

## Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context

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Résumé de l'article

Alimentées par des contextes politiques divergents, les tribus autochtones de part et d'autre de la frontière canado-américaine ont parcouru des trajectoires assez différentes, faisant l'objet de traitements dissimilaires de la part de leur gouvernement respectif ayant revendiqué leurs terres.

Les tribus amérindiennes aux États-Unis ont pu quelquefois profiter de la collaboration de législateurs et de responsables gouvernementaux progressistes qui ont promulgué des lois et des politiques courageuses ayant contribué à l'avènement de changements positifs. À l'inverse, les peuples autochtones du Canada ont généralement eu à se débrouiller seuls, décennie après décennie, devant des bureaucrates médiocres, indifférents, ou parfois même malveillants et trop penauds ou régressifs pour apporter des améliorations significatives. En outre, le Parlement canadien n'a toujours pas proposé de législation substantielle dans la même veine et ampleur des textes américains, et ce même à la lumière de nombreuses sources indépendantes favorisant une telle approche. Plutôt, des décennies de mesures législatives fragmentaires n'ont servi que de timide tentative pour contrer les effets les plus odieux de l'archaïque *Loi sur les Indiens*, alors que les voix gouvernementales louables, ayant fait appel à d'importantes et d'audacieuses améliorations, ont été largement ignorées.

## TWO ROADS DIVERGED: A COMPARATIVE ANALYSIS OF INDIGENOUS RIGHTS IN A NORTH AMERICAN CONSTITUTIONAL CONTEXT

*Peter Scott Vicaire\**

Fuelled by contrasting political backdrops, indigenous tribes on opposite sides of what has become the Canadian-American border have travelled upon very different trajectories, receiving dissimilar treatment from the respective governments that have laid claim to their lands.

Indian tribes in the United States have sometimes had progressive legislators and high-ranking government officials enact bold laws and policies that were instrumental in creating positive change. Inversely, Aboriginal peoples in Canada have generally had to muddle through decade after decade of middling, indifferent, or occasionally even malicious bureaucrats who have continued to be too sheepish or backward-thinking to make any significant improvements. Further, the Canadian Parliament has yet to offer any substantive legislation in the vein and magnitude of that which was vital in making positive changes for American Indian tribes, even though numerous independent sources have pointed to such an approach. Rather, decades of piecemeal legislation have served only as a half-hearted attempt to counter the more odious effects of the archaic *Indian Act*, while those laudable governmental voices that have called for bold, substantial change have been largely ignored.

Alimentées par des contextes politiques divergents, les tribus autochtones de part et d'autre de la frontière canado-américaine ont parcouru des trajectoires assez différentes, faisant l'objet de traitements dissimilaires de la part de leur gouvernement respectif ayant revendiqué leurs terres.

Les tribus amérindiennes aux États-Unis ont pu quelquefois profiter de la collaboration de législateurs et de responsables gouvernementaux progressistes qui ont promulgué des lois et des politiques courageuses ayant contribué à l'avènement de changements positifs. À l'inverse, les peuples autochtones du Canada ont généralement eu à se débrouiller seuls, décennie après décennie, devant des bureaucrates médiocres, indifférents, ou parfois même malveillants et trop penauds ou régressifs pour apporter des améliorations significatives. En outre, le Parlement canadien n'a toujours pas proposé de législation substantielle dans la même veine et ampleur des textes américains, et ce même à la lumière de nombreuses sources indépendantes favorisant une telle approche. Plutôt, des décennies de mesures législatives fragmentaires n'ont servi que de timide tentative pour contrer les effets les plus odieux de l'archaïque *Loi sur les Indiens*, alors que les voix gouvernementales louables, ayant fait appel à d'importantes et d'audacieuses améliorations, ont été largement ignorées.

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## Introduction

On September 8, 1760, British military forces under the command of General Amherst surrounded Montreal in a three-pronged attack, forcing France to capitulate and effectively putting an end to the French and Indian War,<sup>1</sup> a conflict that had been raging across much of North America since 1754. Upon the signing of the *Treaty of Paris* in 1763, France lost all of its North American mainland possessions,<sup>2</sup> leaving Great Britain as the dominant European power on the continent. In order to assuage the concerns of Indian<sup>3</sup> tribes over this transfer of power, King George III issued the *Royal Proclamation of 1763*, which obstructed English settlement “upon any Lands whatever, which, not having been ceded to or purchased by Us ... are reserved to the said Indians.”<sup>4</sup> King George III’s government was very interested in retaining the friendship of the indigenous peoples, as wars with the numerous tribes “threatened the British military, and settler societies lived in fear.”<sup>5</sup> Though it appeased some tribes, the proclamation also prohibited westward colonial expansion and was the first of many British actions that ultimately led to the American Revolution.<sup>6</sup>

Regardless of the protective terms of the proclamation concerning Indian lands, a looming threat of Indian war came to fruition when Pontiac, an Ottawa chief, encouraged the taking up of arms against the British in 1763.<sup>7</sup> In direct response, the superintendent of Indian affairs, Sir Wil-

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<sup>1</sup> The French and Indian War is the name given to the North American theatre of the Seven Years War, an immense world conflict involving Austria, England, France, Prussia, and Sweden, and which played out in Europe, India, and North America.

<sup>2</sup> The only territorial remnants that France held on to were Saint-Pierre and Miquelon, a group of small islands in the North Atlantic Ocean, just south of Newfoundland. They remain under French control to this day.

<sup>3</sup> In this article, indigenous peoples living in the United States will be referred to as “Indians”, while those living in Canada will generally be referred to as “Aboriginal peoples” unless referring to the singular “Aboriginal”. It should also be noted that Aboriginal peoples in Canada belong to three distinct groups recognized in sections 25 and 35 of the Canadian *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), as Indians, Métis, and Inuit. “First Nations” refers to *Indian Act* (RSC 1985, c I-5) band collectives that are neither Métis nor Inuit.

<sup>4</sup> George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation of 1763*].

<sup>5</sup> Joseph Eliot Magnet, “Who Are the Aboriginal People of Canada?” in Dwight A Dorey & Joseph Eliot Magnet, eds, *Aboriginal Rights Litigation* (Markham: LexisNexis Butterworths, 2003) 23 at 37.

<sup>6</sup> See Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005) at 6.

<sup>7</sup> Warriors from the Delaware, Seneca, Chippewa, Miami, Potawatomi, and Huron tribes (among others) joined the uprising in an effort to drive British soldiers and settlers out of the Great Lakes region.

liam Johnson, called together a monumental assembly at Fort Niagara, which took place in 1764. This congregation has since been deemed the “most widely representative gathering of American Indians ever assembled.”<sup>8</sup> Represented were over twenty-four “nations [from] as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay.”<sup>9</sup> At this meeting a “nation-to-nation relationship” between the tribes and the British settler society was affirmed by way of the *Treaty of Niagara*, which established that “no member gave up their sovereignty.”<sup>10</sup> After the two-day conference, which involved speeches, declarations of peace, and exchanges of presents and wampum, the tribes dispersed back to their respective homelands on either side of the then non-existent 5,525 mile east-west boundary line.

There was no way that the tribal representatives at Niagara could have foreseen what would happen just over a decade after their momentous gathering; their seven generations would be propelled on very different trajectories, greatly dependent upon the arbitrary political lines drawn by the forthcoming American and Canadian governments after the American Revolution.

The purpose of this article is to provide a general, comparative analysis of the differing levels of recognition and denial of the inherent rights of indigenous peoples in North America by way of the Canadian and American constitutions, as well as the ensuing judicial and bureaucratic interpretations of these rights. It should be clearly understood that this paper is limited to the state perspectives and legal frameworks established by the United States and Canada. It does not purport to provide indigenous views of sovereignty and self-determination, which often challenge, on many fronts, these state-enforced formulations.<sup>11</sup> Though the overarching power over indigenous collectives in North America ultimately exists because of military might and police force, the legal authority presumed to have been established is maintained by way of these constitutions—and often disfigured by slanted judicial interpretations or lack of access to the courts established by the newcomers.<sup>12</sup>

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<sup>8</sup> Donald Braider, *The Niagara* (New York: Holt, Rinehart and Winston, 1972) at 137.

<sup>9</sup> John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 155 at 163.

<sup>10</sup> *Ibid* at 161.

<sup>11</sup> See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 2d ed (Oxford: Oxford University Press, 2008).

<sup>12</sup> See e.g. Jennifer E Dalton, “Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21:1 CJLS 11 (judicial decisions in-

The approaches of Canada and the United States have transmogrified in different ways. Since 1876, Canada has dealt with Aboriginal peoples by way of the *Indian Act*,<sup>13</sup> a single, comprehensive statute that defines and controls nearly all aspects of Aboriginal peoples' dealings with the government. Because of this, the Canadian approach has at least been generally consistent. Conversely, the American approach seems to have suffered from some peculiar multiple personality disorder: Indian law "is a loosely related collection of past and present acts of Congress, treaties and agreements, executive orders, administrative rulings, and judicial opinions connected only by the fact that law in some haphazard form has been applied to American Indians over the course of several centuries."<sup>14</sup>

Notwithstanding the United States' "haphazard" approach to its dealings with Indian tribes, this article argues that it has a better record of recognizing, and to a certain degree, even nurturing, the rights of Indian tribes. This argument is rooted in the view that the two main Canadian constitutional documents<sup>15</sup> have increasingly bound Aboriginal peoples to Canadian society to the detriment of their own distinct sovereignties. Aboriginal peoples forced into the folds of these two Canadian constitutional schemes have paid an expensive price. They certainly did not consent to, nor were they consulted about, their inclusion in the 1867 scheme, and "[i]t should not be forgotten that the Aboriginal peoples were not directly involved in patriation of the Constitution and inclusion of the *Charter* in 1981-82; on the contrary, there was strong opposition to patriation among them."<sup>16</sup> Some Aboriginal representatives lobbied in London, England, against the new constitution and attempted to block patriation in the British courts.<sup>17</sup>

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volving section 35(1) of the *Constitution Act, 1982* have not provided or advanced the right of self-determination); Matthew LM Fletcher, "Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes" (2009) 51:4 *Ariz L Rev* 933 (the US Supreme Court's certiorari process "creates conditions that lead the Supreme Court to accept cases that are likely to be decided against tribal interests" at 937 [emphasis omitted]).

<sup>13</sup> The *Indian Act* (*supra* note 3) is discussed below, in Part II. In the United States, there is no comparable statute, and as a result, political intercourse with Indian tribes is often erratic and uncoordinated.

<sup>14</sup> Vine Deloria Jr & David E Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin: University of Texas Press, 1999) at 158.

<sup>15</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5; *Constitution Act, 1982*, *supra* note 3.

<sup>16</sup> Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34:1 *Osgoode Hall LJ* 61 at 70 [McNeil, "Aboriginal Governments"].

<sup>17</sup> See Douglas E Sanders, "The Indian Lobby" in Keith Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Me-

Contrastingly, it will be shown how the United States' claim of federal plenary power over Indian tribes (rather than Canada's aim of absorbing Aboriginal peoples within society) has, ironically, helped to distinguish and solidify lines of sovereignty for tribes in the United States, or as President Lyndon B. Johnson stated in 1968, to "affirm the right of the first Americans to remain Indians while exercising their rights as Americans."<sup>18</sup> It was around the same time as President Johnson made this distinction that Prime Minister Pierre Trudeau thought it "inconceivable ... that in a given society one section of the society [could] have a treaty with the other section of the society."<sup>19</sup> He continued, "We must all be equal under the laws and we must not sign treaties amongst ourselves."<sup>20</sup> Clearly, there was a difference in the perception of who and what indigenous peoples were in North America. It remains so today, and this difference is the focus of this article.

Ironically, whereas the United States was founded upon the fierce belief in individual liberties and Canada chose to remain a steadfast, loyal member of a larger British Commonwealth collective, the two nations have actually treated the respective indigenous populations within their borders contrary to these countries' own historical political tenets. Indian tribes in the United States have enjoyed a greater degree of indigenous communal rights, while Aboriginal peoples in Canada have experienced a significantly lesser one.

As will be shown, Canada lags behind the United States by over three-quarters of a century, ultimately due to its courts', legislators', and bureaucrats' steadfast refusal to acknowledge Aboriginal peoples' sovereignty in any true sense. But speaking optimistically, Canada does enjoy an advantage in that it can, and should, learn from the mistakes made by both the United States and the Indian tribes within it.

Granted, there are some ways in which Canadian law is better than American law in this field. The Supreme Court of Canada, despite its te-

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thuen, 1983) 301; *R v United Kingdom (Secretary of State for Foreign and Commonwealth Affairs)*; *ex parte Indian Association of Alberta*, [1982] QB 892, [1982] WLR 641 CA (Eng).

<sup>18</sup> "The Forgotten American", *Weekly Compilation of Presidential Documents* 4:10 (11 March 1968) 438 at 448.

<sup>19</sup> The Right Honourable Pierre Elliot Trudeau, "Remarks on Indian Aboriginal and Treaty Rights" (delivered at the Aboriginal and Treaty Rights Meeting, Vancouver, 8 August 1969), cited in Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000) at 52.

<sup>20</sup> The Right Honourable Pierre Elliot Trudeau, Address (delivered at the Meeting of the Don Valley Liberal Association, Question and Answer Session, Don Valley, Ont, 21 January 1972), cited in Cairns, *supra* note 19 at 52.

nacious unwillingness to frame Aboriginal rights broadly (even though it has the ability to do so), still has not demonstrated the hostility and ignorance<sup>21</sup> that its American counterpart has shown in the past three decades, since *Oliphant v. Suquamish Indian Tribe*.<sup>22</sup> Furthermore, and perhaps most importantly, the bright-line limitation of the federal plenary power under Canada's constitution is a real advantage not enjoyed by Indians in the United States—and will be discussed in more depth below in Part IV. Regardless of these advantages, Canada would still gain valuable insight by looking south to how the United States has succeeded (and failed) in its treatment of the Indian population within its borders.

To properly explain where indigenous people in North America find themselves today in the context of their *sui generis*<sup>23</sup> rights, it is quite necessary to provide a historical backdrop. This will explain the circuitous route that indigenous peoples have taken (or perhaps more appropriately, have been taken on), depending on which side of the previously non-existent American and Canadian border their ancestral territories were located when the geopolitical boundaries were marked off by the United States and Great Britain after the American Revolution.

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<sup>21</sup> For a damning historical look at the US Supreme Court's treatment of Indian tribes since *Johnson v. M'Intosh* (21 US (8 Wheat) 543 (available on WL Can) (1823) [*Johnson*]), see David E Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997).

<sup>22</sup> 435 US 191 (1978), 98 S Ct 1011 [*Oliphant* cited to US] (non-Indians who violate tribal law are immune from prosecution in a tribal court unless Congress has expressly conferred that power). However, Congress has recently (February 28, 2013) tempered this decision with an expansion of the *Violence Against Women Act* (42 USC §§ 13925-4045d (2006)) allowing tribal courts jurisdiction over domestic violence and sex crimes involving an Indian and non-Indian on tribal lands: see *Violence Against Women Reauthorization Act of 2013*, Pub L No 113-4, § 904 (slip law), online: The Library of Congress <<http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.47>>. See generally Peter Scott Vicaire, *The Canadian Court Justice Indian Law Report Card*, online: Turtle Talk <<http://turtletalk.files.wordpress.com/2009/04/supreme-court-of-canada-report-card1.pdf>> (for a useful statistical breakdown of Aboriginal law cases of the Supreme Court of Canada (since 1982)); Peter Scott Vicaire, *The Supreme Court Justice Indian Law Report Card*, online: Turtle Talk <<http://turtletalk.files.wordpress.com/2009/04/supreme-court-justice-indian-law-report-card3.pdf>> (for the US Supreme Court (since 1986)).

<sup>23</sup> "*Sui generis*", meaning "of its own kind" or "unique", is a term of art in Canadian Aboriginal law. It was introduced in the landmark Supreme Court decision *Guerin v. The Queen* ([1984] 2 SCR 335, (*sub nom Guerin v R*) 13 DLR (4th) 321), where the Court held that the Canadian government has a fiduciary duty to First Nations and that Aboriginal title is a *sui generis* right.



## I. Historical Starting Lines: Dissimilar Beginnings

With the birth of the fledgling United States, many Indian tribes<sup>24</sup> found themselves within a nation that resented them for the assistance that they provided to the British during the revolution. The United States did not want the Indian tribes as a part of their country, and its policies were, from the start, designed to separate rather than include.<sup>25</sup> There was an observable “us” and “them” mentality, which would ultimately benefit Indian tribes in the United States.

For example, in a letter written by George Washington concerning the decision of many tribes to side with the British in the Revolutionary War, he expressed his desire to “draw a veil over what is past and establish a *boundary line* between them and us.”<sup>26</sup> Washington saw the lands and territories held by British-allied tribes as conquered provinces even though he did not advocate removing them from the land.<sup>27</sup> Washington reasoned that the Indian tribes “could not be restrained from acts of hostility, but were determined to join their Arms to those of G. Britain and to share their fortune; so, consequently, with a less generous People than Americans they would be made to share the same fate.”<sup>28</sup> Further, in 1801, Thomas Jefferson referred to tribes in his first presidential annual mes-

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<sup>24</sup> Though the western tribes tended to favor the British (stemming from the cultivation of good relations since the defeat of Pontiac), the Iroquois Confederacy was split. Six Nations Chief Joseph persuaded the Mohawk and some Seneca to support the British, but many Oneida and Tuscarora sided with the Americans. After an American attack on them, many of the previously neutral Onondaga and Cayuga chose to side with the British. For an interesting article discussing competing Cayuga claims against New York between those who stayed in New York and those who moved to Ontario, see Howard A Vernon, “The Cayuga Claims: A Background Study” (1980) 4:3 *American Indian Culture and Research Journal* 21 at 32-33.

<sup>25</sup> For a good starting point in the discussion of the unique legal status of Indians in the United States, see Francis Paul Prucha’s foundational works: *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994); *The Great Father: The United States Government and the American Indians* (Lincoln, Neb: University of Nebraska Press, 1984) [Prucha, *Great Father*].

<sup>26</sup> Letter from George Washington to James Duane (7 September 1783) in Camilla Townsend, ed, *American Indian History: A Documentary Reader* (Malden, Mass: Wiley-Blackwell, 2009) 84 at 85 [emphasis added].

<sup>27</sup> See *Ibid.* Robertson provides a fascinating look at *Johnson* (*supra* note 21), a small land claim dispute before the US Supreme Court that introduced the already internationally recognized “discovery doctrine” to American law. This doctrine provided the United States with the legal, albeit immoral, authority to remove indigenous peoples from their lands: see Robertson, *supra* note 6 at 75-76. See also Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Belknap Press, 2005).

<sup>28</sup> Washington, *supra* note 26 at 85.

sage as “our Indian neighbors”,<sup>29</sup> and James Madison later called them “our aboriginal neighbors”.<sup>30</sup> Clearly, all three of these American founding fathers did not consider Indians to be American, and as we shall see, Washington’s claim that Americans were a more “generous people” to Indians than the British would prove to be quite accurate, if not prophetic.

On the other side of the invisible political wall that emerged after the chaos of the Revolutionary War were tribes in what would become the Dominion of Canada and that had generally shown allegiance to the British Crown in the Revolutionary War.<sup>31</sup> Many of those same tribes<sup>32</sup> would again side with the British in the War of 1812, encouraged by the belief that Great Britain would create for them a buffer state with a separated Indian population in the Ohio Valley.<sup>33</sup> Of course, that did not transpire, and as these tribes’ influence on military matters waned in the first half of the nineteenth century, so too did their political standing and treaty-making powers.<sup>34</sup>

For the purposes of this article, there were actually two historical newcomer beginnings—September 17, 1787, and July 1, 1867, when the United States and Canada, respectively, adopted their constitutions. The variance in military power held by tribes at the time of the adoption of these two constitutions is critical; this eighty-year difference has had an enormous effect on the way that indigenous peoples have been dealt with and has directly led to the substantial differences that exist today. Certainly, seeds planted early in fertile soil produce more desirable crops than those tossed on long-barren ground.

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<sup>29</sup> Thomas Jefferson, “First Annual Message” (delivered 8 December 1801) in *A Compilation of the Messages and Papers of the Presidents* (New York: Bureau of National Literature, 1897) vol 1 at 314, online: Law Library Microform Consortium <<http://www.llmcdigital.org>> [*Messages and Papers of the Presidents*].

<sup>30</sup> James Madison, “Inaugural Address” (delivered 4 March 1809) in *Messages and Papers of the Presidents*, *supra* note 29, vol 2 at 453.76

<sup>31</sup> According to James H. Merrell (“Indians and the New Republic” in Jack P Greene & JR Pole, eds, *The Blackwell Encyclopedia of the American Revolution* (Cambridge, Mass: Blackwell, 1991) 392 at 393), it is estimated that approximately thirteen thousand indigenous warriors fought on the British side.

<sup>32</sup> The Shawnee, Creek Red Sticks, Ojibwe, Chickamauga, Fox, Iroquois, Miami, Mingo, Ottawa, Kickapoo, Delaware (Lenape), and Mascouten fought with the British, while only the Choctaw, Cherokee, and Creek allies fought alongside the Americans.

<sup>33</sup> See JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, 3d ed (Toronto: University of Toronto Press, 2000) at 106.

<sup>34</sup> For an illuminating survey of pre-1800 treaty making between indigenous and European Americans, see Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).

## A. *United States*

### 1. Preconstitutional United States

Article IX of the *Articles of Confederation* provided an express grant of authority to Congress to handle dealings with Indians but also contained a parallel, protective clause afforded to the states.<sup>35</sup> Congress was given “sole and exclusive right [of] ... regulating the trade and managing all affairs with the *Indians*, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.”<sup>36</sup> Thus, what was supposedly an exclusive delegation of power to the central government was in fact severely limited by the parallel reservation of state power. However, the “discontents and confusion resulting from these conflicting claims” were later (postconstitutionally) discussed by Chief Justice John Marshall in *Worcester v. Georgia*,<sup>37</sup> where he affirmed that the constitutional legitimacy to deal with Indians was provided solely to the federal government and that states could no longer interfere in Indian matters and relations.

### 2. Postconstitutional United States

The US Constitution is the source of federal power to control Indian affairs. As interpreted by Chief Justice Marshall in *Worcester*, it “confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. ... The shackles imposed on this power, in the confederation, are discarded.”<sup>38</sup> The assumption of congressional power over Indian tribes by virtue of the “commerce clause” is troubling to many (mainly Indians), because nowhere does that clause confer power *over* Indian tribes; rather, it simply provides the power to regulate commerce and enter into treaties *with* Indian tribes. Regardless, that is how the commerce clause has been interpreted since

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<sup>35</sup> For an interesting analysis of preconstitutional federal power in Indian affairs, see Matthew LM Fletcher, “Preconstitutional Federal Power” (2007) 82:2 Tul L Rev 509 (regarding a preconstitutional source for congressional plenary power over Indian affairs that may have survived the ratification of the constitution).

<sup>36</sup> *Articles of Confederation*, 1781, art IX [emphasis in original].

<sup>37</sup> 31 US (6 Pet) 515 at 559 (available on WL Can) (1832) [*Worcester*].

<sup>38</sup> *Ibid* [emphasis in original].

*Worcester*, the last of three cases, known as the Marshall trilogy,<sup>39</sup> which form the foundation of Indian law in the United States to this day.<sup>40</sup>

The commerce clause<sup>41</sup> is one of only three places in the US Constitution that mention Indians<sup>42</sup> and is by far the most important of the three.<sup>43</sup> It is often referred to as the “foreign commerce clause”, the “interstate commerce clause”, and the “Indian commerce clause”, each of which is simply a different application of the same sentence. In order to bolster the legal rationale for the United States’ constitutional authority over Indians, Chief Justice Marshall coupled the commerce clause with the “treaty clause”<sup>44</sup> to provide Congress with “all that is required for the regulation of our intercourse ... with [tribes].”<sup>45</sup> But as noted by Professor Matthew Fletcher, because some Indian tribes had accepted the protection of the United States by way of treaties, Chief Justice Marshall’s supreme court improperly interpreted the word “protection” to mean “dependence”. It was this alleged dependence upon the federal government that supposedly authorized Congress to assume control over all tribes, “as if one tribe’s ‘dependence’ amounted to *all* tribes’ dependence.”<sup>46</sup>

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<sup>39</sup> It was held in *Worcester* that state law was null within reservation lands. The other two cases are *Cherokee Nation v. Georgia* (30 US (5 Pet) 1 (available on WL Can) (1831) [*Cherokee Nation*] (Indian nations were neither states nor foreign nations; they were “domestic dependent nations” at 17)) and *Johnson* (*supra* note 21 at 572-74 (by virtue of the doctrine of discovery, only the United States had the right to extinguish, by purchase or conquest, Indian title to land; Indians only held a right of occupancy)). These decisions have never been overruled, and although *Worcester* has been substantially eroded over the years, all three still serve as the foundation of contemporary American Indian law.

<sup>40</sup> For an interesting overview of the Marshall trilogy, see Matthew LM Fletcher, “The Iron Cold of the Marshall Trilogy” (2006) 82:3 NDL Rev 627 (“the pedagogical value of the Marshall Trilogy goes far beyond the mere holdings of the cases. ... The arguments, concepts, and notions in these opinions resonate today about 170 years after the last of the decisions” at 628).

<sup>41</sup> US Const art I, § 8, cl 3.

<sup>42</sup> The other two times that Indians are mentioned in the US Constitution are in article I, section 2, clause 3, and its superseding (1868) amendment XIV, section 2, which removed the reference to slaves as being three-fifths of a person, while retaining the exclusion of “Indians not taxed”, for voting-apportionment purposes.

<sup>43</sup> Interestingly and in what is no doubt a comment on his perception of Indians in the American constitutional scheme, Chief Justice William H Rehnquist, in his book, *The Supreme Court: How It Was, How It Is* ((New York: Alfred A Knopf, 2001) at 36), discussed the commerce clause and performed a bit of constitutional revisionism when he cropped the words “and with the Indian Tribes.”

<sup>44</sup> US Const art II, § 2, cl 2.

<sup>45</sup> *Worcester*, *supra* note 37 at 559.

<sup>46</sup> Matthew LM Fletcher, “The Supreme Court and Federal Indian Policy” (2006) 85:1 Neb L Rev 121 at 166 [Fletcher, “Supreme Court”].

However, in 1871, thirty-six years after Chief Justice Marshall left the bench (upon his death), Congress passed a law that put an end to treaty making with Indian tribes.<sup>47</sup> Since then, the two-pronged legal rationale for American authority over tribes has been effectively halved, and the US Supreme Court has since had to rely solely on the commerce clause.<sup>48</sup> But this loss of the two-pronged approach has not been a problem for the US Supreme Court. In fact, control over tribes significantly increased shortly after treaty making became outmoded.

For instance, in 1886, the US Supreme Court determined<sup>49</sup> that Congress was lawfully sanctioned to authorize the *Major Crimes Act*,<sup>50</sup> which extended federal criminal jurisdiction into Indian country.<sup>51</sup> Further, in 1903, the US Supreme Court held, in *Lone Wolf v. Hitchcock*,<sup>52</sup> that there were no effective limits on federal power over Indian tribes; the power is plenary—like the court that rendered the decision, supreme. This outright assumption of federal plenary power over Indian tribes was a critical blow, seen by one judge (in 1979) as “one of the blackest days in the history of the American Indian, the Indians’ Dred Scott decision.”<sup>53</sup> It remains

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<sup>47</sup> *An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the Year ending June thirty, eighteen hundred and seventy-two, and for other Purposes*, c 120, § 3, 16 Stat 544 at 570-71 (1871) (codified as amended at 25 USC § 71 (2006)). For an interesting argument that the statute is unconstitutional, see David P Currie, “Indian Treaties” (2007) 10:4 Green Bag (2d) 445.

<sup>48</sup> It is interesting to note that the US Supreme Court recently held in *National Federation of Independent Business v. Sebelius* (567 US \_\_, 132 S Ct 2566 (2012)), that the commerce clause could not be used to enforce an individual mandate to purchase health care, yet that very clause is still used to claim absolute power over all Indian tribes in the United States.

<sup>49</sup> *United States v Kagama*, 118 US 375, 6 S Ct 1109 (1886) [*Kagama* cited to US].

<sup>50</sup> *An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes*, c 341, § 9, 23 Stat 362 at 385 (1885) (codified as amended at 18 USC § 1153 (2006)).

<sup>51</sup> “Indian country” is a term of art, defined in 18 USC § 1151 (2006). It is often used interchangeably with “Indian Reservation”, but there are important differences. Indian country includes reservations, dependent Indian communities, and trust allotments and restricted allotments that may be located outside reservations.

<sup>52</sup> 187 US 553, 23 S Ct 216 (1903).

<sup>53</sup> *Sioux Nation of Indians v United States*, 601 F (2d) 1157 at 1173, 220 C Cls R 442 (1979) (Nichols J, concurring). *Scott v. Sandford* (60 US (19 How) 393, 15 L Ed 691 (1857) [*Dred Scott* cited to US]) was a US Supreme Court ruling that people of African descent held as slaves (and their descendants, whether or not they themselves were slaves) neither were citizens nor were protected under the constitution.

a catalyst for much modern academic discourse<sup>54</sup> and, to a much lesser degree, even judicial criticism.<sup>55</sup>

### 3. States Versus Tribes

Article I, section 8 of the US Constitution provides the federal government with a limited, enumerated list of powers, further refined by the Bill of Rights,<sup>56</sup> and which establishes the authoritative limits of Congress. Clearly state-centric, the Tenth Amendment explicitly states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>57</sup> Notwithstanding this broad range of powers, states still generally do not have jurisdictional authority in Indian country for either criminal or non-criminal matters<sup>58</sup> because the commerce clause serves as

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<sup>54</sup> See Robert G Natelson, “The Original Understanding of the Indian Commerce Clause” (2007) 85:2 Denv UL Rev 201 (“[w]ithin its sphere, the [commerce clause] ... provided Congress with authority to override state laws. It did not ... abolish or alter the pre-existing state commercial and police power over Indians within state borders” at 265); Fletcher, “Supreme Court”, *supra* note 46 (“the lack of constitutional grounding for federal Indian law opens the door to new Supreme Court precedent. Since nothing in the Constitution prevents or even discourages the Court from making policy choices, there is no respect for stare decisis in the Court’s Indian cases” at 162-63); Alex Tallchief Skibine, “The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration” (2003) 8:1 Tex F on CL & CR 1 (the US Supreme Court’s “anti-tribal decisions [are due to] ... its failure to integrate its general jurisprudence on federalism and associational rights, as well as its preference for formalism, into federal Indian law” at 3 [footnote omitted]); Robert N Clinton, “There Is No Federal Supremacy Clause for Indian Tribes” (2002) 34:1 Ariz St LJ 113 (“application of the Supreme Court’s historically-based, originalist methodology to those portions of the Constitution dealing with federal power over Indian affairs compels the need to reexamine several basic Indian law doctrines, most notably the so-called federal Indian plenary power doctrine” at 115); Nell Jessup Newton, “Federal Power over Indians: Its Sources, Scope, and Limitations” (1984) 132:2 U Pa L Rev 195 (“extraordinary deference to congressional power over Indians is closely related to the courts’ failure to protect Indian tribal rights” at 197).

<sup>55</sup> See *Red Lake Band of Chippewa Indians v Swimmer*, 740 F Supp 9 at 11-12 (available on WL Can) (DDC 1990).

<sup>56</sup> The Bill of Rights is the name for the first ten amendments to the US Constitution.

<sup>57</sup> US Const amend X.

<sup>58</sup> Apart from the several *PL 280* states (discussed below in Part III), states have jurisdiction in criminal matters only when both the accused and the victim are non-Indians. Also, after *Nevada v. Hicks* (533 US 353, 121 S Ct 2304 (2001) [*Hicks* cited to US]), states may also exercise jurisdiction over Indians living on the reservation for their activities off the reservation.

a bar against state authority when Congress enacts legislation that expressly restrains that authority.<sup>59</sup>

Nevertheless, just as soon as the United States became a nation, states attempted to assume jurisdictional control over Indian country and “would have succeeded far more than they did had it not been for the U.S. Supreme Court.”<sup>60</sup>

Returning briefly to *Worcester v. Georgia*, the US Supreme Court firmly held in that case that state laws “can have no force”<sup>61</sup> on an Indian reservation without Congress’s express consent. Further, it later recognized, in 1886, that “[Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”<sup>62</sup> To be sure, this was amply illustrated in 1832, when the state of Georgia ignored Chief Justice Marshall’s *Worcester* decision and evicted the Cherokees from their ancestral homeland, in what has come to be known as the “Trail of Tears.”<sup>63</sup> Regardless, to this day, Indian tribes are still generally considered to be outside state jurisdiction because they are “domestic dependent nations”,<sup>64</sup> over which state laws “can have no force.”<sup>65</sup>

While the US Supreme Court has often proven to be an effective buffer for Indian tribes against impinging state interests,<sup>66</sup> two laws have been

<sup>59</sup> One important example of this is the *Indian Nonintercourse Act (An act to regulate trade and intercourse with the Indian tribes*, c 33, § 4, 1 Stat 137 at 138 (1790) (codified as amended at 25 USC § 177 (2006)), first passed in 1790, which requires the federal government to approve all transfers of interests in tribal lands.

<sup>60</sup> Stephen L Pevar, *The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights*, 3d ed (Carbondale, Ill: Southern Illinois University Press, 2004) at 176.

<sup>61</sup> *Worcester*, *supra* note 37 at 561.

<sup>62</sup> *Kagama*, *supra* note 49 at 384. Ironically, this call for protection of tribes from encroaching states was the reasoning behind the implementation of the “plenary power” doctrine.

<sup>63</sup> For a useful, succinct history, see Gloria Jahoda, *The Trail of Tears: The Story of the American Indian Removals, 1813-1855* (New York: Holt, Rinehart and Winston, 1975).

<sup>64</sup> *Cherokee Nation*, *supra* note 39 at 17.

<sup>65</sup> *Worcester*, *supra* note 37 at 561.

<sup>66</sup> *Oklahoma Tax Commission v Chickasaw Nation*, 515 US 450, 115 S Ct 2214 (1995) [cited to US] (state “may not apply its motor fuels tax ... to fuel sold by [a tribe] ... in Indian country” but “may tax the income ... of all persons, Indian and non-Indian alike, residing in the [s]tate outside Indian country” at 453); *Bryan v Itasca County*, 426 US 373, 96 S Ct 2102 (1976) (state could not impose tax on reservation Indians in the absence of congressional intent, as the statute that extended civil jurisdiction of the states to Indian reservations did not confer the power to tax); *McClanahan v Arizona State Tax Commission*, 411 US 164, (*sub nom McClanahan v State Tax Commission of Arizo-*

passed by Congress that permit the outright intrusion of state governments into Indian country: *House Concurrent Resolution 108*<sup>67</sup> and *Public Law 280*.<sup>68</sup>

*House Concurrent Resolution 108* was the harbinger of the dreaded termination era and will be discussed below in Part III, while *PL 280* authorized five “mandatory states”<sup>69</sup> to receive full criminal jurisdiction in Indian country and allowed for the remaining states to opt in to assume criminal jurisdiction. Because most states did not want the added burden and costs of policing reservations, only ten “option states” did so. As a result, today, there is a confusing patchwork scheme of state, tribal, and federal control in criminal matters. But however intrusive *PL 280* may be, it should be remembered that it did not divest tribes of their inherent powers, nor did it waive tribal sovereign immunity from suit or provide states with any authority over the tribes themselves. Further, it did not allow states to interfere with treaty rights, encumber trust property, or determine the ownership of trust land.<sup>70</sup>

The US Supreme Court, exhibiting its above-mentioned multiple personality disorder, has also handed down many decisions that have strongly favoured state over tribal interests.<sup>71</sup> This dilution of the *Worcester* ap-

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*na*) 93 S Ct 1257 (1973) [cited to US] (Arizona state individual income tax was “unlawful as applied to reservation [Navajo] Indians with income derived wholly from reservation sources” at 165); *Williams v Lee*, 358 US 217, 79 S Ct 269 (1959) [*Williams* cited to US] (state courts do not have jurisdiction over a civil suit brought against an Indian by a non-Indian where the cause of action arises on a reservation).

<sup>67</sup> US, HR Con Res 108, *Indians*, 83d Cong, 1953, as repudiated by the *Tribally Controlled Schools Act of 1988*, Pub L No 100-297, § 5203(f), 102 Stat 385 at 385 (codified as amended at 25 USC §2501(f)) [*House Concurrent Resolution 108*]. See also *infra* note 191 and accompanying text.

<sup>68</sup> *An Act to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes*, Pub L No 83-280, 67 Stat 588 (1953) (codified as amended at 18 USC § 1162 (2006) (*PL 280*)). For a solid look at the history of *PL 280* and the damage wrought upon affected Indian tribes, see Carole Goldberg-Ambrose with the assistance of Timothy Carr Seward, *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles: American Indian Studies Center University of California, 1997); Carole Goldberg-Ambrose & Duane Champagne with assistance from Wallace T Cleaves et al, *A Second Century of Dishonor: Federal Inequities and California Tribes* (UCLA American Indian Studies Center for the Advisory Council on California Indian Policy, 1996).

<sup>69</sup> California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation).

<sup>70</sup> See e.g. *Boisclair v Superior Court of San Diego County*, 801 P (2d) 305, 313-15 (available on WL Can) (Sup Ct Cal 1990).

<sup>71</sup> See e.g. *Strate v A-1 Contractors*, 520 US 438, 117 S Ct 1404 (1997) [cited to US] (“absent express authorization by federal statute or treaty, tribal jurisdiction over conduct



proach has led to the use of two tests designed to identify and, when warranted, repel state infringement into tribal matters: the federal pre-emption test and the infringement test.<sup>72</sup>

The federal pre-emption test is powered by the “supremacy clause”,<sup>73</sup> which establishes that federal laws (and treaties) are the highest form of law in the American legal system, both in federal and state courts; state judges are mandated to uphold them, even if their own state’s constitution or laws conflict with them. As discussed above, since the regulation of Indian affairs is squarely in the federal realm of powers via the commerce clause, any state law that conflicts with federal law fails this test.<sup>74</sup> Further, states generally cannot pass the test when the regulation or law in question mainly affects the tribe or its members with respect to activities carried out on the reservation.<sup>75</sup>

Whereas the federal pre-emption test is concerned with preventing states from stepping on federal toes, the infringement test is concerned with preventing states from stepping on tribal ones. In *Williams v. Lee*, a case involving the determination of tribal-court jurisdiction, the US Supreme Court held that states may not infringe “on the right of reservation

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of nonmembers exists only in limited circumstances” at 445); *Department of Taxation and Finance of New York v Milhelm Attea & Bros*, 512 US 61, 114 S Ct 2028 (1994) [cited to US] (“Indian traders are not wholly immune from state regulation that is reasonably necessary to assessment or collection of lawful state taxes” at 75); *Oliphant, supra* note 22 (“Indian trib[al courts] do not have inherent criminal jurisdiction to try and to punish non-Indians” at 212; “Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress” at 208); *Moe v Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 US 463, 96 S Ct 1634 (1976) [cited to US] (“[s]tate may require [an Indian retailer on the reservation] ... to add the tax [on cigarettes] to the sales price [with respect to sales to non-Indians]” at 483); *Utah & Northern Railway v Fisher*, 116 US 28, 6 S Ct 246 (1885) (states could tax personal property owned by non-Indians on a reservation); *United States v McBratney*, 104 US 621, 26 L Ed 869 (1881) (states could prosecute non-Indians who commit a crime against another non-Indian on a reservation).

<sup>72</sup> For a good introduction to the pre-emption and infringement tests, see Steven Paul Sherick, “State Jurisdiction over Indians as a Subject of Federal Common Law: The Infringement-Preemption Test” (1979) 21:1 *Ariz L Rev* 85. See also David H Getches et al, *Cases and Materials on Federal Indian Law*, 6th ed (St. Paul: West, 2011) at 596-601.

<sup>73</sup> US Const art VI, cl 2.

<sup>74</sup> See *White Mountain Apache Tribe v Bracker*, 448 US 136, 100 S Ct 2578 (1980) [cited to US] (“[state] taxes are pre-empted by federal law” at 138; “the proposed exercise of state authority is impermissible” at 151); *Warren Trading Post Co v Arizona Tax Commission*, 380 US 685, 85 S Ct 1242 (1965) [cited to US] (“state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation” at 686).

<sup>75</sup> See *Hicks*, *supra* note 58 at 362.

Indians to make their own laws and be ruled by them.”<sup>76</sup> This statement encapsulates the intent of the test: shielding tribes from state power and at the same time, protecting the right of tribes to be self-governing.<sup>77</sup>

This modern framework certainly does not provide as much protection for tribes against states as did Marshall’s original *Worcester* and *Cherokee Nation* understanding—that state law “can have no force” on “domestic dependent nations”. As such, since those decisions (1832 and 1831, respectively), there has been a three-way jurisdictional tug-of-war among tribal, federal, and state interests, predicated on interpretations of the constitutional framework, yet with consistent acknowledgement of three sovereigns.<sup>78</sup>

Unfortunately for tribes in the United States, their respective sovereignties have not often been afforded the same respect as those of the states in which their lands lie. But as we will see below, their situation is enviable compared to the protections afforded to tribes in Canada. The following section will describe how Canada’s early and enduring view of Aboriginal peoples differed from that of the United States and how this perception led directly to very damaging legislation and judicial interpretations.

## ***B. Canada***

### 1. Preconstitutional Canada

During the first half of the nineteenth century, comparable approaches in dealings with indigenous peoples were taken by American and Canadian courts.<sup>79</sup> Whereas Chief Justice Marshall saw tribes as “domestic dependent nations”,<sup>80</sup> the judiciary in Upper Canada saw them as a “dis-

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<sup>76</sup> *Williams*, *supra* note 66 at 220.

<sup>77</sup> See *Pevar*, *supra* note 60 at 133.

<sup>78</sup> For a modern look at the expansion of state jurisdiction in Indian country, see Jeff Corntassel & Richard C Witmer, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood* (Norman, Okla: University of Oklahoma Press, 2008).

<sup>79</sup> William Wicken provides a thorough examination of the preconstitutional history between the Mi’kmaq and the British in William C Wicken, *Mi’kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002). Likewise, Sidney L. Harring provides an illuminating history of this era in his *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1998).

<sup>80</sup> *Cherokee Nation*, *supra* note 39 at 17.

tinct, though feudatory people.”<sup>81</sup> And whereas Chief Justice Marshall saw a treaty as “a contract between two nations, not a legislative act,”<sup>82</sup> the Upper Canada King’s Bench opined that “however barbarous these Indians may be considered, the treaty under which they migrated to and reside in this country is binding.”<sup>83</sup>

Notwithstanding these somewhat parallel views of Indian tribes and Aboriginal peoples by Canadian and American courts, there was still a critical, diverging undercurrent in play, based on the dichotomy of “us” (i.e., subjects of the British Crown who were citizens neither of Canada nor of their respective tribes) and “them” (i.e., citizens of tribes, not citizens of the United States). These seeds of dissimilarity planted in the late 1700s would not bloom until 1867, with the enactment of the Canadian constitution. In the interim, whereas many early British North American cases discussed lands belonging to the Crown, yet reserved for Aboriginal peoples’ occupation or put aside for their benefit,<sup>84</sup> the United States routinely discussed the notion of Indian lands and the rights of occupancy be-

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<sup>81</sup> *The King v Phelps* (1823), 1 UCKB 47 at 52, 1 CNLC 411 [*Phelps*].

<sup>82</sup> *Foster v Neilson*, 27 US (2 Pet) 253 at 314, 7 L Ed 415 (1829) [*Foster*].

<sup>83</sup> *Phelps*, *supra* note 81 at 53.

<sup>84</sup> See e.g. *Totten v Watson* (1858), 15 UCQB 392 (available on WL Can) (dealing with legislation prohibiting Aboriginals from selling lands reserved for their occupation and held by the Crown, but allowing sale of land by individual Indians who had acquired title to the land); *The Queen v Hagar* (1857), 7 UCCP 380 (available on WL Can) (dealing with legislation “designed to protect Indians from all contracts made by them in respect to the lands set apart for their use” at 382); *Lower Canada (Commissioner of Indian Lands) v Payant Dit St Onge* (1856), 3 LC Jur 313, 8 Rappports judiciaires révisés de Québec 29 (Sup Ct) [cited to LC Jur] (Aboriginals do not have “any right or title, by virtue whereof, [they can] ... sell wood growing on lands” that are “set apart and appropriated to and for the use of the tribe or body of Indians therein residing” at 313, 315); *R v Baby* (1855), 12 UCQB 346 (available on WL Can) (dealing with legislation prohibiting “the buying from Indians, or contracting to buy from them, without the consent of the Crown, not merely any lands of which they are actually in possession but any lands held by the government for their use and benefit” at 353); *The Queen v Strong* (1850), 1 Gr / UC Ch 392 at 394 (available at WL Can) (parol testimony concerning lands “appropriated for the residence of certain Indian tribes,” which were trespassed upon by a non-Aboriginal, was sufficient prima facie evidence); *Doe dem Sheldon v Ramsay* (1852), 9 UCQB 105 (available on WL Can) (a grant of land by the governor of Quebec to the Mohawks did not convey a legal estate); *Bown v West* (1846), 1 UCQB (OS) 639 (available on WL Can) (court could not interfere with a land transfer involving Aboriginals because the Crown held the whole of the estate); *Doe ex dem Jackson v Wilkes* (1835), 4 UCQB (OS) 142 (available on QL) (“the Governor of a colony, acting in the name of the King, could [not] under his own seal at arms grant away the lands of the crown” at 147).

ing protected and respected by the courts until extinguished via legal means.<sup>85</sup>

As discussed below, we shall see that the long delay on Canada's part in recognizing aspects of inherent, indigenous rights even in part can be directly attributed to the fact that Aboriginal peoples in Canada were considered subjects, though not citizens, until 1960. Contrastingly, Indians in the United States were long considered neither subjects nor American citizens; they were citizens of their own tribe and not a part of the American body politic. The following section will elaborate on this divergent "us" and "them" dichotomy.

## 2. Subjects and Non-citizens Versus Nonsubjects and Non-citizens

The critical distinction between Canada's subject-non-citizen approach and the United States' nonsubject-non-citizen approach is highlighted by two events that occurred only two years apart—in 1868 and 1870. In 1868, the Fourteenth Amendment<sup>86</sup> was ratified as a means for the US Congress to overturn *Scott v. Sanford*,<sup>87</sup> the vile US Supreme Court decision that held that black slaves (and their descendants, whether or not they themselves were slaves) were not protected by the US Constitution and could never be American citizens. However expansive the Fourteenth Amendment may have been, it still limited that grant of citizenship to those people who were "subject to [US] ... jurisdiction." Since Indians were governed by their own respective tribal laws and not subject to US jurisdiction, they were not afforded citizenship. Simply put, they were not American; they were Indian.

Contrastingly, two years later—in 1870—Justice Dalton held, in *R ex rel. Gibb v. White*, that "[t]here is a marked difference between the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen. ... In [Upper Canada] ... Indians are sub-

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<sup>85</sup> See e.g. *Clark v Smith*, 38 US (13 Pet) 195, 10 L Ed 123 (1839) (lands in which Indians have a right of occupancy will be encumbered by that right until it is legally extinguished); *Cherokee Nation*, *supra* note 39 ("Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites" at 48); *Johnson*, *supra* note 21 (through the Revolutionary War and the ensuing treaties, the United States earned the exclusive right to extinguish the Indians' title to the land at issue); *Fletcher v Peck*, 10 US (6 Cranch) 87, 3 L Ed 162 (1810) [cited to US] ("the nature of Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the state" at 142-43).

<sup>86</sup> US Const amend XIV.

<sup>87</sup> *Dred Scott*, *supra* note 53.

jects.”<sup>88</sup> Indeed, Indians in Canada were conveniently considered by the Canadian government to be subjects but were still not afforded citizen status unless they voluntarily enfranchised themselves.<sup>89</sup> They were able to cast election ballots or hold political office only if they surrendered their treaty rights and Indian status or if they had fought for Canada in a war.<sup>90</sup> The unconditional franchise for Indians, with no strings attached, was not granted until 1960, when Prime Minister John Diefenbaker amended the *Canada Elections Act*.<sup>91</sup> The United States beat Canada to the punch by thirty-six years.

In 1924,<sup>92</sup> Congress passed the *Indian Citizenship Act*,<sup>93</sup> which conferred American citizenship on all Indians born in the United States who had not yet become citizens through treaties or statutes. However, the US Supreme Court performed some jurisdictional damage control with *United States v. Nice*<sup>94</sup> when it held that Indians remained subject to Congress’ plenary authority even after they became United States citizens. Therefore, as of 1924, Indians in the United States were both American citizens and citizens of their own respective Indian tribes. Conversely, until 1960, Aboriginals in Canada were stuck in a bizarre no man’s land of pseudo-citizenship. They were considered subjects but not full-fledged citizens; as mentioned above, they could not vote or hold political office unless they abandoned their Indian status and treaty rights.

George Washington’s aforementioned social, ideological, and geographical lines of distinction between the two groups were invaluable to

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<sup>88</sup> (1870), 5 PR 315 at 317 (available on QL) (Ont).

<sup>89</sup> Enfranchisement was resisted, but compulsory enfranchisement came in various forms: only people who could prove membership in particular bands were recognized as having Indian status, while any Indians who fought for Canada in a war or became a doctor, lawyer, or Christian minister were automatically enfranchised and lost their Indian status.

<sup>90</sup> See *Canada Elections Act*, RSC 1952, s 14(2)(e).

<sup>91</sup> See *An Act to amend the Canada Elections Act*, SC 1960, c 7, s 1, repealing *Canada Elections Act*, *supra* note 90, ss 14(2)(e), 14(4). The first Aboriginal (Okanagan) person to be elected to the House of Commons was Leonard S. Marchand, who entered the House on June 25, 1968.

<sup>92</sup> This was fifty-four years after the Fifteenth Amendment granted all American citizens, regardless of “race, color, or previous condition of servitude,” the right to vote (US Const amend XV, § 1).

<sup>93</sup> *An Act To authorize the Secretary of the Interior to issue certificates of citizenship to Indians*, Pub L No 68-175, 43 Stat 253 (codified as amended at 8 USC § 1401(b) (2006)).

<sup>94</sup> 241 US 591, 36 S Ct 696 (1916) [cited to US] (United States citizenship “is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adapted for their protection” at 598).

tribes in the United States in maintaining their sovereign indigenous status. The benefits enjoyed by tribes in the United States by being “them” were becoming evident, while the damages inflicted upon Aboriginal peoples by being a member of “us” in Canada were quite destructive to their sovereignty, which was never ceded, surrendered, or extinguished. Their inclusion in Canada’s first constitution would only exacerbate the problem.

### 3. Postconstitutional Canada

Eighty years after the United States adopted its constitution, Great Britain passed the *Constitution Act, 1867*,<sup>95</sup> which formed the Dominion of Canada.<sup>96</sup> Unlike the United States’ constitutional scheme, where any rights not granted to the federal government were reserved for the states, the Canadian scheme maintained an overarching federal jurisdiction based upon the power known as “Peace, Order, and good Government.”<sup>97</sup> Any matter not provided for under the enumerated, exclusive authority of the provinces fell within the scope of the federal Parliament.

Unlike the status of Indians in the United States when its constitution was adopted, Aboriginal peoples in Canada were seen as neither politically significant nor militarily dangerous when the newly formed dominion adopted its constitution. For example, the Council of the Three Fires, which encompassed the entire traditional territory of the Ojibwa, Odawa, and Potawatomi, had “ceased to be an effective military entity because First Nations’ military strength relative to newcomers had greatly diminished, and the United States and Britain had reached an entente in America thereby eliminating its potential as an ally to foreign powers.”<sup>98</sup>

Because of this, when the British Crown divided up constitutional powers between the federal and provincial governments, Aboriginal peoples forcibly became a virtual constitutional footnote in section 91(24),

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<sup>95</sup> *Constitution Act, 1867*, *supra* note 15. At its time of enactment, it was called the *British North America Act*.

<sup>96</sup> The Dominion of Canada initially consisted of Ontario, Quebec, New Brunswick, and Nova Scotia.

<sup>97</sup> *Constitution Act, 1867*, *supra* note 15, s 91 (“[i]t shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”). “Peace, Order, and good Government” is often abbreviated as “POGG”.

<sup>98</sup> Norman D Shields, *Anishinabek Political Alliance in the Post-Confederation Period: The Grand General Indian Council of Ontario, 1870-1936* (MA Thesis, Queen’s University, 2001) at 14 [unpublished].

which simply reads: “Indians, and Lands reserved for the Indians.”<sup>99</sup> Tossed into the federal pot, it “is the only provision to deal with Aboriginal peoples and has provided only minimal protection for their rights.”<sup>100</sup> Unlike Indian tribes in the United States, which were placed alongside states and foreign nations in the US Constitution,<sup>101</sup> tribes in Canada were actually placed further down the enumerated list of federal powers than “Beacons, Buoys, Lighthouses, and Sable Island.”<sup>102</sup>

In 2001, the Ontario Court of Appeal claimed, in *Chippewas of Sarnia Band v. Canada (Attorney General)*,<sup>103</sup> that until 1860, dealings between the British Crown and First Nations were viewed as transactions between sovereign nations “governed by agreements or treaties made by the English Crown and the First Nations.”<sup>104</sup> The court was off the mark by several decades because, in 1830, in light of the reduction in position of Aboriginal peoples from military allies to societal impediments, Britain changed “responsibility for Indian affairs from military to civil authorities.”<sup>105</sup> This signified a decisive change in policy toward Aboriginal peoples from one that was once “characterized by diplomacy and respect of military allies to one of submission to British authority.”<sup>106</sup> In 1840, the *Union Act*<sup>107</sup> made no mention of them and made no provision for the Indian Department on the civil list; nor did it budget for the long-standing payment of annuities for Upper Canada treaties.

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<sup>99</sup> Those seven words speak volumes, as they show that Canada’s land, even land “reserved” for Aboriginal peoples, was already considered by Canadian officials as belonging to the Crown. Contrastingly, the United States only held the exclusive right to extinguish Indian title to lands to which the Indians retained a right of occupancy.

<sup>100</sup> John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3d ed (Markham: LexisNexis, 2007) at 94.

<sup>101</sup> But it should be remembered that the US Supreme Court later held, in *Cherokee Nation* (*supra* note 39 at 17), that tribes were neither states nor foreign nations; they were “domestic dependent nations”.

<sup>102</sup> *Constitution Act, 1867*, *supra* note 15, s 91(9).

<sup>103</sup> (2000), 51 OR (3d) 641, 195 DLR (4th) 135 (CA) [*Chippewas* cited to OR]. This case is criticized for its departure from previous precedent and principles regarding the legal treatment of Aboriginal people in Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33:2 Ottawa L Rev 301.

<sup>104</sup> *Chippewas*, *supra* note 103 at para 51.

<sup>105</sup> Magnet, *supra* note 5 at 40.

<sup>106</sup> Paul Finkelman & Tim Alan Garrison, eds, *Encyclopedia of United States Indian Policy and Law* (Washington, DC: CQ Press, 2009) vol 1, *sub verbo* “Canada, Indian Policy of” by Susan Neylon, 161 at 163.

<sup>107</sup> 1840 (UK) 3 & 4 Vict, c 35, reprinted in RSC 1985, App II, No 4. This act abolished the legislatures of Lower Canada and Upper Canada, and established a new political entity to replace them, the Province of Canada.

During the first half of the nineteenth century, there was scant political activism by Aboriginal peoples and perhaps no “pan-Indian” activism of any kind.<sup>108</sup> In ensuing decades, the political and societal clout of Aboriginal peoples in British North America continued to decline, notwithstanding the Métis’ Red River Rebellion of 1869-70 and the ill-fated Northwest Rebellion of 1885, which subsequently led to the Métis leader, Louis Riel, being executed by hanging. Even the eleven treaties<sup>109</sup> signed by the Aboriginal peoples and Canada between 1871 and 1921 were not enough to stave off Aboriginal peoples’ political and societal diminishment. Canada was too busy in its constitutional nation building to pay much attention to displaced Aboriginal peoples, and Aboriginal peoples were too busy simply trying to survive in a world overrun by newcomers.

It was not until the 1888 watershed *St. Catherine’s* decision<sup>110</sup> that the position of tribes in Canada and their title rights to lands were even considered. As for the outcome regarding Aboriginal peoples’ interests, tellingly, Aboriginal peoples were not even a party in the case. A quick summary is in order.

*St. Catherine’s* was a federal-provincial dispute over lands within the borders of Ontario. In 1873, a treaty<sup>111</sup> was concluded between the Crown and the “Saulteaux Tribe of the Ojibbeway Indians.” The federal government later claimed that it had retained the right to issue commercial forestry licenses and that it did so to the *St. Catherine’s* Milling and Lumber Company, the namesake of the case. In response, Ontario brought suit, arguing that it owned the lands in question, that Aboriginal peoples (“Indians” is used in the case) held only a lesser use and occupancy right at the pleasure of the Crown, and therefore, that the federal government did

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<sup>108</sup> Good starting points for research into early Aboriginal peoples’ political activism would be Shields, *supra* note 98; Miller, *supra* note 33; Janet E Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998).

<sup>109</sup> The “numbered treaties” or “Post-Confederation Treaties”.

<sup>110</sup> *St. Catherine’s Milling & Lumber Co v The Queen* (1888), 14 App Cas 46, 10 CRAC 13 (PC) [*St. Catherine’s* cited to App Cas] (note that it is spelled “St. Catharine’s” in the lower court). The source of Aboriginal title was based on the *Royal Proclamation of 1763* (*supra* note 4), giving Aboriginals a “personal and usufructuary right, dependent upon the good will of the Sovereign” and which could be taken away at any time (*St. Catherine’s*, *supra* note 110 at 54).

<sup>111</sup> *Treaty No 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the North West Angle of the Lake of the Woods*, 3 October 1873, online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100028667/1100100028669>>.



not have the right to issue lumbering permits. The court<sup>112</sup> agreed with the province on all counts, declaring that Aboriginal peoples' right to the land, *even land under treaties*, was merely a "personal and usufructuary right dependent upon the good will of the Sovereign,"<sup>113</sup> which flowed directly from the *Royal Proclamation of 1763*.<sup>114</sup>

In some ways, *St. Catherine's* was much in line with Chief Justice Marshall's *Johnson v. M'Intosh* decision. Just as Indians in the United States maintained only a "right of occupancy",<sup>115</sup> which could only be extinguished by Congress, Aboriginal peoples in Canada held "personal and usufructuary" rights merely by the grace of the Crown. Contrastingly, however, in the United States, the Indian tribes' "right of occupancy" resulted from their original ownership of the land, not on an external, foreign document. Ironically, and certainly a frustrating exercise in logic, the *St. Catherine's* court held that the British document that stripped Aboriginal peoples of their inherent rights was the same document that gave them their currently recognized rights. Apparently, the Crown giveth and the Crown taketh away.

Thus, Indians in the United States possessed (and still possess) inherent, sovereign powers by virtue of who they are—original possessors of the land—while Aboriginals in Canada, at least until 1973, maintained power solely based on what Great Britain and Canada gave them. Even though they had never surrendered their sovereign, inherent rights, Canada simply did not recognize that fact; they were considered Canadian Aboriginal subjects, not sovereign Aboriginal peoples living in Canada. This distinction is critical because, for almost a century since the *St. Catherine's* decision and well into modern times, Canadian society has grown atop this skewed view—a dubious foundation for the nation.

It was not until the *Calder*<sup>116</sup> decision of 1973 that Canada acknowledged its faulty legal and moral reasoning, and finally caught up to the way the United States had, since 1823, recognized Indian title to land.<sup>117</sup>

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<sup>112</sup> The Judicial Committee of the Privy Council, which sat in London, England, was the ultimate court of appeal for Canada until 1949. With the advent of the Supreme Court of Canada that year, the Privy Council's role vis-à-vis Canada was abolished, though it still remains the final court for many former British colonies.

<sup>113</sup> *St. Catherine's*, *supra* note 110 at 54.

<sup>114</sup> This debilitating view of Aboriginal title was later affirmed in *Quebec (AG) v Canada (AG); Re Indian Lands* (1920), [1921] 1 AC 401, 56 DLR 373 (PC) (also known as the "Star Chrome" case).

<sup>115</sup> *Johnson*, *supra* note 21 at 574.

<sup>116</sup> *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145.

<sup>117</sup> See *Johnson*, *supra* note 21.

In *Calder*, the Supreme Court of Canada overruled *St. Catherine's* when it held that Aboriginal title, based on prior occupation by Aboriginal peoples, existed at common law and not because of the *Royal Proclamation of 1763*. Shortly after this decision, the federal government implemented its comprehensive land claim process to deal with Aboriginal peoples' claims to lands that had not been ceded by treaty.<sup>118</sup>

Regardless of *Calder* and the ensuing land claims commission, Canada's one hundred and fifty years of legal and moral tardiness has had devastating effects on Aboriginal peoples.<sup>119</sup> As will be discussed below, in Part IV, most of the post-*Calder* judicial decisions suffer from the residual effects of the centuries-old colonial mindsets that doggedly cling to interpreters of the law today. In this vein, Professor Brian Slattery discussed what he calls the "Imperial Model", which "has had a remarkable influence on the thinking of lawyers and judges over the past century and a half. And, in the absence of anything better to replace it, it continues to provide the tacit matrix for much legal thinking about the Constitution."<sup>120</sup> This is amply illustrated by the overt provincial presence within reserves, discussed immediately below.<sup>121</sup>

#### 4. Provinces Versus Bands

Similar to the supremacy clause in the United States, where any state law that is inconsistent with federal law is inoperative, in Canada, the "paramountcy doctrine" renders inoperative any provincial legislation that displaces or frustrates a federal legislative purpose.<sup>122</sup> As already dis-

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<sup>118</sup> But see Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev Legal Soc Issues 29 ("there is currently insufficient recognition by the Canadian government of Aboriginal title and self-government as crucial components of comprehensive land claims agreements" at 31); Peter H Russell, "Indigenous Self-Determination: Is Canada as Good as It Gets?" in Barbara Ann Hocking, ed, *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Canberra: Aboriginal Studies Press, 2005) 170 (land claims "[a]greements' reached through ... negotiations are heavily compromised—too little autonomy for many on the Aboriginal side, too much for many in the dominant society" at 171).

<sup>119</sup> For a good examination of the *Calder* decision, see Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007).

<sup>120</sup> "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34:1 Osgoode Hall LJ 101 at 103 [Slattery, "The Organic Constitution"] (noting that the dominant conception of the Canadian constitution emphasizes the influence of European legal traditions and fails to acknowledge Aboriginal contributions).

<sup>121</sup> Whereas in the United States, the term "reservation" is used to define Indian lands, in Canada, "reserve", is used.

<sup>122</sup> See *R v Morris*, 2006 SCC 59 at para 89, [2006] 2 SCR 915.

cussed, by virtue of section 91(24), the federal government has sole jurisdiction over “Indians, and Lands reserved for the Indians.” Regardless, just as American states have tried for generations to assume more jurisdictional control in Indian country, so too have Canadian provinces been trying to extend their jurisdiction over Aboriginal peoples’ lands and resources. However, the Canadian provinces have been far more successful, helped immensely by section 88 of the *Indian Act*.<sup>123</sup>

Passed in 1950 with little political fanfare or opposition, section 88 (then section 87) expressly provided for the general application of provincial law to Aboriginals, whether on the reserve or not.<sup>124</sup> As parsed by Kerry Wilkins, section 88 was ostensibly “meant, almost certainly, to address and acknowledge the widespread sense that provincial measures should not constrict the exercise of Indians’ legitimate treaty rights.”<sup>125</sup> However, its darker intentions were based on the federal government’s belief “that the provinces had a role to play in achieving the recognized long-term goal of assimilation ... of the Indian peoples into mainstream society.”<sup>126</sup> This also facilitated the child welfare “sixties scoop”, where an alarming rate of Aboriginal children were taken from their homes and communities by provincial authorities and adopted out to non-Aboriginal parents.<sup>127</sup>

Section 88 provides that any provincial legislation that merely has an incidental effect on the federal power, including the powers in section 91(24) of the *Constitution Act, 1867*, is *intra vires*. Thus, any provincial legislation is valid with respect to Aboriginals on reserves so long as its pith and substance<sup>128</sup> is couched within one of the classes of subjects as-

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<sup>123</sup> Leroy Little Bear co-edited an influential book on section 88, which held some sway in policy circles in the 1980s: see J Anthony Long & Menno Boldt, in association with Leroy Little Bear, eds, *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988).

<sup>124</sup> For a useful article on the history, effects, and interplay of section 88, see Kent McNeil, “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34:1 UBC L Rev 159.

<sup>125</sup> “Still Crazy After All These Years’: Section 88 of the *Indian Act* at Fifty” (2000) 38:2 Alta L Rev 458 at 462.

<sup>126</sup> *Ibid* at 463.

<sup>127</sup> See generally Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: Canadian Council on Social Development Series in association with James Lorimer & Company, 1983); Suzanne Fournier & Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas & McIntyre, 1997).

<sup>128</sup> See *Cardinal v Alberta (AG)*, [1974] SCR 695 at 703, 40 DLR (3d) 553.

signed to the provinces and not to the set of federal powers.<sup>129</sup> For example, provincial traffic laws fully apply on any Indian reserve within the province's borders because their effect on the federal government's interest in Aboriginal affairs is deemed incidental and of little import.<sup>130</sup> However, things get more complicated when Aboriginal and treaty rights are involved because they strike at the heart of section 91(24): "Indians, and Lands reserved for the Indians."

After years of judicial back-and-forth on the issue of which provincial laws applied to Aboriginals and which did not,<sup>131</sup> in 1985, the Supreme Court of Canada finally dug in its heels with *Dick v. R*, where it distinguished between two categories of provincial laws—firstly, those that could be applied to Aboriginals (Indians) without disturbing their "Indianness" and, secondly, those that by their very nature regulated them "qua Indians."<sup>132</sup> The first type of provincial law could apply to Aboriginal people; the second could not. This approach was later reconfigured in *Delgamuukw v. British Columbia*, where Chief Justice Lamer provided an inconsistent view. First, he held that Aboriginal rights (including treaty rights) are within the "core of Indianness which lies at the heart of s. 91(24)" and, therefore, that "[p]rovincial governments are prevented from legislating in relation to [them]."<sup>133</sup> But he also held that provincial governments *can* infringe upon Aboriginal rights if they meet the justification test found in *R v. Sparrow*.<sup>134</sup>

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<sup>129</sup> See *Four B Manufacturing v United Garment Workers of America* (1979), [1980] 1 SCR 1031, 102 DLR (3d) 385 (the provincial labour law legislation did not deal with the subject matter of "Indians" and was therefore valid as applied to them).

<sup>130</sup> See *R v Francis*, [1988] 1 SCR 1025, 51 DLR (4th) 418.

<sup>131</sup> See e.g. *R v Batisse* (1978), 19 OR (2d) 145, 84 DLR (3d) 377 (Dist Ct) [cited to OR] ("Treaty No. 9 was ... an agreement between the Indians and the federal Government and ... Ontario obtained no legislative rights vis-à-vis Indians because of the presence of one of their nominees as a commissioner" at 145); *R v Kruger and Manuel* (1975), 60 DLR (3d) 144, [1975] 5 WWR 167 (BCCA) (provincial laws of general application apply uniformly throughout a jurisdiction and are thus applicable to Aboriginals); *Natural Parents v Superintendent of Child Welfare* (1975), [1976] 2 SCR 751, 60 DLR (3d) 148 (the BC provincial *Adoption Act* is referentially incorporated and becomes federal legislation, applicable to Aboriginals); *R v White* (1964), 50 DLR (2d) 613, 52 WWR 193 (BCCA) [cited to DLR] ("[l]egislation that abrogates or abridges the hunting rights reserved to Indians under treaties and agreements ... is ... legislation in relation to Indians because it deals with rights peculiar to them" at 618).

<sup>132</sup> [1985] 2 SCR 309 at 326, 23 DLR (4th) 33.

<sup>133</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 178, 153 DLR (4th) 193 [cited to SCR].

<sup>134</sup> *Ibid* at paras 165-69. The *Sparrow* justification test mandates that the government justify any legislation that infringes on Aboriginal rights that were in existence in 1982: *R*

That is where the law stands today in regard to the application of provincial governments' laws on Aboriginal peoples' reserves: provinces may enforce their laws where it is found that the "Indianness" of Aboriginal peoples, as determined by the Canadian courts themselves, is not being inappropriately encroached upon. This judicial determination is focused not so much on protecting or shielding Aboriginal peoples from wrongful interference with their affairs by the provinces, but rather on protecting the integrity of the federal-provincial distribution of powers scheme. This primary focus on the distribution of powers was made clear in a pair of recent Supreme Court of Canada decisions that dealt with overlapping Aboriginal and labour issues.<sup>135</sup> The Court's analysis began and ended with a traditional division of powers analysis, in which it was held that the primary function of Aboriginal child-welfare agencies related to labour relations and that these agencies should therefore be regulated by the provinces. Thus, the Court saw no need for an inquiry into the "core of Indianness", despite the culturally appropriate nature of the Aboriginal child-welfare services, the beneficiaries' Aboriginal identity, and the existence of federal funding.

To summarize what has been discussed so far, Indian tribes in the United States have been, and continue to be, considered "domestic dependent nations", politically apart, but still a part of the country as a whole. Over time, the rights held by Indian tribes have been consistently chipped away, culminating in 1886, when Congress claimed that it had plenary power over Indian tribes on the basis that the federal government needed to provide protection to tribes from the states. Contrastingly, Aboriginal peoples in Canada had long been considered, without their consent, to be subjects of Great Britain, and until 1973, any rights that Aboriginal peoples may have had existed by the will of the Crown. With the patriation of Canada's constitution in 1982, Aboriginal peoples were deemed to be a part of Canada's constitutional landscape with some protected, Aboriginal-specific rights.

But what rights did Aboriginals enjoy as subjects of the British Crown? Prior to *Calder*, they held limited title to the lands of their ancestors, and this title depended upon the good will of the Crown.<sup>136</sup> In 1929, it was determined that Aboriginal peoples had no capacity to enter into

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*v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR]. It is discussed in greater detail in Part IV, below.

<sup>135</sup> *NIL/TU, O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696; *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 SCR 737.

<sup>136</sup> See Neylon, *supra* note 106 at 162-63.

treaties and that those treaties that were already in existence were void *ab initio*.<sup>137</sup> Canada could bluntly interfere in internal tribal matters, even using the law to dismantle complete governance systems that had been in place for countless centuries.<sup>138</sup> To nip Aboriginal peoples' land claims in the bud, federal legislation was passed that prohibited anyone from soliciting or receiving money from Indians for claims without express permission from the superintendent general of Indian affairs.<sup>139</sup> Breaking that law could lead to imprisonment and a fine.<sup>140</sup>

Thus, with the enactment of the *Constitution Act, 1867*, Aboriginal peoples, viewed as subjects but non-citizens of the Crown in Canada, were held captive by section 91(24). The passage of the *Indian Act*<sup>141</sup> in 1876 only increased this legislative imprisonment, which endures to the present day.

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<sup>137</sup> See *R v Syliboy* (1928), [1929] 1 DLR 307, 50 CCC 389 (NS Co Ct). Though merely a case from a Nova Scotia county court concerning fourteen muskrat pelts, it remained the law on treaties throughout Canada for fifty-six years, finally being overturned by the Supreme Court of Canada in 1985, with *Simon v. R* ([1985] 2 SCR 387, 24 DLR (4th) 390).

<sup>138</sup> See *Logan v Styres* (1959), 20 DLR (2d) 416, 5 CNLC 261 (Ont HC) [*Logan* cited to DLR] (“[w]hile it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has [by virtue of section 91(24) of the *Constitution Act, 1867*] the authority to provide for the surrender of Reserve land” at 424).

<sup>139</sup> This legislation arose over concerns after some American lawyers solicited funds from Oneida, St. Regis, Oka, and Lorette reserves to present a claim against the state of New York for lands that they claimed belonged to the Iroquois Confederacy. It seems section 149(a) of the *Indian Act* was subsequently added to prevent indigenous peoples in Canada from using the courts in such a manner. See Treaties and Historical Research Centre, PRE Group, Indian and Northern Affairs, *The Historical Development of the Indian Act* (np: Indian and Northern Affairs, Treaties and Historical Research Center, 1978) at 120.

<sup>140</sup> See *Indian Act*, RSC 1927, c 98, s 141. The legislative text read:

Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

<sup>141</sup> *Indian Act*, SC 1876, c 18 [*Indian Act 1876*].

## II. Darkest Before the Dawn for Tribes in the United States

The *Indian Act* of 1876 was, and remains, a monolithically injurious piece of legislation for Indians<sup>142</sup> in Canada. It excluded Indians from the definition of “person”<sup>143</sup> and dictated the who, what, where, when, and why of being Indian. To this day, it governs virtually every aspect of Indians’ lives on reserves. It was a consolidation of previous legislation passed from 1850 to 1857 that defined who was an Indian; controlled land distribution, land alienation, band membership and status determination, band governance, and management of funds;<sup>144</sup> excluded Aboriginals from general exemptions from hunting and fishing regulatory schemes;<sup>145</sup> and called for the total assimilation of Aboriginals into white society.<sup>146</sup> Until the 1960s, Indian Affairs agents, present on most reserves and empowered by the *Indian Act*, possessed an almost absolute regulatory power over Aboriginals and were authorized to issue or deny passes that allowed Aboriginals to leave the reserve, even temporarily.<sup>147</sup>

However, things were not so rosy for Indian tribes in the United States during this time either. “The theme of Indian policy for the remainder of the nineteenth and first quarter of the twentieth century was ‘civilization and assimilation,’”<sup>148</sup> a theme that was encapsulated by the *General Allotment Act*<sup>149</sup> (also known as the *Dawes Act*). Prior to the passage of that act, the allotment, or parcelling out, of tribal land was voluntary, but in 1887, it became mandatory. Tribal members were assigned a parcel of land (usually 80 or 160 acres), and any remaining “surplus” lands were sold to anyone who could afford them. Between the years 1887

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<sup>142</sup> It does not apply to Métis or Inuit, thus the “Indian” moniker.

<sup>143</sup> *Indian Act 1876, supra* note 141, s 3(12) (“[t]he term ‘person’ means an individual other than an Indian, unless the context clearly requires another construction”).

<sup>144</sup> *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850 (UK), 13 & 14 Vict, c 42, s 5.

<sup>145</sup> *An Act to amend the Act prohibiting the hunting and killing of Deer and other game within this Province, at certain seasons of the year*, 1853 (UK), 15 & 16 Vict, c 171; *An Act for the protection of Fisheries in Lower Canada*, 1855 (UK), 18 Vic, c 114.

<sup>146</sup> *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, 1857 (UK), 20 Vict, c 26. It is commonly referred to as the *Gradual Civilization Act*.

<sup>147</sup> See Indian and Northern Affairs Canada, *The Canadian Indian* (Ottawa: Minister of Supply and Services Canada, 1986) at 86.

<sup>148</sup> Nell Jessup Newton et al, eds, *Cohen’s Handbook of Federal Indian Law*, 2005 ed (Newark, NJ: LexisNexis Matthew Bender, 2005) at 77.

<sup>149</sup> *An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes*, c 119, §§ 1-3, 24 Stat 388 at 388-89 (1887) (codified as amended at 25 USC §§ 331-33 (1994)).

and 1934, 118 reservations had lands that were allotted,<sup>150</sup> and by 1920, nearly 36 million acres had been transferred from communal to individual ownership.<sup>151</sup> By 1934, two-thirds (or 27 million acres) of the land allotted to Indians had changed hands by sale to non-Indian ownership.<sup>152</sup>

Indeed, it was a dark time for indigenous peoples in North America. However, it is at this point, in 1934, that the paths of indigenous peoples in the United States and Canada began to diverge substantially. This divergence was brought on by a seemingly perfect storm of bold, forward-thinking bureaucrats, a responsive national leader, and a strong desire to turn away from failed, antiquated approaches. The end result was the passage of the *Indian Reorganization Act (IRA)*.<sup>153</sup>

### A. *The Indian Reorganization Act*

In the 1928 case of *R v. Syliboy*,<sup>154</sup> Aboriginal peoples in Canada were still seen by the judiciary, at least in Nova Scotia, as descended from “savages” and were considered jurisdictional chattel held by the British Crown by way of previous French possession. Just a few years after that decision, the United States enacted the *IRA*. This would prove to be a decisive turn for the nation, which veered away from its failed methods of dealing with Indian tribes and, in doing so, embarked upon a more respectful path for their mutual relations.<sup>155</sup> The *IRA* “was, by all accounts,

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<sup>150</sup> See US, American Indian Policy Review Commission, *Final Report* (Washington, DC: US Government Printing Office, 1977) at 6.

<sup>151</sup> See Prucha, *Great Father*, *supra* note 25 at 865.

<sup>152</sup> See Wilcomb E Washburn, *Red Man's Land / White Man's Law: The Past and Present Status of the American Indian*, 2d ed (Norman, Okla: University of Oklahoma Press, 1995) at 145.

<sup>153</sup> *An act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes*, Pub L No 73-383, 48 Stat 984 (1934) (codified as amended at 25 USC §§ 461-79 (2006)).

<sup>154</sup> *Supra* note 137 at 313:

[T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

<sup>155</sup> For a fascinating look at the history behind the *IRA* as well as the important players involved in the drafting of the legislation, see Elmer R Rusco, *A Fateful Time: The*



one of the most significant single pieces of legislation directly affecting Indians ever enacted by the Congress of the United States.”<sup>156</sup> As Professor Skibine notes, it “represented the first comprehensive attempt at incorporating Indian tribes as political entities within the legal and political system of the United States. The IRA embodied the endorsement of a policy promoting tribal self-government and a government-to-government relationship between Indian tribes and the United States.”<sup>157</sup>

With the advent of the *IRA*, fostered by President Franklin D. Roosevelt’s administration, the allotment period officially came to an end, and tribes were encouraged to adopt their own respective constitutions as well as corporate charters for economic development. However, because the process for adopting these documents was often foreign to tribes, as well as being mainly uniform with little tribal input, there was, from the start, much tribal resentment.<sup>158</sup> As such, the *IRA* certainly was not perfect, and it still has its fair share of detractors,<sup>159</sup> but at least it was a start. At a minimum, the *IRA* recognized and reaffirmed that tribes were still distinct from the United States’ body politic.

On the other side of that ever-widening gulf between the treatment of indigenous peoples in Canada and the United States, the former continued full steam ahead with its destructive and untenable approach to its relationship with Aboriginal peoples.<sup>160</sup> The glaring distinction between

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*Background and Legislative History of the Indian Reorganization Act* (Reno: University of Nevada Press, 2000).

<sup>156</sup> “Tribal Self-Government and the Indian Reorganization Act of 1934”, Legislative Comment, (1972) 70:5 Mich L Rev 955 at 955.

<sup>157</sup> Alex Tallchief Skibine, “Redefining the Status of Indian Tribes Within ‘Our Federalism’: Beyond the Dependency Paradigm” (2006) 38:4 Conn L Rev 667 at 675.

<sup>158</sup> See Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca: Cornell University Press, 2007) at 110-11.

<sup>159</sup> For an initial discussion of the merits and faults of the *IRA*, see Robert B Porter, “Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?” (1997) 7:1 Kan JL & Pub Pol’y 72 at 76-78, 83-85; S Lyman Tyler, *A History of Indian Policy* (Washington, DC: United States Department of the Interior, Bureau of Indian Affairs, 1973) at 131-36; Richmond L Clow, “The Indian Reorganization Act and the Loss of Tribal Sovereignty: Constitutions on the Rosebud and Pine Ridge Reservations” (1987) 7:2 Great Plains Quarterly 125.

<sup>160</sup> See e.g. *Logan*, *supra* note 138 (where the forcible disruption of Mohawk tribal governance was upheld); *R v Commanda*, [1939] 3 DLR 635, 72 CCC 246 (Ont H Ct J) [cited to DLR] (“it does not matter whether Indians have any rights flowing from [a] ... treaty or not. [They] ... may be taken away by the [provincial] ... [l]egislature without any compensation” at 640); *R v Smith*, [1935] 3 DLR 703, [1935] 2 WWR 433 (Sask CA) [cited to DLR] (regardless of the existence of a treaty, any Aboriginal right of access to a wildlife preserve is “merely the privilege accorded to all persons to enter the preserve *without carrying fire-arms*” at 707 [emphasis in original]); *Point v Dibblee Construction Co*,

the old-school and new-school approaches is perfectly embodied by three bureaucrats working from opposite sides of the border—John Collier and Felix Cohen in the United States, and Duncan Campbell Scott in Canada. A year after Scott retired from his long-standing position (1913-32) as superintendent general of Indian affairs in Canada, Cohen began (1933-1947) working in the Solicitor's Office of the Department of the Interior with Collier as the new commissioner of Indian affairs (1933-1945). Whereas Scott obstinately clung to the abortive, destructive ideologies of the previous century, Collier and Cohen were both highly progressive thinkers.

The results of their divergent approaches are plainly evident today and call deafeningly for comparable, high-level modern bureaucrats to take the reins in Canada and break away from the failed policies and deleterious approaches of the past.

### *B. John Collier*

Coinciding with President Roosevelt's New Deal, Collier implemented the "Indian New Deal" with the passing of the *IRA*. Before assuming his position, Collier had long criticized the American government's approach to Indian affairs, and in his first departmental annual report, he stated that "[n]o interference with Indian religious life or expression will hereafter be tolerated. The cultural history of Indians is in all respects to be considered equal to that of any non-Indian group."<sup>161</sup> His hardline approach did not soften over the years, a fact made plainly evident in his annual report for 1938, where he laid out the mandate for his department in no uncertain terms:

Dead is the centuries-old notion that the sooner we eliminated this doomed race, preferably humanely, the better. No longer can we, with even the most generous intentions, pour millions of dollars and vast reservoirs of energy, sympathy, and effort into any unproductive attempts at some single, artificial permanent solution of the Indian problem. No longer can we naively talk of or think of the "Indian problem." Our task is to help Indians meet the myriad of complex, interrelated, mutually dependent situations which develop among them, according to the very best light we can get on those

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[1934] OR 142, [1934] 2 DLR 785 (H Ct J) (individual Aboriginal interest in land is a limited right of occupation and does not include tort actions for recovery of land or for the removal of trespassers); *Sero v Gault* (1921), 64 DLR 327, 50 OLR 27 (H Ct J) (the Aboriginal right of self-government was not constituted at common law).

<sup>161</sup> John Collier, "Office of Indian Affairs" in US, *Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30 1934* (Washington, DC: United States Government Printing Office, 1934) 78 at 90.

happenings—much as we deal with our own perplexities and opportunities.<sup>162</sup>

Having a commissioner of Indian affairs like John Collier representing Indian tribes in the federal government was a bold new direction for the United States and truly marked the beginning of a new era of Indian-American relations. Collier's mandate was further emboldened with the help of Felix Cohen.

### C. *Felix Cohen*

Collier's right-hand man was Felix Cohen, the man credited with being the key legal designer of the Indian New Deal. Before assuming his duties at the Department of the Interior, Cohen was a philosopher and lawyer, having obtained an advanced degree in philosophy from Harvard and in law from Columbia. Cohen

was a legal realist, [but] he differed from other legal realists in believing that ethical and policy dimensions provide an external standard against which to measure legal behavior and also provide a set of policy objectives toward which the law should strive. He was therefore most associated with the pragmatic instrumentalist school of legal realism. He was recognized as a "leader in reconstructing legal philosophy to better integrate penetrating thought and just action."<sup>163</sup>

He was sympathetic to the concerns of Indian nations in protecting their natural resources and land base, and he considered the protection of Indian cultures from the majority's dominance to be a serious ethical concern for which all Americans were morally responsible.<sup>164</sup> In fact, Cohen believed that

the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.<sup>165</sup>

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<sup>162</sup> John Collier, "Office of Indian Affairs" in US, *Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30 1938* (Washington, DC: United States Government Printing Office, 1938) 209 at 209-10.

<sup>163</sup> Newton et al, *supra* note 148 at ix, citing Gerard R Moran, *Dedication* (1954) 9:1 Rutgers L Rev 343.

<sup>164</sup> See Stephen M Feldman, "Felix S. Cohen and His Jurisprudence: Reflections on Federal Indian Law" (1986) 35:2 Buff L Rev 479 at 491, 500-501.

<sup>165</sup> Felix S Cohen, "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy" (1953) 62:3 Yale LJ 348 at 390.

In 1941, Cohen published the *Handbook of Federal Indian Law*,<sup>166</sup> which incorporated more than a century and a half of American Indian law. As evidenced in the handbook, Cohen's legal and ethical beliefs consisted of the view that Indians had certain rights, including those of self-governance and self-determination: "Central to that analysis was the long-standing tradition that Indian tribes were governments with authority over both their members and their land, rather than being governed by the state governments that surrounded them."<sup>167</sup>

When drawing straws for senior officials in Indian affairs in the early twentieth century, Aboriginal peoples in Canada certainly pulled the shortest one. They got Duncan Campbell Scott, who was recently "honoured" with the dubious distinction of being named one of the "most contemptible Canadians" in history, based on his role in the Department of Indian Affairs.<sup>168</sup>

#### *D. Duncan Campbell Scott*

Apart from his bureaucratic duties as superintendent general of Indian affairs, Scott was also a much-revered poet and prose writer. When he died in 1947, he was declared "the unofficial poet laureate of Canada,"<sup>169</sup> as well as "one of the ancestral voices of the Canadian imagination."<sup>170</sup> But as one of his biographers has noted, "Scott would have been a significant historical figure had he never penned a stanza of poetry,"<sup>171</sup> due to his role in Canadian politics. And while in his poetry and prose "[h]e took a romantic interest in native tradition, ... living natives were another matter."<sup>172</sup> There is certainly a grim irony to be found in his lyrical mourning for what he saw as a vanishing culture and the fact that he and his department were fervently working to hasten its demise. Whereas Collier and Cohen moved their department away from the stark, earlier policies of Indian assimilation, Scott ardently stuck to them and has since become infamous for stating plainly in 1920, "[My] object is to continue until there

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<sup>166</sup> Newton et al, *supra* note 148.

<sup>167</sup> *Ibid* at ix.

<sup>168</sup> See Will Ferguson, "Duncan Campbell Scott (1862-1947): The Rhyming Racist", *The Beaver* 87:4 (August-September 2007) 37.

<sup>169</sup> *Duncan Campbell Scott: The Poet and the Indians*, 1995, DVD (Toronto: Vtape, 2009).

<sup>170</sup> Northrop Frye, "Conclusion to a *Literary History of Canada*" in *The Bush Garden: Essays on Canadian Imagination* (Concord, Ont: House of Anansi Press, 1971) 213 at 245.

<sup>171</sup> E Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at vii.

<sup>172</sup> Ronald Wright, *Stolen Continents: The Americas Through Indian Eyes Since 1492* (Boston: Houghton Mifflin, 1992) at 321.

is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question and no Indian Department.”<sup>173</sup>

While Scott was obviously not successful in his objective of absorbing all Indians into the folds of Canadian society, neither was the United States in its similar attempts during its allotment and assimilation era, as discussed above. But the United States had one last hurrah in this area. After Collier and Cohen, the political pendulum eventually swung the other way with a vengeance in the middle of the twentieth century.

### III. Termination and the *Indian White Paper*

Indigenous peoples in the United States and Canada have survived attempts at forced assimilation, the most pointed of which occurred in the United States from 1949 to 1968. This period was known as the “termination era”, a reference to the federal government’s policy of simply terminating the tribe’s trust relationship with the United States. Comparatively, in Canada, the long-standing assimilationist policies perpetuated by the *Indian Act* culminated in 1969 with the *Indian White Paper*, put forth by Prime Minister Trudeau and Minister of Indian Affairs Jean Chrétien. Both assimilative attempts will be looked at below, in the order in which they occurred.

#### A. *Termination*

Soon after the dichotomous ideological split was played out by Collier and Cohen in the United States and Scott in Canada, the United States government again exhibited its disturbing multiple personality disorder. Stemming from a 1949 report by the Commission on Organization of the Executive Branch of the Government (Hoover Commission),<sup>174</sup> there was a clarion call for the complete integration of Indians into American society. The policies of the *IRA* era were by then a bygone notion, and it was believed not only that total assimilation of Indians would save the United States much money but that it was also in the best interests of the Indians themselves.<sup>175</sup> The Hoover Commission found that

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<sup>173</sup> Evidence of DC Scott to the Special Committee of the House of Commons Examining the *Indian Act* Amendments of 1920, cited in Treaties and Historical Research Centre, *The Historical Development of the Indian Act* (np: PRE Group, Indian and Northern Affairs, 1978) at 114.

<sup>174</sup> US, *Social Security and Education, Indian Affairs: Letter from the Chairman, Commission on Organization of the Executive Branch of the Government* (HR Doc No 129) (Washington, DC: US Government Printing Office, 1949). The report did not, however, support abrupt discontinuation of services.

<sup>175</sup> See *Ibid.*

[t]he basis for historic Indian culture has been swept away. Traditional tribal organization was smashed a generation ago. Americans of Indian descent who are still thought of as 'Indian' are a handful of people, not three-tenths of one percent of the total population. Assimilation cannot be prevented. The only questions are: What kind of assimilation, and how fast?<sup>176</sup>

In response to these recommendations, in 1953, Congress adopted *House Concurrent Resolution 108*,<sup>177</sup> which stated that federal services and other benefits to tribes should be ended "at the earliest possible time." Rather than tribes' cultural histories being considered equal to any non-Indian group "in all respects", as Collier and Cohen had advocated, they were simply to be terminated. Commissioner of Indian Affairs Dillon Myer insisted that the implementation of termination be a co-operative effort with tribal leaders, but if that co-operation was found to be lacking, the Bureau of Indian Affairs (BIA) would forge ahead on its own.<sup>178</sup> Ultimately, approximately 110 tribes lost all relations with the federal government.<sup>179</sup> A tribe has not been terminated since 1966, and since then, almost all of them have had federal recognition restored.<sup>180</sup> The same year that saw *House Concurrent Resolution 108* also saw *Public Law 280*,<sup>181</sup> which transferred criminal jurisdiction on Indian reservations to five states.<sup>182</sup> To be sure, it was a dark time for Indians in the United States, and it was not until 1968 that President Lyndon B. Johnson would provide some much-needed respite.

The underlying rationale for the termination of the trust responsibility toward Indian tribes has been attributed, by one scholar, to deeply-embedded "Western-based legal principles and ideals,"<sup>183</sup> such as equality. An explicit example of this time-worn notion arose in 1983, when John Roberts (now chief justice of the US Supreme Court) worked in the White

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<sup>176</sup> *Ibid* at 54-55.

<sup>177</sup> *Supra* note 67.

<sup>178</sup> See Prucha, *Great Father*, *supra* note 25 at 1033.

<sup>179</sup> See Charles F Wilkinson & Eric R Biggs, "The Evolution of the Termination Policy" (1977) 5:1 *Am Indian L Rev* 139 at 151-52; Michael C Walch, "Terminating the Indian Termination Policy", Note, (1983) 35:6 *Stan L Rev* 1181 at 1186.

<sup>180</sup> See e.g. 25 USC §§ 903-903g (2006) (Menominee tribe); 25 USC §§ 861-861c (2006) (Wyandotte, Peoria, and Ottawa tribes); 25 USC §§ 761-68 (2006) (Paiute tribe); 25 USC §§ 566-566h (2006) (Klamath tribe).

<sup>181</sup> *Supra* note 68.

<sup>182</sup> California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin (except for the Menominee Reservation).

<sup>183</sup> N Bruce Duthu, *American Indians and the Law* (New York: Penguin Group, 2008) at 141.

House counsel's office for the Reagan administration. Roberts, then twenty-eight years old, was tasked with responding to the proposed congressional policy statement to symbolically repudiate *House Concurrent Resolution 108*. Roberts wrote in his memo that he was astonished at the tribal opposition to the principles protected in a resolution that "reads like motherhood and apple pie."<sup>184</sup> Thus, those Western-based legal principles and ideals that are often destructive of indigenous rights, are alive and well in the US Supreme Court. Of course, views may change over time, but considering Roberts' Indian law opinions as chief justice of the US Supreme Court,<sup>185</sup> they apparently haven't changed much at all.

Notwithstanding Chief Justice Roberts' affinity for the apple-pie tastiness of Indian termination, *House Concurrent Resolution 108* was expressly repudiated by Congress in 1988, including "any policy of unilateral

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<sup>184</sup> Memorandum from John G Roberts, Associate White House Counsel, to Fred F Fielding, White House Counsel (18 January 1983), Simi Valley, Cal, Ronald Reagan Presidential Library (Indian Policy (3), Box 29, John G Roberts Files).

<sup>185</sup> Of the nine Indian law cases Chief Justice John Roberts has ruled on, he has not once found in favour of tribal interests: see *Salazar v Raham Navajo Chapter*, 567 US \_\_, 132 S Ct 2181 (2012), Roberts CJ, dissenting [cited to US] ("the Government must pay each tribe's contract support costs in full" when it has "sufficient funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor" at 1); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v Patchak*, 567 US \_\_, 132 S Ct 1877 (2012) (the *Quiet Title Act* (28 USC § 2409a (2006)) did not apply because plaintiff did not assert that he was the rightful owner of the land in question, but rather that the federal acquisition of tribal land taken into trust was unlawful); *United States v Jicarilla Apache Nation*, 564 US \_\_, 131 S Ct 2313 (2011) (attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe); *United States v Tohono O'odham Nation*, 563 US \_\_, 131 S Ct 1723 (2011) [cited to US] ("[t]wo suits [making] ... the same claim [are barred from the Court of Federal Claims] ... if they are based on substantially the same operative facts, regardless of the relief sought in each suit" at 9); *United States v Navajo Nation*, 556 US 287, 129 S Ct 1547 (2009) [cited to US] ([i]t is ... conceivable, albeit unlikely, that some other relevant statute, though invoked by the Tribe at the outset of litigation, might have gone unmentioned by the Federal Circuit and unanalyzed by this court" at 296; however, "[n]one of the sources of law cited ... provide[d a] ... sound ... basis for its breach-of-trust lawsuit" at 302); *Hawaii v Office of Hawaiian Affairs*, 556 US 163, 129 S Ct 1436 (2009) (substantive provisions and "whereas" clauses of congressional resolution did not strip state of its authority to alienate ceded lands); *Carcieri v Salazar*, 555 US 379, 129 S Ct 1058 (2009) (the secretary of the interior's authority under the *IRA* to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when the *IRA* was enacted in 1934); *Plains Commerce Bank v Long Family Land & Cattle Co*, 554 US 316, 128 S Ct 2709 (2008) (no exception applied to the bank's sale of tribal land to non-Indians, and the bank had not consented to tribal court jurisdiction); *Wagnon v Prairie and Potawatomi Nation*, 546 US 95, 126 S Ct 676 (2005) (state tax on a non-Indian distributor for fuel supplied to a gas station operated by a tribe on reservation was valid and posed no affront to tribal sovereignty).

termination of Federal relations with any Indian nation.”<sup>186</sup> Regardless of the value placed on this symbolic act thirty-five years after the fact, “the memory of congressional committees and bureaucrats in Washington ‘terminating’ the existence of hundreds of tribes across Indian country stands as a chilling reminder to Indian peoples that Congress can still unilaterally decide to extinguish the special status and rights of tribes without Indian consent.”<sup>187</sup>

### *B. Self-Determination*

However grim that outlook may have been, President Lyndon B. Johnson began assuaging fears at least as early as 1968, with his congressional message on Indian affairs entitled “The Forgotten American”.<sup>188</sup> In doing so, he “set in motion the concept of Indian self-determination as we know it today.”<sup>189</sup> That same year, a “dramatic shift in national policy toward Indians”<sup>190</sup> occurred when Congress prohibited states from gaining any additional authority over Indian reservations via *PL 280*.<sup>191</sup> President Nixon built on his predecessor’s momentum with respect to advocacy of self-determination for Indian tribes when he said to Congress in 1970 that

[i]t is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.<sup>192</sup>

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<sup>186</sup> *Tribally Controlled Schools Act of 1988*, *supra* note 67, § 5203(f).

<sup>187</sup> Getches et al, *supra* note 72 at 200. Though the United States has recently (as of December 16, 2010) endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (GA Res 295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53, (2007)), it remains unclear how much effect that non-legally binding political gesture will have on protecting Indians from “termination” within the United States.

<sup>188</sup> *Supra* note 18.

<sup>189</sup> Rebecca L Robbins, “The Forgotten American: A Foundation for Contemporary American Indian Self-Determination” (1990) 6:1 *Wicazo Sa Rev* 27 at 27.

<sup>190</sup> *Rosebud Sioux Tribe v South Dakota*, 900 F (2d) 1164 at 1174 (available on WL Can) (8th Cir 1990), cert denied, 500 US 915, 1111 S Ct 2009 (1991).

<sup>191</sup> See *An act to prescribe penalties for certain acts of violence or intimidation, and for other purposes*, Pub L No 90-284, § 402, 82 Stat 73 at 79 (1968) (codified as amended at 25 USC § 1322 (2006)).

<sup>192</sup> “Indian Affairs: The President’s Message to Congress”, *Weekly Compilation of Presidential Documents* 6:28 (13 July 1970) 894 at 894.



That year, Congress developed an Indian Business Development Program<sup>193</sup> to stimulate business and employment and then, in 1974, enacted both the *Indian Financing Act of 1974*<sup>194</sup> and the *Native American Programs Act of 1974*<sup>195</sup> in order to bolster Indian commercial opportunities. Perhaps of most importance, Congress passed the *Indian Self-Determination and Education Assistance Act* in 1975,<sup>196</sup> which established procedures that enabled tribes to negotiate contracts (“638 contracts”—derived from the name of the law, *Public Law 93-638*) with various federal agencies to administer their own education and social service programs. In 1978, the *Indian Child and Welfare Act of 1978*<sup>197</sup> provided Indian families with considerable protection against the removal of their children from their homes by state courts and agencies. In the 1980s, the *Indian Mineral Development Act of 1982*<sup>198</sup> allowed tribes to enter into joint-venture agreements with mineral developers, while the *Indian Tribal Government Tax Status Act of 1982*<sup>199</sup> extended tax advantages already enjoyed by the states to tribes. In 1988, the *Indian Gaming Regulatory Act (IGRA)*<sup>200</sup> confirmed the tribes’ ability to operate casinos in order to raise tribal revenue and support economic development.

In 1994, President Clinton issued an executive order that mandated that all federal agencies interact with tribes on a “government-to-government” basis, respectful of the tribes’ sovereignty.<sup>201</sup> In an ensuing 2000 executive order, President Clinton reaffirmed “the right of Indian

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<sup>193</sup> See *Indian Financing Act of 1974*, Pub L No 93-262, §§ 401-404, 88 Stat 77 at 82-83 (codified as amended at 25 USC §§ 1521-24 (2006)).

<sup>194</sup> *Supra* note 193 (codified as amended at 25 USC §§ 1451-1544 (2006)).

<sup>195</sup> Pub L No 93-644, §11, 88 Stat 2291 at 2323-27 (codified as amended at 42 USC §2991-94 (2006)).

<sup>196</sup> Pub L No 93-638, 88 Stat 2203 (1975).

<sup>197</sup> Pub L No 95-608, 92 Stat 3069 (codified as amended at 25 USC §§ 1901-63 (2006)).

<sup>198</sup> Pub L No 97-382, 96 Stat 1938 (codified as amended at 25 USC §§ 2101-108 (2006)).

<sup>199</sup> Pub L No 97-473, 96 Stat 2605 at 2607 (codified as amended in scattered sections of 26 USC).

<sup>200</sup> Pub L No 100-497, 102 Stat 2467 (codified as amended at 25 USC §§ 2701-21 (2006)). The *IGRA* was enacted on the heels of the Supreme Court decision in *California v Cabazon Band of Mission Indians*, 480 US 202 (1987), 107 S Ct 1083 [*Cabazon*] (because California did not *prohibit* all gambling but rather *regulated* it, the state was not allowed to enforce its regulations on the tribe). Nine years after *Cabazon*, the Supreme Court of Canada held that tribes in Canada could not operate gaming businesses because they were deemed to be not “Aboriginal” enough of an activity. That case, *R v. Pamajewon*, will be discussed in greater detail below, in Part IV ([1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*]).

<sup>201</sup> Memorandum from William J Clinton to the Heads of Executive Departments and Agencies, “Government-to-Government Relations with Native American Tribal Governments” (24 April 1994) in 3 CFR 1007 (1995).

tribes to self-government” and required federal agencies to work with tribes to protect their “tribal trust resources, and Indian tribal treaty and other rights.<sup>202</sup> In 2009, President Obama issued a memorandum on tribal consultation, which mandated federal agency heads to submit a detailed plan of action that their agency would adopt in order to implement President Clinton’s Executive Order 13175.<sup>203</sup> President Obama signed into law the *Tribal Law and Order Act of 2010*,<sup>204</sup> which among other beneficial changes, provides tribes with enhanced capabilities to combat reservation crime and for tribal courts to impose greater fines and criminal sentences. Most recently, on March 7, 2013, the reauthorization and expansion of the *Violence Against Women Act*<sup>205</sup> was signed into law, allowing tribal courts jurisdiction over non-Indians in crimes involving domestic violence. At the signing ceremony, President Obama stated that “[t]ribal governments have an inherent right to protect their people, and all women deserve the right to live free from fear.”<sup>206</sup>

In summary, Indian tribes in the United States have made great strides forward since the ending of the termination era and the advent of the self-determination era in 1968. Even though their sovereignty is still limited, their jurisdictional powers are relatively on par with those of the fifty states. Tribes enjoy sovereign immunity from suit and

[l]ike a U.S. state, tribes are subject to federal law, but operate under their own constitutions, administer their own judicial systems, and implement self-managed tax and regulatory regimes. Vis-à-vis other federal, state and municipal governments, tribes in the current era of self-determination expect and demand government-to-government relations, rather than assuming the earlier role of a [dependent] subject to paternalistic management by non-Indian governments.<sup>207</sup>

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<sup>202</sup> US, Exec Order No 13175, *Consultation and Coordination with Indian Tribal Governments*, 3 CFR 304 (2001).

<sup>203</sup> Memorandum from Barack Obama to the Heads of Executive Departments and Agencies, “Tribal Consultation” (5 November 2009) in 3 CFR 406 (2010).

<sup>204</sup> Pub L No 111-211, 124 Stat 2258 at 2261 (codified at 25 USC §§ 2801-15 (Supp 2011)).

<sup>205</sup> 42 USC §§ 13925-4045d (2006), as amended by *Violence Against Women Reauthorization Act of 2013* (*supra* note 22).

<sup>206</sup> The President, “Remarks by the President and the Vice President at Signing of the Violence Against Women Act” (Address delivered at Washington, DC, 7 March 2013), online: The White House <<http://www.whitehouse.gov/the-press-office/2013/03/07/remarks-president-and-vice-president-signing-violence-against-women-act>>.

<sup>207</sup> Stephen Cornell & Joseph P Kalt, “American Indian Self-Determination: The Political Economy of a Successful Policy”, Joint Occasional Papers on Native Affairs Working Paper No 1 (November 2010) at 3, online: Native Nations Institute <[http://nni.arizona.edu/pubs/jopna-wp1\\_cornell&kalt.pdf](http://nni.arizona.edu/pubs/jopna-wp1_cornell&kalt.pdf)>.

We'll now turn our attention north, and the clock back, to 1968.

### C. *The Indian White Paper*

It is interesting to note that, in the same year that the United States was officially wiping its hands clean of its termination-era approach and opting instead for the encouragement of tribal self-determination, Canada was jumping head first into assimilationist policies. It did so by way of the *Indian White Paper*,<sup>208</sup> advocated by Prime Minister Pierre Trudeau and introduced by his Minister of Indian Affairs (and future Canadian Prime Minister) Jean Chrétien. Whereas John Roberts, in 1983, was astonished at Indian resistance to being assimilated into the United States, Trudeau thought it

inconceivable ... that in a given society, one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves ... We can't recognize aboriginal rights because no society can be built on historical 'might-have-beens'.<sup>209</sup>

This dissimilarity in the opinions of Roberts and Trudeau illustrates a grave, underlying difference, again harking back to the “us” and “them” dichotomy; Roberts was flummoxed as to why Indians *did not want to be* Americans while Trudeau saw Aboriginal peoples *as already being* Canadian.

Much like the United States' termination-era policies and Duncan Campbell Scott's mindset from earlier in the century, Trudeau's *Indian White Paper* called for the complete elimination of the Department of Indian Affairs and Northern Development, as well as Aboriginal reserves. It espoused the notion that, instead of the century and a half of maltreatment and dispossession at the hands of the Canadian government, it was rather the special status that Aboriginal peoples had received that was the cause of their social and economic dilemmas. Therefore, it was logically deduced that to remove Aboriginal people's special status would also remove the problems that they faced. Federal responsibilities for Indian affairs would be cauterized, and any previously recognized treaty or Aboriginal rights would become legally irrelevant.

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<sup>208</sup> Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969). The irony of the document's name is not lost on many Aboriginal people.

<sup>209</sup> The Right Honourable Pierre Elliot Trudeau, “Remarks on Indian Aboriginal and Treaty Rights” (delivered at the Aboriginal and Treaty Rights Meeting, Vancouver, 8 August 1969), reprinted in Miller, *supra* note 33 at 329.

Not surprisingly, Aboriginal opposition to the *Indian White Paper* was fast and fierce. It raised awareness among Aboriginal peoples of their shared common backgrounds and living conditions and, in effect, ended the fragmentation of hundreds of isolated Aboriginal communities, triggering a propagation of pan-Indian organizations.<sup>210</sup> Resistance was so focused, and ultimately so successful, that the *Indian White Paper* was permanently abandoned in 1971. Regardless, there are still relatively recent voices that continue to express the desire to assimilate the Aboriginal peoples of Canada.<sup>211</sup> Fortunately for Aboriginal peoples in Canada, this is not constitutionally permissible.

But is this a question of a bird in the hand being worth two in the bush? Is it better for indigenous peoples to enjoy more rights without constitutional protection or is it preferable to enjoy fewer, better protected rights? Notwithstanding the longevity and the benefits of the self-determination era, the symbolic repudiation of *House Concurrent Resolution 108*, and Congress's stated aversion to "any policy of unilateral termination of Federal relations with any Indian nation,"<sup>212</sup> tribes in the United States are still technically at the mercy of Congress's claimed plenary power. Conversely, Aboriginal peoples in Canada have their *existing* treaty and Aboriginal rights entrenched in section 35 of the Canadian constitution; it is not possible to "terminate" them, though as we shall see below, this end can still be achieved if rights are simply not recognized from the beginning. This difference between having constitutionally protected rights in lesser quantities versus greater amounts of rights that are not constitutionally protected will be discussed in the next section.

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<sup>210</sup> See Menno Boldt, *Surviving as "Indians": The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993) at 85-86.

<sup>211</sup> See e.g. Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2008) at 4-5 (exploring Aboriginal orthodoxy as a point of view shared by a small but vocal elite that benefits this elite of activists, politicians, administrators, and entrepreneurs, to the detriment of the majority of Aboriginal people); Melvin H Smith, *Our Home or Native Land: What Governments' Aboriginal Policy Is Doing to Canada* (Victoria, BC: Crown Western, 1995) (arguing that policies of large-scale transferring of land and authority to Aboriginal groups are problematic due to a lack of accountability). See also Cairns, *supra* note 19 ("arrangements that recognize [Canadians] and give us our own space and simultaneously bind us to each other" at 212).

<sup>212</sup> 25 USC § 2501(f) (2006).

## IV. Modern Challenges

### A. *Canada and the Charter*

Since 1982, the rights of Aboriginal peoples recognized and affirmed by the Canadian government have been inextricably linked to the same document that serves the general Canadian populace—the *Constitution Act, 1982*. When enacted, it introduced fundamental changes to Canada’s constitutional landscape. Perhaps most important was the protection of individual rights by way of the *Canadian Charter of Rights and Freedoms*,<sup>213</sup> which created an unprecedented role for courts in the oversight of the legality of government action.<sup>214</sup>

Section 35(1) of part II of the *Constitution Act, 1982*—which is not included in the *Charter*—is the primary section of the Canadian constitution dealing with Aboriginal issues. That section reads simply: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Thus, section 35(1) provides for constitutional protection of *existing* Aboriginal and treaty rights of Aboriginals, even though the constitution neither defines these rights nor provides an enumerated list of them. It has fallen to the judiciary to interpret them or for further clarification to emerge through agreements negotiated by Aboriginal peoples and Canadian governments.

The placement of the “meat” of Aboriginal rights outside the *Charter* is considered significant by many. Professor Kent McNeil has opined that it could suggest that section 35 allows for Aboriginal self-government since the *Charter* (sections 1 to 34) is more concerned with individual rights.<sup>215</sup> Professor Peter Hogg has argued that excluding section 35 from the *Charter* has both negative and positive effects. On the positive side, section 35 cannot be limited by section 1<sup>216</sup> or the section 33 notwithstanding

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<sup>213</sup> Part I of the *Constitution Act, 1982*, *supra* note 3 [*Charter*].

<sup>214</sup> See Patrick Macklem et al, eds, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 7.

<sup>215</sup> See “Aboriginal Governments”, *supra* note 16 at 67.

<sup>216</sup> Peter W Hogg, *Constitutional Law of Canada*, looseleaf (consulted on 10 April 2013), (Toronto: Carswell, 2007) ch 28 at 46. Section 1 is known as the “reasonable limits” clause because it authorizes governments to limit individual *Charter* rights. When a government infringes on a protected right, the onus is placed on the Crown to show two things on a balance of probabilities: first, that the limitation was “prescribed by law”, and second, that it is “justified in a free and democratic society.” In other words, the government must have a justifiable purpose, and its actions must be proportional to the desired end. The primary test to determine whether the purpose is demonstrably justifiable in a free and democratic society is known as the *Oakes* test—taken from *R v. Oakes* ([1986] 1 SCR 103, 26 DLR (4th) 200).

clause.<sup>217</sup> On the negative side, however, section 24, which allows personal remedies for rights violations, is not available. To make matters worse for Aboriginal peoples, *R v. Sparrow*<sup>218</sup> limits section 35 in a manner comparable to the section 1 Oakes test,<sup>219</sup> which allows reasonable limitations on rights and freedoms. Aboriginal rights can be infringed if the Canadian government can justify that infringement: “Implicit in [the] constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples.”<sup>220</sup> Regardless of its placement in the constitution, Professors F.L. Morton and Rainer Knopff, in their criticisms of *Charter* case law and emergent judicial discretion, considered section 35 as if it were part of the *Charter*. They stated that “[s]ection 35 is technically ‘outside’ of the Charter, but as a declaration of the special rights of Canada’s most salient racial minority – rights that are enforceable in the courts—it has become an important part of the Charter revolution.”<sup>221</sup>

Finally, Jack Woodward has opined that “Canada stands in a distinguished position among the nations of the common law world with aboriginal populations as the only country with aboriginal rights unconditionally entrenched in the constitution.”<sup>222</sup> However, he quickly follows this laudatory statement with an ominous precaution that the constitutional wording of section 35 “has been a source of uncertainty.”<sup>223</sup>

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<sup>217</sup> Hogg, *supra* note 216, ch 28 at 46. Section 33 allows the federal Parliament or a provincial legislature to declare a law or part of a law to apply temporarily “notwithstanding” the fact that it might violate certain sections of the *Charter*, thereby preventing judicial review on these grounds. Such an override of *Charter* protections must be for a limited period of time—namely, five years or less.

<sup>218</sup> *Supra* note 134. The *Sparrow* decision is discussed in further detail below: see *infra* notes 239-42 and accompanying text.

<sup>219</sup> Hogg, *supra* note 216, ch 28 at 46.

<sup>220</sup> *Sparrow*, *supra* note 134 at 1110.

<sup>221</sup> *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000) at 42.

<sup>222</sup> *Native Law*, loose-leaf (consulted on 9 November 2012), (Toronto: Carswell, 1994), ch 2 at 26.

<sup>223</sup> *Ibid.* In fact, the extent of section 35 protection was so uncertain that the drafters felt it necessary to enact subsections 37(1) and 37(2) of the *Constitution Act, 1982* and proceed with the resulting constitutional conferences; see Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at xv. See also David C Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, 1989) at 3-8. The conferences pro-

Despite these concerns, since 1982, section 35 has been successfully used by Aboriginal peoples to protect those rights that existed or were recognized by 1982, namely, logging<sup>224</sup> and fishing rights,<sup>225</sup> access to land,<sup>226</sup> and the right to the enforcement of treaties.<sup>227</sup> There still remains a major debate, however, over the breadth of the right to self-government, and for thirty years, the Supreme Court of Canada has treaded guardedly in this area.<sup>228</sup> Lacking the bold mandate and support set forth by the Roosevelt administration in 1934, there has been no Canadian equivalent to the American *IRA*, and the nearsighted, cautious attempts<sup>229</sup> made in

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duced very little change, however. The March 1983 conference produced a minor amendment to section 25, entrenching a clause that protected rights and freedoms acquired through land claims from abrogation or derogation by the *Charter* (section 35(3) of the *Constitution Act, 1982*). That same conference also produced a provision that specified that at least three additional first ministers' conferences were to be held in 1984, 1985, and 1987. Those subsequent conferences produced no additional amendments (section 37.1 of the *Constitution Act, 1982*, which was repealed following the conferences).

<sup>224</sup> See e.g. *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686.

<sup>225</sup> See e.g. *Sparrow*, *supra* note 134.

<sup>226</sup> See e.g. *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657; *R v Côté*, [1996] 3 SCR 139, 138 DLR (4th) 385.

<sup>227</sup> See e.g. *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513; *R v Marshall*, [1999] 3 SCR 533, 179 DLR (4th) 193.

<sup>228</sup> See Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009-10) 41:1 *Ottawa L Rev* 101 (applying the *Van der Peet* in practice results in indeterminacy in the scope of Aboriginal self-government rights).

<sup>229</sup> In 1996, Bill C-79 proposed numerous interim modifications regarding the system of band governance, bylaw authority, and the regulation of reserve land and resources (*An Act to permit certain modifications in the application of the Indian Act to bands that desire them*, 2nd Sess, 35th Parl, 1996-97 (first reading 12 December 1996)). It was opposed by Aboriginal peoples because it was seen as a flawed, piecemeal initiative based on inadequate consultation that ignored the recently completed Royal Commission on Aboriginal Peoples. The bill was never passed. In 2002, the federal government tried to overhaul the *Indian Act* with Bill C-7, known as the *First Nations Governance Act (An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 2nd Sess, 37th Parl, 2002-2003 (committee report presented in House of Commons 28 May 2003)). This bill called for bands to develop both a system by which to choose their leaders and rules concerning how band money is spent. Contentious to most bands was the fact that they would no longer be exempt from the *Charter*. Again, this bill was opposed by Aboriginal peoples and was never passed. See also Stephen Cornell, Miriam Jorgensen & Joseph P Kalt, "The First Nations Governance Act: Implications of Research Findings from the United States and Canada", Report to the Office of the British Columbia Regional Vice-Chief Assembly of First Nations (np: Native Nations Institute for Leadership, Management, and Policy, 2002), online: Native Nations Institute <<http://nni.arizona.edu/pubs/AFN02Report.pdf>>.

respect of Aboriginal self-government in Canada continue to produce relatively meager advances.<sup>230</sup>

This disappointing lack of progress, however, is not for want of direction. At least as far back as 1973, there have been numerous studies, reports, and findings that point in the same, simple direction—more substantive recognition by Canada of Aboriginal sovereignty means stronger Aboriginal societies.<sup>231</sup> In 1973, the National Indian Brotherhood (NIB) released its *Statement on Economic Development of Indian Communities*,<sup>232</sup> which called for Aboriginal peoples to be treated on par with the provinces within the federal system, with transfer and equalization payments delivered directly to Aboriginal governments to be used at their discretion. In 1976, the NIB went on to release a set of three documents (of which the first report was a joint effort between NIB and the Department of Indian Affairs) that called for stronger Indian constitutional and cultural identity; security from want and full access to options available in Canadian society; purposeful lives through education and political equality; and possession of land to the fullest extent possible.<sup>233</sup>

One year later, the *Berger Report*<sup>234</sup> of 1977 provided a look at the importance of history, land, culture, and self-determination to Aboriginal peoples. Next, in 1979, Jack Beaver gave his final report (the *Beaver Re-*

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<sup>230</sup> The *Mikmaq Education Act* (SC 1998, c 24) provided for the transfer of jurisdiction over education, in that certain sections of the *Indian Act* ceased to apply to the signatory communities within Nova Scotia. The *First Nations Land Management Act* (SC 1999, c 24) granted First Nations control over reserve lands and resources, and ended some ministerial discretion under the *Indian Act* over land-management decisions on reserves. Signatories were required, however, to enact a land code consistent with the act. Only 20 First Nations communities (out of 614) have ratified land codes in place. The *First Nations Fiscal and Statistical Management Act* (SC 2005, c 9) allowed signatories to opt out of several *Indian Act* land provisions and allowed for the collection of the goods and services tax (GST) to help fund First Nation governments. Only 58 of the 614 First Nations are participants, and critics see the act as imposing expensive accountability guidelines and as an attempt by the federal government to lessen its fiduciary obligations.

<sup>231</sup> For an in-depth look at the ill-fated strategies and recommendations provided over the years to the Canadian government to develop First Nations societies, see Peter Douglas Elias, *Development of Aboriginal People's Communities* (North York, Ont: Captus Press, 1991).

<sup>232</sup> National Indian Brotherhood, "Statement on Economic Development of Indian Communities", Prepared for the Western-Federal-Provincial Conference on Economic Opportunities, July 24, 25 and 26, 1973 (Ottawa: The Brotherhood, 1973).

<sup>233</sup> National Indian Brotherhood, *A Strategy for the Socio-economic Development of Indian People: National Report* (Ottawa: National Indian Brotherhood, 1977).

<sup>234</sup> *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada, 1977).



port)<sup>235</sup> of the National Indian Socio-economic Development Committee to the NIB and the Department of Indian Affairs and Northern Development. His three conclusions were that self-government has to be defined at the community level; planning must be community-based; and Canada must provide the necessary elements—access to land and natural resources, better access to education, increased capital, and a political dedication to real development. The *Penner Report* of 1983 subsequently recommended that the provinces be removed from any jurisdiction in Aboriginal affairs and reiterated that a viable economic base for Aboriginal communities could only be created under effective Aboriginal control of governments at the community level.<sup>236</sup> This report also blamed the federal government for paying little attention to development strategies identified by Aboriginal peoples themselves.

Lastly, the Royal Commission on Aboriginal Peoples (RCAP) was established in 1991 to address the issues faced by Aboriginal peoples across the country. The RCAP final report, released in 1996, was over four thousand pages in length and gave 440 recommendations that called for sweeping changes.<sup>237</sup> While a few of these proposed changes (e.g., the Indian Health Transfer Policy) somewhat echoed the United States' attempts at nurturing tribal self-determination in 1975 (through the *Indian Self-Determination and Education Assistance Act*), several others were markedly Canadian in form and function (e.g., an Aboriginal parliament and order of government, subject to the *Charter*). In the sixteen years since the RCAP report was completed, however, the federal government

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<sup>235</sup> JW Beaver, *To Have What Is One's Own*, Report from the President, National Indian Socio-economic Development Committee (np: National Indian Socio-economic Development Committee, 1979).

<sup>236</sup> Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) (Chair: Keith Penner).

<sup>237</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996). Some of the major recommendations included a new royal proclamation stating Canada's commitment to a new relationship, treaty process, and recognition of Aboriginal nations and governments; the recognition of an Aboriginal order of government (though subject to the *Charter*), with authority over matters related to the welfare of Aboriginal peoples and their territories; the replacement of the federal Department of Indian Affairs and Northern Development with two departments, one to implement the new relationship with Aboriginal nations and the other to provide services for non-self-governing communities; the creation of an Aboriginal parliament; the expansion of the Aboriginal land and resource base; the recognition of Métis self-government, provision of a Métis land base, and recognition of Métis rights to hunt and fish on Crown land; initiatives to address social, education, health (Indian Health Transfer Policy), and housing needs; the establishment of an Aboriginal peoples' university; and the recognition of Aboriginal nations' authority over child welfare: see *Report of the Royal Commission on Aboriginal Peoples: Renewal; A Twenty-Year Commitment*, vol 5 (Ottawa: Supply and Services Canada 1996), appendix A.

has not implemented the recommendations, and Aboriginal peoples have therefore been left with the unhurried approach of the Canadian courts to defining their constitutional rights as identified in section 35.

As noted by the Alberta Court of Queen's Bench, "Section 35 ... refers to the protection of [Aboriginal] rights as of April 17, 1982; the insertion of the word 'existing' [was] ... deliberately [inserted] to achieve that result."<sup>238</sup> This take on existing Aboriginal rights was confirmed by the Supreme Court in *R v. Sparrow*, which held that the scope of the section is restricted to only those rights that were in existence when the *Constitution Act, 1982* came in to effect;<sup>239</sup> these rights are "unextinguished"<sup>240</sup> and any extinguished rights are not revived. One might visualize a frozen lake with two air holes placed centuries apart—the Canadian government forcibly submerged all Aboriginal rights for centuries, and only those rights that were fortunate enough to make it to the second hole have been recognized by the government as valid. All others are dead in the water. This judicial shell game of "now you see them now you don't" has proven to be an effective method of denying Aboriginal peoples in Canada their inherent rights, while affording Canadian governments the ability to simultaneously profess to the world (and itself) that the rights of Aboriginal peoples living within Canada's borders are secure, entrenched safely within the nation's constitution. Thus, while the constitution does entrench Aboriginal rights recognized by the Canadian government, it also effectively serves as a kind of statute of limitation for claiming those rights, with no tolling allowed. Where before it was the Crown, now, it is the constitution that giveth and the constitution that taketh away.

The Court in *Sparrow* also held that existing Aboriginal rights "must be interpreted flexibly so as to permit their evolution over time."<sup>241</sup> Adopting the expression used by Professor Slattery, the Court held that existing Aboriginal rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."<sup>242</sup> This judicial assurance that Aboriginal rights must be interpreted in a contemporary form appears, however, to have been built on an unstable foundation, with the risk of crashing down soon after it was built. The question of *how* existing Aboriginal rights are recognized and affirmed by section 35 was addressed only six

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<sup>238</sup> *R v. Steinhauer* (1985), 63 AR 381, 15 CRR 175 at 180 (QB).

<sup>239</sup> *Sparrow*, *supra* note 134.

<sup>240</sup> *Ibid* at 1092.

<sup>241</sup> *Ibid* at 1093.

<sup>242</sup> Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 at 781-82.

years after *Sparrow*, in *R v. Van der Peet*.<sup>243</sup> This decision provided a test, incorporating ten key components, to succinctly define an Aboriginal right as “an activity [that] must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>244</sup>

The problem with the *Van der Peet* test is obvious: it effectively freezes Aboriginal rights—mooring them to the distant past—while tethering them to 1982. Professor John Borrows aptly summed up the test’s inherently faulty nature:

With this test, as promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, ‘once upon a time,’ central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities today. His test has the potential to reinforce troubling stereotypes about Indians.<sup>245</sup>

Indeed, the *Van der Peet* test mandates that modern (post-1982) rights be analyzed through a centuries-old lens and triggered only when the modern-day, non-Aboriginal courts deem an Aboriginal activity “Aboriginal” enough.

A year after *Van der Peet*, the Supreme Court of Canada deepened the constitutional hole in which Aboriginal peoples in Canada suddenly found themselves when it handed down the *R v. Pamajewon* decision.<sup>246</sup> *Pamajewon* was the first time that the Aboriginal right of self-government was asserted, but by following the recently established *Van der Peet* framework, a terrible outcome for Aboriginals was already written on the wall.

The case involved casinos and gaming on reserves. Because the Aboriginal appellants could not show, as required by *Van der Peet*, that gaming was “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group,” they could not own or operate casinos on reserves. As Professor Bradford Morse observed, “The [*Pamajewon*] Court has articulated legal standards replete with subjective

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<sup>243</sup> [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR]. This is the first of three cases now known as the *Van der Peet* trilogy, which also includes *R v. N.T.C. Smokehouse Ltd.* ([1996] 2 SCR 672, 137 DLR (4th) 528) and *R v. Gladstone* ([1996] 2 SCR 721, 137 DLR (4th) 648).

<sup>244</sup> *Van der Peet*, *supra* note 243 at para 46.

<sup>245</sup> *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 60.

<sup>246</sup> *Supra* note 200.

elements, lacking in clear enduring principles to guide the effort, and based upon a museum-diorama vision of aboriginal rights.”<sup>247</sup>

*Pamajewon’s* American sister case, *California v. Cabazon Band of Mission Indians*,<sup>248</sup> provides an illuminating snapshot comparison. Aboriginal litigants in Canada, in 1996, could not legally operate gaming facilities on reserves because they could not prove to the outsider Canadian court that the act of gaming was culturally distinctive at the time of contact. Yet Indian tribes in the United States, in 1987, were recognized as having the ability to do so because, returning to the year 1832 and the *Worcester v. Georgia* decision, state laws had no force in Indian country. Therefore, the constitutional protection of Aboriginal rights in Canada via section 35 can be rendered quite impotent because the determination of what is “Aboriginal” and what is not is subject to contemporary prejudices, biases, and misconceptions of Canadian judges. This takes from Aboriginal peoples the right to identify who and what they and their societies are—and, much more importantly, what they want them to be in the future—that is the core of self-determination.

Unlike section 35, section 25 of the *Constitution Act, 1982*<sup>249</sup> is part of the *Charter*—and was placed there to ensure that the *Charter* “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” According to Roger Tassé, the deputy minister of justice at the time of the adoption of the *Charter*, section 25 was designed as an interpretation clause that “comes as a rule of construction for the charter in its application to the rights of aboriginal peoples.”<sup>250</sup> Its placement was a direct response to the opposition of many Aboriginal groups to the idea of a consti-

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<sup>247</sup> Bradford W Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*”, Case Comment (1997) 42:4 McGill LJ 1011 at 1030. This article provides a helpful comparison of Indian gaming in Canada and the United States, as well as a much more in-depth look at the troubling *Pamajewon* decision.

<sup>248</sup> *Cabazon*, *supra* note 200.

<sup>249</sup> *Charter*, *supra* note 213, s 25:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

<sup>250</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 49 (30 January 1981) at 93 (Roger Tassé).

tutionally based *Charter*, stemming from the belief that the *Charter*'s focus on individual rights would threaten Aboriginal and treaty rights.<sup>251</sup> Therefore, in theory, section 25 provides a barrier so that the constitutional rights of non-Aboriginal Canadians cannot impinge upon Aboriginal-specific rights. In practical terms, however, since the *Charter* was introduced, section 25 has never been used as a "shield" by an Aboriginal person or tribe. Though courts have had many occasions to address this function of section 25, not one has yet done so.<sup>252</sup>

### *B. The United States and Its Constitution*

This part serves more as a placeholder for conceptual symmetry in this article than as an offering of substantive material. To be sure, tribes in the United States face modern-day challenges, but these have remained relatively consistent since 1787 and have already been discussed in detail above. In short, Indian tribes continue to contend with the incessant erosion of early, relatively empowering interpretations of tribal sovereignty and to struggle for self-determination against impinging state and federal interests.

## Conclusion

In summary, indigenous peoples in Canada enjoy significantly fewer indigenous-specific rights than their counterparts in the United States. This discrepancy stems from the earliest notions that, while Indian tribes in the United States were domestic, dependent nations, Aboriginal peoples in Canada were simply subjects of the Crown. Indian tribes in the United States have maintained inherent rights based on their historical traditions and culture—rights they have possessed "from time immemorial"<sup>253</sup> and into present day—while tribes in Canada, at least until 1973, maintained rights only insofar as these rights were accorded by the Crown. Today, this long-embedded view remains "the tacit matrix for much legal thinking about the [Canadian] Constitution."<sup>254</sup> Aboriginal peoples in Canada today, however, continue to counter this nonrecogni-

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<sup>251</sup> *Ibid* at 32-33.

<sup>252</sup> For an interesting comment on judicial analysis of section 25, see Celeste Hutchinson, "An Analytical Framework for Section 25 of the *Charter*", Case Comment on *R v Kapp*, (2007) 52:1 McGill LJ 173.

<sup>253</sup> *Worcester*, *supra* note 37 at 558.

<sup>254</sup> Slattery, "The Organic Constitution", *supra* note 120 at 103

tion and assert their inherent rights through international human rights standards and norms.<sup>255</sup>

Despite the somewhat limited nature of tribal governments and their quasi-American court systems, Indians living on reservations in the United States are at least able to receive protection *from their own* tribal governments and *by their own* tribal courts, which are empowered *by their own* constitutions. In contrast, since 1982, Aboriginal peoples in Canada have theoretically had the right to self-government, but over thirty years later, very few governmental structures have materialized:<sup>256</sup> there are no tribal courts and only one Aboriginal-created constitution.<sup>257</sup> Moreover, tribal governments in the United States enjoy “sovereign immunity [from

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<sup>255</sup> See e.g. *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 187. On November 12, 2010, Canada endorsed the declaration but did so against the framework of the already existing constitution and laws: see Aboriginal Affairs and Northern Development Canada, *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (12 November 2010), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.

<sup>256</sup> *The James Bay and Northern Québec Agreement* ((Québec: Éditeur officiel du Québec, 1976) s 26) allows band corporations to possess bylaw powers similar to those of municipal governments under provincial legislation. The *Sechelt Indian Band Self-Government Act* (SC 1986, c 27) grants the Sechelt band the authority to exercise delegated powers and negotiate agreements concerning specific issues. The *Yukon First Nations Self-Government Act* (SC 1994, c 35) is perhaps the most promising development, but its mandate is limited by the fact that self-government must be exercised within the existing Canadian constitutional structure and that the *Charter* still fully applies to Aboriginal governments. The Nunavut territory and government, whose population is eighty-five per cent Inuit, was established in 1999 and has jurisdictional powers and bodies similar to the Northwest Territories government. The *Nisga’a Final Agreement* ((27 April 1999), online: Aboriginal Affairs and Northern Development Canada <<http://www.nnkn.ca/files/u28/nis-eng.pdf>>) mandates that the *Charter* applies to Nisga’a government and that federal and provincial laws apply to the Nisga’a and their lands, but the final agreement and settlement legislation prevail to the extent of any inconsistency between them and provisions of any federal or provincial law. Further, if a Nisga’a law has an incidental impact on an area over which Nisga’a government has no authority and that law is inconsistent with a federal or provincial law, the federal or provincial law will prevail to the extent of the inconsistency. Further limitations severely limit the ability to call the Nisga’a arrangement a true self-government. For a breakdown of the actual agreement, see Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, *The Nisga’a Final Agreement* by Mary C Hurley, PRB 99-2E (24 September 2001), online: Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/researchpublications/prb992-e.htm>>.

<sup>257</sup> Namely, the *Constitution of the Nisga’a Nation* ((October 1998), online: Nisga’a Lisims Government <[http://nisgaalisims.ca/files/nlg/The\\_Constitution\\_of\\_the\\_Nisga\\_a\\_Nation\\_October\\_1998\\_.pdf](http://nisgaalisims.ca/files/nlg/The_Constitution_of_the_Nisga_a_Nation_October_1998_.pdf)>). The Nisga’a can create a court (*Nisga’a Final Agreement*, *supra* note 256, ss 33-37) but have not yet done so.

suit] absent a clear waiver by the tribe or congressional abrogation,”<sup>258</sup> while tribal governments in Canada still answer directly to Aboriginal Affairs and Northern Development Canada<sup>259</sup> and enjoy no such fundamental sovereign right. The rights of Aboriginal peoples in Canada have, however, been entrenched within the Canadian constitution and would therefore no longer be susceptible to an aggressive government looking to legally and politically extinguish them. Indian tribes in the United States are still technically vulnerable to such an attack.

Indians in the United States have had several progressive legislators and high-ranking government officials make bold moves in their favour and enact policies that were instrumental in creating positive change. Aboriginal peoples in Canada have had to muddle through decade after decade of middling, indifferent, or sometimes even malicious bureaucrats who are either too sheepish or too backward-thinking to make any real, significant improvements. Likewise, the Parliament of Canada has yet to offer any substantive legislation in the vein and magnitude of a modern day *Indian Reorganization Act*, even though numerous sources have pointed to that type of solution. Rather, decades of piecemeal legislation have served as only a half-hearted attempt to counter the more odious effects of the *Indian Act*, while those laudable governmental voices that have called for substantial change have been largely ignored.

At the time of the writing of this article, the Canadian government recently (on December 14, 2012) pushed several pieces of legislation through Parliament including Bill C-45, the *Jobs and Growth Act*,<sup>260</sup> a 457-page omnibus bill containing (among other disparate legislation) elements of serious concern to Aboriginal peoples. These concerns, coupled with the very visible Idle No More indigenous grassroots movement and Attawapiskat First Nation Chief Spence’s hunger strike (in order to have a meeting with the prime minister and Governor General), amply illustrate the high degree of frustration and resentment experienced by Aboriginal peoples in Canada today. This sense of agitation is further aggravated by the fact that Aboriginal peoples were not consulted about these profound legislative changes even though the Supreme Court of Canada has devel-

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<sup>258</sup> *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 at 509, 111 S Ct 905 (1991) [cited to US] (“the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief” at 510).

<sup>259</sup> In June 2011, the Government of Canada changed the name of the Department of Indian Affairs and Northern Development (DIAND) to Aboriginal Affairs and Northern Development Canada (AANDC).

<sup>260</sup> SC 2012, c 31.

oped a robust “duty to consult” doctrine.<sup>261</sup> The latter requires governments to consult with First Nations when proposed changes that would affect them are being considered. Regardless, as stated by Ontario Regional Chief Stan Beardy, “[a]t no time in the nine months that Bill C-45 was being considered did the Government of Canada discuss any matters related to it with First Nations—this bill breaches Canada’s own laws on the fiduciary legal duty to consult and accommodate First Nations. The Canadian government just gave birth to a monster.”<sup>262</sup> Thus, antiquated, nineteenth-century paternalism still appears to be alive and well in Canada.

By way of Bill C-45, for instance, changes to the *Indian Act* now allow First Nations to surrender lands to the Crown even if a mere majority *attending a meeting* vote to do so; it no longer matters whether or not there is actually a majority of the electors of the band at such a meeting. The pertinent section reads: “If ... the proposed absolute surrender is assented to at the meeting or referendum by a majority of the electors voting, the surrender is deemed ... to have been assented to by a majority of the electors of the band.”<sup>263</sup> To add insult to injury, the minister of Indian affairs and northern development now also has the authority to call such a band referendum for “the purpose of considering a proposed absolute surrender” of the band’s territory.<sup>264</sup> This harkens back to the previously discussed US *Dawes Act*, from a hundred and twenty-five years ago, by which over twenty-seven million acres of lands left tribal control and resulted in patchwork, checkerboard reservations. To exacerbate the land issue, Bill S-2, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*,<sup>265</sup> now also allows for the transfer of property rights to non-Aboriginals on First Nations lands—even lands protected under treaties.

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<sup>261</sup> See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

<sup>262</sup> Chiefs of Ontario, News Release, “Bill C-45, Jobs and Growth Act Not to Be Recognized or Enforced by First Nations in Ontario” (14 December 2012), online: Chiefs of Ontario <<http://www.chiefs-of-ontario.org/node/453>>. The Chiefs of Ontario Political Confederacy went on to say that “Aboriginal Senator Patrick Brazeau [who voted in favour of Bill C-45] is a traitor to all First Nations people in Canada, including the future generations” (*ibid.*).

<sup>263</sup> *Indian Act*, *supra* note 3, s 39(3).

<sup>264</sup> *Ibid.*, s 39(1)(b)(ii).

<sup>265</sup> Bill S-2, *An Act respecting family homes situated on First Nations reserves and matrimonial interests or rights in or to structures and lands situated on those reserves*, 1st Sess, 41st Parl, 2011.



In addition to the Bill C-45 legislation discussed above, other recent bills have also raised the ire of Aboriginal peoples in Canada: Bill S-6, the *First Nations Elections Act*;<sup>266</sup> Bill S-8, the *Safe Drinking Water for First Nations Act*;<sup>267</sup> Bill C-27, the *First Nations Financial Transparency Act*;<sup>268</sup> Bill S-207, *An Act to amend the Interpretation Act (non-derogation of aboriginal and treaty rights)*;<sup>269</sup> Bill S-212, the *First Nations Self-Government Recognition Act*;<sup>270</sup> and Bill C-428, the *Indian Act Amendment and Replacement Act*.<sup>271</sup> Forcing this slew of laws upon First Nations in Canada without consultation once again mires the possibility of true government-to-government relationships in a centuries-old myopia and baldly ignores the many reports, commissions, and studies that point to the direction that the United States had already started to take in the mid-1930s.

In conclusion, while the entrenchment of Aboriginal rights in the Canadian constitution is commendable, Canada would be wise to look to its southern neighbour for much-needed guidance on the recognition of the inherent rights of Aboriginal peoples. As shown, governments in the United States are by no means infallible and have committed many egregious violations of indigenous rights throughout the centuries; compared to Canada, however, the United States is still many decades ahead. Only time will tell if governments in Canada will ever catch up—or if they even want to.

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<sup>266</sup> Bill S-6, *An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations*, 1st Sess, 41st Parl, 2011-12 (first reading 4 May 2012).

<sup>267</sup> Bill S-8, *An Act respecting the safety of drinking water on First Nations lands*, 1st Sess, 41st Parl, 2011-12 (first reading 19 June 2012).

<sup>268</sup> Bill C-27, *An Act to enhance the financial accountability and transparency of First Nations*, 1st Sess, 41st Parl, 2011-12 (committee report presented in the Senate 7 March 2013).

<sup>269</sup> 1st Sess, 41st Parl, 2011 (committee report presented in the Senate 28 February 2013).

<sup>270</sup> Bill S-212, *An Act providing for the recognition of self-governing First Nations of Canada*, 1st Sess, 41st Parl, 2011-12 (first reading 1 November 2012).

<sup>271</sup> Bill C-428, *An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement*, 1st Sess, 41st Parl, 2011-12 (second reading and referral to committee in House of Commons 5 December 2012).