Treaty Renewal and Canadian Constitutional Politics

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Indigenous constitutional politics in Canada over the last fifty years can be understood in terms of a single, dynamic project of treaty renewal. Treaty renewal seeks to transform the foundations of territorial authority in Canada by revitalizing the treaty system. It has evolved in shifting political circumstances through the dialectical engagement between treaty proponents and anticolonial treaty skeptics. Skeptics argue that treaty renewal entrenches settler colonialism, rather than challenging it. In response, treaty advocates put forward more transformative versions of treaty renewal, centered more deeply on Indigenous treaty traditions. This process has yielded three versions of treaty renewal: treaty fulfillment, treaty federalism, and treaty resurgence. Each version is anchored in a distinct understanding of treaties, as real estate contracts, nation-to-nation agreements, or as relations of ecological interdependence and reciprocity, respectively. Recovering the dynamic evolution of treaty renewal draws attention to the diverse visions of territorial authority and treaties that have informed anti-colonial struggles in Canada. It moves beyond binary perspectives that distinguish between Indigenous and settler treaty visions to reveal how a more complex field of contestation has reshaped Canadian territorial authority and constitutional politics.

La politique constitutionnelle autochtone au Canada au cours des cinquante dernières années peut être appréhendée sous l'angle d'un projet singulier et dynamique de renouvellement des traités. Le renouvellement des traités aspire à transformer les fondements de l'autorité territoriale au Canada en revitalisant le système des traités. Le phénomène a évolué dans des conditions politiques changeantes, grâce à l'engagement dialectique entre ceux faisant la promotion des traités et ceux optant pour une approche anticoloniale, étant ainsi plutôt sceptiques à l'égard des traités. Ces derniers soutiennent que le renouvellement des traités consolide le colonialisme, plutôt que de le remettre en question. De leur côté, les défenseurs des traités proposent des versions plus transformatives du renouvellement de ceux-ci, davantage axées sur les traditions autochtones. Ce processus a donné naissance à trois versions du renouvellement des traités : le respect des traités, le fédéralisme par traités et la résurgence des traités. Chaque version est ancrée dans une compréhension différente des traités, respectivement en tant que contrats immobiliers, accords de nation à nation, ou relations d'interdépendance et de réciprocité écologiques.

S'attarder à l'évolution dynamique du renouvellement des traités permet d'attirer l'attention sur les diverses visions de l'autorité territoriale et des traités qui ont alimenté les luttes anticoloniales au Canada. Cela amène à dépasser les perspectives binaires qui distinguent les visions autochtones et coloniales des traités pour plutôt révéler comment un champ de contestation plus complexe a remodelé l'autorité territoriale canadienne et sa politique constitutionnelle.

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How should we understand the last fifty years of Canadian constitutional politics? There is a broad scholarly consensus that the withdrawal of Pierre Trudeau's *White Paper* marked a transition to a new era in state-Indigenous relations. How that era should best be understood, however, is a matter of dispute. The Royal Commission on Aboriginal Peoples identified it as a period of "negotiation and renewal."[1] Historian J.R. Miller sees a phase of "confrontation" followed, perhaps, by "reconciliation."[2] Political scientist Martin Papillon identifies "The Rise (and Fall?) of Indigenous Self-Government."[3] Legal scholar Paul McHugh heralds the arrival of the doctrine of Aboriginal title.[4] Dene Political theorist Glen Coulthard sees something more pernicious; the transformation of colonialism through a new "politics of recognition."[5]

In this article, I propose that we understand the post-White Paper era of Indigenous-state politics as one of "treaty renewal." Treaty renewal typically denotes the revivification of historical treaties. Alternatively, it might be understood as the modern revival of treaty-making through comprehensive land claims processes. In this article, I have something broader in mind. Treaty renewal is a sustained political project that seeks to transform the foundations of territorial authority in Canada. Rather than relying on a colonial territorial regime, anchored in Crown sovereignty and legitimated by racist ideas of discovery and terra nullius,[6] proponents of treaty renewal contend that authority over the land is derived from and distributed by the *treaty system*. The treaty system is an intersocietal institution of territorial governance. It goes beyond treaty terms to include the norms and practices that govern how and why treaties are made. The treaty system originates in Indigenous diplomatic practices, and developed over generations as the primary way for Indigenous and non-Indigenous peoples to regulate their territorial coexistence in northern North America.

1 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996).

2 JR Miller, *Skyscrapers hide the heavens: a history of Native-newcomer relations in Canada*, 4th ed (Toronto: University of Toronto Press, 2018).

3 Martin Papillon, "The Rise (and Fall?) of Aboriginal Self-Government" in Alain-G Gagnon & James Bickerton, eds, *Canadian Politics,* 6th ed (Toronto: University of Toronto Press, 2014) 113.

4 Paul G McHugh, *Aboriginal title: the modern jurisprudence of tribal land rights* (Oxford: Oxford University Press, 2011).

5 Glen Sean Coulthard, *Red skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

6 The doctrines of discovery and terra nullius, and their application to Canada, are controversial. Here, I intend the terms to describe a loose constellations of arguments and justifications, rather than specific doctrines. Robert J Miller et al, eds, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010). See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69.

The core objective of treaty renewal is to establish a just regime of territorial authority in the land now called Canada. To accomplish this goal, proponents have advanced a variety of concrete political projects — the negotiation of modern treaties, the recognition of Aboriginal rights and title, and the empowering of Indigenous forms of self-government. Crucially, all of these projects have drawn support both from Indigenous peoples and from state actors seeking to place Canadian sovereignty on more legitimate foundations.[7] As such, treaty renewal has a complex relationship to Indigenous struggles for self-determination. While proponents see treaty renewal as a way for Indigenous peoples to exercise their self-determining authority, some treaty skeptics worry that affirming the treaty system will constrain Indigenous self-determination and uphold the status quo.

Treaty proponents have responded to these concerns by advancing progressively more transformative visions of treaty renewal. In this article, I trace the evolution of treaty renewal, and identify three distinct versions: treaty fulfillment, treaty federalism, and treaty resurgence. Each version of treaty renewal draws on a different account of *what treaties are*, and, by extension, a different account of how territorial authority is distributed. *Treaty fulfillment* draws on a contractual understanding of treaties to make the relatively modest claim that treaties are mandatory, binding agreements that transfer or redistribute territorial authority. *Treaty federalism* draws from a diplomatic understanding of treaties to insist that treaties are nation-to-nation agreements through which self-governing political communities establish a framework for coexistence and shared rule. *Treaty resurgence* draws on relational understandings of treaties to argue that treaties are a means of entering into reciprocal relationships of responsibility to each other and to the earth.

These different versions of treaty renewal reflect the internal complexity of the treaty system itself. As an intersocietal institution of territorial governance, the treaty system draws from multiple sources. Nineteenth-century treaties were complex amalgams of Indigenous modes of alliance-making through kinship imperial diplomacy, and real estate transactions.[8] Treaty-making was a

7 For three prominent examples, see Michael Asch, *On being here to stay: treaties and Aboriginal rights in Canada* (Toronto: University of Toronto Press, 2014); James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995); Patrick Macklem, *Indigenous difference and the constitution of Canada* (Toronto: University of Toronto Press, 2012) [Tully, *Strange Multiplicity*].

8 For a few examples within a large literature, see Miller, *supra* note 2; Alan Ojiig Corbiere, *Anishinaabe Treaty-Making in the 18th- and 19th-Century* (PhD Dissertation, York University, 2019) [unpublished]; Heidi Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture & Research J 145

richly symbolic event, with ceremonial, oral, and written dimensions that were rarely aligned. This complexity produced misunderstandings and manipulations, but it also imbued the treaty system with depth and potency that has sustained iterative projects of treaty renewal.

Treaty renewal has developed in response to shifting political circumstances, as Indigenous advocates advanced their agenda by creatively responding to changing governments, constitutional frameworks, and public discourses. However, treaty renewal is not simply reactive; it has also been propelled forward by an internal dialectic. Pushed by treaty skeptics who see the treaty system as a colonial tool, Indigenous treaty proponents have advanced visions of treaties that are more deeply grounded in Indigenous legal, political, and epistemic traditions and more transformative of the status quo.

The central focus of this article is to provide a descriptive account of the development from treaty fulfillment to treaty federalism to treaty resurgence. In doing so, I provide a novel account of Canadian constitutional politics over the last fifty years. This approach has several advantages. First, it requires that we attend to developments across spheres of political action that are sometimes held apart. Treaty renewal has academic, judicial, policy, and grassroots political dimensions that interact and feed into one another in complex ways, but are obscured by accounts focusing exclusively on one domain. Second, emphasizing treaty renewal rejects "fragment" accounts of Canadian politics and law.[9] Fragment accounts see the core traditions and institutions of Canadian politics as derived from Europe, either because Indigenous peoples lacked political and legal institutions or because those institutions had no lasting impact on Canadian politics. A consequence of this perspective is that Indigenous peoples' political demands are understood as novel challenges to the status quo,[10] rather

at 145-64 ["Respect, Responsibility, and Renewal]; Sharon Venne, "Understanding Treaty Six: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and treaty rights in Canada: essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997) 173; Aimée Craft, *Breathing life into the Stone Fort Treaty: an Anishnabe understanding of Treaty One* (Saskatoon: Purich Publishing, 2013).

9 The fragment thesis is particularly associated with Louis Hartz and Gad Horowitz, but it is a trope which applies to a wide range of literature. Louis Hartz, *The founding of new societies: studies in the history of the United States, Latin America, South Africa, Canada, and Australia*, 1st ed (New York: Harcourt, Brace & World, 1964); G Horowitz, "Conservatism, Liberalism, and Socialism in Canada: An Interpretation" (1966) 32:2 Can J Economics & Political Science 143 at 143-71; Peter H Russell, *Constitutional odyssey: can Canadians become a sovereign people?* (Toronto: University of Toronto Press, 1992); Ian McKay, "The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History" (2000) 81:3 Can Historical Rev 617 at 617-45.

10 Will Kymlicka, *Multicultural citizenship: a liberal theory of minority rights* (Oxford: Clarendon, 1995); Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).

than as deeply embedded within the political traditions of this land. Third, treaty renewal places questions of land and territorial authority at the center of state-Indigenous relations. It reflects Indigenous scholars' repeated insistence that law, politics, and constitutionalism cannot be approached separately from questions of land and territory.[11] Fourth, by emphasizing the diversity of treaty traditions — contractual, diplomatic, and relational — that have informed Indigenous advocacy, we can move beyond binary framings that contrast an Indigenous to a settler perspective on treaties.[12] Fifth, examining treaty renewal can help us to appreciate both the novelty and the contextual continuity of recent innovative arguments for treaty resurgence.

I have written this work on the territories of the Huron-Wendat, Petun, Mississauga Anishinaabe and Haudenosaunee peoples, where I live as a non-Indigenous settler. This territory is subject to many treaties, including the Dish-with-One-Spoon treaty and the Covenant Chain forged at the Treaty of Niagara. The reflections in this paper are part of my own efforts to understand the responsibilities and challenges of living on this treatied land.

The Treaty System

The idea of the *treaty system* builds on existing scholarship on "intersocietal law" or "intersocietal constitutionalism." Grounded in historical scholarship on European-Indigenous relationships in the seventeenth, eighteenth, and nineteenth centuries,[13] legal scholars including Jeremy Webber, Patrick Macklem, Brian Slattery, and John Borrows argue that an intersocietal body of custom-

11 Coulthard, *supra* note 5; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 847-84; Vanessa Watts, "Indigenous Place-Thought and Agency Amongst Humans and Non Humans (First Woman and Sky Woman Go On a European World Tour!)" (2013) 2:1 Decolonization: Indigeneity, Education & Society 20; Vine Deloria Jr, *God is red: a native view of religion*, 30th anniversary ed (Golden, Colo: Fulcrum Publishing, 2003); Leanne Simpson, *Dancing on our turtle's back : stories of Nishnaabeg re-creation, resurgence and a new emergence* (Winnipeg: Arbeiter Ring Publishing, 2011) [Simpson, *Dancing on our turtle's back*].

12 For excellent scholarship on treaties that nevertheless operates within a binary framework, see Asch, *supra* note 7; Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24 Dal LJ 75; Gina Starblanket, *Beyond Rights and Wrongs: Towards a Treaty-Based Practice of Relationality* (PhD Dissertation, University of Victoria, 2017) [unpublished]; Corbiere, *supra* note 8.

13 Richard White, *The middle ground: Indians, empires, and republics in the Great Lakes region, 1650-1815*, 2nd ed (Cambridge: Cambridge University Press, 2010); Francis Jennings, "The Constitutional Evolution of the Covenant Chain" (1971) 115:2 Proceedings American Philosophical Society 88 at 88-96; Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, NC: Omohundro Institute and University of North Carolina Press, 2010); Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33:4 Osgoode Hall LJ 623 at 623-60.

ary constitutional law emerged to govern the relations between Indigenous and settler communities.[14] In James Tully's influential account of this process, Indigenous and non-Indigenous peoples establish a shared "constitution" through an "intercultural dialogue… on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity."[15] Since the body of law and custom that emerges is dynamic, he calls this "treaty constitutionalism" or "aboriginal and common constitutionalism," rather than referring to a single treaty "constitution."[16] While their emphasis varies, all of these scholars emphasize the creation of a set of customary norms and institutions through repeated interactions between Indigenous and non-Indigenous communities.

My notion of the treaty system draws inspiration from this work. I conceptualize the treaty system as a regime of institutions and customs that evolved through repeated interaction and contestation over generations. Where I differ from existing theories of intersocietal constitutionalism is by conceptualizing the treaty system as an institution (or set of institutions) of territorial governance. By negotiating treaties and the norms surrounding treaties, Indigenous and non-Indigenous peoples established the terms through which *territorial authority* could be exercised. By emphasizing territory, rather than mutual recognition, accommodation, peace, or conflict resolution, my account centres land in treaty interpretation. This reflects the straightforward observation that many treaties concern territory, as well as a methodological commitment to follow Indigenous theorists by thinking human politics as always in relationship to land.[17]

The distribution of territorial authority is the central function and purpose of the treaty system. By territorial authority, I mean the ability of a group or individual to exercise legitimate control over a specific area of land. Both Indigenous and non-Indigenous societies claim and exercise territorial authority, but these claims can differ widely in their sources, scope, and justification.

14 Webber, *supra* note 13; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34:1 Osgoode Hall LJ 101 at 101-12.

15 Tully, *Strange Multiplicity*, *supra* note 7 at 184.

16 Tully, *Strange Multiplicity*, *supra* note 7.

17 Aaron Mills, "What is a Treaty? On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Don Mills: University of Toronto Press, 2017) 208 440 [Mills, "What is a Treaty"]; Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the RIght(s) Relationship" in John Borrows & Michael Coyle, eds, *The right relationship: reimagining the implementation of historical treaties* (Toronto: University of Toronto Press, 2017) 248 [Stark, "Changing the Treaty Question"].

Briefly, Euro-settler societies have tended to see land as a bounded area over which authority is exercised.[18] These ideas of land underpin contractual and diplomatic understandings of treaty as transferring ownership or distributing jurisdiction. By contrast, Indigenous intellectual traditions present land as a locus of relationships.[19] Authority emerges from relationships of reciprocity and responsibility to the land itself.[20] On this view, treaties distribute territorial authority by welcoming newcomers into relationship with the human and non-human relatives of a specific place.

Focusing on territorial authority in treaties brings greater emphasis to disagreement in treaty interpretation. Where Tully and others see treaty constitutionalism as a salutary example of cooperation and accommodation, I emphasize the complex and often divergent understandings of territorial authority that characterize treaties. Disputes over whether treaty involves the sale of land, an agreement to jointly govern the land, or an invitation to enter a relationship with the land continue to this day; the tension between the contractual, diplomatic, and relational understandings of treaties has not been resolved. Treaties on this view are sites of contestation rather than agreement or consent.[21]

Recognizing the perpetually contested nature of treaties helps us to situate the theorists of intersocietal constitutionalism *within* a historical project of treaty renewal. On the one hand, these scholars played a crucial role in uncovering and articulating the treaty system as such. On the other hand, they advanced a particular interpretation of that system, one which is shaped by a diplomatic understanding of treaties as inter-national, constitutional agreements. However, this is only one of several possible understandings of treaties. The diplomatic vision existed alongside notions of treaties as real estate contracts and as modes of relationality or kinship. Attending to these alternative accounts reveals that treaty renewal is not simply a matter of turning away from colonialism and toward treaties — as it is sometimes put, away from the Confederation of 1867 and toward the Confederation at Niagara in 1764.[22]

18 Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: University of Minnesota Press, 2017).

19 Coulthard, *supra* note 5 at 60-61; Glen Coulthard & Leanne Betasamosake Simpson, "Grounded Normativity / Place-Based Solidarity" (2016) 68:2 American Quarterly 249 at 249-55; Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017) [Simpson, *Indigenous Freedom*]; Deloria, *supra* note 11.

20 Pasternak, *supra* note 18.

21 For helpful reflections on this point, see Janna Beth Promislow, "Treaties in History and Law" (2014) 47:3 UBC L Rev 1085 at 1111; Walters, *supra* note 12.

22 Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) [Russell, *Canada's Odyssey*]; James Youngblood Henderson, "Empowering

Rather, there are many possible meanings of a turn toward treaties, precisely because treaties are multilayered and ambivalent historical institutions.

Treaty Renewal and Treaty Skepticism

Treaty renewal emerged as a major political movement in the 1970s, as part of the powerful reaction against Prime Minister Pierre Trudeau's assimilationist White Paper in 1969.[23] The White Paper proposed to abolish Indian status and end the "anomaly of treaties between groups within society and the government of that society"[24] Treaty renewal received its first major articulation in Nehiyaw (Cree) leader Harold Cardinal's *Unjust Society.*[25] Since then, treaty renewal has been propelled forward by an internal dialectic between treaty proponents and treaty skeptics, as well as by shifting political opportunities.

Cardinal's work reshaped the public discourse by offering a sharp criticism of Canadian policy, grounded in a critical Indigenous perspective. It also suggested a path forward: "[g]overnment after government has, in some way or another, vaguely committed itself to native rights but no government… has yet committed itself to the simply honesty of fulfilling its obligations to our people as outlined in the treaties."[26] Cardinal presents treaties as the "Indian *Magna Carta*" and as "sacred agreements" which Indigenous peoples entered in good faith.[27] He criticizes the duplicity of the Canadian government in persistently violating these covenants and calls on all Canadians to fulfil their duties as treaty partners. These ideas were echoed in the so-called *Red Paper* published in 1970 by the Indian Association of Alberta, which Cardinal led.[28] They would be taken up and developed over the next three decades, including by Cardinal himself.

Treaty Federalism" (1994) 58:2 Sask L Rev 241 at 241-330; Joshua Ben David Nichols, *A Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020) [Nichols, *Reconciliation without Recollection*]; James Tully, "Aboriginal Peoples: Negotiating Reconciliation" in Alain-G Gagnon & James Bickerton, eds, *Canadian Politics*, 3rd ed (Peterborough, ON: Broadview Press, 1999) 424.

23 Sally M Weaver, *Making Canadian Indian policy: the hidden agenda, 1968-70* (University of Toronto Press, 1981); Miller, *supra* note 2.

24 Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Department of Indian Affairs and Northern Development, 1969) 24.

25 Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1999).

26 *Ibid* at 17.

27 *Ibid* at 30.

28 Indian Chiefs of Alberta, *Citizens Plus* (Edmonton: Indian Association of Alberta, 1970) in (2011) 1:2 Aboriginal Policy Studies 188.

Not all Indigenous activists, however, saw liberatory potential in treaties. Métis scholar Howard Adams expressed deep skepticism about the ability of treaties to remedy colonial injustice. In *Prison of Grass,* Adams drew on Marxist and anti-colonial theories to present a critical analysis of Canadian colonialism.[29] He argued that, given the radical power imbalances between Indigenous peoples and the Canadian government, treaties were effectively mechanisms of coercion.

> In Canada, treaties legitimize the imprisonment of status Indians under white agents backed by the police and soldiers. In return, the Indians received almost nothing for their land and resources except promises as empty as the treaties themselves. Negotiations satisfactory to two parties are not possible when power is unequally distributed between them. Ottawa officials were bargaining from a position of state power, backed by the Mounted Police and the combined military force of Canada and England. They were familiar with the English language and legal contracts based on English law. The Indians, on the other hand, were powerless: they did not speak English, they were seriously divided, and they were economically dependent.[30]

Adams has harsh words for contemporary efforts at treaty renewal: "A tragic consequence of the treaties was that Indians later accepted them as a kind of legal Bible which they felt gave them special rights and privileges . . . . When Indians hold the treaties as sacred testaments, the process of colonization is indeed complete."[31]

Adams' treaty skepticism is grounded in a Marxist distinction between a superstructural "level of rhetoric" and a structural "level of actual operation" in colonial societies.[32] At the level of rhetoric, there is cooperation and good feeling, but this masks a zero-sum conflict at the level of operation, where "the colonizer will never allow his power to diminish".

> This dual level of operation was particularly obvious at the time of the treaty negotiations, when the white man made lavish promises to induce the Indians to surrender their land. But the reality of these negotiations was that the Indians lost their land and their rights with very little compensation except for small plots of land known as reserves.[33]

29 Howard Adams, *Prison of Grass: Canada from a Native Point of View*, revised ed (Saskatoon: Fifth House Publishers, 1989).

30 *Ibid* at 63.

31 *Ibid* at 67. Despite his skepticism, Adams was involved in some forms of treaty-based advocacy. He played an important role in the the "Trail of Broken Treaties" Caravan in the United States in 1972. I thank Corey Snelgrove for drawing this to my attention.

32 *Ibid* at 65.

33 *Ibid.*

Cardinal and Adams' statements represent two poles of opinion about treaties. Cardinal is a treaty advocate, embracing the power of treaties to turn the "unjust society" toward justice. While he is scathing in his description of government dishonesty in treaties, he is confident that the 'spirit' of treaties provides a framework for justice. Adams expresses treaty skepticism, doubting that negotiations with the colonizer will ever be sufficient to break free of the "Prison of Grass."

Treaty advocacy and treaty skepticism have dominated anti-colonial thinking about treaties from the 1970s to the present day. Treaty proponents tend to emphasize interdependence between Indigenous and non-Indigenous peoples, and favour tactics of negotiation and reform. Treaty skeptics tend to emphasize Indigenous self-determination and favour direct action and nation-building outside of state structures. While some individuals fit squarely into one camp or another, others blend the positions or move between them. In particular, many of the scholars discussed below express skepticism toward specific examples of treaty renewal in the course of developing their own more transformative visions.

In recent years, it has been common to characterize Indigenous politics in Canada as divided between "resurgence" and "reconciliation," with the key point of difference concerning the "politics of recognition."[34] This framing is unhelpful, since resurgence and reconciliation are contested terms. Recasting these debates as pitting advocates of treaty renewal against treaty skeptics clarifies the stakes, which I argue ultimately concern the moral status and redeemability of the Canadian state's claim to territorial authority. Treaty proponents and skeptics are divided on whether treaties, broadly conceived, could ever render the settler state's territorial authority legitimate. This debate reflects the dual nature of treaty renewal as a project of state legitimation and Indigenous-directed transformation, a dualism whose origin lies in the multiple, conflicting agendas of treaty parties.

Treaty Colonialism and the Colonial Territorial Regime

The background context for treaty renewal is the *treaty colonialism* that characterized post-Confederation Canada. Between the late 1860s and the 1920s, Canadian courts and governments advanced an account of treaties as optional

34 John Borrows & James Tully, "Introduction" in Michael Asch, James Tully & John Borrows, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto ; Buffalo: University of Toronto Press, 2018) 3.

policy mechanisms through which the executive Crown could "extinguish" the residual, usufructuary land rights of Indigenous peoples. This doctrine sought to reconcile the tradition and practice of treaty-making with the colonial territorial regime.

The colonial territorial regime is structured around the *British North America* (BNA) Act, which purports to divide all authority between the Federal and Provincial Governments.[35] As Joshua Nichols has noted, the *BNA Act* reflects a "Westphalian" understanding of territorial authority in which a nation state is "a territorial unit with a single sovereign that derives its legitimacy from *the* people."[36] This absolutist conception of territorial sovereignty is in tension with the historical practices of divided sovereignty characteristic of British imperialism and of treaty-making.[37]

From the perspective of Indigenous peoples, Section 91(24) of the BNA Act is particularly significant.[38] It grants the Dominion government authority over "Indians, and lands reserved for Indians."[39] This provision is the only reference to Indigenous peoples in the Act, and was drafted without their input.[40] The *Indian Act* of 1876 was a natural extension of this framework. Building on earlier legislation, the *Indian Act* established a despotic regime of unaccountable rule over Indigenous peoples, regulating their lands, governments, and legal traditions.[41] In the Indian Act/BNA Act vision, Indigenous peoples were objects of governance, not self-governing political orders.

At the same time, however, the reality of Indigenous political strength and the legacy of imperial treaty-making meant that the Dominion continued to negotiate treaties. The Numbered treaties, the Williams Treaties, and various treaty adhesions were all negotiated between 1870 and 1926.[42] To reconcile these incongruous regimes, one based on unilateral imposition and the other

35 *British North America Act 1867* (UK), 30 & 31 Vict, c 3 [BNA Act].

36 Nichols, *Reconciliation without Recollection*, *supra* note 22 at 8.

37 Joshua Nichols, "Sui Generis Sovereignties: The relationship between Treaty Interpretation and Canadian Sovereignty" (2018), online (pdf): *Centre for International Governance Innovation* www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.1_1.pdf [perma.cc/RQ6R-HDGA].

38 *BNA Act*, *supra* note 35 s 91(24).

39 *Ibid*.

40 Russell, *Canada's Odyssey*, *supra* note 22 at 147.

41 John Milloy, "Indian Act Colonialism: A Century Of Dishonour, 1869-1969" (2008) Research Paper for the National Centre for First Nations Governance, online (pdf): <epub.sub.uni-hamburg.de/epub/volltexte/2012/12732/pdf/milloy.pdf> [perma.cc/7JE6-NSR5].

42 JR Miller, *Compact, contract, covenant: Aboriginal treaty-making in Canada* (Toronto: University of Toronto Press, 2009).

on negotiation, Canadian courts and policy-makers developed an account of treaties as beneficent acts of Crown prerogative. This doctrine was expressed in two crucial court cases, *St. Catherine's Milling* and *Sylliboy*. It was also manifest in government policy in British Columbia, and became increasingly evident in the management of later treaties.

The leading nineteenth century Aboriginal title case, *St. Catherine's Milling*, took the view that Indigenous land rights were limited to a "personal and usufructuary right," which treaties served to "extinguish."[43] The Crown held "underlying title" irrespective of treaties; where there was no treaty, Crown title was "burdened" by Aboriginal title. It follows that extinguishment could have been accomplished unilaterally; the fact that the government proceeded by negotiation reflected its supposed paternal concern for Indigenous well-being, and not any legal obligation.[44]

This perspective was inconsistent, not only with Indigenous understandings of treaties, but with earlier imperial policy. For example, it was the opinion of imperial officials in 1787 that the inadequate documentation of a treaty with the Credit River Mississauga had the effect of imperiling settler title. The solution was not to appropriate the land through a unilateral act of Parliament, but to negotiate a new treaty. In other words, treaties were required if the Crown was to claim title.[45]

The *St. Catherine's Milling* doctrine, however, did inform Crown behaviour in British Columbia.[46] There, the Provincial government resisted treaty making, preferring instead to authorize the unilateral appropriation of Indigenous lands. After some dispute, the federal government agreed to a policy in which Indigenous peoples would be unilaterally assigned reserves by a Commission.[47] This policy was deemed sufficient to uphold the Crown's paternal concern for its Indigenous "subjects."[48] A similar disregard for Indigenous consent was evi-

43 Kent McNeil, *Flawed precedent: the St. Catherine's case and Aboriginal title* (Vancouver: UBC Press, 2019); *St Catharines Milling and Lumber Co v R*, [1888] UKPC 70 .

44 McNeil*, ibid.*

45 Robert J Surtees, *Indian land cessions in Ontario, 1763-1862: the evolution of a system* (PhD Thesis, Carleton University, 1983) [unpublished] at 97.

46 McNeil, *supra* note 43.

47 Paul Tennant, *Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990); R Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (UBC Press, 2002)

48 A similar policy of unilateral dispossession with compensation developed in Quebec. There too, Indigenous peoples pushed for treaties. See Alain Beaulieu, "'An equitable right to be compensated': The Dispossession of the Aboriginal Peoples of Quebec and the Emergence of a New Legal Rationale (1760-1860)" (2013) 94:1 Can Historical Rev 1 at 1-27.

dent in the negotiations of several of the later treaties. For example, the written terms of Treaty Number Nine were agreed to in advance by the Governments of Ontario and Canada, before being presented, often inaccurately or incompletely, for Indigenous "consent."[49] Similar practices were visible during negotiations of Treaties 8 and 11.[50]

In 1929, the legal status of treaty promises was raised. Mi'kmaq Chief Sylliboy was found to be hunting in violation of Nova Scotian law. Sylliboy argued that his right to hunt was protected by a 1752 Treaty. In the resulting case, Justice Patterson relied on racist notions of Indigenous peoples as "uncivilized" to conclude that "the Treaty of 1752 is not a treaty at all . . .; it is at best a mere agreement made by the Governor and council with a handful of Indians."[51] Treaties were mere political agreements, unenforceable in a court of law, whose benefits to the Mi'kmaq was an expression of Crown benevolence.[52]

Treaty colonialism — and the colonial territorial regime it helps to sustain and legitimate — have remained an important feature of modern Canadian Aboriginal Policy. As Joshua Nichols argues, the notion that Canadian sovereignty is exclusively divided between the federal and provincial orders of government, with Indigenous title existing only as a residual "burden," continues to inform state actions.[53] It was not until after the Supreme Court's decision in *Delgamuukw v British Columbia* that the government ceased negotiating for the "extinguishment" of Aboriginal rights through treaty, and critics argue that the continuing desire for "certainty" amounts to more of the same.[54]

Treaty renewal seeks to overcome treaty colonialism and the colonial territorial regime by re-invigorating the intersocietal treaty system. In the remainder of the essay, I trace the development of this project. Over time, treaty renewal contributes to the reshaping of the structures of territorial authority in Canada, altering the institutions of the settler state. Treaty skeptics worry, however, that what has been achieved is a deepening of treaty colonialism. In response,

49 John S Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: McGill-Queen's University Press, 2010).

50 *Re Paulette and Registrar of Titles, [1973] 6 WWR 115, 42 DLR (3d) 8* para 23 [*Paulette*]. I thank an anonymous reviewer for this reference.

51 *R v Syliboy*, [1929] 1 DLR 307, 50 CCC 89 at 313.

52 Macklem, *supra* note 7 at 136-40.

53 Nichols, *Reconciliation without Recollection*, *supra* note 22.

54 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005).

treaty proponents advance more transformative visions of treaty, more deeply grounded in Indigenous legal and political traditions.

Treaty Fulfillment

The failure of Pierre Trudeau's assimilationist White Paper destabilized Canadian policy towards Indigenous peoples. After 1969, it was increasingly difficult for governments to argue that Indigenous peoples should renounce their connections to land and treaties in favour of assimilation into the Canadian body politic. Policy makers struggled to articulate an appropriate alternative theory of Indigenous peoples' relationship to the state.[55] Treaty renewal emerged to fill this gap.

The uptake of treaty renewal into Canadian constitutional politics has always been shaped by the balances of power and political opportunities present at specific historical junctures. In the 1970s, Indigenous advocates presented their demands in the language of equality and recognition through discourses of Aboriginal and Treaty Rights, multiculturalism, and citizenship. They appealed to spirit and intent of treaties, and to the principles of recognition and fair dealing that underlay treaties, to reject the injustice of the status quo.

In *The Unjust Society,* Harold Cardinal's demands for treaty renewal are modest and narrowly pitched: the government should honour its promises. Riffing on the Trudeau government's commitment to a "just society" and to ascendant multiculturalism, Cardinal insists that Indigenous people should be allowed to be "red tiles" in the Canadian mosaic, rather than inferior white tiles.[56] Cardinal was the principal author of the Indian Chief's of Alberta response to the White Paper, which echoes this vision of differentiated inclusion in its title, "Citizens Plus."[57]

The term "Citizen's Plus" was drawn from the government-commissioned Hawthorn Report.[58] Its theoretical core was the notion that Indigenous people should enjoy the full benefits of Canadian citizenship, along with particular "Aboriginal and Treaty Rights" in recognition of their distinctive status and history. From the perspective of Cardinal and the Alberta Chiefs, this

55 Augie Fleras & Jean Leonard Elliott, *The "nations within": aboriginal-state relations in Canada, the United States, and New Zealand* (Toronto: Oxford University Press, 1992) at xx.

56 Cardinal, *supra* note 25 at 16.

57 Indian Chiefs of Alberta, *supra* note 28.

58 HB Hawthorn, ed, *A survey of the contemporary Indians of Canada: a report on economic, political, educational needs and policies*, vol 1 (Ottawa: Indian Affairs Branch, 1966).

involved nothing more than a commitment by the government to honour its promises.

In addition to the Indian Chiefs of Alberta, the Union of B.C. Indian Chiefs (UBCIC) and the Manitoba Indian Brotherhood prepared formal responses to the White Paper. These documents share common themes: inherent Aboriginal Rights, a rejection of assimilation, a demand for self-determination, and a desire to work collaboratively with the government. They also share, I argue, an implicitly *contractual* understanding of treaties as legally binding agreements between two parties.

Because of the different histories of treaty-making in BC, Alberta, and Manitoba, the specific content of their treaty-related demands differed. The Alberta Chiefs argue that the "spirit and intent" of treaties should guide an effort to "modernize" the treaties.[59] The Manitoba Indian Brotherhood similarly calls for a comprehensive "restructuring" of treaties, while critiquing in much stronger terms the original treaties as "unconscionable agreements."[60] Both organizations, however, regard treaties as binding agreements that recognize prior Indigenous rights and title. Because of the lack of treaties in most of British Columbia, the UBCIC does not make specific reference to treaties; instead, they demand recognition of their Aboriginal title and compensation for the lands that have been dispossessed.[61] Despite the differences in context, all three documents share a vision of Aboriginal rights as inherent, legally enforceable rights that are recognized by treaties. They share a project of *treaty fulfillment*: the demand that historic treaties be honoured and updated, and that new treaties be negotiated where they do not currently exist.

These demands built on deep traditions of Indigenous activism. Already in the 1890s, Indigenous peoples on the Prairies were demanding that treaty promises be honoured, and the Nisga'a, Cowichan, and others in British Columbia were demanding recognition of their land rights.[62] In the 1960s and 1970s, these demands gained traction in Canadian courts.[63]

59 Indian Chiefs of Alberta, *supra* note 28.

60 Indian Tribes of Manitoba, *Wahbung: Our Tomorrows* (Manitoba Indian Brotherhood Inc, 1971).

61 Union of BC Indian Chiefs, *A Declaration of Indian Rights: the BC Indian Position Paper* (1970).

62 Hamar Foster & Benjamin L Berger, "From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Indian Land Question" in Benjamin L Berger, Hamar Foster & AR Buck, eds, *The grand experiment: law and legal culture in British settler societies* (Vancouver: UBC Press, 2008) 240 at 255; John Tobias, "The origins of the Treaty Rights Movement in Saskatchewan" in F Laurie Barron & James B Waldram, eds, *1885 and after : native society in transition* (Regina: University of Regina, Canadian Plains Research Centre, 1986) 241.

63 *R v White and Bob*, for example, upheld a Treaty right to hunt, albeit on the grounds that it was protected under the Indian Act. *R v White and Bob*, [1964] BCJ No 212 (QL), 50 DLR (2d) 613.

The watershed came with *Calder v Attorney-General of British Columbia* in 1973, which went a considerable distance toward affirming the Nisga'a's historical claim.[64] Six judges on the seven-judge panel expressed their belief that there existed a right of Aboriginal title, and three judges suggested that the title had not been extinguished.

The *Calder* case is generally credited with launching the modern doctrine of Aboriginal rights and title.[65] It is crucial, however, to see that Aboriginal title is not conceptually or historically separable from the question of treaties. As Stuart Banner has traced, it was the longstanding practice of purchasing lands by treaty that cemented the early modern notion of an Indigenous right to land.[66] The *Royal Proclamation of 1763* famously recognized Indigenous land rights, but it did so by regulating the private acquisition of Indigenous land and establishing a treaty process. It was the treaty system, the rules around land *acquisition*, that gave Aboriginal land rights their substance. Put another way, the significance of the *Calder* case was to establish that the Crown had an obligation to enter into a treaty with the Nisga'a.

The *Calder* case jolted the political system. The governments responded by adopting treaty fulfillment in the form of three new policies. First, a "specific claims" process addressed violations of treaties and other Crown obligations. Second, the modern treaty process, also known as comprehensive land claims agreements (and later, "self-government" agreements) was established for regions where no treaties existed. Third, an effort was made to move away from assimilation or the *Indian Act*, and toward Indigenous self-government on a municipal model.[67] These shifts were all entangled with the judicial elaboration of Aboriginal Rights. Taken together, these shifts can be understood as an effort to place treaties, understood as honourable and consensual agreements to transfer land ownership, at the centre of state-Indigenous relations.

Treaty Skepticism I: Against Crown Sovereignty

Anti-colonial treaty skeptics sharply criticized the specific and comprehensive claims process and the self-government policies, seeing more evidence of treaty colonialism than fundamental change. These criticisms blended prag-

64 *Calder v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder*].

65 McHugh, *supra* note 4.

66 Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Harvard University Press, 2005).

67 Frances Abele & Michael J Prince, "Four Pathways to Aboriginal Self-Government in Canada" (2006) 36:4 American Rev Can Studies 568 at 568-95.

matic concerns regarding the implementation of the changes with more fundamental objections. The specific claims procedure, for example, empowered the Department of Indian Affairs with almost total control. It would decide whether to hear a case, what evidence was required, and how it would be funded, before ultimately issuing the final ruling.[68] Such a framework did more to uphold and legitimate the colonial territorial regime than to inaugurate a new era based on treaties. It was persistently criticized by Indigenous organizations; eventually, more impartial forums were created through the Indian Specific Claims Commission, in 1992, and the Specific Claims Tribunal, in 2008. The comprehensive claims process was similarly beset by practical challenges — related to funding, provincial intransigence, and so on — that made actual agreements exceptionally rare.[69] The policy of self-government, which in practice meant devolving administrative responsibility for some service provision to Band governments, simultaneously burdened those organizations and failed to empower Indigenous communities to control their own destinies.[70]

Running in parallel to these policy shifts, a narrow judicial application of contract law to treaties seemed to prove treaty skeptics' worst fears about the impossibility of getting a fair hearing before Canadian courts. In *Johnston v The Queen* (1966), the court ruled that the "medicine chest" provision of treaty eight contained no general right to health care; it implied nothing more and nothing less than a literal responsibility for the government to provide a chest full of medicine on the reserve[71]. In *Pawis v The Queen* (1979), the court held that because the Ojibway's treaty right to hunt in a given area had been violated long ago, the limitation period for raising a breach of contract had passed.[72]

Beyond problems of execution lay fundamental concerns about the extent to which a contractual vision of Crown-Indigenous relations could sustain meaningful transformation to the territorial order. While an emphasis on fairness, contract, and Indigenous consent was surely preferable to the unilateral dispossession and treaty violation of the *St. Catherine's Milling/Sylliboy* framework, it left the idea of overarching Crown sovereignty intact. As Paul McHugh suggests, this narrowness may have contributed to its judicial acceptance. The notion of Aboriginal title as a proprietary right *within* the Crown "imperium,"

68 Arthur J Ray, *Aboriginal Rights Claims and the Making and Remaking of History*, McGill-Queen's native and northern series (Montreal: McGill-Queen's University Press, 2016) at 80-81.

69 *Ibid* at 98.

70 Papillon, *supra* note 3; Abele & Prince, *supra* note 67.

71 Macklem, *supra* note 7 at 142-143; *Johnston v The Queen*, [1966] 56 DLR (2nd) 749, 49 CR 203 (SKCA).

72 Macklem, *supra* note 7 at 141; *Pawis v The Queen*, [1979] 102 DLR (3d) 602, [1980] 2 FC 18.

and the corresponding notion of a treaty as a species of real estate contract, help to explain why questions of Aboriginal and treaty rights should be justiciable within Canadian courts.[73] This strength, however, soon became a constraint, as Indigenous peoples pushed for a more transformative vision of coexistence centered around an "inherent right to self-government."

The contractual interpretation of treaties contains within it the germ of more demanding reforms. Inherent in the idea of a contract is two sides consenting to an agreement. For consent to be actual and the contract valid, the two parties must have some degree of shared understanding of the agreement they are making. Over time, Indigenous advocates of treaty renewal were able to insist that *their* understandings of the "spirit and intent" of the treaty relationship be considered.

Despite the criticisms, treaty fulfillment did not disappear. The notion that a just territorial order will be built around respect for Indigenous property rights and the negotiation of fair treaties for their sale continues to remain influential. Recent jurisprudence has advanced treaty fulfillment by placing government violations of treaty under greater scrutiny.[74] But during the 1980s and 1990s, these notions receded into the background, and another vision of treaty renewal, treaty federalism, came to the fore.

Treaty Federalism

The core of treaty federalism is the notion that treaties are diplomatic agreements through which separate polities enter into mutually acceptable arrangements of coexistence and co-governance. In my usage, the notion of treaty federalism does not prescribe a specific division of powers between Indigenous and settler governments. Rather, treaty federalism names a situation in which Indigenous people continue to exercise self-government within a framework of shared governance.

The term treaty federalism is particularly associated with the work of Sa'ke'j Henderson.[75] It also lies at the core of the Royal Commission on Aboriginal Peoples' proposal for a "renewed relationship."[76] Treaty federalism is closely

73 McHugh, *supra* note 4.

74 *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 [*Restoule*]; *Yahey v British Columbia,* 2021 BCSC 1287.

75 Henderson, *supra* note 22; Russel Lawrence Barsh & James Youngblood Henderson, *The Road* (Berkeley: University of California Press, 2020).

76 *Report of the Royal Commission on Aboriginal Peoples: Restructuring the relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996).

related to the notions of *treaty constitutionalism* and *Indigenous constitutionalism*, as they emerge in the works of James Tully and John Borrows.[77] In each case, what is described is a situation in which Indigenous peoples exercise self-government within a treaty-based framework of negotiation and shared rule. Treaty constitutionalists and treaty federalists point in general terms to the practices of treaty-making, and specifically to the Royal Proclamation, the Treaty of Niagara, and the longstanding institutions of the Covenant Chain and the Kaswentha (two-row wampum belt) as crucial precedents that can guide the realization of a decolonized territorial order in the present.

By the 1990s, treaty federalism replaced treaty fulfillment as the dominant form of treaty renewal. This displacement involved four distinct shifts. First, academics and judges moved from a "contractual" model to a notion of treaties as intersocietal, international, or constitutional documents. Second, the idea that Indigenous self-government could be achieved by delegating federal or provincial authority was replaced by a recognition that Indigenous self-government required a transformed constitutional order. Third, Aboriginal rights were increasingly seen as having an intersocietal or Indigenous, rather than colonial or common law origins. Fourth, those rights grew more potent as Section 35 of the *Constitution Act, 1982* "recognized and affirmed" all "existing Aboriginal and Treaty rights."[78] Each of these shifts extended the possibilities of treaty renewal. What drew them together was the idea that, through treaties, Canada could create a more legitimate territorial regime that respected and allowed Indigenous self-government.

Over the course of the 1980s and 1990s, Indigenous perspectives on treaties became more prominent in academic and judicial contexts. These interpretations pushed back on limited notions of treaties as contracts or land cession agreements, suggesting instead that they be conceptualized as "nation-to-nation agreements" and promises to share and live together on the land. Over time, courts outlined new canons of treaty interpretation that better incorporated Indigenous perspectives. Drawing on American precedents, the Supreme Court of Canada ruled that treaties ought to be construed "in the sense in which they would naturally be understood by the Indians."[79] These principles were re-iterated in *R v Badger* (1996), which explained that "treaty represents an exchange of solemn promises . . . [and] an agreement whose nature is sa-

77 Borrows, *supra* note 14; John Borrows, *Canada's indigenous constitution* (Toronto: University of Toronto Press, 2010); Tully, *Strange Multiplicity*, *supra* note 7.

78 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

79 *R v Simon*, [1985] 2 SCR at 402, 24 DLR (4th) 390 quoting *Jones v Meehan*, 175, US 1 (1899).

cred" and that treaty rights, as constitutional rights, could only be violated by an act of Parliament subject to a constitutional balancing test.[80]

This new direction in jurisprudence was one of several factors that led to a flourishing of academic and community-based scholarship on Indigenous understandings of treaties. Indigenous peoples advanced their own accounts of treaties, showing their divergence from the written texts.[81] For example, many challenged the "surrender" clauses of the post-Confederation Numbered treaties. The text of these treaties state that the Indigenous signatories "cede, release, surrender, and yield up" the land. But Indigenous oral histories record that they did not surrender their land; rather, they granted settlers permission to use or share the land. Recent scholarship confirms that this account of the treaty negotiations is better supported by the available evidence than the contrary view.[82]

Beyond the specific circumstances of negotiations, Indigenous advocates and scholars argue that the so-called "land cession" treaties could only be understood within the longer histories of alliance, commercial cooperation, and treaty-making that preceded them. The earlier treaty relations they appealed to are diverse but converge in recognizing Indigenous peoples' ongoing autonomy and authority over their land. For example, in Southern Ontario, land cession treaties should be constitutionalized through the Covenant Chain, a British-Haudenosaunee alliance extended to the Anishinaabe (among others) circa 1764.[83] The Covenant Chain included the *Kaswentha*, the two-row wampum belt covenant, which had initially been a Dutch-Kanien'kehá:ka agreement.[84] By insisting that treaties be read in light of these ongoing relationships, Indigenous peoples challenged their narrow reduction to land transactions.

80 *R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324.

81 Venne, *supra* note 8; Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations*, 1st ed (Calgary: University of Calgary Press, 2000); Treaty 7 Elders, Sarah Carter & Walter Hildebrandt, *True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996); Craft, *supra* note 8; Marie Battiste, ed, *Living treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016); Corbiere, *supra* note 8.

82 Sheldon Krasowski, *No Surrender: the Land Remains Indigenous* (Regina, SK: University of Regina Press, 2019).

83 Susan M Hill, *The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River*, Critical studies in Native history 20 (Winnipeg, MB: University of Manitoba Press, 2017); Corbiere, *supra* note 8; John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian legal history, and self-government" in Michael Asch, ed, *Aboriginal and treaty rights in Canada: essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997) 155 [Borrows, "Wampum at Niagara"]; Paul Williams & Curtis Nelson, "Kaswentha" (Paper prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples, 1995).

84 Williams & Nelson, *supra* note 83.

The second axis on which treaty federalism advanced was in debates over Aboriginal self-government. During the constitutional negotiations that followed the entrenchment of Section 35, self-government was a major topic of negotiation.[85] The Indigenous organizations that participated in these meetings advocated an *inherent* understanding of Aboriginal self-government, one whose source lay beyond the colonial constitutional framework. The negotiations broke down, in part, over a failure to reach agreement on this point, but the federal and provincial governments subsequently acknowledged an inherent constitutional right to self-government in the 1992 Charlottetown Accord.[86] After the Accord was rejected by referendum, the Liberal Chrétien government established a policy of negotiating based on an inherent right of self-government in 1995.[87]

Treaty federalism offers an interpretative framework through which to understand the exercise of inherent Indigenous self-government. In the opening pages of the Royal Commission on Aboriginal Peoples (RCAP) report, *Restructuring the Relationship*, the Commissioners gesture toward this context as they explain their reasons for centring treaties:

> For a great many people, the centre-piece of any new relationship between Aboriginal and non-Aboriginal people is the inherent right of Aboriginal peoples to self-government. Why then would Commissioners begin with treaties? The explanation is simple. The treaty was the mechanism by which both the French and the British Crown in the early days of contact committed themselves to relationships of peaceful coexistence and non-interference with the Aboriginal nations then in sole occupation of the land. The treaties were entered into on a nation-to-nation basis; that is, in entering into the pre-Confederation treaties, the French and British Crowns recognized the Aboriginal nations as self-governing entities with their own systems of law and governance and agreed to respect them as such. For several centuries, treaties continued to be the traditional method of defining intergovernmental relations between Aboriginal and non-Aboriginal people living side by side on the same land. It continues to be the mechanism preferred by most Aboriginal people today.[88]

Two ideas from this passage are significant. First, because treaties "recognize the aboriginal nations as self-governing entities," they preserve and affirm, rather than undermine, Indigenous self-determination. Renewing the treaty relationship therefore involves strengthening the self-governance of Indigenous nations, and the RCAP's policy recommendations reflect this.

85 Russell, *Canada's Odyssey*, *supra* note 22 at 394-95.
86 *Ibid* at 416.
87 Papillon, *supra* note 3 at 118.
88 *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 76 at 2.

Second, Indigenous nations have their own "systems of law." Although it is not elaborated, the implication is that treaties are inter-jurisdictional or intersocietal agreements. Rather than being contracts *within* Canadian law, they are agreements for coordinating *between* Canadian and Indigenous legal orders.

This perspective accords with emerging theories of the intersocietal origins of Aboriginal Rights, which is the third axis on which treaty federalism advanced. Building on judicial decisions that emphasized the importance of "the aboriginal perspective itself on the meaning of [Aboriginal] rights"[89] scholars including Jeremy Webber, Patrick Macklem, Brian Slattery, James Tully and John Borrows argued that the source of Aboriginal rights lay in the dynamic interaction between Indigenous and settler societies.[90] These arguments draw from ideas of legal pluralism and intersocietal law to establish a tight connection between Aboriginal title and historical treaties. In 1996, for example Jeremy Webber, argued that the foundation of Aboriginal rights is to be found in the customs and norms that evolved over generations of interaction between Indigenous and non-Indigenous peoples.[91] These norms included a respect of Indigenous land ownership and a mutual acknowledgment of criminal jurisdiction. Treaty councils were central to this process, since it was there that the norms were debated and applied.

John Borrows offers an elegant explanation of the intertwining of Aboriginal law and treaties in his important 1997 article on Treaty of Niagara of 1764.[92] The Congress at Niagara was convened by Superintendent of Indian Affairs William Johnson to bring peace in the context of a major Indigenous military campaign led by Pondiac (Pontiac). At the council, Johnson assured the attending Indigenous nations of Britain's friendly intentions toward them, promising to respect their land rights and extending a Covenant Chain of Friendship. Borrows argues that through this negotiation the unilateral principles of the Royal Proclamation were explained, affirmed, and consequently incorporated into the Covenant Chain treaty. In this way, the Treaty of Niagara became a foundational treaty, the "most fundamental agreement, whose terms can be

89 *R v Sparrow*, [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385 [*Sparrow*].

90 Webber, *supra* note 13; Borrows, "Wampum at Niagara", *supra* note 83; Borrows, *supra* note 14; Mark D Walters, *The continuity of aboriginal customs and government under British imperial constitutional law as applied in colonial Canada, 1760-1860* (PhD Thesis, University of Oxford, 1995) [unpublished]; Slattery, *supra* note 14; Macklem, *supra* note 7; Tully, *Strange Multiplicity*, *supra* note 7.

91 Webber, *supra* note 13.

92 Borrows, "Wampum at Niagara", *supra* note 83.

read into all subsequent treaties between the British Crown and Indigenous nations.[93]. Its terms include respect for Indigenous land rights and jurisdiction.

A year after the RCAP final report, *Delgamuukw,* went further than any previous case in affirming the existence of Aboriginal title in the absence of treaties.[94] The *Delgamuukw* decision gave new urgency to the British Columbia treaty process, which had to that point failed to conclude a single agreement. In 1998, the Nisga'a final agreement was signed, after more than a century of advocacy. The Nisga'a final agreement included a substantial measure of self-government, creating the *Nisga'a Lisims* government with paramount authority in several areas.[95]

While substantial, the transformation from treaty fulfillment to treaty federalism never succeeded in eliminating a fundamental ambivalence at the heart of treaties and treaty renewal. Treaties are both mechanisms through which the settler state *legitimates* its territorial authority, and instruments through which Indigenous peoples pursue their own territorial agendas. For proponents of treaty renewal, these two objectives can work together; treaties establish Canada on the basis of "consent and cooperation."[96] For treaty skeptics, however, the prior objective is fundamentally incompatible with the former.

Treaty Skepticism II: Against Recognition

As Indigenous politics in Canada entered the new millennium, the optimistic case for treaty renewal became more difficult to sustain. The breakthroughs of the 1990s, including RCAP, the Charlottetown Accord, the Nisga'a Final Agreement, and the *Sparrow* and *Delgamuukw* decisions, did not yield transformative change. At the same time, resource extraction on Indigenous lands intensified, creating frequent conflicts over mining, oil and gas, and lumber harvesting. These two trends came to a head in 2012/2013 with the emergence of the Idle No More Movement. Idle No More was founded by four women in Regina as a reaction against the Conservative government's Bill C-51, which rolled back environmental protections in order to facilitate large-scale infra-

93 *Ibid* at 169.

94 *Delgamuukw*, *supra* note 54.

95 Edward Allen, "Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement" (2004) 11:3 Intl J on Minority & Group Rights 233 at 233-49; Ross Hoffman & Andrew Robinson, "Nisga'a self-government: a new journey has begun" (2010) 30:2 Can J Native Studies 387.

96 John Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2016) 22 NZULR 188 at 199.

structure construction.[97] It quickly became a channel for a much broader set of challenges to colonialism and extractivism, in Canada and beyond.

As Canadian governance turned toward increasingly neoliberal understandings of "self-government,"[98] and struggles against extractive industry became more central to Indigenous politics, new forms of treaty skepticism came to prominence in calls for "refusal" and "radical resurgence." Indigenous scholars including Eve Tuck, Audra Simpson, Taiaiake Alfred, Jeff Corntassel, Glen Coulthard and Leanne Simpson challenge the practices of negotiation, compromise, and recognition that had dominated the constitutional politics of the 1980s and 1990s.[99] Echoing and nuancing Howard Adams caution that "[n]egotiations satisfactory to two parties are not possible when power is unequally distributed between them," these scholars advocate a tactical "refusal" of engagement. Instead, they promote Indigenous nation-building and the resurgence of Indigenous political and legal orders as a path to "build the alternatives" rather than "change the system," in Leanne Simpson's formulation.[100]

Dene political theorist Glen Coulthard is a leading proponent of the new treaty skepticism. Rather than hailing the progress of treaty renewal, Coulthard argues that since the White Paper, colonialism has adopted a new, insidious form: the "politics of recognition."[101] Coulthard reads recognition as a form of state governmentality that entrenches domination and dispossession.

In his landmark book *Red Skin, White Masks*, Coulthard mentions treaties only in passing. His two-page discussion of the RCAP report notes that while its "vision of a reconciled relationship premised on mutual recognition is not without flaw", it is a "potentially productive point of entry."[102] Coulthard then moves on to discussing the federal government's failure to engage with

97 Kino-nda-niimi Collective, ed, *The winter we danced: voices from the past, the future, and the Idle No More movement* (Winnipeg: Arbeiter Ring Publishing, 2014).

98 Papillon, *supra* note 3.

99 Eve Tuck & K Wayne Yang, "Decolonization is not a metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1; Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham, NC: Duke University Press, 2014); Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences against contemporary colonialism" (2005) 40:4 Government & Opposition 597 at 597-614; Jeff Corntassel, "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination" (2012) 1:1 Decolonization: Indigeneity, Education & Society 16; Simpson, *Dancing on our turtle's back*, *supra* note 11; Simpson, *Indigenous Freedom*, *supra* note 19.

100 Leanne Betasamosake Simpson, "Indigenous Resurgence and Co-resistance" (2016) 2:2 Critical Ethnic Studies 19 at 19-34 [Simpson, "Indigenous Resurgence"].

101 Coulthard, *supra* note 5.

102 *Ibid* at 119.

RCAP's recommendations.[103] In a 2015 interview with Harsha Walia, however, Coulthard summarizes his reasons for skepticism toward treaty renewal.

> [H]istorical relationships [between Indigenous and non-Indigenous peoples] were interdependent enough that settler-colonial representatives could be compelled to respect the economic and political strength of Indigenous nations, resulting in a recognition of the relative equality and autonomy that some historic treaties speak to. However, in our current reality the colonial relationship is structured by profound dependency, inequality and hierarchy; in such a situation the analogy of "sharing the river" no longer holds true, nor does it make much sense as a model to aspire to.
>
> Two problems emerge when we try and apply the nation-to-nation framework — for example to the 17th-century Haudenosaunee Two-Row wampum treaty[104] — to the power relations we face today. First, they assume a moral equivalency between the colonizer and the colonized that simply doesn't exist. And second, they assume the legitimacy of the ship — of the state's economic, legal and political institutions that have destroyed the river and eroded the riverbank. Under such conditions, "recognizing" the legitimacy of the colonial ship's right of travel is an impossibility and we need to start orienting our struggles toward a different goal.
>
> The conceptions of reciprocity that inform many Indigenous peoples' understanding of land and relationship cannot be established with, or mediated through, the coercive institutions of state and capital. These constitutive features of Canada need to be radically transformed for an authentic relationship of peace, reciprocity and respect to take root. In order to build a truly decolonized set of relationships grounded in respect and reciprocity we need to sink the ship.[105]

For treaty proponents, the task is to transform the institutions of the Canadian state to overcome its unjust, imperial strands. For Coulthard, the institution of the state itself is the problem, incompatible with both Indigenous lifeways and with respect and reciprocity. Under present conditions of colonial inequality, turning to treaties is a flawed political strategy.

There is a deeper concern as well. Like many resurgence theorists, Coulthard worries that (treaty) negotiations are more likely to change Indigenous peoples than to change the system. Coulthard draws from the work of Paul Nadasdy who observes that the process of negotiating land claims agreements compelled the people of the Kluane First Nation to "translate their complex reciprocal

103 *Ibid* at 119-20.

104 The Two-Row Wampum depicts two boats — a canoe and a sailing ship — travelling parallel courses down a river.

105 Harsha Walia, "'Land is a Relationship': In conversation with Glen Coulthard on Indigenous nationhood" (20 January 2015), online: *rabble.ca* <rabble.ca/columnists/2015/01/land-relationship-conversation-glen-coulthard-on-indigenous-nationhood> [perma.cc/DG26-Y9CR].

relationship with the land into the equally complex but very different language of 'property.'"[106] Reflecting on this observation, Coulthard suggests that,

> one of the negative effects of this power-laden process of discursive translation has been a reorientation of the meaning of self-determination for many (but not all) Indigenous people in the North; a reorientation of Indigenous struggle from one that was once deeply *informed* by the land as a system of reciprocal relations and obligations (grounded normativity), which in turn informed our critique of capitalism . . . to a struggle that is now increasingly *for* land, understood now as material resource to be exploited in the capital accumulation process.[107]

By drawing particular attention to transformations in the "meaning of self-determination" Coulthard raises the concern that treaty federalism, in restoring "nation-to-nation" relationships, actually distorts the grounded normativities that are foundational to Indigenous political orders.

Reflecting the anti-extractive orientation of recent political struggles, but drawing from deep Indigenous philosophical traditions, resurgence places environmental concerns - "struggles *informed* by land"- at the centre of Indigenous politics. For Glen Coulthard and Leanne Simpson, the central aim of Indigenous politics should be to protect and strengthen Indigenous *grounded normativities*. In a co-authored article, they explain:

> What we are calling "grounded normativity" refers to the ethical frameworks provided by these Indigenous place-based practices and associated forms of knowledge. Grounded normativity houses and reproduces the practices and procedures, based on deep reciprocity, that are inherently informed by an intimate relationship to place. Grounded normativity teaches us how to live our lives in relation to other people and nonhuman life forms in a profoundly nonauthoritarian, nondominating, nonexploitive manner. Grounded normativity teaches us how to be in respectful diplomatic relationships with other Indigenous and non-Indigenous nations with whom we might share territorial responsibilities or common political or economic interests. Our relationship to the land itself generates the processes, practices, and knowledges that inform our political systems.[108]

Many Indigenous resurgence scholars agree with Coulthard's desire to revitalize Indigenous legal and political orders and share his worry about the incompatibility between grounded normativities and the modern, capitalist state. Not all, however, are prepared to embrace treaty skepticism as a result. Some seek a vision of ethical coexistence through treaty that directly con-

106 Coulthard, *supra* note 5 at 78.

107 *Ibid*.

108 Coulthard & Simpson, *supra* note 19 at 254.

fronts the predations of extractivism and capitalism. In the last decade or so, a number of scholars have put forward a new vision of treaty renewal: treaty resurgence.

Treaty Resurgence

Treaty resurgence seeks to place territorial authority on a foundation of reciprocal, ethical relationships between human beings, and with the earth. It is a project of resurgence in the sense that seeks to strengthen Indigenous communities through a revitalization of legal and political traditions. It is also a third type of treaty renewal, one which goes further to incorporate Indigenous perspectives by placing Indigenous treaty traditions at its centre. Treaty resurgence scholars go further than earlier generations of treaty scholarship based on oral histories by advancing thick alternative accounts of treaties as a distinct mode of *relationality* rooted in Indigenous laws and normativities. Rather than viewing treaties as contracts or diplomatic accords, these scholars present treaties as practices of kin-making, mutual aid, or recognized interdependence.

Unlike treaty fulfillment and treaty federalism, treaty resurgence has not been taken up by major institutions of the Canadian state. It remains a primarily critical project, one which helps to expose the limitations of existing forms of treaty renewal and suggests alternatives. My discussion of treaty resurgence therefore focuses on academic scholarship. I engage the work of Anishinaabe scholars Leanne Simpson, Heidi Stark, and Aaron Mills, and Anishinaabe and Cree scholar Gina Starblanket. These writers speak particularly to Anishinaabe treaty traditions and are cautious about generalizing to other Indigenous nations.

Nishnaabeg scholar Leanne Simpson's 2008 article "Looking after Gdoo-naaganinaa" is an early, programmatic articulation of treaty resurgence.[109] As we have seen, Simpson is a proponent of resurgence and refusal; she favors "building the alternatives" rather than trying to "change the system."[110] Her advocacy of treaty resurgence should be understood as part of that project. Simpson argues that renewing treaty relationships, as envisioned by RCAP, is an "important decolonizing strategy" but that its potential is limited by persistent misunderstandings of the concept of treaty and of Indigenous traditions of treaty making.[111] She explains that "[d]estabilizing and decolonizing the

109 Leanne Simpson, "Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23:2 Wicazo Sa Rev 29 at 29-42 [Simpson, "Looking after Gdoo-naaganinaa"].

110 Simpson, "Indigenous Resurgence", *supra* note 100.

111 Simpson, "Looking after Gdoo-naaganinaa", *supra* note 109 at 31.

concept of "treaty" then becomes paramount to appreciate what our ancestors intended to happen when those very first agreements and relationships were established."[112] Recovering these treaty traditions can provide a model for "alternatives to our present situation and relationship with colonial governments and settler states."[113]

Simpson situates Crown-Indigenous treaties within a broader context of "relationships within our territory, whether those relationships were with the land, with the animal nations that form the basis of our clan system, or with neighboring Indigenous nations and confederacies."[114] In doing so, Simpson displaces not only narrowly contractual notions of treaty, but also notions of treaty as a distinctively *diplomatic* or inter-societal relationship. This distinction is central to the differentiation between treaty resurgence and treaty federalism. Simpson develops this point by quoting favourably from Cree scholar Harold Johnson, who explains that treaty making is a form of adoption or kin making.[115] This places treaties on a continuum of relationships, but Simpson goes further by narrating foundational treaties with the hoofed nation and the fish nation. She explains that "[a]nimal clans were highly respected and were seen as self- determining, political "nations" (at least in an Indigenous sense) to whom the Nishnaabeg had negotiated, ritualized, formal relationships that required maintenance through an ongoing relationship."[116]

Rather than demarcating a specific, lofty kind of relationship, treaty is presented as a basic mode of "relationality," in Starblanket's phrase.[117] For Simpson, maintaining "good relationships" whether "as individuals, in families, in clans, [or] with other Indigenous nations and confederacies" is part of a single overarching ethic, "Bimaadiziwin or "living the good life.""[118] "Bimaadiziwin is a way of ensuring human beings live in balance with the natural world, their family, their clan, and their nation and it is carried out through the Seven Grandfather teachings, embedded in the social and political structures of the Nishnaabeg."[119] To make and uphold a treaty relationship, then, is a way of practicing Bimaadiziwin.

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112 *Ibid*.

113 *Ibid* at 38.

114 *Ibid* at 31.

115 *Ibid* at 30; Harold Johnson, *Two families: treaties and government* (Saskatoon: Purich Publishing, 2007).

116 Simpson, "Looking after Gdoo-naaganinaa", *supra* note 109 at 33.

117 Starblanket, *supra* note 12.

118 Simpson, "Looking after Gdoo-naaganinaa", *supra* note 109 at 32.

119 *Ibid*.

On a relational understanding, each treaty is nested within a pre-existing set of treaty relations. In her analysis of Anishinaabe treaty-making with Canada and the United States, Heidi Stark explains that "the Anishinaabe saw the treaties as vehicles for building relationships vested in reciprocal responsibilities."[120] Stark draws particular attention to treaty-negotiators' invocations of "Creator" and of the sacred law in the context of treaty councils. She explains:

> By using their sacred laws, the Anishinaabe were engaging in a process that incorporated the Creator and all of creation in their political practices. In doing so, the Anishinaabe were simultaneously recognizing their sovereignty (and thus responsibilities to their lands) as being derived from the Creator and the Anishinaabe were bringing the new-comers into these pre-existing relationships by including the Creator in any dealings or transactions that pertained to this "inheritance." This was critical because of the responsibility Anishinaabe people had both to the Creator and to their lands.[121]

In contrast to both contractual and diplomatic treaty traditions, this relational understanding does not present treaties as *transferring* authority over territory from one party to another. Instead, through treaty, newcomers enter a relationship with their treaty partner, with Creator, and with the land itself.

Treaty resurgence suggests a re-imagination of the foundations of Canada's territorial authority. In this vision, Crown authority depends on maintaining treaty relationships, not only to Indigenous peoples, but to the earth. Through treaty, the Crown has entered into networks of responsibility that includes animals, plants, and other non-human treaty relatives. To legitimate its authority, the state must uphold these responsibilities, which find their substance in Indigenous law.

Legal theorist Aaron Mills is the clearest proponent of treaty resurgence as a form of treaty renewal. Where Simpson and Starblanket focus primarily on treaty resurgence as a path to reviving Indigenous traditions of internationalism and relationality, Mills envisions transformed settler-Indigenous relations. Crucially, however, this version of treaty renewal requires more than improving the state's relationship to Indigenous peoples; it requires fundamental transformation to the settler constitutional order itself. "As a participant in the treaty order . . . settler peoples have to reconcile their liberal foundation with the Earth-first relationalism of the treaty superstructure. That won't be

120 Stark, "Respect, Responsibility, and Renewal", *supra* note 8 at 153.

121 Stark, "Changing the Treaty Question", *supra* note 17 at 257.

an easy task."[122] Indeed, it will require deep, structural change. Nevertheless, Mills expresses optimism that it is possible. For example, he writes that "[m]y intention is for readers to appreciate that rooted constitutionalism [his term for Indigenous constitutionalism] — and rooted legality more generally — is open to all persons and peoples." [123] What is required is that these peoples embrace "humility" by recognizing that they are part of creation, rather than masters over it. Building on Borrows,[124] Mills suggests that the seeds of such a transformation are already present in Canadian history: "this alternative vision of treaty is actual, not ideal. It isn't a dream to be realized one day, forever in the future. The Treaty of Niagara, 1764 represents the intercultural achievement of this understanding on Mikinaakominis, and Indigenous peoples have never legitimated a new constitutional relationship."[125]

Conclusion: The Future of Treaty Renewal

To date, treaty resurgence has not been widely taken up by non-Indigenous Canadian institutions. It is easy to see why. Treaty resurgence advances a vision of treaty renewal that is unfamiliar to settler political traditions and threatening to the contemporary economic and political order. To the degree that treaty resurgence has found expression beyond the academy, it has largely been in the context of local environmental initiatives.[126] This localism resonates with the deep commitment of treaty resurgence to place-based, grounded normativities.

Nevertheless, we should not lose sight of the constitutional dimension of treaty resurgence. For decades (and for centuries) Indigenous peoples have struggled to bring treaties to the center of Canada's territorial regime. This project has had some success; to the degree that they have been institutionalized, treaty fulfillment and treaty federalism represent real gains for Indigenous peoples. However, the challenge remains to answer the skeptics' challenge by anti-colonial substance to the re-invigorated treaty system.

If treaty resurgence is the next step on that path; it is unlikely to be the last. If and when it gains broad currency, there will be distortions and problems of execution. Conceptual shortcomings and inadequacies will become ap-

122 Mills, "What is a Treaty", *supra* note 17 at 242.

123 Aaron James (Waabishki Ma'iingan) Mills, *Miinigowiziwin: all that has been given for living well together: one vision of Anishinaabe constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] at 206.

124 Borrows, "Wampum at Niagara", *supra* note 83.

125 Mills, "What is a Treaty", *supra* note 17 at 238.

126 Jessica Hallenbeck, "Returning to the water to enact a treaty relationship: the Two Row Wampum Renewal Campaign" (2015) 5:4 Settler Colonial Studies 350 at 350-62.

parent, fueling further waves of treaty skepticism and critique. If history is a guide, these critiques will drive further refinements of treaty renewal. If nothing else, the repeated confrontations over treaty renewal have demonstrated the attractiveness and durability of the treaty system itself. To this day, it remains the most plausible institutional framework for a just, anticolonial territorial regime.

In this essay, I have endeavoured to place the treaty system and territorial authority at the centre of our interpretation of the last fifty years of Indigenous constitutional politics. Doing so can bring our accounts of Canadian law and politics into closer dialogue with Indigenous traditions for which land and territory is fundamental. It also draws greater attention to the diversity of Indigenous perspectives on treaty, and to the complex dialectics of treaty colonialism, treaty renewal, and treaty skepticism that have shaped territorial authority in Canada.