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WEAPONIZING FEDERALISM FOR SETTLER COLONIALISM: CANADIAN COURT (MIS-)USE OF FEDERALIST PRINCIPLES AGAINST INDIGENOUS JURISDICTION

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ABSTRACT

Canadian scholars and political thinkers have long contemplated how federalism might be used to enhance and foster legal pluralism and respect for diversity. Yet, as argued here, Canadian courts often work to deny Indigenous legal jurisdiction by leveraging constitutional principles associated with federalism. This article traces what might be called the "weaponization" of federalism to deny Indigenous jurisdiction in four parts. First, I outline the theory and legal importance of federalism as it relates to Indigenous sovereignty. Second, in using the framework of "jurispathy," I discuss how Canadian courts deny recognizing the

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independent existence of Indigenous laws, even when it is in the pleadings before them and relevant to the trier-of-fact. Third, I explore how the Supreme Court of Canada, in the 2024 *Dickson v. Vuntut Gwitchin First Nation* decision, denied the validity of Indigenous constitutionalism, and in turn suggested that Indigenous self-governance is, at least partially, an emanation of Canadian government jurisdiction. Finally, courts have upheld a paternalistic account of section 91(24) of the *Constitution Act, 1867*, which allocates "Indians and lands reserved for Indians" to the federal government. This is despite the fact that, when taking into account the *Royal Proclamation of 1763* and the *Treaty of Niagara*, there is basis to reinterpret section 91(24) not as jurisdiction over a peoples, but a duty and responsibility to them (as opposed to over them).

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RÉSUMÉ

Les universitaires et les penseurs politiques canadiens réfléchissent depuis longtemps à la manière dont le fédéralisme pourrait être utilisé pour renforcer et favoriser le pluralisme juridique et le respect de la diversité. Pourtant, comme je le soutiens ici, les tribunaux canadiens s'efforcent souvent de nier la compétence juridique autochtone en s'appuyant sur des principes constitutionnels associés au fédéralisme. Cet article retrace en quatre parties ce que l'on pourrait appeler « l'instrumentalisation perverse » du fédéralisme pour nier la compétence juridique autochtone. Premièrement, j'expose la théorie et l'importance juridique du fédéralisme en ce qui concerne la souveraineté autochtone. Deuxièmement, en utilisant le cadre de la « jurispathie », j'examine la manière dont les tribunaux canadiens refusent de reconnaître l'existence indépendante des lois autochtones, même lorsque celles-ci figurent dans les plaidoiries qui leur sont présentées et qu'elles sont pertinentes aux faits présentés. Troisièmement, la Cour suprême du Canada, dans *Dickson c. Vuntut Gwitchin First Nation*, a rejeté la validité du constitutionnalisme autochtone et a ainsi suggéré que l'autonomie gouvernementale autochtone est, au moins en partie, une émanation de la compétence du gouvernement canadien. Enfin et quatrièmement, les tribunaux ont maintenu une interprétation paternaliste de l'article 91(24) de la *Loi constitutionnelle de 1867* qui attribue une autorité au gouvernement fédéral sur « les Indiens et les terres réservées aux Indiens ». Cette interprétation a été présentée en dépit du fait

que la *Proclamation royale de 1763* et le *Traité du Niagara* de 1764, deux autorités juridiques fondamentaux pour interpréter l'article 91(24), ont défini pour l'État, non pas une autorité, mais un devoir et une responsabilité de respect souverain envers les communautés autochtones.

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INTRODUCTION

FEDERALSIM *could* be a way of mitigating against the violence of settler-colonialism in countries like Canada. At least, in the abstract as a structure of governance, federalism carries this potential. Federalism refers to a mode of political organization in which power is divided between a national (i.e., central) order of government and sub-national government units (i.e., provincial or regional state governments).[1] From a legal standpoint, federalism is the allocation of lawful jurisdiction of governing authority across different levels and/or groupings of political communities.[2] In traditional Western models of federalism, potential legal disputes between orders are typically resolved so that one singular law reigns supreme. For example, the Canadian doctrine of federal paramountcy holds that where there is irreconcilable conflict, the federal law is to reign supreme over provincial law.[3] At the same time, federalism as a model is inherently pluralistic, creating a range of overlapping legal authorities and even possibilities.[4] The Supreme Court of Canada has described federalism as a deliberate constitutional choice for the state to accommodate diversity.[5] One example of this diversity accommodation is the legal pluralism between the common and civil law traditions in Canadian constitutional and federal arrangements, which stems from Canadian Confederation in 1867.[6] Given this legal and federal plurality within

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1 See also SA Paleker, "Federalism: A Conceptual Analysis" (2006) 67:2 Indian J Political Science 303 at 303.

2 See James A Gardner, "Federalism and Subnational Political Community", Response to "Partisan Federalism" by Jessica Bulman-Pozen, (2014) 127:4 Har L Rev Forum 153 at 154.

3 See e.g. *Law Society of British Columbia v Mangat*, 2001 SCC 67 at paras 51–60, 69–70 [*Mangat*]; *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 90 [*Moloney*].

4 See Erin Ryan, "Federalism as Legal Pluralism" in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism*, Oxford Handbooks (Oxford: Oxford University Press, 2020) 491 at 496–500.

5 *Reference re Secession of Quebec*, 1998 CanLII 793 at para 43 (SCC) [*Quebec Secession Reference*]. This is an idea expressed in other countries as well, for example by the Indian Supreme Court (see *Govt of NCT of Delhi v Union of India*, 2018 INSC 577 at para 107).

6 See Kelty McKerracher, "Relational Legal Pluralism and Indigenous Legal Orders in Canada" (2023) 12:1 Global Constitutionalism 133 at 135; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 114 [Borrows, *Indigenous Constitution*].

Canada, many have argued that there is a comparable basis for recognizing the co-existence of Indigenous legal orders and governance authority, both within the scope of Canadian law, and also beyond it when considering the inherent independent autonomy of Indigenous nations.[7] Indeed, both Indigenous and non-Indigenous lawyers and scholars have advocated that Indigenous laws were never extinguished by the imposition of the settler-state apparatus, and Indigenous governance jurisdiction has not been granted due respect within the Canadian political and legal framework.[8] The imagined possibilities of federalist structures that include legal pluralism and Indigenous autonomy are boundless and inspiring. And they inspire better justice possibilities for Indigenous rights, reconciliation and settler-Indigenous relations.

Yet this approach to federalism, one that is inclusive, pluralistic, and also daringly anti-colonial, has neither been adopted nor seriously contemplated by Canadian courts. It is without question that the Canadian legal system has failed to pay due respect to Indigenous law and legal authority. Keira Ladner and Michael McCrossan pointedly outline how the Supreme Court of Canada has effectively negated not only the salience, but the very existence, of Indigenous legal orders under a

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7 See Michael Asch, "*UNDRIP*, Treaty Federalism, and Self-Determination" (2019) 24:1 Rev Const Stud 1 at 4–8. For the Australian context, see Margaret Davies, "The Ethos of Pluralism" (2005) 27:1 Sydney L Rev 87 at 111.

8 See e.g. Oscar Mejía Mesa, "Le fédéralisme de réconciliation et les Peuples Autochtones : ébauche d'une proposition institutionnelle" (2019) 52:4 Can J Political Science 697; Martin Papillon, "Vers un fédéralisme postcolonial? : La difficile redéfinition des rapports entre l'état canadien et les peuples autochtones" in Alain-G Gagnon, ed, *Le fédéralisme canadien contemporain : Fondements, traditions, institutions* (Montreal: Presses de l'Université de Montréal, 2006) 461 at 468–69 [Papillon, "Fédéralisme postcolonial"]; McKerracher, *supra* note 6 at 137; Val Napoleon, "Legal Pluralism and Reconciliation" [2019] Māori L Rev (November) 1 at 5–6; Martin Papillon, "Nation to Nation?: Canadian Federalism and Indigenous Multi-Level Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 4th ed (Toronto: University of Toronto Press, 2020) 395 at 404 [Papillon, "Nation to Nation?"]; Kiera L Ladner, "Take 35: Reconciling Constitutional Orders" in Annis May Timpson, ed, *First Nations, First Thought: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 279 at 291; John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17.

commitment to Canada's current federal structure.[9] The Supreme Court of Canada set a precedent in *Tsilhqot'in Nation v. British Columbia* (*Tsilhqot'in*) that provinces must have general legal application even over areas of established or potential Aboriginal title under the Constitution, as without provincial oversight there would be a "regulatory vacuum" over matters like environmental conservation—a ruling that completely negates Tsilhqot'in governance and laws.[10]

This ruling is emblematic of a pattern in Aboriginal law jurisprudence where courts affirm their commitment to upholding the binary federal/provincial federalist structure of Canada as the *only* valid allocation of jurisdiction or plurality, with other entities like municipalities being derivations of one of these two orders. However, this tacitly, and sometimes directly, rejects Indigenous jurisdiction as independent of this binary-jurisdictional imagining. It is precisely because of this imposed jurisdictional hierarchy that much Canadian scholarship, particularly from scholars concerned with Indigenous peoples and their rights, has been dedicated to making the case for legal pluralism within Canada's political and federal structure and to countering the supremacy of settler law.[11]

In contrast to the pluralist possibilities inherent in how federalism may be envisioned, the reality in the context of Canada is stark, particularly for Indigenous communities. I aim to provide an analytical account of Canadian case law, especially recent Supreme Court decisions, to chart how Canadian courts continually deny Indigenous legal jurisdiction and impose settler-legal supremacy. Specifically, I argue that Canadian courts

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9 Michael McCrossan & Kiera L Ladner, "Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power" (2016) 49:3 Can J Political Science 411 at 412.

10 *Ibid* at 422–23, 425, citing *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 105 [*Tsilhqot'in*].

11 See e.g. the argument for treaty federalism, which forwards that Indigenous peoples continue to be "self-determining polities" and that, within the context of power inequity and without necessarily acceding Canadian settler-legal supremacy, negotiation and treaties offered a mechanism between Indigenous sovereign nations and the Crown to coordinate respective spheres of jurisdiction of "mutually agreed upon boundaries of self-rules and shared rule" (see Martin Papillon, "The Two Faces of Treaty Federalism" in James Bickerton & Alain-G Gagnon, eds, *Canadian Politics*, 7th ed (Toronto: University of Toronto Press, 2020) 217 at 221–22). See also Ladner, *supra* note 8; James (Sákéj) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241.

leverage federalism, and legal principles associated with federalism, as a "weapon" to justify colonial legal-supremacy and structural settler-violence.

To see Canada's political and governance structure, including federalism, as part and parcel to the state's settler-colonial project is not entirely novel, especially in light of current scholarship attuned to Indigenous perspectives.[12] Confederation in 1867 was a defining moment in the birth of Canada as a federal country. Confederation was a particular moment of institutionalizing Canadian identity in the creation of what would become modern Canada, and it embedded certain internal sovereigns within the nation as constitutionally entrenched (i.e. the provinces). Yet this was done to the exclusion of Indigenous peoples, and without Indigenous perspectives considered. Some scholars go as far as to present Confederation as solidifying a Canadian racial paradigm justifying a settler-colonial expansionist polity.[13] Indeed, Martin Papillon highlights that the Canadian constitution fails to recognize that Indigenous peoples are political and constituent polities, and Canadian federalism has instead relegated Indigenous communities as an "object of government competence" under section 91(24) of the *Constitution Act, 1867*.[14] Joyce Green contends that Canadian social and power structures, including notably its federalist structure, incorporate intellectual, legal and cultural ideologies that continue to justify the status quo since 1867, and create a political culture that facilitates utter ignorance, or even apathy, concerning Indigenous socio-economic realities or political interests.[15] Rather than a historical or political account my aim is to attend to federalism

12 See e.g. Phil Henderson, "Federalism and Settler Imperialism: Racial Regimes, Whiteness, and Conquest in Canadian Constitutionalism" (2024) 57 Can J Political Science 466 at 477–78; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) ("[despite institutional, including judicial, discourses of reconciliation], the relationship between Indigenous peoples and the state have remained colonial to its foundation" at 6 [emphasis in original]).

13 P Henderson, *supra* note 12 at 477–78; Joyce Green, "Autodétermination, citoyenneté et fédéralisme : pour une relecture autochtone du palimpseste canadien" (2004) 23:1 Politique & Soc 9 at 15.

14 Papillon, "Fédéralisme postcolonial", *supra* note 8 at 464 [translated by author].

15 Green, *supra* note 13 at 12–13.

through the lens of legal doctrines and judicial logics, adding to this body of scholarship.

To illuminate my argument that the courts leverage federalism to re-impose settler colonialism, this article unfolds in four parts. First, I provide my methodological understanding of federalism in relation to theory, Aboriginal law, and Indigenous rights. Second, I discuss how Canadian jurisprudence negates the authority and continued validity of Indigenous legal orders and laws—often in the name of establishing settler-governance as the singular, valid legal authority. In so doing, Indigenous legal orders are "killed off" as valid legal possibilities. Third, in discussing the 2024 *Dickson v. Vuntut Gwitchin First Nation* Supreme Court case, I outline how Indigenous constitutionalism is rejected by the courts, even when Indigenous governments entrench constitutions that are parallel and cognizable to that of Canada. This is done, in part, through invoking federalism principles. In the denial of Indigenous laws, governance and constitutionalism, Canadian courts erode respect for Indigenous values and knowledge-systems, as well as their ways-of-being. The just arrangement for Treaty federalism and nation-to-nation modern negotiations is also jeopardized. Finally, I discuss how the courts interpret section 91(24) of the *Constitution Act, 1867*, which grants the federal government jurisdiction over "Indians and lands reserved for the Indians" in a manner that actively negates settler-Indigenous relations and historic promises made by the Crown, and ultimately fails to respect Indigenous communities as independent and organized political communities. Instead, courts both tacitly and expressly maintain a myth that paternalistic federal oversight over Indigenous communities is both natural and required, whilst incorporating constitutional logics that are contradictory to each other.

I. UNDERSTANDING FEDERALISM: FROM THEORY TO PRACTICE IN CANADIAN COLONIAL DYNAMICS

The overarching goal of this article is to trace how federalism is discussed and utilized in Canadian jurisprudence that impacts Indigenous self-governance, including the delineation of colonial versus Indigenous jurisdiction, the recognition and maintenance of Indigenous legal orders, and impositions on Indigenous decision-making authority. As such, I pay particular attention to Aboriginal rights and title jurisprudence, as

opposed to traditional federalism case law. In addition, broader theory and analysis regarding settler-Indigenous relations and federalism is emphasized.

Before delving into the Aboriginal law jurisprudence, however, I find it necessary to situate the debate of federalism and pluralist accommodation in Canada broadly speaking. It is a consistent practice in Canada to question the bounds and potential of the federalist structure, and what it means for the people who live here. Within Quebec, federalism has been widely contemplated and re-imagined in relation to pluralism and as an embrace of multiple sovereignties. As one example, University of Montreal legal scholar Jean Leclair notes that federalism concerns matters of both individual and national freedom thereby granting the space and conditions for political communities to act as autonomous collective bodies and affirm their own liberatory power.[16] This is, of course, tempered and balanced by the fact that federalism, as premised on the Westphalian state model, concerns which orders of government maintain competing jurisdictions of political and state coercion.[17] Consequently, collective freedom under Canadian federalism, as it stands now, is never absolutely autonomous, and it is debatable to what extent "collective freedom" has manifested to date in justice.[18]

It is not entirely clear whether Canadians themselves see federalism as a critical aspect of the political order that reflects diversity or respects autonomy at numerous levels. But this principled idea has been and could be further extended in theory. Hester Lessard, for example, has forwarded that the principle of subsidiarity, which favours decision-making authority closer to the local community level, can accord greater rights and governance representation to marginalized communities such as racialized minorities living in concentrated urban neighbourhoods.[19] Even if we understand federalism to be, in the legal context, uniquely a matter

16 Jean Leclair, "« Vive le Québec Libre! » : Liberté(s) et fédéralisme" (2010) 3 RQ Dr Constl 23 at 30.

17 *Ibid*.

18 *Ibid*.

19 Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2011) 19:2 Const Forum Const 93 at 106–08, cited in Johanne Poirier & Colleen Sheppard, "Rights and Federalism: Rethinking the Connections" (2022) 26:2/27:1 Rev Const Stud 249 at 270–71.

of respective orders of "competence" or "sovereignty" between federal and provincial governments,[20] it is a foundational matter when we consider the role jurisdiction plays in shaping and forming basic rights and liberties in Canada. Federalism, thus, concerns the inherent dignity and autonomy of all communities in Canada.

As alluded to earlier, however, federalism is treated for the purposes of my discussion in its most abstract form, as a broad mechanism of allocating and sharing overlapping jurisdictions of authority, and as a form of governance diversity.[21] It is a choice of federalist structure and design to designate Quebec, Manitoba, and Nova Scotia as particular constitutional and governmental authorities but not other possible geographic and social organizations of people at both broader and narrower levels. As such, federalism concerns what political groupings are denied authority as much as it does those that are wholly affirmed and recognized. Given that federalism evokes a broader question of pluralist governance, the denial or purposeful destruction of Indigenous autonomous legal jurisdiction is a state choice of the proper allotment of power as part of its federal structure. It is true that unitary states also engage in such colonial dismissal of Indigenous governance, but even in unitary states I argue this nonetheless concerns a fundamental and structural question central to federalism: how does the state choose to accommodate or deny internally diverse socio-political communities and their governance autonomy?

While some patterns of settler-colonialism and/or structural denial of Indigenous autonomy discussed in this paper may be found to varying extents in countries that are unitary states, attention to the federalism framework remains important for two key reasons. First, as will be shown, the legal principles associated with federalism are invoked and used by Canadian courts as justification for the dismissal of Indigenous jurisdictions. As such it is a myth that federalism and Indigenous rights are wholly separate concepts. Indeed, federalism is consistently brought up and discussed throughout Aboriginal rights jurisprudence. For

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20 *Cf* Johanne Poirier & Nicolas Levrat, "Le fédéralisme coopératif comme terrain de jeu du droit" (2018) 18 Fédéralisme Régionalisme at Part 1.3, DOI: <10.25518/1374-3864.1736>.

21 Peter W Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981) 30 UNBLJ 9 at 13.

example, in the 2014 Supreme Court case *Grassy Narrows First Nation v. Ontario (Natural Resources)*, the Court adopted a view that while the "honour of the Crown" applies equally to provinces and the federal government, the treaty rights were reconstructively interpreted to allow for provincial natural resource development without federal oversight or approval even if such development impacted treaty lands and treaty terms.[22] Similarly, the reverse is true in that Aboriginal and treaty rights have bearing on the federalist structure. For example, the Alberta Court of King's Bench determined that an Alberta secession reference could not be constitutionally conducted without prior government consultation with affected Indigenous communities, given the fact that secession would engage treaty rights.[23] Ultimately, there is a clear connection between the structure of federalism and constitutional Aboriginal rights.

Second, if federalism promises a form of pluralism, and is a way of curating jurisdictional and political diversity within the state, then it naturally begs the question why should Indigenous communities be excluded? Of course, in the case of Canada it can be noted that courts have, to varying degrees, acknowledged Indigenous laws and self-governance. Aboriginal title, under section 35, confers the right to decide how land will be used, which could be argued to be an element of self-governance.[24] Aboriginal rights and title, though authoritatively defined by the courts, are meant to confer, in practice, a certain degree of choice for Indigenous peoples over collective decision making, in accordance with their own laws, customs and practices.[25] This is, of course, limited to where title and rights are recognized, and even still is not the full right to self-governance beyond land use or prescribed rights. Similarly, while Canadian courts have not yet recognized any inherent right to Indigenous self-government under the constitution, they have taken seriously federal and British

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22 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 35–55; Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims" (2015) 20:1 Rev Const Stud 1 at 27–28; Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35:1 Windsor YB Access Just 311 at 329.

23 *Athabasca Chipewyan First Nation v Alberta (Chief Electoral Officer)*, 2026 ABKB 375 at paras 239–41. Of course, the duty to consult does not go so far as to prohibit an Alberta secession reference outright.

24 *Tsilhqot'in, supra* note 10 at para 73; *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 115 (SCC) [*Delgamuukw*].

25 *R v Desautel*, 2021 SCC 17 at para 86 [*Desautel*].

Columbia legislation incorporating the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) into domestic law.[26] It is important to recall that article 4 of *UNDRIP*, by contrast to Canadian Aboriginal rights jurisprudence, directly calls for an inherent right of Indigenous self-governance.[27] The British Columbia Court of Appeal has even gone so far as to suggest that *UNDRIP* is a form of customary and conventional international law, and as such influences domestic law even absent legislation through the principle of the presumption of conformity.[28] Of course, this is not uniform across the country, as provinces other than British Columbia have not yet explored the implications of *UNDRIP* in this way. Whatever the case, despite these welcome advances, Indigenous peoples in Canada are not, at present, granted an explicit and inherent right to self-government in any of the aforementioned statutes or jurisprudence.[29] Below I trace some of the reasoning patterns in Canadian jurisprudence that hinder the meaningful recognition of Indigenous self-governance, particularly where the courts use federalism principles to this end.

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26 See e.g. *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 47 [*Dickson*]; *Reference re* An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5 at paras 134–36 [*Child Welfare Reference*]; *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 at paras 161–63 [*Gitxaala*], leave to appeal to SCC granted, 2026 CanLII 47879 (SCC). See the incorporation of *UNDRIP* in federal legislation in *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. See its incorporation in British Columbia's legislation in *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

27 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) Annex, art 4.

28 *Gitxaala*, *supra* note 26 at paras 126, 155.

29 I note that First Nations' Band Councils are widely considered not to function as true self-government, as they were both created and continue to be highly regulated under sections 74–86 of the *Indian Act* (RSC, 1985, c I-5, ss 74–86 [*Indian Act*]), the Crown continues to claim ownership of reserve lands, and internal disputes are resolved by the federal Minister of Indigenous and Northern Affairs. Similarly, Nunavut—a territory whose history is marked by the advocacy of the Inuit Tapirisat, and their negotiations and settlement agreement with Canada—is a form of self-government, established by the *Nunavut Act*, SC 1993, c 28. See P Whitney Lackenbauer & André Légaré, "'A More Accurate Face on Canada to the World': The Creation of Nunavut" in Daniel Heidt, ed, *Reconsidering Confederation: Canada's Founding Debates, 1864–1999* (Calgary: University of Calgary Press, 2018) 263 at 264. However, theoretically this act could be rescinded by Parliament, and the federal government maintains jurisdiction over Nunavut as a territory.

II. JURISPATHY AS THE ELIMINATION OF THE NATIVE: THE SETTLER-LEGAL "KILLING" OF INDIGENOUS GOVERNANCE AND LAWS

Robert Cover describes the judicial process where judges affirm the legal authority of their decisions through the killing off of other legal possibilities, or as he calls it "jurispathy."[30] Cover explains this through the conceptual model of the nomos. The nomos represents a normative narrative prism or "interpretive commitment" through which we interpret and filter understandings of justice, or what is right from what is wrong.[31] The nomos (or nomoi in the plural) is fundamentally a social construction, as its validity is only realized through collective interactions and communications of the societal reality in which we live.[32] The "nomos" is structurally parallel to what Anishinaabe scholar Aaron Mills describes as "lifeworlds" or the ontological, epistemological and cosmological framework through which the world appears to a people, which help carve out a range of possibilities to understand justice.[33] However, in a complex, multicultural, and certainly settler-colonial society, it is inevitable that there are numerous and multiple overlapping nomoi or lifeworlds. Indeed, the law of federalism itself contends with competing nomoi, in terms of the competing jurisdiction of provincial and federal legal authority and the resultant range of what can be the determinative "law." In face of a multitude of valid legal possibilities, or distinct lenses of legal interpretation with their own "nomic integrity,"[34] one legal "nomos" is selected as authoritative and valid whereas all other possible nomoi are written off as null and void.[35] The selected interpretation gains authoritative meaning through the deployment of resources like material application and assertions of power, marking it as the "determinative" legal

30 Robert M Cover, "Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4 at 53–54.

31 *Ibid* at 4, 7.

32 Cover, *supra* note 29.

33 Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 850, n 6.

34 Cover, *supra* note 29 at 42.

35 *Ibid* at 40, 53.

interpretation through the physical manifestation of outcome.[36] We see this actualized in Canadian federalism law, where doctrines like paramountcy and interjurisdictional immunity help carve out identifiable, definitive and singular authorities between conflicts of provincial and federal laws.[37] This application of authoritative jurisdiction between the provinces and federal government, and notably the absence of jurisdiction allocated to Indigenous governance systems, is granted legal "meaning" to Canadian society as power and resource management reflect this disparity.

It should be noted that jurispathy is not a universal feature of law, but rather is central to Western constructions of legality.[38] Under a Western legal epistemology, a singular and clear legal interpretation ought to prevail as a matter of political necessity, efficiency and pragmatism.[39] By contrast, many Indigenous legal orders allow for a multitude of legal meanings to mutually exist within an oral story or other source of law.[40] This means Indigenous legal systems are often more flexible and accommodating of pluralism.

Jurispathy against Indigenous laws and governance is structured within Canadian jurisprudence. Part of this is historic, stemming back to

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36 See Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998) at 41. See also Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht, Netherlands: Springer, 2013) 229 at 238–39.

37 See e.g. *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, 1999 CanLII 648 (SCC); *Mangat*, *supra* note 3 at paras 51–60, 69–70; *Moloney*, *supra* note 3 at para 90; *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 32–47; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paras 45–47. See also Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Peter Crawford Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution*, Oxford Handbooks (Oxford: Oxford University Press, 2017) 415.

38 While Western legal systems are not a monolith, there are certain consistent constructions and patterns. This includes a view of land as something possessable and which can be owned.

39 See Davies, *supra* note 7 at 88.

40 See Alan Hanna, "Going Circular: Indigenous Legal Research Methodology as Legal Practice" (2020) 65:4 McGill LJ 671 at 689–94. See also Sarah Morales, *Indigenous Legal Responses to Hate Incidents: A Coast Salish Study* (Victoria: British Columbia Office of the Human Rights Commissioner, 2022) at 9–10.

the *St. Catherine's Milling* case of 1887.Here, in a federal-Ontario dispute over which government had logging rights on Treaty 3 territory, the British Privy Council appeared to recognize the Saulteaux Nation's title to land had been sourced exclusively from the British *Royal Proclamation of 1763*, with no recognition of the possibility of having source in Ojibwe law.[41] In fact, no evidence of Ojibwe law as a relevant foreign (being non-British) law system was presented, and there appeared to be a judicial assumption, one that is both racial and pejorative, that the Ojibwe were incapable of having laws.[42] Notably, it cannot be said that the Privy Council was unwilling or incapable of recognizing Indigenous laws and customs, or their title rights. In the context of other colonial British dominions, the Privy Council did acknowledge land rights arising from prior occupation under Indigenous systems of law.[43] Whatever the case, in *St. Catherine's Milling*, from the trial court to the Privy Council, Canadian federalism saw the question of the settler-Indigenous agreement of Treaty 3 as a question of whether "surrendered" lands fell under provincial or federal jurisdiction unqualified. The legal and testimonial perspectives of the Saulteaux Nation, their interests, and intentions in the treaty were not considered and were cast aside.[44]

In addition to historic jurispathy in Canada, there is also a common modern-day practice of anti-Indigenous jurispathy. As mentioned, Ladner and McCrossan outline the process of jurispathy present within the *Tsilhqot'in* decision, where the Supreme Court determined that provincial laws over forest management must apply over lands claimed (yet not

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41 *St Catherine's Milling and Lumber Company v The Queen* (1888), 14 App Cas 46 at 54, 1888 CanLII 209 (UKJCPC) [*St Catherine's Milling* JCPC]; Kent McNeil, *Flawed Precedent: The* St. Catherine's *Case and Aboriginal Title*, Landmark Cases in Canadian Law (Vancouver: UBC Press, 2019) at 113 [McNeil, *Flawed Precedent*].

42 McNeil, *Flawed Precedent*, *supra* note 41 at 114, 124.

43 Notwithstanding the fact that the Privy Council still maintained colonial power dynamics even in these other jurisdictions (see *ibid* at 116–24). See e.g. *Tamaki v Baker*, [1901] NZPC 1 (NZLII); *Le Case de Tanistry* (1608), [1792] EngR 1396 (CommonLII) (Ireland KB); *Special Reference as to the Ownership of the Unalienated Land in Southern Rhodesia*, [1918] UKPC 78.

44 *St Catherine's Milling* JCPC, *supra* note 41 at 47–53; *Regina v St Catharines Milling and Lumber Company* (1885), 2 CNLC 374 at 374, 1885 CanLII 288 (ON ChD), aff'd 1886 CanLII 30 (ONCA); Karen Drake, "The Impact of *St Catherine's Milling*" in Law Society of Upper Canada, ed, *Special Lectures 2017: Canada at 150: The Charter and the Constitution* (Toronto: Irwin Law & Law Society of Ontario, 2018) 618 at 8–11.

settled) to be Tsilhqot'in title lands, or else there would be "no one left in charge."[45] This goes beyond questions of efficacy, and instead proclaims there is no other entity than the province that would be engaged in forest management. This assertion is not just legal fiction. It is outright wrong. Tsilhqot'in *dechen ts'edilhtan*, or "the laws of our ancestors," prescribes environmental stewardship through legal axioms of interconnectedness and respect for all entities including human and more-than-human.[46] In fact, it is a legal obligation for the Tsilhqot'in, under Tsilhqot'in law, to protect the environment under their legal principles of reciprocity and respect.[47]

The Supreme Court's logic in the *Tsilhqot'in* decision is purportedly based on a commitment to Canadian federalism—that section 92(13) of the Canadian Constitution allocates provincial land use and regulations to the provinces alone and not Parliament.[48] This assumes the division of powers between the federal and provincial governments is exhaustive, and that only these two bodies of power are proper authorities, an assumption long embedded in Canadian federalism jurisprudence.[49] Indeed, in the *Quebec Secession Reference*, the Supreme Court defined federalism as a system where "political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other."[50] Not only is this particular dualist vision of federalism described as an "unwritten principle" of the Canadian constitution, but

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45 McCrossan & Ladner, *supra* note 9 at 422–25, citing *Tsilhqot'in, supra* note 10 at paras 113–14.

46 Alan Bruce Hanna, Dechen ts'edilhtan*: Implementing Tsilhqot'in Law for Watershed Governance* (PhD Dissertation, University of Victoria, 2020) [unpublished] at 111.

47 *Ibid* at 115–16, 124.

48 *Tsilhqot'in, supra* note 10 at para 102; *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 33.

49 The Supreme Court outlines that where a matter falls outside of the enumerated jurisdictional lists in sections 91 and 92 of the Canadian constitution (for example, the Continental shelf just outside of Newfoundland), the residual power of the federal government's jurisdiction over peace order and good governance (POGG) kicks in. This presents an idea that Canadian federalism is exhaustive, and all matters, even those not codified, fall into the jurisdictional sphere of one of the two settler orders of government (see e.g. *Reference re Newfoundland Continental Shelf*, 1984 CanLII 132 at 127–128 (SCC)).

50 *Quebec Secession Reference*, *supra* note 5 at para 56; Borrows, *Indigenous Constitution*, *supra* note 6 at 199–200.

"appears to preclude the possibility of Indigenous self-government beyond mere 'administration'" as granted by either provincial or federal government.[51] Whatever the case, under an exclusive and exhaustive paradigm of federal/provincial power, the question of Indigenous agency within federalism becomes a question of which settler government order has jurisdiction over Indigenous communities. This leaves out the question of "How do we restore nation-to-nation relations that respect Indigenous sovereignty?"[52]

Courts have not only advanced this specific political commitment to a particular vision of federalism, but in doing so they encode contradictory logics as part of Canadian caselaw on Indigenous relations. Since the 1990s, Canadian constitutional jurisprudence has found that Indigenous communities pre-exist European settlement as "organized societies" which would logically imply that they have laws, regulations and social systems as socio-political communities.[53] Yet this fact becomes conveniently erased when courts discuss provincial or federal jurisdiction *over* Indigenous communities. The assumption of "regulatory anarchy" absent provincial or federal regulation completely erases the finding-of-fact that Indigenous peoples have organized societies in any meaningful sense. It denies this fact any legal weight and renders the process of judicial fact-finding mute. It is fair to question whether a better model of legal pluralism, or at least respect for Indigenous self-governance, could emerge if the trier-of-fact abandoned these contradictions, and consistently recalled the complex organization of Indigenous societies.

It is also important to qualify the nature of our courts' jurispathy, because jurispathy is never expressly written in reasons or codified. The process of judicial reasoning in *Tsilhqot'in*, *Coastal GasLink Pipeline v.*

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51 Aaron Dewitt, "Judicial Review as a Limit to Indigenous Self-Governance" (2014) 77:2 Sask L Rev 205 at 207, 209. See *Quebec Secession Reference*, *supra* note 5 at paras 49, 56.

52 Emily Grafton, *Divided Power: How Federalism Undermines Reconciliation* (Halifax: Fernwood, 2025) at 10 [Grafton, *Divided Power*].

53 See *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) [*Sparrow*] ("[t]he evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers" at 1094); *R v Van der Peet*, 1996 CanLII 216 (SCC) [*Van der Peet*] ("[it is a matter of] fact that prior to the arrival of Europeans in North America, Aboriginal peoples lived on the land in distinctive societies with their own practices, customs and traditions" at para 44).

Huson,[54] and other such cases never expressly contends with whether there even is a conflict of laws, or overlapping of laws, at play between Indigenous laws and those of the federal or provincial governments. Indeed, the courts disregard even thinking about such a possibility. For example, in *Tsilhqot'in*, counsel explicitly submitted that the Xeni Gwe'tin (a particular band of the Tsilhqot'in Nation) are the "traditional caretakers [of these lands] ... focused on managing these lands for the continuity of their culture and their community."[55] It was expressly drawn before the court that forest management was accounted for by the Tsilhqot'in absent provincial regulation. Yet the Supreme Court declined to analyze this or incorporate it into their reasoning. This can be referred to as "jurispathy *ab initio*," a killing off of an Indigenous nomos—a lifeworld—before judicial consideration even begins. In effect, not only are Indigenous legal orders rendered materially void under the dual effect of the Court's reasoning and the Canadian state's monopoly over resources and force, but they were never seriously considered as a possibility. Indigenous law is effectively denied recognition of existence, even within the realm of mere possibility.

Without being "serious possibilities" for judicial consideration, Indigenous laws and authority are asserted by courts only to be worthy of judicial contemplation if subsumed under settler-state processes. The Supreme Court in *Tsilhqot'in* suggests "Aboriginal groups have no legal right to manage the forest" until settled negotiation on title or governance is determined by the Canadian government—be it judicial or executive.[56] Similarly, in *Coastal GasLink Pipeline v. Huson*, Justice Church of the British Columbia Supreme Court stated that "Indigenous laws do not become an effectual part of Canadian ... law until [they are formally recognized as] being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence, or statutory provisions."[57] Instead, Justice Church relegated Indigenous law merely as a form of "fact evidence of the Indigenous legal perspective," because while Indigenous laws may exist independently,

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54 2019 BCSC 2264 [*Coastal GasLink*].

55 *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 (Factum, Appellant at para 295).

56 *Tsilhqot'in*, *supra* note 10 at para 113.

57 *Coastal GasLink*, *supra* note 54 at para 127. See also *Alderville First Nation v Canada*, 2014 FC 747 at para 40.

they have no bearing on how Canadian law dictates matters of justice pertaining to Indigenous peoples.[58] This is consistent with how much Supreme Court jurisprudence recognizes Indigenous laws as a form of "evidence" to support a claim for Aboriginal title, though not necessarily sufficient to establish such a claim nor does it give rise to any contemplation of a conflict of laws.[59] As pinpointed by Pooja Parmar, colonial logics have shaped a way of thinking that Indigenous societies merely have "culture" or "perspectives" whereas Canadian society has "law."[60] It should be re-emphasized that this is an effective denial that Indigenous communities are "organized societies" in any meaningful sense.

III. A REJECTION OF INDIGENOUS CONSTITUTIONALISM AND EPISTEMIC VIOLENCE

In a twist of irony, even where the federal government and the provinces do recognize Indigenous laws and self-autonomy, federalism has been invoked by the courts to undercut that authority. This is most evident in the case *Dickson v. Vuntut Gwitchin First Nation* (*Dickson*), where the Supreme Court dealt with the question of whether the Canadian *Charter* applies to Indigenous communities recognized as self-governing via modern treaty.[61]

The *Vuntut Gwitchin First Nation Final Agreement* (*Agreement*) is approved and given effect by both federal and Yukon legislation, and specifically sets out that the Vuntut Gwitchin nation has self-governing powers.[62] It subsequently has been given the status of a treaty and thus is protected under section 35 of the *Constitution Act, 1982*.[63] However, it should be stressed that if we understand Indigenous self-governance to be inherent because Indigenous nations had established the first societies and legal systems on this continent, which I note is the rationale discussed in foundational Aboriginal rights jurisprudence for why Aboriginal

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58 *Coastal Gaslink*, *supra* note 54 at paras 128–29.

59 *Tsilhqot'in*, *supra* note 10 at para 49; *Delgamuukw*, *supra* note 24 at para 157.

60 Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can Bar Rev 526 at 548.

61 *Dickson*, *supra* note 26 at para 39.

62 *Ibid* at paras 17–19.

63 *Ibid*.

rights arise,[64] then Indigenous self-governance as a right exists beyond the scope of the Canadian Constitution or any treaty.[65] Indeed, the Yukon Supreme Court found, and the Supreme Court upheld, that the Vuntut Gwitchin "have been self-governing since time immemorial."[66] Moving aside from this longstanding authority, the *Agreement* establishes that the Vuntut Gwitchin government is *not* a Band Council under the federal *Indian Act*,[67] that it operates entirely free of the *Indian Act*, and that the Vuntut Gwitchin are effectively independent from the Canadian government.[68] In other words, Parliament and the Yukon have recognized, in the codified *Agreement*, that the Vuntut Gwitchin government is entirely independent from them. Despite this fact, the majority for the Court found that even if Indigenous self-government is not "necessarily an emanation of federal authority," the Canadian Parliament was at least *a partial source of that authority* because the Vuntut Gwitchin government was acting within the lawmaking jurisdiction the federal government would have otherwise acted under according to section 91(24) of the *Constitution Act, 1867*.[69]

Federalism thus becomes a conduit for the Supreme Court's logic. Yet, the Supreme Court invokes a perplexing rationale. On the one hand it holds that Indigenous self-governance pre-exists and survives the Canadian state and its federal structure, and further that the Vuntut Gwitchin self-government is independent in function from the Canadian state. Yet on the other hand, it simultaneously holds that Canadian federalism is still retroactively imposed and deemed preeminent in

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64 *Van der Peet*, *supra* note 53 at para 74.

65 See Paul Jonathan Saguil, "Ethical Lawyering Across Canada's Legal Traditions" (2010) 9:1 Indigenous LJ 167 at 175–76; Peter W Hutchins with Carol Hilling & David Schulze, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29:2 UBC L Rev 251 at 252–53. See also Sarah Dalton, "Our Land, Our Way: The Rule of Law, Injunctions and Indigenous Self-Governance" (2022) 73 UNBLJ 312 at 315–16.

66 *Dickson, supra* note 26 at paras 82, 84.

67 See *ibid* at paras 23, 57–58, 76, 83. *Cf Indian Act*, *supra* note 29.

68 *Dickson*, *supra* note 26 at para 23. The Supreme Court recognized as a fact that the Vuntut Gwitchin First Nation government is not effectively under the "control" of federal or territorial government (*ibid* at paras 76, 83). *Cf Indian Act*, *supra* note 29, s 74; Don J Manderscheid, "First Nations and Self-Government: A Matter of Trust" (2007) 22:1 CJLS 109 at 110.

69 *Dickson*, *supra* note 26 at para 82.

determining proper legal jurisdiction. In turn, the Vuntut Gwitchin government is recast as structurally an "administrative ward" of the Canadian government, acting under the authority of the federal government's powers under section 91(24).

It is important that I clarify what I mean by "administrative ward." Despite distinguishing Indigenous self-government from municipal governments,[70] the Supreme Court majority views Indigenous autonomy as dependent on Canadian government, fulfilling functions whose jurisdictional allocation is held by the federal government.[71] The Court clarifies that they are not commenting on Indigenous self-government broadly, but only in the context of Indigenous government authority arising from negotiation and settlement with Canada.[72] As such, *Dickson* sets a concerning precedent that suggests that wherever there is recognition by the federal government of Indigenous self-government, or negotiation and agreement between an Indigenous nation and the federal government, section 91(24) of the Constitution is at play.[73] This ultimately serves as an express rejection of the nation-to-nations relationship, as Indigenous communities are not valued as organized societies when entering government negotiations with the Canadian state.[74] Instead, they are entities that only hold half-legal capacities—they hold enough legal personality to enter into negotiations with Canadian governments, but lack the legal personality to self-regulate and are therefore presumed dependent.

If Canadian law, by virtue of Canada's existing political and constitutional structure, devalues Indigenous communities as having independent political or legal legitimacy, then alternative and decolonial visions for federalism become impossible. Treaty federalism (or treaty constitutionalism) forwards that treaties (i.e., Treaty 6) are a recognition and affirmation of "Indigenous constitutional orders" and as such delegates certain powers, responsibilities, and authority to the Crown and each "nation" to govern their own peoples and shared territories.[75] Where there are no such negotiated treaties, then the authority of both

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70 *Ibid* at para 88.

71 *Ibid* at paras 82–86.

72 *Ibid* at para 91.

73 See *ibid*.

74 See Papillon, "Nation to Nation?", *supra* note 8 at 404.

75 Ladner, *supra* note 8 at 289; J Henderson, *supra* note 11 at 250–51.

"sovereigns" continues to exist intact, as neither Canadian nor Indigenous constitutional orders can subsume or eradicate the other.[76] Under treaty federalism, Indigenous communities are not imagined as having "joined" Canadian federalism, but rather the federalism framework is invoked to recognize that pre-existing Indigenous societies have relations with the Crown defined by treaties and nation-to-nations dynamics.[77]

Treaty federalism cannot manifest where there is no respect and no validity recognition of the authority inherent in Indigenous societies. It is innately premised on mutual recognition, which then enables the external recognition of Indigenous laws.[78] Mutual recognition is impossible where treaty-making and reconciliation negotiations are reframed not as between respectful sovereign peoples determining mutual outcomes and expectations, but rather as emanations of Canadian state benevolence.[79] As such, the unilateral imposition of the Canadian *Charter* on any Indigenous self-government is an affront to the possible realization of treaty federalism.

Of course, as mentioned, the Supreme Court majority did not declare whether the *Charter* would apply to the inherent right of self-government "untethered from federal legislation" as was the case with the *Agreement*.[80] However, even if the *Charter* only applied where there are federal-Indigenous agreements on self-government, this alone raises important issues. First, what does it say about the honour of the Crown and modern treaty negotiation if merely engaging with the federal government in this way can be judicially interpreted as a mechanism to impose Canadian law over an Indigenous self-government when that was not agreed to? It puts this important nation-to-nations relationship into further unequal footing, especially considering that for many Indigenous nations, negotiation with the federal government may be seen as the only pragmatic way in which their self-government interests can be realized. Moreover, if the act of negotiating with the federal government can be regarded as justification for Canadian constitutional and legal imposition on self-governance, this risks opening the door to even further colonial intrusion on

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76 Ladner, *supra* note 8 at 289,

77 Grafton, *Divided Power*, *supra* note 52 at 110.

78 *Ibid.*

79 See Ladner, *supra* note 8 at 289.

80 *Dickson*, *supra* note 26 at paras 91, 101.

Indigenous autonomy. The judicial review of Canadian courts, on the basis of Canadian legal expectations, may be further imposed as a limit on the regulations, laws, and constitutions of Indigenous governments, and will likely come at the expense of Indigenous legal norms and ontological values.[81] Second, the undemocratic and non-consensual nature by which the Canadian constitution is now being imposed on an Indigenous nation's self-governance should be seen as a constitutional legitimacy crisis akin to *la nuit des longs couteaux*.[82]

In any case, the Vuntut Gwitchin did not actually have their constitution overridden by the Canadian *Charter* in *Dickson*, at least not in practice. The Supreme Court majority ultimately found that Indigenous "collective rights," including to self-governance, have special status under section 25 of the *Charter*.[83] In effect, the Court upheld that section 25 shielded the collective right of the Vuntut Gwitchin to impose a residency requirement for elected leaders in their constitution, against the "irreconcilable" conflict with section 15 (equality) of the Canadian *Charter.* While the outcome of this case was that the Vuntut Gwitchin First Nation could continue to self-govern even contrary to the *Charter*, the Court presents a perplexing legal paradigm. For starters, Indigenous collective rights and the right to self-governance are presented as being distinct from and unconnected to any form of individual rights protection—a matter that necessitates entirely ignoring individual-level legal rights and responsibilities within Indigenous legal orders. I will further address this below, but for now it can be emphasized that Indigenous self-governance is constructed as being carved out by the Canadian settler legal order, which presents a form of precarious autonomy—especially as the legal scope of section 25 protections is not yet fully delineated and further is not absolute (meaning it may be overcome).[84] Additionally, to reiterate from before, to hold that the *Charter* applies in any capacity to Indigenous societies is to purport they are subsumed under the authority of the Canadian

81 See Dewitt, *supra* note 51 at 229.

82 "The night of long knives," which refers to the process of patriation for the *Constitution Act of 1982* wherein the Quebec premier René Lévesque was the sole provincial leader not present for the final agreement on the new Constitution, widely being seen by many Québécois as a constitutional betrayal (see CBC, "'The Night of the Long Knives'" (2001), online: <cbc.ca> [perma.cc/FXT7-FGZZ]).

83 *Dickson*, *supra* note 26 at paras 111, 306.

84 *Ibid* at para 148.

legal state without independent personality, negating the nation-to-nations relationship. There is insult here, and even irony, given the history of Indigenous advocacy for self-governance rights before and after the patriation of the *Constitution Act, 1982*, as well as the failure to include Indigenous peoples in subsequent constitutional reform attempts.[85]

The Supreme Court's decision in *Dickson* also culminates as an overt practice of jurispathy, not only against Indigenous laws generally, but specifically against Indigenous constitutionalisms. The Court determined that the Canadian *Charter* must apply to Indigenous self-governance, even if section 25 may protect "collective" Aboriginal rights like self-governance in certain cases.[86] This is despite recognition by the Court not only of the existence of the Vuntut Gwitchin Constitution but also its content, which explicitly includes individual rights and freedoms.[87] In fact, the Vuntut Gwitchin Constitution is formulated in ways that are highly cognizable to the Canadian state. For example, article IV(6) mirrors verbatim the language of section 2(a) of the Canadian *Charter* (freedom of religion, expression, peaceful assembly and association), article IV(8) does the same with section 7 (life, liberty and security of the person), article IV(9) with section 8 (prohibition on unreasonable search and seizure), and the list goes on.[88] The fact that these parallel provisions are expressed under the Vuntut Gwitchin Constitution speaks to its intended establishment over an area of jurisdiction separate from Canadian law—otherwise to reiterate *Charter* terms would be redundant. It was palpable that the Vuntut Gwitchin Constitution was understood by the Vuntut Gwitchin as an "internally determined institution [that was] operational" to address individual rights as would be similarly expressed in the

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85 Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000) at 53; Madeline Rose Knickerbocker & Sarah Nickel, "Negotiating Sovereignty: Indigenous Perspectives on the Patriation of a Settler Colonial Constitution, 1975–83" (2016) 190 BC Studies 67 at 71–88; Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16:1 Rev Const Stud 1.

86 *Dickson*, *supra* note 26 at paras 96, 101, 107.

87 *Ibid* at paras 25–26.

88 *Vuntut Gwitchin First Nation Constitution*, (1992), art IV, online (pdf): <vgfn.ca> [perma.cc/C98P-RX2J].

Charter,[89] yet the Court dismissed the Vuntut Gwitchin Constitution precisely for not *being* the Canadian *Charter*.

We also know that there were available alternative judicial interpretations to that of the Supreme Court majority, making the jurispathy even more apparent. For instance, Justice Rowe gave a strong dissent, wherein he found it inappropriate for the Vuntut Gwitchin self-government to be made subject to the *Charter*, including because it negates the fact that the Vuntut Gwitchin did not agree to such *Charter* application, and because it runs afoul of the fact that the Vuntut Gwitchin First Nation has enacted their own rights protection, as I discussed here.[90]

There are also the theoretical implications around legal "rights" that confound Indigenous self-governance. As alluded to earlier, the Court engages in a dichotomous analysis of individual versus collective rights. The majority for the Supreme Court found that where collective Indigenous rights protected under the Canadian Constitution conflict with individual *Charter* rights, section 25 of the *Charter* dictates that the collectively held rights of Indigenous peoples should prevail.[91] Upon analysis of section 25, the Court did not engage the language of Indigenous self-government, and instead discussed the issue uniquely through the lens of an "other right" held by Indigenous peoples granted by the Canadian Constitution.[92] In discussing Indigenous self-governance in these terms, the Court reaffirms the assumption that Canadian legal and political structures are the *only* valid allocation of authority, and that Indigenous self-governance is simply subsumed within that, at best, as a right. Even if this right were fully realized in practice, this still presents unequal footing for the nation-to-nations relationship, and Indigenous nations are not properly regarded as having sovereign legal personality, but rather as the beneficiaries of rights. It bears reiterating that section 25 rights, as discussed by the majority, may still be superseded even if the substance of such section 25 rights would otherwise be protected under the *Charter*.[93]

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89 Gordon Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of Canada's *Constitution Act, 1982*" (2003) 7:4 Citizenship Studies 481 at 491.

90 *Dickson*, *supra* note 26 at paras 508–21.

91 *Ibid* at para 107.

92 See e.g. *ibid* at paras 108–10.

93 See e.g. *ibid* at para 148.

Concerningly, this "individual versus collective rights" debate erroneously suggests that should an Indigenous constitution, or legal system, not recognize any rights of the individual exactly as the *Charter* would, there is an absence of legal authority. This becomes particularly overt in the dissenting opinion of Justices Martin and O'Bonsawin, who caution against the creation of "*Charter*-free zones," in which there would be an absence of individual rights protections for minorities within Indigenous communities.[94]

The ruling overall in *Dickson* raises a serious concern about epistemic violence, that being the destructive negation and dismissal of Indigenous knowledge systems, values, and ways-of-thinking.[95] As with *Tsilhqot'in*, this fear of *Charter*-free zones obviates the reality that many Indigenous legal orders explicitly protect individual rights, which was clearly the case with the Vuntut Gwitchin Constitution. But more than this, the Supreme Court's reasoning dictates that *valid* justice must uphold individualism as would be the case under a Western epistemology of legal rights and justice. But Indigenous "lifeworlds" are not rooted in thinking of justice and freedom based on "autonomous human individuals" and as such can extend into visions of justice that are diverse and distinct from that of the dominant Canadian-legal perspective.[96] Their conceptions of rights are often more collective or relational in character. For example, under

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94 *Ibid* at paras 234, 236.

95 The term "epistemic injustice" is initially coined by Miranda Fricker to refer to the ways in which some knowledge systems or knowledge experiences are misunderstood or mistreated resulting in injustice (see *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007) at 151). However, Rebecca Tsosie expands on this concept and applies it to demonstrate how Indigenous peoples have been harmed by the US legal system, and how their specific knowledge, value-systems and cultural ways-of-being are violently negated by comparison to established Western-centric policy "standards" (see "Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights" (2012) 87:4 Wash L Rev 1133). However, here, I use the concept of epistemic violence, which refers to the purposeful destruction of episteme (knowledge systems) (see Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Diana Brydon, ed, *Postcolonialism: Critical Concepts* (London, UK: Routledge, 2004) vol 4, 1427 at 1438–40; Boaventura de Sousa Santos, "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge" (2007) 30:1 Rev (Fernand Braudel Center) 45). See also Erin Shields, "Countering Epistemic Injustice in the Law: Centering an Indigenous Relationship to Land" (2023) 70:1 UCLA L Rev 206 at 215–19.

96 See Mills, *supra* note 33 at 864–68.

Coast Salish Island Hul'qumi'num legal traditions, law extends beyond individuals such that when harm is done, families and communities of the harm-doer are obliged to remedy that harm.[97] Where harm is done to one individual, the entire community is involved in decision-making over restitution.[98] Similarly, under Cree law, *pastamowin* (a legal principle prohibiting causing harm) imposes a general but positive legal duty to help others in distress and to take positive action in the face of harm.[99] This emanates from a value system of responsibility and care for "all my relations."[100] As such, by imposing the *Charter* on Indigenous self-governments, the Supreme Court of Canada not only committed "jurispathy" of Indigenous laws to reiterate the singular validity of the Canadian federalist allocation of power. The Supreme Court also committed a "jurispathy" of the very ontology, values, and ways-of-thinking of Indigenous legal orders. This is a destruction of Indigenous nomoi not just in terms of formal and recognized legal authority, but of the social worldviews and relational ethics that underpin Indigenous societies.

IV. SECTION 91(24): INTERPRETATION UNDER A NATION-TO-NATIONS RELATIONSHIP PERSPECTIVE AND IN LIGHT OF THE *ROYAL PROCLAMATION OF 1763*

Many of those reading the Canadian *Constitution Act, 1867* should be perplexed at section 91(24), which allocates to the federal government power over "Indians, and Lands reserved for the Indians."[101] On its face, this provision serves to suggest that amongst the separation of powers between Canada and the provinces, Parliament can assert authority over specific people based on their indigeneity in a paternalistic and colonial manner.[102] What is more disturbing is the manner in which courts have

97 Morales, *supra* note 40 at 25–27.

98 *Ibid* at 26–27.

99 See Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing* nêhiyaw *Legal Systems* (Saskatoon: Purich, 2015) at 28–29, 40; David Milward, "Cree Law and the Duty to Assist in the Present Day" (2020) 43:3 Man LJ 155 at 155–56.

100 McAdam, *supra* note 99 at 28–29.

101 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

102 Karine Martel, "Daniels v. Canada: The Supreme Court's Racialized Understanding of the Métis and Section 91(24)" in Jennifer Markides & Laura Forsythe, eds, *Looking*

treated this provision as a "race-based power."[103] In the 2013 case of *Daniels v. Canada (Indian Affairs and Northern Development)* (*Daniels*) and its subsequent appeals, the courts were tasked with determining whether the Métis people and non-status Indians fell under the federal head of power as "Indians" under section 91(24).[104] At the Federal Court, the trial judge Justice Phelan determined that section 91(24) is a "race-based provision" essentializing Indigenous peoples as a mythic race known as "Indians," a finding neither contested nor acknowledged on appeal.[105] Justice Phelan also set out that the purposes of section 91(24) are as follows:

> 1. To control native peoples where necessary to facilitate development of the Dominion;
>
> 2. To honour Crown obligations inherited from Britain and to extinguish interests that stood in the way of confederation; and,
>
> 3. To civilize and assimilate native peoples.[106]

These findings were accepted by the Supreme Court of Canada.[107] Larry Chartrand determined these purposes over section 91(24) may be accurate from a Crown perspective that views the constitution historically and as a legal justification for settler colonialism.[108] However, Chartrand contends that the assumption section 91(24) grants a "plenary power" over Indigenous peoples is faulty, as it fails to account for Indigenous self-determination in international law and the fact that these

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Back and Living Forward: Indigenous Research Rising Up (Leiden: Brill Sense, 2018) 145 at 146. See also Larry Chartrand, "The Failure of the *Daniels* Case: Blindly Entrenching a Colonial Legacy" (2013) 51:1 Alb L Rev 181 at 182; Jean Teillet & Carly Teillet, "Devoid of Principle: The Federal Court Determination that Section 91(24) of the Constitution Act, 1867 is a Race-Based Provision" (2016) 13:1 Indigenous LJ 1 at 2.

103 Teillet & Teillet, *supra* note 102 at 2.

104 2013 FC 6 [*Daniels* FC], aff'd 2014 FCA 101, aff'd 2016 SCC 12 [*Daniels* SCC].

105 Teillet & Teillet, *supra* note 102 at 2, 19–20; *Daniels* FC, *supra* note 104 at para 568. Note that the Supreme Court did not address the qualification of section 91(24) as a "race-based provision" anywhere in their judgment. They did, however, describe Justice Phelan as providing "thoughtful and thorough reasons" (see *Daniels* SCC, *supra* note 104 at para 4).

106 Chartrand, *supra* note 102 at 184, citing *Daniels* FC, *supra* note 104 at para 353.

107 *Daniels* SCC, *supra* note 104 at para 5.

108 *Supra* note 102 at 184–85.

stated "purposes" are self-contradictory.[109] Crown obligations include respecting treaties and agreements with Indigenous peoples, which stand in contrast to controlling, civilizing or assimilating them. The modern-day treatment of section 91(24) fails to consider alternative anti-colonial possibilities and instead replicates the colonial violence of early jurisprudence on section 91(24). Indeed, *Daniels*'s treatment of race and Indigeneity is not a far cry from the 1939 *Re Eskimo* decision, in which the Supreme Court of Canada determined that the Inuit fell under the head of section 91(24) as "Indians" by conducting a linguistic analysis of how government officials used the word "savages" in reference to Inuit and First Nations alike.[110]

Section 91(24) rattles the perceived morality of the Canadian Constitution not just because its origins and phrasing are outdated given modern settler-Indigenous relations and aspirations for the future. It rattles because Canadian law continues to define section 91(24) in a way that permits the assertion of settler-legal supremacy over Indigenous communities. As noted in *Dickson*, the Supreme Court determined it could "read in" the *Charter* over Indigenous self-governance on the partial basis that the Vuntut Gwitchin government was acting in the place of the federal government's jurisdiction under section 91(24).[111] In fact, the Court determined that the "power" vested under section 91(24) to Parliament "subsist[s] even after entering into a self-government agreement with an Indigenous people."[112] Similarly, in the 2024 *Indigenous Child Welfare Reference*, the Supreme Court found that a federal statute that set out a framework for Indigenous self-governance over child welfare is *intra vires* section 91(24). Accordingly, Indigenous regulations over child welfare are to be respected on the basis that they are given the force of law as federal law thereby allowing Indigenous regulations to supersede provincial encroachments.[113] Ultimately, Indigenous self-governance is discussed as legally cognizable only insofar as it is authorized by the federal government through statute. While the statute itself may well be within federal

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109 *Ibid*.

110 *Reference as to Whether "Indians" in s 91 (24) of the BNA Act includes Eskimo Inhabitants of the Province of Quebec*, 1939 CanLII 22 at 109–11 (SCC).

111 *Dickson*, *supra* note 26 at paras 82–87.

112 *Ibid*.

113 *Child Welfare Reference*, *supra* note 26 at paras 93–95, 122.

competence, this framing of self-governance vis-à-vis section 91(24)s raises the notable concern as to what should happen should Parliament decide to unilaterally revoke its statutory recognition of Indigenous self-jurisdiction. Canadian electoral politics change, and thus so does federal policy. This constitutionalized precarity of Indigenous self-governance to electoral whims sets a concerning power imbalance for Indigenous communities.

Ultimately, where does the nation-to-nations relationship outlined in visions of treaty federalism stand under section 91(24)? In terms of structure, the federal government bears responsibility for Canada's settler colonial project. From a normative standpoint, it owes obligations of reparations, restitution, and land-back to Indigenous peoples by virtue of imposing a system of violence, displacement and dispossession in order to carve out the modern state of Canada.[114] However, as Glen Coulthard accounts, when it comes to colonial recognition of the rights of Indigenous people, the colonial state—and especially colonial courts—will only grant rights insofar as doing so does not "throw into question the background legal, political, and economic framework of the colonial relationship itself."[115] Nonetheless, it ought to be questioned whether the inability of Canadian law to contend with the violence of settler colonialism, especially in its assertion of federalism and jurisdiction, means that its own logic collapses on itself. For example, many negotiated treaties affirmed Indigenous autonomy.[116] As such, any judicial presumption that section 91(24) refers to an authoritative power of the federal government over Indigenous communities creates either a legal contradiction or a legal fiction, or possibly both.

Instead of understanding section 91(24) through the lens of settler government supremacy, there are grounds to re-interpret the provision as necessitating respect for Indigenous self-determination and shared legal jurisdiction. As aforementioned, Canadian courts have accepted that one of the purposes behind section 91(24) is that Canada "inherit[ed] Crown obligations from the British empire." This would logically have to include the *Royal Proclamation of 1763*, which delineated boundaries of

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114 See also Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 J Genocide Research 387 at 388–90.

115 Coulthard, *supra* note 12 at 41.

116 J Henderson, *supra* note 11 at 247.

jurisdiction between Indigenous nations and the Crown, and indicated that no lands would be taken from Indigenous peoples without consent.[117] The proclamation is not without its colonial poetics and implications. It denigrates Indigenous "occupancy" (as opposed to "sovereignty") with paternalistic language of Indigenous nations living "under [British Crown] protection."[118] This language of occupancy, juxtaposed alongside the presumed inherence of Crown sovereignty, was used in *St. Catherine's Milling* to orchestrate a system wherein Indigenous title was a "right not to be transferred but extinguished"; in other words, a system articulating a right that could only be manifested through alienation of Indigenous land to the Crown, at best via sale or transfer.[119] However, Anishinaabe scholar John Borrows contends that the Royal Proclamation can and should be understood in light of the 1764 *Treaty of Niagara* and Two-Row Wampum.[120] With over twenty-two nations present, the British made explicit promises at Niagara as Crown representatives read out the Royal Proclamation, including that the Crown would respect Indigenous sovereignty and require Indigenous consent for settlement on their territory.[121]

On top of this, the British engaged in various Indigenous legal ceremonies at Niagara, including an exchange of Haudenosaunee Two Row Wampum belts as a diplomatic convention between nations.[122] As such, despite the denial of legal pluralism by Canadian courts, Indigenous laws were inherently "incorporated" into the Canadian legal order, as Canada inherited obligations made through the *Treaty of Niagara*. Indigenous legal ceremonies shaped the meaning and contours required to understand

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117 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: UBC Press, 1997) 155 at 159–60 [Borrows, "Wampum at Niagara"].

118 *Ibid* at 161.

119 *St Catherine's Milling* JCPC, *supra* note 41 at 54; Robert Nichols, *Theft is Property!: Dispossession & Critical Theory*, Radical Américas (Durham: Duke University Press, 2020) at 45–46.

120 Borrows, "Wampum at Niagara", *supra* note 117 at 161.

121 *Ibid* at 169.

122 *Ibid* at 163–64.

the Royal Proclamation and the promises it made particularly as understood at Niagara.

Through this reinterpreted light, section 91(24) would dictate that it is the federal government's responsibility to ensure respect for Indigenous sovereignty, uphold its agreements entered into with Indigenous peoples, and maintain healthy and mutual nation-to-nations relationships. It also prescribes the federal government as the Crown representative in the settler-Indigenous nation-to-nations dynamic, which is in keeping with, though slightly nuanced from, recent Supreme Court jurisprudence that finds that Parliament has jurisdiction to affirm constitutional requirements for reconciliation.[123] This is also in keeping with the fact that Indigenous peoples, as the subject matter of section 91(24), are not akin to other matters of federal jurisdiction, like banks, as here we are dealing with Indigenous societies who have maintained legal relationships with the Crown *prior* to colonial settlement, let alone Confederation. Further, while the federal government would retain authority to implement policies regarding Indigenous nations, for example the *Indigenous Child Welfare Act*,[124] the new interpretation I propose would delimit the scope of section 91(24) to explicitly recognize there is no absolute authority over Indigenous nations. Indigenous nations maintain their own autonomy even under section 91(24), and federal powers under said section should be guided and importantly constrained by relational considerations informed by ongoing nation-to-nations dynamics and past promises.

The Royal Proclamation has practical limitations for its scope in modern application. The Royal Proclamation is not universal to Crown-Indigenous relations. Not all Indigenous nations were present,[125] and neither were all Crown entities. The Province of British Columbia, for example, has maintained that the Royal Proclamation never applied to it. British Columbia has argued that at the time of the Proclamation, the British Crown was unaware of the existence of the lands that now compose the province, and so by virtue of that lack of knowledge the Proclamation

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123 *Child Welfare Reference*, *supra* note 26 at paras 64–66.

124 Name abbreviated. See *An Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

125 See also Borrows, "Wampum at Niagara", *supra* note 117 at 163.

cannot grant any recognition of Indigenous title protection in British Columbia.[126]

Despite this, I argue that the Royal Proclamation, and other Crown promises made, should nuance and inform the scope and meaning of section 91(24) because it opens the door for more principled engagement with nation-to-nations relationship dynamics. Even if Inuit, Métis, and some First Nations communities were not present at the *Treaty of Niagara*, the initial premise of Crown sovereignty demarcated by the Royal Proclamation was done via the recognition of and engagement with Indigenous sovereignty, laws, nation-to-nations promises, and relations.

This new interpretation I propose would allow greater historical and logical consistency, especially as modern Canadian jurisprudence justifies Crown sovereignty using rather circular logics.[127] Stemming from the 1991 *R. v. Sparrow* case, the Supreme Court has maintained that the mere assertion of Crown sovereignty, alongside de facto control, is sufficient for Crown sovereignty to be justified.[128] In other words, the Crown has sovereignty over Indigenous peoples because it does, and it says it does. In fact, in *R v. Sparrow*, the Royal Proclamation was tacitly treated as a particularization of the Crown's assertion of sovereignty.[129] Yet simultaneously, the Supreme Court of Canada found that irrespective of any differing judicial interpretations of the Royal Proclamation, it undeniably

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126 Emily Grafton, *Reserved Responsibilities: A Comparative Analysis of Settler Colonial Narratives of Canadian Federalism and Sub-National Jurisdictional Responsibility for Status First Nations Peoples Living On-Reserve in Manitoba, British Columbia and the Northwest Territories* (PhD Thesis, University of Manitoba, 2017) [unpublished] at 183–84; Peter Kulchyski, *The Red Indians: An Episodic, Informal Collection of Tales from the History of Aboriginal People's Struggles in Canada*, Semaphore Series (Winnipeg: Arbeiter Ring, 2007) at 27.

127 It is important to detail that the Supreme Court found that the doctrine of *terra nulius* never applied in Canada as affirmed by the Royal Proclamation. However, no alternative explanation appears to have been affirmed for why the Crown has its sovereignty in light of Indigenous existence (see *Tsilhqot'in, supra* note 10 at para 69).

128 *Sparrow,* supra note 53 at 1103. See also *Van der Peet, supra* note 53 at paras 31–37; *Delgamuukw, supra* note 24; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida Nation*]; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 66–67 [*Manitoba Metis*]; Michael Adams, "Towards Reconciliation: A Proposal for a New Theory of Crown Sovereignty" (2016) 49:1 UBC L Rev 1 at 25–32.

129 *Sparrow*, *supra* note 53 at 1103.

stood as a "basic declaration of [Indigenous] interests in land in this country."[130]

In any case, if this "assertion of sovereignty" concept is to have any meaning, then it certainly must be considered in terms of the context that underpin that assertion historically. Thus, by considering the Royal Proclamation alongside the associated *Treaty at Niagara*, the boundaries and scope of not just Crown sovereignty writ large, but specifically with regard to section 91(24), can be properly situated in their reality of ongoing and numerous nation-to-nations relationships.

Interpreting section 91(24) through the Royal Proclamation and the *Treaty at Niagara* would encourage, as a legal necessity, active engagement and consideration of Indigenous legal perspectives. It is only sensible to consider the intentions, common understandings, and legal perspectives of different parties in relational promises and agreements—think of domestic contracts or international agreements. Even if settler-Indigenous relations are considered sui generis, there is clearly a vacuum in judicial reasoning if the Crown's jurisdiction and section 91(24) are contemplated without discussion of the laws or relations evolving out of the "prior occupation" and existence of "distinctive Indigenous societies."[131] Moreover, to the extent that the honour of the Crown is "anchored to the goal of reconciliation,"[132] then it is worth noting that such a nation-to-nations relational approach to Crown jurisdiction and section 91(24) would be consistent with this goal.

In using the Royal Proclamation as a point to argue that Indigenous legal perspectives, relational agreements, and past promises should be considered limitations on the scope of section 91(24), I am guided in part by the model of the *Treaty of Waitangi*/*Te Tiriti o Waitangi* in New Zealand/Aotearoa.[133] New Zealand/Aotearoa law has developed the concept of the "principles of the treaty/te tiriti" which provides for a spirited account of the parties' evolving and dynamic relationship and intentions with the

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130 *Ibid* at 1104.

131 *Van der Peet, supra* note 53 at para 32. However, this is distinct in the context of *Métis* communities, where a pre-contact rationale does not function. *Desautel*, *supra* note 25 at para 32.

132 *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para 12.

133 *The Treaty of Waitangi*, 6 February 1840, reprinted in 1975/114, Schedule 1 (NZ); *Te Tiriti o Waitangi*, 6 February 1840, reprinted in 1975/114, Schedule 1 (NZ).

treaty/te tiriti.[134] It is because of this that both Māori and English language versions of the treaty bare importance for Treaty interpretation, as do the legal perspectives of Māori. This concept of "principles" is abstract and arguably amorphous, allowing for evolving interpretation and meaning, not unlike the broad concepts of "reconciliation" and "honour of the Crown" as used in Canada.[135]

Of course, in practice, the jurisprudence of "treaty/tiriti principles" is not without flaw or colonial harm. The treaty/te tiriti and its principles are not considered binding, but act as guidance for statutory interpretation and the judicial review of Crown conduct.[136] The legal presumption of colonial courts in New Zealand/Aotearoa rests still on the presumption of the right of the Crown to govern unhampered by "unreasonable restrictions" that may arise from settler-Indigenous relations or Māori sovereignty.[137] Māori scholar Hemopereki Simon has even forwarded that the treaty principles are a function of modern New Zealand colonialism, as the concept in legal practice has led to the obscuring of the difference between treaty/tiriti "versions," hindered needed examination and criticism of the legitimacy of the current colonial status quo, and falls short of Māori self-determination requirements in accordance with *UNDRIP*.[138]

While recognizing the flaws behind treaty/tiriti principles, in the abstract they can still inform a more measured approach to section 91(24). They certainly cement that it is entirely practicable for the scope of Crown sovereignty, including in a constitutional arrangement, to be delineated

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134 *New Zealand Maori Council v Attorney-General*, [1987] NZCA 60 (NZLII) at 28–35 [*Lands*]; *Treaty of Waitangi Act 1975*, 1975/114, Preamble, ss 6(1), 8(1) (NZ).

135 I note that the "Honour of the Crown" exists in New Zealand jurisprudence, perhaps not as a specific doctrine like in Canada, but as an animating element in the treaty/tiriti principles (see *Lands*, *supra* note 134 at 37–39).

136 *Huakina Development Trust v Waikato Valley Authority*, [1987] NZHC 130 (NZLII) at 50–51; *Mercury NZ Limited v Māori Land Court*, [2023] NZHC 1644 at paras 26, 47; Carwyn Jones, *New Treaty, New Traditions: Reconciling New Zealand and Māori Law* (Vancouver: UBC Press, 2016) at 16.

137 *Lands*, *supra* note 134 at 40; Catherine Iorns, "Treaty of Waitangi Principles Relevant to Adaptation to Coastal Hazards from Sea-Level Rise" (2022) 53:4 VUWLR 563 at 578–79; Hemopereki Simon, "Are the Treaty Principles Needed in the Bay of Plenty?: A Critical Reexamination of the Fedarb (Bay of Plenty) Sheet of Te Tiriti o Waitangi" (2024) 15:3 Int'l Indigenous Pol'y J at 10–14.

138 *Supra* note 137 at 13–14.

based on Crown-Indigenous relations and Crown guarantees of Indigenous rights and autonomy. And within such a limitations-based arrangement, the legal perspectives of Indigenous nations on the matter are critical and weighty. Ultimately, the idea that the Royal Proclamation and the nation-to-nations relationship dynamic should guide interpretation of section 91(24) appears both pragmatic and achievable.

In making this argument about the Royal Proclamation and the *Treaty at Niagara*, and what they can mean for section 91(24), I by no means am trying to argue that there are no other valid, alternative re-interpretations of section 91(24) that different Indigenous nations may seek to advance. Nor do I dismiss the contention that such a provision should not exist at all, and indeed many Indigenous nations are justified to reject the entirety of the Canadian Constitution as a colonial imposition no matter how it is interpreted.[139] Instead, I aim to highlight that there are interpretations of the provision available to Canadian courts that better accord respect for Indigenous legality and authority.

Some may contest that, as a constitutional provision, section 91(24) cannot be dramatically re-interpreted especially not in a way that might impose positive obligations on the federal government. I counter that the Supreme Court has already adopted a living tree interpretation of section 91(24). In *Daniels*, the Supreme Court used progressive interpretation techniques, finding that it would be anomalous to interpret the meaning of "Indian" under section 91(24) of the *Constitution Act, 1867* without due regard to how "Aboriginal" is defined under section 35 of the *Constitution Act, 1982*, despite the fact that the former predates the latter as a constitutional document by over one hundred years.[140] Similarly, it can be argued that it is "anomalous" to ignore Crown promises made before confederation, especially if section 91(24) is determined to mean the federal government inherits British Crown obligations. True, the new premise for section 91(24) interpretation I propose would fundamentally alter the

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139 I note that those who sensibly advocate against the existence of section 91(24) would likely not want to see it repealed alone. This is because there would still be no means by which the colonial state would respect Indigenous jurisdiction, and it is likely the provinces would assume authority over most Indigenous matters pursuant to section 92(13) of the *Constitution Act, 1867* (*supra* note 101). More wholesale constitutional and structural change would be necessary.

140 S Ronald Stevenson, "*Daniels v. Canada*: Reflections on Constitutional Technique" (2017) 81:4 SCLR 53 at 63, citing *Daniels* SCC, *supra* note 104 at paras 34–37.

social and political nature of Crown sovereignty as it exists at present, and the living tree is arguably intended to allow for open and adaptive constitutional principles only where it does not disrupt the state's "core" structure. Yet, if the imbalance of power between Indigenous nations and the settler government, including the outright denial of Crown promises made, is such a "core" feature of the Canadian state and our constitutional arrangement,[141] this core creates constitutional contradictions as alluded to before, and as will be further outlined below. Such constitutional contradictions cannot be upheld logically by a state seeking to maintain democratic legitimacy.

The most poignant contradiction of ignoring the Royal Proclamation and *Treaty of Niagara* is its friction with the "honour of the Crown." The honour of the Crown, as a longstanding legal duty that attaches to actual Crown action not just mere incantation, is rooted in the Canadian Constitution[142] including its federal arrangements. Specifically outlined by the Supreme Court, the honour of the Crown requires that the Crown "(1) takes a broad purposive approach to the interpretation of [a] promise [made to Indigenous nations]; and (2) acts diligently to fulfill it."[143] Indeed, the honour of the Crown originates in the "special relationship that arises out of [the Canadian government's] colonial practice," both past and present, where settler laws and customs were superimposed on Indigenous societies.[144] As such, do we presume the "honour of the Crown," as a constitutional principle, mysteriously disappears with regard to section 91(24), a constitutional provision directly dealing with Indigenous autonomy? Even beyond the specific concept of the "honour of the Crown," the Supreme Court has maintained for roughly three decades of Aboriginal rights jurisprudence that when looking at Crown dealings with Indigenous peoples, "[i]t is always assumed that the Crown intends to fulfil its promises."[145] Should the courts presume the Crown did not intend to fulfill its promises made at Niagara? To return to the theme

141 I argue normatively this should not be the case.

142 *Child Welfare Reference*, *supra* note 26 at para 65; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24.

143 *Manitoba Metis*, *supra* note 128 at para 75; *Child Welfare Reference, supra* note 26 at para 65.

144 *Manitoba Metis*, *supra* note 128 at para 67.

145 *R v Badger*, 1996 CanLII 236 at para 41 (SCC); *Child Welfare Reference*, *supra* note 26 at para 66; *Haida Nation*, *supra* note 128 at para 20.

of jurispathy, it must be made clear courts commit jurispathy in their section 91(24) jurisprudence but not just in terms of Indigenous governance and laws, but also internally by negating the legal precedents, obligations, and promises of the Crown itself.

As a final note, it is important to acknowledge that the interpretation of section 91(24) that I advance is by no means meant to deny or shield provinces from their obligations regarding reconciliation, the nation-to-nations relationship, or Indigenous autonomy. It is inaccurate from a historical and contemporary standpoint to suggest that provinces are not involved in Indigenous politics, and it is not appropriate to suggest provinces have jurisdictional ambiguity regarding Indigenous rights and autonomy.[146] My arguments are meant to demonstrate that section 91(24) in particular compels the federal government to maintain the nation-to-nations relationship respecting Indigenous sovereignty. However, the honour of the Crown as a constitutional principle would still apply to provincial conduct where it impacts Indigenous communities.

CONCLUSION

Federalism is in many ways intended to embrace the diversity and multiple sovereignties of a nation-state, and functions as a realpolitik attempt to balance competing sovereign interests. As a result, not only is the denial of Indigenous legal jurisdiction under federalism law a function of settler-colonial violence, but it is even an injustice to the very concept of federalism.

In the words of John Borrows, "the most important step we can take in developing a [legal] culture ... in Canada is to develop a framework that does not subordinate [Indigenous laws and governance] to the common and civil law. When Indigenous peoples and their traditions are given equal status, this will reveal ways to achieve their greater coordination."[147] At present, Indigenous societies have been denied legal

146 Grafton, *Divided Power*, *supra* note 52 at 78–79. Note that provincial governments still retain capacity to legislate on matters affecting Indigenous peoples despite section 91(24) (see e.g. *Daniels* SCC, *supra* note 104 at para 51).

147 Borrows, *Indigenous Constitution*, *supra* note 6 at 119.

autonomy within Canadian federalism, and courts have weaponized principles of federalism to achieve this. This includes:

- Refusing to consider Indigenous governance and laws as having any practical weight, even when raised in pleadings, as a form of "jurispathy *ab initio*";
- Asserting or implying that the only possible governance is vested in either the provinces or the federal government;
- Reframing Indigenous governance as only having authority when granted by the federal government, or as having their self-governance validity emanate, even partially, under Parliament's jurisdiction under section 91(24);
- Denying, even tacitly, the validity of values and rights protections that are do not accord with a Western epistemology, constituting "epistemic violence"; and,
- Negating the weight of federal obligations that arose from Crown promises, like that of the Royal Proclamation and *Treaty at Niagara*, that help carve out a non-paternalistic understanding of section 91(24).

In providing this descriptive and analytical understanding of case law, I hope that legal advocates, the judiciary, scholars and perhaps even the broader public can begin to identify and challenge certain patterns and logics. These include noting the ways in which "federalism" is invoked without due regard for Indigenous nationhood; identifying anti-pluralistic lines of judicial reasoning that are worth contesting, including in future litigation; and, attending to jurisprudential accounts of federalism that destabilize and negate Indigenous autonomy, decolonial possibilities, and reconciliation. It is with these goals in mind that the study of federalism could allow for more than reimagining politico-legal structures and futures and turn to concrete action. One important task for future research is to construct and imagine models of legal pluralism for the better accommodation and recognition of Indigenous laws and jurisdiction, which does not assume monolithic pan-Indigeneity. Operational pluralism comes with challenges and requires meaningful consideration of just resolution over jurisdictional conflicts and other functional predicaments. Future research should also embrace interdisciplinarity, and interrogate the political and social ramifications of federalism, Indigenous self-governance, and section 91(24) interpretation. Finally, more work

should be done comparatively on federalism and Indigenous self-governance.[148] Whatever the case, from these principles and patterns I outline, my hope is that justice and respect for Indigenous autonomy may actually emerge.

148 See e.g. Zachary Jericho Couture, "The Settler/Indigenous Paradigm of Federalism: The Elimination, Containment, and Denial of Indigenous Autonomy Across Federal States" in Erika Arban, ed, *Research Handbook on Comparative Federalism* (Cheltenham: Edward Elgar) [forthcoming in 2027].