

# Reasoning with the Elephant

## The Crown, Its Counsel and Aboriginal Law in Canada

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\* Of the Ontario Bar. This is a considerably refined version of informal remarks presented at a panel discussion called “Crown, First Nations, and Justice: The Interplay Between the Crown and Aboriginal Peoples” at Osgoode Hall Law School, cosponsored by the Osgoode Constitutional Law Society and the Osgoode Indigenous Students Association on October 29, 2014. Heartfelt thanks to John Borrows, Bryce Edwards, Diane McMurray, Kent McNeil and Aaron Mills (Waabishki Ma’iingan) for perceptive comments and suggestions on a previous draft of this article, to Jonathan Rudin, conversations with whom helped shape its direction, and to an undisclosed number of unidentified lawyers currently working in government, whose friendship, comments on drafts, and observations and insights about the law and about their predicament have made this writing better, fairer and more accurate. It would, of course, be unfair and inappropriate to ascribe to any of them without their explicit agreement any of the views expressed in this article. Thanks finally to the students in LAW 370, not least for having endured with patience annual retellings of the elephant story with which this piece begins.

*Aboriginal peoples and their counsel, who spend a great deal of their time in negotiations, litigation and other dealings with the Crown, have good reason to be curious about the Crown, its emissaries and the lawyers who represent it. What are the roles of the various players involved in Crown decision-making? Why would any lawyer want to represent or advise the Crown about matters involving Canadian Aboriginal law? Why does the Crown take the positions it does in its dealings with Aboriginal peoples and their claims, and why do those positions so often seem contrary to Aboriginal peoples' claims and aspirations? The author, a recovering government lawyer, draws on his experience advising the federal and Ontario governments about Aboriginal legal issues to offer considered personal answers to such questions as these, with a view to helping Aboriginal peoples reason productively and strategically with this elephant whose presence continues to beset them.*

## I Introduction

Imagine that you wake up one morning to discover, to your considerable dismay, that you have an elephant standing on your chest. This surprises you because, to the best of your knowledge, you've done absolutely nothing to invite, attract or encourage the presence of elephants. You hadn't been calling them the night before, or ever. You hadn't left a trail of peanuts leading to your sleeping quarters or doused yourself with elephant pheromone. You had, in truth, just been going about minding your own business, giving little, if any, thought to elephants, and quite content, in the unlikely event that you happened to encounter one, to coexist peacefully with it, or perhaps to assist it in some small way if it happened to be clearly in distress. Yet here you are, fully awake and no mistake, with an elephant standing on your chest.

If such a thing were to occur, you would, I suggest, have just three options available.<sup>1</sup>

You could, to begin with, bemoan, to anyone who would listen or to no one in particular, the fact that you have an elephant standing on your chest. "You know," you could with justice exclaim, "it really sucks that I have an elephant standing on my chest." You could point out, in great detail, the unfairness of your plight, your innocence in the face of such a monumental intrusion, and the seeming arbitrariness of the fact that *your* chest, of all places, was the one the elephant chose to colonize. You could continue such lamentation for as long as you wanted, as loudly as you wanted. And you would be right. And when you were finished, likely as not the elephant would still be there, standing on your chest.

Your second option would be to get a weapon — a large gun might be good here — and see about using it to dispatch the elephant. This option has a lot of initial appeal, but it has at least three important drawbacks. To begin with, the risks of failure are really quite high. You will have, at most, the one chance to use your weapon to slay the elephant. You'd better be sure you succeed, because if there's anything worse than having an elephant standing on your chest, it's having an angry, frightened or wounded elephant standing on your chest. Secondly, success brings risks of its own. If you do succeed in bringing down the elephant, the odds are high that you are the one on top of whom the

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1 An additional option, not canvassed here, is to call for help. I haven't dealt with it at length because, assuming help arrives, the options open to anyone helping would be almost exactly the same as the ones available to you.

elephant will be brought down. And if the elephant does fall dead with its weight full upon you — well, as Bob Dylan once famously sang, “you ain’t goin’ nowhere,”<sup>2</sup> and there’s little you’ll be able to do about it. Finally, discussion of this option is, in truth, hypothetical, because you have no such weapon within reach. You would have had no reason to keep one handy when you went to bed the night before. (You weren’t, after all, expecting an elephant.) And you can’t just go and get one now because, in case you’d forgotten, you have an elephant standing on your chest.

Your third option is to find some way of reasoning with the elephant.

Indigenous readers of this fable will have little trouble identifying their own particular elephant. For reasons that make little normative sense within their understanding of things, they find the weight of the Crown and its cohort of settler invitees bearing heavily down upon them and upon their natural collectivities. It has been standing there for quite some time. You can imagine their displeasure.

The aim of the present discussion is to help explicate the preoccupations of this metaphorical (but by no means imaginary) elephant and, perhaps in particular, to illuminate some of the context within which government lawyers, acting as such, deal with Canadian law about Indigenous peoples. Like it or not, and like *them* or not, government lawyers will very often be this elephant’s spokespeople in conversations of consequence that take place with Aboriginal communities. One has a better chance of getting somewhere in such conversations if one understands better how things seem to them.

I bring to this enterprise some personal experience. I have spent the bulk of my legal career in the service of three federal (Chretien, Martin and, very briefly, Harper) and five Ontario (Peterson, Rae, McGuinty, and, more briefly, Harris and Wynne) governments. During most of that time, I dealt in detail with issues arising in Canadian law about Indigenous peoples. I have little personal experience in actual negotiations or in litigation; my own involvement was almost always advisory. (On the rare occasions when I might have represented the Crown in court, something always came up to make the litigation, or my client’s involvement in it, unnecessary.) But even this proximity has given me ample chance to observe and reflect on how, and why, governments address Aboriginal matters. And I’ve looked to some trusted lawyer friends and colleagues with experience on all sides of governments’ legal disputes with Aboriginal peoples to enrich and inform my reflections with their own.<sup>3</sup>

Like almost everyone apt to read an article such as this, I have views of my own about what the Crown *should* do in its dealings with Aboriginal parties and about what Canadian law about Aboriginal peoples is, or ought to be. For purposes of the present discussion, I consider these personal views to be neither here nor there. My primary interest here is neither to criticize nor to justify the ways in which the elephant and its licensed legal advocates conduct themselves. I offer instead a descriptive (dare one say “phenomenological”) account, true to my own experience, of the frameworks within which government lawyers work on Aboriginal issues, and the kinds of concerns that it’s their job to worry about. Accurate, sympathetic description is, in my judgment, the indispensable first stage in the enterprise of criticism. I doubt that my account of “what is” will

2 Bob Dylan, “You Ain’t Goin’ Nowhere” (©Dwarf Music, 1967, renewed 1995).

3 Even so, I propose to say as little as possible about the way the Crown and its prosecutors deal with Aboriginal peoples charged with, or convicted of, criminal offences. I have much too little experience in, and exposure to, that world to comment usefully about it.

satisfy everyone, but the conversation and such clarification as it provokes can only make more perspicuous the nature of the beast with whom, it seems, Aboriginal peoples must reckon. I trust it goes without saying that nothing here purports to express the official government policy of any past or present federal or provincial government.

## II Who Does What

But first, some observations about the elephant's anatomy.

### Some Preliminaries

It's best that we begin at the beginning. The titular head of state, and the seat of all executive authority in Canada, is the Queen,<sup>4</sup> who acts federally through a Governor General, whom she appoints,<sup>5</sup> and provincially through Lieutenant Governors, whom the Governor General appoints.<sup>6</sup> But all of these officials act almost always pursuant to the advice of councils of advisers: federally, the Queen's Privy Council for Canada;<sup>7</sup> provincially, the Executive Council.<sup>8</sup> Technicalities aside, it is the Cabinet, a subset of each of these councils comprising, with rare exceptions, only elected politicians whom the first minister has selected from the political party having the most seats in Parliament or the provincial legislature, that imparts the relevant advice to the relevant Queen's representative; technicalities aside, the Queen's representative, by well-established convention, acts, with extremely rare exceptions, only in accordance with such advice.

It is the legislative branch — Parliament, federally; the legislature, provincially — that debates and passes (or not) proposed legislation; by law and convention, it is supreme within its sphere,<sup>9</sup> free to enact whatever it wants, subject only to constitutional constraints.<sup>10</sup> In practice, however, it is the Cabinet that

4 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 9 [*Constitution Act, 1867*]. See also s 15.

5 *Ibid*, s 10.

6 *Ibid*, ss 58, 62.

7 *Ibid*, ss 11–13.

8 *Ibid*, ss 64–66. Section 63 specified the initial composition of the Executive Councils of Ontario and Quebec.

9 AV Dicey provides one classic formulation of the principle of parliamentary supremacy: the principle “that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”: *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915, reprinted with a new introduction (and different pagination) Indianapolis: Liberty Classics, 1982) at 3–4. The preamble to the *Constitution Act, 1867*, *ibid*, reflects the intention of the original Canadian provinces to be united under “a Constitution similar in Principle to that of the United Kingdom.” By means of this phrase, the Supreme Court has said, the preamble “indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged”: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 96, Lamer CJC. See generally *ibid* at paras 96–104.

10 Sections 91–95 of the *Constitution Act, 1867*, *supra* note 4, delimit the classes of subjects about which Parliament and the provincial legislatures each have authority to legislate. The *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*], denies force and effect to federal and provincial laws that infringe unjustifiably the rights set out in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (ss 2–23) [*Charter*] or the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada (s 35).

sets the legislative agenda. This is so as a matter of law because the Constitution prohibits legislative bodies from adopting certain kinds of bills — money bills, which impose taxes or authorize expenditure of public funds — except upon the recommendation of the Governor General or the Lieutenant Governor<sup>11</sup> and because no bill can become law without the formal assent of the Queen’s representative.<sup>12</sup> It is true as a matter of practice because the governing party generally has the votes in Parliament or the legislature to determine which bills will pass, or even receive further legislative consideration, and which will not. Conventions of internal party discipline compel the members of the governing legislative caucus to take ultimate direction from Cabinet about which bills to support and which to oppose.<sup>13</sup> And (technicalities, again, aside) Cabinet is most often the body authorized by legislation to decide when, and whether, to proclaim a given statute in force and to enact and publish the regulations that give detailed operational effect to broader statutory initiatives.

### Political Imperatives and Aboriginal Interests

From all this, it follows that politics play a key role in shaping the way the Crown deals with Aboriginal peoples. Broadly speaking, two imperatives shape the conduct of political parties serious about governing in Canada. The first is to develop, articulate and seek to realize a particular vision for life and governance, in Canada as a whole or in the province of choice. One reason political parties exist is to promote policies and programs that are alternative to, and thought by their partisans to be better than, those promoted by the other parties. The objective in whose name such promotion and visioning typically takes place is “the public interest.” It would be unthinkable for any political party that was serious about governing to acknowledge that it had no intention of governing in the public interest. As concepts go, however, “the public interest” has very little explanatory power.<sup>14</sup> It rules out deliberate illegality and the more obvious forms of self-dealing, but after that it means pretty much what the governing party of the moment wants it to mean, by virtue of the fact that the governing party is the one the people most recently chose to govern them.<sup>15</sup> It is a contested concept,<sup>16</sup> and the contest over its meaning, from time to time, is the general election. The right to govern is thought to include, within broad limits, the right for the time being to define “the public interest.”<sup>17</sup>

11 *Constitution Act, 1867*, *supra* note 4, ss 54, 90.

12 *Ibid*, ss 55–57, 90.

13 The reality is somewhat more nuanced than I have suggested here. Sensible Cabinet ministers pay attention to the intelligence they obtain through their caucus colleagues about such public response as there may be to proposed initiatives from voters in the members’ home constituencies and sometimes amend, delay or even shelve proposed initiatives on that account before bringing them to a vote, or sometimes even before introducing them.

14 In *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*], the Supreme Court held (at 1113) that the “public interest,” as a concept, is “so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”

15 It takes considerably more than invocation of “the public interest,” of course, to anchor a given statutory initiative within the legislative authority of the order of government that has enacted it.

16 See WB Gallie, “Essentially Contested Concepts” in Max Black, ed, *The Importance of Language* (Englewood Cliffs, NJ: Prentice-Hall, 1962) 121 [*Gallie*].

17 See e.g., *Thorne’s Hardware Ltd v The Queen*, [1983] 1 SCR 106 (“[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although ... the possibility of striking down an order in

Parties' second, and perhaps more obvious, imperative is to obtain and retain political power. Other things being equal, it is thought to be better to be in power than not to be in power. Why? Because it is much more difficult for a party to realize its policy agenda — its conception of “the public interest” — when it is out of power. And it's more fun, and more remunerative, to be the party in power. Reasonable political scientists probably differ about the relative weight of these two imperatives; my own hunch is that the balance between them differs for different parties, and perhaps even within a single political party, from time to time and from place to place, depending in part on circumstances.

From just this much elementary political science we can reach some important initial conclusions about Aboriginal peoples and Canadian governance. As a general rule, at least in southern Canada, Aboriginal peoples have not voted in sufficient numbers to affect results in constituency races, let alone overall outcomes, in federal or provincial elections. It is far from clear that they have the numbers to influence outcomes, even if they vote *en masse* and *en bloc*.<sup>18</sup> Perhaps for this reason, policy proposals addressing, for their own sake, Indigenous peoples' concerns or welcoming their perspectives tend not to have figured prominently in the political parties' published platforms. It seems safe to say, as well, that politicians of consequence generally perceive the aspirations of Aboriginal peoples not to rank high, at present, among the personal priorities of the much more numerous non-Aboriginal electors. From the standpoint of the second of our two imperatives, electability, therefore, a political party typically has little incentive, while in or out of government, to accord priority to Aboriginal communities' needs, perspectives or aspirations. Depending on the interests of those it regards as its political base, it might very well consider any such course to be counterproductive.

When elected governments concern themselves voluntarily<sup>19</sup> with the predicaments of the Aboriginal communities within their territorial jurisdiction, therefore, it is almost always because such concern fits comfortably within their chosen political agendas. Bob Rae's NDP government in Ontario (1990–1995)

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council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action” at 111), at 112 (courts not entitled to inquire into a government's motives for making decisions of general policy).

- 18 For a similar view, see Alan Cairns, “Why Is It So Difficult to Talk to Each Other?” (1997) 42 McGill LJ 63 at 85. In the summer of 2015, senior members of the Assembly of First Nations, including the Grand Chief of the Assembly of Manitoba Chiefs, sought to put this proposition to the test, urging Canada's Indigenous peoples to vote in significant numbers, and in particular ways, in the October, 2015 federal election: see, e.g., Gloria Galloway, “Chiefs Urge Aboriginal People to Vote Against Harper Government”, *The Globe & Mail* (7 July 2015), online: The Globe and Mail <<http://www.theglobeandmail.com/>>. From all indications, Indigenous peoples responded to this call, voting in significantly greater numbers than usual. Time will tell what effect this development has on federal government policy toward Indigenous peoples and whether 2015 is an anomaly or the beginning of a new era of greater Aboriginal participation in the mainstream electoral system. Personally, I would not be upset to be proved wrong about this. My hunch is that Cairns wouldn't, either.
- 19 Sometimes, of course, circumstances require the government of the day to pay more attention to the concerns of Aboriginal peoples than it expected or probably wanted to. The Oka crisis in Québec almost certainly led Brian Mulroney's Progressive Conservative federal government to appoint the Royal Commission on Aboriginal Peoples, and may well have contributed significantly to the consensus decision to include provision in the failed Charlottetown Accord for a constitutionally guaranteed Aboriginal right of self-government. The Ipperwash and Caledonia incidents in Ontario had unexpected repercussions of their own for provincial politics.

and Paul Martin's Liberal government federally (2003–2006) are clear and memorable examples. Both expended considerable political capital while in office on efforts to increase the jurisdictional space within which, and the ease with which, Aboriginal peoples could be Aboriginal. In this, they were, in my experience, exceptional. (Neither was re-elected.) The point is that, speaking generally, elected governments reach out to Aboriginal communities at the level of policy and substantial public program expenditure only when, and only because, they consider it the right thing to do, and only when (and because) they perceive the political consequences of so doing to be insignificant or at least tolerable.<sup>20</sup> More typically, in my experience, elected governments have considered it safer or more convenient, politically speaking, to include Aboriginal peoples without differentiation in the entire population on whose behalf they purport to govern “in the public interest.” So understood, Aboriginal communities take on the aspect of special interest groups.

### **Political Staff and Public Servants**

Governments have two kinds of staff: political staff, who work for particular Cabinet ministers (including, of course, the first minister), and the career public service. It is imperative not to confuse or conflate the two.

The job of a political staffer in government just is to be (responsibly) partisan: to seek to maintain and increase the governing party's relative popularity and credibility; to assist with development and promote the realization of the government's political agenda, especially in respect of matters within her minister's portfolio; and, in so doing, to support the career and facilitate the success of her particular minister. Members of political staff deal principally with their ministers, with staff for other ministers, with elected members of the governing caucus, sometimes with the opposition caucuses, and often with managers and professionals in the civil service. They give political advice to their ministers and frequently are the ones communicating their ministers', or the government's, political agendas to the public service. There is no expectation that political staff will remain employed when their minister leaves Cabinet, though sometimes they do; it would be extraordinary for political staff to remain employed as such despite a change in government after an election.

The public service — the collectivity of government bureaucrats — on the other hand, exists to give loyal, non-partisan service to the government of the day, irrespective of that government's political program or orientation. Officially, it makes no difference whether individual public servants agree or disagree with the political orientation of the current government; the firm expectation, metaphorically speaking, is that they will leave their personal views on matters of politics and public morality at the security desk on their way to the office.<sup>21</sup> The assigned tasks of the public service are to produce and

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20 This may help explain, at least in part, why governments so often seem disposed to litigate, at great length and great expense, Aboriginal claims that they might resolve rather more favourably (and less expensively) through negotiated settlement. To some mainstream constituencies (especially those that perceive their interests in land to be at some risk), an unfavourable result in court is less offensive than what they perceive as unnecessary government capitulation. Some elected governments depend more than others on the ongoing support of such constituencies.

21 From this, it follows that public servants have limited capacity, inside or outside government, to recognize or to address any instances of catastrophic moral failure to which the conduct of their superiors or their political masters might give rise. It is true that both federal and Ontario law give limited protection from reprisals to public servants who seek to call

preserve good government and to do everything possible consistent with that imperative, and with the law, to assist the government in power to achieve effectively its legislative and policy agenda. Whereas positions on a minister's political staff are, by their nature, vulnerable to political change (internal or external), work in the public service, at least traditionally and in the aggregate,<sup>22</sup> is a career. It is able to be a career precisely because of the discipline of loyalty and political neutrality.

It is the public service, then, that provides the continuity and the repository of experience on which good government depends. Elected politicians, even those appointed to Cabinet, rarely have significant prior experience carrying out the work of government in the departments or ministries assigned to them; as a result, those chosen as ministers must rely, often heavily, on the advice and the expertise of their public servants (one is tempted to say "the kindness of strangers") in preparing for public events and in deliberating about and making key decisions.

Elected governments vary somewhat in their attitudes toward the role of the public service. Some governments I have known have welcomed policy initiatives generated, in the interest of good government, from within the public service, as long as those initiatives neither conflicted with nor compromised realization of the elected government's own developed or developing policy agenda. Other elected governments have considered themselves to be the only legitimate source of policy initiatives and have set out to relegate the public service exclusively to the task of rationalizing and executing those initiatives; these governments display no particular interest in the potential contributions of their public service staff to discussion of the instrumental efficacy or risks of their proposed initiatives. Elected governments differ similarly in the value they ascribe to the advice they receive from the public service. Some regard their public servants as experts whose deeper and broader experience with the business of government can only improve their own deliberations; these are eager to engage with and learn from the work of their officials (without, of course, surrendering the option of departing from or disagreeing with that professional advice). Others appear at times — although they would never say so openly — to regard relations with the public service as a regrettable necessity, to be endured as politely as possible but managed for minimum interference. Confronted with the latter reality, public service offices, which are the predominant source of the information that governments need to govern and whose cooperation, therefore, really is essential in fulfilling the tasks of governance, have subtle ways of protracting or complicating the processes of policy and program

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their superiors' attention to "wrongdoing," (see *Public Servants Disclosure Protection Act*, SC 2005, c 46 [PSDPA], ss 2(1) "reprisal," 19–21.9; *Public Service of Ontario Act*, SO 2006, c 35, Schedule A (PSOA), ss 139–142), but the statutory definitions of "wrongdoing" (PSDPA, ss 2(1) "wrongdoing" 8; PSOA, s 108) most probably would not include, for example, the long-standing former federal practice, authorized by legislation till December, 2014 (see *Indian Act*, RSC 1985, c I-5, ss 114–122, as amended by SC 2014, c 38, ss 14–18), of requiring substantial numbers of Indian children to leave their ancestral homes to attend church-run residential schools.

22 In recent years, federal and provincial policies of internal fiscal constraint have reduced access to permanent (or, in federal parlance, "indeterminate") civil service positions. Much more often today than before, entry level civil servants in legal or other professional jobs spend lengthy periods of time as contract (or, in federal parlance, "term") employees. This arrangement, by its nature, reduces job security and can diminish the contract employee's incentive to give candid, independent professional advice to government.



development and implementation, sometimes taking extra time and special care, for instance, in their scrutiny of proposals that seem to them — party politics aside — to be counterintuitive, or sometimes simply foreign.

It is fair, I think, to say that the public service is, on the whole, a conservative force in government. It does not, as a general rule, welcome change and is preternaturally attentive to risk. There are many reasons why. Among the legitimate reasons are the sheer size of the organization and the inertia — the propensity to remain in motion if in motion, or at rest if at rest — characteristic of any entity of such size. It takes great care and attentiveness to steer a large ship safely, especially through narrow or turbulent waters, and considerable patience and effort to change its direction safely; it takes still greater care and attentiveness to redesign, rebuild or replace a vessel while afloat upon it.<sup>23</sup> Add to this the responsibility the public service bears for ensuring that government policy initiatives, once implemented, work. It is public servants, not politicians, who deal with the public regularly about the consequences of government policies and programs while implementing them. It is public servants that have to reckon with the operational challenges of policy and program implementation, often on increasingly limited budgets. It is the public service that bears the risk of being called to account (though rarely publicly) by an elected government when a favourite program or policy goes awry, proves unpopular or fails to meet expectations. And it is the public service (along, of course, with the rest of us) that will have to live with the consequences of an elected government's escapades, often long after that government has lost at the polls and gone home. Good, conscientious public servants take a long view, mindful that a measure of stability is extremely important to ongoing good government. This orientation can frustrate governments elected on promises of rapid, significant change. And, of course, vice versa.

Relationships between the elected government and the public service can take on special significance in a government's dealings with Aboriginal peoples and communities. On the one hand, elected governments moved by the plight of Aboriginal peoples can be understandably impatient at the seemingly glacial pace of ameliorative institutional change. It can be very tempting to promise publicly specific measures or results, sometimes with stipulated timelines, with a view to compelling the public service to implement the desired change more quickly. The danger is that such promises may not reflect a thorough understanding of the relevant legal, practical or operational risks and complexities. Proposals and promises that initially sound both salutary and innocuous can have surprisingly far-reaching consequences.<sup>24</sup> Resiling from them later, when

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23 The original source of this lovely image, from a completely different context, is Otto Neurath, "Protocol Sentences" in AJ Ayer, ed, *Logical Positivism* (New York: The Free Press, 1959) 199 at 201: "We are like sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials." "Protocol Sentences" is an English translation, by George Schick, of Otto Neurath, "Protokollsätze" (1932) 3:1 Erkenntnis 204. JC Chandor's 2013 movie *All Is Lost* illustrates this predicament quite literally.

24 By way of example, governments sometimes consider including non-derogation clauses in legislation. A meaningful non-derogation clause provides that nothing in the statute abrogates or derogates from, for example, any existing Aboriginal or treaty rights that Aboriginal peoples may have. The effect of such a provision is to give such rights priority, as a matter of statutory interpretation, over anything in the legislation that would compromise them or their exercise. Put differently, such provisions, when meaningful at all, operate to deprive the enacting legislature and government of the opportunity they would otherwise have under section 35 of the *Constitution Act, 1982*, *supra* note 10 (see, e.g., *Sparrow*, *supra* note 14

realization dawns about their unintended consequences, only reinforces Aboriginal communities' well-earned expectations of duplicity or betrayal: the stereotype that the Crown cannot be trusted to mean what it says. On the other hand, overlooking, refusing to take into account, or taking insufficient account of Aboriginal perspectives can have, at a minimum, comparably detrimental consequences: politically, legally, or from a policy or public safety standpoint. When elected governments display this latter propensity, the public service sometimes feels drawn to remind and encourage them, for reasons of prudence and, increasingly, legal necessity, to pay greater attention to representative Indigenous voices. But apart from any specific contrary statutory provisions, nothing requires those in the elected government to follow, or even to consider, advice from the public service. They can and sometimes pointedly do seek alternative perspective elsewhere.

This is so even in respect of legal matters. By law and convention, it is a role of the attorney general, federal or provincial, to advise the elected government on questions of law and to ensure that the enterprise of government proceeds in accordance with the law.<sup>25</sup> (By convention, the attorney general ought at least to consider resigning if the government proceeds with legislation despite her advice that it is clearly unconstitutional.)<sup>26</sup> A key role of the justice department or ministry is to call the relevant law to the attention of the attorney general, to advise on what it means, and to identify and assess such legal risks as relate to a given proposal or initiative under consideration by the elected government. But the attorney general is free to adopt or not to adopt the advice from public service legal officers and always has the option of seeking supplementary or alternative legal advice from an outside source. This sometimes happens, in respect of Aboriginal as well as other matters.

This brings us, finally, to the government lawyer.

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(Aboriginal rights); *R v Badger*, [1996] 1 SCR 771 [*Badger*] (treaty rights)) to justify any infringements of such rights that result from that legislation. There is nothing in law preventing a government from choosing to deprive itself of justification opportunities, but it is, at a minimum, prudent for a government to consider, before doing so, whether and how well it can live with having accorded such rights — many of which may still be unascertained — such absolute priority.

- 25 See e.g., *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5; *Department of Justice Act*, RSC 1985, c J-2 [*DOJ Act*], ss 4–5. Section 4.1 of the *DOJ Act*, added by RSC 1985, c 31 (1st Supp), s 93, as amended by SC 1992, c 1, s 144(F), requires the federal Minister of Justice to examine every proposed federal bill and regulation for possible inconsistency with the *Charter*, *supra* note 10) and to report any such inconsistency to the House of Commons. Litigation is currently underway about the standard appropriate for use in making that determination. For useful discussion, see e.g., Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006) 31 *Queen’s LJ* 598; Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the *Charter* Era” (2009) 34 *Queen’s LJ* 773; and Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47 *UBC L Rev* 743.
- 26 See e.g., J L I J Edwards, “The Attorney General and the *Charter of Rights*” in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 45 (“[f]or the government to reject the Attorney General’s advice would be quite exceptional and, in my view, should lead the Attorney General to question seriously his commitment to serve the Government as its chief legal adviser” at 53); Huscroft, *ibid* (“[g]ood faith disagreement between the Attorney General and the government about the interpretation and application of the *Charter* is possible, but even in these circumstances it is not tenable for the Attorney General to continue in office; there is no room for public disagreement between the Crown and its Chief Law Officer about the requirements of the constitution” at 795).

### **Counsel For, and To, the Elephant**

The government lawyer is an employee of the government's justice department or ministry. Her client, broadly speaking, is the Crown (federal or provincial), and many government lawyers work at and for their justice departments or ministries, representing or giving advice to the government as a whole; others are assigned to legal services units or branches whose function it is to represent and advise only particular ministries or departments. Even those in the latter group, however, endure some supervision, for consistency and quality control, from the central justice department or ministry, as do the several regional offices of the federal Department of Justice, which conduct much of the litigation and deal with the local advisory work.

Facing inward, government lawyers give legal advice and provide drafting services (contracts, treaties, bills, regulations and other legal instruments) to their clients; in this, they resemble the mahout, whose task it is to guide the elephant on a path free of danger and trouble. Facing outward, they support and participate in the Crown's negotiations with others (the other order of Crown government, municipalities, Aboriginal communities and/or other private parties) and represent the Crown in litigation.<sup>27</sup>

When facing outward, in litigation or in negotiations, government lawyers, like lawyers anywhere, act pursuant to instructions from their clients. But unlike some private sector counsel, whose clients give them broad latitude to secure the best results they can in the best way they can, Crown negotiators require formalized mandates, typically approved by Cabinet, even to participate with Aboriginal communities in land claim or other negotiations of any consequence. Any departures from those mandates require authorization from the same bodies that issued and approved them originally: from Cabinet for a Cabinet mandate, and so on. Obtaining a decision on a proposed negotiation mandate, or mandate revision, can take (to say the least) considerable time. Positioning in non-criminal Crown litigation with Aboriginal parties may or may not require specific approval from Cabinet — that likely depends principally on the perceived significance of the legal issues and of the practical stakes, and on the rank of the court about to hear the matter — but it will almost never be left entirely to the discretion of the counsel assigned to the file. In matters of any real import, it will almost always be necessary to obtain the approval, or at least the acquiescence, of senior officials in the justice department or ministry and of all the government departments or ministries whose interests the litigation is perceived to affect: especially if the recommendation is to depart from the usual practice of vigorous opposition to and defence against Aboriginal claims. The role of the government lawyers in this exercise is to canvass plausible options and to recommend a position or a strategy, having regard to their best understanding of the law and of the evidence available, the costs of litigation, the likelihood of success with possible lines of legal argument, and the predictable consequences of success or failure, both for the parties to that particular legal dispute and, as precedent, for government interests and policies more generally. Consistency in positioning and concern for the system-wide implications of potentially unfavourable precedent are, understandably, generally of greater importance for government counsel than they are for private counsel who represent several

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27 Some provinces — British Columbia, for one — regularly hire outside counsel to act as barristers in civil litigation involving Aboriginal parties and issues. The two governments with which I am most familiar, Canada and Ontario, do not, as a general rule.

different clients, typically with unrelated interests. The government client frequently accepts the lawyers' recommendations, especially if they have been brokered carefully in advance with counsel for the client departments or ministries. But there is no guarantee that it will do so, and when it does not, the task (and professional obligation) of the government lawyer is to act in accordance with the instructions she has received, regardless of her professional opinion or personal preference (that, or find another client), unless the instructions would require doing something that is flat-out illegal. In an area of law as nuanced as Canadian law about Aboriginal peoples, demonstrating flat-out illegality to a client audience not the least bit eager to acknowledge it is extremely difficult.

The advisory tasks that fall to government lawyers facing inward are prey to subtle but substantial constraints. The official expectation is that government law offices giving advice are to do so dispassionately, giving no thought to the wisdom or substantive merit of the policy or program initiatives remitted to them for legal scrutiny. This is, in my judgment, a reasonable expectation. Law and policy converge in several interesting ways — policy *becomes* law when it takes the form of legislation or regulations and routinely informs the exercise of reviewable statutory discretion, for instance — but the two are conceptually and functionally distinct. Speaking broadly, law tells policy (and program development) the shape and size of the playing field on which its game may take place: the limits of the possible and the boundaries of the necessary. Except in respect of justice policy, where lawyers, understandably, are often among those doing the policy work, and in situations where policy or program implementation calls for legal drafting, legal expertise is not especially relevant in making decisions about when, how and with whom the government client chooses to play the policy game.

Even so, client expectations (actual or perceived), the eagerness within some government law offices to be perceived to be meeting them, and the management styles within some of those offices can each operate to colour the legal advice that is deemed permissible.

There are two relevant kinds of requests for government legal advice. The client may request the best legal arguments available in support of positions, or the most prudent way of implementing decisions or initiatives, that the government has already decided, or very much wants, to adopt. Or it may seek its lawyers' best view of the law about some relevant legal issue, to understand better its obligations or to inform at an earlier stage its appraisal of available policy options.

Requests of the first sort are typical of governments that either do not feel much need for the expertise of the public service or perceive themselves to be in a hurry, or often both. Leaving aside the limiting case of flat-out illegality, there is nothing inappropriate about such requests. In effect, they seek the best tools for legal advocacy in support of the position, or the best means of risk reduction in respect of the decision, already adopted, in response to the risk of challenge from outside, and sometimes against potential sources of doubt from inside, the government. Properly understood, these are requests for reassurance that the government can defend itself credibly against challenges to the legality or constitutionality of its chosen approach.

Somewhat more common, and always appropriate, is the second kind of request: the request for counsel's advice about what the relevant law means or requires, or about legal risk. Such requests can take different forms: inquiries about whether a proposed course of action or policy goal is legally or constitu-

tionally permissible, why or why not, and if so, how; or inquiries about the legal risks and consequences attending policy options.

With this second kind of advice request, there is always the real possibility that the government client will hear something it doesn't want to hear. (It is unfortunate, therefore, how often government clients postpone their requests for legal advice or review until quite late in the process of policy or program development.) Some governments are more patient with process than others, but a good working assumption, especially in recent years, is that the government client already has an implementation schedule in mind when it seeks legal advice about some proposal. When this is so, the government client probably does not want to hear that it can't or legally oughtn't proceed, either at all or at least without taking account of concerns (Aboriginal rights claims, for instance, or treaty interpretation issues) it hadn't thought of, or without more elaborate prior procedure or protocol (e.g., consulting with Aboriginal communities in addition to those it already had in mind). In my experience, any advice suggesting, for reasons having to do with Aboriginal law, that a preferred course of action carries a legal risk that is higher than "low" is apt to attract consternation.

Now in a perfect world, the government client, when confronted with unwelcome advice about a question of Aboriginal law — assuming always that the unwelcome advice is the best advice; it certainly isn't always — would give it thoughtful consideration and decide with care what to do in the face of it. The government might change its approach or direction in light of the advice, especially if it receives the advice early enough in the process. It might accept the advice but decide that it's prepared to take the legal risk, and proceed. Or it might seek a second opinion — alternative legal advice from a private firm — in the hope that the author of the second opinion would see things differently and reach, and substantiate, happier legal conclusions. Subject, in the last of these cases, to any relevant fiscal constraints or internal government directives restricting resort to external resources, the government client is free to take any of these paths in any given instance. It is under no obligation to follow, or even to pay attention to, internal legal advice it requests and receives.

But government legal offices sometimes worry about the consequences of displeasing the client: of being perceived to be "uncooperative." (It is thought, with some justification, to be an insult, or at least a provisional vote of non-confidence, for example, for the government client to ask a private firm to review and second-guess legal work done internally.) For that reason, and more generally for reasons of internal government comity, it is often thought preferable not to confront the client with legal advice the client will find unpopular: advice with potential to complicate — or worse, to frustrate or prevent — realization of the government's proposed policy agenda. Such disincentives, when in place, operate to influence the destinies of requests for legal advice. (I have had one supervisor tell me of particular draft advice, not that it was inaccurate but that "I couldn't possibly tell the minister that." On another occasion, a different supervisor, commenting on different draft advice, sent it back for mandatory revisions because it reflected a legal position the government would never argue in court. And one fairly recent attorney general insisted that all draft legal advice of any consequence survive review by his political staff (!) before its release to the client department or ministry.) Draft advice whose consequences run the risk of being thought too inconvenient to the government sometimes disappears, never reaching the client, sometimes gets reassigned and redrafted, and sometimes generates pressure on the author to recast or moderate her origi-

nal conclusions in a spirit of greater cooperativeness.<sup>28</sup> Typically, in my experience, this occurs in *anticipation* of *possible* client displeasure with the advice, not in response to concerns the client expresses upon receipt and review of it, and often at the expense of timely response to the client's request.<sup>29</sup>

There is indeed a proper role for review and coordination of draft legal advice in government. Legal advice, no less in government law than elsewhere, has to be clear; it must be accurate, substantiating its conclusions and calling attention to contrary lines of argument and authority; it must be consistent with previous and contemporary advice (or provide the reasons — a change in the law is an obvious one — for the real or apparent inconsistency, and resolve it); it must be responsive to the questions the client actually has posed, not tangential to them; and it ought not to be longer than its content justifies. Mechanisms for review and approval of draft advice are, at a minimum, highly useful to the task of meeting these quality standards consistently. Colleagues peer reviewing my work regularly improved it. It is when the candor, cogency and accuracy of legal advice give way to concerns for cooperativeness (or artificial brevity) that the lawyer's advisory function risks losing its integrity ("if all you wanted was a touchdown," the philosopher Max Black once said in a different context, "why not shoot the opposing team?")<sup>30</sup> and the client incurs increased risk of unpleasant surprise.

These last reflections invite brief inquiry about the kinds of lawyers willing to represent and advise the Crown in its interactions with Aboriginal peoples.

### III Why Would Anyone Do That?

As the discussion just concluded suggests, the work life of the government lawyer doing Aboriginal law is considerably more structured — more constrained — than that of her private sector counterpart. She has relatively little (in my experience, increasingly little) autonomy to advise or represent her client as she herself thinks best; she works in an environment suspicious of bad news and of novel approaches. There is little (and decreasing) opportunity for pride in personal ownership of legal work in the governments I know best. Public legal positions (in litigation or in negotiations) and internal legal opinions emerge from closely supervised processes (laden sometimes with specific instructions to consult, or not to consult, with relevant others in government) and are often themselves negotiated products, reflecting at best the expertise, and at worst the personal taste, of supervisors. There are, as suggested above, legitimate reasons for some of this, but not every lawyer would find it congenial to practice Aboriginal law, in particular, under such circumstances. Such a practice would not, for example, be an ideal fit for someone who enjoys the spotlight, is extremely creative, has a high tolerance for risk, works best independently or has a well-developed entrepreneurial streak. For whom, then, is such practice a sufficiently

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28 Related to this, perhaps (I'm not sure), is the ever-greater pressure supervisors imposed on my colleagues and me for brevity in legal advice: a phenomenon suggesting that the reasoning in support of the advice has become less important. It is, as it happens, much easier to revise and redirect a brief, relatively undocumented opinion than one already substantiated at greater length and with greater care.

29 Occasionally, though, a government client, apprised informally of the direction a draft legal opinion appears to be taking, withdraws the opinion request in order not to have received advice that would complicate pursuit of a preferred course of action.

30 Max Black, "The Analysis of Rules" in Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Ithaca: Cornell University Press, 1962) 95 at 124.

comfortable fit? What would prompt someone — what possessed me — to seek or accept such work?

For those who encounter government counsel principally as opponents in litigation or in negotiations with Aboriginal parties, the obvious answer to this question may be that such individuals are unsympathetic to Aboriginal interests and aspirations, and that government is the place from which they can advocate their views most comfortably. As evidence, one might point to the positions they ably espouse on behalf of their clients in opposition to Aboriginal claims, in the courtroom or during negotiations.<sup>31</sup>

This may seem the obvious answer, but it is, in my judgment, the wrong one. It is, though tempting, neither prudent nor altogether fair for Aboriginal parties (or their counsel) to assume that a government lawyer making submissions in court or during negotiations is articulating her own personal views. She may be, but she may not. (She is a lawyer, doing what lawyers do in public on their clients' behalf.) The personal views of government counsel on questions of Aboriginal law, like those of the population generally, vary and differ widely, but rarely, in my experience, do they reflect undiluted opposition to Aboriginal claims. (Individuals espousing such undiluted views (or their polar opposites) probably would not stay in government very long. They would, with reason, find themselves frustrated by the temperamental conservatism, the abhorrence of avoidable controversy and the penchant for issues management characteristic of work in government.) The advice or recommendations a government counsel is giving her client internally may be quite different from the positioning she is instructed to articulate externally: a fact that confidentiality constraints preclude her from disclosing publicly. I know personally of some Aboriginal litigation cases that government counsel, left to their own devices, would have settled justly had their clients accepted their advice and given them permission to do so, and of others in which the government counsel, confronted with an Aboriginal claim that seems to them to have some merit, express private disappointment on the claimant's behalf when the claim does not receive (what they perceive to be) its strongest or most effective articulation.

A more fruitful place to start is by wondering what attracts some lawyers to government work. There are, I think, six overlapping kinds of incentives.

First, government work appeals to those who dislike the business side of law. Increasingly, as private sector models invade the public service, managers require government lawyers to docket the time they spend on each file for each government client. Even so, government lawyers, unlike their private sector counterparts, do not have to spend time billing and collecting from their clients (or attending social events to cultivate them), and their tenure does not depend on the amount of money, or the amount of business, they bring in. Regardless of the number of files they carry, the amount of time they spend on each, or their success or failure in particular proceedings, they know they will be paid. (In that respect, Her Majesty is the ideal client. She always pays and never second-guesses.) Once they acquire permanent (or, in federal parlance, "indeterminate") status, they know, as well, that they will be able to stay as long as they want. The remuneration government counsel receive rarely approaches the strato-

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31 Christie Blatchford calls instructive attention to this perception in a May 2008 column, but could usefully have pointed out that lawyers — government lawyers perhaps especially — act publicly pursuant to their clients' instructions at the time, not on personal frolics of their own. Christie Blatchford, "Reconciliation is difficult after a remark that hurts", *The Globe and Mail* (30 May 2008), online: <<http://www.theglobeandmail.com/>>.

spheric compensation available in elite private firms, but it is trustworthy remuneration and, by most standards, substantial.

The fact that profit is not, as such, an expectation or a concern in government legal practice generates two other potential inducements. One is that government practice traditionally affords a more congenial work-life balance than one often finds in private practice, especially at the outset of one's career. For those who have (and take seriously) significant family obligations, government practice, with its generous pension and benefits package, can be extremely attractive. The other is that government practice affords, traditionally at least, the luxury of a little more time to reflect upon and contextualize the issues arising from particular work. Those with an academic bent can find that permission appealing.

A fourth incentive is the perception that government legal practice affords counsel, especially those in litigation jobs, greater opportunity early in their careers to participate in, and take some responsibility for, interesting legal work. Fifth, the government, as employer, has better than average respect for racial, religious, ethnic and gender diversity and exerts less expectation than many law firms do that one "fit" socially with one's colleagues. There are ample opportunities, both formal and informal, to socialize with government colleagues, but they are not mandatory. It is in that respect a good, safe place for introverts.

Sixth and finally, the very idea that public service — identifying the public interest and defending it against more partial or partisan interests that threaten to compromise it — is a vocation worthy of personal dedication and sacrifice has residual idealistic appeal, especially to some young counsel.

Briefly then, the lawyer who, having other options, chooses a job in government is likely to be someone not drawn strongly to risk, to competition or to business: someone for whom some or all of family, order and balance, career and income security, public service and a chance to participate in interesting work for its own sake are sufficiently important to warrant sacrificing control and independence in the management of her files, a chance at exceptional financial rewards, and a degree of personal satisfaction at a job well done. But sometimes, of course, work in government simply is the best, or the only, option available at a time when a lawyer needs a job or a change. Chance often plays a surprisingly important part in a lawyer's career development.

All well and good, but why, if not out of animus, would a government lawyer choose to practice Aboriginal law? Such a question assumes, wrongly, that this is always (or usually) a choice. Not all government lawyers who do Aboriginal work enter government service in order to do such work. Many have it thrust upon them, either because a particular Aboriginal file requires someone with their expertise or because, in a time of constraint, there simply is no one else available to do it. (But for just such a circumstance, I might very well never have encountered Aboriginal law.) Some such people move on quickly, sometimes because of personal discomfort with the responses they are instructed to make to Aboriginal claims; others decide to stay (or never decide to leave) and make it their careers.

Still awaiting clarification is this latter phenomenon: why people choose to do, or continue doing, Aboriginal law for government. Personally, I doubt that there is a single satisfactory explanation. Different personal circumstances, different personal views, different file assignments, different degrees of tolerance for incumbent management styles and different alternative opportunities (or the lack thereof) at relevant times can each affect the trajectory of a given lawyer's



career. (It is often difficult, for example, for counsel known to have represented the Crown in Aboriginal matters to attract interest from private firms that represent Aboriginal clients.) Some government counsel find themselves persuaded personally, in the end, by the merits of legal arguments it is their job to develop and to articulate convincingly. But one conviction motivating at least a significant minority of those who seek and stay at government Aboriginal law positions deserves acknowledgement. Those in this group take seriously the honour of the Crown; they choose (and remain at) government work because they want to be there, on the inside, doing what they can to ensure that the Crown fulfills its constitutional obligations<sup>32</sup> to act honourably in its dealings with Aboriginal communities.<sup>33</sup> Their internal efforts, though not always successful, sometimes make some difference. (You will have to trust me on this. Requirements of solicitor-client confidentiality preclude them even from letting you know that they have tried.) If respect for Crown honour had no champions within government, the opportunities for consensual resolution of Aboriginal claims would be far fewer, and the positions governments took in response to such claims would be still more obdurate, than they are typically perceived to be.

With all this as background, we are ready to begin explicating what the elephant and its counsel think about when they think about Aboriginal peoples.

#### IV The Limits of the Possible

Imagine first a hypothetical federal or provincial government prepared to do all it can — short of constitutional amendment<sup>34</sup> — to address and accommodate Aboriginal communities' perspectives, concerns and aspirations, while continuing to govern in the public interest.<sup>35</sup> One crucial task of counsel serving such a government will be to recognize and identify the outer boundaries of permissible Crown conduct in pursuit of that highly commendable policy agenda. One obvious reason why this is so is that trust does not come easily to Aboriginal communities in their dealings with the Crown. Too often, in their considered view, the Crown has been dishonest with them, saying one thing while meaning

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32 See e.g., *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, 3 SCR 103 [*Beckman*].

33 One could write at considerable length about the challenges besetting this vocation. For one thing, the honour of the Crown is itself a contested concept. (See *Gallie*, *supra* note 16.) On the current state of the law, for instance, it is open to the Crown to contend that it acts honourably whenever it avoids doing something that the courts have already said would be dishonourable. Many government lawyers hold this view; it is, on the present state of the law, a legally defensible one. (There is still too little clarity in the judicial decisions about criteria for Crown honour to enable confident predictions about the future course of the law.) Those within government whose conception of Crown honour embraces the spirit, as well as the letter, of the doctrine, however, face challenging strategic choices. Should they assert their concerns at every opportunity that poses, in their judgment, issues of Crown honour, risking marginalization perhaps because of their predictability, or should they proceed strategically, choosing their battles carefully and letting what they consider “the small stuff” go by? Reasonable government lawyers of this general persuasion disagree about this. Those who prefer the latter approach sometimes disagree, as well, about which potential Crown honour issues warrant or require comment and which are best let go.

34 As everyone reading this already knows, all attempts since the *Constitutional Amendment Proclamation, 1983*, SI/84-102 (adding subsections (3) and (4) to s 35 of the *Constitution Act, 1982*, *supra* note 10) to amend the Constitution in ways that might materially have affected Aboriginal peoples' circumstances have failed for lack of sufficient support.

35 This thought experiment is not altogether far-fetched. Both the Bob Rae NDP government in Ontario (1990–1995) and the Paul Martin Liberal government federally (2003–2006) offered reasonable approximations of this hypothetical administration.

another, making commitments and promises and then repeatedly failing to fulfill them, or sometimes even to acknowledge that it has made them. No one benefits when the Crown undertakes policy or program initiatives, or makes offers or commitments, that exceed its capacity to deliver. The prudent, considerate course, therefore, is for the Crown to make every effort to ensure that it can defend and sustain what it says it proposes to do, before it says it proposes to do it. This requires identification of and attention to the relevant legal and constitutional constraints.

### The Rule Of Law

A principal source of generic constraint on Crown authority and Crown conduct, no less in its dealings with Aboriginal peoples than otherwise, is the rule of law: the familiar but crucial notion that no one is above the law,<sup>36</sup> that there are limits on the kinds of conduct permissible to government. Canada, according to the preamble to the 1982 Constitution, is founded on principles that recognize the rule of law. Governments may not act just as they please,<sup>37</sup> even in service of what they perceive as some higher social value.<sup>38</sup> There must be some foundation in law — in the Constitution, in statute or in common law — for everything the Crown does. Put differently, the Crown is accountable for the legality (or lack thereof) of its conduct. We legitimately expect the Crown to police itself in this respect: to acknowledge and adhere to this imperative irrespective of whether anyone outside of government has the will, the means or the occasion to seek to call it to account. Federal and (at least some) provincial attorneys general have statutory obligations to ensure that their governments govern in accordance with the law.<sup>39</sup> We would have good grounds for displeasure with a government that set about doing whatever it could get away with, curbing its zeal only when found by a court of last resort to have overreached.

But one need not rely entirely on principle or on internal Crown integrity to anchor the accountability imperative in practical reality. As government lawyers engaged with issues of Aboriginal law are by now well aware, non-Aboriginal third parties are increasingly apt to challenge the Crown in court when they perceive their own interests to be compromised or at risk because of the way in which the Crown has chosen to deal with Aboriginal interests or communities.<sup>40</sup>

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36 “In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen”: Dicey, *supra* note 9, at 114. See also e.g., *Entick v Carrington* (1765), St Tr 1029, 95 ER 807.

37 See e.g., *Roncarelli v Duplessis*, [1959] SCR 121 at 140, Rand J [*Roncarelli*].

38 *Morgentaler v The Queen*, [1976] 1 SCR 616 at 678, quoted with approval in *Perka v The Queen*, [1984] 2 SCR 232 at 248, 274.

39 See *supra* note 25 and accompanying text.

40 A partial list of such challenges includes: *R v Willocks* (1995), 22 OR (3d) 552 (SCJ) (alleging that a provincially funded criminal diversion program aimed specifically at Aboriginal offenders contravened section 15 of the *Charter*, *supra* note 10); *Campbell v British Columbia (AG)* 2000 BCSC 1123, 189 DLR (4th) 333 [*Campbell*] (challenging the constitutional validity of the Nisga’a Treaty); *R v Huovinen*, 2000 BCCA 427, 188 DLR (4th) 28 (challenging preferential access to the fishery afforded to holders of Aboriginal community fishing licenses under the federal Aboriginal Communal Fishing Licences Regulations, SOR/93-332); *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*] (claiming that Aboriginal community fishing licenses infringe section 15 of the *Charter*, *supra* note 10); *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708, 108 OR (3d) 647, leave to appeal granted 2012 ONSC 2323, 112 OR (3d) 782 (Div Ct), appeal dismissed as moot 2013 ONSC 632 (Div Ct) (challenging provincial delegation to mining company of procedural aspects of duty to consult);

No such claim, as far as I know, has yet succeeded ultimately,<sup>41</sup> but some have led to expensive out of court settlements; all have required vigorous defence, not least because of the great expense and considerable public embarrassment that would result from a successful third party challenge. And the risk of such challenges, especially from sympathetic and well-funded private interests, gives Crown lawyers additional reason to be scrupulous about ensuring that their clients' initiatives on Aboriginal peoples' behalf rest on reliable, defensible legal foundations. Crown initiatives, even those undertaken with the best of intentions to honour Aboriginal expectations and understandings, do Aboriginal communities no favours when they cannot survive judicial scrutiny.

There is, of course, a countervailing caution to all this. Nothing I have said entitles governments or their officials to invent nonexistent legal or constitutional constraints to excuse themselves from the burden of doing things they would rather not do.<sup>42</sup> Sometimes a little extra research and creative thinking can disclose and explicate a solid legal and constitutional foundation for a proposed Crown initiative that had seemed indefensible when viewed exclusively from within the orthodoxy prevailing in a government legal office. (Or, in a different case, can document trouble hitherto overlooked.) Conscientious government lawyers must exercise sound judgment when giving advice on the limits of legal or constitutional possibility, taking care not to rely prematurely or excessively on conveniently familiar lines of approach.<sup>43</sup> The point is that there are such limits and that it is imperative, both legally and prudentially, to identify them with all possible accuracy and, having done so, to respect them. What are some of those constraints?

### *Using (or Losing) Legislative Capacity*

Few, if any, constitutional limits constrain the capacity of the federal order of government to enact fresh legislation addressing Aboriginal peoples' concerns or facilitating realization of their aspirations, so long as courts can be satisfied that that legislation is really about "Indians, [or] Lands reserved for the Indi-

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*Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348 [*Moulton*], rev'd 2015 BCCA 89 [*Moulton (CA)*], leave to appeal to SCC refused (claiming damages against Crown for failure to fulfill duty to consult defendant First Nation and for failure to warn of possible blockade).

41 *Kapp*, *ibid* and *Moulton*, *ibid* succeeded at trial, but Crown appeals in both cases were successful.

42 To some, it may seem incongruous, if not irrelevant, to mention this in the context of a discussion of the legal constraints on a hypothetical government committed to doing all it can for Aboriginal peoples. But if my experience in government is the least bit representative, it is not at all unusual for the views of some civil servants, including government lawyers, not to align entirely with those of the government of the day on particular issues. How and why this happens varies from one circumstance to the next, but one need not assume bad faith to account generically for this phenomenon. As suggested in more detail above (see notes 22-25 and accompanying text), elected governments commonly feel compelled to bring about change; the public service, when left to its own devices, leans decidedly toward risk avoidance, continuity and stability. To Aboriginal communities viewing the situation from outside government, this public service propensity can seem retrograde and obstructionist when the government of the day endorses and welcomes their aims. When the government of the day seems hostile to Aboriginal perspectives, on the other hand, this propensity can seem courageous and responsible.

43 Members of the Aboriginal bar might help here by providing their government counterparts with legal and constitutional arguments in support of proposed Crown initiatives beneficial to their clients. Often in these situations the audience that most needs persuading is the audience within the relevant government.

ans.”<sup>44</sup> Provincial governments and legislatures, on the other hand, must be considerably more careful. Because federal legislative authority over matters relating to these two classes of subjects is exclusive, any provincial legislation deemed to be really about Indians (status or non-), Metis,<sup>45</sup> or their lands will be invalid: of no force and effect. In particular, any provincial law that “singles out” Indians (or, presumably, their lands) will be invalid.<sup>46</sup> We now know that not every mention of something Aboriginal in a provincial statute renders the statute, or even the provision within it that does the mentioning, unconstitutional,<sup>47</sup> but provincial government lawyers contemplating proposed Aboriginal-friendly provincial statutory provisions must always consider carefully, when asked, whether such provisions are really about something within the purview of provincial legislative authority, not about “Indians” or their lands.<sup>48</sup>

One thing neither order of government can do (without an enabling constitutional amendment) is accede to the desire of some Aboriginal communities that it surrender — “vacate” is the term sometimes used — the legislative or other authority the Constitution has remitted to it over some matter (child welfare or education, perhaps, or fisheries) to leave room for the unobstructed exercise of such communities’ own jurisdiction in respect of that matter. This would

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44 *Constitution Act, 1867*, *supra* note 4, s 91¶24. Or, needless to say, any other head of federal legislative authority mentioned in section 91. Federal legislation is, of course, ineffective to the extent that it infringes unjustifiably any Aboriginal community’s existing Aboriginal or treaty rights: *Constitution Act, 1982*, *supra* note 10, s 35(1); *Sparrow*, *supra* note 14 (Aboriginal rights); *R v Marshall*, [1999] 3 SCR 456 [*Marshall*] (treaty rights), but a federal government genuinely committed to supporting Aboriginal aspirations would be unlikely to enact legislation that had that effect. The extent to which section 15 of the *Charter* would constrain such legislation is still not completely clear. We know from case law that invidious distinctions among “Indians” in or under federal legislation can infringe section 15 (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203; *Taypotat v Taypotat*, 2013 FCA 192, 365 DLR (4th) 485, rev’d on other grounds *sub nom Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548) and that section 15 applies to distinctions between Aboriginal peoples and others in federal legislation enacted under heads of power other than section 91¶24 (*Kapp*, *supra* note 40, at para 29). What remains unclear is whether section 15 controls federal legislation aimed specifically at Indians or lands reserved for Indians when such legislation results in invidious distinctions between Aboriginal and non-Aboriginal peoples: see *Reference re An Act to Amend the Education Act*, [1987] 1 SCR 1148 at 1206, Estey J (concurring in the result). At a minimum, Canada could plausibly argue that section 15(2) of the *Charter* protected from further section 15 scrutiny federal legislation whose purpose was to ameliorate Aboriginal peoples’ disadvantage: *Kapp*, *ibid*.

45 In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, the Supreme Court declared Métis and non-status Indians to be “Indians” for purposes of section 91¶24 of the *Constitution Act, 1867*, *supra* note 4. This, the court observed, “does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*” (*ibid*, at para 51). Even so, it could yet spell trouble for the Alberta legislation (*Métis Settlements Act*, RSA 2000, c M-14 and *Métis Settlements Land Protection Act*, RSA 2000, c M-16) that provides a land base for and provides for the constitution and governance of Métis settlements in Alberta.

46 *Four B Manufacturing v United Garment Workers of America*, [1980] 1 SCR 1031 at 1048; *R v Sutherland*, [1980] 2 SCR 451 at 455; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 179 [*Delgamuukw*]; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 67, [2002] 2 SCR 146 [*Kitkatla*].

47 See e.g., *Kitkatla*, *ibid*, at paras 68–69.

48 “In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s 92 [of the *Constitution Act, 1867*] and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s 91”: *Cardinal v Alberta (AG)*, [1974] SCR 695 at 703.

be impermissible even if it were clear that the relevant Aboriginal communities had the jurisdiction they claim, and even if it did not seem manifestly imprudent for an order of government to renounce altogether a slice of its own authority when it could not possibly know what future circumstances might make resort to that authority crucial. The division of powers is what it is. Neither order of government may “create and endow with its own capacity a new legislative power not created by the Act [the *Constitution Act, 1867*] to which it owes its own existence”;<sup>49</sup> neither, the Supreme Court has held repeatedly, may it surrender voluntarily legislative authority the Constitution has assigned to it.<sup>50</sup> The Constitution, the court observed in 1981, “is not a counter for the exchange of constitutional wares.”<sup>51</sup> Canadian legislative bodies, federal and provincial, may, of course, decide to confer by statute extensive subordinate law-making or administrative authority on Aboriginal individuals or on properly constituted Aboriginal entities<sup>52</sup> and even, apparently, to give subordinate legislation, validly made pursuant to that authority, priority over conflicting laws enacted by the parent legislature, if they do so explicitly.<sup>53</sup> They may also decide to repeal any of their own previous legislation, and/or to refrain from using portions of their legislative authority, for a period of time or from time to time. But the principle of parliamentary supremacy,<sup>54</sup> though constrained in other ways by Canada’s constitutional framework,<sup>55</sup> still precludes the government of the day from committing its legislative body (whether federal or provincial) to refrain from using powers the Constitution has given it; no agreement a government entered to that effect would be enforceable.<sup>56</sup> This is but one example of the broader proposition that the Crown — the executive — lacks the power to bind the legislature. Equally unenforceable, for this same reason, would be putative Crown agreements or undertakings to enact, or even to introduce,<sup>57</sup> legislation

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49 *Reference re the Initiative and Referendum Act*, [1919] AC 935 (JCPC) at 945. See also *Reference re Agricultural Products Marketing Act*, [1978] 2 SCR 1198 at 1232 (cannot enlarge legislative authority by agreement).

50 *Nova Scotia (AG) v Canada (AG)* (Nova Scotia Interdelegation), [1951] SCR 31; *Coughlin v Ontario Highway Transport Board*, [1968] SCR 569 at 574; *Reference re the Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 72; *McEvoy v New Brunswick (AG)*, [1983] 1 SCR 704 (“Parliament can no more give away federal constitutional powers than a province can usurp them” at 720).

51 *Reference re Resolution to Amend the Constitution of Canada*, [1981] 1 SCR 753 at 804.

52 See e.g., *Hodge v The Queen* (1883), 9 App Cas 117 at 132; *Re Gray* (1918), 57 SCR 150; *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] SCR 1; *Sga’nism Sim’augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49 at para 89 [Sga’nism]. Sections 81–85.1 of the *Indian Act*, RSC 1985, c I-5 [Indian Act], as amended, which confer bylaw-making authority on the councils of Indian Act bands, are obvious examples.

53 *Re Gray*, *ibid* at 167–171, Duff J, at 180–182, Anglin J; *Friends of the Oldman River v Canada*, [1992] 1 SCR 3 at 38; *Sga’nism*, *ibid* at para 90. In *R v Jimmy* (1987), 15 BCLR (2d) 145 [Jimmy], the BC Court of Appeal held (at 150) that a valid fisheries bylaw enacted under the *Indian Act* prevailed, on the reserve to which it pertained, over conflicting federal fisheries law. In *R v Lewis*, [1996] 1 SCR 921, the court cited *Jimmy*, *ibid* with apparent approval.

54 See *supra* note 9 and accompanying text.

55 See *supra* note 10.

56 See e.g., *Ontario (AG) v Scott*, [1956] 1 SCR 137 at 154.

57 *British Columbia (AG) v Esquimalt & Nanaimo Railway*, [1950] AC 87 (JCPC) [Esquimalt] (“Their Lordships ... cannot agree that a section of an Act of Parliament is to be regarded as an offer by the executive; and there can be no question of an offer by the legislature, which no one supposes could become a party to the supposed contract. Legislation and contract are

necessary for the fulfillment of an agreement, or to protect from amendment or repeal such legislative provisions once in force.<sup>58</sup>

### *Enforcement, and Not*

Additional legal and constitutional constraints govern the Crown in respect of valid legislation once that legislation takes effect. “A Minister cannot, by agreement, deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it.”<sup>59</sup> The same is true, in all likelihood, of any other Crown official clothed with a statutory power. And we have known since 1688<sup>60</sup> that once valid legislation is in force, the Crown — the executive — may not dispense with it or with its application or enforcement and may not suspend it except in accordance with the will of the enacting legislature.<sup>61</sup> Put differently, Crown officials may neither contract out of their statutory authority (in arrangements with Aboriginal peoples or others) nor refrain, as a matter of pure preference, from applying or enforcing certain laws, altogether or exclusively in respect of Aboriginal peoples or communities.<sup>62</sup> Understood in this sense, Crown decisions not to act require a legal foundation no less than Crown decisions to act.<sup>63</sup>

Existing Aboriginal and treaty rights, constitutionally protected from unjustified federal or provincial interference,<sup>64</sup> provide some legal foundation for

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entirely different methods of creating rights and liabilities and it is essential to keep them distinct” at 110). See also *Perry v Ontario* (1997), 33 OR (3d) 705 (CA) at 724–725 [*Perry*].

58 *Esquimalt, ibid* (“The difficulties in the way of extending such a promise so as to include an undertaking by the executive which would be broken if it were thought desirable in the public interest to introduce amending legislation on some subsequent occasion appear to their Lordships to be, for constitutional reasons alone, insurmountable” at 108–109).

59 *The King v Dominion of Canada Postage Stamp Vending Co Ltd*, [1930] SCR 500 at 506, quoted with approval in *Perry, supra* note 57, at 724; *Ayr Harbour Trustees v Oswald* (1883), 8 App Cas 623 (HL) at 634.

60 *Bill of Rights, 1688* (UK), 1 Wm & Mary, 2d Sess, c 2, online: legislation.gov.uk <<http://www.legislation.gov.uk/>>, received into Ontario law (in respect of “all matters of controversy relative to property and civil rights”) pursuant to the *Property and Civil Rights Act*, RSO 1990, c P.29, s 1 and into Canadian constitutional law, arguably, by the preamble to the *Constitution Act, 1867*, quoted in relevant part at *supra* note 9.

61 Whereas the late King James the Second by the Assistance of diverse evill Councillors Judges and Ministers imployed by him did endeavour to subvert and extirpate ... the Lawes and Liberties of this Kingdome ... By Assuming and Exerciseing a Power of Dispensing with and Suspending of Lawes without Consent of Parlyament[,] ... And thereupon the said Lords Spirituall and Temporall and Commons ... Declare ... That the pretended Power of Suspending of Lawes or the Execution of Lawes by Regall Authority without Consent of Parlyament is illegall[, and] That the pretended Power of Dispensing of Lawes or the Execution of Lawes by Regall Authoritie as it hath bene assumed and exercised of late is illegall ...

*Bill of Rights, 1688, ibid*. All orthography in original. See also *R v Catagas* (1977), 81 DLR (3d) 396 (Man CA) [*Catagas*].

62 Apart from anything else, a government practice of sparing Aboriginal peoples or communities the consequences of mandatory regulatory arrangements otherwise applicable to them would invite close scrutiny under section 15(1) of the *Charter* and would not necessarily qualify for exemption as an affirmative action program under section 15(2).

63 On the latter, see e.g., *Roncarelli, supra* note 37, at 140, Rand J.

64 *Constitution Act, 1982, supra* note 10 at s 35(1); *Sparrow, supra* note 14 (federal interference with Aboriginal rights); *Marshall, supra* note 44 (federal interference with treaty rights); *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2 SCR 257 [*Tsilhqot'in*] (pro-

Crown forbearance toward the Aboriginal communities to which such rights belong. But even here Crown counsel have grounds for caution. Treaty rights, which by their nature bespeak agreement between the Crown and the signatory Aboriginal parties, are, within broad limits, appropriate subjects of voluntary Crown acknowledgement and deference. Considerable case law supports the view that the Crown and the courts are to read generously and expansively, especially in respect of harvesting practices, the several pre-Confederation and numbered post-Confederation treaties entered with signatory Aboriginal peoples.<sup>65</sup> Aboriginal rights are another matter. The Crown may no more decide unilaterally that certain Aboriginal communities have a given Aboriginal right than it may decide unilaterally that they do not. Except where they have been incorporated into treaties, Aboriginal rights have no legal force unless they have received judicial accreditation.<sup>66</sup> And for better or worse, the test the Supreme Court has established for accreditation of Aboriginal rights<sup>67</sup> entails detailed, careful ethnohistorical and anthropological inquiry into the way of life of the claimant group's ancestral community at a time quite early in, if not altogether

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vincial interference with Aboriginal rights and title); *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, 2 SCR 447 [*Grassy Narrows*] (provincial interference with treaty rights).

- 65 See e.g., *R v Taylor and Williams* (1981), 34 OR (2d) 360 (CA) [*Taylor & Williams*] (reading subsistence harvesting rights into a treaty that does not mention them); *Nowegijick v The Queen*, [1983] 1 SCR 29 (treaties to be construed, in case of doubt, in manner most favourable to Aboriginal parties); *R v Simon*, [1985] 2 SCR 387 [*Simon*] (treaty harvesting right includes right to transport weapons to hunting grounds); *R v Sundown*, [1999] 1 SCR 393 [*Sundown*] (treaty harvesting right includes right to build temporary shelter on Crown land for use in hunting); *Marshall, ibid* (treaty provision for trade with a government truckhouse entails right to harvest, within limits, for trade); *R v Meshake*, 2007 ONCA 337, 85 OR (3d) 575 [*Meshake*] and *R v Shipman*, 2007 ONCA 338, 85 OR (3d) 585 [*Shipman*] (members of a non-signatory Aboriginal community may “shelter,” with permission, under the treaty harvesting rights of a signatory community within the signatory community’s treaty area). There are some exceptions: see e.g., *R v Howard*, [1994] 2 SCR 299 (signatories to 1923 treaty bound by surrender of all pre-existing rights off reserve); *Grassy Narrows, ibid* (Ontario entitled to benefit of a treaty privilege reserved to “Dominion of Canada”). Different principles, more attentive to the written text, govern the interpretation of the more comprehensive “modern” treaties concluded since the 1970s. See e.g., *Quebec (AG) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 (“The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties. ... The importance and complexity of the actual text is one of the features that distinguishes the historic treaties made with Aboriginal people from the modern comprehensive agreement or treaty, ... We should therefore pay close attention to its terms” at para 7); *Beckman, supra* note 32, at paras 9–12.
- 66 In *Tsilhqot’in, supra* note 64, the Supreme Court appears to suggest (at para 113) that Aboriginal title does not exist *until* the courts have deemed its existence to have been demonstrated: “And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; ...” This suggestion seems inconsistent with the several previous decisions that deemed conduct to have been protected by Aboriginal (and, in some cases, by undisclosed treaty) rights even though the conduct occurred before the courts had decided that the relevant right existed. For examples in the treaty context, see *Taylor & Williams, ibid*; *Simon, ibid*; *Sundown, ibid*; *Marshall, ibid*; *Meshake, ibid* and *Shipman, ibid*. As regards Aboriginal rights, see, e.g.: *Sparrow, supra* note 14; *R v Nikal*, [1996] 1 SCR 1013 [*Nikal*]; *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]; and *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 [*Sappier*]. The better view, surely, is that Aboriginal rights are not known to exist in Canadian law *unless* confirmed judicially, but those rights the courts confirm to exist have existed all along.
- 67 Articulated first in *R v Van der Peet*, [1996] 2 SCR 507 at paras 44–75 [*Van der Peet*].

before, the European presence here.<sup>68</sup> The court has insisted, as well, that what proves true in respect of one community's assertion of one Aboriginal right tells us nothing about whether that community has any other Aboriginal rights or whether any other community has that same kind of Aboriginal right.<sup>69</sup>

Under current law, therefore, it is (at a minimum) highly problematic for the Crown simply to assume as a matter of policy, without further legal or historical inquiry, that some or all relevant Aboriginal communities have a given Aboriginal right and to apply and enforce existing law on the basis of that policy assumption.<sup>70</sup> (Especially if the kind of right assumed to exist is highly controversial or fraught with consequence: self-government, for instance, or a right to engage in commercial activity.) Excusing Aboriginal communities from the operation of otherwise applicable law on the basis of nothing more than a policy assumption that they have certain unascertained rights can be very difficult to distinguish from selective use of a putative dispensing power. In *Catagas*,<sup>71</sup> the Manitoba Court of Appeal expressed its displeasure for essentially this reason with a provincial government policy decision not to prosecute Aboriginal peoples for offences under the federal *Migratory Birds Convention Act*; it held that the policy afforded no defence to an Aboriginal person subsequently charged with and prosecuted for an offence under that legislation.<sup>72</sup>

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68 The relevant historical reference date varies. For Métis' Aboriginal rights, it is the date of effective Crown control over the relevant territory: *R v Powley*, 2003 SCC 43 at para 37, [2003] 2 SCR 207 [*Powley*]. For Aboriginal title, it is the date the Crown assumed sovereignty over the land claimed: *Delgamuukw*, *supra* note 46, at paras 144–145. For all other Aboriginal rights, it is the date of the ancestral community's first contact with Europeans: *Van der Peet*, *ibid*, at paras 60–61.

69 *Van der Peet*, *ibid* at para 69.

70 Knowledge that a given Aboriginal community has a credible basis on which to claim a certain Aboriginal right suffices, however, to clothe the Crown with an enforceable obligation to consult with that Aboriginal community before contemplating conduct that might have an appreciable adverse effect on the right that could credibly be claimed: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35, [2004] 3 SCR 511 [*Haida*]; *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 31–50, [2010] 2 SCR 650 [*Rio Tinto*]. The law about how the duty to consult operates in respect of administrative enforcement of regulatory provisions is so far quite sparse; the vast majority of the relevant case law concerns situations in which a non-Aboriginal third party seeks Crown permission or approval to do something that might adversely affect an established or putative right. On two occasions, the Federal Court of Appeal has held that the Crown's consultation duties do not extend into the prosecutorial context: *Labrador Métis Nation v Canada (AG)*, 2006 FCA 393, 277 DLR (4th) 60, and *Ochapowace Indian Band v Canada (AG)*, 2009 FCA 124 at para 37, [2009] 3 CNLR 242. Both involved decisions not to prosecute third parties engaged in conduct the Aboriginal community thought prejudicial to its rights. In *R v Kelley*, 2007 ABQB 41, [2007] 5 WWR 177 [*Kelley*], on the other hand, the Alberta Court of Queen's Bench suggested strongly (esp. at para 64) that the Crown can have a duty to consult before prosecuting an Aboriginal person for conduct that may be constitutionally protected. In several other cases, Alberta and British Columbia courts have considered on their merits in the prosecutorial context questions about the sufficiency of Crown consultation: see e.g., *R v Lefthand*, 2007 ABCA 206, 77 Alta. LR (4th) 203; *R v Douglas*, 2007 BCCA 265, 278 DLR (4th) 653; *R v Tommy*, 2008 BCSC 1095, [2008] 4 CNLR 178; *R v Aleck*, 2008 BCSC 1096, [2008] 4 CNLR 102.

71 *Supra* note 61.

72 In an important recent article ("A Tale of Two Agreements: Implementing Section 52(1) Remedies for the Violation of M[étis] Harvesting Rights" in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009) 333), Jean Teillet concludes (at 368) that "*Catagas* is no longer good law," principally because its reasoning takes no account of subsequent jurisprudence giving Aboriginal and treaty rights priority over legislative regimes that infringe them unjustifiably. (See generally *ibid* at 365–369, *Catagas supra* note 61.) I agree that the Crown may refrain from laying charges against an Aborigi-



There is, of course, no reasonable ground for objection to case-by-case review of Aboriginal peoples' alleged contraventions of existing offence provisions. Prosecution is appropriate only where the Crown has a "reasonable prospect of conviction";<sup>73</sup> the likelihood that an individual has, and was exercising, a treaty or Aboriginal right is always relevant, and sometimes decisive, in ascertaining the prospects of convicting her, if charged. But this exercise requires that the Crown at least consider and appraise the potential strength of the case available in support of such a right; it does not countenance reliance on unexamined assumptions (whether affirmative or negative). There is at least some ground for concern that prosecutorial conduct that amounted to dispensation would qualify for review for abuse of process. On the civil side, the Crown, it is true, will generally not be liable in negligence when its reason for failing to prevent harm it could have prevented was good faith reliance on competent but mistaken legal advice that it had no power to intervene.<sup>74</sup> But reliance on such a defence in the present context would require, again, that the Crown had indeed received and considered legal advice about the evidence and arguments then available in support of the relevant candidate treaty or Aboriginal rights. Proceeding without having undertaken such inquiry would be considerably more risky.

The Crown may, of course, cooperate in bringing test cases before the courts to seek clarification about the existence and scope of particular Aboriginal or treaty rights. The federal Crown,<sup>75</sup> and at least some provincial Crowns,<sup>76</sup> may even put such questions directly before the courts in references for authori-

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nal person whose conduct comes within the protected scope of an Aboriginal or treaty right that the courts have found belongs to her community. To the extent that *Catagas*, (*ibid*) may be read to suggest the contrary, I agree that it is no longer good law. But my concern in the text at present is not with Aboriginal or treaty rights that are known to exist, but with attribution of Aboriginal or (less commonly) treaty rights whose existence is in doubt, or in dispute. *Catagas* would, in my judgment, still apply in respect of, for example, a blanket exemption from prosecution based only on a preferred hypothesis that all, or particular, Aboriginal communities, have a certain Aboriginal right. And consider *Kelley*, *supra* note 70, a case about an interim agreement in which the provincial Crown promised the Métis Nation of Alberta that it would not prosecute Métis individuals for hunting offences as long as their hunting activity satisfied certain conditions contained in the agreement. The court, following *Catagas*, held that the agreement itself did not change existing Alberta law about hunting offences, but concluded nonetheless, as Teillet correctly points out (at 361–365), that it would be an abuse of process to prosecute Métis who were hunting in accordance with the conditions in the agreement.

73 See e.g., *R v Bjelland*, 2009 SCC 38, [2009] 2 SCR 651 at para 62.

74 *Fulowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 SCR 132 at para 89:

It will rarely be negligent for officials to refrain from taking discretionary actions that they have been advised by counsel, whose competence and good faith in giving the advice they have no reason to doubt, are beyond their statutory authority: ...The effect of [the contrary view] is that officials may be found to have acted negligently by refraining from taking action that they believed in good faith and on the basis of reputable, professional legal advice, to be unlawful. In other words, the law of negligence would require the inspectors to take action which they believed abused their powers. This cannot be the law.

75 *Supreme Court Act*, RSC 1985, c S-26, s 53 (Governor in Council may refer constitutional and certain other questions to SCC for determination).

76 See e.g., *Courts of Justice Act*, RSO 1990, c C.43, s 8 (Lieutenant Governor in Council may refer "any question" to Court of Appeal for hearing and consideration). There is an appeal as of right to the Supreme Court of Canada from any decision of a provincial Court of Appeal in a reference: *Supreme Court Act*, s 36, *ibid*.

tative advisory opinions.<sup>77</sup> In principle, the Crown could use such proceedings to support an Aboriginal community's claim in respect of such rights. But if it did so, it would have to be ready for the controversy that doing so could generate<sup>78</sup> and it could not count on a warm reception from the courts for its submissions. More than once, the Supreme Court, in particular, has shown distinct disapproval of governments that have conceded constitutional issues it considered contestable.<sup>79</sup>

For both legal and prudential reasons, therefore, the Crown, and government counsel, must proceed cautiously in responding to unproved claims of Aboriginal right and to potentially controversial claims of treaty right, even, perhaps especially, if it is sympathetic to them. If a government wishes to refrain from exercising its authority out of deference to such a claim, it should be satisfied, after inquiry, that the right claimed exists, that it belongs to the community claiming it and what kinds of conduct it protects. And once satisfied that all this is so, the government must be prepared to dedicate the money, time

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77 In *Ontario (AG) v Canada (AG)*, [1912] AC 571, the Privy Council confirmed that both orders of government have legislative authority to make laws authorizing such references.

78 At present, academic opinion is sharply divided on whether it is ever permissible, as a matter of law, for the Crown to concede that conduct or legislation infringes the *Charter*. Those who think not contend that it is the Crown's obligation to defend its legislation, or the conduct of its officials, from constitutional challenge. For a sampling of this literature, see Huscroft, *supra* note 25 (arguing forcefully that such concessions are virtually never appropriate and that attorneys general must always appeal unfavourable *Charter* rulings), and Roach, *supra* note 25 and Debra M. McAllister, "The Attorney General's Role as Guardian of the Public Interest in *Charter* Litigation" (2002) 21 Windsor YB Access Just 47 (both arguing that *Charter* concessions may sometimes be permissible).

79 See e.g., *Schachter v Canada*, [1992] 2 SCR 679, where Lamer CJC, who wrote for the majority, scolded federal Crown counsel (at 695) for conceding that the relevant legislation contravened section 15 of the *Charter* and for declining at trial to seek to justify any such contravention; *M v H*, [1999] 2 SCR 3 at para 45 (court not bound by Crown concession that statute infringed section 15(1) of *Charter*; considered issue on merits despite Crown concession); *Sappier*, *supra* note 66 at paras 62–64 (accused in prosecution entitled to rely on Crown concession that treaty valid, but questionable whether Crown concession appropriate, given broader implications of issue). And Ontario counsel of a certain vintage will remember Ontario's experience before the Supreme Court at the hearing of the appeal in *Miron v Trudel*, [1995] 2 SCR 418. *Miron v Trudel* was a private dispute between an insurance company and two insureds, whose outcome turned on the constitutionality of a statutory condition in Ontario's *Insurance Act* defining "spouse" to include only legally married couples. Ontario, which was not a party to the litigation, elected to intervene to concede that the statutory definition infringed section 15 of the *Charter* and could not, in its view, be justified. According to counsel who were present, Chief Justice Lamer upbraided Ontario's counsel for not defending the legislation, engaged Ian Binnie, then still in private practice, at Ontario's expense to offer the defence Ontario had chosen not to offer, and ordered Ontario to cooperate fully with Binnie, providing him with such government records as he might require to prepare his arguments. In the result, a majority of the court held, without reference to any of this history, that the statutory definition did contravene section 15 and that the breach could not be justified. See also *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 [*Sharpe*] and *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*], where majority judgments accepted (*Sharpe*, *ibid*, at para 18; *Sauvé*, *ibid*, at para 6) and minority judgments regretted (*Sharpe*, *ibid*, at para 151; *Sauvé*, *ibid*, at para 78) Crown concessions of *Charter* infringements. Both appeals concerned the justifiability of the *Charter* infringements.

To the best of my knowledge, *Sappier*, *ibid*, is the only Supreme Court decision that features (at para 54) a Crown concession of an Aboriginal rights infringement. In that instance, the court accepted the Crown's concession as conclusive. Earlier, however, the Crown had contested vigorously the claimants' assertions of the relevant Aboriginal rights.

and effort it will take to obtain the evidence and develop the legal arguments required to defend these conclusions plausibly in court.

### The “S” Word

Any mainstream government that is serious about responding receptively to Aboriginal interests and aspirations is going to have to confront, fairly early, the issue of sovereignty. Many Aboriginal peoples and communities understand themselves, on defensible grounds and with utmost sincerity, always to have been sovereign; they and some others also question the legitimacy of the Crown’s assumption that it is sovereign over them and over their traditional lands.

In Chapter 4 of Lewis Carroll’s *Through the Looking-Glass*, Tweedledum and Tweedledee introduce Alice to a slumbering Red King, discovered in mid-dream. Everything else in the tale occurs, and everyone else in the tale exists, the Tweedle brothers confirm, within and solely because of the Red King’s dream. “If that there King was to wake,” Tweedledum tells Alice, “you’d go out—bang!—just like a candle!”<sup>80</sup>

Crown sovereignty in Canada is a little like that. It is the postulate — the assumption — from which the whole edifice of mainstream legal authority in what we now call “Canada” derives.<sup>81</sup> No bill becomes law without royal assent.<sup>82</sup> The regular courts are the monarch’s courts; it is the Crown, and the Crown alone, that may appoint the judges comprising them. The whole of their authority to preside and to adjudicate derives from the validity of those appointments. The validity of those appointments depends upon the power of the Crown, as sovereign, to have made them; so, therefore, does the enforceability of those judges’ rulings. Where the Crown is not sovereign, the authority that derives from these appointments dissipates.<sup>83</sup> No one supposes, for example, that a Canadian judge has authority while in France or New York to solemnize marriages or adjudicate disputes, even those involving other Canadians. In

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80 Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* (New York: The Modern Library, [nd]) 138–272, at 189.

81 It is arguable that this formulation understates the situation: that the notion of Crown sovereignty controls the permissible content of mainstream law as well as the capacity to determine authoritatively what that law is. Under British imperial law, the pre-existing legal arrangements in colonies the Crown acquired survived the Crown’s acquisition of sovereignty “subject to and deriving legitimacy from the overarching imperial constitution” (Mark D Walters, “*Mohegan Indians v Connecticut* (1705–1773) and the Legal Status of Aboriginal Customary Laws and Governments in British North America” (1995) 33 *Osgoode Hall LJ* 785 at 791) *unless they were incompatible with the sovereignty of the Crown: Re Process into Wales* (1668–1674), Vaughan 395 at 400, 124 ER 1130 at 1132; *Ruding v Smith* (1821), 2 Hag Con 371 at 382, 161 ER 774 at 778; *Kodeeswaran v Ceylon (AG)*, [1970] AC 1111 (JCPC) at 1118. Compare *Madzimbamuto v Lardner-Burke*, [1969] 1 AC 645 (JCPC) at 720–721 [*Madzimbamuto*]. Quite possibly it is for this reason that such pre-existing laws and rights stood at risk of extinguishment after the Crown acquired sovereignty. But on the single occasion to date on which the Supreme Court of Canada considered the doctrine of sovereign incompatibility, in *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*], the majority disposed on other grounds of the claim of Aboriginal right and elected (at paras 61–64) to defer deciding about the merits of the doctrine until it was necessary to do so.

82 See *supra* note 12 and accompanying text.

83 See e.g., Noel Lyon, “A Perspective on the Application of the *Criminal Code* to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in *R v Sparrow*” [1992] *UBC L Rev* (Sp Ed) 306, at 308–309.

such a circumstance, her pronouncements carry no more institutional weight than those of her hairdresser.

As postulates go, the one about Crown sovereignty in Canada is, when viewed from sufficient distance, roughly as precarious and as vulnerable as the Red King's slumber. According to basic principles of British imperial (and international) law, there were three ways by which the British Crown could acquire sovereignty over distant territory:<sup>84</sup> by "settlement by British subjects in a place where there is no civilised government and legal system";<sup>85</sup> by cession or transfer to the Crown from the local authorities;<sup>86</sup> or by conquest of the local population.<sup>87</sup> Colonization by settlement presupposes that the territory colonized was, for legal purposes, unoccupied:<sup>88</sup> *terra nullius* ("no one's land"). But on two recent occasions, the Supreme Court of Canada has acknowledged the existence of "pre-existing Aboriginal sovereignty" in this part of North America.<sup>89</sup> Any such acknowledgement should, if true, disqualify settlement as a foundation for Crown sovereignty, at least wherever "pre-existing Aboriginal sovereignty" pertained. And indeed, the Supreme Court, still more recently, has told us that "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada."<sup>90</sup> Settlement, therefore, cannot anchor such sovereignty as the Crown has here.

Neither, it seems, can conquest, according to the court. Twice now it has held that "Canada's Aboriginal peoples were here when Europeans came, and were never conquered."<sup>91</sup> This leaves only cession.<sup>92</sup> Reasonable people can and do differ about which, if any, of the several treaties the Crown has already signed with Aboriginal communities constitute cessions of sovereignty to the Crown.<sup>93</sup> But regardless of what one says about that, there are still Aboriginal

84 See e.g., *Mabo v Queensland* (1992), 175 CLR 1 (HCA) [*Mabo*] at 32–34.

85 Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Praeger, 1966) at 99.

86 It appears to be immaterial for purposes of Imperial law whether the local ceding authorities themselves had international personality: see *ibid* at 104.

87 See generally *ibid* at 98–108. Roberts-Wray mentions a fourth way: annexation by "unilateral manifestation of the will of the Crown...; for example, in the case of remote unoccupied areas, such as those in the Antarctic, where there is no question of settlement, cession or conquest" (*ibid* at 107–108). No one would characterize North America before European contact as a "remote unoccupied area."

88 According to Roberts-Wray, *ibid* at 540, such land "may be previously entirely unoccupied" or, perhaps, "occupied by primitive people, whose form of government would not entitle them to claim international personality, with a legal system (if any) to which a more enlightened community could not be expected to conform."

89 *Haida*, *supra* note 70 at para 20; *Manitoba Métis Federation v Canada (Attorney General)*, 2013 SCC 14 at para 67, [2013] 1 SCR 623 [*Manitoba Métis Federation*], quoting with approval Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup Ct L Rev (2d) 433 at 436.

90 *Tsilhqot'in*, *supra* note 64 at para 69.

91 *Haida*, *supra* note 70 at para 25; *Manitoba Métis Federation*, *supra* note 89 at para 67.

92 See e.g., James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241, which argues forcefully that treaties between the Crown and Aboriginal communities are the only defensible source of Crown authority over such communities and that all such Crown authority is delegated authority.

93 In *Haida*, *supra* note 70, at para 20, the court spoke of the treaty-making process as one in which "sovereignty claims [were] reconciled." But see *Logan v Styres* (1959), 20 DLR (2d) 416 (Ont. HCJ), which held that the Six Nations — the Haudenosaunee — became subjects of the Crown and owed it their allegiance by reason of having occupied and used, under the Crown's protection, the lands the Crown had provided to them in the Haldimand Deed of 1784.

peoples within the Canadian landmass with whom the Crown has made no treaties at all. Pending evidence of acts of informal cession from any of those, one might have thought that this lacuna, at least, would pose a problem, unsettling the foundations of the Crown's claims of authority over those communities.

Not really, as it turns out. Courts do indeed, as just discussed,<sup>94</sup> have ample scope to enforce the constitutional limits recognized to constrain the *exercise* of Crown sovereignty in Canada. But except in one highly unusual circumstance, which turns out to prove the rule,<sup>95</sup> there is nowhere within the mainstream Canadian legal system from which one can call the *fact* — more accurately, the postulate — of Crown sovereignty effectively into question or seek acknowledgement of an alternative sovereign. In this respect, the game is, to be candid, fixed from the outset. “It is worth recalling,” the Supreme Court declares in *Sparrow*, that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [Indigenous peoples’ traditional] lands vests in the Crown.”<sup>96</sup> According to well-established Commonwealth authority, the Crown acquires sovereignty by act of state, and domestic (municipal) courts lack jurisdiction to entertain challenges to the validity of such acts.<sup>97</sup> Every time someone has sought to challenge in a Canadian court the Crown's or domestic legislation's authority, or the court's jurisdiction, over an Aboriginal person or group, the court has dismissed the challenge as non-justiciable.<sup>98</sup> And when issues arise in Canadian or Commonwealth courts about the sovereignty (or lack thereof) of foreign entities, the courts have always referred them to the federal executive and accepted as dispositive the determination made by the minister responsible.<sup>99</sup> It might well be open to the execu-

94 See *supra* notes 36-43 and accompanying text.

95 The exception occurs “where a court sitting in a particular territory has to determine the status of a new régime which has usurped power and acquired control of that territory” at the apparent expense of the Crown's authority. Where this is so, the Privy Council held in *Madzimbamuto*, *supra* note 81 (at 724), the court “must decide. And it is not possible to decide that there are two lawful governments at the same time while each is seeking to prevail over the other.” But in such a circumstance, the proper course is to continue to acknowledge the Crown as the lawful sovereign at least as long as it is “taking steps to regain control” and such efforts are not certain to fail: *ibid* at 725.

96 *Sparrow*, *supra* note 14, at 1103.

97 See e.g., *Cook v Sprigg*, [1899] AC 572 (PC); *Sobhuza II v Miller*, [1926] AC 518 (PC); *Coe v Commonwealth of Australia* (1979), 24 ALR 118 (HCA); *Mabo*, *supra* note 84, at 31–32. See also Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Native Law Centre, University of Saskatchewan, 1979) at 63 and Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 111, who cite additional authority to similar effect. For purposes of domestic law, McNeil and Slattery both remind us, it makes no difference whether the relevant Crown declaration of sovereignty is consistent with the principles of international law.

98 See e.g., *R v Williams*, [1995] 2 CNLR 229 (BCCA); *R v Chief*, [1997] 4 CNLR 212 (Sask QB); *R v Ignace* (1998), 156 DLR (4<sup>th</sup>) 713 (BCCA); *R v David*, [2000] OJ No. 561 (SCJ); *R v Jones* (2000), 265 AR 96 (QB); *R v Noltcho*, 2000 SKQB 223, 196 Sask R 221; *R v Yellowhorn*, 2006 ABQB 307, 62 Alta LR (4<sup>th</sup>) 143; *RO: RI: WI: IO v Canada (AG)*, Ontario SCJ, September 19, 2006, unreported, aff'd 2007 ONCA 100; *R v Francis* (2007), 85 OR (3d) 45 (SCJ); *R v Day Chief*, 2007 ABCA 22, 72 Alta LR (4<sup>th</sup>) 229. Compare *Walker v New South Wales* (1994), 182 CLR 45 (HCA).

99 It is established beyond doubt that a certificate given on the authority of a Minister, that a party to proceedings is an independent sovereign, will be accepted by the Courts as conclusive. ... Judgments clearly imply that the issue is not justiciable, and that if the Executive informs the Court that a Ruler is independent, that is conclusive whatever the qualifications. In other words, ‘independent’ in the rule of law means what the Executive says it means:

tive — today, the federal Minister of Foreign Affairs<sup>100</sup> — to certify as sovereign any Aboriginal people or community claiming that status, but decisions about the matter of certification, or even about whether to give the question consideration, would perforce be political (and highly controversial);<sup>101</sup> nothing in mainstream law could compel him or her to certify. Government lawyers could, if asked, reflect upon the downstream legal consequences of any such certification. Pending any such certification or inquiry, however, they operate within, and their roles presuppose perpetuation of, the Red King’s dream.

## Two Additional Challenges

At least two other unrelated considerations can give pause to counsel advising governments eager to cooperate with Aboriginal communities’ aspirations.

First, there are still important respects in which it is unclear what the law requires of the Crown. Here is an example. Everyone reading this already knows that the Crown has enforceable duties to consult Aboriginal communities about conduct that might compromise Aboriginal or treaty rights that those communities may have.<sup>102</sup> But recent jurisprudence has made it clear that the *Indian Act* band is not necessarily the proper bearer of such Aboriginal or treaty rights as may exist in a given geographic area,<sup>103</sup> even where the relevant rights or claims are not those of Métis. This conclusion makes good doctrinal sense, but it leaves room for dispute about which collectivity is the rightful bearer, or claimant, of a given right. The British Columbia Court of Appeal has held that “the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself.”<sup>104</sup> This is helpful as far as it goes, but it assumes that there is already some agreement about the composition of “the Aboriginal collective itself” whose viewpoint should be determinative. And that is often the very issue in dispute.<sup>105</sup>

Whom, then, must the Crown consult when faced with such potential for confusion? In practice, candidate entities often work this out among themselves,

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Roberts-Wray, *supra* note 85, at 589. See *Aksionarnoye Obschestvo AM Luther v James Sagor & Co*, [1921] 1 KB 456 at 464, *aff’d* on the point (but *rev’d* on other grounds) [1921] 3 KB 532 (CA); *Duff Development v Government of Kelantan*, [1924] AC 797 (HL) at 813, 820; *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, [1967] AC 853 (HL) at 901–902; *Chateau-Gai Wines Ltd v Canada (AG)*, [1970] Ex CR 366 at 384; *De la Penha v Newfoundland* (1986), 63 Nfld & PEIR 356 (Nfld CA); and *Old HW-GW Ltd v Canada (Minister of National Revenue)* (1993), 153 NR 136 (FCA) at 143–144. But see *supra* note 95.

100 See *State Immunity Act*, RSC 1985, c S-18, s 14, as am. by SC 1995, c 5, ss 25, 27.

101 “[S]overeignty is a political fact for which no purely legal authority can be constituted ...”: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 142, quoting HWR Wade, “The Basis of Legal Sovereignty” [1955] Cambridge LJ 172 at 196.

102 See e.g., *Haida* *supra* note 70; *Rio Tinto*, *supra* note 70.

103 See e.g., *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 77; *Kelly v Canada (AG)*, 2013 ONSC 1220 at paras. 56–59, *rev’d* in part but *aff’d* on this issue 2014 ONCA 92; *Ogichidaakwe v Ontario (Energy)*, 2014 ONSC 5492 at para 13.

104 *William v British Columbia*, 2012 BCCA 285 at para 149, *rev’d* on other grounds 2014 SCC 44, [2014] 2 SCR 257. There was no appeal from the Court of Appeal’s conclusion at para 149.

105 Further complicating fulfillment of the Crown’s constitutional consultation obligations is the Supreme Court’s ongoing propensity to reserve to itself the power to determine, after all the evidence and argument are in, what Aboriginal right is being claimed in particular litigation. The Crown does not have the luxury of deferring to the conclusion of litigation its obligation to consult with communities claiming Aboriginal rights. For discussion of this predicament, see Kerry Wilkins, “Whose Claim Is It, Anyway? *Lax Kw’alaams Indian Band v Canada (AG)*” (2012), 11 Indigenous LJ 73 at 82–83.

consensually, referring the Crown to the entity they consider most appropriate or delegating to that other entity the power in that instance to conduct consultations with the Crown on their behalf. And in principle, at least, the Crown always has the option of consulting with all the various candidate entities. But even that inclusive approach has its risks. It is not uncommon for a community's elected *Indian Act* council and the governing body comprised in accordance with traditional principles each to contend to the Crown that it is the only proper representative of the community and to oppose Crown consultation with the other one. The legal issues arising from such situations are difficult and do not admit of easy resolution. It is fair, of course, to say that this is a problem the Crown brought on itself by means of unilateral decisions made long ago. But acknowledging that does not reduce the difficulty of dealing fairly with such issues today.

The second consideration is that some Aboriginal groups and individuals feel the need for at least some ongoing resort to the standards of mainstream law, for at least the foreseeable future, within Aboriginal communities.<sup>106</sup> Many Aboriginal thinkers and representatives disagree strongly with this point of view,<sup>107</sup> and the Crown, again, very probably has only itself to thank for the circumstances that have led to it. But here as before, this latter fact does nothing to ameliorate the difficulty of the predicament; such sentiments complicate Crown attempts to get out of the way of Aboriginal autonomy. The Crown must be alert to, and prepared to defend any such agenda against, potential challenges from Aboriginal as well as non-Aboriginal groups. The Native Women's Association of Canada went to the Supreme Court seeking representation in the discussions that led to the Charlottetown Accord,<sup>108</sup> principally with a view to ensuring that the *Charter*,<sup>109</sup> shorn of its "notwithstanding" clause,<sup>110</sup> apply to any constitutionally recognized rights of Aboriginal self-government. And the federal, B.C. and Nisga'a governments had to defend the Nisga'a Treaty against

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106 Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) 75–96 articulates this concern persuasively. See also, among others, Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 *Const Forum* 110.

107 For a comparably persuasive articulation of this contrary view, see Patricia Monture-OKanee, "Thinking about Aboriginal Justice: Myths and Revolution" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) 222–232, esp at 227:

our social systems did not historically have to deal with the grave social ills that we presently face in our communities. For example, many historical records indicate that the abuse of women in many Aboriginal societies was almost nonexistent at the time of contact. We cannot look to the past to find the mechanisms to address concerns such as abuse, because many of the mechanisms did not exist. The mechanisms did not exist because they were not needed. What we can reclaim is the values that created a system where the abuses did not occur... . We must be patient with each other as we learn to live in a decolonized way again. This means that we, as Aboriginal individuals, must stop accepting the myth of white superiority and begin advocating truly Aboriginal responses

(endnotes omitted).

108 *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627.

109 *Charter*, *supra* note 10.

110 *Ibid*, s 33.

separate constitutional challenges brought several years apart by non-Aboriginal interests<sup>111</sup> and by dissident Nisga'a members.<sup>112</sup>

There are, in brief, some good reasons for government lawyers to proceed with care, even, perhaps especially, when their client governments are sincerely committed to cooperating in the realization of meaningful Aboriginal autonomy.<sup>113</sup> The stakes are extremely high; the risks, for government and Aboriginal parties both, considerable. Such risks need not preclude contemplation or pursuit of such an agenda. Their existence strongly suggests, however, the magnitude of the undertaking and the need for exceptional care and commitment in response to the legal and constitutional challenges that beset its execution.

## V But in the Real World, ...

The discussion just concluded assumed a government of the day that assigned high priority to supporting Aboriginal communities' claims of autonomy and aspirations to self-sufficiency. A few governments, federal and provincial, have approximated this profile;<sup>114</sup> I worked for two of them. But the elected governments choosing that orientation have been, and continue to be, exceptions; those that have done so have not been re-elected and have faced, for better and for worse, bureaucracies that were generally a good deal more reticent than themselves. Accuracy, therefore, requires reflection on the Crown's more typical stance toward Aboriginal peoples and issues. If the task is to reason when necessary with this particular elephant, it seems unwise just to assume that it will always be in the best of moods.

If I had to choose a single word to capture the attitude I have found most characteristic of the Crown toward Aboriginal peoples, that word would be "impatient." By no means is this a term that those who speak for the Crown would use to describe it, or themselves; given the palpable power imbalance in the Crown's relationship with Aboriginal peoples, it would seem impolitic, discourteous, for Cabinet ministers or professional public servants to admit publicly to impatience (what, after all, does our elephant have to be impatient about?), except perhaps in response to some prolonged event of civil disobedience they considered disproportionate. But for one observing the Crown from a distance, as an anthropologist might view an unfamiliar tribe, "impatient" seems an apt generic label.

In my understanding, the Crown's impatience has two principal sources.

### The Fragility of Innocence

In his early treatise *Being and Nothingness*,<sup>115</sup> Jean-Paul Sartre considers at some length

a woman who has consented to go out with a particular man for

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111 *Campbell*, *supra* note 40.

112 *Sga'nism*, *supra* note 52.

113 An additional reason for caution, as my friend Diane McMurray points out, is the unpredictability of the Supreme Court of Canada jurisprudence on Aboriginal peoples and the Constitution of Canada. For one attempt, some years ago, to discern a pattern in that jurisprudence see Kerry Wilkins, "Judicial Aesthetics and Aboriginal Claims" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich, 2004) [*Advancing Aboriginal Claims*] 288–312, esp at 290–304.

114 See e.g., *supra* notes 19 and 35 and accompanying text.

115 Jean-Paul Sartre, *Being and Nothingness: An Essay in Phenomenological Ontology* (tr. Hazel E. Barnes) (New York: Washington Square Press, 1966).



the first time. She knows very well the intentions which the man who is speaking to her cherishes regarding her. She knows also that it will be necessary sooner or later for her to make a decision. But she does not want to realize the urgency; she concerns herself only with what is respectful and discreet in the attitude of her companion. ... This is because she does not quite know what she wants. ... But then suppose he takes her hand. This act of her companion risks changing the situation by calling for an immediate decision. To leave the hand there is to consent in herself to flirt, to engage herself. To withdraw it is to break the troubled and unstable harmony which gives the hour its charm. The aim is to postpone the moment of decision as long as possible. We know what happens next; the young woman leaves her hand there, but she *does not notice* that she is leaving it. She does not notice because it happens by chance that she is at this moment all intellect. She draws her companion up to the most lofty regions of sentimental speculation; she speaks of Life, of her life, she shows herself in her essential aspect—a personality, a consciousness. And during this time the divorce of the body from the soul is accomplished; the hand rests inert between the warm hands of her companion—neither consenting nor resisting—a thing.<sup>116</sup>

In describing the “various procedures [she uses] in order to maintain herself in this” condition, Sartre calls attention to “a certain art of forming contradictory concepts which unite in themselves both an idea and the negation of that idea.” “[W]hile sensing profoundly the presence of her own body—to the degree of being disturbed perhaps—she realizes herself as *not being* her own body, and she contemplates it as though from above as a passive object to which events can *happen* but which can neither provoke them nor avoid them because all its possibilities are outside of it.”<sup>117</sup>

This discussion captures, about as well as anything I have read, something crucial about the Crown’s manner with Aboriginal peoples. On the table, as it were, between it and today’s Indigenous communities is a legacy, now several centuries old, of settler prosperity achieved and maintained at the expense and to the detriment of the societies that have dwelt here since before Europeans arrived. It is from that legacy, practically speaking, that the Crown derives the authority it assumes, and the rest of us the prosperity that we take for granted, today. But judged by today’s standards of propriety and fair dealing, the means by which the Crown acquired its hegemony over the pre-existing Aboriginal societies and over the lands and resources on which those societies depended seem distasteful and frankly embarrassing when not unconscionable; few would countenance, publicly at least, comparable conduct toward Aboriginal communities if it took place today.<sup>118</sup> The disadvantage and disorientation that still

116 *Ibid* at 96–97. Emphasis in original.

117 *Ibid* at 97–98. All emphasis in original.

118 There is some dispute in current law and legal history about whether, and if so when, it is appropriate to apply present-day standards, as opposed to the “standards of the day,” in appraising for the purpose of assigning liability the conduct of officials in generations past. Those legal historians who disdain application of today’s standards to earlier patterns of conduct call the practice “presentism.” For sharply contrasting recent views on this very issue in the present context, see PG McHugh, “Time Whereof – Memory, History and Law in

besets such societies in the wake of the ongoing settler influx is right there on display, in plain view: a constant reminder to the attentive of the legacy of their orchestrated disenfranchisement. Their very survival — the fact that they have had the temerity not to disappear — represents an ongoing risk of moral rebuke.

This circumstance is, to say the least, awkward. Having to acknowledge it, and then to act authentically (whatever that could mean) in recognition of it, would perforce be deeply destabilizing, especially for an entity already so convinced of its entitlement, its blamelessness and its honour. Any such acknowledgement would open to doubt the Crown's legitimacy. So the Crown, rather like the woman in Sartre's example concerned to "postpone the moment of decision," busies itself assiduously with other matters that (usually really do) need attending to: matters whose effect is to distract it from the hands clasped before it on the table.<sup>119</sup> ("Activity," the captain says to the baroness in the film version of *The Sound of Music*, "suggests a life filled with purpose.") This feat of inattention is considerably more challenging for the Crown at its table than for the woman at hers, in part because the woman's situation is only temporary but principally because, in our scenario, the Crown's is, indisputably, the hand that has done all the grasping. Our elephant, which finds it has done extremely well while standing on your chest, much prefers not to think about how it got there.<sup>120</sup>

I do not suggest that such self-distraction is necessarily advertent. It is not as though there are Crown employees or government offices charged, in emulation of Professor Lockhart in the second Harry Potter book, with erasing these unpleasant thoughts from the Crown's collective memory. (If there are, I have

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the Jurisprudence of Aboriginal Rights" (2014), 77 Sask L Rev 137 and Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" (2014), 77 Sask L Rev 173.

It is neither necessary nor prudent here to get deeply into this issue. My purpose in the main text is not to consider whether the Crown should be liable to Aboriginal peoples today for the conduct of its representatives in earlier times, but only to suggest that much such conduct, if it took place today, would be occasion for shame. Still, one cannot help observing that the Supreme Court of Canada has repeatedly felt free to judge the Crown's past conduct using standards that the Crown, at the time of that conduct, could not possibly have known would be applicable. See e.g., *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*] (new theory of Crown fiduciary duty applied to Crown conduct in 1958); *Nikal*, *supra* note 66 (breach of Aboriginal right deemed unjustified though the Crown at time of trial could not have known justification would be required); *Haida*, *supra* note 70 (provincial Crown liable for consultation obligations it did not know existed); *Manitoba Métis Federation*, *supra* note 89 (new theory of Crown obligations applied to federal Crown conduct in the 1870s and 1880s).

119 The federal government's Statement of Apology about residential schooling is a conspicuous but singular exception: Canada, Statement of Apology to former students of Indian Residential Schools (11 June 2008), online: Indigenous and Northern Affairs Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>>.

120 By way of example, one could hardly improve on Prime Minister Stephen Harper's observation, at a press conference at the close of the G20 summit in Pittsburgh in 2009, that "[w]e also have no history of colonialism. So we have all the things that many people admire about the great powers but none of the things that threaten or bother them": David Ljunggren, "Every G20 nation wants to be Canada, insists PM", Reuters (25 September 2009) online: Reuters <<http://www.reuters.com/article/2009/09/26/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926>>. For the full text of the Prime Minister's remarks, and the PMO's subsequent explanation of this one, see Aaron Wherry, "What he was talking about when he talked about colonialism", *Maclean's* (1 October 2009), online: Maclean's <<http://www.macleans.ca/>>.

not met them.)<sup>121</sup> And government counsel are more than capable, when compelled to do so in Aboriginal litigation about particular historical events or in scrutiny of Aboriginal claims presented for negotiation, of attending closely to such events with a view (as is their job) to portraying the Crown's involvement as defensibly as possible. It is, however, remarkable how infrequently government thinking (mine, while I was there, included) about Aboriginal matters turns spontaneously toward contemplation of what the Crown has already done and what resulted from it, and no less remarkable how infrequently anyone inside government notices that this is so. This is the pattern to which I wish to call attention. The fact that the woman in Sartre's fable *does not notice* (emphasis Sartre's) what has occurred is precisely what gives his story, and the phenomenon it exemplifies, such power.

This protective inattention helps explain the Crown's all-but-invariant focus, in its voluntary dealings with Aboriginal communities, on the present and the future, and its palpable impatience with those communities that insist on beginning by (doing what the Crown would consider) "complaining":<sup>122</sup> by contextualizing such dealings with a recital of the history of their relationship with the Crown, including, as appropriate, their dissatisfaction with settlers' and officials' previous conduct. In fairness, it is often unclear what would count today to undo even the worst of that shared past; the future is all that remains available for us to shape. From this it hardly follows, however, that the only, or even the most appropriate, way of proceeding into the future is by pretending that there has been no past (an eternal sunshine of the spotless mind) or that such past as there has been does not matter, offers no lessons.<sup>123</sup> For Aboriginal peoples, at least in my experience, the history of their dealings with the Crown is precisely what defines their current relationship with it:<sup>124</sup> that which prescribes

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121 I can, however, attest to times when the Crown client has decided it would rather not know the answers to certain legal questions it has asked about Aboriginal issues.

122 This is by no means just a recent phenomenon in Crown-Aboriginal relations. It was, for example, the frame that structured the Crown's negotiations with the Saulteaux Ojibway in the last round of negotiations that led to Treaty 3, in 1873. See Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke, 1880; Saskatoon: Fifth House Publishers, 1991) at 55–58.

123 It is only fair to acknowledge here that the law, at present, favours the Crown on this issue. Although courts sometimes consider the cumulative effects of past Crown conduct in ascertaining the scope of the Crown's duty to consult an Aboriginal community about some proposed course of future Crown conduct (see e.g., *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 BCLR (5th) 234, 333 DLR (4th) 31), the Supreme Court has made it very clear that a record of past Crown conduct, even when dishonourable, toward an Aboriginal community does not suffice on its own to give rise to Crown consultation duties today; such duties arise exclusively when a risk of fresh future harm arises from proposed Crown conduct: *Rio Tinto*, *supra* note 70, at paras 48–50. When First Nations do have a right to consultation with the Crown, they risk squandering that opportunity if courts perceive them to have dwelt on previous harms they have suffered at the Crown's hands, instead of focusing on the *proposed* Crown conduct: see e.g., *Stellat'en First Nation v British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 49 BCLR (5th) 302, 368 DLR (4th) 44.

124 Also relevant here, perhaps, is the difference between the linear, unidirectional conception of time most common in European and mainstream North American thinking and the more cyclical understanding of time ascribed to many Aboriginal communities. For one account of the latter, see Leroy Little Bear, "Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making" in *Advancing Aboriginal Claims*, *supra* note 113 at 26–38, esp at 28–29.

what is possible within, and what is necessary to them from, that relationship.<sup>125</sup> And the oral reiteration of the story of that relationship is, for them, a crucial means not only of continuing to work on the relationship, but of preserving and refreshing the oral history that constitutes those communities' institutional memory.<sup>126</sup> The Crown, by contrast, typically insists on specifying unilaterally the boundaries permissible in any given conversation with an Aboriginal community. Overlooking its chances all along to say that enough was finally enough, it proceeds, as much as it can, from the premise that the past just, you know, happened: that its present relationship with Aboriginal communities is the result of natural causes, not amenable to normative appraisal, and that it would be inefficient and unproductive to spend time rehearsing them.<sup>127</sup> Crown representatives can get testy when this approach meets resistance.

### Exasperation with the Inconvenience

The ongoing effort it takes the Crown not to notice its own colonial past is, I have argued, one of the two discernible sources of its generalized impatience

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125 In the history of Indian-White relations, it is clear that politicians, reformers, the clergy, the military, in fact the whole lot, knew the potential for destruction that their policies and actions could have on Native communities. They were betting that something good would come out of the devastation. And they were able to make these decisions with easy confidence, because they weren't betting with *their* money. They weren't betting with *their* communities. They weren't betting with *their* children.

...

If nothing else, an examination of the past—and of the present, for that matter—can be instructive. It shows us that there is little shelter and little gain for Native peoples in doing nothing. So long as we possess one element of sovereignty, so long as we possess one parcel of land, North America will come for us, and the question we have to face is how badly we wish to continue to pursue the concepts of sovereignty and self-determination. How important is it for us to maintain protected communal homelands? Are our traditions and languages worth the cost of carrying on the fight?

Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Toronto: Doubleday Canada, 2012) at 264–265. All emphasis in original.

126 But even when we remember that the treaties embodied storylines, we often forget something else. We should in fact remember this easily, for in the Aboriginal versions, the Aboriginal texts of the treaties, *the stories needed to be told*. And retold. Retelling, of course, is a central constituent of all stories. Stories take on their character – their meaning – in the *retelling* as much as in the *telling*; and this reflects the way in which it is not the presentation of events but the presentation of words that is important, providing the surest check against the anarchy of falsifying or forgetting.

There are a couple of ways in which this works. First of all, such retellings are not primarily instrumental. The stories, including the stories that are the treaties, are retold for their own sake, not for the sake of proving this or that to someone else. ... Furthermore, they take their authority not so much from the experience of Aboriginal peoples as from the expression of Aboriginal *voices*. The distinction between direct speech and narration, like that between showing and telling, is crucial here; for the heart of the treaties is in the *telling*, not the *showing*:

J Edward Chamberlin, "Culture and Anarchy in Indian Country" in Asch, *supra* note 106, 3–37 at 18. All emphasis in original.

127 By way of example, the Crown, in my experience, is much more willing to consider entering into cooperative prospective discretionary arrangements with Aboriginal communities about particular issues than to deal with those same issues "on a rights basis." The latter approach would, among other things, necessitate reflection on the shared past.

with Aboriginal peoples. The other source of that impatience is, if anything, still more important.

In brief, it is this: from where the Crown sits, Aboriginal peoples are inconvenient.<sup>128</sup> Again, this is not a sentiment that any professional public servant or prudent Cabinet minister would utter publicly today. And I do not suggest that this proposition reflects official considered government policy: not, at least, since the now legendary federal White Paper of 1969<sup>129</sup> or the Ontario government's bellicose response to the occupation of Ipperwash Provincial Park in September, 1995.<sup>130</sup> Instead, in my perception, it operates pretty much as assumptions usually do: as an untested proposition taken so thoroughly for granted that it generally goes unnoticed, is left unsaid because it goes without saying.<sup>131</sup> This phenomenon also has two aspects.

### *The Fuss*

To begin with, there is the fuss involved in having to deal with Aboriginal peoples. Truth to tell, Aboriginal peoples have always been something of a conundrum for mainstream governments. They are, after all, the ones on whose chest the elephant came to stand. This circumstance has left them with rather less incentive, and somewhat less capacity, to join the rest of us in life on the elephant's back. Left to their own devices, they would almost certainly have been just as happy to continue their previous elephant-free existence. They spoke different languages, for goodness' sake, and had what seemed from the outside to be most unusual customs. And they were already here, in some numbers, and showed no signs of going anywhere: not voluntarily, at least. What was a Crown to do?

Time was, though, when Parliament, at least, could do pretty much whatever it wanted, or thought it needed, to do about Aboriginal peoples: define the ones with whom it was prepared to concern itself;<sup>132</sup> make it an offence for them

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128 This thought first occurred to me a couple of years before Thomas King published his non-fiction masterwork *The Inconvenient Indian*, *supra* note 125. When King's book appeared, I was by turns dismayed at having been "scooped" and deeply moved by the quality of his prose and the depth and breadth of his thinking. King, who is Cherokee, describes and documents, much better than I could, what it has meant to Aboriginal peoples to be, for several centuries, considered inconvenient by the settler cultures that have come to dominate the United States and Canada. (It was not as though they were slaves, he observes (at 82). "We were more like ... furniture.") I have nothing to add to his account. My own experience has been with the Crown. What I can contribute is some description of this same phenomenon from that quite different perspective.

129 Statement of the Government of Canada on Indian Policy (The White Paper, 1969) (Ottawa: Queen's Printer, 1969), online: Indigenous and Northern Affairs <<http://www.aadnc-aandc.gc.ca/>>.

130 See *Report of the Ipperwash Inquiry*, the Hon Sidney B Linden, Commissioner (2007), online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/>>.

131 A reader of a previous draft of this article challenged me to explain why I saw this as an assumption, not as "an underlying belief that simply is not publicly acknowledged." The difference I see between the two notions is this. It is possible to make an assumption, to presuppose something, without realizing that one is doing so. I don't think it is possible to believe something without realizing that one believes it. The notion of inconvenience seems to me to account for much of what those in government do and think when confronted with Aboriginal issues, but seldom, in my experience, does it figure explicitly or thematically even in the discourse internal to government about those issues. But reasonable people can disagree about this.

132 See most recently *Indian Act*, *supra* note 52, ss 4–4.1, 5–7, as amended by RSC 1985, c 32 (1st Supp), ss 2–4, RSC 1985, c 48 (4<sup>th</sup> Supp), s 1 and SC 2010, c 18, ss 2(2)–(4).

to engage in potlatch, sun dance or any similar Indigenous ceremony,<sup>133</sup> or eventually in any dance off reserve or “show, exhibition, performance, stampede or pageant” in a province west of Ontario without prior federal consent;<sup>134</sup> prohibit them from wasting time in a poolroom;<sup>135</sup> prohibit anyone, without prior federal approval, from accepting or raising money for the prosecution of an Indian claim;<sup>136</sup> enfranchise an Indian or a band involuntarily, without waiting for an application for enfranchisement;<sup>137</sup> or prohibit them from having intoxicants in their possession, on<sup>138</sup> or off<sup>139</sup> reserve. Until December 16, 2014, federal legislation required any Indian child of a certain age living on reserve or on public land<sup>140</sup> to attend such school as the federal Minister of Aboriginal Affairs might choose to designate.<sup>141</sup> There was, of course, some fuss involved in having to enact and administer such measures;<sup>142</sup> even so, it was easier back then.

It is not quite so easy now. Having all agreed (except Quebec)<sup>143</sup> in 1982 to give constitutional protection to “the existing aboriginal and treaty rights of the aboriginal peoples of Canada,”<sup>144</sup> the federal and provincial orders of government find their options constrained somewhat. Having ascertained that this new constitutional provision actually means something, that treaty and Aboriginal rights now prevail over federal or provincial measures that infringe them without justification,<sup>145</sup> the Crown has felt compelled, in the public interest, to con-

133 *An Act to further amend “The Indian Act, 1880”*, SC 1884, c 27, s 3; RSC 1886, c 43, s 114 as amended by SC 1895, c 35, s 6; RSC 1906, c 81, s 149, as amended by SC 1918, c 26, s 7; RSC 1927, c 98, s 140(1), repealed SC 1951, c 29, s 123(2).

134 SC 1914, c 35, s 8, RSC 1927, c 98, s 140(3), as amended by SC 1932–33, c 42, s 10, repealed SC 1951, c 29, s 123(2).

135 SC 1930, c 25, s 16, repealed SC 1951, c 29, s 123(2).

136 SC 1927, c 32, s 6; RSC 1927, c 98, s 141, repealed SC 1951, c 29, s 123(2).

137 SC 1932–33, c 42, s 7; SC 1951, c 29, s 112; RSC 1952, c 149, s 112, repealed SC 1960–61, c 9, s 1.

138 SC 1951, c 29, s 96; RSC 1952, c 149, s 96; RSC 1970, c I–6, s 97; RSC 1985, c I–5, s 97, repealed, RSC 1985, c 32 (1st Supp), s 17.

139 SC 1951, c 29, s 94; RSC 1952, c 149, s 94; RSC 1970, c I–6, s 95; RSC 1985, c I–5, s 95, repealed RSC 1985, c 32 (1st Supp), s 17.

140 SC 1956, c 40, s 1; RSC 1970, c I–6, s 4(3); RSC 1985, c I–5, s 4(3).

141 SC 1920, c 50, s 1; RSC 1927, c 98, ss 9–10, as amended by SC 1930, c 25, s 3 and SC 1932–33, c 42, s 1; SC 1951, c 29, ss 113–118; RSC 1952, c 149, ss 113–118, as amended by SC 1956, c 40, ss 28–29 and SC 1956, c 40, s 30; RSC 1970, c I–6, ss 114–119; RSC 1985, c I–5, ss 114–119, as amended by SC 2014, c 38, ss 14–17. Throughout this period, however, the minister has lacked statutory authority to order that a Protestant Indian child attend a Roman Catholic school or a Roman Catholic child a Protestant school. The 2014 amendments repealed the *Indian Act* provisions that had authorized residential schools and had entitled the federal minister to direct particular Indian children to attend particular schools.

142 Anyone reading the minutes of the House of Commons committee considering the 1920 amendments to the *Indian Act* (Can Parl, HC, Special Committee to Consider an Act to Amend the Indian Act (Bill No 14), 13<sup>th</sup> Parl., 4<sup>th</sup> Session, 1920, NAC RG-14, Series D-1, vol 666), for example, the amendments that, among other things, made it a legal requirement for an Indian child to attend the school to which the Superintendent General directed him or her, can sense the frustration committee members felt at having to endure that process, especially while entertaining submissions from counsel for the Nisga’a and the Six Nations claiming land and sovereignty, respectively.

143 See e.g., *Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793.

144 *Constitution Act, 1982*, *supra* note 10 at s 35(1).

145 *Sparrow*, *supra* note 14 (Aboriginal rights); *Marshall*, *supra* note 44 (treaty rights); *Delgamuukw*, *supra* note 46 (Aboriginal title); *Powley*, *supra* note 68 (Métis Aboriginal rights);

test with some vigour most claims affecting it that assert, or are based on, Aboriginal rights, and to argue for less generous interpretations of the provisions in its treaties with Aboriginal peoples. (It is interesting that “the public interest” is typically just assumed to require that treaty and Aboriginal rights be as few and as narrow in scope, geographically and substantively, as possible: that such rights are themselves, in a word, inconvenient.)<sup>146</sup> Because the courts have made the task of authenticating such claims so thoroughly a matter of historical and anthropological inquiry,<sup>147</sup> the business of defending against them is, by its nature, expensive and time-consuming. A meaningful number of such claims now succeed in court; few seemed worth making, and fewer still succeeded, before 1982. And treaty and Aboriginal rights, unlike most of the rights in the *Charter of Rights*, are not subject to renewable legislative override.<sup>148</sup>

But this is not the half of it. We have known since 1984 that the federal Crown,<sup>149</sup> and more recently that the provincial Crowns,<sup>150</sup> have had all along fiduciary obligations, enforceable in the courts, toward Aboriginal communities and that courts, where possible, will construe past Crown conduct in a manner consistent with those obligations.<sup>151</sup> Accordingly, the Crown must now take greater care than historically it would have thought appropriate when exercising its control over “independent legal interests”<sup>152</sup> belonging to Aboriginal collectivities.<sup>153</sup> Supreme Court decisions in 2004<sup>154</sup> dispelled the assumption that the Crown was free to do as it pleased until some Aboriginal community proved both that it had a relevant treaty or Aboriginal right and that what the Crown was doing infringed that right. Instead, the Crown, all along, has had an enforceable obligation to consult with a given Aboriginal community whenever it contemplated conduct that, to its knowledge, might have some appreciable adverse effect on a treaty or Aboriginal right that that community had or could

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*Tsilhqot'in*, *supra* note 64 (Aboriginal rights/title and provincial measures); *Badger*, *supra* note 24 and *Grassy Narrows*, *supra* note 64 (treaty rights and provincial measures).

146 On more than one occasion during my tenure in government, I suggested to various superiors that the government devote some time to identifying its own essential interests, so that it would understand better why its answer to a given Aboriginal claim was so often “no” and whether it needed to be. Such an exercise would, I thought, be useful despite requiring re-visitation after changes in government. It was not a popular suggestion.

147 See *supra* notes 67–69 and accompanying text.

148 The “notwithstanding” clause, *Charter*, *supra* note 10, s 33, is available only in respect of rights enumerated in ss 2 and 7–15 of the *Charter*. None of those provisions mentions Aboriginal or treaty rights.

149 *Guerin*, *supra* note 118; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 [*Blueberry River*]; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*]; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]; *Ermineskin Indian Band v Canada*, 2009 SCC 9, [2009] 1 SCR 222.

150 *Tsilhqot'in*, *supra* note 64; *Grassy Narrows*, *supra* note 64.

151 See e.g., *Osoyoos*, *supra* note 149.

152 See e.g., *Guerin*, *supra* note 118, at 385, Dickson J (for four of eight judges).

153 There is still some dispute in the case law about whether interests protected by treaty can attract Crown fiduciary obligations. The majority in *Manitoba Métis Federation*, *supra* note 89, said (at para 58) that “[a]n Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty or, by extension, legislation.” In *Grassy Narrows*, *supra* note 64, however, the court said (at para 50) that “[i]n exercising its jurisdiction over Treaty 3 lands, the Province of Ontario ... is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.”

154 *Haida*, *supra* note 70; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550. See also *Rio Tinto*, *supra* note 70.

credibly claim.<sup>155</sup> Put differently, the Crown is on the hook for consultation obligations to any community whose *unproved* claim of Aboriginal or treaty right has a credible prospect of success, in respect of any proposed course of action that *might*, directly or indirectly,<sup>156</sup> compromise exercise of the right, if the right exists. This obligation extends to the exercise of powers conferred on the Crown by treaty to “take up” lands subject to treaty harvesting rights,<sup>157</sup> and even, therefore, where the proposed Crown conduct would not necessarily amount to an infringement of the right.<sup>158</sup> Finally, the honour of the Crown is proving to be something of a wild card, generating, sometimes unexpectedly, fresh, retroactive, enforceable Crown obligations to Aboriginal communities.<sup>159</sup> For all that anyone knows today, there could be more of these.

For the Crown, whose daily routines would be challenging enough even if the realm included no Aboriginal peoples, all this has complicated matters considerably. (“So many things I would have done, but clouds got in my way.”)<sup>160</sup> The duty to consult alone has added layers of procedural complexity, to the tasks of Crown planning and policy development and to the process of considering projects for approval, for which the Crown, frankly, was ill prepared. It is not helpful, either, that so many questions about this duty and its scope remain unanswered in the jurisprudence. (We still do not know, for instance, what resources, if any, the Crown, as a general rule, must provide to Aboriginal communities to facilitate their meaningful participation in its mandatory consultations.)<sup>161</sup> Vagueness and ambiguity leave room for dispute within government about what the law requires. Resolving such disputes in a sensible way requires good judgment; exercising good judgment takes time. And although this will seem ludicrous to Aboriginal parties and to the counsel who represent them, the Crown faces meaningful financial constraints of its own, born of an expectation that it will spend public money prudently and not tax more than necessary to acquire more of it. There is often great internal pressure to hurry.

Taken together, all of this amounts to inconvenience. Left to its own devices, the Crown would generally prefer not to have to incur that additional inconvenience. All other things equal, the Crown client would always prefer to hear, and very many Crown counsel would prefer to be able to say: (1) that no

155 See, in particular, *Rio Tinto*, *ibid* (“To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: ... Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated” at para 40, “A potential for adverse impact suffices” at para 44, but the impact must be “appreciable” and must not be “mere[ly] speculative” at para 46).

156 See *ibid* at paras 44, 47 (“strategic, higher level decisions” that may have some downstream impact, including Crown decisions to privatize some relevant resource, can suffice to trigger enforceable Crown consultation obligations).

157 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 55, 64, [2005] 3 SCR 388 [*Mikisew*].

158 *Ibid* at paras 31–32, 55, 57, 60, 64; *Grassy Narrows*, *supra* note 64, at paras 50–53.

159 See, in particular, *Haida*, *supra* note 70; *Manitoba Métis Federation*, *supra* note 89.

160 Joni Mitchell, “Both Sides, Now” (© Siquomb Music, BMI, 1968).

161 In *Moulton*, *supra* note 40, *rev’d* on other grounds by *Moulton (CA)*, *supra* note 40, the BC Supreme Court held (at paras 293–296) that the Crown has an obligation, when it knows that an Aboriginal community it is consulting has limited capacity to engage in consultation, to adjust the process in ways that ease its burden on the community: extending the time for consultation, providing the community with more information and scheduling meetings at times more convenient to the community’s routines, for instance. The court, however, stopped short of saying “that the Province was under an obligation to provide funding for improved capacity”: *ibid* at para 293.



Aboriginal interests in a given instance are sufficiently relevant to deflect or delay the agenda; or, if this is not clearly true, (2) that the Crown for other reasons has no obligation to consult with any Aboriginal communities about those interests before it proceeds; or, if it may have some such obligation, (3) that that obligation extends only to a single community and is minimal in scope; and, if at all possible, (4) that what the Crown has already done suffices to discharge any such obligation. Put differently, the preference within government, in instances where there is room for doubt, is to underestimate, not overestimate, risk: to take its chances, if need be, in court instead of routinely doing everything possible to avoid the need for litigation.<sup>162</sup> Underlying this preference, I think, is the inarticulate fear that a contrary approach would lead to a massive increase in transaction costs, to paralysis and, perhaps, eventually to ugly public backlash.

### *And For What?*

But notice the assumption underlying this view of things. We know that the Crown is often quite willing to incur great expense, to navigate elaborate procedural labyrinths, or both, when it anticipates some salutary public benefit as a result of its investment. The news is full of examples; reasonable people often differ about the wisdom of some of them, but those who accept that a given outcome justifies the time and expense required to attain it generally do not dwell on the inconvenience (if they even call it “inconvenience”) of the path there from here. What makes it seem inconvenient for the Crown to reach out to Aboriginal communities — especially, perhaps, when the law requires it — is the unacknowledged assumption that the government has little or nothing of value to learn from such outreach: that it is, all things considered, an inefficient use of public resources.

I noticed this only when I realized how rarely, in my experience, Crown governments or officials reached out to Aboriginal communities or their Elders purely to see what they could learn from them, what expertise their Indigenous interlocutors might contribute, on some issue of public significance. The Crown today does, of course, consult (or, to use the term preferred within government, “engage”)<sup>163</sup> with Aboriginal communities quite regularly for all sorts of reasons: because it believes the Constitution, or some statutory provisions, require that it do so; because it is already consulting with a wide range of other relevant interest groups and might as well include them; because it wants to identify and neutralize possible Aboriginal opposition to some popular public or private initiative, perhaps by proposing ways of sharing with them the benefits of the proposal; because it wants, for strategic or policy reasons, a better understanding of Aboriginal perspectives; because consulting with Aboriginal peoples seems necessary or desirable for political (or “relationship maintenance”) reasons; or perhaps just because it seems to be “the right thing to do.” These are all perfectly defensible reasons — some are downright commendable — for consult-

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162 By way of example, a certain class of legal opinions for which I was responsible, involving appraisal of risk of enforceable Crown consultation duties, required a much more extensive approval process if the risk to the Crown was high than if the risk to the Crown was low.

163 Briefly, talk of “consultation” is thought to entail acknowledgment that the Crown has a duty to consult a given Aboriginal community in a given instance; that, in turn, is thought to entail acknowledgement that the community has at least a credible basis on which to claim a relevant treaty or Aboriginal right. Talk of “engagement” is thought to avoid those inconvenient implications.

ing (or “engaging”) with Aboriginal communities. But none of these several motivations entails any clear expectation that recourse to traditional knowledge or to Aboriginal teachings, experience or perspectives will improve the quality of the conversation, or of public policy: that the Crown will learn anything from such encounters that it cannot learn with less fuss in some other way. With the arguable exceptions of the Royal Commission on Aboriginal Peoples (1990–1996),<sup>164</sup> a report the Law Commission of Canada commissioned in the mid-2000s on Indigenous legal traditions<sup>165</sup> and a parallel study of Indigenous law undertaken briefly within the federal Department of Justice at about the same time (none of which has yet had any effect on government policy), it is difficult to think of an occasion when a provincial or federal government with which I am familiar sought advice from Aboriginal communities or Elders in a spirit of humility, as one might seek needed instruction, judgment or perspective from any other expert. In case my own experience was incomplete or skewed, I made informal inquiries of some lawyer friends still in government, to see whether they could identify any such instances. Apart from one former colleague, who suggested that the Crown might sometimes seek traditional knowledge to improve its understanding of northern terrain and ecosystems, and another, whose practice is to encourage government clients to reach out early to relevant Aboriginal communities, my inquiries yielded no results.

Small wonder then, perhaps, that the Crown’s experience of the task of dealing with Aboriginal peoples is one of fuss and inconvenience, rather like snow shoveling or an unpleasant bodily function that one prefers to execute as quickly, and with as little attention and effort, as the circumstances permit.

It has not always been so. Settlers’ and explorers’ reliance on Indigenous geographical expertise to find their way around, on Indigenous agronomists to recognize and cultivate edible plants in North America, and on Indigenous hospitality to survive those initial winters, is one of the relatively few things we learn about Indigenous peoples in grade school. John Borrows documents numerous occasions in the early days of contact, extending into at least the early 1800s, when settler peoples and their official representatives utilized Indigenous customs and protocols in making treaties, and even in conducting routine commercial transactions, with Aboriginal peoples.<sup>166</sup> And there is some historical evidence that colonial admiration for the federalist governance structure of the Haudenosaunee Confederacy helped shape the form of federalism inscribed in the United States Constitution.<sup>167</sup>

But that was then, it seems tempting to say; since then, the knowledge and technology available to mainstream civilization have advanced exponentially. What need, really, could contemporary policy-makers have for traditional knowledge or Indigenous perspective?

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164 *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), online: Government of Canada Web Archive <[http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)>.

165 John Borrows, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (January 2006), online: Government of Canada Publications <<http://publications.gc.ca/>>.

166 See *ibid* at 109–111.

167 See e.g., *ibid* at 137; Bruce E Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution* (Ipswich, Mass: Gambit, 1982); Donald A Grinde, Jr. and Bruce E Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: American Indian Studies Centre, 1991).

I doubt that that question answers itself quite so neatly. Some thinkers insist that we in the mainstream do well for our own sake, even today, to remain open to contemporary versions of Indigenous teachings. Wade Davis, for instance, highlights climate change as a dangerous consequence of mainstream self-absorption.<sup>168</sup> Indigenous voices matter, he argues,

because they can still be heard to remind us that there are indeed alternatives, other ways of orienting human beings in social, spiritual, and ecological space. This is not to suggest naively that we abandon everything and attempt to mimic the ways of non-industrial societies, or that any culture be asked to forfeit its right to benefit from the genius of technology. It is rather to draw inspiration and comfort from the fact that the path we have taken is not the only one available, that our destiny therefore is not indelibly written in a set of choices that demonstrably and scientifically have proven not to be wise. By their very existence the diverse cultures of the world bear witness to the folly of those who say we cannot change, as we all know we must, the fundamental manner in which we inhabit this planet.<sup>169</sup>

And there is, come to think of it, something remarkable about the resilience and perseverance of the Indigenous societies in present-day North America: about their talent for survival. “We must be doin’ somethin’ right to last two hundred years,” a character in Robert Altman’s movie *Nashville* sang in commemoration of the US bicentennial. Indigenous societies here have outstripped that longevity record by a factor of more than two, and have done so under spectacularly inauspicious circumstances. One wonders how well our mainstream culture and governance institutions could fare in response to prolonged dislocation and condescension at the hands of an alien power bearing superior force and insisting on carrying on in a foreign language. As mainstream Canadian society encounters unprecedented challenges of its own — climate change not least among them — and begins to display early signs of its own fragility, just possibly there are lessons worth learning there.<sup>170</sup>

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168 There is no serious scientist alive who questions the severity and implications of this crisis, or the factors, decisions, and priorities that caused it to occur. It has come about because of the consequences of a particular world view. ... Our economic models are projections and arrows when they should be circles. To define perpetual growth on a finite planet as the sole measure of economic well-being is to engage in a form of slow collective suicide:

Wade Davis, *The Wayfinders: Why Ancient Wisdom Matters in the Modern World* (Toronto: House of Anansi, 2009) at 217.

169 *Ibid* at 217–218. See also e.g., Jared Diamond, *The World Until Yesterday: What Can We Learn from Traditional Societies?* (New York: Viking, 2012).

170 In *Whose Justice? Whose Rationality?* (Notre Dame, IN: Notre Dame University Press, 1988), Alasdair MacIntyre contemplates (at 364) mechanisms by which such learning might occur:

For the adherents to a tradition which is now in this state of fundamental crisis may at this point encounter in a new way the claims of some particular rival tradition, perhaps one with which they have for some time coexisted, perhaps one which they are now encountering for the first time. They now come or had already come to understand the beliefs and way of life of this other alien tradition, and to do so they have or have had to learn ... the language of the alien tradition as a new and second first language. (Continued...)

“The problem,” Thomas King has said, “was and continues to be unexamined confidence in western civilization and the unwarranted certainty of Christianity. And arrogance.”<sup>171</sup> I find it very difficult to disagree with any of that. In fairness to the Crown, however, its demonstrable impatience with Aboriginal communities does not result exclusively from colonialist presumption or stubborn perversity. Change is difficult at the best of times, even for individuals;<sup>172</sup> for an entity the size of the Crown, whether federal or provincial, it is, of necessity, considerably more so. Now that we are where we are, the challenge of fruitful change is formidable. Indigenous teachings and worldviews are, through absolutely no fault of their own, foreign and often opaque to typical mainstream understandings; it will take some time and dedication even for those in the mainstream who take an interest in such matters to come to an adequate appreciation of them and of their advantages: to learn how to give them full faith and credit. Time and dedication seem to be in short supply. Provincial and federal Crowns have millions of people to whom, and for whom, they are constantly responsible. Delivering peace, order and good government to that population requires, among other things, maintenance of a spider web of continuity, so that the patterns of daily life can remain intelligible and enduring, even while under change. Charged with overseeing that continuity, the public service has a strong professional and temperamental preference for orderliness: for keeping the boat, despite its intermittent leakage, afloat and underway.<sup>173</sup> From that standpoint, sudden or profound change is occasion for fright. Meantime, election cycles encourage preoccupation with the shorter term and, increasingly it seems, privileged attention to the wishes of the governing party’s committed base, at the expense of the kinds of long-range thinking and systemic reconsideration required to appreciate and to learn from such riches as Indigenous teachings might offer.

## VI With Apologies

We have reached the stage at which, in a perfect world, I would utter magic words and offer — *presto!* — a course of conduct, or a line of argument, by

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When they have understood the beliefs of the alien tradition, they may find themselves compelled to recognize that within this other tradition it is possible to construct from the concepts and theories peculiar to it what they were unable to provide from their own conceptual and theoretical resources, a cogent and illuminating explanation—cogent and illuminating, that is, by their own standards—of why their own intellectual traditions had been unable to solve its problems or restore its coherence. The standards by which they judge this explanation to be cogent and illuminating will be the very same standards by which they have found their tradition wanting in the face of epistemological crisis.

171 King, *supra* note 125 at 265.

172 Since we are what we do, if we want to change what we are we must begin by changing what we do, must undertake a new mode of action. Since the import of such action is change it will run afoul of existing entrenched forces which will protest and resist. The new mode will be experienced as difficult, unpleasant, forced, unnatural, anxiety-provoking. It may be undertaken lightly but can be sustained only by considerable effort of will. Change will occur only if such action is maintained over a long period of time:

Allen Wheelis, *How People Change* (New York: Harper & Row, 1973, 1975) at 101.

173 In a song called “Anthem” (© Sony/ATV Songs LLC, 1993), Leonard Cohen is famous for reminding us that “there is a crack in everything/that’s how the light gets in.” The professional civil servant, including the government lawyer, is more apt to be attentive to the cracks below, the ones that yield to water, than to the cracks above that yield to light.

means of which Aboriginal peoples could reason, effectively and persuasively, with their particular elephant.

I have, I regret to say, nothing to offer that could meet such an expectation. I wish I had, but that isn't how it works. There are too many overlapping constituencies within government, each with its own imperatives, personality, culture and management style, for any such prescription I might offer here to have a reasonable chance of efficacy.<sup>174</sup> The most I can hope in sharing these thoughts is that Aboriginal peoples and their counsel, having now perhaps some improved understanding of the Crown, the internal constituencies that comprise it, the incentives converging and competing within and among those constituencies, the legal doctrines that challenge and constrain it, even at its most forthcoming, and the attitudes and blind spots that have been most typical of it, can make better informed strategic decisions case by case when they deal, by choice or necessity, with it and with its representatives.

On the subject of strategy, please allow me two concluding observations.

The first is that judicial decisions are something our elephant has no choice except to listen to. Confronted with the final judicial word on some Aboriginal issue, the Crown, if the word is unwelcome, will generally construe the result as narrowly as possible, and seek grounds on which to limit as much as possible the ruling's negative impact, in an effort to maximize its remaining operational flexibility. In this, it may sometimes succeed. But it will, where it must, comply. (The rule of law compels it.) Judicial proceedings, therefore, are one potentially effective channel through which to seek to reason with the elephant. In circumstances where they seem opportune, it is important, however, to undertake them with some strategic acumen, not least because they can be draining and very, very expensive.

A crucial early realization from a strategic standpoint is that courts are highly unlikely to reach any legal conclusion that scares them. Judges take seriously their responsibility to preserve the integrity of the legal and constitutional order as a whole and will reject submissions that seem to them to put it meaningfully at risk.<sup>175</sup> (In this, they too are by nature conservative of the legal order they oversee.) There are, in other words, limits on what it is possible to achieve

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174 Except, perhaps, this modest one. Get to know, as well as you can, your bureaucrat: the person within government most likely to determine or influence the outcome of some particular decision that concerns you. (In other words, pay some attention, as Dorothy did in *The Wizard of Oz*, to the person behind the curtain.) If she knows you, and especially if she trusts you and thinks you have a point, she is at least somewhat more likely to do what she can on your behalf. And it is possible, though only that, that such acquaintanceship will give you occasional glimpses behind the shield of issues management and institutional anonymity that so often renders the process of making government policies and decisions opaque to those outside government.

175 See e.g., WIC Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's LJ 217; *Mabo*, *supra* note 84, at 29–30:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. ... If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

through litigation at any given time. Courts are content, where so persuaded, to prescribe what seem to them to be manageable corrections to the mainstream constitutional order, but they do not want to be perceived to have disrupted or destabilized it.<sup>176</sup> At the Supreme Court especially, Aboriginal peoples tend to lose when the court perceives them, at any given time, to be overreaching.<sup>177</sup> The Crown, on the other hand, tends to lose when the court perceives it to have misbehaved: to be acting like a jerk.<sup>178</sup> Contemporary constitutional doctrine about Aboriginal peoples seems, frankly, to be proving malleable and secondary to these judicial intuitions.

Judges' perceptions of the difference between manageable correction and unmanageable disruption do, however, evolve with appreciation of the consequences of their previous rulings and of evident changes in public sentiment. An outcome that might have seemed frightening to them twenty years ago might today, in light of experience since, seem manageable and, therefore, acceptable. (Or, of course, vice versa.)<sup>179</sup> Where, therefore, litigation itself seems a plausible strategic option (and where its purpose is to win),<sup>180</sup> it seems wise to give

176 Consider, by way of example, the aftermath of the Supreme Court's decision in *Marshall*, *supra* note 44, rendered on September 17, 1999. A somewhat adventurous decision on treaty interpretation favourable to the Aboriginal signatories to a 1760 treaty with the Crown, *Marshall* gave rise to significant and extended public unrest, especially among non-Aboriginal fishers, in Atlantic Canada. In the wake of that unrest, the court released a second decision, exactly two months later ([1999] 3 SCR 533), giving detailed reasons for rejecting an intervenor's (!) application for a rehearing of the case. Equally interesting was the court's response before and after *Marshall* to applications for leave to appeal from Aboriginal parties on issues involving s 35 of the *Constitution Act, 1982*. From 1995 to 1999, the court had given Aboriginal parties leave to appeal in s 35 cases no fewer than ten times (in *Badger*, *supra* note 24; *Nikal*, *supra* note 66; *Van der Peet*, *supra* note 67; *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672; *Gladstone*, *supra* note 66; *R v Pamajewon*, [1996] 2 SCR 821; *R v Adams*, [1996] 3 SCR 101; *R v Côté*, [1996] 3 SCR 139; *Delgamuukw*, *supra* note 46; and *Marshall*, *ibid*, itself). After *Marshall*, it was not until June 10, 2010, almost eleven years later (see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, leave to appeal granted, online: Judgments of the Supreme Court of Canada <http://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/11854/index.do?r=AAAAAQAGTGF4IEt3AAAAAAE>), in the case that became *Lax Kw'alaams Indian Band v Canada (AG)*, 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*], that the court next gave an Aboriginal party leave to appeal in a section 35 case. With the exception of *Mikisew*, *supra* note 157, a consultation case, and *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*], a division of powers case, all the Supreme Court jurisprudence about treaty or Aboriginal rights in the intervening period resulted from Crown appeals.

177 Good examples include *Mitchell*, *supra* note 81; *Wewaykum*, *supra* note 149; *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585; *R v Marshall*, *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall/Bernard*]; *Lax Kw'alaams*, *ibid*; and *Grassy Narrows*, *supra* note 64.

178 Good examples include *Guerin*, *supra* note 118; *Blueberry River*, *supra* note 149; *Powley*, *supra* note 68; *Haida*, *supra* note 70; *Mikisew*, *supra* note 157; *Manitoba Métis Federation*, *supra* note 89; and *Tsilhqot'in*, *supra* note 64.

179 Consider, e.g., *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 (reconsidering, and departing from, *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123); *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331 (distinguishing and departing from *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519), and *Tsilhqot'in*, *ibid* (relying on, and citing with approval, the Nova Scotia Court of Appeal decision it had reversed unanimously in *Marshall/Bernard*, *supra* note 177, and overruling *Morris*, *supra* note 176, on treaty and Aboriginal rights and the doctrine of interjurisdictional immunity).

180 According to some commentators, winning need not always be the only defensible goal of litigation. In "The Upside of Losing" (2013) 113 *Columbia L Rev* 817, Ben Depoorter argues (at 821) that

adverse court decisions may be particularly salient in raising awareness about an underlying social cause. Unfavorable litigation outcomes can be

thought to the sequence in which the cases involving important Aboriginal issues reach and proceed through the courts. For better or worse, a course of incremental progress in the direction of Aboriginal autonomy, making good use of situations with sympathetic facts and building upon a pattern of favourable rulings free of scary outcomes or reactions,<sup>181</sup> seems much more likely to achieve substantial results in the courts in the long run than attempts all at once, no matter how understandable, to undo hundreds of years of colonial oppression.

But second, and no less important, it seems that I overlooked an option in my initial canvass of possible responses to the discovery, on your chest, of an unwelcome elephant. “I think,” my friend Aaron Mills (Waabishki Ma’ingan: White Wolf), who is Anishinaabe, told me after reading an earlier draft of this article, that “there are more options under the elephant than the three you present ...” Aaron called my attention to a number of contemporary Indigenous thinkers<sup>182</sup> who, in his words,

prefer to start with ourselves. They still begin with the fact that we’re being crushed under the elephant’s weight[,] of course, but rather than engage the elephant about its standing upon us, they want to make sure we remember how a ribcage is supposed to be shaped, what a deep breath feels like, etc. The strategy is to shore up or ‘thicken’ our own practices of self/ways of being in the world in spite of the elephant, even as he stubbornly refuses to move. Only when we’ve got enough of ourself back is it fruitful to contemplate reasoning with the elephant.<sup>183</sup>

Speaking as someone who is not Indigenous, I find this to be a wise and courageous course. If I was correct to suggest above<sup>184</sup> that we all still have something of value to learn from the substance, the texture and the example of Indigenous teachings, then everyone benefits from Indigenous efforts to preserve, despite the inclement conditions, the vitality of those teachings. The mere fact of their survival constitutes some ground for hope.

One would like to think that the Crown would attend to such efforts with at least some passing sympathetic interest. Doing so, however, would require that it acknowledge, at least tacitly, that it might have something to learn from genuine efforts to recover and reconstitute Indigenous experience and perspective. Any such acknowledgement, today, would be momentous.

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distinctively powerful in highlighting the misfortunes of individuals under prevailing law, while presenting a broader narrative about the current failure of the legal status quo. The resulting public backlash may mobilize public and political forces and ultimately slow down legislative trends, and can even prompt legislative initiatives that reverse the unfavorable judicial decisions or induce broader reform.

Depoorter’s argument deserves further thought, but it seems to presuppose the existence of a public sufficiently sympathetic to the predicament of the unsuccessful litigant. It seems to me unwise to assume that such a public routinely exists at present for Aboriginal litigants.

181 Much about the future course of Aboriginal title litigation, for example, could depend on what happens in the next few years on and to the lands that the Supreme Court held in *Tsilhqot’in*, *supra* note 64, to be subject to Tsilhqot’in Aboriginal title.

182 He identified by name Taiiaki Alfred, Leanne Simpson, Glen Coulthard, Johnny Mack and Jeff Corntassel, and later added Audra Simpson’s name to this list.

183 Aaron Mills, personal e-mail communication, February 17, 2015, quoted with his permission.

184 See *supra* notes 168–171 and accompanying text.

Like the colleagues he brought to my attention, Aaron has come to doubt the ultimate efficacy of dialogue with the elephant, understood as the existing apparatus of mainstream Canadian governance. Where he differs from some of them is in his willingness nonetheless to share the gift of those teachings with interested members of settler society.<sup>185</sup> In his view, as I understand it, all of us in contemporary Canada — Indigenous and non- — have an elephant standing on our chest, though we may and do experience its presence differently. It is important to him, despite the differences in our perceptions of that experience, that we converse and cooperate across the barrier of indigeneity with a view eventually to finding more harmonious ways of living among one another and alleviating, at least, the burden of the elephant's weight.

It seems clear that this is something I need to think further about. It may suit you to consider doing the same.

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185 Aaron Mills, personal e-mail communications, February 26, March 8 and March 22, 2015, cited with permission.