

**(RE)creating Good Governance
Creating Honourable Governance:
renewing Indigenous constitutional orders**

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FIRST WORDS

I have argued countless times elsewhere that Indigenous peoples have their own constitutional orders. ‘Unfolded into’ or ‘encrypted as’ Aboriginal and treaty rights, Indigenous constitutional orders are protected under the Canadian constitution and as such, these constitutional orders provide for political decolonization and a recognition of inherent jurisdiction and sovereignty which exists as *sui generis* within the Canadian constitutional order.¹ This is essentially an argument of treaty constitutionalism or what James (sakej) Youngblood Henderson refers to as treaty federalism.

So what does this mean? Treaty constitutionalism refers to the fact that there exists in Canada competing constitutional orders whereby both Indigenous and the Canadian constitutional orders and their respective nations claim jurisdiction over the same territory. Both claim that their right to do so is established by and grounded in history, law (their own domestic legal tradition and the wider systems of international law both pre and post 1537), international agreements (treaties), and their respective constitutions. Interestingly enough, it is so easily argued that the competing jurisdictional claims of Indigenous nations and their oft contested sovereignties are also vested in section 35 of the Constitution Act, 1982 by way of recognizing and affirming the *sui generis* Aboriginal and treaty rights of Indigenous nations. Accepting such arguments it also follows that the Canadian Constitution provides a framework for the constitutional reconciliation of these competing sovereignties and jurisdictional claims. Such that section 35 of the Constitution Act, 1982 recognizes and affirms Indigenous jurisdictions and section 25 of the Constitution Act, 1982 affords them protection from abrogation and derogation by the Charter while sections 91, 92 and 93 of the Canada Act, 1867 define the jurisdictional claims of Canadian governments.

Though some may choose to dismiss this as an inaccurate representation of Canadian political and constitutional history or some far fetched ‘Indian tale’, it is not. Though still fairly obscure as a theory of Canadian constitutionalism, treaty constitutionalism or treaty federalism is not only argued to be the bedrock of Canadian federalism and its claims of sovereignty. It grounded many of the Indigenous constitutional activists and visionaries of the nineteen-eighties and nineties and arguably found expression in both the *Constitution Act*, 1982 and the Charlottetown Accord).² It has grounded numerous constitutional claims pertaining to both Aboriginal and treaty rights in self-government talks and legal disputes such as those concerning Mi’kmaq

¹ James Sákéj Henderson, Marjorie Benson, and Isobel Findlay, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000).

² Ladner and McCrossan, *Electoral Participation*, *supra note 1*. See also Mary-Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 3 *Canadian Human Rights Yearbook* 4.; Douglas E. Sanders, “The Indian Lobby” in Keith Banting and Richard Simeon Eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Agincourt, ON: Methuen, 1983).

fishing rights some of which were taken up in the *Marshall* decision.³ Perhaps most importantly, this understanding of the evolution of Canadian sovereignty and the continuity of Indigenous sovereignty was upheld by the Royal Commission on Aboriginal Peoples in both its final report to the federal government and its earlier publications on self-government.⁴ This is both important and significant because as a royal commission, RCAP represents an independent voice and thus, a source of authority and increased credibility for other scholars, politicians, bureaucrats and judges.

Briefly, treaty constitutionalism was accepted as both a valid understanding of the past and a acceptable vision of the future by the Royal Commission on Aboriginal Peoples. As RCAP explains,

over time and by a variety of methods, Aboriginal people became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law. ... the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held with the Crown and the rights that flow from those relations. The treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867* in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents governing relations between the federal and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown.⁵

Though RCAP accepts treaty constitutionalism as the bedrock of Canada, providing both for Canadian sovereignty and the continuation of Indigenous sovereignty, RCAP does not spend any time considering issues surrounding the renewal and/or implementation of treaty constitutionalism. Rather, treaty constitutionalism becomes RCAP's 'royal omission' for none of its 444 recommendations directly address issues of treaty constitutionalism and its vision of self-government (which has been widely criticized by Aboriginal scholars and leaders) completely omits considerations of treaties, Indigenous constitutional orders (legal and political

³ R. v. Marshall, [1999] 3 S.C.R. 456. See also James Sákéj Henderson, *The Mikmaw Concordat* (Halifax: Fernwood, 1997); Kiera Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38 C.J.P.S 923 [Ladner, "Up the Creek"].

⁴ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Vol. 2*, (Ottawa: Canada Communications Group, 1996), 193-194 [RCAP, *Report*.]; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canada Communications Group, 1993) [RCAP, *Partners*].

⁵ RCAP, *Report*, *supra* note 4 at 193-194.

traditions) and continued Indigenous sovereignty.⁶ As a result, many are still searching out ways to implement the spirit and intent of their treaties and sections 25 and 35 of Canada's Constitution Act, 1982 and thus to renew treaty constitutionalism and their own constitutional orders. This paper is part of that search, part of the struggle to deal with RCAP's omission and to restore honour to the Crown and good governance in Indigenous communities.

Tan'si? How? While my article "Take 35: Reconciling Constitutional Orders" began the process of addressing issues of constitutional reconciliation and decolonization and the related questions of constitutionality and feasibility, it did not address issues of implementation. Given this shortcoming and the fact that I am constantly asked questions related to matters of implementation, this article represents an initial foray into issues surrounding the implementation of the treaty order. In so doing it responds to questions such as: how do we move beyond the jurisdictional quagmire that results from the competing constitutional orders and the contestation of Indigenous sovereignty within the settler state? How do we move treaty constitutionalism forward? How do we begin the process of political decolonization? How do we operationalize treaty constitutionalism at the community level? How do we rebuild good governance within the community and in intergovernmental relations between Indigenous nations and the state? In answering such questions this paper argues that if we work towards the renewal of good governance and the creation of honourable governance then it is possible to implement treaty constitutionalism and that such implementation is not only constitutional but constitutionally required. Acknowledging that I have been working in this field intermittently for much of the past 20 years and that I still have more questions than answers, I know that what I offer herein are simply my initial thoughts and that there will be many more questions and answers that flow from this and other work in the years to come.

COMMUNITY RENEWAL

Indigenous political systems were and are complex structures of governance which were designed and created to meet the specific needs of a nation to make, interpret and enforce 'laws' in a manner that was consensual and inclusive and was compatible with their territory, spiritual beliefs and economy.⁷ Indigenous political systems were created and are maintained by a constitutional order which set forth a system of government, provided a defined and limited ability to make, interpret and enforce 'law' within a territory and set forth the rules of the 'political game' and the roles and responsibilities of all members of the nation. Such constitutions were not written documents and quite often – as is the case with the British Constitution – these constitutional orders consisted of a myriad of documents (albeit 'oral documents' such as songs, stories, ceremony, orations and bundles). Such constitutional orders

⁶ Kiera Ladner, "Negotiated Inferiority: The Royal Commission on Aboriginal People's Vision of a Renewed Relationship" (2001) 31 American Review of Canadian Studies 241 [Ladner, "Negotiated Inferiority"].

⁷ Kiera Ladner, "Governing within an Ecological Context: Creating an Alternative Understanding of Blackfoot Governance" (2003) 70 Studies in Political Economy 125 [Ladner, "Ecological Context"].

were not subject to the authority of another nation or another government, but they were subject to the people of the nation and the manner in which they decided to live together ‘the best way possible’. This idea truly captures the meaning of good governance within Indigenous thought, for it is quite simply about “the way in which a people lives best together” in (or as part of) their territory or the various complex, inclusive, community-building, consensus based, adaptive and transformative structures of governance that people created.

Few would disagree with the statement that the Indian Act did not and does not provide for a system of good governance. Rather, the Indian Act system of band council government was created to aid the federal government in administering Indian reserves. Functioning very much as puppet governments or subordinate administrators, Indian Act band councils have few responsibilities or abilities that are independent of federal oversight. Band councils have the ability under section 81 of the *Indian Act* to make by-laws in a variety of areas of interest to local governments including traffic regulations (excluding speed), the establishment of dog pounds, the construction and maintenance of local infrastructure such as roads and ditches, and the regulation of bee-keeping.⁸ It is true, band councils have been delegated much responsibility for administering federal policies and programs such as health care, education and social services.⁹ But, Indian Affairs is able to influence and interfere in a multiplicity of ways including through its control of all band funds, departmental administrative and accountability requirements, the use of third party management protocols, and its ability to override election results and thus call elections or appoint new band councils (sections 74-79). In short, the Indian Act does not provide for good governance or for that matter even governance as it is very questionable as to whether in fact band councils are governments and not simply federal administrative structures.

Indigenous visionaries, philosophers/word warriors, leaders and activists/warriors have long been fighting to protect and or reclaim Indigenous political and legal traditions and to rid themselves of political interference by colonial governments. People such as Big Bear, who fought to protect Nehiyaw/Plains Cree sovereignty (and thus the Nehiyaw constitutional order). Having lobbied the government for years to negotiate a treaty between their nations, Mistahimaskwa (Chief Big Bear) who refused to sign Treaty Six in 1876 because he refused to ‘live with a rope around his neck’ (aysaka’paykinit) as he would not give up his freedom, nor the freedom and sovereignty of his nation to be led around like a domesticated animal in a skunkun (reserve or roped off piece of land).¹⁰ Following the negotiations of 1876, Mistahimaskwa continued his efforts to engage the Queen’s representatives in a discussion about the terms of the Treaty, to foster a nation-to-nation relationship and to attempt to mobilize the Nehiyaw to take a collective stance in negotiating and reconciling with the Queen. Despite the vision, dedication and leadership of Mistahimaskwa, efforts to mobilize the Cree in peaceful union and to engage

⁸ Canada, *Indian Act* (Ottawa: Minister of Supply and Services, 1989).

⁹ P. D. Elias, *Development of Aboriginal People’s Communities* (North York: Captus Press, 1991).

¹⁰ Hugh A. Dempsey, *Big Bear: The End of Freedom* (Lincoln: University of Nebraska Press, 1984) at 241.

the Crown's representatives in discussion failed (resulting in the Cree's participation in the Northwest Resistance/rebellion) and that metaphorical rope (aysaka'paykinit) was placed around his nation's neck.

So what happens when aysaka'paykinit is removed? What happens when the Government of Canada actually lives up to its treaty promises and upholds the honour of the Crown? What happens when the Indian Act that has defined and confined Indigenous governance as subordinate administrators is repealed? How do we operationalize Indigenous constitutional orders and the treaties? How do we create good governance and rebuild communities? In short, how do we rebuild Indigenous nations and constitutions? These are the questions that need to be answered.

Scholars such as Leanne Simpson remind me that this process of removing the rope from around the nation's neck, rebuilding nations and operationalizing Indigenous teachings about such matters as law and governance is going to take some time. Speaking from a position grounded in Anishnaabemowin philosophy, Simpson constantly reminds of the need to look to the future and make changes and decisions with the seventh generation in mind. Recognizing that the process of rebuilding will not happen overnight and that it will be a generational process, Simpson speaks to lighting the eighth fire (her generation being part of the seventh fire) and rebuilding by raising communities up through the next generations; ensuring that children are raised with the skills, philosophy and understanding necessary to truly engage in rebuilding family by family from a decolonized perspective.¹¹ Simpson is not alone in suggesting that the rebuilding of nations is a ground up generational process as number of other Indigenous women including Patricia Monture have also written from this vantage.

Neither dismiss the possibilities for decolonization that current generations hold or power that Indigenous traditions, philosophies and constitutional orders offer today. They simply acknowledge that decolonization is a long and arduous multigenerational project and emphasize the importance of raising up decolonized Indigenous citizens and activists who can make this happen. While I wholeheartedly acknowledge the need for those who think as Indigenous people, who understand their cultures and their responsibilities and who can shepherd the process of decolonization, I do not have enough patience to wait for future generations to be so grounded in Indigenous knowledge that they can pick up their nations and move forward. This is not to suggest that the likes of Monture and Simpson do, given their activism and their own struggles in decolonization. I simply suggest that communities cannot wait for the next generation of leaders, knowledge holders, warriors and word warriors. The need to act is now.

Renewing Indigenous constitutional orders does necessarily not mean replicating the teachings of the past, the system of governance nor the legal order. Indigenous philosophy is, according to the likes of Leroy Little Bear, about flux. By and large, the same holds true with Indigenous governance. There existed enormous fluidity and flexibility within the structural design and functionality of traditional systems that resulted in transformative political systems that could adapt to both external and internal needs. The reality is, these structures are about relationships

¹¹ Leanne Simpson, *Lighting the Eighth Fire* (Winnipeg: Arbeiter Ring Press 2008).

and responsibilities and how a nation decided to live together. While flux is inherent allowing structures to adapt to changing circumstances it also an acknowledgement of the need to respond to internal flux or to engage in renewal of relationships and responsibilities and the collective understanding of how one lives together in the best way possible.

Thus, making Indigenous governance “Indigenous’ does not mean going back in time or struggling to reestablish that one authentic. This means acknowledging that Indigenous systems of governance were/are themselves human creations that attempt to capture an ideal as to the way a people lives best together at a given point in time and in relation to a specific territory. It also means acknowledging that flux is part of is both a structural and a philosophical feature of most Indigenous political systems traditionally that allowed governance to be adaptive and transformative despite the added complexities of multiple co-existing institutions.¹² It also means embracing Indigenous ideas of development and progress or cyclical development. Cyclical development meaning that one needs to take from the past to build the future. It is understanding that change is constant and one can never rebuild you can only adapt and adapting to meet the needs of today by embracing ones relationship to the larger whole and the constant state of flux.

Equating community well-being with economic development, the Harvard Project on American Indian Economic Development contends that there is a direct correlation between good governance and economic success (community well-being) and more importantly, that nation building (defined as practical sovereignty, effective governing institutions, cultural match, strategic orientation and nation-building leadership) is a requisite of successful economic development.¹³ But as the literature on community wellness (specifically that on understanding suicide in Indigenous communities) reminds, creating strong healthy communities and good governance is not simply about building effective governance (a formal system) and ensuring that there is a cultural match between the systems of governance and the community.¹⁴ It is not enough to just integrate tradition into the political system (as the Harvard Project suggests), for this disregards the role of tradition in community life,¹⁵ the relationship between community and governance (in a consensus based system of governance there is little division between leaders

¹² See Ladner, “Ecological Context,” *supra* note 7.

¹³ Stephen Cornell, "Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States" in *Joint Occasional Papers on Native Affairs* (Tucson and Cambridge: Native Nations Institute for Leadership, Management, and Policy and the Harvard Project on Native American Economic Development, 2006); Stephen Cornell and Joseph Kalt, "Cultural Evolution and Constitutional Public Choice: Institutional Diversity and Economic Performance on American Indian Reserves" (Cambridge, MA: The Harvard Project on American Indian Economic Development, 1995).

¹⁴ Michael Chandler and Christopher Lalonde, "Cultural Continuity as a Protective Factor Against Suicide in First Nations Youth" (2008) 10 *Horizons* 68.

¹⁵ See *Ibid.*

and community for it is not a hierarchical system of ruler/ruled),¹⁶ and the need to engage a community-building process that empowers individuals to take up their place in the community/government while also reminding clans, families and governments to take up their roles and responsibilities within the community.¹⁷

Thus, removing the rope or escaping the colonial legacies of governance with its imposed system of subordinate rule means picking up the teachings about Indigenous constitutional orders (about the systems of governance and law and the underlying philosophy), working through decolonization, and using this as a basis to work together as a collective to find the way a people lives best together today.¹⁸ Whether or not a community decides to use tradition as a guide or to completely rebuild traditional structures of governance (a western-eurocentric model of governance is not an answer as the community wellness and Harvard project literatures suggest that cultural congruence is essential for good governance) in to far as it is the community that comes together to decide how they want to live together in the best way possible, operationalize their sovereignty and renew their constitutional order. Though such a collective process of decolonization, education, renewal and decision-making will not be an easy task it is necessary if actual nation building is to occur and a consensus driven renewal of governance and constitutional orders is to be achieved. Such a process is necessary for unlike western-eurocentric political traditions, Indigenous political traditions see governance as a way a people live best together and political systems not as a way of manufacturing consent periodically but as a way of constantly facilitating consent through consensus decision making and inclusive non-hierarchical structures. Rebuilding this process of good governance is like talking about a revolution in that it will take time and great effort for communities to be engaged and for all members (and factions) of a given community to engage in the process of nation building. That time, however is coming, and this, my next 'research' project (political decolonization in action) is set to begin.

CANADA'S CONSTITUTIONAL GUIDELINES

Understanding that the implementation of treaty constitutionalism within Indigenous nations and/or communities is really about the actualization of decolonization and self-determination,

¹⁶ See Ladner, "Ecological Context," *supra* note 7.

¹⁷ John McKnight, "Two Tools for Well-Being: Health Systems and Communities" in M. Minkler Ed., *Community Organizing and Community Building for Health* (New Brunswick: Rutgers University Press, 2007).

¹⁸ Decolonization, or rather the gendering of decolonization and decolonization of gender is necessary to mitigate the further colonization of Indigenous systems and the perpetuation of the colonial legacies of patriarchy, masculinization and heteronormativity. Kiera Ladner, "Gendering Decolonization, Decolonizing Gender" *CPSA*. UBC, Vancouver. 2008 [Ladner, "Gendering"]; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA: South End Press, 2005).

then it follows that the this process can only be defined and confined by Indigenous constitutional orders and their renewal. This is not to suggest that communities have a free reign to do as they please for their sovereignty is still vested in and limited by their own constitutional order (their legal, political and philosophical traditions) and their agreements (formalized through treaty or otherwise) with other nations. Whether used as a foundation for a new political system or for rebuilding communities along the lines of the Harvard Project, Indigenous constitutions must continue as the bases of renewal for it is here where sovereignty is vested, protected, defined and confined. Thus community renewal must respect the fact that Indigenous rights and responsibilities are vested in their constitutional orders and protected by the treaties. To succeed, however, it must also ensure that decolonization is gendered and gender decolonized so that community rebuilding truly does result in an inclusive realization of ‘the way we live best together’.¹⁹

Once that metaphorical rope is removed, the implementation of the treaty order within Indigenous nations is a matter of self-determination wherein rights and responsibilities are vested in and limited by Indigenous constitutional orders and existing and/or future treaties. While Indigenous nations must be guided by their own constitutional orders, so too must Canada be guided by its own constitutional order. Thus let us turn our attention to the manner in which Canada’s constitution provides for and guides the implementation of treaty constitutionalism.

In the nineteen-seventies, eighties and nineties, Canada underwent its own process of constitutional renewal. While it was primarily an elite driven process and its success continues to be questioned both inside and outside of Quebec, it did result in the constitutionalization of Indigenous rights within Canada. Though opposed by all major Indigenous organizations (the only organization to agree to the Constitutional provisions pertaining to Aboriginal peoples was the Métis Association of Alberta) and though many are still critical for its supposed domestication of Indigenous rights and responsibilities, the Canadian Constitution does afford protection and recognition to Aboriginal and treaty rights.²⁰ Though their dreams were not fully realized and they failed to halt the patriation process so as to allow for the development of a more solidified shield with which to protect Indigenous rights from the state and settler society, those individuals and organizations that had the foresight and waged this battle for constitutional recognition achieved the impossible. Though more limited than desired, section 35 recognizes and affirms Aboriginal and treaty rights arguably as sui generis rights originating within Indigenous nations and/or the agreements between Indigenous nations and settler society while section 25 affords these rights further protection from the Charter.

According to Ladner and McCrossan,

¹⁹ Ladner, “Gendering”.

²⁰ Kiera Ladner and Michael McCrossan, “The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order” in James B. Kelly and Christopher P. Manfredi Eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2008) 263 at 267 [Ladner and McCrossan, “Road Not Taken”].

Although rejected out of fear that the level of protection needed for Aboriginal and treaty rights was not attained, sections 25 and 35 achieved the impossible. Encrypted as Aboriginal and treaty rights, these sections represented the recognition and affirmation of Indigenous constitutional orders within the Canadian Constitution and their subsequent protection from the Charter. As James (Sa'ke'j) Youngblood Henderson, Marjorie Benson, and Isobel Findlay argue, "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." In essence, Aboriginal and treaty rights are the manifestation of Indigenous constitutional orders and the means by which these orders are recognized and affirmed in the Canadian Constitution.²¹

Ladner and McCrossan argue that this understanding of sections 25 and 35 was "embraced in large part by the early literature and early decisions such as Sparrow."²² Such an understanding continues and is increasingly widely accepted despite the fact the courts charted their own path and have interpreted section 35 quite narrowly.²³ As Brian Slattery suggests, as a "static [Canadian] constitutional order" section 35 is being defined by the Courts in accordance with the 'dominant viewpoint' that contends

the Crown's acquisition of sovereignty over indigenous peoples and their territories gave rise to Aboriginal rights in the Common law of Canada. These rights continue to exist in their original form unless or until extinguished by legislation, voluntary surrender or other valid process. As legal rights, Aboriginal rights are cognizable and enforceable in Canadian courts. However, Aboriginal peoples have to prove the existence of these rights on a case-by-case basis in order to gain judicial protection.²⁴

Slattery suggests that the courts may be departing from this constrictive view and adopting one which sees section 35 as a "generative constitutional order" and which accepts such rights as dynamic and as participatory, developing out of the a relationship between and the reconciliation

²¹ Ibid. at 268-269. Quoting Henderson, Benson, and Findlay, *supra* note 1 at 432-34.

²² Ibid. at 376.

²³ Henderson, Benson, and Findlay, *supra* note 1; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).; Russell Lawrence Barsh and James Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'" (1982) 17 *Journal of Canadian Studies* 59.; Turpel *supra* note 7.; See also Russell Barsh and James Sakej Henderson, "The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 *McGill Law Journal* 993.; Michael Murphy, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights" (2001) 34 *Canadian Journal of Political Science* 109.

²⁴ Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 *Supreme Court Law Review* at 434

of Indigenous peoples and Crown sovereignty.²⁵ Concluding that a new paradigm of interpretation and implementation is underway, Slattery argues that this shift is the result of the Courts' groundbreaking decisions in *Haida* and *Taku* that reintroduced the concept of the 'honour of the Crown' as an interpretive principle.²⁶ Some however, may argue that this shift began with *Van der Peet* for while decision poses one of the most constrictive readings of an Aboriginal rights test, it posits that the purpose of section 35 is reconciliation, thus offering another interpretive principle.²⁷ While these two interpretive principles offer the potential of change, one needs to be mindful of the fact that because of the Courts' fixation on asserting Canadian sovereignty while denying Indigenous sovereignty these interpretive principles represent a move towards an acknowledgement of an 'Indigenous-friendly' understanding of constitutionalism and not a paradigm shift or an outright acceptance of treaty constitutionalism. That said, these two guiding principles could assist in implementing the treaty order.

As Ladner and Dick suggest, "with the *Van der Peet* decision, the court took Indigenous rights jurisprudence down a new and regrettable path, choosing to embrace a cultural justification for Aboriginal rights."²⁸ This is because, in reframing the court's conceptualization of Aboriginal rights, Chief Justice Lamer states:

In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. ...²⁹ ... [Therefore] the test for identifying the Aboriginal rights recognized and affirmed by s.35(1) must be directed at . . . identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans.³⁰

While this interpretation of Aboriginal rights is exceedingly problematic for numerous reasons,³¹ what is important for the purposes of this paper is that the Supreme Court attempts to create a complete paradigm shift (like Slattery suggests occurs in the *Haida* decision) by proposing that

²⁵ Ibid.

²⁶ CITE TWO CASES

²⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

²⁸ Kiera Ladner and Caroline Dick, "Out of the Fires of Hell: Globalization as a Solution to Globalization - An Indigenist Perspective" (2008) 23 *Canadian Journal of Law and Society* 63.

²⁹ *Van der Peet*, at para. 30.

³⁰ *Van der Peet*, at para. 44.

³¹ See Ladner and Dick, *supra* note 28; Barsh and Henderson, *supra* note 23; Murphy, *supra* note 23.

purpose of recognizing and affirming Aboriginal (and treaty) rights in section 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.”³²

As Russel Barsh and James (Sákéj) Youngblood Henderson explain, this reconstruction of the purpose of section 35(1) as reconciliation is “a doctrine plucked from thin air.”³³ Beyond this, it is a thoroughly problematic doctrine which is demonstrative of “the manner in which the Supreme Court obfuscates and denies First Nations their rights and the opportunity to re-establish their own constitutional orders (as well as the ability to realize the nation-to-nation relationship agreed upon).”³⁴ This is so because, because the Courts have attempted to undermine claims of Indigenous sovereignty by suggesting that culturally grounded Aboriginal rights claims have already been reconciled with the sovereignty of the state and have, thus, fortified the penultimate sovereignty of the Crown. Worse yet, the *Mitchell* decision further fortifies Crown sovereignty (not that this was needed), by advancing the position that Canadian sovereignty is immutable and that any possible remnant of Indigenous sovereignty was either subordinated or merged with Canadian sovereignty.³⁵

That said, reconciliation as an interpretive principle holds incredible potential. This is because as I have argued previously, section 35 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.³⁶ It is as Henderson, Benson and Findlay suggest:

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.³⁷

³² Van der Peet, at para. 31.

³³ Barsh and Henderson, *supra* note 23 at 998.

³⁴ Kiera Ladner, "Take 35: Reconciling Constitutional Orders" in *First Nations First Thoughts*, Annis May Timpson Ed. (Vancouver: UBC Press, 2009) 419 at 285 [Ladner, “Take 35”].

³⁵ For a discussion of sovereignty and the manner in which the courts have dealt with it See Ladner and McCrossan, *supra* note 20 at 278-280. See also *Mitchell v. M.N.R.*, 2001 SCC at 125.

³⁶ Ladner, “Take 35”, *supra* note 34 at 288.

³⁷ Henderson, Benson, and Findlay, *supra* note 1 at 433-434.

Thus, viewed in this way, as an interpretive principle, reconciliation holds significant potential for those seeking to realize both the Indigenous understanding of s. 35 and the implementation of treaty constitutionalism. It holds potential, however, only if we can escape the colonial mentality which upholds the sovereignty of the Crown and an understanding of colonization tantamount to conquest for neither are reflections of Canadian history nor assist Canada in realizing its post-colonial potential. The same holds true for the honour of the Crown.

Briefly, the idea of the honour of the Crown first appeared in the 1990 *Sparrow* decision wherein the Court “held that the constitutional affirmation of Aboriginal rights should be interpreted in the light of the fundamental principle of the honour of the Crown.”³⁸ As if forgotten, the idea of the honour of the Crown does not appear again until 2004 in the *Haida Nation* decision when Chief Justice McLachlin states:

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.³⁹

For Slattery, the *Haida Nation* and *Taku River* decisions (these were followed by the *Mikisew* decision) ushered in the new paradigm characterized by a “generative constitutional order – one that mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society.”⁴⁰ Beyond obligating Canadian governments to engage in consultation (even in cases where an Aboriginal or treaty right have yet to be ‘established’, the honour of the Crown obligates the government to manage conflict in their relationship with Indigenous peoples and to work towards reconciliation (not necessarily accommodation).⁴¹

Though Slattery claims that these decisions overcame the assertions of Canadian sovereignty that have plagued the courts interpretation of sections 25 and 35 (thus leading away from the ‘standard’ interpretation towards an affirmation of the Indigenous interpretation of the

³⁸ Slatterly, *supra* note 24 at 433. See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 4-5.

³⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C 73 at 5-6.

⁴⁰ Slatterly, *supra* note 24 at 436.

⁴¹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 50.

Constitution outlined earlier), I am not sold by his line of argument nor the Courts'. In *Haida Nation*, Chief Justice McLachlin states that "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" and suggests that continuing "sovereignty claims [will be] reconciled through the process of honourable negotiation."⁴² Just because the court is careful in its framing of Crown sovereignty as *de facto* (factual control – illegitimate or otherwise) rather than *de jure* (resulting from a legitimate assertion) as Slattery has argued, does not mean that the Court has successfully overcome its own inability to question Canadian sovereignty or recognize the constitutionality of continued Indigenous sovereignties.

The presumption of sovereignty and exclusive jurisdiction have been challenged in Canadian law⁴³ and in legal and constitutional scholarship.⁴⁴ 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.⁴⁵

In my mind, this is anything but honourable. Notwithstanding the limitations caused by the problematic construction of sovereignty, the honour of the Crown along with reconciliation may provide Indigenous peoples and Indigenous understandings of the constitution(s) (really competing constitutional orders) a glimmer of hope and opportunity. This opportunity is likely more comparable to a crack in the opening of a doorway rather than Slattery's paradigm shift, but it is an opportunity nonetheless and in this field (as Peter Russell has reminded me on several occasions) you make the most of every possible opportunity.

HONOURABLE GOVERNANCE

According to Henderson:

⁴² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 at 20.

⁴³ *Mitchell v. M.N.R.*, [2001] S.C.R. 911 and *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

⁴⁴ James (sakej) Youngblood Henderson, "First Nations Legal Inheritances in Canada: the Mikmaq Model" (1995) 23 *Manitoba Law Review* 1.

⁴⁵ Patrick Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in Michael D. Levin Ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 at 18.

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 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 ... 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.⁴⁶

How do we move from constitutional conditions for legal pluralism to the realization of legal and epistemic pluralism? How do we realize the potential for a post-colonial set forth in s. 35 of the *Constitution Act, 1982*? How do we begin the process of rediscovering good relations and finding mutually beneficial, mutually agreeable ways to live together? How do we realize the paradigm shift that Slattry speaks of? How do we move from theories of treaty constitutionalism and from constitutional conditions of treaty constitutionalism to implementation?

If we take reconciliation and the honour of the Crown as interpretive frameworks and guiding principles, it is possible to begin the process of addressing issues of implementation. The treaties initially served to reconcile jurisdictional responsibilities of Indigenous nations and the settler society and arguably provided the Crown with recognition of its derivative sovereignty. Derivative sovereignty such that its authority and ability to govern in another's territory was in essence derived from both its claim of dominion over its own subjects (as per its own constitution) and the recognition of said dominion over settler-society and/or the delegation of such responsibilities by Indigenous nations as established through treaty or de facto recognition. While it is easily argued that these concurrent sovereignties have long been reconciled, the courts' statement that the purpose of s. 35 is reconciliation further affirms the long-held conviction that s. 35 provides for further reconciliation as part of under the rubric of the Canadian Constitution and therefore under the umbrella doctrine of constitutional supremacy.⁴⁷ Viewed in this light, reconciliation is essentially an interpretive framework for the implementation of treaty constitutionalism such that it instructs both the court and the government to further engage in political reconciliation and thus implementation without the limitations imposed by the standard interpretation of s. 35 or the defense of absolute Canadian sovereignty (de facto or de jure).

⁴⁶ Henderson, "Aboriginal Jurisprudences and Rights", 75-76

⁴⁷ Ladner, "Take 35", supra note 34.

As an interpretive principle, honour of the Crown provides justification for this understanding of reconciliation and thus, for implementing treaty constitutionalism. The Courts have said that Canadian governments are responsible for upholding the honour of the Crown in their relationships with Indigenous peoples within Canada. The need to uphold the honour of the Crown goes far beyond fiduciary obligations or outlining a responsibility to consult with Indigenous peoples when their Aboriginal rights have been or are in jeopardy of being breached. Upholding the honour of the Crown or governing honourably is required to manage the treaty relationship between Indigenous nations and the settler state and is invoked even in situations where a treaty and/or Aboriginal right has yet to be established or confirmed through negotiation or by the Courts. As an interpretive principle or guideline for understanding and implementing sections 25 and 35 of the *Constitution Act*, 1982, honour of the Crown obligates governments to conduct itself in accordance with the Constitution in its dealings with Indigenous peoples.⁴⁸ Thus, it requires governments to act in accordance with the honour of the Crown when engaging in reconciliation and providing for the renewal of Indigenous constitutional orders which were encrypted as Aboriginal and treaty rights in 1982.⁴⁹

Keeping in mind that Justice Ian Binnie has argued that “The *Constitution Act*, 1982 ushered in a new chapter but did not start a new book”⁵⁰ and that this has formed the standard approach taken by Court (until recently). As such the Courts have typically acted as though little has changed as have instead defended the presumed sovereignty of the settler state and ideas of parliamentary supremacy, conquest and Indigenous subordination. As Slattery and others have suggested however, the times they are a changing and a paradigm shift has either occurred or is in the process of occurring as the Courts slowly adapt to the paradigmatic shift resulting from 1982 and general trends in the literature. As Ladner and McCrossan state, “Legal scholars have argued that 1982 marked the dawning of a new era of constitutional supremacy, one that included Indigenous constitutional orders unfolded through Aboriginal and treaty rights as part of the supreme law of Canada.”⁵¹

Henderson addresses the constitutional foundations and implications of this new era in a recent article outlining his theory of dialogical governance. Arguing that section 52(1) of the Constitution Act 1982 transformed Canadian politics by establishing constitutional supremacy as the primary tenet or defining principle of Canadian law and politics. Quoting the Supreme Court’s decision in *Quebec Succession Reference*, Henderson states:

Section 52(1) provides the essence of constitutionalism, declaring “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” This principle requires that all government

⁴⁸ James (sakej) Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” unpublished paper.

⁴⁹ Ladner and McCrossan, “Road Not Taken” *supra* note 20.

⁵⁰ *R. v. Mitchell* 33 at para 115.

⁵¹ Ladner and McCrossan, “Road Not Taken” *supra* note 20 at 277.

action comply and be consistent with all the various provisions of the constitution. Constitutional supremacy replaces the covert and overt white or settler supremacy behind Parliamentary supremacy.

The Court has established that constitutionalism and the rule of law are not in conflict with democracy principle; rather, they are essential to it. ... They control all exercises of executive and legislative power, determining their legitimacy and legal force: indeed their sole claim to exercise lawful authority rests exclusively with the constitution and “can come from no other source.” ...

The Court has asserted that executive or legislative power must be harmonized with the principles of constitutionalism and the rule of law. Any power unilaterally asserted by government under the principle of majority rule or effectively is contrary to constitutional supremacy and the rule of law.⁵²

Taken to its logical conclusion, Part B of the *Constitution Act*, 1982 radically transforms the constitutional basis and constitutional requirements of parliamentary government as it is operationalized in Canada. No longer is it possible to think about Parliament and the provision of good governance without due consideration of constitutional supremacy. That is to say, ‘peace, honour and good government’ is no longer the primary constitutional consideration for government in Canada as s 52(1) requires that both the executive and the legislature govern in accordance with the constitutional supremacy. This surely signals the shift from parliamentary supremacy to constitutional supremacy or at very least a heightening of the ‘dialogue’ between Parliament and the Court. Regardless as to whether any vestige of parliamentary supremacy remains, one thing is certain, the requirements of governing in accordance with the rule of law and the constitution is constant. Much like the imperative of peace, order and good governance this requirement is not situation dependent and thus, while the Courts have addressed constitutional supremacy as it relates to issues of Quebec’s possible succession, section 52 (1) is not so limited in its application.

Section 52(1) as we know has the ability to transform the entire political system. Alan Cairns acknowledged this when theorizing the Charter as the third pillar of the Canadian political system alongside federalism and parliamentary government. For him, the Charter transformed Canadian politics both by bringing citizens into the constitutional arena as a rights bearing citizenry and by making those rights constitutional thus allowing them to influence the two other pillars and their multiple manifestations. Envisioning the Charter as a pillar of the Canadian system captures the magnitude of the impact that section 52(1) had and continues to have on Canadian politics. After all, s. 52(1) requires both courts and governments to consider the Charter and the impact of the Charter on the operationalization of both federalism and the parliamentary system. This, however, is only part of the picture as Cairns’ theorization and the majority of the (political science) literature on constitutional law and/or law and politics has

⁵² Henderson, “Dialogical Governance” supra note 48 at 33-35. Quoting: *re Reference by the Governor General in Council Concerning Certain Questions relating to the Secession of Quebec* [1998] 2 SCR 217 at para 106-108.

ignored the fact that this holds true for those rights recognized and affirmed in section 35 (which is not part of the Charter and does not contain rights created by the Charter or the Canadian constitution). Thus, it is not just the Charter that has a transformative affect on Canadian politics or that becomes one of the defining attributes of the Canadian political system alongside federalism and the Westminster model of parliamentary government. Or at very least, it should not.

For those who hold steadfast to the idea of parliamentary supremacy, even a slight acknowledgement of the possibility of constitutional supremacy or even simply acknowledging that as a constitutional democracy any remaining remnants of parliamentary supremacy must adhere to and abide by the constitution, means that section 35 should be accorded another separate pillar. This is because it requires all governments to act in accordance with the honour of the Crown and reconciliation. In short, it requires honourable governance and provides for the implementation of treaty constitutionalism or the renewal of the relationship between Indigenous nations and the settler state and Indigenous constitutional orders.

Understanding that the purpose of section 35 is reconciliation requires the reconciliation of Canadian federalism and its jurisdictional claims (sections 91, 92 and 93 of the Canada Act, 1867) with Indigenous constitutional order and their jurisdictional claims as encrypted in section 35 within the rubric of constitutional supremacy. Reconciliation is essentially an interpretive framework for the implementation of treaty constitutionalism such that it instructs both the court and the government to further engage in political reconciliation and thus implementation without the limitations imposed by the standard interpretation of s. 35 or the defense of absolute Canadian sovereignty (de facto or de jure). As such, recognizing the constitutionality of both sovereignties (one of which is, in part a derivative of the other in that it excurses jurisdictions delegated it by Indigenous nations and whose authority (until de facto) was at the pleasure of Indigenous nations) section 52(1) requires that the constitution be interpreted in accordance with the interpretive principles of reconciliation and the honour of the Crown.

This means that federalism has to operate constitutionally and that it cannot be assumed that all jurisdictions are already occupied by federal and provincial governments or that sections 91, 92 and 93 leave no room for Indigenous governments other than as responsibilities delegated through negotiation.⁵³ Looking beyond this standard interpretation and acknowledging that s. 35 reconciles competing sovereignties means that upholding the honour of the Crown requires Canadian governments to facilitate the renewal of these constitutional orders by creating jurisdictional space, negotiating around concurrent and competing claims and beginning to deal with jurisdictional disagreements as co-autonomous jurisdictions (not subordinate Indian Act 'governments') acting either *intra* or *ultra vires*. To put it another way, as part of a constitutional dialogue or simply as a result of constitutional supremacy, as interpretive principles and constitutional requirements, reconciliation and the honour of the Crown do not integrate Indigenous governments into Canadian federalism but instead recognize Indigenous sovereignty as recognized, protected and reconciled under the Canadian constitution and other

⁵³ Radha Jhappan, "The Federal-Provincial Power-grid and Aboriginal Self-Government" *New Trends in Canadian Federalism*, Francois Rocher and Miriam Smith Ed. (Peterborough: Broadview Press, 1995)

governments as having the responsibility of upholding the honour of the Crown in their relationships with the treaty order.

Beyond requiring federalism to operate in accordance with the honour of the Crown and reconciliation, constitutional supremacy also requires Parliament (and provincial legislatures) to uphold the honour of the Crown. As constitutional imperatives, reconciliation and honour of the Crown coupled with constitutional supremacy and the rule of law necessitates honourable governance. To understand the implications of this, it is necessary to look very briefly at the historical evolution and meaning of the honour of the Crown. As David Arnot, former Treaty Commissioner of Saskatchewan stated in the University of Saskatchewan's 1997 Poundmaker Memorial Lecture,

With respect to “the honour of the Crown”, I suggest that this notion reflects the deepest and oldest layer of our tradition of human rights in Canada. ... Long before we agreed, as an increasingly ethnically complex and contested nation, in a formal Charter of Rights we had inherited the British tradition of acting honourably for the sake of the sovereign. This is a very ancient convention with roots in Pre-Norman England, at a time when every yeoman swore personal allegiance to his chieftain or king ... Anyone who was charged with speaking or acting on behalf of the King bore an absolute personal responsibility to lend credit to his master's good name. ...

The personal relationships between sovereigns and their ministers weakened as the medieval state grew more complex and bureaucratic. The sovereign became insulated from personal involvement in the affairs of the state.

Although the culture of principle had begun to disappear in deeds, it survived in words. A cynical observer might be tempted to conclude that the language of Crown honour was often deployed to cloak the misconduct of ministers and to reassure British subjects that the power of the state remained in responsible and chaste hands that would not dare behave selfishly.⁵⁴

There is no doubt that the honour of the Crown is an important part of the historical development of our parliamentary tradition such that it explains (albeit in part) both roots of ministerial responsibility and the development of a constitutional monarchy wherein government is still conducted in the name of the Crown. That said, even in political science this concept and means of explaining political history has fallen by the wayside in mainstream political science. More importantly, while the Courts have renewed its importance as a constitutional doctrine, even the most thorough and dynamic studies of the Crown in Canada do not address the honour of the Crown as it relates to Aboriginal and treaty rights, or for that matter such studies continue to be void of any discussion of Aboriginal peoples and their relationship with the Crown (treaty or otherwise).⁵⁵

⁵⁴ David M. Arnot “The Honour of the Crown” *Saskatchewan Law Review* 60 (1996) 339 at 340

⁵⁵ David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (University of Toronto Press, 1995).

Given that ministers of the Crown have a constitutional duty to act in accordance with the honour of the Crown in all of their dealings with Indigenous peoples regardless as to whether or not an Aboriginal or treaty right has been confirmed (through judicial interpretation or negotiation). Given that governments have a constitutional responsibility for reconciliation (done in accordance with the honour of the Crown). Further, given that “each Crown has constitutional duty of honourable governance and a fiduciary relationship with Aboriginal people to the extent of its constitutional power to affect Aboriginal peoples’ rights to discretionary control over their lives.”⁵⁶ Acknowledging such considerations, there is significant need for further study as to how the honour of the Crown can be translated and expressed as day-to-day governance. That is to say as a discipline, political science needs to engage in the study of the constitutional requirement and meaning of honourable governance rather than to confine our study to the somewhat outdated discussions of Peace, Order and Good Government, parliamentary supremacy and charter dialogue. Though much more thought needs to be given to the meaning and implications of honourable governance, it is safe to say that both federal and provincial governments are confronted with a constitutional requirement to act honourably or to uphold the honour of the Crown as it governs in accordance within the new era of concurrent and overlapping jurisdictions and sovereignties and the renewed relationship between Indigenous peoples and the settler state (based on reconciliation and the honour of the Crown as interpretive principles of constitutional supremacy).

FACING FORWARD

The Court has instructed that the doctrine of the honour of the Crown is the underlying principle in the relationship between the Crown and constitutional rights of Indigenous peoples in Canada. As Henderson states:

The purpose of this doctrine is a constitutional therapy for the ill of colonization on Aboriginal peoples, striving to include Aboriginal peoples in Canadian governance and to moderate historical disadvantage and exclusion ... It creates a method for the courts to identify and to resolve the unstable relation between assumptions about governmental power and their policy and practices and constitutional rights of Aboriginal peoples. It allows for an imaginative and noble effort to construct and reconstruct power into honourable governance.⁵⁷

I disagree with Henderson to the extent that I do not see this as means of furthering the inclusion of Indigenous people into the Canadian state but rather see this as a means of renewing relations between nations and reconciling sovereigns the process of which may result in the further inclusion of Indigenous nations in Canadian governance but such a move towards inclusion and participation is up to each nation and the manner in which reconciliation is achieved. Regardless as to this disagreement (potential or actual), this doctrine represents a break with the past and a real potential for a paradigm shift; the extent of which would serve to transform Canada from a

⁵⁶ Henderson, “Dialogical Governance” supra note 48 at 66.

⁵⁷ Henderson, “Dialogical Governance” supra note 48 at 47

colonial state to a post-colonial realization of legal and epistemic pluralism. In short it makes the departure from the historical norm of dishonour to the Crown and dishonourable governance a constitutional requirement. It creates opportunities for the development and/or renewal of good governance and Indigenous constitutional order at the community and/or nation level, and it creates opportunity for the development of honourable governance rather than dishonourable governance within the Canadian context. Taking hold of such opportunity, however, will not be easy as Canadians will be forced to grapple with the trumping of parliamentary supremacy by constitutional supremacy and the necessity of developing mutually agreeable, and mutually beneficial strategies and processes to effectively recognize, reconcile and implement (encrypted) Aboriginal and treaty rights.

Acknowledging that to effectively recognize, reconcile and implement (encrypted) Aboriginal and treaty rights in this new constitutional era requires that Indigenous nations be given the room and opportunity to renew their own constitutional orders and exercise sovereignty limited only by their own constitution and the combined process of constitutional reconciliation. Still, to give meaning to good governance for Indigenous peoples, political reconciliation and honourable governance, one must begin the process of imagining the creation of a post-colonial Canada or the implementation of honourable governance. What will this take?

Section 91(24) provides the federal government with the responsibility for 'Indians and lands reserved for Indians' within the Canadian constitution and since represents the responsibility for the relationship and ensuring that the honour of the Crown is maintained. This is not a responsibility over Indigenous peoples or for Indigenous governance as this is unconstitutional and is a violation of treaty relations and tenets of both international and commonwealth law. Acknowledging this, means that it is necessary to repeal the Indian Act and replace it with legislation which sets forth a mutually agreeable, mutually beneficial vision of honourable governance and which enables the implementation of the treaties and the renewed relationship within the federation (i.e. not within each nation as such legislation would be considered unconstitutional or *ultra vires*). To succeed such legislation would have to bring certainty to the relationship within Canadian law, implement fiduciary obligations and treaty responsibilities (in accordance with the principles of reconciliation and the honour of the Crown), disallow federal paramouncy (except where explicitly agreed to without subjugation or the negotiation of inferiority), and address resource sharing. Building on this process, the courts would also have to address issues of constitutional supremacy such that their role would necessarily be transformed for they would no longer be able to try to determine the meaning of Indigenous constitutional orders but would instead have the ability to rule on jurisdictional disputes in much the same manner as they do in current jurisdictional disputes concerning federal and provincial governments by ruling on matters of constitutionality (jurisdiction) rather than the exercise of said jurisdiction. In short, operationalizing constitutional reconciliation and the honour of the Crown will be a long and arduous journey but it is a journey down that road not travelled that we must take. Along the way we will discover the tools with which to create the road and make the travels of future generations easier and more honourable.