missed Opportunity" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Charters, Claire, "Indigenous Peoples and International Law and Policy" in Richardson, Benjamin J, Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Chartrand, Paul, "Aboriginal Rights: the "race" for recognition in Canada" in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Christie, Gordon, “Indigenous Legal Theory: Some Initial Considerations” in Richardson, Benjamin J, Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Christie, Gordon, “Aboriginal Title and Private Property” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Christie, Gordon, “Critical Indigenous Philosophy” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Collins, Neva, “Native title, economic development and the environment” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009

Coulthard, Glen, “Resisting Culture: Selya Benhabib’s Deliberative Approach to the Politics of Recognition in Colonial Contexts” in Kahane, David, Weinstock, Daniel, Leydet, Dominique & Williams, Melissa, eds, *Deliberative Democracy in Practice* (University of British Columbia Press, 2010)

Coulthard, Glen, “Beyond Recognition: Indigenous Self-Determination as Prefigurative Practice” in Simpson, Leanne, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Arbeiter Ring Publishing, 2008)

Coates, Colin M, “Multiculturalism in Colonial Society: Canadian Examples from the 17th and 18th Century” in Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007)

Coates, Ken, “The Marshall Decision and Legal Mediation of Multiculturalism: A Reflection on the Future of Relations Between Indigenous and Transplanted Societies in Canada” in Saunders, Barbara & Haljan, David, *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press, 2007)

Cosentino, Gina, “Treaty Federalism: Challenging Disciplinary Boundaries and Bridging Praxis, Theory, Research and Critical Pedagogy in Canadian Political Science” in Nelson, Camille A & Nelson, Charmaine, *Racism Eh? A Critical Inter-Disciplinary Anthology of Race and Racism in Canada* (Captus Press, 2004)

Coyle, Michael, “ADR Processes and Indigenous Rights: A Comparative Analysis of Australia, Canada and New Zealand” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Coyle, Michael, “Establishing Indigenous Governance: The Challenge of Confronting Mainstream Cultural Norms” in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l’Université Laval, 2013)

Cruz, Christine Zuni, “Law of the Land- Recognition and Resurgence in Indigenous Law and Justice Systems” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Belanger, Yale, “Future Prospects for Aboriginal Self-Government in Canada” in Yale Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Purich Publishing Ltd., 2008)

De Schuter, Helder, “Towards a Hybrid Theory of Multicultural Justice” in Tierney, Stephen, ed, *Accommodating Cultural Diversity* (Ashgate, 2007)

Dorsett, Shaunnagh & McVeigh, Shawn, “Section 223 and the shape of native title: the limits of jurisdictional thinking” in Ford, Lisa & Rowse, Tim, *Between Indigenous and Settler Governance* (Routledge, 2011)

Eisenberg, Avigail, “Introduction: New Approaches to Freedom in Canada” in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006)

Eisenberg, Avigail, “Reasoning about identity: Canada’s distinctive culture test” in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006)

Eisenberg, Avigail, “Reasoning About the Identity of Aboriginal Peoples” in Tierney, Stephen, ed, *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice* (Ashgate, 2007)

Evans, Julie, Genovese, Ann, Reilly, Alexander & Wolfe, Patrick, “Introduction” in Evans, Julie, Genovese, Reilly & Alexander Wolfe, Patrick, *Sovereignty: Frontiers of Possibility* (University of Hawai’i Press, 2013)

Ford, Lisa, “Locating indigenous self-determination in the margins of settler sovereignty: an introduction” in Ford, Lisa & Rowse, Tim, *Between Indigenous and Settler Governance* (Routledge, 2011)

Forst, Rainer “A Critical Theory of Multicultural Toleration” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Fox, Peter, “Indigenous Land Use Agreements” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009

Francis, Mark, “Canadian Indigenous Peoples and the Transformation of Political Theory into Cultural Identity” in Haddock, Bruce & Sutch, Peter, *Multiculturalism, Identity and Rights* (Routledge, 2003)

Fraser, Nancy, “Social Justice in the Age of Identity Politics” in Fraser, Nancy & Honneth, Axel, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso, 2003)

French, Chief Justice Robert, “Lifting the Burden of Native Title: Some Modest Proposals for Improvement” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009

Fung, Anna, Giardini, Anne & Miller, Bob, “A Decade Since Delgamuukw: Update From an Industry Perspective” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Gaudreault-DesBiens, Jean-Francois, “The Ethics of Canadian Aboriginal Law and the Potential Relevance of Federal Loyalty in a Reconfigured Relationship Between Aboriginal and Non-Aboriginal Governments: A Thought Experiment” in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l’Université Laval, 2013)

Gover, Kirsty, “Indigenous jurisdiction as a provocation of settler state political theory: the significance of human boundaries” in Ford, Lisa & Rowse, Tim, *Between Indigenous and Settler Governance* (Routledge, 2011)

Godlewska, Christina & Webber, Jeremy, “Aboriginal Title, Treaties, and the Nisga’a” in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)

Grammond, Sébastien, “The Reception of Indigenous Legal Systems in Canada” in Breton, Albert, ed, *Multijuralism: Manifestations, Causes, and Consequences* (Ashgate Publishing, 2009)

Greene, Janice, “What Mauchibinesse Taught me About Aboriginal Rights” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Hanvelt, Marc & Papillon, Martin, “Parallel or Embedded: Self-Government and the Changing Nature of Citizenship in Canada” in Kernerman, Gerald & Resnick, Philip, *Insiders or Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship* (University of British Columbia Press, 2004)

Harris-Short, Sonia, “Self-Government in Canada: A Successful Model for the Decolonization of Aboriginal Child Welfare?” in Tierney, Stephen, ed, *Accommodating Cultural Diversity* (Ashgate, 2007)

Henderson, James (Sakej) Youngblood, “The Context of the State of Nature” in Battiste, Marie, ed, *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000)

Henderson, James (Sakej) & Battiste, Marie, “Indigenous Philosophy” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Hogg, Peter, “The Constitutional Basis of Aboriginal Rights” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Hunter, John JL, “Disappointed Expectations: Why Delgamuukw Has Failed to Achieve Results on the Ground” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Hseuh, Vicki, “Under Negotiation: Empowering Treaty Constitutionalism” in Levy, Jacob T, (with Iris Marion Young), *Colonialism and Its Legacies* (Lexington Books, 2011)

Hughston, Vance, “A practitioner’s perspective of native title” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009

Hutchins, Peter W, “Power and Principle- State-Indigenous Relations Across Time and Space” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Hutchins, Peter W, “Cede, Release and Surrender: Treaty-Making, the Aboriginal Perspective and the Great Judicial Oxymoron or Let’s Face It- It Didn’t Happen” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Imai, Shin “Indigenous Self-Determination and the State” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Irlbacher-Fox, Stephanie, “Justice Authorities in Self-Government Agreements: The Importance of Conditions and Mechanisms of Implementation” in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)

Isaac, Thomas, “Striking a Balance: The Rights of Aboriginal Peoples and the Rule of Law in Canada” in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)

Iverson, Duncan, “Deliberative Democracy and the Politics of Reconciliation” in Kahane, David, Weinstock, Daniel, Leydet, Dominique & Williams, Melissa, eds, *Deliberative Democracy in Practice* (University of British Columbia Press, 2010)

Iverson, Duncan, “Consent or Contestation?” in Webber, Jeremy & McLeod, Colin, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010)

Iverson, Duncan, “Afterward: The Normative Force of the Past” in Belmessous, Salila, ed, *Native Claims: Indigenous Law Against Empire, 1500-1920* (Oxford: Oxford University Press, 2011)

Iverson, Duncan, “Historical Injustice”, ch 28 in *Oxford Handbook*.

Jules, Manny, Preface in Flanagan, Tom, Alcantara, Christopher & Le Dressay, André, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen’s University Press, 2010)

Kennedy, Dawnis, “Recognition without Respect? Section 35 and Indigenous Legal Orders” in Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Minister of Public Works and Government Services, 2006)

Knafla, Louis A, Introduction , ““This is our Land” : Aboriginal Title at Customary and Common Law in Comparative Contexts” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Laden, Anthony Simon & Owen, David, Introduction in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Laden, Anthony Simon, “Negotiation, Deliberation, and the Claims of Politics” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Ladner, Kiera & Michael McCrossan, “The Road not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order” in Kelly, James B & Manfredi, Christopher B, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (University of British Columbia Press, 2009)

Ladner, Kiera, “Treaty Federalism: An Indigenous Vision of Canadian Federalism” in Rocher, François & Smith, Miriam, *New Trends in Canadian Federalism* (Broadview Press, 2003)

Ladner, Kiera, “Take 35: Reconciling Constitutional Orders” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

Ladner, Kiera, « À la recherche d’un nouvel ordre constitutionnel entre les Mi’kmaq et l’État canadien » in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l’Université Laval, 2013)

Lajoie, Andrée, “What Constitutional Law Does not Want to Hear about History” in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum* (2001)

Lajoie, Andrée, “The Integration of Aboriginal Values and Interests into Canadian Judicial and Normative Discourse” in Christie, Gordon, ed, *Aboriginal Society and Aboriginal Rights: A Multidisciplinary Perspective from Quebec* (Theytus Books, 2006)

Lajoie, Andrée, “Legal Pluralism in Kahnawake” in Christie, Gordon, ed, *Aboriginal Society and Aboriginal Rights: A Multidisciplinary Perspective from Quebec* (Theytus Books, 2006)

Lambert, Douglas, “Where to From Here: Reconciling Aboriginal Title with Crown Sovereignty” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Leclair, Jean, « Le fédéralisme: un terreau fertile pour gérer un monde incertain » in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l'Université Laval, 2013)

Little Bear, Leroy, “An Elder Explains Indigenous Philosophy and Indigenous Sovereignty” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Levy, Jacob T, “Indigenous Self-Determination” in Macedo, Stephen & Buchanan, Allen, eds, *Secession and Self-Determination: Nomos XLV* (New York University Press, 2003)

Levy, Jacob T, “Contextualism, constitutionalism, and modus vivendi approaches” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Lutz, John. “Myth Understandings: First Contact, Over and Over Again”, introduction to John Lutz, *Myth and Memory: Rethinking Stories of Indigenous-European Contact* (University of British Columbia Press, 2007)

Macklem, Patrick, “Indigenous Recognition in International Law: Theoretical Observations” in Noreau, Pierre, ed, *Gouvernance autochtone: réconfiguration d'un avenir collectif: nouvelles perspectives et processus émergents* (Les Éditions Thémis, 2010)

Macklin, Jenny, “Can native title deliver more than a “modicum of justice”” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

Maclure, Jocelyn, “Perspicuous Representation versus Normative Theory: A Critical Commentary on James Tully’s Approach to Recognition” in Shabani, Omid Payrow, ed, *Multiculturalism and the Law: Critical Debates* (University of Wales Press, 2007)

Mandell, Louise, “The Ghost” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Markell, Patchen, “Recognition and Redistribution” in *Oxford Handbook of Political Theory*.

Mason, Andrew, “Multiculturalism and the critique of essentialism” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

McDonald, Fiona, “The Manitoba Government’s Shift to “Autonomous” First Nations Child Welfare- Empowerment or Privatization?” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

McDonald, Roderick & McMorrow, Thomas, “Rabbits, Ravens, Snakes, Turtles: Analysing the Political Economy of Aboriginal Communities from the Inside Out” in Noreau, Pierre, ed,

Gouvernance autochtone: réconfiguration d'un avenir collectif: nouvelles perspectives et processus émergents (Les Éditions Thémis, 2010)

McHugh, Paul, "A History of the Modern Jurisprudence of Aboriginal Rights- Some Observations on the Journey So Far" in Dysenhaus, D, Hunt M & Huscraft, G, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009)

McHugh, Paul, "The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History, and the Tribes" in Stebbings, C & A Musson, A, eds, *Making Legal History: Approaches and Methodology* (Cambridge University Press, 2012)

McHugh, Paul & Ford, Lisa, "Settler sovereignty and the shapeshifting Crown" in Ford, Lisa & Rowse, Tim, *Between Indigenous and Settler Governance* (Routledge, 2011)

McIntosh, Constance, "The Reconciliation Doctrine in Chief Justice McLachlin's Court: From a "Final Legal Remedy" to a "Just and Lasting" Process" in Wright, David & Dodek, Adam, eds, *Public Law at the McLaughlin Court: The First Decade* (Irwin Law, 2011)

McNeil, Kent, "Continuity of Aboriginal Rights" in Wilkins, Kerry, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing, 2004)

McNeil, Kent, "Judicial Treatment of Indigenous Land Rights in the Common Law World" in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

McNeil, Kent, "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

McNeil, Kent, "Judicial Approaches to Self-Government since Calder: Searching for Coherence" in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)

McNeil, Kent, "Indigenous land rights and self-government: inseparable entitlements" in Ford, Lisa & Rowse, Tim, *Between Indigenous and Settler Governance* (Routledge, 2011)

McNeil, Kent, "Indigenous Nations and the Legality of European Claims to Sovereignty over Canada" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

McNeil, Kent, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans, Anne Genovese, Alexander Reilly & Patrick Wolfe, *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, 2013)

McRanor, Shauna, “The Imperative of “Culture” in a Colonial and de facto Polity” in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada* (University of British Columbia Press, 2006)

Meyer, Lorraine, “Whose Sovereignty are we Talking About?” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Mildon, Drew, “A Bad Connection: First Nations Oral Histories in the Canadian Courts” in Hulan, Renée & Renate Eigenbrod, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Fernwood Publishing, 2008)

Miller, David, “Nationalism” in *Oxford Handbook of Political Theory*.

Mills, Charles, “Multiculturalism as/and/or anti-racism?” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Moore, Margaret, “Indigenous Peoples and Political Legitimacy” in Jeremy Webber & Colin McLeod, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010)

Muldoon, Paul, “The Very Basis of Civility: On Agonism, Conquest and Reconciliation” in Kymlicka, W & Bashir, B, *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008)

Murphy, Michael, “Civilization, Self-Determination and Reconciliation” in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

Murray, Robert, “Liberalism, Aboriginal Rights, and the Canadian Moral Identity” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Nahwegahbow, David C & Nicole DO Redmond, “Whether the Constitution Act has made a Difference for First Nations” (Delivered at the Ontario Bar Association 6th Annual Charter Conference: the Charter at 25, September 2007)

Napoleon, Val, “Aboriginal Discourse: Gender, Identity and Community” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Neate, Graham, “Native Title: Looking forward through the past” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

Nettheim, Garth, “Native Title in Other Lands” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

- Newman, Dwight, "Institutional Roles and Chief Justice Lamer's Aboriginal Rights Jurisprudence" in Dodek, Adam & Jutras, Daniel, *Le Feu Sacré: l'héritage d'Antonio Lamer/ The Sacred Fire: The Legacy of Antonio Lamer* (LexisNexus, 2009)
- Newman, Dwight, "Reconciliation: Legal Concept(s) and the Faces of Justice" in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)
- Newman, Dwight, "Putting Kymlicka in Perspective: Canadian Diversity and Collective Rights" in Tierney, Stephen, ed, *Accommodating Cultural Diversity* (Ashgate, 2007)
- Noreau, Pierre, "Introduction" in Noreau, Pierre, ed, *Gouvernance autochtone: réconfiguration d'un avenir collectif: nouvelles perspectives et processus émergents* (Les Éditions Thémis, 2010)
- Okin, Susan Moller, "Multiculturalism and Feminism: No Simple Question, No Easy Answers", in Eisenberg & Spinner-Halev, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press, 2005)
- Okin, Susan Moller, "Is Multiculturalism Bad for Women?" in Cohen, JM Howard & MC Nussbaum, *Is Multiculturalism Bad for Women?* (Princeton University Press, 1999)
- Oman, Natalie, "Theories of Inter-cultural Negotiation" in Bell, Catherine Edith & Kahane, David Joshua, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: University of British Columbia Press, 2005)
- O'Reilly, James, "Aboriginal Self-Government" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)
- Otis, Ghislain, "Introduction: Connaître/reconnaître l'altérité juridique autochtone" in Otis, Ghislain, *L'adoption coutumière autochtone et les défis du pluralisme juridique* (Presses de l'Université Laval, 2013)
- Otis, Ghislain, "L'individu comme acteur relationnel: l'option de la loi dans le "fédéralisme personnel" en context autochtone" in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l'Université Laval, 2013)
- Otis, Ghislain, « La protection constitutionnelle de la pluralité juridique : le cas de l'adoption coutumière autochtone au Québec » in Otis, Ghislain, *L'adoption coutumière autochtone et les défis du pluralisme juridique* (Presses de l'Université Laval, 2013)
- Otis, Ghislain & Papillon, Martin, "Introduction: Decolonizing Our Relationships" in Otis, Ghislain & Papillon, Martin, *Fédéralisme et Gouvernance Autochtone/ Federalism and Aboriginal Governance* (Presses de l'Université Laval, 2013)
- Owen, David & Tully, James, "Redistribution and recognition: two approaches" in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Pape, Arthur, “The Duty to Consult and Accommodate: A Judicial Innovation Intended to Promote Reconciliation” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Patton, Paul, “Political Liberalism and Indigenous Rights” in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Peterson, Nicolas, “Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Rights to Land” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Pitts, Jennifer, “Empire, Progress, and the “Savage Mind” in Jacob T Levy, *Colonialism and its Legacies* (Lexington Books, 2011)

Pocock , J.G.A. “Theory in History: Problems in Context and Narrative” in *Oxford Handbook of Political Theory*.

Promislow, Janna & Sossin, Lorne, “In Search of Aboriginal Administrative Law” in Flood, Colleen M & Sossin, Lorne, *Administrative Law in Context*, 2nd ed (Emond Montgomery Publications, 2012)

Ray, Arthur J, “From the US Indian Claims Commission Cases to *Delgamuukw*: Facts, Theories and Evidence in North American Land Claims” in Louis A Knafla and Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Reilly, Alex, “Native Title as a Cultural Phenomenon” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

Reilly, Alexander, “Sovereign Apologies” in Evans, Julie, Genovese, Reilly & Alexander Wolfe, Patrick, *Sovereignty: Frontiers of Possibility* (University of Hawai’i Press, 2013)

Reynolds, Dr James I, “The Spectre of Spectra: The Evolution of the Crown’s Fiduciary Obligation to Aboriginal Peoples Since *Delgamuukw*” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Richardson, Benjamin J, Imai, Shin & McNeil, Kent, “Indigenous Peoples and the Law- Historical, Comparative and Contextual Issues” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Ray, Arthur J, “From the US Claims Commission Cases to *Delgamuukw*: Facts, Theories and Evidence in North American Land Claims” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Richardson, Benjamin J, “The Dyadic Character of US Indian Law” in Benjamin J Richardson, Shim Imai and Kent McNeil, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Richardson, Benjamin J, “The Ties that Bind: Indigenous Peoples and Environmental Governance” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Rigsby, Bruce, “Social Theory, Expert Evidence, and the Yorta Yorta Rights Appeal Decision” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Robbins, David M & Woodward, Jack, “Tsilhqot’in Nation v. British Columbia: A Decade After Delgamuukw” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Ross, Stephen & Ward, Neil, “Mapping Indigenous Peoples’ contemporary relationships to country: the way forward for native title & natural resource management” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

Rotman, Leonard, “Let’s us Face it, We are All Here to Stay” But do we Negotiate or Litigate?” in Wilkins, Kerry, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing, 2004)

Ruru, Jacinta, “The Māori Encounter with Aotearoa: New Zealand’s Legal System” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Ruru, Jacinta, “Claiming Native Title to the Foreshore and Seabed” in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Russell, Peter, “Oka to Ipperwash: The Necessity of Flashpoint Events” in Simpson, Leanne & Kiera Ladner, eds, *This is our Honour Song: Resurgence, and the Protection of Indigenous Nations* (Arbeiter Ring Press, 2010).

Schaap, Andrew, “The Absurd Proposition of Aboriginal Sovereignty” in Andrew Schaap, ed, *Law and Agonistic Politics* (Farnham, Ashgate, 2009)

Shabani, Omid Payrow, “Introduction: The Practice of Law-Making and the Problem of Difference” in Shabani, Omid Payrow, ed, *Multiculturalism and the Law: Critical Debates* (University of Wales Press, 2007)

Shachar, Ayelet, “Feminism and multiculturalism: mapping the terrain” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Slattery, Brian, "The Legal Basis of Aboriginal Title" in Frank Cassidy, ed, *Aboriginal Title in British Columbia* (Oolichan Books, 1992)

Slattery, Brian, "A Taxonomy of Aboriginal Rights" in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)

Slattery, Brian, "The Metamorphosis of Aboriginal Title" in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Slattery, Brian, "The Generative Structure of Aboriginal Rights" in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)

Slowey, Gabrielle, "Unfinished Business: Self-Government and the James Bay Northern Quebec Agreement Thirty Years Later" in Yale Bélanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Purich Publishing, 2008)

Slowey, Gabrielle A, "A Fine Balance? Aboriginal Peoples in the Canadian North and the Dilemma of Development" in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

Slowey, Gabrielle, "Federalism and First Nations: Finding Space for Aboriginal Governments" in Ian Peach & Roy Romanow, *Constructing Tomorrow's Federalism: New Perspectives on Canadian Governance* (University of Manitoba Press, 2007)

Stevenson, S Ronald, "Toward a Shared Narrative of Reconciliation: Developments in Canadian Aboriginal Rights Law" in Lessard, Hester, Johnson, Rebecca & Webber, Jeremy, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Communities* (University of British Columbia Press, 2011)

Stevenson, Mark, "Visions of Certainty", in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum* (2001)

Strelein, Lisa, "A Captive of Statute" in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

Taylor, Charles, "The Politics of Recognition" in Gutman, Amy, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, 1994)

Tierney, Stephen, "Cultural Diversity: Normative Theory and Constitutional Practice" in Tierney, Stephen, ed, *Accommodating Cultural Diversity* (Ashgate, 2007)

Timpson, Annis May, "Introduction: Indigenous Thought in Canada" in Timpson, Annis May, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009)

Tomsons, Sandra, "Why Non-Aboriginal People Should Listen to Aboriginal Elders" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Tomsons, Sandra, "Dialogue with John Borrows" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Tomsons & Mayer, "Dialogue" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Tully, James, "Re-Imagining Belonging: A Citizen Approach" in Ulf Hereroft & Mette Hjort, *The Postnational Self: Belonging and Identity* (University of Minnesota Press, 2002)

Tully, James, "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada" in Curtis Cook & Juan D Landau, *Aboriginal Rights and Self-Government* (McGill-Queen's Press, 2000)

Tully, James, "Aboriginal Peoples: Negotiating Reconciliation" in James Bickerton & Allan-G Gagnon, *Canadian Politics*, 3rd ed, 2001.

Tully, James, "Consent, Hegemony and Dissentin Treaty Negotiations" in Jeremy Webber and Colin McLeod, *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010)

Tully, James, "Reconsidering the BC Treaty Process" in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum* (2001)

Tully, James "Exclusion and Assimilation: Two Forms of Domination in Relation to Freedom", Chapter 8 in Melissa S Williams & Stephen Macedo, *Political Exclusion and Domination, NOMOS XLVI* (New York University, 2005)

Tully, James, "Reconciling Struggles over the Recognition of Minorities: Towards a Dialogical Approach" in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006)

Tully, James, "The Practices of Lawmaking and the Problem of Difference" in Shabani, Omid Payrow, ed, *Multiculturalism and the Law: Critical Debates* (University of Wales Press, 2007)

Tully, James, "Philosphy in the Age of Pluralism" in James Tully & Daniel M. Weinstock, eds, *Philosophy in an Age of Pluralism* (Cambridge University Press, 1995)

Turner, Dale, "White and Red Paper Liberalism" in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Valadez, Jorge, "The Implications of Incommensurability for Deliberative Democracy" in Kahane, David, Weinstock, Daniel, Leydet, Dominique & Williams, Melissa, eds, *Deliberative Democracy in Practice* (University of British Columbia Press, 2010)

Vallance, Neil, “The Misuse of “Culture” by the Supreme Court of Canada” in Eisenberg, Avigail, *Diversity and Equality: The Changing Framework of Freedom in Canada*, (University of British Columbia Press, 2006)

Vivian, Alison, “Conflict management in the native title system: A proposal for an Indigenous Dispute Resolution Tribunal” in Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009.

Waldron, Jeremy, “Why is Indigeneity Important?” in Miller, Jon & Kumar, Rahul, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007)

Walkem, Ardith, “An Unfulfilled Promise: Still Fighting to Make Space for Indigenous Legal Traditions” in Morellato, Maria, ed, *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009)

Walters, Mark, “The Jurisprudence of Aboriginal Rights: Aboriginal Rights in Canada” in Kymlicka, W & Bashir, B, *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008)

Walters, Mark, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008)

Walters, Mark, “Promise and Paradox: The Emergence of Indigenous Rights Law in Canada” in Richardson, Benjamin J; Imai, Shin, & McNeil, Kent, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009)

Walters, Mark, “”Your Sovereign and Our Father”: The Imperial Crown and the Idea of Legal-Ethnohistory” in Dorsett, Shaunnagh & Hunter, Ian, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave-Macmillan, 2010)

Webber, Jeremy, “The Public Law Dimension of Indigenous Property Rights” in Bankes, Nigel & Koivurova, Tino, eds, *The Proposed Nordic Sami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, 2013)

Webber, Jeremy & Gover, Kirsty, “Proprietary Constitutionalism” in Tushnet et al. “Routledge Handbook of Constitutional Law”

Weinstock, Daniel M, “Liberalism, multiculturalis, and the problem of internal minorities” in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

Westra, Haijo, “The Defence of Native Title and Discovery in Sixteenth Century Mexico” in Louis A Knafla and Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010).

Whitt, Lauren, "Transforming Sovereignities", in Tomsons, Sandra & Mayer, Lorraine, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013)

Whyte, John D, "Developmental and Legal Perspectives on Aboriginal Justice Administration" in Whyte, John, *Moving Towards Justice: Legal Traditions and Aboriginal Justice* (Purich Publishing, 2008)

Washburn, Wilcomb F, "The Moral and Legal Justifications for Dispossessing the Indians" in James Morton Smith, ed, *Seventeenth-Century America: Essays in Colonial History* (Norton, 1972)

Williams, David, "Customary Rights and Crown Claims: Calder and Aboriginal Title in Aotearoa New Zealand" in Foster, Hamar, Raven, Heather & Webber, Jeremy, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007)

Williams, Melissa S, "The Uneasy Alliance of Group Representation and Deliberative Democracy" in Will Kymlicka and Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford University Press, 2000)

Williams, Sharon, "Sharing the River: Aboriginal Representation in Canadian Political Institutions" in David Laycroft, ed, *Representation and Democratic Theory* (UBC Press, 2004).

Yarrow, David, "Law's Infidelity to Its Past: The Failure to Recognize Indigenous Jurisdiction in Australia and Canada" in Louis A Knafla & Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (University of British Columbia Press, 2010)

Young, Iris Marion, "Hybrid Democracy: Iroquoian Federalism and the Post-Colonial Project" in Ivison, Duncan, Patton, Paul & Sanders, Will, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000)

Young, Iris Marion, "Structural Injustice and the Politics of Difference" in Laden, Anthony Simon & Owen, David, eds, *Multiculturalism and Political Theory* (Cambridge University Press, 2007)

SECONDARY MATERIALS: ARTICLES

Alcantara, Christopher, "To treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada" (2008) 38 *Publius: The Journal of Federalism* 343

Alfred, T, "Editorial: Of White Heroes and Old Men talking: Eastern Door" (2000) June 4th, 2000 (accessed online)

Alfred, T & Corntassel, J, "Being Indigenous : Resurgences Against Contemporary Colonialism" (2005) 40 *Government and Opposition* 597

Alienikoff, T Alexander, "Constitutional Law in an Age of Balancing" (1987) 96 *Yale LJ* 957

Anaya, James, "Indigenous Law and the Contribution to Global Pluralism" (2007) 6 *Indigenous LJ* 3

Anderson, Robert B, Kayseas, Bob, Dana, Leo Paul & Hindle, Kevin, "Indigenous Land Claims and Economic Development: The Canadian Experience" (2004) 28 *American Indian Quarterly* 634.

Anker, Kirsten, "Law in the Present Tense: Continuity and Tradition in the *Yorta Yorta Aboriginal Community v. Victoria*" (2004) 28 *Melbourne UL Rev* 1.

Asch, Michael, "The Judicial Conception of Culture After *Delgamuukw*" (2000) *Rev of Const Stud* 119.

Asch, Michael, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17 *CJLS* 23

Asch, Michael & Macklem, Patrick, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 *Alta L Rev* (No. 2) 498

Arbour, Jane M, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003) 21 *Sup Ct L Rev* 3.

Attwood, Bain, "The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society" (2004) *History Compass* 1.

Attwood, Bain, "In the Age of Testimony: The Stolen Generations Narrative, "Distance", and Public History", (2008) 20 *Public Culture* 75

Attwood, Bain, "Returning to the Past: The South Australian Colonisation Commission, the Colonial Office and Aboriginal Title" (2013) 34 *J Legal Hist* 50

Babcock, Hope M, "A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered" (2005) 2005 Utah L Rev 441.

Bachvarova, Mira, Book Review of Hendrix, "Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims" (2010) 36 Social Theory and Practice 341

Balkin, Jack, "Nested Oppositions" (1990) 99 Yale L Rev 1660

Nigel Bankes, "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120

Barsh, Russell & Henderson, James Youngblood, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993

Bartlett, Richard, "Mabo: Another Triumph of the Common Law" (1983) 15 Sydney L Rev 178

Richard Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983) 15 Ottawa L Rev 430

Battiste, Jaime, "Understanding the Progression of Mi'kmaw Law" (2008) 31 Dal LJ 311

Baxter, Jamie and Trebilcock, Michael, ""Formalizing" Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform" (2009) 7 Indigenous LJ 45

Beaulieu, Alain, "An equitable right to be compensated": The Dispossession of Aboriginal Peoples in Quebec and the Emergence of a New Legal Rationale (1760-1860)" (2013) 94 The Can Hist Review 1

Bedford, David, "Emancipation as Oppression: The Marshall Decision and Self-Government" (2010) 44 J of Can Studies 206

Bell, DG, "Was Amerindian Dispossession Lawful? The Response of the 19th Century Maritime Intellectuals" (2000) 23 Dal LJ 168

Bell, DG, "A Commercial Harvesting Prosecution in Context: The Peter Paul Case, 1946" (2006) 55 UNBLJ 86

Bennett, Fred, "Aboriginal Rights Deliberated" (2007) 10 Critical Review of International Social and Political Philosophy 319

Bennett, Mark, "Review of Law as a Moral Idea", (2008) 87 Can Bar Rev 805

Bennett, Mark, "Indigeneity" as Self-Determination" (2005) 4 Indigenous LJ 72

- Berger, Bethany R, "Liberalism and Republicanism in Federal Indian Law" (2005-2006) 38 Conn L Rev 813
- Biber, Katherine, "Being/Nothing: Native Title and Fantasy Fulfillment" (2004) 3 Indigenous LJ 1
- Binnie, WLC, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's LJ 217
- Blackburn, Carole, "Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada" (2007) 13 Journal of the Royal Anthropological Institute (NS) 621
- Blanchard, Martin, "Recognition and the case of indigenous reparations: A Habermasian Critique of Haberma", CREUM, University of Montreal, 2005 (accessed on-line)
- Boast, Richard, "The "Spanish" Origins of International Human Rights Law: A Historiographical Review" (2010) 41(2) VUWLR 235
- Borrows, John, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall LJ 537
- Borrows, John, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court of Canada" (2001) 80 Can Bar Rev 15
- Borrows, John "Indigenous Legal Traditions in Canada" (2005) 19 Wash UJL & Pol'y 167
- Borrows, John, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 UBCL Rev 285
- Borrows, John, "(Ab)Originalism and Canada's Constitution" (2012), 58 Sup Ct L Rev (2s) 351
- Boyer, Patricia, "Felix Cohen and the Spanish Origin of Indian Rights" (2010) 8 Law, Culture and the Humanities 153
- Bratspies, Rebecca & Miller, Russell, "Introduction" (2006-2007) 11 Am Indian L Rev 253
- Brilmayer, Lea, "Secession and Self-Determination: A Territorial Interpretation" (1991) 16 Yale J Int'l L 177
- Calliou, Brian, "Methodology for Recording Oral Histories in the Aboriginal Community" (2004) 15 Native Studies Review 73
- Alex Cameron, "Power without Law" (2011) 44 Can J of Political Science 250
- Carens, Joseph R, "Liberalism and Culture" (1997) 4 Constellations 35

Carter, Mark, "The Rule of Law, Legal Rights in the Charter, and the Supreme Court's New Positivism" (2007-2008) 33 Queen's LJ 453

Carver, Peter, "Comparing Aboriginal and Other Duties to Consult in Canadian Law" (2011-2012) 49 Alta L Rev 855

Cassidy, Julie, "Sovereignty of Aboriginal Peoples" (1998) 9 Ind Int'l & Comp L Rev 65

Cavanagh, Edward, "Review: Aboriginal Title" (2012) Settler Colonial Studies 194

Chandler, Michael J & Lalonde, Christopher, "Cultural Continuity as a Hedge Against Suicide in Canada's First Nations" (1998) 38 Transcultural Psychiatry 191

Charlton, Guy C, "Letting Go of Culture: A Comment on R. v. Sappier, R. v. Grey" (2008) 39 Ottawa L Rev 317

Charlton, Guy Campion, "Culture or Contract: Off-Reservation Indigenous Commercial Logging in Wisconsin and the Maritimes" (2007) 6 Indigenous LJ 31

Charowsky, Zena, "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals" (2011) 74 Sask L Rev 213

Charters, Claire, "Do Maori Rights Racially Discriminate Against Non-Maori?" (2009) 40 VUWLR 649

Chartrand, Larry, Chartrand, Lisa, Feldthusen, Bruce & Han Sarah, "Reconciliation and transformation in practice: Aboriginal judicial appointments to the Supreme Court" (2008) 51 Canadian Public Administration 143

Chartrand, Larry, "The Story in Aboriginal Law and the Aboriginal Law in the Story: A Métis Professor's Journey" (2010) 50 Sup Ct L Rev 89

Christie, Gordon, "Judicial Justification of Recent Developments in Aboriginal Law?" (2002) 17(2) CJLS 41

Christie, Gordon. "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 Sup Ct L Rev 285

Christie, Gordon, "Review of Alan C. Cairns, Citizen Plus" (2002) 40 Osgoode Hall LJ 189

Christie, Gordon, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23 Windsor YB Access Just 17

Christie, Gordon, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139

- Christie, Gordon, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 *Indigenous LJ* 13
- Christodoulidis, Emilios A, "Republican Constitutionalism and Reflexive Politics" (2006) *Archiv fuer Rechts und Sozialphilosophie* 371
- Cirkovic, Elena, "Self-Determination and Indigenous Peoples in International Law" (2006-2007) 31 *Am Indian L Rev* 375
- Clinton, Robert A, "There is No Federal Supremacy Clause for Indian Tribes" (2002) 34 *Ariz St LJ* 113
- Cornell, Stephen & Kalt, Joseph P, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache" (1995) 33 *Economic Inquiry* 402
- Cornell, S & Kalt, JP, "Where's the Glue? International and Cultural Foundations of American Indian Economic Development" (2000) 29 *The Journal of Socio-Economics* 443
- Corntassel, Jeff, "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination" (2012) 1 *Decolonization: Indigeneity, Education and Society* 86
- Côté, JF, "Reception of English Law" (1977) 25 *Alta L Rev* 29
- Coulthard, Glen, "Subjects of Empire: Indigenous Peoples and the "politics of recognition" in Canada" (2007) 3 *Contemporary Political Theory* 1.
- Courtois, Stéphane, "A Liberal Defence of the Intrinsic Value of Cultures" (2008) 7 *Contemporary Political Theory* 31
- Coyle, Michael, "Addressing Aboriginal Land Rights in Ontario: An Assessment of Past Policies and Options for the Future- Part 1" (2005) 31 *Queen's LJ* 75; ("Part II") (2006) 33 *Queen's LJ* 796
- Crenshaw, Kimberle, "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women" (1991) *Stan L Rev* 1241
- Cunningham, Clayton, "Aboriginal Powers, Privileges, and Immunities of Self-Government" (2013) 76 *Sask L Rev* 315
- Curtis, William M, "Members Only? Critical Response to Herr's "Defence of Non-Liberal Nationalism"" (2007) 35 *Political Theory* 334
- Dalton, Jennifer E, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21 *CJLS* 11

Danley, J, "Liberalism, Aboriginal Rights, and Cultural Minorities" (1991) 20 *Philosophy and Public Affairs* 108

Davis, Megan, "The "S" Word and Indigenous Australia: A New Variation on an Old Theme: Review of Indigenous Sovereignty and the Democratic Project" (2006) 31 *Australian J of Legal Phil* 127

Richard Day, "Who is that gives us this gift? Native-American Political Theory and the Western Tradition" (2001) 2 *Critical Horizons* 173

Desjardins, Ian, "Sovereignty and Development: The New Relationship between the Crown and Aboriginal Peoples" (accessed on-line)

Deveaux, Monique, "A Deliberative Approach to Conflicts of Culture" (2003) 31 *Political Theory* 780

Devlin, Richard & Dobrowolsky, Alexandra, "Citizens Supplicant? Alan Cairns' Citizen Plus and the Politics of Aboriginal Constitutional Scholarship" (2002) 7 *Rev Const Stud* 79

Dhossa, Shiraz, "Liberal Imperialism? Natives, Muslims and Others" (2002) 30 *Political Theory* 738

Dhossa, Shiraz, "Liberal Posturing: Multiculturalism's Discreet Charm" (2001) 15 *Journal of Multilingual and Multicultural Development* 447

Dick, Caroline, "The Politics of Intragroup Difference: First Nations Women and the Sawridge Dispute" (2006) 39 *CJPS* 97

Dickson, Timothy, "Section 25 and Intercultural Judgement" (2003) 61 *UTLJ* 143

Digessor, PE, "Review of Political Reconciliation, by Andrew Schaap" (2006) 34 *Political Theory* 830

Dodds, Susan, "Justice and Indigenous Land Rights" (1998) 41 *Inquiry* 187

Donovan, Brian, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw" (2001-2002) 35 *UBC L Rev* 43

Donovan, Brian, "Common Law Origins of Aboriginal Entitlements to Land" (2002-2003) 29 *Man LJ* 289

Dorsett, Shaunnagh, "Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of "Barbarous" Customs in New Zealand in the 1840's" (2008) 30 *J Legal Hist* 175

Dowling, Christina, "The Applied Theory of First Nations Economic Development: A Critique" (2005) 4 *The Journal of Aboriginal Economic Development* 120

Dufraimont, Lisa, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 *UT Fac L Rev* 1

Edger, Robert, "Collective Rights" (2009) 72 *Sask L Rev* 1

Edinger, Elizabeth, "Back to the Future with Interjurisdictional Immunity: Canadian Western Band v. Alberta; British Columbia v. Lafarge" (2008) 66 *The Advocate* 553

Edwards, BER, "Who do we Think we Are? Writing on Citizenship and Identity in the Early Twenty First Century" (2010) 44 *J of Canadian Studies* 221

Eisenberg, Avigail, "Diversity and Equality: Three Approaches to Culture and Sexual Difference" (2003) 11 *Journal of Political Philosophy* 41

Eisenberg, Avigail, "Review of The Moral Force of Indigenous Politics" (2009) 23 *Ethics and International Affairs* 71

Elliot, Robin, "Interjurisdictional Immunity after Canadian Western Band and Lafarge Canada Inc: The Supreme Court Muddies the Doctrinal Waters- Again" (2008) 43 *Sup Ct L Rev* 433

Ermine, Willie, "The Ethical Space of Engagement" (2007) 6 *Indigenous LJ* 193

Finch, Chief Justice Lance SC, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) *Continuing Legal Education Society of British Columbia*, November 2012.

Flathman, Richard E, "Review of the Liberal Archipelago: A Theory of Diversity and Freedom" (2006) 34 *Political Theory* 397

Fletcher, Matthew LM, "Rethinking the Role of Custom in Tribal Court Jurisprudence" (2007) 13 *Michigan J of Race and L* 57

Forst, Rainer, "First Things First: Redistribution, Recognition and Justification" (2007) 6 *European J Political Theory* 291

Forst, Rainer, "Foundations of a Theory of Multicultural Justice" (1997) 4 *Constellations* 63

Foster, Hamar, "One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada", (2010) 37 *The Advocate's Quarterly* 66

Fraser, Nancy, "From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age" (1995) 212 *New Left Rev* 68

Fraser, Nancy, "Rethinking Recognition" (2000) 3 *New Left Rev* 107

Fraser, Nancy, "Abnormal Justice" (2008) 34 Critical Inquiry 393

Friedland, Hadley & DeCoste, Frederick C, "Not so Naked After All: A Review Essay of Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation by Frances Widdowson & Albert Howard" (2010) 41 Ottawa L Rev 59

Furey, John, "Interjurisdictional Immunity: The Pendulum Has Swung" (2008) 42 Sup Ct L Rev 597

Getches, David, "Beyond Indian Law: the Rehnquist court's pursuit of states' rights, color-blind justice, and mainstream values" (2001) 86 Minn L Rev 267

Gibson, Gordon, "The Gitxsan Alternative" (2010) 27 Inroads 38

Gibson, James L, "Land Redistribution/Restitution in South Africa: A Model of Multiple Values as the Past meets the Present" (2010) British J of Political Science 134

Gilbert, Jeremie, "Historical Indigenous Peoples Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title" (2007) 56 ICLQ 583

Gilmour, Brad & Mellett, Bruce, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51 Alta L Rev 385

Glass, Arthur, "Review of Postcolonial Liberalism" (2003) 30 Australian Humanities Rev.

Glenn, H Patrick, "Continuity and Discontinuity in Aboriginal Entitlement" (2007) 7 Oxford University Commonwealth LJ 23

Gogal, Sandra, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43 Alta L Rev 129

Gordon, Seth, "Indigenous rights in Modern International Law from a Third World Perspective" (2006-2007) 31 Am Indian L Rev 401

Gormley, Daniel J, "Aboriginal Rights as Natural Rights" (1984) 3 The Canadian J of Native Stud 29

Graben, Sari, "Rationalizing Risks to Cultural Loss in Resource Development" (2013) 26 Can J of Law and Jurisprudence 83

Habermas, Jurgen, "Equal Treatment of Cultures and the Limits of Postmodern Liberalism" (2005) 13 J of Political Philosophy 1

Harris, Douglas C, "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal" (2009) BC Studies 137

Hartney, Michael, "Some Confusions Concerning Collective Rights" (1991) 4 Can J of Law and Jurisprudence 293

Henderson, James (Sakej) Youngblood, "Unravelling the Riddle of Aboriginal Title" (1977) 5 Am Indian L Rev 75

Henderson, James (Sakej) Youngblood, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241

Henderson, James (Sakej) Youngblood, "Perspectives on Marshall: Constitutional Powers and Treaty Rights" (2000) 63 Sask L Rev 719

Henderson, James (Sakej) Youngblood, "Taking Equality into the 21st Century: An Aboriginal Commentary" (2000-2001) 12 NJCL 31

Henderson, James (Sakej) Youngblood, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1

Henderson, James (Sakej) Youngblood, "Sui Generis and Treaty Citizenship" (2002) 6 Citizenship Studies 415

Henderson, James (Sakej) Youngblood, "The Perspective of Aboriginal Peoples of Canada on the Monarchy: Reflections on the Occasion of the Queen's Golden Jubilee" (2003) 13 Constitutional Forum 9

Henderson, James (Sakej) Youngblood, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72 Sask L Rev 29

Henderson, James (Sakej) Youngblood, "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 14 AIKR 24

Hendrix, Burke, "Political Authority and Indigenous Sovereignty" (2010) 19 The Good Society 47

Herr, Ranjoo Seodu, "In Defence of Non-Liberal Nationalism" (2006) Political Theory 304

Herr, Ranjoo Seodu, "Liberal Presumptions: A Response to Curtis" (2007) 35 Political Theory 341

Herr, Ranjoo Seodu, "Liberal Multiculturalism: An Oxymoron?" (2007) 38 Philosophical Forum 23

Herr, Ranjoo Seodu, "Cultural Claims and the Limits of Liberal Democracy" (2008) 34 Social Theory and Practice 25

Hickford, Mark, "Vague Native Rights to the Land: British Imperial Policy on Native Title and Custom in New Zealand, 1837-53" (2010) 38 *The Journal of Imperial and Commonwealth History* 175

Hirschl, Ran, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 *Fordham L Rev* 721

Hogg, Peter & Godil, Rahal, "Narrowing Interjurisdictional Immunity" (2008) 42 *Sup Ct L Rev* (2d) 623

Hogg, Peter & Turpel, Mary Ellen, "Implementing Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 *Can Bar Rev* 187

Hogg, Peter W & Bushell, Allison A, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Wasn't Such a Bad Thing After All)" (1997) 35 *Osgoode Hall LJ* 75

Hogg, Peter, "Compensation for Damage Caused by Governments" 6 *National J of Constitutional L* 7

Hohfeld, W, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale LJ* 16

Holder, Cindy, "Liberalism and Illiberalism: Are Patriarchal Cultures Really a Problem" Rethinking Objections from Cultural Viciousness" (2002) 12 *Contemporary Legal Issues* 727

Holder, Cindy L & Corntassel, Jeff J, "Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights" (2002) 24 *Hum Rts Q* 126

Hunter, Ian, "Natural Law, Historiography, and Aboriginal Sovereignty" (2007) 11 *Legal History* 137

Hutchins, PW et al, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 *UBC L Rev* 251

Hutchins, Peter W & Anjali Choksi, "From Calder to Mitchell: Should the Court Control Cultural Borders?" (2002) 16 *Sup Ct L Rev* (2d) 241

Imai, Shin, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice Lebel" (2006) 55 *UNBLJ* 146

Imai, Shin and Stacey, Ashley, "Moving Backwards: Does the Lack of Duty to Consult Create the Right to Infringe Aboriginal and Treaty Rights?" Osgoode Hall Law School, Research Paper # 13/2013

Innes, Robert Alexander, "Introduction: Native Studies and Native Cultural Preservation, Revitalization, and Persistence" (2010) 34 *American Indian Culture and Research J* 1

Jorns, Catherine J, "Indigenous Peoples and Self-Determination: Challenging Settler State Sovereignty" (1992) 24 Case W Res J Int'l Law 199

Isaac, Thomas, "The Storm Over Aboriginal Self-Determination: Section 35 of the Constitution Act, 1982 and the Redefinition of the Inherent Right of Self-Government" (1992) 2 CNLR 6

Isaac, Thomas, "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem" (1992) 30 Alta L Rev 708

Iverson, Duncan, "The Logic of Aboriginal Rights" (2003) 3 Ethnicities 321

Jenkins, Christopher D, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) 35 UBC L Rev 1

Jenson, Eric, "American Indian Tribes and Secession" (1993-1994) 29 Tulsa L J 385.

Johnson, Darlene, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 1 Can J of Law and Jurisprudence 19

Katz, Larissa, "The Concept of Ownership and the Relativity of Title" (2011) 2 Jurisprudence 191

Katz, Larissa, "The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law" (2009) 55 McGill LJ 47

Keller, Perry, "Justice and Ethnicity: review article for Multicultural Citizenship" (1996) 59 Modern Law Rev 903

Kickbush, Kathryn, "Can Section 35 Carry the Heavy Weight of Reconciliation?" (2010) 68 The Advocate 503

Kompridis, Nicolas, "Disclosing Possibility: The Past and Future of Political Theory"(2005) 13 International J of Philosophical Stud 325

Kompridis, Nicolas, "Normativizing Hybridity/Neutralizing Culture" (2005) 33 Political Theory 318.

Kingsbury, Benedict, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples Claims in International or Comparative Law" (2001) 34 Int'l Law and Politics 189

Kingsbury, Benedict & Gover, Kirsty, "Indigenous Groups and the Politics of Recognition in Asia: Cases from Japan, Taiwan, West Papua, Bali, the Peoples' Republic of Canada and Gilgit" (2004) 11 International J on Minority and Groups 1

Kleinhaus, Martha-Marie & Macdonald, Roderick A, *What is a Critical Legal Pluralism?* (1997) 12 Can J of Law and Society 25

Kymlicka, Will, "The Rights of Minority Cultures: Reply to Kukathas" (1992) 20 Political Theory 140

Kymlicka, Will, "The Good, the Bad, and the Intolerable: Minority Group Rights" (1996) 43 Dissent 22

Kymlicka, Will, "Theorizing Indigenous Rights" (1999) 49 UTLJ 281

Kymlicka, Will, "Liberalism, dialogue and multiculturalism" (2001) 1 Ethnicities 128

Ladner, Kiera, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38 Can J of Pol Sci 923

Ladner, Kiera & Dick, Caroline, "Out of the Fires of Hell : Globalization as a Solution to Globalization: An Indigenist Perspective" (2008) 23 CJLS 63

Ladner, Kiera, "Negotiated Inferiority: The Royal Commission on Aboriginal Peoples' Vision of a Renewed Relationship" (2001) 31 American Rev of Canadian Stud 241.

Lajoie, Andrée, Cécile Bergada et Éric Gélneau, « Conceptions abenakies des droits ancestraux » (2005) 46 C de D 749

Lambert, Douglas Honourable, "The Future of Indigenous Law in the Canadian Legal System" (2006) 64 The Advocate 217

Lambert, Douglas Honourable, "Three Points about Aboriginal Title" (2012) 70 The Advocate 34

Lambert, Douglas Honourable, "The Tsilhqot'in Decision" (2012) The Advocate 311.

Leclair, Jean, "Federal Constitutionalism and Aboriginal Difference" (2005-2006) 31 Queen's LJ 521

Lenzerini, Federico, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" (2006) 42 Texas International LJ 155

Libesman, Heidi, "Review of Indigenous Difference and the Constitution of Canada by Patrick Macklem" (2002) 40 Osgoode Hall LJ 200

Libesman, Heidi, "In Search of a Postcolonial Theory of Normative Integration: Reflections on AC Cairns' Theory of Citizens Plus" (2005) 38 CJPS 955

Libesman, Heidi, "Between Modernity and Post-Modernity" (2004) 16 Yale JL & Human 413

Lindberg, Tracey, "What do you call an Aboriginal Women with a Law Degree? Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out" (1997) 9 Can J of Women and the Law 301

Lindblom, Charles E, "The Science of 'Muddling Through'" (1959) 19 Public Administration Rev 79

Lindblom, Charles E, "Still Muddling, Not Yet Through" (1979) 39 Public Administration Rev 517

Low, Margaret and Shaw, Karena, "Indigenous Rights and Environmental Governance: Lessons from the Great Bear Rainforest" (2011-2012) 172 BC Studies 9

Luk, Senwung, "Not so Many Hats: The Crown's Fiduciary Duties to Aboriginal Communities Since Guerin" (2013) 76 Sask L Rev 1

Luk, Senwung, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2010) 41 Ottawa L Rev 101

Luk, Senwung, "Justified Infringement: A Minimal Impairment Approach" (2013) 25 J Env L & Pract 169

Luther, Emily, "Whose 'Distinctive Culture'? Aboriginal Feminism and R. v. Van der Peet" (2010) 8 Indigenous LJ 27

Lyons, David, "The New Indian Land Claims and the Original Rights to Land" (1977) 4 Social Theory and Practice 249

Lysyk, Kenneth, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can Bar Rev 51

Maclure, Jocelyn, « Définir les droits constitutionnels des peuples autochtones : La « nouvelle » approche du Québec » (2005) 7 éthique publique 1

Maclure, Jocelyn, "The Politics of Recognition at an Impasse: Identity Politics and Democratic Citizenship" (2003) 36 CJPS 3

Macklem, Patrick, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's LJ 173

Magnet, Joseph Eliot, "Collective Rights, Cultural Autonomy and the Canadian State" (1986-1987) 32 McGill LJ 170

Magnet, Joseph Eliot, "Multiculturalism and Collective Rights" (2005) 17 Sup Ct L Rev (2d) 431

- Mallon, Ron, "Human Categories Beyond Non-Essentialism" (2007) 15 *Journal of Political Philosophy* 146
- Mainville, Sara J, "Treaty Councils and Mutual Reconciliation under Section 35" (2007) 6 *Indigenous LJ* 141
- Mandell, Louise, "Aboriginal Title Over the Buffalo Jump: Decision of the British Columbia Court of Appeal in the Tsilhqot'in Case, August 23, 2012 (accessed online)
- Mayeda, Graham, "Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court" (2010) 50 *Sup Ct L Rev* (2d) 41
- McCallum, Margaret, "After Bernard and Marshall" (2006) 55 *UNBLJ* 73
- McCausland, Ruth & Vivian, Alison, "Why do Some Aboriginal Communities Have Lower Crime Rates than Others: A Pilot Study?" (2000) 43 *Austl Crim & NZJ* 301
- McHugh, Paul, "A common law biography of section 35" (paper presented at 35@30: Reflecting on 30 years of s. 35, Faculty of Law, University of Toronto, October 25-27, 2012)
- McKinnon, Bruce J, "Aboriginal Title- After Bernard and Marshall: Part 1" (2007) 65 *The Advocate* 611
- McKinnon, Bruce J, "Aboriginal Title- After Bernard and Marshall: Part 11" (2007) 65 *The Advocate* 513
- McLeod-Kilmurry, Heather, "Does Preserving the Environment Advance or Conflict with Social Justice and Human Rights?" (2010) 50 *Sup Ct L Rev* (2d) 465
- MacDonald, David, "Reconciliation after Genocide in Canada: Towards a Syncretic Model of Democracy" (2013) 9 *AlterNative: An International J of Indigenous Peoples* 59
- Macdonald, Roderick A, "Metaphors of Multiplicity: Civil Society, Regions and Legal Pluralism" (1998) 15 *Ariz J Int'l & Comp L* 1
- McDonald, Lindsey Te Ata O tu and Muldoon, Paul, "Globalization, Non-Liberalism and the Struggle for Indigenous Citizenship" (2006) 41 *Aust J Pol Sci* 209
- McHugh, Paul, "The Common Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past" (1998) 61 *Sask L Rev* 393
- McHugh, PG, "New Dawn to Cold Light: Courts and Common Law Aboriginal Rights" (2005) *NZL Rev* 485
- McHugh, PG, "Sovereignty in Australasia: Comparatively Different Stories" (2009) 13 *Legal History Review* 55

McHugh, Paul, "A common law biography of section 35", paper presented at 35@30: Reflecting on 30 years of s. 35, Faculty of Law, University of Toronto, October 25-27, 2012

McLachlin, Right Honourable Beverly, "Aboriginal Peoples and Reconciliation" (2003) 9 Canterbury L Rev 240

McIntosh, Constance, "From Judging Culture to Taxing "Indians": Tracing the Legal Discourse of the "Indian Mode of Life" (2009) 47 Osgoode Hall LJ 399

McIntosh, Constance, "Developments in Aboriginal law: The 2008-2009 Term" (2009) 48 Sup Ct L Rev (2d) 1

McKinnon, Bruce J, "Aboriginal Title- After Marshall and Bernard: Part I" (2007) 65 The Advocate 513

McKinnon, Bruce J, "Aboriginal Title-After Marshall and Bernard: Part II" (2007) 65 The Advocate 661

McNeil, Kent, "Self-Government and the Inalienability of Aboriginal Title", (2002) 47 McGill LJ 473

McNeil, Kent, "How can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8 Constitutional Forum 33

McNeil, Kent, "The Onus of Proof of Aboriginal Title" (1999) 35 Osgoode Hall LJ 775

McNeil, Kent, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup Ct L Rev 255

McNeil, Kent, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous LJ 1

McNeil, Kent & Yarrow, David, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 Sup Ct L Rev (2d) 177

McNeil, Kent, "Aboriginal Title in Canada: Site-Specific or Territorial" (2014) 91 Can Bar Rev 745.

McNeil, Kent, "Aboriginal Title in Canada: Site-Specific or Territorial?", presented at the Law on the Edge Conference, Canadian Law and Society Association/ Law and Society Association of Australia and New Zealand, University of British Columbia, Vancouver, July 1-4, 2013

De Mestral, Armand & Fox-Decent, Evan, "Rethinking the Relationship Between International and Domestic law" (2008) 55 McGill LJ 573

Metcalfe, Eric, "Illiberal Citizenship? A Critique of Will Kymlicka's Liberal Theory of Minority Rights" (1996) 22 Queen's LJ 167

Miller, Robert J, "Collective Discursive Democracy as the Indigenous Right to Self-Determination" (2006-2007) 31 Am Indian L Rev 341

Millette, Daniel, "Review of Beyond the Indian Act" (2010-2011) BC Studies 103

Mills, Aaron, "Wapshkaa ma'ligan, Aki, Anishinnabeck, laye tahsh Crown" (2010) 9 Indigenous LJ 107

Milward, David, "Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence" (2010) 14 E & P 287

Mowbray, Martin, "What Matters? Policy Driven Evidence, Indigenous Government and the Harvard Project" Australian Social Policy Conference 2005

Monture-Angus, Patricia, "Citizens Plus: Sensitivities versus solutions" in *Bridging the Divide: Aboriginal Peoples and the Canadian State*, The CRIC Papers, June 2001

Moodie, Doug, "Thinking Outside the 20th Century Box: "Mitchell"- Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government" (2003) 35 Ottawa L Rev 3

Moore, Margaret, "Natural Resources, Territorial Right and Global Justice" (2012) 40 Political Theory 84

Morgan, Edward M, "Self-Government and the Constitution: A Comparative Look at Native Americans" (1984) 12 Am Indian L Rev 39

Muldoon, Paul, "Between Speech and Silence: The Postcolonial Critic and the Idea of Emancipation" (2001) 2 Critical Horizons 33

Muldoon, Paul, "The Sovereign Exception: Colonization and the Foundation of Society" (2008) 17 Social Legal Stud 59

Muldoon, Paul, "Thinking Responsibility Differently: Reconciliation and the Tragedy of Colonisation" (2005) 26 J of Intercultural Studies 237

Mullan, David, "The Duty to Consult Aboriginal Peoples: The Canadian Example" (2009) 32 CJALP 107

Mullan, David, "The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog" (2011) 24 CJALP 255

- Murphy, Michael, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?" (2001) 34 Canadian J of Political Science 109
- Murphy, Michael, "Looking Forward Without Looking Back: Jean Chretien's Legacy for Aboriginal-State Relations" (2004) 9 Rev of Constitutional Studies 151
- Murphy, Michael, "Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada and New Zealand" (2008) 87 Can Bar Rev 357
- Murphy, Michael, "Representing Indigenous Self-Determination" (2008) 58 UTLJ 185
- Murray, Robert, "Liberalism, Culture, Aboriginal Rights: In Defence of Kymlicka" (1999) 29 Can J of Philosophy 109
- Nahwegahbow, David C & Richmond, Nicole DO, "Whether the Constitution Act made a difference for First Nations" (2007) 23 NJCL 153
- Napolean, Val, "Delgamuukw: A Legal Straitjacket for Oral Histories" (2005) 20 CJLS 123
- Napolean, Val, "Behind the Blockades" (2010) 9 Indigenous LJ 1
- Newell, Ryan L, "Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law" (2012) 11 Indigenous LJ 41.
- Newell, Ryan, "Indigenous Land Disputes and the Contested Nature of the Rule of Law" (2012) 11 Indigenous LJ 41.
- Newman, Dwight, "Aboriginal "Rights" as Powers: Section 35 and Federalism Theory" (2007) 37 Sup Ct L Rev (2d) 163
- Newman, Dwight, "Canada's re-emerging division of powers and the unrealized force of reciprocal interjurisdictional immunity" (2011) 20 Constitutional Forum 1
- Newman, Dwight, "The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests" (1999) 62 Sask L Rev 543
- Newman, Dwight, "Tsihqot'in Nation v. British Columbia and Civil Justice: Analysing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History" (2005) 43 Alta L Rev 433.
- Newman, Dwight, "Value Collectivism, Collective Rights, and Self-Threatening Theory" (2013) 33 Oxford J Legal Stud 197
- Newman, Dwight, "You Still Know Nothin' Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights" (2007) 52 McGill LJ 725

- Newman, Dwight, "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2007) 44 Alta L Rev 779
- Newman, Dwight, "Contractual and Covenental Conceptions of Treaty Interpretation (2011) 54 Sup CT L Rev (2d) 475
- Nichols, Robert Lee, "Realizing the Social Contract: The Case of Colonialism and Indigenous Peoples", (2005) 4 Cont Pol Theory 42
- Niezen, Ronald, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18 CJLS 1
- Nine, Cara, "A Lockean Theory of Territory" (2008) 56 Political Studies 148
- Nine, Cara, "Superceding Historic Injustice and Territorial Rights" (2008) 11 Critical Review of International Social and Political Philosophy 79
- Ogden, Richard, " "Existing" Aboriginal Rights in Section 35 of the Constitution Act, 1982" (2009) 88 Can Bar Rev 51
- Olszynki, Martin, "Shell Jackpine Mine Expansion Project: The Mysterious Case of the Missing Justification", University of Calgary Law Blog, December 12, 2013
- Otis, Ghislain. "Constitutional Liability for the Infringement of Rights Per Se: A Misguided Theory" (1992) 26 UBC L Rev 21
- Otis, Ghislain, « Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada » (2004) 49 McGill LJ 393.
- Palmeter, Pamela, "Opportunity or Temptation: Plans for Private Property on Reserves Could Cost First Nations Their Independence" (2010) The Literary Rev of Canada
- Panagos, Dimitrios, "The Plurality of Meanings Shouldered by the Term "Aboriginality": An Analysis of the Delgamuukw Decision" (2007) 40 Can J of Political Science 591
- Papillon, Martin, "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States" (2012) 42 Publius 289
- Parrish, Austen L, "Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights" (2006-2007) 31 Am Indian L Rev 291
- Patton, Paul, "Historic Injustice and the Possibility of Supercession" (2005) 26 J of Intercultural Studies 255
- Patton, Paul, "Response to Henry Reynolds" (2006) 6 Macquarie LJ 21.

Peach, Ian, "The Power of a Single Feather: Indian Resistance and the Evolution of Indian Politics in Canada" (2011-2012) 10 Rev Constitutional Studies 1

Penner, Jonathan, "The Curious History of the Interjurisdictional Immunity and its (Lack of) Application to Federal Legislation" (2011) 90 Can Bar Rev 1

Pentney, William, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II: The Substantive Guarantees" (1988) 22 UBC L Rev 207

Pfiferle, Brian, "The Indefensibility of Post-Colonial Aboriginal Rights" (2007) 70 Sask L Rev 393

Phillips, Anne, "Equality, Pluralism, Universality: current concerns in normative theory" (2000) 2 Brit J of Pol & Int'l Rels 237

Pildes, Richard H, "The Structural Conception of Rights and Judicial Balancing" (2002) 6 Review of Constitutional Studies 179

Pitty, Roderic & Smith, Shanara, "The Indigenous Challenge to Westphalian Sovereignty" (2011) 46 Australian J of Political Science 121

Pommersheim, Frank, "At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty" (2010) 55 SDL Rev 48

Poole, Thomas, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 Oxford J Legal Stud 435.

Poole, R, "Justice or appropriation? Indigenous Claims and liberal theory" (2000) Radical Philosophy (May –June)

Potes, Veronica, "The Duty to Accommodate Aboriginal Peoples: Substantive Consultation?" (2006) 17 J Envtl L & Prac 27

Promislow, Janna, "'Irreconcilable?' The Duty to Consult and Administrative Decision Makers" (2013) 22 Constitutional Forum 63

Reddekopp, Neil, "Theory and Practice in the Government of Alberta's Consultation Policy" (2013) 22 Constitutional Forum 47

Reid, Kyla, "Political Legitimacy in the Wake of Indigenous Governance Claims" (2010) 35 Australian J of Legal Philosophy 85

Reilly, Alexander, "How Mabo Helps Us Forget" (2006) 6 Macquarie LJ 25

Reilly, Alexander, "A Constitutional Framework for Indigenous Governance" (2006) 28 Sydney L Rev 403

Reiter, Eric, "Fact, Narrative, and the Judicial Uses of History: Delgamuukw and Beyond" (2010) 8 Indigenous LJ 55

Reynolds, Henry, "Reviving Indigenous Sovereignty" (2006) 6 Macquarie LJ 5

Riley, Angela R, "(Tribal) Sovereignty and Illiberalism" (2007) 95 Cal L Rev 79

Ritchie, Kaitlin, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46 UBC L Rev 397

Ritter, David, "The Ideological Foundations of Arguments about Native Title" (2010) 45 Aust J of Pol Sci 191

Robinson, Andrew, "Cultural Rights and Internal Minorities: Of Pueblos and Protestants"(2003) 36 Can J Pol Science 107

Rogers, Sandra, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 Sup Ct L Rev (2d) 1

Rotman, Leonard, "Developments in Aboriginal Law: The 2000-2001 Term" (2001) 15 Sup Ct L Rev 1

Roughen, Nicole, "The Association of State and Indigenous Law: A Case Study in Legal Association" (2009) 59 UTLJ 135

Russell, Peter, "High Courts and the Rights of Aboriginal Peoples: the Limits of Judicial Independence" (1998) 61 Sask L Rev 247

Ryder, Bruce, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1990-1991) 36 McGill LJ 308

Rynard, Paul, "Welcome In, But Check Your Rights at the Door: The James Bay and Nisga'a Agreements in Canada" (2000) 33 Can J Pol Science 211

Salée, Daniel (with the assistance of David Newhouse and Carole Levesque), "Quality of Life of Aboriginal Peoples in Canada: An Analysis of Current Research" (2006) 12 IRPP Choices 1

Salée, Daniel, "Indigenous Peoples and Settler Angst in Canada: A Review Essay" (2010) 41 International J of Canadian Stud 315

Salée & Lévesque, "Representing Aboriginal Self-Government in First Nations/State Relations: Political Agency and the Management of the Boreal Forest in Eeyou Istchee" (2010) 41 Intl J of Can Studies 99

Samson, Colin, "The Dispossession of the Innu and the Colonial Magic of Canadian Liberalism" (1999) 3 Cit Studies 5

Sanderson, Chris W, Bergner, Keith B & Jones, Michelle S, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty" (2011-2012) 49 *Alta L Rev* 821

Sanderson, Douglas, "Against Superecession" (2011) 24 *Can J L & Jurisprudence* 155.

Schapp, Andrew, "Political Reconciliation Through a Struggle for Recognition?" (2004) 13 *Social and Legal Stud* 523

Schapp, Andrew, "The proto-politics of reconciliation: Lefort and the aporia of forgiveness in Arendt and Derrida" (2006) 41 *Australian J of Political Science* 615

Schaap, Andrew, "Political Theory and the Agony of Politics" (2007) 8 *Pol Studies Rev* 56

Schapp, Andrew, "Reconciliation as Ideology and Politics" (2008) 2 *Constellations* 249

Scheurman, William E, "Constitutionalism and Difference" (1997) 47 *UTLJ* 263

Schneiderman, David, "Theories of Difference and the Interpretation of Aboriginal and Treaty Rights" (1996) 14 *Intl J Can Stud* 35

Schuman, Jacob, "Indian Canon Originalism" (2013) *Harv L Rev* 1100

Scott, David, "Culture in Political Theory" (2003) 31 *Political Theory* 93

Secher, U, "The Reception of Land Law into the Australian Colonies Post-Mabo: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore" (2004) 27 *UNSW LJ* 703

Shachar, Ayelet, "Reshaping the Multicultural Model: Group Accommodation and Individual Rights" (1998) 8 *Windsor Rev Legal Soc Issues* 83

Shachar, Ayelet, "Of Citizenship and Multicultural Vulnerability" (2000) 28 *Political Theory* 64

Shachar, Ayelet, "The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority" (2000) 35 *Harv CR-CLL Rev* 385

Shachar, Ayelet, "Two Critiques of Multiculturalism" (2001) 25 *Cardozo L Rev* 253

Sher, George, "Ancient Wrongs and Modern Rights" (1981) 10 *Philosophy and Public Affairs* 3

Short, Damien "Reconciliation, Assimilation, and the Indigenous Peoples of Australia" (2003) 24 *International Political Science Rev* 491

Short, Damien, "Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project" (2003) 7 *Citizenship Studies* 291

- Short, Damien, "Reconciliation and the Problem of Internal Colonialism" (2005) 3 J of Intercultural Studies 267
- Short, Damien, "Review: Steven Curry, "Indigenous Sovereignty and the Democratic Project" (2006) 5 Contemporary Political Theory 108
- Short, Damien, "The Social Construction of Indigenous "Native Title" Land Rights in Australia" (2007) 55 Current Sociology 857
- Short, Damien, "When Sorry isn't good enough: Official remembrance and reconciliation in Australia" (2012) 5 Memory Studies 293
- Silverstein, Ben, "The Rule of Native Title: A View of Mabo in the British Empire" (2007) 16 Griffith L Rev 55
- Simmons, John A, "Historical Rights and Fair Shares" (1995) 14 Law and Philosophy 149
- Singer, Joseph William, "Well-Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28 Ga L Rev 481
- Singer, Joseph William, "Original Acquisition of Property- From Conquest & Possession to Democracy & Equal Opportunity" (2011) 86 Indigenous LJ 763
- Slattery, Brian, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 Queen's LJ 232
- Slattery, Brian, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall LJ 101
- Slattery, Brian, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255
- Slattery, Brian, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727
- Smith, JC, "The Concept of Native Title" (1974) 24 UTLJ 1
- Snowball, Lucy & McCausland, Don, "Theories of Indigenous Violence: A Preliminary Practical Assessment" (2008) 41 Austl Crim & NZJ 216
- Sossin, Lorne, "Indigenous Self-Determination and the Future of Administrative Law" (2012) 45 UBC L Rev 595
- Sossin, Lorne, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 25 Can J Admin L & Prac 93
- Spaulding, Richard, "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997) 47 UTLJ 35

Spinner-Halev, Jeff, "Feminism, Multiculturalism, Oppression, and the State" (2001) 112 *Ethics* 84

Spinner-Halev, Jeff, "From Historical to Enduring Injustice" (2007) 35 *Political Theory* 574

Strelein, Lisa, "Conceptualizing Native Title" (2001) 23 *Sydney L Rev* 95

Sunstein, Cass R, "Incompletely Theorized Arguments in Constitutional Law" (2007) 74 *Social Research: An International Quarterly* 1

Sutton, Peter, "The politicization of disease and the disease of politicization: causal theories and Indigenous health differential", National Rural Health Conference, 2004

Tamanaha, Brian Z, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney L Rev* 375

Tanner, "The New Hunting Territories Debate: An Introduction to Some Unresolved Issues" (1986) 28 *Anthropological* 19.

Teillet, Jean, "The Métis and Thirty Years of Section 35: How Constitutional Protection for Métis Rights has Led to the Utter Loss of the Rule of Law" (2013) 58 *Sup Ct L Rev (2d)* 333

Thomassen, Lasse, "Bound by Identity"- Review Essay" (2005) 33 *Political Theory* 420

Tsosie, Rebecca, "Whiteness: Some Critical Perspectives: The New Challenge to Native Identity: An Essay on Indigeneity and "Whiteness"" (2005) 18 *Wash UJL & Pol'y* 55

Tsosie, Rebecca, "Reconceptualising Tribal Rights: Can Self-Government be Actualized within the United States Constitutional Structure?" (2011) 15 *Lewis & Clark L Rev* 927

Tully, James, "Aboriginal Property and Western Theory: Recovering a Middle Ground" (1994) 11 *Social Philosophy and Policy* 153

Tully, James, "The Agonistic Freedom of Citizens" (1999) 28 *Economy and Society* 161

Tully, James, "Political Philosophy as a Critical Activity" (2002) 30 *Political Theory* 333

Tully, James, "The Unfreedom of the Moderns in Comparison to the Ideals of Constitutional Democracy" (2002) 65 *Modern L Rev* 204

Turpel, Mary Ellen, "Aboriginal Rights and the Canadian Charter: Interpretative Monopolies and Cultural Difference" (1989-1990) 1 *CHRYB* 3

Tzimas, E Ria, "To What End the Dialogue" (2011) 54 *Sup Ct L Rev (2d)* 493

- Tzimas, E Ria, "Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation" (2005) 28 Sup Ct L Rev 461
- Veracini, Lorenzo, "The Settler-Colonial Situation" (2010) 19 Native Studies Rev 101
- Vermette, D'Arcy, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29 Windsor YB Access Just 55
- Volmert, Andrew, "Indigenous Self-Determination and Freedom from Rule" (2010) 19 The Good Society 53
- Waddell, Ian, "The Laboured Birth of Section 35" (2008) 66 The Advocate 891
- Waldron, Jeremy, "Superceding Historic Injustice" (1992) 103 Ethics 4
- Waldron, Jeremy, "Redressing Historic Injustice" (2002), 52 UTLJ 135
- Waldron, Jeremy, "Indigeneity: First Peoples and Last Occupancy" (2003) 1 NZPIL 55
- Waldron, Jeremy, "Settlement, Return, and the Supercession Thesis" (2004) 5 Theoretical Inquiries in Law 237
- Walker, Bruce, "Plural Cultures, Contested Territories: A Critique of Kymlicka" (1997) 30 Can J of Pol Sci 211
- Walker, Neal, "The Idea of Constitutional Pluralism" (2002) 66 Mod L Rev 317
- Walters, Mark, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's LJ 350
- Walters, M, "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill LJ 711.
- Walters, Mark, "The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law" (2001) 51 UTLJ 91.
- Walters, Mark, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470.
- Walters, Mark, "Histories of Colonialism, Legality and Aboriginality" (2007) 57 UT Fac L Rev 819
- Walton, Luanne, "Making Sense of Canadian Constitutional Interpretation" (2000-2001) NJCL 315
- Ward, Damon, "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia" (2003) History Compass 1

Ward, Damen, "Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1846-60" (2006) 34 J of Imperial and Commonwealth History 483

Webber, Jeremy, "The Grammar of Customary Law" (2009) 54 McGill LJ 579

White, Graham, "Treaty Federalism in Northern Canada and the United States" (2012) 32 Publius 89

Wicks, Anthony, "Beyond Audi Alterum Partem: The Duty to Consult Aboriginal Peoples in Canada and New Zealand" (2009) 13 J S Pac L 40

Wiessner, Siegfried, "Indigenous Sovereignty: A Reassessment in Light of the U.N. Declaration on the Rights of Indigenous Peoples" (2008) 41 Vand J Transnat'l L 1141

Wilkins, Kerry, "Of Provinces and Section 35 Rights" (1999) 22 Dal LJ 185

Wilkins, Kerry, "But we Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Self-Government" (1999) 49 UTLJ 53

Wilkins, Kerry, "Take Your Time and Do it Right: Delgamuukw, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27 Man LJ 241

Wilkins, Kerry, "R. v. Morris: A Shot in the Dark and Its Repercussions" (2008) 7 Indigenous LJ 1

Wilkins, Kerry, "Whose Claim is it Anyway? Comment on Lax Kwa'laams" (2013) 11 Indigenous LJ 73

Woolford, Andrew, "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process" (2004) 29 Can J of Sociology 111

Yirush, Craig, "Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704-1743" (2011) 29 LHR 333

OTHER MATERIALS

Academic Materials: Theses and Dissertations

Anker, Kirsten, *The Unofficial Law of Native Title: Indigenous Rights, State Recognition and Legal Pluralism in Australia* (PhD, University of Sydney, 2007)

Banks, Judy, *Taking Culture to Court: Anthropology, Expert Witnesses, and the Aboriginal Sense of Place in the Interior Plateau of British Columbia* (MA thesis, Simon Fraser University, 2008)

Brock, Kathy Lenore, *The Theory and Practice of Aboriginal Self-Government: Canada in a Comparative Context* (D Phil, University of Toronto, 1989)

Brown, Jennifer A, “*Our Native Peoples*”: *The Illegality of Canadian Citizenship and the Canadian Federation for Aboriginal Peoples* (MA, Carleton University, 2007)

Burns, John T, *Canada’s Accommodating Judiciary: How the Supreme Court of Canada Can Actively Encourage Negotiations in Aboriginal Rights and Treaty Claims* (Master of Arts, Department of Legal Studies, Carleton University, 2007)

Catapano, Andrea Lucille, *The Rising of the Ongwehonwe: Sovereignty, Identity and Representation on the Six Nations Reserve* (Doctor of Philosophy, Stoney Brook University, 2007)

Charlton, Guy, *Constitutional Conflict and Aboriginal Law: Hunting, Fishing and Gathering Rights in Canada, New Zealand and the United States* (PhD, Law, University of Auckland, 2009)

Costa, Ravi de, *New Relations, Old Certainties: Australia’s Reconciliation and the Treaty Process in British Columbia* (PHD, Institute of Social Research, Swinburne University of Technology, 2002)

Coulthard, Glen Sean, *Subjects of Empire? Indigenous Peoples and the “Politics of Recognition” in Canada* (Doctor of Philosophy, Department of Political Science, University of Victoria, 2010)

Cunningham, Clayton, *Of Self-Government: Aboriginal Rights, Privileges, Powers and Immunities* (MA Thesis, University of Alberta, 2008)

Dalton, Jennifer E, *Aboriginal Engagement in Canada: Seeking Reconciliation Through Electoral Participation and Land Negotiations* (Doctor of Philosophy, Osgoode Hall Law School, 2010)

Ginn, Diana Edith, *Aboriginal Self-Government* (MA Thesis, York University, 1987)

Hejazi, Omid, *Evaluating Nationalism in the Liberal Framework* (M.A., Philosophy, Queen's University, 2007)

Ignace, Ronald Eric, (*Stsmil'exqen*), *Our Oral Histories are our Iron Posts: Secwepemc Stories and Historical Consciousness* (PHD, Department of Sociology and Anthropology, Simon Fraser University, 2008)

Johnson, Miranda, *Struggling Over the Past: Colonization and the Problem of History in Settler Societies* (Doctor of Philosophy, Department of History, University of Chicago, 2008)

Lindberg, Tracey, *Critical Indigenous Legal Theory* (Doctor of Laws, Faculty of Law, University of Ottawa, 2007)

Liston, Mary, *Honest Counsel: Institutional Dialogue and the Canadian Rule of Law* (PhD, University of Toronto, 2007)

Loth, Christian, *The Inherent Right Policy: A Blending of Old and New Paradigm Ideas* (MA Thesis, Carleton University, 1996)

Mack, Johnny, *Thickening Totems and Thinning Imperialism* (Master of Arts, Faculty of Law, 2009)

Napolean, Val, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy, University of Victoria, 2009)

Newman, Dwight, *Community and Collective Rights* (D. Phil (Laws) University of Oxford, 2005)

Oman, Natalie Benva, *Sharing Horizons: A Paradigm for Political Accommodation in Intercultural Settings* (Doctor of Philosophy, Department of Philosophy and Political Science, 1997)

Panagos, Dimitrios, *Aboriginality, Existing Aboriginal Rights and State Accommodation in Canada* (Doctor of Philosophy, Department of Political Studies, Queen's University, 2008)

Peach, Ian Laird, *Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Determination and Indigenous Law* (Master of Laws, Queen's University, 2009)

Thom, Brian, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Dissertation, Department of Anthropology, University of British Columbia, 2005)

Watts, Vanessa A, *Towards Anishnabe Governance and Accountability: Rethinking our Relationships and Sacred Bimaadiziwin* (MA Thesis, Department of Human and Social Development, UVIC, 2008)

Webber, Gregoire C N, *Limitation of Constitutional Rights as a Negotiating of Political Legitimacy, with Special Reference to Canada Since 1982* (Doctor of Philosophy, University of Oxford, 2007)

Wilkins, Kerry, *Uncharted Territory: Fundamental Common Values and the Inherent Right of Aboriginal Self-Government* (LLM, University of Toronto, 1998)

Widdowson, Frances, *The Political Economy of Aboriginal Dependency: A Critique of the Royal Commission on Aboriginal Peoples* (PHD, York University, 2006)

Winter, Stephen G, *In Dialogue with "Citizens Plus": Towards a Different Model of Citizenship* (Master of Arts, Dalhousie University, 2001)

Woons, Marc Joseph, *Aboriginal Participation in Canada: Overcoming Alienation and Mistrust in a Situation of Complex Interdependence* (Master of Arts, Political Science, University of Northern British Columbia, 2008)

Other: Government Reports, Media etc.

Government of Canada

Department of Health, Government of Canada: "In the Wake of a Storm- the Resilience of First Nations Communities", August 26-27, 2009. Papers prepared for this symposium include Rupert Ross, "Exploring Emotional Suppression and Disconnection in Aboriginal Canada", Taiiike Alfred, "Colonialism and State Dependency", Michael Tousignant and Nibisha Sioui, "Resilience and Aboriginal Communities in Crisis: Theory and Interventions", Onowa McIvor and Art Napoleon, "Language and Culture as Protective Factors for At-Risk Communities", Simon Brascgroupe and Catherine Waters, "Cultural Safety, Exploring the Concept of Cultural Safety in Aboriginal Health and Community Wellness", Health Canada- FNIHB- "Role of Economic Development and Resilience as a Key Dimension of First Nations Communities at Risk- Position Document and Strategic Issues- Discussion Paper, 2009", Dr. Lori Haskell and Dr. Melanie Randell "Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada, Working Draft- A Critical Review of the Literature and Key Findings" and Dr. Kiera Ladner, "Understanding the Impact of Self-Determination on Communities in Crisis".

Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant*, 2007

Report of the Treaty Commissioner of Saskatchewan, 2012

Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa, Minister of Supply and Services, 1993)

Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal and Treaty Rights, Final Report of the Senate Standing Committee on Legal and Constitutional Affairs, December 2007

Urban Aboriginal Task Force, December 2007- Report Commissioned by the Ontario-Federation of Indian Friendship Centres, the Ontario Métis Aboriginal Association and the Ontario Native Women's Association

British Columbia:

New Relationships with Aboriginal Communities in British Columbia, Annual Report on Progress, 2011-2012

Environmental Law Centre, *Environmental Assessment in British Columbia*, University of Victoria, November 2010

Ontario:

The Ipperwash Inquiry Report, A road map to better relationships between Aboriginal people and the Ontario government (Government of Ontario, 2007)

Australia:

Australian Law Reform Commission, *New Visions for Native Title and Reconciliation*, April 9, 2009

Closing the Gap: The Indigenous Reform Agenda, May 21, 2013

Judicial Guidelines:

Federal Court- Aboriginal Law Bar Liaison Committee, *Aboriginal Litigation Practice Guidelines*, October 16, 2012

Media:

“Tough critique or hate speech”, *Maclean's* (February 25, 2009)

ADDENDUM TO THESIS DOCUMENT TO ADDRESS SUPREME COURT OF CANADA DECISIONS IN TSILHQOTIN AND GRASSY NARROWS

While it is not traditionally considered necessary in a law thesis to address jurisprudence that emerges after the submission of the thesis for review, the two recent decisions of the Supreme Court of Canada in *Tsilhqot'in* and *Grassy Narrows* are sufficiently significant that it is important to contextualize the overall thesis argument in light of these monumental decisions. This is particularly important as the decisions, somewhat unexpectedly given the normal time a Supreme Court of Canada decision is reserved for judgment, came immediately after the submission of the thesis document. This document will provide an overall assessment of these judgments from the perspective of what they mean for the thesis argument. Rather than change the body of the thesis argument, which it is proposed can stand as an integrated whole, this addendum will address the implications of these decisions. It will be seen that the decisions are largely confirmatory of the broad themes developed in the thesis argument. In particular, the decisions stand within an understanding of the broad jurisprudential framework that is argued to be slowly emerging through the decisions of the Supreme Court of Canada. However, there are some divergences in points of detail, particularly in relation to the specific test that developed for identifying the scope of aboriginal title lands. These differences in detail do not take away from the main point that there continues to be a convergence towards a particular type of methodology for dealing with Section 35 claims, one which is prospectively oriented, increasingly de-linked from traditional models of the common law, inspired by the promises implicit in Section 35 and firmly rooted in the need for dialogical resolution of contested issues. Indeed, the thesis argument can be used to point out potential problems in the specific tests proposed by the Supreme Court of Canada, particularly in relation to the task of encouraging negotiated resolution of disputes about aboriginal title. The thesis argument may offer several signposts to identify and evaluate possible routes to manage and reduce the uncertainty that will likely continue after these important judgments.

SUMMARY OF TSILHQOTIN DECISION

The primary direct implication of the Tsilhqot'in decision of the Supreme Court of Canada is that approximately 1750 square kilometres of land are confirmed to be aboriginal title lands held by the Tsilhqot'in Nation. This decision affirms the decision of Mr. Justice Vickers of the British Columbia Supreme Court and rejects the legal test proposed by the British Columbia Court of Appeal. The Court of Appeal had overturned the trial judgment on the basis that the trial judge had relied on an overly broad "territorial" approach to determine the scope of aboriginal title rights of the Tsilhqot'in. The Supreme Court of Canada concluded that the trial judge had correctly interpreted the test for aboriginal title and applied it appropriately to the factual record that had been proven in the case. Chief Justice McLachlin, writing for all 8 judges who heard the appeal, provided extensive comments on the test for title, on the legal incidents of aboriginal title once established, on the duties of the Crown prior to the establishment of title and the duties of the Crown subsequent to the establishment of title over particular lands. In particular, the Crown is obliged to seek the consent of the title holder for any development which is proposed to take place on title lands, failing which the Crown would be obliged to satisfy an onerous burden to justify any infringement of title. The Tsilhqot'in decision stands as the most important elaboration of the requirements to establish infringement and to justify such infringements since the Sparrow decision in 1990.

The second important consequence of the Tsilhqot'in decision is the resolution of a long-standing controversy about the implications of the division of powers for the ability of a province to justify infringements of Section 35 rights. Several prominent academics had argued that provinces lacked the ability to present justification arguments as the mere fact of infringement engaged the inter-jurisdictional immunity doctrine and rendered an infringing provincial law inapplicable on the basis that it touched the core of the federal jurisdiction conferred by Section 91(24) of the Constitution Act, 1867. The Delgamuukw decision had stated that Section 35 rights lay at the core of federal jurisdiction under Section 91(24). However, it and several other decisions had also referred to the ability of a province to present justification arguments. The Supreme Court of Canada decisively resolved this controversy by declaring that the inter-jurisdictional immunity doctrine plays no role in this context, preferring the carefully constructed

framework of infringement and justification generated by Section 35 of the Constitution Act, 1982. In the course of reaching this conclusion, it cast considerable doubt on the reliability of its previous decision in *Morris v. Olson*.

SUMMARY OF GRASSY NARROWS DECISION

Rendered just two weeks after the decision in *Tsilhqo'tin*, on July 11, 2014, the Supreme Court of Canada, in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, affirmed the decision of the Ontario Court of Appeal that the provisions dealing with taking up of land under Treaty # 3 did not require federal approval or involvement. The trial judge had concluded that a two-step process was required for the provincial Crown to take up land on the basis of the particular negotiating history of Treaty # 3, particularly the fact that the treaty was negotiated by the “Dominion of Canada” on lands that were thought to be under federal jurisdiction at the time. The Supreme Court of Canada rejected the conclusion that the treaty required federal involvement in the taking up of lands for provincial Crown purposes, holding that it was Ontario and only Ontario that had this authority. (para. 30) This conclusion was reached following an examination of relevant constitutional provisions, the interpretation of the treaty text and legislation enacted to regulate the roles and responsibilities of both governments following the resolution of a dispute about the location of the provincial boundary. However, in exercising this authority Ontario is bound by constitutional duties, such as the duty to consult and accommodate. More generally, the honour of the Crown and fiduciary obligations potentially play a role in constraining the exercise of provincial authority under the Treaty.

While the treatment of the division of powers issue is far more cursory than the earlier decision in *Tsilhqot'in*, in large part because resolution of the issue was not necessary, the Supreme Court of Canada held that earlier decision to be a “full answer” to questions about the ability of the provincial Crown to justify infringements of the treaty.

CONVERGENCE WITH THESIS ARGUMENT

In large measure, the thrust of both of these important decisions is fully consistent with the broad themes developed in the thesis. The overall model of Section 35 as supporting a modern and prospective framework for the dialogical resolution of differences and movement towards the goal of reconciliation pervades both judgments. History is certainly taken seriously in developing the content of Section 35 rights and the correlative duties placed on the Crown but there is a firm sense that the enterprise is situated within a negotiating environment where the resolution of differences is in the hands of the parties under the ultimate supervision of the courts.

This is seen most clearly in the resolution of the division of powers issue shared in both cases. For aboriginal title and treaties, the doctrine of inter-jurisdictional immunity is not seen to be a barrier to provincial justification of infringements of Section 35 rights. This result provides a strong confirmation of one of the central arguments developed in the thesis.

Likewise, the development of a distinctive approach to the justification of infringements in the *Tsilhqot'in* decision closely tracks the argument developed in the thesis. The justification test has a strongly procedural orientation, developing notions of proportionality and minimal impairment. However, the Supreme Court of Canada has not yet fully embraced the dialogical core of the very concept of justification. While the discharge of duties flowing from the honour of the Crown is firmly included in the process of justification, the Supreme Court of Canada has not fully developed the need for dialogue and engagement that seems to be implicit in the very idea of justification.

In each decision, the crucial role played by the duty to consult is further developed from the *Haida* line of cases. In *Tsilhqot'in*, discharge of the duty to consult is said to be the only obligation burdening the Crown prior to establishment of aboriginal title, but the elaboration of this duty reflects the strong commitment to serious inter-cultural dialogue that is located at the heart of the promise of Section 35. The frequent references to strength of claim analysis confirm the need to make efforts to understand alternative perspectives about engagement with land and the different normative visions that guide this engagement. After the establishment of aboriginal title, the

consultative duties of the Crown are dramatically enhanced and include the explicit duty to seek the consent of the Aboriginal title holders for activities that might infringe the right to enjoy their lands. The same theme is developed in *Grassy Narrows* where the provincial discharge of the duty to consult, and the associated duty to accommodate, is placed at the heart of the project of reconciliation of provincial authority and provincial obligation. In sum, these decisions strongly confirm the main argument of the thesis concerning the growing prominence and centrality of the duty to consult as a major driver in the articulation of the constitutional framework erected around Section 35.

These decisions also provide strong evidence of the growing merger of the *Sparrow* and *Haida* frameworks for understanding the requirements of Section 35. This is particularly the case in *Tsilhqot'in* where compliance with *Haida* duties is expressly incorporated into the *Sparrow* framework for justifying infringements of aboriginal title. As noted previously, the process of justification is itself aligned with the “governing ethos” of reconciliation and the dialogical relationship that is implied by this value. The focus of the Court is on the different duties that arise prior to and after the establishment of aboriginal title, but the Court is very mindful that the duties can overlap and pays careful attention to the “transition” of one set of duties to the other. It is hard to avoid the conclusion that such a transition can only be managed by careful and respectful dialogue between the Crown and an aboriginal title claimant.

There are strong indications in each judgment that the understanding of Section 35 developed by the Supreme Court of Canada is motivated by generating improvements in the modern relationship between aboriginal peoples and other Canadians, and especially the federal and provincial Crowns. There is a strong sense that Section 35 has generated an obligation structure that requires respect for aboriginal claims and strong processes for resolving unresolved issues. This is reflected in the important references to obligations to negotiate in good faith and the increasingly strong obligations that are intended to govern the transition to a state of fully reconciled interests and rights. Inter-cultural dialogue is clearly seen to be the key vehicle for resolving contested constitutional issues, with the courts playing an important but limited supervisory role.

Turning to treaties, the Supreme Court of Canada has again confirmed that common intention is the touchstone for the interpretation of historic treaties. (see especially, *Grassy Narrows*, para. 40) The focus of the Court seems to be in the confirmation of clear duties that ensure that different treaty rights can be exercised in a complementary fashion. The confirmation of the Mikisew Cree model of using the duty to consult to support implied procedural obligations to work out treaty conflicts is an important development of this theme.

Considered globally, these two recent decisions of the Supreme Court of Canada are strongly confirmatory of the broad trend towards a distinctive theory of Section 35 that is modern, prospective, historically and culturally sensitive and oriented strongly to dialogue and deliberation.

KEY POINTS OF DIVERGENCE

The most important point of divergence between these two decisions and the arguments presented in the thesis concerns the precise test for elaborating the scope and location of aboriginal title lands. Therefore, the bulk of discussion will be focussed on this aspect of the *Tsilhqot'in* decision. However, there are a few other differences that should be mentioned. First, the decisions actually go a little further than the thesis argument with respect to the role of inter-jurisdictional immunity. The thesis chapter suggests that a limited role for the doctrine could be preserved for such cases as provincial extinguishment, attempts to alter the content of the doctrine of aboriginal or treaty rights or measures that completely prohibit the exercise of a right. *Tsilhqot'in* strongly hints that measures such as these could be attacked as being in relation to Section 91(24), though very little clear guidance is offered on these questions. As mentioned previously, the *Tsilhqot'in* decision also falls short in developing the dialogical potential in the process of justifying infringements of rights, though the emphasis on consultation, the importance of aboriginal perspective and strong notions of proportionality seem to imply future growth in this direction.

There are significant differences between the account of aboriginal title developed in *Tsilhqot'in* and the argument developed in the thesis. The thesis argument regards occupation, continuity

and exclusivity as separate components of the test for identifying aboriginal title lands. However, the core argument is that the task of determining whether lands are identified as title lands as opposed to lands subject to some other Section 35 makes most sense if four analytical tools are deployed. First, title, like all Section 35 rights, is best conceived of a modern right, though clearly deeply rooted in history. Second, clarity can be obtained by thinking critically about the different roles played by aboriginal title and traditional lands as distinct ways of describing aboriginal attachment to land. Third, aboriginal title falls within an overall spectrum of rights with title accorded to lands which were and continue to be centrally significant to the maintenance of modern cultures into the future. Fourth, the dialogical resolution of practical conflicts about attachment to land is most likely to be worked out in the administration of the duty to consult as opposed to adjudication of claims for aboriginal title in civil suits.

It is important to note that the approach to aboriginal title developed in the thesis would not necessarily produce title awards that are smaller than those that may follow the Tsilhqot'in decision. While the Tsilhqot'in decision does not completely close the door on this issue, the biggest difference in orientation in the thesis argument is the shift towards consideration of the modern significance of connection to land. It is argued that this approach, in addition to being consonant with some of the strongest currents in modern political theory about claims for land restitution, is better able to take shifts in occupation and reliance into account. These would include situations of displacement by government action or shifts in land utilization in response to environmental and socio-political change.

In contrast, Tsilhqot'in arguably downplays the factor of occupation, limits consideration of continuity to claims where current occupation is relied upon and greatly expands on reliance on the role of exclusivity and intention to control. In a very different way, title is established as a modern right but primarily in the sense that it is held to be operative only after formal establishment or recognition. In contrast to the thesis argument, no explicit consideration is given to the present importance or cultural significance of the lands to the aboriginal group.

These differences would certainly be of no more than academic interest if the decision provided sufficient clarity to move the parties closer to consensual resolution of contested issues. If a clear

test emerges from the decision which allows all parties to move to delineation of title lands and start the process of developing protocols for shared land use management, a significant contribution to the process of moving towards reconciliation would have been made. However, there appear to be good reasons to be skeptical whether this is the most likely scenario following the judgment. It must be remembered that the previous decisions of the Supreme Court of Canada (especially *Delgamuukw* and *Bernard/Marshall*) created a dynamic where aboriginal peoples viewed title as synonymous with traditional lands and governments viewed title as protecting much smaller areas. Unfortunately, there is sufficient ambiguity in the *Tsilhqot'in* ruling to allow this binary divide to continue. Governments (and certainly some private parties) are likely to see title as reflected in regular and sufficient use of land. Aboriginal claimants have ample foundation to see the judgment as confirming their traditional view of title as being an expansive interest that covers all or most of traditional territories. This binary divide may make resolution at the negotiation table more difficult and could well require further guidance from appellate courts.

Part of the difficulty seems to flow from the picture the Supreme Court of Canada paints of the Court of Appeal ruling. It considers the Court of Appeal as limiting title to village sites and farms (para. 42) and as painting a picture of “small islands” of title surrounded by areas subject to other Section 35 rights. However, this seems to lead to a highly binary understanding of the options that are available and almost certainly mischaracterizes the actual ruling of the Court of Appeal. It is true that the Court rejected a territorial approach to title and gave several highly restrictive examples in obiter comments (salt licks and buffalo jumps being the most notorious examples). But the invitation to file fresh claims was open-ended and did not place restrictions on the scope of claims that could be made. It only specified that the claims could not be made to broad and undifferentiated territories. Regular use of specific areas or tracts was required.

As noted, the *Tsilhqot'in* judgment permits governments and others to continue to see title as focused on areas of regular or sufficient occupation. Reference will likely be made to the fact that the *Tsilhqot'in* secured title recognition to only 5% of what they claim as their traditional lands. The decision will also be characterized as an exercise of deference to the fact-finding function of the trial judge. A different judge might well understand the factual framework

(supplemented by elder and expert testimony) in a different light. The Supreme Court of Canada, at times, stresses the paramount importance of sufficiency and regularity of occupation. (see paras. 41, 42 and 44) The invitation to draw an analogy with the decided cases on common law possession might produce the argument that these cases usually support title to very small areas of land. Reliance on aspects of Bernard/Marshall and the role of continuity in other Supreme Court of Canada cases (e.g. Sappier and Lax Kwa'laams) might also come into play.

A wide variety of unanswered questions will come to the fore. Is use of land every season required? If not, every two years, every ten years or even every generation? This is linked to the problem of developing standards for sufficiency. Does it ultimately reduce to what will be found sufficient by a trial judge? Does the prediction made by Chief Justice McLachlin in Bernard/Marshall that semi-nomadic occupation will more likely provide a foundation for harvesting rights rather than title still stand? Does the quality and level of occupation even matter if the lands fall within the perimeter of a broader territory where effective control was maintained?

These problems of interpretation and application are exacerbated by the ambiguities introduced by the description of “traditional” or “ancestral” lands in the judgment. Only a subset of the Tsilhqot'in Nation live in the area that has been declared subject to title, so other claims are possible outside the areas covered by this lawsuit. But if the traditional territory is indeed as large as described by the Tsilhqot'in, there would be room for very few traditional territories of equivalent scope in British Columbia even though the Supreme Court of Canada notes that “hundreds” of claims are being made. (para. 4) At a conceptual level, it will become important to explore the relationship between the notion of a “seasonal round” and that of a “traditional territory”. It certainly would be expected that the seasonal round would be the core component of a traditional territory. These issues are particularly important considering the high likelihood that title claims frequently overlap.

The net result is that sufficient ambiguity is left in the judgment that there will continue to be major debate about how to apply the test in other contexts. As noted above, governments may well stress the factor of regular use giving rise to sufficient occupation but it is highly likely that

aboriginal claimants will stress the broader factor of exclusive control at sovereignty. There are strong references to the importance of aboriginal perspective and laws to the determination of title lands and the references to consideration of environmental and cultural circumstances and the carrying capacity of land will provide arguments to support broad approaches to the scope of title. These arguments will likely be supplemented by expert testimony from the social sciences and, most importantly, the testimony of elders. Indeed, the judgment moves beyond evidence of use of lands to a consideration of the ability of an external observer to make the inference that the title holding group intended to maintain exclusive control of particular lands. An intention to control can arguably extend well beyond areas of direct utilization or even areas immediately surrounding zones of usage. There is a strong incentive to maintain buffer zones and to control trade corridors. These aspects of the judgment will certainly be deployed to support wide claims of title. It certainly would not be surprising if claims extended to very large portions of the claimed traditional territory of the group.

There are a number of areas of the judgment that merit further analysis. A key example is the reliance on the common law doctrine of possession. It is not clear whether the doctrine is being applied directly or by analogy. If directly, the title would have arisen at sovereignty but the decision tends to indicate that no present proprietary interest exists until a court declaration or formal recognition occurs. We have multiple descriptions of what is in place prior to this time: an interest that has “survived” and “remains valid” unless extinguished (para. 10), an interest which gives rise to the “potential” for aboriginal title (para. 12), a strong implication that no interest is “vested” prior to confirmation (para. 111), a confirmation that the “only right” that exists prior to confirmation is the right to be consulted (para. 113) and a description of an interest that is “not yet legally established”. (para. 95) The “fact” of prior occupation is seen to give rise to a “burden” on title but this burden appears to be conceived of as giving rise to procedural obligations, such as those captured by the Royal Proclamation of 1763. The Court describes title as a “unique product of a historic relationship”, (para. 72) but there is very little elaboration of what the burden on Crown title means prior to establishment of aboriginal title, beyond the reference to the duty to consult. As the duty to consult was clearly inaugurated with the enactment of Section 35, there is great uncertainty about the implications for the characterization of the potential right of title prior to formal proof or recognition. If, on the other hand, the

reference to common law possession is intended to support an analogy, there are a number of ways to question the fit of the analogy to the facts. The common law cases on possession generally support quite small declarations of title and there is no experience with claims based on collective use and occupation. It is particularly challenging intellectually to raise a current title based on past rather than current occupation.

Part of the problem with this ambiguity is that the Supreme Court of Canada was dealing simultaneously with the proprietary and regulatory implications of the doctrine of aboriginal title. It was concerned with any approach that would undermine the premise of the Haida decision, which appears to be the continued ability of the Crown to exercise regulatory authority up to the point of a declaration of aboriginal title. (para. 115) As noted above, this produces a range of descriptions of the burden that the common law placed on Crown title prior to this point. The tenor of the judgment is that the “burden” is placed on Crown discretion rather than giving rise to a real property right. As argued in the thesis, a major problem of property theory relates to the role that exclusivity plays as both a contributor to the establishment of property rights and a key descriptor of the right once it is established. This may contribute to the ambiguity in the judgment concerning the respective roles of occupation and exclusivity. (para. 36)

A variety of scenarios are likely to arise to test the applicability of the test that is developed in Tsilhqot’in. Core usage combined with wide buffers and areas subject to Crown displacement have already been mentioned. In addition, major movement of species and hunting territories may have been precipitated by the migration of species or changes in environmental conditions. There is also a great deal of cultural variation in how various groups express their relationship to land. There are also deep evidentiary problems that will be compounded by the need to produce evidence of sufficient occupation from increasingly distant time periods. If the Australian experience provides a guide, new battles are likely to emerge about extinguishment and compensation for past interference with title lands.

There is also likely to be deep conflict about aspects of the treaty ruling of the Supreme Court of Canada in Grassy Narrows. There is an obiter reference (para. 2) to the effect of the cede, release and surrender clause of the treaty- to “yield ownership of territory, except for certain lands

reserved to them.” A more general reference is made in *Tsilhqot’in*, a non-treaty case, to the suggestion that treaty signatories “gave up their claim” to land ownership. (para. 40) A growing legal and historical literature is casting doubt on these statements and they will continue to be controversial. They certainly highlight the difference between suggesting the possibility that “vast areas” of some parts of the country will be potentially subject to established aboriginal title whereas the treaties will be perceived as providing far less expansive benefits. The net result is that strong contestation of the content and implication of Section 35 rights is likely to be a part of the legal and political debate for the foreseeable future.

POSSIBLE USE OF THE THESIS ARGUMENT TO MAP OUT A POSSIBLE WAY FORWARD

If the above assessment of the impact of the two recent decisions is accurate, there is little prospect that the current deep binary chasm about the interpretation of the key Section 35 rights will be closed in the near future. In areas subject to historic treaties, there is likely to be tension about the fundamental model that governs the nature and interpretation of the treaties. In areas subject to potential aboriginal title claims, conflicting interpretations of the *Tsilhqot’in* decision may cloud efforts to resolve disputes about the scope and implications of aboriginal title. Similar uncertainty exists with respect to other important Section 35 rights, especially commercial harvesting rights and self-government.

Several options are available to map a way forward in this reality. It is certainly open to the parties to opt for case-by-case resolution. Alternatively, there may be calls to maintain rights-neutral and interest-based negotiation rather than engage in the lengthy and costly exercise of resolving deep disputes about the content of constitutional rights. Litigation is an expensive and uncertain enterprise for all parties so it would not be surprising that continued efforts would be made to find negotiated accommodations dealing with potential Section 35 claims that meet the aspirations of all parties. After all, the Supreme Court of Canada has been very clear that negotiated resolutions of contested aboriginal constitutional issues are to be strongly preferred.

Looking at the issue from a government perspective, two alternatives will likely attract some attention. First, it would not be unreasonable to see interest in generalizing the result in *Tsilhqot'in* to other potential claimants. On this approach, it would be expected as a rule of thumb that other claimants would be entitled to a quantum of title that is comparable to that secured by the *Tsilhqot'in*. However, there are numerous problems with this approach. The judgment certainly leaves room for other *Tsilhqot'in* claims for title. Very little analysis of the parameters of *Tsilhqot'in* traditional or ancestral lands can be found in the factual record of the case. Most importantly, there is little reason to expect other claimants to agree to a purely quantitative comparison. Second, governments could develop guidelines for recognition to allow for non-litigated determinations of entitlement to aboriginal title at least for those areas where there is an overlapping consensus that particular tracts of land meet the test for title. Without providing an exhaustive list, some potential candidates could include especially important spiritual and cultural sites, areas of harvesting activity that are especially important for the group, areas where the current activities of the group are concentrated (so long as they are within the areas occupied at sovereignty) or any other area that meets a mutually-acceptable notion of central significance. This list is certainly not intended to be exhaustive but rather to highlight the possibility that recognition standards could be developed to provide for consensual identification of at least some lands subject to aboriginal title.

While these alternatives might develop as a natural response to the decision in *Tsilhqot'in*, the thesis argument would suggest that the likely forum for advancing issues related to the scope of aboriginal title will be in the administration of the duty to consult. Disputes about differing views of attachment to and entitlement to land are likely to emerge far more frequently and certainly far more quickly in the context of judicial reviews of land use and licensing decisions than in civil claims for declarations pertaining to Section 35 rights. Strength of claim analysis and assessment of impact are likely to be the main drivers for stimulating dialogue between the Crown and aboriginal peoples about Section 35 rights. This will especially be the case if the dialogical and deliberative core of the “governing ethos” of Section 35 continues to be developed in the jurisprudence that develops under that provision. An emerging issue will certainly be the determination of precisely what is meant by “impact”. When title is claimed is impact to be assessed on a generic basis within all parts of the area claimed to be held as title lands or is the

duty going to require some consideration of more tangible impacts? Though the issue is certainly not free of doubt, it is submitted that considerations of impact will resonate most strongly when they pertain to particularly sensitive areas and particularly important activities. In other words, it will be hard to avoid some consideration of degrees of occupation. It is certainly possible that indicia of “significance” and “centrality” will emerge as the duty to consult is developed in more cases that engage “deep consultation”. Though the result of multiple adjudications will not produce a complete picture of where title is found, it is highly likely that the process will generate a sense of the most important contenders for title status. A theory of title could emerge from this process and it certainly will not be limited to narrow areas such as “village sites”, “salt licks” or “buffalo jumps”. The practice that emerges, particularly if aligned with recognition standards such as those discussed above, could provide a basis for the confirmation of property rights to potentially large areas that sustained and still sustain a living culture and economy.

It is necessary to remember that judicial reviews dealing with the duty to consult are not rights determining processes, but the Tsilhqot’in decision may be perceived to give judges a “green light” to offer non-binding opinions on likely contenders of lands for title status. The big difference between this process and a civil claim dealing with aboriginal title is that the duty to consult is adjudicated with an overwhelmingly modern focus. The key point is that approach to differentiating aboriginal title from other Section 35 rights that is offered in the thesis argument may help to provide a principled account of the process of assessing strength of claim and impact on rights in an environment that will continue to be dominated by the administration of the duty to consult.

Stress points within the Tsilhqot’in decision will also likely first appear in the administration of the duty to consult. A good example could be the reliance on the decision of the High Court of Australia in *Ward* in the Tsilhqot’in analysis. The Supreme Court of Canada draws on *Ward* to make the point that the various elements of the test for establishing aboriginal title should not be considered separately. However, the High Court was making a very different point. The quoted passage was part of a summary rejection of an argument presented by the indigenous claimant that appeared very similar to the result ultimately reached in *Tsilhqot’in*. A vision of native title was put forward that placed emphasis on the notion that title land vested in the claimant on an

exclusive basis. The High Court, in the course of expressly rejecting this argument, observed that “...It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it.” (para. 90) To do so would “...reduce a very complex relationship to a single dimension.” The clear complications attendant upon the reliance on Australian title jurisprudence will almost certainly first appear in the context of judicial reviews involving the duty to consult.

Even bigger problems are raised by the temporal reference points of the decision. The strong focus of the decision is on the modern consequences of first potential and second actual declarations of aboriginal title. Paragraph 86 refers to the implications of the decision for “present and future generations” and the references to the “claims stage” seem to focus on the existence of modern claims resolutions policies. The decision describes an interest which does not amount to a proprietary charge on the land until a formal declaration of specific recognition has occurred. As noted above, there is deep ambivalence about the relevance of events that intervene between sovereignty and the moment of specific recognition- including the impact of dispossession, fundamental changes of circumstances and possible extinguishing events. There is certainly room to interpret the judgment within a model of a Section 35 centred theory of rights that is informed by a retrospective examination of the historical record to support the declaration of modern rights.

A subsequent wave of cases may be expected to raise questions that deal with the past more explicitly. Is compensation owed for pre-Section 35 interferences with what may now be determined to be aboriginal title land? Is the fiduciary obligation of the Crown really limited to discharging the duty to consult, particularly as there are strong indications from the courts that Section 35 itself generated the duty to consult? How does the resolution framework that is provided by Section 35 apply to adjudication of disputes that arose prior to its enactment? Are we any closer to a global theory of how the honour of the Crown is discharged over time, taking into account the clear evolution and frequent changes in how these obligations are articulated? Claims involving compensation and extinguishment will certainly bring these temporal questions to the fore.

One of the disappointing aspects of the decision is that a full range of alternative positions were not considered in the reasoning of the Court about aboriginal title. Some significant reliance was placed on the work of Kent McNeil but no consideration was given to the recent shift in his writing to the primacy of sovereignty over occupancy claims. It is even more disappointing that the important generic rights framework developed by Brian Slattery was not considered in the analysis. Both scholars would likely be disappointed by the limited reference to operative property rights arising from the outset. However, the result appears to be consistent with an emerging body of work in legal history that casts doubt on the proposition that the common law historically recognized property rights as arising from indigenous use and occupation. The two most common features one sees in the Canadian legal materials from the 19th century are the characterization of rights as usufructuary and the description of remedies for interference with such rights as sounding in procedural obligations of the Crown. This perspective is, in part, molded by documents such as the Royal Proclamation of 1763 with its statement of special procedural obligations for the Crown in relation to lands occupied by Indians tribes. It is also reflected in the most authoritative statement of the status of such rights in the 19th century- the St. Catherine's Milling decision. These general features are supported by a growing body of legal scholarship led by the work of Paul McHugh and often described as the "New Zealand" school of legal history. A clear distinction is drawn in this work between how native title was thought about in the past and how it is described in the modern jurisprudence under Section 35. In the past, the claims of indigenous peoples were seen to give rise to solemn but non-justiciable obligations of the Crown to deal equitably with aboriginal groups before opening up lands to general settlement. These claims reflected a "burden" on title but were not seen to give rise to a distinctive title that competed with the title asserted by the Crown. Some writers describe aboriginal title in that period as a "processual" right- one that generated obligations on the Crown to act with honour and in a protective fashion. This is contrasted with a perspective that sees immediate common law recognition of justiciable property rights- often found in instruments such as the Royal Proclamation. As noted previously, this is strongly associated with the work of Brian Slattery. However, the common law materials from the early periods of Canada's settlement provide little evidence to support such a theory and lots to dispute its automatic operation. There is even less support in the historical record for any idea of

recognition and incorporation of whole indigenous legal systems as the *lex loci* for particular territories of land.

It is against this background that Kent McNeil developed the theory of aboriginal title as based on common law notions of occupation and possession. His theory is ultimately founded on notions of equality. If the common law can generate a title for any citizen that can demonstrate legal possession of a parcel of land, what barriers of a non-discriminatory nature prevent aboriginal peoples from accessing and taking the benefit of this legal doctrine?

Prior to the *Tsilhqot'in* decision, the dominant academic debate turned on whether aboriginal title was an interest that applied to the full traditional lands of an aboriginal group. The *Bernard* decision was seen to be a large barrier to this view of the operation of the common law because of its comments on nomadicism, its calls for proof of intensive occupation and its apparent rejection of the McNeil account of possessory title. The hotly contested nature of the issue was also reflected in the widely disparate legal theories adopted by the British Columbia Supreme Court and the Court of Appeal in the *Tsilhqot'in* case. Particular concern was raised in academic commentary about the excessively narrow and inappropriate examples of possible title lands given in obiter comments by the sole judge writing the Court of Appeal opinion.

The thesis argument develops the argument that Section 35, particularly as understood by reference to the overlapping frameworks generated by the *Sparrow* and *Haida* line of cases, is designed to generate modern deliberation to achieve a modern result. History is taken seriously but the body of decisions coming from the Supreme Court of Canada do not purport to be an elaboration of ancient rules of the common law. They draw from various models of the common law and a close examination of the facts at various points in history to generate a thoroughly modern theory of rights and obligations. Cases like *Manitoba Metis Federation* develop the idea that the honour of the Crown may generate modern obligations to correct a “rift in the national fabric”, but these cases are fully consistent with the emphasis on encouraging a modern response to reconciliation.

To reiterate, while the recent decisions resonate in very large measure with the core arguments developed in the thesis argument, there are some significant differences in approach with respect to the precise identification of title lands, the role that history plays in identifying rights that are protected by Section 35 and the relevance of various intervening events between the date of sovereignty and the adjudication of a modern claim. That said, the Supreme Court of Canada clearly seems motivated to construct a framework which constitutes a middle ground between the positions of the primary parties and generates movement towards consensual resolution of contested issues. If, as argued, the conflicting messages in *Tsilhqot'in* may pose a barrier to the timely resolution of these issues, by continuing the binary divide that has characterized the relations between aboriginal peoples and the Crown, the thesis argument may offer a framework which assists in mapping a way forward, particularly in relation to the administration of the duty to consult.