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# The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims

***Kent McNeil\****

*This article examines the application of the theory of the unity of the Crown in Canada in the context of Indigenous peoples. It reveals a consistent retreat by the courts from acceptance of the theory in the late nineteenth century to rejection of it in the second half of the twentieth century. This evolution of the theory's relevance, it is argued, is consistent with Canada's federal structure and eventual independence from the United Kingdom. However, in a startling reversal, the Supreme Court reverted to the theory in its 2014 judgment in *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)* to support its decision that the provinces have control over natural resource development in the areas of Canada that are covered by the numbered treaties.*

*L'auteur de cet article examine l'application de la théorie de l'unité de la Couronne au Canada dans le contexte des peuples autochtones. Il révèle une retraite constante de la part des tribunaux de l'approbation de la théorie à la fin du dix-neuvième siècle à son rejet au cours de la deuxième moitié du vingtième siècle. Il soutient que cette évolution de la pertinence de la théorie correspond au régime fédéral canadien et son indépendance ultime du Royaume-Uni. Cependant, dans un renversement surprenant, la Cour suprême est retournée à la théorie dans son arrêt de 2014 dans *Première Nation de Grassy Narrows c. Ontario (Ressources Naturelles)* pour appuyer sa décision voulant que les provinces ont l'autorité sur l'exploitation des ressources naturelles dans les zones du Canada faisant l'objet de traités numérotés.*

\* Professor, Osgoode Hall Law School. I am grateful to Michael Asch, Robert Janes, Rarihokwats, Kathy Simo, Roger Townshend, James Tully, and Kerry Wilkins for reading a draft of this article and providing me with very helpful comments. This article examines the theory of Crown unity from the perspective of Canadian constitutional law. I acknowledge that Indigenous peoples in Canada may have very different perspectives, especially where their treaty relationship with the Crown is concerned. The notion that the nation-to-nation treaties they entered into with the Queen or King of the British Empire were somehow unilaterally transformed into domestic treaties with the Crown in Canada as a result of constitutional evolution, as determined by case law discussed in this article, may be unacceptable. I would like to thank Michael Asch for reminding me of this.

*For the King has in him two Bodies, viz., a Body natural and a Body politic . . . . [T]he Body politic includes the Body natural, but the Body natural is the lesser, and with this the Body politic is consolidated. So that he has . . . a Body natural and a Body politic together indivisible; and these two bodies are incorporated in one Person, and make one Body and not diverse, that is the Body corporate in the Body natural, et e contra the Body natural in the Body corporate.*

*Case of the Duchy of Lancaster (1562)* 1 Plowden's Reports 212

*Her Majesty's a pretty nice girl  
But she changes from day to day.*

John Lennon and Paul McCartney (1969)

The orthodox theory is well-known and used to be generally accepted: there is only one Crown in Canada, though the Crown acts through various ministers and other officials at both the federal and provincial levels of government. But, does this theory make sense? Who or what exactly is the Crown? Does the Crown have legal personality and, if so, on what basis? Moreover, what impact has the theory had on the Aboriginal and treaty rights of the Indigenous peoples of Canada? The recent decision of the Supreme Court of Canada in *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*<sup>1</sup> provides some insight into the last question, revealing that the theory's impact on Indigenous rights tends to be negative.

*Grassy Narrows First Nation* involved Treaty 3, entered into in 1873 between "Her Most Gracious Majesty the Queen of Great Britain and Ireland, by her Commissioners, . . . and the Saulteaux Tribe of Ojibbeway Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs."<sup>2</sup> A clause of the treaty provides:

Her Majesty further agrees with her said Indians, that they, the said Indians, shall have [the] right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.<sup>3</sup>

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1 2014 SCC 48, 372 DLR (4th) 385 [*Grassy Narrows First Nation*].

2 Treaty 3, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co, 1880, reprinted Toronto: Coles Publishing Company, 1979), 320-26 at 320, online: <[www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679](http://www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679)>.

3 *Ibid* at 323.

The main issue in *Grassy Narrows First Nation* was whether the taking-up authority in this clause could be exercised by the government of Ontario, without the government of Canada's participation or consent, after the lands in question were included in the Province of Ontario by the northern extension of Ontario's boundary in 1912.<sup>4</sup> In a unanimous judgment delivered by Chief Justice McLachlin, the Supreme Court decided that Ontario, and Ontario alone, can take up Treaty 3 lands within the province, as long as the government of Ontario consults with the First Nations whose rights would be affected and accommodates them in appropriate circumstances.<sup>5</sup> There is no role for Canada in this process. If, however, "the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise."<sup>6</sup>

In deciding that Ontario alone can take up lands, McLachlin CJC implicitly endorsed the concept of the unity of the Crown: "although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. The level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution."<sup>7</sup> In reaching this conclusion, she cited the opinion of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*,<sup>8</sup> where, she said, "Lord Watson concluded that Treaty 3 purported to be 'from beginning to end a transaction between the Indians and the Crown', not an agreement between the government of Canada and the Ojibway people."<sup>9</sup> In another passage, the Chief Justice put it this way:

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.<sup>10</sup>

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4 By the *Ontario Boundaries Extension Act*, SC 1912, c 40.

5 In accordance with *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 [*Mikisew Cree First Nation*].

6 *Grassy Narrows First Nation*, *supra* note 1 at para 52.

7 *Ibid* at para 30. See also the decision of the Ontario Court of Appeal that was affirmed by the Supreme Court, *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158, 114 OR (3d) 401 [*Keewatin*].

8 (1888), 14 App Cas 46 [*St. Catherine's Milling*].

9 *Ibid* at 60, as quoted by McLachlin CJC in *Grassy Narrows First Nation*, *supra* note 1 at para 33.

10 *Grassy Narrows First Nation*, *supra* note 1 at para 32.

In this article, I will examine how the theory of unity of the Crown was applied in Canada prior to the *Grassy Narrows First Nation* decision, especially where Indigenous peoples were concerned. While examining the matter historically, I will also attempt to explain the doctrinal underpinnings of the theory, with emphasis on the common law requirement that rights and obligations be vested in a juristic entity with legal personality. I will suggest that the theory makes no sense in Canada's federal context, and should not have been transported here by Privy Council judges whose constitutional mindset was English. I will conclude by critiquing the Supreme Court's revival of the theory to support its decision in *Grassy Narrows First Nation*.

## 1. Early Application of the Theory in Canada

### (a) *Attorney General of Ontario v Mercer*

The first important Canadian case of which I am aware that has some bearing on this issue of the unity of the Crown is *Attorney General of Ontario v Mercer*.<sup>11</sup> The case involved a dispute between Canada and Ontario over entitlement to land, title to which had become vested in the Crown by escheat when the fee simple titleholder died intestate without heirs.<sup>12</sup> Interpreting several provisions of the *Constitution Act, 1867* (then the *British North America Act, 1867*),<sup>13</sup> the Privy Council decided that the province was entitled to the lands, principally due to section 109, which provides:

All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.<sup>14</sup>

Although the Lord Chancellor (the Earl of Selborne), delivering the opinion, suggested that the term "lands" in this section may not include the right to

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11 (1883), 8 App Cas 767 [*Mercer*].

12 The case was commenced by an information laid by the Attorney General of Ontario to recover possession of the escheated lands from the defendant Mercer and others, but after Ontario succeeded at trial Canada appealed in the name of the defendant, whereupon the action proceeded to determine the question of whether Ontario or Canada was entitled to lands in the province that escheated to the Crown.

13 30 & 31 Vic, c 3.

14 *Ibid*, s 109.

escheat,<sup>15</sup> he nonetheless decided that “royalties,” broadly interpreted, does encompass this right. Accordingly, lands that escheat to the Crown, whether before or after Confederation, belong to the province in which they are located, not to Canada.

The Lord Chancellor did not mention the unity of the Crown in reaching this conclusion. However, when basing his decision on statutory interpretation, he begged the question of how “lands, mines, minerals, and royalties” can “belong” to a province. Does this mean that each province has legal personality, so that it can hold property? In the common law, legal rights — especially property rights — can only be vested in juristic persons, whether natural (living human beings) or artificial (corporations).<sup>16</sup> In England, the dual capacity of the King or Queen was acknowledged and explained in the sixteen century by inventing the concept of his or her two bodies: the natural body, which can live and die and own property as a natural person, and the body politic — the Crown — which does not die and which owns property as a corporation sole.<sup>17</sup> But while this ingenious device may work, however awkwardly,<sup>18</sup> in England, how does a province, or indeed the Dominion of Canada, fit into the scheme?

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15 This is questionable (see Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2<sup>nd</sup> ed (Cambridge: Cambridge University Press, 1898), vol II, 82: “Escheat . . . can hardly be described as [a mode] by which property rights are acquired. The lord’s rights have been there all along; the tenant’s rights disappear; the lord has all along been entitled to the land; he is entitled to it now, and, since he has no tenant, he can enjoy it in demesne.”), but for our purposes it is irrelevant.

16 See Sir Robert Megarry and HWR Wade, *The Law of Real Property*, 5<sup>th</sup> ed (London: Stevens & Sons Limited, 1984), 49-52.

17 See *Case of the Duchy of Lancaster* (1562) 1 Plow 212 (QB); *Willion v Berkley*, (1561) 1 Plow 223 (CP). For detailed discussion, see Ernst H Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957). See also Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991), 1-5. For a definition of corporation sole, see Megarry and Wade, *supra* note 16 at 51: “A corporation sole consists of a single individual holding an office which has a perpetual succession.”

18 See FW Maitland, “The Crown as Corporation Sole” (1901) 17 Law Q Rev 131-46, reprinted in HAL Fisher, ed, *The Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University Press, 1911), vol III, 244-70, and David Runciman and Magnus Ryan, eds, *FW Maitland: State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003), 32-48 [Maitland, “Crown as Corporation,” cited to Fisher], arguing that the concept of corporation sole had been invented in an attempt (unsuccessful, in Maitland’s learned opinion) to rationalize the anomalous situation of the parish parson, whose right to the glebe passed to his successor (not to his heirs), even though a successor would not be named until after his death: see FW Maitland, “The Corporation Sole” (1900) 16 Law Q Rev 335-54, reprinted in Fisher, *ibid*, vol III, 210-43, and Runciman and Ryan, *ibid*, 9-30. Sir Frederick Pollock, in the 6<sup>th</sup> edition of his *First Book of Jurisprudence* (London: MacMillan and Co, 1929), at 121, cited these two articles by Maitland and wryly observed: “In England we now say that the Crown is a corporation, though this is an innovation made in an age of pedantry, and seems to be of no real use.”

**(b) *St. Catherine's Milling and Lumber Company v The Queen***

Lord Watson attempted to answer this question in *St. Catherine's Milling*.<sup>19</sup> As is well known, the case decided that the beneficial interest in the lands in Ontario that are covered by Treaty 3 belonged to the province, not to the Dominion of Canada, after the surrender provision in the treaty removed the burden of the Ojibway's Aboriginal title from the Crown's underlying title. In reaching this conclusion, the Privy Council relied on section 109 of the *Constitution Act, 1867*.<sup>20</sup> Lord Watson stated:

The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause . . . .<sup>21</sup>

On what this provision means when it says that the lands "belong to Ontario" after the Aboriginal title was surrendered by Treaty 3, Lord Watson observed:

In construing these enactments [of the *Constitution Act, 1867*], it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.<sup>22</sup>

This passage is a clear expression of the theory of the unity of the Crown, as applied in Canada's federal context. Public property is held by a single juristic entity, the Crown,<sup>23</sup> which we know has legal personality and

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19 *St. Catherine's Milling*, *supra* note 8.

20 *Supra* note 13.

21 *St. Catherine's Milling*, *supra* note 8 at 58-59. Note that Lord Watson's view that the Crown has "a present proprietary estate" in land that is subject to Aboriginal title and that such land is "vested in the Crown" has been rejected by the Supreme Court of Canada: see *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 3 CNLR 362 [*Tsilhqot'in Nation*], at paras 70-71, 110-16.

22 *St. Catherine's Milling*, *supra* note 8 at 56.

23 The term "Crown" appears as a noun only once in the *Constitution Act, 1867*, *supra* note 13, in the Preamble: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom." Used as an adjective in the phrase "Commissioner of Crown Lands," the term appears in sections 63, 83, 134, and 135, in each instance in reference to the member of the executive occupying that office before Confederation in the Province of Canada and after Confederation in the provinces

perpetual succession as a corporation sole (though Lord Watson did not refer to it as such). But what of the provinces that were united and formed by the *Constitution Act, 1867*, and the Dominion of Canada that was created by the same statute — do they lack legal personality? If they have legal personality, why can't they own land in their own right? If they don't have legal personality, how can they have a beneficial interest in lands owned by the Crown? And yet, according to Lord Watson, they clearly can have such an interest. He said this:

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117.<sup>24</sup>

Apparently, the legal position regarding public lands was the same after Confederation as before. Referring to the *Act of Union*<sup>25</sup> that united Upper and Lower Canada in 1840, Lord Watson said:

By an Imperial statute passed in the year 1840 . . . , the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the *British North America Act, 1867*.<sup>26</sup>

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of Ontario and Quebec. This usage assumes that public lands in the provinces were Crown lands, before and after Confederation. If "Crown" means the same thing in these sections as in the Preamble, it evidently refers to "the Queen," the term commonly used throughout the Act to refer to Her Majesty in her official capacity.

24 *St. Catherine's Milling*, *supra* note 8 at 57-58. See also *ibid* at 59. Section 108 of the *Constitution Act, 1867* (*supra* note 13) provides that "[t]he Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada." Section 117 gives Canada the right "to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

25 3 & 4 Vic, c 35.

26 *St. Catherine's Milling*, *supra* note 8 at 55. Cf Lord Watson's observations on the *Constitution Act, 1867*, in *Liquidators of the Maritime Bank of Canada v Receiver-General New Brunswick*, [1892] AC

In this passage, Lord Watson appears to have used the terms “Her Majesty,” “the Queen,” “the Sovereign,” and “the Crown” interchangeably — they all refer to the Queen in her official capacity as the sovereign of her overseas colonies as well of the United Kingdom and as the owner of Crown lands, wherever situated within her dominions.<sup>27</sup>

Frederic William Maitland, with his usual directness and wit, took Lord Watson to task for being a “lawyer with theories in his head” and “placing a legal estate in what he calls the Crown or Her Majesty.”<sup>28</sup> The *British North America Act, 1867*, Maitland wrote, contains “courageous words,” such as: “Canada shall be liable for the Debts and Liabilities of each Province existing at the Union” (section 111); “[t]he several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act” (section 117); “[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation” (section 125), etc.<sup>29</sup> But, as a result of Lord Watson’s decision in *St. Catherine’s Milling*, Maitland observed that

... we have to distinguish the lands vested in the Crown “for” or “in right of” Canada from lands vested in the Crown “for” or “in right of” Quebec or Ontario or British Columbia, or between lands “vested in the Crown as represented by the Dominion” and lands “vested in the Crown as represented by a Province.” Apparently “Canada” or “Nova Scotia” is person enough to be the Crown’s *cestui que trust* and at the same time the Crown’s representative, but is not person enough to hold a legal estate. It is a funny jumble, which becomes funnier still if we insist that the Crown is a legal fiction.<sup>30</sup>

To this we might add that, not only can provinces have a beneficial interest in Crown lands, but according to Lord Watson they also have “the property” in moneys obtained from the sale of these lands. Apparently, the provinces have legal personality for some purposes, but not for others.

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437, at 441-42 [*Maritime Bank of Canada*], quoted in note 58 *infra*.

27 The distinction between land owned by the Queen in her official capacity as corporation sole and land owned by her in her personal capacity as a natural person is vital. When she dies, the latter goes to her heir whereas the former goes to her successor. See *Mercer*, *supra* note 11 at 778-79.

28 Maitland, “Crown as Corporation,” *supra* note 18 at 264.

29 *Ibid* at 263.

30 *Ibid* at 264-65. See also Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969), at 118, commenting on the “sophistry” reflected in Lord Watson’s judgment by “emphasis on Her Majesty personally as being vested with title to property, whether it was that of Canada or of a Province, but acknowledging that different administrating persons or bodies would wield effective control.” Laskin observed: “This simply confused the Crown as executive and the Crown as personification of the state, but contributed nothing to its evident differentiation as federal and provincial executive. It was a lingering grasp of unreality which no longer has any international legal significance since Canada can contract with foreign states independently” (*ibid*).

## 2. Modern Case Law

### (a) *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*

The issue of the divisibility of the Crown was revisited by the English Court of Appeal in *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*.<sup>31</sup> That case involved a challenge by the Indian Association of Alberta, the Union of New Brunswick Indians, and the Union of Nova Scotian Indians to patriation of Canada's Constitution in 1982. Briefly, those First Nation organizations objected to patriation because they thought it would violate the direct relationship the Indian nations have with the Queen of the United Kingdom and interfere with her obligations to them, established by solemn declarations and agreements such as the *Royal Proclamation of 1763*<sup>32</sup> and the historical treaties. The Court of Appeal, while sympathetic to their position, decided that responsibility for Indian affairs had been entirely transferred from the government of the United Kingdom to the Canadian government by devolution of constitutional authority. Any obligations of the Crown to the First Nations were therefore owed by the Crown in right of Canada, not the Crown in right of the United Kingdom. Accordingly, there was no basis in law for the plaintiffs to object to patriation.

In reaching this decision, the judges re-examined the old theory of the unity of the Crown and concluded that its application had been modified in the context of the British Commonwealth. Lord May said this:

Although at one time it was correct to describe the Crown as one and indivisible, with the development of the Commonwealth this is no longer so. Although there is only one person who is the Sovereign within the British Commonwealth, it is now a truism that in matters of law and government the Queen of the United Kingdom, for example, is entirely independent and distinct from the Queen of Canada. Further, the Crown is a constitutional monarchy and thus when one speaks today, and as was frequently done in the course of the argument on this application, of the Crown "in right of Canada," or of some other territory within the Commonwealth, this is only a short way of referring to the Crown acting through and on the advice of Her Ministers in Canada or in that other territory within the Commonwealth.<sup>33</sup>

31 [1982] QB 892, [1981] 4 CNLR 86 [*Indian Association of Alberta*, cited to QB]. See also *Manuel et al v Attorney-General of England*, [1982] 3 CNLR 13 (Ch), aff'd [1982] 3 WLR 821 (Eng CA).

32 6 October 1763, in RSC 1985, App II, No 1.

33 *Indian Association of Alberta*, supra note 31 at 928.

Lord Denning observed that “in the 18<sup>th</sup> and 19<sup>th</sup> centuries it was a settled doctrine of constitutional law that the Crown was one and indivisible. The colonies formed one realm with the United Kingdom, the whole being under the sovereignty of the Crown. The Crown had full powers to establish such executive, legislative and judicial arrangements as it thought fit.”<sup>34</sup> The *St. Catherine’s Milling* case, he noted, had been decided at a time when the theory of the unity of the Crown still applied. But the constitutional position has changed since then. Lord Denning stated:

Hitherto I have said that in constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century — not by statute — but by constitutional usage and practice. The Crown became separate and divisible — according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926 . . . . Thenceforward the Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion or province or territory.<sup>35</sup>

The case before the Court of Appeal involved separation of the Crown in right of Canada from the Crown in right of the United Kingdom.<sup>36</sup> In that context, Lord Denning was perhaps justified in situating the change in the period leading up to and including the Imperial Conference of 1926, during which time the Dominions began to exercise independence from the United Kingdom in foreign affairs.<sup>37</sup> In so situating the change, His Lordship was also able to avoid disagreeing with Lord Watson’s views on the matter in *St. Catherine’s Milling*.<sup>38</sup> However, in the domestic context of Canadian federalism, there was no corresponding shift in the constitutional position between the time *St. Catherine’s Milling* was decided in 1888 and the Imperial Conference of 1926. Apart from the creation of the new provinces of Saskatchewan and Alberta in 1905 and the retention by Canada of public lands and resources

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34 *Ibid* at 911.

35 *Ibid* at 916-17. For authority, Lord Denning cited *R v Secretary of State for Home Department, Ex parte Bhurosah*, [1968] 1 QB 266, where the English CA held that Queen is Queen of Mauritius and so the Crown in right of Mauritius can issue passports, and *Mellenger v New Brunswick Corporation (C.A.)*, [1971] 1 WLR 604, where the same court held that the Queen is Queen of New Brunswick and so the Province has state immunity.

36 See Peter W Hogg, Patrick J Monahan, and Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011), at 14, describing the result in *Indian Association of Alberta*, *supra* note 31: “The Crown was thus divisible: the Crown in right of Canada was a separate legal entity from the Crown in right of the United Kingdom.”

37 See David E Smith, *The Invisible Crown: The First Principle of Canadian Government*, 2nd ed (Toronto: University of Toronto Press, 2013), at 28-30.

38 See text accompanying notes 21-27 *supra*.

in the Prairie Provinces until 1930,<sup>39</sup> the allocation of public property and division-of-powers as set out in the *Constitution Act, 1867*, remained the same. The Crown in right of Canada and the Crown in right of the four original provinces were conceptually separated in 1867, as made clear by the various provisions of that Act that distributed public property, debts and liabilities between Canada on the one hand and the various provinces on the other.<sup>40</sup> As Maitland suggested, it would make sense to accord legal personality to each of these domestic manifestations of the Crown from the time of Confederation forward, even if the Crown in right of Canada did not have legal personality internationally until it gained control of Canada's foreign affairs.<sup>41</sup>

Unlike Lord Denning, Lord Kerr did not regard the degree of independence of a colony or dominion as having anything to do with the location of the Crown's rights and obligations:

The situs of such rights and obligations rests with the overseas governments within the realm of the Crown, and not with the Crown in right or respect of the United Kingdom, even though the powers of such governments fall a very long way below the level of independence. Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it can be seen that there is an established government of the Crown in the overseas territory in question. In relation to Canada this had clearly happened by 1867.<sup>42</sup>

Referring to the *Constitution Act, 1867*, his Lordship said this:

The effect of the 1867 Act and its successors, up to the *Statute of Westminster, 1931*, was accordingly to create an all-embracing federal governmental structure for Canada, which — subject to one point discussed hereafter —

39 This anomaly meant that s 109 of the *Constitution Act, 1867*, quoted in text accompanying note 14 *supra*, did not apply to the Prairie Provinces. This discriminatory treatment was corrected by the Natural Resources Transfer Agreements, given constitutional force by the *Constitution Act, 1930*, 20 & 21 Geo V, c 26 (UK).

40 See text accompanying note 29 *supra*. See also Laskin, *supra* note 30 at 118-19.

41 It is entirely possible for an entity to have legal personality in domestic law but not in international or British Imperial law. For example, Aboriginal nations in Canada apparently did not have legal personality internationally prior to the United Nations Declaration on the Rights of Indigenous Peoples, which may have changed this, but since Crown assertion of sovereignty they have had legal personality in Canadian law for the purpose of holding Aboriginal title, a proprietary right: see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Tsilhqot'in Nation*, *supra* note 21. See discussion in "The Post-*Delgamuukw* Nature and Content of Aboriginal Title," in Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), 102 at 124-27.

42 *Indian Association of Alberta*, *supra* note 31 at 927.

was wholly independent and autonomous in relation to all internal affairs.<sup>43</sup>

In relation to the division of powers and of public property, he continued:

Since the passing of this Act [the *Constitution Act, 1867*] there have been numerous cases, many of which reached the Privy Council, concerning the respective rights and obligations as between the Dominion and the provinces. In the present context the most important ones arose out of the dichotomy between sections 91(24) and 109: whereas the Dominion Government was vested with exclusive legislative power concerning the Indian peoples and the lands reserved for them, the lands themselves, and the usufructuary rights arising out of them, were vested in the provinces.<sup>44</sup>

While not disagreeing expressly with the way Lord Watson had described the meaning of “belong to the several Provinces” in section 109,<sup>45</sup> Lord Kerr nonetheless showed no hesitation in speaking of powers being “vested” in the Dominion government and public property being “vested” in the provinces. I have no doubt that Maitland would have approved of this apparent acknowledgement of the constitutional reality in federal Dominions and of the implied attribution of legal personality to the Crown in right of Canada and to the Crown in right of each of the provinces as separate juristic entities.<sup>46</sup>

Lord Kerr pointed out that the decision in *St. Catherine's Milling*, holding that legislative authority over “Indians, and Lands reserved for the Indians” was vested in the Parliament of Canada while underlying title to those lands was vested in the provinces, resulted in further litigation. The most important cases involved responsibility for fulfillment of the Crown's obligations under the Indian treaties, especially Treaty 3.<sup>47</sup> In *Attorney-General for Canada v Attorney-General for Ontario*,<sup>48</sup> the Privy Council decided that Ontario, although benefiting from the surrender of Aboriginal title by the 1850 Robinson Treaties, had no legal obligation after Confederation to pay

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43 *ibid* at 924-25. The exception referred to is the reservation and disallowance power in ss 55-56, by which the UK government retained ultimate authority over enactments of the Parliament of Canada.

44 *Ibid* at 925

45 See discussion of *St. Catherine's Milling*, *supra* note 8, in text accompanying notes 21-22 *supra*. Lord Kerr referred to the Privy Council's judgment in that case as authority that s 109, “and the cession under the treaty, vested the whole of the beneficial interest in the land (including its timber, etc.) in the province to the exclusion of the Dominion, notwithstanding the legislative power of the Dominion under section 91(24)”: *Indian Association of Alberta*, *supra* note 31 at 925.

46 See also Laskin, *supra* note 30 at 119.

47 For critical discussion of the leading cases, see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), 221-39.

48 [1897] AC 199.

the annuities owing to the Indian parties. The Privy Council came to the same conclusion with regard to the annuities payable under Treaty 3 in *Dominion of Canada v Province of Ontario*.<sup>49</sup> In *Ontario Mining Company and Attorney-General for Canada v Seybold et al. and Attorney-General for Ontario*,<sup>50</sup> the Privy Council left open the question of whether the Province had any obligation to provide lands for the reserves that had been promised to the Saulteaux Tribe by the terms of Treaty 3.<sup>51</sup>

This litigation between the Dominion of Canada and the Province of Ontario over responsibility for promises made in the treaties reveals even more clearly that the Crown in right of Canada and the Crown in right Ontario are separate juristic entities with distinct legal personalities, for otherwise how could they sue one another?<sup>52</sup> The issue usually got finessed by the technique of bringing the action in the name of and against attorneys general rather than the Queen or King, but that could not hide the reality of what was taking place: the legal actions were really between two governments acting on behalf of two Crowns, one in right of Canada and the other in right of Ontario.<sup>53</sup> Using attorneys general as plaintiff and defendant was little more than a semantic slight-of-hand in the style of cause to avoid the appearance of the Crown suing itself and to side-step the issue of the legal personality of Canada and Ontario.<sup>54</sup>

### (b) *Mitchell v Peguis Indian Band*

In *Mitchell v Peguis Indian Band*,<sup>55</sup> the Supreme Court addressed the issue of the

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49 [1910] AC 637.

50 [1903] AC 73.

51 The case decided that Canada was unable on its own to fulfill its treaty obligation to create reserves, as the beneficial interest in the lands surrendered by Treaty 3 had vested in the Crown in right of Ontario, as held by the Privy Council in the *St. Catherine's Milling* case: see text accompanying notes 19-21 *supra*. The matter was resolved by federal-provincial agreements, culminating in 1924: see Peter A Cumming and Neil H Mickenberg, eds, *Native Rights in Canada*, 2<sup>nd</sup> ed (Toronto: Indian-Eskimo Association of Canada and General Publishing Co, 1972), 230-31. The 1924 agreement was implemented by reciprocal legislation: SC 1924, c 48; SO 1924, c 15.

52 Of course this issue arises in virtually every division-of-powers case involving Canada and a province, not just cases involving Aboriginal peoples and their land rights: see the many cases discussed in the federalism chapters in Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, Looseleaf Edition) [Hogg, *Constitutional Law*].

53 *Ibid* at 10-3, n 5. See also Hogg, Monahan, and Wright, *supra* note 36 at 14, n 71.

54 An equivalent issue arises where Canada and a province contract with one another, as happens frequently. See Laskin, *supra* note 30 at 122: "it is mere word-playing or play-acting to say that because a person cannot at common law contract with himself, there cannot in law be a contract to which Her Majesty is a party on each side." But to be a party on each side of a contract, the Crown must have more than one legal personality.

55 [1990] 2 SCR 85 [*Mitchell*].

meaning of “Her Majesty” in the context of a section of the *Indian Act*.<sup>56</sup> The provision in question, s. 90(1), deems “personal property that was (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, . . . always to be situated on a reserve.” This deeming provision relates to section 87, which exempts the property of an Indian or band situated on a reserve from taxation, and section 89 (the section involved in the case), which provides that such property “is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.” The litigation involved money owed by the Province of Manitoba to the Peguis Indian Band and other First Nations under an agreement by the Province to refund taxes improperly collected on electricity supplied to their reserves. Before the money was paid to the First Nations, the appellants obtained a pre-judgment garnishing order against it for a sum allegedly owing to them for negotiating the tax refund agreement. The First Nations denied liability, *inter alia* on the ground that the agreement had not been obtained through the appellants’ efforts, but the issue of their liability to pay had not yet gone to trial.

The case before the Supreme Court involved the legality of the garnishing order, which depended in part on whether the term “Her Majesty” in section 90(1) is limited to the Crown in right of Canada, or encompasses the Crown in right of Manitoba and the other provinces as well. Of the seven Supreme Court justices hearing the appeal, only Dickson CJC was of the opinion that the term included the provincial Crowns so that the money the Province owed to the First Nations was deemed to be located on their reserves and could not be garnished for that reason. Although the other six judges disagreed with this interpretation, they decided in favour of the First Nations nonetheless, mainly on the basis of Crown immunity and construction of the provincial *Garnishment Act*.<sup>57</sup>

For our purposes, the relevance of the *Mitchell* decision lies in the approaches taken by Dickson CJC alone and La Forest J for the rest of the Court to interpretation of “Her Majesty” in section 90(1). Both judges seem to have rejected the suggestion that, as a matter of constitutional law, the Crown is indivisible within Canada. Dickson CJC wrote:

The Court of Appeal relied on the idea that the Crown was indivisible to hold that “Her Majesty” had to apply to both levels of government. With respect,

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56 RSC 1970, c I-6, currently RSC 1985, c I-5.

57 RSM 1970, c G20.

I cannot adopt that approach. The Court of Appeal's interpretation seems grounded in the belief that there cannot be "two Queens." As Professor Hogg succinctly notes in *Constitutional Law of Canada*, 2nd ed., at p. 216, divisibility of the Crown in Canada does not mean that there are eleven Queens or eleven Sovereigns but, rather, it expresses the notion (at p. 217) of "... a single Queen recognized by many separate jurisdictions." Divisibility of the Crown recognizes the fact of a division of legislative power and a parallel division of executive power.<sup>58</sup>

However, the Chief Justice did not think the question of whether "Her Majesty" in section 90(1) includes the provincial Crowns hinges on the issue of the divisibility of the Crown. Instead, this is a question of statutory interpretation that he said could be resolved by applying the principle from *Nowegijick v The Queen* that "doubtful expressions" in treaties and statutes affecting Indians should be interpreted in their favour.<sup>59</sup> In the context of section 90(1), he said this principle is supported by taking the Aboriginal perspective into account:

[T]he Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside the sovereignty of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada.<sup>60</sup>

La Forest J did not share Dickson CJC's perception of the Aboriginal perspective, at least in modern times. He stated:

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58 *Mitchell*, *supra* note 55 at para 23. Dickson CJC went on to say that, if "a principle so basic" needed to be supported by judicial authority, it could be found in the Privy Council decision in *Maritime Bank of Canada*, *supra* note 26, where Lord Watson stated at 441-42: "The object of the Act [the *British North America Act, 1867*] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces." The Chief Justice did not refer to Lord Watson's opinion in the *St. Catherine's Milling* case, delivered just four years earlier, where his Lordship expressed the view that there is just one Crown in Canada: see text accompanying note 22 *supra*. Instead, Dickson CJC found support for the divisibility of the Crown in the judgments in *Indian Association of Alberta*, *supra* note 31, discussed in text accompanying notes 31-54 *supra*. See also *Smith v The Queen*, [1983] 1 SCR 554 at 571 [*Smith*], where Estey J, for a unanimous Court, spoke of "two Crowns" (in the French version, expressed as "la Couronne du chef du Canada et du chef de la province"), while applying *St. Catherine's Milling* in the context of a surrender of reserve lands in New Brunswick.

59 [1983] 1 SCR 29 at 36.

60 *Mitchell*, *supra* note 55 at para 35.

In arriving at his conclusion that the trial judge was correct in interpreting “Her Majesty” in s. 90(1)(b) as including the provincial Crowns, the Chief Justice sets considerable store on what he takes to be the aboriginal perception of “Her Majesty.” With deference, I question his conclusion that it is realistic, in this day and age, to proceed on the assumption that from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are simply internal to itself, such that the Crown may be considered what one might style an “indivisible entity.”<sup>61</sup>

So, while Dickson CJC and La Forest J disagreed over the Aboriginal perception of the Crown, they both appear to have come to the conclusion that the Crown is divisible in Canadian constitutional law.

**(c) *Osoyoos Indian Band v The Town of Oliver***

*Osoyoos Indian Band v The Town of Oliver*<sup>62</sup> involved an Indian band’s authority under the *Indian Act* to tax reserve lands. In 1925, the Province of British Columbia constructed a concrete-lined irrigation canal across the reserve of the Osoyoos Band in the Okanagan Valley. Apparently, this was done without proper legal authority, a problem that Canada addressed in 1957 by issuing an Order in Council that transferred an interest in the reserve land on which the canal was located to the Province. In so doing, Canada relied on section 35 of the *Indian Act*, which authorizes the Governor in Council to consent to the expropriation of reserve lands pursuant to provincial legislation and to “authorize a transfer or grant of such lands to the province.”<sup>63</sup> Specifically, the Order in Council provided that

the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the *Indian Act*, is pleased hereby to consent to the taking of the said lands [as described in the Order] by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia.<sup>64</sup>

61 *Ibid* at para 122. La Forest J continued: “But even accepting that assumption, it does not follow that fairness requires one to proceed on the basis that Indians would be justified in concluding that all property they may acquire pursuant to agreements with that ‘indivisible entity’ should be automatically protected, regardless of situs, by the exemptions and privileges conferred by ss. 87 and 89 of the *Indian Act*. I have no doubt that Indians are very much aware that ordinary commercial dealings constitute ‘affairs of life’ that do not fall to be governed by their treaties or the *Indian Act*. Thus I take it that Indians, when engaging in the cut and thrust of business dealings in the commercial mainstream are under no illusions that they can expect to compete from a position of privilege with respect to their fellow Canadians.”

62 [2001] 3 SCR 746 [*Osoyoos Indian Band*].

63 RSC 1952, c 149, s 35, currently RSC 1985, c I-5, s 35.

64 Order in Council 1957-577, dated 25 April 1957, as quoted in *Osoyoos Indian Band*, *supra* note 62 at para 6.

The issue before the Supreme Court was whether the effect of the Order was to remove the lands in question from the reserve so that they would not be subject to the property assessment and property taxation by-laws enacted by the Osoyoos Indian Band Council in 1994 pursuant to section 83 of the *Indian Act*. This depended in turn on whether the Order had transferred the fee simple title to the Province, thereby removing the lands from the reserve, or merely granted the Province an easement for irrigation canal purposes, in which case the lands remained part of the reserve.

A majority of the Court, in a judgment delivered by Justice Iacobucci, held that only an easement had been granted, with the result that the lands were still part of the reserve and subject to the property tax by-laws of the Band. Regarding the nature of the interest transferred, Iacobucci J wrote:

I conclude that the Order in Council is ambiguous. There are no clear words of exclusion or limitation that make plain the extent of the interest being transferred. Some phrases in the recitals suggest that a transfer of a fee simple is contemplated . . . , while others suggest a more restricted interest . . . . Given that the law views property as a bundle of rights, that the Order in Council grants “a portion” of the reserve is not inconsistent with the granting of an easement or a right to use the land “for irrigation canal purposes.” A right to use the land for a restricted purpose is part of the bundle of rights that make up the property interest in the reserve and so may be referred to as “a portion” of the reserve.<sup>65</sup>

Iacobucci J thus held that a property interest, albeit less than fee simple, had been transferred from Canada to the Province of British Columbia by the Order. He did not discuss and did not seem to have been concerned about the theoretical indivisibility of the Crown or the question of how the Crown in right of Canada could convey property to the Crown in right of British Columbia. On the contrary, he took it for granted that such a transaction could take place.<sup>66</sup>

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65 *Osoyoos Indian Band*, *supra* note 62 at para 81.

66 Regarding the words “transfer the administration and control” in the Order, Iacobucci J said they “are not determinative of the nature of the interest acquired by the Province in this case. Administrative powers can be ancillary to an easement for irrigation purposes”: *ibid* at para 88. He therefore regarded administrative powers over land as distinct from proprietary interests, both of which can be transferred from the Crown in right of Canada to the Crown in right of a province. Compare *Canada (Attorney General) v Highbie and Albion Investments Ltd*, [1945] SCR 385, per Rinfret CJ and Taschereau J, affirming the theory of Crown unity by relying on *St. Catherine’s Milling*, *supra* note 8, and other cases, in particular *Saskatchewan Natural Resources Reference*, [1931] SCR 263, where Newcombe J stated at 275: “It is not by grant *inter partes* that Crown lands are passed from one branch to another to the King’s government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only

Justice Gonthier delivered the opinion of the four dissenting members of the Court in the *Osoyoos Indian Band* case. Unlike the majority, he thought that the Order transferred the fee simple, which he equated with full ownership, to the Province, removing the lands in question from the reserve and thus from the taxation authority of the Osoyoos Band Council. He concluded that, “through the adoption of the Order in Council by the federal government, Her Majesty the Queen in right of the Province of British Columbia obtained full ownership over the lands on which the irrigation canal is situated.”<sup>67</sup>

All the judges in *Osoyoos Indian Band* were thus in agreement that property interests can be transferred by Order in Council from the Crown in right of Canada to the Crown in right of British Columbia. This must mean that these Crowns are separate juristic entities, each with legal personality and the capacity to obtain, hold, and transfer property rights.

**(d) *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)***

In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*,<sup>68</sup> the Supreme Court went even further than it had in *Osoyoos Indian Band* in dividing the Crown in the context of dealings with Indian reserve lands. In the 1940s, the Beaver Indian Band had surrendered its reserve lands near Fort St. John in British Columbia to the Crown, in accordance with the surrender provisions of the *Indian Act*.<sup>69</sup> In 1948, the federal Department of Indian Affairs (DIA) sold these lands to the Director, the *Veterans' Land Act* (DVLA).<sup>70</sup> Contrary to its own policy and to the interests of the Band to which the Crown owed fiduciary obligations in the context of the surrender,<sup>71</sup> the DIA did not retain the mineral rights when it transferred title to these lands to

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one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.” Here, Newcombe J was expressing the old view of unity of the Crown and administrative control that was accepted by Rinfret CJ and Taschereau J in *Higbie* in 1945, but that has since been discarded in the more recent decisions examined in this article, until *Grassy Narrows First Nation*, *supra* note 1.

67 *Osoyoos Indian Band*, *supra* note 62 at para 188.

68 [1995] 4 SCR 344 (*Blueberry River Indian Band*). I have chosen to discuss this case after *Osoyoos Indian Band* rather than chronologically because *Osoyoos*, like *Mitchell*, involved division between the Crown in right of Canada and the Crown in right of a province, whereas *Blueberry River* involved a division within the federal government itself.

69 RSC 1927, c 98, ss 50-54, currently RSC 1985, c I-5, ss 37-41.

70 SC 1942, c 33.

71 See *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*].

the DVLA. After the DVLA in turn transferred its title to veterans, oil and gas were discovered on the lands. The Beaver Indian Band and its successors (the plaintiffs in this case) received no benefit from this discovery.

In this action for breach of the Crown's fiduciary obligations, the Supreme Court held that the DIA breached these obligations when it transferred the surrendered lands to the DVLA without reserving the mineral rights. However, recovery for this breach was barred by the applicable statutory limitation period. The Court nonetheless held that the DIA breached the Crown's fiduciary obligations again when it failed to recover the mineral rights from the DVLA prior to the conveyances to the veterans, as the DIA could and should have done after becoming aware that the mineral rights might be of value, by invoking section 64 of the *Indian Act*, which empowered the Superintendent General of Indian Affairs to cancel any sale of Indian land and resume the land if the sale was made "in error or mistake."<sup>72</sup>

The relevance of this decision to the unity of the Crown arises from an argument made by the plaintiffs in relation to the nature of the 1948 transfer of the lands from the DIA to the DVLA. McLachlin J, as she then was, summarized the argument as follows:

[T]he Bands argue that the 1948 transfer to the DVLA was not a transfer at all, but merely an administrative allocation within the bosom of the unified Crown. Thus, the Crown's fiduciary duty continued, although it was transferred for administrative purposes to the DVLA after 1948. Consequently, the cause of action did not arise until the land was alienated from the DVLA to the veterans.<sup>73</sup>

Justice McLachlin's response is noteworthy:

I cannot accept this argument. Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. First, the transfer converted the Band's interest from a property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible

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72 *Indian Act*, *supra* note 69, s 64 (RSC 1927). Gonthier and McLachlin JJ, who delivered judgments concurring in result, were in agreement on this issue: *Blueberry River Indian Band*, *supra* note 68 at paras 20-23 (Gonthier J), 112-18 (McLachlin J).

73 *Blueberry River Indian Band*, *supra* note 68 at para 110.

to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arms length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.<sup>74</sup>

So even though the DIA and the DVLA were both entities of the federal government, McLachlin J treated them as separate and capable of owning and conveying property, both real (the reserve lands) and personal (the money from the sale of the lands). She might have relied on section 5(1) of the *Veterans' Land Act*, which makes the DVLA "a corporation sole" with perpetual succession for "the purposes of acquiring, holding, conveying and transferring . . . property" as authorized by the Act, but she did not do so explicitly, perhaps because the section goes on to provide that, in so doing, the DVLA acts as "the agent of His Majesty in the right of Canada."<sup>75</sup>

### **3. *Grassy Narrows First Nation v Ontario: An Aberration?***

The modern case law thus reveals a growing tendency to accept the reality that the Crown is divisible in the Commonwealth and within the Canadian federation.<sup>76</sup> The Crown in right of Canada and the Crown in right of each of the provinces are clearly separate juristic entities, each endowed with distinct legal personality.<sup>77</sup> This tendency to view the Crown as divisible has generally worked against the interests of Aboriginal parties. In *Indian Association of Alberta*, where the Aboriginal claimants relied on the unity of the Crown, the English Court of Appeal held that the Crown in right of Canada is a legal entity separate from the Crown in right of the United Kingdom. In *Mitchell*, unity of the Crown would have strengthened the First Nations' argument regarding the meaning

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<sup>74</sup> *Ibid* at para 111.

<sup>75</sup> *Veterans' Land Act*, *supra* note 70, s 5(1). Prior to the surrender, legal title to these reserve lands was "in the Crown" (see the definition of "reserve" in the *Indian Act*, RSC 1927, c 98, s 2(j)), and so the DIA must have been acting on behalf of the Crown in right of Canada when it conveyed legal title to these lands to the DVLA. But how, one might ask, could the DVLA have received title from the Crown in right of Canada as agent of the same Crown? The answer may be found in s 7, which provides that the DVLA may, for the purposes of the Act, "acquire by consent or agreement from His Majesty in the right of Canada or from any province or municipal authority, or from any person, firm or corporation, such lands and buildings situate in any part of Canada ... as the Director may deem necessary." The statute therefore not only provides express authority for the DVLA to acquire lands from the Crown in right of Canada, apparently as agent of the same Crown, but also treats the provinces as separate legal entities from whom the Director can acquire property.

<sup>76</sup> See *Halsbury's Laws of England*, 4<sup>th</sup> ed 2003 Reissue (London: LexisNexis UK, 2003), vol 6, at 424 n 1.

<sup>77</sup> Accord Hogg, *Constitutional Law*, *supra* note 52 at 10-3.

of “Her Majesty” in section 90 of the *Indian Act*, but the majority held that even First Nations would not perceive the Crown as an “indivisible entity.”<sup>78</sup> While the divisibility of the Crown did not affect the outcome in *Osoyoos Indian Band*, it certainly would have been detrimental to the plaintiffs in *Blueberry River Indian Band* had it not been for section 64 of the *Indian Act*, and it could have a negative impact on First Nations generally by restricting the scope of the Crown’s fiduciary obligations within federal government departments.<sup>79</sup>

Yet in the *Grassy Narrows First Nation* case, where divisibility of the Crown clearly would have favoured the First Nation plaintiffs, the judges in both the Ontario Court of Appeal and Supreme Court of Canada reverted to and relied upon the old theory of the unity of the Crown.<sup>80</sup> This reliance is evident in the unanimous judgment of the Court of Appeal that was affirmed by the Supreme Court. After reviewing the relevant Treaty 3 case law, especially *St. Catherine’s Milling* where Lord Watson had emphasized the unity of the Crown, the Court of Appeal stated:

The Ojibway’s Treaty partner is the Crown, not Canada. Canada is not a party to the Treaty. The Treaty promises are made by the Crown, not by a particular level of government. The Ojibway may look to the Crown to keep the Treaty promises, but they must do so within the framework of the division of powers under the Constitution.<sup>81</sup>

The Court of Appeal then took the constitutional evolution of Canada into account:

The taking up clause [in Treaty 3<sup>82</sup>] also has to be interpreted in the light of the process of constitutional evolution from the time of the *Royal Proclamation* in 1763, to the creation of the Province of Canada in 1840, the creation of the Dominion of Canada and the Province of Ontario at Confederation in 1867, and finally, the extension of Ontario’s border in 1912. Throughout that process of constitutional evolution, the Crown and the relationship between the Crown and Canada’s Aboriginal peoples remains a constant, central and defining feature. What has evolved is the allocation of legislative and administrative powers and responsibilities to different levels of government. In formal terms, what changes with constitutional evolution is the level of

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78 Mitchell, *supra* note 55 at para 122.

79 See text accompanying note 74 *supra*.

80 Patrick Macklem, in his article “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill LJ 382, found a parallel tendency on the part of the courts to embrace Indigenous difference when it supports the dominant legal paradigm of the Canadian state and to deny Indigenous difference when it does not.

81 Keewatin, *supra* note 7 at para 135.

82 See text accompanying note 3 *supra*.

government on whose advice the Crown acts.<sup>83</sup>

The Court viewed this process of constitutional evolution as continuing up to the present and as informing the interpretation of treaties: “Treaties must be capable of adapting to the natural evolution of the Constitution, which evolves as a ‘living tree’ to meet ‘the changing political and cultural realities of Canadian society’”.<sup>84</sup> For the Court, this meant that the power to take up lands in the Treaty 3 area that Canada had added to Ontario by the extension of the provincial boundaries in 1912 passed from the Canadian to the Ontario government by constitutional evolution, even though the Treaty stated that taking up was to be “by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.”<sup>85</sup>

What is remarkable here is the Court of Appeal’s view that constitutional evolution has affected the way treaties are understood and has extended provincial authority in relation to treaty lands, but has not changed “the Crown and the relationship between the Crown and Canada’s Aboriginal peoples” — that “remains a constant, central and defining feature.”<sup>86</sup> Yet when the plaintiffs in *Indian Association of Alberta* argued that the Crown is a constant in the context of treaties, the English Court of Appeal clearly rejected that argument, holding that the Crown itself had evolved from an indivisible entity into many separate Crowns within the Commonwealth.<sup>87</sup> Moreover, we have seen that

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83 *Keewatin*, *supra* note 7 at para 136.

84 *Ibid*, quoting from *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at para 23.

85 Treaty 3, *supra* note 2.

86 *Keewatin*, *supra* note 7 at para 136, quoted in greater length in text accompanying note 83 *supra*. Compare *McAteer v Canada (Attorney General)* (2014), 121 OR (3d) 1 [*McAteer*], leave to appeal dismissed [2014] SCCA 444, involving the requirement of an oath to “the Queen” to become a Canadian citizen, at para 48, per Weiler JA for the Court: “The evolution of Canada from a British colony into an independent nation and democratic constitutional monarchy must inform the interpretation of the reference to the Queen in the citizenship oath. As Canada has evolved, the symbolic meaning of the Queen in the oath has evolved.”

87 *Indian Association of Alberta*, *supra* note 31, was cited in *Keewatin*, *supra* note 7 at para 138, as authority for the proposition that “treaty interpretation has to evolve along with the constitution,” without reference to the English Court of Appeal’s opinion that the meaning of the Crown has evolved as well. However, more recently in *McAteer* the Court of Appeal cited Lord Denning’s judgment in *Indian Association of Alberta* as authority that the Crown is “separate and divisible for each self-governing dominion or province or territory” (*McAteer*, *supra* note 86 at para 51, quoting from *Indian Association of Alberta* at 917). Delivering the unanimous judgment in *McAteer*, Weiler JA at para 49 also agreed with the application judge’s statement that “Her Majesty the Queen in Right of Canada (or Her Majesty the Queen in Right of Ontario or the other provinces), as a governing institution, has long been distinguished from Elizabeth R. and her predecessors as individual people.” She continued at paras 50-51: “During the heyday of the Empire, British constitutional theory saw the Crown as indivisible . . . . However, as Canada developed as an independent federalist state, the conception of the Queen (commonly referred to as the Crown)

the Supreme Court of Canada, in *Mitchell, Osoyoos Indian Band*, and *Blueberry River Indian Band*, has treated the Crown as divisible. One would therefore have thought the Supreme Court would have disagreed with the Ontario Court of Appeal on this issue.

That is not what happened. The Supreme Court not only affirmed this aspect of the Ontario Court of Appeal's decision, but went even further. As we have seen, the Supreme Court agreed that Treaty 3 was with the Crown, not with Canada, and that Ontario — and Ontario alone — has the constitutional authority to exercise the taking-up power. But the Supreme Court also decided an issue that the Court of Appeal had left unresolved, namely that section 91(24) of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity<sup>88</sup> do not prevent the Province from justifiably infringing the treaty right to hunt and fish, which could happen if the taking up of lands left no meaningful scope for the exercise of that right.<sup>89</sup> In so deciding, the Supreme Court relied, without discussion, on its own judgment in *Tsilhqot'in Nation*<sup>90</sup> from two weeks earlier,<sup>91</sup> in which it overruled its decision in *R. v Morris*<sup>92</sup> on the protection provided to treaty rights by section 91(24) and interjurisdictional immunity.<sup>93</sup>

But what is this entity, “the Crown,” with whom both the Ontario Court of Appeal and the Supreme Court said the treaty had been made? We have seen that the notion of the Crown as a single abstract entity with legal personality as a corporation sole made some sense in England, but with the creation of the Canadian federation in 1867 and the subsequent development of the Commonwealth, the notion became conceptually and practically unworkable. Lord Watson's reliance on the unity of the Crown in the Canadian context in *St. Catherine's Milling* in 1888 was probably already an anachronism,

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evolved . . . Moreover, the Crown may for some purposes fall within provincial power under s. 92 of the *Constitution Act, 1867*, and for other purposes fall within federal power under s. 91. For the purposes of Canadian federalism, the Crown therefore cannot be viewed as a single indivisible entity.” Given the discrepancy between *Keewatin* and *McAteer* (decided just 18 months apart) on the issue of the divisibility of the Crown, is it indiscreet to point out that none of the judges from *Keewatin* sat on *McAteer*?

88 Briefly, this doctrine protects a core of federal jurisdiction under s 91(24) and other heads of federal legislative authority from provincial laws, even in the absence of federal legislation occupying the field: see Hogg, *Constitutional Law*, *supra* note 52 at 15-28 to 15-38.8.

89 *Grassy Narrows First Nation*, *supra* note 1 at para 52: see text accompanying note 6 *supra*.

90 *Supra* note 21.

91 *Grassy Narrows First Nation*, *supra* note 1 at para 53.

92 [2006] 2 SRC 915.

93 The Supreme Court's deviation in *Tsilhqot'in Nation* and *Grassy Narrows First Nation* from earlier precedents on the application of the doctrine of interjurisdictional immunity in the context of s 91(24) is discussed in Kent McNeil, “Aboriginal Title and the Provinces after *Tsilhqot'in Nation*” (2015) 71 Supreme Court L Rev (2d), forthcoming [McNeil, “Aboriginal Title and the Provinces”].

but in any case by the time of the *Statute of Westminster* in 1931 the Crown had clearly been divided into separate juristic entities, as acknowledged by the English Court of Appeal in *Indian Association of Alberta*. Within Canada this separation, which should have operated at the federal and provincial levels from the time of Confederation, is expressed by the terminology “the Crown in right of Canada,” “the Crown in right of Ontario,” etc., and is evidenced by division-of-powers litigation and federal-provincial agreements.<sup>94</sup> Yet Chief Justice McLachlin concluded in *Grassy Narrows First Nation* that “[t]he treaty, as discussed, was between the Crown — a concept that includes all government power — and the Ojibway.”<sup>95</sup> The problem with this, in my view, is that the Crown as a “concept that includes all government power” cannot have legal personality in our federal system. So how could this conceptual entity be party to a treaty? The Supreme Court nonetheless relied on the old notion of a unified Crown from *St. Catherine’s Milling* — when its application in Canada already made little sense, as Maitland pointed out — and used it to justify an interpretation of Treaty 3 today that flies in the face of the express words of the Treaty.<sup>96</sup>

#### 4. Conclusion

Our examination of the case law relating to the theory of the unity of the Crown in the context of the Indigenous peoples of Canada reveals progression from rigid application of the theory in *St. Catherine’s Milling*, through explicit rejection of the theory’s applicability in the context of Canada’s federal structure

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94 See Laskin, *supra* note 30 at 122; Hogg, *Constitutional Law*, *supra* note 52 at 10-3 n 5; Smith, *supra* note 37 at 153. Compare Lordon, *supra* note 17 at 282-83. See e.g. An Agreement between the Government of Canada and the Government of the Province New Brunswick respecting Indian Reserves, 25 March 1958, confirmed by SC 1959, c 47, and SNB 1958, c 4. Section 3 of the Agreement provides: “New Brunswick hereby transfers to Canada all rights and interests of the Province in reserve lands except lands lying under public highways, and minerals.” In *Smith*, *supra* note 58, the Supreme Court apparently had no difficulty concluding that this Agreement transferred legal title to reserve lands in New Brunswick from the provincial to the federal government. For a traditional explanation of the legal nature of federal-provincial agreements, see David W Mundell, “Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them” (1960) 2 Osgoode Hall LJ 56 at 70-75.

95 *Grassy Narrows First Nation*, *supra* note 1 at para 39.

96 Interestingly, in its recent decision in *McAteer*, *supra* note 86, the Ontario Court of Appeal has provided additional insight into its conception of “the Queen” (which Weiler JA at para 51 said is “commonly referred to as the Crown”), in the context of the citizenship oath. *Inter alia*, Weiler JA observed at para 54: “Although the Queen is a person, in swearing allegiance to the Queen of Canada, the would-be citizen is swearing allegiance to a symbol of our form of government in Canada. This fact is reinforced by the oath’s reference to ‘the Queen of Canada,’ instead of ‘the Queen.’ It is not an oath to a foreign sovereign. Similarly, in today’s context, the reference in the oath to the Queen of Canada’s ‘heirs and successors’ is a reference to the continuity of our form of government extending into the future.”

and independence from the United Kingdom in *Indian Association of Alberta*, to disregard of the theory's relevance in the context of transfers of reserve lands in *Osoyoos Indian Band* and *Blueberry River Indian Band*. Leading constitutional scholars generally concur in dismissing the theory's application within Canada.<sup>97</sup> In 1969, Justice Bora Laskin, then a member of the Ontario Court of Appeal and later Chief Justice of Canada, wrote:

Her Majesty has no personal physical presence in Canada . . . and only the legal connotation, the abstraction that Her Majesty or the Crown represents, needs to be considered for purposes of Canadian federalism . . . . Where it is necessary to personify the state, whether it be Canada or a Province, the common reference to the Crown has been modified by the addition of an identifying phrase "in right of Canada" or in right of the particular Province. This is recognition that it makes no sense juristically to insist that it is the same Crown that is meant when in fact it is not Her Majesty who is involved.<sup>98</sup>

Similarly, Peter Hogg, in the first edition of his influential text, *Constitutional Law of Canada*, wrote in 1977:

There is only one individual at any time who is the Queen (or King). The Crown accordingly has a monolithic connotation, which has sometimes been articulated in dicta such as that the Crown is "one and indivisible." For nearly all purposes the idea of the Crown as one and indivisible is thoroughly misleading . . . . In a federal system, such as Canada's, it is frequently necessary to distinguish one government from another. The federal government is the Crown in right of Canada (or the Dominion), of course, and each of the provincial governments is the Crown in right of Ontario or whichever province it may be. Each province, and the Dominion, has a separate legal existence, evidenced by a separate treasury, separate property, separate employees, separate courts, and a separate set of laws to administer.<sup>99</sup>

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97 Contrast Mundell, *supra* note 94. Mundell provided a useful doctrinal description of the application of the theory of the unity of the Crown (though he preferred the term "Her Majesty") in Canada as of 1960, the purpose which he admitted was "purely explanatory": *ibid* at 56.

98 Laskin, *supra* note 30 at 118-19. See also the quotation accompanying note 30 *supra*, where Laskin commented on the unreality of Lord Watson's views on the unity of the Crown in *St. Catherine's Milling* (this part of Laskin's book was relied on extensively by the Ontario Court of Appeal in *McAteer*, *supra* note 86 at paras 50-51). Later, Laskin CJC observed in *Alberta v Canadian Transport Commission*, [1978] 1 SCR 61 at 71: "There may be something to be said for the view that, having regard to the nature of Canada's federal system, the notion of the indivisibility of the Crown should be abandoned. The Constitution of Canada distributes legislative power between a central Parliament and provincial Legislatures and prerogative or executive power (which is formally vested in the Queen) is similarly distributed to accord with the distribution of legislative power, thus pointing to different executive authorities."

99 Peter W Hogg, *Constitutional Law of Canada*, Student Edition (Toronto: Carswell, 1977), 164. Hogg, Monahan, and Wright, *supra* note 36 at 13-14, contains a very similar passage, while adding at 15 that the usage "the Crown 'in right of' . . . is obviously suggestive of indivisibility, but the suggestion must be resisted. Each government is a separate legal entity. In asking whether the

Professor Hogg has maintained essentially the same position up to and including the most recent update of the Looseleaf Edition of his text, with the addition of discussion of the decision of the English Court of Appeal in *Indian Association of Alberta* for further support.<sup>100</sup>

The position stated by Justice Laskin and Professor Hogg makes eminent good sense. As Hogg has maintained, in the Canadian context the concept of a unified Crown is misleading and impractical. The reality is that a single Crown no longer exists as a juristic person that is somehow different from the governments that have legal rights and exercise constitutional powers in our federal system. Instead, Canada and each of the ten provinces are separate juristic entities with distinct legal personalities. The unified Crown is an abstraction — Maitland called it a legal fiction — that outlived its purpose as a juristic entity long ago and should be relegated to legal history. So although one can still refer to the Crown in general terms — e.g. when speaking of the honour of the Crown or the fiduciary obligations of the Crown — this does not mean that a single juristic entity is meant. Instead, in these contexts the term encompasses the Crown in all its separate manifestations in Canada.<sup>101</sup> In specific instances, one then has to proceed to identify which Crown is involved. In some cases, it will be the Crown in right of Canada,<sup>102</sup> whereas in others it will be the Crown in right of a province.<sup>103</sup> It is those specific, individual Crowns that have legal personality, not “the Crown.”<sup>104</sup> This separation was made conceptually possible by the realization in the 16<sup>th</sup> century that the King or Queen has two bodies — the natural body obviously cannot be divided, but the body politic can and has been.<sup>105</sup>

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Crown in right of Ontario, for example, is liable under a contract, we are asking a question about the legal duties of a legal person, the government of Ontario.” See also Lordon, *supra* note 17 at 29-34, 293-306; Smith, *supra* 37 at 28-30, 183-84.

100 Hogg, *Constitutional Law*, *supra* note 52 at 10-2 to 10-3.

101 See Lordon, *supra* note 17 at 5-7.

102 See e.g. *Mikisew Cree First Nation*, *supra* note 5, and *Guerin*, *supra* note 71, involving honour of the Crown in right of Canada and federal fiduciary obligations respectively.

103 See e.g. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, involving honour of the Crown in right of British Columbia.

104 Contrast Mundell, *supra* note 94.

105 See note 17 *supra* and accompanying text. When Aboriginal peoples in Canada contend that their treaties are agreements with the Queen, as argued in *Indian Association of Alberta*, *supra* note 31, they seem to mean the Queen and her successors as living persons. The notion that the Queen is really two or more persons, and that their treaties are with the Queen as a body politic, may not have been understood by people whose societies are kinship-based. Moreover, when Treaty 3 and the other numbered treaties of the 1870s were being negotiated, the treaty commissioners frequently employed kinship language and represented the treaties as agreements with a personal sovereign. An example is Alexander Morris’s statement to the assembled chiefs during the Treaty

What then is one to make of the Supreme Court's decision in *Grassy Narrows First Nation*? Quite frankly, I think the Court reverted to unity of the Crown in the treaty context in order to avoid concluding that Treaty 3 was made with the Crown in right of Canada because the Court thought such a conclusion might upset the balance of federalism. If the Treaty was with Canada and the taking-up clause meant what it said, namely that the power to take up Treaty 3 lands could be exercised only by or with the authorization of the Dominion of Canada, this could have had serious implications for the Province of Ontario's control over natural resource development. In my opinion, *Grassy Narrows First Nation* and *Tsilhqot'in Nation* are companion decisions in this respect — recall that they were released just two weeks apart, and so no doubt were being written by Chief Justice McLachlin at roughly the same time. As mentioned earlier, *Tsilhqot'in Nation* reversed *R. v Morris*<sup>106</sup> on the protection provided to treaty rights by section 91(24) of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity. As *Tsilhqot'in Nation* involved Aboriginal title to land, the implications of the rejection of the application of this doctrine are enormous — it means that provincial laws in relation to resource development can infringe Aboriginal title, as long as the infringement can be justified under the *Sparrow* test.<sup>107</sup>

So *Grassy Narrows First Nation* and *Tsilhqot'in Nation* achieve the same result: in both cases resource development is placed firmly within provincial jurisdiction, regardless of whether the development impacts treaty rights or Aboriginal rights and title. This result was achieved in *Tsilhqot'in Nation* by rejecting the application of the doctrine of interjurisdictional immunity. *Grassy Narrows First Nation* applied this aspect of *Tsilhqot'in Nation*, while empowering Ontario to take up lands by deciding that Treaty 3 is with the Crown, not Canada. Both decisions therefore favour provincial over federal jurisdiction, a result that Canada was as eager as the provinces of Ontario

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3 negotiations, in *Morris*, *supra* note 2 at 58: "I told you I was to make the treaty on behalf of our Great Mother the Queen, and I feel it will be for your good and your children's . . . . We are all children of the same Great Spirit, and are subject to the same Queen." Again, at the beginning of the Treaty 6 negotiations in 1876, *Morris* said: "You are, like me and my friends who are with me, children of the Queen" (*ibid* at 199). Regarding Treaty 6, Elder Alma Kytwayhat stated that the Queen "offered to be our mother and to love us in the way we want to live": quoted in Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations* (Calgary: University of Calgary Press, 2000), 34. See also JR (Jim) Miller, "The Aboriginal Peoples and the Crown," in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal and Kingston: McGill-Queen's University Press, 2012), 255-69; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 77-99.

106 *Supra* note 92.

107 *R v Sparrow*, [1990] 1 SCR 1075. See McNeil, "Aboriginal Title and the Provinces", *supra* note 93.

and British Columbia to achieve, as evidenced by the fact that, as a party in these cases, Canada supported the provinces on division-of-powers and interjurisdictional immunity.<sup>108</sup> The losers on the jurisdictional issues in each case were First Nations, whose rights are now subject to justifiable infringement by the provinces.<sup>109</sup>

From the case law, it is thus hard to avoid the conclusion that unity of the Crown tends to get invoked by the courts when it works against Indigenous claimants, but is disregarded when it would assist them. In this context, at least, one has to agree with the Beatles that “Her Majesty . . . changes from day to day,”<sup>110</sup> depending on whose interests are at stake.

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108 See Respondent’s factum on Behalf of the Attorney General of Canada, in *Tsilhqot’in Nation*, SCC file no. 34986: online <[http://www.scc-csc.gc.ca/factums-memoires/34986/FM030\\_Respondent\\_Attorney-General-of-Canada.pdf](http://www.scc-csc.gc.ca/factums-memoires/34986/FM030_Respondent_Attorney-General-of-Canada.pdf)>, especially paras 86-110; Factum of the Respondent (Third Party) the Attorney General of Canada, in *Grassy Narrows First Nation*, SCC file no. 35379: online <[http://www.scc-csc.gc.ca/factums-memoires/35379/FM030\\_Respondent\\_Attorney-General-of-Canada.pdf](http://www.scc-csc.gc.ca/factums-memoires/35379/FM030_Respondent_Attorney-General-of-Canada.pdf)>, especially paras 56, 79, 89-103. I find it disturbing that the Attorney General of Canada usually supports the provinces against First Nations in these kinds of cases, even when it means sacrificing federal jurisdiction (does this ever happen in other division-of-powers cases?), but this is a subject for another article.

109 Treaty rights, however, may still be protected against infringing provincial laws by s 88 of the *Indian Act*, RSC 1985, c I-5, as the Supreme Court’s judgments in *Tsilhqot’in Nation* and *Grassy Narrows First Nation* did not address this issue. For cases holding that s 88 provides treaty rights with broad protection against provincial laws, see *R v White and Bob* (1964), 50 DLR (2d) 613 (BCCA), aff’d (1964) 52 DLR (2d) 481 (SCC); *Simon v The Queen*, [1985] 2 SCR 387; *R v Sioui*, [1990] 1 SCR 1025. These unanimous decisions were not mentioned, let alone overruled, in *Tsilhqot’in Nation* and *Grassy Narrows First Nation*.

110 I would like to thank my daughter Katie for rekindling my appreciation of the Beatles, leading me to make this link between their lyrics and what Paul McHugh and Lisa Ford have termed “the shapeshifting Crown” in their chapter, “Settler Sovereignty and the Shapeshifting Crown,” in Lisa Ford and Tim Rowse, eds, *Between Indigenous and Settler Governance* (Abingdon, Oxon: Routledge, 2013), 23.

