COMPLETING CANADIAN CONFEDERATION

WITH AN ABORIGINAL ORDER OF GOVERNMENT

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EXECUTIVE SUMMARY

This report explores scholarship relevant to the emergence of a third, Aboriginal[1] order of government in Canada. We analyze how evolving jurisprudence, Aboriginal-led stewardship of protected areas, modern land-claim and co-management agreements, and the implementation of UNDRIP are reshaping the traditional two-order federal structure and recognizing indigenous stewardship over traditional territories. While legal recognition remains fragmented and partial, a three-cornered federation is steadily being built from the ground up. This gradual process has the potential to enhance political stability, economic certainty, and the completion of Canadian Confederation.

Background

Europeans arriving on the shores of what are now known as the Americas encountered a continent fully populated by organized societies. Europeans learned how to conduct themselves according to Aboriginal diplomatic norms and legal orders. The relationship between the Europeans and their Aboriginal allies in this period (roughly 1550 – 1800) hewed more closely to Aboriginal norms than European.

By the mid-nineteenth century, the balance of power had shifted. The system of alliances gave way to violence, domination, and oppression as the young Dominion of Canada, and the new United States of America radically altered their relationship to Aboriginal nations. This change

[1] We use the adjective 'Aboriginal' to refer to First Nation, Inuit and Métis people in Canada, in line with usage in the Constitution Act 1982. In French,' autochtone' is used. The term 'Indigenous peoples' has become the international standard, as in the United Nations Declaration on the Rights of Indigenous Peoples.

was evident when the historical Treaties (also known as post-confederation numbered Treaties, Treaty 1-11) started to be negotiated (1871 to 1921) between the Canadian Federal Government and the nations living in west and north of the Great Lakes. The pressure of settlement and the presence of state power meant that no treaties were negotiated in present day Quebec, British Columbia, Yukon and Nunavut (RCAP Vol 2 Part 1).

Historical Treaties had a different meaning for Indians and the Government. Whereas for the former, they were 'peace and friendship' agreements; for the latter, they were 'cede and surrender' treaty, and this view was entrenched in jurisprudence and Dominion policy. It is only within the past two decades, well after the constitutionalizing of section 35, that Canadian courts have begun to reorient themselves, accepting the existence of Aboriginal law and self-governance. Modern treaties began to be negotiated in 1975, incorporating shared land and resource management regimes and self-government agreements. The emergence of a third constitutional order is the product of these changes.

Objectives

This project considers scholarship related to the emergence of a third, Aboriginal constitutional order in Canada. It examines evolving jurisprudence, new forms of self-government, agreements between Aboriginal and other Canadian governments concerning lands and other matters, and the impact of the United Nations Declaration on the Rights of Indigenous Peoples. To manage complexity and to do justice to the breadth of Aboriginal experience, we focus in this document on First Nation and to a much lesser degree the Métis experience. Inuit have built distinctive forms of self-government in four Canadian jurisdictions rooted in their own history of contact with the Crown and current circumstances. There is not space to treat this distinctive history in the present document.

With this work we hope to inspire others to test and develop these findings with a critical eye, and to provide an analysis that useful to those we are working to realize Indigenous self-government within the federation.

Results

Canadian courts and Crown governments have yet to explicitly recognize a third, Aboriginal constitutional order, but the outlines of a third order jurisdiction are emerging in at least three areas. We examine:

1. Evolving jurisprudence interpreting Sec. 35 of the Constitution Act
2. The growing number and types of shared governance and rights recognition agreements between Aboriginal governments and federal, provincial and territorial governments
3. Implications of Canada's endorsement of the United Nations Declaration on the Rights of Aboriginal Peoples.

There is the most substantial secondary literature relevant to the first two of these.

Key Messages

In line with Canada's 'living tree' constitutional tradition, we have the extraordinary opportunity to adjust the federation to give space to a third order of Aboriginal government. Aboriginal peoples will build their own institutions of self-determination. They will develop their own policies for domestic purposes. In response, the institutions of Canadian governments must change so that they mesh smoothly with emerging Aboriginal government, building upon recent innovations to develop institutions to extend the equalization principle to these governments and provide mechanisms for shared policy development and conflict resolution.

Broad public acceptance and understanding of these changes is essential and will depend upon education and explanation.

Search methods and Methodology

Four senior scholars and five research assistants used Google Scholar, CanLII and LexisNexis to locate and verify sources. The research assistants prepared annotated bibliographies and review essays that served as resources for the research report. Search terms were revised in an iterative process based on the results of the analysis and the knowledge base of the report's authors. The text was co-written and repeatedly revised.

COMPLETING CONFEDERATION WITH A THIRD ABORIGINAL ORDER OF GOVERNMENT

Canadian courts and Crown governments have yet to explicitly recognize a third, Aboriginal constitutional order, but the outlines of a third order jurisdiction are emerging.[2] In this document, we focus on this as it arises for First Nations. While there are important areas of convergence in the experience of First Nation, Métis and Inuit, there are unique histories and present circumstances. In this document we focus on First Nations, with some attention when possible to the other two constitutional groups, who will be discussed in future publications. Métis history is distinct and both history and current governance objectives require separate treatment. Inuit have built distinctive forms of self-government in four Canadian jurisdictions rooted in their own history of contact with the Crown.

We examine three arenas of change:

1. Evolving jurisprudence interpreting Sec. 35 of the Constitution Act

[2] We use the adjective 'Aboriginal' to refer to First Nation, Inuit and Metis people in Canada, in line with usage in the Constitution Act 1982. In French,' autochtone' is used. The term 'Indigenous peoples' has become the international standard, as in the United Nations Declaration on the Rights of Indigenous Peoples.

2. The growing number and types of shared governance and rights recognition agreements between Aboriginal governments and federal, provincial and territorial governments
3. Canada's adoption of the United Nations Declaration on the Rights of Aboriginal Peoples.

In line with Canada's 'living tree' constitutional tradition[3], federalism continues to evolve in response to a growing political consensus of the need to safeguard economic stability and the health and well being of all citizens while attending to the treaty and other constitutional rights of Canada's Aboriginal people. Before focussing on recent developments, some background will be important.

Background: How Aboriginal-Canada relations got to this point

Europeans arriving on the shores of what are now known as the Americas encountered a continent populated by organized societies from coast to coast and pole to pole. Along the North-eastern seaboard, Dutch, French and British colonists found themselves as strangers to pre-existing social and political norms. Among themselves, Aboriginal peoples and nations had been conducting formal inter-national diplomacy since time immemorial. These diplomatic forms included well established norms, practices and technologies designed to draw allies into closer and closer relations, more akin to family than ally. It was into this world of Aboriginal norms and legal orders that European settlers arrived (Borrows 2010).

[3] The living tree doctrine is a Canadian constitutional principle that recognizes the importance of balancing continuity and consistency with changing social realities. Like a living tree, the constitution grows through judicial interpretation that responds to social change and practical innovations while respecting its original principles. See Brouillet and Gagnon (2018). Metallic (2022) relies upon this doctrine in interpreting the salience of the United Nations Declaration on the Rights of Indigenous Peoples to Canadian law.

To engage with Aboriginal legal orders, Europeans learned how to conduct themselves according to Aboriginal diplomatic norms. These included the use of the calumet, wampum, and a metaphoric language that communicated broad generalities rather than specific outcomes (e.g. to 'clear the road' or to 'wash away the blood' as metaphors for peace.) French, Dutch and British officials entered into these negotiations initially to secure land, and then trading partners. These relationships matured into military and political alliances. Between the British and the Haudenosaunee confederacy (the five and later six nations) this alliance came to be known as the Covenant Chain. The 'chain' is itself a metaphor, having evolved from a rope that bound the parties, to an iron chain, and finally to a silver covenant chain that symbolized a mature, military and political alliance requiring annual renewal (polishing the chain).

To enter into treaty prior to the nineteenth century meant to enter into a shared political space of claim and counter claim. The relationship between the Europeans and their Aboriginal allies in this period (roughly 1550 – 1800) hewed more closely to Aboriginal norms than European. Alliance members were bound together in something more akin to a family, and indeed, French Indian allies referred to the Canadian governor as 'father,' while Britain and her allies described their relationship as 'brothers'.

By the mid-nineteenth century, this familial relationship of alliance gave way to violence, domination, and oppression as French and British colonial officials yielded authority to a new breed of government officials with no memory of the prior order. The young Dominion of Canada, and the new United States of America radically altered their relationship to Aboriginal nations. This change was evident when the historical Treaties (also known as post-confederation numbered Treaties, Treaty 1-11) started to be negotiated (1871 to 1921) between the Canadian Federal Government and the nations living in west and north of the Great Lakes. The Aboriginal

parties to the treaties understood them to be binding diplomatic agreements but the Dominion officials were seeking secure ownership and access to arable agricultural land on the prairies, a route for a transcontinental railway, Klondike gold, and northern oil. The prevailing balance of power had decisively shifted due to disease, extermination of the buffalo, and the presence of police and military forces. These circumstances and the ultimate suppression of Metis resistance meant that the Dominion government was able to coerce First Nation acceptance of treaties and confinement to reserves, and Metis acceptance of scrip in exchange for cash or a small parcel of land (Augustus, 2005; Daschuk, 2013; Asch, 2014).

The pressure of settlement and the presence of state power meant that no numbered treaties were negotiated in present day Quebec, British Columbia, Yukon and Nunavut (RCAP Vol 2 Part 1). Treaty negotiation halted after 1923.

Historical Treaties had a different meaning for Indians and the Government. Whereas for the former, they were ‘peace and friendship’ agreements; for the latter, they were ‘cede and surrender’ treaty. By signing them, the Government considered Indian land surrendered while its sovereignty recognised. In simple terms, with the signature of the numbered treaties, the government asserted its political superiority while paving the way to shaping a legal system that for a long time was dominated by imperial doctrines and colonial mindsets. Canadian courts in the nineteenth century were still shaped by such colonial heritage; thus treating First Nations as defeated wards, and supported governmental assertions of legal, political and cultural superiority. The numbered treaties that cover most of central and western Canada were unlike all previous treaties as they were boilerplate documents and held no ‘meeting of the minds’ as required by contract law. Terms were misrepresented to Aboriginal signatories, while the ‘taking up clause’ provided legal authority for the Crown to assume ownership of all but small Indian ‘reserves’. In

those parts of Canada south of the 60th parallel where no treaties were signed, very small reserves were established by administrative fiat (see e.g. Cole Harris, 2002).

It is only within the past two decades, well after the constitutionalizing of section 35, that Canadian courts have begun to reorient themselves, accepting the existence of Aboriginal title, law and self-governance. Increasingly, the Courts have begun to recognize Aboriginal litigant claims of governance and political authority over their members and territories (Satsan et all 2022).

In addition to transformative jurisprudence, political negotiations have produced modern treaties (such as the James Bay and Northern Quebec Agreement (JBNQA), signed in 1975, Canada's first modern comprehensive land claims treaty)[4] as well as shared land and resource management regimes, self-government agreements, and other intergovernmental arrangements such as for parks and conservation areas. The emergence of a third constitutional order is the product of these changes.

Objectives

The objective of this project was to consider in one analysis scholarship relevant to the emergence of a third Aboriginal constitutional order. This included scholarship on evolving jurisprudence, agreements between Aboriginal governments and other Canadian orders, and the impact of the United Nations Declaration on the Rights of Indigenous Peoples. With this work we hope to inspire others to test and develop these findings with a critical eye.

[4] Since 1975, 27 modern treaties have been negotiated by Inuit and First Nation peoples. Pursuant to the modern treaties, Inuit in Labrador, Quebec, Nunavut and Northwest Territories have confirmed land rights and established governments. Métis are party to only one modern treaty (Sahtu in the Northwest Territories). They have negotiated self-government and rights recognition agreements that are recognized in federal legislation in Ontario, Manitoba, Saskatchewan and Aberta. These differ from the modern treaties in that they do not include a land base.

Beyond the opportunities created by participation in the SSHRC Knowledge Synthesis program, we intend to disseminate our findings in a variety of ways that are described in the knowledge mobilization section below. Because we are responding to the needs expressed by First Nation partners in the Rebuilding First Nations Governance project, we consider them to be the first audience for this work.

Methods

A team of research assistants with support from senior researchers were assigned to develop bibliographies. We used Google Scholar, CanLII and LexisNexis to locate and verify sources. These results were then supplemented by checking references within the source materials themselves. The following themes, developed iteratively, were used in searches:

- Third order of Aboriginal Government
- Retrieval and revivification of Aboriginal political theory
- Legal history and evolution of jurisprudence
- Legal and policy mechanisms that recognize, implement and reconcile Aboriginal rights and interests in land and resources
- Practices of intergovernmental engagement
- Canadian innovation in these areas in the global context

One student, a native speaker, reviewed the academic literature in French using Google Scholar. The keywords used were “troisième ordre de gouvernement autochtone canada”, “aires protégées arrangements gestion gouvernement autochtone Canada”, “auto-gouvernance autochtone Indian Act canada” and “auto-gouvernance autochtone loi sur les indiens canada” and “autodétermination autochtone loi sur les indiens Canada” on self-

government outside of the framework of the Indian Act, and finally "jurisprudence ordre de gouvernance autochtone" on jurisprudence laying basis for an Aboriginal order of government or a third order of government. This student prepared a review essay on the treatment of these issues in francophone scholarship. While there is substantial convergence with the anglophone academic literature, there are some distinctive features of the academic literature in French. For this reason, the review essay on the literature in French is included in the Supplementary materials section.

As the work proceeded, we repeatedly adjusted the categories and undertook contextual research in secondary sources as needed. It became apparent that the original plan to present the Canadian experience in the global context was less informative than focusing on implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada and abroad. The Declaration became the focus of a new strand of research. We concluded that while it is early for the impact of UNDRIP to have registered, it is likely to be important to the emergence and elaboration of the third order (Metallic 2022).

Results

Evolving Jurisprudence

The jurisprudence concerning the existence of Aboriginal governance in Canada demonstrates a fragmented recognition of Aboriginal authority, but not the full-throated acceptance of a constitutionally entrenched third order of government. The strongest recognition appears in Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families***,** 2024 SCC 5**.** The Supreme Court of Canada unanimously upheld *An Act respecting First Nations, Inuit and Métis children, youth and families* (Bill C-92) under Parliament's s. 91(24) jurisdiction

("Indians, and Lands reserved for Indians"). The Act's purpose was to protect Aboriginal children through culturally appropriate services and advance reconciliation, falling squarely within federal authority. Put absolutely, "the Act creates space for Aboriginal groups, communities and peoples to exercise their jurisdiction to care for their children" (para 134).

In contrast, the jurisprudence on land rights does not strongly support the existence of Aboriginal *governance*. Per the SCC in *Delgamuukw*, British Columbia's entry into Canada in 1871 asserted a radical title to the land, such that First Nations people could only possess an interest in land parasitic to the Crown's underlying title. On this view, s. 35 of the *Constitution Act, 1982* did not revive any sovereignty rights which the Gitksan and Wet'suwet'en may have had. Similarly, Cowichan Tribes v. Canada (Attorney General) does not declare that Cowichan possess sovereignty in the sense of an independent, constitutionally recognized third order of government, nor a general right of Aboriginal self-government or legislative power over the title area as a freestanding constitutional order. Instead, Cowichan re-affirms the orthodox *Tsilhqot'in*/*Delgamuukw* line that Aboriginal title is a burden on the underlying Crown radical title. This is not the same as sovereignty – though see Sanderson and Singh (2021) for more about the complex relationship between Aboriginal title, the inherent limit, and sovereignty.

In-between the positions of *An Act respecting First Nations, Inuit and Métis children, youth and families*, and the jurisprudence on Aboriginal title, we have jurisprudence regarding the Indian act and treaties. Within the sphere of *Indian Act* governance on reserve, the courts recognize limited forms of First Nation self-governing authority but generally treat *Indian Act* chief and councils as administrators acting under federal legislation. In Dickson, the Supreme Court of Canada held that the Charter applies to Aboriginal governments when exercising powers "integral to self-governance" under federal statutes such as the *Indian Act*, including elections,

membership rules, and resource management. Canadian courts may therefore intervene in internal matters where constitutional rights, such as equality under the *Indian Act*, are violated. *Indian Act* band councils acting as administrators under this framework remain subject to federal limitations.

Treaty-based governance provides a further sphere in which Aboriginal authority is recognized, but again without constitutional recognition of sovereignty. In *House of Sga'nisim v Canada,* the appellants argued that the treaty attempted to create a "third order of government" and to use s. 35 of the *Constitution Act, 1982* impermissibly to amend the Constitution by ordinary legislation. They also argued that any purported delegation of powers through federal or provincial Settlement Legislation to the Nisga'a Government was an improper abdication of legislative power. The Court rejected these arguments and held that the impugned grants of legislative or self-government powers and the other impugned grants of authority in the Treaty were valid delegations of power. It was unnecessary to decide whether some or all of the self-government powers derived from an inherent Aboriginal right, and the Treaty was constitutionally valid. It follows that if a treaty recognized a third order of government, it could be found as valid.

Treaty arrangements also provide for delegated powers in cases such as **Mikisew Cree First Nation**, where the First Nation was described as a third order of government in Canada with the right and responsibility to determine its own democratic governance structure. In that case the governance structure was created by Regulations, and if a reasonable interpretation of the Regulations could be found there was no need to search further for precedents. The federal court says clearly in their conclusion, "the Mikisew Cree First Nation is a third order of government in Canada, it has the right and responsibility to determine its own democratic governance structure"

(para 18). That structure is created by the regulations as they follow from treaty rights under treaty 8.

However, other cases reject constitutional recognition of Aboriginal governments as a third order of government. In Orr v Peerless Trout First Nation FCJ**,** the Court held that s. 3 of the Charter is clear and unambiguous and that it is not for the Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so. The Supreme Court of Canada addressed s. 3 of the Charter in *Baier* in a similarly clear manner, stating that voting and candidacy rights are explicitly protected only in relation to the House of Commons and provincial legislatures, and that courts cannot create constitutional rights in respect of a third order of government where the Constitution does not provide for them.

A similar pattern appears in the jurisprudence relating to Métis governance. *The Métis Act, SS 2001, c M-14.01*, does not establish or reference in any way the Constitution of Métis Nation – Saskatchewan. Métis Nation – Saskatchewan came into existence by virtue of the Constitution of Métis Nation – Saskatchewan and is treated as a voluntary organization and self-proclaimed nation established by individuals who self-identified as Métis in Saskatchewan. The Métis Nation – Saskatchewan's Constitution states in Article 12 that the Metis Nation is seeking self-government as a third order of government within Canada, but at present, constitutional recognition at the federal level remains an aspiration of the organization.

Jurisprudential limits on Aboriginal governance are also evident in *Mitchell v. M.N.R*, where the Supreme Court rejected a cross-border rights claim and held that Aboriginal rights exist within Canada's sovereign framework, as recognition of cross-border rights would challenge Canadian territorial integrity.

The jurisprudence thus reveals a stark tension: growing recognition of an Aboriginal right to governance alongside reluctance by the Courts to affirm a third constitutional order. However, there are important developments in policy and practice. The federal Crown has, in recent years, entered into comprehensive land claim agreements that often provide modern treaty nations some degree of governance over matters that are otherwise the exclusive jurisdiction of the federal and provincial orders of government. At the same time, jurisprudence since *Delgamu'uk/Gisday'wa* has amplified the import of Section 35, affirming jurisdiction over lands and child welfare while stopping short of rewriting the Constitution Act.

Aboriginal title and land governance

> "Land and water are inextricable from Indigenous cultures; they cannot be separated from Indigenous ways of life, identities, values, spiritual practices or knowledge systems." (ICE p35)[5].

Indigenous political organizing since the 1960s has often focused on reclaiming jurisdiction over lands and waters (Satsan, McNeil & Abele, 2020; Abele et al., 2021) to restore an economic base and to reclaim cultural and spiritual responsibility to steward the land for future generations according to their own legal orders. (Arngna'naaq 2020; Hadyn and Pasternak 2019; Tesar 2026). Aboriginal peoples have successfully advanced their interests on several fronts: implementation of modern treaties; recognition of Aboriginal title; the creation of Indigenous-led parks and protected and conserved areas; and the displacement of federal and provincial law with

[5] We Rise Together - Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation https://www.icce-caec.ca/wp-content/uploads/2022/07/PA234-ICE_Report_2018_Mar_22_web.pdf

Indigenous law. These varied innovations are rooted in the original sovereignty of the peoples, their enduring responsibilities to their territories and to the well-being of the people.

These innovations have also, in different ways, redefined and strengthened the role of Aboriginal peoples in their relationships to and with the Crown, and are taking Canada beyond the strict two-order boundaries laid out at Confederation (White 2020; Smith 2021). The new arrangements have been created piecemeal, mostly on a local or regional basis to protect and care for specific Indigenous territories, and shaped by the prevailing state of evolving jurisprudence and the regional histories, politics and peoples involved (Smith 2021). The extent of their collective impact on the Canadian landscape – literally and figuratively - should not, however, be underestimated. Figure 1 graphically illustrates just how much of Canada's geography is subject to shared land management arrangements in the modern treaties, to commitments in numbered and historic treaties, and the regions of the country where Aboriginal title may continue to exist (the white spaces). Figure 2 shows just some of the Indigenous-led conservation initiatives that are putting Aboriginal communities in decision-making roles over forestry, freshwater and marine ecosystems and wildlife habitat and stewarding these according to Aboriginal law and custom.

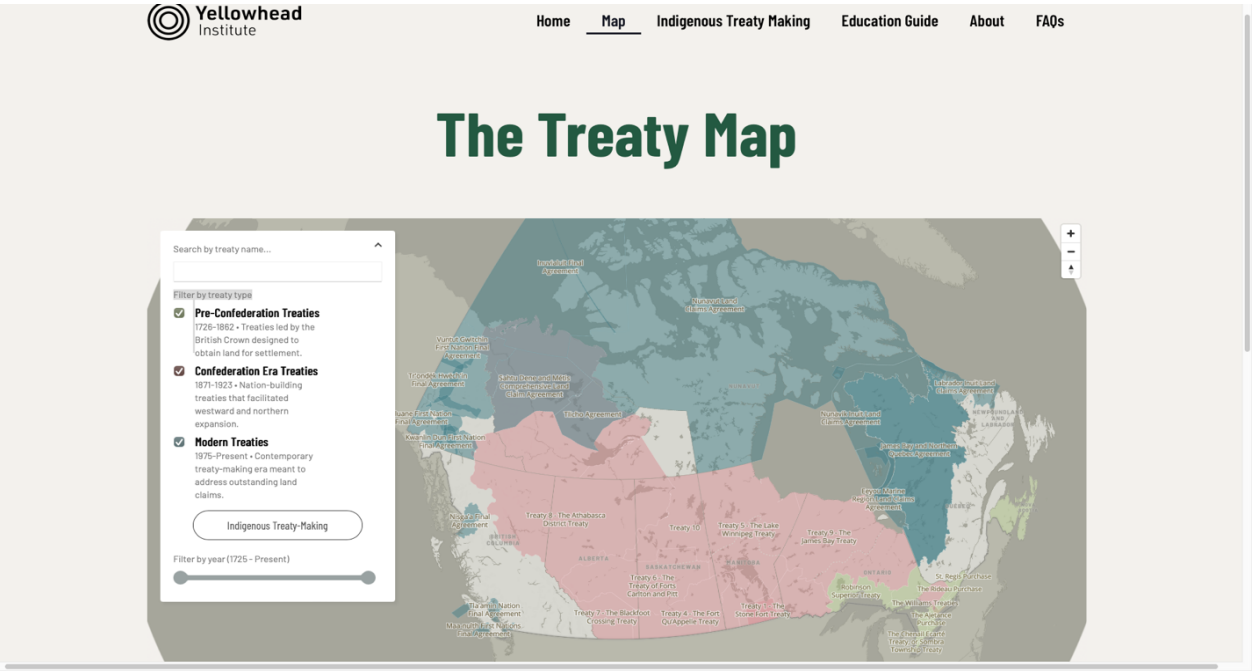

Figure 1: This interactive Treaty Map maintained by the Yellowhead Institute, shows the extent of Canada's land mass governed by treaties made with Indigenous peoples across Canada from the 1700's to the modern day. They all bind the Crown to certain legal responsibilities to this day. See Yellowhead Institute https://treatymap.yellowheadinstitute.org/map/

Unfortunately, their cumulative impact on the constitutional order has been little studied and understood. Much of the existing literature tends to isolate analysis through the researcher's particular area of expertise: environment, law, industrial and economic development, anthropology and so on, or by subject matter. With the rare exception of studies such as *Land Back*, there is little Indigenous-led research. Analysis is often from the outside looking in at the mechanics and outcomes of individual arrangements. Less studied is what they are achieving for the exercise of Indigenous rights; nor how this accumulation of arrangements may be re-shaping federalism in the context of Indigenous sovereignty. The following discussion captures some of the key advances in Aboriginal jurisdiction and explores what the literature reveals about their impact on the federation.

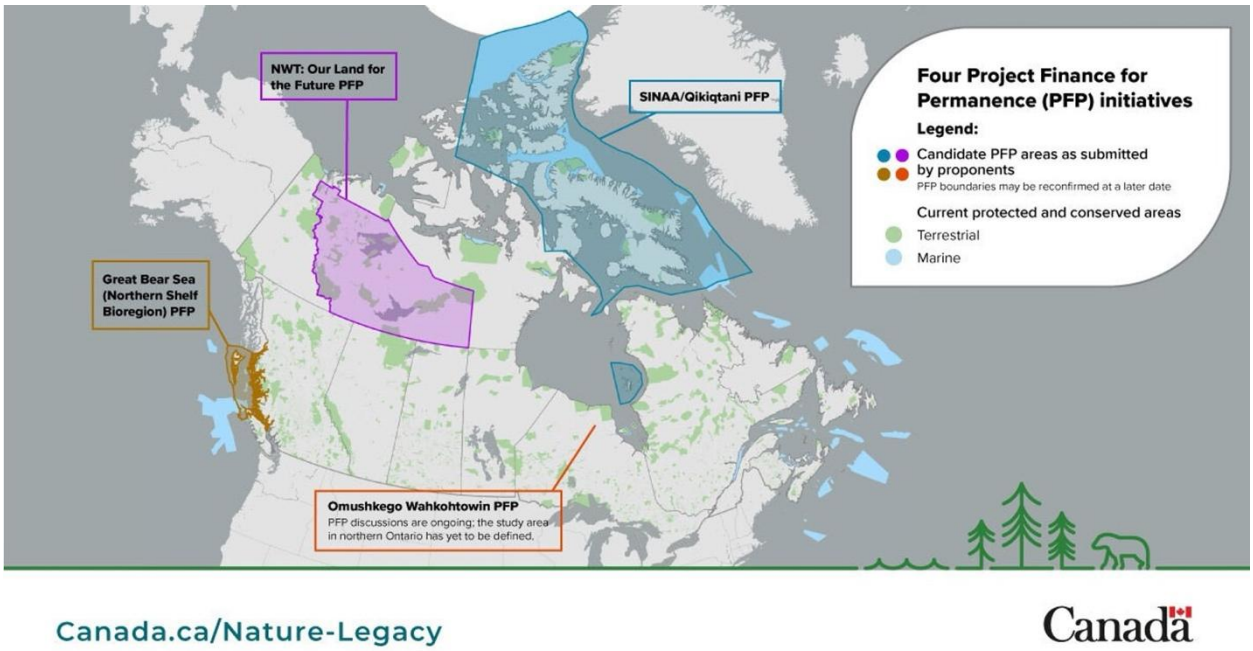

Figure 2: In addition to the Great Bear Initiative, there are other Indigenous-led conservation projects either approved or in development across Canada. This map illustrates those where sustainable funds for ongoing management is created through new financing vehicles called Projects for Finance Permanence or "PFP's".

Source: https://www.canada.ca/en/environment-climate-change/services/nature-legacy/about/project-finance-for-permanence.html

Co-management of land and resources under modern treaties

Comprehensive Land Claim Agreements (CLCA's, also referred to as modern treaties) began to be negotiated after a five-decade gap in Canada's treaty-making after the last numbered treaty was signed in 1923. Generally, CLCAs transfer the ownership of certain categories of land to the Aboriginal governing body in fee-simple, although some other lands are more like Crown land in effect, where the Indigenous government also owns and controls the sub-surface rights and has independent lawmaking authority. These modern treaties also generally separate lands subject to the agreement into zones or categories, including lands where management will be shared with the Crown.

Co-management is now the legally entrenched and constitutionally protected vehicle for decision-making about resources and the environment across roughly four million square kilometers of the country (Swerdfager and Armitage 2023), only slightly less than the landmass of the entire European Union. In general, CLCAs establish boards of management, comprised of equal representation of the parties, with specified jurisdiction (e.g. land and water use, wildlife management, environmental assessment). Some boards are only advisory in nature, making recommendations to a Crown Minister. Others have decision-making authority but little independent power of enforcement (White 2020).

CLCA's and in particular, the co-management bodies they establish, have been criticized for falling far short of a true nation-to-nation relationship (Alcantara 2008; Bruce and Mulrennan 2025), one that brings Indigenous legal traditions and world views to bear on the process of decision-making. But others see a glimpse of a new order emerging. Joanne Smith devotes her law thesis to examining the normative frameworks underlying three Indigenous-state co-management agreements to identify the factors that best support a nation-to-nation relationship premised on interdependence, mutual recognition and acknowledging Indigenous peoples as self-determining polities with their own rooted legal orders interwoven with their relationship to the land (Smith 2021). In a book-length study of co-management boards established under modern treaties across northern Canada, Graham White pointedly states that one of the book's objectives is to encourage his fellow political scientists to further study "a new and potentially significant set of institutions in the ever-evolving domain of Canadian federalism" (White 2020:5). And, for Swerdfager and Armitage the evolving model of co-management arrangements, including those being agreed to outside of modern treaties, "is about much more than simple collaboration… Co-management arrangements, in multiple forms, are institutions of governance" which, they argue,

are embedded in broader processes of political change "in which colonial systems of power and resource management must be reimagined" (Swerdfager and Armitage 2023:8).

Asserting sovereignty through Indigenous-led conservation

Short of getting land back, the creation of Indigenous parks and other protected and conserved areas are a relatively new way Aboriginal peoples are securing a governing role over their traditional territories. Over the last two decades, efforts have grown in ambition, size and sophistication to embrace the exercise of Indigenous sovereignty over these lands through Indigenous laws, governance and knowledge systems (Indigenous Circle of Excellence 2018). The largest and most complex of these land reconciliation projects are referred to as Indigenous Protected and Conserved Areas (IPCAs), recognized and supported by other governments and the philanthropic sector.

According to Tesar (2026) there is no standard formula for the governance agreements that create Aboriginal-led protected and conserved areas. As with co-management under CLCA's, there are criticisms that structures too often import colonial frameworks onto the exercise of Indigenous jurisdiction and law-making and thus are not truly nation-to-nation-to-nation (Smith 2021; Bruce and Mulrennan 2025). But a simple structural analysis of the governance agreements may be deceiving. In her analysis of the Great Bear Rainforest (GBR) Agreement Deborah Curran points to a different conception of the way to reconcile Aboriginal and Crown jurisdiction over a given area. …" the GBR process focused on the infrastructure of reconciliation in the GBR—the landscape, ecology, forests, species, and Indigenous values—to establish regional performance-based targets and objectives for ecological and social health such that monumentally destructive decisions are forestalled. **This is, in practice, a shift in**

jurisdiction mediated by the parties themselves, not the Constitution Act, 1982 or colonial courts**." (**emphasis added**).**

Across Canada, some other provinces and territories are making new room within their authorities for similar endeavours. Quebec is the only province to create a category of Aboriginal-led Protected Area, but the Northwest Territories *Government's Protected Areas Act* (2019) allows for protected areas to be proposed by an Indigenous government or organization and requires the Minister to try to enter into agreements. The Manitoba Parks Act has some tools such as the "Indigenous Traditional Use Park" and "The Indigenous Heritage Land Use" as categories of land use designation (ICE, 2018). In compliance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and B.C.'s enactment of the Declaration on the Rights of Indigenous Peoples Act (the Declaration Act), British Columbia recognizes IPCAs and has supported the declaration of Tribal Parks including Doig River First Nation's K'ih Tsaa?dze Tribal Park in 2011.[6] Moreover, British Columbia has the "Conservancy" land designation that can be applied (Tesar 2026).

Taken together, the various IPCA arrangements afford Aboriginal nations an important degree of institutionalized control over their traditional territories, reflected in agreements with other orders of government. As government-to-government agreements, they have the potential to provide models, or a foundation, for further development of the working relationship between orders.

Reconciling Aboriginal title with the presumed sovereignty of the Crown

[6] https://doigriverfn.com/our-lands/kiht-saadze-tribal-park/ (last accessed April 22, 2026). See below for additional discussion of UNDRIP.

Colonial land-cessation treaty-making was unevenly applied across Canada in the course of our history, leaving pockets of the country where courts have said that the "presumed" sovereignty of the Crown remains to be reconciled with pre-existing Aboriginal title. The largest region of Aboriginal title lands is the province of British Columbia. The SCC's decisions on Aboriginal title in *Delgamuukw/Gisday'wa v British Columbia* (1997) and *Tsilhqot'in v. British Columbia* (2014) opened significant opportunities for those Aboriginal peoples who had not signed a treaty to pursue recognition of their title and to find their way back to asserting their jurisdiction over their territories.

While jurisprudence has started to define the nature and source of Aboriginal title, it remains the least well understood form of land tenure in Canada and in their decisions courts continue to urge the parties to work together to find a way to reconcile their coexistence, and to think outside the current colonial paradigm in doing so. In a 2020 decision over an Innu rights challenge of mining activity that straddled modern day Quebec and Labrador, the court explained it this way:

> Aboriginal rights, including the sub-category of Aboriginal title, are *sui generis* in nature. A *sui generis* right is a unique one, which it is impossible to fit into any recognized category. Aboriginal title is not to be conflated with traditional civil or common law property concepts, or described using the classical language of property law, as it has unique characteristics that distinguish it from civil law and common law conceptions of property, including features that are incompatible with property as it is understood in the civil law and common law. For example, Aboriginal title is inherently collective and it restricts both the alienability of land and the uses to which land can be put. Aboriginal title is also firmly grounded in the relationships formed by the confluence of prior occupation and the assertion of sovereignty by the Crown, which

> give rise to obligations flowing from the honour of the Crown that are clearly more akin to personal rights. Disputes involving Aboriginal title must also be understood with reference to Aboriginal perspectives. (SCC 2020 24)

Some legal scholars are pushing the conceptualization of Aboriginal title from being a form of property right (although a unique one) towards being a form of sovereignty. Among the unique features of title is that "it can trace it's genealogy to systems of Indigenous law" (Sanderson and Singh 2021:423), and that the collective decision-making authority over lands prior to the assumption of Crown sovereignty, suggests a jurisdictional aspect to title (Beaton, Hamilton and Nichols 2022). Arguing for a more robust judicial doctrine on title, Beaton et al point out that it is not enough for the courts to encourage reconciliation between pre-existing Aboriginal sovereignty with assumed Crown sovereignty – there must a framework to structure "the negotiated coordination of Indigenous, federal and provincial jurisdictions" (Beaton et al 2022:118).

In the absence of a more structured framework, Aboriginal governments are regardless, pushing the Crown to more broadly make constitutional room for Aboriginal title and governance in new ways. In 2024, the Government of Canada recognized the Aboriginal title of the Haida Nation with the Chiixuujin / Chaaw Kaawgaa "Big Tide (Low Water)" Haida Title Lands Agreement, with the government of B.C. signing a similar agreement with the Nation. Both have also legally recognized the Council of the Haida Nation as the Nation's government.[7] These agreements exemplify how the specific nature of land governance under Aboriginal title can be defined through government-to-government negotiations, including a recognition that the agreement does

[7] Haida Nation Recognition Act S.C. 2024, c.29

not affect private property (fee simple) ownership. In February 2026 Canada and the Musqueam Nation signed an agreement to recognize Musqueam Rights and Title within Musqueam Territory. Creating a means to determine how exactly rights and title will be implemented in an area covering most of the city of Vancouver is the main objective of the agreement. Fundamental Principle 3.1) b. the agreement states:

> "The teaching nə̓c̓aʔmat ct - the Musqueam core legal principle which means "we are all one." In the context of this Agreement including Future Discussions and Negotiations, this means that we are working together in the spirit of collaboration and co-existence."

These kinds of arrangements are too new to be the subject of scholarly analysis but provide an important indication of the ways in which our federation is changing.[8]

Last but not least, it is worth considering two important case studies where Crown governments reconciled themselves to the unilateral Aboriginal exercise of jurisdiction in resource management. Both are in relation to fisheries: one at Listuguj Nation in Quebec and the other at Nippissing First Nation in Ontario.

From similar roots in violent confrontation over Aboriginal rights to harvest fish, each Nation independently chose to use their own laws to reassert their traditional authorities. Listuguj Nation has over several decades systematically developed and implemented fishing laws to allow them to rely on their resources to sustain themselves, which by 2018 had evolved to launch their own lobster fishery, managed through their own lobster law and lobster fishing plan. Persistence and success led to the federal Department of Fisheries and Oceans signing a

[8] See McNeil (2021) for a discussion of the reconciliation of Aboriginal common law with Canadian law.

Rights Recognition Agreement with Listuguj Nation in 2021 and it now works with the community to support governance and enforcement (Odura 2022) of the Nation's laws over the fisheries.

The Anishnabek peoples of Lake Nipissing were driven to assert their own fisheries law, Giigoon Naaknigewin, in 2004. With the fisheries on the verge of collapse, Nipissing First Nation (NFN) stepped in to ensure sustainability and protect subsistence fishing as well as commercial fishing. But implementation and compliance proved a problem because as a governing body established under the Indian Act, laws enacted by the Chief and Council had no enforceability off-reserve and on the water. Jurisdiction over inland waters is a provincial responsibility. To address the jurisdictional gap and because of the shared concerns for sustainability, NFN and the province's Ministry of Natural Resources signed a memorandum of understanding in 2016 with Ontario recognizing Nipissing's law and its constitutional authority to create their own laws; setting the stage for collaboration on stewardship and enforcement. (Williams 2022).

Impact of the UN Declaration on the Rights of Indigenous Peoples

Canada fully endorsed and committed to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2016. The Declaration defines the rights of Indigenous peoples, and ultimately, it can be understood as an attempt to reconcile state and Indigenous laws and sovereignty. The practical and political challenges arising from this reconciliation, on a global scale and in Canada, are substantial. In the Canadian case, UNDRIP has the potential to contribute to the emergence of a third constitutional order as its impact in jurisprudence begins to be felt –although it is still very early to tell and there remain important matters to resolve.

UNDRIP challenges the Westphalian understanding of state sovereignty as an exclusive right,[9] and also the 15th century doctrine of discovery, an antiquated principle that took no account of the original sovereignty of the nations encountered by Europeans in the period of expansion and empire building. There are many traces of the doctrine of discovery in imperial and Canadian jurisprudence, but as we noted earlier in this report, Canadian law has been tentatively evolving away from it, especially since patriation of the constitution in 1982 with the inclusion of Sections 25 and 35. The latter affirms existing aboriginal and treaty rights of "Indian, Inuit and Métis peoples of Canada" while the former guarantees that the Charter of Rights and Freedoms does not abrogate or derogate from aboriginal and treaty rights.

At patriation, Section 35 was criticized for providing a non-specified 'empty box' of rights, as the rights mentioned were unspecified at patriation in 1982 and in the series of (unsuccessful) First Ministers Conferences mandated under Section 37 to define these rights.[10] Subsequently, however, Aboriginal peoples have made substantial progress in 'filling the Section 35 box' with substantive rights through negotiation and litigation.

Scholars have begun to comment on the implications of Canada's endorsement of (2007) and commitment, in 2016, to implement UNDRIP. Present indications are mixed. So far only the

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[9] This refers to a principle in international law dating from the resolution of conflicts among European powers in the 17th century, under which each state has exclusive sovereignty over its territory. In the 20th century it was repeated in the United Nations Charter, which states that "nothing ... shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

[10] In line with Section 37, three constitutional conferences were held between 1983 and 1987 in an attempt to specify the contents of the "box" –to reach agreement on the specific and practical meaning of the term 'aboriginal rights'. The assembled prime minister, premiers and Aboriginal leaders failed to reach agreement, in effect leaving the legal box empty. See Metallic, N. (2022). Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act. In Alpert, R., Wright, W., Berger, K., & Pal, M. (Eds.). *Rewriting the Canadian Constitution.* [forthcoming]: pp. 22-27. https://digitalcommons.schulichlaw.dal.ca/scholarly_works/1200/

federal, British Columbia and Northwest Territories governments have passed legislation to implement UNDRIP, though presumably it would be important for every province and territory to introduce legislation that clarifies its approach to implementation. British Columbia passed the Declaration on the Rights of Indigenous Peoples Act *(DRIPA)* in November, 2019. The federal Parliament passed the United Nations Declaration on the Rights of Indigenous Peoples Act (*UNDRIPA)* in June 2021, and the Northwest Territories Legislative Assembly passed its legislation in 2023.

Wilkins (2021) argues that the federal law, *UNDRIPA,* is "neither necessary nor sufficient" for implementing the Declaration into Canadian domestic law because it merely states an intention to implement the Declaration. Nonetheless, *UNDRIPA* took an important step by concretely committing to tabling an Action Plan developed in consultation with Indigenous peoples within two years. The Action Plan was released in 2023, and there have been subsequent annual progress reports[11].

One persistent point of contention concerns the issue of consent. The UN Declaration states that Indigenous peoples have the right to give or withhold free, prior and informed consent regarding projects affecting their lands, territories, and resources, while emphasizing the importance of their right to participate in decision-making, aiming for consensus rather stalemate. The federal *UNDRIPA* does not use the word *consent* in relation to Indigenous peoples, instead invoking *consultation and cooperation* with Indigenous peoples as important for implementation and accountability[12]. The 2025 progress report on the implementation of the Action Plan notes need

[11] The plan can be read in full at: Department of Justice Canada. (2023*). The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan*. [Action Plan]. https://www.justice.gc.ca/eng/declaration/ap-pa/ah/index.html

[12] See: Department of Justice Canada. *United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14),* S. 5, 6(1) and 7(1).

for "clarity on the consultation and cooperation requirement of the UN Declaration Act and its relationship to the section 35 constitutional duty to consult and to free, prior and informed consent" (Department of Justice Canada, 2025, p. 42). The lack of clarity in the relationship between these legal terms and the overall focus of *UNDRIPA* on *consultation and cooperation* rather than *FPIC* currently define the politics of *UNDRIP* implementation.

Naiomi Metallic's (2022) examination the relationship between *UNDRIP* and Section 35 presents a clear-minded vision for reconciliation of sovereignties that draws from the Canadian traditions of living tree constitutionalism and international legal innovation. She argues that the implementation of UNDRIP can "breathe new life" into Section 35 by being the basis of a re-interpretation, rather than an amendment, of Canada's constitution. Her argument is twofold. First, that there is a strong basis in Canadian law for UNDRIP being an "interpretive guide" for s. 35 in a similar way that the 1948 UN Declaration of Human Rights has been used to interpret Canada's Charter of Rights and Freedoms and other parts of its law (pp. 6-7). Second, that implementation of UNDRIP can help deal with the contemporary limitation of Section 35 by 'filling the box' with the Indigenous rights and government responsibilities that are specifically elucidated throughout the Declaration.[13] She notes that the Declaration specifically references the role of Indigenous self-government and legal traditions, orders and institutions like those that are founding parts of Canada's Constitution.[14] This will fill a gap in how courts have previously

[13] Metallic argues that UNDRIP implementation can "breath life" into s. 35 by providing an alternative to Eurocentric ways of thinking and providing content through its specific provisions. See: *pp. 33-44.*
[14] Metallic extensively quotes Brenda Gunn regarding the ways in which UNDRIP emphasizes the role of Indigenous legal orders in state-governance that fulfils Indigenous rights. See: Gunn, B. (2019). The Federal court Aboriginal Bar Association Liaison Committee as a Mode of Reconciliation: Weaving Together Indigenous Law, Common Law and International Human Rights Law. In Drake, K., & Gunn, B. (Eds.). *Renewing Relationships: Indigenous Peoples and Canada: pp. 318-319.* Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan. https://digitalcommons.osgoode.yorku.ca/faculty_books/376.

interpreted Canada's constitutional foundation,[15] so that implementing UNDRIP will "in addition to breathing life into our living tree, also serve to strengthen our constitutional roots."

The Supreme Court of Canada's (SCC) 2024 reference regarding *An Act respecting First Nations, Inuit and Métis children, youth and families (Bill C-92)* is a crucial piece of evidence in support of Metallic's vision for *UNDRIP* as an interpretive guide for advancing self-government within Canada's legal system. Passed into law in 2019, Bill C-92 was unprecedented in Canadian legal history for its recognition of Indigenous jurisdiction over child welfare and its recognition of *UNDRIP* implementation. Yet, its text left unanswered questions regarding how Indigenous jurisdiction would interact with that federal and provincial governments, and how this jurisdiction could be practically utilized by First Nations exercising their inherent rights[16]. The SCC's reference at least partially answered the question regarding the interaction between provincial, federal and Indigenous jurisdiction by responding to the government of Québec's position that the Bill's reference to the inherent right to self-government was a unilateral amendment of the constitution, and therefore invalid. Although the SCC did not definitely rule that the inherent right is part of the constitution, it said that the federal government was allowed to invoke it in legislation. Crucially, the SCC used the federal government's commitment to UNDRIP as a guide for interpreting Bill C-92 as part of its broader policy of advancing reconciliation.

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[15] Here, Metallic draws from John Borrows' discussion of Indigenous legal orders as being foundational to Canada, see: Borrows, J. (2010). *Canada's Indigenous Constitution:* pp. 15-16. University of Toronto Press. https://utppublishing.com/doi/epdf/10.3138/9781442610385

[16] For a comprehensive examination of Bill C-92, see: Metallic, N., Friedland H., & Morales S. (2019). *The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families*. Yellowhead Institute. https://digitalcommons.schulichlaw.dal.ca/reports/78/; For an analysis of how inherent rights governance in how First Nations have implemented Bill C-92, see: Williams, J., & Ducharme, M. (2024). Briefing: Governing Structures in First Nations' Children and Family Laws (Bill C92). *Rebuilding First Nations Governance. https://carleton.ca/rfng/wp-content/uploads/sites/170/Bill-C92-Briefing-Note-FINAL-publ-1.pdf*

Whether implementation of *UNDRIP* will breathe life into Canada's constitution is fundamentally a legal question, but it has substantial economic and foreign policy implications[17]. The ways that the language of consultation, rather than consent, is used in the *Building Canada Act* - a part of Bill C-5, the flagship piece of legislation within the federal government's attempt to fast-track development and diversify Canada's export economy away from dependence on U.S. markets – has drawn much attention. The Act's preamble does state the government's commitment to partnerships with Indigenous governments and peoples and to respecting Section 35 rights and the rights set out in UNDRIP[18]. But the act has been heavily criticized for its lack of references to free, prior and informed consent in regard to streamlining regulatory processes to fast-track projects deemed in the national interest[19].

Canada still has a very long way to go to implementing *UNDRIP* and for realizing the full potential of Section 35 in its governance, but it does seem clear that now the two tasks are closely connected. If Canadian governments continue to affirm their commitment to *UNDRIP* in policy, this will help them work towards the greater goal of fully reconciling Indigenous and colonial legal orders and governance jurisdiction.

Implications for policy, practice and research

[17] For a discussion of UNDRIP's place in Canada's public foreign policy and the conduct of multinational companies, see: Amatulli, G. (2025). How UNDRIP implementation in Canada can influence Canadian Foreign Policy and the promotion of indigenous rights worldwide. *Canadian Foreign Policy Journal 31*(1): 75-76. https://doi.org/10.1080/11926422.2025.2540622.
[18] Building Canada Act (S.C. 2025, preamble). https://laws-lois.justice.gc.ca/eng/acts/B-9.89/page-1.html
[19] See, for example: Indigenous Bar Association. (2025, June). Indigenous Bar Association Raises Serious Concerns About Bill C-5 and Calls for Meaningful Consultation with Indigenous Peoples. https://www.indigenousbar.ca/press-releases/indigenous-bar-association-raises-serious-concerns-about-bill-c-5-and-calls-for-meaningful-consultation-with-indigenous-peoples; Tsilhqot'in Nation Government. (2025, June). Statement on Opposition to Bill C-5. https://tsilhqotin.ca/opposition-to-bill-c-5/.

In Canada we have the extraordinary opportunity to adjust the federation to give space to a third order of Aboriginal government. Aboriginal peoples will build their own institutions of self-determination. They will develop their own policies for domestic purposes. In response, the institutions of Canadian governments must change so that they mesh smoothly with emerging Aboriginal governments.

The genius of the Canadian federal system is that it provides multiple channels for cooperation and conflict resolution among regional governments that are sovereign in their own jurisdictional spheres. Despite many regional and cultural challenges, the federal system has supported a strong federal government while enabling resource sharing among provinces, substantial provincial elbow room in promoting economic development, and decentralized opportunities for innovation.

Resource sharing is constitutionalized in Canada, affirmed under Section 36(1) of the Constitution Act [1982]:

> *Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:*
>
> *(a) promoting equal opportunities for the well-being of Canadians;*
>
> *(b) furthering economic development to reduce disparity in opportunities; and*
>
> *(c) providing essential public services of reasonable qu*ality to all Canadians.

The bread-and-butter program that responds to this constitutional provision, though not the only one, is the Equalization Program, which operates automatically to transfer funds from the federal General Revenue Fund to each province based on a formula that assesses provincial fiscal capacity.

An important gap in current scholarship, policy and practice concerns the extension of the equalization principle to Aboriginal governments.

The constitution introduces flexibility and supports provincial innovation because it defines areas of separate and shared jurisdiction among the two orders. In practice the division of powers has been modified over time. The federal government has used its spending power to influence policy even in areas of exclusive provincial jurisdiction.[20] Nevertheless, provinces exercise substantial independence in areas of social provision and economic development. This allows provincial governments to respond to the needs and preferences of their residents and sometimes has encouraged innovation. Probably the most famous example of this is the introduction of a form of socialized medicine in the province of Saskatchewan before it was extended to the whole country.

The research discussed in this paper suggests that a third order of Aboriginal government is emerging in Canada, through "bottom up" jurisprudence and institutional innovation. The third order is unlike the other two and there is unlikely to be convergence in form. Nevertheless, it is worth considering the policy implications and areas for further research in order to take advantage of the benefits conferred by the federal system. These include a relatively seamless system for resource sharing, so that all citizens live in jurisdictions with equal per capita fiscal capacity; institutions adapted for conflict mitigation and mediation; and a linked system of jurisdictions that are sovereign in their own specified spheres. All of these qualities would be of

[20] The federal spending power arises from the Public Debt and Property provision in the Constitution Act 1867, under which the federal government may make a conditional gift to the provincial order to be spent even in areas of provincial jurisdiction. For example, while healthcare is a provincial responsibility, the federal government has used its spending power to influence provincial healthcare priorities.

value to First Nation governments that presently struggle with inadequate funding and federal executive branch control of their priorities.

Research and development leading to implementation is indicated in the following areas:

1. A system for funding heterogeneous Aboriginal governments must be developed that incorporates the benefits that now apply to federal and provincial governments, including the equalization principle, and federal participation in infrastructure funding in the manner and at the per capita level as applies to the second constitutional order.
2. Federal and provincial institutions must continue to reorganize to interact with Aboriginal governments on the same basis as they do with each other. For the federal order, this means abandoning practices of oversight and control that are incompatible with self-determination in favour of institutions more similar to those involving provinces. For the provincial order and for municipal governments, continued capacity development and institutional innovation is needed to take advantage of the opportunities a three-cornered federation would offer.
3. Over time, as the third order continues to evolve, it will be necessary to devise institutions for shared policy and program development at ground and senior levels.
4. Scholars and Canadian governments must look to the United Nations Declaration on the Rights of Indigenous Peoples as it affects policy and jurisprudence.
5. There is a need for public education, so that Canadians whose work in the public and private sectors brings them into direct contact with Aboriginal peoples and institutions will better understand the changes that are now underway.

Knowledge Mobilization Activities

Beyond the opportunities created by SSHRC for sharing the results of this project, we intend using the well-developed knowledge mobilization systems that are part of the SSHRC Partnership Grant funded Rebuilding First Nations Governance (RFNG) project. These will include posting the article to our website and promoting it on our social media networks; a podcast for the RFNG series Inherent Rights, Informed Voices and two pieces for the RFNG Short Cuts short article series. These are the primary means by which we make our research results accessible to busy professionals and the general public, who might not have time to read academic articles. Both the podcast and the short articles are being produced by students with senior researcher support and supervision. We will also be presenting these findings to a think tank we plan to host in the fall of 2026 where we will be gathering key First Nations thinkers and influencers to discuss Aboriginal and treaty rights issues related to *Canada's Build Canada Act*.

The analysis in this report has proven complementary to another strand of research undertaken in the RFNG project, concerning implementation of First Nation self-government under section 35 of the Constitution Act. It will inform the publications planned for this research.

Finally, we are preparing a research note based upon this work for submission to the Canadian Journal of Political Science.

Conclusion

By design, this document considers changes that are both major, and in progress. We have not chosen to seek a settled outcome. To understand these changes, it was necessary to probe their origins in the grand confrontation of civilizations that began in the 15th century, when European powers began to compete for trading opportunities and for territory on other continents. Canadian laws and political institutions carry the impact of this broad historical process, marked

from the earliest days by Aboriginal resistance to European conquest. Our constitution and laws have been transformed in a grand renegotiation of relationships, both pragmatic and principled.

This investigation of scholarship on the emergence of a third, Aboriginal order of government did not uncover consensus on the existence of a third order, but rather suggestive indications that at least three pathways in that direction have opened up. These are related to legal arguments put forward by Aboriginal peoples over many decades, innovative arrangements for the protection and stewardship of Aboriginal territories, and the likely implications of Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, whose existence Canadian Aboriginal people worked over decades to realize.

It seems clear that these three processes of change are interconnected and mutually reinforcing.

It is also clear that we confronted and did not overcome a sobering challenge of scope. The scholarship in French has points of convergence with the synthesis in this report, but as the document in the appendix shows, divergence as well. The scholarly literature in French requires a strong separate treatment set in appropriate historical and cultural context. Similarly, research on the experience of Inuit and Metis requires a distinct examination that was beyond our capacity to undertake in this document. This work awaits us.

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Appendix

Francophone scholarship on the third order of government.

Anna Soer

The literature review of francophone scholarship on a third order of government in Canada was made using Google Scholar as a database. The keywords used were “troisième ordre de gouvernement autochtone canada” on the third order of government, “aires protégées arrangements gestion gouvernement autochtone Canada” on protected areas arrangements, “auto-gouvernance autochtone Indian Act canada” and “auto-gouvernance autochtone loi sur les indiens canada” and “autodétermination autochtone loi sur les indiens Canada” on self-government outside of the framework of the Indian Act (three sets of keywords were used in order to generate more results, as each one resulted in only 3-4 pages), and finally “jurisprudence ordre de gouvernance autochtone” on jurisprudence laying basis for an Indigenous order of government or a third order of government. In total, 85 references were counted as relevant, starting in 1992.

Certain authors reappear, such as Otis G., Savard J.F., or Motard G. among others, with Otis taking a lead in the number of publications.

1. Third or Indigenous Order of Government

Unsurprisingly, many sources take the case of Québec as a starting point of argumentation, many in the field of law. The first few articles published on the subject in the 1990’s thereby start with analysis of the Charlottetown Accord (Bissonnette, 1993) or the James Bay agreement for the case of Nunavik (Bussières, 1992). Several articles also analyze the Royal Commission on

Indigenous Peoples as a key milestone for the recognition of Indigenous rights (Carens, 1995; Boivin, Morin, 2007; Dupuis, 1995).

Additionally, and perhaps more importantly, many sources take the angle of culture, plurinationalism and reconciliation between the francophone Québec (linguistic minority) and Indigenous nations (Germain, 2012; Binette, 2021; Canet, 2001; Dusseux-Gicquel, 2017; Giroux, 2017; Gosselin-Tapp, 2023; Tremblay, 2005). The question of federalism also appears (Bernier, Rigaud, 2009; Bickerton, 2020; Morin, 2004; Savard, 2006), or even of Québec secession (Roy, 2019). As such, the francophone literature on Indigenous third order of government is mostly geared towards the relations between the Québec government – or even statehood – in juxtaposition or opposition with Indigenous governments and self-determination. The angle of identity (Bickerton, 2020; Green, 2004; Leclair, 2023; Macklem, 2017; Picard, 2021) as foundational for citizenship thereby seems to be anchored in wider scholarly reflections on Québec's identity, either within Canadian federalism or outside of it.

This first section of enquiry thereby seems to anchor francophone reflections on the Indigenous order of government as either a threat, an opportunity, or simply an institutional reality to Québec's position within the Canadian federation (including on reconciliation, Mesa, 2019). As articles reflect on the legal institutional complexity of several key legal cases, further research in anthropology or political theory fundamentally asks the question of what is Québec with these new developments (Pâquet, 2023, asks this question in direct link with Québecois nationalism)? Culturally, institutionally, federally, and as Charest and Tanner (1992) phrase it, the question of power relations seems to dominate the topic.

Interestingly, some legal research poses the question of the personality of law as well as sovereignty model (Otis, Motard, 2009) and how the recognition of Indigenous legal orders

redefines Canadian legal language and approaches, including in terms of culturalist legal approaches (Otis, 2009; Leclair, 2011).

The topic of political representation of First Nations within Québec's and Canadian institutions (Hawkes, 2001; Ross et al., 2014) seem to remain marginal, with one mention of the Erasmus-Dussault Commission on development support for First Nations (Myles, 2007).

2. Protection Areas Arrangements

Most articles pertain to specific protected areas arrangements. From Pipmuakan (Charron-Ducharme, 2024) to Akumunan (Champagne-Côté, 2022) or Assinica (Côté et al., 2025), most francophone articles pertain to cases found in Québec. A few articles (Martin, 2014; Teitelbaum, 2015; Champigny, 2024; Thom, 2019; Doucet, 2021) go beyond the Québec case, but all others revolve around specific arrangements signed in Québec, or how such arrangements impact jurisdiction and/or self-determination and sovereignty in Québec.

Otis (2024) thereby juxtaposes Indigenous self-determination and sovereignty with Québec's independence, a "juspluralist" approach found the first section of this literature review. Similarly, Motard (2015) sees evidence of consensus-based governance in the regional government of Eeyou Itschee-Baie James, thereby a new type of democratic governance for shared governance ("démocratie consociative"). Much research has, consequently, focused on forest management arrangements. The forestry regime, as analyzed by Teitelbaum (2015) or Blouin (2021), is thereby shown to provide little avenue for effective strategic co-governance, demonstrating Québec's governance rationale still anchored in colonial dominance, despite the fact that several other existing or future arrangements are perceived by local Nations are positive for their self-determination, questioning the importance of local perceptions as opposed to

institutional dynamics (Charron-Ducharme, 2024; Champagne-Côté, 2022; Lesage, 2022; Wilson, 2023; Grammond et al., 2012). Milon (2016) reinforced this last point in their doctoral dissertation, demonstrating unequal negotiation and institutional power – institutional violence – between the Québec government and negotiating Indigenous Nations in the case of the Lac Barrière agreement of 1991. Houde and Lemyre (2017) examine the case of Wemotaci Iriniwok, which demonstrates at one the colonial nature of protected areas and at the same time the ability for Nations to navigate such regime to stimulate political innovation – an unexpected dialogue between institutional and ontological structures.

Tromelin (2019) and Lord (2010) both emphasize the common management approach ("faire commun" or "l'approche commune"), echoing research on the commons, highlighting the intercultural identity foundation underpinning current protected areas management strategies and arrangements. Tromelin specifically integrates a larger conversation on the place of the more-than-human into these arrangements, unique in the corpus of texts. Following this intercultural approach, and with research previously detailed (see for instance Milon, 2016), Doucet (2021) demonstrates the predominance of state interests over those of Indigenous Nations, pushing, in the same vein as Otis (2024), a pluralist approach to territorial authority. Interestingly, both Doucet (2021) and Saint-Arnaud et al. (2022) are the only two articles that center FPIC in protected areas arrangements and forestry management – both however highlighted the limited application of FPIC in negotiations and implementations.

Conservation and climate adaptation imperatives were focus points in several articles. Gendreau et al. (2012) thereby sees adaptive co-management as necessary flexibility for climate change adaptation but also for increased self-determination and implication of local communities. On this, Pagé (2021) makes a point on the inclusion of non-treaty Nations in the management of

wildlife, now not included in treaty negotiations. Charette (2024) sees the development of bioconservation initiatives, here the biodiversity reserve of Noire-Coulonge, as a tool for reconciliation, stopping short however of self-determination, as Indigenous self-government goes beyond the scope of the study. Champigny (2024), Perreault-Brière (2019) and Pothier-Lavasseur (2024) posit the imperatives of conservation as key avenues for governance and constitutional (for the case of Champigny) alternatives, both in terms of social acceptability but also in terms of institutional dynamics/tools.

Protected areas arrangements thereby show conflictual and oppositional contexts on a case-by-case basis. While there seems to be a consensus on the colonial potential behind protected areas arrangements, many authors demonstrate the subversion capacity of Nations to assert self-determination within those treaties and signed arrangements with the Québec government. The francophone literature, while focusing on Québec, on protected areas follows some conclusions of the review in the first section. Pluralist approaches to arrangements seem to dominate research, including in recommendations offered by studies. From this review, none however demonstrate protected areas as ways to assert (separatist) sovereignty – some studies show limited applicability of self-determination but fall short of assertion of sovereignty.

3. Self-government outside of the Indian Act

12 francophone articles relate in different ways to Indigenous self-government outside of the framework imposed by the Indian Act. As Lamieux (2007) frames Québec-Eeyou Cri relations as inscribed in a nation-to-nation process, demonstrating coexistence difficulties due to radically different ontological foundations – and thereby pinpoints to liberal political system as a cosmopolitan myth – Gareau (2013) heavily criticizes Canadian colonialism in the context of Bill C-45, enacted during the Harper government. In continuation of Canadian colonialism,

Poirier (2019) turns towards Modern Treaties and transcribes three positions from academic scholars. The first, Modern treaties as a fundamental question of legitimacy of sovereignty and together living. Secondly, Modern treaties as an illusion, where the question is instead about the constitutional transition and great transformation away from the colonial state. And thirdly, Modern treaty or not, sovereignty will either come through the Canadian legal framework or through self-affirmation, governed in either way in hope.

Paradis (2016) chose two cases, the Kelowna Accord and the Law on First Nations education, and sees public policies as a potential avenue for greater self-determination or for greater oppression, thereby perhaps bringing in nuance to the third position transcribed by Poirier. Modern treaties and legal developments for greater Indigenous self-determination are analyzed as double-edged swords, a negotiation, a continuous balancing act, with structural inequality.

On law, Motard (2013), Laurent (2025), Picard (2022), Wilson (2023), Otis (2009), Morin (2004) and Gelineau-Asseray and Lajoie (2004) all engage in a critical evaluation of the Canadian legal context, including constitutional context, in juxtaposition with Indigenous self-determination. Motard (2013) in her doctoral dissertation dives into the issue of the principle of personality of law as a way towards emancipation, while facing instrumentalization under neocolonial legal mechanisms. Despite this potential for instrumentalization, Motard still concludes that this principle of personality of laws has potential as a mechanism towards emancipation. On legal recognition, both Picard (2022) and Gelineau-Asseray and Lajoie (2004) dive into the subject of ancestral rights, Picard specifically recognizing the constitutional context supporting ancestral rights and traditional activities, accordingly, here illustrated through the case of the Huron Wendat Nation. They both reckon with the current constitutional context and push the reflection in line with Article 35 of the Constitution and self-determination as a concept.

Following this discussion on ancestral rights, Wilson (2023) and Otis (2009) pose the issue of acceptability, legal culture and natural resources jurisdiction. While Wilson does not challenge the limits of acceptability, Otis, through the case of Nunatsiavut, analyses the constitutional challenge that modern treaties pose and sees a need for reciprocal adaptation of Indigenous law and state law to form a new land management order.

Conclusion

Francophone scholarship on the subject of the third order of government, whether directly referred to as such or through protected areas arrangement or through jurisdictional discussions, largely limit their scope to cases within the province of Québec with only a few exceptions. With only 85 publications counted as relevant, the scholarship is much more limited than the anglophone scholarship. This however does not necessarily mean that francophone scholars are less interested in this topic, but that publishing in French is less prevalent (francophone scholars also very often publish in English so to increase the visibility of their work).

Further research is however necessary to determine the full extent of francophone scholarship on the subject of third order or self-determination, so to include publications not listed on Google Scholar as well as oral and visual publications.

Plurinationalist or juspluralist approaches largely dominate the corpus, with the notable exception of the position transcribed by Poirier (2019) that describes collaboration with the state a violent fallacy. Most publications thereby juxtapose the Québec question with the question of Indigenous self-determination, and it is this question – rather than Indigenous self-determination in and of itself – that guides the francophone corpus.