

FIRST NATIONS AND THE CONSTITUTION: A QUESTION OF TRUST

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This article argues that the fiduciary relationship between Aboriginal peoples and the Crown is a special instance of a general doctrine of collective trust that animates the Canadian Constitution as a whole. This doctrine sheds light on the federal structure of Canada, the unique status of Quebec, and the position of First Nations as a self-governing polities within Confederation. The article explores the origins and character of the constitutional trust, and considers its application to issues surrounding the inherent Aboriginal right of self-government and Aboriginal land rights.

Dans cet article l'auteur suggère que la relation fiduciaire qui existe entre les peuples autochtones et la couronne est une application particulière d'une doctrine générale de fiducie collective sous-jacente à l'ensemble de la constitution canadienne. Cette doctrine aide à comprendre la structure fédérale du Canada, le statut spécial du Québec et la position des premières nations en tant qu'entités politiques autonomes dans la confédération. L'auteur examine les origines et la nature de la fiducie constitutionnelle et considère son application pour ce qui a trait au droit inhérent des Autochtones à l'autonomie gouvernementale et à leur droit à des territoires.

All persons possessing any portion of power ought to be strongly
and awefully impressed with an idea that they act in trust . . .
Edmund Burke¹

Introduction

What is the legal status of First Nations? Are they, as some say, simply subordinate bodies, like municipalities, that owe their existence and powers to legislation such as the Indian Act?² Or are they, as others maintain, long-suppressed sovereign nations rightfully entitled to recognition at the international level? To put the question in another way, are Aboriginal peoples ordinary subjects of the Crown with no authority beyond what

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I am indebted to Kent McNeil, Shin Imai and Phil Tunley for their valuable comments on an earlier version of this article. I would also like to thank the Social Sciences and Humanities Research Council of Canada and Osgoode Hall Law School for making time available for research and writing.

¹ Reflections on the Revolution in France (1790) (C.C. O'Brien (ed.), 1969), p. 190.

² R.S.C. 1985, c. I-5.

the state has given them, or do they have an inherent right of self-government that transcends the confines of the Canadian state?

This article will defend a position that lies between these polar extremes. Under this view, First Nations possess inherent and sovereign authority over their own affairs, which does not owe its existence to the Indian Act or other legislation. This Aboriginal right of self-government has been entrenched in section 35 of the Constitution Act, 1982.³ However, as with the Federal and Provincial governments, the powers of Aboriginal governments are limited in scope and can be exercised only within the context of the Canadian Confederation.

This intermediate viewpoint invites a number of questions. What is the source of the "inherent" governmental authority of First Nations, if not the Canadian state? If the authority is truly "sovereign", how can it be characterized as limited in scope? Can it actually be reconciled with the continued presence of First Nations within Confederation, or does it lead logically down a slippery slope to independence? In the course of the paper, I will suggest answers to these and other related questions. In doing this, it will also be necessary to offer what amounts to a new account of the Constitution as a whole.

Let us begin with the framework laid down in recent judgments of the Supreme Court of Canada. This involves a number of basic propositions, which can be summarized as follows. In pre-European times, the indigenous peoples of Canada were sovereign and independent nations controlling their own territories and ruling themselves under their own laws.⁴ In various stages, these nations passed under the sovereignty of the Crown, and their members are now Canadian subjects.⁵ Nevertheless, First Nations continue

³ Schedule B of the Canada Act, 1982 (U.K.) 1982, c.11.

⁴ In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 383, (1973), 34 D.L.R. (3d) 145, at p. 195, Hall J. adopted the view of Chief Justice Marshall of the United States Supreme Court in *Worcester v. State of Georgia* (1832), 6 Peters 515, at pp. 542-543:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws.* (Emphasis furnished by Hall J.).

In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1053, (1990), 70 D.L.R. (4th) 427, at p. 448, Lamer J. stated for the court:

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.

⁵ See, *Calder v. Attorney-General of British Columbia*, *ibid.*, per Hall J., at pp. 383-385 (S.C.R.), 195-196 (D.L.R.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321, per Dickson J., at pp. 376-379 (S.C.R.), 335-336 (D.L.R.); *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103, (1990), 70 D.L.R. (4th) 385, at p. 404.

to possess special "aboriginal rights" which, although not the creation of the Canadian state, are recognized under the common law of Canada.⁶ Many First Nations also hold "treaty rights" flowing from agreements with the Crown or between the Crown and other states.⁷ Prior to 1982, these rights could be abridged or extinguished by statute.⁸ However, since the enactment of section 35 of the Constitution Act, 1982, any Aboriginal or treaty rights not extinguished before 1982 have enjoyed constitutional protection and can only be limited by statute when strict standards are met.⁹ Finally, under Canadian common law, the Crown owes special fiduciary or trust-like obligations to First Nations that can be enforced in the courts; these obligations have now been constitutionalized by section 35.¹⁰

This account represents a significant advance over judicial viewpoints previously available in Canada or indeed in the United States. Still, it leaves a number of important issues unexamined or unresolved. For example, if First Nations were once independent, how did they come to lose this status? To invoke European "discoveries" is to employ ethnocentric criteria that cannot meet neutral standards of justification.¹¹ Further, to rely simply on conquest or cession ignores the arguments of some Aboriginal groups that they never were conquered by the Crown or voluntarily accepted its authority.¹² So our first and most basic challenge is to give an account

⁶ See *Calder v. Attorney-General of British Columbia*, *ibid.*, per Judson J., at pp. 320-328 (S.C.R.), 150-156 (D.L.R.), per Hall J., at pp. 376-406 (S.C.R.), 190-211 (D.L.R.); *Guerin v. The Queen*, *ibid.*, per Dickson J., at pp. 376-379 (S.C.R.), 335-336 (D.L.R.), per Wilson J., at pp. 348-349 (S.C.R.), 356 (D.L.R.); *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340, (1989), 57 D.L.R. (4th) 197, at p. 210; *R. v. Sparrow*, *ibid.*, at pp. 1094-1101 (S.C.R.), 397-403 (D.L.R.); *R. v. Sioui*, *supra*, footnote 4, at pp. 1055 (S.C.R.), 450 (D.L.R.).

⁷ See *Simon v. The Queen* [1985] 2 S.C.R. 387, (1985), 24 D.L.R. (4th) 390; *R. v. Sioui*, *supra*, footnote 4.

⁸ See *Calder v. Attorney-General of British Columbia*, *supra*, footnote 4, per Judson J., at pp. 333 (S.C.R.), 159-160 (D.L.R.), per Hall J., at pp. 402-404 (S.C.R.), 208-210 (D.L.R.); *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104, at pp. 111-112, 116, (1977), 75 D.L.R. (3d) 434, at pp. 439, 443; *Guerin v. The Queen*, *supra*, footnote 5, per Dickson J., at pp. 376-377 (S.C.R.), 335 (D.L.R.).

⁹ *R. v. Sparrow*, *supra*, footnote 5.

¹⁰ See *Guerin v. The Queen*, *supra*, footnote 5, per Dickson J., at pp. 375-389 (S.C.R.), 334-344 (D.L.R.), per Wilson J., at pp. 348-352 (S.C.R.), 356-359 (D.L.R.); *R. v. Sparrow*, *supra*, footnote 5, at pp. 1107-1108 (S.C.R.), 408 (D.L.R.). For a recent application of the fiduciary doctrine, see *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at p. 575, (1991), 83 D.L.R. (4th) 381, at p. 384.

¹¹ The point is developed in B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, in F. Cassidy (ed.), *Aboriginal Self-Determination* (1991), pp. 197-217, also printed in (1991), 29 Osgoode Hall L. J. No. 4 (forthcoming).

¹² Thus, a descendent of the Aboriginal parties to Treaty Number Six recently affirmed that under the Treaty: "We are bonded with another sovereign nation. We never gave up our nationhood."; *The Globe and Mail*, Monday, March 9, 1992, p. A5.

of the Canadian Constitution that explains why and to what degree it is binding on First Nations.¹³

Even if we assume that First Nations have *in some manner* come under the Crown's aegis, a second question arises. Has their original sovereignty been completely extinguished or does it continue to exist in some modified form under the protective wing of the Canadian Constitution? If the latter view is correct, how does Aboriginal sovereignty interact with Federal and Provincial governmental powers?

Other issues are raised by the existence of a trust-like relationship between the Crown and First Nations. In *R. v. Sparrow*,¹⁴ the Supreme Court held:

... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

What is the theoretical basis for this holding? Does it, for example, assume that the Crown stands to Aboriginal peoples as a guardian towards a ward, on the assumption that Aboriginal peoples are largely incapable of handling their own affairs?¹⁵ Or does the Crown's trust responsibility rest on other premises, more compatible with the democratic principles informing the Constitution?

Finally, the Supreme Court has held that Aboriginal land rights survived the Crown's acquisition of sovereignty, but that they could be extinguished by legislation or voluntary surrender. In large sectors of Canada, notably in British Columbia and the Atlantic Provinces, there were no land cession agreements or statutes terminating Aboriginal title in explicit terms. Does this mean that all lands in these areas are still subject to Aboriginal title, including lands occupied by private parties? Or did certain generally-worded statutes quietly strip native peoples of their ancestral homelands, wholesale and without compensation? Do these stark alternatives exhaust the field, or is there some intermediate view that upholds the rights of First Nations without undermining the foundations of the current land system?

Despite their differences, these various questions have a common theme. They all call into question the basis and character of the Canadian state and its relationship with First Nations. They all prompt us to think in fundamental ways about the Constitution and the principles that animate and sustain it. Unhappily, our traditional stock of constitutional ideas is

¹³ See M. Asch and P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow* (1991), 29 *Alta Law Rev.* 498.

¹⁴ *Supra*, footnote 5, at pp. 1108 (S.C.R.), 408 (D.L.R.).

¹⁵ This was the view expressed by Marshall C.J. of the United States Supreme Court in *Cherokee Nation v. State of Georgia* (1831), 5 Peters 1, at p. 17, where he characterized Indian tribes as "domestic dependent nations" which were "in a state of pupilage", and stated that their relation to the United States "resembles that of a ward to his guardian".

of little help here. Unlike the United Kingdom and the United States, we have no widely-accepted doctrines that account for the origins and nature of the Constitution and explain its claims on our loyalty. So far as we have a theory at all, it is one grounded in imperial constitutional law, which by invoking the ghost of Empire Past raises more problems than it solves. But if our Constitution is no longer the creature of British colonial rule, what has it become? Have we converted to the view that the Constitution is an expression of the will of the Canadian people, who collectively make up the ultimate sovereign?¹⁶ If so, how can this theory be reconciled with the corporate claims of First Nations and the Provinces, which are anti-majoritarian when seen in the larger context of Canada?

These are complex and difficult issues, which hardly seem to allow for simple answers. So it may be rash to suggest that the key to a solution lies close at hand, and in a somewhat unlikely place: the doctrine that the Crown owes trust-like obligations to native peoples. The search for an acceptable basis for this doctrine leads, I think, to a better understanding of the principles that inform our Constitution as a whole and distinguish it in important ways from the constitutions of other countries.

I. *The General Concept of A Constitutional Trust*

The idea that political power is essentially a matter of trust is hardly new. It has been advanced by thinkers widely separated in time and place, and has assumed a remarkable variety of forms.¹⁷ What is of interest to us here, however, is that it provides a link between traditional First Nations philosophies and certain strands of European political thought.

Professor Oren Lyons, a peace-keeper with the Six Nations, offers these observations about his people's outlook:¹⁸

My people, the Iroquois, were very powerful people. They had a coalition of forces that was governed by two fires: the spiritual fire and the political fire. The central fire, of course, was the spiritual fire. The primary law of Indian government is the spiritual law. Spirituality is the highest form of politics, and our spirituality is directly involved in government. As chiefs we are told that our first and most important duty is to see that the spiritual ceremonies are carried out. Without the

¹⁶ See, for example, *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 745, (1985), 19 D.L.R. (4th) 1, at p. 19: "The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government."

¹⁷ Ranging, for example, from Vaclav Havel's brilliant essay, *Politics and Conscience*, in V. Havel, *Living in Truth* (J. Vladislav (ed.), 1989), pp. 136-157, especially at pp. 153-154, to the ancient concept of the Mandate of Heaven in Chinese philosophy, as seen in W.-T. Chan, *A Source Book in Chinese Philosophy* (1963), especially pp. 3, 62, 77-78, 92-93.

¹⁸ O. Lyons, *Spirituality, Equality, and Natural Law*, in L. Little Bear, M. Boldt, and J.A. Long (eds.), *Pathways to Self-Determination: Canadian Indians and the Canadian State* (1984), pp. 5-6.

ceremonies, one does not have a basis on which to conduct government for the welfare of the people. This is not only for our people but for the good of all living things in general. So we are told first to conduct the ceremonies on time, in the proper manner, and then to sit in council for the welfare of our people and of all life.

There is another fundamental understanding in Indian government, and it is that all life is equal. Whether it is the growing life of trees, plants, or animals, or whether it is human, all life is equal. Furthermore, all human beings, black, red, yellow, and white, are equal and of the same family. . . . It has been the mandate of our people to look after the welfare of the land and its life. Central to this responsibility is a recognition and respect for the equality of all of the elements of life on this land.

Among the many ideas broached in this passage, I would like to call attention to the view that government is a *mandate* carrying with it the responsibility to govern for the welfare of the people and indeed of all life. The people are considered equal, whatever their racial or ethnic origins. This mandate, as understood among the Iroquois, is basically spiritual in nature, flowing ultimately from the Creator.¹⁹ It entails the responsibility to govern not only for the benefit of those living today but more particularly for the good of future generations.

This last theme permeates a statement issued by a gathering of Native American elders assembled in Navajo country in 1982:²⁰

Brothers and Sisters the natural law is the final and absolute authority governing 'Etinohah'—the earth we call our mother. . . . We are nourished by our mother—the earth—from whom all life springs. We must understand our dependence on her and protect her with our love, respect and ceremonies. The faces of our future generations are looking up to us from the earth; and we step with great care not to disturb our grandchildren. . . . The natural law says that the earth belongs to our children—seven generations into the future—and we are the caretakers who must understand, respect and protect 'Etinohah' for all life.

Again we notice the doctrine that governmental power has inherent limits, that we are merely caretakers for the benefit of future generations.

In his *Second Treatise of Government*, published in 1690, the English philosopher John Locke advanced an influential doctrine of government

¹⁹ See "A Declaration of the First Nations" adopted by the Assembly of First Nations Conference of December 1980; reproduced in the Second Report of the Special Committee on Indian Self-Government in Canada (Chairman: Mr. K. Penner), Canada, House of Commons, Issue No. 40, October 12, 1983, October 20, 1983, p. 176. This states in part:

We the Original Peoples of this land know the Creator put us here. The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind. The laws of the Creator defined our rights and responsibilities. The Creator gave us our spiritual beliefs, our languages, our culture, and a place on mother earth which provided us with all our needs.

²⁰ Quoted in O. Lyons, *Traditional Native Philosophies Relating to Aboriginal Rights*, in M. Boldt and J. A. Long (eds.), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (1985), p. 21.

that, despite basic differences with native American philosophies; has some interesting points of similarity. As is well-known, Locke invokes the concepts of a state of nature, natural law, human equality, and a social compact. Less well-known is the fact that he elaborates a basic doctrine of governmental trust. The following passages give some flavour of his approach:²¹

... Political Power is that Power which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over it self, with this express or tacit Trust, That it shall be employed for their good, and the preservation of their Property:[²²] ... it can have no other end or measure, when in the hands of the Magistrate, but to preserve the Members of that Society in their Lives, Liberties, and Possessions; and so cannot be an Absolute, Arbitrary Power over their Lives and Fortunes, which are as much as possible to be preserved; ... (para. 171)

These are the Bounds which the trust that is put in them by the Society, and the Law of God and Nature, have set to the Legislative Power of every Commonwealth, in all Forms of Government. First, They are to govern by promulgated establish'd Laws, not to be varied in particular Cases, but to have one Rule for Rich and Poor, for the Favorite at Court, and the Country Man at Plough. Secondly, These Laws also ought to be designed for no other end ultimately but the good of the People. ... (para. 142)

... the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited ... (para. 149)

Prominent in these passages is the concept that Government is a trust under which power can only be exercised for the good of the people.²³ Although in Locke's view the proximate source of the trust is the social compact, its ultimate basis is the Law of Nature, which Locke identifies with the will of God as discoverable by reason.²⁴ Thus, even if the controversial notion of a social compact were dropped from Locke's scheme, there would remain the important idea that political power is subject to a trust in favour of the citizenry.

These varied theories provide a backdrop against which the thesis of this article can be assessed. I will argue that the Canadian Constitution is animated by a distinctive doctrine of *constitutional trust*, which contrasts

²¹ J. Locke, *Two Treatises of Government* (P. Laslett (ed.), 1965), pp. 409, 413, 428-429; passages slightly modernized by the elimination of italics.

²² Note that Locke uses the term "Property" here in the extended sense explained in para. 87 (*ibid.*), as including a person's "Life, Liberty, and Estate".

²³ For helpful discussions, see P. Laslett, Introduction, in Laslett, *ibid.*, pp. 126-130; and J.W. Gough, *John Locke's Political Philosophy* (2nd ed., 1973), pp. 154-192.

²⁴ For Locke's explanation of these points, see especially paras. 6 and 135, *op. cit.*, footnote 21, pp. 311, 402-403.

on the one hand with the principle of parliamentary sovereignty prevailing in the United Kingdom, and on the other with American ideas of popular sovereignty and individual rights. While this doctrine of trust has certain affinities with Aboriginal themes, and in other respects resembles some of Locke's ideas, it has a particular character of its own, shaped by the communitarian and pluralist forces of Canadian history.

In making this argument, I do not mean to suggest that the Canadian Constitution was designed to embody the doctrine of trust, or even that the notion has featured conspicuously in our constitutional discourse. I only say that the manner in which we have actually carried on our constitutional affairs strongly evinces the concept of a trust, whatever our declared intentions: that is, the concept is tacitly embedded in the law and practice of the Canadian Constitution and has the power to illuminate and explain a number of its basic traits.²⁵

II. *Trust as the Root of the Canadian Constitution*

As we all know, Canada has an entrenched Constitution, which is paramount to ordinary laws and governmental bodies and cannot be amended by simple statute. This is such an obvious feature of our public law that we rarely pause to consider its origins and basis. Surprisingly, these are not at all clear. Nothing directly comparable is found in modern British constitutional law, the source of many of our basic doctrines. While the concept that Parliament was bound by fundamental law had some currency in England as late as the 17th century, it gave way during the 18th century to the modern doctrine of parliamentary supremacy.²⁶ As part of this doctrine, it was held that Parliament had the ability to change any part of the British Constitution by ordinary statute, including some of the Constitution's most ancient and distinctive features, and to enact laws affecting the fundamental rights and liberties of the people.²⁷

The fledgling British colonies in North America inherited the notion of parliamentary sovereignty, but they did so only in a modified form. While local colonial legislatures were recognized as sovereign within their spheres, it was held that those spheres were, in general, limited by the terms of the Constitutions granted by the Imperial Parliament. Moreover, Imperial statutes extending to the colonies were taken to override any

²⁵ See the approach in *Re Manitoba Language Rights*, *supra*, footnote 16, at pp. 750-752 (S.C.R.), 23-25 (D.L.R.), where the court concluded that it might give effect to what it termed "unwritten postulates which form the very foundation of the Constitution of Canada".

²⁶ Compare, for example, the accounts in C.H. McIlwain, *The High Court of Parliament* (1910), and J.W. Gough, *Fundamental Law in English Constitutional History* (1961).

²⁷ For a classic discussion, see, H.W.R. Wade, *The Basis of Legal Sovereignty* (1955), 13 Camb. L.J. 172.

conflicting colonial laws and to be immune to local repeal.²⁸ So, in practice, Canadian lawyers became familiar with the concept of a higher law, in the form of limits imposed by the Westminster Parliament.

This trend was reinforced at Confederation, with the passage of the British North America Act, 1867 by the Imperial Parliament.²⁹ The paramountcy of Westminster accounted for the supremacy attributed to this Act and its successors, and provided courts with the rationale for striking down local statutes that conflicted with its terms.³⁰ The Act's division of governmental powers between Federal and Provincial authorities greatly increased the need for such judicial supervision and further imprinted the notion of limited government in the Canadian consciousness.

Canada's rise to independence and the termination of Westminster's authority have long since deprived the Constitution of its original foundation.³¹ If British power once provided the rationale for the Constitution's supremacy, it no longer can; yet nothing seems to have replaced it. To all appearances, the Constitution is suspended in mid-air like a levitating saint, sustained by faith alone.

Despite this odd spectacle, the doctrine of constitutional supremacy has remained unchallenged in Canada and indeed has moved from strength to strength with the advent of the Charter of Rights and Freedoms.³² Somehow, without benefit of deliberate cultivation, the concept of fundamental law has grown deep roots in Canadian soil. As a matter of current law, it is clearly beyond the power of any Canadian legislature to repeal or amend the entrenched portions of the Constitution. These can only be altered by the concurrent action of various governmental bodies, according to a complicated amending formula embodied in the Constitution Act, 1982.³³

But if we are curious enough to inquire *why* the amending formula is binding, no clear answer is forthcoming. Is it, perhaps, because the formula was approved in 1982 by a majority of Canadians acting through their Federal representatives, on the theory that the Constitution gains its validity from popular consent? If this is the true explanation, it is peculiar that

²⁸ See Colonial Laws Validity Act, 1865, 28-29 Vict., c. 63 (U.K.), ss. 2-5, and discussion in K. Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp. 139-140, 396-405. See also B. Slattery, *The Independence of Canada* (1983), 5 Sup. Ct. Law Rev. 369, at pp. 384-390, and references given there.

²⁹ 30 & 31 Vict., c. 3 (U.K.), now renamed the Constitution Act, 1867.

³⁰ See Slattery, *loc. cit.*, footnote 28.

³¹ "There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931 . . ."; *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, at p. 816, (1967), 65 D.L.R. (2d) 353, at p. 375.

³² Part I of the Constitution Act, 1982, *supra*, footnote 3.

³³ *Ibid.*, sections 38-49.

the amending formula cannot now be by-passed by a majority vote in the Federal Parliament or a national referendum. Again, we may be puzzled by the prominent roles actually played by the Provinces in the 1982 constitutional process³⁴ and the memorable curtain-call of the British Parliament. These suggest that majority consent was not the only consideration and that certain historical and structural factors ultimately held sway. So, a different explanation has some appeal. This holds that the current amending formula is binding simply because it was approved by the authorities designated by the old formula inherited from imperial times.³⁵ However, this response raises troubling questions about the legitimacy of the Canadian state, insofar as it portrays the Constitution as grounded ultimately in the old imperial arrangements, arguably born in conquest and coercion.

The view proposed here is that, whatever its historical origins, the modern Canadian Constitution owes its supremacy to the existence of a fundamental trust that molds and informs our governmental institutions. At the most abstract level, the trust embodies the fundamental doctrine that governments do not possess unlimited powers but are constrained by their intrinsic mandate, which is to govern for the welfare of the people, both those now living and those to be born. But this doctrine, which is hardly unique to Canada, does not take effect in the abstract. It operates only within a particular social context, which is shaped by a community's particular historical experiences and its on-going legal and political structures. In its distinctive Canadian incarnation, the doctrine holds that the governmental trust is owed not just to individual citizens but also to various communities represented in our confederal structure, to wit the Provinces, the First Nations, and Canada as a whole.

On this view, the division of powers between the Federal Government and the Provinces constitutes a fiduciary structure under which regional communities are guaranteed a large degree of autonomy over their own affairs, without the possibility of outside interference. By the same token, the structure embodies a commitment to the larger community of Canada that its transcending interests will not be the prisoner of regional outlooks but will be furthered by Parliament.³⁶ The amending formula secures the

³⁴ According to the Supreme Court's ruling in *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (1981), 125 D.L.R. (3d) 1, a substantial measure of provincial concurrence was required by constitutional convention but not by law.

³⁵ This was the approach attempted in *Slattery*, *loc. cit.*, footnote 28. For other views and discussion, see P. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), pp. 44-49.

³⁶ This basic outlook is reflected in a classic statement by the Privy Council in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437, at pp. 441-442: "The object of the [Constitution Act, 1867] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, *entrusted* with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy." (Emphasis added).

Provinces in their prerogatives and rules out encroachments on their spheres without their acquiescence;³⁷ at the same time, it ensures that the sphere of Federal responsibility will not be diminished without Federal consent.

But the division of powers is not the only collective manifestation of the constitutional trust. I suggest that the Constitution incorporates a particular fiduciary relationship with the Province of Quebec. This relationship is grounded in various historical acts and practices that cumulatively have recognized the right of the largely francophone community of Quebec to retain its distinctive laws, religion, language, and culture, and to live under a separate government with powers sufficient to sustain the society's unique character. The most prominent landmarks in this evolving relationship are the Quebec Act of 1774,³⁸ the Constitutional Act of 1791,³⁹ the Constitution Act, 1867, and parts of the Constitution Act, 1982. However, these Acts are merely signposts along a network of well-worn constitutional pathways that have contributed to the formation of certain common law doctrines. On this view, a constitutional amendment recognizing explicitly the distinct status of Quebec (as is currently proposed) would only carry to its natural conclusion a doctrine already deeply ingrained in the fibre of the Constitution.⁴⁰

The third collective facet of the Canadian constitutional trust is the special fiduciary relationship between the Crown and Aboriginal peoples, recognized by the Supreme Court.⁴¹ This relationship is grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North America, especially during the formative period extending from the founding of colonies in the early 1600s to the

³⁷ Thus, while section 38(1) of the Constitution Act, 1982 allows certain constitutional amendments to be made with the assent of only two-thirds of the Provinces with fifty per cent of the total population, s. 38(3) allows a Province to opt out of any amendment under s. 38 that derogates from its powers or rights.

³⁸ 14 Geo. III, c. 83 (U.K.).

³⁹ 31 Geo. III, c. 31 (U.K.).

⁴⁰ See Government of Canada, *Shaping Canada's Future Together: Proposals* (1991); and Parliament of Canada, Special Joint Committee of the Senate and the House of Commons, Final Report: *A Renewed Canada* (1992) (Co-chairs: G. Beaudoin and D. Dobbie).

⁴¹ See cases cited *supra*, footnote 10. For commentary, see: R.H. Bartlett, *You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen* (1984-85), 49 Sask. L. Rev. 367; R.H. Bartlett, *The Fiduciary Obligation of the Crown to the Indians* (1989), 53 Sask. L. Rev. 301; M.A. Donohue, *Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Relationship* (1990), 15 American Indian L. Rev. 369; D.P. Emond, *Case Comment: Guerin v. R.* (1986), 20 Estates and Trusts Reports 61; J. Hurley, *The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen* (1985), 30 McGill Law J. 559; D. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples* (1986), 18 Ottawa L. Rev. 307; W.R. McMurtry and A. Pratt, *Indians and the Fiduciary Concept, Self-Government and the Constitution; Guerin in Perspective*, [1986] 3 C.N.L.R. 19; J.I. Reynolds and L.F. Harvey, *The Fiduciary Obligation of the United States and Canadian Governments Towards Indian Peoples* (1985).

fall of New France in 1760.⁴² By the end of this period, the principles underlying these practices had crystallized as part of the basic constitutional law governing the colonies, and were reflected in the Royal Proclamation issued by the British Crown on October 7, 1763.⁴³

The Proclamation evokes the complex nature of the trust relationship in a series of shaded contrasts:⁴⁴

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds;

Notice the subtle apposition of justice with regal self-interest, Aboriginal autonomy with British suzerainty, Indian land rights with the Crown's territorial title, and protective measures with procedures for purchase. The overall effect is to affirm both the powers and the attendant responsibilities of the Crown relative to Aboriginal nations, as quasi-sovereign entities living under the Crown's protection.

Upon Canada's emergence from colonial rule, the legal principles governing the trust relationship became part of the common law of Canada, shorn of any inappropriate imperial features.⁴⁵ The process of internal decolonization was carried to a further stage in 1982, with the guarantee of Aboriginal and treaty rights in section 35 of the Constitution Act, 1982.⁴⁶ The most important effect of this provision was to entrench the trust relationship with Aboriginal peoples and put it on a more contemporary

⁴² On the historical basis of the relationship, see *Guerin v. The Queen*, *supra*, footnote 5, per Dickson J., at pp. 383-384, 387 (S.C.R.), 340, 343 (D.L.R.), per Wilson J., at pp. 348-349 (S.C.R.), 356-357 (D.L.R.); *R. v. Sparrow*, *supra*, footnote 5, at pp. 1107-1108 (S.C.R.), 408 (D.L.R.); *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, (1990), 71 D.L.R. (4th) 193, per Dickson C.J.C., at pp. 108-109 (S.C.R.), 209 (D.L.R.), per La Forest J., at pp. 129-131 (S.C.R.), 225-226 (D.L.R.).

⁴³ The most accurate printed text of the Proclamation is found in C.S. Brigham (ed.), *British Royal Proclamations Relating to America* (1911), p. 212, quoted here. A less accurate but more accessible version is found in R.S.C. 1985, Appendix II, No. 1. The original text, entered on the Patent Roll for the regnal year 4 Geo. III, is located in the United Kingdom Public Record Office: c. 66/3693 (back of roll).

⁴⁴ Brigham, *ibid.*, p. 215. This preamble is one of several punctuating the text; it leads off the provisions devoted specifically to Aboriginal peoples.

⁴⁵ See *Roberts v. Canada*, *supra*, footnote 6, at pp. 338-340 (S.C.R.), 209-210 (D.L.R.); and discussion in J.M. Evans and B. Slatery, Case Comment: *Roberts v. Canada* (1989), 68 Can. Bar. Rev. 817, at pp. 830-832. For the transition from imperial law to Canadian common law, see B. Slatery, Understanding Aboriginal Rights (1987), 66 Can. Bar Rev. 727, at pp. 736-741, 753-755; and Slatery, *loc. cit.*, footnote 28, at pp. 392-393.

⁴⁶ Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35(2) explains that the term "aboriginal peoples" includes "the Indian, Inuit and Métis peoples".

and democratic footing.⁴⁷ As such, the provision affords protection to Aboriginal land rights, laws, and powers of self-government, and perhaps also Aboriginal languages and cultures.⁴⁸

The Aboriginal trust relationship is collective in nature. The Crown's fiduciary obligations are owed to Aboriginal nations as corporate entities, even if the individual members of the nations are also affected. This collective aspect of the relationship puts it on a par with the trust relationship implicit in the federal structure, whereby the Provinces enjoy certain powers and rights as collective entities considered apart from their citizens.

This analogy suggests a further point. From the legal perspective, Aboriginal nations are *constitutional entities* rather than ethnic or racial groups. Although a First Nation, like a Province, may happen to be composed mainly of people of a certain stock, its status does not stem from its racial or ethnic make-up but from its political autonomy. Just as there is no reason why a person of Irish or Chinese descent cannot be a Quebecois, there is no reason why someone of French origins cannot belong to a First Nation. Indeed, traditionally, most First Nations have had methods of admitting outsiders, through adoption, marriage, long-standing residence, or other processes. That an Aboriginal nation is made up of peoples of mixed and varied origins or has evolved a pluralistic lifestyle does not make it any less Aboriginal.⁴⁹ This said, it is clear that a First Nation may have a legitimate constitutional interest in controlling its own membership to ensure the perpetuation of its social identity, culture, and language.

⁴⁷ See *R. v. Sparrow*, *supra*, footnote 5, at pp. 1107-1109, 1114 (S.C.R.), 408-409, 413 (D.L.R.). The court observes, at pp. 1093 (S.C.R.), 397 (D.L.R.), that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time ... the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'".

⁴⁸ For a spectrum of views on section 35, see: W.I.C. Binnie, *The Sparrow Doctrine: Beginning of the End or End of the Beginning?* (1990), 15 *Queen's Law J.* 217; N. Lyon, *An Essay on Constitutional Interpretation* (1988), 26 *Osgoode Hall L.J.* 95; K. Lysyk, *The Rights and Freedoms of the Aboriginal Peoples of Canada*, in W.S. Tarnopolsky and G.-A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms* (1982), 467; K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada* (1982), 4 *Sup. Ct. Law Rev.* 255; K. McNeil, *The Constitution Act, 1982, Sections 25 and 35*, [1988] 1 *C.N.L.R.* 1; W. Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982. Part II. Section 35: The Substantive Guarantee* (1988), 22 *U.B.C. Law Rev.* 207; D. Sanders, *The Rights of the Aboriginal Peoples of Canada* (1983), 61 *Can. Bar Rev.* 314; D. Sanders, *Pre-existing Rights: The Aboriginal Peoples of Canada* (Sections 25 and 35), in G.A. Beaudoin and E. Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (2nd ed., 1989), p. 707; B. Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights* (1982-83), 8 *Queen's Law J.* 232; B. Slattery, *The Hidden Constitution: Aboriginal Rights in Canada* (1984), 32 *American Journal of Comparative Law* 361; Slattery, *Understanding Aboriginal Rights*, *loc. cit.*, footnote 45; B. Slattery, *Aboriginal Language Rights*, in D. Schneiderman (ed.), *Language and the State* (1991), 369.

⁴⁹ See further, Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, *ibid.*, at pp. 269-270.

By contrast, the goal of maintaining a Nation's supposed racial character can hardly be defended.⁵⁰

A second cluster of points emerges from these observations. The trust relationship affects individual people only insofar as they are members of an Aboriginal nation, and then only in their capacity as members. Thus, the fact that individuals are genetically akin to members of an Aboriginal nation or have a similar lifestyle does not necessarily mean that they belong to that nation; the question turns on the nation's membership criteria. Again, members of Aboriginal nations are also Canadian citizens, and in certain contexts have rights and duties identical to those of other Canadians. So, the trust relationship does not colour all their dealings with the Crown, whether conducted on an individual or a communal basis.⁵¹

The trust relationship attaches primarily to the Federal government, but it also affects Provincial governments in certain contexts. Prior to Confederation, the Crown was bound in its capacity as head of the various colonies and territories making up British North America. The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown's overall fiduciary obligations to First Nations. Rather, these obligations tracked the various powers and rights to their destinations in Ottawa and the Provincial capitals. Since section 91(24) of the Constitution Act, 1867 makes the Federal government responsible for "Indians and Lands reserved for the Indians", the main burden of the trust relationship clearly falls on its shoulders. However, so long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations.⁵²

For example, we know that promises made by the Crown to secure the surrender of Aboriginal lands give rise to particular fiduciary obligations that supplement the general trust relationship.⁵³ We also know that such land surrenders, even though made to the Federal government, enure to

⁵⁰ See the pertinent issues raised by Lise Bissonnette in the article entitled "Question aux premiers peuples"; *Le Devoir*, 16 March 1992.

⁵¹ See the thoughtful observations of La Forest J. in *Mitchell v. Peguis Indian Band*, *supra*, footnote 42, at pp. 127-147 (S.C.R.), 223-239 (D.L.R.).

⁵² See the remarks of Dickson C.J.C. in *Mitchell v. Peguis Indian Band*, *ibid.*, at pp. 108-109 (S.C.R.), 209-10 (D.L.R.); La Forest J.'s comment that the "provincial Crowns bear no responsibility to provide for the welfare and protection of native peoples" (at pp. 143 (S.C.R.), 237 (D.L.R.)) should be read, I think, as emphasizing the exclusive responsibilities of the Federal government for native peoples under section 91(24), without ruling out the possibility of incidental Provincial responsibilities arising from Provincial powers in other areas.

⁵³ *Guerin v. The Queen*, *supra*, footnote 5; *Ontario (A.G.) v. Bear Island Foundation*, *supra*, footnote 10. These decisions reverse the view expressed by the Privy Council in *A.-G. for Canada v. A.-G. for Ontario*, [1897] A.C. 199, at p. 213.

the benefit of the Province concerned under section 109 of the 1867 Act.⁵⁴ Where the benefiting Province has the exclusive constitutional authority to fulfill the Crown's promises, it cannot take the benefit of the surrender without incurring corresponding fiduciary obligations. Thus, if the Federal Crown has undertaken to set aside reserves out of the lands surrendered, this promise binds the Province to which the lands pass, because it alone has the power to carry out the promise.⁵⁵ It follows that a Province may refuse to accept the benefit of an Aboriginal surrender if it is unwilling to incur the accompanying obligations.

Viewed in this perspective, the Crown's relationship with native peoples differs significantly from the guardian-ward relationship known to private law. Indeed analogies with the private law governing trusts and fiduciary obligations are not always helpful in this context.⁵⁶ The same caution applies to concepts of international trusteeship, as embodied in the League of Nations' Mandate System and the United Nations' Trusteeship System. The Canadian Crown's fiduciary relationship with First Nations is a particular instance of the Crown's overall trust responsibilities to the peoples of Canada, which are woven into our constitutional traditions. Whereas both the private law of guardianship and the international trusteeship system assume the *incapacity* of individuals and nations to manage their own affairs, the Crown's fiduciary relationship with First Nations presupposes the inherent *capacity* of the latter to govern themselves. Further, it entails a duty to respect and protect native powers of self-government within Canada. We will return to this subject later in the article.

The collective obligations implicit in Canada's confederal structure make up only one aspect of Canada's constitutional trust. The Crown also has fiduciary obligations to private individuals, as embodied in the Canadian Charter of Rights and Freedoms. Although the Charter is mostly worded in terms of *rights*, its actual effect is to impose a range of *duties* on various governmental institutions, including legislatures, executive bodies, and the courts. These duties are fiduciary in the sense that they are grounded in a relationship of trust between government and citizenry, under which the former's powers are conditioned by the duty to respect vital elements of a citizen's personal dignity and well-being, such as freedom of thought

⁵⁴ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.). Section 109 provides that all lands belonging to the several Provinces at the time of Confederation shall continue to belong to them "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same".

⁵⁵ On the latter point, see *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.).

⁵⁶ As Dickson J. emphasized in *Guerin v. The Queen*, *supra*, footnote 5, at pp. 387 (S.C.R.), 343 (D.L.R.): "... the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise." See also the comments of Strayer J. in *Alexander Band No. 134 v. Canada*, [1991] 2 F.C. 3, at pp. 15-17 (F.C.T.D.).

and security of the person, and to maintain proper conditions for a person's relationships with others, as through equality under the law and freedom of association.

As such, the Charter should not be understood as directed exclusively at the courts. The judiciary, of course, has an important role to play in the interpretation and enforcement of the Charter. But to concentrate on that aspect is to view the Charter in a distorted perspective, not unlike viewing the Criminal Code as aimed only at judges. The concept of a constitutional trust suggests that the various institutions of government have coordinate and overlapping functions in implementing the obligations recognized in the Charter. The provisions allowing for reasonable limits and notwithstanding clauses should both be interpreted in this context, not as escape-routes for legislatures looking to evade their Charter obligations, but as avenues for fulfilling their constitutional mandates.⁵⁷

III. Some Special Features of the Trust

The doctrine of constitutional trust envisioned here has several distinctive attributes. By contrast with theories of a social contract, the doctrine does not maintain that our governmental institutions sprang historically or even notionally from the consent of the peoples concerned, whether these be First Nations, French-Canadians, or the general run of citizens. Neither does it hold that the current legitimacy of these institutions depends on continuing popular consent, whether tacit or explicit, communal or individual. Although moments of popular consent can of course be identified in our history (as well as moments of coercion and intimidation), I suggest that the legitimacy of our Constitution is grounded primarily in our factual and moral interdependency as members of Canadian society, as this has evolved historically, and depends on the degree to which the Constitution reflects overall just arrangements, given our history.⁵⁸

We are born with a range of socially-based rights and duties that we have neither earned nor voluntarily assumed. Many of these rights and duties cannot be shed unilaterally, by simple acts of the will. Moreover, they multiply and intensify as we grow to maturity and take on a broader range of social roles. Among them are obligations owed to family, spouses, children, neighbours, co-workers, and other members of society generally. But they also include the duty to respect and support existing communal institutions carrying authority within our society, including institutions of government.

⁵⁷ These points are developed in B. Slattery, *A Theory of the Charter* (1987), 25 Osgoode Hall Law J. 701.

⁵⁸ For various views on this topic, see: A. MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed., 1984); J. Finnis, *Natural Law and Natural Rights* (1980); L. Green, *The Authority of the State* (1990).

All these duties have built-in limits. As children we should, of course, obey our parents; but that duty gives out when parents become abusive. As members of society, we owe basic duties of respect and forbearance to other individuals; but we do not have to suffer passively a murderous assault. Likewise, we should generally obey laws enacted by governmental authorities actually in place; but those authorities are bound by trust-like obligations which, if violated in a fundamental way, may invalidate governmental acts or release us from our duty to comply. What is true of individuals holds for communities. If, for example, the state inflicts some basic injustice on a particular ethnic community, it may negate the trust relationship and justify the community in exercising a right of self-determination.

So, on this view, the legitimacy of the Constitution is a function of various complex considerations, including our factual and moral interdependency as members of an on-going society, the need for communal institutions of decision-making, the existence of governmental institutions historically adapted to our particular situation, and the justice of the arrangements these institutions embody. In particular, the Constitution's legitimacy (or lack thereof) rests on the degree of respect shown for the fiduciary obligations that these factors give rise to.

The doctrine of trust has a second distinctive feature. It posits an evolving constitutional relationship or series of relationships, whose incidents change and develop over time, blending incremental adaption with conscious reform.⁵⁹ The meaning of the Constitution, on this view, lies as much in custom and practice as it does in historical intentions, so that the "original meaning" of a constitutional document (assuming such a thing can exist) is not necessarily its current meaning. By contrast, social contract theories tend to envision a fixed constitutional structure whose features are defined by the terms of the original agreement. From the strict contractarian perspective, the only way of changing the Constitution is to amend the agreement; any other mode of change, such as practice, judicial interpretation, or common understanding, is illegitimate. So, the search for "original meaning" has an importance in contractarian thought that it lacks under the theory of a constitutional trust, which allows for incremental adaption and change.

Finally, the trust doctrine argues that governmental authority is *inherently* conditioned and shaped by responsibilities towards the com-

⁵⁹ This is consistent with the judiciary's basic approach to the Constitution. As stated in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136 (P.C.): "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. 'Like all its written constitutions it has been subject to development through usage and convention'..." See also *R. v. Sparrow*, quoted *supra*, footnote 47. For discussion and references, see Hogg, *op. cit.*, footnote 35, pp. 340-341.

munities and individuals governed; that is to say, government is intrinsically a matter of trust, regardless of its specific origins, character, or underlying philosophy. By contrast, strict contractarianism allows for the possibility of unlimited governmental power, so long as this flows from the original agreement.⁶⁰ Just as, on one view, individuals in desperate straits can sell themselves into slavery, so also, according to contractarian logic, nations can deliver themselves into the hands of an omnipotent sovereign. The doctrine of constitutional trust runs counter to any such idea. It argues that the rationale of all governmental institutions is to advance communal and individual welfare; this rationale poses basic limits on governmental powers, no matter how these powers originated historically.

So, the doctrine of trust rejects the concept of an omnipotent Parliament, which, in any case, has no deep roots in local Canadian traditions. As seen earlier, Canadian legislatures have never possessed unqualified powers, but have always operated within the spheres defined by their Constitutions. The sole institution once thought to possess unlimited power over Canada was the Imperial Parliament. The power of Westminster in relation to Canada is now defunct, as is the rationale that once lent it a patina of credibility: the desire to control distant colonial peoples and safeguard basic British interests. The doctrine of the omnipotence of Parliament should be recognized for what it was: the child of a marriage of convenience between parliamentary self-aggrandizement and imperial ambition, sanctified by legal positivism. Whatever its continued currency in the United Kingdom, it has no legitimate place in contemporary Canadian constitutional thought.

IV. *The Governmental Powers of First Nations*

As noted earlier, the complex process by which the Crown gained authority over Canadian territories did not terminate the Aboriginal rights of First Nations, which continued to exist under the common law of Canada.⁶¹ Prominent among these rights, I suggest, is the Aboriginal right of self-government. This view is supported by *R. v. Sioui*,⁶² where the Supreme Court cited a passage from *Worcester v. Georgia*,⁶³ summarizing British practice in North America prior to the American Revolution:

⁶⁰ Of course, some contractarian theorists, such as John Locke, reject this notion.

⁶¹ See authorities cited *supra*, in footnote 6.

⁶² *Supra*, footnote 4, at pp. 1054 (S.C.R.), 449 (D.L.R.); see also pp. 1055 (S.C.R.), 450 (D.L.R.), where Lamer J. states: "The British Crown recognized that the Indians had certain ownership rights over their land. . . . It also allowed them autonomy in their internal affairs, intervening in this area as little as possible."

⁶³ *Supra*, footnote 4, at pp. 548-549. (Emphasis supplied by Lamer J.). The author of the decision, Chief Justice Marshall of the United States Supreme Court, was surveying British practice throughout its asserted North American dominions, including the Canadian territories covered by the Royal Proclamation, 1763, cited at p. 548.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: *she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.*

On this view, Aboriginal peoples became autonomous nations living under the Crown's protection, exercising powers of self-government within a larger constitutional structure partially generated by joint British and Aboriginal practice.

The Aboriginal right of self-government was originally subject to Federal jurisdiction under section 91(24) of the Constitution Act, 1867.⁶⁴ Over the years, the right was whittled away by the provisions of the Indian Act. However, it seems the right of self-government as such was never extinguished. The important consequence is that, when section 35 of the Constitution Act, 1982 took effect, the right of self-government was still extant and featured among the "existing aboriginal and treaty rights" recognized in the section.⁶⁵

According to the Supreme Court's ruling in *R. v. Sparrow*,⁶⁶ any legislative limitations on section 35 rights, whether enacted before 1982 or subsequently, are invalid unless they meet a rigorous constitutional standard. This means that native peoples have the current right to set up governmental institutions to manage their own affairs, and *prima facie* are not limited in this respect by the provisions of Federal statutes such as the Indian Act, except where these provisions meet the *Sparrow* standard.

⁶⁴ This gives Parliament the power to legislate with respect to "Indians, and Lands reserved for the Indians".

⁶⁵ For background, see M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984); D. Ginn, *Aboriginal Self-Government* (LL.M. Thesis, Osgoode Hall Law School, York University, 1987); J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Doctoral Dissertation, Cambridge University, 1985; reprinted, University of Saskatchewan Native Law Centre, 1985); D. M. Johnston, *The Quest of the Six Nations Confederacy for Self-Determination* (1986), 44 U.T. Faculty of Law Rev. 1; R. Kapashesit and M. Klippenstein, *Aboriginal Group Rights and Environmental Protection* (1991), 36 McGill L.J. 925; Little Bear, Boldt, and Long, *op. cit.*, footnote 18; P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination* (1991), 36 McGill Law J. 382; S. Nakatsuru, *A Constitutional Right of Indian Self-Government* (1985), 43 U.T. Faculty of Law Rev. 72; B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations* (1991), 36 McGill L.J. 308; D. Sanders, *Aboriginal Self-Government in the United States* (1985); P. Williams, *The Chain* (LL.M. Thesis, Osgoode Hall Law School, York University, 1982); J.D. Whyte, *Indian Self-Government: A Legal Analysis*, in Little Bear, Boldt, and Long, *op. cit.*, footnote 18; J. Woodward, *Native Law* (1989), pp. 81-83.

⁶⁶ *Supra*, footnote 5.

What in practice does this amount to? The courts have yet to begin exploring the subject in a serious manner, and ongoing constitutional discussions have so far failed to yield concrete clarifications. Nevertheless, I think that the main outlines of the subject are reasonably clear, even if the detail requires elaboration.

At the start, it is useful to distinguish three separate questions, which can easily be confused.⁶⁷ *First*, is the Aboriginal right of self-government recognized in section 35 of the Constitution Act, 1982 to be regarded as *derivative* or *inherent*? In the former case, the right is viewed as the creature of the constitutional provision and merely "granted" to Aboriginal peoples. If the provision did not exist, neither would the right of self-government. By contrast, on the second view the right of self-government is regarded as originating, not from the constitutional provision itself, but from sources within the communities affected, under customary law, common law, or natural law. On this view, the constitutional provision serves merely to recognize, delimit, and protect the right, rather than create it.

Second, should the constitutional right of self-government be characterized as *limited in scope* or *unlimited*? On the first view, there are fixed constitutional limits to the powers that Aboriginal governments may exercise, parallel to those that circumscribe the powers of the Federal and Provincial governments under sections 91 and 92 of the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms. On the second view, there are no fixed constitutional limits to the powers of Aboriginal governments, so that in theory they may act in any area they choose, including, for example, international relations, defence, external trade, and so on. Moreover, they would not be subject to constitutional restraints such as those found in the Charter.

Third, is the constitutional right of self-government *subordinate* within its sphere to the powers of other governments, or is it *supreme* within its sphere? In the former case, the powers of an Aboriginal government are subordinate to those of another body, such as a Provincial legislature or the Federal Parliament, so that laws enacted by an Aboriginal government are always liable to be overridden or nullified. This status would be comparable to that held, for example, by Municipal governments *vis-à-vis* Provincial legislatures, or by Territorial governments *vis-à-vis* the Federal Parliament. By contrast, on the second view, an Aboriginal government has the power to legislate within a certain sphere without the possibility of being overruled by any other level of government, whether Federal

⁶⁷ The following section draws in part upon an analysis originally prepared for the Royal Commission on Aboriginal Peoples. I am grateful to the Commission for permission to use it here.

or Provincial. This status would be comparable to that held in practice by Provincial legislatures.

These issues speak to three subjects, namely: (1) the *origins* of the right of self-government; (2) the *scope* or *extent* of the right; and (3) the *exclusivity* of the right. It is important to note that these are quite distinct issues, so that our response to one does not necessarily determine our response to any other. For example, it would be possible for a right of self-government to be *inherent*, and yet to operate only within certain fixed *limits*, and indeed to be *subordinate* to the powers of another governmental body. The fact that a right arises from within a community, rather than being granted by a superior level of government, does not necessarily mean that the right is unlimited in scope or that it is free from all external interference. For example, in United States law, Indian governments are thought to possess inherent powers and yet to exercise them only within certain limits and subject to the overriding power of Congress.⁶⁸

Keeping these three issues in mind, let us now consider the nature of the Aboriginal right of self-government under section 35 of the Constitution Act, 1982. First, it emerges from what we have already said that the right is *inherent*, in the sense that it originates from within Aboriginal communities as a residue of the powers they originally held as independent nations prior to European settlement. It does not stem from Constitutional grant; that is, it is not a *derivative* or *created* right. Nevertheless, the right of self-government is recognized within the Canadian legal system, both under the common law of Canada and section 35 of the Constitution. So, while the right is inherent in point of origin, as a matter of current status it is a right held under Canadian law and enforceable in the ordinary courts.

The implication is that, while Aboriginal peoples have the inherent legal right to govern themselves, this right can only be exercised within the basic framework of Canadian Confederation. It does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess.⁶⁹ Rather, Aboriginal governments are in the same position as the Federal and Provincial governments: their powers are *limited* to a sphere defined by the Constitution.

Within that sphere, however, I suggest that Aboriginal governments possess *supreme* authority. That is, legislation enacted by such governments within their acknowledged constitutional arena is not subject to indis-

⁶⁸ See the discussion in F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), pp. 207-279.

⁶⁹ Of course, on the view presented earlier, "sovereign" states do not possess unlimited powers of government; they are subject to the constraints imposed by the constitutional trust.

criminate Federal or Provincial override. How extensive, then, is the sphere of Aboriginal governmental power and how precisely does it interact with the powers of the Federal and Provincial governments?

The matter can be summarized in four basic principles. *First*, the Aboriginal sphere of authority under section 35 is co-extensive with the Federal head of power recognized in section 91(24) of the Constitution Act, 1867. *Second*, within this sphere, Aboriginal governments and the Federal government have concurrent legislative powers. *Third*, in the case of conflict between Aboriginal laws and Federal legislation enacted under section 91, valid Aboriginal laws (including customary laws) will take precedence, except where the Federal laws can be justified under the section 35 standard laid down in the *Sparrow* case. *Fourth*, relative to Provincial laws, Aboriginal laws have basically the same status as Federal laws enacted under section 91(24), under the standard rules developed by the courts to police the Constitutional division of powers.

Let me explain how these principles have been arrived at and what they entail. If section 35 of the Constitution Act, 1982 recognizes an inherent right of self-government, several things follow. First, it is reasonable to infer that Aboriginal jurisdiction must extend at a minimum to Aboriginal peoples and their territories. However, this sphere of authority overlaps with the Federal power to legislate for "Indians, and Lands reserved for the Indians" under section 91(24) of the 1867 Act. There is no indication that section 35 was intended to supersede completely an established head of Federal power such as section 91(24). So, it follows that Aboriginal governments and the Federal Parliament must have concurrent authority over the matters specified in section 91(24).⁷⁰

Nevertheless, given that the Aboriginal rights recognized in section 35 are protected from unjustified legislative limitation, it may be inferred that Aboriginal laws presumptively take precedence over Federal legislation (including laws enacted under section 91(24)), except where the need for Federal action is compelling and substantial and the legislation is consistent with the basic trust relationship.⁷¹ One such case might arise, for example,

⁷⁰ See *R. v. Sparrow*, *supra*, footnote 5, at pp. 1109 (S.C.R.), 409 (D.L.R.):

... we find that the words "recognition and affirmation" [in section 35] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

⁷¹ This is the two-pronged test laid down in *R. v. Sparrow*, *ibid.*, at pp. 1113-1114 (S.C.R.), 412-413 (D.L.R.). The proposed standards of "reasonableness" and "in the public interest" were rejected by the Supreme Court as inadequate, at pp. 1113, 1118-1119 (S.C.R.), 412, 416 (D.L.R.).

where there is a strong need for uniform laws applying to Aboriginal peoples across the country and it is not within the power of local Aboriginal governments to achieve this objective (and no Canada-wide Aboriginal government exists to supply the want). Again, it might be argued that it is a fundamental condition of membership in Confederation that the basic core of the Federal Criminal Law should apply uniformly across the country.

Up to now, we have assumed only a considerable overlap between the Aboriginal sphere of authority under section 35 and Federal power under section 91(24). However, for reasons of constitutional economy and rationality, it can be argued that the two spheres are virtually identical: that is, section 91(24) should be construed as including all matters over which an inherent Aboriginal right of government exists, and vice versa. This means, for example, that the term "Indians" in section 91(24), which has already been held to include the Inuit peoples,⁷² should be interpreted as covering the Métis peoples as well, since they are explicitly identified as "aboriginal peoples" in section 35(2).⁷³

Standing back now from the scheme, we can see that the position of Aboriginal governments relative to the Federal government is similar to that of the Provinces, while it also differs from them in certain respects. Like the Provinces, Aboriginal governments have the power to deal with a wide range of matters that concern their communities and territories; further, laws enacted pursuant to this power will generally take precedence over conflicting Federal statutes, except where the latter satisfy the section 35 standards laid down in the *Sparrow* decision. However, unlike the Provinces, the power of Aboriginal governments is not exclusive of the Federal Parliament, which holds concurrent authority over the entire field under section 91(24). So, in the absence of Aboriginal law, Federal law will apply. It should be remembered, nevertheless, that Aboriginal law includes not only written enactments but also unwritten customary law.

The relation between Aboriginal and Provincial governments is more complex. However, it can be said that, relative to the Provinces, Aboriginal governments have generally the same status as the Federal government,

⁷² See *Re Term "Indians"*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417.

⁷³ Section 35(2) provides: "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada." For discussion of the scope of section 91(24) of the Constitution Act, 1867, see, C. Chartier, 'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867 (1978-79), 43 Sask. L. Rev. 37; Hogg, *op. cit.*, footnote 35, pp. 552-553; B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (1986), pp. 213-247; Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, *loc. cit.*, footnote 48, at pp. 269-270; Woodward, *op. cit.*, footnote 65, pp. 53-56.

under the existing rules governing the division of powers.⁷⁴ These rules can be summarized as follows. The Provinces cannot legislate in relation to subjects falling within the exclusive Federal and Aboriginal spheres, which include all matters coming under the rubric "Indians, and Lands reserved for the Indians". So Provincial legislation that singles out these subjects for special treatment is invalid.⁷⁵ The same holds true of ostensibly neutral Provincial legislation that affects the subjects in some integral way.⁷⁶ However, beyond these limitations, Provincial laws of general application may validly apply to Aboriginal people and their territories so long as the laws fall within Provincial jurisdiction and do not conflict with valid Federal or Aboriginal laws. Where such a conflict occurs, the Federal or Aboriginal laws will take precedence. So, within its sphere of authority, an Aboriginal government may prevent the application of Provincial statutes by enacting divergent legislation.⁷⁷

It could be asked whether section 35 changes this position, so that certain Provincial laws might override Aboriginal laws under the *Sparrow* standard, even when this would not be possible under the normal rules governing the division of powers. That is, does the *Sparrow* doctrine allow Provincial governments greater powers *vis-à-vis* Aboriginal laws than it possesses relative to Federal legislation enacted under section 91(24)? Or does *Sparrow* only patrol the border between Federal and Aboriginal

⁷⁴ See generally Hogg, *op. cit.*, footnote 35, pp. 551-562; Slaterry, Understanding Aboriginal Rights, *loc. cit.*, footnote 45, at pp. 774-781; Woodward, *op. cit.*, footnote 65, pp. 87-131.

⁷⁵ This stricture would not, of course, invalidate provincial legislation granting exemptions to Aboriginal peoples in recognition of their Aboriginal and treaty rights.

⁷⁶ See, for example, *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, (1975), 60 D.L.R. (3d) 148, per Laskin C.J. for the majority at pp. 760-761 (S.C.R.), 154 (D.L.R.). Although made in a different context, the observations of the Supreme Court in *R. v. Sparrow*, *supra*, footnote 5, at pp. 1110 (S.C.R.), 409-410 (D.L.R.), seem apt: "Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests."

⁷⁷ This conclusion extends to Aboriginal governments the general rule governing the interaction between Federal and Provincial powers. Thus, in *R. v. Francis*, [1988] 1 S.C.R. 1025, at p. 1028, (1988), 51 D.L.R. (4th) 418, at p. 421, La Forest J. stated: "... in the absence of conflicting federal legislation, provincial motor vehicle laws of general application apply *ex proprio vigore* on Indian reserves." (Emphasis added). Even Martland J., who took an expansive view of Provincial power in his minority opinion in *Natural Parents v. Superintendent of Child Welfare*, *ibid.*, stated at pp. 744 (S.C.R.), 164 (D.L.R.): "I do not interpret s. 91(24) as manifesting an intention to maintain a segregation of Indians from the rest of the community in matters of this kind, and, accordingly, it is my view that the application of the *Adoption Act* to Indian children will only be prevented if Parliament, in the exercise of its powers under that subsection, has legislated in a manner which would preclude its application." (Emphasis added).

governments, leaving the border between Aboriginal and Provincial governments to be handled by division of powers doctrines?

At first sight, the answer is not completely clear. On the one hand, there is nothing in the text of section 35 to indicate that Aboriginal rights, including the right of self-government, are immune from Provincial legislation. So, it can be argued that the *Sparrow* standard of justification applies to both Federal and Provincial governments. As a result, under section 35 Provincial laws might sometimes prevail over Aboriginal laws when they could not override comparable Federal laws. However, this conclusion fails to take full account of section 91(24). Under this section, the Federal Parliament has the exclusive authority (as among non-Aboriginal governments) to deal with Indians and lands reserved for Indians. By inference, it alone has the power to pose justified limits to the Aboriginal and treaty rights protected by section 35. Under section 92, the Provinces do not possess the power to legislate in relation to Aboriginal and treaty rights, and so the question of justification under section 35 simply does not arise.⁷⁸ In the result, while Parliament may when justified enact laws under section 91(24) that prevail over valid Aboriginal laws, this power is not available to the Provincial legislatures.

The same conclusion is supported by another train of thought. It would appear that an Aboriginal government might, by *delegation* from the Federal Parliament, exercise governmental powers to the exclusion of Provincial laws. For, within the sphere of section 91(24), Federal laws will take precedence over Provincial laws in case of conflict. But the inherent right of self-government recognized and protected in section 35 arguably cannot be weaker or less extensive than a delegated right of government under section 91(24). So, Aboriginal laws under section 35 must enjoy the same degree of precedence over Provincial legislation as Federal laws under section 91(24).

If this conclusion is correct, it follows that the Federal Parliament cannot subvert the overall constitutional scheme by enacting legislation for Aboriginal peoples that referentially incorporates a wide range of Provincial statutes that could not otherwise apply to First Nations under the division of powers. Such Federal legislation, it is submitted, would seriously affect the Aboriginal right of self-government under section 35 of the Constitution Act, 1982 and cannot meet the *Sparrow* standard of

⁷⁸ This may be what the Supreme Court had in mind when it observed in *R. v. Sparrow*, *supra*, footnote 5, at pp. 1105 (S.C.R.), 406 (D.L.R.), that one of the clear effects of section 35 was that it "affords aboriginal peoples constitutional protection against provincial legislative power". The court went on to observe, at pp. 1109 (S.C.R.), 409 (D.L.R.), that while section 35 imported restraints on sovereign power, the rights that it recognized were not absolute: "Federal legislative powers continue, including, of course, the right to legislate with respect to Indians...". (Emphasis added; for full passage, see *supra*, footnote 70).

justification. So, section 88 of the current Indian Act, which referentially makes applicable to Indians "all laws of general application from time to time in force in any province" is of doubtful constitutional validity.⁷⁹

Nevertheless, it must be remembered that the "double aspect" doctrine, which allows for the overlapping operation of Provincial and Federal laws in many areas, also applies here.⁸⁰ Thus, some general Provincial laws will continue to govern Aboriginal peoples and territories, except where they conflict with Aboriginal or Federal laws (or otherwise intrude on section 35 rights).

What impact will the Charter of Rights and Freedoms have on Aboriginal governments? This is a troublesome question, allowing for a number of viewpoints. However, the most likely answer involves two propositions. First, the right of self-government enjoys protection from the Charter because it is covered by section 25 of the Charter, which shields Aboriginal rights from Charter review.⁸¹ Second, at the same time, individual Aboriginal persons also enjoy a measure of Charter protection in their dealings with Aboriginal governments.

These conclusions are based on a distinction between the *right* of self-government proper, and the *exercise* of governmental powers under that right. The argument runs as follows. Insofar as the right of self-government is an Aboriginal right, it is not liable to be abrogated or diminished by the provisions of the Charter because of the shield erected in section 25. However, individual native persons are citizens of Canada and as such possess Charter rights in their relations with governments, including Aboriginal governments. In this respect then, the Charter will impose some restrictions on the manner in which Aboriginal governments treat their own constituents, so long as these restrictions do not amount to an abrogation or derogation from the right of self-government proper or from other section 25 and 35 rights.⁸² At the same time, it seems clear

⁷⁹ For discussion of this provision's effect, apart from the impact of section 35, see *Dick v. The Queen*, [1985] 2 S.C.R. 309, (1985), 23 D.L.R. (4th) 33.

⁸⁰ See Hogg, *loc. cit.*, footnote 35, at pp. 316-318, 353-367.

⁸¹ Section 25 provides in part: "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..." For commentary on the section, see, McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, *loc. cit.*, footnote 48; W. Pentney, *The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982*, Part I. *The Interpretive Prism of Section 25* (1988), 22 U.B.C. Law Rev. 21; Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, *loc. cit.*, footnote 48; B. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (1988).

⁸² It is possible to argue that section 32(1) of the Charter, which states that the Charter applies to the Federal and Provincial legislatures and governments, exempts Aboriginal governments from any form of Charter review by failing to mention them. However, the better view is that the section does not provide an exhaustive list of governments subject to the Charter.

that the Charter must be interpreted and applied in a manner consistent with the culture and traditions of the Aboriginal people in question.⁸³

V. *The Status of Aboriginal Land Rights*

We come now to the final question posed at the start, which concerns the position of Aboriginal land rights.⁸⁴ It will not be possible here to deal with the entire range of situations found across Canada. Instead we will focus on a single Province, British Columbia, where the problem arises in a particularly acute form. Our analysis, nevertheless, may be suggestive for other parts of Canada as well.

The history of Aboriginal lands in British Columbia has received two radically opposed interpretations. The first holds that laws passed in the colony prior to its entry into Confederation absolutely extinguished Aboriginal land rights.⁸⁵ While the legislation does not contain explicit language

⁸³ Section 27 of the Charter provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." On the question of cultural perspective, see M. E. Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences* (1989-90), 6 *Can. Human Rights Yearbook* 3.

⁸⁴ The genesis of modern legal doctrine on the subject can be traced in the following works: G. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969), pp. 108-133; Indian-Eskimo Association of Canada (D. Sanders *et al.*), *Native Rights in Canada* (1970); P.A. Cumming and N.H. Mickenberg (eds.), *Native Rights in Canada* (2nd ed., 1972); K. M. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder* (1973), 51 *Can. Bar Rev.* 450; D. Sanders, *The Nishga Case* (1973), *B.C. Studies* (no. 19) 3; J.C. Smith, *The Concept of Native Title* (1974), 24 *U.T. Law J.* 1; B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (Doctoral Thesis, Oxford University, 1979; reprinted, University of Saskatchewan Native Law Centre, 1979); G. S. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (Doctoral Thesis, Osgoode Hall Law School, York University, 1981); L. Littlebear, *A Concept of Native Title* (1982), 5 *Can. Legal Aid Bul.* (Nos. 2 & 3) 99; B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (University of Saskatchewan Native Law Centre, 1983); Slattery, *Understanding Aboriginal Rights*, *loc. cit.*, footnote 45; K. McNeil, *Common Law Aboriginal Title* (1989); K. McNeil, *A Question of Title: Has the Common Law Been Misapplied to Disposses the Aboriginals?* (1990), 16 *Monash Univ. L. Rev.* 91; K. McNeil, *The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket*, in M. Bray and A. Thomson (eds.), *Temagami: A Debate on Wilderness* (1990), pp. 185-221; B. Slattery, *The Legal Basis of Aboriginal Title: Some Thoughts on the Delgamuukw Case*, in F. Cassidy (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992).

⁸⁵ This was the view of Judson J., with Martland and Ritchie JJ. concurring, in *Calder v. Attorney-General of British Columbia*, *supra*, footnote 4, especially at pp. 333 (S.C.R.), 159-160 (D.L.R.). The Supreme Court of Canada split evenly on the issue, with three other judges taking the opposing viewpoint. A seventh judge, who cast the deciding vote, expressed no opinion on the matter, but ruled against the Aboriginal plaintiffs on a procedural ground. The recent judgment of the British Columbia Supreme Court in *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185, adopts the extinguishment theory, but, with respect, its reasoning is open to serious objections; see, for example, H. Foster, *It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in Delgamuukw et al v. The Queen* (1991), 49 *The Advocate* 341.

to this effect, it does feature general provisions of the following type: "All the lands in British Columbia, and all the mines and minerals therein, belong to the Crown in fee."⁸⁶ The clear intent of these provisions, it is said, is to give the Crown a complete and unencumbered title to all lands in the Province. This intent necessarily conflicts with the continued existence of an Aboriginal interest in the lands. So, the original rights of the First Nations of British Columbia to their ancestral homelands were terminated at the stroke of a pen. Native peoples instantly became trespassers or bare licensees in their own villages, gardens, fishing stations, and hunting territories.

However, the same facts also bear a different construction. This holds that Aboriginal title in most areas of British Columbia has never been extinguished, either by legislation or treaty. While the legislation cited above clearly confirms that the Crown possesses an ultimate title to all lands in the colony, it does not otherwise affect Aboriginal land rights, which co-exist with the ultimate title of the Crown and form a burden on it.⁸⁷ So, *prima facie*, First Nations continue to hold Aboriginal rights to large tracts within the Province, including certain city and town sites, industrial areas, farms, residential properties, Provincial parks, and so on. These rights take precedence over private rights derived from the Province (which can confer no better rights than it possesses), and either invalidates them or suspends their operation until the Aboriginal interest is extinguished.⁸⁸

These, then, are the main opposing viewpoints. The difficulty, it seems to me, is that they both lead to rather implausible conclusions. To consider the first alternative, we are asked to credit the view that the British Columbia government might, by general language not specifically addressing the issue, completely extinguish longstanding land rights held by the original peoples of the territory, rights that were central to their economic survival as well as their spiritual and cultural vitality. To the contrary, one would have thought that very clear language indeed would be necessary to achieve such a drastic result.

Turning now to the second alternative, we are invited to hold that most of the economic and social life of the Province is based on a false premise, namely the validity of land titles granted by the Provincial Crown. On this view, most industrial, commercial, agricultural, and resource activity in the Province is *prima facie* unlawful, as interfering with the unextinguished

⁸⁶ Proclamation No. 13 issued by Governor James Douglas, dated February 14th, 1859, in R.S.B.C. 1871, Appendix, p. 55. The legislation is itemized and reviewed in *Calder v. Attorney-General of British Columbia*, *ibid.*, at pp. 331-333, 410-413 (S.C.R.), 158-159, 214-217 (D.L.R.).

⁸⁷ This was the conclusion of Hall J., with Spence and Laskin JJ. concurring, in *Calder v. Attorney-General of British Columbia*, *ibid.*, pp. 410-411 (S.C.R.), 214-215 (D.L.R.).

⁸⁸ Subject, of course, to any applicable statutes of limitation.

land rights of Aboriginal peoples. The same defect affects many residential properties, so that large numbers of ordinary people may lack good titles to their homes. Whatever considerations can be mustered to support this view, it seems at odds with one of the law's most fundamental purposes: to promote social order and stability.⁸⁹

We seem to be caught, then, on the horns of a terrible dilemma. We are urged, on the one hand, to legitimate the dispossession and impoverishment of the First Nations of British Columbia in the name of upholding the current social and economic order. On the other hand, we are instructed to turn that order upside-down in the attempt to remedy a century-old injustice.

I would like to suggest that the dilemma is not a real one. It assumes that we are wedded to a rigid legal logic drawn from the law of expropriation, when in fact the subject calls for flexible principles suited to large questions of constitutional law. The dilemma treats the issue as basically identical to an alleged statutory taking of a small tract of private land for public purposes, say to build a school or expand a park. In such a case, it is a simple matter of construing the provision one way or the other. Ruling in favour of the landowner may pose some inconvenience to government but will hardly undermine the fundamental norms of society. Likewise, ruling in favour of the government may occasion some distress to the landowner but will not cause large-scale loss to entire cultural or political groups.

In reality, the question of Aboriginal land rights is not a narrow matter of private right but a subject of far-reaching constitutional significance. It calls into question the basic status and rights of indigenous nations and the nature of their relationship with the Crown.⁹⁰ These matters are necessarily governed by foundational legal principles, which must be applied flexibly in light of the general purposes they serve. This approach allows us to avoid the dilemma outlined above and to entertain a variety of intermediate solutions. Let me tentatively outline one such solution.

As seen earlier, when the Crown gained suzerainty over First Nations, it assumed special fiduciary responsibilities, which included the duty of shielding them from the potential depredations of incoming settlers. This fiduciary relationship was a variation on the normal duty of protection owed by the Crown to its subjects. It arose from the tacit arrangement

⁸⁹ See the Supreme Court's observations in *Re Manitoba Language Rights*, *supra*, footnote 16, at pp. 749-751 (S.C.R.), 22-24 (D.L.R.).

⁹⁰ See La Forest J.'s prescient statement in *Paul v. Canadian Pacific Ltd.* (1983), 2 D.L.R. (4th) 22, at p. 34 (N.B.C.A.) that the ordinary presumptions governing takings of land and compensation "must apply with additional force to the taking of Indian lands because this affects the honour and good faith of the Crown". The latter consideration has now been adopted by the Supreme Court as a constitutional standard; see *R. v. Sparrow*, *supra*, footnote 5, at pp. 1107-1110, 1114 (S.C.R.), 408-410, 413 (D.L.R.).

whereby First Nations relinquished the right to defend themselves militarily in return for Crown protection, while remaining quasi-autonomous political entities.⁹¹

One of the Crown's main responsibilities was to safeguard First Nations in their lands, which were central to Aboriginal well-being and survival.⁹² In the early days of British colonization on the Atlantic coast, land was much in demand by settlers, leading to fraudulent purchases, unlawful appropriations, and other abuses. These led to disputes and conflicts that constantly threatened to get out of hand and engulf the colonies in war. The role of the Crown, as it emerged, was dual: to protect the lands of the native peoples against illegitimate intrusions, and to establish a fair procedure enabling settlement to continue.

These basic factors were explicitly recognized by the British Crown in the Royal Proclamation, 1763, which, as already noted, states that it is essential to the security of the colonies that the Indian Nations living under British protection should not be molested in their unsundered lands. The document goes on to remark that great frauds and abuses have been committed in purchasing Indian lands, to the prejudice of British interests and the great dissatisfaction of the Indians. In the result, the Proclamation outlaws private purchases of Indian lands and provides that Aboriginal land rights can only be extinguished by voluntary surrender to the Crown in a public session.

Three basic principles underlie the Proclamation's detailed provisions. First, First Nations are to be protected in their lands by the Crown. Second, legitimate settlement may take place in areas designated from time to time by the Crown. Third, before an area can be settled, any native land rights must be ceded voluntarily to the Crown.

There is good reason to think that the Royal Proclamation, 1763 applied to British Columbia when it was issued, or at any rate became applicable whenever the area was officially claimed by the Crown. However, judicial rulings are mixed on the point, and the matter has not yet been resolved by the Supreme Court of Canada.⁹³ Even if the Proclamation

⁹¹ See further, Slattery, *Understanding Aboriginal Rights*, *loc. cit.*, footnote 45, at pp. 753-755.

⁹² See the comments in *Guerin v. The Queen*, *supra*, footnote 5, at pp. 348-350, 383-384, 392 (S.C.R.), 340, 346, 356-357 (D.L.R.).

⁹³ See the affirmative conclusion of Hall J. in *Calder v. Attorney-General of British Columbia*, *supra*, footnote 4, at pp. 394-401 (S.C.R.), 203-208 (D.L.R.), and the opposing view of Judson J. at pp. 323-328 (S.C.R.), 153-156 (D.L.R.); the latter view was adopted by the British Columbia Supreme Court in *Delgamuukw v. The Queen*, *supra*, footnote 85. For detailed discussion, see Slattery, *The Land Rights of Indigenous Canadian Peoples*, *op. cit.*, footnote 84, pp. 63-65, 175-190, 204-282, 329-349; and Slattery, *The Legal Basis of Aboriginal Title: Some Thoughts on the Delgamuukw Case*, in Cassidy, *op. cit.*, footnote 84.

did not apply, it seems clear that the common law principles reflected in the Proclamation extended to British Columbia, as they did to other parts of Canada.⁹⁴

Assuming that the Proclamation covered British Columbia, the question arises whether it could be repealed or amended locally. The issue is complex and cannot be resolved here.⁹⁵ For the sake of simplicity, I will suppose that prior to Confederation British Columbia lawmakers *did* have the power to amend the Proclamation, without attempting to formulate a definite view on the issue.

The central question now before us is the effect of the land laws passed in British Columbia before Confederation. As seen earlier, on one view this legislation extinguished Aboriginal title, while on the other it left Aboriginal title basically undisturbed. I suggest that there is a third possibility, which has certain advantages over the other two. On this view, the legislation did not extinguish Aboriginal title or authorize its extinguishment by Crown act. On the other hand, it did not leave Aboriginal title entirely untouched. What it did was set up a land system generally empowering the Crown to grant private rights to lands in the Province, even where the lands concerned were subject to Aboriginal title. In the latter case, the Crown grants would burden the Aboriginal title but would not extinguish it. The new rights would take precedence over the Aboriginal title, unless or until the rights were terminated, at which point Aboriginal title would resume full force.

However, this Provincial power was subject to significant limits stemming from the Crown's trust relationship with First Nations. The Crown's general duty to protect Aboriginal lands, when coupled with the statutory discretion to burden Aboriginal title, gave rise to particular fiduciary obligations controlling the exercise of the discretion.⁹⁶ Broadly speaking, these obligations bound the Crown to strike a fair balance between the public good and Aboriginal interests in dealing with Aboriginal lands. Ideally, this balance would best be struck through voluntary agreements with the First Nations affected. Failing that, the Provincial Crown would have the

⁹⁴ See *Guerin v. The Queen*, *supra*, footnote 5, at pp. 375-388 (S.C.R.), 334-43 (D.L.R.), per Dickson J.

⁹⁵ See discussion and references in Slattery, *The Land Rights of Indigenous Canadian Peoples*, *op. cit.*, footnote 84, pp. 315-319; and Slattery, *Understanding Aboriginal Rights*, *loc. cit.*, footnote 45, at pp. 774-775.

⁹⁶ As Dickson J. states in *Guerin v. The Queen*, *supra*, footnote 5, at pp. 384 (S.C.R.), 341 (D.L.R.):

... where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

power to make its own determinations, subject to the supervision of the courts, which could enforce the fiduciary duties and grant appropriate remedies.

Thus, to take a clear case, where the Provincial Crown unilaterally granted private rights to an occupied Aboriginal village site, the grant should ordinarily be struck down in the courts, in the absence of some compelling governmental rationale. Where the grant could not be nullified without seriously harming the longstanding interests of innocent third parties, monetary compensation or other remedies might be more appropriate. Again, where the Crown granted a timber lease covering part of a traditional Aboriginal territory, a court might review the lease and decide to nullify or curtail it, or perhaps to divert a fair portion of the revenues to the First Nation affected. Obviously, it would be far preferable for the Crown to avoid these judicial interventions by reaching agreements with the First Nations, but in the absence of such agreements the courts have a broad mandate to enforce the fiduciary relationship.

When British Columbia entered Confederation, the position just described was largely maintained by section 109 of the Constitution Act, 1867, which provides that all lands belonging to the Province shall remain its property "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same". The latter phrase has long been held to cover Aboriginal land rights,⁹⁷ while the word "Trusts" is apt to include the attendant fiduciary obligations.⁹⁸ Since section 91(24) of the 1867 Act gives the Federal Parliament exclusive legislative authority over "Indians, and Lands Reserved for the Indians", henceforth the Province lacked the power to pass laws extinguishing Aboriginal title or affecting the fiduciary structure.⁹⁹ Nevertheless, British Columbia retained the power to manage lands located in the Province and in so doing to grant rights burdening Aboriginal title, subject always to enforceable fiduciary duties. The resulting inter-meshing of Provincial and Federal roles means that any agreement with the First Nations of British Columbia regarding

⁹⁷ In *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, footnote 54, at p. 58, the Privy Council held that lands encumbered by Aboriginal rights at Confederation passed to the Province of Ontario "subject to 'an interest other than that of the Province in the same,' within the meaning of sect. 109 ...".

⁹⁸ See, *A.-G. for Canada v. A.-G. for Ontario*, *supra*, footnote 53, at p. 210, where the Privy Council correctly noted that the word "Trusts" in section 109 was not strictly limited to "such proper trusts as a court of equity would undertake to administer". As noted, *supra*, footnote 53, its subsequent holding that treaties ceding Aboriginal lands do not give rise to trust obligations has now been overruled.

⁹⁹ On the view, supported by the Privy Council's observations in the *St. Catherine's* case, *supra*, footnote 54, at p. 59, that the phrase "Lands reserved for the Indians" should be interpreted broadly as extending to Aboriginal lands generally. For discussion, see Slattery, *Understanding Aboriginal Rights*, *loc. cit.*, footnote 45, at p. 773.

Aboriginal title requires in practice the participation of both levels of government.

These general principles provide a context for interpreting the particular provisions governing British Columbia's entry into Confederation.¹⁰⁰ Paragraph 13 of the Terms of Union provides that the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government", and goes on to describe a joint Federal-Provincial process for setting aside tracts of land for Indian use. Whatever the precise meaning of this ill-drafted provision, it is unlikely that it nullifies the Province's power to grant rights to lands affected by Aboriginal title; by the same token, it does not relieve the Province of its particular fiduciary duties regarding those lands. The duties accompany the power and restrain it.

Unextinguished Aboriginal land rights in British Columbia are now entrenched under section 35 of the Constitution Act, 1982. This provision reinforces the common law trust relationship and provides the courts with a constitutional basis for reviewing legislation adversely affecting Aboriginal title. Insofar as the British Columbia land regime authorizes the Provincial Crown to impose burdens on Aboriginal lands unilaterally, the courts may now determine how far this regime can be justified under section 35 and what remedies may be appropriate if it fails to meet the *Sparrow* standard.

In sum, this intermediate viewpoint, while hardly perfect, suggests a way of recognizing the continuing Aboriginal land rights of First Nations in British Columbia, without threatening to overturn completely the existing order. By allowing for the possibility of judicial intervention, it also provides the parties with a strong stimulus to settle these matters by voluntary agreement.

Conclusion

The doctrine of constitutional trust, then, brings to the fore certain premises tacitly embedded in the law and practice of the Canadian Constitution, and as such helps to clarify the status of First Nations within Confederation. While the doctrine has clear theoretical dimensions, it may also help to solve certain practical problems long besetting relations between Aboriginal peoples and the Crown. Beyond this, the word "trust" aptly conveys the outlook that must increasingly come to inform relations among the various peoples of Canada, if we are to share a future together. To recall some words quoted earlier: "The faces of our future generations are looking up to us from the earth; and we step with great care . . .".¹⁰¹

¹⁰⁰ Order of Her Majesty in Council Admitting British Columbia into the Union, issued the 16th of May, 1871.

¹⁰¹ *Supra*, footnote 20.