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A Narrowing Field of View: An Investigation into the Relationship Between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism

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Abstract

In its recent decisions in *Tsilhqot'in Nation* and *Grassy Narrows*, the Supreme Court of Canada has significantly altered the position of Indigenous peoples within the structure of Canadian federalism. This article sets out to investigate the basis for the Court's jurisdiction to change this structure. Its approach is historical, as it covers judicial treaty interpretation from *St Catherine's Milling* to *Grassy Narrows*. By contextualizing the most recent change in light of the last 250 years of treaty making, we can see how the notion of Crown sovereignty has become entangled with the Westphalian model of the state (i.e., the state as a politically self-contained and legally autonomous unit for a single "people" or "nation") and how this entanglement has served to set the boundaries of treaty interpretation. By drawing out how these legal fictions continue to inform the way in which the courts have interpreted treaties, we can begin to explore the possibilities that have been hiding in plain sight. Namely, that the treaties (as documents of inter-societal law) present a conceptual challenge to the Westphalian model and its coupling together of the terms "nation" and "state." More specifically, the treaties challenge this coupling by pluralizing the idea of the nation, which, in turn, requires us to reimagine the structure of the state. This decoupling of nation and state brings us back to a deeper engagement with the idea of federalism in Canada. This means that the treaties are constitutional documents that offer us a way to reimagine both what Canadian federalism could be and how this particular case could assist in reimagining a post-Westphalian international order.

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A Narrowing Field of View: An Investigation into the Relationship Between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism

JOSHUA BEN DAVID NICHOLS*

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In its recent decisions in *Tsilhqot'in Nation* and *Grassy Narrows*, the Supreme Court of Canada has significantly altered the position of Indigenous peoples within the structure of Canadian federalism. This article sets out to investigate the basis for the Court's jurisdiction to change this structure. Its approach is historical, as it covers judicial treaty interpretation from *St Catherine's Milling* to *Grassy Narrows*. By contextualizing the most recent change in light of the last 250 years of treaty making, we can see how the notion of Crown sovereignty has become entangled with the Westphalian model of the state (*i.e.*, the state as a politically self-contained and legally autonomous unit for a single "people" or "nation") and how this entanglement has served to set the boundaries of treaty interpretation. By drawing out

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how these legal fictions continue to inform the way in which the courts have interpreted treaties, we can begin to explore the possibilities that have been hiding in plain sight. Namely, that the treaties (as documents of inter-societal law) present a conceptual challenge to the Westphalian model and its coupling together of the terms “nation” and “state.” More specifically, the treaties challenge this coupling by pluralizing the idea of the nation, which, in turn, requires us to reimagine the structure of the state. This decoupling of nation and state brings us back to a deeper engagement with the idea of federalism in Canada. This means that the treaties are constitutional documents that offer us a way to reimagine both what Canadian federalism could be and how this particular case could assist in reimaging a post-Westphalian international order.

WITH THEIR DECISIONS IN *Tsilhqot'in Nation* and *Grassy Narrows*, the Supreme Court of Canada has fundamentally altered the position of section 91(24) within the *Constitution Act, 1867* and, with it, the very model of federalism in Canada.¹ They do so by plainly stating that “[t]he doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights.”² This is Chief Justice McLachlin’s response to the second issue in *Grassy Narrows*, but it is not the full answer to the question.³ The full answer is given in *Tsilhqot'in*

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1. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*]; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*]; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].
 2. *Grassy Narrows*, *supra* note 1 at para 53.
 3. There were two issues before the Court in *Grassy Narrows*: “1. Does Ontario have the authority under Treaty 3 to ‘take up’ tracts of land in the Keewatin area? 2. Does the doctrine of interjurisdictional immunity preclude Ontario from justifying infringement of Treaty 3 rights?” (See *ibid* at para 27). It is interesting to note that the Chief Justice holds that it is “unnecessary” to answer the second question because of her affirmative response to question one (see *ibid* at para 53). While the questions are undoubtedly related, one concerns the powers allocated to the province of Ontario within the terms of Treaty 3 and the other concerns the power of the provinces in relation to the federal government’s exclusive powers under s 91(24) of the *Constitution Act, 1867* (vis-à-vis powers in relation to “Indians and lands reserved for Indians”). See *Constitution Act, 1867*, *supra* note 1. This is a significant distinction that is not accounted for within the decision. This distinction concerns the nature of the constitutional relationship between Aboriginal peoples and the Crown. In one version of this relationship, s 91(24) is interpreted as being exclusively federal and so interjurisdictional immunity is used to shield this relationship from legislative incursion from the provinces. This version has a historical basis that goes back to the Royal Proclamation of 1763. The version of this relationship that the Court articulates is constitutionally distinct: It removes interjurisdictional and presents the Crown as including both the federal and provincial governments. This unilaterally changes the constitutional structure of the relationship between Aboriginal peoples and the Crown. This version characterizes Aboriginal peoples as being a “cultural minority” within the general Canadian body politic (*i.e.*, subject to both federal and provincial jurisdiction). The background presumptions between these two pictures of the constitutional relationship are categorically distinct: The

Nation in an extensive subsection on the division of powers.⁴ We can get a rough and ready sense of how this alters the existing model of federalism by turning our attention to an example of the Court's previous position on this point. As former Chief Justice Dickson stated in *Simon*, "[i]t has been held to be within the exclusive power of Parliament under section 91(24) of the *Constitution Act, 1867*, to derogate from rights recognized in a treaty agreement made with the Indians."⁵ The jurisdictional lines that are expressed within this picture of federalism (a picture whose roots stretch back to the *Royal Proclamation, 1763* and the *1764 Treaty of Niagara*⁶) have now been unilaterally redrawn. According to the new picture the Court has set out in these companion decisions, section 91(24) does not bar the provinces from infringing upon Aboriginal and treaty rights. Rather, as parts of the Crown, they have a duty to consult and accommodate, and to attempt to justify any infringements of the treaties via the *Sparrow/Badger* analysis under section 35 of the *Constitution Act, 1982*.⁷

first (older) version positions Aboriginal peoples in a sui generis relationship to the federal government and the second (new) version positions them as subjects of both federal and provincial authority. Also, I would like to note that I agree with Robin Elliot's argument that the term "interjurisdictional immunity" is an unhappy one. It encourages the misconception that the purpose of the doctrine is to protect the interests of particular entities, rather than jurisdictional exclusivity. I believe that we should follow his suggestion and rename it the "doctrine of jurisdictional exclusivity." See Robin Elliot, "Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters—Again" (2008) 43 SCLR (2d) 433 at 495.

4. *Tsilhqot'in Nation*, *supra* note 1 at paras 128-52.
5. *Simon v The Queen*, [1985] 2 SCR 387 at 411 [*Simon*]. In *R v Morris*, the Court elaborated on this by stating that "[t]his Court has previously found that provincial laws of general application that interfere with treaty rights to hunt are inapplicable to particular Aboriginal peoples. ... Where such laws are inapplicable because they impair 'Indianness', however, they may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*." 2006 SCC 59 at para 43 [*Morris*]. This is a peculiar thing to say, given the fact that the opening words of section 88 clearly state that it is "[s]ubject to the terms of any treaty." See *Indian Act*, RSC 1985, c I-5, s 88.
6. John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48 UBC L Rev 701 at 734-38 [Borrows, "Durability"].
7. *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]; *R v Badger*, [1996] 1 SCR 771 [*Badger*]; *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

The significance of this change in the law is difficult to overstate.⁸ It has quite simply changed the picture of federalism in Canada. The picture that preceded it was one in which the British Crown (represented by the Governor General) was tasked with the role of preventing local colonial governments from interfering with the First Nations.⁹ The basic structure of this relationship is clearly set out in the *Report of the Parliamentary Select Committee on Aboriginal Tribes* in 1837:

The protection of the Aboriginies should be considered as a duty peculiarly belonging and appropriate to the executive government, as administered either in this country or by the governors of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures. ... [T]he settlers in almost every colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be the judge in such controversies.¹⁰

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8. Previous cases have held that provincial laws could not impair the status and capacity of “Indians and Lands reserved for the Indians” due to the exclusive federal authority granted in s 91(24). See *Four B Manufacturing v United Garment Workers*, [1980] 1 SCR 1031 at 1047; *Dick v La Reine*, [1985] 2 SCR 309 at 315, 326; *Simon*, *supra* note 5 at 411; *R v Francis*, [1988] 1 SCR 1025 at 1028-29; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 181; *Morris*, *supra* note 5 at para 4. I address this body of case law in Chapter 4 of my book. See Joshua Nichols, *A Reconciliation Without Recollection: An Investigation into the Foundations of Aboriginal Law* (Toronto: University of Toronto Press, forthcoming).
 9. The *Indian Lands Act* of 1860 formally ended the era of Imperial federalism, as it transferred authority for Indians and Indian lands to the Colonial legislature. See *An Act Respecting Indians and Indian Lands*, CSLC 1860, c 14, s 4.
 10. See Great Britain, Parliamentary Select Committee, *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements)* (London: R Clay, Bread-Street-Hill, 1837) at 117. This report is a reaction against the larger trend—which begins after the War of 1812—of devolving administrative responsibilities to local settler governments in order to reduce the costs associated with maintaining a network of military alliances that were no longer necessary. This same concern about the position of Indigenous peoples within the division of powers was expressed by the US Supreme Court in *United States v Kagama*. As they put it, for Indigenous communities, “the people of the States where they are found are often their deadliest enemies.” See *United States v Kagama*, 118 US 375 (1886) at 384. I address this and the changes that occur within the nineteenth and twentieth centuries in Chapter 3 of my book. See Nichols, *supra* note 8, ch 3. There is a wealth of excellent scholarship in this area. See e.g. John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) [Borrows, *Freedom*]; Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006); Brian Slattery, “The Royal Proclamation of 1763 and the Aboriginal Constitution” in Terry Fenge and Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal: McGill-Queen’s Press, 2015) 14 [Slattery, “Royal Proclamation”]; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected the Crown’s Acquisition of Their Territories* (DPhil Thesis, University of Oxford, 1979); John Giokas, “The Indian Act: Evolution, Overview and Options for

Lord Dufferin (Governor General of Canada from 1872 to 1878) articulated the same structure in 1882 when he stated that “[y]ou must remember that the Indian population are not represented in Parliament, and, consequently, that the Governor General is bound to watch over their welfare with especial solicitude.”¹¹ As Brian Slattery clearly explains, the Royal Proclamation of 1763 set out:

a quasi-federal arrangement in which a protective cloak of imperial rule is thrown over a host of autonomous Indigenous nations, living within their own territories, with their own laws and constitutions. These nations are not conquered peoples nor are they subject to direct British rule. Rather, their connections with the Crown take the form of treaties, which are periodically negotiated and renewed, often in annual sessions.¹²

The logic underlying this picture is clear: There is, contrary to the recent assertions of the Court, a significant difference between the “Crown in right

Amendment and Transition” (Paper prepared for the Royal Commission on Aboriginal Peoples, 1995); Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (New York: Cambridge University Press, 2015); Mark D Walters, “The Aboriginal Charter of Rights: The Royal Proclamation of 1763 and the Constitution of Canada” in Terry Fenge and Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal: McGill-Queen’s Press, 2015) 49; Robert A Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) [Williams, “Discourses of Conquest”]. For the relationship with international law, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2001).

11. Henry Milton, ed, *Speeches and Addresses of the Right Honourable Frederick Temple Hamilton, Earl of Dufferin* (London: John Murray, 1882) at 209. Michael Asch’s work helps to clearly explicate how this structure was communicated to Aboriginal peoples through the processes of treaty making. See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014); Michael Asch, “Back to the Future: Confederation Treaties and Reconciliation” in Michael Asch, John Borrows & James Tully, eds, *Reconciliation and Resurgence: Indigenous–Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).
12. Slattery, “Royal Proclamation,” *supra* note 10 at 22.

of Canada” and either the federal or provincial governments.¹³ While this line has been blurred over time by a progressive series of unilateral devolutions of responsibility and assumptions of power, it has nonetheless remained in place.¹⁴ With each shift, the “quasi-federal arrangement” that lies at the basis

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13. *Grassy Narrows*, *supra* note 1 at para 32. The Court takes an expansive approach to interpreting the meaning of the phrase “the Crown in right of Canada.” As the Chief Justice states:

The view that only Canada can take up or authorize the taking up of lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context. It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty (*ibid.*).

I see this as an expansive interpretation, as it significantly alters the nature of the relationship between the parties to the treaty and it does so without any reference to the Aboriginal perspective. First off, if we actually consult the text of Treaty 3, we find that the phrase “Crown in right of Canada” is not used. Rather, the text uses the phrase “the Government of the Dominion of Canada.” See *Treaty 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, 3 October 1873, online: Government of Canada, Indigenous and Northern Affairs <www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679> [perma.cc/5VLQ-DN64].

It is possible to argue that this distinction is so minimal that it is possible to substitute one for the other, but as soon as one puts a heavier interpretive strain on it, then this substitution becomes more questionable. After all, the constitutional relationship between the Crown and the Dominion in 1873 is, strictly speaking, not the same as the one between the Crown and Canada post-1982. Secondly, there is the question of whether the Aboriginal parties to Treaty 3 would have understood the legal significance of the phrase “the Crown in right of Canada.” It is difficult to imagine that they would have understood this as referring to both the federal and the provincial governments, let alone whether they understood the constitutional significance of the terms “cede, release, surrender and yield” (*ibid.*). As I see it, the Chief Justice’s reasoning in *Grassy Narrows* is not even an obvious interpretation of the phrase “the Crown in right of Canada” for a native English speaker who is familiar with the common law. The idea that one can simply read this phrase as one that enables both provincial and federal governments to take up lands in Treaty 3 is as unpersuasive as it is disquieting.

14. The blurring of the lines established in the Royal Proclamation of 1763 and affirmed through the *Treaty of Niagara* in 1764 occurs gradually. We can think of these lines as the measured distance that is expressed in the *Two Row Wampum* or *Guswentan*. These lines begin to shift in the early nineteenth century as the British begin to reorder their system of imperial administration following the War of 1812. This marks the beginning of a number of policy and administrative experiments that eventually led to the devolution of responsibility for Indian administration to the Colonial Legislature in 1860. See *supra* note 9. For an excellent historical account of the administrative changes taking place through the British Empire during this period, see Lauren Benton & Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, MA: Harvard University Press, 2016). I provide a review of these changes in the Canadian context in Chapter 3 of my book. See Nichols, *supra* note 8 at c 3. Despite this, the line appears again in the distribution of

of the practical constitutional norms, which established Canada in and through the process of treaty making is altered. The earliest form of this arrangement being the “protective cloak of imperial rule” under which Aboriginal nations were free to exercise home rule on their territories free from the interference of “local legislatures.”¹⁵ This earlier structure was fundamentally altered by the devolution of administrative responsibilities over Indian Affairs in the first half of the nineteenth century. The process of devolution continued as the newly forming Dominion took shape. The result of this structural rearrangement was by no means a clear and distinct federal model. Rather, the relationship between the Imperial Crown, the Dominion, and Aboriginal nations was ambiguous and unsteady. The constitutional lines between parliament and the Governor General—which were supposed to maintain the treaty relationship between the Crown and Indigenous nations—were blurred as the administrative powers of Indian Affairs was continuously expanded. This picture of the constitutional order that emerged was filled by parliament and the provincial legislatures.

powers set in place with the *British North America Act, 1867*, as the federal government is given exclusive power in relation to Indians and lands reserved for them via s 91(24). This is already a further unilateral devolution of responsibility for Indian Affairs from the British Crown to the Dominion (*i.e.*, the responsibility shifts from the British Imperial Crown to the Dominion). However, even this imposed division was unclear, as the provinces were given “All Lands, Mines, Minerals, and Royalties” via s 109. See *Constitution Act, 1867*, *supra* note 1, s 109. In *St Catherine’s Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 at 60 [*St Catherine’s Milling*], Lord Watson states that “from beginning to end” the treaties were “a transaction between the Indians and the Crown.” The effect of this was to grant underlying title to the provinces and assign the federal government the “mere burden” of Aboriginal rights and title (see *ibid* at para 13). As John Borrows argues, this decision “eroded the promises of the Proclamation and the Treaty of Niagara” and promoted the interests of provincial governments. See John Borrows, “Canada’s Colonial Constitution” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17 at 24 [Borrows, “Colonial Constitution”]. However, as Mark Walters points out, Lord Watson’s decision is a paradoxical one: On the one hand, he offers a greatly diminished understanding of Aboriginal rights, but, on the other, he does not follow the preceding decisions that had argued that the rights were nonexistent. See Walters, *supra* note 10 at 62-63. As such, this decision manages to preserve the “concept of Aboriginal title in Canadian law at a time when many Canadian judges would have denied it altogether” and it can thereby be seen as a dim manifestation of the unwritten constitutional practices that are exemplified in the Royal Proclamation of 1763 and the treaties (*ibid* at 63). This pattern of erosion was continued with the passage of s 87 (now s 88) of the *Indian Act* in 1951, which, as Borrows notes, made “First Nations largely subject to provincial legislation ... without their consent.” See Borrows, “Colonial Constitution,” *supra* note 14 at 25.

15. Slattery, “Royal Proclamation,” *supra* note 10 at 22.

Aboriginal nations were positioned wards whose only claim to political rights were the quasi-municipal band councils of the *Indian Act*. In each movement, the jurisdictional space of Aboriginal peoples is unilaterally diminished. What begins as a “quasi-federal” structure in which Aboriginal peoples govern their territories under their own laws and constitutions ends with a handful of “simple municipal institutions” that are subject to a confusing system of overlapping federal and provincial jurisdiction.¹⁶

In *Tsilhqot'in Nation* and *Grassy Narrows*, the Court continues this unilateral process of devolution. I believe that these cases, in particular, provide us with an opportunity to revisit the doctrines of treaty interpretation because they change the position of Aboriginal peoples within the constitutional order. These cases alter the division of powers without even a cursory examination of the Aboriginal perspective. This is a very curious omission, as post-1982 Supreme Court jurisprudence on treaty rights has consistently placed a strong emphasis on the need for taking account of Aboriginal understandings of treaty arrangements.¹⁷ Yet the term does not even appear in *Grassy Narrows*, despite this being a subject of extensive engagement at the trial level.¹⁸ Following these decisions, we are left

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16. See Department of Secretary of State for the Provinces, “Report of the Indian Branch of the Secretary of State for the Provinces” (Ottawa: I.B. Taylor, 2 February 1871), online: <central-bac-lac.gc.ca/.item/?id=1870-IAAR-RAAI&op=pdf&app=indianaffairs>. The 1869 *Gradual Enfranchisement Act* unilaterally replaces traditional forms of governance with band councils whose purpose is to prepare the Indians for “responsible government.” See *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6.
17. For examples of cases that place this emphasis on the Aboriginal perspective, see *Simon*, *supra* note 5; *Badger*, *supra* note 7; *R v Sioui*, [1990] 1 SCR 1025 [*Sioui*]; *R v Sundown*, [1999] 1 SCR 393 [*Sundown*]; *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220 [*Marshall/Bernard*]; *R v Marshall*, [1999] 3 SCR 456 [*Marshall*].
18. For a discussion on the Ojibway perspective, see *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at paras 214-87. The only part of the Supreme Court decision in *Grassy Narrows* that even comes close to touching on the Aboriginal perspective is the claim that “Ontario has exercised the power to take up lands for a period of over 100 years, without any objection by the Ojibway.” *Supra* note 1 at para 40. The statement itself implies laches or adverse possession, which, given the context of the last 150 years of colonial domination, simply does not hold water. Even setting this objection aside, I find this claim particularly puzzling given that, in 1927, an amendment to the *Indian Act* granted the Superintendent-General the right to require anyone soliciting funds for an Indian legal claim to obtain a license from him (effectively removing the right to seek legal counsel) and this remained law until its repeal in 1951. See *An Act to amend the Indian Act*, SC 1926-27, c 32, s 6 [*Indian Act Amendment*]. This brings us back to question what exactly constitutes an “objection”?

with two distinct pictures of federalism and no account for either their structural differences or their respective legal foundations.

My aim in this article is to address the foundations for the picture of federalism that the Court has set out in *Tsilhqot'in Nation* and *Grassy Narrows*. I specify “foundations” because my attention in this article is on what precedes or leads up to this change to Canadian federalism. This article is neither a case analysis nor a doctrinal examination of interjurisdictional immunity (IJI).¹⁹ Rather, I begin by pointing to the fact that changing the application of IJI has serious implications for the constitutional relationship between the Crown and Aboriginal peoples and then I take a step back from them. This is because I believe that in order to really appreciate the significance of the change that has occurred, we need to gain some perspective. Put differently, in one picture of the constitutional order, IJI was used to preserve exclusive federal jurisdiction under section 91(24). This exclusivity had a basis that went back to the Royal Proclamation of 1763 and preserved a complicated and sui generis relationship with Aboriginal peoples. By removing IJI and subjecting Aboriginal peoples to both federal and provincial jurisdiction, the background presumptions (or foundations) of the constitutional relationship are changed. My focus is thus on the foundations and my line of approach is historical. I begin by providing two sketches of the Canadian constitutional order. They are sketches and so are rough approximations of two different constitutional orders. Their purpose is to highlight how the position of Aboriginal peoples within the constitutional order has changed over the last 250 years. The first picture focuses on the pre-confederation relationship between the Imperial Crown, Aboriginal peoples, and the colonial governments. The second picture focuses on the post-confederation relationship between Canada and Aboriginal peoples (*viz.* from the Dominion to the post-1982 Canadian state). They serve as a reminder that the Canadian constitutional order is not an abstract theoretical structure whose lines are clearly set and fixed in place. Changes can and do occur over time. Most often, these changes are small: a technical modification or a shift in emphasis. Sometimes, however, a number of small changes in degree accumulate and suddenly a change in kind occurs. When such a change occurs, it can be difficult to appreciate its significance without an awareness of the accumulation of smaller changes that precede it. This brings me to the second part of this article. In this part, I provide a detailed survey of the

19. For a more detailed case analysis, see Borrows, “Durability,” *supra* note 6; Kerry Wilkins, “Life Among the Ruins: Section 91(24) after *Tsilhqot'in* and *Grassy Narrows*” (2017) 55 *Alta L Rev* 91.

Canadian jurisprudence on treaty interpretation from *St Catherine's Milling to Grassy Narrows*.

The purpose of the arrangement of sketches and surveys is to focus on how the notion of Crown sovereignty has shaped the doctrines of treaty interpretation and fit them into a particular version of the constitutional order. In surveying the changes in the doctrine of treaty interpretation, I will explore how the notion of Crown sovereignty has become entangled with the Westphalian model of the state (*i.e.*, the state as a self-contained and legally autonomous unit for the singular 'people') and how this entanglement has set the boundaries of treaty interpretation in Canada. The presumption that Crown sovereignty is necessarily bundled with legislative power and underlying title has served to bind Aboriginal peoples into the constitutional order as a minority within the singular Canadian body politic. By drawing out the way in which this presumption both has informed and continues to inform how the courts have interpreted treaties, we can begin to explore the possibilities that have been hiding in plain sight. Namely, the treaties (as documents of inter-societal law within a federal constitutional order) present a conceptual challenge to the Westphalian model. This challenge calls for the disaggregation of the terms "state" and "nation."²⁰ More specifically, once we reconsider the meaning of Crown sovereignty and its relationship to the treaties, we can see that they actually challenge this coupling of nation and state by pluralizing the idea of the nation, which, in turn, requires us to reimagine the constitutional structure of the state. This decoupling of nation and state brings us back to a deeper engagement with the idea of federalism in Canada. It helps us see the transformative potential that the treaties have when they are understood as constitutional documents and not a *sui generis* form of surrender. Seen in the former light, they offer us a way to reimagine both what Canadian federalism could be and how this particular case could assist in reimagining a post-Westphalian international order.

I. TWO PICTURES OF A CONSTITUTIONAL ORDER

The constitutional relationship between the federal government of Canada and Aboriginal peoples has changed significantly over the last 250 years. We can roughly sketch these changes by dividing them into two distinct pictures.

1. The older, 250-year-old version of this relationship was between the Imperial Crown (represented in the colonies by the Governor General) and

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

Aboriginal nations. The general structure of this relationship (often referred to as treaty federalism) is graphically illustrated by the separation between the rows in the *Two Row Wampum Treaty Belt* in 1613 and the lateral image of the partners holding hands on the *Covenant Chain Wampum* presented by Sir William Johnson, as Superintendent of Indian Affairs for the Crown, to the Western Lakes Confederacy in the *1764 Treaty of Niagara*. The responsibility for maintaining the treaties was devolved to the colonial government in 1860 and then to parliament in 1867 via section 91(24) (with the Governor General remaining in an increasingly blurred representational role for the British Crown). While the representative of the Crown had changed, the structure of the relationship could still be maintained within the new constitutional framework. The pre-existing federal relationship should have been the context in which both the nature of Crown sovereignty and section 91(24) were interpreted. Read in this context, it would be a power that granted parliament the responsibility for maintaining the treaty relationships and sharing power with Aboriginal peoples (*i.e.*, under the supervision of the Governor General and to the exclusion of the “local legislatures”). In other words, the Crown would be in possession of a thin version of sovereignty that would not include unilateral legislative power or underlying title, as these would be subject to treaty negotiations.²¹ This would restrict section

21. I will refer to this version of Crown sovereignty as “thin.” I use the descriptive terms “thin” and “thick” to refer to different versions of Crown sovereignty. The thick version combines Crown sovereignty with legislative power and underlying title. I contrast this with a thin version that would restrict it to minimal settings (*e.g.*, external legal personality, territorial integrity, et cetera), while leaving the issues of legislative power and underlying title as questions subject to constitutional negotiations. By simply leaving this thick version of Crown sovereignty as a non-justiciable fact, the court has converted the constitutional order into a “straightjacket” for Aboriginal peoples. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 46 [*Secession Reference*]. While it is by no means surprising that they would consider Crown sovereignty itself to be outside the bounds of judicial cognizance, it is another matter altogether to bundle Crown sovereignty with legislative power and underlying title and set this entire bundle aside as non-justiciable. What exactly is left within the constitutional order once legislative power and underlying title are deemed to be non-justiciable? It seems to me that a kind of procrustean logic is at work here; once thick Crown sovereignty is accepted, then Aboriginal rights are proportionately diminished (*e.g.*, the “personal and usufructuary rights” from *St Catherine’s Milling* or later the *Charter*-like s 35 rights from *Sparrow*). See *St Catherine’s Milling*, *supra* note 14; *Sparrow*, *supra* note 7. The way out of this constitutional quagmire is not to simply claim that Aboriginal treaties are international treaties. This generates a new set of problems due to the conceptual presuppositions that flow within an international legal order that has been built on a Westphalian notion of the “nation-state.” Rather, I argue that, if treaties with Aboriginal peoples are *sui generis*, then so is the concept of state sovereignty within the constitutional order. In my view, this means that a broader understanding of precisely

91(24) to a “treaty power” that would allow parliament to “negotiate with nations and peoples who occupy and possess territory that Canadian authority wished to acquire.”²² This version of the relationship is articulated in the United States jurisprudence by Chief Justice Marshall in *Worcester v Georgia*, which holds that the doctrine of discovery is limited to an exclusive right to treat with Aboriginal nations and did not include underlying title to their lands or political dominion over them.²³

how the federal constitutional model of internal self-determination set out by the Supreme Court in the *Secession Reference* can be employed to address this problem. As they rightly argue, “legality and legitimacy are linked” within our constitutional tradition and this linkage generates an “obligation to negotiate.” See *Secession Reference*, *supra* note 21 at paras 89, 99. If we can dissolve the specious legal fictions that serve to situate Aboriginal peoples as a cultural minority within Canada (which is how the Court positions them in the *Secession Reference*) and see how they are equal partners in confederation, then this model of federal constitutional negotiation opens up a way to decolonize the constitutional order in Canada. While a full defence of this argument exceeds the limits of the current article, I would like to refer interested readers to an article that deals with similar issues in the duty to consult jurisprudence. See Robert Hamilton & Joshua Nichols, “The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult” (2019) 56:3 *Alta L Rev* 729.

22. Larry Chartrand, “The Failure of the *Daniels* Case: Blindly Entrenching a Colonial Legacy” (2013) 50 *Alta L Rev* 181 at 185.
23. *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) [*Worcester*]. This minimal or consent-based version of the doctrine of discovery is clearly articulated by Chief Justice Marshall:

The principle, “that discovery of parts of the continent of America gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession,” acknowledged by all Europeans because it was the interest of all to acknowledge it; gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one of which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell (*ibid* at 516).

As Robert A Williams Jr, reminds us, this case is still predicated on the familiar racial stereotype of Indian as “warlike” savages. The unilateral categorization of Indigenous peoples as “savages” is used to legitimate the sovereignty of the Crown (and by extension, the federal government in the United States), but the content of that sovereignty is read down so as to limit the external personality of tribes, thereby limiting the federal government to acquiring their lands by conquest or purchase and excluding the states from interfering in their internal self-government. This is a quasi-federal structure that explicitly includes Indigenous peoples within the division of powers. It is a position that has been subject to continual encroachment, but nonetheless will serve as a continual reference point (or landmark) in my investigation of the Canadian jurisprudence. Examples of the aforementioned encroachment

The basis of this federal constitutional relationship is not merely a legal fiction that claims to magically²⁴ grant one party unilateral power over the other, but mutual recognition, consent, and continuity.²⁵ This further entails that the treaties are constitutional documents that cannot be subject to unilateral infringement. This follows from both a consideration of the historical practices of treaty making and colonial administration and from a careful consideration

on tribal sovereignty in the United States includes the formation of the plenary power doctrine (an extension of the doctrine of discovery that the courts view as granting Congress plenary law making powers over Indian tribes) from the mid-nineteenth century to the early twentieth century in a line of cases that stretches from Chief Justice Taney's—the same chief justice who decided the infamous *Dred Scott v Sandford*, 60 US 393 (1856)—interpretation of the *Marshall Trilogy* in *United States v Rogers*, 45 US 567 (1846) [*Rogers*] to *Ex Parte Crow Dog*, 109 US 556 (1883), *United States v Kagama*, 118 US 375 (1886), and *Lone Wolf v Hitchcock*, 187 US 553 (1903). This line of cases also includes the notorious decision in *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) [*Oliphant*], which was subsequently extended in *Montana v United States*, 450 US 544 (1981) [*Montana*] to make it so that the “inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe” (at 565), thereby establishing a puzzling set of jurisdictional vacuums that exposes Indigenous peoples (and disproportionately Indigenous women) to the risk of violence without legal recourse. Legislation such as Public Law 280 (which was introduced in 1953 and, much like s 88 of the *Indian Act*, enabled states to assume criminal and civil jurisdiction in matters involving Indians as litigants on reserve lands). For more on Public Law 280, see Kyle S Conway, “Inherently or Exclusively Federal: Constitutional Preemption and the Relationship Between Public Law 280 and Federalism” (2013) 15 U Pa J Const L 1323. For an instructive analysis of the law in this area, see Robert A Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005) [Williams, *Like a Loaded Weapon*].

24. I will be using the term “magic” in the paper to refer to the effects of colonial legal fictions, such as the doctrine of discovery, civilizational thesis, and *terra nullius*. My aim here is to draw attention to the fact that these fictions function like judicial magic in the slight-of-hand sense of the term. They provide the appearance of a legitimate constitutional foundation for settler states, but they only do so via means that are mysterious (e.g., Aboriginal peoples either have no sovereign legal rights whatsoever or they have legal rights that can be unilaterally diminished). If we actually pay close attention to the details of the decisions that use (either explicitly or implicitly) these magical arguments, we see that the appearance of legitimacy is in fact based on a series of hidden moves. The curtain drops and, suddenly, when it is raised, the constitutional order is established and Aboriginal peoples are subjects. Once we slow the magic show down and begin to scrutinize each movement more closely, the character of the show itself changes, the appearance of sovereign legitimacy falls away, and what we are left with is a series of specious propositions and rhetorical claims. My use of “magic” is thus similar to John Borrows’s use of the term “alchemy.” See John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37 *Osgoode Hall LJ* 537 [Borrows, “Alchemy”].
25. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 212.

of the conceptual relationship between sovereignty and the rule of law in settler colonies.²⁶ If the treaties are unilaterally diminishable, then a legal fiction must be used to explain why sovereign authority can operate in this manner and still be consistent with the rule of law. These colonial legal fictions are particularly important in settler states, as they serve to justify the occupation of land by the European colonial empires. The problem is that these concepts cannot serve this function openly because they are not load-bearing. There is no solid analytic ground to them. They have no *a priori* legal essence; rather, they are just a series of ad hoc variations. At the end, they amount to nothing more than an attempt by one party to either remove or diminish the legal rights of another by pointing to some objective fact (*i.e.*, Aboriginal peoples cannot have rights because they lack or exhibit quality 'x'). In order to ground an evaluative claim of this nature as a solid 'objective fact' (*i.e.*, to make it a rigid designator), one would need to be able to escape the limits of their subjective perspective and occupy a god's-eye view (or 'view from nowhere'). Without this magical ability, the veneer of *a priori* truth is stripped from the claim and what remains is a set of actions whose only remaining basis is the so-called right of the strongest. As Andrew Fitzmaurice rightly notes, "[p]ower may well come from the barrel of a gun, but force cannot be successfully sustained, even in the more Machiavellian understandings of

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26. First off, as Stuart Banner argues, the actual practices of treaty making and colonial administration show that practices crystallized long before legal theories. As he puts it:

One can find no claims in the colonial period of an Indian "right of occupancy" midway between full ownership and no rights at all. Some, especially in the early seventeenth century when the issue was still unsettled, asserted that the Indians had no property rights. From the late seventeenth century on, most believed that the Indians were full owners of their land. But no one was in the middle, so far as one can discern today. The right of occupancy described in *Johnson v. McIntosh* did not yet exist.

See Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: The Belknap Press of Harvard University Press, 2005) at 29. Roughly put, this means that the historical records cannot bear the weight of the legal theories and fictions that are layered on top of them to found the constitutional order in settler states. When we turn our attention to the legal fictions themselves, we see more problems. The work of leading legal historians, such as Christopher Tomlins and Andrew Fitzmaurice, clearly show that European colonial legal fictions of discovery and *terra nullius* do not have consistent and transhistorical definitions. See Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014) at 51-58; Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge University Press, 2010) at 116-20.

politics, as an everyday means of establishing political compliance (as Machiavelli himself stressed).²⁷

The contextual-interpretive approach that grounds this picture of the constitutional order serves to continue the tradition of diverse federalism in which Aboriginal peoples continue to exercise jurisdiction and governance over their lands to the exclusion of the provinces and to share some measure of jurisdiction with parliament (via the relationship to the Imperial Crown mediated by the Governor General).²⁸ In general terms, this picture of Canadian federalism presents us with a pluri-national “Union” state that includes the British and French colonists and the Aboriginal nations.²⁹ I will refer to this version of the first picture as “Canada’s Aboriginal Constitution.”³⁰

2. The more recent and currently dominant 150-year-old version beings with the presumption that the Crown has sovereignty, legislative power, and underlying title and uses this as its basis for reading section 91(24) as a provision that grants parliament nearly unlimited power over Indians and their lands. This version finds expression in a long line of colonial legislation (*viz.* the labyrinthine

27. Fitzmaurice, *supra* note 26 at 7.

28. One example of this tradition (or at least elements of it) can be seen in the implementation of the self-determination policy by President Richard Nixon. In his July 8, 1970 address to Congress, he called for a new policy of “self-determination without termination” and initiating a wave of legislation. See Richard M Nixon, “Special Message to the Congress on Indian Affairs, July 8, 1970” (Public Papers of the Presidents of the United States: Richard M Nixon, 1970); *Indian Self-Determination and Education Assistance Act*, Pub L No 93-638, 88 Stat 2203 (1975) (signed into law by President Gerald Ford following Nixon’s resignation from office). This marked a turning point that has led to a model that supports a limited degree of Indigenous jurisdiction over their lands that can serve as a barrier to state law. While the jurisdiction available to Indigenous peoples in the United States continues to be constrained by laws and cases whose only possible grounding is in archaic, colonial legal fictions such as the doctrine of discovery, it has moved beyond the existing model of federal municipalities with devolved powers that remains in Canada. See *e.g.* Public Law No 83-280 (which has a similar effect to s 88 of the *Indian Act* in Canada); *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) [*Oliphant*] (which deprives tribes of criminal jurisdiction over non-Indians on tribal lands on the basis of explicitly colonial assumptions). For more on the American context and these changes in particular, see Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: WW Norton, 2005); Williams, *Loaded Weapon*, *supra* note 23.

29. I am adopting the use of the terms “plurinational” and “Union State,” which are used by Stephen Tierney in his insightful book. See *supra* note 20.

30. My use of the term “Canada’s Aboriginal Constitution” is based on the work of Brian Slattery and John Burrows. See Brian Slattery, “The Aboriginal Constitution” (2014) 67 SCLR (2d) 319; John Burrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Burrows, *Freedom*, *supra* note 10.

series of precursors and amendments that make up the *Indian Act*), the case law emanating from *St Catherine's Milling*, and the numerous instances in which the courts maintain that there was “never any doubt” that the Crown holds sovereignty, legislative power, and underlying title.³¹ In this version, the treaties are seen as a sui generis set of surrender documents and so Aboriginal peoples are seen as an ethnic minority with a special set of constitutional protections.³² The ultimate basis of this unilateral version of the relationship is the doctrine of discovery and its associated legal fictions of *terra nullius*, adverse possession, and conquest, which is to say legal fiction in its most specious and pernicious sense.

Within this picture, Aboriginal peoples are constitutively reduced; they are magically rendered into mere “occupants” of the territories that they lived in and governed from time immemorial.³³ According to this narrative, they were

31. *Sparrow*, *supra* note 7 at 1103.

32. I use the term “ethnic minority” in reference to Will Kymlicka’s distinction between ethnic and national minorities. See *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 181–82.

33. Chief Justice Marshall articulated the doctrine of discovery in *Johnson v M'Intosh*, 21 US 543 (1823) [*Johnson v M'Intosh*]. *Johnson v M'Intosh* is the first of a trilogy of cases that also includes *Cherokee Nation v Georgia*, 30 US 1 (1831) [*Cherokee Nation*]. These two cases are collectively referred to as the *Cherokee Cases*. In *Johnson v M'Intosh*, Marshall maintains that, while “the rights of the original inhabitants were in no instance entirely disregarded,” they were “to a considerable extent impaired” (*ibid* at 21). Chief Justice Marshall sets out the specific nature of this impairment as follows: through discovery, the crown acquires absolute title “subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it” (*ibid*). I note this here as it shows that the effect of the doctrine of discovery goes to the foundation of the relationship between settlers and Aboriginal peoples. It makes it so that the very starting position is radically unequal. In *Johnson v M'Intosh*, Indians are diminished to the level of “occupants of the soil” whose residual interests can be unilaterally removed in advance of any and all negotiations (*ibid*). The specific degree of “diminishment” and how this fits into the division of powers changes over the course of the *Marshall Trilogy*. In the *Cherokee Cases*, Chief Justice Marshall moves to considering the position of Indian nations within the division of powers and adjusts the effect of the doctrine of discovery from basically vacating any and all rights to self-government and underlying title to a more minimal version in which the diminishment only served to constrain the international relationship between tribes and other European nations. The overall basis for the diminishment in both the strong and the weak versions of the doctrine of discovery remains a unilateral value judgement (and we must be careful to remember that this is a judgment whose origin is never provided and so it is seemingly issued from the view from nowhere that cannot be put into question in the settler courts) on the “character and habits” of Indigenous peoples that leaves them categorized as “savages.” For more on this, see Williams, “Discourses of Conquest,” *supra* note 10 at 308–17; Williams, *Loaded Weapon*, *supra* note 23 at 47–70. For some commentary on the doctrine of discovery within the Canadian law see, Joshua Nichols, “A Reconciliation

uncivilized savages who lacked the basic level of socio-cultural sophistication required for the possession of full legal rights and so the extent of these rights would be determined on a case-by-case basis.³⁴ This magical reasoning further entails that their consent to British sovereignty was unnecessary. The simple assertion of sovereignty was sufficient to acquire underlying title and, with it, the exclusive power to legislate over these lands.

Chief Justice Marshall provides us with a clear articulation of the foundations of this kind of constitutional order in *Johnson v M'Intosh*:

An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.³⁵

This argument combines the diminishing magic of the doctrine of discovery with the doctrine of sovereign incompatibility to set the basis for the constitutional order of the United States. It presupposes a version of sovereignty that requires absolute title on a conceptual level, and this means that the legal interests of Aboriginal peoples must be proportionally diminished to the “right of occupancy.” Put otherwise, it presumes the Westphalian model with its singular conceptions of nation and state.

The same argument can be found in Canada’s official response to the Six Nations appeal to the League of Nations in 1923 and again in its arguments in response to the Mi’kmaw Nation’s complaint to the United Nations Human

Without Recollection? *Chief Mountain and the Sources of Sovereignty*” (2015) 48 UBC L Rev 515; Christopher D Jenkins, “John Marshall’s Aboriginal Rights Theory and Its Treatment in Canadian Jurisprudence” (2001) 35 UBC L Rev 1.

34. See JS Mill, *On Liberty and Considerations on Representative Government*, ed by R B McCallum (Oxford: Basil Blackwell & Mott, 1948) at 8-9; *R v Syliboy* (1928), [1929] 1 DLR 307 (NS Co Ct) at 313 [*Syliboy*]. As the court in *Syliboy* put it, “the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized” (*ibid*). The interpretive hinge of the argument is the distinction between “civilized” and “uncivilized.” Once the evaluative determination can be made, then the legal consequences necessarily follow. There is no concern that unfettered administrative power over the uncivilized will compromise the legitimacy of the constitutional order itself because the objective distinction serves as a bulwark against this.
35. *Johnson v M'Intosh*, *supra* note 33 at 588.

Rights Committee in 1980.³⁶ A clear example of this blind commitment to the Westphalian model can be found in Canada's 1923 response:

Naturally and obviously it was not the intention in this or preceding "treaties" to recognise or infer the existence of any independent or sovereign status of the Indians concerned. Such a principle, if admitted, would apply as much, if not more, to these other groups of Indians as to the Six Nations, and the entire Dominion would be dotted with independent, or *quasi*-independent Indian States "allied with but not subject to the British Crown." It is submitted that such a condition would be untenable and inconceivable.³⁷

Let us take a moment to unpack the argument a little. First, we are told that any recognition of the independent or sovereign status of Indigenous peoples would lead to a more complicated territorial division and confederal constitutional order. This is a simple consequential description of sorts; it merely informs us that if 'x' occurs, then 'y' is the result. Second, we are then informed that this condition would be "untenable and inconceivable." This is not an argument; it is, at best, an assertion or claim. What is the basis of this claim? It cannot be the case that complicated federal or confederal structures are either untenable or inconceivable within the common law. The legal structure of the United Kingdom and the practices of the Imperial Crown prior to confederation clearly contradict this assertion. How are we to explain why this jump from description to evaluation occurred? I argue that this jump is based on the unstated presumption of the Westphalian model (*i.e.*, a "thick" concept of Crown sovereignty). This presupposition strictly determines the bounds of what is natural and obvious and separates it from that which is untenable and inconceivable.

36. Duncan Campbell Scott (who was the head of the Department of Indian Affairs from 1913–1932 and drafted the response) argued that the treaties are not treaties "in the meaning comprehended by international law," but simply part of the "plan of negotiation adopted by the Government in dealing with the usufructuary rights which the aboriginal peoples have been recognised as possessing in the land from the inception of British rule." See Letter from the Canadian Government to the Secretary-General of the League of Nations (7 February 1924), "Appeal of the 'Six Nations' to the League of Nations" (1924) 5 *League of Nations OJ* 829 at 835 [League of Nations]. Canada's response to the Mi'kmaq Nation's complaint was simple: (1) self-determination "cannot affect the national unity and territorial integrity of Canada," and (2) the treaties "are merely considered to be nothing more than contracts between a sovereign and a group of its subjects." See *The Mi'kmaq Tribal Society v Canada*, UN Human Rights Committee, Communication No. 78/1980, Document 4 at 4, online: <www.usask.ca/nativelaw/unhrfn/mikmaqfiles/No4.pdf> [perma.cc/H82N-ZGNF]; James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008) at 38.

37. League of Nations, *supra* note 36 at 836.

Within this picture of the constitutional order, the only space left for Aboriginal peoples within the division of powers is quasi-municipal. Like a municipal government, they are subject to unilateral infringement by superior legislative bodies. Unlike a municipal government, however, they are not entirely creatures of statute. The basis of their rights is not devolution; rather, they exist outside of and prior to the existing order. The constitutional frame thus begins with a thick version of Crown sovereignty and then positions Aboriginal peoples in the residual space. Yet, once legislative power and underlying title are fully vested in the Crown, where exactly can Aboriginal governments persist? This is where the distinctions between quasi and sui generis' begin. In Canada, this has led to the development of a set of federal municipalities whose powers are afforded a limited *Charter*-like constitutional plating. This plating still allows for the possibility of unilateral infringement, but it holds these infringements to judicial tests for justification. The changes introduced by the Court in *Tsilhqot'in Nation* and *Grassy Narrows* are a part of this picture. It is an extension of a trend that has continually and unilaterally expanded provincial administrative authority over Indigenous peoples and their lands. I will refer to this version of the first picture as "Canada's Colonial Constitution."³⁸

I should note here that these pictures are general approximations. They can serve as a map of the criss-crossing and overlapping patterns of law, policy, governance, and practices of resistance, but they cannot be seen as a one-to-one representation of reality. In other words, the map is not the territory. This means that neither picture has existed and/or operated to the full and total exclusion of the other. There are certainly periods in which one of the two is predominant, but elements from each can (and often do) appear side-by-side within the same judicial decision or governmental policy. This lack of absolute either/or separation does not mean that we must simply throw our hands up in frustration and declare that the past cannot offer us guidance (to "let the dead bury the dead," so to speak) and focus only on the future. Rather, it means that there is no essential picture buried beneath the surface and so the shifting lines and patterns made by these pictures are the product of contingent choices, not necessity.³⁹ This means that we need to make use of these pictures (or maps) so that we can begin

38. The term is taken from the work of John Borrows. See John Borrows, "Canada's Colonial Constitution" in Michael Coyle & John Borrows, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17.

39. Patrick Macklem also argues this point. See Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382 at 394.

to find our way about our present situation. Without reference to them, it is easy to accept the current version of the picture as being somehow wooden or concrete (*i.e.*, solid all the way through) and so all that is left for us to do is to set to work aligning everyone's perspective with this fundamental reality. This is, in my mind, what Wittgenstein means when he presents us with the case of the eye in the field of sight. What we lose track of here, as Wittgenstein so clearly reminds us, is that it is possible to lose track of the fact that you are seeing reality from a perspective and, when this happens, "nothing in the field of sight" can remind you of this.⁴⁰ One way to find our way back to our perspective is to rearrange things so that we can see them from a different angle, under a different light, and be reminded that what we are seeing is not the field of reality, but simply a field of sight. This is precisely the purpose of these two pictures: They are reminders that serve to bring us back to the everyday use of our laws and thereby open up the possibility for reimagining our current constitutional order.

40. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, translated by CK Ogden (London: Routledge, 1961) at 5.63-5.634 [Wittgenstein, *Tractatus*]. Roughly speaking, my use of Wittgenstein's metaphor here is that it can be easy to lose track of the distinction between the current, dominant view of the constitutional order and the perspective that this view presumes. For example, under the current, dominant constitutional view, Aboriginal peoples have a special set of legal rights that are grouped with "minority, ... equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*." See *Secession Reference*, *supra* note 21 at para 46. On the other hand, Quebec is situated as a "participant in the federation" (*ibid* at para 150). The legal difference between these two relationships is categorical: Aboriginal peoples are positioned as a "cultural minority" within the body politic and so they exist in a subject-to-sovereign relationship to the Crown. Quebec is engaged through lens of the division of powers, democracy, and federalism. The unstated presumptions that allow this distinction to appear to be the case are like the relationship between the eye and the field of sight, in that, if we simply adopt the point of view offered and look out at the constitutional order, there is nothing that enables us to see how this came to be. Much like the simple fact that "nothing in the visual field allows you to infer that it is seen by an eye," we just see a picture of how things appear to be. See Wittgenstein, *Tractatus*, *supra* note 40 at 5.633. We do not see the unstated presumptions that ground that perspective. What we lose track of here is that the point of view we have adopted is just that—a point of view. As Wittgenstein reminds us, "no part of our experience is at the same time a priori. Whatever we see could be other than it is." See Wittgenstein, *Tractatus*, *supra* note 40 at 5.634.

II. TWO COLONIAL INTERPRETIVE DOCTRINES: FROM MERE AGREEMENTS TO THE MODERN APPROACH

The Canadian jurisprudence (that is, the body of law that exists within the 150-year-old picture) on treaty interpretation can be roughly divided into two doctrines. The first is expressed by Lord Watson in *St Catherine's Milling* when he equates Treaty 3 as being a contract that effectively “released and surrendered” the “whole right and title” of the Ojibway’s lands to the Crown for “certain considerations.”⁴¹ The very basis of this view stems from the interpretive position taken by the Privy Council on the basic nature of Aboriginal title:

There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.⁴²

The reasoning here requires a bit of unpacking in order for us to find our way through it. Lord Watson is responding to the proposition that Indians have the capacity to own their lands (*i.e.*, to have the fee simple title). As we can see above, he rejects this proposition. In his view, the fact that they have lived on their lands from time immemorial does not provide them with legal ownership. Why is this the case? The unstated rationale is the heart of the matter and, unsurprisingly, it is also where the reasoning begins to rely more heavily on inference and omission. The basis of his reasoning is in his interpretation of the legal effect of the *Royal Proclamation, 1763*, which, as he puts it, limits the “tenure of the Indians” to “a personal and usufructuary right, dependent upon the good will of the Sovereign.”⁴³ This means that the parties do not enter into negotiations as equals. The Crown already holds the underlying title to their lands before negotiations even begin. It holds this title, as far as we can tell, as a necessary incident of Crown sovereignty over the land. This positions the Indians’ interest in their own lands as a “mere burden” that can be removed whenever the Crown so chooses and so even their continued occupancy on these lands is subject to the “good will of the Sovereign.”⁴⁴ What is omitted here is any account of the

41. *St Catherine's Milling*, *supra* note 14.

42. *Ibid* at para 7. This section of the case is cited by Justice Judson in a later case. See *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 380 [*Calder*].

43. *St Catherine's Milling*, *supra* note 14.

44. *Ibid*.

Ojibway peoples' understanding of the treaty. The dispute here is seen as being between internal subdivisions of the Crown (the Dominion and the province of Ontario) and the signatories of Treaty 3 have no voice to argue their position—not least because they were not represented at all in this litigation. In effect, their legal interests are assumed to be “mere burdens” before the case is even argued.

The basic interpretive structure put forward by Lord Watson is that treaties with Aboriginal peoples are dissimilar to the usual sense of the term (*viz.* in international law) because “Indians” cannot own the lands that they occupy. This means that agreements made with them are simply surrenders of the residual “personal and usufructuary” rights that remain. In them, the Crown removes the “mere burden” (which it could always unilaterally remove via legislation) and thereby converts its title to a *plenum dominium*. He further clarifies the legal status of the treaties in 1897 with his decision in the *Annuities Case*.⁴⁵ In this decision, he determined that the annuities provisions of the Robinson Treaties constituted “promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province [of Upper Canada], that the latter should pay the annuities as and when they become due.”⁴⁶ Despite this diminished status, the “personal obligation” still retained a legal effect (there is a trace of a trust-like relationship evidenced here, but it is one grounded on the notion that Aboriginal peoples are savages).

This minimal remnant of legal binding force did not hold in all cases. In 1929, in *Syliboy*, Justice Patterson held that the Mi'kmaq Treaty of 1752 was “not a treaty at all,” but “at best a mere agreement made by the Governor and council with a handful of Indians.”⁴⁷ The precise legal character of these “mere agreements” can be clearly seen when they are placed in relation to statutes. As Justice Patterson unequivocally states, “[w]here a statute and treaty conflict a British Court must follow the statute.”⁴⁸ Taken on its own, this is simply an articulation of parliamentary sovereignty, but coupled with the diminished legal character of the “mere agreements,” it serves to lower the binding effect below that afforded to contracts. Put otherwise, the effect of this decision was, as Promislow notes, to define treaties as a form of “political agreement that was unenforceable at law.”⁴⁹

45. Attorney-General for the Dominion of Canada v Attorney-General for Ontario (*Annuities Case*) (1896), [1897] AC 199 (PC) [*Annuities Case*].

46. *Ibid.* at 213.

47. *Syliboy*, *supra* note 34 at 313.

48. *Ibid.*

49. Janna Promislow, “Treaties in History and Law” (2014) 47 UBC L Rev 1085 at 1146.

Before I move on with my analysis of the foundational assumptions that inform this first doctrine, I would like to explicitly note that both this doctrine and the one that follows it are variants within the 150-year-old picture. They form the dominant approaches to treaties in the settler courts from the late nineteenth century through today, but I want to emphasize that “dominant” should not be taken to mean that they were uncontested. As Duncan Ivison helpfully reminds us, we should not be looking for “evidence of primal or continuing consent,” but rather “evidence of *contestability* – for the capacity of people to effectively contest those norms and actions acting on them and to alter or shape their course in different ways.”⁵⁰ That is to say, it is the actual nature of the existing relationships over time that should be the focus and not some event that can be interpreted as neutralizing contestation.⁵¹ The 250-year-old picture has persisted continually in both Indigenous practices of resistance and in the background of settler law and policy. We can see the latter in a number of areas:

The continued practices of treaty making: The numbered treaties are negotiated between 1871 and 1921 and the practice is reinitiated in the modern land claim agreement process that followed from the Supreme Court’s landmark decision in *Calder*.

Legislation: The *Natural Resource Transfer Agreements* of the 1930s included a provision protecting treaty-based hunting rights, which constitutionalized them for the first time in Canadian law and, in 1951, section 87 (later renumbered 88) provided treaties with a degree of protection against provincial laws).

Case law: At times, traces can be found within dissents and the decisions of lower courts.⁵²

50. Duncan Ivison, “Consent or Contestation?” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 193-94.

51. Promislow aptly summarizes this point when she maintains that, this way, “the nature of those relationships and interdependencies becomes the focus, and consent itself becomes a process rather than an event.” See *supra* note 49 at 1100.

52. It should be noted that the *Natural Resource Transfer Agreements* have been interpreted by the Supreme Court to have modified those hunting rights by both extinguishing any commercial hunting rights and expanding the territorial scope of those limited rights to all unoccupied Crown lands within the province. See *R v Horseman*, [1990] 1 SCR 901. For some instructive analysis of this decision, see Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26 Queen’s LJ 143 at 160-62; Kerry Wilkins, “Unseating *Horseman*: Commercial Harvesting Rights and the *Natural Resources Transfer Agreements*” (2007) 12 Rev Const Stud 135. Also, in regard to the case law, I should note that, while the dominant picture was the one that employed the doctrine of discovery to see the Royal Proclamation of 1763 as an assertion of unilateral and unlimited sovereignty over Indigenous peoples and their lands, there were cases that held that treaties were legally enforceable.

III. REVISITING THE BASIS OF THE FIRST DOCTRINE

The picture that the *St Catherine's Milling/Syliboy* interpretive approach presents us with is difficult to navigate. The decisions map out a set of relationships between the parties, but we cannot quite get a perspicuous view of how and why they start in the positions that we find them in. It seems to start *in medias res*. That is, it is much like a play that begins in the middle of things. As the curtain drops, we, as the audience, are confronted by a situation where the implications of previous but unseen events are being worked out. This leaves us not only asking what will follow, but also what preceded the scene before us. In this case, what is left out is precisely how and why the Crown and the Indians have such asymmetrical degrees of interest in land. How does the Crown have the ability to have been “all along vested [with] a substantial and paramount estate, underlying the Indian title?”⁵³ What can “all along” mean here? It seems to be a reference to temporal sequence, but it is also somehow removed from it. It carries with it the impossible temporality of the *a priori* (or “view from nowhere”) that bends and warps ordinary language into infelicitous metaphysical expressions such as “always already.” It is something that magically appears and forms the foundation for the sequence of everything else that follows, but it is a foundation that does not (and indeed cannot) remain fixed.

While *St Catherine's Milling* is the foundational case for this picture of the treaties in Canada, it is not the first of its kind. We can see a version of this same picture (and this version is, to my eye, more explicit and detailed) in the United States jurisprudence in *Johnson v M'Intosh*, which holds that, upon the arrival of Europeans, it was “the character and religion” of Indigenous peoples that “afforded an apology for considering them as a people over whom the

See e.g. *Dreaver v The King* (1935), 5 CNLC 92 (Exch Ct). In this case, the court found that the medicine chest provisions of Treaty 6 made the federal government liable as a trustee for medical and related expenses that it had taken out of the First Nations' accounts. As Promislow rightly notes, cases such as *Dreaver* serve as a reminder that, while the line of reasoning from *Syliboy* exercised a great deal of influence as a precedent in the first half of the twentieth century, “differences regarding the legal nature of treaty obligations persisted.” See *supra* note 49 at 1149.

53. *St Catherine's Milling*, *supra* note 14.

superior genius of Europe might claim an ascendancy.”⁵⁴ It is on this basis (*i.e.*, on the basis of a particular perspective on the legal and moral significance of cultural difference) that “the rights of the original inhabitants ... were necessarily [and] to a considerable extent, impaired.”⁵⁵ There is, even in this case, a curious acknowledgement of the doubtful nature of the “abstract principles” that form the foundation of the doctrine of discovery:

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.⁵⁶

This is curious, as it enables Chief Justice Marshall to both distance himself from defending the legitimacy of the “abstract principles” of the doctrine of discovery and to nonetheless support his decision to uphold its legal force by taking judicial notice of the “character and habits” of those who are subject to it. The Canadian context is different as the Royal Proclamation of 1763 had never been displaced by a revolution and so the validity of inheriting title (so to speak) was not in question in the same way. Nevertheless, the tactic of supporting the legal fiction of discovery with the racist rhetoric of savagery and lack of civilization are frequently employed. In fact, this case is cited (alongside the Royal Proclamation of 1763) in *Sparrow* as support for the proposition that “there was from the outset never any doubt that sovereignty and legislative power,

54. *Johnson v M'Intosh*, *supra* note 33 at 573. It is also interesting to note that, in both *St Catherine's Milling* and *Johnson v M'Intosh*, there were no Indigenous parties involved. Rather, in each case, the question of title to Indigenous lands is between two settler parties. In *Johnson v M'Intosh*, it is the validity of a set of deeds purchased by settler land speculators and Chief Justice Marshall holds against the deeds on the basis that private citizens cannot purchase lands from Indians (a central principle from the Royal Proclamation of 1763). Chief Justice Marshall goes on to address the implications of Aboriginal rights and title for the division of powers in the United States in the so-called *Cherokee Cases* (*Cherokee Nation* and *Worcester*). See *supra* note 33. The end result is to position Indigenous nations as “domestic dependent nations” (*Cherokee Nation*, *supra* note 33 at 30) that retain their pre-existing right of self-government “so far as respected themselves only” (*Worcester*, *supra* note 23 at 547). This qualification is key to the absurd jurisdictional limitations that are set in both *Oliphant* and *Montana*. Whereas in *St Catherine's Milling*, the case is between the province of Ontario and Canada and so is a division of powers case, in *Worcester*, Aboriginal peoples are not included as “nations” in any sense of the term. Rather, they are positioned as “mere burdens” on the title to their own lands. If we were to transcribe their status in *St Catherine's Milling* into the language of Chief Justice Marshall, they would be simply “domestic dependents.”

55. *Johnson v M'Intosh*, *supra* note 33 at 574.

56. *Ibid* at 589.

and indeed the underlying title, to such lands vested in the Crown.”⁵⁷ It is cited in almost all of the most important cases in Canadian Aboriginal law. Its usage is, much like Chief Justice Marshall’s reasoning, double-edged; on the one hand, it serves to support the legal authority of the unilateral assertion of a thick concept of Crown sovereignty, but, at the same time, it supports the survival of the Indians’ diminished right of “occupancy” within the settler legal system.⁵⁸ From the Supreme Court decisions in *Calder*, *Guerin*, *Van der Peet*, *Mitchell*, and *Wewaykum* to a host of lower court decisions, one thing is abundantly clear: This openly racist legal fiction remains securely fixed within the heart of Canada’s “living tree.”⁵⁹

When the doctrine of discovery is employed by the courts to ground the Crown’s claim to sovereignty, legislative power, and underlying title, they are constrained in a peculiar way. That is, they can define the doctrine of discovery, but they cannot inquire into the legitimacy of its foundations because it simply has none. It is, to borrow Nietzsche’s words, the concept that requires us “to think an eye which cannot be thought at all,” or, to put it somewhat differently, to adopt a ‘view from nowhere.’⁶⁰ Thus, in order to preserve the legal authority and legitimacy of this legal fiction, the court must simply accept the abstract definition and not inquire further. When it comes to the legitimacy of the Crown’s claim to sovereignty, legislative power, and underlying title, the court can only say that it “was never doubted.”⁶¹ When the title to these lands is contested, the onus must therefore be reversed. It is the “character and habits” of Indigenous peoples that forms the primary subject of the Court’s inquiry. This diminished view of Indigenous peoples and the treaties is conceptually connected to the theory of sovereignty and law being employed. This interpretive approach utilizes

57. *Sparrow*, *supra* note 7.

58. As I see it, the basis of this double-edged quality is found in the dialogical relationship between power, law, and public opinion. See *supra* note 55.

59. *Calder*, *supra* note 42 at 315, 320, 346, 380-91, 416; *Guerin v The Queen*, [1984] 2 SCR 335 at 377-79; *R v Van der Peet*, [1996] 2 SCR 507 at paras 36, 107, 267 (citing *Guerin*); *Mitchell v MNR*, 2001 SCC 33 at para 169 (Justices Binnie and Major concurring); *Wewaykum Indian Band v Canada*, 2002 SCC 79 at 75. This is naturally just a list showing the continued legal authority of *Johnson v M’Intosh* in the Canadian jurisprudence. A fuller investigation would be required to properly analyze the uses to which the case is put and the implications of that use in each individual case. For a perspicacious examination of the effect of this on Canada’s doctrines on constitutional interpretation, see John Borrows, “(Ab) Originalism and Canada’s Constitution” (2012) 58 SCLR (2d) [Borrows, “(Ab)originalism”].

60. Friedrich Nietzsche, *On the Genealogy of Morality*, translated by Carol Diethe, ed by Keith Ansell-Pearson (Cambridge: Cambridge University Press, 1994) at 87.

61. See *supra* note 21 on the non-justiciability of Crown sovereignty.

the resources of legal positivism in combination with a basic Westphalian model of the state (*viz.* the unitary nation-state) to set the criterion for what constitutes law (*viz.* the sovereign makes laws, which form a closed system) and uses this to determine the legal content of the treaties.⁶² Wittgenstein reminds us how these kinds of unstated standards or ideals effect our reasoning:

The ideal, as we conceive of it, is unshakable. You can't step outside it. You must always turn back. There is no outside; outside you cannot breathe. – How come? The idea is like a pair of glasses on our nose through which we see whatever we look at. It never occurs to us to take them off.⁶³

This combination of the unitary concept of the nation-state, positivist conception of law, and doctrine of discovery serve as the glasses that the court cannot take off. It can only see the presence of this standard or its absence (*viz.* the only possibilities that exist are the unitary sovereignty of the nation-state or the legal vacuum that exists in its absence). This means that the treaties can only be a surrender of the residual rights of Aboriginal peoples to the unitary-nation state.⁶⁴ It is not possible for them to continue to exist as nations within the state because it is conceptually committed to a unitary model. With these glasses in

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62. I am consciously employing a very general sense of legal positivism (*i.e.*, the idea of law as a closed system made up of the positive laws of a unitary sovereign) that is most similar to the version of positivism articulated by John Austin in the late nineteenth century. These problems and questions concerning the presumption of a unitary state extend beyond Austin's work into the twentieth century, but this tradition is by no means a simple one. The work of leading scholars in this tradition (such as HLA Hart and Joseph Raz) are implicated in this problem, but, in my view, they certainly cannot all be painted with the same brush (so to speak). The task of mapping out and analyzing this problem in their respective texts extends far beyond the limits of this essay.
63. Ludwig Wittgenstein, *Philosophical Investigations*, 4th ed, translated by GEM Anscombe, PMS Hacker & Joachim Schulte (Oxford: Wiley-Blackwell, 2009) at para 103 [Wittgenstein, *Philosophical Investigations*].
64. As Tierney helpfully points out, this view falls directly in line with the approach favoured by AV Dicey, as he was a long-standing opponent of Home Rule for Ireland. See *supra* note 20 at 240–41. Dicey favoured a view of the constitution that ignored any distinction between English and British identity and so ultimately supported English domination of the other sub-national state peoples (*i.e.*, Scottish, Welsh, Irish, et cetera). For a review of Dicey's position on Home Rule, see Thomas Bingham, "Dicey Revisited" [2002] Pub L 39. This position contrasts strongly with the strand of liberalism that we can see in Lord Acton's claim that a multinational state would be evidence of British liberty or, as he put it, "the combination of different nations in one State is a necessary condition of civilised life as the combination of men in society." See John Emerich Edward Dalberg-Acton, "Nationality" in *The History of Freedom and Other Essays* (London: Macmillan, 1907) 270 at 290.

place, Aboriginal peoples can only be seen as ethnic minorities or a secessionist movement (that aspires to its own nation-state) within the settler nation-state.

The problem is that the picture that the courts see with their glasses on is not a stable one. The “abstract principles” of the doctrine of discovery (which provides the rationale for the diminished status of Indigenous peoples and allows the settler courts to see them as “Indians”) and its associated legal fictions do not simply remain as a silent foundation beneath the stratified sediment of the cases that follow it. Therefore, no matter how cautiously we follow F. W. Maitland’s warning to not to “mix up two different logics, the logic of authority, and the logic of evidence,” we cannot be sure that they have been fully separated.⁶⁵ This is because the doctrine of discovery does not fit into the chronological logic of a sequence that would enable you to point to a “before” and an “after” in neatly formed and discrete strata. You cannot simply point to it as a historical fact (part of the “logic of evidence”) and then use it to ground the Crown’s claim to having “undoubted” sovereignty without affirming the continuing authority of its “abstract principles.”⁶⁶ There is no clearer demonstration of this fact than in Chief Justice Marshall’s reasoning in *Johnson v M’Intosh*. If we are going to think of it as a foundation, then it is a volcanic one. It cuts across and through layers, displacing their sequencing and leaving a labyrinthine network of vents and hollows. Conversely, to return to my use of the literary analogy of the *in*

65. Frederic William Maitland, “Why the History of English Law Is Not Written” in HAL Fisher, ed, *The Collected Papers of Frederic William Maitland*, vol 1 (Cambridge: Cambridge University Press, 1911) 480 at 491.

66. My point here is that the doctrine of discovery is not a historical event or statement of fact; it is a legal fiction. It involves the use of a simple chronological sequence wherein the Europeans arrived and acquired sovereignty and so it could appear to be something that is governed by the “logic of evidence.” However, what is missing from this sequence is how the mere arrival of the Europeans served to diminish the sovereignty of Aboriginal peoples. This part of the legal fiction of discovery operates on the “logic of authority.” This distinction between the “logic of authority” and the “logic of evidence” can be clearly illustrated through a consideration of the *Persons* case. See *Re Section 24 of the B.N.A. Act* (1929), [1930] 1 DLR 98 (UK JCPC) [*Persons*]. The Lord Chancellor, Viscount Sankey, held that the exclusion of women from public office was simply confined to the “logic of evidence” (as a wooden, fixed matter of historical fact). The “logic of authority” would have been effectively bound to follow the “dead hand of the past” and maintained that exclusion as law. The phrase the “dead hand of the past” is used by Justice Hall in his dissent in *R v Whitfield* where he states that two of the older cases cites “cannot be accepted as establishing a principle of law applicable to situations arising 100 years after the situations to which they applied became obsolete. The dead hand of the past cannot reach that far.” See *R v Whitfield* (1969), [1970] SCR 46 at 53. However, this more circumspect approach to the distinction between “evidence” and “authority” is often lost in Aboriginal law. For example, in *Rogers*, Chief Justice Roger B Toney found that,

medias res, we can say that it also supplies the *deus ex machina* that resolves each seemingly impossible conflict. However, it does so at a cost. It can only appear as something that was there “all along” or “was never doubted.” It cannot account for itself because it has no perspective to respond from. Its magical effects are strictly connected to its view from nowhere. Its value is that it fixes the objects within the field of view (*viz.* the Crown has always already had underlying title and/or this is the “character and habits” of the Indians), but the cost is that it raises the question of perspective and, with it, the question of the legitimacy of the constitutional order.⁶⁷ This means that the foundation that it offers is hollow and the order built upon it is subject to sudden and catastrophic collapse. This fragility is clearly evidenced by the inability of this perspective to directly respond to the most basic question of legitimacy (*e.g.*, how did the Crown acquire

[t]he native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control. It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices (*Rogers, supra* note 23 at 572).

In this absurd line of argument, “evidence” and “authority” are treated as somehow being one and the same. The *Persons* case provides us with clear and principled rejection of this kind of confusion. Lord Chancellor Sankey states that “[t]he exclusion of women from all public offices is a relic of days more barbarous than ours,” and that “to those who ask why the word [person] should include females, the obvious answer is why should it not.” *Persons, supra* note 66 at 99, 109. In order to ground this use of the logic of authority, he set out the “living tree” approach to constitutional interpretation, which holds that “[t]he *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. ‘Like all written constitutions it has been subject to development through usage and convention’” (*ibid* at 106-107; Lord Chancellor Sankey citing Sir Robert Borden). This allowed the Privy Council to avoid simply cutting down the provisions of the Act by relying on “a narrow and technical construction” and instead giving it “a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs” (*ibid* at 107).

67. Here, I have in mind the link between legality and legitimacy that the Supreme Court sets out in the *Secession Reference*. See note 21.

sovereignty over Aboriginal peoples?) without resorting to legal fictions that serve to diminish Aboriginal peoples' standing as peoples and procedural rules that serve to exclude the question altogether. We can see the combination of both of these supporting structures (legal fiction and the procedures that it grounds) in the combination of Crown immunity and the imposition of a provision of the *Indian Act* in 1927, which made it an offence for anyone to solicit or receive funds from Indians to pursue their legal claims without first obtaining written permission from the Superintendent-General of Indian Affairs.⁶⁸

IV. THE EMERGENCE OF THE SECOND DOCTRINE

The collapse of the basis of the *St Catherine's Milling/Syliboy* doctrine begins in the 1960s wave of decolonization and the civil rights movement. The rhetoric of civilization and savagery had worn thin and could no longer provide legitimation for the unilateral power of the Crown over Indigenous peoples. This led the Trudeau government to put forward the *White Paper*, which aimed to entirely eliminate Indian status and, with it, rights and title, under the banner of racial

68. The common law doctrine of Crown immunity held that the Crown could not be sued in its own courts without consent. This was removed at the federal level by statute. See *Crown Proceedings Act, 1947* (UK), 10 & 11 Geo VI, c 44; *Petition of Right Amendment Act*, SC 1951, c. 33; *Crown Liability Act*, RSC 1970, c C-38; *Crown Proceedings Act*, SBC 1974, c 24. As for the *Indian Act*, this provision is introduced in *An Act to Amend the Indian Act* (see *Indian Act Amendment*, *supra* note 18), continued in the *Indian Act*, RSC 1927, c 98, s 141, and ultimately repealed in the extensive revisions undertaken in the *Indian Act*, SC 1951, c 29, s 123. The fact that this legislation was enacted is a testament to the fact that the legal rights of Indigenous peoples in Canada were by no means a settled issue. Paul Tennant notes that the Judicial Committee of the Privy Council's 1918 decision in *Re Southern Rhodesia Land* [1919] AC 211 and 1921 decision in *Amodu Tijani v Secretary, Southern Nigeria* (1921) AC 399 had held that Aboriginal title pre-existed British authority and remained in place unless explicitly extinguished. This was a distinct reversal from the position that Lord Watson had taken in *St Catherine's Milling*. Tennant argues (and I agree) that it is reasonable to presume that this played a major role in parliament moving to ban claims-related activities in 1927. He also notes that the removal of this policy in the 1951 revisions to the *Indian Act* could be due to the fact that, after 1949, the Supreme Court of Canada became the final court of appeal. This meant that the cases of the Judicial Committee of the Privy Council would henceforth only serve as precedents. See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990) at 214-15. Kent McNeil cites this favourably in his recent and instructive essay on the uses (and abuses) of legal history and expert testimony. See Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 70 at 81.

equality. The Indigenous response to this was a rapid, widespread, and effective rejection. Within the settler law, these changes were brought home with the *Calder* decision in 1973 when a majority of the Supreme Court of Canada found that the rights of Indigenous peoples were not solely derived from the Crown, but were inherent in the fact that they were here before the Europeans arrived.⁶⁹ This led to a complete reorganization of the Crown's approach to Aboriginal administration and litigation. In effect, the project of enfranchisement was transformed into the project of reconciliation, but this did not take shape overnight. Rather, the change in normative principles (from the doctrine of discovery and its unilateral "view from nowhere" to consent) changed the plausible range of actions that could be used to legitimize the authority of the Crown. It is this political and legal shift that leads the Crown to initiate the modern treaty process following *Calder*.⁷⁰ This change does not reach the Court's doctrine of treaty interpretation until the 1980s.

Taylor and Williams in 1982 was the first case to begin collecting together a set of principles and form an approach that clearly departed from the *St Catherine's Milling/Syliboy* doctrine of treaty interpretation.⁷¹ As Associate Chief Justice MacKinnon stated:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we

69. *Calder*, *supra* note 42.

70. This process begins with the James Bay and Northern Québec Agreement of 1975 and the Northeastern Québec Agreement of 1978. See James Bay and Northern Quebec Native Claims Settlement Act, SC 1976-1977, c 32. For the Agreement and a collection of its associated documents, see Ministère de la Justice, James Bay and Northern Québec Agreement and Complimentary Agreements, 1998 Edition (Québec: Les Publications du Québec, 1998) [JBNQA]. It is telling that the agreements establish a system of self-government specifically referred to as "special legislation concerning local government" (*ibid* at 172). This is telling for our purposes, as it clearly shows where Aboriginal self-government is situated within the division of powers (*viz.* it is limited to a devolved, quasi-municipal level). The operating presumption is that the Cree and Naskapi peoples are, as John Ciaccia stipulates in the opening section of the JBNQA, "two minorities" who have special "needs and interests" and are "closely tied to their lands" (*ibid* at xvi, xxi). The picture thus fits squarely within the 150-year-old Colonial Constitution (*e.g.*, the Crown has "undoubted"—but also unexplained—sovereignty and Aboriginal peoples are simply ethnic minorities with a diminished, but burdensome, set of *sui generis* legal interests).

71. *R v Taylor and Williams* (1981), 34 OR (2d) 360 (CA) [*Taylor and Williams*]. This case arose from status Indians being charged and convicted of hunting out of season (a provincial regulatory offence) for taking sixty-five bullfrogs from Crowe Lake.

now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.⁷²

This contextual approach to treaty interpretation was predicated on the combination of two key principles that had appeared in previous cases. First is the principle that holds that, when the honour of the Crown is involved, there can be no appearance of “sharp dealing.” Justice MacKinnon cites the reasoning of Justice Cartwright’s dissent in *R v George* as authority.⁷³ As Justice Cartwright put it:

[w]e should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.⁷⁴

This particular citation is important to keep in mind, as it clearly stipulates that the honour of the Sovereign is at stake when parliament engages in unilateral actions that breach treaty rights. Second is the principle that holds that “if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.”⁷⁵ The authority that Justice MacKinnon cites for this principle is the concurring decision of Justice Norris in *R v White and Bob*.⁷⁶ In this case, the court had split on the question of whether the agreements

72. *Ibid* at 364.

73. *Ibid* at 367. It may be of interest to note that Mr. MacKinnon was counsel for Mr. George in this case. See *R v George*, [1966] SCR 267 [*George*].

74. *George*, *supra* note 73 at 279 (cited in *Taylor and Williams*, *supra* note 71 at 367).

75. *Taylor and Williams*, *supra* note 71 at 367.

76. *R v White and Bob* (1964), 50 DLR (2d) 613 at 652 (BC CA) [*White and Bob*]. Interestingly, the precise page that Justice MacKinnon cites in *White and Bob* contains a citation from Chief Justice Marshall in *Worcester*, which simply holds that “[t]he language used in treaties with the Indians should never be construed to their prejudice” (*Worcester*, *supra* note 23 at 582). While *Worcester* does reflect the 250-year-old picture of Canada’s constitutional order—which I have been referring to as Canada’s Aboriginal Constitution—this particular citation from the case does not contain the modified (or minimal) version of the doctrine of discovery that forms the heart of this case. Rather, it simply adds a kind of “liberal and generous” interpretive principle that can be seen as being based in an asymmetrical trust-like relationship between Aboriginal peoples and the Crown (*viz.* the ward/Guardian relationship). For an example of a case in which this can be seen explicitly, see *Jones v Meehan*, 175 US 1 (1899) [*Jones*]. This case explicitly bases its liberal approach to treaty

in question were simply land transfer agreements (the position taken by Justices Sheppard and Lord) or treaties (the position taken by Justices Davey and Norris) and it was Justice Sullivan who broke the tie by concurring with the latter. In his reasons, Justice Norris sets a framework for treaty interpretation that shifts away from the use of either “rigid rules of construction” or “the tests of modern day draftsmanship” and towards a closer consideration of “the circumstances existing when the document was completed.”⁷⁷ This framework clearly breaks with the *St Catherine’s Milling/Syliboy* doctrine, which placed the emphasis clearly on “rigid rules of construction” and so the term “treaty” was a strictly defined term of art. I should qualify the distance between this framework and the one that precedes it somewhat. It is a clear break with *Syliboy*, as that decision had deprived the treaties of any legally binding force by explicitly determining that the Mi’kmaq were savages. While there is also a distance from Lord Watson’s reasoning in *St Catherine’s Milling*, it is less clear cut. After all, Lord Watson does maintain that Aboriginal title is a legal interest. It is a non-proprietary legal interest that exists as a mere burden upon the Crown’s underlying title. As Mark Walters argues, there is a paradoxical quality to Lord Watson’s ruling:

[I]t may be seen, on the one hand, as saving the concept of Aboriginal title in Canadian law at a time when many Canadian judges would have denied it altogether, and yet, on the other hand, by pinning the idea of Aboriginal title to the Proclamation, Lord Watson provided an anaemic understanding of Aboriginal

interpretation on the claim that Indians lack the required capacity to understand the treaties they were entering into. The trust-like relationship between Guardian and ward is first used within the American case law by Chief Justice Marshall in *Cherokee Nation*, as he maintains that Indians in the United States of America “occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.” See *Cherokee Nation*, *supra* note 33 at 17. This reasoning leads him to refer to Indigenous nations as “domestic dependent nations” (*ibid*). This trust-like relationship does not contest the legitimacy of the strong version of the doctrine of discovery that is expressed in *Johnson v McIntosh* and that grounds the *St Catherine’s Milling/Syliboy* doctrine of treaty interpretation.

77. *White and Bob*, *supra* note 76 at 648-49. I think it is useful to note that Justice Norris finds that the term “treaty” in section 87 (now section 88) of the *Indian Act* “embraces all such engagements made by persons in authority as may be brought within the term ‘the word of the white man’ the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.” See *White and Bob*, *supra* note 76 at 649. Also, Justice Lamer cited the first two sentences of this in *Sioui*. See *supra* note 17 at 1041.

rights as legal interests that were, in some sense, held hostage to (using his ambiguous words) the “good will of the Sovereign.”⁷⁸

This clearly captures the continuing connection that exists between *St Catherine’s Milling* and the foundations of the modern approach to treaty interpretation. The assumption of the Crown’s sovereignty, legislative power, and underlying title remains the silent and unquestioned center (or hinge proposition) of both interpretive frameworks and Aboriginal peoples are still being held hostage.

There is also a slight break between *St Catherine’s Milling* and *Taylor and Williams*. It is briefly touched on by Justice Norris in *White and Bob* with his use of the phrase “the common understanding of the parties.”⁷⁹ This introduces the need for some consideration of the Aboriginal perspective, but it is still confined to the limits of an event-based understanding of consent. The problem with this understanding is that the combined function of common law procedures around the law of evidence and judicial discretion can effectively justify the status quo. This can foreclose on any meaningful consideration of the Aboriginal perspective on the actual basis of the conflict, which is whether the treaties are constitutional documents or simply surrenders.⁸⁰ If they are the former, then they must relate directly to the meaning of section 91(24) and so to the division of powers. However, if they are the latter, then they merely provide a limited set of vague legal interests. The Aboriginal perspective serves as the break between these two models because the strong version of the doctrine of discovery that resides at the basis of the power over interpretation of section 91(24) relies on an uncontestable assertion (a view from nowhere) and so once the Aboriginal perspective becomes a consideration, the alchemy of sovereignty becomes far more complicated.⁸¹

78. Walters, *supra* note 10 at 63.

79. *White and Bob*, *supra* note 76 at 649.

80. A prime example of the use of treaties to reinforce the status quo can be found in the approach taken in *Logan v Styres* (1959), 20 DLR (2d) 416 (ON SC). In this case, the Ontario High Court found that the Haldimand Deed of 1784 and the Simcoe Deed of 1793 (documents granting lands to the Six Nations in southern Ontario for their assistance to the British in the American War of Independence) had made the Six Nations into British subjects because they were seen as “accepting the protection of the Crown” (*ibid* at 422). It is clear that this kind of narrow and technical construction is unilateral in nature and confronts the other party as a kind of magical re-description of events (*viz.* it is as if the Court simply held up the documents, muttered a magical phrase, and, after the requisite puff of smoke had cleared, informed the Six Nations that they had been British subjects all along).

81. Borrows, *Alchemy*, *supra* note 24.

The principle of liberal construction was endorsed by the Supreme Court in *Nowegijick v The Queen* in 1983.⁸² In this case, the appellant (Gene A. Nowegijick, a status Indian who was living on reserve) was objecting to the income tax assessment of his wages by appealing to section 87 of the *Indian Act* (*i.e.*, the provision that immunizes Indian property on reserve from taxation).⁸³ In accepting the argument put forward by the appellant, Justice Dickson touched on the issue of treaty interpretation in conjunction with statutory interpretation. As he puts it, “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”⁸⁴ As I have already noted, the principle of liberal construction alone does not fully break with the *St Catherine’s Milling/Syliboy* doctrine. This does not disturb the “undoubted” (or better, unquestioned) foundations of the Crown’s claim to sovereignty, legislative power, and underlying title. In fact, it can be used to reinforce it by casting the Crown-Aboriginal relationship as being analogous to the Guardian-ward relationship (this is, after all, the reasoning in *Jones v Meehan*).⁸⁵ In other words, the continuity between *St Catherine’s Milling* and the principles of liberal construction and the honour of the Crown that are put forward in *Taylor and Williams* and *Nowegijick* is the strong version of the doctrine of discovery that is articulated in *Johnson v M’Intosh* (*viz.* discovery grants the Crown undoubted sovereignty, legislative power, and underlying title). This operates to deprive Aboriginal peoples of any ability to contest the nature of Crown sovereignty in the courts by confining the bounds of contestation to the vague set of legal interests that exist where the Crown has not explicitly extinguished via legislation.

V. THE SUI GENERIS DOCTRINE AND THE MEANING OF SECTION 35 OF THE CONSTITUTION ACT, 1982

The formal break with the *St Catherine’s Milling/Syliboy* doctrine (or at least the *Syliboy* part of it) comes in 1985 with *Simon v The Queen*.⁸⁶ This case explicitly addressed the question of the status of the Treaty of 1752 between the British and the Mi’kmaq. Chief Justice Dickson first addresses the issue of the capacity of the

82. *Nowegijick v The Queen*, [1983] 1 SCR 29 [Nowegijick].

83. *Indian Act*, RSC 1970, c I-6, s 87.

84. *Nowegijick*, *supra* note 82 at 36. Justice Dickson cites *Jones* as support for this approach. See *Jones*, *supra* note 76.

85. See *Jones*, *supra* note 76.

86. *Simon*, *supra* note 5.

Mi'kmaw to enter into a treaty by directly rejecting the language used by Justice Patterson in *Syliboy*. In the Chief Justice's view, this language:

reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.⁸⁷

This makes it clear that both parties to the treaty had the capacity required to make a treaty. While this seems to resolve the issue of capacity, it does not determine what type of treaty the document is. This finding is set out later on:

In considering the impact of subsequent hostilities on the peace Treaty of 1752, the parties looked to international law on treaty termination. While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.⁸⁸

He does not define what *sui generis* means and so finding our way through the reasoning here will require some time. Three previous decisions form the basis for this finding: *White and Bob*, *Francis*, and *Pawis*.⁸⁹ If we turn our attention to these authorities, we find some curious reasoning. First, in *Francis*, the cited page is from Justice Abbot and Justice Kellock's concurring decision regarding the legal status of the *Jay Treaty*.⁹⁰ The reasons provided rely exclusively on statutory interpretation of the *Indian Act*. After considering section 87 (now section 88), Justice Kellock states:

87. *Ibid* at 399.

88. *Ibid* at 404.

89. *Ibid*. Chief Justice Dickson specially cites *White and Bob*, *supra* note 76 at 617-18; *Francis v The Queen*, [1956] SCR 618 at 631 [*Francis*]; *Pawis v The Queen* (1979), [1980] 2 FC 18 at 24 [*Pawis*].

90. *Francis*, *supra* note 89 at 631. See Treaty of Amity, Commerce, and Navigation, between His Britannick Majesty and The United States of America, by Their President, with the advice and consent of Their Senate, United States and Great Britain, 19 November 1794 (entered into force 29 February 1796) [Jay Treaty]. *Francis* focused on Article 3 of the Jay Treaty, which reads: "No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales, or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians." See Jay Treaty, *supra* note 90, art 3.

I think it is quite clear that “treaty” in this section does not extend to an international treaty such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute. In my opinion the provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act*, the terms of such general legislation apply to Indians equally with other citizens of Canada.⁹¹

The gist of the reasoning here is that the term “treaty” in the *Indian Act* only applies to “treaties with Indians.” This is a curious authority for Chief Justice Dickson to rely on, as it only resolves the distinction between international treaties and treaties with Indians for the purposes of section 88 of the *Indian Act* and it does this by stating that the treaties with Indians are made with Indians as defined by the statute. There is no explanation as to how the Crown acquired the power to legislatively define Indians and no analysis of the relationship between the Crown and Aboriginal peoples in 1794 when the treaty was made. The reasoning forms a magic circle; the Crown is able to define Indians and so any treaty with them is by definition not an international treaty.⁹²

The cited pages of *White and Bob* are similarly unhelpful as Justice Davey refers back to Justice Kellock’s judgment in *Francis* to limit the meaning of the word “treaty.” As he puts it:

91. *Francis*, *supra* note 89 at 631.

92. In some cases, the courts have limited this power to define “Indians” for the purposes of s 91(24). See *Reference as to Whether the Term “Indians” in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104 [*Eskimo Reference*]. In the *Eskimo Reference*, the Court was asked to determine whether Inuit in Quebec were under federal or provincial jurisdiction. The federal government did not want to assume responsibility and so it argued that the term “Indians” in s 91(24) should be read in light of the Royal Proclamation of 1763. It argued that the Inuit were not covered in the Proclamation for two reasons: first, the terms “nation” and “tribe” are not employed in relation to them; second, they were never “connected” to or “under the protection” of the Imperial Crown (*ibid* at 115). The Court rejects both of these arguments. It adopted an originalist interpretive approach to determining the meaning of the term and finds that “the *British North America Act*, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole” (*ibid* at 115). The problem with this reasoning is that, while it offers a historical contextual approach, it does nothing to challenge the doctrine of discovery that lies at the foundation of the interpretation of s 91(24) that maintains that the provision that grants parliament unlimited power over Indians and their lands (*viz.* by this view, the Imperial British Crown was given the newly minted Dominion’s parliament with something it actually never possessed and so it seems to float in the air like some kind of “gift from nowhere”).

It is unnecessary to venture any extended definition of the word “Treaty” in this context, but it can be safely said that it does not mean an “executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities . . .,” *per* Rand, J., in *Francis v. The Queen*, 3 D.L.R. (2d) 641 at p. 647, [1956] S.C.R. 618. It is also clear in my opinion that the word is not used in its widest sense as including agreements between individuals dealing with their private and personal affairs. Its meaning lies between those extremes.⁹³

The specific position between these “extremes” is Justice Kellock’s circular conception of “treaties with Indians” (*viz.* treaties with Indians are not treaties in the international sense because Indians are Indians). Justice Davey sets out the ultimate backing for this on the following page when he holds that legislation in relation to Indians “falls within Parliament’s exclusive legislative authority under s. 91(24) of the B.N.A. Act” and cites Lord Watson’s judgment in *St Catherine’s Milling* as authority.⁹⁴ Once again, there is no accounting for how the Crown acquired this magical power over Indians. The term itself is empty, as it is interpreted by the courts as simply referring to a category of peoples that the Crown can unilaterally define via legislation and, once defined, are then subject to its unlimited authority.

The final case cited by Chief Justice Dickson is *Pawis*. This is a decision of the Federal Court that deals with fisheries charges against four Ojibway men and the legal effect of the Lake Huron Treaty. On the latter issue, Justice Marceau states that it is “obvious” that the treaty in question was not a treaty in the “international law sense” because the Ojibway “did not then constitute an ‘independent power’,

93. *White and Bob*, *supra* note 76 at 617. It is interesting to note that Justice Lamer falls back onto effectively the same set of authorities (*viz.* *Simon* and *White and Bob*) in *Sioui* when he states:

Without deciding what the international law on this point was, I note that the writers to whom the appellant referred the Court studied the rules governing international relations and did not comment on the rules which at that time governed the conclusion of treaties between European nations and native peoples. In any case, the rules of international law do not preclude the document being characterized as a treaty within the meaning of s. 88 of the *Indian Act*. At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.

Sioui, *supra* note 17 at 1038. Here, again, Aboriginal peoples are situated as somehow falling between states and subjects before they even engage in treaty negotiations.

94. *White and Bob*, *supra* note 76 at 618.

they were subjects of the Queen.”⁹⁵ First, it is apparently “obvious” that this treaty is not to be understood in the international law sense. This is so because the Ojibway were “subjects of the Queen.” At this point, we come back, once again, to the status and capacity of Aboriginal peoples. How did they become subjects? There is no accounting for this within the bounds of the case. It is simply “obvious.” I believe that by now we can see that it is the strong version of the doctrine of discovery operating here to magically diminish Aboriginal peoples from being an “independent power” to “subjects of the Queen.” This leaves the treaties as a “very special” and “difficult to ... define” agreement between “the Sovereign and a group of her subjects.”⁹⁶

Taking these cases into consideration, we can now return to the question of what Chief Justice Dickson means by the term *sui generis*. It simply means that the treaties are not the same as the treaties made in international law because they are treaties made with Indians. However, this is also where his rejection of *Syliboy* becomes complicated. He had held that “both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected” and this leads him to conclude that the Treaty of 1752 was “validly created by competent parties.”⁹⁷ It seems that, in order for his *sui generis* definition of treaties to be consistent with this position on capacity, there has to be distinction between having the capacity to enter into a treaty and the equality between the parties. That is, the Micmac may have had the capacity to enter into the Treaty of 1752, but they did not enter into this treaty as equal partners. Rather, they were already subjects of the Queen simply by virtue of being Indians. This does not really resolve the difficulty for Chief Justice Dickson, as this fine demonstration of jurisprudential sleight of hand still reflects “the biases and prejudices of another era in our history.”⁹⁸ The authorities cited clearly show that the issue of capacity and the nature of the

95. *Pawis*, *supra* note 89. In the same paragraph, Justice Marceau elaborates on the special character of Aboriginal treaties:

Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the ‘principal men of the Ojibewa Indians’ were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.

96. *Ibid.*

97. *Simon*, *supra* note 5 at 401.

98. *Ibid* at 399.

treaties is still connected at its foundations. It is still based on a set of legal fictions (*viz.* discovery, *terra nullius*, the civilization thesis, et cetera) that rely upon a prejudicial and racist view of the “character and habits” of Aboriginal peoples. The difference between *Syliboy* and *Simon* is simply that the latter moves away from the explicit reliance on these fictions and instead folds back to their implicit forms in *St Catherine’s Milling*. This is not an insignificant difference: It is the difference between a worthless piece of paper and a treaty that is enforceable in Canadian courts.⁹⁹ However, both are reliant on a thick version of Crown sovereignty that constrains Aboriginal peoples within a constitutional frame that they cannot change. As Gordon Christie rightly observes, the *sui generis* designation is one which merely “clouds the picture of parliamentary supremacy” by effectively separating “questions about Crown-Aboriginal treaties from answers that might follow from analysis of ordinary treaties and agreements.”¹⁰⁰ The result of this is the creation of a “unique approach to issues of treaty termination and the extinguishing or infringing of treaty rights.”¹⁰¹ What is unique about it is that the mechanisms of its operation are buried deeply within the cases cited as authority for its creation. Chief Justice Dickson explicitly decides this case on the basis of section 88 of the *Indian Act* and not section 35 of the *Constitution Act, 1982* and so this brings us to the question of whether section 35 changes this picture.

The first case to interpret section 35 in relation to the treaties is *Badger* in 1996. In this case, Justice Cory provides a useful summary of what he views as the “applicable principles of interpretation” along with a series of pinpoint citations that serve as their supporting authority. The first principle of interpretation that he sets out is as follows: “First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.”¹⁰² This principle requires some careful consideration, as it sets the ground for those that follow. To hold that a treaty “represents an exchange of solemn promises” is unhelpfully vague. It can be interpreted as being consistent with the concurrent decision in *Badger*, where Justice Sopinka (supported by Chief Justice Lamer) straightforwardly claimed

99. I would like to thank Kerry Wilkins for reminding me of the importance of this difference.

100. Christie, *supra* note 52 at 152. Promislow echoes this precise point when she states that, “[i]f anything, the *sui generis* status of treaties in Canada muddied the sovereignty waters.” Promislow, *supra* note 49 at 1151.

101. Christie, *supra* note 52 at 152.

102. *Badger*, *supra* note 7 at para 41. For the cases cited as authority for this principle, see *Sioui*, *supra* note 17 at 1063; *Simon*, *supra* note 5 at 401.

that “there is no disagreement” that treaties are not constitutional documents.¹⁰³ This, once again, circles around the question of capacity and jumps over the heart of the problem (*viz.* why are treaties with “Indian nations” not constitutional documents?). In this way, the vaguely superlative nature of the terms “solemn” and “sacred” is directly related to the diminished view of Indian nations that the doctrine of discovery supplies.

This reading of the first principle could very well strike a reader as being ungenerous. The wording of Justice Cory is vague and fits squarely into the modern *sui generis* approach to treaties. This diminished view of Indian nations, however, is explicitly set out in the authority that he cites. The sources for the very wording of this principle are *Sioui* and *Simon*. As Justice Lamer (as he was then) puts it, “[i]t must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred.”¹⁰⁴ He supports this by citing two cases.¹⁰⁵ The citation in *Simon* provides little assistance, as it simply holds that the Treaty of 1752 “was an exchange ... between the Micmacs and the King’s representative entered into to achieve and guarantee peace” and that it creates “an enforceable obligation between the Indians and the white man.”¹⁰⁶ The second source of authority is *White and Bob* and it proves to be the decisive

103. *Badger*, *supra* note 7 at para 3. Justice Sopinka supports this reasoning by contrasting the treaty with the *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2) [NRTA]*. This is unambiguously a constitutional document, and, by virtue of this status, the treaty becomes a subordinate document. As he puts it, “[t]he Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting in the interpretation of the *NRTA*, but it has no other legal significance.” See *Badger*, *supra* note 7 at para 8.

104. *Sioui*, *supra* note 17 at 1063.

105. *Ibid*; *Simon*, *supra* note 5; *Badger*, *supra* note 7.

106. *Simon*, *supra* note 5 at 410. Interestingly, Justice Lamer (in *Sioui*) and Justice Cory (in *Badger*) cite different pages of *Simon* as support of the proposition that treaties are “solemn agreements.” Justice Cory cites page 401 of *Simon*, which holds that both the British Crown and the Micmac had the necessary capacity to enter into the treaty and that it created “mutually binding obligations which would by solemnly respected.” It is worth noting that the page cited by Justice Cory attributes the following three qualities to the treaty: (1) it creates mutually binding obligations, (2) it provides a mechanism for dispute resolution, and (3) both parties possessed “full capacity to enter into a binding treaty.” On the other hand, Justice Lamer cites page 410 of *Simon*, which also characterizes treaties as “solemn agreements,” but it is less explicit about the issue of standing (*i.e.*, it can be taken as implied that the word “representatives” indicates that standing is to be imputed) and characterizes the obligation as being one between “Indians and the white man.” I think it is reasonable to assume that Justice Cory opts for page 401 of *Simon* to avoid the racial framing of “solemn obligations” created by the treaty.

one and so should be considered closely and at length.¹⁰⁷ As Appellate Justice Norris clearly explains:

In the section “Treaty” is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term “the word of the white man” the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied. In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. The transaction in question here was a transaction between, on the one hand, the strong representative of a proprietary company under the Crown and representing the Crown, who had gained the respect of the Indians by his integrity and the strength of his personality and was thus able to bring about the completion of the agreement, and, on the other hand, uneducated savages. The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded. The transaction in itself was a primitive one—a surrender of land in exchange for blankets to be divided between the Indian signatories according to arrangements between them—with a reservation of aboriginal rights, the document being executed by the Indians by the affixing of their marks. The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a “Treaty.”¹⁰⁸

The reasoning here serves to clear much of the fog that the *sui generis* doctrine generates. The treaties cannot be read as transactions between peoples of equal status. According to Appellate Justice Norris, this would merely “compound injustice without real justification at law.”¹⁰⁹ This statement is highly suspect, as it seems to assume that the principles of interpretation applicable to equal parties would be overly strict and thus would serve to further reduce the rights of Indians (this seems to me to be what he means by the phrase “compound injustice”). The presumption of inequality here has a remedial purpose. For one, it enables the courts to avoid binding Aboriginal parties to highly unfavourable

107. *Sioui*, *supra* note 17 at 1063; *White and Bob*, *supra* note 76.

108. *White and Bob*, *supra* note 76 at 649.

109. *Ibid.*

terms. This approach, however, also serves to reinforce the thick version of Crown sovereignty and limit the constitutional character of the treaties. What it does not mention is that, were the treaties to be read as agreements between equal parties, then a finding that they are formally flawed and therefore not binding would necessarily affect both parties. That is, the voiding of a treaty would cast doubt on both the legality and legitimacy of the Crown's claims of sovereignty, legislative power, and underlying title. In other words, the precautions set out by Appellate Justice Norris only make sense within a constitutional structure in which the Crown's claims are seen as being immune from contestation. This reasoning does not follow. If the treaties are between equal partners and the Crown is not presumed to have sovereignty, legislative power, and underlying title, then the consideration of the Aboriginal perspective would need to be far more robust. The treaties could not be interpreted as mere surrenders; rather, they would need to be seen as constitutional documents establishing a quasi-federal relationship between the Indian nations and the Imperial Crown (*i.e.*, the relationship that we can see articulated by Chief Justice Marshall in *Worcester*). This would serve to change the nature of Crown sovereignty from thick to thin and thereby change the interpretation of section 91(24) because the Imperial Crown could not give the Dominion what it did not possess (*i.e.*, power over Indians and their lands).¹¹⁰ This would mean that section 91(24) would grant parliament a power in relation to the Indian nations that would be nothing more than the minimal treaty administering power that would be consistent with the 250-year-old picture.¹¹¹ Instead, Appellate Justice Norris treats the status of the Crown as being absolutely fixed (by the magic of the doctrine of discovery) and that of Indians as being unilaterally variable. This unstated and unqualified assumption is the basis for his claim that the only just and legal light in which the treaties can be seen is that they are nothing but a "primitive" form of transaction that effects the surrender of land in exchange for goods sealed by the solemn "word of the white man" to a group of "uneducated savages." In other words, the treaties are (to borrow Rudyard Kipling's infamous title) part and parcel of the white man's

110. Chief Justice Marshall made precisely the same point concerning the limits of what the Crown could grant. See *Worcester*, *supra* note 23 at 544-45.

111. I specify treaty 'administering' because, according to section 132 of the *Constitution Act, 1867*, the federal Crown had no power of its own to make international treaties. Rather, it had legislative authority to implement "Empire treaties" entered on Canada's behalf. See *Constitution Act, 1867*, *supra* note 1, s 132. Thanks to Kerry Wilkins for pointing this out.

burden.¹¹² This is the reasoning that lurks within the authority that is cited by Justice Cory in *Badger* to support the solemn and sacred nature of the treaties and it colours the liberal principles of interpretation that follow from it.

The remaining three principles that Justice Cory sets out in *Badger* follow from the reasoning of Appellate Justice Norris in *White and Bob*. This “diminished” view of Aboriginal peoples as “uneducated savages” (a view entirely consistent with the reasoning in *St Catherine’s Milling* and *Johnson v McIntosh* and the 150-year-old Colonial Constitution that they generate) provides the framework for treaty interpretation. The principles of the honour of the Crown, liberal and generous interpretation, and the clear and plain standard for extinguishment serve to secure the treaties as a legal “burden” and provide the necessary interpretative tools for determining its quantum in each particular case. The citations that provide the authority for these principles all flow from and are circulated within the same set of cases: *White and Bob*, *Taylor and Williams*, *Nowegijick*, *Simon*, and *Sioui*.¹¹³ The pattern of citation itself is, of course, standard practice within the common law (*stare decisis* brings with it a kind of tidal ebb and flow within the case law), but the fact that the pattern can be traced to this specific set serves to show that the foundation of the *sui generis* doctrine or modern approach to treaties is narrow and therefore strictly determinable. However, this is not to say that this foundation is actually solid all the way through. It is dependent upon the magic of the doctrine of discovery and this is what binds this case to the section 35(1) analysis in *Sparrow*.

The only real addition to this picture that *Badger* offers is the introduction of the section 35 justification of infringement test from *Sparrow*. This extension of the *Sparrow* test from Aboriginal right to treaty rights has been thoroughly criticized and with good reason. Even within the confines of *Sparrow*, the actual legal basis of the test is suspect. Chief Justice Dickson and Justice La Forest determine the meaning of section 35(1) of the *Constitution Act, 1982* by reconciling it with section 91(24) of the *Constitution Act, 1867*. In their view, they are reconciling

112. Rudyard Kipling, “The White Man’s Burden: The United States and the Philippine Island,” *McClure’s Magazine* 12 (February 1899), online: <pdicrodas.webs.ull.es/anglo/KiplingTheWhiteMansBurden.pdf >.

113. With the exception of *Calder*, the cases that Justice Cory relies on that are not included in this list (*viz. Sparrow, Mitchell v Peguis Indian Band*) all refer back to the set listed. See *Sparrow*, *supra* note 5; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85. *Sparrow* is cited as authority for the principle of the honour of the Crown and the pages cited (at 1107-108) reference both *Taylor and Williams* and *Nowegijick*. *Mitchell v Peguis Indian Band* is cited for support for the principle of liberal interpretation of treaties (at 142-43), which is where Justice La Forest cites *Nowegijick*. See *Badger*, *supra* note 7 at para 41.

“federal duty” with “federal power.”¹¹⁴ The balance between these terms, skewed as the “federal power” of section 91(24), is taken as unquestionable and so its limits are not determined. The source of this broad view of section 91(24) is the unquestioning presumption of thick Crown sovereignty. This positions section 35(1) as little more than a self-imposed limitation that, via judicial interpretation, takes the form of a justificatory test that is modeled on the *Oakes* test.¹¹⁵ The legitimacy of this within the contest of the *Constitution Act, 1982* is itself questionable. After all, the *Oakes* test concerns the relationship between section 1 and the *Charter* (which covers sections 1–34). Section 35(1) is not within the *Charter* and so it is not subject to either section 1 or section 33. The hinge of this entire framework is the presumption of thick Crown sovereignty. It is what allows the Court to inflate “federal power” in section 91(24) to such a degree that it can simply jump over the fact that there is “no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights.”¹¹⁶ The foundation of this view of section 91(24) is also clearly set out just a few pages before:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.¹¹⁷

The authority cited for this absence of doubt is the Royal Proclamation of 1763, *Johnson v M'Intosh*, and three specific pages from the decisions of Justices Judson and Hall in *Calder*.¹¹⁸ The citations in *Calder* merely repeat the content picture set out in *Johnson v M'Intosh* and *St Catherine's Milling* (as it is Lord Watson's narrow view of the Proclamation that is used). What should be clear from all of this is that the interpretative framework that the Court constructs for section 35(1) shares the same foundation as interpretive frameworks that have been applied to the treaties from *St Catherine's Milling* through to the so-called modern approach developed through *White and Bob*, *Taylor and Williams*, *Nowegijick*, *Simon*, *Sioui*, and *Badger*. Both are founded on the strong version of the doctrine of discovery from *Johnson v M'Intosh* and *St Catherine's Milling*.

114. *Sparrow*, *supra* note 7 at 1109.

115. *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

116. *Sparrow*, *supra* note 7 at 1109.

117. *Ibid.*, at 1103.

118. *Ibid.* Specifically, Chief Justice Dickson and Justice La Forest cite *Calder*, *supra* note 42 at 328, 383, 402.

It is this “extravagant and absurd idea” (to borrow Chief Justice Marshall’s phrasing from *Worcester*) that explains both how and why Aboriginal peoples were “diminished” before treaty negotiations even began (*viz.* as Appellate Justice Norris put it in *White and Bob*, they were “uneducated savages”) and how “federal power” in section 91(24) can continue to unilaterally infringe rights that have explicit constitutional protections.¹¹⁹

This exposes the foundation of both the modern approach to treaty interpretation and the Colonial Constitution and, by exposing it, demolishes it. Wittgenstein captures the nature of the relationship between our investigation and this demolition:

Where does this investigation get its importance from, given that it seems only to destroy everything interesting: that is, all that is great and important? (As it were, all the buildings, leaving behind only bits of stone and rubble.) But what we are destroying are only houses of cards, and we are clearing up the ground of language on which they stood.¹²⁰

What appeared “great and important” was little more than a shabby legal fiction propped up by a view from nowhere. Despite all of the judicial pomp and circumstance surrounding the basis of the Crown’s sovereignty, legislative power, and underlying title, it amounts to little more than a house of cards.¹²¹ This means that what is destroyed is not actually buildings (*viz.* solid and distinct physical structures). Rather, what is destroyed is simply an idea of the state that is now little more than a “relic of days more barbarous than ours.”¹²² What remains is thus not “stone and rubble” (or to use the language of the courts, a “legal vacuum”), but a clearing that offers us a better view of the possibilities that remain within our shared constitutional grammars.¹²³

119. *Worcester*, *supra* note 23 at 544; *White and Bob*, *supra* note 76 at 649.

120. Wittgenstein, *Philosophical Investigations*, *supra* note 62 at para 118.

121. *Sparrow*, *supra* note 7 at 1103. See also Michael Asch, “Canadian Sovereignty and Universal History” in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) 29.

122. *Persons*, *supra* note 66 at para 10.

123. By the phrase “constitutional grammar,” I have in mind AWB Simpson’s insightful claim that “[f]ormulations of the common law are to be conceived of as similar to grammarians’ rules, which both describe linguistic practices and attempt to systematize and order them; such rules serve as guides to proper practice since the proper practice is in part the normal practice; such formulations are inherently corrigible, for it is always possible that they may be improved upon, or require modification as what they describe changes.” See AWB Simpson, “The Common Law and Legal Theory” in AWB Simpson, ed, *Oxford Essays in Jurisprudence*, 2nd series (Oxford: Clarendon Press, 1973) 77 at 94.