

Take 35: Reconciling Constitutional Orders

Kiera L. Ladner
Assistant Professor
Department of Political Science
University of Western Ontario
London, Ontario
Email: kladner@uwo.ca

Paper Presented at the
78th Annual Conference of the
Canadian Political Science Association
York, June 1-3, 2006

DRAFT

please consult author before citing

comments welcome

INTRODUCTION¹

For Indigenous peoples, the story of Canada is one of myth, magic, deceit, occupation and genocide. For Canadians, the story is one of discovery, lawful acquisition and the establishment of peace, order and good governance. These conflicting stories of Canadian history are representative of historical narratives of the colonized and the colonizer. But they are not just matters of historical perspective or historical concern as they define and frame how each explains their past, understands the present and envisions their future.

My recent article, “Up the Creek: Fishing for a New Constitutional Order” in the *Canadian Journal of Political Science* explored both the Mi’kmaq and Canadian historical narratives in an attempt to explain the claims of each nation within the same fishery and the resulting jurisdictional quagmire and contestation of sovereignties. The article discusses how each nation claims to have gained jurisdiction over Mi’kma’ki (Mi’kmaq territory) and the salmon within said territory, how neither see their jurisdiction as being circumvented, eliminated by, or ceded to the other and how both claim some semblance of jurisdiction today. In short, the federal government bases its jurisdictional claims on an act of ‘legal magic’ (Russell, 2005) or the incantation of the European explorers which proclaimed the lands discovered and established the sovereignty of the Crown; the *Magna Carta, 1215* which established a common fishery and a public right to fishing; and, the *Constitution Act, 1867* which provided the federal government with the responsibility for maintaining the public fishery. Meanwhile, the Mi’kmaq base their claims on their own constitutional order which defines and regulates fishing as both a right and a responsibility of Mi’kmaw within Mi’kma’ki; a right to fish and a responsibility for the salmon that has never been ceded to the Crown (nor any of its representatives) but was instead recognized and affirmed in the treaties which established the constitutional relationship with the Crown and recognized the Crown’s ability to govern its own within Mi’kma’ki.

There is much that this article did not address. Several people (including one of the reviewers) have commented that I failed to explain how Canada does have jurisdiction of Mi’kma’ki and the fisheries therein by means of discovery (a claim of terra nullius), cession (consent) or conquest. The fact is, none of these are applicable in the case of Mi’kma’ki (as was discussed in the aforementioned article). Nevertheless, “when Mi’kmaq country was thus ‘magically’ transformed into Crown land, it was as if a terrible curse had been put on its Indigenous inhabitants” (Prins, 1996, 154). It was a curse which, despite promises to the contrary and agreements affirming the continued sovereignty of the Mi’kmaw, sought to magically transform the Mi’kmaw into subjects/wards of the Crown through the mythology of *terra nullius* and the magical assertion of Crown sovereignty (Macklem, 2001). It was a curse that magically transformed the Mi’kmaq fishery into a public fishery that the Crown was charged with the responsibility to manage and in so doing, managed to rapidly exclude Mi’kmaw from their fishery.

Despite the Crown’s assertion of sovereignty and contemporary debates over the illegal fishing and the constitutionality of an exclusive Mi’kmaw fishery, one thing is clear - the fishery is

¹ This paper is part of an ongoing project examining Indigenous constitutional visions. I wish to acknowledge the financial support of SSHRC.

justifiably contested by two constitutional orders. It is still the subject of the Mi'kmaw constitutional order despite the fact that it has been treated as though it was terminated in exchange for a set of constitutionally entrenched Aboriginal and treaty rights that are themselves subject to the will (infringement) of the Crown. Such treatment, however does not mean that Indigenous constitutional orders have ceased to exist or were terminated by the Crown's assertion of sovereignty. To the contrary, as legal scholars such as Henderson, Borrows, Macklem and Barsh have argued: "A faithful application of the rule of law to the Crown's assertion of title [and, thus, sovereignty] throughout Canada would suggest that Aboriginal peoples possess the very right claimed by the Crown" (Borrows, 2002, 113).

As the case of this jurisdictional quagmire illustrates, the roots of these competing constitutional orders 'run deep' and are not likely to be uprooted without tremendous upheaval and reconciliation. Reconciliation is required if Canadians and their governments are to come to terms with these competing constitutional orders and if these contested sovereignties are to be resolved peacefully. This is required for Indigenous constitutional orders and the resulting disputes of Canadian sovereignty are not only the root cause of most contemporary disruptions in Indian country, but they are the foundation upon which the growing unrest in Indian country – particularly among the youth – are built. While such movements are gaining momentum, similar unrest, needs and demands are also being expressed in a multiplicity of forums and by a multiplicity of actors including both *Indian Act* leaders and traditional leaders.

It is becoming increasingly apparent in Indigenous politics that it is necessary to find a way to all live here together and to reconcile competing constitutional orders and contested sovereignties. The problem is however, this is not becoming increasingly obvious within mainstream Canadian politics. In fact, most would argue that reconciliation is not even on the political map of most Canadians and most Canadian leaders, as is evident in the reaction that I receive from scholars working on issues of justice and reconciliation and from students of Canadian politics. This is extremely problematic. But it is a situation that is likely to change as Indigenous unrest grows and as Indigenous communities simply begin dismantling the colonial order within their communities, regardless of the reaction of the Canadian government.

As change erupts, reconciliation will become increasingly necessary. As it does, it becomes more and more obvious that how we begin to do so is unknown, as is our vision as to what reconciliation will look like. Luckily, the courts and scholars have been somewhat pro-active in this visioning process. In stepping beyond questions of necessity, the Supreme Court and scholars such as Cairns and Borrows have turned their attention to questions of possibility and process. Following on the footsteps of the first article from my project on Indigenous constitutional visions, I now seek to understand how two constitutional orders and their contested sovereignties can be reconciled and to determine whether reconciliation is in need possible. In so doing, I look to the courts and the existing literature to determine if there is an existing vision of reconciliation in Canada which would allow for these contested sovereignties to be reconciled, and I begin the process of addressing the possibilities for reconciliation that were created by s. 35 of the *Constitution Act, 1982*. It should be noted that what follows is my ponderings on reconciliation, decolonization, s.35 and constitutional pluralism at this point in time. I am quite certain that I will continue to think about and write on these matters for years to come.

THE COURTS AND RECONCILIATION

While many Canadians may not be cognizant of their history and may choose to ignore the realities of the present, reconciliation is necessary. It is a necessity for Indigenous peoples as they seek to realize their goals of self-determination, cultural renewal and economic independence; also for Canadians as they grapple with Indigenous demands for a (re)newed relationship between themselves and the settler-nation(s). It is a necessity that has been recognized and advocated by the courts in several decisions pertaining to Aboriginal rights, in that it has argued that the purpose of recognizing and affirming Aboriginal (and treaty) rights in s. 35(1) of the Constitution Act, 1982 was to “achieve a reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown” (*R. v. Van der Peet*, 539).

Simply put, the purpose of s.35 is reconciliation. But is it? It is easily argued that the treaties achieved a reconciliation of Aboriginal and Crown sovereignties (or claims thereof). This manner of understanding the treaties is commonly referred to as “treaty federalism” or “treaty constitutionalism.”² Treaty constitutionalism suggests that treaties between Indigenous nations and colonial nations *were not only* negotiated on a nation-to-nation basis, but they entailed mutual recognition of nationhood and affirmations of commitment to a *nation-to-nation relationship*. These nation-to-nation agreements allowed the newcomers (and their perpetual offspring) and Indians to peacefully co-exist as autonomous nations within the same territory (Henderson, 1999; Ladner 2003b). As such, treaties recognized and affirmed a right to self-government and sovereignty for each nation (alien and Indigenous) within Indigenous territories and they did not limit such rights, except in areas of jurisdiction which were explicitly delegated or dealt with in each specific treaty (Cornell, 1988).

While I acknowledge that many nations did not negotiate treaties with the Crown, most of these had normalized and/or formal relationships defined by a mutual recognition of nationhood. These relationships typically affirmed and/or defined the right of each nation to govern themselves - though not necessarily within the occupied territory - and such relationships typically did not provide any recognition or rights to the occupiers within a territory vis-à-vis the resources of a territory. Most importantly, in situations where such relationships were not formalized and treaties were not negotiated, no areas of jurisdiction were explicitly delegated to the Crown and thus, Indigenous nations maintain all rights and responsibilities within their territory. The rights and responsibilities of Indigenous nations which still need to be formally reconciled with the Crown’s assertion of sovereignty as justified by its ‘legal magic’ – or the act of discovery and the legal system that colonial nations created to justify and legitimize their occupation and destruction of ‘other’ nations (Russell, 2005; Anghie, 1999)

Many have argued that s.35(1) recognizes and affirms the treaties (the constitutional orders and relationships that they recognized and affirmed) and Indigenous constitutional orders which were not limited by any treaty relationship (Aboriginal rights) as part of the Canadian constitutional order (Henderson, 1996; Ladner, 2003b). The court, however, has not taken this approach and has instead viewed Aboriginal and treaty rights as creations of the Canadian constitutional order and subject to judicial interpretation and parliamentary supremacy; as opposed to the

² For a more thorough discussion of treaty federalism or treaty constitutionalism see: Henderson (1994); Ladner (2003b).

Constitutional supremacy which Henderson advocates (Henderson, 2000). The court has therefore framed reconciliation in a manner inconsistent with principles of Treaty Constitutionalism, one which disregards Indigenous constitutional orders (regardless of treaty) and subjects Indigenous nations and their 'sovereign' constitutional orders to the sovereignty of the Crown.

For former Chief Justice Lamer, achieving such a reconciliation meant recognizing that Aboriginal rights could be limited by Canadian sovereignty and that divisive rights had to be balanced or weighted against the rights of Canadians and the 'public interest' (of which they are a part). In rendering its decision in *Van der Peet*, a case involving a member of the Sto:lo nation who claimed to have an Aboriginal right to sell salmon, the Court argued that it had a responsibility to limit the First Nations fishery to subsistence fishing in order to protect the public interest and the rights of 'all Canadians'.

Using similar (il)logic to decide *Mitchell v. MNR* (2001), a case regarding the transporting of goods across the imaginary line (international border) which runs through the reserve of Akwesasne, Chief Justice McLachlin provides further justification for Canada's limiting of Aboriginal rights. She states:

Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions and customs that existed prior to contact. The practice, custom or tradition must have been 'integral to the distinctive culture' of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it. It must be a feature of 'central significance' to the peoples' culture, one that 'truly *made the society what it was*'. This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question. (emphasis in original, *Mitchell*, 2001, 22)

As McLachlin's explanation of the court's 'Aboriginal Rights Test' demonstrates, the court's understanding of reconciliation has little to do with reconciling or working out a mutually agreeable relationship between the competing constitutional orders. It pertains more clearly to the interests of Canadians, limiting the rights of Indigenous peoples by freezing them in some perpetual state of 'permafrost' and incorporating any remnants of a separate constitutional order into Canada. What is interesting is that although they disagree with Chief Justice McLachlin's reliance on a 'permafrost' or 'frozen' theory of Aboriginal rights, Justices Binnie and Major concur with the majority decision (both the majority and minority decisions found against *Mitchell*, though for slightly different reasons). They do so on the grounds that trade north of the St. Lawrence was not a 'defining feature' or 'vital to the Mohawk's collective identity'. In addition, they note that if it did in fact exist, the claimed right would be eclipsed by Canadian

sovereignty for reasons of its incompatibility with Canadian sovereignty as such a right would not 'survive the transition to non-Mohawk sovereignty' and because the purpose of section 35(1) is reconciliation and thus, 'an affirmation of our collective sovereignty' (Mitchell, 2001, 6-9 & 47-90).

Reconciliation has not been a point of consideration in Supreme Court decisions pertaining to treaty rights, as the court has not applied its Aboriginal rights test to cases involving treaty rights. Instead, the court has developed a separate set of methods and tests to validate the existence of a claimed treaty rights and to ascertain the meaning and justifiable limitations of such rights. That said, I would argue that the court's understanding of reconciliation (and reconciliation as the purpose of s.35) is implicit in, or at very least consistent with, the court's understanding of, and justification for, infringement. Developed in cases such as *Sparrow* (1990) and *Badger* (1996), the infringement test recognizes the ability of governments to legitimately restrict or interfere with constitutionally recognized and protected rights when the limitation is unreasonable, does not pose 'undue hardship', and does not deny holders the ability to exercise their rights (*Sparrow*, 1990: 411). While this does not speak directly to the court's understanding of reconciliation and section 35 (1), the manner in which this test was transformed and expanded in *Marshall II* (1999) does. *Marshall II* removes the necessity of justification from the infringement test and creates the opportunity for 'unjustified infringement' (Henderson, 2000: 728) such that a government is now able to unilaterally impose regulations and restrictions which may not need to meet any standard or justification at all. In short, *Marshall II* subjects the constitutionally recognized rights of treaty nations to considerations of 'compelling public purpose' (McCallum, 2004), parliamentary supremacy (Barsh and Henderson, 1999: 17) and considerations of Canadian sovereignty (Borrows, 2002: 99). In essence, it is just as former Chief Justice Lamer argued in *Van der Peet*, when he suggested that the purpose of s.35 (1) was to 'reconcile the pre-existence of Aboriginal society with the sovereignty of the Crown' and asserted that reconciliation meant recognizing that s. 35 rights could be limited by Canadian sovereignty and had to be balanced against the rights of Canadians and the 'public interest'.

As evidenced by this brief discussion of the court's framing of reconciliation, Aboriginal rights and treaty rights, the judiciary has demonstrated itself to be ineffective in dealing with providing Indigenous peoples with the opportunities and the means to decolonize themselves and their relationship with the colonial state or a means to address the competing constitutional orders and the resulting disputes of sovereignty. That the judiciary has been ineffective in dealing with these matters is not simply an issue of the courts finding against First Nations. In short, the ineffectiveness of the judiciary in its dealings with Indigenous nations is the result of the courts' colonial mentality and its position as defender of the interests of the colonial state and the colonial paradigm. Their rationalization of, or test for, Aboriginal rights (including underlying the idea that Aboriginal rights must be compatible with Canadian sovereignty) and their understanding of treaty rights and infringement (both pre- and post-*Marshall II*) obfuscates and denies Aboriginal peoples their rights and the opportunities to exercise sovereignty, to engage a nation-to-nation relationship and to govern within their territory (i.e. manage their resources) in accordance with their own constitutional order (possibly, as recognized and affirmed in treaties). How the Supreme Courts obfuscates and denies First Nations their rights and the opportunity to re-establish their own constitutional orders and to realize the agreed upon nation-to-nation

relationship can be demonstrated with reference to the key components of the Aboriginal rights test and the infringement 'test', reconciliation and sovereignty.

As Russel Barsh and James (sakej) Youngblood Henderson explain, the idea that the purpose of s.35(1) of the constitution is reconciliation is "a doctrine plucked from thin air" (Henderson & Barsh 1997, 998). Nevertheless, the implications of such a doctrine are enormous. "Taken to its logical extreme, the 'reconciliation' test has the effect of extinguishing everything that had not already been judicially recognized prior to 1982" (Henderson & Barsh, 1997, 999). This is because the test implies that an Aboriginal right "may have been circumscribed or extinguished prior to 1982 by the mere existence of British settlement" (Henderson & Barsh 1997, 998). I concur with Henderson and Barsh's characterization of the implications of this test. Even if the test is not taken to its 'logical extreme' it is extremely problematic. By requiring the reconciliation of that which is inconsistent with Canadian law and/or the 'collective interests' or the 'common good,' the court is recognizing the supremacy of the laws, rights and interests of non-Aboriginal Canadians. Since the court views Indigenous nations as Canadians and as part of the 'common' or 'collective', it has defined the 'common good' and the 'collective interest' (as represented by the federal government) as the middle ground and product of reconciliation.

Given the parameters and limitations of the courts' view of reconciliation and its understanding of Aboriginal rights and treaty rights (and their respective tests and methods of interpretation), it is easy to understand why the court's vision and judicial action itself would be ineffective for Indigenous peoples seeking to reconcile competing constitutional orders and contested sovereignties. This is because, in its framing of reconciliation and Aboriginal and treaty rights, the court has chosen to ignore the contemporary manifestations of pre-colonial societies; to deny the treaty order or the nation-to-nation relationships established previously; to negate Indigenous sovereignty by requiring compatibility with Canadian sovereignty; to relegate discussions of decolonization and reconciliation to a consideration of what benefits the 'common good' (read: the colonial state). How can reconciliation between co-sovereigns be attained through judicial action when the court is a colonial institution that is charged with the responsibility of protecting the Crown's sovereignty? The constitutional order itself denies the treaty order, Indigenous sovereignty, Indigenous constitutional orders and Aboriginal and treaty rights. Still, while the courts are not the vehicle in which to pursue reconciliation, it is possible that the courts have opened a doorway to a future of reconciliation within Canada, wherein reconciliation and the processes of reconciliation (such as truth commissions) are envisioned 'outside of the box', as it has been defined by the courts.

CAIRNS AND RECONCILIATION

The courts are not the only ones to engage in a discussion of reconciliation or how such matters as Aboriginal interests, nationhood, sovereignty, self-government, and inherent jurisdictions have to be reconciled with the rights and interests of the Canadian state and the 'rest of Canada'. Though most are not framed within a discourse of reconciliation, there is much literature devoted to such discussions. Take for example, Alan Cairns' book, *Citizens Plus* (Cairns, 2000). While it does not address reconciliation directly, his visioning of self-government and the relationship between First Nations and Canada can easily be discussed in terms of reconciliation. Reacting to the *Report of the Royal Commission on Aboriginal Peoples* and contemporary thinking about

self-government that calls for a renewal of a nation-to-nation relationship between Canada and Indigenous people, Cairns calls for a return to the citizenship model (citizens plus) that was originally developed in the 1967 *Hawthorn Report* (Hawthorn, 1967).

Cairns discusses self-government as a contemporary political demand which emerged as “... part of a major effort to overturn a historic pattern of inequality between Aboriginal peoples and other Canadians” (Cairns 2000, 43). Presenting self-government as a contemporary reaction to colonization, Cairns ignores the fact that First Nations were (and arguably are) sovereign nations with their own constitutional orders. He also disregards the fact that by standards of both international law and domestic law (not to mention treaty constitutionalism), Indigenous nations continue to have an inherent right to self-determination. Instead, he focuses on the terms of a new relationship between the colonizer and the colonized, suggesting that the way forward will not be grounded in a recognition of parallelism or a modernization of Aboriginal traditions, but on a recognition by the Canadian government of Aboriginal peoples as ‘Citizens Plus’. This formulation of ‘allowing’ Aboriginal people to realize some of their demands, of course maintains “Canadian solidarity firmly based on a common, shared, equally valued citizenship” (Cairns 2000, 115).

According to Cairns, such a solidarity or shared citizenship is fundamental to Canada’s survival and to Canadian acceptance of, and willingness to reconcile with, Aboriginal peoples and their governments. Similarly, Cairns argues that a shared citizenship is equally fundamental to the future and success of Aboriginal self-determination in Canada. Cairns sees citizenship as a unifier of Canadian society (including Aboriginal-state and Aboriginal-Canadian relations), and thus arguably, a grounds for reconciliation whereby Indigenous peoples are reconciled with Canada through the acceptance of this shared citizenship and the continuance of some semblance of ‘aboriginality’ and ‘rights’ (the ‘plus’ in citizens plus).

Several scholars, including Joyce Green, have used Cairns’ conceptualization of citizenship and his proposal to renew Canada through the recognition of Aboriginal peoples as ‘citizens plus’ (though in a slightly altered form) as a foundation for thinking about issues of citizenship, reconciliation and post-colonial federalism (Green, 2005). For many other Aboriginal and non-Aboriginal scholars, however, this vision of self-government has been criticized for perpetuating colonialism and denying true reconciliation (Alfred, 1999; Ladner, 2001) because it allows for the continued domination of the majority and a citizenship which benefits the colonizer and ignores Indigenous peoples as nations with their own constitutional orders. I concede, that scholars such as Green and Hunter may be right in suggesting the citizenship and participation in Canadian institutions may enable the ‘indigenization’ of the settler state and the creation of what they term a ‘post-colonial nation’ (Hunter, 2003; Green, 2005, 343). That said, however, such action does not, in my mind, facilitate the reconciliation of nations and constitutional orders, for it merely subsumes and absorbs one into the other and expects that the homogeneity resulting from reconciliation is indigenized and not simply a perpetuation of the colonial order. Therefore, neither Cairns nor the ideas which his work has spawned, provide the foundation for reconciliation, as they obfuscate and deny Indigenous constitutional orders and seek to recreate Indigenous nations as citizens (plus) of the Canadian state, albeit possible altered through indigenization.

BORROWS AND RECONCILIATION

Approaching the subject of reconciliation and/or decolonization from a completely different perspective than Cairns (though in a manner somewhat similar to Green), John Borrows is also so captivated by ideas of citizenship that it too becomes the foundation for his visioning of an acceptable future (Borrows, 2002). Influenced by contemporary liberal scholars citizenship and diversity such as Kymlicka, Norman, and Tully, Borrows takes as a given the idea of a shared citizenship between Indigenous peoples and the settler society. However, unlike Cairns who seeks to undermine Indigenous nationalism and create a common citizenship whereby Indigenous peoples are *citizens plus* with governments that are essentially municipalities plus, Borrows does not call for the further colonization to create a foundation for reconciliation and/or a (re)newed relationship. Instead, Borrows starts from the premise that rather than ceasing to exist with the magical acts of discovery and assertions of sovereignty, Indigenous nations and Indigenous laws (and constitutional orders) continue to exist – often as part of the British/Canadian constitutional order.

According to scholars such as Borrows and Macklem, sovereignty, is not magic; though most assume it to be. To this end, Borrows states:

Its mere assertion by one nation is said to bring another's land to a 'definite and permanent form'; simply conjuring sovereignty is sufficient to change an ancient people's relationship with its land. A society under sovereignty's spell is ostensibly transformed. Use and occupation can be extinguished, infringed, or made subject to another's design (Borrows, 2002, 94).

Challenging claims that assertions of sovereignty displaced the Indigenous people of their laws and territory, Borrows argues that such assertions are not only absurd (as was suggested by Chief Justice Marshall of the US Supreme Court) but a direct violation of all principles of the rule of law. For Borrows, the Crown's assertion of sovereignty did not extinguish or displace Indigenous tenure or law. As a result, he finds much fault in the courts of reconciliation. By suggesting that the rights of Aboriginal people have to be reconciled with the Crown's sovereignty, the court is effectively subjecting Indigenous people to an alien sovereign and sanctioning their colonization (Borrows, 2002, 97-98). This is extremely problematic given the fact that given the fact that the legal and constitutional bases of such assertions are questionable. Questionable, to the extent that Borrows concludes, "a faithful application of the rule of law to the Crown's assertion of title throughout Canada would suggest that Aboriginal peoples possess the very right claimed by the court." (Borrows, 2002, 113)

Reconciliation, therefore, is not a matter of reconciling Aboriginal 'pre-existence' with Canadian sovereignty as Indigenous nations never surrendered their sovereignty nor provided their consent. Instead, Indigenous constitutional orders continue to exist, though in an altered form as they now exist as part of the Canadian order which is nothing but an 'amalgam of different ... orders'. Thus, for Borrows, reconciliation is really a matter of reconciling Canadian claims with the tenure and constitutional orders of Indigenous peoples and bringing these orders to life within the Canadian (amalgam) order. Since Aboriginal laws and territories form the basis of Canada and since self-determination is limited not by reserves but by traditional territories, Borrows calls for the Indigenousization of Canada as the Indigenous in Canada has for too long been excluded and had their rights and territories impeded upon. In so doing, he argues that,

Each party needs to ... negotiate and reconcile their differences through joint effort. Aboriginal perspectives underlying the Canadian constitutional framework need to be brought to light. Adherence to the rule of law requires that the parties develop a conception of participation and citizenship in Canada that respects and includes Aboriginal peoples and their laws more explicitly in its framework. (Borrows, 2002, 137)

To this end, Borrows, suggests that this gradual process of Indigenization will result in Aboriginal peoples, laws and traditions playing a greater role in Canada to the extent that Canada is taken over and actually becomes that which it says it is; a new country and a new political order created *on* Native land.

Borrows' plan of Indigenizing Canada offers a very innovative way of facilitating reconciliation between Aboriginal peoples and Canadians by creating processes of inclusion and infusion which are aimed at diffusing Canadian legal, societal and political norms and creating a new, indigenized homogeneity, which respects and is based on the traditions of all of the nations (alien and Indigenous) which constitute Canada. This is among the most innovative of visions, and unlike the visions put forth by Cairns or the Supreme Court, it would facilitate the creation of some semblance of a post-colonial Canada (as is Borrows goal to create a new legal and political order based on a recognition and inclusion of the amalgam of nations). The problem is, it would nevertheless, represent a perpetuation of colonialism as he merely calls for the reform or Indigenization of those very colonial laws and institutions that have subjugated, dominated and oppressed Indigenous peoples and further subjects Indigenous laws, traditions, philosophies and practices to the colonial institutions and interpretation.

Even more problematic, however, is the fact that this plan represents a direct violation of the treaty order and/or full Indigenous sovereignty where no powers or responsibilities were delegated to the Crown through a treaty process. It is a direct violation of the treaties and Indigenous constitutional orders. Indigenous peoples never agreed to surrender their own constitutional orders in favour of incorporating them (along with those of all other Indigenous nations) into the Canadian constitution order whereby their own laws and traditions would be subject to the authority of an Indigenized court (one which is infused with Indigenous laws and traditions, and asked to rule using such). Indigenous constitutional orders do not subject the aliens to their authority, but instead recognize that Canada has the right to govern herself. It is giving up Indigenous constitutional orders and adopting a amalgam constitutional order and surrendering Indigenous sovereignty to be nations within Canada, nations that are simply a representation of Canadian diversity; but Canadian nonetheless.

To put it another way, while Borrows calls for an Indigenization of Canada, his vision not only subjects Canada to increased Indigenous control (direct and indirect through the incorporation of Indigenous laws) but forces the assimilation of Indigenous nations into Canada and the dismantling of their constitutional order. Borrows therefore, does not offer an acceptable vision of reconciliation, for reconciliation is not a matter of subjecting one party to the order and control of the other or forcing one to dismantle and give up that which is the source of the conflict – competing constitutional orders and contested sovereignties.

RECONCILIATION?

While I have concluded that the visions of reconciliation inherent in the writings of the courts, Cairns and Borrows are not representative of (true) reconciliation. The question is, what about the other literatures that I have not discussed in this draft of this paper – Kymlicka, Norman, Tully, Salee, Macklem, Alfred, Barsh, and Monture-Angus. Most of these scholars recognize that the major conflicts that exist and erupt today in Indian country, and in the relationship between Indigenous nations and the settler society, do so because of these competing constitutional orders (for example, Burnt Church). Still, my reading of this literature suggests that none offer a complete vision of reconciliation that would address the two constitutional orders (Tully, Macklem and Salee, come close to doing so). One must ask, why is it that most contemporary scholarship is ignoring the two constitutional orders or at very least, trying to sidestep this entanglement, and construct an alternative (such as self-government/self-administration and citizens plus)? Is it because doing so brings to question the legitimacy of Canada as a nation and the ability of the Crown to assert sovereignty over the entire territory (as is evident in the writings of Macklem)? Is it because the competing constitutional orders are irreconcilable? Or is it because, the rhetoric of reconciliation does not fit the situation (as was suggested by a colleague, and raised at the outset of this paper)? The literature on reconciliation may offer a means of answering such questions.

According to John de Gruchy, “reconciliation is about the restoration of justice, whether one has to do with ... the renewal of interpersonal relations or the transformation of society” (de Gruchy, 2002, 2). It is true that the courts, Cairns and Borrows all speak to a transformation of Indigenous society either through judicial interpretation (limiting) of their rights, the renewal of the Aboriginal-state relationship through the recreation of Canadian citizenship, or the creation of a ‘post-colonial’ Canada through Indigenization. But, none escape the confines of rhetoric and provide a viable vision of a reconciliation that would transform society in such a way so as to address competing constitutional orders or facilitate processes of restorative justice that would address the historical oppression of Indigenous nations, laws and constitutional orders by alien nations. The closest we get to achieving reconciliation is in Borrows. But here too, facilitating reconciliation between nations (and their respective orders) is passed by as Borrows chooses to focus on the process of recreating them as one.

Perhaps the issue with reconciliation is with the concept itself, for what is reconciliation and what does it include? Maybe it is inappropriate to be using this concept or, for that matter, to be seeking reconciliation of the seemingly irreconcilable constitutional orders. Admittedly, it does not fit with how much of the literature has conceptualized reconciliation, nor with what most of the literature has been interested in as a subject matter. In fact, the issue of reconciling constitutional orders does not fit readily with the existing reconciliation literature. Still, it does fit. Not only have the courts enabled this fit in suggesting reconciliation as a constitutional purpose and requirement, but so to has the literature in suggesting that there is such a thing as political reconciliation (de Gruchy, 2002, 26). According to de Gruchy, political reconciliation “refers to projects such as the process of national reconciliation in South Africa, the overcoming of sectarianism in Northern Ireland, or the achievement of sustainable peace in the Middle East” (de Gruchy, 2002, 26). While not a matter of global interest (or national, for that matter) and few major works have been written about political reconciliation and colonialism, the concept of reconciliation does fit the case.

As is demonstrated in the case of Australia's attempt at political reconciliation, the problems associated with this concept and such processes are a matter of avoidance and homogeneity. In 1991, Australia embarked on a ten-year official reconciliation process, which was intended to address "Aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and other relevant matters" (*Council for Reconciliation Act, 1991*). Despite the potential of this process, Aboriginal leaders were gravely disappointed as the government used it as an exercise in Australian nation-building, refused to deal with what it defined as the 'politics of symbolism' (i.e. sovereignty and self-determination) and forced the process to concentrate on the 'practical issues' in peoples day to day lives (Short, 2003, 502). In the end, this process failed to achieve Indigenous objectives for it avoided issues that questioned colonialism and the legitimacy of Australian rule, and it supported the existing homogeneity of the nation by offering to reconcile or bring Aboriginals 'into the fold' without altering or challenging the constitutional sensibilities and status of the nation. That is to say, reconciliation was used not to achieve a mutually agreeable political reconciliation of the primary issues resulting from colonialism (land rights, sovereignty and self-determination) but to "sustain and legitimate existing inequalities between Indigenous and non-Indigenous peoples in Australia" (Augoustinos, Lecouteur & Soyland, 105).

The same could be said with respect to the manner in which the Canadian courts have framed reconciliation. Reconciliation has not framed in a manner that gives voice to the big political issues of colonialism and decolonization or that facilitates (or even calls for) political reconciliation. Further, much like Australia, the court's attempts at reconciliation has 'sustained and legitimated inequalities' such that in both *Van der Peet* and *Marshall II* the court limited economic development (commercial) by reason that Aboriginal and treaty rights had to be weighed against the rights of other Canadians to sustain and/or develop a public fishery. Simply put, the courts avoided the bigger issues of competing constitutional orders and advanced a doctrine of homogeneity where Aboriginal and non-Aboriginal peoples constitute a singular peoples unified by both their 'collective interest' or 'common good' and the unequivocal sovereignty of the Crown.

Still, the situation in Canada appears to be more promising in the immediate than the Australian situation. Despite the fact that Australians have been engaged in a discussion of reconciliation nationally since the early nineties (a process which is likely, in the long run, to facilitate massive societal change), as Henderson reminds us, Canada has, by and large, already reconciled the two constitutional orders in the treaty process (Henderson, Benson & Findlay, 2000). As I have written elsewhere, and alluded to in my discussion of Treaty Constitutionalism (or Treaty Federalism) earlier in this paper, the treaties created a constitutional order which recognized and affirmed the rights of each nation to govern their own people within a given territory, and facilitated the delegation of certain responsibilities to the colonial/Canadian government (typically as mutual jurisdictions). Jurisdictions not specifically delegated to the colonial government remain an exclusive domain of the Indigenous constitutional order. Thus, in the event that no treaty was negotiated, all jurisdictions remain that of the Indigenous constitutional order as the relationship between these nations and their jurisdictions were never reconciled. Whichever the case, both situations of competing constitutionalism (treaty and non-treaty) were further reconciled in 1982 with the inclusion of Aboriginal and treaty rights in the Canadian

constitution. In fact, many have argued that in effect 1982 represented a gesture towards political reconciliation as Indigenous constitutional orders were implicitly recognized within the Canadian Constitution. That said, formal political reconciliation continues to be necessary as Indigenous constitutional orders continue to be the object of the colonial/Canadian government's oppression, domination; efforts which have focused on dismantling Indigenous constitutional orders and maintaining a system of colonial administrators (*Indian Act* band council government).

Acknowledging that reconciliation – particularly political reconciliation – is necessary is a first step. This step has been taken at several different points in time by the treaty makers, the judiciary and by those politicians (and academics) that patriated the constitution in 1982. To go beyond this first step and to succeed in meaningful political reconciliation, we must begin to entertain questions of possibility. As Henderson et.al. note,

The challenge is to make the present and the future an enabling environment for all peoples, and to promote a fair and just society by respecting the treaty reconciliations and creating new reconciliations where needed. As the Lamer Court said, “we are all here to stay.” The courts should not, through narrow interests or neglect, compromise the future. The future is the only heritage that remains uncontaminated by colonial thinking and laws. ... When all Canadians start to conceive a way to restore our environment, to cleanse our legislative and judicial systems, and to imagine a pluralistic future of fresh chances and unlimited possibilities, we shall begin to share our future. The crucial question is how do we get there? (Henderson, Benson and Findlay, 2000, 428).

For legal scholars such as Henderson, Benson, Findlay, Barsh, Little Bear and Macklem, the answer lies in the Canadian constitutional order.

CONSTITUTIONAL PONDERINGS ‘take 35’

The inclusion of Aboriginal and treaty rights in the Canadian Constitution in 1982 ushered in great possibilities for Indigenous peoples and their constitutional orders. It offers the possibility of decolonizing Canada and creating a post-colonial country based on the recognition and affirmation of Indigenous constitutional orders in s. 35 as part of the rubric of Aboriginal and treaty rights. As Henderson *et. al.* argue:

Section 35(1) expressly affirms Aboriginal and treaty rights in the constitutional supremacy of Canada. ...

The *Constitution Act, 1982* has reconciled Aboriginal peoples with constitutional supremacy, the structural division of the imperial sovereignty. It vests their constitutional rights in the constitution of Canada, which is different than the Lamer Court's interpretation of constitutional rights reconciliation of Aboriginal peoples with the sovereignty of the Crown. While treaty relationships still remain vested with the imperial Crown, the treaty and Aboriginal rights are now vested in the Aboriginal peoples of Canada. The constitution of Canada replaces the indivisible sovereignty. ...

The spirit and the intent of section 35(1), then, should be interpreted as “recognizing and affirming” Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights. ...

Since 1982, the constitutional duty of courts and legislatures is to respect Aboriginal peoples and their laws and decisions as part of the sovereignty of Canada. (Henderson, Benson & Findlay, 2002, 432-434)

Henderson and others claim that the recognition and affirmation of Aboriginal and treaty rights in the *Constitution Act, 1982* further reconciled the Aboriginal constitutional order with the Canadian constitutional order (and its claims of sovereignty) by placing Indigenous constitutional orders within the framework of constitutional supremacy.

This is essentially an argument of treaty constitutionalism, post-1982. It is a logical method of constitutional analysis or understanding of s. 35 and the Canadian constitution from the vantage of treaty constitutionalism or treaty federalism. It is an understanding that is both historically grounded and widely held (as it was in 1982) as it honours the spirit and the intent of the treaties, it does not deny or obfuscate Indigenous constitutional orders and it provides a foundation for decolonization rather than supporting the continuation of the colonial regime and its practices of political genocide. Further, it is an understanding of the Canadian constitution that speaks of political reconciliation and thus, the formal reconciliation of Indigenous and Canadian constitutional orders in a manner that does not avoid the ‘big issues’ of sovereignty, colonial legacies, decolonization, constitutional pluralism and non-necessity of homogeneity.

Understood in this light, s. 35(1) is an affirmation of treaty constitutionalism. As explained previously, this historically based understanding of the treaties contends that treaties recognized and affirmed Indigenous constitutional orders, delegated certain powers and responsibilities to the Crown and provided colonial orders with the ability to govern its own people within the shared territories. Meaning that each constitutional order would continue to exist independently, limited by the terms of the treaties (both in terms of the relationship and the jurisdictions it created/transformed). Under the terms of the treaties, Indigenous constitutional orders are protected (as is the colonial/Canadian order), non-interference was promised and thus, ‘legal orders, laws and jurisdictions’ were maintained indefinitely until such time as both parties agreed to alter the terms of the treaty. Where no such treaty was negotiated, the prerogatives of both ‘sovereigns’ remain intact as neither constitutional order has ever been subsumed by, limited by and/or incorporated into the other. Whereas Indigenous constitutional orders exist under the rubric of treaty rights for treaty nations, where no treaty exists these constitutional orders give meaning to the nation’s Aboriginal rights as they frame and define the rights and responsibilities of both citizens and the nation. Thus, regardless of treaty or the lack thereof, Indigenous rights and responsibilities are vested in and limited by Indigenous constitutional orders and merely ‘recognized and affirmed’ and not created or vested in s. 35(1) of the Canadian constitutional order. Still, Canadian governments (and their courts) claim exclusive jurisdiction over Indigenous nations and their territories, and claim Aboriginal and treaty rights as but a mere burden on the Crown’s sovereignty.

To entertain questions of Canadian sovereignty and the resulting claims of exclusive jurisdiction (divided between Canadian governments and excluding Indigenous nations), or to suggest that Indigenous claims of rights and responsibilities (framed as an Aboriginal or treaty right) must be reconciled with the sovereignty of the Crown is wrong. Such presumptions are simply wrong. This treatment denies and obfuscates the history of colonization and the rights of Indigenous nations (as established in the colonial period). The presumption of sovereignty and exclusive jurisdiction have been challenged in Canadian law (*Mitchell v. MNR, R. v. Pamajewon*) and in legal and constitutional scholarship (Henderson, 1996). As Patrick Macklem explains:

How is it that the settling nations were able to make claims of sovereignty over these people, claims that form the historical backdrop to contemporary assertions of Canadian sovereignty over Canada's First Nations? In the debates surrounding Confederation, there was no discussion whatsoever about the propriety of asserting Canadian sovereignty over Canada's indigenous population. Sovereignty was assumed, and its assumption is basic to the Canadian legal imagination. Aboriginal peoples in Canada are currently imagined in law to be Canadian subjects, or Canadian citizens. Parliament is imagined to possess the ultimate law making authority over all its citizens. A fundamental assumption underpinning the law governing Native people is that Parliament has the authority to pass laws governing Native people without their consent (Macklem, 1993, 13).

As Macklem explains, such assumptions are extremely problematic and their legitimacy and legality are questionable in international law and domestic law and legal doctrines (constitutional and otherwise). Macklem is not alone in questioning and challenging these assumptions that form the bedrock of the Canadian constitutional order as Indigenous nations never surrendered their sovereignty nor provided their consent. Scholars such as Borrows use this as the basis to argue that Indigenous sovereignty and constitutional orders continue to exist in an altered form as they become a part of the Canadian constitutional order (an "amalgam of different ... orders"), thus necessitating the incorporation of Aboriginal ideals and principles into the Canadian constitutional order (Borrows, 2002). Meanwhile, others see the continuance of Indigenous sovereignty and constitutional orders as the basis for Aboriginal self-determination and even treaty constitutionalism (Tully, 1995).

The fact is, Indigenous people never ceded their rights and responsibilities (collective sovereignty) under their own constitutional order nor did they consent to be ruled by the Crown or her operatives (such as Parliament). Such claims are simply historical myths justified by legal conventions and tools created by colonial authorities to justify and legitimate their expansion and claims vis-à-vis other would-be-colonizers, and European political, economic, spiritual and legal elite. But while the 'legal magic' of Europe and its colonial offspring claims to have vanished the rights and responsibilities of the 'other', the actions of colonial authorities tell a different story of recognizing and affirming Indigenous nationhood, rights and responsibilities through the treaty process and beyond. Most importantly, the 'legal magic' did not eliminate the Indigenous constitutional orders for they continue to exist, in accordance with their own legal and political traditions, to this day; though in an altered form limited by treaty and by colonial/Canadian policies.

Sidestepping the matter of ‘legal magic’ and accepting that Indigenous constitutional orders not only continue to exist but exist as part of the Canadian constitutional order as Aboriginal and treaty rights in s. 35(1), leads one to question the meaning of Indigenous constitutional order in the contemporary (as part of the Canadian Constitution) and the meaning of political reconciliation (particularly constitutional reconciliation). Section 35, as so many have argued, contains within it the inherent right to self-government (not simply self-administration); a right which is recognized in but not created by the Canadian constitution. Self-governance is a right and a responsibility vested in Indigenous constitutional orders and as such contains all jurisdictions essential for contemporary Indigenous governance in Canada. In other words, vested in “Aboriginal legal orders, laws and jurisdictions and unfolded through Aboriginal and treaty rights” (Henderson, Benson & Findlay, 2002:433), the s. 35(1) right to self-determination contains all matters of jurisdiction – including both ‘core’ and ‘peripheral’ or secondary matters – subject to the limitations agreed to in each nation’s treaty (historic or future).

While there is no need to engage in a discussion of self-governance with Canadian governments in so far as jurisdictional matters, legal orders, laws and structures of governance are concerned, such a need may exist within each nation. Indigenous peoples will need to engage in processes of decolonization for Indigenous constitutional orders have not been predominant in Indigenous politics since the Canadian government engaged in political genocide and institutionalized the *Indian Act* system of government (Ladner, 2003a). Just as the Haudenosaunee say of their treaties such as the Covenant Chain, Indigenous constitutional orders need to be dusted off and polished by both Indigenous governments (traditional governments especially) and the people of the nation. In rekindling and re-empowering Indigenous constitutional orders or in dusting off and polishing these orders, Indigenous peoples are likely to need to engage in discussions of renewing, and possibly even recreating, Indigenous legal and political systems.

No matter what the courts think, Indigenous nations do not exist in a state of permafrost, with needs, aspirations, rights, responsibilities, legal traditions, political institutions, laws that were frozen in time when they came into contact with Europeans. Legal, jurisdictional and administrative necessities that did not exist at the time of contact or when the Canadian government engaged in political genocide using the *Indian Act* exist and will continue to emerge from time to time. Constitutional orders need to adapt and evolve to respond to ‘modern’ necessities such as the regulation of motor vehicles and traffic, environmental protection, emergency preparedness and power delivery. These processes of constitutional renewal have to be engaged just as the Canadian constitutional order is continuously renewed through constitutional interpretation; executive, legislative and/or judicial action; and, intergovernmental relations.

Regardless as to how these Indigenous constitutional orders are renewed, there is no need to negotiate self-government in so far as jurisdictional matters are concerned. But, such a need may exist to reconcile and coordinate competing and shared areas of jurisdictions and to address the sharing of traditional territories and their resources. In deed, many treaties address matters of shared jurisdiction as is the situation with education in the case of the so-called numbered treaties (Ladner, 2003b). In these instances Indigenous and Canadian governments will need to engage in some semblance of political reconciliation so as to coordinate their policy and programs or to agree upon a division of responsibility in shared areas as has been done in areas

of jurisdiction that are shared by both provincial and federal governments (actual or by way of the federal spending power). Further, in areas where both Indigenous and Canadian governments claim the same jurisdiction and the corresponding right and/or responsibility, such is the case in the matter of the salmon fishery in Mi'kmaq where provincial, federal and Mi'kmaq authorities all claim to have jurisdiction. In such situations, reconciliation may be necessary to coordinate jurisdictions and avoid confrontation.

Reconciliation of these competing constitutional orders by means of negotiation, coordination and interpretation need not endure the same fate and failures of other processes of reconciliation in the Fourth. Unlike the ten year process of official reconciliation on Australia, constitutional reconciliation need not be doomed because of avoidance and homogeneity. Recognizing each nation as having its own constitutional order automatically sidesteps issues of homogeneity for it recognizes the political diversity of nations and their treaty relationships and it fails to support the existing homogeneity of the colonial nation, its vision of reconciliation and its claims of sovereignty and exclusive jurisdiction. Instead of avoiding pertinent issues underlying the need for reconciliation, it offers an opportunity to achieve a mutually agreeable political reconciliation of the primary issues resulting from colonialism (land rights, sovereignty and self-determination).

Reconciliation of these competing constitutional orders by means of consultation, coordination, intergovernmental negotiation and judicial interpretation, would not necessarily force Indigenous nations to reconcile their existence with the sovereignty of the Crown. According to Chief Justice McLachlin in her decision of *Haida Nation v. British Columbia* (2004),

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiations and proof. ...

...The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal people with respect to the interests at stake. The effect of good faith consultation may reveal a duty to accommodate (*Haida Nation*, 2004: 5-6).

Though McLachlin C.J. goes on to suggest that the "Crown must balance Aboriginal concerns reasonably with ... other societal interests" (*Haida Nation*, 2004:6) the emphasis remains on acting in accordance with the honour of the Crown, even when rights have not fully been demonstrated. Moreover, reconciliation between Aboriginal people and the Crown involves and necessitates the honour of the Crown and thus, the accommodation of Aboriginal interests without the Crown 'cavalierly running roughshod over Aboriginal rights'.

This is a bold statement involving the interpretation and protection of Aboriginal rights and Crown responsibility from a court that seemed set to curtail Aboriginal rights in cases such as *Van der Peet* and *Mitchell* and intent on providing governments with every opportunity to forgo treaty rights in favour of societal interests and Crown sovereignty in cases such as *Marshall II*.

That said, in some respects, *Haida* represents a return to the past as well as a new treatment of Aboriginal rights and a more nuanced, Aboriginal-friendly understanding of reconciliation. Though not fully developed or articulated as a basis of interpreting and protecting Treaty rights, Binnie's decision of *Marshall* seems to suggest that the honour of the Crown must be upheld in understanding treaties such that the context of the treaty, its spirit and intent, and the intentions and understanding of Aboriginal peoples are given due consideration.

As Henderson points out, the court fell short of "comprehending these *sui generis* inherent rights in terms of the Aboriginal jurisprudences in which they have their sources" (Henderson, 2004: 75). Perhaps, however, *Haida* represents a partial acknowledgement of this source of Aboriginal rights (and thus those rights protected by treaty) and the need to accommodate and reconcile these competing orders in a manner consistent with the honour of the Crown, the treaties, and a contextualized understanding of these *sui generis* rights. Though the federal government is claiming otherwise, 'word on the street' suggests that *Haida* does indeed represent a shift in the court's understanding of both Aboriginal rights and the Crown's responsibilities (its honour) and that it may open the door more widely for a discussion of reconciliation. A discussion which would facilitate a step towards a meaningful and mutually beneficial reconciliation of the competing constitutional orders; a reconciliation where absolute primacy would not be given to assumptions of Crown sovereignty or Canadian interests in so far as accommodation of Aboriginal interests is necessary to maintain the honour of the Crown.

Regardless, as to what opportunities and protections have been created by the courts or the judiciary's understanding of Aboriginal and treaty rights, scholars will continue to think about questions of reconciliation and the meaning of s. 35(1). Conversations with Sakej Henderson and Leroy Little Bear have led me to think beyond the current thinking about reconciliation, the manner in which treaty and Aboriginal rights are being understood, defined and confined by the courts, and current understandings (in the literature and elsewhere) of treaty constitutionalism. They have me thinking about reconciling competing constitutional orders and what s.35 (1) means for both Indigenous constitutional orders and the Canadian constitutional order. To understand the meaning of s.35 (1), reconciliation, and the implications of my ponderings thus far, one has to understand how it is that we came to need reconciliation to address contested sovereignties and competing constitutional orders.

According to Henderson,

These Aboriginal orders and treaties had the force of imperial law within North American colonies. The remarkable thing is that, despite this, the British imperial order forgot about reconciling them until 1982. The imperial statutes that established delegated self-rule and responsible government for the colonies never sought to reconcile these new powers with the pre-existing Aboriginal orders or with the empire's treaty obligations to Aboriginal peoples. The government structures these statutes created with care for the colonists embodied the key principles of provincial federalism but were silent about the Aboriginal orders and treat federalism. ...

...The constitutional affirmation of treaty and Aboriginal rights was designed to prevent the federal and provincial orders of government, as well as the judiciary,

from flouting or overlooking Aboriginal rights or their underlying principles, with a view to securing equality a dignity in Canada for Aboriginal peoples and their rights. The ultimate purpose of these reforms was to create constitutional conditions – a legal and epistemic pluralism protected by the constitutional order from pragmatic, majoritarian politics – within which Aboriginal peoples and Canadians could rediscover good relations and live together on the shared land more compatibly (Henderson, 2004: 75-76).

In creating this ‘legal and epistemic pluralism’, s.35 (1) constitutionalized Indigenous political orders and made them part of the Canadian constitution. In so doing it reconciled what Henderson terms provincial federalism with treaty federalism or treaty constitutionalism. To take this one step further (as Henderson and Little Bear have urged), the rights and responsibilities vested in these Indigenous constitutional orders and recognized and affirmed them within section 35(1) were reconciled in 1982 through the process of constitutional renewal with those rights and responsibilities (jurisdictions) which are vested within sections 91, 92 and 93 of the Canadian constitutional order. As a result of this constitutional pluralism and because both sets of jurisdictions exist within (implicit recognition or explicitly established) the Canadian constitutional order, there is no need to reconcile these rights with the sovereignty of the Crown. The process of constitutional renewal did just that as it recognized two sources of political authority, rights and responsibilities and sovereignty. Regardless as to this recognition and its implications, as both forms of federalism exist as part of the Canadian constitution, and thus, as Henderson argues are the subject of constitutional supremacy rather than unconstitutional intrusions legitimized using claims of parliamentary supremacy or even judicial supremacy (see: Henderson, 2000).

While I agree, with Henderson (and Little Bear) to the extent that section 35(1) recognizes and affirms Indigenous constitution orders as separate yet equal constitutional orders within the Canadian Constitution, I would argue that further reconciliation is necessary. As I alluded to earlier in this paper, there exists a great need to reconcile these contested sovereignties and the resulting competing constitutional orders. Recognition – explicit or implicit – does not make for good governance and smooth transitions between jurisdictions, especially when jurisdictions will continue to be claimed by a number of different constitutional orders with the likelihood of multiple spheres of jurisdiction occupying the same territory. Constitutional orders will have to be accommodated and jurisdictions will need to be reconciled through negotiation, judicial interpretation, constitutional dialogues between governments and the courts, and consensual constitutional change or deviation. Legal and political dialogue will be necessary. As will a formal process of constitutional reconciliation. To this end, despite my disagreement with the judiciary’s understanding of reconciliation (reconciling the pre-existence of Aboriginal people with the Canadian sovereignty), I would argue that the courts have opened the door in making reconciliation a constitutional requirement; especially when the requirement of reconciliation is paired with the constitutional requirement to uphold the honour of the Crown and Indigenist understandings of the Canadian constitution, Indigenous constitutional orders, history and principles of treaty constitutionalism. Now, if only the courts would remember the principles of constitutional law that are to guide their decisions: “It is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution” (*New Brunswick Broadcasting Co. v. Nova Scotia*, 1993, 373).

‘Cut’: Final Thoughts on Rethinking our Future Together

As they exist as part of the Canadian constitution, the courts cannot abrogate or diminish Indigenous constitutional orders. Still, while constitutional recognition may provide for the legal reconciliation of the two orders, it does not provide for political reconciliation. It is a situation which if taken to its logical conclusion accounts for lack of substantive change in Aboriginal politics since 1982. This is because, it is the very institutions that see themselves as the defenders of the Crown’s sovereignty which are being asked to denounce this sovereignty and recognize the sovereignty of Indigenous peoples within both Indigenous and Canadian constitutional structures. Thus, given that the courts have been and are likely to be quite useless in acting as an arena in which these constitutional orders can be reconciled (unless the court’s interpretation of reconciliation holds), some alternative mechanism of reconciliation needs to be developed. It needs to be developed not only because of the courts’ inabilities, but also because it is the political relationship between Indigenous nations and the Canadian government that needs reconciliation so as to ensure that the ripples caused by overlapping and contradictory jurisdictions are smoothed over. It is political, because as the courts have said, ‘we are all here to stay’ and thus as interdependent and intertwined people and nations, we have to find a way to live here together in a mutually agreeable and mutually beneficial manner.

Finding our way, will take time, dialogue and education. After all, how can Canadians begin to engage in a discussion of reconciliation or to reconcile constitutional orders when most are ignorant about the real constitutional history of this land, and when most are unaware (or emphatically deny) of the need for reconciliation. Further, as my brief discussion of the literature suggests, a means of reconciliation that adequately addresses the competing constitutional orders (now unified under Canada’s constitutional order) will need to be developed. While finding our way and constructing a post-colonial polity will take time, time is of the essence for while the relationship between these constitutional orders has yet to be fully realized, one thing is clear, Indigenous peoples have the ability to engage their governments in the range of jurisdictions explicit within their own constitutional orders, protected in the treaty order (regardless of treaty), and recognized and affirmed in s. 35 (1) of Canada’s *Constitution Act, 1982*.

Works Cited

- Alfred, Taiaiake. *Peace, Power, Righteousness: an indigenous manifesto*. Don Mills: Oxford University Press, 1999.
- Anghie, Antony, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" *Harvard International Law Journal* 40:1, 1990.
- Augoustinos, Martha, LeCouteur, Amanda, and A. John Soyland. "Self-sufficient arguments in political rhetoric: constructing reconciliation and apologizing to the Stolen Generations." *Discourse & Society*, 13:1, 2002:105-142.
- Barsh, Russel Lawrence and James (Sakej) Youngblood Henderson. "Marshalling the Rule of Law in Canada: Of Eels and Honour." *Constitutional Forum* 11: 1, 1999: 1-18.
- Barsh, Russel and James Youngblood Henderson. "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand." *McGill Law Journal* 42, 1997: 994-1009.
- Borrows, John. *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press, 2002.
- Cairns, Alan. *Citizens Plus: Aboriginal Peoples and the Canadian State*. Vancouver: University of British Columbia Press, 2000.
- Council for Reconciliation Act*, Australia, 1991.
- Cornell, Stephen. *The Return of the Native: American Indian Political Resurgence*. New York: Oxford University Press. 1988.
- de Gruchy, John W. *Reconciliation: Restoring Justice*. Minneapolis: Fortress Press, 2002.
- Green, Joyce. "Self-determination, citizenship, and federalism: indigenous and Canadian palimpsest." In *Reconfiguring Aboriginal-State Relations*, ed. Michael Murphy, 329-355, Montréal: McGill-Queen's University Press, 2005.
- Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511
- Hawthorn, Harry. *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*. Ottawa: Indian Affairs Branch, 1967.
- Henderson, James (Sakej) Youngblood. "Aboriginal Jurisprudences and Rights." *Advancing Aboriginal Claims: visions, strategies, directions*. Ed. Kerry Wilkins, Saskatoon: Purich Publishing, 2004: 67-90.
- Henderson, James (Sakej) Youngblood, Benson, Marjorie, and Isobel Findlay. *Aboriginal Tenure in the Constitution of Canada*. Scarborough, ON: Carswell Thomson Professional Publishing, 2000.

- Henderson, James (Sakej) Youngblood. "Constitutional powers and treaty rights." *Saskatchewan Law Review* 62:2, 2000: 719-749.
- Hunter, Anna. "Exploring the Issues of Aboriginal Representation in Federal Elections." *Electoral Insight* 5:3, 2003:27-34. available: http://www.elections.ca/eca/eim/pdf/insight_2003_11_e.pdf
- Ladner, Kiera L. "Rethinking the Past, Present and Future of Aboriginal Governance" in *Reinventing Canada*, Eds. J. Brodie and L. Trimble, Toronto: Prentice Hall, 2003a: 43-60.
- Ladner, Kiera L. "Treaty Federalism: An Indigenous Vision of Canadian Federalisms." In *New Trends in Canadian Federalism*, eds. M. Smith and F. Rocher, Peterborough: Broadview Press, 2003b: 167-194,
- Ladner, Kiera L. "Visions of Neocolonialism: Renewing the Relationship with Aboriginal Peoples." *Canadian Journal of Native Studies*, 21:1, 2001: 105-135.
- Macklem, Patrick. *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001
- Macklem, Patrick. "Ethnonationalism, Aboriginal Identities, and the Law", in M. Levin, ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism*, Toronto: University of Toronto, 1993: 9-28.
- McCallum, Margaret E. "Rights in the Courts, on the Water, and in the Woods: The Aftermath of *R.v. Marshall* in New Brunswick." *Journal of Canadian Studies* 38:3, 2004.
- Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911
- New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319
- Prins, Harald. *The Mi'Kmaq: Resistance, Accommodation and Cultural Survival*. Toronto: Harcourt Brace, 1996.
- R. v. Pamajewon*, [1996] 2 S.C.R. 821
- R. v. Sparrow*, [1990] 1 S.C.R. 1075
- R. v. Van der Peet* [1996] 2 S.C.R. 507
- Russell, Peter. *Recognizing Aboriginal Title*, Toronto: University of Toronto Press, 2005.

Short, Damien. "Reconciliation, Assimilation, and the Indigenous Peoples of Australia."
International Political Science Review, 24:4, 2003: 491-513.

Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge:
Cambridge University Press, 1995.