The Answer,

Not the Problem

An Examination of the Role of Aboriginal Rights in Securing a Liberal Foundation for the Legitimacy of the Canadian State

by

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Abstract

Are Aboriginal rights defensible within the framework of liberalism? Liberalism’s commitment to individual equality seems to preclude Aboriginal rights insofar as these rights are exercisable by only a sub-set of the Canadian population and not by all Canadians equally. Instead of asking how Aboriginal rights can be justified within the liberal state, we need to question the legitimacy of the state’s assertion of sovereignty over Aboriginal peoples and territories. Of the four potentially applicable modes of acquiring sovereignty – discovery, conquest, cession and prescription – only treaties have the potential to provide a liberally-compelling basis for the legitimacy of Crown sovereignty. But historical treaties did not purport to transfer sovereignty. As such, Canadian sovereignty suffers from a normative lacuna. Aboriginal rights, as set out in mutually consensual treaties addressing the sharing of sovereignty, have the potential to fill this lacuna and thereby to ground the legitimacy of Crown sovereignty.
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Introduction

Let’s compare Idle No More to Occupy Wall Street. On the one hand, these two social movements seem to have much in common. They are both decentralized, grassroots movements that appeal to social justice values. On the other hand, the Occupy movement appears to have resonated with many Canadians, while the reaction to Idle No More has been more mixed, if not hostile. What accounts for this disparity? It may be that the Canadian public views the Occupy movement as advocating for a more equal distribution of wealth throughout the entire population, while Idle No More appears to seek special rights for a particular sub-set of the Canadian population, namely, Aboriginal peoples. In other words, the Occupy movement seems to promote equality, while Idle No More seems to violate the principle of equality. It is this notion that Aboriginal rights violate the principle of equality that is the focus of this thesis.

More specifically, my research is motivated by the question of whether Aboriginal rights are defensible within the framework of liberalism, and if so, how. Liberalism’s commitment to the principle of individual equality seems to preclude Aboriginal rights insofar as Aboriginal rights are not available to all citizens equally. Rather, they are exercisable by only a sub-set of the population, namely Aboriginal peoples. In Chapter One I argue that the notion that Aboriginal rights are illiberal is responsible for the problematically restrictive aspects of the Van der Peet


2 See Gollom, ibid, quoting Robert Brym, a sociology professor at the University of Toronto.

3 See Charlie Angus, “Charlie Angus on racists in cyberspace”, Now 32:47 (25 July – 1 August 2013) online: Now <http://www.nowtoronto.com> (recognizing that “whenever an article is posted about Idle No More or treaty rights or First Nation poverty, the comments section is quickly overwhelmed with abusive attacks”).

4 See Gollom, supra note 1, quoting Robert Brym (explaining that “[t]he Occupy movement's demand for greater economic equality seems to have resonated with a large part of the Canadian population”).

5 R v Van der Peet, [1996] 2 SCR 507, 137 DLR (4th) 289 [Van der Peet].
test for Aboriginal rights pursuant to section 35(1) of the Constitution Act, 1982. If it can be established that Aboriginal rights are not illiberal, then the rationale for these restrictions within the Van der Peet test should vanish.

In searching for a liberal defense of Aboriginal rights, the place to begin is with the work of Will Kymlicka, which I discuss in Chapter One. He argues that in order to engage in the liberal project of investigating, pursuing and re-evaluating one’s own conception of the good life, individuals must have access to their own culture. But Aboriginal culture is susceptible to being overwhelmed by the majority culture. As such, special protections for Aboriginal culture are warranted within the framework of liberalism. Kymlicka’s argument has been criticized for failing to recognize Aboriginal sovereignty as the source of Aboriginal rights, and for limiting Aboriginal rights in accordance with a distributive principle. I contend that both of these issues stem from a more fundamental issue: Kymlicka’s argument assumes the legitimacy of the state that is doing the distributing. In my view, it is this assumption that must be questioned.

I argue that theories such as Kymlicka’s have been asking the wrong question. Instead of asking how Aboriginal rights can be justified within the liberal state, we need to question the legitimacy of the Canadian state’s assertion of sovereignty over Aboriginal peoples and territories. The true significance of Aboriginal prior occupancy is that it places the onus on subsequent arrivals to

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7 Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Clarendon Press, 1995) at 80-83, 105. See Chapter One, Section 3, for a discussion of this argument.

8 See Kymlicka, ibid at 109.

9 See Kymlicka, ibid at 126.

defend the legitimacy of their claims. In my view, those who were here first are under no obligation to explain how their special rights fit within a liberal state unilaterally imposed on them. It is the subsequent arrivals who are obligated to explain how their assertion of sovereignty over Aboriginal peoples can be legitimate within the framework of liberalism.

In advancing this argument, I follow A. John Simmons who distinguishes between the project of showing that a state is justified and the project of showing that a state is legitimate.\textsuperscript{11} The former aims to establish that the type of state in question has the kind of virtues that make that type of state worthwhile.\textsuperscript{12} The latter aims to show that a given state is entitled to exercise sovereignty over its citizens because of the historical relationship it has with those particular citizens.\textsuperscript{13} Much contemporary political philosophy conflates these two projects by supposing that a state that provides a just distribution of goods, rights or social benefits to its citizens is thereby not only justified, but also legitimate.\textsuperscript{14} I argue in Chapter One that such a conflation is unwarranted. Instead, an investigation into the legitimacy of the Canadian state calls for an examination of the historical circumstances under which that state initially acquired sovereignty. In the Canadian context, there are four potentially relevant modes of acquisition of sovereignty: (i) discovery and occupation, (ii) conquest, (iii) cession and (iv) prescription. I examine each of these modes in Chapters Two, Three, Four and Five respectively. The criteria I employ in evaluating the modes of acquisition are the basic tenets of liberalism adopted by the majority in Van der Peet, including the rule of law. Thus, the ability of any given mode of acquisition to shore up the legitimacy of Crown sovereignty will be undermined if the Crown has not complied with the legal requirements of that particular mode, or if those requirements violate liberal principles such as equality and autonomy.


\textsuperscript{12} See Simmons, \textit{ibid} at 125-26.

\textsuperscript{13} See Simmons, \textit{ibid} at 128.

Specifically, in Chapter Two, I identify three variants of the doctrine of discovery: the strong version, the weak version and the intermediate version. I argue that in the Canadian context, Britain, and later Canada, employed the intermediate version, according to which a discovering nation acquired sovereignty over foreign territory immediately upon discovery, subject only to the right of the Indigenous inhabitants to use and occupy their territory. This right of use and occupancy could be extinguished by either cession or conquest.  

I argue that insofar as the doctrine of discovery rests upon the ethnocentric assumption of the inferiority of Indigenous peoples, it violates not only the principle of equality but also individual autonomy. It privileges one particular conception of the good life – a life lived in accordance with European norms and religious institutions – and imposes harsh legal consequences, namely loss of sovereignty, on those pursuing an alternate conception of the good life. As such, the doctrine of discovery cannot serve as a liberally-satisfying basis for the legitimacy of Crown sovereignty.

Similarly, I contend in Chapter Three that conquest cannot legitimate Crown sovereignty within a liberal paradigm for at least three reasons. First, I note that the legal requirements of conquest were rarely, if ever, met in the interactions between Europeans and Indigenous peoples in Canada. Second, conquest is not legally consistent with the doctrine of discovery in a common law context. According to the common law, the Indigenous inhabitants of newly acquired territory became British subjects immediately upon Britain’s acquisition of sovereignty over that territory. The common law also prohibits the British Crown from engaging in acts of state, such as conquest, against British citizens on British soil. To the extent that Britain considered itself to have acquired sovereignty pursuant to discovery, then, it could not also have acquired sovereignty through conquest as a stand-alone mode of acquisition, nor could it have extinguished the rights of Indigenous inhabitants that remained following discovery through conquest. In other words, conquest as either a stand-alone means of acquiring sovereignty or as

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15 For a discussion of the intermediate version of the doctrine of discovery, including its application in the Canadian context, see Chapter Two, Sections 3.4 and 3.5.

16 For a full account of this argument, see Chapter Three, text accompanying notes 64-66, 78-83.


18 See McNeil, ibid at 246, 265.

19 See McNeil, ibid at 246.
a concomitant to the intermediate version of the doctrine of discovery is precluded by European reliance on the doctrine of discovery. Third, conquest runs afoul of the principle of equality insofar as it sanctions the extinguishment of the rights of those who are not able to repel an exercise of force, without providing a normatively significant reason for differentiating on the basis of physical power.

In contrast, I argue in Chapter Four that cession, understood as the surrender of sovereignty through mutually consensual treaties, has the potential to provide a liberally-satisfying foundation for the legitimacy of Crown sovereignty. That is, negotiated treaties that accurately reflect the intentions of all parties can provide the type of consent that is consistent with the liberal principle of autonomy. In the Canadian context, though, Aboriginal peoples consistently assert that they did not surrender sovereignty or title to their land in historical treaties; rather, they agreed to share their land on an equitable basis with the newcomers. And an examination of a selection of historical treaties reveals that such treaties did not even purport to secure a surrender of sovereignty from Aboriginal peoples. At most, the text of these treaties claims to extinguish the Indigenous rights remaining following discovery in accordance with the intermediate version of the doctrine of discovery, but not to transfer sovereignty. These historical treaties, then, are not useful in an attempt to legitimate Crown sovereignty.

In Chapter Five, I examine prescription, according to which a state can acquire sovereignty over occupied territory by effectively occupying that territory itself, provided certain other requirements are met, such as the passage of a sufficient amount of time. Jurists disagree about whether acquiescence on the part of the original inhabitants is a requirement of prescription, and if it is, on the degree of acquiescence required. I argue that the stronger the requirements of acquiescence, the closer prescription comes to embodying the notion of consent and thereby to complying with liberal principles. However, the stronger the requirements of acquiescence, the less likely it is that these requirements were met in the Canadian context. Accordingly,

20 For examples in support of this point, see Chapter Four, Section 3.2.
21 For an argument in support of this conclusion, see Chapter Four, Section 3.3.
22 For a discussion of the legal principles of prescription, see Chapter Five, Sections 1 and 2.
23 I discuss these competing views in Chapter Five, Section 2.
prescription is unlikely to be able to provide a liberal foundation for the legitimacy of Crown sovereignty.

I consider the implications of the foregoing in Chapter Six. My analysis of the four modes of acquisition reveals that Crown sovereignty remains illegitimate on liberal grounds in areas not covered by treaties addressing sovereignty, and in areas where the Crown has failed to comply with its agreements to share sovereignty. As such, there is a lacuna in the legal and political landscape of Canada. Aboriginal rights have the potential to fill this lacuna and thereby to ground the legitimacy of Crown sovereignty. The most liberally-compelling way in which this may occur is through treaties that provide for the sharing of sovereignty between Canada and Aboriginal peoples.  

Such treaties would set out the particular rights of the particular Aboriginal signatory. These rights would include not mere rights to engage in isolated hunting and fishing practices, but rights to exercise jurisdiction. Courts would have a role in enforcing the terms of treaties. But even before such treaties are executed, courts can also play a role in facilitating the process of allowing Aboriginal rights to contribute to the legitimation of Crown sovereignty. In Chapter Six, I set out a proposed test for Aboriginal rights pursuant to section 35(1) that reflects the need to place the onus on the Crown to legitimate Crown sovereignty. I also offer a test for identifying the “other rights or freedoms that pertain to the aboriginal peoples of Canada” protected by section 25 of the Charter that would prevent Charter rights from undermining the ability of Aboriginal rights to contribute to the legitimation of Crown sovereignty.

In short, Aboriginal rights are the answer, not the problem. The problem is not how Aboriginal rights can be justified within a liberal state. The problem is how Canada’s assumption of sovereignty over Aboriginal peoples and territories can be legitimated on liberal grounds.

24 C.f. Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 77.
25 See Hoehn, ibid at 84.
26 See Hoehn, ibid at 122, 133.
27 See Hoehn, ibid at 112.
Aboriginal rights, if set out in mutually consensual treaties and understood as reflecting Aboriginal sovereignty and jurisdiction, have the potential to serve as the answer to this problem.

I wish to note that I approach this project from an Indigenous perspective: I am a citizen of the Métis nation. As such, although I express my argument in academic terms, for me these issues are not merely academic. I live these issues.

Finally, throughout this work, I refer to ‘Aboriginal’ or ‘Indigenous’ peoples or nations. The examples I employ, though, are all from the First Nations’ context, and as such my conclusions apply only to First Nations. That being said, I believe that the same conclusion – namely that the Crown lacks a liberally-satisfying basis for its assertion of sovereignty – can equally be made in the Métis context. Unfortunately, marshaling the arguments in support of this conclusion has proven to be beyond the scope of this work. I hope to undertake this project in the future.

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28 I do not purport, however, to represent a pan-Indigenous perspective or even the perspective of any particular Indigenous people.

29 I use the terms ‘Aboriginal’ and ‘Indigenous’ interchangeably.
Chapter One
Liberalism, Equality and Aboriginal Rights

1 Overview

This chapter addresses the issue of whether Aboriginal rights, including Aboriginal sovereignty, are defensible within the framework of liberalism, and if so, how. The notion that Aboriginal rights violate the principle of equality – one of the pillars of liberalism – has surfaced in government policy, academic literature, and Aboriginal rights jurisprudence. Will Kymlicka provides an influential and articulate response to this view. Yet, his liberal defence of Aboriginal rights has been criticized for failing to account for Aboriginal sovereignty as the source of Aboriginal rights. I argue that theories such as Kymlicka’s have been asking the wrong question. Instead of asking how Aboriginal rights can be justified within the liberal state, we need to ask how the Canadian state’s assertion of sovereignty over Aboriginal peoples and territories can be legitimated.

2 The Problem

Liberalism rests upon three basic tenets.\(^1\) The first two consist of the twin pillars of individual freedom and individual equality. The third tenet is the notion that the rights-bearer is the individual.\(^2\) Liberal democratic societies instantiate these principles by guaranteeing certain fundamental civil and political rights to each and every individual citizen, often by means of a constitutionally-entrenched bill of rights.\(^3\) The emphasis on individual equality means that

\(^1\) See Dale Turner, *This is not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 13.

\(^2\) See Turner, *ibid* (explaining that “liberalism privileges the individual as the fundamental moral unit of a theory of justice; that is, individuals count most when we think about political justice”). See also Gordon Christie, “Law, Theory and Aboriginal Peoples” (2005) 2 Indigenous LJ 67 at 81 (contending that “liberal theory rests on deep respect for the individual. The individual is conceptualized as the locus of moral worth, a being in whom value inheres, a fundamental source of value and meaning in lives lived”).

“[l]iberal theory cannot countenance…differential valuing between individuals.”\textsuperscript{4} The problem, then, is that liberalism’s commitment to individual equality seems to preclude protection of Aboriginal rights, because these rights belong only to certain groups and not to each and every Canadian citizen equally. As Will Kymlicka so succinctly puts it, “…on the standard interpretation of liberalism, aboriginal rights are viewed as matters of discrimination and/or privilege, not of equality.”\textsuperscript{5}

One may be forgiven for wondering whether this issue has any practical significance, or whether it is the kind of dilemma that philosophers manufacture in order to keep themselves in business. In fact, the real-world consequences of this issue were demonstrated by the Canadian government’s 1969 policy statement, known as the White Paper,\textsuperscript{6} which advocated abolishing the special rights and status of Indians by, among other things, eliminating Indian treaties,\textsuperscript{7} repealing the Indian Act,\textsuperscript{8} winding up the Department of Indian Affairs and Northern Development,\textsuperscript{9} directing Indians to obtain social services from the provincial bodies that serve all other citizens,\textsuperscript{10} and ultimately removing any reference to Indians from Canada’s constitution.\textsuperscript{11} The rationale underlying these proposals was that the special rights and status of Indians were inconsistent with the principle of equality.\textsuperscript{12} The document begins by highlighting

\textsuperscript{4} Christie, \textit{supra} note 2 at 81.
\textsuperscript{7} \textit{Ibid} at 20.
\textsuperscript{8} \textit{Ibid} at 7.
\textsuperscript{9} \textit{Ibid} at 8.
\textsuperscript{10} \textit{Ibid} at 7, 14-16.
\textsuperscript{11} \textit{Ibid} at 11-12.
\textsuperscript{12} For a comprehensive analysis of the ways in which liberal principles inform the recommendations of the \textit{White Paper}, see Kymlikca, \textit{Liberalism, supra} note 5 at 142-44, 156.
the special treatment and different status accorded to Indians.\textsuperscript{13} Regardless of whether that special status has resulted in worse, equal or better treatment, “[w]hat matters,” according to the \textit{White Paper}, “is that it has been different.”\textsuperscript{14} In contrast to this differential treatment, the recommendations listed above were supposed to guarantee equality between Indians and non-Indian Canadians.\textsuperscript{15} The \textit{White Paper} generated a “massive and fervent” backlash by Aboriginal peoples, and the federal government withdrew the proposal in 1970.\textsuperscript{16}

Even though the \textit{White Paper} no longer serves as official government policy, its underlying rationale continues to attract adherents.\textsuperscript{17} As Dale Turner notes, Tom Flanagan’s book, \textit{First Nations? Second Thoughts},\textsuperscript{18} “is the contemporary exemplar of White Paper liberalism” insofar as “Flanagan argues vehemently against the idea that Aboriginal peoples are entitled to any special rights or political status within the Canadian state.”\textsuperscript{19} I will address some of Flanagan’s specific arguments in later chapters, but for now it is sufficient to note that he contends that Aboriginal rights contradict fundamental aspects of a liberal democracy.\textsuperscript{20} That is, according to Flanagan, Aboriginal peoples should not be entitled to exercise “unique rights, including the

\begin{itemize}
\item \textsuperscript{13} See the \textit{White Paper}, supra note 6 at 2 (claiming that “Indian relations with other Canadians began with special treatment by government and society, and special treatment has been the rule since Europeans first settled in Canada”).
\item \textsuperscript{14} \textit{Ibid} at 4.
\item \textsuperscript{15} See the \textit{White Paper}, \textit{ibid} at 6 (stating that “[t]his Government believes in equality. It believes that all men and women have equal rights”).
\item \textsuperscript{17} See Turner, \textit{supra} note 1 at 14. For a comprehensive critique of the \textit{White Paper}, see Turner, \textit{supra} note 1 at 12-37.
\item \textsuperscript{19} Turner, \textit{supra} note 1 at 15. See also John Borrows (Kegedonce), \textit{Drawing Out Law: A Spirit’s Guide} (Toronto: University of Toronto Press, 2010) at 154-55, 158. Borrows provides an articulate account of a fictional law student who argues that special rights for Aboriginal peoples are racist insofar as these rights differentiate on the basis of race and thus violate the principle of equality. The name of this fictional law student is “Tom’lana’gan” (\textit{ibid} at 158).
\item \textsuperscript{20} \textit{Supra} note 18 at 22.
\end{itemize}
inherent right of self-government” because to differentiate between Aboriginal and non-Aboriginal peoples “is a form of racism.”

It is not only philosophers, government policy-makers, and scholars who grapple with the compatibility of Aboriginal rights and liberalism; it seems that average Canadians struggle with this issue as well. For example, in *R v Kapp*, a group of commercial fishers in British Columbia, who were mostly non-Aboriginal, claimed that special Aboriginal fishing rights violated their right to equality under the *Charter*. The federal government had developed a program that would enhance the participation of Aboriginal peoples in commercial fisheries. One aspect of this program allowed certain designated Aboriginal fishers to fish for salmon in the mouth of the Fraser River throughout a specified twenty-four hour period, during which all others were prohibited from fishing. A group of mostly non-Aboriginal commercial fishers protested by fishing during the specified twenty-four hour period. They were charged with fishing at a prohibited time. In their defence, they argued that the special Aboriginal fishery was unconstitutional on the grounds that it violated their equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* by discriminating against them on the basis of race.

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22 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

23 *Ibid* at paras 1, 9.

24 *Ibid* at paras 5-6.


27 *Ibid*.

28 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 15(1) of the *Charter* states: “15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” For further discussion of the *Kapp* decision, see Chapter Six, Section 4.

29 *Kapp, supra* note 22 at paras 1, 9.
Most importantly, though, the notion that Aboriginal rights are inconsistent with the liberal principle of equality pervades the Supreme Court of Canada’s jurisprudence on Aboriginal rights pursuant to section 35(1) of the Constitution Act, 1982.30 In fact, this notion is directly responsible for the problematically restrictive aspects of the test for Aboriginal rights, namely, the limitation of Aboriginal rights to what is “integral” to the claimant’s “distinctive” culture and the focus on a pre-contact time period.31 In Van der Peet, the majority emphasizes that liberalism protects general and universal rights, such as those reflected in the Charter.32 These rights are held equally by all individuals in society because the “inherent dignity” of each person is entitled to equal respect.33 Aboriginal rights, in contrast, must have some other, non-liberal foundation, as not all individuals are entitled to exercise Aboriginal rights:

19 Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, Aboriginal rights must be viewed differently from Charter rights because they are rights held only by Aboriginal members of Canadian society. They arise from the fact that Aboriginal people are Aboriginal.34


31 I am indebted to Darlene Johnston for bringing this point to my attention. See Richard Spaulding, “Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective” (1997) 47 UTLJ 35 at 86, n 67. C.f. Douglas Sanderson, “Redressing the Right Wrong: The Argument from Corrective Justice” (2012) 62 UTLJ 93 at 116-17 (both noting that a majority of the Court in Van der Peet views Aboriginal rights as not resting upon liberal values and also arguing that the Van der Peet test conceives of Aboriginal rights as only subsistence rights, as opposed to rights to Indigenous institutions that embody Indigenous values); Christie, supra note 2 at 83 (explaining the majority’s notion that Aboriginal rights are illiberal by highlighting the majority’s view that Aboriginal rights “are not rights held in virtue of the holder being a rational agent, deserving of respect, rights universal in their application to individual humans. Aboriginal rights are firmly grounded as Aboriginal rights, meant to provide protection for the ‘Aboriginality’ of Aboriginal communities, those elements that predate the arrival of Europeans and the influence of their culture”) [footnotes omitted]. For an analysis of the way in which liberal assumptions underlying the Supreme Court of Canada’s Aboriginal title jurisprudence restricts “the power and authority of Indigenous peoples over their lands”, see Brenda L. Gunn, “Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System” (2007) 6 Indigenous LJ 31.

32 R v Van der Peet, [1996] 2 SCR 507 at para 18, 137 DLR (4th) 289 [Van der Peet].

33 Ibid.

34 Ibid at para 19.
This non-liberal foundation is the ‘aboriginality’ of Aboriginal people, or in other words, the fact that Aboriginal people are Aboriginal.\textsuperscript{35} The illiberal nature of Aboriginal rights, then, means that Aboriginal rights must be defined with “necessary specificity.”\textsuperscript{36} It turns out that this “necessary specificity” refers to the majority’s view of what differentiates Aboriginal peoples from non-Aboriginal Canadians. The majority sets out to identify this differentiating feature by engaging in a purposive analysis.\textsuperscript{37} The purpose underlying Aboriginal rights, according to the majority, is as follows:

\begin{quote}
In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.\textsuperscript{38}
\end{quote}

In other words, because only Aboriginal people can exercise Aboriginal rights, the purpose underlying Aboriginal rights must be defined with respect to what “separates” or differentiates Aboriginal peoples from other Canadians. This passage reveals the majority’s view of the two features that differentiate Aboriginal peoples: first, Aboriginal peoples were already here prior to European contact; and second, Aboriginal peoples have their own “distinctive” cultures. The majority then takes these two supposedly differentiating features and translates them into requirements that Aboriginal peoples must meet to establish Aboriginal rights. In this way, the notion that Aboriginal rights are illiberal results in at least two restrictions to the test for Aboriginal rights.

\textsuperscript{35} Ibid.

\textsuperscript{36} Ibid at para 20.

\textsuperscript{37} Ibid at paras 20-21.

\textsuperscript{38} Ibid at paras 21, 30 [emphasis added].
The first restriction is that Aboriginal rights include only those practices, customs and traditions that are integral to the distinctive culture of the Aboriginal claimant.\(^{39}\) This means that the impugned practice must have been a central and significant part of the claimant’s distinctive culture; it must have been “one of the things that truly made the society what it was.”\(^{40}\) In other words, because only Aboriginal people can exercise Aboriginal rights, only the Aboriginal aspects of the claimants’ culture will receive constitutional protection.

A second way in which the majority in Van der Peet restricts Aboriginal rights is by limiting them to practices that existed “prior to contact between aboriginal and European societies.”\(^{41}\) Interestingly, the rationale underlying Aboriginal rights, namely, the reconciliation of Crown sovereignty with pre-existing Aboriginal societies,\(^{42}\) could have just as easily justified a later time period, namely, “the period prior to the assertion of sovereignty by the Crown.”\(^{43}\) The majority contemplates the later time period but rejects it without providing any normatively significant reason for doing so.\(^{44}\) Presumably, the reason is that living on this continent prior to the arrival of Europeans is one of the features that differentiate Aboriginal peoples from non-Aboriginal people in Canada, as the majority notes in its articulation of the purpose of Aboriginal rights.\(^{45}\) In contrast, both Aboriginal peoples and settlers were living here prior to the assertion of Crown sovereignty, and so this later time period would not account for the supposed illiberal nature of Aboriginal rights.

\(^{39}\) \textit{Ibid} at para 46.

\(^{40}\) \textit{Ibid} at para 55.

\(^{41}\) \textit{Ibid} at para 60.

\(^{42}\) \textit{Ibid} at para 31.

\(^{43}\) \textit{Ibid} at para 61.

\(^{44}\) \textit{Ibid}.

\(^{45}\) See text accompanying note 38.
Scholars have criticized the restrictive nature of these two features of the test for Aboriginal rights, as did Justices L’Heureux-Dubé and McLachlin in their separate dissenting reasons in Van der Peet. I have argued that these two restrictions rest upon the majority’s assumption that Aboriginal rights are illiberal insofar as they are exercisable by only a sub-set of the population, and not by all Canadians equally. Accordingly, if it can be established that Aboriginal rights are in fact consistent with liberalism and the principles of individual freedom and equality, then the rationale for the restrictive aspects of the Van der Peet test would dissolve. This, then, is the framework within which I seek to establish that Aboriginal rights can be justified on liberal grounds.

This raises the question of what version or form of liberalism informs my project. As Turner notes, “[i]t is difficult if not impossible to find agreement on the meaning of ‘liberalism.’” Fortunately, it is not necessary for my purposes to reconcile competing versions of liberalism. Rather, my goal is to reconcile Aboriginal rights with liberalism in the context of the majority’s analysis of this topic in Van der Peet. Accordingly, the version of liberalism that is germane to my project is just the version articulated in that decision. Admittedly, the majority’s comments on this topic are sparse, but they are sufficient to provide a useful framework.

Specifically, the majority in Van der Peet describes liberal rights as having the following characteristics: they inhere in individuals; they are general and universal; they are held by all

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46 See R Barsh and J Youngblood Henderson, "The Supreme Court's Van der Peet trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993; John Borrows and Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta L Rev 9; Bradford W Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon” (1997) 42 McGill LJ 1011 at 1030-37; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-1998) 22 Am Indian L Rev. 37; Christie, supra note 2 at 85-86 (arguing that the Van der Peet test has been applied in such a way as to protect specific activities engaged in by individuals, as opposed to the reasons underlying those practices; it is these reasons that would have formed the core of the cultural identities of Aboriginal peoples at the moment before contact); Sanderson, supra note 31 at 115-17, 131 (arguing that the Van der Peet test provides a very thin and empty form of redress insofar as it protects only subsistence rights as opposed to Indigenous institutions).

47 Supra note 32 at paras 95-223 and paras 224-322 respectively.

48 Supra note 1 at 13. See also Kymlicka, Multicultural Citizenship, supra note 3 at 75 (noting that “[t]here has been a striking diversity of views within the liberal tradition, most of which have been shaped by historical contingencies and political exigencies”).
people in society; they are instantiated in the *Charter*; and they ensure that the inherent dignity of each individual is respected.\(^{49}\) From this, we can deduce at least the following three features of the majority’s conception of liberalism. First, the majority’s description is consistent with the three basic tenets of liberalism identified above:\(^{50}\) (i) the individual is the rights-bearer, (ii) individual freedom is a fundamental value, and (iii) individual equality is a fundamental value. Specifically, the rights enshrined in the *Charter*, which are endorsed by the majority in *Van der Peet* as instantiations of liberalism, protect individual equality\(^{51}\) and various individual freedoms.\(^{52}\) Second, it is arguable that the majority would also endorse the more fundamental principle underlying the three tenets of liberalism, namely, that each individual has an essential interest in leading a good life.\(^{53}\) As Kymlicka explains, we are fallible, and at any given moment we may be mistaken about what constitutes the good life.\(^{54}\) Further, the good life must be led “from the inside” in the sense that the individual in question must endorse the conception of the good life guiding his or her life in order for it to have value.\(^{55}\) Even if someone is mistaken about what constitutes the good life, forcing that person to engage in a more worthwhile pursuit will

\(^{49}\) *Supra* note 32 at para 18.

\(^{50}\) See text accompanying notes 1-3.

\(^{51}\) See especially s 15 of the *Charter*, *supra* note 28.

\(^{52}\) See especially the following sections of the *Charter*, *ibid*: “2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association. 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein…. 23. (1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.”

\(^{53}\) See Kymlicka, *Liberalism*, *supra* note 5 at 10.

\(^{54}\) See *ibid* at 10-11.

\(^{55}\) See *ibid* at 12.
not actually improve his or her life.\textsuperscript{56} From these premises it follows that we must be free to question and re-examine our beliefs about the good life.\textsuperscript{57} As Kymlicka puts it:

> Individuals must therefore have the resources and liberties needed to live their lives in accordance with their beliefs about value…Hence the traditional liberal concern for civil and personal liberties. And individuals must have the cultural conditions conducive to acquiring an awareness of different views about the good life, and to acquiring an ability to intelligently examine and re-examine these views. Hence the equally traditional liberal concern for education, freedom of expression, freedom of the press, artistic freedom, etc.\textsuperscript{58}

In other words, the value of individual freedom and individual equality, particularly as these principles are instantiated in the \textit{Charter}, is that they provide the conditions necessary for the liberal project of examining, re-examining and pursuing one’s own conception of the good life. This more fundamental commitment to the pursuit of one’s own conception of the good life, then, likely informs the version of liberalism endorsed by the majority in \textit{Van der Peet}. Finally, the majority would likely have no problem endorsing the principle of the rule of law, which is also a basic premise of liberalism\textsuperscript{59} and which is enshrined in the \textit{Charter}.\textsuperscript{60}

3 \hspace{1em} A Liberal Solution

Will Kymlicka has provided a captivatingly articulate, powerful and influential argument defending Aboriginal rights within the framework of liberalism.\textsuperscript{61} In \textit{Multicultural Citizenship},

\begin{verbatim}
56 See \textit{ibid.}
57 See \textit{ibid} at 13.
58 \textit{Ibid.}
60 See the preamble of the \textit{Charter, supra} note 28, for recognition of the supremacy of the rule of law.
61 For recognition of the significance of Kymlicka’s contribution, see Spaulding, \textit{supra} note 31 at 35-36, and for a discussion of the strengths of Kymlicka’s equality argument, see Spaulding, \textit{supra} note 31 at 44-48.
\end{verbatim}
he presents four interrelated arguments: the equality argument, an argument based on historical agreements, an argument based on the value of cultural diversity, and an argument based on an analogy with states.\footnote{Supra note 3 at 108-126.} In the equality argument, he begins with the basic premise, just discussed, that liberalism ascribes to individuals the freedom not only to choose a conception of the good life, but also to re-examine and revise that conception.\footnote{Ibid at 80-81.} Two preconditions follow from this premise: first, individuals must have access to the resources and liberties required to live their lives “from the inside”, that is, in accordance with the values they have chosen; second, individuals are entitled to the conditions that will allow them to formulate and re-examine their views about the good life.\footnote{Ibid at 81.} In other words, individuals must have the freedom to make certain choices, but these choices only exist within a cultural setting.\footnote{Ibid at 83.} Many people have a deep bond to their own particular culture,\footnote{Ibid at 85-90, 107.} such that their ability to investigate and pursue the good life depends on their ability to participate in their own culture. That is, our culture provides us with the context within which choices about the good life can be made.\footnote{Ibid at 105.} Aboriginal peoples’ cultures are vulnerable, without special protection, to being overrun by decisions made by the majority.\footnote{Ibid at 109.} Accordingly, special rights that would protect Aboriginal peoples’ interest in their culture are warranted. These may include “self-governing powers”\footnote{Ibid at 126.} as well as “territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights.”\footnote{Ibid at 109.} The result of Kymlicka’s equality argument, then, is that what initially may have seemed
discriminatory, namely, special rights for Aboriginal peoples, is in fact not only consistent with liberal principles, but actually required by them.\textsuperscript{71}

It is important to recognize that the equality argument is based on a principle of distributive justice, insofar as it justifies special rights for Aboriginal peoples only in those cases where “there actually is a disadvantage with respect to cultural membership, and if the rights actually serve to rectify the disadvantage.”\textsuperscript{72} In other words, if the culture of a particular Aboriginal people were secure from threat, that people would not be entitled to any special rights:

One could imagine a point where the amount of land reserved for indigenous peoples would not be necessary to provide reasonable external protections, but rather would simply provide unequal opportunities to them. Justice would then require that the holdings of indigenous peoples be subject to the same redistributive taxation as the wealth of other advantaged groups, so as to assist the less well off in society. In the real world, of course, most indigenous peoples are struggling to maintain the bare minimum of land needed to sustain the viability of their communities. But it is possible that their land holdings could exceed what justice allows.\textsuperscript{73}

This passage illustrates that Kymlicka advocates for a kind of distributive justice where the justification for Aboriginal rights depends on Aboriginal culture suffering some threat or disadvantage in relation to mainstream culture and majority decision-makers.

Next, we turn to the historical argument. Here, Kymlicka recognizes that Aboriginal peoples may have special rights that flow from historical agreements, such as the rights preserved in historical treaties.\textsuperscript{74} He defends respect for historical agreements on the principle of self-determination and the importance of ensuring that citizens feel they are able to trust governments.\textsuperscript{75} Kymlicka’s position with respect to Aboriginal peoples who did not execute historical treaties is less clear.

\textsuperscript{71} Ibid at 126.

\textsuperscript{72} Ibid at 109-10, 220, n 5. See also Turner, supra note 1 at 66.

\textsuperscript{73} Kymlicka, Multicultural Citizenship, ibid at 110 [footnotes omitted].

\textsuperscript{74} Ibid at 116.

\textsuperscript{75} Ibid at 119.
On the one hand, he states that those Aboriginal peoples who were involuntarily incorporated into the state through colonization may have a claim to self-determination under international law. On the other hand, he also states that those Aboriginal people who did not execute historical agreements will likely appeal to the equality argument in support of their claim for Aboriginal rights. Kymlicka goes on to state that even those who have executed historical agreements will ultimately need to ground their claims on the equality argument, given the weaknesses that plague historical agreements, including the fact that they are not only subject to interpretation but also require updating and revision. On this last point, he states:

[How should we respond to agreements that are now unfair, due to changing conditions? The land claims recognized in various treaties may be too much, or too little, given changes in the size and lifestyle of indigenous communities….To stick to the letter of historical agreements when they no longer meet the needs of minorities seems wrong.]

In other words, like the equality argument, the historical argument is also subject to a principle of distributive justice; that is, what matters most for Kymlicka are not the actual terms agreed to in the past but the present “needs” of Aboriginal peoples.

According to Kymlicka’s third argument, namely the argument based on cultural diversity, protection of Aboriginal culture is warranted because Aboriginal culture benefits non-Aboriginal members of the larger society. That is, the lives of non-Aboriginal members of society will be enriched if they are able to access not only their own majority culture but also Aboriginal culture. Although Kymlicka concludes that this argument strengthens the equality argument, he also cautions against putting much weight on it and identifies a number of its weaknesses. It

Ibid at 117.

Ibid at 119.

Ibid at 120.

Ibid.

Ibid at 121.

Ibid at 121.

Ibid at 126.

Ibid at 121-23.
should also be noted that the cultural diversity argument is dependent on the equality argument insofar as the former presumes the normative significance, within liberalism, of individuals having access to culture. Moreover, it seems that the same principle of distributive justice that informs the equality argument would also apply to the cultural diversity argument: if non-Aboriginal individuals have no difficulty in accessing Aboriginal culture, or presumably, if they have no desire to do so, then the cultural diversity argument ceases to provide a justification for Aboriginal rights.

Kymlicka’s fourth argument is based on an analogy between Aboriginal peoples and states. Kymlicka notes that the ability of a state to control its borders and its citizenship criteria poses a paradox for liberals. The reason is that liberalism is based on equality of persons, but not all persons are equally entitled to access the freedoms afforded by modern liberal democracies; rather, these states reserve many of their rights for their own citizens, and not everyone who would like to become a citizen of any given state is entitled to do so. In other words, liberal theories seem to equivocate between ‘persons’ and ‘citizens’. Kymlicka’s proposed solution is to posit that liberal states exist not only to protect the civil and political rights and freedoms of individuals, but also to protect an individual’s cultural membership. States, then, are entitled to restrict membership insofar as doing so protects the integrity of the state’s culture. But the culture of some individuals, such as Aboriginal persons, can only be protected by endorsing group-differentiated rights. Like the previous two arguments, this argument is dependent on the equality argument insofar as it ascribes normative significance to the ability of individuals to access culture. As such, it is also informed by a principle of distributive justice.

A number of scholars have critiqued Kymlicka’s arguments. Many have recognized, for example, that on Kymlicka’s view, Aboriginal rights are contingent on Aboriginal peoples’

83 Ibid at 124.
84 Ibid.
85 Ibid at 125.
86 Ibid.
87 Ibid.
experiencing hardship in accessing and reproducing their culture, rather than on their claims to sovereignty. As discussed above, each of Kymlicka’s latter three arguments are either dependent upon (in the case of the cultural diversity argument and the argument from an analogy with states) or subordinate to (in the case of the historical agreements argument) the equality argument. As such, all four arguments are informed by Kymlicka’s distributive principle, namely, that Aboriginal rights serve to rectify some disadvantage experienced by Aboriginal peoples in accessing their culture. This means that Aboriginal rights are contingent on Aboriginal culture actually suffering from some disadvantage. If not for that disadvantage, Kymlicka’s justification for Aboriginal rights would evaporate. Kymlicka’s statement, outlined above, that a situation could arise in which an Aboriginal community possessed “too much” land vis-à-vis the needs of non-Aboriginal citizens who are less well-off, vividly illustrates the implication that Aboriginal rights, such as rights to land, are grounded in the experience of hardship, rather than in the fact that the lands in question constitute the traditional territories of the Aboriginal claimants.

But this is not how Aboriginal peoples understand their claims. As a result,

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88 See e.g. Duncan Ivison, Paul Patton and Will Sanders, “Introduction” in Duncan Ivison, Paul Patton and Will Sanders, eds, Political Theory and the Rights of Indigenous Peoples (Cambridge: Cambridge University Press, 2000) 1 at 20 (contending that an argument for Aboriginal rights based on contemporary disadvantage “misrecognizes the nature of indigenous claims for the recognition of their inherent rights in the facts of contemporary disadvantage relative to an independently derived currency of rights and resources. For some, this is entirely correct. There can be no special pleading on the basis of historical status or cultural difference when it comes to distributing rights and resources. But seeing indigenous claims as so much ‘special pleading’ against a common currency of justice is, arguably, precisely the problem that indigenous peoples are arguing needs to be addressed”). See also Margaret Moore, “An Historical Argument for Indigenous Self-Determination” in Stephen Macedo and Allen Buchanan, eds, Secession and Self-Determination (New York: New York University Press, 2003) 89 at 92 [“An Historical Argument”] (contending that Kymlicka’s argument “subsumes indigenous peoples under the broader category of national minorities and argues that they are entitled to the same kind of rights. This is manifestly not how most indigenous peoples see themselves or their claims. Every term that they use to describe themselves – indigenous, aboriginal, native, First Nations – emphasizes the fact that they were the land’s original occupants, that they were once self-governing people, that they have a special attachment to the land, and that their rights are inextricably connected to the memory of being displaced from land to which they are attached”).

89 See text accompanying notes 73 and 79.

90 See Turner, supra note 1 at 65-66.
the distinctness of indigenous claims, if understood as deriving from their attachment to the land and the history of their relations with the colonial state, is lost or rendered opaque in discussions of distributive justice. Indigenous claims are not just for rights to any fair share of...Canadian resources, but to a particularised share... one that must be understood against the background of the denial of their equal sovereign status, the dispossession of their lands and the destruction of their cultural practices.  

Similarly, Patrick Macklem and Dale Turner both recognize that Kymlicka’s argument fails to account for Aboriginal claims to sovereignty. Macklem explains that Aboriginal peoples seek more than merely the “freedom to engage in cultural practices otherwise threatened by assimilative tendencies;” they seek to assert authority and jurisdiction over land and peoples:

Kymlicka's initial characterization of the problem indelibly marks his conclusions. By viewing the moral or political issue implicated by indigenous difference as one that requires the justification of unequal distributions of political rights and responsibilities within a particular nation-state, Kymlicka includes indigenous people in the very political structure from which they seek a measure of autonomy. The "special political rights and responsibilities" sought by Aboriginal people are jurisdictional in nature and involve elements of sovereignty and governance over individuals, groups and territory. Indian government involves more than the conferral of special rights to engage in particular activities: It also involves rights to determine how, when, where and by whom such activity can occur, and the possibility that such decisions will be made in ways that conflict with nonindigenous political values, such as equality of individuals. The principles used to assess the recognition of Indian forms of government ought to reflect the dimensions of sovereignty implicit in Indian government. Equality of individuals, however modified by viewing cultural membership as morally arbitrary, does not do justice to the nature of the claims being advanced by indigenous people, nor to the value of sovereignty itself.

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91 Ivison, Patton and Sanders, supra note 88 at 10 [citations omitted].


Similarly, Turner argues that Kymlicka’s commitment to a distributive principle “does not fully recognize the legitimacy of Aboriginal sovereignty.” That is, the distributive principle requires that Aboriginal rights, including governance rights, may exist only to the extent that they do not disturb an equal distribution of such rights to other cultures in Canada. On this view, the sovereignty of the Canadian state is still supreme, and accordingly, “Aboriginal peoples argue that limiting their rights in this ahistorical way misrecognizes the source of their right of governance.” In contrast, Turner argues that if the way in which Aboriginal peoples were incorporated into the state was unjust, then this incorporation requires a much fuller investigation.

4 An Alternative Liberal Solution

Given these problems with Kymlicka’s approach, I propose an alternative argument for grounding Aboriginal rights within the framework of liberalism. I am guided by Turner’s exhortation to engage in a sustained investigation of the way in which Aboriginal peoples were “incorporated”, as Kymlicka puts it, into the Canadian state. My approach differs from Turner’s, though, in that Turner seeks to question incorporation from the Aboriginal perspective, while I will evaluate incorporation from both a western perspective and an Aboriginal perspective. My goal of working within the paradigm established by the majority in Van der Peet means that I aim to critique incorporation from the perspective of the liberal principles outlined above. That is, my argument is similar to Kymlicka’s insofar as it attempts to ground Aboriginal rights in the “more basic rights that are generally accepted and relatively
uncontroversial in liberal democratic societies.” At the same time, though, I also aim to respect the Aboriginal perspective regarding the significance of Aboriginal sovereignty.

In my view, theories of Aboriginal rights, such as Kymlicka’s, have been asking the wrong question; they have been seeking to determine how Aboriginal rights can be justified within liberalism. This question itself presupposes the normative legitimacy of the state. For example, Kymlicka’s principle of distributive justice assumes that there is a legitimate state to do the distributing. The state distributes rights, including governance rights, to Aboriginal peoples; Aboriginal peoples are the passive recipients of the distribution, rather than the source of rights. In this way, the distributive principle, in addition to being contingent on Aboriginal peoples experiencing disadvantage and ignoring Aboriginal claims to sovereignty, also simply assumes the state as a given. But this begs the following questions: how did the Canadian state come to be sovereign over Aboriginal territories and peoples? What is the rationale underlying the state’s assertion of sovereignty over Aboriginal territories and peoples? Do these proffered rationales comply with liberal principles, especially the liberal principles outlined above? I contend that we need to invert the questions being asked. Instead of asking how Aboriginal rights can be justified within a liberal state, we need to evaluate the legitimacy of the state’s assertion of sovereignty over Aboriginal territories and peoples. That is, we must examine whether the state’s assertion of sovereignty complies with liberal principles.

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100 Moore, “An Historical Argument”, supra note 88 at 91.

101 C.f. Turner, supra note 1 at 66 (explaining that on Kymlicka’s theory of distributive justice, “the rights of Aboriginal governance are recognized only to the extent that they do not trump the sovereignty of the Canadian state”).

102 In the context of articulating his historical argument, Kymlicka does acknowledge that “there is a prior question of determining which citizens should be governed by which states” (Multicultural Citizenship, supra note 3 at 116). But he does not pursue this line of thought by examining the legitimacy of the Canadian state vis-à-vis Aboriginal peoples and territories. Kymlicka’s acknowledgement here, though, is what motivates Turner’s thesis that Kymlicka’s argument can be reinterpreted in a way that allows for Aboriginal voices in the dominant legal and political discourses by thoroughly investigating how Aboriginal peoples were incorporated into the state (Turner, supra note 1 at 68-70).

103 See Turner, supra note 1 at 66 (explaining that Kymlicka’s argument misrecognizes the source of Aboriginal rights).

104 For instances of scholars critiquing or questioning the legitimacy of Canada’s assertion of sovereignty over Indigenous peoples, see Patrick Macklem, Indigenous Difference and the Constitution of Canada
Scholars have identified shortcomings in basing Aboriginal rights on claims of prior occupancy. Like Kymlicka’s argument, these critiques assume that what must be legitimated are Aboriginal rights, as opposed to the Crown’s assertion of sovereignty. Similarly, the majority in Van der Peet assumed that Aboriginal rights are illiberal against the backdrop of the liberal state, and so Aboriginal rights must be defined with respect to what differentiates Aboriginal peoples, such as prior occupancy. The result is that the notion of prior occupancy now serves to restrict Aboriginal rights. However, in my view, the significance of an Aboriginal claim of prior occupancy is that it calls for a shift in the onus. Aboriginal peoples were here first; the onus is not on them to justify their rights. The onus is on the subsequent arrivals to legitimate their ensuing assertions of sovereignty. Subsequent arrivals are not entitled to assume without more that their assertion of sovereignty is legitimate and consistent with the principles of liberalism, and then to demand to know how Aboriginal rights can be justified within liberalism.

( Toronto: University of Toronto Press, 2001) at 113-28 and 121, n 49 [Indigenous Difference]; John Borrows, Recovering Canada: The Resurgence of Indigenous Law ( Toronto: University of Toronto Press, 2002) at 111-137 and especially 117-18 (arguing that Canada’s assertion of sovereignty violates the principle of the rule of law) [Recovering Canada]; Moore, “An Historical Argument”, supra note 88 at 99-104; Gordon Christie, “A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation” (2005) 23 Windsor YB Access Just 17; Turner, supra note 1 at 32-33 (providing support for the contention that the “legitimacy of the initial formation of the Canadian state is not without controversy”). For an argument in support of the recognition of Aboriginal sovereignty in the Canadian context, see Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Center, University of Saskatchewan, 2012).

105 See Jeremy Waldron, “Indigenity? First Peoples and Last Occupancy” (2003) 1 NZJ PIL 55; Flanagan, supra note 18 at 6, 11-26. See also Kymlicka, Liberalism, supra note 5 at 158-161, n 4. For a discussion of the problems potentially associated with prior occupancy arguments, see Macklem, “Distributing Sovereignty”, supra note 93 at 1327-1333. For a defence of the significance of prior occupancy, see Macklem, Indigenous Difference, ibid at 76-85.

106 See text accompanying notes 31-45.

107 Cf. Macklem, “Normative Dimensions”, supra note 92 at 186 (recognizing that the “normative force behind a claim of prior sovereignty lies in its implicit criticism of the justice of British and French assertions of sovereignty over Aboriginal peoples”).

108 See Hoehn, supra note 104 at 114 (explaining that “[t]he onus of proof for claims of sovereignty over territory should reflect the principle of the equality of peoples. This means that Crown sovereignty cannot be assumed, as it has been in Aboriginal title claims, with the principal onus falling on the Aboriginal nation”).
My argument proceeds as follows. I outline the possible ways in which Canada could have acquired sovereignty over Aboriginal territory at international law. These modes of acquisition include (i) discovery and occupation, (ii) conquest, (iii) cession and (iv) prescription. I then evaluate whether the Crown complied with the international law – and in some cases common law – principles governing these four modes of acquisition. I also evaluate whether these modes of acquisition, as well as the Crown’s actions with respect to these modes of acquisition, comply with the basic principles of liberalism. I conclude that they do not. This lack of a liberally-satisfying explanation for the state’s asserted sovereignty results in a normative lacuna. 109 Although the Crown does not have a liberally-compelling explanation for its assertion of sovereignty over Aboriginal peoples, Aboriginal rights can function as a proxy or place-holder for such an explanation. That is, Aboriginal rights can fill the lacuna.

The significance of Aboriginal rights, then, is that they have the potential to contribute to the legitimation of the assertion of Crown sovereignty over Aboriginal territories and peoples. In other words, it is the Crown’s assertion of sovereignty that must be defended in the context of liberalism, and Aboriginal rights have the potential to contribute to that defence. The content of Aboriginal rights, though, is key. Aboriginal rights can only serve the role of a proxy for a legitimation of the assertion of Crown sovereignty insofar as they approximate the content of Aboriginal sovereignty. I discuss this contention in detail in Chapter Six.

Some scholars have sought to construct a liberal defence of Aboriginal rights on the basis of the principle of self-determination.110 These arguments often contain a premise, whether implicit or explicit, asserting the equality of nations.111 Liberalism, however, rests on the tenet that the rights-bearer is the individual, not the nation.112 To address this problem, some have argued that

109 This argument has developed out of a related yet different argument presented in a paper I wrote during my Juris Doctor program: Karen Drake, *Cowboys and Indians: The Rule of Law or the Wild West? The Lacuna in Section 35 Aboriginal Rights Jurisprudence* (2007) [unpublished, archived with the author]. In this paper, I argued that the lack of an explanation for *de jure* Crown sovereignty in the section 35(1) case law constitutes a lacuna that undermines the rule of law, the solution to which is shared sovereignty between the Crown and Aboriginal peoples in a nation-to-nation relationship.

110 See e.g. Mark Bennett, “‘Indigeneity’ as Self-Determination” (2005) 4 Indigenous LJ 71.

111 See Bennett, *ibid* at 103. See also Moore, “An Historical Argument”, *supra* note 88 at 100.

112 See text accompanying note 2.
a right of self-determination can be grounded in the basic liberal principle of individual autonomy. These arguments may be compelling, and my goal is not to critique them. On my approach, though, the onus is not on Aboriginal peoples to justify their rights. From this perspective, then, it is not necessary for Aboriginal peoples to attempt to build arguments in support of their rights upon principles such as self-determination. Rather, the onus is on the Crown to attempt to ground the legitimacy of its asserted other-determination.

5 Responses to Potential Criticisms

There are at least four potential critiques of my argument. I respond to each of these below.

5.1 Why Focus on the Historical Acquisition of Sovereignty?

One may object that the liberal framework leaves no room for the kind of historical examination into the acquisition of sovereignty that I propose. On this view, “it is far from clear why it matters who first acquired a piece of land.” The reason is that the legitimacy of the liberal state is supposed to flow from the fact that it currently generates a just distribution of goods, rights or benefits for each of its citizens. On this ahistorical approach, it does not matter how a state came to exist in a particular territory, as long as it complies with liberal democratic principles today. Arguments based on a hypothetical social contract, such as John Rawls’ original position, are sometimes thought to embody such an approach. These arguments

113 For a list of such commentators, see Bennett, supra note 110 at 92-93. In contrast, for authors who have criticized “arguments that derive group rights to self-determination from individual rights to autonomy”, see Bennett, supra note 110 at 93.

114 Kymlicka, Liberalism, supra note 5 at 158, n 4. But note that Kymlicka later recognizes, in the context of articulating his historical argument, that in order for the state to treat its citizens with equal respect, “there is a prior question of determining which citizens should be governed by which states” (Multicultural Citizenship, supra note 3 at 116).

115 C.f. Bennett, supra note 110 at 107 (explaining that the “standard legitimating arguments [for colonialism] are that the colonization has resulted in democratic government and that Indigenous peoples are free and equal within the democracy”).


117 See Bennett, supra note 110 at 98, 103; A John Simmons, Justification and Legitimacy: Essays on Rights and Obligations (Cambridge: Cambridge University Press, 2001) at 142-45. But see David C
conceive of the social contract as a “heuristic construct” as opposed to a historical event; given
the justness of the terms of the hypothetical social contract, reasonable persons would agree to
it.\textsuperscript{118} And if reasonable persons would agree to the institutions of a certain kind of state, then the
exercise of political power by such a state is legitimate.\textsuperscript{119} Similarly, on a charitable
interpretation of Jeremy Waldron’s view that historic injustice can be superseded by the passage
of time,\textsuperscript{120} “the recognition of Aboriginal claims to land or self-government rights should not be
about compensating for historical injustice, but about addressing contemporary discrimination
and disadvantage.”\textsuperscript{121} In other words, contemporary liberalism seems to preclude precisely the
kind of investigation into historical circumstances for which I advocate.

The work of A. John Simmons in \textit{Justification and Legitimacy}\textsuperscript{122} provides the foundation for a
compelling response to this potential objection. Simmons demonstrates the importance of the
distinction between showing that a state is justified and showing that it is legitimate.\textsuperscript{123} In
contrast, the approach just described, which pervades contemporary political philosophy

\begin{footnotesize}
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\item Williams, ‘Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal
Indian Law’ (1994) 80 Va L Rev 404 at 420 (arguing that Rawls did not intend for his original position to
serve as “a legitimate basis for government that transcended time and place”); John Rawls, “The Law of
Peoples” (1993) 20:1 Critical Inquiry 36 at 47 (contending that “no people has the right to self-
determination…at the expense of the subjugation of another people”); Spaulding, \textit{supra} note 31 at 101, n
144.
\item See Williams, \textit{ibid} at 419.
\item See Simmons, \textit{supra} note 117 (arguing that for Rawls, “[p]olitical power is legitimate with respect to a
set of persons if it would be reasonable for them to endorse it”).
\item Jeremy Waldron, “Superseding Historic Injustice” (1992) 103:1 Ethics 4. For a comprehensive
refutation of Waldron’s arguments in support of the claim that historic injustice can be superseded by the
\item Ivison, Patton and Sanders, \textit{supra} note 88 at 9-10.
\item \textit{Supra} note 117.
\item \textit{Ibid} at 122.
\end{itemize}
\end{footnotesize}
including that derived from Rawls and Kant conflates these two projects. As Simmons explains, the contemporary view assumes that justifying the state and legitimating the state require the very same arguments. This, however, is not the case. On the one hand, “justifying the state” involves showing that the kind of state in question is morally defensible and that such a state is better than no state. The goal of a justification argument is to show that it is a good thing to have a particular kind of state in the world, given its virtues or the goods it supplies. On the other hand, showing that a state is legitimate involves “showing that the actual history of the state’s relationship to its individual subjects is morally acceptable.”

Legitimacy arguments, then, call for a historical investigation into the actual relations between a state and its citizens. The goal of legitimacy arguments, unlike justification arguments, is to show that a particular state is entitled to exercise sovereignty over its citizens. A state may be legitimate

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124 For an argument in support of the conclusion that “in Rawls’s work one can plainly see, if not a simple conflation of questions about justification and legitimacy, at least a very distinct narrowing of the differences between the argumentative grounds for claims of justification and legitimation”, see Simmons, ibid at 142-45. But for the opposing view, see the final three references at note 117.

125 For a concise summary, as well as a critique, of a liberal argument advanced by Kant against the distinction between justification and legitimacy, see Simmons, ibid at 140-41.

126 See Moore, “Political Legitimacy”, supra note 59 at 144. See also Simmons, ibid at 141-42.

127 Ibid at 122.

128 Ibid at 125-26.

129 Ibid at 126.

130 Ibid at 128.

131 For support for the proposition that legitimacy arguments require a historical examination into the origin of the right claimed, see John William Singer, “Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity” (2011) 86 Ind LJ 763 (stating that “[b]oth the great philosophers and our property law casebooks argue that the origins of property rights are crucial to determining their legitimacy…”). See also Hoehn, supra note 104 at 89.

132 Simmons, ibid at 130. Simmons explains legitimacy as “the complex moral right [a state] possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties”, which I take to be equivalent to the right to exercise sovereign authority.
with respect to certain citizens but not with respect to others, depending on the particular relations between the state and specific citizens.\textsuperscript{133}

Simmons identifies the distinction between justification and legitimacy in the works of both Robert Nozick\textsuperscript{134} and John Locke, although the latter, according to Simmons, articulates the distinction more clearly.\textsuperscript{135} Although Locke did not use these terms, he employed two means of evaluating state power that correspond to Simmons’s distinction.\textsuperscript{136} According to Locke, a state is legitimate only if its citizens have actually freely consented to be governed by that particular state and the state governs in accordance with the terms of the consent given.\textsuperscript{137} Locke also goes on to argue that a certain kind of state (namely, a limited state) is able to rebut the anarchist objection, or in other words, is justified. In so doing, though, he does not appeal to consent.\textsuperscript{138} Accordingly, Locke embraces the justification-legitimacy distinction by allowing that a state to which no one has consented may be justified, although it cannot be legitimate.

One may still wonder what harm lies in collapsing the distinction between justification and legitimacy. Simmons explains that in so doing, we “rob political philosophy of a natural and important dimension of institutional evaluation.”\textsuperscript{139} In other words, justification arguments and legitimacy arguments answer two different questions, and it is not obvious that the former should have any bearing on the latter.\textsuperscript{140} As Simmons puts it, “it is not obvious that the mere unsolicited

\textsuperscript{133} \textit{Ibid.}

\textsuperscript{134} For an account of the distinction between state legitimacy and state justification in Nozick’s political philosophy, see Simmons, \textit{ibid} at 127-28.

\textsuperscript{135} \textit{Ibid} at 129.

\textsuperscript{136} \textit{Ibid} at 128.

\textsuperscript{137} \textit{Ibid} at 129.

\textsuperscript{138} \textit{Ibid}.

\textsuperscript{139} \textit{Ibid} at 142.

\textsuperscript{140} \textit{Ibid} at 132 (arguing that the proposition that “a state is stable and lawful and refrains from prosecution shows that it is good (or, at least, not bad) in certain ways, but it does not obviously show that the state has the kind of special moral relationship with any particular subjects that gives it a right to rule them”).
provision of benefits (and good treatment) would ground a right to direct and coerce.”

The reason is that the factors that ground a state’s justification and the factors that ground a state’s legitimacy “are simply independent variables.” Simmons illustrates this point with an analogy between a state and a business. Just because a particular business provides a valuable service or offers good prices, it is not entitled to force any particular person to accept those services against his or her will. Similarly, the fact that a state possesses certain virtues does not entitle it to exercise sovereignty over particular individuals. If the opposite were the case, we would have no reason to submit to the sovereignty of our own state as opposed to any other just state.

A thought experiment may illustrate this point. Suppose that the constitution of the United States of America provides for the most effective protection of social goods and benefits, such that reasonable persons would adopt it. Suppose that Canada’s constitution also protects social goods and benefits, but to a slightly lesser extent. If we are warranted in conflating justification and legitimacy arguments, then America’s assertion of sovereignty over Canadian territory and citizens, based on nothing more than the value of its constitution, would be legitimate. But of course, such a result would violate the principle of the sovereign equality of states, according to which states are forbidden from attempting “to undermine another state’s free exercise of its

141 Ibid at 139.
142 Ibid at 136.
143 Ibid.
144 Ibid at 137.
145 C.f. Williams, supra note 117 at 420-21, where he formulates a very similar thought experiment. He exhorts the reader to suppose that England and Wales are different countries; he then uses England and Wales as his example countries. For the sake of enhancing the relevancy of Williams’s thought experiment in the context of my thesis, I have changed the entities from England and Wales to the United States of America and Canada. Further, Williams’s point differs slightly from mine; he argues that for social contractarians such as Rawls, the fact that England’s constitution “best encapsulates the social contract that ‘reasonable’ persons would adopt” demonstrates “only that the English government exercises legitimate sovereignty over English citizens, despite the absence of formal individual consent. It does not demonstrate that the English can exercise sovereignty over the Welsh simply because they possess a constitutional form that more closely approximates the Ideal Social Contract.”
sovereign will.” For all of these reasons, the conflation of justification and legitimacy arguments should be rejected.

This brings us to the issue of the criteria for establishing legitimacy. I do not intend to defend any particular positive criteria of state legitimacy, as my project does not require that I do so. Instead, I advance a negative position insofar as I identify the criteria that would disqualify a particular kind of state from being legitimate. Specifically, in my view, a state that purports to enjoy a liberal justification cannot be legitimate if the manner in which it acquired sovereignty over its citizens violated the basic tenets of liberalism. Thus, if a liberal state could show that it complied with Locke’s strong conception of legitimacy, or in other words, that it actually obtained consent to exercise sovereignty over its citizens, it would be legitimate. The Supreme Court of Canada’s articulation of the purpose of section 35(1) and the rationale underlying the duty to consult and accommodate in *Haida Nation* and *Taku River* is consistent with a strong Lockean requirement of consent. Chief Justice McLachlin, writing for the Court in both decisions, recognizes the illegitimacy of Crown sovereignty when she refers to it as *de facto*, as opposed to *de jure*. For example, in *Taku River* she states that the purpose of section 35(1) “is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.” Similarly, in *Haida Nation*, she explains that the honour of the Crown arises “from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.” As Brian Slattery

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146 John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, Inc., 2008) at 40 (explaining that this “prohibition is so central to the entire international legal system in the post-Second World War period that it is considered a ‘peremptory norm’ of international law – that is, a rule so fundamental that it cannot be set aside even by agreement between states” [footnotes omitted]).

147 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

148 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].


150 *Supra* note 148 at para 42.

151 *Supra* note 147 at para 32.
explains, *de facto* means “illegal or illegitimate but accepted for practical purposes” in contrast to *de jure* which means “rightful, legitimate, just…and [in] full compliance with all legal requirements.”\textsuperscript{152} Chief Justice McLachlin then goes on to explain in *Haida Nation* that the reconciliation of Aboriginal sovereignty and *assumed* Crown sovereignty occurs through negotiated treaties:

\textit{20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims…. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises"…. This promise is realized and *sovereignty claims reconciled through the process of honourable negotiation*. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate. 

\ldots

\textit{25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.}\textsuperscript{153}

Taken together, these passages indicate that in at least some circumstances in Canada today, Crown sovereignty is illegitimate, and that the legitimacy of the Crown’s assertion of sovereignty depends upon the Crown and Aboriginal peoples entering into negotiated treaties

\textsuperscript{152} Supra note 149 at 437-38, citing Black’s Law Dictionary, 5th ed (St. Paul: West Publishing Co., 1979) at 375, 382. See also Hoehn, supra note 104 at 34.

\textsuperscript{153} Supra note 147 at paras 20, 25 [emphasis added].
addressing this issue. In other words, the Supreme Court of Canada seems to endorse a Lockean conception of legitimacy that requires a state to obtain actual consent to exercise sovereignty, such as through negotiated treaties to that effect.

The Court’s recognition that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty” is also significant because it acknowledges Aboriginal sovereignty. The legitimacy of Aboriginal sovereignty is not in dispute; only the Crown’s sovereignty is described as “de facto”. This acknowledgement lends further support to the recommendation that the onus be shifted onto the Crown to provide a foundation for the legitimacy of its assumed sovereignty.

The Supreme Court of Canada, then, has expressed support for the Lockean view. It remains to be seen, though, whether any other method of acquiring sovereignty may prove to be equally legitimate. That is, it may be the case that actual consent, although sufficient to establish legitimacy, is not necessary. But what is necessary is compliance with liberal principles, including those identified above, such as the rule of law. Accordingly, an acquisition of sovereignty that did not meet international law requirements would not be legitimate. Further, an acquisition of sovereignty that complied with all applicable international law requirements but violated some other liberal principle, such as individual equality or individual freedom, including the freedom to examine and pursue one’s own conception of the good life, would also not be legitimate in the case of a liberal state. For these reasons, the next four chapters analyze the four modes of acquisition that could potentially be applicable in the Canadian context in order to determine both whether the Crown has complied with the legal requirements of any of these modes and also whether each of these modes comply with liberal principles.

See Slattery, supra note 149 at 438 (explaining that the meaning of the passages cited above is that the assertion of Crown sovereignty “will continue to be legally deficient until there has been a just settlement of [Aboriginal] rights through negotiated treaties”); Hoehn, supra note 104 at 34.

Haida Nation, supra note 147 at para 20.

See text accompanying notes 49-60.
5.2 The Act of State Doctrine

A potential critique of my position is that it calls upon the courts to delve into an interrogation of Crown sovereignty despite the act of state doctrine, which seems to preclude just such an interrogation. In its most basic formulation, this doctrine provides that the acquisition of territory by a sovereign state is an act of state that is not justiciable in municipal courts. This doctrine shares some similarities with the contemporary Kantian and Rawlsian view discussed above, given that both appear to preclude the type of investigation required to evaluate the legitimacy of the state. Scholars have called for the rejection of the act of state doctrine on normative grounds in the context of Aboriginal claims, particularly in the light of the promise of section 35(1) of the Constitution Act, 1982. Most recently, Felix Hoehn has presented a particularly thorough and persuasive critique of the act of state doctrine. My argument here draws upon these contributions insofar as I contend that the rationale underlying the act of state doctrine remains intact as long as courts examine only the Crown’s claim to exercise *de jure* sovereignty, without disturbing the Crown’s *de facto* sovereignty. To understand this position, it is necessary to first consider the differences between the various articulations of the doctrine.

In the context of Aboriginal rights jurisprudence, courts have articulated at least two variations of the act of state doctrine. The first variation “denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty.” This is the principle on which the British Columbia Court of Appeal relied to disallow the Nisga’a’s

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157 *Mabo v Queensland (No 2)*, [1992] HCA 23, 175 CLR 1 at 31 [*Mabo*].


160 *Supra* note 104 at 38-44.

161 See Hoehn, *ibid* at 38-44; Walters, *supra* note 159 at 502-503 (arguing that “it is possible to subject the concept of Crown sovereignty to critical reinterpretation without denying its existence”).

162 *Calder v British Columbia (Attorney-General)*, [1973] SCR 313 at 404, 34 DLR (3d) 145 p [*Calder*].
claim for Aboriginal title in the *Calder* case. In this decision, Justices Tysoe and Maclean each relied on the proposition that when a sovereign first acquires a territory, that acquisition constitutes an act of state, and even where international law protects certain rights of the original inhabitants, a municipal court does not have the authority to adjudicate those rights unless the new sovereign has first recognized them within the domestic law. As no legislation protecting the Nisga’a’s right to Aboriginal title existed, the British Columbia Court of Appeal dismissed the Nisga’a’s appeal. The Supreme Court of Canada, though, overturned this decision. Justice Hall identified the following *ratio* underpinning this version of the act of state doctrine: “a municipal Court could not review the Act of State if in so doing the Court would be enforcing a treaty between two Sovereign States”. Justice Hall rejected the application of this doctrine in the *Calder* case because the Nisga’a were not seeking to enforce a treaty between two sovereign states. It is possible to understand this *ratio* either narrowly, as Hall J did, or more broadly. On this latter view, the *ratio* prohibits municipal courts from acting as an arbiter of international law issues between two foreign sovereign states. However, by examining the legitimacy of Crown sovereignty vis-à-vis Aboriginal peoples, a court would not be acting as an arbiter of international law issues between two foreign sovereign states just as the Supreme Court of Canada did “not purport to act as an arbiter between sovereign states…within the international

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163 *Calder et al v British Columbia (AG)* (1970), 13 DLR (3d) 64 (available on QL) (BCCA).

164 *Ibid* at 70-73, 103-106.


166 *Supra* note 162 at 405.

167 *Ibid* at 406. Although Hall J was writing for himself and only two others, and Judson J (also writing on behalf of himself and two others) did not explicitly address the act of state doctrine, Judson J’s recognition of common law Aboriginal title is a tacit rejection of the act of state doctrine. See also Borrows, *Recovering Canada*, *supra* note 104 at 120 (explaining Hall J’s conclusion that the act of state doctrine applies only when the Crown acquires underlying title by treaty or conquest, both of which were rare in Canada).

community” when it decided to answer the question whether Quebec has a right to secede unilaterally from Canada.  

The second variation of the act of state doctrine articulated in the Aboriginal rights context states: "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state." Different possible rationales for this version are suggested by the relevant literature. For instance, it may be thought that municipal courts are not well suited to the task of examining the manner in which a state acquires new territory. This, however, cannot be the correct rationale, given the common law principle that requires municipal courts to examine the manner in which the Crown acquired sovereignty in order to determine which body of law is in force in the new territory. 

For example, if a foreign territory was acquired by discovery and occupation, then the English common law became the law of the land with the arrival of English subjects. But if the territory was acquired by cession or conquest, then the original laws remained in place until the Crown changed them. What this means is that municipal courts must be able to apply international law doctrines in order to determine whether cession, conquest or occupation took place within their own state.


170 New South Wales v The Commonwealth, [1975] HCA 58, (1975) 135 CLR 337 at 338. This passage is also cited in Mabo, supra note 157 at 31.

171 This rationale is suggested by Hall J’s statement in Calder that “English Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory”: supra note 162 at 404.

172 See Mabo, supra note 157 at 32.


174 See Mabo, ibid at 35.

175 See Mabo, ibid at 32 (holding that “[a]lthough the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown”). See also Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) at 131-32 (explaining that according to the British common law, courts have jurisdiction to determine the constitutional status of
Another possible rationale is that it is not the role of the judiciary to interfere in the territorial integrity of the state. This rationale is supported by Justice Brennan’s statement in the *Mabo* decision of the High Court of Australia, according to which the act of state doctrine “precludes any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions.”176 Or as Mark Walters puts it, “it is simply not the business of Canadian judges to begin dismantling the Canadian state.”177 This raises the question of whether my proposed approach places Canada’s territorial integrity in jeopardy. The answer is that it does not. My call for an investigation into the legitimacy of Crown sovereignty requires only an examination of whether that sovereignty is *de jure*, not whether it is *de facto*.178

A conclusion that the Crown lacks *de jure* sovereignty need not threaten Canada’s territorial integrity. As Hoehn argues, it is possible to imagine and define Aboriginal and Canadian sovereignties in non-stereotypical and non-absolutist terms that do not presuppose two mutually acquired territory, such as whether the territory was acquired by discovery and occupation, conquest or cession).


177 *Supra* note 159 at 502.

178 Kent McNeil notes that it would be unrealistic to deny that Canada now has *de facto* sovereignty over British Columbia: Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest” in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35 at 47. It is not obvious, though, that the same can be said for all of Canada. For example, the Royal Commission on Aboriginal Peoples held that the federal government’s relocation of several hundred Inuit from northern Quebec to the High Arctic islands in 1953 was motivated at least in part by a concern with shoring up Canada’s *de facto* sovereignty over this territory: Royal Commission on Aboriginal Peoples, *The High Arctic Relocation: A Report on the 1953-55 Relocation* (Ottawa: Canada Communication Group Publishing, 1994) at 118, 131-32. In other words, federal government officials acknowledged the tenuous nature of Canada’s *de facto* sovereignty in at least some areas as late as 1953. It is not necessary for my argument, though, to resolve the issue of the extent of Canada’s *de facto* sovereignty. My argument calls for an evaluation of *de jure* sovereignty, but leaves untouched the issue of *de facto* sovereignty.
exclusive dominions.\textsuperscript{179} Such an approach is much more likely to achieve the reconciliation called for by section 35(1) than a division of Canada’s territory.\textsuperscript{180}

According to this approach, then, the act of state doctrine prohibits the judiciary from assessing the Crown’s \textit{de facto} sovereignty, but not its claim to exercise \textit{de jure} sovereignty.\textsuperscript{181} As Hoehn puts it, “although the act of state doctrine protects Canada’s territorial integrity, in domestic matters the doctrine will not shelter Crown assertions of sovereignty that do not meet constitutional standards of legitimacy.”\textsuperscript{182} Courts must be entitled to question the legitimacy of Crown sovereignty, as this is precisely what the Supreme Court of Canada did in its \textit{Haida Nation} and \textit{Taku River} decisions when it described Crown sovereignty as being merely \textit{de facto} as opposed to \textit{de jure}, and it explained that negotiated treaties between the Crown and Aboriginal peoples are needed to secure the legitimacy of Canada’s sovereignty.\textsuperscript{183} This approach also coheres with the passage in \textit{Sparrow} where a unanimous Supreme Court of Canada adopted Noel Lyon’s view that section 35 “calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”\textsuperscript{184} To be consistent with these decisions, then, the act of state doctrine must allow for an assessment of the legitimacy of Crown assertions of sovereignty, but it can also still bar any attack on Canada’s territorial integrity.\textsuperscript{185}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{179} Supra note 104 at 43.
\item\textsuperscript{180} See Hoehn, \textit{ibid}. Cf. Hoehn, \textit{ibid} at 57-59 (arguing that recognition of Aboriginal sovereignty by the courts would not necessarily lead to a disruption in Canada’s territorial integrity but rather would “strengthen the legitimacy of Canada’s claim to territorial integrity” pursuant to international law principles).
\item\textsuperscript{181} See Hoehn, \textit{ibid} at 38-44; Walters, \textit{supra} note 159 at 502-503 (arguing that “it is possible to subject the concept of Crown sovereignty to critical reinterpretation without denying its existence”).
\item\textsuperscript{182} Ibid at 79.
\item\textsuperscript{183} See text accompanying notes 146-54.
\item\textsuperscript{184} \textit{R v Sparrow}, [1990] 1 SCR 1075 at 1106, 70 DLR (4th) 385 [\textit{Sparrow}], citing Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall LJ 95 at 100. This passage was also quoted by McLachlin J in her dissent in \textit{Van der Peet}, \textit{supra} note 32 at para 229.
\item\textsuperscript{185} See Walters, \textit{supra} note 159 at 503; Hoehn, \textit{supra} note 104 at 39.
\end{enumerate}
\end{footnotesize}
On this analysis of the act of state doctrine, my proposed project is unproblematic. My argument calls for an assessment of the legitimacy of Crown sovereignty, but it does not contemplate a disassembling of the Canadian state.

5.3 Realpolitik

Dwight Newman criticizes the approaches of both Kymlicka and Turner on the ground that their particular commitments to liberalism mean that they are engaging in realpolitik. Newman’s criticism of Kymlicka is a response to the rationale Kymlicka provides for attempting to reconcile liberalism and Aboriginal rights, as opposed to defending Aboriginal rights on some other, non-liberal basis. Kymlicka argues that an attempt to reconcile Aboriginal rights with liberalism is worthwhile “whether one’s first commitment is to liberalism, or to minority rights.” According to Kymlicka, such an attempt is preferable to a non-liberal defence of Aboriginal rights because the non-liberal arguments are not very strong politically, for they do not confront liberal fears about minority rights. They don’t explain why minority rights aren’t the first step on the road to apartheid, or what serves to prevent massive violations of individual rights in the name of the group. Opponents of liberalism may find them convincing, but they may not be the ones who need convincing on this point. For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand.

This passage may seem prescient in the light of the view of the majority of the Supreme Court of Canada in Van der Peet that Aboriginal rights must be restricted in particular ways because they are, in the majority’s view, illiberal. That being said, a possible interpretation of Kymlicka’s passage may be that even those who reject liberalism, regardless of how compelling their reasons are for such a rejection, should endorse the attempt to reconcile Aboriginal rights with liberalism.

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186 See Kymlicka, Liberalism, supra note 5 at 153ff.
187 Ibid at 153.
188 Ibid at 153-54 [emphasis in original].
189 See text accompanying notes 30-45.
precisely because such an approach would persuade those in power who do subscribe to liberalism. This is presumably Newman’s reading of Kymlicka, and hence Newman’s reason for rejecting Kymlicka’s approach on the ground that it succumbs to realpolitik. Newman also characterizes Turner as working within Kymlicka’s realpolitik, particularly on the basis of the following passage from Turner’s *This is not a Peace Pipe: Towards a Critical Indigenous Philosophy*: “If Aboriginal peoples are going to continue to assert that they possess unique forms of rights, sovereignty, and nationhood that the state must recognize as legitimate they will have to convince the dominant culture of the legitimacy of those assertions.”

In my view, my approach would constitute realpolitik if I advanced it while at the same time repudiating the fundamental tenets of liberalism or conceding that it is not possible to provide a rational defence of liberalism. My approach would also constitute realpolitik if I argued that even those who do not subscribe to liberalism, including potentially at least some Indigenous nations, should adopt or endorse my approach merely for the sake of persuading those who do subscribe to liberalism. Regarding the former option, while providing a defence of liberalism itself is beyond the scope of this work, that fact does not mean that I disclaim the basic principles of liberalism, nor that I concede that such principles cannot be justified on rational grounds. Regarding the latter option, I am not making the claim that anyone who does not subscribe to liberalism should adopt or endorse my argument. For those who are interested in exploring how Aboriginal rights can be understood as being consistent with the principles underlying liberalism, my argument will be germane. It is true that a desired outcome of my approach is that it will ground a more comprehensive conception of Aboriginal rights, one that does not include the restrictive aspects of the *Van der Peet* test discussed above. That fact alone, though, does not convert my argument into an exercise in realpolitik.


192 Turner, *supra* note 1 at 73.

193 See text accompanying notes 30-45.
5.4 Colonization of Indigenous Philosophies

A related but slightly different position holds that an attempt to ground Aboriginal rights within a liberal framework “effectively silences the beliefs Aboriginal peoples themselves hold about Aboriginal rights.”

Dwight Newman raises this critique against Kymlicka’s attempt to provide a liberal foundation for Aboriginal rights. For example, Newman notes that Kymlicka’s argument defends collective legal but not collective moral rights (for any collectivity, Aboriginal and non-Aboriginal alike). And yet, according to Newman, Indigenous peoples seem to endorse collective moral rights insofar as what was then the Draft Declaration on the Rights of Indigenous Peoples, to which Indigenous peoples contributed substantially, protects collective rights. Newman goes on to argue that the protection of these collective rights is evidence of the Indigenous view that communities can hold collective moral rights, but this is the very proposition that Kymlicka rejects. To address this issue, Newman advocates for a cross-cultural moral theory project that takes Aboriginal perspectives seriously by fully engaging with Aboriginal positions and views. Kymlicka’s approach, in contrast, “in effect requires Aboriginal communities to explain themselves in Western (literal and figurative) language.

Similarly, Gordon Christie argues that in the context of Aboriginal rights, liberalism generates “intellectual colonialism” insofar as it imposes its own principles and values onto Aboriginal communities, leaving no room for Aboriginal peoples to define Aboriginal rights in accordance


195 Ibid at 744.

196 Ibid at 745.

197 Ibid.

198 Ibid at 748.

199 Newman, “You Still Know Nothin’ 'Bout Me”, ibid at 747. See also Bennett, supra note 110 at 87 (arguing that “it is predominantly liberal citizens and politicians that need to be convinced of the rights of Indigenous peoples. This is problematic to the extent that it silences unique Indigenous perspectives of their claims and justifications. While it is pragmatic in the short term to argue for Indigenous rights by way of Western political monologue, this only delays analyzing a more crucial issue: that of the importance of such thought for Indigenous peoples and their own traditions of political thought”).
with their own conceptions of value and forms of knowledge.\textsuperscript{200} Glen Coulthard makes a comparable point in his review of Dale Turner’s This is not a Peace Pipe: Towards a Critical Indigenous Philosophy.\textsuperscript{201} Turner tackles the question of how Aboriginal worldviews may more effectively inform the meaning and content of Aboriginal rights.\textsuperscript{202} The solution he proposes is the formation of a community of Indigenous intellectuals called “word warriors” who are able to communicate Indigenous forms of knowledge in ways that are comprehensible within the dominant legal and political discourses of the Canadian state.\textsuperscript{203} According to Coulthard, Turner assumes that the Indigenous perspectives advanced by word warriors will have the capacity to shape mainstream discussions of Aboriginal rights; but Turner does not adequately address the assimilative power that dominant discourses may have on word warriors.\textsuperscript{204}

My humble hope is that my project avoids or at least mitigates these potential problems. Unlike Kymlicka’s argument, I do not employ liberal principles in support of a direct liberal defence of Aboriginal rights. Instead, I argue only indirectly for the compatibility of Aboriginal rights, including Aboriginal sovereignty, with liberalism, by using liberal principles to critique the legitimacy of Crown sovereignty. By showing that the Crown’s assertion of sovereignty over Aboriginal territories and peoples does not comply with fundamental liberal principles, I aim to open up space for Aboriginal-Crown negotiations about shared sovereignty where Aboriginal perspectives can be articulated on their own terms. If Crown sovereignty lacks legitimacy on liberal grounds, then there is no reason why the dominant legal and political discourses and values, including Canadian laws, would serve as the backdrop or bottom line for Aboriginal-Crown negotiations. On the contrary, because it is Crown sovereignty that is only \textit{de facto} and needs to be legitimated, Aboriginal jurisdiction, including Aboriginal legal systems, should form the backdrop for Aboriginal-Crown negotiations. Word warriors still have important work to do.

\textsuperscript{200} Supra note 2 at 70-72.

\textsuperscript{201} Supra note 1.

\textsuperscript{202} Ibid at 5.

\textsuperscript{203} Ibid.

But the obligation is not solely on Indigenous word warriors to bridge the gap between the two worldviews. There is at least an equal, if not stronger, obligation on non-Aboriginal representatives, negotiators and citizens to educate themselves about Aboriginal perspectives, including Aboriginal legal systems and the values underlying those systems.

6 Summary

I have argued that the traditional approach needs to be inverted. It is not Aboriginal rights that require a liberal defence. Rather, it is the legitimacy of the Canadian state’s assertion of sovereignty over Aboriginal peoples and territories that requires a liberal defence. The next four chapters examine whether any of the four relevant modes of acquisition are able to form a liberally-satisfying basis for the legitimacy of Crown sovereignty.
Chapter Two
Occupation and the Doctrine of Discovery

1 Overview

In the next four chapters, I examine each of the various modes of acquiring sovereignty at international law for the sake of evaluating the normative legitimacy of Canada’s assertion of sovereignty over Aboriginal peoples and territories. Although I begin by inquiring whether Britain, France or Canada, as the case may be, has met the legal requirements of each of the modes of acquisition, my principal concern is with evaluating whether these modes comply with the fundamental principles of liberalism: individual equality, individual liberty and autonomy, and the rule of law. The legal analysis is relevant because a lack of legality may indicate a deficit of normative legitimacy; that is, a state that attempts to justify its assertion of sovereignty by reference to a mode of acquisition without having complied with the basic legal requirements of that mode may run up against problems conforming to the principles of equality, autonomy and the rule of law. Accordingly, my investigation consists of both a legal analysis and a normative evaluation, with an emphasis on the latter.

The five traditionally identified modes of acquiring sovereignty at international law are occupation, accretion, cession, conquest and prescription.¹ Although James Crawford warns against an uncritical reliance on this orthodox classification scheme,² his caution is germane only in the context of competing sovereignty claims adjudicated by international law tribunals. Municipal courts, in contrast, regularly refer to the modes of acquisition insofar as the common law requires municipal courts to examine the manner in which the Crown acquired sovereignty in order to determine which body of law is in force in the new territory.³ Further, both Canadian

1 See James Crawford, Brownlie’s Principles of Public International Law, 8th ed (Oxford: Oxford University Press, 2012) at 220.

2 Ibid at 221 (explaining that international tribunals do not necessarily apply the orthodox classification scheme when adjudicating competing claims to sovereignty; rather, they consider the interaction of a variety of principles, including the principles of acquiescence and recognition. As such, “[t]he result often cannot be ascribed to any single ‘mode of acquisition’”).

3 See Mabo v Queensland (No 2), [1992] HCA 23, 175 CLR 1 at 32.
courts\textsuperscript{4} and scholars\textsuperscript{5} have identified four of the five modes of acquiring sovereignty as potential legitimations for Britain’s, and later Canada’s, early assertions of sovereignty. As such, a critical examination of the application of the orthodox classification scheme to the Canadian context is quite appropriate for my purposes.

Of the five modes identified, accretion is not relevant in the Canadian context.\textsuperscript{6} I will consider each of the other modes of acquiring sovereignty: occupation, cession, conquest and prescription. This chapter focuses on occupation, including the concomitant doctrine of discovery, while the remaining three modes will be discussed in the subsequent three chapters.

I begin my examination of occupation with an overview of this mode’s legal requirements, one of which is that the territory being occupied must be empty, or \textit{terra nullius}. As Canada was not empty when Europeans arrived, the discussion of occupation leads to a discussion of the doctrine of discovery. I note that the doctrine of discovery has varied in its application both over time and geographically, and that scholars have articulated various permutations of it. The situation in Canada was no different. I identify three different formulations of the doctrine that scholars have claimed describe the Canadian situation. I refer to these as the strong version, the weak version, and the intermediate version. I argue that the intermediate version provides the most accurate characterization of Britain’s practices within Canada. I then engage in a critical evaluation of the doctrine of the discovery. I provide a summary of the critique already leveled by numerous scholars, namely that the doctrine is ethnocentric. I then go on to show that this ethnocentrism

\textsuperscript{4} For a discussion of Canadian courts’ reliance on the doctrine of discovery to justify assertions of sovereignty, see text accompany notes 76 and 77. For a discussion of Canadian courts’ reliance on conquest to justify assertions of sovereignty, see Chapter Three, text accompanying notes 73-74. For a discussion of Canadian courts’ treatment of cession, see Chapter Four, text accompanying notes 10-15. For a discussion of Canadian courts’ treatment of prescription, see Chapter Five, text accompanying notes 20-28.

\textsuperscript{5} See e.g. John Borrows, \textit{Recovering Canada: The Resurgence of Indigenous Law} (Toronto: University of Toronto Press, 2002) at 117.

\textsuperscript{6} For an account of accretion, see John H Currie, \textit{Public International Law}, 2d ed (Toronto: Irwin Law, 2008) at 285 (explaining that “[a]ccretion and erosion refer to natural processes that have the effect of gradually adding to or decreasing the extent of territory already under the sovereignty of a state...In general, accretion and erosion cause little difficulty in the ascertainment of sovereignty over territory, the assumption being that any increase in territory simply accrues to the state already enjoying sovereignty over the appurtenant territory”).
underlies the incompatibility between the doctrine of discovery and liberalism. That is, as recognized by Patrick Macklem, the doctrine of discovery fails to treat Indigenous nations as formal equals with European nations. In addition, the doctrine of discovery fails to accord Indigenous peoples both freedom to choose their own conception of the good life and freedom of religion. As such, the doctrine of discovery violates not only the principle of equality, but also the principle of liberty as embodied by the principle of individual autonomy, all of which are fundamental aspects of liberalism.

2 Occupation

John Currie provides a concise account of occupation as a mode of acquiring sovereignty: “In essence, the doctrine of effective occupation as a basis of sovereign title requires an effective and continuous display of state authority over territory, coupled with a demonstrated intent by the state to establish and maintain its sovereignty over that territory.” Traditionally, occupation is only available in the case of territory that is *terra nullius*, that is, territory not yet possessed by a socially and politically organized community. This requirement distinguishes occupation from prescription, whereby a state may gain sovereignty over territory already in the possession of another sovereign by effectively occupying that territory.

The doctrine of effective occupation is not applicable in the Canadian context insofar as the territory that came to be known as Canada was not *terra nullius* when Europeans arrived. Rather, this territory was occupied by Indigenous nations who were living in socially and politically

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7 *Ibid* at 275.


9 See Currie, *supra* note 6 at 275.

10 In order to comply with the doctrine of prescription, a state must also meet certain other requirements, which are discussed in Chapter Five.
organized communities. Certain European nations, however, devised a means of claiming sovereignty over Indigenous territories by deeming those territories to be *terrae nullius*. As such, the concept of *terra nullius* has been described as having two definitions: “a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all.” England and France, in particular, relied on the concept of *terra nullius* in order to justify their use of the doctrine of discovery in support of their assertions of sovereignty in the new world. Accordingly, an examination of occupation in the context of European claims over Indigenous territories reveals the necessity of analyzing the doctrine of discovery. The remainder of this chapter is devoted to that task.

3 The Doctrine of Discovery

3.1 Overview of the Doctrine of Discovery

Although there are a number of variations of the doctrine of discovery, some initial statements can be made by way of a general overview. Robert Miller provides the following broad outline of the doctrine:

> In essence, the Doctrine of Discovery provided that newly arrived Europeans immediately and automatically acquired legally recognized property rights in native lands and also gained governmental, political, and commercial rights over the inhabitants without the knowledge or the consent of the Indigenous peoples.

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11 See *Calder v British Columbia (Attorney-General)*, [1973] SCR 313 at 328, 34 DLR (3d) 145 p, Judson J [*Calder*] (holding that “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries”). See also *R v Van der Peet*, [1996] 2 SCR 507 at para 30, 137 DLR (4th) 289, Lamer CJ [*Van der Peet*] (holding that “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries”).

12 See Miller, *supra* note 8 at 21.

13 Miller, *ibid*.

14 See Miller, *ibid* at 21-22.

15 For a discussion of the doctrine of discovery, see Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall LJ 681 at 685ff.

16 *Supra* note 8 at 2.
Two justifications have been provided for applying the doctrine of discovery and the concept of *terra nullius* to lands occupied by Indigenous peoples: a presumed lack of civilization on the part of Indigenous peoples, and the fact that Indigenous peoples were not Christians.\(^\text{17}\) I critique these purported justifications in Section Four below. An analysis of the doctrine of discovery in the Canadian context is necessary because Canadian courts have, even in modern decisions, pointed to this doctrine as the justification for Crown assertions of sovereignty over Indigenous lands and peoples.\(^\text{18}\) Indeed, the dominant European view has long been that European states acquired sovereignty over North America by means of some variation of the doctrine of discovery.\(^\text{19}\)

As mentioned, there are numerous permutations of the doctrine of discovery. Its implementation has varied both temporally, over the course of approximately the last sixteen centuries,\(^\text{20}\) and geographically, with its application to Indigenous territories around the globe.\(^\text{21}\) Scholars have articulated differing versions and disagreed on the doctrine’s precise requirements.\(^\text{22}\) I identify three versions that scholars have attempted to apply to the Canadian context; I refer to these as the strong version, the weak version and the intermediate version. The strong version holds that a

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\(^{17}\) See Miller, *ibid* at 8; Lindley, *supra* note 8 at 18-19; *Johnson v M’Intosh* (1823), 8 Wheaton 543 at 576, 21 US 543 (USSC) [*Johnson v M’Intosh*].

\(^{18}\) See especially *Guerin v Canada*, [1984] 2 SCR 335 at 378, 13 DLR (4th) 321, Dickson J [*Guerin*]; *Van der Peet*, supra note 11 at paras 35-36, 49; *Mitchell v MNR*, 2001 SCC 33 at paras 112-13, [2001] 1 SCR 911, Binnie J, minority opinion. See also *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385, where the Court held that “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” and cited *Johnson v M’Intosh*, supra note 8, as support for this proposition. As discussed below at Sections 3.4 and 3.5, *Johnson v M’Intosh* grounds the assertion of European sovereignty over Indigenous lands on the intermediate version of the doctrine of discovery. See also *Tsilhqot’in Nation v British Columbia*, 2012 BCCA 285 at para 166, [2012] 3 CNLR 333.


\(^{20}\) See Miller, *supra* note 8 at 9-22.

\(^{21}\) See Lindley, *supra* note 8 at 24-44.

\(^{22}\) See Lindley, *ibid* at 10-23. Contra Miller, *supra* note 8 at 22 (arguing that “Europeans occasionally disagreed over the exact meaning of Discovery, and even sometimes violently disputed their divergent claims; but one principle they never disagreed about was that the Indigenous peoples and nations lost sovereign, commercial, and real property rights immediately upon their ‘discovery’ by Europeans”).
European state acquires sovereignty and unfettered rights to Indigenous lands either immediately upon discovery or upon establishing effective occupation subsequent to discovery. The weak version holds that upon discovery, the discovering state acquires not sovereignty but rather the right to exclude other European states from acquiring the land. In order to actually acquire sovereignty over the discovered land, the discovering state must also engage in either cession or conquest with the Indigenous inhabitants; until this occurs, Indigenous peoples retain their own sovereignty. The intermediate version is similar to the weak version; the primary differences are that the discovering state does acquire sovereignty upon discovery, and until cession or conquest occurs, what the Indigenous peoples retain is not sovereignty or even a fee simple interest in their land, but rather some lesser interest. Each version is discussed in more detail below.

3.2 The Strong Version of the Doctrine of Discovery

One of the clearest statements of the strong version of the doctrine of discovery in the Canadian context comes from the Royal Commission on Aboriginal Peoples. In the course of critiquing the doctrine, the Commission describes European nations as viewing themselves as being entitled to claim sovereignty and unfettered rights to Indigenous lands merely upon discovering those lands, and without having to effectively occupy them:

[O]ne of the first steps in building a renewed relationship is the need to abandon doctrines such as terra nullius and discovery. The concept of terra nullius was used by Europeans to suggest that they came to empty, uninhabited lands or at least to lands that were not in the possession of 'civilized' peoples, that were not being put to 'civilized' use. The doctrine of discovery held that the discovery of such lands gave the discovering nation immediate sovereignty and all right and title to it.

These concepts must be rejected. To state that the Americas at the point of first contact with Europeans were empty uninhabited lands is, of course, factually incorrect. To the extent that concepts such as terra

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23 Royal Commission on Aboriginal Peoples, The Final Report of the Royal Commission on Aboriginal Peoples, vol 1, Looking Forward and Looking Back (Ottawa: Supply and Services Canada, 1996) [RCAP, vol 1]. For an additional example of the strong version, see Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) at 222-23 [Common Law Aboriginal Title] (describing a 1675 legal opinion given by eight lawyers, which was subsequently cited by the Ontario High Court of Justice (Chancery Division) in R v St Catharines Milling and Lumber Co, (1885) 10 OR 196 at 206-209 (available on QL) (Ont H Ct J)).
nullius and discovery also carry with them the baggage of racism and ethnocentrism, they are morally wrong as well. To the extent that court decisions have relied on these fallacies, they are in error. These concepts have no legitimate place in characterizing the foundations of this country, or in contemporary policy making, legislation or jurisprudence.24

Similarly, the decision of the Privy Council in St Catherine’s Milling25 also reflects a strong version of the doctrine of discovery. The Privy Council concluded that the Indian title held by the Indian signatories to Treaty Three was derived from the Royal Proclamation26 of 1763.27 In other words, the source of whatever rights the First Nations had prior to executing Treaty Three was not their prior occupation of their own land, nor was it their exercise of legal jurisdiction or sovereignty over their own land. It follows from the Privy Council’s decision that had the Royal Proclamation not been proclaimed, First Nations would have had no rights to their land whatsoever, and there would have been no reason for the Crown to treat with First Nations. The Privy Council also held that “the tenure of the Indians was a personal and usufructuary right, dependent on the good will of the Sovereign.”28 The notion that Indian title was “dependent on the good will of the Sovereign” implies that the Privy Council viewed Indian title as not being an inherent right. It should also be noted that there is no discussion of the concept of occupation by the British or Canadian states in St Catherine’s Milling; that is, there is no sense that the British or Canadian states were required to meet a sufficient level of effective occupation prior to being entitled to view Indian title as a non-inherent right derived solely from the Royal Proclamation. Taken together, these statements are consistent with the strong version of the doctrine of discovery, according to which European nations were entitled to view Indigenous lands as being

24 Ibid at 695.

25 St Catherine’s Milling and Lumber Company v Ontario (AG) (1888), 14 App Cas 46, 10 CRAC 13, 4 Cart 107 (PC) [St Catherine’s Milling cited to App Cas].

26 George R, Proclamation, 7 October 1763 (3 Geo III) [Royal Proclamation] as reproduced in RCAP, vol 1, supra note 23 at Appendix D. I follow Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Center, University of Saskatchewan, 2012) in citing to the Royal Commission’s reproduction of the Royal Proclamation, because as Hoehn notes at p 12, n 17, “[t]he Royal Commission found that this text is truer to the original text of the [Royal Proclamation] printed by the King’s Printer, Mark Baskett, London 1763, than the reproduction at [RSC 1985, App II, No 1].”

27 St Catherine’s Milling, supra note 25 at 54.

28 Ibid.
entirely unoccupied and to acquire sovereignty over and all rights to those lands immediately upon discovery.

3.3 The Weak Version of the Doctrine of Discovery

M.F. Lindley and Sharon Korman articulate what I refer to as the weak version of the doctrine of discovery. Lindley explains that European states did not treat the lands of non-Christians as *terrae nullius* in the sense of being “vacant and open to acquisition by Occupation.” Rather, the rule that discovery gave rights to the discoverer’s State in respect of the land discovered was adopted to regulate the competition between the European Powers themselves, and it had no bearing upon the relations between those Powers and the natives. What the discoverer’s State gained was the right, as against other European Powers, to take the steps which were appropriate to the acquisition of the territory in question. What those steps were would depend upon whether there was already a native population in possession of the territory…

Based on his survey of the practice of European states prevalent in four continents extending over four centuries, Lindley concludes that European states were entitled to complete their acquisition of Indigenous lands by engaging in either cession with, or conquest of, the Indigenous inhabitants. According to the weak version of the doctrine, discovery does not allow for the acquisition of sovereignty over Indigenous lands by mere discovery or discovery combined with occupation on the assumption that those lands were *terrae nullius*; rather, discovery gave the discoverer the right to exclude other European states from acquiring the land. But in order to actually acquire sovereignty over discovered land, it was necessary to also

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29 Supra note 8 at 26.

30 Ibid [emphasis added].

31 Ibid at 43. Lindley bases his conclusion on his survey of the text of papal grants; the text of letters patent, charters and commissions granted by European monarchs; the text of the proceedings of the Conference of Berlin of 1884-85; the actual practice of European states; and historical judicial decisions: ibid at 24-43.

32 Lindley recognizes that the exception to this principle was Australia, where European nations employed the strong version of the doctrine of discovery: supra note 8 at 40-41. See also Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 42. See also McNeil, *Common Law Aboriginal Title*, supra note 23 at 121ff.
engage in either cession or conquest. In other words, until Indigenous peoples had either voluntarily ceded their lands or had been conquered, they retained rights of sovereignty.

Korman echoes Lindley’s articulation of the weak version of the doctrine of discovery:

[D]iscovery and papal donation were not thought by themselves to confer sovereignty over non-Christian territory wherever there was a native population already in possession of such territory. What they were thought to confer was rather the right, assertible by the discoverer’s state against other European powers, to take the steps necessary to acquire the lands discovered, either by natives without their consent, or by cession, which would have the effect of conveying it from the native tribes to the Christian state concerned.

Like Lindley, Korman rejects what I refer to as the strong version of the doctrine of discovery as an interpretation of what actually occurred. She argues that both the theory and practice adopted by European states was not that Indigenous lands were terrae nullius and “thus open to acquisition by discovery and occupation”, but that upon discovery of Indigenous lands, European states “had an automatic right to extinguish the sovereignty of infidel kingdoms by conquering them” or presumably alternatively by treating with them.

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33 See also Korman, *ibid* at 42-43.

34 See Lindley, *supra* note 8 at 31.

35 Korman, *supra* note 32 at 44 [footnotes omitted; emphasis in the original].

36 *Ibid* at 46-47 [emphasis in the original].

37 See also Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest” in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35 at 40-41 (explaining that “[a]ny agreement the European nations reached on acquisition of territorial sovereignty in the Americas applied only among themselves, not to the Indian nations that were not parties thereto. Discovery gave the discovering European nation an inchoate title against other European nations but had no effect on the preexisting sovereignty and territorial rights of the Indian nations, other than excluding other European nations from dealing with them. This inchoate title by discovery could be consummated by possession, which could be acquired by conquering or treating with the Indian nations” [footnotes omitted]).
3.4 The Intermediate Version of the Doctrine of Discovery

The intermediate version of the doctrine of discovery is expressed most succinctly by Chief Justice Marshall of the United States Supreme Court in *Johnson v M’Intosh*:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire….But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. *This principle was, that discovery 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.*

…

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; *but their rights to complete sovereignty, as independent nations, were necessarily diminished,* and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that *discovery gave exclusive title to those who made it.*

While the different nations of Europe respected the right of the natives, as occupants, they asserted the *ultimate dominion* to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.38

The Court’s position is that on discovering Indigenous territory, a European state immediately acquired title to that territory vis-à-vis other European states, and this title could be consummated by establishing effective occupation. With respect to the Indigenous inhabitants, on discovery, a European state immediately acquired “the ultimate dominion”, in the land. There was no need to establish effective occupation or “possession” to consummate the right vis-à-vis

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38 *Johnson v M’Intosh*, supra note 17 at 572-74 [emphasis added].
the Indigenous inhabitants. The discovering nation’s dominion, though, was subject to the right of the Indigenous inhabitants to use and occupy their land. This right of use and occupancy was not contingent on recognition by, or a grant from, the discovering state, as Lord Watson held in *St Catherine’s Milling*.\(^{39}\) The following passage demonstrates that a European nation could extinguish this right of use and occupancy through either cession or conquest:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that *discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest*; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.\(^{40}\)

It is important to note, though, that by engaging in cession or conquest, what the European nation is extinguishing is not the sovereignty of the Indigenous inhabitants, as Korman suggests;\(^{41}\) the sovereignty of the Indigenous peoples was already “necessarily diminished” at the moment of discovery. Similarly, the Indigenous inhabitants do not retain their sovereignty until cession or conquest, as Lindley suggests.\(^{42}\) What they retain is merely a right to use and occupy their land. This fact is further illustrated by Chief Justice Marshall’s statement that the discovering state acquires the right to grant the land immediately upon discovery; the only qualification is that if the Indigenous inhabitants have not yet ceded the land or been conquered, then the grant is subject to their right of use and occupancy. As Chief Justice Marshall notes, none of the European states agreed more unequivocally with his formulation of the doctrine of discovery than England.\(^{43}\)

\(^{39}\) See text accompanying and following note 28.

\(^{40}\) *Johnson v M’Intosh*, *supra* note 17 at 587.

\(^{41}\) For Korman’s position on this issue, see Korman, *supra* note 32 at 46-47.

\(^{42}\) For Lindley’s position on this issue, see Lindley, *supra* note 8 at 43-44, 45-46.

\(^{43}\) *Johnson v M’Intosh*, *supra* note 17 at 576.
3.5 The Doctrine of Discovery in the Canadian Context

In my view, the weak version of the doctrine of discovery does not provide an accurate account of what occurred in Canada. Rather, it seems more likely that in the Canadian context, France purported to employ the strong version while Britain purported to employ the intermediate version.

Considering first the actions of France, it is commonly thought that France based its assertion of sovereignty in North America on the strong version of the doctrine of discovery. For example, in the Supreme Court of Canada’s decision in St Catherine’s Milling, Taschereau J asserted, in regard to France’s occupation in Canada, that the charters and royal grants issued by the French King conveyed the full estate and entitled the grantee to possession. The contention, that the royal grants and charters merely asserted a title in the grantees against Europeans or white men, but that they were nothing but blank papers so far as the rights of the natives were concerned, was certainly not then thought of, either in France or in Canada.

Turning next to the practices of Britain, an examination of these practices reveals that Britain did not purport to employ the weak version of the doctrine of discovery in the Canadian context. The actions of the British, and later Canadian, Crowns do not reflect a belief that European states had to obtain a cession or effect a conquest of Indigenous lands prior to claiming sovereignty over those lands. For instance, Charles II of England purported to grant a charter in 1670 to the Hudson’s Bay Company, ceding the entire Hudson Bay drainage area, known as Rupert’s Land, to the Company. At that time, Britain had not secured land cession treaties from the Indigenous peoples.

44 See Slattery, supra note 15 at 688 (explaining that “[t]he usual view is that France obtained an original title to New France by virtue of the explorations of Jacques Cartier and the settlements initiated by Champlain”); Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall LJ 623 at 632-33 (explaining that “[t]he French charters of the seventeenth century… granted the land to the colonization companies ‘en toute propriété’” [footnotes omitted]).

45 St Catharines Milling and Lumber Co v Ontario (AG) (1887), 13 SCR 577 at 644 (available on QL).

nations in the area referred to as Rupert’s Land, nor had it conquered those Indigenous nations. Similarly, in 1821 a statute was passed extending the jurisdiction of the criminal courts of Lower and Upper Canada to the territories of the Hudson’s Bay Company. However, even in 1821, Britain had still not executed land cession treaties with the Indigenous nations in this territory. Although there is no record of any courts ever having been constituted under this legislation, the act of passing legislation over a particular territory, and especially legislation purporting to establish courts, is a clear indication of an assumption of sovereignty over that land, just as is a grant of a charter over land by a sovereign. Accordingly, the actions of the British Crown indicate that it perceived itself as having acquired sovereignty over the North American territory that it had ‘discovered’ as of the moment of discovery, even without having conquered the Indigenous nations or having secured land cessions from them. Given this, the actions of the British Crown were not consistent with the weak version of the doctrine of discovery.

And yet, the actions of the British and Canadian Crowns were also not consistent with the strong version of the doctrine, insofar as these governments did eventually execute land cession treaties with Indigenous nations. The land cession treaties would have been superfluous if the British and Canadian Crowns understood themselves to be operating in accordance with the strong version of the doctrine. Likewise, in their concurring opinion in Marshall and Bernard, Justices LeBel


48 See Stanley, ibid.

49 See Calder, supra note 11 at 394, Hall J, dissenting, but not on this point (stating that “[s]urely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed”) But see McNeil, Common Law Aboriginal Title, supra note 23 at 222-23 (describing a 1675 legal opinion prepared by eight lawyers stating that payment by proprietors to Indians for their land “was done not for want of sufficient title from the Crown, but out of prudence and Christian charity”).
and Fish recognize that the British Crown did not treat North America as being *terra nullius* at the time of the assertion of British sovereignty.\(^{50}\)

Granted, support for the strong version is found in the decision of Privy Council in *St Catherine’s Milling*. However, Lord Watson’s reasoning in this decision is based on an unconvincing interpretation of the *Royal Proclamation*. That is, the text itself of the *Royal Proclamation* refutes Lord Watson’s reading.\(^{51}\) Before analyzing Lord Watson’s interpretation, a brief account of the *Royal Proclamation*’s provisions pertaining to Aboriginal peoples is useful. The *Royal Proclamation* enjoins governors of the British colonies in North America from granting “any Land whatever” until the Indigenous nation who possesses that land cedes or sells it to Britain.\(^{52}\) It also enjoins British subjects from purchasing land directly from Indigenous nations.\(^{53}\) Further, it describes these lands as having been reserved to the Indians and provides that if any of the Indians wish to dispose of their lands, the British Crown will purchase them at a public meeting or assembly of the Indians.\(^{54}\)

In *St Catherine’s Milling*, Lord Watson, on behalf of a unanimous Privy Council, based his conclusion that the rights reserved to the Indians in the *Royal Proclamation* were “dependent on the good will of the Sovereign” on two specific phrases in that document. First, he noted that it

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\(^{50}\) *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 132, [2005] 2 SCR 220 [*Marshall and Bernard*] (holding that “[a]t the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*”).

\(^{51}\) John Borrows convincingly argues that the *Royal Proclamation* and the Treaty of Niagara of 1764 together form a treaty between the British Crown and Indigenous nations, and that the terms of this treaty cannot be gleaned from the *Royal Proclamation*’s text alone, but must be discerned in combination with the wampum belts and oral promises and representations made at Niagara in 1764: John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 [“Wampum at Niagara”]. Borrows’s reading of the *Royal Proclamation* also refutes Lord Watson’s interpretation of the *Royal Proclamation* in *St Catherine’s Milling*, given the commitment to respect Indigenous sovereignty in the Two Row Wampum: see Borrows, “Wampum at Niagara”, *ibid* at 163-65.

\(^{52}\) *Supra* note 26 at 723.

\(^{53}\) *Ibid* at 723-24.

\(^{54}\) *Ibid* at 724.
was declared to be the will and pleasure of the king to reserve certain lands to the use of the Indians “for the present”. However, the reference to “the present” does not necessarily imply that the king was prepared to reverse his position and allow for usurpation of Indigenous lands at any moment. Rather, this phrase is simply consistent with the instructions set out in the Royal Proclamation, namely, that the land in question will remain reserved for the Indians at present, until it is ceded to Britain by the Indians at a public assembly of Indians.

Second, Lord Watson noted that the reserved lands were described as already being “parts of Our dominion and territories”. Admittedly, this description is inconsistent with the weak version of the doctrine of discovery and is consistent with the strong version endorsed by Lord Watson. That being said, it is also consistent with the intermediate version, according to which Indigenous nations retain certain property rights on discovery of their lands by European states.

The rejection of the strong version of the doctrine of discovery is illustrated by the Supreme Court of Canada’s decision in Calder, where it rejected Lord Watson’s reasoning from St Catherine’s Milling. In Calder, six of the seven presiding judges agreed that the Nisga’a First Nations had Aboriginal title to their ancestral territories. The seventh judge would have dismissed the Nisga’a’s claim on a procedural issue. Of the six, three held that the Nisga’a’s Aboriginal title had been extinguished by legislation, while the other three held that it had not been extinguished. Justice Judson wrote on behalf of the former, while Justice Hall wrote on behalf the latter. Justice Hall rejects the strong version of the doctrine of discovery articulated in St Catherine’s Milling when he holds that the proposition that “after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer” is wholly wrong. Instead, according to Justice Hall, Aboriginal title is

55 Supra note 25 at 54-55.
56 Ibid at 54.
57 Supra note 11 at 344.
58 Ibid at 404.
59 Ibid at 416.
a legal right that “does not depend on treaty, executive order or legislative enactment.”

Similarly, in the following oft-quoted passage, Justice Judson rejects Lord Watson’s view that Aboriginal title, or “Indian title”, was derived from and dependent on the *Royal Proclamation*:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".

In these passages, Justices Judson and Hall reject the strong version of the doctrine, according to which Europeans acquired unfettered rights to Indigenous lands immediately upon discovery. Justice Dickson (as he then was), writing for the majority in *Guerin v Canada*, corroborates this rejection of the strong version of the doctrine of discovery when he confirms “the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the *Royal Proclamation of 1763*, nonetheless predates it.”

It might be thought that the Canadian situation reveals a paradox. On the one hand, agents of the British Crown assumed that the Crown had sovereignty over North America at the time of discovery, and they consistently conducted themselves in accordance with this assumption, without having executed treaties or engaged in conquest. On the other hand, the Crown did eventually execute land cession treaties with Indigenous nations. The appearance of a paradox evaporates when we understand the doctrine of discovery in terms of the intermediate version. As discussed above in Section 3.4, according to the intermediate version, upon discovery, a European state obtained sovereignty over the ‘discovered’ territory immediately, at least vis-à-vis the Indigenous inhabitants. In contrast, a European state’s title to ‘discovered’ territory was

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60 *Ibid* at 390.

61 *Ibid* at 328.


63 *C.f.* Korman, *supra* note 32 at 44, n 13 (describing the position of European nations as being “curiously paradoxical” insofar as they denied sovereign rights to Indigenous peoples and yet they also purported to have conquered Indigenous peoples, which implies that Indigenous peoples had a pre-existing right to rule themselves).
not consummated vis-à-vis other European states until it had established effective occupation. Following discovery, the Indigenous inhabitants retained only the right to use and occupy their land, which was subject to extinguishment through either cession or conquest. This explains how England was able to grant the charter of 1670 to the Hudson’s Bay Company for Rupert’s Land, even though England had not yet purchased the land or conquered the Indigenous inhabitants. This also explains why the British and Canadian Crowns did eventually execute treaties with Indigenous peoples, even though they considered themselves to already be sovereign over the land in question. As discussed in more detail in Chapter Four, the most that the text of historical treaties purports to do is to extinguish the Indigenous rights remaining following discovery; these treaties do not purport to transfer sovereignty from the Indigenous to the European nations.

This brings us to the question of the significance of the intermediate version of the doctrine of discovery. That is, why is it useful to understand that the British and Canadian Crowns operated in accordance with the intermediate version of the doctrine, as opposed to the weak or strong version? The answer is that if the strong version of the doctrine of discovery had been employed, there would have been no need for the Crown to extinguish Aboriginal rights, by cession or conquest or otherwise, as no Indigenous interests would have survived the ‘discovery.’ As a result, acts of cession and conquest in the Canadian context should be understood as incidental to discovery, rather than as potential stand-alone modes of acquisition. I will discuss this point in more detail in subsequent chapters dealing with cession and conquest.

4 Normative Analysis of the Doctrine of Discovery

4.1 Ethnocentrism

Numerous scholars have identified and criticized the ethnocentric or racist assumption underlying the doctrine of discovery. Similarly, Justices LeBel and Fish, in their concurring

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64 Of course, even according to the text of historical treaties, this extinguishment is subject to any rights reserved in those treaties.

opinion in *Marshall and Bernard*, hold that the notion that Canada was *terra nullius* prior to the assertion of Crown sovereignty “is clearly unacceptable.”67 Further, the Royal Commission on Aboriginal Peoples has called upon federal, provincial and territorial governments in Canada to reject the concepts of *terra nullius* and the doctrine of discovery on the grounds that they are “factually, legally and morally wrong.”68 The racist nature of these concepts is most clearly revealed in *Johnson v M’Intosh*, where the explanation for the differential treatment between European and Indigenous nations was the inferior “character and religion” of the Indigenous inhabitants.69 In other words, the presumed lack of civilization and/or the non-Christian character of the Indigenous nations meant that European states could obtain sovereignty over Indigenous lands, subject to the inhabitants’ right of use and occupancy, simply by ‘discovering’ them, but sovereignty could not be acquired over European lands in the same way. As Brian Slattery puts it, “[n]o one, for example, would seriously suggest that a visiting British official could gain title to Vatican City for the Queen simply by raising the Union Jack in St. Peter’s Square.”70


67 *Supra* note 50 at para 134.

68 *Supra* note 23 at 696.

69 *Supra* note 17 at 573, 589 (holding that “[a]lthough 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”).

70 *Supra* note 15 at 686.
John Borrows critiques the strong version of the doctrine when he states that, factually speaking, the doctrine is false.\textsuperscript{71} When Europeans arrived, there was nothing for them to ‘discover’ because Indigenous peoples had already discovered what is now Canada.\textsuperscript{72} The heart of this critique is that the assumption that Indigenous lands were \textit{terrae nullius} is ethnocentric, biased and discriminatory.\textsuperscript{73} If Indigenous peoples are understood as equals, then there is no reason to suppose that they had not already discovered their own territory.

Analogous critiques can be made about the weak and intermediate versions of the doctrine of discovery, as both sanction differential treatment of Indigenous peoples and their land. In the intermediate version, European nations acquired exclusive title to Indigenous lands merely upon discovering those lands, without having to establish effective occupation. However, it is not possible to acquire exclusive title to territories over which European nations exercise sovereignty in the same way. Although the weak version does not allow European nations to acquire property rights vis-à-vis Indigenous peoples merely by discovering their territory, it does allow the European nation to create a monopsony for the sale of the Indigenous territory. As a consequence, Indigenous peoples are prevented from selling their lands “to whomever they wished and for whatever price they could negotiate.”\textsuperscript{74} The effect of this was to diminish the economic value of Indigenous land, resulting in a concomitant enrichment to the European nation.\textsuperscript{75} It was not possible to acquire a monopsony over European territories in the same way. Accordingly, differential treatment underlies all three versions of the doctrine of discovery.

It may be tempting to dismiss critiques of the doctrine of discovery as being anachronistic; after all, it does not seem fair to judge those who lived centuries ago by today’s standards. Such an approach, however, would be misguided. As discussed above, the Supreme Court of Canada’s

\begin{itemize}
\item \textsuperscript{71} John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) at 17 [\textit{Indigenous Constitution}].
\item \textsuperscript{72} \textit{Ibid}.
\item \textsuperscript{73} \textit{Ibid} at 17-18.
\item \textsuperscript{74} Miller, \textit{supra} note 8 at 4.
\item \textsuperscript{75} See Miller, \textit{ibid}. See also McNeil, \textit{Common Law Aboriginal Title, supra} note 23 at 235.
\end{itemize}
contemporary Aboriginal rights jurisprudence is built upon the doctrine of discovery. In other words, the doctrine of discovery continues to do the heavy legal lifting when it comes to explaining the rationale underlying Canada’s assertion of sovereignty over Aboriginal peoples and territories. It is the means by which Canada attempts to legitimate its exercise of sovereignty over Aboriginal peoples and territories.

4.2 Lack of Compliance with Liberalism

The doctrine of discovery fails to comply with at least two of the basic tenets of liberalism: equality and liberty. In both cases, the ethnocentrism of the doctrine is what underlies this failure.

Turning first to equality, Patrick Macklem provides an articulate account of the way in which the doctrine of discovery fails to comply with this principle. He observes that the doctrine of discovery fails to treat Indigenous nations as formal equals with European nations. Formal equality “requires that all potential recipients of a distribution be treated as formal equals unless a valid reason exists, related to the good in question, for differential treatment.” As we have seen, the reason for the differential treatment offered by the doctrine of discovery is the supposed inferiority of Indigenous peoples. But this proposition is inherently ethnocentric, and as such “it

76 See supra note 18.

77 See Hoehn, supra note 26 at 104 (explaining that “when the Court applies the doctrine of Aboriginal title, it also applies the doctrine of discovery that lies at its foundation. This means that the discovery doctrine is not just ‘history’ but rather it continues to be used in a manner that denies Aboriginal rights and treats Aboriginal peoples as less than equal partners in Canada”). C.f. Robert A Williams Jr, “Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes” (1992) 39 Fed B News & J 358, cited in Gunn, supra note 65 at 39 (explaining in the context of American law that “most practitioners and students do not realize that every time the current Supreme Court cites to any of the core principles to uphold one of its Indian law decisions, it perpetuates and extends the racist legacy brought by Columbus to the New World of the use of law as an instrument of racial domination and discrimination against [I]ndigenous tribal peoples' rights of self-determination”).

78 Patrick Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2007) at 121 [Indigenous Difference].

79 Ibid at 120.
cannot stand as a valid reason for excluding Aboriginal nations from the distribution of sovereignty on the continent.”

Macklem may be referring to the strong version of the doctrine of discovery in his critique insofar as he describes the doctrine as characterizing North America as vacant. That being said, his analysis is just as applicable to the intermediate version of the doctrine. Although the intermediate version does not view Indigenous lands as *terra nullius*, it does fail to treat Indigenous nations as formally equal to European nations. It allows European nations to gain sovereignty over Indigenous land by simply ‘discovering’ it, leaving Indigenous nations with a mere right of use and occupancy. The doctrine does not, however, allow for the acquisition of sovereignty over European land in the same way.

Macklem’s argument is based on the equality of peoples, as opposed to the equality of individuals. However, as discussed in the previous chapter, the rights-bearer within liberalism is commonly thought to be the individual, not the collective. As Kymlicka puts it: “Once individuals have been treated as equals, with the respect and concern owed them as moral beings, there is no further obligation to treat the communities to which they belong as equal.” This view, however, must be confined to the justification project. It is the exercise of justifying the state that focuses on the relationship between the state and the individual, and asks in particular whether the state provides a just distribution of social goods to its citizens. When we turn to the legitimation project, though, our scope must include the relations between peoples or nations. The exercise of establishing the state’s legitimacy calls for an investigation into the history of how the state acquired sovereignty, and if it did so by incorporating another nation, then the inquiry will necessarily address relations between those nations. That being said, it is also interesting to consider what effect the doctrine of discovery has on the relationship between the state and its newest citizens. In my view, the doctrine of discovery violates liberalism’s commitment to individual liberty in at least two ways.

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80 *Ibid* at 121. See also Patrick Macklem, “Normative Dimensions”, *supra* note 66 at 217.

81 Macklem, *Indigenous Difference*, *ibid*.

First, liberalism’s commitment to individual autonomy, including the freedom to choose one’s own conception of the good life, is an integral aspect of the principle of liberty. However, the doctrine of discovery denies this autonomy to Indigenous individuals insofar as it privileges a life of ‘civilization’ over a supposed ‘non-civilized’ life. That is, the doctrine of discovery accords normative weight to one particular conception of the good life – a life lived in accordance with European norms, conventions and institutions – in preference to any other possible version of the good life. The second, and related, way in which the doctrine of discovery violates liberalism’s commitment to liberty is by failing to uphold the principle of freedom of religion. Freedom of religion is fundamental to liberalism, as is evinced by the fact that this principle is enshrined in section 2(a) of the Charter,\(^\text{83}\) which serves as the clearest legislative embodiment of liberal principles in this country. The doctrine of discovery, though, privileges Christianity over all other religions. It imposes harsh legal consequences – namely loss of sovereignty – on non-Christians precisely because they are non-Christians.

Douglas Sanderson makes a similar point when he argues that what settler governments have denied to Indigenous peoples is not merely their traditional lands, but also the ability to choose to live an Indigenous life by participating in Indigenous institutions and living in accordance with Indigenous values.\(^\text{84}\) Sanderson explains that

> Indigenous people want to have choices about how best to exercise their freedoms – the very freedoms they once possessed and now want returned to them – and of course, part of making choices is the risk of making poor choices. It goes without saying that, for the past one hundred-and-twenty years, settler society has prevented Indigenous people from making any real choices about their communities, and the choices that settler society has made on behalf of Indigenous people has resulted largely in poverty and despair for Indigenous people. *Indigenous people should be free to make choices about how best to set and pursue their own ends*, and corrective justice requires returning to Indigenous

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people the ability to make choices in the context of communities that affirm Indigenous values and traditions.  

Likewise, Gordon Christie criticizes Aboriginal rights jurisprudence for failing to uphold the liberal principle of individual autonomy and freedom to choose one’s own conception of the good life when he writes:

Liberalizing Aboriginal societies through the deployment of a legal regime which translates Aboriginal claims into rights to be ordered in society seems to come rather close to the imposition of belief-structures on Aboriginal peoples. What of the liberal injunction against imposing on individuals theories about how to live their lives? Where do we find in the project of liberalization respect for the autonomy of Aboriginal peoples?

Borrows provides a compelling illustration of the illiberal nature of the doctrine of discovery in the form of an Anishinabe story in Drawing Out Law: A Spirit’s Guide, where he describes an anonymous memorandum entitled “How Dogs Were Created.” The memo explains that a giant was terrorizing the people of a village. Anyone who ventured into the forest did not return to the village. A council was called, at which the people of the village decided that the best course of action would be to move their village to a new site. After making preparations, the people set out in canoes. As they approached the shore of their new home, a large black beast broke through the trees and charged the boats. The people attacked the beast with their weapons and killed it. But then from the scraps of flesh and bone, new creatures emerged: dogs. The dogs were playful and full of goodwill, and became the people’s best friends.

The most accessible theme of this story seems to be that the following is a principle of Anishinabe law: in order to defeat one’s opponents, one must “find a way to turn them into

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85 *Ibid* at 132 [emphasis added].


88 *Ibid* at 120-23.
friends.” The villagers defeated the beast by turning it into good-natured and friendly dogs. But Borrows tells us that within this story there is also “a deeply hidden ironic twist, playing with the doctrine of discovery in law.” The hidden twist may be that the villagers represent settlers ‘discovering’ Indigenous lands, and the beast represents Indigenous peoples, as viewed from the settler perspective, namely, savage, threatening and ‘other’. During their council meeting, the villagers/settlers never contemplated negotiating with the beast or engaging with it in a way that respects its autonomy. On the contrary, the memo implies that in order to be able to co-exist with the beast, the settlers had to ‘civilize’ it by altering its way of life and turning it into something the settlers could live with: dogs. That is, settlers had to alter the way of life of Indigenous peoples to make them obedient, domesticated and tractable. According to this Anishinabe story, then, the problem with the doctrine of discovery is that it fails to uphold the basic liberal commitment to allowing individuals to choose and pursue their own conception of the good life. The settlers’ attempt to legitimate their assertion of sovereignty over Indigenous peoples is based on a denial of the right of Indigenous peoples to determine for themselves what the good life will look like.

A potential response to this critique is that Europeans were justified in imposing European legal and political institutions and systems on Indigenous peoples because the cultures of Indigenous peoples were illiberal. On this view, illiberal cultures have no merit, and so nothing was lost when Indigenous peoples were denied the ability to live in accordance with their illiberal conception of the good life. The problem with this response is the lack of support for the claim that Indigenous societies and cultures are illiberal. This is an empirical claim, and as such it

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89 Ibid at 123.

90 Ibid.

91 Christie attributes a similar view to Will Kymlicka when he writes: “Insofar as Aboriginal societies constrain individual liberty, liberalizing Aboriginal societies, Kymlicka argues, does not remove something valuable from the lives of Aboriginal peoples, for any pre-existing non-liberal cultures they might enjoy bear no value whatsoever, either intrinsic or instrumental. Rather, the liberalization of Aboriginal societies is conceived of as the bestowing of a great gift - indeed the greatest gift that could be offered - in that it transforms worthless cultures into worlds in which Aboriginal people, from within, can begin to find meaning and value in their lives” (supra note 86 at 92).

92 But see Christie, ibid at 91. If I understand Christie’s point correctly, though, it is that some Aboriginal societies are non-liberal in the sense that the project of identifying how to live the good life is
can only be supported with empirical evidence. Any such evidence, to be persuasive, would need to engage with specific Indigenous institutions; it would need to show that these institutions are truly illiberal, and do not merely appear to be so from the perspective of an outside observer. It is not sufficient to make generalized, pan-aboriginal assumptions about the supposed illiberal nature of all Indigenous cultures throughout Canada.

When we consider particular Indigenous nations, we find that the evidence points in the opposite direction. For example, Dale Turner describes just how fundamental liberal values are to Iroquois culture in the following passage:

> According to the Great Law of Peace, a human being possesses intrinsic value and ought to be accorded respect. The notion of respect goes to the core of the Iroquoian religious thought; but in a political context, respecting another person’s intrinsic value means that you recognize that they have the right to speak their mind and to choose for themselves how to act in the world. It follows that in principle, one cannot tell another what to do or how to behave. Europeans often commented on the individualistic nature of Native Americans and on the fundamental respect and freedom they accorded one another in their daily lives.\(^\text{93}\)

Similarly, James [sákēj] Youngblood Henderson highlights the persuasive and non-coercive aspects of Míkmaq laws and government.\(^\text{94}\) And Joseph Le Caron, a Récollet missionary, observed the profound respect for religious freedom and individual autonomy exhibited by the Indigenous peoples he encountered while accompanying Samuel de Champlain in 1615 along the shores of Lake Huron:\(^\text{95}\)

unnecessary because “within Aboriginal societies the broad strokes of how to live the good life have been worked out” (ibid). Christie is not claiming that Aboriginal societies are illiberal in the sense of denying basic freedoms and equality to individuals, such as equality between men and women.

\(^\text{93}\) Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 49.


Another obstacle [to their conversion], which you may conjecture from what I have said, is the opinion they have that you must never contradict any one, and that every one must be left to his own way of thinking. They will believe all you please, or, at least, will not contradict you; and they will let you, too, believe what you will. It is a profound insensibility and indifference, especially in religious matters, for which they don’t care. No one must come here in hopes of suffering martyrdom, if we take the word in its strict theological sense, for we are not in a country where savages put Christians to death on account of their religion. They leave every one in his own belief; they even like our ceremonies externally, and this barbarism makes war only for the interests of the nations. They kill people only in private quarrels, from intoxication, brutality, vengeance, a dream or extravagant vision; they are incapable of doing it in hatred of the Faith. 

In addition, the Royal Commission on Aboriginal Peoples notes that the rule of law is a fundamental guiding principle for Aboriginal societies, just as it is for the rest of Canada.

Given the ways in which the doctrine of discovery fails to comply with the principles of liberty and equality, it is not an adequate basis on which to ground the legitimacy of Canadian sovereignty over Indigenous territories within a liberal framework.

5  Summary

In this chapter, we found that scholars have articulated at least three different versions of the doctrine of discovery, which I have referred to as the strong version, the weak version, and the intermediate version. In my view, the intermediate version most accurately captures British and Canadian practices in the Canadian context. In critically examining the doctrine of discovery, I also illustrated the way in which the ethnocentrism of the doctrine of discovery underlies the incompatibility between the doctrine and liberalism. The doctrine of discovery not only fails to treat Indigenous nations as formal equals with European nations, but it fails to accord Indigenous peoples both the freedom to choose their own conception of the good life and freedom of religion.


We can conclude then, that wherever Canada relies on the doctrine of discovery to legitimate its assertion of sovereignty over Indigenous peoples, it lacks a compelling liberal justification for that assertion. As such, it is necessary to go on to consider whether any of the other modes of acquisition, such as cession, conquest or prescription, apply to the Canadian context.
Chapter Three
Conquest

1 Overview

This chapter examines the international law doctrine of conquest in order to determine whether it can serve as a liberally-satisfying justification for Canada’s assertion of sovereignty over Aboriginal territories and peoples. I begin by setting out the doctrine of conquest at international law, including the requirements that must be met in order for conquest to have occurred. Although the use of force or power lies at the heart of conquest, it does not follow that just any use of force to exert control over territory will amount to conquest. I then outline the factors that tend to demonstrate the improbability of conquest having occurred in the Canadian context, given that the legal requirements of this doctrine were rarely met. I also argue that even in cases where the international law requirements of conquest may have been met, Britain cannot claim to have legally conquered the Indigenous inhabitants of what is now Canada, because Britain viewed those Indigenous inhabitants as already being British subjects, and British domestic law prohibits the British Crown from engaging in acts of state, such as conquest, against its own citizens. I then subject the doctrine of conquest to a normative analysis. Specifically, I critique what I refer to as the ‘us too’ argument, which posits that Indigenous peoples cannot complain about having been conquered, since Indigenous peoples frequently engaged in conquest amongst themselves prior to the arrival of Europeans. I also highlight the way in which the might is right assumption underlying conquest conflicts with liberalism’s commitment to equality.

2 Definition and Requirements of Conquest

2.1 Definition of Conquest

The international law doctrine of conquest can be defined “as the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants.”¹ Although conquest was a valid means of acquiring sovereignty over foreign territory until “the

early part of the twentieth century and possibly as late as the Second World War,” it is no longer a principle of international law.\(^2\) As John Currie explains:

>[V]arious developments, including the establishment of the League of Nations in 1919, the adoption in 1928 of the General Treaty for the Renunciation of War, the Nuremburg judgments imposing criminal sanctions for the “waging of aggressive war,” and, ultimately, the adoption of the general prohibition on the use of force in Article 2(4) of the UN Charter, all played a role in displacing annexation following conquest as a valid root of title.\(^3\)

What is the significance of this fact for my evaluation of Canada’s assertion of sovereignty over Aboriginal peoples? If Britain and/or France met the requirements for conquest prior to the twentieth century, could Canada rely on that conquest today in justifying its assertion of sovereignty, even though conquest is no longer a valid principle of international law? The answer is yes, given the intertemporal rule. This rule provides that rights and obligations at international law are to be assessed with regard to the international law principles prevailing at the time when the right or obligation arose, and not those prevailing when a dispute arises at a later date.\(^4\) Accordingly, conquest is still germane today given that “a valid root of title may still be traced to acts of conquest occurring prior to the early twentieth century, at a time when such a mode of acquisition was legally permissible.”\(^5\)

This brings us to the question of the requirements of conquest. It may be tempting to assume that insofar as conquest rests upon an exercise of brute force or power, any effective exertion of control over territory constitutes conquest.\(^6\) As Sharon Korman explains, however, conquest properly understood as a mode of acquisition of sovereignty at international law “signified not


\(^3\) Ibid at 279 [footnotes omitted].


\(^5\) Currie, ibid at 280.

\(^6\) Korman notes that it is sometimes assumed that prior to the early twentieth century, international law “placed no limitations on the acquisition of territory by force.” According to Korman, this view is mistaken: supra note 1 at 99.
mere force (otherwise everything would be permitted and the distinction between lawful and unlawful means of acquiring territory would dissolve), but a legal institution subject to rules (and limitations) from which, by convention, legal rights could arise.” Korman identifies three such essential elements of conquest, each of which is discussed in detail in the next section.

2.2 Requirements of Conquest

2.2.1 State of War

The first essential element of the doctrine of conquest identified by Korman is that a state of war must exist between the relevant states at the time when the conquering state takes possession of the territory at issue. In other words, the use of force in the absence of a formal state of war could not justify a claim of sovereignty on the basis of conquest. According to Korman, this requirement was applicable from the time of the Peace of Westphalia in 1648 until the First World War. The requirement of a state of war is confirmed by the following statement by the Permanent Court of International Justice in the Eastern Greenland decision: “Conquest only operates as a cause of loss of sovereignty when there is a war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State.” The existence of a state of war, in turn, did not necessarily follow from the factual existence of hostilities between states; rather, ‘war’ was a concept with formal legal status and

7 Supra note 1 at 95.

8 Korman explains her methodology as follows: she extracts the three requirements of conquest from Erich Kussbach’s definition of this concept in the Encyclopedia of Public International Law. She then tests each of these criteria against state practice and the views of jurists: ibid at 98.

9 Ibid.

10 Ibid at 99-100, 109.

11 Ibid at 99.

12 See Korman, ibid at 102.

13 Legal Status of Eastern Greenland (Denver v Norway), 1933 PCIJ (ser. A/B) No. 53 at 47 [Eastern Greenland].
requirements of its own. As Quincy Wright puts it, a “state of war may exist without active hostilities, and active hostilities may exist without a state of war.”

This leads to the question of what the legal requirements were for a state of war. Currie explains that a state of war could be established in one of two ways: by means of either an express intention or a necessarily implied intention manifested by one state to enter into the legal relationship constituting a state of war with another state. The former is evinced by a “declaration of war, or an ultimatum with conditional declaration of war, issued by the proper constitutional authorities of the state.” In England, this proper constitutional authority is the Crown. Although Canada’s constitution does not expressly address this issue, the preambular statement in the Constitution Act, 1867 that Canada’s constitution is “similar in Principle to that of the United Kingdom” suggests that in Canada, the Crown is also the proper constitutional authority entitled to issue a declaration of war. In contrast, a state could manifest an implied intention to enter into a state of war by engaging in “an act of war, such as an attack on the territory or on the armed forces of another state followed by active hostilities.” The key in such circumstances, though, is that the state engaging in an act of war must have a real intent to create a state of war; as such, if a state commits an act of war without declaring its intention either to make war or not to make war and “continues such acts on a large scale,” then its intent to make war may be deduced from those acts. Finally, in the context of hostilities with an Indigenous community, all that mattered with respect to establishing a state of war was the

14 Currie, supra note 2 at 463-464.
15 Quincy Wright, “When does War Exist?” (1932) 26:2 AJIL 362 at 363 [footnotes omitted].
16 Supra note 2 at 464.
17 Wright, supra note 15 at 363.
18 Wright, ibid at 363, n 6.
20 Ibid.
21 Wright, supra note 15 at 364.
22 Wright, ibid at 365.
intention of the state party. The reason was that Indigenous communities were not recognized as states. Accordingly, at international law, they had no power to declare or recognize a state of war.\footnote{Wright, ibid at 365-66.}

Some scholars have also identified a ‘just war’ requirement, according to which a war would only be warranted if the aggressor state had just cause for engaging in acts of war.\footnote{See e.g. John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 19 [Borrows, Canada’s Indigenous Constitution].} Currie explains, though, that the significance of the just war concept at international law has varied throughout the centuries.\footnote{For a discussion of the historical development of the concept of just war, see Currie, supra note 2 at 450-54.} It was clearly a feature of ancient Roman civilization, given that society’s doctrine of \textit{iustum bellum}, or ‘just war.’\footnote{Currie, ibid at 450-51.} The doctrine was then revived in the fifth century by St. Augustine and refined in the thirteenth century by St. Thomas Aquinas.\footnote{Currie, ibid at 451.} It was also adopted by international legal philosophers in the pre-Westphalian era, but at this point its utility seems to have been limited, given Currie’s observation that “there were virtually as many theories of what constituted…just cause as there were legal philosophers willing to address the topic….Not surprisingly, this rendered the theory all but useless in constraining resort to war.”\footnote{Ibid at 452.}

Currie goes on to explain that in the eighteenth, nineteenth and early twentieth centuries, the concept of just war was relegated to the status of a moral rather than legal theory, which allowed for the development of the principle that at international law every state had an inherent and unrestricted right to engage in war.\footnote{Ibid at 452-53. See also Korman, supra note 1 at 104 (explaining that prior to 1919, war constituted a lawful use of force, regardless of its cause).} Thus, the relevance of the just war requirement will depend on the time period during which the war in question took place.
2.2.2 Subjugation of the Vanquished State

The second essential element of the doctrine of conquest identified by Korman is that the defeated state must be subjugated or the war terminated before occupation of enemy territory can transfer sovereignty. In other words, by the mid-nineteenth century international law held that sovereignty would not vest in the conqueror while hostilities were still ongoing. The rationale underlying this rule was that control over territory must be effective, and there must be no reasonable chance of the defeated state regaining control, before a conquering state was permitted to annex conquered territory.

2.2.3 Manifest an Intention to extend Sovereignty

The third essential element of the doctrine of conquest identified by Korman is that the conqueror must manifest its intention to extend its sovereignty over the conquered territory. Korman identifies three different modes by which the conqueror could manifest such an intention. First, the conqueror could demand and obtain cession from the defeated state by having it execute a treaty of peace. Second, the conqueror could annex the conquered territory to its own territory by issuing a proclamation of annexation. Third, the conqueror could engage in other executive and legislative acts manifesting its intention to extend its sovereignty, including disposing of public lands in the conquered territories. Korman notes that, like the second element of the doctrine of conquest, discussed above, the requirement that the conqueror manifest its intention to extend its sovereignty over the conquered territory is of relatively recent

30 Supra note 1 at 98-99.
31 Korman, ibid at 109.
32 Korman, ibid.
33 Ibid at 99.
34 Ibid at 123.
35 Ibid.
36 Ibid at 123, 125.
37 Ibid at 123, 129.
origin. It did not exist in the seventeenth and eighteenth centuries, and developed only in the nineteenth century.

From the foregoing, it can be concluded that at international law not just any exercise of force justified an assertion of sovereignty over foreign territory and that the precise requirements of conquest varied throughout the centuries.

3 Conquest in the Canadian Context

3.1 Conquest as a Mode of Acquiring Sovereignty

This brings us to the question of whether Britain or France can rely on conquest to justify their assertions of sovereignty over the Indigenous peoples within what is now Canada. Some have assumed, without engaging in a legal analysis, that this is the case. For example, Tom Flanagan attempts to refute the proposition that Aboriginal peoples in Canada were never conquered by arguing that it “does not matter that British or Canadian military forces had never defeated [certain Aboriginal communities] in war” because Aboriginal peoples were powerless to refuse the imposition of Canadian law, including the reserve system and Indian Act regulation.

However, as we have seen, the facts do matter when it comes to determining whether or not the legal requirements of conquest have been met. And the fact of whether or not a war even occurred happens to be especially germane to this issue. The above discussion demonstrates that the legal requirements of conquest are finite and knowable. Any sustainable conclusion regarding conquest, then, must be based upon an application of these legal requirements to the facts at issue.

Although an exhaustive evaluation of the history of hostilities between Britain and France on the one hand, and Indigenous nations on the other, is beyond the scope of this work, in this and the next section I identify a number of factors that undercut an attempt to justify British or French

38 Ibid at 120.
39 Ibid at 120-22.
sovereignty on the basis of conquest. In so doing, I am guided by the legal requirements of conquest discussed above.

The story of conquest in the New World begins with the recognition that Britain and France engaged in war against each other and also often enlisted Indigenous nations to assist them in their battles. But when one European nation conquered another, the Indigenous allies of the conquered nation were not necessarily thereby conquered as well. For example, even though Britain conquered France’s North American territories in 1760 in the Seven Years’ War, France’s Indigenous allies did not consider themselves to have been conquered.41 And as Borrows notes, the fact that Britain shared this view is reflected in the Articles of Capitulation executed by Britain and France at the end of the Seven Years War.42 Article 40 of this document states that France’s Indigenous allies “shall be maintained in the Lands they inhabit” and “shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty.”43 In other words, the land rights of the Indigenous allies of France were not extinguished by the conquest of France. But if the conquest of France had constituted a conquest of France’s Indigenous allies, then pursuant to the intermediate version of the doctrine of discovery, conquest would have extinguished Indigenous land rights.44 Further, Britain and France rarely purported to enter into a state of war against an Indigenous nation.45 When hostilities did occur between a European state and an Indigenous nation, the applicable legal criteria of conquest, discussed above, were rarely met.46

42 Ibid at 158.
44 C.f. Borrows, “Wampum at Niagara”, ibid at 159 (arguing that the “capitulation agreement represented the promise that First Nations territory was not to be reduced, nor was First Nations sovereignty to be subsumed, by alliance with either the French or the English”).
45 See LFS Upton, Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867 (Vancouver: British Columbia Press, 1979) at xiii: “Unique among Canadian Indians, the Micmacs fought for their lands.”
46 See Borrows, Canada’s Indigenous Constitution, supra note 24 at 19-20.
Some may argue that a possible exception to this general statement is the hostilities between Indigenous nations and the English in the seventeenth and eighteenth centuries in what is now New England and the Maritime Provinces. The Anglo-Wabanaki War of 1722 to 1727 may serve as a particularly useful example, since the parties to this war were the English and the Wabanaki Confederacy itself, as opposed to the English and the French, with the Wabanaki merely assisting the French, as was the case in so many other instances of hostilities between European and Indigenous nations. The cause of this war was encroachment by English settlers and fishermen on Wabanaki territory. In 1721, Mi'kmaq and Maliseet ambassadors joined hundreds of Abenakis on the coast of Maine in order to protest against this encroachment to English officials from Boston. The Wabanaki asserted that the English had never acquired a right over Wabanaki land “either by right or conquest, or by grant or by purchase” and ordered the English to withdraw from their land. The English refused to withdraw and so the Wabanaki took up arms to defend their territories.

One may be tempted to conclude that the events surrounding this war meet the requirements for conquest. Regarding the first requirement, L.F.S. Upton notes that Massachusetts in fact declared war on the Abenakis in May of 1722. Let us assume for the sake of argument, without

47 According to Harald Prins, the Wabanaki Confederacy was a pan-tribal alliance whose composition varied over time and according to circumstances; originally, it “consisted of a group of neighbouring Abenaki communities and extended to similar clusters of Maliseet and Passamaquoddy. Later, it widened even more and included the more numerous Mi’kmaq”: Harald EL Prins, “The Crooked Path of Dummer’s Treaty: Anglo-Wabanaki Diplomacy and the Quest for Aboriginal Rights” in Papers of the Thirty-Third Algonquian Conference (Winnipeg: University of Manitoba Press, 2002) 360 at 362. See also James (sákéj) Youngblood Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18 Dalhousie LJ 196 at 239 (explaining that “[a]t the time of the arrival of the Europeans, the Wabanaki Confederacy comprised the Penobscot, Passamaquoddy, Malecite, and the Mikmaq”).

48 For a discussion of a number of instances in which the Wabanaki Confederacy assisted the French in war against the British, see Prins, ibid.

49 See Prins, ibid at 367.

50 See Prins, ibid.

51 Prins, ibid at 367-68.

52 See Prins, ibid at 368.

53 Supra note 45 at 42.
concluding, that this declaration was applicable to the Indigenous nations within what is now Canada and that British officials within what is now Canada were entitled to rely upon it in establishing a state of war. As discussed above, at this time, the just war requirement was not an accepted principle of international law. And neither the second nor the third requirements of conquest identified by Korman were applicable at this time. Further, the war was concluded with peace treaties executed and ratified between various members of the Wabanaki Confederacy and English representatives beginning in 1725.\(^{54}\) One of these, known as *Dummer's Treaty of 1725*,\(^ {55}\) has been held by Canadian courts not to be applicable in New Brunswick because it refers only to “the Indians in the province of Massachusetts Bay.”\(^{56}\) In addition, it was signed and ratified by Massachusetts authorities, but not by authorities in Nova Scotia, which at the time encompassed what is now New Brunswick.\(^{57}\) There was, however, another treaty, known as *Mascarene’s Treaty*,\(^ {58}\) which was signed at Annapolis Royal on June 4, 1726 by the Mi’kmaq, Maliseet, Passamaquoddy and Penobscot from all parts of the Maritimes, including Maine and Cape Breton\(^ {59}\) and ratified by the colonial government of Nova Scotia.\(^ {60}\) Canadian courts have held that *Mascarene’s Treaty* is applicable in Canada.\(^ {61}\)

\(^{54}\) See Prins, *supra* note 47 at 370-74. See also Upton, *ibid* at 43.

\(^{55}\) *The submission and agreement of the Delegates of the Eastern Indians* (December 15, 1725, Boston, New England), online: Cape Breton University <http://www.cbu.ca/mrc/treaties/1725> [*Dummer’s Treaty*].

\(^{56}\) See *R v Paul (TP)* (1998), 196 NBR (2d) 292 at para 25, 158 DLR (4th) 231 (CA).

\(^{57}\) Andrea Bear Nicholas, “Mascarene’s Treaty of 1725” (1994) 43 UNBLJ 3 at 3.

\(^{58}\) *Mascarene’s Treaty of 1725* as signed June 4, 1726, Annapolis Royal, enclosed in Governor L. Armstrong to Secretary of State, 24 November 1726, reproduced in and cited to Nicholas, *ibid* at 15-16 [*Mascarene’s Treaty*].

\(^{59}\) Nicholas, *ibid* at 9.

\(^{60}\) Nicholas, *ibid* at 10.

According to the written text of *Mascarene’s Treaty*, the Indigenous signatories acknowledged that King George became the “rightful possessor” of the Province of Nova Scotia or Acadia by means of the *Treaty of Utrecht* of 1713, and they also acknowledged King George’s jurisdiction and dominion over Nova Scotia or Acadia and submitted to him “in as ample a Manner as We have formerly done to his most Christian Kings,” namely, the King of France.62

The perspective of the Aboriginal signatories to *Mascarene’s Treaty* will be considered in greater detail in the next chapter, but the question remains whether these events constitute a conquest in accordance with the requirements set out above. In my view, they do not, for at least two reasons. First, the actual text of *Mascarene’s Treaty* does not support the notion that the Anglo-Wabanaki War of 1722 to 1727 ended in conquest. *Mascarene’s Treaty* does not state that Britain acquired sovereignty over the Wabanaki in the Anglo-Wabanaki War of 1722 to 1727. On the contrary, it explicitly states that the Aboriginal signatories living within Nova Scotia or Acadia acknowledge that Britain became sovereign over Nova Scotia or Acadia thirteen years earlier, by securing a cession from France over that territory in the *Treaty of Utrecht*.63 The explicit terms of *Mascarene’s Treaty*, then, undermine the notion that Britain understood itself as having acquired sovereignty over the Wabanaki within Acadia or Nova Scotia by means of conquest in the Anglo-Wabanaki War of 1722 to 1727.

To understand my second reason for rejecting the notion that the Anglo-Wabanaki War of 1722 to 1727 constituted a conquest, it is necessary to appreciate the distinction between the operation of international law and the operation of domestic law. As just discussed, “the English assumed they acquired clear title to the French colonial domains ceded to them at Utrecht” in 1713.64 In other words, the English perspective was that by the time of the Anglo-Wabanaki War of 1722 to 1727, the Indigenous inhabitants of the ceded French colonies were already “British subjects on British land.”65 The text of *Mascarene’s Treaty* confirms that this perspective persisted for at

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62 *Mascarene’s Treaty, supra* note 58 at 15-16.

63 *Ibid*.

64 Prins, *supra* note 47 at 365.

65 Upton, *supra* note 45 at 42.
least the next thirteen years. As Kent McNeil recognizes, conquest constitutes an act of state, but
British domestic law does not permit the Crown to engage in acts of state against British citizens
in British territory. In other words, it is not legally possible for the British Crown to conquer its
own citizens within its own territory. Accordingly, the Anglo-Wabanaki War of 1722 to 1727
could not have constituted a conquest because by the Crown’s own admission the Wabanaki
were already British subjects at that time, and the British Crown was governed by British
domestic law, which would not sanction an act of state against British subjects on British soil.

But the question still remains whether Britain’s conquest of Acadia in the War of the Spanish
Succession, which was ended by the Treaty of Utrecht, constituted a conquest of not only
France but also of the Wabanaki nations of Acadia. In my view, Britain did not consider itself to
have acquired an original root of sovereignty over the Wabanaki in the War of the Spanish
Succession. The reason is that this war was between European nations, such as Spain, Great
Britain and France, among others. Although the Wabanaki participated in the hostilities, they did
so not on their own behalf but in order to assist the French. If, in Britain’s view, the Wabanaki
were conquered in the War of the Spanish Succession, the conquest would have occurred only
insofar as the Wabanaki were already subjects of the French King. This is demonstrated by
Britain’s belief that it acquired sovereignty over Acadia by means of the Treaty of Utrecht, yet
no Indigenous nations were signatories to the Treaty of Utrecht. Rather, only France agreed to
cede sovereignty over Acadia in this treaty. Accordingly, Britain would have viewed the


67 Treaty of peace and friendship between The most Serene and most Potent Princess Anne, by the Grace
of God, Queen of Great Britain, France, and Ireland, and the most Serene and most Potent Prince Lewis
the XIVth, the most Christian King, Concluded at Utrecht the 31/11 Day of March/April 1713. By Her
Majesties Special Command (London: John Baskett, 1713) at 72-73

68 See Prins, supra note 47 at 365 (explaining that in the War of the Spanish Succession, France had
“dragged the Wabanaki into yet another cycle of conflict). See also the statement by a Wabanaki orator at
peace negotiations with the English at Casco Bay in 1713 quoted in Prins, ibid at 365-66: "It is well that
the kings should be in peace... It is not I that am striking you these past twelve (sic) years past, it is the
Frenchman who has availed himself of my arm to strike you.”

69 See Prins, ibid at 365.

70 Treaty of Utrecht, supra note 67 at Article XII, pp 72-73. Granted, some members of the Wabanaki
Confederacy within the “Provinces of the Massachusetts Bay and New Hampshire” did sign a treaty with
sovereignty it acquired over the Wabanaki by means of the Treaty of Utrecht as derivative of France’s prior assertion of sovereignty over the Wabanaki.

But this view begs the question of how France acquired sovereignty over the Wabanaki in the first place. And this question (as applied to Aboriginal peoples in Canada generally, not just the Wabanaki) is the truly germane question for the purposes of my project; in answering the question of how Canada can legitimate its assertion of sovereignty over Aboriginal peoples, any answer must be traced back to the original root of sovereignty in order to evaluate the normative value of the assertion. And France’s assertion of sovereignty is based upon discovery and occupation. 71

This explanation is consistent with the observation in the previous chapter that Canadian courts have long held that discovery, and not conquest, is the means by which France and Britain gained sovereignty over Aboriginal peoples and lands in Canada. 72 It is also consistent with the Supreme Court of Canada’s statement in Haida Nation, 73 acknowledging that the Crown’s assertion of sovereignty over Aboriginal territory and peoples cannot be justified by means of

the British at Portsmouth after hostilities concluded in 1713. According to the Treaty of Portsmouth of 1713, the Wabanaki signatories acknowledged themselves to be the “lawfull subjects of our Sovereign Lady, Queen Anne” and promised their “hearty subjection and obedience unto the Crown of Great Britain” (Treaty of Portsmouth (1713), online: Portsmouth Peace Treaty of 1713 <http://www.1713treatyofportsmouth.com/index.cfm>[Treaty of Portsmouth]). This raises the question of whether Britain understood itself as acquiring sovereignty over at least some members of the Wabanaki Confederacy by means of the Treaty of Portsmouth. In my view, it did not. As discussed in the next chapter, treaties embodying a surrender of sovereignty contain explicit language stating that the original inhabitants ‘cede’ or ‘yield’ ‘sovereignty’ or ‘dominion’ (see Chapter Four, section 3.3). The Treaty of Portsmouth, though, contains only a recognition of sovereignty on the part of the Aboriginal signatories, which suggests that Britain viewed itself as having already acquired sovereignty over the Aboriginal signatories at some earlier time. Specifically, the text of Mascarene’s Treaty illustrates that Britain considered itself to have gained sovereignty over those Aboriginal peoples located in Nova Scotia or Acadia by means of the Treaty of Utrecht, not the Treaty of Portsmouth.

71 See Chapter Two, text accompanying notes 44-45.

72 See Chapter Two, text accompanying notes 18-19, 76-77.

73 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511 [Haida Nation].
conquest: “Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered.”

It is important to clarify that I am not arguing that Britain did in fact gain sovereignty over the Wabanaki within Acadia by means of the Treaty of Utrecht, or that any claim by Britain or France to have gained sovereignty by discovery was normatively legitimate. On the contrary, James [sakêj] Youngblood Henderson has argued persuasively that the British-Wabanaki treaties confirm that “the Aboriginal nations were a separate and foreign jurisdiction from the colonies.” In support of this conclusion, Henderson refers to a 1743 decision of the Royal Court of Commissioners in a dispute between Connecticut and the “Mohegan Indians”, in which a majority held that the Crown did not view the Wabanaki parties as subjects of the British Crown, but as a distinct people. Even if this case is applicable in the Canadian context, I certainly would not dispute this holding. My point is merely that any claim that Britain conquered the Wabanaki in the Anglo-Wabanaki War of 1722 to 1727 would be contradicted by the actual terms of Mascarene’s Treaty, and would be inconsistent with the position actually taken by Britain in that treaty, namely that it had already been sovereign over Nova Scotia or Acadia and its inhabitants since 1713. My further point is merely that Britain could not both take this latter position and also claim to have conquered the Wabanaki in the Anglo-Wabanaki War of 1722 to 1727 given that British domestic law prohibits the Crown from engaging in acts of state against British citizens on British soil.

Although the foregoing factors may not necessarily justify a categorical conclusion that conquest was not an applicable mode of acquiring sovereignty over Aboriginal peoples in Canada, they do point towards the likely irrelevance of conquest in the Canadian-Aboriginal context.

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74 Ibid at para 25. This passage is also cited with approval by McLachlin CJ and Karakatsanis J writing on behalf of the majority in Manitoba Metis Federation Inc v Canada (AG), 2013 SCC 14 at para 67, 355 DLR (4th) 577 [Manitoba Metis Federation].

75 For a critique of the doctrine of discovery, see Chapter Two, Section 4.

76 Supra note 47 at 249.

77 Ibid at 248.
3.2 Conquest as a Concomitant to the Doctrine of Discovery

The observation that discovery, and not conquest, was the applicable mode of acquiring sovereignty in the Canadian-Aboriginal context raises the question of whether conquest ever took place as an incident to discovery. That is, even if conquest in the sense of an independent mode of acquisition of sovereignty likely did not occur in Canada, it is still necessary to inquire whether conquest as a concomitant to the doctrine of discovery occurred here. Recall that in the last chapter, we found that Britain employed the intermediate version of the doctrine of discovery in the Canadian context. According to Chief Justice Marshall’s articulation of the intermediate version in Johnson v M’Intosh, on discovery, a European state immediately acquired exclusive title to Indigenous land. This exclusive title, though, was subject to the right of the Indigenous inhabitants to use and occupy their land, which could be extinguished through either cession or conquest. Accordingly, the question that remains is whether the Indigenous rights that survived discovery were extinguished by conquest in Canada.

In my view, this question must be answered in the negative, for the same reasons given above for rejecting the notion that the Anglo-Wabanaki War of 1722 to 1727 constituted a conquest. McNeil convincingly argues that Chief Justice Marshall’s notion that conquest could extinguish the Indigenous rights remaining upon discovery was not the law of Britain’s dominions. As McNeil argues, at the moment when a state obtains sovereignty over foreign territory through discovery or settlement, the reception of English law and the naturalization of the original inhabitants happen simultaneously. That is, upon Britain’s assumption of sovereignty pursuant to its ‘discovery’ of foreign territory, the Indigenous inhabitants of that territory become British subjects, and domestic British law governs. And as already discussed above, British law does not allow the Crown to engage in acts of state, such as conquest, against British citizens on British

78 Johnson v M’Intosh (1823), 8 Wheaton 543 at 576, 21 US 543 (USSC).
79 See section Chapter Three, Sections 3.4 and 3.5.
80 Supra note 66 at 246.
81 Ibid at 208-209.
For this reason, McNeil concludes that Chief Justice Marshall’s notion that conquest could extinguish the Indigenous rights remaining after discovery is not the law of Canada. 83

McNeil’s argument is also consistent with the Royal Proclamation of 1763, 84 in which Britain essentially announced its intention not to use conquest as a means of extinguishing Indigenous rights. The Royal Proclamation states that the parts of Britain’s territories that have not been ceded to or purchased by Britain are reserved to the Indian Nations. 85 In other words, Britain recognizes only cession or purchase, but not conquest, as a valid means of extinguishing the Aboriginal rights that persist after a European nation has gained sovereignty by means of the doctrine of discovery. 86

4 Normative Analysis of Conquest

The foregoing discussion demonstrates the improbability of conquest applying in the Canadian-Aboriginal context. In case it does apply, I critically evaluate this concept in the next two sub-sections. In the first sub-section below, I analyze the argument that Indigenous peoples are not

82 See McNeil, ibid at 246, 265.
83 Ibid at 246.
84 George R, Proclamation, 7 October 1763 (3 Geo III) [Royal Proclamation] as reproduced in RCAP, vol 1, supra note 23 at Appendix D. I follow Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Center, University of Saskatchewan, 2012) in citing to the Royal Commission’s reproduction of the Royal Proclamation, because as Hoehn notes at p 12, n 17: “[t]he Royal Commission found that this text is truer to the original text of the [Royal Proclamation] printed by the King’s Printer, Mark Baskett, London 1763, than the reproduction at [RSC 1985, App II, No 1].”
85 Ibid at 723-24.
86 Scholars have identified another reason for Britain’s prohibition against the use of force in the Royal Proclamation, namely that Indigenous peoples in North America in 1763 were in a position to use military might to protect their rights. See for example, John Borrows, Canada’s Indigenous Constitution, supra note 24 at 133 (stating that in 1763, the “British were constrained to recognize Indigenous political and military might”). See also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 753 (explaining that the source of the Crown-Aboriginal fiduciary duty lies not “in a paternalistic concern to protect a ‘weaker’ or ‘primitive’ people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help”). Slattery’s observation is quoted in the majority decision of Manitoba Metis Federation, supra note 74 at para 66. I do not dispute this explanation; I only add the prohibition against acts of state by the Crown against British citizens within domestic law as a complementary explanation.
entitled to complain about having been supposedly conquered by European nations, because Indigenous peoples engaged in conquest amongst themselves prior to European arrival. In the second sub-section, I note that conquest rests upon the notion that might is right and recount some of the problems that flow from this notion. I then go on to evaluate the might is right proposition from the perspective of liberalism.

4.1 ‘Us Too’

Some scholars have presented what I refer to as the ‘us too’ argument. The premises of this argument claim that Indigenous peoples engaged in conquest against each other before Europeans arrived, displacing each other from different areas throughout what is now Canada. The (sometimes implied) conclusion is that European nations should be entitled to do the same thing to Indigenous peoples. For example, Flanagan describes what he believes are examples of Indigenous displacements that occurred post-European contact, as reported by European explorers. He then states that even though the events he describes “occurred after contact with European colonists, they suggest a pattern of behaviour that likely prevailed in earlier centuries.” Based on these premises, he concludes:

Why not consider the coming of the Europeans as a fourth migration, a new set of tribes pushing others in front of them? Should we hesitate to do so because the European colonists had lighter-coloured skin, hair, and eyes than the older inhabitants? At bottom, the assertion of an inherent right of aboriginal self-government is a kind of racism. It contends that the only legitimate inhabitants of the Americas have been the Indians and Inuit. According to this view, they had the right to drive each other from different territories as much as they liked, even to the point of destroying

87 See e.g. Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Clarendon Press, 1995) at 220, n 5: “…the land held by some indigenous groups at the time of contact was itself the result of the conquest or coercion of other indigenous groups.” See also Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy” (2003) 1 NZJPL 55 at 76-77 for the argument that special rights to land and self-governance for Indigenous peoples cannot be based on the Principle of First Occupancy if the Indigenous claimants acquired the territory in question by warfare or violence against other Indigenous peoples.

88 Supra note 40 at 17-18.

89 Ibid at 19.
whole peoples and taking over their land, but Europeans had no similar right to push their way in.\textsuperscript{90}

The ‘us too’ argument, stated at its highest, can be understood as appealing to the principle of equality: Indigenous and European nations should be treated equally insofar as they should be assessed by the same standard, namely, by the rule that conquest is a legitimate means of acquiring sovereignty.

Despite its putative appeal to equality, the ‘us too’ argument suffers from at least three problems. The first should be clear given the foregoing sections of this chapter. That is, at international law, the doctrine of conquest is governed by finite and knowable legal requirements. Determining whether a conquest has occurred is a matter of applying these legal requirements to the facts at issue. But the ‘us too’ argument does not even attempt this work.

Second, as discussed above, British law only sanctions acts of state, such as conquest, against foreign populations, but not against British subjects. To the extent that Britain relied on the doctrine of discovery, British conquest of Indigenous peoples would have been legally impossible because according to British law, Indigenous peoples were already British subjects at the time when any possible conquest may have occurred.

Flanagan may respond, though, that my second criticism misses his point, which is that European nations should not be subject to their own legal principles; rather, their actions should be evaluated with reference to pre-contact events occurring amongst Indigenous nations, as interpreted by European observers. This brings me to my second critique. It is not clear why, of all the possible standards by which European actions could be judged, the preferable one should be a European interpretation of a select set of pre-contact events. As John Borrows explains, prior to the arrival of Europeans in North America, Aboriginal peoples had their own well-developed legal “systems to oppose those who threatened access to land and resources. Direct occupation of land was only one of a range of options that Aboriginal peoples employed to secure their resources.”\textsuperscript{91} That is, Indigenous peoples prior to contact did not engage in an

\textsuperscript{90} Ibid at 25.

\textsuperscript{91} Borrows, \textit{Canada’s Indigenous Constitution}, supra note 24 at 129 [footnotes omitted].
unrestrained, free-for-all contest over land. Rather, they were governed by sophisticated intersocietal norms designed to prevent conflict and the use of force. To avoid employing an inaccurate or arbitrary standard, it is incumbent on anyone advancing the ‘us too’ argument to identify any relevant norms guiding the use of force according to Indigenous legal systems, and then to determine whether European “migrations” into Indigenous territories met those norms. In other words, the ‘us too’ argument fails to explain why a European perception of select, isolated pre-contact events amongst Indigenous peoples would serve as a more legitimate standard by which to assess European conduct than the actual legal traditions of Indigenous peoples.

Another potentially applicable standard may be the norms that emerged from the post-contact intersocietal practices between Indigenous and European nations. Alternatively, the most obvious standard by which European practices should be judged are European standards. This is particularly so given the common law doctrine of reception, which explains how British common law is received into a new territory that has been acquired by occupation. As Peter Hogg explains: “When an uninhabited territory was settled by British subjects, the rule of the common law was that the first settlers were deemed to have imported English law with them. In the absence of any competing legal system, English law followed British subjects and filled the legal void in the new territory.” And since Britain viewed itself as having acquired sovereignty in Canada through discovery and subsequently occupation, the doctrine of reception holds that the

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92 See Borrows, *Canada’s Indigenous Constitution*, ibid at 129-32.


common law was binding on British arrivals to Canada.\textsuperscript{96} It also assumes that the laws of Indigenous peoples were “either too unfamiliar, or too primitive, to justify compelling British subjects to obey them.”\textsuperscript{97} The ‘us too’ argument fails to explain how Britain could be entitled to rely on the doctrine of reception to supplant Indigenous laws with British laws and yet at the same time be exempt from British laws prohibiting acts of state against British citizens. In other words, the ‘us too’ argument embodies an unsustainable contradiction. Rather than complying with the principle of equality, the ‘us too’ argument, viewed in the light of the doctrine of reception, creates a double standard insofar as it would allow Britain to escape from select, inconvenient British laws while also asserting the otherwise ubiquitous application of British laws in Canada.

I discuss my third critique of the ‘us too’ argument in Chapter Six, as it depends upon an assessment of the role of treaties and prescription in the acquisition of sovereignty in what is now Canada.

\subsection{4.2 Might is Right}

Scholars have recognized that even though the doctrine of conquest does not sanction the “reign of unregulated force,” it still embodies the notion that might is right,\textsuperscript{98} and that this notion is problematic for a number of reasons.\textsuperscript{99} Borrows argues that “the doctrine of conquest is not a morally sound concept upon which to build our legal system” because a relationship based on conquest is likely to engender feelings of resentment and opposition on the part of Indigenous peoples toward the state, and therefore to foster conflict and confrontation.\textsuperscript{100} In addition to its normative shortcomings, conquest also suffers from a logical flaw; Currie recognizes that a

\begin{itemize}
\item \textsuperscript{96} For a critique of the doctrine of reception, see Borrows, \textit{Canada’s Indigenous Constitution}, \textit{supra} note 24 at 13-16.
\item \textsuperscript{97} JE Cote, “The Reception of English Law” (1977) 15 Alta L Rev 29 at 38. See also Borrows, \textit{Canada’s Indigenous Constitution}, \textit{supra} note 24 at 13.
\item \textsuperscript{98} See e.g. Korman, \textit{supra} note 1 at 95.
\item \textsuperscript{99} In contrast, for a discussion of the justifications of conquest advanced by classical writers, see Korman, \textit{ibid} at 18-29.
\item \textsuperscript{100} Borrows, \textit{Canada’s Indigenous Constitution}, \textit{supra} note 24 at 20.
\end{itemize}
doctrine that advocates both the sovereign equality of nations and “their right to try to subjugate one another militarily” is theoretically incoherent. Korman elaborates on this point when she writes:

What is chiefly remarkable about the idea that there exists a right of conquest in international society is the implication it carries that superior force, or military might, is capable in itself of conferring rights upon states….For if the right of conquest is a right conferred by power, and the members of international society are manifestly unequal in terms of power, then international law must be such as to favour the stronger over the weaker members of international society. This makes it difficult to comprehend how states might truly be said to be equal before the law.

In addition to this logical inconsistency, we may wonder whether conquest, and in particular its commitment to the notion that might is right, suffers from an inconsistency with liberalism. On the one hand, Korman’s observations seem to suggest that it does, insofar as the might is right principle appears to violate the principle of equality. On the other hand, as discussed in the previous chapter, some argue that liberalism is a theory about the justice of a state-sanctioned distribution of goods amongst individuals. That is, it is a theory about the justice of the relationship between a state and its citizens; it is not a theory about the justice of relations between states. On this view, it is not clear that liberalism would have anything to say about the use of force between states.

Our inquiry does not necessarily end here, though. As discussed above, in the Canadian context, European nations purported to acquire sovereignty over what is now Canada immediately upon discovery. If conquest did occur, it would have occurred as an incident of discovery. But in that

101 Supra note 2 at 453.
102 Supra note 1 at 9-10 [footnotes omitted; emphasis added].
103 See also Margaret Moore, “Indigenous Peoples and Political Legitimacy” in Jeremy Webber and Colin M Macleod, eds, Between Consenting Peoples: Political Community and the Meaning of Consent (Vancouver: UBCPress, 2010) 143 at 150 (critiquing conquest on the grounds that “[b]y its very nature, conquest violates the rights of sovereignty of the political community whose territory is invaded; this point is of particular concern in international law but is also relevant to liberal theory, given that liberalism places a great value on due process and the rule of law”).
104 See Chapter Two, text accompanying note 82.
case, Britain viewed Indigenous peoples as already being British subjects. Accordingly, conquest in the Canadian context does in fact depend upon the notion that might is right as between the state and its citizens. This brings us to the question of whether liberalism can countenance the distribution of rights on the basis of the ability of citizens to withstand and repel state-imposed military force.

As discussed in Chapter One, the version of liberalism that informs my project is the version articulated by the Supreme Court of Canada in *Van der Peet*. Specifically, all individuals in society are equally entitled to exercise certain fundamental rights because the “inherent dignity” of each person is entitled to equal respect. The notion that might is right, in contrast, is antithetical to the principle of equality and to liberalism. The might is right notion states that the rights to which an individual is entitled are those that he or she is able to secure through the exercise of brute strength or the ability to wield force or power. Far from treating individuals as equal, the might is right notion privileges those with physical power over those who are physically weaker, without explaining why brute physical strength should be a normatively significant marker of differentiation. Accordingly, conquest as a concomitant to discovery is unacceptable within a liberal paradigm.

### 5 Summary

To summarize, both legal and normative considerations count against conquest as an acceptable means of legitimating Crown sovereignty in the Canadian context. Legally, Britain’s reliance on the doctrine of discovery means that its own domestic law could not sanction conquest against Indigenous inhabitants who would have become British subjects under the common law immediately upon discovery. Normatively, conquest’s commitment to the might is right principle means that it runs afoul of liberalism’s commitment to equality. This leaves cession and prescription to be considered.
Chapter Four
Cession

1 Overview

This chapter considers whether cession, or the execution of treaties, can serve as a liberally-satisfying justification for Crown sovereignty over Aboriginal peoples and territory in Canada. I begin by discussing the international law principle that one state may cede sovereignty to another state, which is usually evidenced by a treaty of cession. A number of passages from Supreme Court of Canada decisions assume that this is the way in which Canada acquired sovereignty over Indigenous peoples. In contrast, I argue that there are at least two reasons for rejecting this view. The first is the well-known argument that Aboriginal peoples did not intend to relinquish sovereignty by signing treaties; rather, they understood treaties as embodying an agreement that the parties would share the land in question equitably.

The second argument is that the actual text of Aboriginal-Crown treaties does not even purport to transfer sovereignty from Indigenous nations to Britain or Canada. Even the historical treaties that do contain an acknowledgement of British sovereignty, such as the Peace and Friendship treaties in the Maritime provinces, do not contain any provisions transferring sovereignty from Indigenous nations to Britain. Rather, they assume that Britain had already acquired sovereignty over the Indigenous signatories by some other means at some earlier period, and the treaties merely recognize this prior acquisition. This is consistent with Britain’s oft-stated position that it acquired sovereignty in some areas by means of the doctrine of discovery and in other areas through cession from France, who in turn originally acquired sovereignty by means of the doctrine of discovery. As such, it is not surprising that Canadian treaties do not contain provisions ceding sovereignty. Any such provision would have been superfluous in the face of European reliance on the doctrine of discovery. The role of treaties from the British and Canadian perspective, then, was merely to extinguish the Indigenous rights to land that persisted following discovery, in accordance with the intermediate version of the doctrine of discovery. Neither Britain nor Canada conceived of historical treaties as accomplishing any more than this, and historical treaties cannot be re-invented as accomplishing any more than this now.
2 Treaties as Transferring and Recognizing Sovereignty

Along with discovery and occupation and conquest, cession is another mode of acquiring sovereignty at international law. Cession refers to “the transfer of sovereignty over territory pursuant to agreement between the ceding and acquiring states.”¹ Such agreements are often expressed in the form of a treaty.² As John Currie notes, though, in order for the transfer of sovereignty to be effective, the ceding state must actually relinquish authority over its territory.³ That is, “a transfer of sovereignty over territory by cession must occur in fact as well as in law.”⁴ Further, the parties to a treaty, including an Indigenous nation, must understand the terms of the treaty in order for it to be valid.⁵ M.F. Lindley cites numerous incidents from previous centuries in which Great Britain sought to enforce this rule against other European nations.⁶ In these cases, a European nation purported to acquire sovereignty from an Indigenous nation who did not share the European nation’s understanding of the treaty.⁷ Great Britain’s position was that these were not valid treaties of cession.⁸

Many commentators have concluded that the fact that European nations entered into treaties with Indigenous peoples is evidence that the former viewed the latter as exercising sovereignty or nationhood.⁹ But this leaves unanswered the question of what exactly Indigenous nations

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² See Currie, *ibid*.
³ See *ibid*.
⁴ Currie, *ibid*.
⁷ See Lindley, *ibid*.
⁸ See Lindley, *ibid*.
⁹ See Douglas Sanders, “The Supreme Court of Canada and the ‘Legal and Political Struggle’ over Indigenous Rights,” (1990) 22:3 Canadian Ethnic Studies 122 at 122 (explaining that “[i]t is now generally accepted that the initial relations between Indian tribes and the European colonial powers in
surrendered in the treaties they executed. That is, did Indigenous nations transfer their sovereignty to European nations through treaties?

3 Aboriginal Treaties in the Canadian Context

3.1 Overview

Jack Woodward recognizes that Canadian courts have not provided consistent answers to the question whether treaties with Aboriginal peoples transferred sovereignty:

[T]he role treaties have played in making Indians subjects of the Crown is unclear. King J. of the Ontario High Court\(^{10}\) said that, by the Haldimand Treaty, the Six Nations Indians became subjects of the Crown. On the other hand, Marceau J. of the Federal Court\(^{11}\) said that the Ojibway parties to the Robinson Treaty were already subjects of the Queen.\(^{12}\)

The Supreme Court of Canada seems to support Justice King J’s view, insofar as it has stated that the function of treaties is to reconcile Aboriginal and Crown sovereignty. For instance, the

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New England were on a nation to nation basis. Written treaties between tribes and European powers go back to the early 17\(^{th}\) century\(^{13}\)); Royal Commission on Aboriginal Peoples, The Final Report of the Royal Commission on Aboriginal Peoples, vol 2, Restructuring the Relationship (Ottawa: Supply and Services Canada, 1996) at 110 (reporting that in “the eyes of many treaty peoples, the fact that the French and British Crowns concluded alliances and treaties with First Nations demonstrates that these nations were sovereign peoples capable of conducting international relations”); Tracey Lindberg, “The Doctrine of Discovery in Canada” in Robert J Miller et al, Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies (Oxford: Oxford University Press, 2010) 89 at 98 (explaining that “[t]here was no language and no law that dealt with the nations as other than sovereigns and the nature of treaties and agreement that followed colonizer landing on Indigenous lands were predicated on notions of nationhood, authority, and autonomy” [footnotes omitted]); Patrick Macklem, “Normative Dimensions of an Aboriginal Right of Self-Government” (1995-1996) 21 Queen's LJ 173 at 197 (stating that “the treaty-making process is evidentiary support of the fact that Aboriginal nations were (and were regarded by the Crown as) self-governing communities, and entitled to govern themselves until they suggest an intent to the contrary”).

\(^{10}\) *Logan v Canada (AG)* (1959), 20 DLR (2d) 416 at 422, [1959] OWN 361 (Ont HC).

\(^{11}\) *Pawis v R* (1979), 102 DLR (3d) 602 at 607, [1979] 2 CNLR 52 (TD).

Court in *Haida Nation* states that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”\(^{13}\) and that “Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties.”\(^{14}\) A majority of the Court makes a similar point in *Beckman v. Little Salmon/Carmacks First Nation*: “Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations.”\(^{15}\) What then, explains the divergence in opinion between Justice King and the Supreme Court of Canada on the one hand, and Justice Marceau on the other?

To be fair to the courts, to the extent that different treaties contain different terms and were executed by different parties in different circumstances, it may be possible that some treaties transfer sovereignty while others do not. According to this view, to resolve this issue conclusively, it would be necessary to examine the specific terms and circumstances of each and every Aboriginal-Crown treaty.\(^{16}\) Such an undertaking is beyond the scope of this thesis. My goal, rather, is to highlight the factors that tend to demonstrate that the British and Canadian Crowns did not acquire sovereignty over Aboriginal peoples and territories by means of treaties, despite some statements to the contrary by the courts. There are at least two arguments in support of this conclusion, each of which is discussed in detail below. The first is the well-known argument that Aboriginal peoples did not understand treaties as transferring sovereignty, and did not intend to relinquish sovereignty by signing them. The second is that the actual text of the

\(^{13}\) *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20, [2004] 3 SCR 511 [*Haida Nation*].

\(^{14}\) *Ibid* at para 25.

\(^{15}\) *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 8, [2010] 3 SCR 103.

\(^{16}\) In contrast, John Borrows convincingly argues that that the *Royal Proclamation* and the Treaty of Niagara of 1764 together form a treaty between the British Crown and Indigenous nations, the terms of which “may yet be found to form the underlying terms and conditions which should be implied in all subsequent and future treaties”: John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBCPress, 1997) 155 at 169 [Borrows, “Wampum at Niagara”]. On this view, a certain measure of consistency amongst post-1764 treaties can be assumed.
treaties does not even purport to transfer sovereignty from Indigenous nations to Britain or Canada.

3.2 The Aboriginal Perspective

It is now a well-established legal principle that Aboriginal treaties are to be liberally construed insofar as the meaning of a treaty cannot be deduced from a technical reading of its written text; rather, treaty provisions are to be construed “in the sense in which they would naturally be understood by the Indians.” 17 Writing for the majority in Badger, 18 Cory J provides a concise yet comprehensive summary of the jurisprudence in support of this principle:

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….Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned…. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. 19

Later in the same decision, Cory J goes on to explain the rationale underlying the requirement that treaties be understood in the sense in which the Aboriginal signatories would have understood them:

Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement….The treaties

19 Ibid at para 41.
were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.  

In addition to inadvertent miscommunication due to a language barrier, European authorities also sometimes intentionally and explicitly used deception when executing treaties with Aboriginal nations. For example, Harald Prins records that in 1717, an English witness openly made the following admission: “I have been present when an article of Peace has run in one sense in the English [language] and quite contrarie in the Indian by the Governour’s express order and this has brought unnumbered mischiefs upon them.” These factors highlight the importance of identifying the Aboriginal perspective regarding the status of sovereignty in the execution of treaties.

Although over-broad generalizations must be avoided given the distinct circumstances of each treaty, the wide-ranging research completed by the Royal Commission on Aboriginal Peoples lends credibility to its conclusion that Aboriginal peoples had no intention of relinquishing sovereignty when executing treaties:

Each treaty is a unique compact, but there is remarkable consistency in the principles of the treaties as expressed by the treaty nations themselves. They maintain with virtual unanimity that they did not give up either their relationship to the land (or as Europeans called it, their title) or their sovereignty as nations by entering into treaties with the Crown. Indeed, they regard the act of treaty making as an affirmation of those fundamental rights.

20 Ibid at para 52.

Indian treaty nations naturally approached the treaties they made with Europeans on the same basis as the treaties they made with each other. As we saw in Volume 1, indigenous treaty practice was to reinforce the autonomy of nations and to establish relations of kinship among them. To the treaty nations, the making of a treaty affirmed their nationhood and their rights to territory. They created sacred relations of kinship and trust.\(^{22}\)

In other words, from the Aboriginal perspective, not only did Aboriginal peoples not surrender their sovereignty in treaties, but they also did not surrender their title to their land. The Commission explains the rationale underlying this perspective by noting that notions such as ‘extinguishment’ and ‘surrender’ do not exist in many Indigenous cultures and defy articulation in many Indigenous languages.\(^{23}\) This observation is consistent with James [sákéj] Youngblood Henderson’s research, which shows that it is “very difficult, if not impossible,” to employ European legal “notions of ‘ownership’ and ‘property’ rights in the context of Aboriginal languages or worldview.”\(^{24}\) As such, the proposition that Indigenous peoples intended to surrender their sovereignty when signing historical treaties seems implausible.\(^{25}\)

The Crown-Aboriginal treaties represented by Two Row Wampum belts confirm the Aboriginal perspective regarding Aboriginal sovereignty. Wampum are shells that are drilled and threaded into strings which can then be woven into belts.\(^{26}\) The various patterns formed by the shells

\(^{22}\) Supra note 9 at 40.

\(^{23}\) Ibid at 44. See also Lindberg, supra note 9 at 110-13 (explaining that the notion that Indigenous peoples could sever their relationship to their land by selling it altogether “would be a foreign one and likely to be quite incapable of translation”). For an in-depth discussion of the Algonquian worldview regarding space (as opposed to the western concept of ‘land’), see James (sákéj) Youngblood Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18 Dalhousie LJ 196 at 216-224.

\(^{24}\) Ibid at 217.

\(^{25}\) See John Borrows, Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Incorporated, 2002) at 113 (explaining that “the treaty process is a deeply flawed means by which to acquire” sovereignty and that in most treaties, “there was no consensus or ‘meeting of the minds’ on the question of the Crown receiving sovereignty or underlying title to the land from Aboriginal peoples”).

\(^{26}\) See John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 65 [Borrows, Canada’s Indigenous Constitution].
within the belts represent legal agreements and principles. Indigenous nations exchanged wampum belts after reaching agreement through negotiations.\textsuperscript{28} As such, wampum strings and belts serve as memory aids to assist Indigenous peoples “in remembering and reciting their community’s laws.”\textsuperscript{29} Many Indigenous nations employed wampum in this way, including the Haudenosaunee, the Anishinabek, and the Mi’kmaq peoples.

The \textit{Gus Wen Tah}, or Two Row Wampum, has a long history. The Haudenosaunee exchanged Two Row Wampum belts with the Dutch in 1645, with the French in 1701 and with the English in 1763-64.\textsuperscript{33} In July and August of 1764, British representatives met with approximately two thousand First Nations chiefs in order to negotiate the Treaty of Niagara.\textsuperscript{34} The First Nations representatives had come from “as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay.”\textsuperscript{35} Borrows notes that it is possible that Indigenous nations came from even farther away, based on records indicating “that the Cree and Lakota (Sioux) nations were also present at this event.”\textsuperscript{36} At this meeting, the Indigenous nations presented a Two Row

\begin{footnotes}
\item[27] See Borrows, \textit{Canada’s Indigenous Constitution}, \textit{ibid}.
\item[28] See Dale Turner, \textit{This is not a Peace Pipe: Towards a Critical Indigenous Philosophy} (Toronto: University of Toronto Press, 2006) at 47.
\item[30] See Turner, supra note 28 at 47-48 for an account of the significance of wampum within Haudenosaunee or Iroquois culture; see also Borrows, \textit{Canada’s Indigenous Constitution}, supra note 26 at 64-66, 130.
\item[31] See e.g. Borrows, \textit{Canada’s Indigenous Constitution}, \textit{ibid} at 130 (describing a 1701 peace treaty between the Haudenosaunee and the Anishinabek that was recorded with a wampum belt bearing the image of a “bowl with one spoon”, which “references the fact that both nations would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that no knives or sharp edges would be allowed in the land, for this would lead to bloodshed” [footnotes omitted]).
\item[32] See Borrows, \textit{Canada’s Indigenous Constitution}, \textit{ibid} at 65.
\item[33] See Borrows, \textit{Canada’s Indigenous Constitution}, \textit{ibid} at 76.
\item[34] See Borrows, “Wampum at Niagara”, supra note 16 at 163.
\item[36] Borrows, “Wampum at Niagara”, \textit{ibid} [footnotes omitted].
\end{footnotes}
Wampum “to reflect their understanding of the treaty of Niagara and the words of the Royal Proclamation.” Grand Chief Michael Mitchell of Akwesasne explains the significance of the Two Row Wampum as follows:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.

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

The principles of the Two Row Wampum became the basis for all treaties and agreements that were made with the Europeans and later the Americans.

In other words, as Borrows argues, the Aboriginal participants at Niagara understood the Treaty of Niagara to be a confirmation of their continuing sovereignty. They were agreeing to live peacefully side-by-side with the British, insofar as their two vessels would travel together down the river, but the Aboriginal nations would not interfere in the sovereignty of the British, and the British would not interfere in the sovereignty of the Aboriginal nations. And as Borrows reveals, the conduct and statements of First Nations representatives in the years and decades following

37 Borrows, “Wampum at Niagara”, ibid.


39 Borrows, “Wampum at Niagara”, ibid (stating that “the Treaty of Niagara discredits the claims of the Crown to exercise sovereignty over First Nation”).
the Treaty of Niagara are consistent with and reinforce the Aboriginal perspective of continuing sovereignty.\(^{40}\)

Further, as Grand Chief Mitchell states above, the Two Row Wampum served as the foundation for subsequent Crown-Aboriginal treaties. The Aboriginal perspective, namely that they did not relinquish sovereignty by signing treaties, is not surprising in this light. Moreover, both the view that the Two Row Wampum informs all subsequent treaties as well as the great number of Aboriginal nations who participated in the Treaty of Niagara lend support to the potential legitimacy of identifying a general Aboriginal perspective regarding sovereignty and treaties. Indeed, Borrows argues that the Treaty of Niagara should be understood as complementing the *Royal Proclamation* of 1763, and that together they form not only a treaty between the British Crown and First Nations, but the most fundamental agreement yet entered into between these parties.\(^{41}\) The result, Borrows concludes, is that

> the express terms and promises made in the Proclamation and at Niagara may yet be found to form the underlying terms and conditions which should be implied in all subsequent and future treaties. This would provide First Nations treaty law with some universality and consistency which heretofore has been missing from the case-by-case, factually specific, judicial treatment of each agreement.\(^{42}\)

The Two Row Wampum exchanged at the Treaty of Niagara, then, arguably provides a basis on which to rest the general statement that from the Aboriginal perspective, Aboriginal peoples did not cede sovereignty by executing Aboriginal-Crown treaties.

If Aboriginal peoples did not agree to relinquish sovereignty in treaties, what did they agree to? Did they agree “to cede and extinguish forever whatever rights they might have to tracts of land larger than the European continent…in exchange for tiny and crowded reserves…and a few usufructuary rights that exist at the pleasure of the Crown”?\(^{43}\) The Royal Commission on

\(^{40}\) *Ibid* at 165-68.

\(^{41}\) *Ibid*.

\(^{42}\) *Ibid* at 169.

Aboriginal Peoples explains that “treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers.” 44 Henderson illustrates this point with respect to the Mi’kmaq when he notes that the sacred order of their territories “was never viewed as a commodity that could be sold, only shared.” 45 He demonstrates the prime importance of sharing within the Mi’kmaq worldview by explaining the Mi’kmaq principle that they have an obligation to protect their relationship with their land “and a right to share its uses, but only the future unborn children in the invisible sacred realm of the next seven generations [have] any ultimate ownership of the land.” 46 For the Mi’kmaq, sharing was not only “an honour, a duty and a privilege”, but also “an integral part of the ethical development of a Mi’kmaq.” 47 This emphasis on sharing is confirmed by Leroy Little Bear’s explanation that Indigenous legal systems did not contemplate, much less permit, the transfer of absolute title to land: 48

[T]he standard or norm of the aboriginal peoples' law is that land is not transferable and therefore is inalienable. Land and benefits therefrom may be shared with others, and when Indian nations entered into treaties

University Press, 2000) 36 at 44 (rejecting such a conception on the grounds that “Indigenous people understood these treaties in the same way as the earlier peace and friendship treaties: as international treaties among equal nations to agree to work out ways of sharing the use of land and resources while maintaining their freedom as nations”).

44 Supra note 9 at 45. See also Henderson, supra note 23 at 219 (explaining that the “sharing of space…is the meaning for all of Aboriginal life”); Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 119-22 (providing support for the proposition that “First Nations frequently assert that treaties only facilitated sharing the land and did not relinquish sovereignty”).

45 Ibid at 231.

46 Ibid at 232.


with European nations, the subject of the treaty, from the Indians' viewpoint, was not the alienation of the land but the sharing of the land.\textsuperscript{49}

As Little Bear explains, “sharing” does not mean that Aboriginal peoples gave up their own rights to the land “for all eternity”; rather, they “shared with Europeans in the same way they shared with the animals and other people.”\textsuperscript{50} To summarize, to the extent that generalization is possible, concepts such as surrendering sovereignty and alienating land did not exist within Indigenous legal traditions; rather, when executing treaties, Indigenous peoples intended to enter into an arrangement to share their land with Europeans. This, then, is the Aboriginal perspective.

One may still ask, though, whether this was in fact the Aboriginal perspective in the case of a treaty whose text explicitly states that the Aboriginal signatories recognize the sovereignty of the British Crown. For example, are there any grounds for concluding that the Aboriginal signatories to Mascarene’s Treaty, discussed in the previous chapter, understood themselves to be retaining their sovereign independence despite the unequivocal recognition of British sovereignty in the English text? In my view, Henderson provides a compelling argument for answering this question in the affirmative.\textsuperscript{51} He contends that in executing the Wabanaki-British treaties, including Mascarene’s Treaty, the Aboriginal nations never intended to place themselves under the sovereignty of the British Crown, as these Aboriginal nations “had no concept of rules from above and did not tolerate such a conception of rule.”\textsuperscript{52} Rather, the Mi’kmaq, at least, understood the treaties as providing the British with reserves within Mi’kmaq territory. These treaties carved out a section of Mi’kmaq sacred space to be shared with the British.\textsuperscript{53}

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\textsuperscript{49} Leroy Little Bear, “Aboriginal Rights and the Canadian ‘Grundnorm’” in J Rick Ponting, ed, \textit{Arduous Journey: Canadian Indians and Decolonization} (Toronto: McClelland and Stewart, 1986) 243 at 247. For other instances of scholars relying on this passage, see McNeil, \textit{ibid}; Lindberg, \textit{supra} note 9 at 112.

\textsuperscript{50} \textit{Ibid} at 246.

\textsuperscript{51} For a comprehensive discussion of the significance of the historical treaties between the British Crown and the Wabanaki Confederacy, see Henderson, \textit{supra} note 23.

\textsuperscript{52} \textit{Ibid} at 240-41.

\textsuperscript{53} See Henderson, \textit{ibid} at 259.
\end{flushright}
This perspective is illustrated by the actions of Loron Sagouarrab, who signed *Dummer’s Treaty* in 1725 on behalf of the Penobscot, a member nation of the Wabanacki Confederacy.\(^5^4\)

*Dummer’s Treaty* and *Mascarene’s Treaty* were essentially companion treaties, both having been signed at the conclusion of the Anglo-Wabanaki War of 1722 to 1727, but by different parties. The text of *Dummer’s Treaty* states that the Aboriginal signatories "have concluded to make... our submission unto his most Excellent Majesty George."\(^5^5\) After Sagouarrab signed the treaty and returned to Penobscot, Father Etienne Lauverjat, a Jesuit missionary, translated the written text for him.\(^5^6\) On hearing the translation, Sagouarrab was offended that the British had misled him, especially on the issue of submission to the British Crown, and he dictated a response to Governor Dummer, which Father Lauverjat translated into English.\(^5^7\) The letter reads, in part:

Sir

Having hear'd the Acts read which you have given me I have found the Articles entirely deffering from what we have said in presence of one another, 'tis therefore to disown them that I write this letter unto you

1st That I have been to make my submission in my name my or in the name of nation to you & to King George your king.

…

3. That I have acknowledged your king for my king & that Him I have such own'd & have that my Ancestors themselves have Acknowledged for declar'd subjects to the Crown of England

…

Here is rather what I said to you I come here att your Invitation to Inform you of the disposition my nation is att present in to witt, that they accept of the cessation of Arms which you have offer'd them.

\(^{5^4}\) See Prins, *supra* note 21 at 369.

\(^{5^5}\) *The submission and agreement of the Delegates of the Eastern Indians* (December 15, 1725, Boston, New England), online: Cape Breton University <http://www.cbu.ca/mrc/treaties/1725> [*Dummer’s Treaty*].

\(^{5^6}\) See Prins, *supra* note 21 at 371-372.

\(^{5^7}\) See Prins, *ibid* at 372.
As for what relates to your King, when you have ask'd me if I
acknowledged Him for King I answered yes butt att the same time have
made you take notice that I did not understand to acknowledge Him for
my king butt only that I own’d that He was king in His kingdom as the
king of France is king in His.

...

The disagreement I find between your.writings & what I spoke to you
viva voce stopps me & makes me suspend my negociation till I have
received your answer.

I thought to have spoken Justly and according to the Interests of my
Nation butt I have had the confusion to see that my words have been
taken in a quite contrary sense. 58

The Penobscot perspective, then, was not that the Penobscot had surrendered to the British, but
rather that the British had made a peace offering to the Wabanaki. Further, Sagouarrab never
agreed to submit himself or his nation to the British King. He merely acknowledged that King
George is the King of Britain.

The Mi’kmaqs shared Sagouarrab’s perspective. On December 1, 1725, during the negotiations
leading to Mascarene’s Treaty, Lieutenant Governor Mascarene read out the proposed treaty
terms. 59 In response to the requirement of submission to the British Crown, a member of the
Mi’kmaq nation objected, stating, “we reckon ourselves a free People and are not bound.” 60 Yet,
despite this disagreement, it appears that the Mi’kmaq went ahead and signed the version of
Mascarene’s Treaty referring to submission to the British King and acknowledging Britain’s
jurisdiction and dominion over Nova Scotia or Acadia. 61 What accounts for this discrepancy?
One answer may be that the Mi’kmaq nation never intended to sign anything containing such a
submission, but the language barrier prevented them from identifying the offending passages in
the written text. On the part of the British, it may have been an innocent error, or this may have been one of the instances, recognized by Prins, of British authorities intentionally agreeing to one thing orally while recording the opposite in the English text.\footnote{See text accompanying note 21.}

To summarize, despite the textual statements within Mascarene’s Treaty to the contrary, the oral statements by members of the Mi’kmaq nation are consistent with the Aboriginal perspective that Aboriginal peoples never agreed to surrender their sovereignty.

### 3.3 The Text of Historical Treaties

Having identified the Aboriginal perspective, the text of the treaties remains to be examined. It may be tempting to assume that the purpose of Aboriginal treaties, from the British and Canadian perspective, was to transfer sovereignty from Indigenous peoples to the Crown, and so the written words of the treaties must reflect this goal. Indeed, this seems to have been the assumption of the courts that have stated that historical treaties serve to reconcile Aboriginal and Crown sovereignty.\footnote{See text accompanying notes 13-15.} However, an examination of the actual text of the treaties demonstrates that this is not the case. That is, the text of historical treaties does not purport to transfer sovereignty from Indigenous to European nations.

Britain has had ample experience drafting treaties of cession. When a treaty signatory cedes sovereignty to Britain, the treaty at issue contains a provision explicitly stating that the conquered state is ceding ‘sovereignty’ or ‘dominion’ to Britain. The Treaty of Utrecht of 1713 illustrates this point. It was executed at the conclusion of the War of the Spanish Succession by Britain and France, among others. At Article XII, the King of France, referred to as “his Most Christian King”, yields “dominion” over Nova Scotia or Acadia and Annapolis Royal, including the “inhabitants” of these territories, to Great Britain:

\begin{quote}
The most Christian King shall take care to have delivered to the Queen of Great Britain, on the same Day that the Ratifications of this Treaty shall be exchanged, Solemn and Authentick Letters, or Instruments, by virtue whereof it shall appear that the island of Saint Christophers is to be
\end{quote}
possessed alone hereafter by British subjects, likewise all Nova Scotia or Accadie, with its ancient Boundaries, as also the City of Port Royal, now called Annapolis Royal, and all other things in those Parts, which depend on the said Lands and Islands, together with the Dominion, Property, and Possession of the said Islands, Lands, and Places, and all Right whatsoever, by Treaties, or by any other way obtained, which the most Christian King, the Crown of France, or any the Subjects thereof, have hitherto had to the said Islands, Lands, and Places, and the Inhabitants of the same, are yielded and made over to the Queen of Great Britain…

In other words, the actual text of this treaty explicitly states that France yields its dominion over Nova Scotia and Annapolis Royal and their inhabitants to Britain.

The Treaty of Paris of 1763 also illustrates this point. The Treaty of Paris was signed by Britain, France and Spain at the conclusion of the Seven Years’ War. In it, the King of France, again referred to as “his Most Christian Majesty,” cedes “sovereignty” over France’s North American colonies, including “their inhabitants”, to Britain. Specifically, Article IV of the Treaty of Paris states:

IV. His Most Christian Majesty renounces all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guaranties the whole of it, and with all its dependencies, to the King of Great Britain: Moreover, his Most Christian Majesty cedes and guaranties to his said Britannick Majesty, in full right, Canada, with all its dependencies, as well as the island of Cape Breton, and all the other islands and coasts in the gulph and river of St. Lawrence, and in general, every thing that depends on the said countries, lands, islands, and coasts, with the sovereignty, property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without

64 Treaty of peace and friendship between The most Serene and most Potent Princess Anne, by the Grace of God, Queen of Great Britain, France, and Ireland, and the most Serene and most Potent Prince Lewis the XIVth, the most Christian King, Concluded at Utrecht the 31/11 Day of March/April 1713. By Her Majesties Special Command (London: John Baskett, 1713) at 72-73 [Treaty of Utrecht] [emphasis added].

65 The definitive treaty of peace and friendship between His Britannick Majesty, the most Christian King, and the King of Spain. Concluded at Paris, the 10th day of February, 1763. To which, the King of Portugal acceded on the same day. Published by authority. (London: E. Owen and T. Harrison, in Warwick-Lane, 1763) [Treaty of Paris].
restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned.\textsuperscript{66}

In other words, the actual text of this treaty explicitly states that France cedes its sovereignty over Canada and the inhabitants of Canada to Britain.

This type of explicit recognition of the transfer of sovereignty was not confined to relations between European states. A similarly explicit cession of sovereignty exists in the English version of the \textit{Treaty of Waitangi},\textsuperscript{67} which was executed by the British Crown and thirty-nine Indigenous chiefs in New Zealand in 1840.\textsuperscript{68} The first article of the English version states:

\begin{quote}
The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.\textsuperscript{69}
\end{quote}

Again, like the previous two treaties just examined, the actual text of the English version of this treaty explicitly states that the Indigenous signatories cede sovereignty to the Queen of England. In contrast, the treaties between Aboriginal peoples in Canada and the British or Canadian Crowns do not contain any similarly explicit agreement to cede sovereignty or dominion.

For example, the Douglas treaties do not even contain the words “sovereignty” or “dominion”. Rather, these treaties merely state that the Aboriginal signatories “consent to surrender, entirely and for ever” certain specified tracts of land to James Douglas on behalf of the Hudson’s Bay

\textsuperscript{66} \textit{Ibid} [emphasis added].

\textsuperscript{67} I am indebted to the Honourable Justice Leonard S. Mandamin for bringing this point to my attention.

\textsuperscript{68} Claudia Orange, \textit{The Treaty of Waitangi} (Wellington, New Zealand: Bridget Williams Books Limited, 1997) at 259.

\textsuperscript{69} \textit{The Treaty of Waitangi (English Text)} reproduced in and cited to Orange, \textit{ibid} at 258 [emphasis added].
Similarly, there is no mention whatsoever of yielding sovereignty over the inhabitants of the territories in question. In other words, from a textual viewpoint, the Douglas treaties, far from surrendering sovereignty, are essentially real estate conveyances between Aboriginal nations and the Hudson’s Bay Company.

The Robinson treaties similarly do not contain the words “sovereignty” or “dominion”. The language of the Robinson Superior treaty is representative of both Robinson treaties. It states that the Aboriginal signatories “freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest” in certain specified territory, except for designated areas set aside as reserves. In other words, like the Douglas treaties, the text of the Robinson treaties does not purport to transfer sovereignty over any territory or the inhabitants of any territory.

Likewise, the numbered treaties do not contain the word “sovereignty”, and the word “dominion” is used only to refer to the “Dominion of Canada” or to the British “dominions”. For example, Treaties One and Two state that the Aboriginal signatories “cede, release, surrender and yield up to Her Majesty the Queen, and Her successors forever, all the lands included within” certain specified areas. The language of Treaty Three is representative of that employed within the rest of the numbered treaties. It states that the Aboriginal signatories “do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within” certain specified areas. It may be argued that the

70 Douglas Treaties - Conveyance of Land to Hudson’s Bay Company by Indian Tribes, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1100100029049/1100100029050> [Douglas treaties].

71 Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Superior Conveying Certain Lands to the Crown, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1100100028978/1100100028982> [Robinson Superior treaty].

72 Treaties 1 and 2 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1100100028664/1100100028665> [Treaties One and Two].

73 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, online: Aboriginal Affairs and Northern Affairs and Development Canada <http://www.aadnc-aandc.gc.ca/eng/1100100028101/1100100028102> [Treaty Three].
reference to “all rights…whatsoever” implies the inclusion of rights to sovereignty or dominion. However, this formulation does not even approach the level of textual specificity contained within the two treaties between France and Britain examined above or in the Treaty of Waitangi.

One may still argue, though, that even though these treaties do not contain provisions transferring sovereignty or dominion, they are significant because they do contain acknowledgments of British sovereignty. Tom Flanagan, for instance, argues against the assertion that Aboriginal nations never gave up their right of self-government by contending that “[a]ll treaties, from the covenants of submission of the eighteenth century to the land-surrender agreements of the nineteenth and twentieth centuries, explicitly recognized the sovereignty of the Crown.”

For example, each of the Robinson treaties and the numbered treaties refer to the Indigenous signatories as the “subjects” of either the Queen or the King, as the case may be.

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75 Robinson Superior treaty, supra note 71; Treaties One and Two, supra note 72; Treaty Three, supra note 73; Treaty 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at the Qu’apelle and Fort Ellice, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679> [Treaty Three].
Further, Treaties Two through Eleven each contain a provision similar to that contained within Treaty Two, which states that the Indigenous signatories promise “to conduct and behave themselves as good and loyal subjects” of either the Queen or the King, as the case may be.\(^{76}\) Similarly, the text of the Peace and Friendship treaties executed in the Maritime Provinces contain a recognition on the part of the Indigenous signatories of the sovereignty or dominion of the British Crown. One example is *Mascarene’s Treaty*, discussed in the previous chapter. According to the written text of this treaty, the Indigenous signatories acknowledged that King George became the “rightful possessor” of Nova Scotia or Acadia by means of the *Treaty of Utrecht* of 1713, and they also acknowledged King George’s jurisdiction and dominion over Nova Scotia or Acadia and submitted to him “in as ample a Manner as We have formerly done to his most Christian Kings,” namely, the King of France.\(^{77}\) Can Canada legitimize its claim to sovereignty on these types of provisions that do not transfer sovereignty, but purport to recognize sovereignty?

In my view, it cannot. The reason is that the treaties that only recognize but do not transfer sovereignty imply that Britain or Canada acquired sovereignty at some earlier time in some other way, such as discovery or cession from another European nation. In other words, the treaties that only recognize sovereignty do not purport to be an original root of title. But in order to evaluate the legitimacy of Canada’s assertion of sovereignty, it is necessary to identify how that sovereignty was supposedly acquired; in other words, it is necessary to identify and evaluate the putative original root of title.

It is not surprising that the Peace and Friendship treaties do not purport to be an original root of title, given that Britain considered itself to have acquired sovereignty over the relevant territory, including its Indigenous inhabitants, by securing a cession from France in the *Treaty of Utrecht* of 1713, as discussed in the previous chapter. In other words, from Britain’s perspective, it did not need to employ treaties to acquire sovereignty over any Indigenous nations within Acadia.


\(^{77}\) *Mascarene’s Treaty of 1725* as signed June 4, 1726, Annapolis Royal, enclosed in Governor L. Armstrong to Secretary of State, 24 November 1726, reproduced in and cited to Andrea Bear Nicholas, “Mascarene’s Treaty of 1725” (1994) 43 UNBLJ 3 at 15-16 [*Mascarene’s Treaty*].
because the Treaty of Utrecht already gave it that sovereignty. Accordingly, it would not have made sense for Britain to include provisions transferring sovereignty in the Peace and Friendship treaties.

Analogous reasoning also explains why British and later Canadian Crowns did not include sovereignty-transfer provisions in the Douglas treaties, the Robinson treaties, or the numbered treaties. As discussed in Chapter Two, Britain’s view was that it had acquired sovereignty over Aboriginal territory immediately upon discovery. As such, any treaties purporting to transfer sovereignty from Aboriginal nations to Britain or Canada would have been superfluous, at least from Britain’s perspective. Douglas Sanders confirms this view, at least with respect to the post-confederation period, when he writes:

By the time of the Canadian confederation in 1867, and the Rupert’s Land transfer of 1869-70, Indian tribes were treated as ‘domestic,’ as within British and Canadian jurisdiction. Treaties were not required to obtain jurisdiction over the tribes.  

This raises the question of what exactly the purpose was of Aboriginal treaties, if it was not to transfer sovereignty. At first glance, it may seem that Britain’s practice of treaty-making contradicted its assertion of sovereignty based on discovery. That is, the notion that Britain could have acquired sovereignty over Aboriginal territories immediately upon discovery seems inconsistent with the treaty-making process and its implication that Indigenous nations possessed the requisite sovereignty to enter into treaties. From Britain’s perspective, though, there was no contradiction at all. It was simply complying with the intermediate version of the doctrine of discovery. As discussed in Chapter Two, the intermediate version of the doctrine of discovery states that vis-à-vis the Indigenous inhabitants of a foreign territory, European nations gain sovereignty immediately upon discovery, subject only to the right of the Indigenous inhabitants to use and occupy their lands. At international law, this right of use and occupancy can be extinguished by conquest or cession. As discussed in the previous chapter, under British domestic law, conquest was not a legally acceptable means by which to extinguish Indigenous

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78 Sanders, supra note 9 at 123.

79 For a sophisticated discussion of the contradiction underlying Britain’s practice of treaty-making while asserting sovereignty pursuant to the doctrine of discovery see Lindberg, supra note 9 at 123.
rights. This left only cession. Accordingly, when Britain, and later Canada, executed treaties with Aboriginal nations, they understood themselves to be simply extinguishing the Aboriginal rights that persisted following discovery, and not to be acquiring sovereignty from the Aboriginal nations.\textsuperscript{80} The Royal Commission on Aboriginal Peoples confirms this explanation when it states, in regard to Chief Justice Marshall’s articulation of the doctrine of discovery in \textit{Johnson v M’Intosh}:

\begin{quote}
This principle explains the British Crown’s purposes in treaty negotiations, at least after the \textit{Royal Proclamation} of 1763. The Crown thought it had dominion over Indian lands, even in the absence of a treaty. Indian title was seen as a possessory right, a cloud upon the Crown’s title that could be purchased to perfect that title.\textsuperscript{81}
\end{quote}

As such, it is not surprising that the actual text of the treaties is consistent with the Aboriginal perspective regarding the transfer of sovereignty: neither Aboriginal peoples nor Britain nor Canada viewed treaties as transferring the sovereignty or dominion from Aboriginal peoples to the Crown.

## 4 Normative Analysis of Cession

Of all the modes of acquisition, cession is the most likely to be able to provide a liberally-satisfying legitimation of Crown sovereignty. Cession incorporates respect for autonomy insofar as valid treaties embody the mutual consent and agreement of the parties. As discussed above, to be valid, the parties must understand the terms of the treaty when executing it.\textsuperscript{82} Similarly, the Supreme Court of Canada’s jurisprudence holds that interpretation of historical treaties cannot be based on only one perspective, namely that evidenced by the treaty’s written text.\textsuperscript{83} Understood in this way, treaties have the potential to meet Locke’s strong requirement for state legitimacy, according to which a state is legitimate with respect to those citizens who have actually freely

\textsuperscript{80} See Sanders, \textit{supra} note 9 at 123 (explaining that the “English texts of the treaties suggest that their primary function was to transfer land”).

\textsuperscript{81} \textit{Supra} note 9 at 40.

\textsuperscript{82} See text accompanying notes 5-8.

\textsuperscript{83} See text accompanying notes 17-20.
consented to be governed by that particular state and insofar as the state governs in accordance with the terms of the consent given.\textsuperscript{84} And as the discussion of state legitimacy in Chapter One revealed, the Supreme Court of Canada endorses the view that the illegitimacy of Crown sovereignty could be rectified if the Crown and Aboriginal peoples were to enter into negotiated treaties addressing the issue.\textsuperscript{85} Accordingly, if a treaty exists that explicitly transfers sovereignty from the Indigenous signatory to either Canada or a precursor to Canada, and the perspective of both parties confirms that this was in fact the intent and effect of the treaty, then such a treaty would provide a liberally-satisfying legitimation for Canada’s assertion of sovereignty over that particular Indigenous nation. Alternatively, if a treaty provides for shared sovereignty amongst the Crown and Aboriginal nations, and the parties agree that this is in fact the meaning of the treaty, and sovereignty is actually exercised in accordance with the terms of the treaty, then such a treaty would provide an equally liberally-satisfying legitimation for the shared sovereignty of those nations.

As discussed in this chapter, Aboriginal peoples assert not only that they did not agree to cede sovereignty in historical treaties, but also that they agreed to the precise opposite. That is, in treaties such as the Two Row Wampum, the parties agreed that Aboriginal sovereignty would continue. Accordingly, to ground the legitimacy of exclusive Crown sovereignty in such a treaty would violate the autonomy of the Aboriginal signatories who agreed to the continuation of their own sovereignty. And to ground the legitimacy of Crown sovereignty in a treaty that does not even contain any textual provision purporting to transfer sovereignty amounts to a violation of the rule of law. That is, the rule of law does not sanction the use of a legal instrument that purports to have one effect to achieve a contrary effect. To do so would be arbitrary. And the rule of law, as discussed in Chapter One, is a fundamental component of liberalism.\textsuperscript{86}

\textsuperscript{84} See Chapter One, text accompanying note 136.

\textsuperscript{85} See Chapter One, text accompanying notes 146-53.

\textsuperscript{86} See Chapter One, text accompanying notes 59-60.
As such, it seems unlikely that historical treaties can serve as a liberally-satisfying foundation for Crown sovereignty. That being said, the treaty process has great potential in this regard; this potential will be discussed in more detail in Chapter Six.

5 Summary

To summarize, neither Indigenous nations nor European nations understood historical Indigenous treaties as constituting an original root of sovereignty in Canada. Accordingly, an attempt to base Canada’s assertion of sovereignty on cession will run afoul of liberalism’s commitment to autonomy insofar as Indigenous nations deny that they consented to cede their sovereignty to European nations. It will also run afoul of liberalism’s commitment to the rule of law insofar as the historical treaties examined in this chapter do not even purport to transfer sovereignty from Indigenous to European nations. This leaves only prescription as the remaining mode of acquisition to be examined.
Chapter Five
Prescription

1 Overview

The doctrine of prescription is particularly interesting in the Canadian context because it is quite similar to effective occupation, with the primary difference being that occupation traditionally applies only to territory that is terra nullius, while prescription is not confined by this restriction.\(^1\) In other words, prescription allows one state to gain sovereignty over foreign territory by means of occupation even if that territory is already occupied. As discussed below, though, the doctrine of prescription does have other requirements, in addition to mere occupation. At first glance, then, it may seem that prescription has the potential to save Canada’s assertion of sovereignty from the problems plaguing the doctrine of discovery that stem from the application of that doctrine solely to Indigenous peoples and not to European states. To evaluate this proposition, it is necessary to examine the further requirements of prescription.

The definition of prescription and even its existence are not uncontentious.\(^2\) My goal is not to resolve the various disagreements among scholars on this topic. The onus to do so would be on those who advocate that prescription does in fact provide a legitimate basis for Canada’s assertion of sovereignty over Aboriginal peoples and territories. In contrast, my aim is merely to show that the stronger the acquiescence requirements of prescription are and the closer these requirements approach the level of consent, the less likely it is that these requirements were met in the Canadian context.

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\(^2\) For example, Ian Brownlie identifies three different situations that have been described as amounting to prescription: (i) cases of possession from time immemorial, (ii) competing and contemporaneous acts of sovereignty, such as those illustrated in the Island of Palmas (Miangas) Case (*Netherlands v United States of America*) (1928), 2 RIAA 829 (PCA), and (iii) cases where the original sovereign acquiesces to the acquiring sovereign’s dominion. Brownlie’s view is that the “first two categories are not really cases of prescription” and that the third can be explained by means of the principles of acquiescence, leading him to conclude that “one may doubt whether there is any role in the law for the doctrine of prescription as such”: Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 151 [footnotes omitted].

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2 Definition and Requirements of Prescription

There are at least two possible variations of prescription: acquisitive prescription and negative prescription. Ian Brownlie notes that the requirements of acquisitive prescription are very similar to those of occupation, with three differences. First, the degree of possession required to establish prescription is greater. Second, the former sovereign must engage in unequivocal state acts that acquiesce to the transfer of sovereignty. The third difference consists of the four criteria of acquiescence; Brownlie describes these four criteria as follows.

First, the possession exercised by the acquiring state must be qua sovereign. In other words, the acquiring state must purport to exercise sovereignty over the territory in question and must not recognize the sovereignty of the original sovereign over that territory. Second, the possession exercised by the acquiring state must be peaceful and uninterrupted. The use of force in this context would bring the matter within the ambit of the doctrine of conquest, which is governed by its own requirements. Further, Brownlie explains that protests are sufficient to defeat this criterion. He also recognizes, though, that other scholars have argued that the effect of a protest is merely to postpone the process of prescription and that since the establishment of the League of Nations, protests must be followed by recourse to the international law mechanisms available for settling such disputes, such as the United Nations and the International Court. Third, the

3 Ibid at 148.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.
9 See Currie, supra note 1 at 282.
10 Supra note 2 at 149.
11 Ibid.
possession exercised by the acquiring state must be public.\footnote{Ibid at 150.} The point here is that acquiescence cannot be genuine unless the original sovereign is actually aware that the acquiring sovereign purports to exercise sovereignty over its territory.\footnote{Ibid.} Fourth, the possession exercised by the acquiring state must persist for the requisite period of time.\footnote{Ibid.} Brownlie notes that although a few writers have attempted to set out a specific period of time, such as fifty years, “modern writers usually hold the view that the length of time required is a matter of fact depending on the particular case.”\footnote{Ibid at 150, note 200.} These, then, are the requirements of acquisitive prescription.

Some have also defended the legal validity of negative prescription, according to which “title arises even without acquiescence, simply by lapse of time and possession which is not disturbed by measures of forcible self-help.”\footnote{Brownlie, ibid at 150.} Brownlie, though, disputes the legal validity of negative prescription, noting that

\begin{quote}
[s]uch views are today exceptional and are not supported by state practice or jurisprudence. They commonly antedate the period when forcible self-help and conquest were prohibited. It is probably the law that prescription cannot create rights out of situations brought about by illegal acts, and it is unlikely that this form can be presented, with any plausibility, as a general principle of law, since it does not rest on good faith.\footnote{Ibid [footnotes omitted].}
\end{quote}

Without weighing in on this issue, I would simply note that the onus is on anyone relying on negative prescription as a justification for Canada’s assertion of sovereignty over Aboriginal peoples and territories to respond to the deficiencies identified by Brownlie, especially the fact that negative prescription is supported by neither state practice nor jurisprudence.

Having ascertained the requirements of prescription, the next step is to determine whether this doctrine is applicable in the Canadian context.
3 Prescription in the Canadian Context

Political theorists have sometimes argued that Canada’s assertion of sovereignty can be justified by the passage of time, but without addressing how or even whether the requirements of prescription have been satisfied. For example, Tom Flanagan asserts that “there can be no doubt that prescription has conferred title to the European discoverers and their successor states over the hundreds of years that they have controlled the New World.” Yet Flanagan neglects to explain how the criteria of acquiescence were met in the Canadian context, or if he believes that acquiescence is not a legally binding requirement of prescription, to defend that view. A bald assertion is not a substitute for analysis.

Although the Supreme Court of Canada has not explicitly attempted to justify Canada’s assertion of sovereignty by relying on prescription, there is at least one reference within its Aboriginal rights jurisprudence to the notion that the mere passage of time is significant in this regard. Specifically, in his minority opinion in *Mitchell v MNR*, Justice Binnie, writing for himself and Justice Major, unilaterally reinterprets the *Gus Wen Tah*, or Two Row Wampum, which was discussed in the previous chapter. Justice Binnie begins by acknowledging the treaty’s actual interpretation, and indeed by reproducing the Haudenosaunee explanation that each of the two

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18 C.f. Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy” (2003) 1 NZPIL 55 at 73-75 (contending that the passage of time prevents the principle of prior occupancy from serving as a basis for Indigenous rights, including Indigenous sovereignty, while also declining to address the requirements of prescription because, as Waldron puts it, “going down this road would involve us in all sorts of controversial issues about how prescription operates in modern international law, which I do not want to get into here.” Although New Zealand is the focus of Waldron’s paper, he notes at page 57 that the situation in North America raises “similar or partly analogous concerns”). C.f. also Margaret Moore, “Indigenous Peoples and Political Legitimacy” in Jeremy Webber and Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 143 at 151-52 (identifying the argument that “the long passage of time” poses a difficulty for the view that unjust usurpation delegitimizes a state because such “historically based arguments are generally subject to a statute of limitations.” It is important to note, though, that Moore does not endorse the conclusion that the passage of time is a reason to do nothing in response to historic injustices).


21 See Chapter Four, Section 3.2.
purple rows represents a vessel; one is a birch bark canoe that carries the laws and customs of the Aboriginal people and the other is a ship that carries the laws and customs of the settlers. The Haudenosaunee account goes on to state that the two peoples will travel side-by-side, each in their own boat; neither “will try to steer the other's vessel.” Justice Binnie also acknowledges that the metaphor means that “[e]ach is the sovereign of its own destiny.” Yet he also goes on to give a “modern” re-interpretation of the Two Row Wampum, which is “modified to reflect some of the realities of a modern state.” This modern and modified re-interpretation is based on the idea of a “merged” or “shared” sovereignty and it “asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merged partners.”

The outcome of the passage of time is “a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel's components pull together as a harmonious whole, but the wood remains wood, the iron remains iron and the canvas remains canvas.” This “modern” metaphor means that “aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.” In other words, the passage of time resulted in Indigenous peoples, and in particular the Haudenosaunee, losing their own sovereign autonomy, despite having entered into an agreement with the British to the exact contrary.

The problems plaguing this modified interpretation of the Two Row Wampum are manifold. As Mark Walters notes, this interpretation attempts to legitimate Crown sovereignty by

22 *Mitchell v MNR, supra* note 20 at para 127. For a full reproduction of this account, see Chapter Four, text accompanying note 38.

23 *Mitchell v MNR, ibid.*

24 *Ibid* at para 128.

25 *Ibid* at para 129.

26 *Ibid* [emphasis added].

27 *Ibid* at para 130.

28 *Ibid* at para 129.

29 One such problem is the minority’s reliance on the Report of the Royal Commission on Aboriginal Peoples for support for the modified interpretation: see *Mitchell v MNR, ibid* at paras 129-30. However,
unilaterally reinterpreting a treaty that originally denied that sovereignty.\textsuperscript{30} The minority cites no evidence “to demonstrate that aboriginal peoples had consented, even implicitly, to the new arrangement.”\textsuperscript{31} Moreover, the modified interpretation directly contradicts the explicit image of the Two Row Wampum, where the two purple rows, or vessels, never merge together. Most importantly in the context of analyzing the doctrine of prescription, if the modified interpretation means that the passage of time can convert two sovereign nations into one, then its analysis on this point is deficient.\textsuperscript{32} We have found that prescription has traditionally been governed by at least some requirements.\textsuperscript{33} Admittedly, a unanimous consensus on the formulation and application of each of these requirements does not exist today. The onus, though, is on those who rely on prescription to determine which of these requirements is most likely to be legally binding, and which are not, and then to demonstrate that the applicable requirements were in fact met in the Canadian context. The modified interpretation does not even attempt this work.

This brings us to an assessment of whether the requirements of prescription have been met in Canada. This assessment is not meant to be comprehensive, but rather to highlight the potential obstacles to justifying Crown sovereignty by means of prescription. These obstacles are most

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the Royal Commission does not use the words “merge” or “merged” to describe the relationship between Aboriginal and Crown sovereignty. The Royal Commission does discuss the concept of “shared sovereignty”, but only for the sake of defending a third level of government, namely Aboriginal government, within the Canadian constitutional context. The Royal Commission does not employ the concept of “shared sovereignty” to explain how Canada came to be sovereign over Aboriginal peoples or to justify Aboriginal peoples’ loss of sovereign autonomy: Royal Commission on Aboriginal Peoples, The Final Report of the Royal Commission on Aboriginal Peoples, vol 2, Restructuring the Relationship (Ottawa: Supply and Services Canada, 1996) at 240-41 [RCAP]. For a much more optimistic interpretation of Binnie J’s notion of “merged sovereignty,” see Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 148-49.

\end{footnote}

\begin{footnote}{31}Walters, \textit{ibid}.
\end{footnote}

\begin{footnote}{32}The significance that the minority opinion places upon the passage of time vis-à-vis Crown sovereignty is not entirely clear, given the statements at paras 112-13 which seem to adopt the doctrine of discovery: \textit{Mitchell v MNR}, \textit{supra} note 20.
\end{footnote}

\begin{footnote}{33}See Section 2 above.
\end{footnote}

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apparent upon examining the third requirement of prescription, which consists of the four criteria of acquiescence.

Recall that the first criterion of acquiescence requires that the acquiring state make a display of state authority over the territory in question while not recognizing the sovereignty of the original sovereign.\textsuperscript{34} Acquiring states will have trouble meeting this criterion in Canada, as European officials originally adhered to Indigenous laws in their interactions with Indigenous peoples.\textsuperscript{35} In so doing, they tacitly acknowledged the sovereignty of Indigenous nations, by recognizing their jurisdiction to make laws. We have already encountered one example of this phenomenon when we examined the \textit{Gus Wen Tah}, or Two Row Wampum.\textsuperscript{36} As we found, wampum are Indigenous legal institutions that embody legal agreements and principles.\textsuperscript{37} By offering and accepting wampum, newcomers not only acknowledged, but also participated in, Indigenous legal institutions. Of course, the exchange of the Two Row Wampum at the Treaty of Niagara was not the only occasion when Europeans exchanged wampum with Indigenous nations.\textsuperscript{38} And the exchange of wampum was not the only example of European participation in Indigenous legal protocols. As John Borrows explains:

\begin{quote}
When non-Aboriginal peoples ventured forth from their lands into North America, they encountered peoples with well-developed laws and duties related to land and resource use. In the first years of contact, many non-Aboriginal peoples adapted themselves to the existing Indigenous protocols. Non-Aboriginal peoples would recognize Indigenous land and resource use through many of the same institutions with which
\end{quote}

\footnotesize
\begin{itemize}
\item\textsuperscript{34} See text accompanying note 7.
\item\textsuperscript{36} See Chapter Four, Section 3.2.
\item\textsuperscript{37} See Chapter Four, text accompanying notes 27-29.
\item\textsuperscript{38} See Chapter Four, text accompanying notes 30-32. See also John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) at 132 [Borrows, \textit{Canada’s Indigenous Constitution}] (explaining that in “the early 1700s...the French entered into treaties with the Anishinabek of the Great Lakes by using Anishinabek forms, wampum belts and ceremonies”).
\end{itemize}
Indigenous peoples were familiar: councils, feasts, ceremonies, orations, discussion, treaties, intermarriage, adoption, games, contests, dances, spiritual sharing, boundaries, buffer zones, occupations, and war.  

As a specific example, Borrows cites the peace and friendship treaties between the Mi’kmaq, Maliseet and Passamaquoddy and the British Crown from 1693 to 1779, such as *Mascarene’s Treaty*, discussed in the previous two chapters. Borrows notes that these treaties “were grounded in Indigenous protocols, procedures, and practices.” By submitting themselves to Indigenous laws and legal institutions, then, the newcomers acknowledged the jurisdiction of Indigenous nations to make laws, and hence Indigenous sovereignty.

With respect to the second criterion for acquiescence, we found that the possession exercised by the acquiring state must be peaceful and uninterrupted, which precludes any use of force. As a result, European states who have engaged in hostilities with Indigenous peoples would have difficulty complying with this condition, even where those hostilities fall short of meeting the criteria of conquest. This would include the military activity between Indigenous nations and the English in the seventeenth and eighteenth centuries in what is now New England and the maritime provinces, such as the Anglo-Wabanaki War of 1722 to 1727. We also found that protests are sufficient to disprove peaceful possession. The history of Aboriginal protests against European assertions of control over Aboriginal territory has been long and continual. As the Royal Commission on Aboriginal Peoples states:

39 Borrows, *Canada’s Indigenous Constitution*, ibid [footnotes omitted].
40 *Ibid*.
41 See Chapter Three, Section 3.1 and Chapter Four, text accompanying notes 51-62.
42 *Supra* note 38.
43 See text accompanying notes 8-11.
44 For a discussion of the Anglo-Wabanaki War of 1722 to 1727, see Chapter Three, Section 3.1.
45 See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 246, n 35 (explaining that Canada’s acquisition of Indigenous territory was not peaceful and unchallenged “as there has been continual Aboriginal resistance to Crown assertions of possession”). *C.f.* Borrows, *Canada’s Indigenous Constitution*, supra note 38 at 19 (arguing that “Indigenous peoples have not generally acquiesced to the common law’s purported replacement of their laws”).
Aboriginal peoples have consistently protested their exclusion from their traditional territories, the continuing alienation of reserve lands and resources, and governments’ failure to honour the terms of treaties. Aboriginal peoples have also protested the characterization of these disputes as ‘claims’, since this suggests that it is the undisputed rights of others that are being challenged, whereas it is the established rights of Aboriginal peoples that are being asserted. Aboriginal peoples have used petitions, protests and direct action in their continuing attempts to secure a just resolution of their grievances.\footnote{RCAP, supra note 29 at 528.}

After undertaking a comprehensive review of the issue of Aboriginal protests, Justice Sidney Linden, Commissioner of the Ipperwash Inquiry, found that “[d]espite their frequency and importance, reliable statistics on Aboriginal occupations and protests are hard to find, and it is difficult to determine exactly how many Aboriginal occupations and protests have occurred in Canada.”\footnote{Sidney B Linden, \textit{Report of the Ipperwash Inquiry}, vol 2, \textit{Policy Analysis} (Toronto: Queen’s Printer for Ontario, 2007) at 19.} A few examples, then, will have to suffice.

When the British government purported to grant land along Lakes Superior and Huron in the 1840s to various mining companies, the Indigenous owners of that land protested by, among other things, sending a petition in 1849 to the British government asserting that the British were their guests, as opposed to their sovereign:

\begin{quote}
Can you lay claim to this land? Have you conquered it from us? You have not; for when you first came among us your children were few and weak and the war cry of the Chippewa struck terror to the heart of the pale face. But you came not as an enemy, you visited us in the character of a friend, you have lived as our guest and your children have been treated as our brothers. Have you purchased it from us? If so, when? How? And where are the treaties?\footnote{“Petition of the Chippewa Indians to the British Government”, \textit{Montreal Gazette} (7 July 1849).} \end{quote}
Similarly, at a Royal Commission hearing in 1887 in British Columbia, David Mackay, one of the chiefs of the Nisga’a Nation, disputed the basis of the Crown’s assertion of jurisdiction over Nisga’a land: 49

> What we don’t like about the Government is their saying this: ‘We will give you this much land.’ How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land – our own land. [Our] chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so….it has been ours for thousands of years. 50

The Six Nations Confederacy has also been no stranger to protests. 51 As Darlene Johnston notes, for the past three centuries, ever since establishing formal relations with European powers, the Six Nations Confederacy has consistently asserted its right to sovereignty. 52 The Confederacy even sent one of its chiefs, Chief Levi General, also known as Deskahe, to the League of Nations in the 1920s in order to make the case for recognition of the Confederacy’s sovereignty before the international community. 53 Although Deskahe addressed the League of Nations twice, the League did not take any official action. 54 Back on Canadian soil, however, the RCMP invaded the council house at the Grand River and “the traditional longhouse chiefs [were] replaced by an elected council.” 55 This example demonstrates that even if there is a requirement to pursue one’s


50 Reproduced in Berger, ibid at 146. See also Calder v British Columbia (AG), [1973] SCR 313 at 319, 34 DLR (3d) 145 p, Judson J.


52 Ibid at 2.

53 See Johnston, ibid at 23.

54 See Johnston, ibid.

55 RCAP, supra note 29 at 529.
complaint in the international arena, this requirement could not have applied to Indigenous peoples, given the futility of such a course of action on the part of Indigenous peoples.

Indigenous protests have not been confined to previous centuries. By analyzing newspaper content, Howard Ramos has identified 616 Aboriginal protests that occurred in Canada between 1951 and 2000. By way of example, the Report of the Ipperwash Inquiry lists twenty-four major recent Aboriginal protests and occupations in Canada. In sum, there has been no shortage of Aboriginal protests against the exercise of Crown control over Aboriginal land in Canada, and as such it seems quite unlikely that Canada could meet the second criterion of acquiescence.

According to the third criterion of acquiescence, the possession exercised by the acquiring state must be public. As noted above, the rationale underlying this principle is that the original sovereign must be aware that the acquiring sovereign purports to exercise sovereignty over its territory in order for acquiescence to be truly genuine. It seems that it would be difficult to meet this criterion in instances where Indigenous nations executed a treaty that they understood to be an acknowledgement by the European nation of continuing Indigenous sovereignty. That is, an Indigenous nation can hardly be thought to have acquiesced to the sovereignty of a foreign


57 Supra note 47 at 21 (citing the following approximate dates and locations: Anishinabe Park (northern Ontario, 1974); Moresby Island, Queen Charlotte Islands (British Columbia, mid-1980’s); Algonquins of Barriere Lake (Ontario, 1988-89); Lubicon Cree (Alberta, 1988); Temagami Anishinabe (northern Ontario, 1988); Oka/Kanesatake (Ontario/Quebec, 1990); Lillooet, Mount Currie Band (1990-91); Peigan Lonefighters Society (Alberta, 1991); James Bay Cree (Quebec, 1991-92); Chippewas of the Nawash (southern Ontario, 1992-93); Revenue Rez (Toronto, 1994-95); Gustafsen Lake (British Columbia, 1995); Ipperwash (southern Ontario, 1993-); Clayoquot Sound (British Columbia, 1985-1993); Constance Lake (northern Ontario, 1997); Burnt Church (Nova Scotia, 1999-2000); Sun Peaks (British Columbia, 2000-); South-West Nova Fishing protest (Nova Scotia, 1999-2000); Days of Rage Protest (Akwesasne, Ontario, 2001); Aroland First Nation blockades (northern Ontario, 2001-2003); Red Hill Valley Occupation (Hamilton, Ontario, 2002-2004); Grassy Narrows (northern Ontario, 2003-Present); Kitchenuhmaykoosib Inninuwug First Nation (northern Ontario, 2006); Caledonia (Southern Ontario, 2006-)).

58 See text accompanying notes 12-13.

59 The Gus Wen Tah, or Two Row Wampum is one such example; see Chapter Four, text accompanying notes 33-42 for a discussion of the Two Row Wampum.
nation when that foreign nation explicitly agreed that it would not interfere with the Indigenous nation’s sovereignty.

The fourth criterion of acquiescence provides that the possession exercised by the acquiring state must persist for the requisite period of time. In regard to this criterion, it is important to note that in 1927, shortly after Deskahe’s plea to the League of Nations, a provision was added to the Indian Act making it an offence to raise funds in support of any claim advanced by an Indian tribe or band, or to pay a lawyer to advance such a claim. This prohibition remained in force until 1951. In my view, the significance of this fact is that the time period required for prescription could not run between 1927 and 1951. Any lack of protest on the part of Indigenous peoples during this period could not be attributed to genuine acquiescence in the face of the acquiring state’s overt attempts to silence such protests.

These, then, are some of the difficulties that one would face in appealing to prescription to legitimate Canada’s assertion of sovereignty over Aboriginal peoples and territories. We may still wonder, though, whether prescription would comply with liberal principles, even if it were applicable in the Canadian context.

4 Normative Analysis of Prescription

It may be thought that prescription has the potential to ground the legitimacy of Crown sovereignty in a way that is as liberally-satisfying as cession. After all, the rationale underlying acquisitive prescription is acquiescence on the part of the original sovereign. If the standards to establish acquiescence are high enough, then it may seem that acquiescence is equivalent to consent. There are at least two problems with this approach, particularly in the Canadian context. The first is that scholars disagree about the weight to be accorded to acquiescence in prescription. Those who defend negative prescription reject any acquiescence requirements while even those who acknowledge the need for acquiescence disagree about the content of its

60 See text accompanying notes 14-15.

61 Indian Act, RSC 1927, c 98, s 141, as amended by SC 1927, c 32, s 6. See RCAP, supra note 29 at 529.

62 Indian Act, SC 1951, c 29, s 123(2).
requirements. Assuming for the sake of argument that disagreement regarding the requirements for acquiescence has been settled, the question still remains as to whether these requirements are strong enough to serve as a substitute for consent. Without knowing the content of these hypothetical requirements, the opportunities for evaluating them are limited. That being said, the clearest way in which such requirements may comply with the principle of autonomy is if both parties agreed to such requirements prior to their application, regardless of their content. As Kent McNeil recognizes, though, Aboriginal peoples did not agree to the international law principles pertaining to prescription – including, of course, the requirements regarding acquiescence – insofar as they did not participate in the creation of this norm. Only European nations engaged in the state practice that gave rise to the customary international law principles pertaining to prescription. This brings us to the second problem with attempting to equate acquiescence with consent.

As the above discussion illustrates, it would be extremely difficult, if not impossible, to establish that the requirements of acquiescence have been met in Canada. Indeed, the stronger the requirements are - that is, the closer they approach equivalency with consent - the less likely it is that Aboriginal peoples in Canada acquiesced to Crown sovereignty. The difficulty with establishing acquiescence in the Canadian context is most vividly illustrated by the fact, discussed in the previous chapter, that Aboriginal peoples entered into agreements with the Crown that recognize continuing Aboriginal sovereignty. Accordingly, to ground the legitimacy of Crown sovereignty in prescription would violate the autonomy of the Aboriginal signatories who agreed to the continuation of their own sovereignty. That is, the notion that a nation could be deemed to have acquiesced to one course of action when the two parties explicitly agreed to the opposite course of action does not comply with the principle of autonomy. As such, it seems

63 See text accompanying notes 10-16.

64 Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest” in Alexandra Harmon, ed, The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest (Seattle: the University of Washington Press, 2008) at 41-42 and 47. McNeil goes on to argue that customary international law principles based on state practice, such as prescription and the other modes of acquisition, can only bind those nations who participated in their creation, namely, European nations (ibid at 41).

65 See McNeil, ibid at 41.
unlikely that prescription can serve as a liberally-satisfying foundation for Crown sovereignty in the Canadian context.

5 Summary

To summarize, the doctrine of prescription offers two variations: acquisitive prescription and negative prescription. The former requires that the original sovereign acquiesce to the incoming sovereign, while the latter does not. Neither of these variations is both applicable in the Canadian context and liberally-satisfying. In regard to acquisitive prescription, the stronger the acquiescence requirements are, the more likely it is that this doctrine may comply with the liberal principle of autonomy. But at the same time, the stronger the acquiescence requirements are, the less likely it is that they were met in the Canadian context. In regard to negative prescription, while it may be the case that its criteria were satisfied in the Canadian context, it violates the principle of autonomy, particularly in the light of agreements between Aboriginal nations and the Crown, such as the Two Row Wampum, that guarantee continuing Aboriginal sovereignty.
Chapter Six
Implications

1 Overview

This chapter begins with a thought experiment or story offered in response to Tom Flanagan’s contention that European nations should be entitled to push aside Aboriginal nations because, according to Flanagan, that is what Aboriginal nations within Canada did to each other before the arrival of Europeans. I then go on to consider the implications of the conclusions reached in the foregoing chapters for both section 35(1) of the Constitution Act, 1982 and section 25 of the Charter. Only treaties addressing the sharing of sovereignty between Aboriginal nations and Canada have the potential to ground the legitimacy of Crown sovereignty in a liberally-satisfying way. But courts cannot draft treaties and impose them on parties. And yet, there must be some means of resolving disputes regarding conflicting Crown and Aboriginal jurisdiction during the period prior to the execution of treaties. Section 35(1) has the potential to serve this function. Accordingly, I propose a test for section 35(1) rights that recognizes the continuing sovereignty and jurisdiction of Aboriginal nations while also encouraging negotiations. Finally, I also propose a test for section 25 to complement my proposed section 35(1) test.

2 A Story or Thought Experiment

2.1 Overview

Those who are more philosophically inclined may wish to read the following as a thought experiment. The scenario may be viewed as from behind a veil of ignorance. The reader does not know to which nation he or she would belong in this scenario and the question to be decided is whether Ruddred’s assertion of sovereignty over New Ruddred is legitimate. I am also offering this story in the sense described by the fictional Elder in Scroll Fourteen of John Borrows’s

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1 Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 112.

2 This is not an original position type of hypothetical construct per se, as the reader is not being asked to chose between sets of principles that are general, universal and so on: see John Rawls, A Theory of Justice (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971) at 130-36.
After listening to two candidates for political office give typical election speeches, the Elder explains that something is not right about the speeches because, as the Elder puts it,

‘…[t]heir words are all directed to our heads, there’s nothing about the heart. You wouldn’t choose a relationship with someone based on your thoughts alone; you’d need to feel something to make that decision. You also wouldn’t choose relationships based on your feelings alone, or at least you shouldn’t; there’d need to be some thought there. These men are asking us to make important decisions about our political relationships without talking to our hearts. I even heard that when I went back to school a few years ago.

‘Learning’s not complete if you don’t address the whole person. In the old days, we used to weave lessons from the natural world into our teachings. Our leaders would expand our understanding by telling stories. They understood that stories could appropriately combine reason and emotion when they correlated with one another. We need more true stories to help us make sound decisions. That’s where our real law resides. Our leaders need to knit them into their teachings….all we’ve heard are dry phrases with no colour or life. They don’t make me dream. I don’t trust ideas detached from their context, with no emotional gauge to weigh and evaluate them; just as I also don’t trust stories that don’t accord with reason. Emotion and reason must work in balance.’

The purpose of my story is to provide a further response to Tom Flanagan’s ‘us too’ argument, discussed in Chapter Three. Recall that Flanagan argues that before Europeans arrived, Indigenous peoples displaced each other from different areas throughout what is now Canada. His conclusion is that European nations should be entitled to do the same thing to Indigenous peoples, that is, “to push their way in.” As this story depends on the preceding discussions of cession (in Chapter Four) and prescription (in Chapter Five), it had to wait until now.

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4 Ibid at 212 [footnotes omitted].

2.2 The Birth of New Ruddred

A new mineral, named peltite, has been discovered deep underground in the remotest areas of Canada. Peltite is in high demand as it is used to power the newest generation of smartphones, and thus far the only known deposits exist in Canada. Unfortunately, Canadian companies do not possess the technology to extract peltite. But another country does: Ruddred. And so Canada enters into licensing agreements with Ruddredian companies, giving them access to Canadian territory in exchange for royalties on the sales of peltite. In order to operate its mines, though, Ruddred argues that it must employ Ruddredian workers, because only they have the appropriate training and skills to operate the specialized equipment and technology used in a peltite mine, which is all programed in the Ruddredian language. Canadian officials relent and legislate a special provision in Canada’s Temporary Foreign Worker program to allow more Ruddredian workers to stay in Canada for much longer than would otherwise be permitted. Hundreds of thousands of Ruddredians flow into Canada. The peltite mines are so profitable that Canada’s economy becomes the envy of the world, and Ruddred asks for and receives permission to bring in even more Ruddredian workers.

The Ruddredians develop their own highly organized and sophisticated communities situated near the mine sites. But because the peltite mines are in such isolated and remote areas, the vast majority of Canadians do not encounter Ruddredians in their day-to-day lives, despite the great numbers of Ruddredians now living in Canada. Further, the Ruddredians are fairly self-sufficient; they have little need to leave their sophisticated communities. In fact, the Ruddredians opt to arbitrate their family and civil disputes in accordance with Ruddredian laws. Courts across Canada are overburdened anyway, and would not have been able to handle the increase in litigation created by the presence of what are now millions of additional residents. Although Canada never officially cedes criminal jurisdiction to Ruddred, in practice, Canada simply does not have the resources to establish police forces, criminal courts, and crown prosecutors in each of the Ruddredian communities. Canadian officials do their best to station officers in the communities and to send circuit courts there on a regular basis, but practical exigencies mean that months and sometimes years go by without an officer or a circuit court visiting. Fortunately, the issue never becomes a pressing problem because Ruddredians quietly establish their own criminal courts that efficiently deal with criminal incidences occurring within Ruddredian communities. Although Ruddredian criminal law principles differ fundamentally from Canadian
ones, Canadians are satisfied that Ruddredian criminal law is both procedurally and substantively fair.

Eventually, after decades have passed, the number of Ruddredians located in Canada vastly exceeds the number of Canadians. At this point, Ruddredian courts and police officers begin to enforce Ruddredian laws throughout Canada. When Canadian officials protest, Ruddred replies that it asserts sovereignty over all of Canada. Canadian officials respond that such as assertion is simply absurd. How could Ruddred have gained sovereignty over Canada without ever waging any war or conquering this country? Ruddred replies that Canada signed treaties ceding sovereignty to Ruddred. This confuses Canadian officials. Canada only ever signed licensing and royalty agreements with Ruddred; it never signed treaties of cession. Ruddred explains that although the English versions of these agreements may not mention sovereignty, the Ruddredian versions do. Furthermore, the Ruddredian versions of the agreements are in the form of a highly sophisticated encrypted technology; this technology is far superior to mere paper copies of documents, and therefore the Ruddredian versions must trump the English versions.

Regardless of these treaties, Ruddred goes on to argue that Canadians are too inferior to exercise sovereignty over themselves and their territory. They were not even able to develop the technology needed to extract peltite. Further, Canada did not utilize its territory to its full potential; before the Ruddredians arrived, the vast majority of Canadian land was undeveloped wilderness. In fact, in all respects, Canadian society is less developed and sophisticated than that of Ruddred, and therefore Canadians do not deserve to be sovereign.

These arguments seem ridiculous to Canadians, who are sure that the international community will agree with their point of view. Canadian officials make numerous submissions before various United Nations bodies and organizations. Everyone is sympathetic to the Canadian position, but the UN has so many more pressing issues to deal with. Other countries are struggling with genocide, child soldiers, mass rapes and various other atrocious human rights violations. The events in New Ruddred seem quite peaceful in comparison. Although Canada engages in numerous and frequent protests against Ruddred’s unilateral assumption of sovereignty, decades pass, and eventually the international community recognizes the sovereignty of New Ruddred, as it seems to exercise effective control over all of what used to be Canada.
2.3 Third Response to the ‘Us Too’ Argument

Recall that, stated at its highest, the ‘us too’ argument can be understood as appealing to the principle of equality; it posits that because Indigenous nations supposedly “[drove] each other from different territories as much as they liked” prior to European contact, European nations should be entitled to do the same to Indigenous nations. In the case of European nations, though, this entitlement somehow mutates into the right, not to drive Indigenous nations off their territory, but to assert sovereignty over both Indigenous territories and Indigenous peoples themselves. Leaving aside the question of whether Indigenous practices and European assertions of sovereignty are truly analogous, The Birth of New Ruddred is meant to illustrate another deficiency of the ‘us too’ argument: its reliance on the principle of equality means that other nations must be entitled to assert sovereignty over Canadian territory and Canadians by simply declaring the inferiority of Canadians and then populating limited areas of Canada, as this is how European nations claim to have acquired sovereignty over Indigenous peoples. In other words, The Birth of New Ruddred is the logical extension of the ‘us too’ argument. If European nations were entitled to acquire sovereignty over Indigenous peoples by doing whatever Europeans perceived Indigenous peoples as doing to each other, then other nations are equally entitled to acquire sovereignty over Canada by doing what Europeans did to Indigenous peoples. The ‘us too’ argument, then, is an invitation to the world to colonize Canada.

3 Implications for Section 35(1)

I have argued that in the quest to determine whether Aboriginal rights are compatible with liberalism, the legitimacy of the Canadian state cannot serve as an underlying assumption or as an unexamined premise in the argument. The primary significance of the prior occupation of Aboriginal peoples – of the fact that they were here first – is that the onus is on the newcomers, rather than on Aboriginal peoples, to establish the legitimacy of their claims. The onus is on those who choose to enter a foreign territory, and then purport to claim sovereignty over it, to account for that assumption of sovereignty. There are four modes of acquisition to which Canada could potentially appeal in order to ground the legitimacy of its assumption of sovereignty over Aboriginal territories and peoples: (i) discovery and occupation, (ii) conquest, (iii) cession and

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6 Ibid.
(iv) prescription. To provide a compelling basis for legitimacy in a liberal state, the mode of acquisition in question must not violate liberal principles. In the case of each of the four identified modes of acquisition, they either do not comply with liberal principles or their legal requirements were not met in the Canadian context. Only cession has the potential to provide a liberally-satisfying explanation for the legitimacy of state sovereignty. But the written text of many historical treaties does even not purport to transfer sovereignty from Aboriginal peoples to the Crown. And where sovereignty is mentioned in historical treaties, the assumption seems to be that the Crown acquired sovereignty by some other means at an earlier time, and not by means of the treaty itself. Further, many Aboriginal nations explain that historical treaties embodied an agreement to share the land, as opposed to a surrender of sovereignty; this understanding is consistent with the Two Row Wampum. The Crown, however, has not implemented historical treaties in accordance with this understanding. For these reasons, Crown sovereignty remains illegitimate on liberal grounds in areas of Canada where treaties embodying an agreement regarding sovereignty have yet to be executed and in areas where the Crown has failed to implement those agreements regarding sharing sovereignty that have been reached. Such areas suffer from a normative lacuna. Aboriginal rights have the potential to fill this lacuna. In so doing, they can contribute to the legitimation of the assertion of Crown sovereignty over Aboriginal territories and peoples. That is, it is the legitimacy of the Crown’s assertion of sovereignty that is in need of a liberal defence, and Aboriginal rights have the potential to contribute to such a defence. In other words, Aboriginal rights are not a problem to be solved within liberalism; they are the answer to the problem of how Crown sovereignty can be legitimated on liberal grounds.

But to fulfill this function, Aboriginal rights cannot be given just any definition. We found that only treaties have the potential to serve as a liberal foundation for Crown sovereignty. In order to secure a liberally-compelling basis for the legitimacy of Crown sovereignty, then, the Crown and Aboriginal nations must negotiate treaties that set out the terms by which these nations will share

For a discussion of the benefits of using the present tense instead of the past tense, “shared”, see Hoehn, supra note 1 at 149.
sovereignty. Of course, if an Aboriginal nation chooses to cede sovereignty outright to the Crown, that is its prerogative. However, this prospect is unlikely, given the Aboriginal perspective that Crown-Aboriginal relations are to be governed by the Two Row Wampum, as discussed in Chapter Four. The Royal Commission on Aboriginal Peoples endorses the notion that the provincial and federal governments of Canada must share sovereignty with Aboriginal peoples and recommends that governments in Canada recognize that Aboriginal governments operate within their own sovereign sphere of jurisdiction. Similarly, Felix Hoehn argues that Aboriginal and Crown sovereignty can be reconciled and de facto Crown sovereignty can be legitimated through negotiated treaties that allow for the sharing of sovereignty. Reconciling sovereignties through negotiated treaties also ensures that the meaning and content of Aboriginal rights will be informed by Aboriginal perspectives, as Dale Turner advocates. These rights will not be mere site-specific hunting and fishing rights. Instead, as Hoehn recognizes, the discussion “will naturally shift from defining the ‘rights’ of Aboriginal peoples to negotiating a fair and efficient means for the Crown and Aboriginal peoples to share jurisdiction and to nurture a positive relationship.” In other words, what is being determined in these treaties are the respective spheres of jurisdiction and governance of the Crown and Aboriginal peoples. This will provide an opportunity for Indigenous institutions based on Indigenous values and perspectives, including Indigenous laws and legal systems, to thrive. As Douglas Sanderson

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8 See Hoehn, ibid at 77 (explaining that “[a]n Aboriginal nation, especially one that has not yet entered into a treaty with the Crown, has a solid legal and constitutional foundation for asserting its continuing sovereignty, as well as concomitant rights to territory and jurisdiction. It can also claim that Crown sovereignty is not legitimate, and therefore remains only de facto, until a treaty reconciles the sovereignty of the Aboriginal nation with Canadian sovereignty”).

9 Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol 2 (Ottawa: Minister of Supply and Services Canada, 1996) at 240-44 [RCAP].

10 Supra note 1 at 131, 148-50.

11 Dale Turner, This is not a Peace Pipe: Towards a Critical Indigenous Philosophy (Toronto: University of Toronto Press, 2006) at 66.

12 Supra note 1 at 84.

13 See Hoehn, ibid at 117.

14 For a comprehensive discussion of the significance of Indigenous laws and legal systems in Canada, see John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010).
argues, the injustice suffered by Indigenous peoples is not merely having been deprived of land, but also having been deprived of their own institutions embodying their own values, practices and identities.\textsuperscript{15}

It is also important to note that treaties providing for the sharing of sovereignty are not the source of Aboriginal sovereignty; rather, once negotiated, they will be the source of the legitimacy of Crown sovereignty vis-à-vis Aboriginal nations.\textsuperscript{16} Further, as Hoehn notes, such treaties are not static, one-time events.\textsuperscript{17} It may be necessary to make amendments as circumstances change; this is consistent with the Aboriginal view that treaty-making is a process.\textsuperscript{18}

The following discussion addresses some of the implications of the foregoing argument for section 35(1) of the \textit{Constitution Act, 1982}. A comprehensive analysis of all such implications is beyond the scope of this work. However, Hoehn offers an insightful treatment of this topic in \textit{Reconciling Sovereignties: Aboriginal Nations and Canada}.\textsuperscript{19} He identifies a paradigm shift occurring in the Supreme Court of Canada’s section 35(1) jurisprudence. It is a shift away from the application of the doctrine of discovery and \textit{terra nullius} in the Canadian context toward a recognition of Aboriginal sovereignty and the illegitimacy of Crown sovereignty unless and until it is grounded in a treaty.\textsuperscript{20} He goes on to provide an in-depth discussion of the implications of Aboriginal sovereignty for section 35(1).\textsuperscript{21} In this section, I draw heavily upon Hoehn’s analysis.

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\textsuperscript{16} See Hoehn, \textit{supra} note 1 at 131 (explaining that “[a]n Aboriginal nation’s jurisdiction derives from its sovereignty over territory, and treaty making is an expression of that sovereignty. The Aboriginal nation does not gain jurisdiction from the treaty, it \textit{shares} or \textit{reserves} jurisdiction. The Crown, however, needs a treaty to have a legitimate source for its jurisdiction in the territory”).

\textsuperscript{17} \textit{Ibid} at 119.

\textsuperscript{18} \textit{Ibid}.

\textsuperscript{19} \textit{Ibid}.

\textsuperscript{20} \textit{Ibid} at 1-4.

\textsuperscript{21} \textit{Ibid} at 111-50.
What, then, does the illegitimacy of Crown sovereignty mean for section 35(1)? First and foremost, it means that the purpose of section 35(1) is not the reconciliation of prior Aboriginal occupation with Crown sovereignty, as the majority in *R v Van der Peet* claimed.\(^22\) Rather, it is the reconciliation of Aboriginal sovereignty and *de facto* Crown sovereignty, as suggested in *Haida Nation*\(^23\) and *Taku River*.\(^24\) To accomplish this purpose, Aboriginal sovereignty “should be ‘recognized and affirmed’ by section 35 of the *Constitution Act, 1982* as an ‘existing aboriginal and treaty right.’”\(^25\) But because the normative onus is not on Aboriginal peoples to legitimize their sovereignty, but rather on the Crown to do so, neither should the legal onus in a section 35(1) argument be on the Aboriginal nation.\(^26\) As discussed, this reconciliation, and concomitantly the legitimation of Crown sovereignty, must take place through negotiated agreements. But “[c]ourts cannot conduct negotiations or write treaties.”\(^27\) As such, the role of the courts in adjudicating section 35(1) claims cannot be to impose the terms of an agreement on the parties.\(^28\) Rather, courts must provide the framework in which negotiations will occur and maintain the impetus on the parties to negotiate. As Hoehn argues, quoting the Supreme Court of Canada in *Reference re Succession of Quebec*,\(^29\) “by enforcing existing rights and upholding federalism, by controlling ‘the limits of the respective sovereignties,’ [courts] can create the optimal legal environment for [negotiations] to occur while at the same time ensuring that the

\(^{22}\) *R v Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289 [*Van der Peet*].

\(^{23}\) *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20, [2004] 3 SCR 511 [*Haida Nation*].

\(^{24}\) *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42, [2004] 3 SCR 550 [*Taku River*].

\(^{25}\) Hoehn, *supra* note 1 at 79 [footnotes omitted].

\(^{26}\) See Hoehn, *ibid* at 114.

\(^{27}\) Hoehn, *ibid* at 112.

\(^{28}\) See Hoehn, *ibid* at 118 (explaining that “[t]he ultimate content of the treaty and a ‘just settlement’ must be determined by the parties themselves and cannot be imposed by a court” and that “a court cannot force the parties to come to an agreement, nor can it impose terms of an agreement if the parties are unable to reach one”).

rule of law and the fundamental rights of each of the parties are protected.” Once treaties have been negotiated, courts will have a role to play in adjudicating disputes regarding the implementation, interpretation and enforcement of those treaties. But how should courts define Aboriginal rights prior to the execution of a treaty and what can courts do to promote and facilitate negotiations?

As discussed in Chapter One, the backdrop underlying the Van der Peet test for Aboriginal rights is a fully legitimate and justified state. This state distributes rights upholding the inherent dignity of the individual to each and every citizen equally. Any additional rights distributed to a specific sub-set of the population, then, violate the principle of equality. Courts, though, have no choice but to recognize Aboriginal rights as they have constitutional status pursuant to section 35(1) of the Constitution Act, 1982. Accordingly, from the Court’s perspective, to mitigate the violation of the principle of equality, these special, additional rights must be narrowly defined in accordance with what makes this sub-set of the population ‘special’. This approach has resulted in severe restrictions within the test for Aboriginal rights. But if we remove the basic premise of a fully justified and legitimate state, then the argument in support of these restrictions falls apart. Instead, we begin with a very different premise, namely, that the Canadian state is illegitimate vis-à-vis those Aboriginal nations who have not yet executed treaties regarding sovereignty or where the Crown has not respected treaties that do provide for a sharing of sovereignty. Until such treaties are executed and fully implemented, we are left with competing sovereignties and competing jurisdictions. The content of Aboriginal rights, then, must reflect the legitimacy of Aboriginal sovereignty and jurisdiction.

In accordance with this proposition, Hoehn argues that courts must be prepared to recognize Aboriginal jurisdiction in the form of Aboriginal rights even before treaties have been executed. Hoehn identifies two possible ways in which courts can recognize Aboriginal

\[\text{Footnotes}\]

30 Supra note 1 at 112.

31 See Hoehn, ibid at 122, 133.

32 See Hoehn, ibid at 134 (explaining that “[c]laims to free-standing rights…are a symptom of competing sovereignties, sovereignties that are yet to be reconciled”).

33 Ibid at 133.
jurisdiction: through the common law doctrine of continuity,\textsuperscript{34} or “as the justiciable core of the jurisdiction of an Aboriginal nation.”\textsuperscript{35} As Hoehn explains, “[t]he doctrine of continuity holds that the existing property and other rights of the territory’s inhabitants survive the Crown’s assertion of sovereignty unless expressly confiscated or surrendered by treaty.”\textsuperscript{36} In setting out a test for the justiciable core of the jurisdiction of an Aboriginal nation, Hoehn draws upon the concept of a “core of Aboriginal jurisdiction”\textsuperscript{37} identified by the Royal Commission on Aboriginal Peoples.\textsuperscript{38} The Royal Commission provides the following articulation of this concept:

The core of Aboriginal jurisdiction includes all matters that

i. are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity;

ii. do not have a major impact on adjacent jurisdictions; and

iii. are not otherwise the object of transcendent federal or provincial concern.\textsuperscript{39}

From this, Hoehn derives the following two criteria for Aboriginal rights: “first, that recognition of the right is of such importance to the life, welfare, culture, or identity of an Aboriginal people that it should not await the outcome of negotiations; and second, the matter must be justiciable.”\textsuperscript{40} Hoehn’s second criterion, that the matter at issue must be justiciable, accounts for the Royal Commission’s second two factors. That is, according to Hoehn, matters that have a major impact on adjacent jurisdictions and matters that are the object of transcendent federal or provincial jurisdiction “are beyond the capacity or mandate of courts to resolve” as they can only

\textsuperscript{34} Ibid at 139-41.
\textsuperscript{35} Ibid at 138, 141-44.
\textsuperscript{36} Ibid at 140.
\textsuperscript{37} Ibid at 143.
\textsuperscript{38} RCAP, supra note 9 at 215.
\textsuperscript{39} Ibid.
\textsuperscript{40} Supra note 1 at 143.
be resolved through political negotiations.\footnote{\textit{Ibid} at 143.} Finally, turning to Aboriginal title, Hoehn explains that under the sovereignty paradigm that he identifies, this particular Aboriginal right would not exist.\footnote{\textit{Ibid} at 122-24.} The reason is that Aboriginal title is conceived of as a burden on the Crown’s ultimate title.\footnote{See Hoehn, \textit{ibid} at 122.} But if an Aboriginal nation has jurisdiction over its own territory flowing from its own sovereignty, then the Crown does not have ultimate title to that land.\footnote{See Hoehn, \textit{ibid}.} In other words, there is no need for ‘Aboriginal title’ when an Aboriginal nation has jurisdiction over its territory.

I endorse Hoehn’s notion that the Aboriginal rights recognized prior to the execution of treaties must be a reflection of Aboriginal jurisdiction flowing from Aboriginal sovereignty. I also endorse Hoehn’s reason for rejecting the concept of Aboriginal title. I would propose a slightly different test for Aboriginal rights, though. As discussed, it is the Crown’s assumption of sovereignty that lacks legitimacy, and the onus is on the Crown to establish its legitimacy. In the context of the test for Aboriginal rights, then, the onus should equally be on the Crown, not on Aboriginal peoples. In other words, the test for Aboriginal rights can more properly be understood as a test for Crown encroachments on Aboriginal jurisdiction. This means that the onus is on the Crown to establish that those laws or regulations that impinge upon Aboriginal jurisdiction meet the test for Crown encroachments. We can think of this reformulated test as skipping directly to the justification stage of the Aboriginal rights test set out in \textit{R v Sparrow}.\footnote{\textit{R v Sparrow}, [1990] 1 SCR 1075 at 1109, 1113, 70 DLR (4th) 385 [\textit{Sparrow}].} The actual criteria employed, though, must be quite different from those articulated in \textit{Sparrow}. Without embarking on a comprehensive analysis of the \textit{Sparrow} justification test, it is sufficient to note that this test is premised on the assumed legitimacy of Crown sovereignty as opposed to the sovereignty and jurisdiction of Aboriginal peoples. For example, even the seemingly most innocuous aspect of the \textit{Sparrow} justification test is inconsistent with the existence of Aboriginal sovereignty and jurisdiction. That is, the first step of the \textit{Sparrow} justification test asks whether, in enacting the impugned legislation or regulations, the Crown has a valid legislative objective,
one example of which is conservation and management of a natural resource.\textsuperscript{46} However, it is not clear why the Crown, instead of the Aboriginal nation, would be entitled to regulate a resource within Aboriginal jurisdiction merely because those regulations aim at conservation. Insofar as the resource in question is located within the territorial jurisdiction of an Aboriginal nation, it would fall to that Aboriginal nation to set out regulations for the conservation of the resource. This brings us to the question of the criteria for the test for Crown encroachments on Aboriginal jurisdiction.

I propose the following two-part test. The Crown may encroach upon Aboriginal jurisdiction if it establishes:

i. that at least one of the following factors have been met:
   a. the impugned Aboriginal law or regulation endangers people’s lives or physical safety;
   b. the impugned Aboriginal law or regulation is outside the jurisdiction of the Aboriginal nation in question; or,
   c. the impugned Aboriginal law or regulation will cause irreparable damage to the resource in question; and,

ii. that there is a rational connection between the impugned Crown law and the relevant factor established under the first step.

The rationale underlying the first factor is that protection of human life and physical safety may arguably justify one state interfering with the sovereign integrity of another state. Such protection, then, may also justify state interference with Aboriginal jurisdiction. The second factor encompasses those matters that Hoehn refers to as being non-justiciable. These are issues that can only be resolved through negotiations, such as matters of transcendent federal or provincial jurisdiction and matters that have a major impact on adjacent jurisdictions. Such matters can be distinguished from the kind addressed by the Privy Council in the \textit{Aeronautics

\textsuperscript{46} Ibid at 1113.
In this case, the subject of aeronautics had not been assigned to either a federal or provincial head of power in the Constitution Act, 1867 because flying aircraft did not yet exist in 1867. Thus, it fell to the courts to make a determination on the issue. In the case of competing Aboriginal and Crown jurisdictions, however, the same approach would be unwarranted. Court-imposed compromises preclude the kind of mutually consensual agreement that may provide liberal grounds for state legitimacy.

The third factor of my proposed test for Crown encroachments into Aboriginal jurisdiction is the concomitant of the Supreme Court of Canada’s statement in Haida Nation v British Columbia (Minister of Forests) that it would not be honourable for the Crown to “unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource” because doing so may “deprive the Aboriginal claimants of some or all of the benefit of the resource.” Likewise, an Aboriginal nation must not be permitted to deplete a resource in which the Crown may have an interest prior to the completion of negotiations between the parties. Pursuant to this revised test, Aboriginal rights may serve as a temporary proxy or placeholder for the legitimacy of Crown sovereignty. They do not establish that legitimacy; only negotiated treaties can do that.

Some may argue that reversing the onus in the way I have advocated would create a plethora of litigation. It would encourage Aboriginal nations to simply assert and exercise their jurisdiction, even if the Aboriginal laws or regulations would conflict with existing Crown laws and regulations, given that the onus is to be placed on the Crown to justify its incursions into Aboriginal jurisdiction. The Crown may then decide to litigate each of these instances of inconsistent jurisdiction. But of course, the Crown need not choose to litigate; it could enter into negotiations regarding these issues instead. And the prospect of incurring the costs associated with being the party who bears the onus in litigation may be the incentive the Crown needs to negotiate treaties that set out the terms for sharing sovereignty with Aboriginal nations.

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47 Regulation and Control of Aeronautics in Canada (Re), [1932] 1 DLR 58, [1932] AC 54 [Aeronautics Reference].
48 Haida Nation, supra note 23 at para 27.
4 Implications for Sections 25 and 15(2) of the Charter

It is also interesting to examine the implications of the lack of legitimacy of Crown sovereignty for sections 15(2) and 25 of the Canadian Charter of Rights and Freedoms. As Bastarache J recognizes in R v Kapp, the on-going tension between Aboriginal rights and the liberal paradigm established by the Charter comes to a head in section 25. In Kapp, the federal government had developed a program that would enhance the participation of Aboriginal peoples in commercial fisheries. One aspect of this program allowed the Musqueam, Burrard and Tsawwassen First Nations to fish for salmon in the mouth of the Fraser River for a specified twenty-four hour period, during which all others were prohibited from fishing, and to sell their catch. A group of mostly non-Aboriginal commercial fishers protested by fishing during the specified twenty-four hour period. They were charged with fishing at a prohibited time. In their defence, they argued that the special Aboriginal fishery was unconstitutional on the grounds that it violated their equality rights under section 15(1) of the Charter by discriminating against them on the basis of race.

A majority of the Court rejected this defence, relying on section 15(2), which states:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or

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50 R v Kapp, 2008 SCC 41 at para 78, [2008] 2 SCR 483 [Kapp].

51 Ibid at paras 5-6.

52 Ibid at paras 8, 68.

53 Ibid at para 9.

54 Ibid.

55 Supra note 49. Section 15(1) states: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

56 Kapp, supra note 50 at paras 1, 9.
groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.\footnote{57}

The test for section 15(2) articulated by the majority is as follows: “A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.”\footnote{58} The majority held that the Aboriginal fishery program met the first part of the test. Although the Crown identified numerous objectives for the program, one of which – acknowledged by the majority – was the negotiation of Aboriginal fishing rights claims, the majority focused on the fact that the program provided economic opportunities to the bands, which would redress the social and economic disadvantage they experienced.\footnote{59} On this basis, the majority held that the program had an ameliorative purpose.\footnote{60}

Turning to the second part of the test, the majority noted that the bands in this case were disadvantaged with respect to income, among other things.\footnote{61} The majority further held that the Aboriginal fishery program related to this disadvantage by providing additional sources of income and employment.\footnote{62} For these reasons, the majority found that the Aboriginal fishery program was protected by section 15(2) and as such, it did not violate section 15(1)’s equality guarantee.\footnote{63}

In contrast, Bastarache J held that the entire issue could be disposed of on the basis of section 25,\footnote{64} which states:

\footnote{57} Charter, supra note 49, s 15(2).
\footnote{58} Kapp, supra note 50 at para 41.
\footnote{59} Ibid at para 58.
\footnote{60} Ibid.
\footnote{61} Ibid at para 59.
\footnote{62} Ibid.
\footnote{63} Ibid at para 61.
\footnote{64} Ibid at para 76.
The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.\(^65\)

In applying this provision, Bastarache J identifies three steps to be followed.\(^66\) The first asks whether a *prima facie* case of discrimination pursuant to section 15(1) has been established.\(^67\) The answer in this case was affirmative; because the fishery allocation was subject to a limit, an extra allocation to Aboriginal fishers would affect the general fishery.\(^68\) The second step asks whether the impugned Aboriginal right falls within section 25.\(^69\) The issue here was whether the “other rights or freedoms” referred to in section 25 included the Aboriginal fishing right. Bastarache J held that they did, for a number of reasons. Specifically, the three First Nations had consistently claimed Aboriginal and treaty rights to fish.\(^70\) In addition, the Crown admitted that the Aboriginal fishery right was a first step toward establishing a treaty right for the three First Nations.\(^71\) This was important because, according to Bastarache J, section 25 protects not only established Aboriginal and treaty rights, but also rights requiring protection pursuant to the Crown’s duty to consult and accommodate, as articulated in *Haida Nation* and *Taku River*.\(^72\) The third step asks whether there is a true conflict between the impugned Aboriginal right and the

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\(^{65}\) *Charter, supra* note 49, s 25.

\(^{66}\) *Kapp, supra* note 50 at para 111.

\(^{67}\) *Ibid* at para 116.

\(^{68}\) *Ibid* at para 115-16.

\(^{69}\) *Ibid* at para 111.

\(^{70}\) *Ibid* at para 119.

\(^{71}\) *Ibid* at para 120.

\(^{72}\) *Ibid* at paras 106, 120.
This step was easily satisfied in this case. The right to equality pursuant to section 15 was not consistent with the special fishery rights for the three First Nations. Accordingly, Bastarache J concluded that section 25 provides a full answer to the claim of discrimination under section 15(1).

This brings us to the question of which approach is preferable. In my view, insofar as the majority’s approach relies on the impugned Aboriginal right having an ameliorative purpose, its suffers from the same problems identified in Chapter One with Will Kymlicka’s distributive justice argument. That is, it seems clear that what was at issue here was an asserted Aboriginal right, specifically an asserted Aboriginal fishing right. As Dominique Nouvet explains, First Nations in British Columbia had been seeking recognition of their Aboriginal fishing rights following the Supreme Court of Canada’s decision in *Sparrow*, and the federal government developed the Aboriginal fishery program in order to address the escalating conflicts over the First Nations’ asserted rights. The Aboriginal fishery program, then, is an acknowledgement of asserted Aboriginal fishing rights, and as such it is the type of accommodation measure that fulfills the Crown’s duty to consult and accommodate, as set out in *Haida Nation*. Indeed, even the majority in *Kapp* acknowledges that the Aboriginal fishery program was part of an attempt to negotiate a solution to Aboriginal fishing rights claims. But as discussed in Chapter One, Aboriginal peoples are not asserting that they are entitled to special rights because they happen to be economically disadvantaged as compared to other Canadian citizens. Rather, they are asserting rights of sovereignty and jurisdiction. And a right to exercise jurisdiction does not depend in any way on the relative economic advantage or disadvantage of the group asserting the right. The majority’s reliance on section 15(2) in *Kapp*, though, implies that an accommodation

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73 *Ibid* at para 111.
74 *Ibid* at para 122.
75 *Ibid* at para 123.
76 See Chapter Two, text accompanying notes 88-97.
78 Nouvet, *ibid*.
79 *Supra* note 50 at para 58.
of an Aboriginal right may not survive Charter scrutiny if the Aboriginal community in question is not able to establish that it suffers from some disadvantage.

In response to this line of thought, it may be countered that my concern is unfounded; even if a court undertakes a section 15(2) analysis but ultimately finds that this section cannot save the impugned program from section 15(1) because the Aboriginal community in question does not suffer any economic disadvantage, the court can then go on to apply a section 25 analysis. In my view, though, a court should proceed directly to a section 25 analysis when the program in question protects an established Aboriginal right or an accommodation of an asserted Aboriginal right. As Nouvet explains, the approach taken by courts has the potential to negatively influence the public’s perception of the legitimacy of Aboriginal rights.\(^{80}\) By characterizing Aboriginal rights accommodations as social assistance programs for disadvantaged groups, courts may “inadvertently help perpetuate the stereotype held by many Canadians that First Nations live off of social programs and ‘handouts.’”\(^{81}\) This leads to the question, then, of how to apply section 25.

The literature on section 25 has been preoccupied primarily with two questions: the first is whether section 25 operates as a canon of interpretation or as a shield,\(^ {82}\) and the second is how to define the phrase “other rights or freedoms that pertain to the aboriginal peoples of Canada” within section 25.\(^ {83}\) In regard to the first issue, some have argued that section 25 functions as a mere canon of interpretation or as an interpretive prism.\(^ {84}\) On this view, section 25 is an exhortation to the adjudicator to apply the Charter right in such a way that it does not adversely

\(^{80}\) Supra note 77 at 90.

\(^{81}\) Nouvet, ibid.

\(^{82}\) For a comprehensive list of scholarly articles addressing this issue, see Kapp, supra note 50 at paras 94-95.

\(^{83}\) See e.g. Bruce H Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms (Saskatchewan: University of Saskatchewan, Native Law Centre, 1988) at 30-46.

\(^{84}\) For an explanation of the differences between the canon of interpretation approach and the shield approach, see Wildsmith, ibid at 10-11. See also Kapp, supra note 50 at paras 79-80.
impact on the section 25 right, if possible.\textsuperscript{85} If such an application is not possible, then the \textit{Charter} right prevails despite the adverse effect on the section 25 right.\textsuperscript{86} According to the alternative approach, section 25 functions as a shield. This means that in a conflict between \textit{Charter} rights and section 25 rights, the latter trump the former.\textsuperscript{87} In this way, section 25 shields Aboriginal rights from \textit{Charter} rights. As Bastarache J notes in \textit{Kapp}, practically all commentators on this issue accept the shield approach,\textsuperscript{88} and the trend in the jurisprudence is to do the same.\textsuperscript{89} Indeed, Bastarache J provides an extensive analysis in favour of the shield approach, including an examination of both the French and English text of section 25, the legislative history of the provision, and academic and judicial commentary on the issue.\textsuperscript{90} To this I would add that only the shield approach is consistent with the reconciliation of Aboriginal sovereignty and \textit{de facto} Crown sovereignty. That is, only the shield approach ensures that Aboriginal rights are able to contribute to the legitimation of the Crown’s assertion of sovereignty. The reason is that it is possible to conceive of nearly any Aboriginal right as violating the equality of non-Aboriginal Canadians; indeed, this is precisely what the \textit{White Paper} did when it based its recommendation to abolish any and all special recognition for Aboriginal peoples on the principle of equality.\textsuperscript{91} Given this, if section 25 is not a shield, then \textit{Charter} rights, including section 15(1), could completely eviscerate Aboriginal rights. But Aboriginal rights – in the sense of free-standing rights recognized prior to the negotiation of sovereignty treaties – serve as place-holders until agreements can be reached grounding the legitimacy of Crown sovereignty. Put another way, the interpretive prism approach makes the same mistake made by contemporary Rawlsian and Kantian philosophers who conflate the

\textsuperscript{85} See Wildsmith, \textit{ibid}; \textit{Kapp, ibid}.

\textsuperscript{86} See Wildsmith, \textit{ibid}; \textit{Kapp, ibid}.

\textsuperscript{87} See Wildsmith, \textit{ibid}; \textit{Kapp, ibid}.

\textsuperscript{88} \textit{Ibid} at para 94. For a long list of authors advocating in favour of the shield approach, see \textit{Kapp, ibid} at paras 94-95.

\textsuperscript{89} \textit{Ibid} at para 96. For a list of cases adopting the shield approach, see \textit{Kapp, ibid} at para 96.

\textsuperscript{90} \textit{Ibid} at paras 84-96.

\textsuperscript{91} For a discussion of the federal government’s 1969 \textit{White Paper}, see Chapter One, text accompanying notes 6-16.
questions of justification and legitimation by assuming that a just distribution of social goods can legitimate the state.92 As I argued in Chapter One, an equal distribution of liberal social goods, such as Charter rights, does nothing to address the legitimacy of Crown sovereignty over Aboriginal territories and peoples.93

Turning to the second issue, the general consensus is that section 25 protects rights that Aboriginal peoples hold by virtue of being Aboriginal. For example, Brian Slattery explains that section 25 “seems to cover any rights whatever that aboriginal peoples enjoy by virtue of their distinctive status. It would not, of course, include rights that they possess as ordinary Canadians or in capacities unrelated to native status.”94 Accordingly, attempts to define section 25’s “other rights or freedoms that pertain to the aboriginal peoples of Canada” focus on the uniqueness of Aboriginal peoples.95 For example, in her concurring opinion in R v Kapp at the British Columbia Court of Appeal, Kirkpatrick JA held that “‘other rights or freedoms’ must relate to a significant aspect of aboriginal life, culture or heritage, and relate to aboriginals as aboriginals.”96 She concluded that the Aboriginal fishery in that case fell within the category of ‘other rights or freedoms’.97 It was a benefit conferred on the three First Nations by virtue of their special Aboriginal status and it could potentially be included within a future treaty, in which case it would be protected by section 35.98 Similarly, Bastarache J holds that ‘other rights or

92 See Chapter One, text accompanying notes 114-20.

93 See Chapter One, text accompanying notes 121-45.


95 See Wildsmith, ibid at 35 (concluding that “it seems likely that ‘other rights or freedoms’ includes statutory and contractual sources of rights and freedoms that can be attributed to the unique position of the native peoples…. What would not be included are private rights and freedoms that a native person or group might possess in his or her capacity as an ordinary Canadian citizen or corporation, such as contractual rights acquired in a private business arrangement”).

96 R v Kapp, 2006 BCCA 277 at para 138, 271 DLR (4th) 70.

97 Ibid at 152.

98 Ibid at 151.
freedoms’ include rights that are unique to Aboriginal peoples because of their special status.\textsuperscript{99} In explaining this, he cites Patrick Macklem for the proposition that section 25 "protects federal, provincial and Aboriginal initiatives that seek to further interests associated with indigenous difference from Charter scrutiny"\textsuperscript{100} Accordingly, Bastarache J would include within ‘other rights or freedoms’ legislation or agreements that seek to protect interests associated with Aboriginal culture, territory, sovereignty or the treaty process.\textsuperscript{101}

Justices Bastarache and Kirkpatrick are surely correct to focus on what is unique to Aboriginal peoples. They have both articulated various features of this uniqueness. For the sake of establishing a unified test to define “other rights or freedoms that pertain to the aboriginal peoples of Canada”, though, it may be helpful to look behind these various features. I have argued that the rationale underlying special rights for Aboriginal peoples is that they may serve as place-holders until treaties addressing sovereignty can be executed. In order to serve this function, the content of Aboriginal rights must reflect the legitimacy of Aboriginal sovereignty and jurisdiction. As such, if either of the following two questions are answered in the affirmative, then the relevant right or freedom would fall within section 25’s “other rights or freedoms that pertain to the aboriginal peoples of Canada”:

Is the right or freedom at issue an instance of the exercise of Aboriginal jurisdiction?\textsuperscript{102} or,

Would the right or freedom at issue fall within Aboriginal jurisdiction if not for the existence of \textit{de facto} Crown sovereignty?

In this way, section 25 may ensure that Charter rights do not detract from the goal of grounding the legitimacy of Crown sovereignty.

\textsuperscript{99} \textit{Supra} note 50 at 103.


\textsuperscript{101} \textit{Ibid} at paras 103, 106.

\textsuperscript{102} I am only concerned here with the issue of the application of section 25 when Aboriginal rights or freedoms are threatened by the Charter rights of non-Aboriginal peoples. The issue of the interaction of the Charter rights of Aboriginal individuals with rights of Aboriginal sovereignty, jurisdiction or self-government is beyond the scope of this work.
5 Summary

I have proposed a test for section 35(1) that would encourage Aboriginal nations to simply assert and exercise jurisdiction while the Crown bears the obligation to justify any intrusion into that jurisdiction. My proposed section 25 test is complementary insofar as it protects Aboriginal jurisdiction from Charter scrutiny. The section 35 test proposed here has the virtue of being theoretically consistent with the argument I have presented. Just as the normative onus is on the Crown to legitimate its assumption of sovereignty over Aboriginal peoples and territories, so too should the legal onus be on the Crown to justify its legislative intrusion into Aboriginal jurisdiction. In practice, though, this proposed test has the potential to emphasize conflicts between Aboriginal jurisdiction and assumed Crown jurisdiction. This is not necessarily a downfall of the proposed test. The point is not to allow the parties to become complacent with the status quo. The point is to create conditions that would actually spur negotiations and the resolution of such a long-outstanding and fundamental issue as the illegitimacy of Crown sovereignty.
Conclusion

I have argued that in territories not covered by treaty, the legitimacy of Crown sovereignty depends on the execution of treaties that address sovereignty and the exercise of Aboriginal jurisdiction.\(^1\) Similarly, in territories covered by historical treaties, the legitimacy of Crown sovereignty depends on Crown compliance with the terms of those treaties. In cases where the Aboriginal party executed a historical treaty on the understanding that it was not ceding title to its land but rather that it was agreeing to share its territory on an equitable basis, it is arguable that the Crown has not complied with the actual terms agreed to by the parties. In these cases, it may be useful for the parties to articulate explicitly how that sharing of sovereignty will occur. This may mean negotiating supplementary treaties. And in the meantime, the test for Aboriginal rights should reflect not only the legitimacy of Aboriginal sovereignty, but also the normative onus on the Crown to legitimate its assertion of sovereignty. Accordingly, the legal onus should also be on the Crown to justify any incursions into the exercise of Aboriginal jurisdiction pursuant to section 35.

Some of my proposals may, to some eyes, appear extreme. The notion that the Crown must negotiate treaties addressing shared sovereignty, though, is not extreme. To a certain extent, this is what the Crown and Aboriginal peoples are already doing when they negotiate and implement modern treaties.\(^2\) Similarly, it is not extreme to require the Crown to uphold the treaty terms to which it actually agreed. Indeed, the honour of the Crown requires no less.\(^3\) But the notion that

\(^1\) See Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 77.

\(^2\) For a discussion of the ways in which the Nisga’a Final Agreement addresses the sovereignty of the Nisga’a Nation by providing for the exercise of Nisga’a jurisdiction over land in which that nation appears to hold an ultimate or underlying title, see Hoehn, *ibid* at 107-108. Hoehn also identifies ways in which the Nisga’a Final Agreement falls short of reflecting sovereignty, *ibid* at 109-10.

\(^3\) See *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, 355 D.L.R. (4th) 577 [cited to SCC], where the majority granted a declaration that the federal Crown failed to implement the Métis land grants set out in section 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown. Although the obligations at issue in this case were not treaty obligations, the majority held, at para 68, that the honour of the Crown is “engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty” and drew an analogy, at para 71, between the type of constitutional obligation enshrined in section 31 of the *Manitoba Act, 1870* and treaty promises.
Aboriginal peoples should exercise jurisdiction in the absence of a treaty defining that jurisdiction, as well as the notion that only Crown incursions into this jurisdiction should be subject to judicial oversight, may strike some as extreme. To assess this reaction, it is necessary to identify the perspective that gives rise to it. We can safely conclude that it is not the Aboriginal perspective. From the Aboriginal perspective, nothing could be more legitimate than an Aboriginal nation exercising jurisdiction over its own territory. But it is also not the western, liberal perspective. As I have argued, there is ample room within liberal thought to separate the project of justifying the state from the project of legitimating the state. And of the four modes of acquisition that could legitimate Canadian sovereignty, only mutually consensual treaties have the potential to comply with liberal principles. And until such treaties are executed, it is Crown sovereignty, not Aboriginal sovereignty, that stands in want of legitimation. In other words, it is the liberal perspective itself that undergirds the notion that Aboriginal peoples should be entitled to simply assert and exercise jurisdiction even in the absence of treaties, as well as the notion that it is Crown intrusions into that jurisdiction that need to be justified. If my recommendations do seem extreme, then, it is not because they lack a logical, liberal foundation.

That being said, it may be that theoretical arguments alone are not sufficient to reach the hearts and minds of Canadian citizens and representatives. Instead, as discussed in Chapter Six and as suggested by the fictional Elder in John Borrows’s book, Drawing Out Law: A Spirit’s Guide, to reach a significant decision, an individual may need to engage not only reason but also emotion.4 The decision to recognize the illegitimacy of Crown sovereignty is arguably such a significant decision. Accordingly, the project of legitimating Crown sovereignty through Aboriginal sovereignty rights may ultimately depend not only on logical arguments, but also on stories. My story in Chapter Six is a very modest attempt in this regard. Much more significant are the stories of our Elders and our Métis Senators. Their stories do not merely translate a theoretical argument into a more accessible form. Rather, their stories embody the worldviews, including the legal and political principles and institutions, of their respective nations.5 As such, these stories have the

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5 See Borrows ibid at 212, where the fictional Elder states that the real laws of her Anishinabek community reside in stories. See also John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 79-80 [Borrows, Canada’s Indigenous Constitution].
potential to persuade not only on account of their non-theoretical appeal but also because of their ability to envelop non-Aboriginal Canadians in an Aboriginal perspective. That is, Aboriginal stories, along with other ways of knowing within Aboriginal societies, can explain what it means for Aboriginal peoples to exercise jurisdiction in accordance with Aboriginal laws and legal principles. In this way, Aboriginal stories, teachings, laws and legal and political institutions may fill the lacuna left by the lack of legitimacy of asserted Crown sovereignty. As discussed in Chapter One, Dale Turner’s word warriors have important work to do. Let’s tell our stories.

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6 In my view, Borrows’s Drawing Out Law, supra note 4, accomplishes this task splendidly.
7 See Borrows, Canada’s Indigenous Constitution, supra note 5 at 23-58 (arguing that Aboriginal laws have a variety of sources, including sacred law, natural law, deliberative law, positivistic law and customary law).
8 See Dale Turner, This is not a Peace Pipe: Towards a Critical Indigenous Philosophy (Toronto: University of Toronto Press, 2006). See also Chapter One, Section 5.4 for a discussion of Turner’s word warriors.
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