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CONSTITUTIONAL CONFLICT AND THE DEVELOPMENT OF CANADIAN ABORIGINAL LAW

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ABSTRACT

This paper argues that aboriginal rights in Canada have been greatly affected by 19th century governmental and social conflicts within the Canadian colonial state. These conflicts, largely over the ownership of land and regulatory authority between the federal government and the provinces necessarily impacted the First Nations on the ground while affecting how their legal claims were recognized and implemented. In particular they impacted the legal efficacy of treaty rights, the scope of rights recognised by the courts and an expansive legally protected notion of indigenous sovereignty. As a result, the rights now protected under sec. 25 and 35 of the *Constitution Act 1982* are more restricted than the text might imply.

I INTRODUCTION

The confederation of the United Province of Canada, Nova Scotia, and New Brunswick transferred whatever authority the colonies held over First Nations affairs to the new federal government. Within this legal regime, inherited from pre-confederation law and practice and the *British North America Act 1867*, aboriginal rights were uncertain and precarious. First, there was considerable uncertainty about the legal source and status of treaty regarding aboriginal rights. The law was an amalgamation of common law rights, customary practices, statutory enactments, international legal doctrines, imperial and colonial policy and imperial prerogative instruments such as the *Royal Proclamation of 1763*. Second, there was uncertainty about the content and the scope of the rights. Third, there was uncertainty about how aboriginal and treaty rights related to provincial authority within the federal system. Finally, the rights were subject to the doctrine of

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parliamentary supremacy and were subject to regulation and extinguishment by legislation.¹

This uncertainty was made more tenuous by the need to work out the basis and scope of the new provinces' and the Dominion's authority under the *British North America Act 1867* (hereafter *Constitution Act, 1867*). While often treated as separate areas of legal inquiry, the development of Canadian aboriginal law occurred as part of a process where the larger Canadian polity and courts were giving form to the federal-provincial relationship outlined in the *Constitution Act 1867*. The recognition, incorporation or disregard of First Nations' territories, customary law and governmental entities and aboriginal individuals involved fundamental constitutional values such as: parliamentary sovereignty, federalism, separation of powers, rule of law and voting rights; the political and/or judicial determination of scope of constitutional authority; and constitutional innovation concerning the authority of governmental institutions, individual rights and equality.

This paper argues that aboriginal rights in Canada have been greatly affected by 19th century governmental and social conflicts within the Canadian colonial state. These conflicts, largely over the ownership of land and regulatory authority between the federal government and the provinces necessarily impacted the First Nations on the ground while affecting how their legal claims were recognized and implemented. In particular they impacted the legal efficacy of treaty rights, the scope of rights recognised by the courts and an expansive legally protected notion of indigenous sovereignty. As a result, the rights now protected under ss 25 and 35 of the *Constitution Act 1982* tilt more heavily toward usufructuary and cultural site specific rights rather than arising a more proprietary conception of aboriginal title.

II ABORIGINAL RIGHTS AND CANADIAN CONSTITUTION

Aboriginal law and legal doctrine, which seeks to reconcile, 'aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions', has been incorporated and subsumed into a larger set of constitutional principles and the constitutional and statutory law of the Canadian state.² This law exists as, 'one of the ways in which people make sense of the world around them and make it coherent' while they grope for a particular identity and political culture. Contested since the establishment of the British North American colonies and

1 Peter W. Hogg, *Constitutional Law of Canada* (The Carswell Company Limited, 2nd ed, 1985), 563-568.

2 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2006] 1 CNLR 78,[1] (Binnie, J).

their subsequent confederation as a federal state in 1867, the legal framework manages the 'claims, interests and ambitions' of individuals and groups while establishing governmental and federal structures which give rise to additional interests. In this way, conflicts which involve the general nature of the federal system, the division of powers, and individual and collective rights impact on aboriginal law because they were initially grounded in the conscious act of nation-building; a process intimately intertwined with larger issues of territory, self-government, community, diversity and sovereignty.

First Nations were not completely ignored in the *Constitution Act 1867*. The basic principles of protection, assimilation and civilization established by the imperial government and pre-confederation colonial policy remained.³ However, the tribal interests as collective *de facto* self-governing entities with nearly exclusive control of their populations, finances, and lands established by earlier imperial policy from 1763 to 1860 were dramatically changed.⁴ After the constitutional assignation of institutional responsibilities and jurisdiction for the tribes and their lands, their interests and rights became in part the interests of various institutional, governmental or non-indigenous groups. The federal government, granted paramount authority over, 'Indians, and Lands reserved for Indians,' under s 91(24) assumed institutional responsibility for the tribes and took extensive control of the reserves and tribes in the 1876 *Indian Act*. The provinces, had 'exclusive' jurisdiction over local affairs, including the 'property and Civil Rights in the Province' under s 92(13), ownership of 'all lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union' under s 109, and the continued retention of their respective 'public property not otherwise disposed of' under s 117. Armed with these powers and legislative competence the provinces were determined, for material, political, ideological and philosophical reasons, to retain their local authority against federal encroachment. As both levels of governments grounded their existence and actions in a conscious act of nation-building, a process intimately intertwined with larger issues of; territory, self-government, community, diversity and sovereignty the tribes pre-European occupation of

3 John L Tobias, 'Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy' in Ian A.L. Getty and Antoine S. Lussier, (eds), *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983), 39.

4 John S. Milloy, 'The Early Indian Acts: Developmental Strategy and Constitutional Change' in J.R. Miller, ed. *Sweet Promises A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 145.

North America and the unique legal and constitutional arrangements which arose from their presence were entangled in the constitutional and political disputes within the developing Canadian state.

This is not to say that constitutional and institutional disputes are the only determinant of the existence and scope aboriginal rights in Canada. With increased European settlement, Miller notes: ‘the Indians ceased to be allies and economic partners [and] they increasingly assumed the roles of obstacle to development and consumer of public funds.’⁵ The shift of power away from the tribes, which allowed colonial governments to show less solicitude for tribal interests, was accompanied by the development of more unitary and euro-centric conceptions of sovereign and national authority.⁶ Unlike the Americans who developed view that the tribes retained an inherent authority based on the pre-contact occupation and use of territory, the British and settlers replaced the idea of a juridical equality for the tribes. ‘As the settler state consolidated its sense of self,’ Paul McHugh writes, ‘it tended to increasingly see and treat aboriginal peoples as part of and entirely subject to its own sovereignty rather than as separate polities.’⁷ From the settler’s point of view, the issue of political authority and sovereignty was increasingly understood as a fight for a liberal conception local responsible government under a unified sovereign imperial crown.⁸ These changing conceptions were reinforced by Imperial policy. As the Colonial Office committed to settler self-government in the mid-19th century, the ability of imperial authorities to implement an effective protective policy, which had always been somewhat rhetorical and tenuous in practice, simply disappeared.⁹

At the same time the imperialist and colonial project inexorably led to the creation of boundaries and the assignation of various characteristics which separated the ‘civilized’ European from the indigenous inhabitants. The dispossession of indigenous territories and the destruction and/or appropriation of indigenous groups and knowledge are concomitant with of imperialism and colonialism. As Smith explains:

5 Ibid 98.

6 Paul G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004) 117-159.

7 Ibid 127.

8 Robert C Vipond, ‘Lament For a Notion: The Eclipse of Reform Liberalism’ in Joseph F Fletcher, Ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 24-36, 25-26.

9 David T. McNab, ‘Herman Merivale and Colonial Office Indian Policy’ in Ian A.L. Getty and Antoine S. Lussier, (eds), *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (UBC Press, 1983) 85.

Imperialism was the system of control which secured the markets and capital investments. Colonialism facilitated this expansion by ensuring that there was European control, which necessarily meant securing and subjugating the indigenous populations.¹⁰

Where early settlement led to laws and policies more solicitous of aboriginal rights, the totalizing logic of colonialism and imperialism undermined them over time.¹¹

At the same time, jurisprudence and policy were increasingly influenced by sociological factors such as racial and cultural stereotypes.¹² For example, Kent McNeil argues that Social Darwinist thought and racism formed an increasingly virulent context to Canadian Indian policy. These conceptions influenced judicial conceptions of aboriginal rights.¹³ The major themes of this racial theory reinforced the belief that non-Caucasians were inferior as a result of their inherent ‘uncivilised’ or ‘primitive’ characteristics which in turn informed conceptions of aboriginal title. The depreciation of cultural and racial characteristics extended into the notion that the tribes had neither the requisite law nor intellectual inclination to have possessory interests in the territories they occupied. Cottam notes that the non-legal notion of aboriginal title was conceived by David Mills’, an advisor to the Ontario in *St. Catherines Milling and Lumber Co.* case.¹⁴ For Mills, the acknowledgement of Indian title did not mean that the Indian actually had title to the lands they occupied; the Crown possessed full title to all their lands through the Doctrine of Discovery. The treaty process, which arguably implied that aboriginals held a possessory interests ‘did not originate in the want, or the supposed want, of a sufficient title in the Crown’, but was due to the ‘scruples of Puritan and Quaker settlers’ who paid Indians as a matter of conscience rather than as a matter of legal obligation.¹⁵ Any interest recognised either in a treaty, or any other legal instrument was ‘a matter of public policy, determined by political considerations....’ This notion was adopted by the Chancellor Boyd, who opined without evidence that the Ojibwe Treaty

10 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Ltd, 1999), 21.

11 John C Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queens University Press, 2003), 151.

12 Sidney L Harring, *Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press, 1998).

13 Kent McNeil, ‘Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s’, (1999) 38 *Journal of the West* 1, 68.

14 S. Barry Cottam, ‘Indian Title as a Celestial Institution: David Mills and the St. Catherine’s Milling Case’ in Kerry Abel and Jean Friesen, eds. *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg, Manitoba: University of Manitoba Press, 1991) 247.

15 Ibid 257-258.

partners were, ‘more than [the] usually degraded Indian type’ in the lower Court in the *St. Catherines Milling and Lumber Co.* case. For Chancellor Boyd, ‘the claim of the Indians by virtue of their original occupation is not such as to give any title to land itself; but only serves to commend them to the consideration and liberality of the Government upon their displacement...’¹⁶ Cotton notes that Mills arrived at these non-legal notions of Indian title due to his acceptance of Anglo-Saxon supremacy and his antipathy to collectivist notions of property rights.¹⁷

Nevertheless, while this background context of imperial colonial expansion and racist bias informs legal developments, it was channeled and contested through the constitutional framework and the legal system. In Post-Confederation Canada, federal and provincial politicians struggled over the fundamental nature of the federal union and the scope of federal and provincial powers.¹⁸ The disputes not only involved fundamental imperial, national and settler political and economic interests but also were about fundamental political and legal philosophies regarding the nature and extent of the developing national state. They were framed by common law legal doctrines, antecedent political and policy choices, colonial governing arrangements as well as a set of beliefs about a particular area of the law or factual situation which are logically related and internally coherent; what Samuel has called the ‘structure of law.’¹⁹ This structure provided decision-makers with a mechanism or a rule of thumb for deciding legal disputes and established the basis for subsequent policy and legal decision-making as precedent. In the area of aboriginal law, where the legal process was often used for blatantly immoral purposes or as an instrument of unadulterated power, the structure of the law and the competing political agendas were often incorporated and reconciled for purposes of the particular disputes in judicial decisions. Though these opinions often exhibited tortured reasoning, they had

16 *Regina v The St. Catherines Milling and Lumber Company*, X OR 1885 196, 234.

17 *Ibid* 259-60.

18 Benton calls the historical comparative and interpretive study of these processes and conflicts the study of “jurisdictional politics.” For Benton, jurisdictional politics means “conflicts over the preservation, creation, nature, and the extent of different legal forums and authorities” that arose out of a colonial milieu where the informal law of the Anglo-settlers, the law of indigenous societies, rules governing the interaction of these groups, and the coalescing colonial and national state intersected. Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge: Cambridge University Press, 2002), 10.

19 “This structure is not, however a structure of rules. It is the structures that one uses to make sense of the world in which law applies. It is a matter of structuring the facts.” Geoffrey Samuel, “Comparative Law and Jurisprudence” (1998) 47 *I.C.L.Q.* 817 at 827.

significant precedential effects and were incorporated within the doctrine of aboriginal rights in Canada.

A The Constitution Act 1867, Provincial Rights and St. Catherine's Milling and Lumber Company

There has been much debate about whether the structure and intent of the *Constitution Act, 1867* was to create a powerful federal government and the role of the Judicial Committee in interpreting the document to fit its *a priori* view of a decentralized federal system.²⁰ On one hand, the document has been understood as providing the federal government with 'formidable weapons of centralization' such as the general power of disallowance over provincial legislation, of provincial lieutenant-governors and the residual powers under s 91 to make, 'Laws for the Peace, Order, and good government of Canada, in relation to all matters not coming within the Classes of Subjects' assigned exclusively to the provinces in s 92.²¹ The centralizing thrust of the document was premised on the idea that the American constitution, which enumerated a short list of powers to the national government while reserving the remainder to the states and the people 'commenced at the wrong end'.²² For centralists the then raging American civil war was empirical proof of the need for strong central authority. On the other hand, the provinces were granted exclusive and extensive authority over local affairs in sec. 92. These local powers, reflecting a counterargument to centralists such as MacDonal, reflected an underlying diversity among the provinces and local political cultures which equated provincial communities with individual freedom.²³ As subsequently interpreted by the Privy Council, this exclusive constitutional grant of local authority accorded the provinces substantial autonomy and equal status with the federal government.

Whatever the true nature of the *Constitution Act 1867*, there is no question that after

20 Frederick Vaughan, 'Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and Alternative Explanation' (1986) 19 *Canadian Journal of Political Science*, 495-519; Paul Romney, 'The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the British North America Act' (1992) 25 *Canadian Journal of Political Science*, 3-28.

21 Arthur R M Lower, 'Theories of Canadian Federalism' in Arthur R M Lower et al., *Evolving Canadian Federalism* (Durham, N.C: Duke University Press, 1958) 3, 14.

22 Eugene Forsey, "In Defence of Macdonald's Constitution" (1976) 3 *Dalhousie Law Journal* 529.

23 Robert C Vipond, *Liberty and Community Canadian Federalism and the Failure of the Constitution* (Albany, N.Y: State University of New York Press, 1991).

Confederation, provincial politicians advocated an interpretation which tended to expand the power of the provinces at the expense of the federal government.²⁴ They vehemently objected to the idea, advocated that the constitution had set up a subordinate federal system which granted all residual power to the federal government and contemplated that the provinces be analogous to municipal governments.²⁵ In this wide ranging political dispute, the courts, particularly the Judicial Committee of the Privy Council became a significant forum to press for an interpretation that would provide for expansive provincial power. ‘Its advocates realized that the thing they wanted—whether prestige, power, protection of certain cultural values, or economic independence—depended expressly on constitutional reforms.’²⁶ Over time, the constitutional perspective led them to develop a “constitutional doctrine of provincial autonomy” which the courts, particularly the Judicial Committee, could use to circumscribe federal power. This doctrine was premised on the idea that the historically autonomous relationship the colonies had had with the Imperial Crown was not diminished by the creation of Canada, and a political theory which equated provincial rights with liberal individualism. Among other things, the dispute involved issues ranging from federal-provincial financing arrangements, dual membership in provincial and federal legislatures, municipal affairs and control of the waterways, the liquor trade, the role of the Lieutenant-Governor, the federal disallowance of provincial legislation and control of territory that had been ceded to the tribes to the Dominion. Vipond outlines the core principles of the doctrine:

First, the provincialists argued that the federal principle means, at a minimum, that the federal government had no right to interfere in those subjects placed within the control of the provincial legislatures, just as, conversely the provincial governments have no right to infringe upon federal jurisdiction. Federalism means that each level of government is supreme or sovereign within its sphere, which is why the BNA Act conferred upon each “exclusive” authority to legislate on a given set of subjects. Second, the provincialists argued that real federalism requires a balanced division of power in which neither level overwhelms the other. In this sense, federalism implies political parity, and the autonomists argued that the division of powers outlined in section 91 and 92 of the BNA Act

24 Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government 1867-1942* (Toronto: University of Toronto Press, 1981).

25 “Subordinate federalism” is a system whereby provincial governments would have only those powers strictly needed for local purposes and which would provide for sectional interests and prejudices. The national government, with all remaining authority would protect minorities and achieve constitutional liberty without being subject to the pressures of populist democracy. Bruce W Hodgins, ‘Disagreement at Commencement: Divergent Ontarian Views of Federalism, 1867-1871’ in Donald Swanson, ed. *Oliver Mowat's Ontario* (Toronto: MacMillan, 1972) 53, 67-68.

26 Vipond, above n 23, 8.

established a rough balance between national and provincial powers respectively. Third, the provincialists argued that federalism means contractualism. Confederation, they said, was created as a compact among the provinces which, according to the act's preamble, had "expressed their desire to be federally united in one Dominion."²⁷

The constitutional doctrine of provincial autonomy lay at the core of Ontario's dispute with the federal government in the *St. Catherine's Milling and Lumber Co. v. the Queen*.²⁸ This case concerned the ownership of lands ceded by treaty to the Dominion by the Saulteaux Ojibwa in 1873. However, the dispute had its genesis in the federal purchase of Rupert's Land (the North West territory) from the Hudson's Bay Company (HBC) in 1867.²⁹ At the time the southeastern boundary of Rupert's Land was unclear. Ontario, which had been carved out of the western half of the French territory ceded to Great Britain in 1763, argued that when King Charles II conveyed Rupert's Land to the HBC in 1670, the limits of French (Quebec) possessions in North America extended west of Lake Superior (and thus were included in the territory ceded by France to Great Britain in 1763 and were part of Ontario).³⁰ The federal government disputed this position and argued that the HBC Rupert's Land eastern boundary was a line drawn due north from the confluence of the Ohio and Mississippi Rivers, a boundary which would have seriously limited the territorial extent of western Ontario. As a purchaser of the HBC territory, the federal government would control all Crown lands, subject to aboriginal interests at common law or in the Deed of Surrender from the HBC to the Dominion³¹ in the territory. If the land was found to be in Ontario, s 109 held that the province held the proprietary rights. After a protracted dispute,

27 Ibid 5.

28 See, eg, *British North America Act 1867, s. 109 (Ont.)*; *St. Catherine's Milling and Lumber Company v the Queen* (1889) 14 App. Cas. 46 (JCPC) ('*St. Catherine's Milling and Lumber Co.*'). The name "St. Catherine's Milling and Lumber Company" had no apostrophe in the title of the case before the Ontario Magistrates Court and the Canadian Supreme Court. The lower court's spelling in used when referring to those cases in this paper.

29The boundary issue is discussed more thoroughly in J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations" in Chapter 3 in The Ontario Department of Public Records and Archives, *Three History Theses* (Toronto, 1961).

30 The federal government subsequently sought reimbursement from Ontario the money it paid to the tribes as a result of the 1873 treaty. It was unsuccessful in this action. *Canada v. Ontario* (1907), 10 Ex. C.R. 445; Exchequer Court of Canada; *Dominion of Canada v. Province of Ontario* [1910] AC 637.

31 Frank J. Tough, 'Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory' (1992) 17 *Prairie Forum* 2, 225-250.

the Judicial Committee found in favor of Ontario in 1884.³² The result was implemented by imperial legislation in 1889.³³

Nevertheless, between the 1884 decision and the 1889 imperial legislation, the federal government did not immediately concede the boundary question or yield control of the resources in the area. MacDonald, as both Prime Minister and Attorney General, took the position that the 1873 treaty conveyed title of the territory to Dominion as a bona-fide purchaser, thus rendering irrelevant Ontario's victory on the boundary extension. MacDonald argued:

The land belonged, so far back as the grant of Charles II could give it, to the Hudson's Bay Company, but it was subject to Indian title. They and their ancestors had owned the lands for centuries until the Dominion Government purchased them. These lands were purchased, not by the province of Ontario—it did not pay a farthing for it—but by the Dominion...By seven treaties the Indians of the Northwest conveyed the lands to Canada; and every acre belongs now to the people of Canada, and not to the people of Ontario;...there is not one stick of timber, one acre of land, or one lump of lead, iron or gold that does not belong to the Dominion, or to the people who purchased from the Dominion government.³⁴

This logic depended on an expansive interpretation of the s 91(24), which would include within the phrase 'lands reserved for Indians' those areas reserved as hunting grounds under the *Royal Proclamation of 1763* as well as a recognition that the tribes possessed or owned their land subject only to the Crown's exclusive right of pre-emption. The treaty, which 'relieved' the Indian title and occupancy rights then resulted in the Dominion holding fee simple title.³⁵ The Dominion argued that its position was in complete accord with English and American precedent as 'from the earliest times the Indians had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation.'³⁶

32 After the decision, Oliver Mowat, Premier of Ontario, declared that Ontario had resisted Dominion Prime Minister's John A. MacDonald's conspiracy to make Ontario "one of the least of the great provinces," and that Ontario now had "an extent of country ample enough to admit of its development, so that, as the other provinces develop, so Ontario should develop also" [sic] quoting Randall White, *Ontario 1610-1985 A Political and Economic History* (Toronto and London: Dundurn Press 1985), 165-167.

33 *Canada-Ontario Boundary Act 1889*, 52-53 Vic. c. 28 (U.K.).

34 Anthony J. Hall, 'The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a factor in Federal-Provincial Relations in Nineteenth-Century Canada' in Kerry Abel and Jean Friesen, eds. *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg, Manitoba: University of Manitoba Press, 1991) 267, 271-272.

35 Before the Supreme Court of Canada counsel for Ontario argued that Dominion's position "could not be put forward on the part of the Dominion without operating as a fraud on the rights of the Province of Ontario." *St. Catherine's Milling and Lumber Co. v the Queen* [1887] 13 S.C.R. 577, 595.

36 *St. Catherine's Milling and Lumber Co.*, 48.

Ontario argued that the title to lands occupied by the aboriginals and over which aboriginal title had not been extinguished had always been in the Crown (and thus ‘belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union’ under s 109) and the aboriginal tenure was not analogous to fee simple. ‘Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or equitable title in the ordinary sense.’³⁷ As Crown land subject to Indian occupancy, Ontario took fee simple title in the area once the aboriginal interest was extinguished by treaty by virtue of s 109.

The Judicial Committee agreed for the most part with Ontario. Lord Watson, while agreeing with the Dominion that the tribes had a property right in their lands, nevertheless did not find that aboriginal title was equivalent to fee simple in the territory surrendered by the treaty. Rather, Watson noted, ‘[t]he Crown has all along has a present proprietary estate in the land, upon which the Indian title was a mere burden.’³⁸ As such, the ‘tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign’ which arose from the *Royal Proclamation of 1763* itself.³⁹ As s 109 provided that Ontario held the beneficial interest in all Crown lands, subject ‘to any Interest other than that of the Province’ the 1873 Dominion-Saulteaux Ojibwa treaty extinguished Ojibwa Indian title while concomitantly vesting the land in the Crown-in-Right of Ontario.

For those advocating the doctrine of provincial rights, Ontario’s argument in *St. Catherine’s* was about its own autonomy and the exclusiveness of its jurisdiction, as well as the equality of the Crown-in-right of the Province with the Crown-in-right of Canada. From this perspective, even though Ontario was not party to the treaty and the surrender of Indian title was made to the Dominion, the province as direct delegate of the imperial Crown held the proprietary interest in the lands. Ontario’s interest in the ‘crown’ lands within its boundaries was not only superior to those of third party purchasers, but equal to the claims of the other imperial delegate, the

37 Ibid 49. This argument was made before the Judicial Committee. Ontario’s argument before the Supreme Court of Canada and the lower courts was even less disposed towards the existence of tribal title. Before the lower courts Ontario argued that “No title beyond that of occupancy was ever recognized by the crown as being in the Indians, and this recognition was based upon public policy and not upon any legal right in the aboriginal inhabitants.” *St. Catherine’s Milling and Lumber Co*, 597.

38 *St. Catherine’s Milling and Lumber Co* [12].

39 Ibid [6].

Dominion government. This claim was based on the idea that Ontario continued to hold all the natural resources, land, powers and prerogatives previously held by the Province of Canada prior to Confederation and which devolved to Ontario on Confederation. Moreover, Ontario's claim is superior and prior to that of the Dominion because it derived directly from the *Royal Proclamation of 1763* and the administration of the lands by the Province of Canada prior to the creation of Canada.⁴⁰ Lord Watson, who several years later held in the 1896 *Local Prohibition* case that Ontario had the authority to regulate liquor under s 92 because the United Province Canada had regulated liquor prior to Confederation⁴¹, clearly subscribes to this provincial rights position regarding the earlier relationship between the Crown and the pre-Confederation:

Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada.⁴²

As such, the *Constitution Act 1867*, by s 109 is 'sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown...'⁴³ Under the doctrine of provincial autonomy, the balance of the federal structure is maintained.⁴⁴ The province, as the Privy Council noted in *Hodge v. The Queen* has 'authority as plenary and as

40 "The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, *by the Provincial Governments*, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty." Ibid 54 [emphasis added].

41 *The Attorney-General for Ontario v The Attorney General for the Dominion of Canada (Canada)* [1896] UKPC 20 (9 May 1896).

42 *St. Catherine's Milling and Lumber Co*, 55.

43 Ibid 57.

44 "Their Lordships are, however, unable to assent to the argument for the Dominion founded on s 92(24). There can be no a priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title." Ibid 59.

ample within the limits prescribed by sect. 92 as the Imperial parliament in the plenitude of its power' could bestow.⁴⁵

B *The Canadian Federation and Aboriginal Rights*

1. *Usufructuary Nature of Aboriginal Rights and Title*

After Lord Watson's holding, the previously held notion of common law aboriginal title, which implied a legally cognisable beneficial use to the land burdening the Crown's underlying paramount title, was equated with personal usufructuary aboriginal rights to hunt, fishing and gather undertaken for subsistence and cultural reasons.⁴⁶ Prior to *St. Catherine's*, the use that Indian tribes put to land was not wholly determinative of the legal efficacy their interest. Tribal occupancy rights provided the tribe with full use of the soil and enabled the tribe to use the territory as they thought appropriate.⁴⁷ Aboriginal use led to legally efficacious interests at common law; as evidenced by Justice Strong's dissent before the Supreme Court of Canada in *St. Catherine's Milling*:

In reference to Indian habits and modes of life and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.⁴⁸

Instead Watson reduced the 'usufruct' reserved in the Proclamation to encompass the entire content of aboriginal title. The newly conceived usufructuary right was not an estate in land or any sort of efficacious legal right. Rather it was akin to a revocable licence to hunt, fish and gather which imposed no legal impediment to the Crown's underlying proprietary title and the uses to which the territory might be put. This conflation of aboriginal title and aboriginal rights, which then consisted of various traditional use rights, is evident in the 1921 "*Star Chrome*" case. In this case Lord Duff emphasises this aspect of aboriginal title:

While the language of the statute of 1850 undoubtedly imports a legislative acknowledgment of a right inherent in the Indians to enjoy the lands appropriated to their use under the superintendence and

⁴⁵ *Hodge v The Queen* [1883] 9 AC 117, 132.

⁴⁶ *Attorney-General for Canada v Attorney-General for Ontario* [1897] AC 199; *Ontario Mining Company v Seybold* [1903] AC 73.

⁴⁷ Brain Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title (Studies in Aboriginal Rights No. 2)* (Saskatoon, Sask: University of Saskatchewan Native Law Centre, 1983), 31-38.

⁴⁸ *St. Catherine's Milling and Lumber Co*, 612 (Strong J. dissenting citing Kent's *Commentaries* and *Mitchel v The United States*, 34 U.S. (9 Pet.) 711 (1835)).

management of the Commissioner of Indian Lands, their Lordships think the contention of the Province to be well founded to this extent, that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.⁴⁹

As such, though the courts continued to hold notions of aboriginal title and usufructuary rights conceptually distinct, in practice the concepts were merged. Aboriginal title was either ‘defined’ as a ‘burden’ on the Crown’s interest, which was subsequently extinguished by treaty or legislation, or it was defined as an aboriginal right to traditionally harvest various natural resources. The reasoning of Justice McGillivray in the 1932 decision *R. v. Wesley* is indicative of the melding of the concepts:

It is thus clear that whether it be called a title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation [of 1763] in the territories therein mentioned which certainly included the right to hunt and fish at will all over those lands in which they held such interest.⁵⁰

Such a legal conclusion would clearly facilitate settlement and economic exploitation. The notion that aboriginal title gave rise to traditional natural resource gathering rights fits well with the colonial impulse for economic development and improvement. It also reflected political reality, in that judicial protection of aboriginal title could not threaten non-aboriginal uses premised on liberal economic principles or federal/provincial regulatory regimes. By generally treating aboriginal title and aboriginal rights as mutually constitutive, the courts avoided any discussion of whether the holder of un-extinguished aboriginal title had the right ‘to use it [the land] according to their own discretion.’⁵¹

This notion changed with the recognition of aboriginal title by the Supreme Court of

49 *Attorney-General for Quebec v Attorney-General for Canada* [1921] 1 AC 401, 408 (P.C.) [“*Star Chrome*” case] Lord Duff wrote at p. 410 in his speech: “The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, *language which does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title*; and the view that the Act was passed for the purpose of affording legal protection for the Indians in the enjoyment of property occupied by them or appropriated to their use, and of securing a legal status for benefits to be enjoyed by them, receives some support from the circumstance that the operation of the Act appears to extend to lands occupied by Indian tribes in that part of Quebec which, not being within the boundaries of the Province as laid down in the Proclamation of 1763, was, subject to the pronouncements of that Proclamation in relation to the rights of the Indians, a region in which the Indian title was still in 1850, to quote the words of Lord Watson, ‘a personal and usufructuary right dependent upon the good-will of the Sovereign [emphasis added].”

50 *R v Wesley* [1932] 2 WWR 337, 348 (Alta.S.C.).

51 *Johnson v M’Intosh*, 21 U.S. (8 Wheat) 681, 688 (1825).

Canada in the 1973 decision *Calder v. Attorney-General of British Columbia*.⁵² *Calder* expressly overruled *St. Catherine's* on aboriginal title being a usufructuary right and created by the *Royal Proclamation of 1763*, and recognised that aboriginal title existed by virtue of prior occupation of North America.⁵³ Later in *Guerin v. The Queen*, the Court held that whilst the Crown acquired while radical or underlying title at the time of sovereignty such title was burdened by the 'pre-existing legal right' based on the use and occupation of the land prior to European arrival.⁵⁴ This 'independent legal interest' gives rise to a *sui generis* fiduciary duty on the part of the Crown⁵⁵ and extends beyond traditional hunting, fishing and gathering activities to include the right to manage and govern the land. '[I]t has become accepted in Canadian law,' Chief Justice Lamar states in *Van der Peet*;

that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment...⁵⁶

Subsequently in 2014 the Supreme Court recognised aboriginal title for the first time (with a concomitant right to manage and govern the land) in *Tsilhqot'in Nation v. British Columbia*.⁵⁷

Nevertheless, Canadian law continues to be effected by the historic adherence to aboriginal rights qua usufructuary rights. This is most evident in the post 1982 aboriginal jurisprudence which has developed a site specific aboriginal rights jurisprudence based on the cultural salience of an activity. Consistent with the conception of a non-proprietary interest, the Supreme Court has stated that scope and content aboriginal rights are not 'general and universal, but are determined on a case-by-case basis, and they are not dependent upon an underlying claim for aboriginal title.'⁵⁸ As such, cultural and usufructuary activities are both the probative evidence for

52 *Calder et al. v Attorney-General of British Columbia* [1973] SCR 313.

53 The Court further elaborated on the nature of Aboriginal title and rights in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [117] where the Court noted: "[T]he content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."

54 *Guerin v The Queen* [1984] 2 S.C.R. 335, 379-82. (Dickson, J concurrence).

55 *Ibid*, 385.

56 *R. v Van der Peet* [1996] 2 S.C.R. 507, [112].

57 *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257.

58 [A]boriginal rights are highly fact specific -- the existence of an aboriginal right is determined through consideration of the particular distinctive culture, and hence of the specific practices, customs and traditions, of the aboriginal group claiming the right. The rights recognized and affirmed by s. 35(1) are not rights held uniformly by all aboriginal peoples in Canada; the nature and existence of aboriginal rights vary in accordance with the variety of

asserting the claim as well as the entire content of that claim, should it be recognised.

Thus:

Where an aboriginal group has shown that a particular activity, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.⁵⁹

Most aboriginal rights claims have some geographical element, but the claim itself is not dependent upon a prior finding of aboriginal title by the court:

A protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.⁶⁰

However, solicitous to the First Nations in today's jurisprudential environment, the idea of a stand alone aboriginal right to exercise particular subsistence and cultural activities over an area without rising to the requisite level of aboriginal title flows directly from *St. Catherine's*. This is because *St. Catherine's* essentially eliminated any legal relevance of factual and/or legal 'occupancy' of a particular territory by a particular tribe as a potential source of proprietary rights. Prior to *St. Catherine's* it was presumed that aboriginal occupancy, like occupancy of territory more generally could serve as a basis for asserting proprietary rights over a territory. This occupancy may be established in many different ways; from the building of dwellings, planting fields, by using specific territory for hunting and fishing or otherwise exploiting various resources. When considering aboriginal occupation, the legal character is based on the aboriginal societies' traditional way of life. This will vary among tribes and be dependent upon a 'group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'.⁶¹ After *St. Catherine's* the nexus between occupancy and title was severed. As a province under sec. 109 held the proprietary interest in the land, and federal authority was limited to legislation over the tribes, the necessity of tying hunting, fishing, and gathering rights to aboriginal title disappeared. In *St. Catherine's* the rights were understood as extending across

aboriginal cultures and traditions which exist in this country. *R. v. Gladstone*, [1996] 2 S.C.R. 723, [65].

59 Ibid 26.

60 *R. v. Côté*, [1996] 3 S.C.R. 139, 167.

61 *R. v. Marshall*, [1999] 3 S.C.R. 456, [49].

territory reserved for Indians, whether or not a particular tribe occupied it, because the rights were: 1) simple usufructs or cultural activities; and 2) conceived of as flowing from the *Proclamation of 1763*. As such the rights can extend to territory over which the tribe did not have common law aboriginal title because aboriginal title was neither legally cognizable nor relevant for government policymakers concerned with Indian tribes. Rather the basis of the right is not title and possession of a particular tract of territory (thus rendering treaties of cession with the tribe legally inefficacious) but the historically vague quasi-fiduciary “Honour of the Crown” to provide for the First Nations.

This conception is reflected by how Crown land in the Manitoba, Saskatchewan, and Alberta was reconciled with aboriginal and treaty promises rights under the Natural Resource Transfer Acts (NRTAs). In these territories (unlike in Ontario), the Crown Land did not go to the respective provinces when they came into existence because of the 1871 federal purchase from HBC. The Dominion held the territory in fee simple subject only to aboriginal title and the occupying tribes ceded the territory from 1871 to 1921. Each NRTA contains an identical provision, which supersedes and replaces any treaty obligations regarding hunting, fishing and gathering.⁶² The NRTAs preclude provincial regulation of aboriginal hunting, trapping and fishing for food at all seasons of the year “on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.”⁶³ It makes no provision for the exercise of any rights based on aboriginal title *per se* as any tribal member can exercise the rights across the entire province. As such, the now constitutionally protected s 35 aboriginal rights, although grounded on the one hand in aboriginal culture and law, and aboriginal occupancy and use of particular territory on the other, nevertheless privilege the cultural and non-territorial nature of aboriginal hunting, fishing, and gathering rights. The basis of the right is not dependent on title and possession of a particular tract of territory but the historically vague obligation of the Crown to provide for aboriginals and allow them to secure food. This is a significant departure from the doctrine of aboriginal title and jurisprudence in other states. In other states, an aboriginal right to hunt and fish is generally parasitic upon a finding of aboriginal title.

62 “The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not.”

Moosehunter v. The Queen, [1981] 1 S.C.R. 282, 285.

63 *R. v. Horseman*, [1990] 1 S.C.R. 901, 913-4.

Moreover, while the Canadian conception of aboriginal title includes the right to use the land for non-traditional purposes, The Supreme Court has held that those uses must be ‘reconciled with the communal and ongoing nature of the group’s attachment to the land.’⁶⁴ This limitation is consistent with the underlying logic of a usufructuary rights which allows for uses of property without diminishing or damaging it.⁶⁵ Moreover, the idea is consistent with a culturally prescribe non-territorial source for the rights as the extent of permitted uses is tied to historic cultural uses and meanings relating to the groups existence. While such uses are important as evidence and historic occupancy and possession, there use to limit the scope and extent of the aboriginal property interest once it has been recognised is unnecessarily circular. The result is that ‘non-traditional’ uses are likely to be understood by the courts through a subsistence and ‘common pool resource’ paradigm,⁶⁶ seriously undermining tribal governmental competence and property rights.

2. *No Sovereign Tribal Authority absent Statutory Recognition*

The *St. Catherine’s* Court grounded aboriginal title and rights as a *legal* right sourced in the *Royal Proclamation of 1763* and granted the exclusive authority of the province over non-reserve lands under the *Constitution Act 1867*. As a result, later courts had little difficulty dispensing with the idea of pre-contact inherent tribal sovereignty, residual authority (in those areas not legislated for by the Dominion and the provinces) or tribal law that could be a separate source of governing authority. The continued sovereignty of aboriginal tribes, as evidenced by judicial recognition of aboriginal law, cultural practice and historic occupation and use of natural resources, does not survive the assertion of European sovereignty:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown...⁶⁷

64 . *Tsilhqot’in Nation*, above n 57, [67].

65 L. F. E. Goldie, ‘Note: Title and Use (And Usufruct) — An Ancient Distinction Too Oft Forgot’ (1985) 79 *Am. J. Int’l L.* 689, 690-695.

66 For a discussion of the implications of common pool resource issues see Elinor Ostrom, *Governing The Commons The evolution of institutions for collective action* (Cambridge: Cambridge University Press, 1990), 29-37.

67 *R. v Sparrow* [1990] 1 S.C.R. 1075, 1103.

Early treaty cases, which denied the legal efficacy to treaties unless the terms were enacted into statute, also denied the existence of an independent sovereign aboriginal nation, or the existence of residual sovereignty, with whom the Crown negotiated.⁶⁸ For example, the court in *R. v. Syliboy* emphatically denied the existence of Aboriginal (Mi'kmaq) sovereignty despite the international aspect of the 1725 and 1752 treaties.⁶⁹

In the post-*Constitution Act 1982* decision *R. v. Simon*, the Supreme Court held that the same treaty dismissed by the *Syliboy* Court had not been extinguished and continued to have some legal force but refused to apply rules of international law to determine whether it had been terminated. On the crucial question of whether the tribe had the capacity to enter into the treaty, the *Simon* Court, rather than positing a mutual compact between juridical equals, instead relied on a 1929 commentary critical of *Syliboy* which had noted:

Ordinarily "full powers" to the British specially conferred are essential to the proper negotiating of a treaty [these were not given to Nova Scotia Governor Hopson who negotiated and signed the 1752 Treaty], but the Indians were not on a par with a sovereign state and fewer formalities were required in their case.⁷⁰

The acceptance of unquestioned political sovereignty precludes judicial recognition of inherent aboriginal governmental authority, eliminating tribal law as a parallel source of authority within the Canadian polity. From the perspective of the Canadian colonial state such a result was not undesirable. Federal and Provincial jurisdiction was conceived as occupying the entire field of *governmental* authority and competence. While the tribes could exercise governmental authority over their members and reserves in such legislation as the *Indian Act 1876*, such authority was delegated and subject to defeasement when inconsistent with the policy and legal objectives of the Canadian state. Indeed from the perspective of the colonial state, a notion that the tribes held a fee simple interest in their lands, would necessarily imply a legal competence and governmental capacity with the attendant ability generate legally efficacious and competitive rights to those exercised by the federal government and the provinces.⁷¹ A Dominion victory in *St. Catherine's* could arguably have established an alternative legal narrative: that there is an 'aboriginal law as law' which allows for, and underpins a tribal conveyance of territory and other

68 The Privy Council held that the 1850 Robinson Treaty was nothing more than a personal obligation of the governor and suggested that the use of international law concepts applicable to aboriginal treaties is not appropriate. *Attorney-General For Canada v Attorney-General For Ontario (Indian Annuities case)* [1897] AC 199, [14].

69 *Rex v Syliboy* [1929] 1 D.L.R. 307, 313.

70 *Simon v The Queen* [1985] 2 S.C.R. 387, 400.

71 Gordon Christie, 'Justifying Principles of Treaty Interpretation' (2000) 26 *Queen's L.J.* 143.

rights, and their 'possession' in state law would, in part, require a recognition and incorporation of their law into provincial and federal law.

What was the impact today of the failure to recognize inherent aboriginal rights without the concomitant recognition of residual aboriginal sovereignty which resulted from the Judicial Committee sourcing Indian rights in the *Proclamation of 1763*? First, failure to recognize residual sovereignty means that the inherent nature of aboriginal law cannot create additional practices but can only elaborate the ones practiced historically prior to European contact. Aboriginal rights cannot arise after contact with the Europeans:

The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.⁷²

Second, it precludes the idea that tribes have 'reserved' rights in the determining the content of the agreement similar to those posited by the Reserved Rights Doctrine in the United States.⁷³ This American doctrine is premised on the idea that a treaty is not as a 'grant of rights to the Indians, but a grant of rights from them -- a reservation of those granted.'⁷⁴ In contrast, the Canadian judicial construction assumes a more totalizing prior defeasance of tribal property and sovereign interests before the treaty was negotiated. While neither the American nor the British or the Canadians construed treaty making as a diplomatic act between juridical co-equals, the treaty recognition and interpretive methodologies taken by the American courts to retain the notion and echo of tribal sovereignty. One impact of the importation of the reserved rights doctrine would be the expansion of treaty rights retained by the tribes. Unless a treaty clearly dismembers the legal existence of the tribe, sovereign authority is necessarily reserved to the

72 *R. v Van der Peet* [1996] 2 S.C.R. 507, [73]. (Lamar C.J.C.).

73 See *R. v Sioui* [1990] 1 S.C.R. 1025, 1052-3 where the Court notes that relations with the tribes were similar to relations between independent states.

74 *United States v. Winans*, 198 U.S. 371 (1905), 381.

tribe because of the rule that when a consensual alteration of rights is made by international treaty the “failure to delegate an incident of sovereignty leaves it undisturbed.”⁷⁵ As it appears that many treaty signatories did not intend to concede their rights to self-government, territory or uses not specifically demanded by the Europeans, there would be potentially a great expansion of aboriginal governmental competence and rights should the doctrine be adopted.⁷⁶ Moreover, the retained rights imply an evolution and expansion of rights as the political, social and economic circumstances change across time.

Third, the legal recognition of sovereignty, either historically or as a residual characteristic implies that the tribes have an inherent constitutionally protected right to manage the natural resources under tribal law as well as being able to legally prevent non-aboriginal resource uses. In the area of hunting, fishing and gathering rights, the idea carries with it the notion that management of the resources should be done by the aboriginal group or include of tribal law relating to the usage.

In any event, the failure to recognize the residual sovereignty lessens the ability of the tribes to expand the range of constitutionally protected practices under s 35 today, absent additional agreements concluded under s 35(3). While aboriginal rights are recognised as pre-dating the Canadian state, and contemporary jurisprudence understands tribal law, which supports those rights, as flowing from an independent juridical source, the source is not ‘sovereign’ in the same sense as the Canadian state. Thus, it is not surprising that the rights guaranteed under s 35 seem not to be included in the ‘living tree’ analysis used when discussing other constitutional rights. This analytical approach in its usual form privileges a judicial interpretation conferring the ‘widest amplitude’ for the exercise of authority under ss 91 and 92 of the *Constitution Act 1867* and recognises the ongoing evolution of rights the rights found in the Charter. Instead, the reconciliation process outlined by the Supreme Court under its current s 35 jurisprudence, is

75 Maureen Davies, ‘Aspects of Aboriginal Rights in International Law’ in Bradford W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa, Ont.: Carleton University Press, 1985) 16, 24.

76 See Jon William Parmenter, ‘Pontiac’s War: Forging New Links in the Anglo-Iroquois Covenant Chain 1758-1766’ (1997) 44 *Ethnohistory* 617; Dorothy V Jones, *License for Empire Colonialism by Treaty in Early America* (Chicago: The University of Chicago Press, 1982), 73.

meant to give modern expression to traditional uses, practices and customs as they existed in history without creating 'new' uses or practices.⁷⁷

3 *Historic Treaty Rights limited to Usufructs and Cultural Practices*

While enforceable treaty rights are an important feature in Canadian jurisprudence today, the limited legal efficacy of treaty provisions prior to 1982 was an important result of the Privy Council jurisprudence. Lord Watson's decision set aside any notion that aboriginal treaties might be legally enforceable or inform statutory commitments to the tribes. The effect was that treaty rights (sourced in international and contract law in other common law jurisdictions) were equated to common law aboriginal title and rights in Canadian law. Absent specific statutory enactments related to certain treaty obligations the source, extent and extinguishment the same for common law and treaty rights.⁷⁸

As such, a Canadian-First Nations treaty conveyed no possessory interest and, as mentioned above, the tribes did not have the competent legal personality to enter an enforceable treaty contract. This inevitable extension of Lord Watson's reasoning was made manifest in subsequent litigation regarding the Ontario's obligation under the federal cession treaties. Moreover, federal authority to procure resources from the provinces as part of the process by which the tribes obtained services and commodities in exchange for the land ceded was similarly restricted. For example, in *Ontario Mining Co. v. Seybold* the Judicial Committee held that a treaty whereby various reserve lands which were turned over to federal government on the condition that the proceeds of land and mineral sales be returned to the tribes was unenforceable, because the land belonged to the province after aboriginal title had been extinguished.⁷⁹ Similarly in *Attorney-General for Canada v. Attorney-General for Ontario* the Judicial Committee determined that the 1850 treaties between the Governor of the United Province of Canada and the Ojibwa were

⁷⁷ Peter W. Hogg, *Constitutional Law of Canada*, vol. 2 looseleaf (Scarborough, Ont.: Thomson Carswell, 1997), s. 33.7; Michael Coyle, 'Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples' (2003) 40 *Alta L. Rev.* 841 at 844. See also *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, 248.

⁷⁸ An example of such statutory implementation is found in the Natural Resource Transfer Agreements (NRTAs), which transferred federal Crown lands to the three Prairie Provinces, incorporated presumed and agreed upon aboriginal and treaty rights to hunt and gather for food outside of the reserves into statute. The *Natural Resource Transfer Acts* for each Prairie Province have been renamed and consolidated in the *Constitution Act 1930* are found at R.S.C., 1985, App. II, No. 26. The NRTAs have constitutional status. See also *R. v. Sundown*, [1999] 1 S.C.R. 393.

⁷⁹ *Ontario Mining Co. v. Seybold* [1903] AC 73.

unenforceable against the province.⁸⁰ The Dominion, for itself and on behalf of the tribe argued that Ontario, as owner of the land surrendered due to s 109 and was liable for the increased annuities and payments due under the treaty.⁸¹ It argued that the transfer of land that was effectuated by the treaty included an aboriginal right to increased payments, which had been agreed to as part of the 1850 treaties. From this perspective the treaty had created a charge upon Ontario's title similar to an encumbrance or charge. This idea of a treaty created interest was noted by the Privy Council: 'In substance,' Lord Watson wrote, 'Indian annuities form a charge upon the lands, and their proceeds arising after Union....'. However, the interest was not a legal interest. The Committee "had no difficulty" concluding that:

Under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its [the Province of Canada] governor...that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered...⁸²

Thus the 1850 treaties did not provide the Ojibwa with any legal or equitable rights to payment from Ontario.⁸³ As a 'personal obligation' of the Governor, the interest was not enforceable *in rem* such that its contractual or treaty obligations would attach to the ceded land when the United Province of Canada was reorganised into Ontario and Quebec. While the holding represented the idea that aboriginal interests over the territory they used and occupied were non-proprietary, it also assumed a particular notion of Ontario within the constitutional framework.

With the characterisation of the treaty obligation as 'personal', the Privy Council accepted the historical notion that the Canadian colonies all enjoyed a direct relationship with the imperial Crown and that continued under the *Constitution Act 1867* (despite that Ontario and Quebec did not in fact exist as separate jurisdictions). As such the federal and provincial governments were co-equal sovereign creations of the Imperial Crown, which also maintained separate and co-

80 *Attorney-General For Canada v Attorney-General For Ontario (Indian Annuities case)* [1897] AC 199, [14].

81 The aboriginals had approached the Government of Canada in 1873 for increased annuities under the treaties.

82 *Ibid*, 213.

83 The issue of whether treaties created a legally cognizable interest in Canada was not completely settled until the end of the 19th century. There was strong arguments in favor of treaty rights which have been lost in the historiography and jurisprudence which evolved from *St. Catherine's Milling*. With his dissenting opinion *In re Indian Claims* Canadian Supreme Court Justice Gwynne noted this line of argument. *Province of Ontario v Dominion of Canada and Province of Quebec; In re Indian Claims* (1895) 25 S.C.R. 434, 511-512.

ordinate relationships to the Imperial Crown. Such a conception is evident in *Hodge v. The Queen* where the Privy Council stated:

They [the provincial legislatures] are in no sense delegates of, or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in Sect. 92, it conferred powers not in any sense exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Sect. 92 as the Imperial Parliament in the plenitude of its power possesses and could bestow.⁸⁴

Before Confederation, the Imperial Crown by *the Royal Proclamation of 1763* and each individual colony were considered capable of extinguishing aboriginal rights, either through legislation or by treaty provided colonial legislation or actions were not disallowed or reserved by the Imperial Crown.⁸⁵ However, Watson's reference to the obligation of Canada's Governor towards the signatory tribes as 'personal', (i.e. as analogous to those 'Head of State' treaty commitments which conceived of inter-state relations as a personal relationship among sovereign heads of state)⁸⁶ underscores the notion that Ontario continued to maintain its previous relationship with the Imperial Crown; and its 'sovereignty' within its sphere of authority outlined in the *Constitution Act 1867*.⁸⁷ From such a perspective, the treaty obligations of the United Province of Canada could not attach to the land as a 'trust' obligation under s 109 because the obligation was assumed by the Imperial Crown in the first instance without such a 'trust'. To

84 *Hodge v The Queen (Canada)* [1883-1884] 9 AC 117, 132. In 1892, Lord Watson, summarily dismissed the argument that confederation had changed the relationship between the Crown and the provinces. "[I]n so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act." Later Watson noted: "it [the province] derives no authority from the government of Canada and its status is in no way analogous to that of a municipal institution..." *Liquidators of the Maritime Bank v Receiver General of New Brunswick* [1892] AC 437, 442. See also D. Michael Jackson *The Crown and Canadian Federalism* (Toronto: Dundurn Press, 2013), 93-96.

85 Prior to Confederation the Crown-in-Right of the Province of Canada "had full power, by legislation, administrative acts and treaties, to unilaterally revoke Indian rights" based on the theory that no colonial act relating to aboriginals was disallowed or reserved for disapproval. *A-G Ontario v Bear Island Foundation* (1984) 49 O.R. (2d) 353, 468.

86 Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: P.I.E. Peter Lange, 2009), 22-25.

87 The Robinson Treaty was ratified by Governor General in Council and was never referred to the Colonial Office for approval. James Morrison, *The Robinson Treaties: A Case Study*, (31 March 1993) Report prepared for the Royal Commission on Aboriginal Peoples, Treaty and Land Research Section, , 134-136 <https://uncaprcap.files.wordpress.com/2015/04/the-robinson-treaties-of-1850-morrison.pdf>.

hold otherwise, would imply a change in the ‘direct’ relationship between Ontario and the Imperial Crown which existed prior to Confederation by way of the *Constitution Act 1867* at Confederation. When considering relationships with aboriginals under pre-Confederation treaty obligations, this purported change would seemingly require Ontario to be a delegate of the Dominion Crown in areas of provincial jurisdiction; a result not contemplated by other Privy Council jurisprudence at the time.

The result is that an aboriginal treaty does not give rise to legal obligations either in international law (as an inchoate obligation prior to parliamentary approval or whether it is approved or enacted into law by parliament) or through contract. Rather they were mere promises and agreements that provide no legally enforceable rights. The Northwest Territory Court of Appeal in *R. v. Sikyea*, noting Lord Watson’s dismissive language about the rights of aboriginals under treaties in *A-G for Canada v. A-G for Ontario* stated:

While this refers [the non-legal obligation of the governor] only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This “promise and agreement”, like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the B.N.A. Act, from doing so.⁸⁸

The obligation and promises in the agreement are to be carried out ‘with an exactness which honour and good conscience dictate’, but courts would not enforce the agreement against the Crown should it fail to fulfill its obligations.⁸⁹

This situation has changed with the enactment of s 35. Today Canadian law recognizes the governmental capacity and possessory interest embodied in land agreements with the various tribes. Courts have utilized various interpretative approaches to expand and protect First Nation’s interests in unextinguished historic treaties. Moreover, unlike aboriginal rights, whose content depends on a judicial examination of pre-contact practices, the aboriginal activities are covered by a treaty are those exercised at the time the agreement:

88 *Regina. v Sikyea* [1964], 43 D.L.R. (2d) 150 (N.W.T.C.A.) aff’d [1964] S.C.R. 642, 154.

89 *Rex v. Wesley*, [1932] 2 W.W.R. 337, 344 (Alta.S.C.); (McGillivray, J), 351 citing the *Indian Annuities case* when he noted that “In Canada, the Indian treaties appear to have been judicially interpreted as being mere promises and agreements.”

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.⁹⁰

Nevertheless, these historic treaties or agreements, even where the enumerated and implied rights remain unextinguished, neither reserve possessory or proprietary rights to land for their respective First Nations, nor are aboriginal rights claimed in the area parasitic upon the territories delimited by the agreement.⁹¹ In those territories covered by cession treaties, tribal proprietary rights to land must be found in federal and provincial legislation and cannot be sourced in the treaty agreement. While usufructuary and cultural uses outlined in historic treaties may find protection post-1982, such as the rights to fish and trade for necessities,⁹² the underlying presumptions of Crown ownership and the non-sovereign nature of the tribal polity remains. Thus treaty jurisprudence largely tracks aboriginal rights jurisprudence and the source and content of underlying Crown obligations toward tribal claims to more expansive uses of lands or minerals is beyond judicial decision under treaty jurisprudence.⁹³

III CONCLUSION

Indigenous issues were implicated in the development of the colonial and national state because they had initially controlled, had a colour of interest, or simply had a presence that was perceived by the settlers as a hindrance to development. First Nations generally did not accept the settlers' liberal notions of property and economic development. The fear that Indigenous interests would intrude upon or preclude settlers (and often squatters) property rights or create an indigenous veto on the economic development of the country was evident in many cases where a tribunal refused to recognize or protect indigenous interests.⁹⁴ In the seminal aboriginal cases before the

90 *R. v. Badger*, [1996] 1 S.C.R. 771, [52].

91 See Sidney L. Harring, *Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press 1998) at 35-81; Darlene Johnson, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T.Fac.L.Rev. 1.

92 *R. v. Marshall*, [1999] 3 S.C.R. 456, [49].

93 For example, hunting, fishing and gathering rights may be regulated for a variety of reasons. In all cases the federal and provincial regulation of an aboriginal or treaty right must be done in accordance with the criteria set down in *R. v. Sparrow*. The criteria which applies to determine permissible regulation of a Treaty rights is the same as that set forth in *Sparrow*. *R. v. Badger*, [1996] 1 S.C.R. 771.

94 *St. Catherine's Milling and Lumber Co*, 649 (Tashereau, J.).

Judicial Committee and elsewhere, the Dominion, in asserting aboriginal interests, was not seeking to vindicate their pre-existing rights, nor was it asserting that aboriginal treaties created legally enforceable obligations against the Dominion. It sought to have the rights recognized so it could control and appropriate aboriginal resources on the basis of its own institutional prerogatives and nation building program. Nevertheless, despite the endemic racism and imperatives of economic development, it is likely that the Dominion would have been more protective of aboriginal rights. With the subsequent vindication of the Doctrine of Provincial rights, the institutional interest for advocating judicially efficacious aboriginal rights disappeared. At the same time, an opportunity to re-assert either common law aboriginal title or treaty rights by a court seeking to vindicate a governmental right disappeared, because neither the provinces nor the federal government were ever in the position where a judicial vindication of an aboriginal interest would have such broad constitutional consequences.

Presently, the most significant feature of Canadian aboriginal rights is the constitutional protection afforded them by s 35. When reviewing the generally protective post-1982 decisions, one can see the impact of the earlier decisions and the subsequent vindication of the doctrine of provincial autonomy and its subsequent incorporation into the jurisprudence. As Justice Binnie noted:

The Constitution Act, 1982 ushered in a new chapter but it did not start a new book. Within the framework of s. 35(1) regard is to be had to the common law ("what the law has historically accepted") to enable a court to determine what constitutes an aboriginal right.⁹⁵

Like the rights-based jurisprudence *Constitutional Act, 1982* which arose from conflicts over the status of Quebec in the Canadian federation, this earlier jurisprudence was generated by bitter federal-provincial conflicts over the meaning and scope of the *Constitution Act 1867*. The result of these contests were for the most part in favor of the provinces: no enforceable treaty rights, the conflation of usufructuary rights with aboriginal title, and failure to incorporate notions of aboriginal sovereignty into Canadian law. These developments have affected the development of the post-1982 law. First, while the rights themselves are considered inherent, the First Nations (whose historic occupation, use, and possession of the territory gave rise to these inherent rights) have neither the inherent right to self-government or residual inherent sovereignty absent

95 *Mitchell v M.N.R.* [2001] 1 S.C.R. 29, [115] (Binnie, J. concurrence).

statutory recognition in Canadian law. Second, because First Nations rights to use land for hunting, fishing and gathering were equated with aboriginal title, post-1982 aboriginal jurisprudence has developed a far ranging notion of aboriginal rights in contrast to aboriginal title. Finally, the constitutional protection and content of aboriginal rights and treaty rights are essentially the same.